THE DEATH PENALTY AND THE MENTALLY ILL: A SELECTED AND ANNOTATED BIBLIOGRAPHY

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ABSTRACT. The United States Supreme Court over the last decade has selectively whittled away at the scope and availability of the death penalty by exempting certain groups from execution under the Eighth Amendment. In 2002 the court ruled that executing mentally retarded criminals violates the Constitution's ban on cruel and unusual punishment. In 2005 the court ruled that the Constitution forbids the execution of individuals who were under the age of 18 when they committed their crimes. Currently there is an active debate on whether to extend the categorical exemptions created by the Court to the mentally ill. At the forefront of this debate is the American Bar Association, which issued a recommendation on the issue. This article presents research guidance and an annotated bibliography of selected print and electronic resources on the topic of the Death Penalty and the mentally ill.

KEYWORDS. Cruel and unusual punishment, Eighth Amendment, categorical exemptions, mentally ill, mental illness, capital punishment, death penalty, evolving standards of decency.

ARTICLE SEARCH QUERY. “mentally ill” “mental illness” /s “capital punishment” “death penalty”

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INTRODUCTION

Over the last decade, the United States Supreme Court created two categorical exemptions to the death penalty under the Eighth Amendment.[1] The first exemption was in *Atkins v. Virginia*, 536 U.S. 304 (2002), when the Court exempted the mentally retarded from the death penalty. The second exemption came three years later, in *Roper v. Simmons*, 543 U.S. 551 (2005), when the Court extended the protection to juveniles under the age of eighteen at the time of the offense. In both cases, the Court looked to trends in legislative and jury decision making[2] and established international human rights norms on the death penalty.[3] Legal scholars have speculated that the Court may eventually create another categorical exemption for the severely mentally ill, based on these developments, and the influence of international law arguments regarding the execution of the mentally ill, hereby exempting them from the death penalty.[4]

To date, the death penalty is legal in thirty-seven jurisdictions in the United States: thirty-five states, the federal government, and the military.[5] In the United States as of January 6, 2012 there were 3,222 individuals sitting on Death Row.[6] An estimated five to ten percent of the individuals on death row suffer from some sort of serious mental illness.[7] While most states do not have specific laws excluding those with mental disabilities from the death penalty, mental illness or extreme mental or emotional disturbance is often a key mitigating circumstance in sentencing for capital offenses.[8] Despite this fact, it is generally believed that the current system of fact-finding in death penalty cases fails to identify individuals with mental disabilities, thereby withholding

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[1] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

[2] *See Atkins*, 536 U.S. at 313-16; *Roper,* 543 U.S. at 565–567.

[3] *See Atkins*, 536 U.S. at 316 n.21; *See* Roper, 543 U.S. at 575–578.

[4] *See* Robert Batey, *Categorical Bars to Execution: Civilizing the Death Penalty*, 45 HOUS. L. REV. 1493 (2008–2009); Eileen P. Ryan & Sarah B. Berson, *Mental Illness and the Death Penalty,* 25 ST. LOUIS U. PUB. L. REV. 351 (2006); Pamela A. Wilkins, *Rethinking Categorical Prohibitions on Capital Punishment: How the Current Test Fails Mentally Ill Offenders and What to Do About It*, 40 U. MEM. L. REV. 423 (2009); Bruce Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B. C. L. REV. 785 (2009); and Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293 (2003).

[5] Death Penalty Information Center, "States With and Without the Death Penalty", Washington D.C., available at http://www.deathpenaltyinfo.org/states-and-without-death-penalty. Currently the Death Penalty is legal in Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Illinois, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. States without the Death Penalty include Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, New Jersey, New York, Rhode Island, Vermont, West Virginia, Wisconsin, the District of Columbia and as of 2009, New Mexico.

[6] Death Penalty Information Center, "Facts about the Death Penalty" (January 6, 2012), Washington D.C., available at http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.

[7] National Mental Health Association, "Position Statement 54: Death Penalty and People with Mental Illnesses" (June 11, 2006), available at http://www.nmha.org/go/position-statements/54.

[8] Laurie T. Izutsu, Note, *Applying Atkins v. Virginia to Capital Defendants with Severe Mental Illness*, 70 BROOK. L. REV. 995, 1005 (2005).

the required consideration of whether their mental condition is a mitigating factor in their crime.[9] In fact, it appears that many jurors appear to equate mental illness with future dangerousness, thereby viewing mental illness as an "aggravating" rather than a mitigating factor in sentencing.[10]

In 2003, the ABA Section of Individual Rights and Responsibilities created the American Bar Association Task Force on Mental Disability and the Death Penalty.[11] The Task Force, which included lawyers, mental health practitioners, and academics, was created in response to the 2002 Supreme Court decision in *Atkins*. The Task Force, the American Psychiatric Association, the American Psychological Association, and the National Alliance for the Mentally Ill have all called for an exemption of the severely mentally ill from the death penalty.[12] The Recommendations of the Task Force were adopted by the American Bar Association in August of 2006.

This bibliography provides annotated references to materials, published after January 2000, that examine the issues surrounding the application of the death penalty to the mentally ill. It includes references to cases, periodical articles, books, websites, and documents issued by legal and professional mental health organizations. It does not include listings for newspaper articles or popular works. Student notes and comments were not considered unless they were cited in other scholarly works. The bibliography is not intended to be comprehensive due to the large quantity of materials on the topic; omission from this list is therefore not a qualitative judgment about the material omitted.

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[9] National Mental Health Association, *supra* note 10.

[10] Ronald J. Tabak, *Overview of the Task Force Proposal on Mental Disability and the Death Penalty*, 54 CATH. U. L. REV. 1153, 1153-58 (2005).

[11] A.B.A Section of Individual Rights and Responsibilities, *Report of the Task Force on Mental Disability and the Death Penalty*, 1 n.1 (2005) (Task Force members included: Dr. Michael Abramsky; Dr. Xavier F. Amador; Michael Allen, Esq.; Donna Beavers; John Blume, Esq.; Professor Richard J. Bonnie; Colleen Quinn Brady, Esq.; Richard Burr, Esq.; Dr. Joel Dvoskin; Dr. James R. Eisenberg; Professor I. Michael Greenberger; Dr. Kirk Heilbrun; Ronald Honberg, Esq.; Ralph Ibson; Dr. Matthew B. Johnson; Professor Dorean M. Koenig; Dr. Diane T. Marsh; Hazel Moran; John Parry. Esq.; Professor Jennifer Radden; Professor Laura Lee Rovner; Robyn S. Shapiro, Esq.; Professor Christopher Slobogin; and Ronald J. Tabak, Esq. (who also headed the committee).

[12] A.B.A Section of Individual Rights and Responsibilities, *Recommendations 122A* (2006), *available at* http://www.abanet.org/moratorium/policy/2000s/hundredtwentytwoa.pdf; Nat'l Alliance On Mental Illness, *Public Policy Platform of the National Alliance On Mental Illness*, §§ 10.9.1–10.10.2 (rev. 9th ed. Aug. 2010), *available at* http://www.nami.org/template.cfm?section=NAMI_Policy_Platform; Am. Psychiatric Ass'n,, *Diminished Responsibility in Capital Sentencing: Position Statement* (2004), *available at* http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200406.aspx; Am. Psychiatric Ass'n, *Mental Disability and the Death Penalty* (2006), *available at* http://www.apa.org/about/policy/chapter-4b.aspx#death-penalty; Mental Health Am., Position Statement 54: Death Penalty and People With Mental Illnesses (2005) *available at* http://www.nmha.org/go/position-statements/54 (search "Position Statement 54: Death Penalty and People With Mental Illness").

I. CASES

Ake v. Oklahoma, 470 U.S. 68 (1985).

A capital case in which the Supreme Court held that if an indigent defendant made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide a psychiatric evaluation if the defendant cannot otherwise afford one. Reversed and remanded. Justice Marshall delivered the opinion of the Court, in which Justices Brennan, White, Blackmun, Powell, Stevens, and O'Connor joined. Chief Justice Burger concurred. Justice Rehnquist dissenting.

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

A capital case in which the Supreme Court held that the Eighth Amendment prohibits the imposition of capital punishment on those with mental retardation. Reversed and remanded. Justice Stevens delivered the opinion of the Court, in which Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer joined. Chief Justice Rehnquist filed a dissenting opinion, in which Justices Scalia and Thomas joined. Justice Scalia filed a dissenting opinion, in which Chief Justice Rehnquist and Justice Thomas joined.

Barefoot v. Estelle, 463 U.S. 880 (1983).

A capital case in which the Supreme Court ruled on the admissibility of clinical opinions, based on hypothetical questions, regarding the defendant's future dangerousness and continuing threat to society. The Court upheld the lower court decision, denying a stay of execution and the appellate court's finding on the merits of the case, reasoning that the use of hypothetical questions in the examination of expert witnesses is a well-established practice and that the experts failure to examine the appellant went to the weight of their testimony, not to its admissibility. In reaching its decision, the Court disregarded the Amicus Curiae brief submitted by the American Psychiatric Association (APA) in support of the defendant's position that such testimony should be inadmissible and urging limitation of psychiatric testimony regarding future dangerousness and a prohibition of such testimony based on hypothetical data. Affirmed. Justice White delivered the opinion of the Court. Justice Stevens filed an opinion concurring in the judgment. Justice Marshall dissented and filed an opinion in which Justice Brennan joined. Justice Blackmun dissented and filed an opinion in which Justice Brennan and Justice Marshall joined in part.

Baumhammers v. Pennsylvania, 960 A.2d 59 (Pa. 2008), *cert denied*, 130 S. Ct. 104 (2009).

A capital case in which the Supreme Court denied certiorari. The Supreme Court denied the petition of a capital defendant suffering from persecutory or paranoid schizophrenia. Defendant argued that the imposition of the death penalty on an individual suffering from severe mental illness was a violation of the Eighth Amendment. The court declined to hear or address the case.

Brewer v. Quarterman, 550 U.S. 286 (2007).

A capital case in which the Supreme Court held that special issue jury instructions relating to deliberateness and potential dangerousness as a "continuing threat to society" failed to clearly instruct the jury that it could consider any mitigating evidence presented by the defendant in deciding whether to impose the death penalty including evidence of mental illness, substance abuse, and a troubled childhood. The Supreme Court held that this failure in instruction entitled the defendants to a writ of habeas corpus even under the stringent review standards of the *Antiterrorism and Effective Death Penalty Act* (AEDPA). This case was consolidated with *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007). Reversed. Justice Stevens delivered the opinion of the Court, in which Justices Kennedy, Souter, Ginsburg, and Breyer joined. Chief Justice Roberts filed a dissenting opinion, in which Justices Scalia, Thomas, and Alito joined. Justice Scalia filed a dissenting opinion, in which Justice Thomas joined, and in which Justice Alito joined as to Part I.

Caritativo v. California, 357 U.S. 549 (1958).

A capital case, consolidated with *Rupp v. Dickson*, No. 562, in which the Supreme Court in a pre-*Ford v. Wainwright*, 477 U.S. 399 (1986) decision, affirmed the adequacy of the California procedures to determine sanity for execution. The procedures were vested in the warden, based on the authority of *Solesbee v. Balkcom*, 339 U. S. 9 (1950). Affirmed, per curiam, without argument. Justice Harlan wrote a concurrence. Justice Frankfurter filed a dissenting opinion, in which Justice Douglas and Justice Brennan joined.

Dusky v. United States, 362 U.S. 402 (1960).

Case in which the Supreme Court established the test to determine defendant's competency to stand trial, finding that it is not enough for the defendant to be simply oriented to time and place with some recollection of events. The Court ruled that instead, the test must be whether the defendant has sufficient present ability to consult with a lawyer with a reasonable degree of rational understanding, and whether he or she has a rational as well as factual understanding of the proceedings against him or her. Reversed and remanded with directions, per curiam.

Estelle v. Smith, 451 U.S. 454 (1981).

A capital case in which the Supreme Court held that the admission of a doctor's testimony at the penalty phase violated respondent's Fifth Amendment privilege against compelled self-incrimination because the respondent was not advised before the pretrial psychiatric examination that he had a right to remain silent per *Miranda v. Arizona*, 384 U.S. 436 (1966), and that any statement he made could be used against him at a capital sentencing proceeding. Affirmed. Chief Justice Burger delivered the opinion of the Court, in which Justices Brennan, White, Blackmun, and Stevens joined, and Justice Marshall joined in all but Part II-C. Justice Brennan filed a concurring statement. Justice Marshall filed a statement concurring in part. Justice Stewart filed an opinion concurring in the judgment, in which Mr. Justice Powell joined. Justice Rehnquist filed an opinion concurring in the judgment.

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

A capital case in which the Supreme Court upheld the common law rule that the insane cannot be executed, concluding that the Eighth Amendment prohibits the State from inflicting the death penalty upon a prisoner who is insane. The Court held that the petitioner is thereby entitled to a competency evaluation and an evidentiary hearing in court on the question of his competency to be executed. Reversed and remanded. Justice Marshall announced the judgment of the Court and delivered an opinion to the Court with respect to Parts I and II, in which Justices Brennan, Blackmun, Powell, and Stevens joined, and an opinion with respect to Parts III, IV, and V, in which Justices Brennan, Blackmun, and Stevens joined. Justice Powell filed an opinion concurring in part and concurring in the judgment, establishing a standard for determining when a defendant is competent for execution, calling for the defendant to be aware of the fact of his or her impending execution and the reason for it. The Court subsequently adopted Justice Powell's concurrences as the correct standard on the issue. Justice O'Connor filed an opinion concurring in the result in part, and dissenting in part, in which Justice White also joined. Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger joined.

Gilmore v. Utah, 429 U.S. 1012 (1976).

A capital case in which the Supreme Court, upon the appeal of the defendant's mother, issued Order No A-453, terminating the existing stay of execution. Chief Justice Burger, with whom Justices Powell joined concurring, held that there was nothing in the record to indicate that the defendant, a convicted murderer who had been sentenced to death, was incompetent and that he knowingly and intelligently waived his rights to seek appeal of his death sentence and that his mother had no standing to seek relief on his behalf—leaving the Court without jurisdiction to hear the case. Justice Stevens, with whom Justice Rehnquist joined, posited that the defendant was competent and his access to the courts was unimpeded, leaving no standing for a third party to litigate an Eighth Amendment claim. Justice White, joined by Justices Brennan and Marshall, dissented, agreeing with the position that only the defendant had standing to challenge the validity of the state's capital punishment statute and that if he had done so the execution should have been stayed until the state courts could review the constitutionality of Utah's death penalty. Justice Marshall dissented, adding that the State failed to determine adequately the validity of the defendant's purported waiver and the propriety of imposing capital punishment. Justice Blackmun dissented, expressing the position that the defendant's mother's standing and constitutional issue was not insubstantial and would call for a hearing for plenary, not summary, consideration.

Godinez v. Moran, 509 U.S. 389 (1993).

Case in which the Supreme Court held that the competency standard for pleading guilty or waiving the right to counsel is the same as the competency standard for standing trial established in *Dusky v. United States*, 362 U.S. 402 (1960). It is not enough for the defendant to be simply oriented to time and place with some recollection of events; instead the test must be whether the defendant has sufficient present ability to consult with a lawyer with a reasonable degree of rational understanding and whether he or she has a rational as well as factual understanding of the proceedings against him or her.

Reversed and remanded with directions. Justice Thomas delivered the opinion of the Court, in which Chief Justice Rehnquist, and Justices White, O'Connor, and Souter joined. Justices Scalia and Kennedy joined in Parts I, II-B, and III of the opinion. Justice Kennedy filed an opinion concurring in part and concurring in the judgment, in which Justice Scalia joined. Justice Blackmun filed a dissenting opinion in which Justice Stevens joined.

Holmes v. Buss, 506 F.3d 576 (7th Cir. 2007).

Case in which the Seventh Circuit Court of Appeals held that the test for competence to participate in post-trial proceedings, including a petition for post-conviction relief, is the same as the test for competence to participate in trial. The court held that the key question is whether the petitioner is competent to play whatever role in relation to his case is necessary to enable it to be adequately presented.

Indiana v. Edwards, 554 U.S. 164 (2008).

Case in which the Supreme Court held that "the United States Constitution permits states to insist upon representation by counsel for those who are competent enough to stand trial, but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." Vacated and remanded. Justice Breyer delivered the opinion of the Court, in which Chief Justice Roberts, and Justices Stevens, Kennedy, Souter, Ginsburg, and Alito joined. Justice Scalia filed a dissenting opinion, in which Justice Thomas joined.

Nobles v. Georgia, 168 U.S. 398 (1897).

A capital case in which the Supreme Court , pre-*Ford v. Wainwright*, 477 U.S. 399 (1986), held that after a regular conviction and sentence, the suggestion of post-conviction insanity does not give a condemned prisoner the right to or require that the question be tried by a jury in order to constitute "due process of law." The Court found that Georgia's procedures did not violate the Due Process Clause of the Fourteenth Amendment. Justice White delivered the opinion of the Court.

Panetti v. Quarterman, 551 U.S. 930 (2007).

A capital case in which the Supreme Court held that a criminal defendant's *Ford v. Wainwright*, 477 U.S. 399 (1986) claim of incompetency not to be executed was not barred by the *Antiterrorism and Effective Death Penalty Act's* (AEDPA) prohibition against "second or successive" applications and that criminal defendants sentenced to death may not be executed if they do not understand the reason for their imminent execution. Reversed and remanded. Justice Kennedy delivered the opinion of the Court, in which Justices Stevens, Souter, Ginsburg, and Breyer joined. Justice Thomas filed a dissenting opinion joined by Chief Justice Roberts and Justices Scalia and Alito.

Penry v. Johnson, 532 U.S. 782, (2001) (*Penry II*).

A capital case in which the Supreme Court affirmed, in part, the state court's conviction on remand from *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*). The Court affirmed in part that the admission of a psychiatric report, based on the psychiatrist's examination of the defendant prior to trial on an unrelated matter during

the penalty phase did not call for habeas relief. The Court reversed in part, ruling that the instructions on mitigating circumstances failed to provide the jury with the means to adequately consider and give effect to mitigating factors of mental retardation and childhood abuse at the sentencing stage of the trial, as required by the Eighth and Fourteenth Amendments and as mandated by the Court in *Penry I*. Affirmed in part, reversed in part, and remanded. Justice O'Connor delivered the opinion of the Court, Parts I, II, and III–A, which were unanimous, and Part III–B, which was joined by Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer. Justice Thomas filed an opinion concurring in part and dissenting in part, in which Chief Justice Rehnquist, and Justice Scalia joined concurring in Parts I, II, and III–A, and dissenting in Part III–B.

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

A capital case in which the Supreme Court held that executing the mentally retarded convicted of capital offenses is not categorically prohibited as "cruel and unusual punishment" under the Eighth Amendment. However, the court also ruled that the state failed to provide the jury with the means to adequately consider and give effect to mitigating factors of mental retardation and childhood abuse at the sentencing stage of the trial, violating the Eighth and Fourteenth Amendments. Overruled by *Atkins v. Virginia*, 536 U.S. 304 (2002). Affirmed in part, reversed in part, and remanded. Justice O'Connor delivered the opinion for a unanimous Court (except as to Part IV-C) with respect to Parts I and IV-A, the opinion of the Court with respect to Parts II-B and III, in which Justices Brennan, Marshall, Blackmun, and Stevens joined, the opinion of the Court with respect to Parts II-A and IV-B, in which Chief Justice Rehnquist, White, Scalia, and Kennedy joined, and an opinion with respect to Part IV-C. Justice Brennan filed an opinion concurring in part and dissenting in part, in which Justice Marshall joined. Justice Stevens filed an opinion concurring in part and dissenting in part, in which Justice Blackmun joined. Justice Scalia filed an opinion concurring in part and dissenting in part, in which Chief Justice Rehnquist, White and Kennedy joined.

Perry v. Louisana, 498 U.S. 38 (1990).

A capital case in which the Supreme Court reviewed the issue of forcible medication of a death row inmate with a mental disorder in order to render him competent for execution. The Court vacated the judgment and remanded the decision for further consideration in light of *Washington v. Harper*, 494 U.S. 210 (1990) per curiam. Justice Souter took no part in the consideration or decision of the case.

Phyle v. Duffy, 334 U.S. 431 (1948).

A capital case in which the Supreme Court addressed the procedures used to determine restoration of competency for the purpose of execution. The Court dismissed the issue because there was no federal constitutional question presented that was ripe for decision. Justice Black delivered the opinion of the Court. Justice Frankfurter filed a concurring opinion joined by Justices Douglas, Murphy, and Rutledge.

Rector v. Bryant, 501 U.S. 1239, (1991) (Marshall, J., dissenting from denial of certiorari).
Denial of certiorari in which Justice Marshall objected to the states' application of *Ford v. Wainwright*, 477 U.S. 399 (1986). Justice Marshall argued that *Ford* had not decided whether the capacity to assist counsel was relevant under the Eighth Amendment, and emphasized that "lower courts clearly erred in viewing *Ford* as "settling the issue."

Rees v. Peyton, 384 U.S. 312 (1966).
A capital case, which was accepted by the Supreme Court in 1965 and which remained on the Court's docket for thirty years. It was dismissed in 1995. *Rees* marked the first attempt by a petitioner to waive a death penalty appeal and forced the Court to establish a procedure for determining a petitioner's competency to waive post-conviction relief.

Riggins v. Nevada, 504 U.S. 127 (1992).
A capital case in which the Supreme Court held that the involuntary administration of antipsychotic medication during defendant's trial violated rights guaranteed by the Sixth and Fourteenth Amendments. The Court held that once defendant requested termination of the medication, the State was obligated to establish both the need for the antipsychotic drug and its medical appropriateness for defendant's safety and that of others as the least restrictive alternative available. The Court also held that due process would have been satisfied if the State had been able to justify the treatment, by showing that an adjudication of guilt or innocence could not be obtained by using less intrusive means. The trial court failed to meet this requirement and failed to acknowledge defendant's liberty interest in freedom from antipsychotic medication. The Supreme Court did not consider the question of whether the drug's administration denied the defendant the opportunity to show jurors his true mental condition at the sentencing hearing as the issue was not raised in the lower court or included in the petition for certiorari. Reversed and remanded. Justice O'Connor delivered the opinion of the Court, in which Chief Justice Rehnquist, and Justices White, Blackmun, Stevens, and Souter joined. Justice Kennedy filed an opinion concurring in the judgment. Justice Thomas dissented and filed an opinion in which Justice Scalia joined in part.

Roper v. Simmons, 543 U.S. 551 (2005).
A capital case in which the Supreme Court ruled that standards of decency had evolved so that executing minors is "cruel and unusual punishment" prohibited by the Eighth Amendment. The majority cited a consensus against the juvenile death penalty among state legislatures, and its own determination that the death penalty is a disproportionate punishment for minors, pointing to teenagers' lack of maturity and responsibility, their greater vulnerability to negative influences, and incomplete character development as signs of a juveniles' reduced culpability. The Court also considered "overwhelming" international opinion against the juvenile death penalty. This case overturned the Court's previous decision in *Stanford v. Kentucky*, 492 U.S. 361(1989). Justice Kennedy delivered the opinion of the Court, joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice Stevens filed a concurring opinion, joined by Justice Ginsburg. Justice O'Connor filed a dissenting opinion. Justice Scalia filed a dissenting opinion, joined by Chief Justice Rehnquist and Justice Thomas.

Sell v. United States, 539 U.S. 166 (2003).

A capital case in which the Supreme Court, under the framework of *Washington v. Harper*, 494 U.S. 210 (1990), and *Riggins v. Nevada*, 504 U.S. 127 (1992), imposed strict restrictions on the right of a lower court to order the forced administration of antipsychotic medication to a defendant who had been found to be incompetent to stand trial for the sole purpose of making him competent and able to be tried. The Court found that an important government issue must be at stake to merit involuntary administration of medication. Furthermore, there must be a substantial probability that the medication will enable the defendant to become competent without substantial undermining side effects. Thereby the courts must conclude that involuntary medication is necessary to meet the state's interests to restore the defendant's competency, with no alternate or less intrusive procedures available that would produce the same results, and that the treatment is medically appropriate for the inmate's condition. Vacated and remanded. Justice Breyer delivered the opinion of the Court, in which Chief Justice Rehnquist, and Justices Stevens, Kennedy, Souter, and Ginsburg joined. Justice Scalia filed a dissenting opinion, in which Justices O'Connor and Thomas joined.

Singleton v. Norris, 319 F.3d 1018 (8th Cir. 2003), *cert. denied*, 540 U.S. 832 (2003).

An Eighth Circuit case that addressed whether Arkansas could use medication to involuntarily render a mentally ill death row inmate competent for execution. The defendant, legally incompetent without medication, argued that once an execution date is set, involuntary administration of medication becomes unconstitutional because the medication is no longer in the inmate's best medical interests. The Eighth Circuit held that the best medical interests of the prisoner must be determined without regard to whether there is a pending date of execution.

Singleton v. State, 437 S.E.2d 53 (S.C. 1993).

A Supreme Court of North Carolina decision that determined that the State could not forcibly medicate an inmate for the sole purpose of execution competency as it is a violation of the inmate's state right to privacy. The Court, relying on competency standards proposed by the American Bar Association (ABA), adopted a two-prong test for competency which differs from the standard set out in *Ford*. The two-prong test included a cognitive prong and an assistance prong. The cognitive prong looked at (1) whether a defendant can understand the nature of the proceedings; (2) whether a defendant can understand what he was tried for; (3) whether a defendant can understand the reason for the punishment; and (4) whether a defendant can understand the nature of the punishment. The assistance prong determines whether the defendant possesses the "capacity or ability to rationally communicate with counsel."

Smith v. Spisak, 130 S. Ct. 676 (2010).

A capital case in which the Supreme Court held that jury instructions, at the penalty phase, did not unconstitutionally require the jury to consider only those factors that jury unanimously found to be mitigating in its determination of whether the aggravating factors outweighed any mitigating circumstances during the sentencing phase. The Court also held, assuming counsel performed deficiently, that the defendant failed to show he was prejudiced, a key element in a finding of ineffective assistance of counsel. The Court

also held that, defendant failed to show a "reasonable probability," that a better closing argument without the defects alleged (that the closing argument regarding mitigation allegedly understated the facts upon which defense experts based their mental illness conclusions, that it said little or nothing about any possible mitigating circumstance other than mental illness, and that it made no explicit request that the jury return a verdict against death), would have made a significant difference to the verdict. The Court reversed the Sixth Circuit's determination that the state court had unreasonably applied established law, holding that there was no clearly established Supreme Court precedent addressing the issue upon which the federal court (6th Cir. Ct. of Appeals) granted relief. Justice Breyer delivered the opinion of the Court, in which Chief Justice Roberts, and Justices Scalia, Kennedy, Thomas, Ginsburg, Alito, and Sotomayor joined, and in which Justice Stevens joined as to Part III. Justice Stevens filed an opinion concurring in part and concurring in the judgment.

Smith v. Texas, 543 U.S. 37 (2004) (*Smith I*).

A capital case in which the Supreme Court held that instructing the jury to return a false answer to a special issue to avoid a death sentence did not allow the jury to fully consider defendant's relevant mitigating circumstances. The Court cited its decision in *Penry v. Johnson*, 532 U.S. 782, (2001)(*Penry II*), which held a similar instruction unconstitutional, the Court reversed finding there was a *Penry* error and that the nullification charge was inadequate under *Penry II*. The Court reversed and remanded, per curiam without argument. Justice Scalia filed a dissenting opinion in which Justice Thomas joined.

Smith v. Texas, 550 U.S. 297 (2007) (*Smith II*).

A capital case in which the Supreme Court held that the state court, on remand from *Smith v. Texas*, 543 U.S. 37 (2004) (*Smith I)*, had incorrectly ruled that the defendant had not preserved on appeal a *Penry II* challenge to the nullification charge, since he only made a *Penry I* challenge at trial; and that this procedural defect required him to show egregious harm, a burden he could not meet. The Court held that the appeals court made errors of federal law by mistaking the Supreme Court's previous holding and that the defendant's claim was preserved and the lower court could not base its holding that defendant needed to show "egregious harm" on an error. Reversed and remanded. Justice Kennedy delivered the opinion of the Court, in which Justices Stevens, Souter, Ginsburg, and Breyer joined. Justice Souter filed a concurring opinion. Justice Alito filed a dissenting opinion, in which Chief Justice Roberts, and Justices Scalia and Thomas joined.

Solesbee v. Balkcom, 339 U.S. 9 (1950).

A capital case in which the Supreme Court, pre-*Ford v. Wainwright*, 477 U.S. 399 (1986), held that where a state policy is against execution of a condemned convict who has become insane after conviction and sentence, it is not a denial of due process under the Fourteenth Amendment to vest discretionary authority of the prisoner's insanity in the Governor (aided by physicians), even when the decision is not subject to judicial review and the statute makes no provision for an adversarial hearing at which the prisoner may challenge the judgment. Affirmed. Justice Black delivered the opinion of the Court.

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

Soering v. United Kingdom, 11 Eur. Ct. H.R. (ser. A) 439 (1989).

An extradition case before The European Court of Human Rights in which the defendant, facing charges of capital murder in the United States, argued that the United Kingdom could not legally extradite him to the United States as it could expose him to "inhumane and degrading treatment and punishment," by exposing him to "death row phenomenon," in violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECIR). The Court held that, absent an assurance that the death penalty would not be imposed, Soering's extradition presented a "real risk" that he could be directly exposed to "inhuman treatment."

Stanford v. Kentucky, 492 U.S. 361 (1989).

A capital case in which the Supreme Court sanctioned the imposition of the death penalty on offenders who were at least 16 years of age at the time of the crime. The Court reasoned that in weighing whether the imposition of capital punishments on offenders below the age of eighteen is cruel and unusual, it is necessary to look at society's evolving decency standards. Performing this analysis, the Court determined that there was no national consensus regarding the imposition of capital punishments on 17 or 16 year-old individuals, leaving the decision up to the states whether to subject 17 or 16 year-olds to capital punishment. Overruled by *Roper v. Simmons*, 543 U.S. 551 (2005). Justice Scalia announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, and IV-A, in which Chief Justice Rehnquist, and Justices White, O'Connor, and Kennedy joined, and an opinion with respect to Parts IV-B and V, in which Chief Justice Rehnquist, and Justices White and Kennedy joined. Justice O'Connor filed an opinion concurring in part and concurring in the judgment. Justice Brennan filed a dissenting opinion, in which Justices Marshall, Blackmun and Stevens joined.

State v. Perry, 610 So. 2d 746 (La. 1992).

A Louisiana Supreme Court case in which the court held that the state could not forcibly medicate a defendant, otherwise incompetent without medication, to render him competent to be executed. The court considered the case in light of *Washington v. Harper*, 494 U.S. 210 (1990) finding that the forcible administration of medication to make defendant competent to be executed did not constitute medical treatment but rather was an aspect of capital punishment. The court concluded that the state's objective in forcibly administering medication was for the sole purpose of implementing execution and that the state failed to show that the prisoner was a danger to himself or others. The Court also held that the state failed to show that the use of antipsychotic drugs was appropriate medically and in the defendant's best medical interest. The court also examined protected privacy or personhood interests determining that forcible administration of medication would violate the defendant's bodily integrity, chemically alter his mind and will, and usurp his fundamental right to make decisions regarding his health or medical treatment, thereby constituting cruel and unusual punishment under the state constitution.

United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953).

A capital case in which the Supreme Court held that the petitioner, sentenced to death by a state court for murder, was not denied due process in violation of the Fourteenth Amendment when he was allowed to plead guilty, without a formal adjudication of his sanity. It was not a violation of due process because there was procedure available for subsequently withdrawing the plea of guilty and entering a plea of "not guilty because of insanity." The Court also held that it was not the constitutional duty of the State, even upon request, to appoint a psychiatrist to make a pretrial examination into petitioner's sanity. The state trial and appellate court records showed a judicial hearing where, on the plea of guilty, the question of sanity at the time of the commission of the crime was canvassed. Affirmed. Justice Reed delivered the opinion of the Court.

Washington v. Harper, 494 U.S. 210 (1990).

A non-capital punishment case, with implications of competency for execution, in which the Supreme Court acknowledged a "not insubstantial" liberty interest in avoiding the unwanted administration of medication, but held that liberty interest as limited and balanced against the safety and security interests of the prison. The Court ultimately found that a state could "treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will," but only if "the inmate is dangerous to himself or others," and "the treatment is in the inmate's medical interest." The Court also held that due process does not demand a judicial hearing before involuntarily medicating an inmate. Reversed and remanded. Justice Kennedy delivered the opinion for a unanimous Court with respect to Part II and the opinion of the Court with respect to Parts I, III, IV, and V, in which Chief Justice Rehnquist, and Justices White, Blackmun, O'Connor, and Scalia joined. Blackmun filed a concurring opinion. Justice Stevens filed an opinion concurring in part and dissenting in part, in which Justices Brennan and Marshall joined.

II. REPORTS & RECOMMENDATIONS

A.B.A., CRIM. JUST. STANDARDS COMM., A.B.A. CRIM. JUST. MENTAL HEALTH STANDARDS (1989), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_toc.html.

In August of 1984, the American Bar Association Criminal Justice Standards Committee developed a set of ninety-six standards for dealing with the mentally ill and disabled in the criminal justice system. These black-letter standards were approved by the ABA's House of Delegates on August 7, 1984. The majority of the Mental Health Standards were published in 1986 as Chapter 7 of the *ABA Standards for Criminal Justice.* New standards on competence and capital punishment were added in August of 1987 and on competence and confessions in August of 1988. The Standards are organized into ten parts, including sections on: mental health, and mental retardation; pretrial evaluations and expert testimony; competence to stand trial; competence on other issues; nonresponsibility for crime; commitment on nonresponsibility aquittees; special dispositional statutes; sentencing mentally ill and mentally retarded offenders; and mentally ill and mentally retarded prisoners. They also include a discussion of the

post-conviction determinations of competency, stays of execution, evaluation and adjudication of competence to be executed, restoration of competency, and the right to refuse treatment.

A.B.A., DEATH PENALTY MORATORIUM IMPLEMENTATION PROJECT, THE STATE OF THE DEATH PENALTY: EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS, KEY FINDINGS, COMPLIANCE LEVELS, AND EXECUTIVE SUMMARIES (2007), *available at* http://www.eurunion.org/legislat/DeathPenalty/ABAStateOfTheDeathPenRept103007.pdf.

This is a summary of previous assessments from the first phase of the ongoing Death Penalty Moratorium Implementation Project, which implements the American Bar Association's call for a moratorium on executions in the United States pending review in each capital punishment jurisdiction's laws and procedures in death penalty jurisprudence. The Assessments review whether each state's capital punishment laws and procedures are being administered fairly and impartially, whether they satisfy Constitutional standards for due process and minimize the risk that innocent persons may be executed. The project evaluated eight states between 2003 and 2007: Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania, and Tennessee. These assessments are summarized in this document. The project is currently in its second phase with Kentucky being the first of six additional states to be assessed. The Assessments research thirteen issues (1) death row demographics; (2) collection, preservation, and testing of DNA and other types of evidence; (3) law enforcement identifications and interrogations; (4) crime laboratories and medical examiner offices; (5) prosecutorial professionalism; (6) defense services; (7) the direct appeal process; (8) state post-conviction proceedings; (9) clemency; (10) jury instructions; (11) judicial independence; (12) the treatment of racial and ethnic minorities; and (13) mental retardation and mental illness. While The ABA takes no position supporting or opposing the death penalty, serious problems were found in every state assessed to date. Online the report is divided into two documents, Key Findings and a Compliance Chart.

A.B.A., SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES, DEATH WITHOUT JUSTICE: A GUIDE FOR EXAMINING THE ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES 1 (2001). *available at* http://www.abanet.org/irr/finaljune28.pdf.

In 2001 the American Bar Association Section of Individual Rights and Responsibilities released these "protocols" to help jurisdictions authorizing the death penalty to conduct comprehensive reviews of the laws, processes, and procedures relevant to the administration of capital punishment in their jurisdictions. These "protocols" are intended to encourage further consideration and implementation of the principles and ABA policies relating to death penalty administration that are encompassed in the ABA's February 1997 resolution. The resolution called for a nationwide moratorium on carrying out the death penalty until severe and pervasive problems in the system were addressed. Part Two of this work focuses on vulnerable populations in death penalty administration and includes a section on mentally retarded and mentally ill defendants and offenders. Includes Appendices.

A.B.A., SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES, RECOMMENDATION 122A (2006), *available at* http://www.abanet.org/moratorium/policy/2000s/hundredtwentytwoa.pdf.

Text of the recommendations and the supporting report of the American Bar Association (ABA) Section of Individual Rights and Responsibilities (IRR) Task Force on Mental Disability and the Death Penalty presented to the ABA and adopted by the House of Delegates in August 2006. In the text the ABA, without taking a position supporting or opposing capital punishment, urges each jurisdiction that imposes the death penalty to apply specific policies and procedures as it relates to the mentally ill. It also resolves that mentally ill defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitation in both intellectual functioning and adaptive behavior, or they had a severe mental disorder or disability that significantly impairs their capacity. The Recommendation also discusses grounds for precluding execution; procedures in cases involving prisoners seeking to forgo or terminate post-conviction proceedings; procedures in cases involving prisoners unable to assist counsel in post-conviction proceedings; and procedures in cases involving prisoners unable to understand the punishment or its purpose. (Also available as *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Ment. & Phys. Dis. L. Rep. 668 (2006)).

A.B.A. SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES, AS APPROVED BY THE ABA HOUSE OF DELEGATES FEBRUARY 3, 1997: RECOMMENDATION (1997), *available at* http://www.abanet.org/moratorium/policy/1990s/ABA1997ResolutionandReport.pdf.

Text of recommendation #107 and the supporting report of the American Bar Association (ABA). In the text the ABA, without taking a position supporting or opposing capital punishment, urges jurisdictions that impose the death penalty to halt all executions until the jurisdiction implements policies and procedures to: (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process; and (2) minimize the risk that innocent persons may be executed.

AMNESTY INT'L, UNITED STATES OF AMERICA: THE EXECUTION OF MENTALLY ILL OFFENDERS, *available at* http://amnesty.org/en/library/asset/AMR51/003/2006/en/75c16634-d46f-11dd-8743-d305bea2b2c7/amr510032006en.html.

This report, released by Amnesty International (AI), an abolitionist organization, is intended to illustrate that people with serious mental illness continue to be sentenced to death and executed in the United States regardless of existing safeguards. The report reviews individual cases while discussing key points of the death penalty and mental illness debate. The report calls for the exemption of the mentally ill from capital punishment and for the adoption of the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care. The report includes recommendations directed towards government officials and appendices. Appendix 1 provides an AI report providing an illustrative list of 100 men and women, who showed some form of serious mental disorder other than mental retardation, executed in the USA since the resumption of the death penalty in 1977. Appendix 2 provides the text of the ABA IRR Recommendations of the Task Force on Mental Disability and the Death Penalty.

A.L.I., REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY (APRIL 15, 2009*)*, *available at* http://www.ali.org/doc /Capital%20Punishment_web.pdf.

This resolution and supporting report of the American Law Institute (ALI) calls for the withdrawal and non-replacement of § 210.6 of the Model Penal Code dealing with capital punishment. The report provides background information, including the history of the 1962 Model Penal Code's approach to the death penalty, and a review of the process the Institute followed in reaching its current position. ALI neither endorses nor opposes the abolition of capital punishment. The report includes annexes. Annex A provides text of § 210.6, of the Model Penal Code. Annex B provides the text of a report to ALI Concerning Capital Punishment dated November 2008. This report by Carol S. Steiker and Jordon M. Steiker was commissioned by ALI Director Lance Liebman and sets forth, in detail, with supporting documentation, the major reasons behind the ALI decision to abandon § 210.6. Annex C provides a test of a Status Report on Capital Punishment dated April 2008. Annex 1 provides the text of a Motion on Capital Punishment, dated April 2, 2007. Annex 2 provides text of Memorandum to Members of the Institute from President Michael Traynor, dated May 10, 2007. Annex 3 contains text of a memorandum from the Ad Hoc Committee on the Death Penalty to the Program Committee, dated October 2, 2007. Annex 4 provides an excerpt from May 16, 2007 Annual Meeting Transcript (re: death penalty). Annex 5 provides a summary of members' comments submitted to ALI via electronic forum or otherwise, dated November 26, 2007. Annex 6 provides the Program Committee Recommendation Regarding the Death Penalty, dated December 3, 2007. Annex 7 provides the text of the Council Resolution (adopted at December 6-7, 2007 Council Meeting).

AM. CIVIL LIBERTIES UNION, HOW THE DEATH PENALTY WEAKENS U.S. INTERNATIONAL INTERESTS (2004), *available at* http://www.aclu.org/human-rights/how-death-penalty-weakens-us-international-interests.

This ACLU report discusses the impact of the United States' continued use of the Death Penalty against the world trend towards abolition and established international human rights norms, especially as they relate to the mentally ill, the mentally retarded and juveniles (pre *Roper v. Simmons*, 543 U.S. 551 (2005)). The report points out that members of the international community find the continued use of capital punishment incongruous to a position of leadership by the United States in human rights and other international policy matters and looks at the negative effects the continued use of capital punishment will have on national security and extradition. The report also points out the impact of international opinion on the Supreme Court, as can be seen in the use of amicus curiae briefs from the European Union and from members of the U.S. diplomatic corps in *Atkins v. Virginia*, 536 U.S. 304 (2002). The report concludes by calling for the United States to join the international community and abolish capital punishment or asks that the U.S. to at least establish a moratorium that would prove the United States' commitment to justice and individual liberties.

AM. CIVIL LIBERTIES UNION, MENTAL ILLNESS AND THE DEATH PENALTY, MAY 5, 2009 (2009), *available at* http://www.aclu.org/capital-punishment/mental-illness-and-death-penalty.

This overview discusses the gaps in the legal protection for severely mentally ill capital defendants, including the continued use of execution. Using information from Mental Health America, the ACLU estimates that five to ten percent of all death row inmates suffer from a severe mental illness. This outline looks at the difficulties faced by mentally ill capital defendants throughout the judicial process from trial to execution, including appeals. It reviews current case law and describes current legislative efforts to exempt those who suffer from a serious mental illness from capital punishment.

AM. COLL. OF PHYSICIANS, ET AL., BREACH OF TRUST: PHYSICIAN PARTICIPATION IN EXECUTIONS IN THE UNITED STATES (1994), *available at* http://www.hrw.org/reports/1994/03/01/breach-trust.

This report by Physicians for Human Rights (PHR), along with the American College of Physicians, the National Coalition to Abolish the Death Penalty, and Human Rights Watch, discusses and gives a brief history of the participation of physicians in executions and the conflict with ethical standards. The report includes a review of medical organizations' and state medical societies' responses to physician participation in executions; a state-by-state summary of state statutes and regulations concerning the death penalty and physicians; case studies obtained through interviews with witnesses and physicians; an ethical study of the participation problem, paying special attention to psychiatric evaluation and treatment of the condemned; an analysis of the ethical foundations prohibiting participation; and recommendations against participation with capital punishment.

AM. PSYCHIATRIC ASS'N, DEATH SENTENCES FOR PERSONS WITH DEMENTIA OR TRAUMATIC BRAIN INJURY: POSITION STATEMENT (2005), *available at* http://www.psychiatry.org/advocacy--newsroom/position-statements/apa-position-statements.

This position statement by the American Psychiatric Association (APA), developed in close collaboration with the American Bar Association Task Force on Mental Disability and the Death Penalty, is intended to urge courts and legislatures to extend the Supreme Court's ruling in *Atkins v. Virginia*, 536 U.S. 304 (2002*)* to two other disorders involving equivalent levels of impairment—dementia and traumatic brain injury. The position statement states that "Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury."

AM. PSYCHIATRIC ASS'N, DIMINISHED RESPONSIBILITY IN CAPITAL SENTENCING: POSITION STATEMENT (2004), *available at* http://www.psychiatry.org/advocacy--newsroom/position-statements/apa-position-statements.

This position statement by the American Psychiatric Association (APA), developed in close collaboration with the American Bar Association Task Force on Mental Disability and the Death Penalty, deals with diminished responsibility in capital sentencing and states the APA's position that defendants should not be sentenced to

death in capital cases or executed if, at the time of the offense, they suffer from a severe mental disorder or disability that significantly impairs their capacity to understand the nature, consequences or wrongfulness of their behavior, to apply rational judgment in relation to their behavior, or to conform their behavior to the tenets of the law. The position statement goes on to state that a disorder typified primarily by repeated criminal conduct or due solely to the acute voluntary abuse of alcohol or other drugs is not alone enough to constitute a mental disorder or disability under the provision. Includes commentary.

AM. PSYCHIATRIC ASS'N, MENTALLY ILL PRISONERS ON DEATH ROW: POSITION STATEMENT (2005), *available at* http://www.psychiatry.org/advocacy--newsroom/position-statements/apa-position-statements.

This position statement by the American Psychiatric Association (APA), developed in close collaboration with the American Bar Association Task Force on Mental Disability and the Death Penalty, addresses three different situations under which concerns about a death penalty defendant's mental competency and suitability for execution become factors post sentencing. The first section states that a sentence of death should be precluded when a prisoner has a mental disorder or disability affecting their capacity to: (i) make a rational decision to forgo or terminate post-conviction proceedings; (ii) assist counsel and communicate pertinent information during post-conviction adjudication; or (iii) understand and appreciate the nature or purpose of an impending execution, or the reason for the imposition of punishment. The following paragraphs clarify these situations and discuss procedural issues.

AM. PSYCHIATRIC ASS'N, MENTALLY ILL PRISONERS ON DEATH ROW, SUPPLEMENT: POSITION STATEMENT (2005), *available at* http://www.psychiatry.org/advocacy--newsroom/position-statements/apa-position-statements.

Further commentary and references supporting the American Psychiatric Association (APA) position statement, *Mentally Ill Prisoners on Death Row*, listed above.

AM. PSYCHIATRIC ASS'N, MORATORIUM ON CAPITAL PUNISHMENT IN THE UNITED STATES: POSITION STATEMENT (2000), *available at* http://www.psychiatry.org/advocacy--newsroom/position-statements/apa-position-statements.

This position statement by the American Psychiatric Association (APA), takes into consideration the recommendation of the American Bar Association (ABA), and calls for a moratorium on capital punishment in the United States until jurisdictions seeking to reform capital punishment establish new policies and procedures to assure that the death penalty is administered "fairly and impartially" in accord with due process. The APA expressly identifies weaknesses and deficiencies perceived in the current capital punishment system, specifically in regard to the mentally ill and developmentally disabled.

AM. PSYCHOLOGICAL ASS'N, THE DEATH PENALTY IN THE UNITED STATES (Aug. 2001), *available at* http://www.apa.org/about/policy/death-penalty.aspx.

This is a policy statement by the American Psychological Association (APA) calling for a moratorium by United States jurisdictions that impose the death penalty. This

resolution calls for the halt of all executions until policy and procedure implementations can be made to address nine specific problems identified by the Association in current capital punishment cases. The identified problems include: death penalty prosecutions that may involve persons with serious mental illness or mental retardation; procedural problems, such as assessing competency; and issues involving mitigation. Includes references.

AM. PSYCHOLOGICAL ASS'N, MENTAL DISABILITY AND THE DEATH PENALTY (2006), *available at* http://www.apa.org/about/policy/chapter-4b.aspx#death-penalty.

This position statement by the American Psychological Association (APA), developed in close collaboration with the American Bar Association Task Force on Mental Disability and the Death Penalty, urges jurisdictions that impose capital punishment not to execute certain persons with mental disabilities under the following circumstances: persistent mental disability; mental disorder or disability at the time of the offense; and mental disorder or disability after imposition of death sentence. The statement also includes grounds for precluding execution and procedures to be followed in the above circumstances. The position statement notes that adoption of these recommendations is not intended to supersede or alter existing APA policy on the death penalty (e.g., Resolution on the Death Penalty in the United States).

CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED (2006), *available at* http://www.constitutionproject.org/manage/file/30.pdf.

The Constitution Project, based in Washington, D.C., develops bipartisan solutions to contemporary constitutional and governance issues by combining high-level scholarship and public education. In 2000, the Constitution Project created a blue-ribbon committee on the Death Penalty. The Committee's members were supporters and opponents of the death penalty and included judges, prosecutors, policymakers, victim advocates, defense lawyers, journalists, and scholars—all of whom expressed profound concern that despite procedural safeguards and other assurances of fundamental fairness in the administration of capital punishment, the system had become deeply flawed. In 2001, the Committee released *Mandatory Justice: Eighteen Reforms to the Death Penalty*, which contains the consensus recommendations of the group. The group, however, predicted that additional experience, study, and reflection might require further recommendations. Those new recommendations are contained in this report and fall into three categories. First are recommendations that address changes in the law since *Mandatory Justice* was issued in 2001, which include the decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005). Second are those that address new areas that committee members identified as contributing to errors and injustices. Third are those recommendations that remain unchanged because the problems they were meant to address still exist. While not included in the first set of recommendations in 2001, the 2006 recommendation includes Recommendation Seven, which calls for the prohibition of executions in cases involving individuals with mental illness.

United Nations, Econ. & Soc. Council Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. E/CN.4/1997/60/Add.1 (Dec. 23, 1996), *available at* http://www2.ohchr.org/english/issues/executions/annual.htm.

This report, filed by the Commission on Human Rights, contains the report of the Special Rapporteur, who does much of the monitoring and fact finding work of the Commission. Each year, the Special Rapporteur releases a report on extrajudicial, summary, or arbitrary executions. In 1997, the Special Rapporteur stated a special concern regarding the "imposition and application of the death penalty on persons reported to be mentally retarded or mentally ill" in the United States.

Position Statement 54: Death Penalty and People with Mental Illnesses, MENTAL HEALTH AMERICA, (June 11, 2006), *available at* http://www.nmha.org/go/position-statements/54.

This position statement, released by Mental Health America, calls upon states "to suspend using the death penalty until more just, accurate and systematic ways of determining and considering a defendant's mental status are developed." The statement sets forth that defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity to appreciate the nature, consequences, or wrongfulness of their conduct; or if they had significant limitations in both their intellectual functioning and adaptive behavior. Includes commentary.

Moratorium on the Use of the Death Penalty, G.A. Res. 62/149, U.N. Doc. A/RES/62/149(Feb. 26, 2008), *available at* http://www.un.org/depts/dhl/resguide/r62.shtml.

The moratorium was adopted by the General Assembly by a 104-54 vote on the report of the Third Committee (A/62/439/Add.2). The United States opposed passage, arguing each nation should be left to choose for itself on the issue. Two previous attempts in 1994 and 1999 to have the General Assembly adopt a moratorium on the death penalty failed.

PUBLIC POLICY PLATFORM OF THE NATIONAL ALLIANCE ON MENTAL ILLNESS, NATIONAL ALLIANCE ON MENTAL ILLNESS §§ 10.9.1-10.10.2 (2008), *available at* http://www.nami.org/template.cfm?section=NAMI_Policy_Platform.

This sixty-page policy statement is released by the National Alliance on Mental Illness (NAMI), an organization of individuals with serious mental illnesses and their family members who advocate for research and services in response to major illnesses that affect the brain. It includes sections on the death penalty and the insanity defense. *Id*. at §§ 10.9.1-10.10.2. NAMI's primary function is to provide support, educate, and advocate; through research and service professionals, providers, and the general public; on the issues that affect people with serious mental illnesses.

The Protection of Persons with Mental Illness and the Improvement of Mental Health Care, G.A. Res. 46/119, U.N. Doc. A/RES/46/119 (Dec. 17, 1991), *available at* http://www.un.org/Depts/dhl/resguide/r46.htm.

These principles, adopted by the General Assembly in resolution 46/119 on December 17, 1991, call for the protection of a person with mental illness and the improvement of mental health care. They include definitions and twenty-five principles dealing with fundamental freedoms and basic rights.

Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, O.A.S.T.S. No. 73, *available at* http://www.oas.org/juridico/english/treaties/a-53.html.

This protocol to the American Convention on Human Rights to Abolish the Death Penalty was adopted by The Organization of American States, which includes the United States. The Protocol holds that the trend among American nations is in favor of abolition of capital punishment, and calls for an international agreement to abolish the death penalty in the Americas. The Protocol has been ratified by eleven countries including: Argentina, Brazil, Chile, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, Paraguay, Uruguay, and Venezuela. The United States is not a signatory.

United Nations, Commission on Human Rights, Question of the Death Penalty, U.N. Doc. E/CN.4/RES/2005/59 (Apr. 20, 2005) *available at* http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-59.doc.

This resolution of the United Nations Commission on Human Rights calls for an end to the use of the death penalty against the mentally ill. In 2005, the United Nations adopted these resolutions, which call for all states that still maintain the death penalty "[n]ot to impose the death penalty on a person suffering from any mental or intellectual disabilities or to execute any such person," thereby, encompassing both the mentally ill and the mentally retarded.

U.N. Secretary-General, *Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty: Rep. of the Secretary-General*, U.N. Doc. E/2010/10 (Dec. 18, 2009) *available at* http://www.un.org/Docs/journal/asp/ws.asp?m=E/2010/10.

This report, the eighth quinquennial report of the Secretary-General on capital punishment, covers the period from 2004-08 and reviews developments in the use of capital punishment. The report also lists recommendations for safeguards for the protection of the rights of those facing the death penalty in general and, under the third safeguard, calls for the prohibition of executions of "persons who have become insane." The issuing body, the Economic and Social Council, has recommended that Member States eliminate the death penalty "for persons suffering from mental retardation or extremely limited mental competence." The protection applies even when a person's insanity developed subsequent to conviction and sentence of death, without regard to competency at the time of the crime or of trial. The report also notes a marked international trend towards abolition and restriction of the use of capital punishment in most countries.

III. BOOKS

AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (rev. 4th ed. 2000).

The 943-page Diagnostic and Statistical Manual of Mental Disorders fourth edition text revised (DSM-IV-TR) is published by the American Psychiatric Association. This revision of the fourth edition of the manual sets forth diagnostic criteria, descriptions, and other information to guide the classification and diagnosis of mental disorders. Published in 2000, this edition replaces DSM-IV, and is expected to be replaced by

DSM-V in the near future. DSM-IV-TR provides a common language and standard criteria for the classification of mental disorders. The manual begins with instructions concerning its use, followed by the DSM-IV-TR classification list with official codes and categories. The text also includes a description of the DSM-IV Multiaxial Assessment System and over 700 pages of diagnostic criteria and descriptive text for each of the DSM-IV disorders. Includes index and appendices.

MARGARET VANDIVER, ET AL., "LETS DO IT!": AN ANALYSIS OF CONSENSUAL EXECUTIONS, IN THE DEATH PENALTY TODAY 187 (Robert M. Bohm ed., 2008).

This chapter provides a statistical overview of prisoners who have waived their rights to post-conviction review. It includes information regarding consensual executions before and after the Supreme Court decision in *Furman v. Georgia*, 408 U.S. 238 (1972), and an exploration of the categories under Durkheim's theory of suicide, *Suicide, a Study in Sociology*, and how they relate to consensual executions. The chapter also includes an examination of the motivation for volunteering for execution, including a section on the mentally ill and discussion on "death row syndrome." Includes tables, notes, references, and a list of cited cases.

ALFRED B. HEILBRUN, JR., THE DEATH PENALTY: BEYOND THE SMOKE AND MIRRORS (2006).

This book attempts to clarify, through evidence and reasoning, whether the presence of death penalty statutes provides a social benefit by limiting homicidal behavior, and whether the death penalty can be adjudicated fairly and in a manner consistent with contemporary values. Chapter Six: "Fair Practice in Adjudicating the Death Penalty: Mental Disorder as a Competence Issue" looks at competency and mental impairment and includes discussion on three issues that may stand in the way of just sentencing: assessment reliability, the determination of competence at the time of the offense, and the theory of dangerousness. Includes tables and references.

ROGER G. HOOD & CAROLYN HOYLE, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE (rev. 4th ed. 2008).

This book, now in its fourth edition, began as a report to the United Nations Committee on Crime Prevention and Control in 1988, and serves as a study on the question of the death penalty and the latest contributions of the criminal sciences in the matter, bringing up to date the survey of world trends on the issue. The fourth edition relies on responses to the seventh Quinquennial Survey of the United Nations (UN) and covers the years 1999-2003, as well as other sources of information from the UN. Chapter Six: "Excluding the Vulnerable from Capital Punishment" includes a section titled: "Protection of the Insane and Severely Mentally Ill," and discusses the implementation of safeguards to protect those who commit capital crimes while mentally ill, focusing separately on the mentally ill at the time of conviction and mental illness after conviction, or competence to be executed. Includes appendices, index, bibliography, and a list of cases cited.

BARRY LATZER & DAVID MCCORD, DEATH PENALTY CASES: LEADING U.S. SUPREME COURT CASES ON CAPITAL PUNISHMENT (3d ed. 2010).

This book contains excerpts of U.S. Supreme Court cases on the death penalty. It also contains a brief history of the Eighth Amendment, capital laws and procedures, discussion on the extralegal debate, and references. Appendix A contains facts and figures on murder and the death penalty. Appendix B contains selected death penalty statutes. Relevant cases include *Roper v. Simmons*, 543 U.S. 551 (2005); *Ford v. Wainwright*, 477 U.S. 399 (1986); and *Atkins v. Virginia*, 536 U.S. 304 (2002).

GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS (3d ed. 2007).

This book deals with forensic psychology and is aimed at mental health professionals who perform evaluations and lawyers and judges, who request evaluations. It is intended as a comprehensive guide to issues that the legal system has most commonly asked clinicians to address. The book is divided into five parts, one of which is "The Criminal Process," which includes chapters on "Competency to Stand Trial," "Other Competencies in the Criminal Process," "Mental State at the Time of the Offense," and "Sentencing." This work also contains a section on "Communicating with the Courts," which includes sample reports. Each chapter has a separate bibliography and the work includes a glossary, index, and notes.

JOHN PARRY, CRIMINAL MENTAL HEALTH AND DISABILITY LAW, EVIDENCE AND TESTIMONY: A COMPREHENSIVE REFERENCE MANUAL FOR LAWYERS, JUDGES AND CRIMINAL PROFESSIONALS (2009).

This book, sponsored by the American Bar Association (ABA), Commission on Mental and Physical Disability Law, synthesizes the best and most recent information regarding mental health and discrimination law as they pertain to criminal justice matters. The manual uses resources from the American Bar Association, referencing the ABA's *Criminal Justice Mental Health Standards* and information from the *Mental & Physical Disability Law Reporter, Mental Disability Law, Evidence and Testimony* and *Disability Discrimination Law,* and *Evidence and Testimony*. This book is divided into three parts. Part I: "Overview," which introduces mental health and disability in the context of broad criminal justice concerns and includes discussion on the legal history of mental health and disability in the criminal justice system and key terms, concepts, developments and considerations. Part II: "Substantive Law and Standards" provides discussion on criminal incompetency, insanity and diminished culpability, dangerousness in the criminal law and jails, prisons and secure "treatment" facilities, as well as information on conditions of confinement and release. Part III: "Expert Evidence and Testimony" covers pretrial, courtroom, and appellate evidence and testimony of forensics experts who participate in the mental health and disability related legal proceedings, including discussion on admissibility of expert evidence and testimony, mental health diagnoses and assessments, criminal incompetency, evidence of insanity and diminished culpability, dangerousness to others and self, care and treatment of inmates, and disability discrimination involving inmates in corrections facilities. The manual also includes a glossary of key terms, a table of cases and a subject index.

RAYMOND PATERNOSTER, ET AL., THE DEATH PENALTY: AMERICA'S EXPERIENCE WITH CAPITAL PUNISHMENT (2008).

This book addresses the contemporary issues surrounding the death penalty, covering legal, historical, philosophical, economic, sociological, and religious points of view. The book is divided into four parts, each with a separate introduction. Part One: "The Enduring Legacy of Capital Punishment in the United States," covers the development of the death penalty in America from 1608 to the present. Part Two: "Legal History, Constitutional Requirements, and Common Justifications for Capital Punishment in the United States," provides constitutional history and an introduction to the death penalty with discussion on the execution of special groups including the mentally ill. Part Three: "The Administration of the Death Penalty: Issues of Race and Human Fallibility," discusses the problems associated with the administration of the death penalty. Part Four: "What's to Come of the Death Penalty" looks to the future. Each chapter includes teaching aids and endnotes. Work also includes references, a name index, case index, subject index, and a forward by Stephen B. Bright.

ROBERT F. SCHOPP, ET AL., MENTAL DISORDER AND CRIMINAL LAW: RESPONSIBILITY, PUNISHMENT AND COMPETENCE (2009).

This book deals with mental disorder and criminal law and examines the integration of justificatory and empirical inquiry in the context of criminal competence and responsibility. Its intent is to lead the reader through a series of steps to gradually advance their understanding of the topic and promote ongoing interdisciplinary research. The book is divided into three parts, Part I: "Mental Disorder and the Criminal Process;" Part II: "Judgments of Dangerousness and the Criminal Process;" and Part III: "Competence to Face Execution and the Roles of the Psychological Professions;" and includes an introduction to the topic with notes. Of special note to this bibliography is the second section of Part I, by Bruce J. Winick, "Determining When Severe Mental Illness Should Disqualify a Defendant from Capital Punishment." Includes index.

RONALD S. HONBERG, THE INTERSECTION OF MENTAL ILLNESS AND CRIMINAL LAW IN THE CRIMINALIZATION OF MENTAL ILLNESS: CRISIS & OPPORTUNITY FOR THE JUSTICE SYSTEM 321 (2008).

This chapter identifies several situations in the criminal process system under which mental illness can become a factor. The chapter includes discussion on legal competency in criminal cases, the standard for determining competency to stand trial, the insanity defense, the rights of prisoners to refuse treatment, and a section on people with mental illness and the death penalty. The chapter includes separate references and the work includes a name index, case index, and subject index.

CHRISTOPHER SLOBOGIN, MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY (2006).

This book offers an examination of the laws governing the punishment, detention, and protection of people with mental disabilities. It is intended to advance new ways of thinking about the state's legal authority to deprive life and liberty to the mentally disordered and argues for a complete overhaul of the insanity defense, the abandonment of the guilty but mentally ill verdict, and a prohibition of the execution of the mentally ill.

Of special note for this bibliography is Chapter Three: "Mental Disability and the Death Penalty," which advances three reasons why the death penalty should never or rarely be imposed on the mentally ill, including an Equal Protection argument, a due process argument, and an Eighth Amendment argument. The work includes extensive notes and an index.

KENNETH WILLIAMS, MOST DESERVING OF DEATH?: AN ANALYSIS OF THE SUPREME COURT'S DEATH PENALTY JURISPRUDENCE (2012).

This book offers an analysis of the Supreme Court's treatment on the issue of the death penalty and its goal of reserving the death penalty for the worst offenders—those "most deserving of death." It is not intended as a promotion for or against abolition rather as a means of providing the reader with a better understanding of the issues surrounding the use of capital punishment. The book is divided into nine chapters. Of special note to this bibliography is Chapter 5 on Mental Illness. The work includes tables and an index.

IV. ARTICLES

Am. Civil Liberties Union, *Capital Punishment Project, Death Penalty 101* (2007), *available at* http://www.aclu.org/capital-punishment/death-penalty-101.

This brief article provides a concise overview of the current state of the death penalty in the United States. The article finds in part that the United States' capital punishment process "is arbitrary and capricious, including its use against the mentally ill..." The article includes death penalty statistics, a list of important Supreme Court cases, and a review of the states' and federal government's current positions on the death penalty.

Robert Batey, *Categorical Bars to Execution: Civilizing the Death Penalty*, 45 HOUS. L. REV. 1493 (2009).

This article discusses how the Supreme Court has used the creation of categorical bars to slowly eliminate certain classes of individuals from the death penalty, bringing the United States more closely in line with international death penalty norms. The article reviews the more recent decisions establishing these limits and uses these decisions as models for analysis. Dividing the analysis into three categories: Established (mental retardation and youth); Incomplete (Non-homicides and lack of intent to kill); and Emerging Categorical Bars (Seriously Mentally Ill). The author focuses on what has been accomplished and what remains to be done in future decisions, ultimately advocating that the death penalty be limited to the crime of murder and the bar be extended only to those suffering from mental illness at the time they committed their crimes.

Anthony N. Bishop, *The Death Penalty in the United States: A International Human Rights Perspective*, 43 S. TEX. L. REV. 1115 (2001–2002).

This article reviews the United States' contradictory policy on human rights, under which the US declares itself committed to human rights and criticizes other countries for their human rights policies while maintaining a retentionist position on the use of the death penalty. It is intended to provide practitioners and judges with limited knowledge of international death penalty law with the basic resources necessary to

understand international law arguments regarding the death penalty. The author includes discussion on the mentally retarded and the mentally ill. The article also discusses some of the likely consequences of the United States' continuing rejection of international human rights norms.

John H. Blume & Sheri Lynn Johnson, *Killing the Non-Willing: Atkins, the Volitionally Incapacitated, and the Death Penalty,* 55 S. C. L. REV. 93 (Fall 2003).

This article considers the Supreme Court decision in *Atkins v. Virginia*, 536 U.S. 304 (2002) and its implications for mentally ill defendants. It includes a brief synopsis of *State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992) and a short summary of pertinent Eighth Amendment law. The authors review the *Atkins* decision, applying the *Atkins* rationale to individuals suffering from volitional incapacity before discussing the broader implications of *Atkins* to other seriously mentally ill offenders. The authors conclude by determining that the benefits of *Atkins* are at best incremental and that while the *Atkins* methodology would likely be applicable to the volitionally incapacitated, the hope that it would extend to those who suffer from mental illness but are able to control their conduct as the next categorical exemption to the death penalty is likely to remain unrealized. Includes Charts (circa. 2003) summarizing state laws on death penalty ineligibility or eligibility for defendants with volitional incapacity.

John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939 (2005).

This article discusses the topic of "volunteers,"—death-row inmates who either refuse to present mitigating evidence or waive their rights to post-conviction review, actions that call into question whether the individual is mentally healthy and accepting just punishment or suffering from mental disease and therefore incompetent to waive their rights. The article summarizes current legal standards on volunteering and assisted suicide, and explores comparisons between the characteristics of volunteers and non-incarcerated suicidal individuals. The article goes on to propose a standard for assessing waiver requests, taking into account possible suicidal ideation and mental competency. The author concludes that motivation must be examined for each "volunteer" individually to find if the inmate is both competent to make legal choices and motivated to accept just punishment. If not, and suicidal ideation appears to be the motivating factor for waiver the courts should not permit waiver of appeal. Article also includes hypotheticals and statistical appendices.

Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169 (2005).

This article focuses on the difficulties that mentally ill defendants may suffer after the sentencing stage, identifying three grounds upon which execution of mentally ill prisoners should be precluded: defendants whose diminished comprehension of the circumstances of the punishment leaves them incompetent under *Ford v. Wainwright,* 477 U.S. 399 (1986) to execute; defendants whose mental illness lessens their ability to assist in their own defense or contribute in a vital way in post-conviction relief; and defendants who wish to waive their right to post-conviction review either by failing to initiate proceedings or terminating post-conviction proceedings as a means of

challenging the validity of the conviction. Through his discussion, the author links each of the above defendant groups to the correlating relevant text of the ABA Task Force on Mental Disability and the Death Penalty proposal. While a proponent of the ABA Recommendations and a member of the Task Force committee, the author goes on to conclude that even with adoption the proposals are not a panacea and that difficult legal problems will continue to arise for condemned prisoners suffering from mental illness.

Richard J. Bonnie, *Panetti v. Quarterman: Mental Illness, the Death Penalty, and Human Dignity*, 5 OHIO ST. J. CRIM. L. 257 (2007).

This article reviews the decision in *Panetti v. Quarterman*, 551 U.S. 930 (2007), with the author reviewing trial proceedings as well as the litigation regarding the defendant's competence for execution. The article discusses the federal jurisdiction to consider the habeas corpus claim under *Ford v. Wainwright*, 477 U.S. 399 (1986) and the Court's creation of an exemption to the *Anti-Terrorism and Effective Death Penalty Act* (AEDPA), 28 U.S.C. §2244(b)(2) restriction on "second or successive" federal habeas petitions. The author concludes by determining that *Panetti* serves to expose two substantial problems to the fair administration of the death penalty—first, the failure of the criminal justice system to take into full and proper consideration the effects of severe mental illness on capital litigation in regards to the fair defense of mentally ill defendants and claims of diminished capacity and second, the failure to correct these deficiencies in post-conviction proceedings. The author concludes by identifying an even larger problem exposed in *Panetti*; that of the failure of the state appellate courts to enforce the Supreme Court's capital sentencing jurisprudence, and the Supreme Court's reluctance to aggressively impose the principles and doctrines established on the issues against the state courts.

Susan M. Borland, *Walking the Edge of Death: An Annotated Bibliography on Juveniles, the Mentally Ill, the Mentally Retarded and the Death Penalty,* 21 N. ILL. U. L. REV. 131 (2001).

This bibliography, prepared in 2000, consists of annotated references to periodical articles, books, web sites, and Supreme Court cases that examine the application of the death penalty to juveniles, the mentally ill, and the mentally retarded. It is not comprehensive. The bibliography has been organized under three subject headings: I. Juveniles; II. Mentally Ill; and III. The Mentally Retarded. The three subject headings are further subdivided into: A. Supreme Court Cases; and B. Books, Articles, and Web Sites. It is a useful resource for information prior to 2000.

J. Richard Broughton, Essay, *The Second Death of Capital Punishment,* 58 FLA. L. REV. 639 (2006).

This essay critiques Supreme Court death penalty cases, specifically presenting a constitutionalist analysis of recent cases involving categorical exemptions from capital punishment(i.e. *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005)), and those cases involving reliance on federal collateral litigation to restrict imposition of capital punishment. The author uses these cases as examples to show the incremental elimination strategy of capital punishment abolition through litigation. According to the author this strategy causes the erosion of the scope and availability of

capital punishment. The author concludes that *Atkins* and *Roper* have distorted the objective national consensus standard and rendered it irrelevant in light of the Court's understanding of its own authority under the Eighth Amendment. The author further surmises that the distortion is gradually bringing about the death of capital punishment by allowing the Supreme Court to supplant itself, over political institutions, as the main forum of debate on the death penalty and allowing the use of subjective and experimental evidence to show the public's concern about the execution of the "innocent."

J. Richard Broughton, *The Roberts Court and the Death Penalty Code*, 12 JONES L. REV. 145 (2008).

This article looks at the role the Supreme Court has played in checking the government's use of the death penalty and how this role has resulted in what the author identifies as "a body of judicial pronouncements amounting to the crafting of a Death Penalty Code." After looking briefly at past Court administrations, the author reviews three possible issues that may come before the Roberts Court. The first issue is how to approach questions about whether to exempt certain groups of defendants from the death penalty under the Eighth Amendment. The author, noting the movement towards the creation of exemptions for the mentally ill as typified by the American Bar Association Recommendations, finds it likely that constitutional litigation on this question will reach the Court, calling for a re-examination of the existing categorical exemption framework. The author concludes by stating it is unlikely that the Roberts Court will move dramatically in a new direction in its capital cases, but that it remains to be seen whether the Roberts Court will continue to follow or revise the prior Courts' death penalty agendas.

Bethany C. Bryant, Comment, *Expanding Atkins and Roper: A Diagnostic Approach to Excluding the Death Penalty as Punishment for Schizophrenic Offenders,* 78 MISS. L. J. 905 (2009).

This comment addresses whether individuals suffering from schizophrenia should be exempt from the death penalty. The author begins by reviewing the history of capital punishment in the United States by laying out the foundation for challenging the death penalty as cruel and unusual punishment under the Eighth Amendment. Bryant then performs a detailed analysis of the *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005) decisions before comparing the mental limitations of those with schizophrenia and those with mental retardation. The author looks at diagnosis, etiology, symptomatology and treatment of both illnesses. Based on this analysis, the author concludes that objective evidence exists to support that schizophrenic offenders like those suffering from mental retardation should not be subjected to the death penalty. Finally, the author suggests that legislative efforts need to be established to reflect society's evolving standards on the matter and that courts, juries, and the general public need to be further educated about schizophrenia.

Ellen Byers, *Mentally Ill Criminal Offenders and the Strict Liability Effect: Is There Hope for a Just Jurisprudence in an Era of Responsibility/Consequences Talk?*, 57 ARK. L. REV. 447 (2004).

This article examines the dichotomy that exists between public dialogue regarding the mentally ill and their treatment under criminal law. Examined and discussed are four

case studies of mentally ill defendants and how contemporary criminal law lacks a studied and serious approach to mental disorder. The author argues as to how the modernization of criminal law has created an unrealistic and unworkable perception of culpability, which has been passively accepted by the Supreme Court through its deference to state legislative judgments. The author then discusses the influence conservative politics and religious fundamentalism has played in politicizing dangerousness and dehumanizing offenders. The author argues that this behavior has created an inflexible sentencing system incapable of taking individual circumstances into consideration. The article raises the question of whether the US can develop a more enlightened and mature means of dealing with mentally ill offenders. In doing so, the article reviews the federal government's recent recognition of the plight of the mentally ill, its grants for establishment of mental health courts, and recent Supreme Court decisions such as *Atkins v. Virginia*, 536 U.S. 304 (2002), which recognize the critical relationship between culpability and punishment.

Julie D. Cantor, *Of Pills and Needles: Involuntarily Medicating the Psychotic Inmate When Execution Looms*, 2 IND. HEALTH L. REV. 119 (2005).

This article discusses the Eighth Circuit decision in *Singleton v. Norris*, 319 F.3d 1018 (8th Cir. 2003), *cert. denied* 540 U.S. 832 (2003), posing the question of whether the Eighth Amendment permits a death row inmate, who is legally insane unless medicated, to be forcibly medicated for the purpose of making him eligible for execution. The article reviews the rights of the mentally ill both in the civil and criminal setting and finds that the psychotic inmate's liberty interest in bodily integrity yields when the inmate poses a danger to himself or others and medicating him is in his medical best interest. The article continues on with a discussion of *Singleton* and the arguments surrounding the issue of forced medication, including discussion on the medical ethics of medicating for the purpose of execution. The author concludes by arguing that the Eighth Circuit decision in *Singleton* was correct and that it is "ethical and perhaps even required for physicians to medicate death row inmates."

Lawrence Connell, *The Supreme Court, Foreign Law, and Constitutional Governance,* 11 WIDENER L. REV. 59 (2004).

This article reviews the use of foreign law to invalidate state criminal laws. The author, through an analysis of *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Lawrence v. Texas*, 539 U.S. 558 (2003), demonstrates how the Court's reliance on foreign law to justify its interpretation of the Constitution is illogical and symbolic of the Court's habit of improper interference with state legislatures over laws when they are in conflict with international norms. The article includes a brief review of how the Court used foreign and international laws in their decision process in the above cases and contains a discussion of why there should be no place for the consideration of foreign and international law in cases regarding the mentally ill and the death penalty in the Court's interpretation of the United States Constitution. The author concludes that the use of these laws is inappropriate and dangerous, and it creates a negative effect on the balance of power and American sovereignty. The author suggests proposals for the prevention of the extension of these precedents.

Patricia Cooper, *Competency of Death Row Inmates to Waive the Right to Appeal: A Proposal to Scrutinize the Motivations of Death Row Volunteers and to Consider the Impact of Death Row Syndrome in Determining Competency*, 28 DEV. MENTAL HEALTH L. (2009).

This article discusses the task of determining competency when death row inmates waive their right to appeal. The article reviews *Rees v. Peyton*, 384 U.S. 312 (1966), reviewing the *Rees*' two-prong standard for determining competence. This article argues that the *Rees* standard is unworkable and is often misapplied, and the Court's failure in *Rees* to address inmates' motivation for their decisions to waive appeals renders the standard inadequate. To resolve this problem, the author supports the recommendation of the American Bar Association Task Force on Mental Disability and the Death Penalty, which calls for the addition of a third prong to enhance and clarify the standard adopted in *Rees*. This prong asks: *"*Is the prisoner who seeks execution able to give plausible reasons for doing so that are clearly *not* grounded in symptoms of mental disorder?" The article also includes a discussion of the theory of "Death Row Syndrome" which espouses the premise that the mental stress of prolonged exposure to death row can cause, in and of itself, incompetency in death row inmates.

Rebecca J. Covarrubias, Comment: *Lives In Defense Counsel's Hands: The Problems and Responsibilities of Defense Counsel Representing Mentally Ill or Mentally Retarded Capital Defendants*, 11 SCHOLAR 413 (2008–2009).

This comment, using the example of *Wood v. Quarterman*, 572 F. Supp.2d 814 (2008), reviews the issue of death row inmates with serious mental illnesses who are entitled to a death penalty exemption but have been overlooked by defense counsel and the courts because of the difficulty in identifying them as mentally ill. This comment examines the difficulties inherent in identifying a defendant's mental illness or mental retardation and the relevant case law regarding the exemption of the mentally ill and mentally retarded for the death penalty. The article reviews *Ford v. Wainwright*, 477 U.S. 399 (1986), *Penry v. Lynaugh*, 492 U.S. 302 (1989), and *Atkins v. Virginia*, 536 U.S. 304 (2002). It also looks at evolving public consensus on executing the mentally ill and mentally retarded through an examination of current state legislation, review of the consensus of the international community, and the positions held by mental health organizations and the American Bar Association on the death penalty. The author concludes by arguing that the Supreme Court's failure to define and direct how and when states should provide a mental health or competency evaluation has led to inconsistencies that complicate the assessment process and that the Court in *Strickland v. Washington*, 466 U.S. 668 (1984), places the burden on defense counsel to make reasonable investigations into mitigating evidence, especially in regard to a death sentence.

Phyllis L. Crocker, *Not to Decide is to Decide: The U. S. Supreme Court's Thirty-Year Struggle with One Case about Competency to Waive Death Penalty Appeals*, 49 WAYNE L. REV. 885 (2003–2004).

This article discusses the history of *Rees v. Peyton*, 384 U.S. 312 (1966), a death penalty case first accepted by the Supreme Court in 1965 as a case of first impression, but which remained on the Court's docket for thirty years until it was dismissed in 1995. Crocker provides extensive archival research on the internal operations of the Court, reviewing correspondence, motions, responses, and internal memos and showing the different

avenues the Court considered in attempting to deal with the case. *Rees*, which exemplified the first attempt by a petitioner to waive a death penalty appeal, forced the Court to establish a procedure for determining a petitioner's competency to waive post-conviction relief. The author concludes that an examination of *Rees* offers not only historic value but contemporary relevance for litigators and courts seeking guidance on how to proceed in death penalty cases when the death row inmate may be incompetent.

Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 BEHAV. SCI. & L. 191 (2002).

This article reviews and summarizes research on death row inmates. The article evaluates the strengths and weaknesses of the three most prevalent types of death row research: demographic data, clinical studies, and research from institutional records. The article includes discussion on ethnic distribution, women on death row, juvenile offenders, intellectual ability, educational achievement, psychological disorders, neurological disorders, neuropsychological deficits, substance abuse and intoxication at capital offense, dysfunctional family history, self-representation capability, violence on death row, and death row conditions and confinement. The article reaches several conclusions, including that there is significant incidence of neurological and neuropsychological abnormalities among death row inmates. Psychological disorders are quite frequent, and the adverse conditions in some jurisdictions serve to aggravate psychological symptoms. The author concludes that current prison mental health service and interventions are insufficient and that the establishment of comprehensive mental health services are needed.

Sarah F. DePanfilis, *Singleton v. Norris: Exploring the Insanity of Forcibly Medicating, then Eliminating, the Insane*, 4 CONN. PUB. INT. L.J. 63 (2004).

This note examines the recent Eighth Circuit Court decision in *Singleton v. Norris*, 319 F.3d 1018 (8th Cir. 2003), *cert. denied* 540 U.S. 832 (2003). The note includes a brief history of American perceptions on the "insane," a summary of the Eighth Amendment's prohibition of "cruel and unusual punishments," and a historic overview of the use of capital punishment on the mentally ill. The note continues with an examination of mental health law on the subject of forcible medication including a review of *Washington v. Harper*, 494 U.S. 210 (1990), *Riggins v. Nevada*, 504 U.S. 127 (1992), and *Sell v. United States*, 539 U.S. 166 (2003). The author also reviews the Court's efforts to address whether a person deemed incompetent may be forcibly medicated in order to restore competency for execution by reviewing *State v. Perry*, 610 So. 2d 746 (La. 1992) and *Singleton v. State*, 437 S.E.2d 53 (S.C. 1993), which reached different conclusions on the matter than the Eighth District in *Norris*. The note proceeds to examine the Supreme Court's recent use of categorical exceptions from the death penalty to clarify the Court's reasoning, comparing *Singleton* to the underlying principles of exemptions afforded other groups like the mentally retarded and juveniles. The note then reviews the development and use of psychotropic medication and their side effects, and the role of antipsychotic medication in the forced competency of death row inmates for execution. The author looks at the various ethical codes guiding the medical field and the position of medical professionals on the issue of the treatment of mentally ill patients for the ultimate goal of achieving competency for execution. The note concludes with suggestion for alternate

solutions to the forced medication of the mentally ill for execution and advocates for the United States Supreme Court to revisit the issue.

Bruce Ebert, *Competency to be Executed: A Proposed Instrument to Evaluate an Inmate's Level of Competency in Light of the Eighth Amendment Prohibition Against the Execution of the Presently Insane*, 25 LAW & PSYCHOL. EV. 29 (2001).

This article reviews the history surrounding the analysis of determining whether an individual is competent to be executed. The author begins his discussion with the Supreme Court's holding in *Ford v. Wainwright*, 477 U.S. 399 (1986), particularly reviewing Justice Powell's concurrence opinion which established a two-prong competency standard. The article goes on to review the conditions and diagnoses which can result in a finding of incompetency and focuses on insufficient intellectual functioning, psychopathology, and dementia. The author then discusses the *Antiterrorism and Effective Death Penalty Act* (AEDPA) and its negative effect on death row appeals. The author concludes by offering guidance and presenting an outline for a process which could be employed in evaluating the competency of death row inmates, an example of which is included in Table Two of the article. Includes tables.

Lyn Suzanne Entzeroth, *The Challenge and Dilemma of Charting a Course to Constitutionally Protect the Severely Mentally Ill Capital Defendant from the Death Penalty,* 44 AKRON L. REV. 529 (2011).

This article looks at which capital defendants are suitable for execution under the precedents established in *Atkins v. Virginia*, 536 U.S. 304 (2002), *Roper v. Simmons*, 543 U.S. 551, (2005), and *Kennedy v. Louisiana*, 554 U.S.407 (2008), in which the Supreme Court limited capital punishment to the "narrow category" of offenders who commit the most serious crimes and whose "extreme culpability" makes them the most worthy of execution. Entzeroth examines these issues as applied to capital defendants who suffer from severe mental illness at the time of the commission of their crime by reviewing the characteristics of severe mental illness and its prevalence among capital offenders and the death row population. The author provides analysis of the development of the modern American death penalty and the position of the severely mentally ill offender within that structure. The author begins with an examination of *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976), concluding that these cases form the constitutional basis of the modern death penalty. The article expounds that while the Court is not willing to find the death penalty unconstitutional, it has established exemptions for certain groups of individuals upon which the death penalty may not be constitutionally imposed. The discussion considers how the Court crafts and justifies these death penalty exemptions and how state legislative action plays a critical role in their development, as typified by the decisions in *Atkins* and *Roper*. The article then reviews the current Eighth Amendment protection for "insane" prisoners at the time of execution as cruel and unusual punishment as reiterated in *Panetti v. Quarterman*, 551 U.S. 930 (2007), concluding that while strong comparisons can be made between the position and status of the severally mentally ill and existing exemptions, these exemptions are remarkably narrow and offer little or no protection for those suffering from severe mental illness. Entzeroth then provides a state by state analysis of state legislative action to ban the execution of the mentally ill, concluding that while some

states are raising constitutional concerns in regards to imposition of the death penalty on the severely mentally ill, there is currently no evidence of a national consensus. The author concludes that the future of the constitutional death penalty exemption for the severely mentally ill is as dependent on the state legislative process as it is on the Court and that *Atkins* and *Roper* alone are not determinative on the subject and that a stronger record of a "national consensus" against the execution of the severely mentally ill is necessary on the state legislative level.

Lyn Suzanne Entzeroth, *The Illusion of Sanity: The Constitutional and Moral Danger of Medicating Condemned Prisoners in Order to Execute Them*, 76 TENN. L. REV. 641 (2009).

This article considers the fate of those death row inmates whose mental illness meet the Supreme Court exemption to the death penalty established in *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007), but whose mental condition appear to be alleviated or lessened by the voluntary or involuntary use of antipsychotic medication. The article reviews the constitutional doctrine that exempts death row inmates from execution under the Eighth Amendment. The article then reviews case law that allows the state, under certain circumstances, to administer antipsychotic medication involuntarily to mentally ill prisoners, including in part *Washington v. Harper*, 494 U.S. 210 (1990), *Riggins v. Nevada*, 504 U.S. 127 (1992), and *Sell v. United States*, 539 U.S. 166 (2003). The article then reviews the constitutional and ethical problems raised by executing those whose competency is only assured through forced medication. The article proceeds to review the American Bar Association's recommendation on the imposition of the death penalty on the severely mentally ill and concludes by recommending that the Eighth Amendment's exemption of the insane be extended to cover individuals whose sanity can only be restored through medication.

Nita A. Farahany, *Cruel and Unequal Punishment*, 86 WASH. U. L. REV. 859 (2009).

This article argues that *Atkins v. Virginia*, 536 U.S. 304 (2002), established a doctrinal shift which puts the Eighth Amendment's Cruel and Unusual Punishment Clause in direct conflict with the Fourteenth Amendment's Equal Protection Clause. The article reviews the history of the Supreme Court's Eighth Amendment proportionality analysis and the legislative enactments created in response to *Atkins*. It proceeds to discuss medical conditions that give rise to the same cognitive, behavioral, and adaptive limitations in *Atkins* but that are not included in statutory definitions adopted pursuant to the *Atkins* decision. The author examines the arguments of other scholars who expound on the extension of *Atkins* to other subject groups, determining that these groups have a far weaker Eighth Amendment claim than *Atkins* and that an argument based on a due process claim is equally flawed. The author concludes that when the Court shifted its Eighth Amendment proportionality analysis under the Cruel and Unusual Punishment Clause to carve out category exemptions, it created an arbitrary and unequal application of the Eighth Amendment to similarly situated individuals and that legislative enactments based on that shift are now ripe to be challenged on Equal Protection grounds. Includes tables.

Kelly A. Gabos, *The Perils of Singleton v Norris: Ethics and Beyond*, 32 AM. J.L. & MED. 117 (2006).

This note discusses the ethical ramifications for physicians and mental health professionals created by the allowance of the "forcible medication" of death row inmates. The note begins with a look at the prevalence of mental illness in the criminal justice system and a review of cases involving the involuntary medication of mentally ill defendant and death row inmates. The note proceeds with a discussion of physician participation in executions throughout the United States, and the ethical principles and guidelines of various medical and psychological organizations. The author focuses on the ethical consideration and the impact of physician participation on the physician–patient relationship. The author concludes by finding the *Singleton v. Norris*, 319 F.3d 1018 (8th Cir. 2003), *cert. denied*, 540 U.S. 832 (2003) decision deficient for its failure to consider execution in an analysis of whether involuntary medication is a medically appropriate treatment for an incompetent death row inmate. The author further argues that the position in which physicians are placed as a result of this legal posture contradicts the very nature of their professional identity, and also inappropriately influences the treatment of mentally ill prisoners. The author suggests applying a stricter standard then the one developed in *Singleton* which would require that the treatment must not only be medically appropriate, but should be the best medically appropriate treatment for that particular patient. The author further concludes that all of the impacts of involuntary medication on the patient should be considered and that physicians should be free to explore other appropriate symptom-alleviating treatments where available.

Saby Ghoshray, *Tracing the Moral Contours of the Evolving Standards of Decency: The Supreme Court's Capital Jurisprudence Post-Roper*, 45 J. CATH. LEG. STUD. 561 (2006).

This article examines the Supreme Court's decisions in *Roper v. Simmons*, 543 U.S. 551 (2005) and *Atkins v. Virginia*, 536 U.S. 304 (2002) by mapping out the course of the Supreme Court capital punishment jurisprudence since its decision in *Furman v. Georgia,* 408 U.S. 238 (1972). The author, through an overview of capital punishment jurisprudence, argues that the Court, specifically by the overturning of *Penry v. Lynaugh*, 492 U.S. 302 (1989) and *Stanford v. Kentucky*, 492 U.S. 361 (1989), revitalized the death penalty debate by seeking to maximize human dignity through the creation of "categorical exemptions" expanding the "qualitative difference" doctrine and the broadening of the Eighth Amendment analysis first established in *Furman*. Ghoshray argues that in these decisions the Court has established new relaxed standards which subordinate traditional Eighth Amendment analysis allowing the court to adopt a more moral centric standard. The article also examines what the author concludes is a coincidental relationship between the Court's current position on capital punishment with doctrinal shifts in the Roman Catholic Church under the leadership of the late Pope John Paul II. The author finally delves into possible long-term implication of the Court's decision in *Atkins* and *Roper* and the potential obstacles faced by the Court if its intention is to make significant changes to current capital jurisprudence doctrine, concluding that the absence of credible objective standards along with the evidence of inconsistent application of the death penalty requires the Supreme Court to act through the creation of prohibitions against the death penalty for those who are diagnosed with severe mental illness at any point along the judicial process.

Anthony E. Giardino, *Combat Veterans, Mental Health Issues, and the Death Penalty: Addressing the Impact of Post-Traumatic Stress Disorder and Traumatic Brain Injury*, 77 FORDHAM L. REV. 2955 (2009).

This essay calls for the creation of special consideration when determining whether the death penalty should be imposed on combat veterans who suffer from service related post-traumatic stress disorder (PTSD) or traumatic brain injury (TBI). The essay argues that these combat veterans are a distinct and special population of offenders who should be treated differently for purposes of the death penalty. The essay addresses the different types of mitigating evidence that a combat veteran can present during the sentencing phase of a capital trial, including military training, which desensitizes veterans to the act of killing, diminished culpability, symptoms of PTSD that alter behavior and judgment, and symptoms of TBI such as emotional disturbance, personality changes, and deficits in intellectual and adaptive functioning. The essay then looks at the categorical exclusions created by *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005) comparing combat veterans with PTSD and TBI to minors and mentally retarded death row inmates on the issue of limited culpability. The author argues that there should be a narrow categorical exclusion created for certain combat veterans, and concludes that because the existence of service related PTSD or TBI reduces personal culpability, combat veterans cannot be considered as "among the worst offenders" and are thus undeserving of the ultimate sanction of the death penalty.

Timothy S. Hall, *Mental Status and Criminal Culpability after Atkins v. Virginia*, 29 U. DAYTON L. REV. 355 (2004).

This essay explores the implication of the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002) in the context of mental health law and the doctrines governing the relationship of the mentally disordered to the criminal justice system. The author argues that the *Atkins* decision departs from the traditional treatment of the mentally disordered and raises questions about the relationship between mental health science and the law. The essay examines the two major doctrines of mental health law as it applies to criminal law: insanity and competence. The author outlines both doctrines. The article then focuses on competence, with the author discussing *Atkins'* contribution to the body of law surrounding capital punishment and the mentally disordered, exploring some of the issues raised by the *Atkins* decision including: the extension of *Atkins* to other mental disabilities, the relationship between diagnosis and law, and due process and the determination of competence for execution. The author specifically looks at *Atkins* and state statutes governing the mentally retarded, how the Courts have implemented *Atkins*, federal habeas relief, and the *Antiterrorism and Effective Death Penalty Act* (AEDPA). The essay concludes that it is too early to predict whether *Atkins* foretells a new era of categorical exemption from capital punishment, but offers an example of the social consensus that mental status matters in issues of crime and culpability, and of the social confusion over precisely how and when it matters.

Ronald S. Honberg, *The Injustice of Imposing Death Sentences on People with Severe Mental Illness*, 54 CATH. U. L. REV. 1153 (2005).

This article discusses the impact of mental illness on the fairness of court proceedings in capital cases and argues for the categorization of mental illness as a per se mitigating factor. The article focuses on how the risk of mistakes are significantly greater when the defendant is severely mentally ill, and discusses several situations under which capital cases involving the mentally ill can become difficult. The author identifies several standard issues that arise in capital cases: the defendant's competency either to participate in his or her own defense or his or her competency to be executed; defendants who refuse to allow their legal representation to present evidence of mental illness; juror prejudice based on the defendant's demeanor under medication as remorseless, or the involuntary medication of a defendant to make him or her competent to stand trial or be executed; the problem of individuals with mental illness who do not want to be defended or have their convictions appealed; and the use of "dueling experts" which often only serve to bias and confuse jurors. The author concludes that the ABA Task Force Recommendations are a good start at handling the difficult issues involved with capital cases and the mentally ill, but that it will take a systematic state-by-state effort to enact legislation providing actual protection and that a Supreme Court decision settling the issue is unlikely to happen anytime soon.

Laurie T. Izutsu, *Applying Atkins v. Virginia to Capital Defendants with Severe Mental Illness*, 70 BROOK. L. REV. 995 (2005).

This note calls for a definitive exemption for individuals with severe mental illness from the death penalty. The note first looks at the Supreme Court's use of a proportionality review to guarantee that the use of the death penalty meets Eighth Amendment requirements. Thereafter, the note reviews the decision in *Atkins v. Virginia*, 536 U.S. 304 (2002) and its discussion on the reduced moral culpability of the mentally retarded in capital cases. It analyzes the framework of the rationale used by the court in *Atkins,* substituting the mentally ill for the mentally retarded to show that people who suffer from severe mental disorders should also be considered less morally culpable and exempt from the death penalty. The note also includes a review of state death penalty statutes, the views of several state justices, experts, as well as members of religious and other world communities, and case studies.

Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089 (2006).

This article discusses the use of state legislation as evidence of an evolving national consensus on matters regarding death penalty jurisprudence. As an example of this trend, the author particularly focuses on Supreme Court cases that have created categorical exemptions for the death penalty. The article argues that although the practice of using state legislation as evidence of evolving national consensus is often justified in terms of deference to state legislatures, it is actually harmful to the concept of federalism. The author sets forth four reasons why the use of state legislation as evidence of evolving consensus actually harms the interest of the states: it imposes uniformity on states that are meant to be free to pursue diverse policies; the current means of assessment can allow

one state undue power to determine the constitutionality of a mode of punishment for all other states; failure to take the differences in state population into consideration can lead to illusory consensus; and future state majorities cannot reverse a death penalty exemption once enacted in the Constitution short of an Article V amendment or a judicial revocation, even if "national consensus" shifts. The article concludes by stating that the use of state legislation is subjective and flawed in both its conception and practice, and consequently it should be explicitly rejected by the Court.

Jeffrey M. Jones, *Slim Majority of Americans Say Death Penalty Applied Fairly,* GALLUP NEWS SERVICE (May 20, 2002), http://www.gallup.com/poll/6031/Slim-Majority-Americans-Say-Death-Penalty-Applied-Fairly.aspx.

This is a poll released prior to the decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), that found that the majority of Americans opposed the death penalty for the mentally retarded (82%), for the mentally ill (75%), and for juvenile offenders (69%). The results are based on telephone interviews with a randomly selected national sample of 1,012 adults, 18 years and older, conducted May 6-9, 2002.

Liliana Lyra Jubilut, *Death Penalty and Mental Illness: The Challenge of Reconciling Human Rights, Criminal Law, and Psychiatric Standards*. 6 SEATTLE J. SOC. JUST. 353 (2007).

This article looks at the current debate regarding the death penalty and the mentally ill from an international human rights perspective. The author's discussion centers on the proposals made by Amnesty International and the American Bar Association after the decision in *Atkins* when both advocated for the categorical expansion of the death penalty exemption to the mentally ill. The author provides a critical analysis of both proposals, looking at their key tenets and discussing their strengths and weaknesses before ultimately finding both documents inadequate, and centering on abolitionist theories rather than on the protection of the intellectually disabled as an at-risk population. The author proceeds to recommend a counter proposal that calls for increased due process protections and fair resolution for mentally ill defendants, emphasizing improved access to medical care, and the adoption of an interdisciplinary approach between human rights, criminal law, and psychiatry.

Jeffrey L. Kirchmeier, *The Undiscovered Country: Execution Competency & Comprehending Death*, 98 KY. L. J. 263 (2009–2010).

This article reviews the question of the extent a mentally ill capital defendant must understand the concept of the termination of life as a punishment. The article reviews the history and policy behind the ban on the execution of the insane, finding its roots in the Anglo-American common-law and the policies of deterrence and retribution. The article proceeds to examine key Supreme Court decisions regarding the standard for determining competency to be executed, including *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007). The author then considers the use of statutory definitions of competency, finding that a number of states fail to provide such definitions and offer little guidance regarding the standards of competency. The author notes that where statutory definition exists, states require an understanding or awareness of the crime and corresponding punishment but fail to define an awareness standard. The article continues to examine how lower courts have dealt with decisions regarding death

comprehension, The author concludes that the Constitution requires a death comprehension test that finds a condemned mentally ill individual incompetent if they do not comprehend that the execution will mean the end of the their physical life.

Dora W. Klein, *Categorical Exclusions from Capital Punishment: How Many Wrongs Make a Right?,* 72 BROOK. L. REV. 1211 (2007).

This article looks at the categorical exclusions created in *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005), arguing that both decisions overstated the uniformity and universality of traits associated with diminished culpability among mentally retarded and juveniles. The author attempts to answer the question "Do the wrongs of capital punishment nevertheless make the Court's decisions in *Atkins* and *Roper* right?" The author proposes that in answering this question it is necessary to consider the implications for both offenders excluded from capital punishment and those not excluded. The article first looks at the Supreme Court's reasoning in *Atkins* and *Roper*, arguing that the Court failed to recognize the impact of categorical exclusions on non-juvenile and non-mentally retarded offenders. The author argues that the blanket exception does not consider offenders who are excluded under the exemption but who are not necessarily less culpable than offenders who remain subject to the death penalty, thereby allowing for unequal and arbitrary treatment of equally culpable offenders. The article proceeds to discuss the effects of *Atkins* and *Roper* on the broader capital punishment system, finding that these decisions allow for unfairness and inconsistency in sentencing and create a false sense of justness. The article concludes that capital punishment after *Atkins* and *Roper* might appear more just, but that appearance is misleading when considering the consequences of categorical exclusions on non-excluded offenders.

Chris Koepke, Note, *Panetti v. Quarterman: Exploring the Unsettled and Unsettling*, 45 HOUS. L. REV. 1383 (2008–2009).

This note reviews the Supreme Court decision in *Panetti v. Quarterman*, 551 U.S. 930 (2007) focusing on the third holding of the Court. There the Court rejected the Fifth Circuit's test for determining the competency to be executed as too restrictive, because it failed to take into consideration evidence of delusional beliefs that might prevent a prisoner from having a "rational understanding" of the state's reasons for seeking to impose the death penalty. First, the note reviews the facts of the case, the Court's analysis on the competency issue, and the dissenting opinion. Then, the note discusses the shortcomings of the Supreme Court's decision. The author argues that the Supreme Court has diminished a clear and workable standard and replaced it with a problematic schematic for assessing mental competency by suggesting that the Eighth Amendment requires a death row prisoner to possess a rational understanding of the reason for their pending execution. The author argues that the Court misconstrued *Ford v. Wainwright*, 477 U.S. 399 (1986), relied on a flawed policy, and failed to conduct the requisite constitutional analysis required under the Eighth Amendment. The article concludes by stating that *Panetti* provides little in the way of answers and it is unlikely to result in greater substantive protections of the mentally ill, ultimately serving only to add additional "hollow" language to *Ford* determinations.

Michael Mello, *Executing the Mentally Ill: When is Someone Sane Enough to Die?,* 22 CRIM. JUST. 30 (2007–2008).

This article, written by Michael Mello, an opponent of the death penalty and a member of the Public Defenders' office that worked on the *Ford v. Wainwright*, 477 U.S. 399 (1986) appeal, presents a personal account and analysis on three death row cases. Ford, *Martin v. Wainwright*, 479 U.S. 958 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007). The article focuses on the Constitution's prohibition on executing the presently insane, with the author noting that "mental illness is pervasive among the congregation of the condemned." This article explores the Supreme Court's attempt to resolve the key question of when someone is sane enough to die. The author posits that the Court has failed to provide an answer to this question, arguing that *Ford* never adequately identified precisely why executing the insane violates evolving standards of decency and that the *Ford* case left open more questions than it answered. A situation repeated in *Panetti,* which also fails to set down an express rule governing competency determinations. The author concludes by stating that we as a country execute the mentally ill, we executed them "after Ford and before Panetti", and this policy is unlikely to change.

Mental Capacity and the Death Penalty, 25 ST. LOUIS U. PUB. L. REV. (Special Issue) 277 (2006).

This 2006 issue of the Saint Louis University Public Law Review focuses on issues surrounding mental capacity and the death penalty. It includes the articles: *Executing People with Mental Disabilities: How We can Mitigate an Aggravating Situation,* by Ronald J. Tabak, on the 2005 Recommendations of the American Bar Association's Task Force on the Mental Disability and the Death Penalty; *Mental Health Courts and Title II of the ADA: Accessibility to State Court Systems for Individuals with Mental Disabilities and the Need for Diversion,* by Ronda Cress, J. Neil Grindstaff and S. Elizabeth Malloy, on the challenges facing mental health courts and the non-accessibility of conventional courts to the mentally ill; *Mental Illness and the Death Penalty,* by Eileen P. Ryan and Sarah B. Berson, (see separate annotation); *Capital Punishment and Mental Health Issues: Global Examples*, by Peter Hodgkinson, Founder and Director of the Centre for Capital Punishment Studies at the University of Westminster School of Law in London, along with Nicola Browne, Seema Kandelia, and Rupa Reddy, on international role of physicians and psychiatrists in the capital punishment process; *The Insanity Defense: History and Problems*, by James Hooper, on society's lack of knowledge regarding mental illness and the view that the insanity defense is just an elaborate way for the individual to defy justice; and an introduction by Chief Justice Michael Wolff of the Missouri Supreme Court, *Tinkering with the Machinery of Death-Mental Capacity, Ability, and Eligibility for the Death Penalty*.

Douglas Mossman, *Atkins v. Virginia: A Psychiatric Can of Worms*, 33 N.M. L. REV. 255 (2003).

This article gives a psychiatrist's perspective to *Atkins v. Virginia*, 536 U.S. 304 (2002), and looks at potential problems raised for courts that handle death penalty cases. The article reviews the increased level of psychiatric involvement in capital cases called for by the Supreme Court, and determines that such involvement will only

further complicate the already complex and capricious process. The article looks at the 1989 Supreme Court decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), focusing on the role that evidence of mental retardation played in the pre-*Atkins* decision. Turning to *Atkins,* the article then reviews the role that mental health professionals will be expected to play in future court determinations. The article compares the Supreme Court's diagnostic process in *Atkins* to the actual process of diagnosing mental retardation and the ambiguities of the process that are often distorted for legal effect. The author proceeds to describe the contradiction between mental health organizations' response to *Atkins* and their traditional position on the use of diagnoses for non-clinical purposes, concluding that *Atkins* will increase the role of psychiatrists and psychologists in capital cases but warns against an overreliance on medical diagnosis as an excuse for behavior rather than merely a component in a larger informed judgment.

John W. Parry, *The Death Penalty and Persons with Mental Disabilities: A Lethal Dose of Stigma, Sanism, Fear of Violence, and Faulty Predictions of Dangerousness*, 29 MENT. & PHYS. DIS. REP. 667 (2005).

This short article, written in support of the American Bar Association (ABA) Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty Recommendations, discusses the difficulty that individuals with obvious mental disabilities have in receiving a fair trial and execution. The author reviews "sanism," the concept of "irrational prejudice, due to a person's mental or emotional disability, that is based predominantly upon stereotype, myth, superstition, and deindividualization", which can be found rampant throughout the legal community. The author finds that sanism, in correlation with the stigma of mental illness, can lead to subjective pretextual decision-making such as the faulty reliance on the concept of dangerousness, and can make it virtually impossible for defendants with mental disabilities to be seen in a positive light once they enter the criminal justice system. The article also discusses the use of predictive psychological evaluations such as risk assessment and subjective clinical judgments to determine dangerousness despite their lack of empirical support. The article concludes with a discussion on *Roper v. Simmons*, 543 U.S. 551 (2005), a case that was not decided until the end of the Task Force's deliberations, with the author suggesting that the decision in *Roper* could serve to offer even greater protection to the mentally disabled than considered in the ABA Recommendations.

Mae C. Quinn, *Reconceptualizing Competence: An Appeal,* 66 WASH. & LEE L. REV. 259 (2009).

This article discusses the negative affect defendants' mental impairments have on the appellate process. The author calls for the reconceptualization of defendant competence as it relates to appeal proceedings. The article reviews the decision in *Dusky v. United States*, 362 U.S. 402 (1960), in which the Court established a defendant's right to have a competency evaluation before proceeding to trial, state statutory schemes, and the current American Bar Association (ABA) Criminal Justice Mental Health Standards on the protection of the mentally ill at trial. The author reasons that they all serve to adequately protect the rights of mentally disabled defendants at trial, but preclude any serious consideration of whether defendant capacity might be essential on appeal. The author notes a lower court trend of ignoring the impact of appellant disability and focuses on a

counter-trend exemplified by the decision in *Holmes v. Buss*, 506 F.3d 576 (7th Cir. 2007), which recognizes that in many cases defendants' competency at the appellate level is crucial to due process of law, and necessary for the effective assistance of counsel. The author also suggests that the Supreme Court's decision in *Indiana v. Edwards*, 554 U.S. 164 (2008) has created an opening for the development of a more individualized approach to the concept of competence. In conclusion, the author suggests a more comprehensive, contextualized, and client-centered approach to capacity in all levels of criminal process, including appeal, and urges for the redrafting of the ABA's Criminal Justice Mental Health Guidelines.

Eileen P. Ryan & Sarah B. Berson, *Mental Illness and the Death Penalty*, 25 ST. LOUIS U. PUB. L. REV. 351 (2006).

This article discusses the difficulties involved in attempting to exempt the mentally ill from the death penalty, putting forth the argument that if any categorical exemption is created it should only apply to those defendants suffering from Axis I disorders in which there are psychosis. The authors start by reviewing Supreme Court decisions involving the death penalty, beginning with *Furman v. Georgia*, 408 U.S. 238 (1972), and ending with a discussion of *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005). The article proceeds to review the legal arguments against the imposition of the death penalty on the mentally ill and the problems of using mental illness as an incremental abolition of the death penalty. The authors also discuss the reaction of professional mental health organizations to the Atkins decision and the American Bar Association Task Force Recommendations on mental disability and the death penalty. The article goes on to examine the various disorder and clinical entities that could potentially qualify for exemption under the American Bar Association Task Force Recommendations, contrasting Axis I psychiatric disorders with psychosis from personality disorders and traumatic brain injuries. The author concludes that any exemptions should be reserved for Axis I disorders where there would be minimal debate regarding the presence of severe mental illness and severe functional impairment.

David A. Sadoff, *International Law and the Moral Precipice: A Legal Policy Critique of the Death Row Phenomenon*, 17 TUL. J. INT'L & COMP. L. 77 (2008-2009).

This article attempts to clarify the nature, scope, and meaning of the "death row phenomenon" or; the concept that a capital punishment inmate is inadvertently subjected to inhumane treatment due to the intense mental suffering and debilitating circumstances endured on death row. The author reviews Soering v United Kingdom, 11 Eur. Ct. H.R. (ser. A) 439 (1989), in which the defendant, facing charges of capital murder, fought extradition to the United States by arguing that it could expose him to "inhumane and degrading treatment and punishment" i.e. death row phenomenon or death row syndrome. The author summarizes the relevant international and domestic case law, recognizing the validity of the death row phenomenon as well as the political reaction it has elicited. The article then attempts to critically evaluate the legitimacy of a phenomenon claim from a legal policy perspective. It concludes with recommendations for proposed judicial approaches for evaluating the legitimacy of the phenomenon claim in both ex post and ex ante contexts.

Christopher Seeds, *The Afterlife of Ford and Panetti: Execution Competence and the Capacity to Assist Counsel*, 53 ST. LOUIS U. L. J. 309 (2008-2009).

This article reviews the decision in *Panetti v. Quarterman*, 551 U.S. 930 (2007), focusing on whether executing prisoners with severe mental illness, who lack the capacity to assist counsel, contravenes evolving standards of decency. The article begins with a review of the prohibition on executing individuals with severe mental illness before and after *Ford v. Wainwright*, 477 U.S. 399 (1986). The author argues that in *Ford* the Court eliminated the element of a defendant's capacity to assist counsel from the assessment of competence for execution. The author proceeds by reviewing Justice Marshall's call for clarification on the issue in *Rector v. Bryant*, 501 U.S. 1239, 1240 (1991) (Marshall, J., dissenting from denial of certiorari). The article then argues that *Panetti,* as the first interpretation of *Ford,* opens the way for new elucidation of this matter and concludes that following *Panetti,* the substantive *Ford* inquiry is open to a reassessment.

Paula Shapiro, Comment: *Are We Executing Mentally Incompetent Inmates Because They Volunteer to Die?: A Look at Various States' Implementation of Standards of Competency to Waive Post-Conviction Review*, 57 CATH. U. L. REV. 567 (2007-2008).

This comment discusses the subject of "volunteers", death row inmates who decide to waive their right to post-conviction review of their sentences. The author argues that the failure in *Ford v. Wainwright*, 477 U.S. 399 (1986) to give guidance on its requirement that a competency determination take place prior to the execution of any capital defendant who waives their post-conviction right to an appeal, has led the states to establish inconsistent standards for determining inmate competency. The author further argues that the lack of uniform and specific standards significantly increases the chance of mentally incompetent inmates being executed unlawfully. This comment examines four states' procedures for determining an inmate's competency to waive post-conviction review: Montana, Nevada, Ohio, and South Carolina—all states in which a volunteer was executed in 2006. The author concludes by advocating for the uniform adoption of five basic procedural requirements by all states in order to ensure adequate and consistent standards for determining competency to waive post-conviction relief as a means to safeguard incompetent inmates' rights and to ensure that they are not being executed solely because they volunteer to die.

Helen Shin, *Is the Death of the Death Penalty Near? The Impact of Atkins and Roper on the Future of Capital Punishment for Mentally Ill Defendants*, 76 FORDHAM L. REV. 465 (October 2007).

This note examines the feasibility of the future exclusion of the mentally ill from the death penalty and the impact it might have on the ongoing debate regarding the overall validity of the death penalty. The author begins with an examination of the relevant history of capital punishment in the United States, explaining the Supreme Court's rationale for upholding the death penalty as a form of punishment. It discusses *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005), setting forth the Supreme Court's criteria for creating an exemption for particular classes of offenders. The author then applies the test established in *Roper* and *Atkins* to analyze whether or not mentally ill criminals should be exempt from the death penalty by reviewing the issue of national consensus. The note then provides an overview of

relevant state capital punishment law in the United States, looking at the proportionality analysis of the Supreme Court and discussing the implications of an exemption for the mentally ill. The author concludes that while there is a growing consensus against subjecting the mentally ill to the death penalty in the foreign arena, and that among legal, mental health and medical experts there is no visible sign of an objective legislative multistate consensus on the issue. The author recommends that state legislatures that still sanction capital punishment reexamine whether executing the mentally ill comports to the *Atkins* and *Roper* decisions.

Christopher Slobogin, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 CATH. U. L. REV. 1133 (2005).

This article discusses the first two recommendations of the American Bar Association Task Force on Mental Disability and the Death Penalty, both of which call for a prohibition on the execution of offenders whose mental disorder has rendered them less culpable at the time of the offense. The article first presents the language of the recommendation, then the related commentary approved by the Task Force Committee, concluding with a brief discussion of possible controversies that may arise from each recommendation. The author discusses the severe mental disorder or disability requirement, the significant impairment requirement, the Task Force's express exclusion of offenders whose disorder is attributable solely to the use of alcohol and/or drugs, as well as those offenders whose only diagnosis is antisocial personality disorder. The author also looks at how the recommendations relate to the insanity defense and to mitigating factors, concluding that the two recommendations of the American Bar Association Task Force recognize the diminished responsibility caused by serious mental disorders and guarantee the treatment of mental illness as a mitigating, and not aggravating, factor.

Christopher Slobogin, *Mental Illness and the Death Penalty*, 24 MENT. & PHYS. DIS. L. REP. 667(2000).

This article sets forth three arguments on why the death penalty should not be used or rarely used on the mentally ill. The first argument is a constitutional challenge based on Equal Protection, arguing that the Fourteenth Amendment's injunction requiring Equal Protection is violated by the different treatment of groups when there is no justification or relevant differences to support the differentiation. The second argument does not challenge constitutionality, but makes a due process argument based on the states' repeated failure to follow their own statutory provisions by treating mental illness as an aggravating factor in the death sentence determination. The third argument, based on the *Ford v. Wainwright*, 477 U.S. 399 (1986) Eighth Amendment bar on the execution of the incompetent, suggests that under a properly construed competency analysis most mentally ill defendants would prove incompetent under *Ford.* The author argues if the defendant is found competent, it is only because they have been medicated for the sole purpose of allowing their execution.

Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293 (2003).

This essay discusses whether states that prohibit the execution of juveniles or the mentally retarded violate the Equal Protection Clause by continuing to authorize the execution of the mentally ill. The essay begins by reviewing the Court's Eighth Amendment's analysis in *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Thompson v. Oklahoma*, 487 U.S. 815 (1988), ultimately finding that an expansion of the exemption in *Atkins* to the significantly mentally ill fails to meet the criteria necessary for a viable Eighth Amendment argument due to a lack of statutory evolution on the issue. The article goes on to discuss the possible expansion of the Court's analysis to the significantly mentally ill through an Equal Protection argument. Using a review of Equal Protection case law, the author makes a comparison between the mentally retarded, juveniles, and the significantly mentally ill and examines the level of comparison and persuasion necessary for a successful expansion of the exemption. The author concludes that differentiating between individuals with significant mental illness, mental retardation and juveniles in the application of the death penalty is a violation of the Equal Protection Clause.

Laura Snodgrass & Brad Justice, *"Death is Different": Limits on the Imposition of the Death Penalty to Traumatic Brain Injuries*, 26 DEV. MENTAL HEALTH L. 81 (2007).

This article discusses whether the Court limitation on the imposition of the death penalty should be expanded to include individuals with traumatic brain injuries (TBI) which result in permanent, cognitive, physical, emotional, and behavioral disabilities. The article discusses the recognized nexus between brain damage and violent crime, arguing that individuals with brain injuries are at higher risk to commit violent crimes and therefore at a higher risk to face the death penalty. Using the rationale set out in *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005), the article compares individuals with brain injuries to individuals with mental retardation and to juveniles. The article proposes an initial analytical approach for resolving underlying issues, including where to draw the line between mild and severe brain damage, how to properly diagnose such individuals and how to recognize them when they enter the criminal justice system. The author concludes by arguing that evidence shows that individuals with TBI show many of the same disabilities, functional limitations and behavioral manifestations as those associated with the mentally retarded and juveniles, marked by a lower level of culpability. The author concludes that execution of such persons would fail to serve the purpose of retribution and deterrence necessary under an Eighth Amendment analysis and does not correspond with evolving standards of decency.

Carol S. Steiker, *Panetti v. Quarterman: Is There a "Rational Understanding" of the Supreme Court's Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285 (2007).

This article reviews the case of *Panetti v. Quarterman*, 551 U.S. 930 (2007), focusing on tensions and uncertainties created by its holdings and its place in the complex body of capital punishment law. The article looks at each of the Court's findings individually, determining that the Court remained non-committal overall in its holdings, first by finding the Fifth Circuit test "too restrictive" but declining to set down a general rule to

govern competency determination. Second, by holding that the lower court's determination of competency was inadequate but failing to set down the procedures for lower courts to follow. The author argues that the most significant holding in *Panetti* is its interpretation of the *Antiterrorism and Effective Death Penalty Act* of 1996 (AEDPA), permitting Panetti to file his *Ford* claim in a second habeas petition, and the important consequences not only for death row petitioners with *Ford* claims, but also for all habeas petitioners in future interpretations of AEDPA. The author continues with an analysis of the Court's Eighth Amendment jurisprudence, looking at what she identifies as key questions about the proper scope of Eighth Amendment constraints on punishment and the methodology for determining that scope. The author concludes that *Panetti* brings us no closer to a rational understanding of the Supreme Court's Eighth Amendment jurisprudence but does illuminate some of the difficulties that will present themselves in the future.

Sarah A. Sulkowski, *The AEDPA and the Incompetent Death-Row Prisoner: Why Ford Claims Should be Exempt From the One-Year and One-Bite Rules*, 6 LOY. J. PUB. INT. L 57 (2004).

This article examines the two major sources of current procedures governing *Ford* claims: the common law imminence requirement, set down in *Herrera v. Collins,* 506 U.S. 390 (1993), and the *Antiterrorism and Effective Death Penalty Act of* 1996 (AEDPA) which set limits on when and how petitioners may raise *Ford* claims in federal court. Written pre *Panetti v. Quarterman*, 551 U.S. 930 (2007), this article suggests changes to ensure that *Ford* claims are available to those who need them. The article argues strict application of AEDPA to *Ford* claims is both unnecessary and constitutionally impermissible, calling for the exemption of *Ford* claims from the scope of AEDPA. The article details the requirements imposed under the common law imminence rule and by AEDPA, the federal courts' divergent interpretations of AEDPA, and examines several possible solutions for *Ford* petitioners. The article concludes that exemption of *Ford* claims from AEDPA's scope gives practical effect to the right not to be executed while incompetent and backs this conclusion through the examination of analogous cases in Supreme Court and other federal jurisprudence.

Symposium, *Beyond Atkins: A Symposium on the Implications of Atkins v. Virginia*, 33 N M. L. REV. 173 (2003).

This 2003 symposium issue of the New Mexico Law Review focuses on the implications of *Atkins v. Virginia*, 536 U.S. 304 (2002). It includes the articles: *Disability Advocacy and the Death Penalty: The Road from Penry to Atkins*, by James W. Ellis, the attorney who represented Atkins, reviewing the relationship of advocates on legislation and thus on the courts through the methodology of Eighth Amendment interpretation; *Adolescence, Mental Retardation, and the Death Penalty,* by Victor L Streib, and *Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment,* by Jeffrey Fagan, both discussing the death penalty and juvenile offenders anticipating the 2005 decision in *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia: A Psychiatric Can of Worms,* by Douglas Mossman, M.D., (see separate annotation); *What Atkins Could Mean for People with Mental Illness*, by Christopher Slobogin, (see separate annotation); *"Life is in Mirrors, Death Disappears": Giving Life to Atkins*, by Michael L. Perlin, focuses on the meaning of *Atkins* for the

advocacy community offering seventeen issues that should be considered in implementation; and *Straight is the Gate: Capital Clemency in the United States from Gregg to Atkins*, by Elizabeth Rapaport, which looks at the executive clemency decisions in capital cases.

Symposium, *Culpability and the Death Penalty: The Intersection of Law and Psychology,* 11 WIDENER L. REV. 1 (2004).

This 2004 Symposium issue of the Widener Law Review focuses on the topic of culpability and the death penalty. It includes the articles: *Off the Rails on a Crazy Train?: The Structural Consequences of Atkins and Modern Death Penalty Jurisprudence*, by J. Richard Broughton, on the Supreme Court's use of the Eighth Amendment to interfere with state capital sentencing schemes and the resulting negative effects on state sovereignty; *Atkins v. Virginia, Federalism, and Judicial Review*, by Charles Hobson, arguing that the Court's use of proportionality review to create a categorical exemption for the mentally retarded has no basis in the Eighth Amendment protection from Cruel and Unusual Punishment and is likely to prove more problematic than beneficial; *Justice Deferred, Justice Denied: the Practical Effect of Atkins v. Virginia,* by Elaine Cassell, which looks at the problems surrounding the fair application of *Atkins* to mentally retarded defendants; *The Supreme Court, Foreign Law, and Constitutional Governance*, by Lawrence Connell, (see separate annotation); *The Differing Conceptions of Culpability in Law & Psychology,* by Donald N. Bersoff, on how the differing concepts of culpability in law and psychology affect how society views and administers punishment and how the Supreme Court and organized psychology ignores and misuses social science data, directly impacting how the death penalty is administered; *Applying Principles of Forensic Mental Health Assessment to Capital Sentencing*, by Kirk Heilbrun, et al., discussing the call in *Atkins* for increased use of mental health professionals to conduct forensic mental health assessments in capital sentencing evaluations; *Into the Briar Patch: Ethical Dilemmas Facing Psychologists Following Atkins v. Virginia*, by Linda Knauss and Joshua Kutinsky, which examines the ethical challenges created by the *Atkins* decision for psychologists' and calls for the creation of clear professional boundaries regarding their roles in death penalty cases; Comment*: Atkins v. Virginia: The False Finding of a National Consensus and the Problems with Determining Who is Mentally Retarded*, by Kimberly A. Meany, critiquing the Court's decision in *Atkins* as inherently flawed due to the lack of national consensus against the execution of the mentally retarded and for failing to define mental retardation inviting constitutional challenge; and a forward by Geoffrey Marczyk and Lawrence J Connell.

Symposium: *The Death Penalty and Mental Illness*, 54 CATH. U. L. REV. 1113 (2005).

This 2005 Symposium issue of the Catholic University Law focuses on issues surrounding mental penalty and the mentally ill. It includes the text of The American Bar Association recommendations, *Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disabilities and the Death Penalty,* and includes the articles: *Overview of Task Force Proposal on Mental Disability and the Death Penalty,* by Ronald J. Tabak, (see separate annotation); *Mental Disorder as an Exemption from the Death Penalty: The*

ABA-IRR Task Force Recommendations, by Christopher Slobogin, (see separate annotation); *The Injustice of Imposing Death Sentences on People with Severe Mental Illness*, by Ronald S. Honberg, (see separate annotation); *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, by Richard J. Bonnie, (see separate annotation); and an introduction by Richard C. Dieter, *Introduction to the Presentations: The Path to an Eighth Amendment Analysis of Mental Illness and Capital Punishment.*

Symposium: The *Honorable James J. Gilvary Symposium on Law, Religion, and Social Justice: Evolving Standards of Decency in 2003 - Is the Death Penalty on Life Support*, 29 U. DAYTON L. REV. 195 (2004).

This 2004 Symposium issue of the University of Dayton Law Review focuses on the topics of law, religion, social justice, and the evolving standards of decency. It includes the articles: *Keynote Address Honorable James J. Gilvary Symposium on Law, Religion, and Social Justice: Evolving Standards of Decency in 2003 - Is the Death Penalty on Life Support,* by Erwin Chemerinsky, addressing the implications of the most recent Supreme Court decisions on the death penalty and suggesting that they signal a fundamental change in how the Court views its imposition; *The Death Penalty Experiment: The Facts Behind the Conclusions*, provides an objective overview of the history of the death penalty in the United States and its status as it stood in 2003; *The Innocence Revolution and Our "Evolving Standards of Decency" in Death Penalty Jurisprudence*, by Mark A. Godsey & Thomas Pulley, discusses how public perceptions of the death penalty are changing due to initiatives like the Innocence Project; *Evolving Standards of Decency: Cracks in the Foundation*, by Denise LeBoeuf, discussing the inherent flaws within the justice system that render the death penalty unjust; *Conscience of a Catholic Judge*, by Michael R. Merz, addressing the issues of conscience faced by Catholic judges asked to participate in death penalty determinations; *Drunk, Sleeping, and Incompetent Lawyers: Is It Possible to Keep Innocent People off Death Row*, by Ira Mickenberg, discusses the problems of willful blindness to ineffective capital representation; *Capital Punishment and the Citizens of Ohio*, by Andrew Oldenquist, and *Retribution and the Death Penalty*, by John Murphy, discussing deterrence and retribution and examining some of the reasons why most Americans still currently favor capital punishment and its role as a valuable tool in law enforcement; *Death is Different: An Essay Considering the Propriety of Utilizing Foreign Case Law in Eighth Amendment Jurisprudence*, by Joseph Brossart, on the propriety of utilizing foreign case law in determining the prevailing standards of decency; *Mental Status and Criminal Culpability after Atkins v. Virginia*, by Timothy S. Hall, (see separate annotation); and a forward by Lori Ellen Shaw, Assistant Dean of Students and Professor of Lawyering Skills at the University of Dayton School of Law.

Symposium: *"The Past, Present, and Future of the Death Penalty"*, 76 TENN. L. REV. 505 (2009).

This 2009 Symposium issue of the Tennessee Law Review presents a collection of articles and essays drawn from the Tennessee Law Review's Colloquium; "The Past, Present, and Future of the Death Penalty," held at the University of Tennessee College of Law on February 6 and 7, 2009. Includes the articles: *Adjudicating Claims of Innocence for the Capitally Condemned in Tennessee: Embracing a Truth Forum*, by Dwight Aaron,

advocating for the creation of a "truth forum" in the state of Tennessee; *Evidence of Racial Discrimination in the Use of the Death Penalty: A Story from Southwest Arkansas (1990-2005) with Special Reference to the Case of Death Row Inmate Frank Williams, Jr.*, by David C. Baldus, et al., presents an augmented version of the study submitted to the Parole Board on Williams' behalf, setting forth an empirical and scholarly basis for the argument that racial prejudice is a key factor in death penalty proceedings; *Racism, Wrongful Convictions, and the Death Penalty*, by Hugo Adam Bedau, reviewing the arguments of death penalty opponents who fall into two standard categories: those who argue the death penalty is wrong because of the risk of executing the innocent and those who argue that it is wrong because it is inherently racially biased. The article evaluates both positions, weighing their impact on the overall goal of abolishing the death penalty; *An Empirical Look at Atkins v. Virginia and Its Application in Capital Cases*, by John H. Blume, et al., analyzes state legislative and judicial responses to *Atkins* through the use of empirical data; *The Illusion of Sanity: The Constitutional and Moral Danger of Medicating Condemned Prisoners in Order to Execute Them*, by Lyn Suzanne Entzeroth, (see separate annotation); *Prosecutorial Error in Death Penalty Cases*, by Gilbert Stroud Merritt, Jr., examining prosecutorial misconduct in capital cases; *Treated Differently in Life but Not in Death: The Execution of the Intellectually Disabled after Atkins v. Virginia*, by Penny J. White, illustrating the repercussions of the different state judicial interpretations of *Atkins* prohibiting the execution of the mentally retarded; *Competency for Execution: The Implications of Communicative Model of Retribution,* Pamela A. Wilkins, *(see separate annotation*); and an introduction by Lane McCarty and Leslie Mund who served as Co-Chairs of the Colloquium.

Ronald J. Tabak, *Executing People with Mental Disabilities: How We Can Mitigate an Aggravating Situation*, 25 ST. LOUIS U. PUB. L. REV. 283 (2006).

This article discusses the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty Recommendations and their acceptance by the American Psychiatric Association in 2005, the American Psychological Association in 2006, and the American Bar Association in 2006. The article goes on to discuss some of the basis for the proposal and discusses the support of the Constitution Project, a blue ribbon committee on the death penalty, that in 2006 released a revised set of recommendations which includes a provision regarding the mentally ill, as well as members of the judiciary who support a capital punishment exemption of those with serious mental disabilities. Also includes examples of problematic cases which may fall under the recommendations.

Ronald J. Tabak, *Mental Disability and Capital Punishment: A More Rational Approach to a Disturbing Subject,* 34 HUM. RTS. 5 (2007). Also *available at* http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol34_2007/spring2007/hr_spring07_tabak.html.

This article provides a brief summary of the American Bar Association (ABA) Section of Individual Rights and Responsibilities (IRR) Task Force on Mental Disability and the Death Penalty Recommendations. The article summarizes the task force's conclusions and relies heavily on the supporting report presented to the ABA House of Delegates.

Ronald J. Tabak, *Overview of Task Force Proposal on Mental Disability and the Death Penalty*, 54 CATH. U. L. REV. 1123 (2005).

This article describes the 2003 creation of the American Bar Association (ABA) Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty, which explored whether individuals with mental illness should be exempt from execution, taking note of the decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). The Task Force included twenty-four lawyers, mental health professionals, and academics. The author served as the chair of the Task Force. The article lays out the work of the Task Force and the underlying concerns, and points the Task Force considered in reaching its recommendations. The Recommendations were adopted by the ABA's policymaking body, the House of Delegates, in August 2006.

Peggy M. Tobolowsky, *To Panetti and Beyond—Defining and Identifying Capital Offenders Who are too "Insane to be Executed*, 34 AM. J. CRIM. L. 369 (2006–2007).

This article examines the evolution of the definition of "insanity" for purposes of the ban on the execution of insane offenders, as well as the accompanying procedures to identify these capital offenders. The article reviews the common law prohibition of the execution of insane offenders and the adoption of the common law prohibitions by American states, as well as the current status of state law prior to the decision in *Ford v. Wainwright*, 477 U.S. 399 (1986). The article also reviews the current status of state law prior to the decision in *Panetti v. Quarterman*, 551 U.S. 930 (2007) and addresses the impact that the Court's decision in *Panetti* could have on various state insanity or competency definitions and procedures. The article describes illustrative cases of death row inmates whose cases could have been or could be affected by the Court's decision in *Panetti.* The author concludes by reviewing the Court's additional guidance in *Panetti* and twenty years of experience following *Ford,* proposing a model definition and implementation procedure to identify mentally impaired offenders who lack the requisite competence for execution. Includes appendix of state statutes or controlling court decisions regarding the prohibition of the execution of insane or incompetent offenders.

Brian W. Varland, *Marking the Process of a Maturing Society: Reconsidering the Constitutionality of Death Penalty Application in Light of Evolving Standards of Decency,* 28 HAMLINE L. REV. 314 (2005).

The article looks at the Eighth Amendment and death penalty issues and the author's perceived shift in the Supreme Court, as typified by the decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005), to take into consideration past issues and the "evolving standards of decency" of a maturing society. The author shows the evolution of the Eighth Amendment "evolving standards of decency" rule through a review of Supreme Court decisions and discusses the adoption and use of the standard in capital cases over the last three decades, culminating with the decisions in *Atkins* and *Roper*, which overturned an earlier ruling by the Court in *Penry v. Lynaugh*, 492 U.S. 302 (1989) and *Stanford v. Kentucky*, 492 U.S. 361 (1989). The author then continues with his analysis of how the "evolving standards of decency" principle evolved into a controlling constitutional rule, and concludes that the Court's movement towards reviewing past death penalty issues

through the "evolving standards of decency" of a maturing society could serve as a viable means for the "incremental abolition" of the death penalty by the Supreme Court.

Pamela A. Wilkins, *Competency for Execution: The Implications of a Communicative Model of Retribution*, 76 TENN. L. REV. 713 (2009).

This article attempts to establish an appropriate constitutional test for competency to be executed. The author argues that in the past, most of the various tests that have been adopted or proposed either fail to consider the purpose for the Eighth Amendment ban or, though taking into account the reason for the ban, are not structured to ensure that decisions will be based on accurate scientific determinations. The article provides background data on the endemic nature of mental illness on the states' death rows, death row conditions which are likely to exacerbate inmate existing mental health issues, the treatment of mental health during the capital trial process, and the problematic constitutional jurisprudence about competency to be executed. The article addresses retributive theory and the Eighth Amendment and the implications of that theory for the formation of a substantive constitutional test for competency to be executed. The article looks at several potential approaches to determine competency to be executed, including the Hazard-Louisell approach, the *Atkins* and *Roper* base Approaches, Mental State approaches and American Bar Association (ABA) Recommendation 122A. The author concludes that only the ABA Recommendation is based on a proper understanding of retribution and is scientifically practicable, taking into account the Eighth Amendment's heightened reliability standards for capital cases.

Pamela A. Wilkins, *Rethinking Categorical Prohibitions on Capital Punishment: How the Current Test Fails Mentally Ill Offenders and What to Do About It*, 40 U. MEM. L. REV. 423 (2009).

This article deals with whether the Eighth Amendment should be held to prohibit the imposition of death sentences upon offenders with severe mental illness. The article examines the current Eighth Amendment test for categorical prohibitions and its potential application to the severely mentally ill. The article provides an overview of punishment theory, deserts, and deserts limitation as a means to understanding what constitutes "cruel and unusual" punishment. The author argues that retribution is a deserts-based theory and the Eighth Amendment incorporates a deserts-limitation principle which bars states from imposing punishment beyond what an offender deserves. The author further argues that the use of categorical prohibitions, which combines an assessment of society's evolving standards with the Court's independent assessment of proportionality, follows the deserts-limitation model but concludes that the current test for categorical prohibitions does not provide an adequate deserts-limitation test and should be abandoned. The author proceeds to offer a new four element test that rethinks categorical exclusions in light of deserts.

Bruce J. Winick, *The Supreme Court's Emerging Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B. C. L. REV. 785 (2009).

This article explores recent Supreme Court decisions and the seeming willingness of the Court to invalidate the death penalty for certain offenses and classes of offenders

based on a disproportionate punishment argument, proposing that mental illness be the next logical step in such an analysis. The author first reviews the Supreme Court's interpretation of the proportionality requirement and when capital punishment is disproportionate within the meaning of the Eighth Amendment, concludes that although there is no current record of legislative action toward abolition and an absence of evidence of evolving social standards of decency, the Court could easily find that the execution of offenders with severe mental illness violates the proportionality standard through the exercise of independent judgment. The author then continues by considering the similarity amongst severe mental illness, mental retardation, and juvenile status, concluding that the Court's proportionality approach should also be applied to mentally ill offenders whose disability at the time of the crime caused functional impairment that significantly diminished their culpability and deterrability. Finally the article analyzes the standards that should be considered when making an Eighth Amendment determination, reviewing those mental illnesses that could satisfy the standard and suggesting how to address such a determination procedurally on a case-by-case basis.

V. WEBSITES

A.B.A. Death Penalty Moratorium Implementation Project, http://www.americanbar.org/groups/individual_rights/projects/death_penalty_moratorium_implementation_project.html.

Official American Bar Association (ABA) website for the ongoing Death Penalty Moratorium Implementation Project launched in 2003 to implement the association's call for a moratorium on executions in the United States, pending review in each capital punishment jurisdiction's laws and procedures in death penalty jurisprudence. This site includes links to the key findings and compliance charts for the state assessment project, as well as links to the individual state assessments. Site also includes links to a brief history of ABA policy on the death penalty, links to ABA policy documents, a link to ABA Amicus Curiae briefs, Supreme Court updates, and information on the death row population in the United States.

Am. Civil Liberties Union, *Mental Illness And The Death Penalty*, http://www.aclu.org/capital-punishment/mental-illness-and-death-penalty-0.

This website is part of American Civil Liberties Union Capital Punishment Project a national project that engages in public education and advocacy, systemic reform and strategic litigation. It includes direct representation of capital defendants and links to cases, news, blogs, and legal documents related to the death penalty and mental illness.

Amnesty Int'l, *Abolish The Death Penalty*, http://www.amnesty.org/en/death-penalty.

Official website on Amnesty International's (AI) death penalty abolition efforts. This site includes extensive information concerning the international use of the death penalty, AI reports on the death penalty, including reports concerning the mentally ill, and death penalty statistics. Site also includes a website library that contains reports, press releases, action appeals, and newsletters.

Bureau of Justice Statistics, *U.S. Dep't Of Justice, Capital Punishment Statistics*, http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=18.

This website is the primary source for criminal justice statistics on capital punishment. It includes data on persons held under sentence of death and persons executed during the calendar year from the state departments of correction and the Federal Bureau of Prisons. The page summarizes issues facing death row inmates, including data on offenders' sex, race, origin, education, marital status, age at time of arrest for the capital offense, and legal status at time of the offense.

Death Penalty Info. Ctr., *Mental Illness And The Death Penalty*, http://www.deathpenaltyinfo.org/mental-illness-and-death-penalty.

This is the Death Penalty Information Center's (DPIC) official website on the topic of the mentally ill and the death penalty. The DPIC, a non-profit organization, serves the media and the public with analysis and information on issues concerning capital punishment. The Mental Illness and the Death Penalty page provides links to other resources (including American Bar Association Resolutions), articles and texts on mental illness, important and recent cases, sentence reversals in intellectual disability cases, statistics, polls and studies, and news and developments dealing with the subject of the mentally ill and the death penalty.

Nat'l Inst. Of Mental Health, Statistics, http://www.nimh.nih.gov/statistics/index.shtml.

This website is a publication of the National Institute of Mental Health (NIMH) a part of the National Institutes of Health, a component of the U.S. Department of Health and Human Services. The site provides statistics and facts about mental disorders and also includes a link to references.