CRUEL AND UNUSUAL: THE CONSTITUTIONAL REQUIREMENT FOR HEIGHTENED PROTECTIONS FOR DEFENDANTS WITH SEVERE MENTAL ILLNESS IN CAPITAL CASES

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ABSTRACT

While the Supreme Court has created categorical bars against the imposition of the death penalty for juveniles and individuals with intellectual disabilities, it has yet to extend such protections to capital defendants with severe mental illness. Just like juveniles and individuals with intellectual disabilities, evolving standards of decency dictate that sentencing a defendant with severe mental illness violates the Eighth Amendment. One indication that society does not condone sentencing defendants with severe mental illness to death is the widespread presence of the insanity defense. Defining "severe mental illness" proves some difficulty in creating categorical protections for capital defendants. However, states can look to the lessons learned after Atkins v. Virginia, the United States Supreme Court case prohibiting the death penalty for defendants with intellectual disability, and the importance of creating standards which rely on clinically accepted definitions for severe mental illness.

While states must implement categorical protection for defendants with severe mental illness, it is unclear whether these protections should be implemented during the guilt or sentencing phase of a capital trial. States such as Idaho and Kansas that have abolished the insanity defense altogether, and thus provide no protections during the guilt phase, must implement some type of categorical prohibition during sentencing. However, due to limitations of the insanity defense, such as juror's unwillingness to find a defendant "not guilty by reason of insanity," even states with the insanity defense should consider a categorical bar during sentencing in order to more effectively protect defendants with severe mental illness.

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I. INTRODUCTION

On Thanksgiving, 2009, James Craig Kahler went to his mother-in-law's and shot her, his estranged wife, and their two daughters, leaving only his son to escape.[1] Kahler's defense team argued that Kahler was experiencing severe emotional disturbance that caused dissociation at the time of the crime.[2] In nearly every state, Kahler could have pursued a not guilty plea through an affirmative insanity defense.[3] However, because Kahler was in Kansas, a state which abolished its insanity defense in 1996, Kahler could not present such evidence.[4] Instead, under Kansas state law, Kahler was only allowed to present evidence of his mental illness to negate the necessary *mens rea*.[5] Under this nearly impossible standard, Kahler was found guilty and sentenced to death.[6]

Kahler has since appealed his conviction, and on March 23, 2020, the United States Supreme Court ruled on the issue, finding Kansas's abolition of the insanity defense constitutional.[7] While *Kahler v. Kansas* focused on the constitutionality of abolishing the insanity defense, it begs another important question: does the Constitution allow defendants with severe mental illness to be sentenced to death? Though this question is relevant across the United States, it is especially pressing in states that provide inadequate protections to defendants during the guilt stage of a capital trial.

1. Kahler v. Kansas, 140 S. Ct. 1021 (2020); Garrett Epps, *Does the Constitution Guarantee a Right to an Insanity Defense?*, ATLANTIC (Oct. 6, 2019), https://www.theatlantic.com/ideas/archive/2019/10/question-heart-kahler-v-kansas/599497/.

2. *Kahler*, 140 S. Ct. 1021; Epps, *supra* note 1.

3. Epps, *supra* note 1.

4. *Kahler*, 140 S. Ct. 1021; Epps, *supra* note 1.

5. *Kahler*, 140 S. Ct. 1021; Epps, *supra* note 1.

6. *Kahler*, 140 S. Ct. 1021; Epps, *supra* note 1.

7. *Kahler*, 140 S. Ct. 1021.

In recent history, the Supreme Court has held that the Eighth Amendment prohibits sentencing juveniles or defendants with intellectual disabilities to death.[8] The Court has yet to extend this holding to defendants with severe mental illness, despite the prevalence of mental illness within the death row population.[9] The Eighth Amendment's evolving standards of decency analysis demonstrates that, like with juveniles or defendants with intellectual disabilities, society believes that defendants with severe mental illness should not be sentenced to death. However, unlike juveniles or defendants with intellectual disabilities, some defendants with severe mental illness have an important safeguard during the guilt stage of a capital trial: the insanity defense.[10]

The insanity defense works to protect defendants with severe mental illness from not only the death penalty, but criminal liability altogether.[11] Not all formulations of the insanity defense are created equal, and thus many states with the insanity defense may still leave many defendants with severe mental illness unprotected. However, states such as Kansas and Idaho have gone so far as to abolish the insanity defense altogether.[12] Because these states have no structural protections for defendants with severe mental illness during the guilt stage, these states must implement a categorical bar on sentencing such defendants to death.

In Part I, this paper will argue that the Eighth Amendment's evolving standards of decency analysis demonstrates that it is unconstitutional to sentence a severely mentally ill person to death. In Part II, this paper will discuss the difficulties in defining "severe mental illness" within the death penalty context and consider which definitions are most effective. In Part III, this paper will argue that states may implement safeguards, such as the insanity defense or a categorical bar, either during the guilt or sentencing stage of a capital trial to ensure that defendants with severe mental illness are not sentenced to death. However, Part III will also explore the limitations of the insanity defense and why a categorical bar may be more beneficial to prevent the sentencing of defendants with severe mental illness to death. Part III will focus in part on Idaho, a state that has abolished the insanity defense.

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8. Roper v. Simmons, 543 U.S. 551 (2004); Atkins v. Virginia, 536 U.S. 304 (2002).

9. *Mental Illness and the Death Penalty*, ACLU (May 5, 2009), https://www.aclu.org/report/report-mental-illness-and-death-penalty. Five to ten percent of the death row population in the United States suffers from severe mental illness.

10. *Id.*

11. *See* Jean K. Gilles Phillips & Rebecca E. Woodman, *The Insanity of the Mens Rea Model: Due Process and the Abolition of the Insanity Defense*, 28 PACER L. REV. 455, 464-65 (2008).

12. Tommy Simmons, *Idaho One of Only 4 States Without a Criminal Insanity Defense*, IDAHO STATE JOURNAL (Nov. 26, 2018) https://www.idahostatejournal.com/news/local/idaho-one-of-only-states-without-a-criminal-insanity-defense/article_6d2b7dad-2df9-52ad-a0a9-bdaa0682f37a.html.

A. The Eighth Amendment's Evolving Standards of Decency

The application of the death penalty is often challenged under the Eighth Amendment. The Eighth Amendment prohibits cruel and unusual punishments.[13] By nature of the language, "whether an action is 'unusual' depends, in common usage, upon the frequency of its occurrence or the magnitude of its acceptance."[14] Thus, a punishment is cruel and unusual if it runs contradictory to evolving standards of decency.[15] To determine evolving standards of decency, the Court first considers objective indicators of decency, such as state legislation, jury verdicts, and professional or religious communities.[16] Then, the Court exercises its independent judgment in determining whether the challenged action violates evolving standards of decency.[17] When applying this analysis, evolving standards of decency indicate that sentencing defendants with severe mental illness to death violates the Eighth Amendment.

i. *Atkins v. Virginia*

In 2002, the United States Supreme Court created the first categorical bar on imposing the death penalty when it decided *Atkins v. Virginia*.[18] In *Atkins*, Daryl Renard Atkins was sentenced to death for capital murder after Atkins and William Jones abducted the victim, robbed him, and shot him.[19] During the guilt phase of the trial, Atkins testified that Jones had shot the victim.[20] However, Jones, who was more coherent and credible, testified that Atkins had shot the victim.[21]

During the penalty phase, a forensic psychologist testified that Atkins was intellectually disabled, based on school and court records, and an IQ score of 59.[22] However, the jury found two aggravating factors, future dangerousness and "vileness of the offense," and sentenced Atkins to death despite evidence of his intellectual disability.[23]

When considering the objective indicia of contemporary values, the Court looked towards state legislation in the matter.[24] At the time of *Atkins*, eighteen states had enacted prohibitions on executing defendants with intellectual disabilities.[25] However, the Court focused less on the number of states which had enacted legislation, but on "the consistency of the direction of change."[26] The Court found that the number of states enacting, or considering enacting, legislation prohibiting the execution of defendants with intellectual disabilities, and the lack

13. U.S. CONST. amend. VIII.
14. Thompson v. Oklahoma, 487 U.S. 815 n.7 (1988).
15. Trop v. Dulles, 356 U.S. 86, 101 (1958).
16. *See* Trop v. Dulles, 356 U.S. 86 (1958); Atkins v. Virginia, 536 U.S 304 (2002); Roper v. Simmons, 543 U.S. 551 (2004).
17. *Atkins*, 536 U.S. at 321.
18. *Id.*
19. *Id.* at 307.
20. *Id.*
21. *Id.*
22. *Id.* at 308-09.
23. *Atkins*, 536 U.S. at 308.
24. *Id.* at 314-15.
25. *Id.* at 315.
26. *Id.*

of states reinstating such executions was "power evidence" that society believed offenders with intellectual disabilities are less culpable.[27]

Next, using its independent judgement, the Court relied on two reasons for creating a categorical prohibition on the execution of defendants with intellectual disabilities.[28] First, neither justification—deterrence or retribution—for the death penalty is served by the execution of the defendants with intellectual disabilities.[29] Second, the reduced mental capacity of defendants with intellectual disabilities creates an unjustified risk that the "death penalty will be imposed in spite of factors which may call for a less severe penalty."[30]

After considering both objective indicia and its independent judgement, the Court ultimately found that the execution of defendants with intellectual disabilities contravened society's evolving standards of decency and thus violated the Eighth Amendment.[31] Using the Court's analysis in *Atkins* as guidance, the execution of defendants with severe mental illness also violates the Eighth Amendment's prohibition on cruel and unusual punishment.

ii. Objective Indicia of Contemporary Values

The first step in determining society's evolving standards of decency is considering objective indicia of contemporary values. The Court has looked towards objective evidence, such as state legislation, the professional opinions, and the international community to determine what practices contravene society's contemporary values.[32] When considering this objective evidence, it appears that society has reached a consensus: sentencing a defendant with severe mental illness to death is cruel and unusual.

The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[33] When looking at legislation as an objective indicator of decency, there has not been much movement to create a categorical bar against sentencing a person with severe mental illness to death. Since *Furman v. Georgia* forced states to re-evaluate their capital sentencing schemes, Connecticut has been the only state to have ever provided a categorical bar.[34]

However, more states have begun to consider legislation which would provide

27. *Id.* at 315-16.

28. *Id.* at 318-20.

29. *Atkins*, 536 U.S at 318-19.

30. *Id.* at 320 (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)).

31. *Id.* at 321.

32. *See* Roper v. Simmons, 543 U.S. 551 (2005); *see also* Hall v. Florida, 572 U.S. 701 (2014); Atkins v. Virginia, 536 U.S 304 (2002).

33. *Atkins*, 536 U.S. at 312 (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).

34. CONN. GEN. STAT. § 53a-46a (2015). Connecticut abolished the death penalty for future crimes in 2012, leaving the possibility for an individual to be sentenced to death for crimes committed prior to 2012. *Id.* However, in 2015, the Connecticut Supreme Court ruled that the death penalty violated the state constitution. State v. Santiago, 122 A.3d 1 (Conn. 2015).

a categorical bar. Currently, Ohio has adopted a law, and ten other states have proposed legislation, that would impose some sort of prohibition on imposing the death penalty on defendants with severe mental illness.[35] The prevalence of proposed legislation addressing this topic over the past few years demonstrates the growing concern surrounding sentencing defendants with severe mental illness to death.

While only one state has gone so far as to impose a categorical bar,[36] there is a national consensus that criminal defendants with severe mental illness should be afforded heightened protections. Forty-six states have some form of the insanity defense, which allows defendants with severe mental illness to plead "not guilty by reason of insanity" during the guilt stage of a trial.[37] If the jury finds a defendant not guilty by reason of insanity, then not only does a defendant with severe mental illness avoid the death penalty, but they avoid criminal liability altogether.[38]

Until 1979, every state in the United States had some form of the insanity defense.[39] However, around that same time, the public began to voice some discomfort over the insanity defense as high-profile defendants, such as Charles Manson and Jack Ruby, pled not guilty by reason of insanity.[40] In 1979, Montana became the first state to abolish the affirmative insanity defense.[41]

Just a few years later, John Hinckley Jr. was found not guilty by reason of insanity for his attempted assassination of President Reagan.[42] This caused widespread public outcry against the insanity defense, and state legislatures across the country were forced to reconsider its place in our criminal justice system.[43] Four states followed Montana in abolishing the insanity defense: Idaho, Utah, Nevada, and Kansas (though Nevada's abolishment was eventually found to violate its state constitution).[44] However, despite the public outcry against the high-profile acquittal of John Hinckley Jr., the vast majority of states reaffirmed their use of the insanity

35. H.R. 2509, 99th Gen. Assemb., 2d Reg. Sess. (Mo. 2018); S. 107, 2018 Leg., Reg. Sess. (Ky. 2018); S. 666, 2017 Leg., Reg. Sess. (N.C. 2017); H.R. 3080, 85th Leg., Reg. Sess. (Tex. 2017); S. 0378, 110th Gen. Assemb., Reg. Sess. (Tenn. 2017); H.R. 1123, 2018 Leg., 93rd Sess. (S.D. 2018); S. 802, 2018 Leg., Reg. Sess. (Va. 2018); S. 155, 120th Gen. Assemb., Reg. Sess. (Ind. 2017); H.R. 2170, 91st Gen. Assemb., Reg. Sess. (Ark. 2017); *see also Ohio Passes Bill to Bar Death Penalty for People with Severe Mental Illness*, DEATH PENALTY (Jan. 11, 2021), https://deathpenaltyinfo.org/news/ohio-passes-bill-to-bar-death-penalty-for-people-with-severe-mental-illness.

36. *Ohio Passes Bill to Bar Death Penalty for People with Severe Mental Illness*, DEATH PENALTY (Jan. 11, 2021), https://deathpenaltyinfo.org/news/ohio-passes-bill-to-bar-death-penalty-for-people-with-severe-mental-illness.

37 Natalie Jacewicz, *With No Insanity Defense, Seriously Ill People End Up in Prison,* NPR (Aug. 5, 2016) https://www.npr.org/sections/health-shots/2016/08/05/487909967/with-no-insanity-defense-seriously-ill-people-end-up-in-prison.

38. W.E. Shipley, Annotation, *Modern Status of Rules as to Burden and Sufficiency of Proof of Mental Irresponsibility in Criminal Case*, 17 A.L.R. 3d 146 (2019).

39. Daniel J. Nasbaum, *The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of "Abolishing" the Insanity Defense*, 87 CORNELL L. REV. 1509, 1518 (2002).

40. Stephanie C. Stimpson, *State v. Cowan: The Consequences of Montana's Abolition of the Insanity Defense,* 55 MONT. L. REV. 503, 504 (1994).

41. Nasbaum, *supra* note 39, at 1520.

42. Gilbert Geis & Robert Meier, *Abolition of the Insanity Plea in Idaho: A Case Study*, 477 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 72, 73 (1985).

43. *Id.*

44. Jacewicz, *supra* note 37; *see* Finger v. State, 27 P.3d 66, 86 (Nev. 2001).

defense—since 1996, no state has abolished their insanity defense.[45] The prevalence of the insanity defense across the United States demonstrates that state legislatures, both historically and currently, believe that defendants with severe mental illness are deserving of heightened protections, and they should avoid not only the death penalty, but criminal liability and punishment altogether.

While legislation is given the most weight when looking at objective indicia, the Court has also considered the expert opinions of professional organizations.[46] In *Hall v. Florida,* Justice Kennedy wrote, "It is the Court's duty to interpret the Constitution, but it need not do so in isolation. The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework."[47] When crafting the decision, the Court considered that Florida's strict 70-point IQ cut-off for determining intellectual disability was in direct contradiction to the unanimous medical consensus which takes into account a standard error of measurement.[48] Like intellectual disability, severe mental illness is a legal determination based upon a medical condition.[49] Additionally, there appears to be a consensus among the major medical organizations—such as American Psychological Association (APA), National Alliance on Mental Illness (NAMI), and Mental Health America—that individuals with severe mental illness should not be sentenced to death.[50]

Additionally, the international community has been outspoken about the use of the death penalty for defendants with severe mental illness. While the Court is not obligated to follow international consensus, the Court has often looked towards the international community in determining evolving standards of decency.[51] In

45. *See, e.g.,* KAN. STAT. ANN. § 22-3220 (2019). *See also* Andrew Chung & Lawrence Hurley, *U.S. Supreme Court Lets States Bar Insanity Defense* (Mar. 23, 2020), https://www.reuters.com/article/us-usa-court-insanity/u-s-supreme-court-lets-states-bar-insanity-defense-idUSKBN21A2E6.

46. Hall v. Florida, 572 U.S. 701, 721 (2014).

47. *Id.*

48. *Id.* at 721-22.

49. AM. BAR ASS'N DEATH PENALTY DUE PROCESS REVIEW PROJECT, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY, (Dec. 2016) https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf.

50. *Death Penalty*, NAMI, https://www.nami.org/Learn-More/Mental-Health-Public-Policy/Death-Penalty (last visited Sept. 23, 2020); E. Packard, *Associations Concur on Mental Disability and Death Penalty Policy*, AM. PSYCH. ASS'N (Jan. 2007), https://www.apa.org/monitor/jan07/associations; *Position Statement 54: Death Penalty and People with Mental Illnesses*, MENTAL HEALTH AM., https://www.mhanational.org/issues/position-statement-54-death-penalty-and-people-mental-illnesses (last visited Nov. 4, 2020).

51. Roper v. Simmons, 543 U.S. 551, 575-76 (2005) ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."); Atkins v. Virginia, 536 U.S 304, 316 n.21 (2002) ("[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."); Enmund v. Florida, 458 U.S. 782, 788 (1982) ("[T]he Court looked to the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made before bringing its own judgment to bear on the matter.").

2018, the United Nation's Office of the High Commissioner for Human Rights issued a statement calling for the prohibition of the death penalty for defendants with severe mental illness in countries such as Ghana, Iran, Pakistan, and the United States.[52] Likewise, the European Union, which opposes the death penalty in all contexts, has attempted to intervene in death penalty cases where the defendant has severe mental illness.[53] Organizations such as Amnesty International and Reprieve UK have also been outspoken against the United States' use of the death sentence for defendants with severe mental illness.[54]

Thus, while there does not seem to be constitutional support for a categorical bar against sentencing a severely mentally ill defendant to death due to the lack of a legislation present, there does appear to be a national consensus that individuals with severe mental illness should be afforded heightened protections, most commonly through some variation of the insanity defense. This is further supported by both professional and international consensus that the death penalty should not be imposed on individuals with severe mental illness.

iii. The Court's Independent Judgment

After considering objective indicia, the Court would implement its independent judgement in deciding whether the punishment will violate the Eighth Amendment's prohibition against cruel and unusual punishment.[55] Historically, the Court will consider the penological purpose of the punishment, as well as the reliability with which evidence of mitigation will be fully considered.[56] When applying these principles, the Court should come to the conclusion that sentencing defendants with severe mental illness to death is unconstitutional.[57]

a. Penological Purposes of the Death Penalty

The two main purposes served by the death penalty are deterrence and retribution.[58] The Court has held that unless the death penalty contributes to one

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52. *Death Penalty,* U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, https://www.ohchr.org/EN/Issues/DeathPenalty/Pages/DPIndex.aspx (last visited Nov. 12, 2020).

53. *See, e.g.*, *Statement on the Execution in Virginia, US*, EEAS (July 7, 2017, 5:38 PM), https://eeas.europa.eu/delegations/israel/29536/statement-execution-virginia-us_en. The European Union issued an official statement condemning Virginia for the execution of William Charles Morva on July 6th, 2017, despite overwhelming evidence that he suffered from severe mental illness. *Id.*

54. *USA: The Execution of Mentally Ill Offenders,* AMNESTY INT'L (Jan. 31, 2006), *https*://www.amnesty.org/en/documents/AMR51/003/2006/en/ (opposing the imposition of the death penalty on mentally ill defendants in the USA); *What Does International Law Say About the Death Penalty and Mental Illness?*, REPRIEVE UK, https://reprieve.org/uk/2016/10/05/what-does-international-law-say-about-the-death-penalty-and-mental-illness/ (last visited Apr. 4, 2021).

55. *Roper*, 542 U.S. at 564.

56. *See infra* Sections I.C.i., I.C.ii.

57. It is important to note that the ideas discussed in Part II.C will not apply to every defendant with mental illness. Thus, defining "severe mental illness" and deciding what defendants are most vulnerable is an importance step in creating categorical protection. The difficulties in defining "severe mental illness" and recommendation for how best to approach this issue will be discussed later in this paper. *See infra* Part II.

58. *Severe Mental Illness and the Death Penalty,* AMERICAN BAR ASS'N DEATH PENALTY DUE PROCESS REV. PROJECT 25 (Dec. 2016)

of these goals, "it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment."[59]

Under principles of deterrence, capital punishment is justified when the increased punishment "will inhibit criminal actors from carrying out murderous conduct."[60] Thus, the imposition of the death sentence can only act as a deterrent when the prospective offender is able to deliberate and premeditate the murder.[61] The Court found in *Atkins* that the cognitive and behavioral impairments of defendants with intellectual disabilities "make[] it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."[62]

Likewise, persons suffering from severe mental illness often experience distorted thinking due to delusions or hallucinations.[63] This distorted thinking makes individuals with severe mental illness less likely to understand the consequences of their actions.[64] Thus, the imposition of the death penalty has no bearing on their decision-making and cannot deter their actions.[65] Because the death penalty will not inhibit offenders with severe mental illness, the penological purpose of deterrence is not served by sentencing such individuals to death.

Sentencing a person with severe mental illness does not serve any retributive purpose. Under retributive principles, a person should be punished in proportion to their moral culpability.[66] In *Atkins,* the Court found that individuals with intellectual disabilities, as a result of their condition, have diminished capacities to understand and process information or control their impulses.[67] This diminished capacity to understand their actions decreases their moral culpability. Likewise, defendants with severe mental illness, who suffer from delusional thinking, may have diminished moral culpability due to their illness, which may make it difficult for the defendant to understand the nature of their conduct.[68] Because of the diminished

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https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf. *See also* Atkins v. Virginia, 536 U.S. 304, 319 (2002) ("*Gregg v. Georgia* identified 'retribution and deterrence of capital crimes by prospective offenders' as the social purposes served by the death penalty" (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976)).

59. Enmund v. Florida, 458 U.S. 782, 798 (1982) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

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

61. *Enmund*, 458 U.S. at 799. (The Court found that "it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.'" (quoting Fisher v. United States, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)).

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

63. Elle Klein, *Constitutional Law: Flying over the Cuckoo's Nest: How the Mentally Ill Landed into an Unconstitutional Punishment in South Carolina*, 68 S.C. L. REV. 571, 588 (2017).

64. *Id.*

65. *Id.*

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

67. *Id.* at 317, 320.

68. AMERICAN BAR ASS'N, *supra* note 58, at 25.

moral culpability of defendants with severe mental illness, the death penalty is not a proportional punishment.

b. The Unreliability Principle

When implementing its independent judgment, the Court has also relied heavily on what has been coined by some as the "unreliability principle."[69] In recent history, the Supreme Court has implemented this principle in the creation of categorical bans for discrete classes of defendants, such as juveniles and those with intellectual disabilities.[70] Applying the unreliability principle leads to an inevitable conclusion: the Eighth Amendment prohibits sentencing a person with severe mental illness to death.

In *Woodson v. North Carolina*, the Court struck down mandatory death sentences, and held that the Eighth Amendment requires individualized determinations.[71] Thus, a jury must be able to consider any mitigating evidence which would show that the defendant is not deserving of the death penalty.[72] However, the Court held in *Eddings v. Oklahoma* that "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer . . . the sentencer must also be able to consider and give effect to that evidence in imposing [the] sentence."[73] Thus, under the unreliability principle, if the sentencer is not able to reliably give effect to mitigating evidence, the death penalty cannot constitutionally be imposed.[74] When applying the unreliability principle, the Court has considered a number of factors, including whether the mitigation evidence affects the defendant's ability to cooperate with their lawyer, makes the defendant a poor witness, and could be considered aggravating evidence by the jury.[75] While the Court has only applied these factors in the context of intellectual disability and juveniles, these factors also apply to severe mental illness.

First, defendants with severe mental illness are not able to effectively assist in their defense due to the inability to clearly communicate with their attorney.[76] In *Miller v. Alabama*, the Court overruled life sentences without parole for juveniles, finding that defendants may have been "convicted of a lesser offense if not for incompetencies associated with youth – for example, [their] inability to deal with police officers or prosecutors (including on a plea agreement) or [their] incapacity."[77] Like juveniles, defendants with severe mental illness have diminished

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69. *See* Scott E. Sundby, *The True Legacy of* Atkins *and* Roper: *The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 WM. & MARY BILL OF RTS. J. 487, 492 (2014).

70. *Atkins*, 536 U.S. at 321 (holding that executions of the mentally retarded is unconstitutional); Roper v. Simmons, 543 U.S. 551, 578-79 (2005) (holding that executions of persons under the age of 18 is unconstitutional).

71. Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976).

72. *See id.*

73. Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (citing Eddings v. Oklahoma, 455 U.S. 104 (1982), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002)).

74. AMERICAN BAR ASS'N, *supra* note 58, at 31.

75. Sundby, *supra* note 69, at 512-15.

76. *Id.* at 512-14.

77. Miller v. Alabama, 567 U.S. 460, 477-78 (2012). Though *Miller v. Alabama* did not deal with the application of the death penalty, the Court relied heavily upon death penalty jurisprudence in deciding that life sentences without parole for juveniles violated the Eighth Amendment. *Id.* at 470.

mental capacity, which impedes their abilities to understand the proceedings.[78] This in turn can affect the defendant's ability to negotiate a plea deal to take the death penalty off the table, or aid in the accumulation and presentation of mitigating evidence.

Individuals with severe mental illness are likely to suffer from paranoia or delusions, which can make them less trusting of their attorney, and thus less likely to cooperate in crafting their defense.[79] To subdue their symptoms, defendants with severe mental illness may be on medication. However, the very medication that could restore the defendant to competency can also have side effects which may impair the defendant's ability to communicate with their attorney.[80]

Defendants with severe mental illness can also make poor witnesses. In *Atkins*, the Court found that intellectual disabilities "create an unwarranted impression of lack of remorse for [the defendant's] crimes."[81] Similarly, defendants with severe mental illness may exhibit symptoms through inappropriate comments, gestures, or outbursts during trial.[82] For example, Kelsey Patterson, a man sentenced to death in Texas who suffered from paranoid schizophrenia, had to be escorted out of the courtroom numerous times during his trial for inappropriate outbursts.[83] Additionally, Mr. Patterson was incomprehensible when taking the stand, and, thus, unable to effectively aid in his defense.[84] Like in the case of intellectual disabilities, jurors can interpret this behavior as a lack of remorse.[85]

Additionally, severe mental illness can act as a double-edged sword, as jurors are likely to consider the presence of severe mental illness as aggravating, rather than mitigating.[86] When considering evidence during sentencing, the future dangerousness of the defendant is one of the biggest factors which increase the likelihood that the jury will impose death.[87] In *Roper v. Simmons*, Simmons's defense attorney attempted to present his age as mitigating.[88] However, the prosecutor responded in his closing statement by presenting Simmons's age as aggravating evidence: "Age, he says. Think about age. Seventeen years old. Isn't

78. *See id.;* Sundby, *supra* note 69, at 507-09.

79. Atkins v. Virginia, 536 U.S 304, 305 (2002); *see* Roper v. Simmons, 543 U.S. 551, 551-52 (2005).

80. Riggins v. Nevada, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring). Justice Kennedy raises concerns about how the side-effects of anti-psychotic drugs could prejudice defendants by "inhibit[ing] the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion." *Id.*

81. *Atkins*, 536 U.S. at 320-21.

82. Sundby, *supra* note 69, at 515.

83. *Case Study: Kelsey Patterson*, TEX. COAL. TO ABOLISH THE DEATH PENALTY, 1, 2, https://tcadp.org/wp-content/uploads/2010/06/kelsey-patterson-Case-Study2.pdf (last visited Oct. 20, 2020).

84. *Id.* at 2.

85. Sundby, *supra* note 69, at 515.

86. 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, 427 (2009).

87. *Severe Mental Illness and the Death Penalty, supra* note 58, at 32.

88. 543 U.S. 551, 558 (2005).

that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."[89] In reaching its holding that juveniles are not eligible for the death penalty, the Court found that there is too substantial a risk that the jury will not weigh the defendant's juvenile status as mitigating, but rather aggravating.[90]

Jurors are similarly likely to find that defendants with severe mental illness pose a future risk to society due to their inability to understand right from wrong, or to control their actions.[91] However, the defendant's inability to understand or control their actions is also evidence of their diminished moral culpability, which suggests the defendant should not be sentenced to death.[92] The Court has expressed some concern over the conflicting nature of this type of evidence, discussing how states could be prohibited from attaching an "aggravating label" to evidence, such as mental illness, which should be mitigating.[93] The "double-edged" nature of severe mental illness evidence makes it difficult for jurors to give effect to this type of mitigation evidence, thus violating the Court's holding in *Eddings*.

Both the objective indicia of contemporary values and the Court's independent judgment analysis dictate that sentencing defendants with severe mental illness to death violates the Eighth Amendment's prohibition of cruel and unusual punishment. While there does not appear to be any significant movement across the United States in creating a categorical bar for individuals with severe mental illness, akin to *Atkins* and *Roper*,[94] there is a national consensus that individuals with severe mental illness are deserving of additional protections from criminal punishment through the availability of the insanity defense. This conclusion is further supported by the idea that evidence of severe mental illness cannot reliably be considered in mitigation, and the death penalty serves no penological purpose for many defendants with severe mental illness.

II. DEFINING "SEVERE MENTAL ILLNESS"

Because the Eighth Amendment should prohibit the execution of defendants with severe mental illness, there must be procedural protections implemented to ensure that such defendants are not exposed to the death penalty. However, one obstacle in conversations surrounding possible protections is the difficulty in defining "severe mental illness." Because the concern surrounding executing defendants with severe mental illness focuses on the defendant's diminished moral culpability and inability the be deterred, any categorical protection must adequately encompass defendants who, at the time of the crime, lack either the mental capacity to understand the quality of their actions or the ability to conform their actions to the rule of law.

The Supreme Court has afforded other categories of vulnerable defendants, such as juveniles and individuals with intellectual disabilities, heightened

89. *Id.*

90. *Roper,* 543 U.S. at 573.

91. Ellen Fels Berkman, Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing,* 89 COLUM. L. REV. 291, 296 (1989).

92. *Id.* at 297-98.

93. *See* Zant v. Stephens, 462 U.S. 862, 885 (1983).

94. *See* cases cited *supra* note 70.

protections from the death penalty.[95] However, there are some factors which differentiate severe mental illness from intellectual disabilities and juveniles in its ability to be defined. For example, the Supreme Court defines juveniles as individuals under the age of eighteen.[96] Thus, anyone who is under the age of eighteen when the crime was committed will not be eligible for the death penalty, and anyone eighteen years or older is eligible for the death penalty.[97] Likewise, though more difficult to define, there are bright-line definitions for intellectual disabilities, as well, that require the defendant to show a requisite low IQ score, and a diagnosis during childhood.[98]

These bright-line definitions are not present in discussions about severe mental illnesses. Rather, the conflicting definitions of severe mental illness make it difficult to determine at what point the defendant is deserving of protections.[99] Additionally, mental illness is a fluid, not a stagnant condition; a defendant can exhibit active symptoms of severe mental illness one day, and not present the same symptoms the next.[100] Thus, it can be hard to determine the defendant's level of mental illness both at the time of the crime, as well as at the time of the trial.[101] This difficulty in defining severe mental illness, as well as categorizing a defendant as severely mentally ill despite fluctuating levels of clarity and rationality makes it difficult to determine who exactly should receive protections against the death penalty.

To understand some of the difficulties crafting a definition for categorical protections for defendants with severe mental illness, it is helpful to look at the issues and ambiguities that arose after the Court's decision in *Atkins*.[102] In its decision in *Atkins*, though it provided some guidance, the Court left it up to the states to define intellectual disability.[103] After *Atkins,* from 2002 to 2013, 7.7% of death row inmates brought a claim of intellectual disability.[104] Of the 7.7% death

95. Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002).

96. Roper, 543 U.S. at 551.

97. *Id.*

98. Atkins v. Virginia, 536 U.S. 304, 308 (2002). In *Atkins,* while the Court provided some guidance on defining intellectual disability, states were largely left to create their own definitions. *Id.* However, this has led to significant litigation concerning how both intellectual disability should be defined and how it should be proven. *See* Hall v. Florida, 572 U.S. 701 (2014) (rejecting Florida's statutory definition of intellectual disability); Moore v. Texas, 137 S.Ct. 1039 (2017) (rejecting Texas's use of the *Briseño* factors to define intellectual disability).

99. 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, 490 (2007).

100. *Id.*

101. *Id*.

102. *Atkins*, 536 U.S. 304.

103. *Id.* at 317.

104. John H. Blume et al., *A Tale of Two (And Possibly Three)* Atkins*: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 WM. & MARY BILL OF RTS. J. 393, 396 (2014).

row inmates who brought intellectual disability claims under *Atkins*, 55% were successful.[105]

However, this success rate varied significantly among states, depending upon which definition of intellectual disability a state adopted. States such as Florida, Texas, and Georgia did not follow clinically accepted definitions for intellectual disabilities, causing rates of successful *Atkins* claims far under the average.[106] For example, Texas used the "Briseño Factors" to assess intellectual disability.[107] Among these factors, Texas courts considered whether the defendant's "family, friends, teachers, employers . . . [thought] he was mentally retarded" and the defendant's conduct "in response to external stimuli [was] rational and appropriate, regardless of whether it [was] socially acceptable."[108] The United States Supreme Court struck this definition down in *Moore v. Texas* in 2017, finding that it relied on stereotypes of intellectual disability rather than medical and scientific evidence.[109] Additionally, Florida's definition of intellectual disability, which was subsequently challenged in *Hall v. Florida, was also* found unconstitutional.[110]

Unlike intellectual disabilities, which affect only two percent of the US population,[111] nearly twenty percent of adults will suffer from some form of mental illness in their lifetimes.[112] However, both the percentage of individuals with intellectual disabilities and individuals with severe mental illness are amplified when looking at prison populations.[113] Additionally, according to the Bureau of Justice Statistics, mental illness is highly prevalent in both state and federal prisons, with over half of inmates in jail or prisons suffering from some form of mental illness.[114] It is estimated that five to ten percent of death row inmates suffer from

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105. *Id.* at 397.

106. *Id.*at 413-14. During this time, only 11% of *Atkins* claims brought in Georgia were successful. *Id.* Likewise, Florida had no successful claim brought during this time period. *Id.* By contrast, North Carolina, who used a clinically accepted definition of intellectual disability, had an 86% success rate for *Atkins* claims. *Id.*

107. *Ex parte* Briseño, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004).

108. *Id.*

109. Moore v. Texas, 137 S. Ct. 1039 (2017).

110. Hall v. Florida, 572 U.S. 701 (2014). Florida's statute required defendants to make a threshold showing of an IQ score of 70 or below. *Id.*at 704. However, this definition contravened wide consensus in the medical community that IQ scores have a margin of error of ±5, and thus defendants with IQs of at least up to 75 should be allowed to make the threshold showing. *Id.* at 723.

111. *See Population Specific Fact Sheet: Intellectual Disability*, NAT'L DISABILITY NAVIGATOR, https://nationaldisabilitynavigator.org/ndnrc-materials/fact-sheets/population-specific-fact-sheet-intellectual-disability/ (last visited Nov. 6, 2020). Just about 7 million people in the United States have an intellectual disability. *Id.* Currently, the population of the United States is over 330 million people. *U.S. and World Population Clock*, UNITED STATES CENSUS, https://www.census.gov/popclock/ (last visited Nov. 6, 2020).

112. *Mental Health by the Numbers*, NAT'L ALL. ON MENTAL HEALTH, https://www.nami.org/mhstats (last visited Nov. 6, 2020).

113. Rebecca Vallas, *Disabled Behind Bars*, CTR. FOR AM. PROGRESS (July 18, 2016, 12:01 am), https://www.americanprogress.org/issues/criminal-justice/reports/2016/07/18/141447/disabled-behind-bars/#:~:text=Cognitive%20disabilities%E2%80%94such%20as%20Down,disability%20than%20the%20general%20population. Cognitive disabilities, including intellectual disabilities and learning disabilities, are three times more prevalent among prison inmates than the general population. *Id.*

114. Doris James & Lauren Glaze, *Mental Health Problems of Prison and Jail Inmates*, BUREAU OF JUST. STAT. (Sept. 6, 2006), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=789.

a severe mental illness,[115] though a study out of South Carolina reports that 43 percent of executions between 2002 to 2015 involved inmates who had been diagnosed with a mental illness at some point in their lives.[116]

When considering implementing categorical protections for defendants with severe mental illness, it will be important to take heed from some of the lessons learned post-*Atkins*. When crafting a definition for severe mental illness, states do not need to reinvent the wheel. Rather, states should look toward the professional medical community for guidance. Professional organizations, such as the American Psychiatric Association and the National Alliance on Mental Illness (NAMI), tend to provide broader definitions for mental disorders, which do not easily translate to a legal definition.[117]

Some states that have proposed legislation providing heightened protections for capital defendants with severe mental illness have adopted a diagnosis-focused approach. For example, the Indiana Senate has introduced legislation that would limit the definition of severe mental illness to schizophrenia, bipolar disorder, major depressive disorder, delusional disorder, post-traumatic stress disorder, or traumatic brain injury.[118] However, this reliance upon a diagnosis that fits within one of these categories can exclude individuals who have been diagnosed with a mental illness not included on this list, but who still experience severe symptoms.[119]

The American Bar Association (ABA) has relied upon the American Psychiatric Association's Diagnostic and Statistical Manual to define "severe mental illness" as disorders that mental health professionals would consider the most serious, including schizophrenia, psychotic disorders, mania, major depressive disorders, and dissociative disorders.[120] The ABA has focused on these disorders due to the significant disruptions in consciousness, memory, or perceptions attributed to

115. *Mental Illness and the Death Penalty*, ACLU (May 5, 2009), https://www.aclu.org/report/report-mental-illness-and-death-penalty.

116. Frank R. Baumgartner & Betsy Neill, *Does the Death Penalty Target People Who are Mentally Ill? We Checked,* WASH. POST (April 3, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/03/does-the-death-penalty-target-people-who-are-mentally-ill-we-checked/. This study was unable to distinguish between defendants who had "severe mental illness" or "any mental illness," so it is likely that not all of the inmates with mental illness during this time period would be protected under some sort of categorical protection. *Id.*

117. *See Report of the Task Force on Mental Disability and the Death Penalty*, AM. PSYCH. ASS'N, https://www.apa.org/pubs/info/reports/mental-disability-and-death-penalty.pdf (last visited Dec. 15, 2019); *Mental Health Conditions*, NAT'L ALL. ON MENTAL ILLNESS https://www.nami.org/learn-more/mental-health-conditions (last visited Dec.15, 2019). NAMI defines mental illness as "a condition that impacts a person's thinking, feeling or mood and may affect his or her ability to relate to others and function on a daily basis. Each person will have different experiences, even people with the same diagnosis." *Id.* While this definition is useful in non-legal contexts, it does not translate well to a legal definition.

118. S.B. 155, 120th Gen. Assemb., Reg. Sess. (Ind. 2017).

119. *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 670 (2006).

120. *Id.*

these disorders.[121] However, the ABA's recommendation for creating a categorical bar on sentencing a defendant with severe mental illness is focused less on an actual diagnosis, but rather on the presence of active symptoms at the time of the crime.[122] To ensure that the exemption "only applies to offenders less culpable and less deterrable than the average murderer," the ABA recommendation requires that the disorder "significantly impair cognitive or volitional functioning at the time of the offense."[123] This focus on symptoms, rather than diagnosis, helps protect defendants with mental illness, such as personality disorders, which are not generally considered as serious as those mentioned above but can still manifest in delusional or psychotic-like symptoms in times of stress.[124]

The largest issue about sentencing defendants with severe mental illness to death is the concern that such defendants are less morally culpable for their crimes, and thus the death sentence would not be proportional. The ABA's suggested definition, focusing less on a diagnosis and more on the defendant's quality of thought at the time of the crime, seems most appropriate to address that concern. Thus, any categorical exemption should not be limited to a diagnosis.

For example, Ohio's recently passed legislation narrows the definition of severe mental illness to include only defendants with schizophrenia, schizoaffective disorder, bipolar disorder, or delusional disorder.[125] Like Florida's narrowed definition of intellectual disability, which created a strict IQ cut-off and excluded defendants that the medical community would have defined as intellectually disabled, Ohio's proposed definition for severe mental illness would exclude defendants who had active symptoms at the time of the crime that impaired their mental abilities, but lacked the "right" diagnosis.[126]

Conversely, Virginia has proposed defining severe mental illness as the "exhibition of active psychotic symptoms that substantially impair a person's capacity to (i) appreciate the nature, consequences, or wrongfulness of the person's conduct; (ii) exercise rational judgment in relation to the person's conduct; or (iii) conform the person's conduct to the requirements of the law."[127] This proposed definition falls more in line with the ABA's recommendation as it focuses more on how the presence of active symptoms and how that affects the quality of thought rather than a diagnosis.

Definitions that fall in line with the ABA's recommendation, such as Virginia's, place an emphasis on the defendant's quality of thought at the time of the crime.[128] This approach seems best suited to address concerns that defendants with severe mental illness have a decreased moral culpability due to their diminished mental capacity. Thus, when adopting categorical protections for defendants with severe mental illness, states should consider definitions that don't limit protections to

121. *Id.* at 670-71.
122. *Id.* at 671.
123. *Id.*
124. *Id.*
125. *See* H.B. 136, 133rd Leg., Gen. Sess. (Ohio 2021).
126. *See* Hall, 572 U.S. at 704.
127. S.B. 116, 2020 Leg., Reg. Sess. (Va. 2020).
128. *See Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, *supra* note 119.

specific definitions, but rather focus on the presence of active symptoms at the time of the crime.

III. PROTECTIONS FOR DEFENDANTS WITH SEVERE MENTAL ILLNESS DURING THE GUILT OR SENTENCING STAGES OF A CAPITAL TRIAL

While states may be required to provide heightened protections for defendants with severe mental illness, it is not clear that states are required to follow a specific statutory scheme in order to achieve this goal. This is in line with the Court's holdings regarding the "narrowing approach," which requires states to "narrow" the pool of defendants eligible for the death penalty through some type of aggravating factors.[129] This narrowing process attempts to ensure that only the worst of the worst offenders are eligible for the death penalty. While states are constitutionally required to narrow the pool, there is no mandate for whether this narrowing must occur during the guilt phase or during sentencing.[130] Likewise, there is no constitutionally set requirement for how many aggravating factors the states may set forth, other than the requirement that the factors "genuinely narrow the class of persons eligible for the death penalty."[131] Thus, states are still given wide discretion in deciding how to implement aggravating factors.

Similar to the narrowing process, states must implement procedures to ensure that individuals with severe mental illness are not eligible for the death penalty. However, these safeguards may be implemented either at the guilt or sentencing stage. Most states have implemented these safeguards in the guilt stage of a capital trial through the availability of the insanity defense.[132] However, some formulations of the insanity defense do not provide adequate protections for defendants with severe mental illness, and thus leave them still exposed to the potential of the death penalty. States that do not provide adequate protections during the guilt stages of a capital trial, even if they have an insanity defense, should still implement a categorical bar during the sentencing stage of a capital trial in order to prevent defendants with severe mental illness from being sentenced to death.

A. The Abolition of the Insanity Defense in Idaho

Four states, including Idaho, have abolished the insanity defense altogether and thus provide only the most minimal and inadequate protections for defendants with severe mental illness during the guilt stage of a trial.[133] Idaho abolished the

129. *See* Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Zant v. Stephens, 426 U.S. 862, 877 (1983).

130. *See generally* Jurek, 428 U.S. 262.

131. Zant v. Stephens, 426 U.S. 862, 877 (1983).

132. *See* Simmons, *supra* note 12. All but four states have some form of the insanity defense. *Id.*

133. Simmons, *supra* note 12.

insanity defense for defendants in criminal trials in 1982.[134] At the time, Ada County, Idaho prosecutor, David Leroy, feared that the insanity defense was being abused across the entirety of the criminal system and creating a financial burden on taxpayers.[135] To address this problem, Leroy approached the Idaho legislature with his proposal, which received bipartisan support.[136]

The abolition of the insanity defense in Idaho leaves defendants who suffer from severe mental illness, but still have the ability to form intent, unprotected during the guilt phase of a capital trial. Under Idaho Code sections 18-207(3), a defendant may introduce evidence of any mental condition which would negate an element of the crime, such as the intent necessary to be found guilty of capital murder.[137] Justice Breyer highlights this issue in his dissent from denial of certiorari in *Delling v. Idaho*: "Idaho law would distinguish the following two cases. *Case One*: The defendant, due to insanity, believes that the victim is a wolf. He shoots and kills the victim. *Case Two*: The defendant, due to insanity, believes that a wolf, a supernatural figure, has ordered him to kill the victim."[138] In this example, the defendant in Case One would be protected under Idaho law because he lacked the necessary *mens rea* to kill a human.[139] However, the defendant in Case Two would not be protected because, while still suffering from insanity, he intended to shoot a human being, thus having the necessary *mens rea*.[140]

The Idaho Supreme Court has repeatedly upheld the abolition of the insanity defense.[141] However, Justice McDevitt, in his dissenting opinion, in *State v. Searcy* discussed how the *mens rea* approach does not comport with the due process requirements of the United States Constitution.[142] The majority in *Searcy* found that the *mens rea* approach satisfies due process because it still allows for the introduction of evidence, generally through expert testimony, to show that the defendant's mental defect or illness negated the *mens rea* requirement of a criminal offense.[143] However, as Justice McDevitt points out, this limits the type of expert testimony which may be introduced and contravenes the historic purposes of the insanity defense: "The issue of criminal blameworthiness merits deeper inquiry [than whether the defendant harbored the requisite *mens rea* for the offense] because it implies a certain quality of knowledge and intent transcending a minimal awareness and purposefulness."[144]

Nevada's Supreme Court agreed with Justice McDevitt in *Finger v. State*, ruling that Nevada's abolishment of the insanity defense violates due process.[145] The court found that while states are not required to adopt any singular method or

134. Geis, *supra* note 42, at 73.

135. Simmons, *supra* note 12.

136. Simmons, *supra* note 12.

137. IDAHO CODE § 18-207 (2019).

138. Delling v. Idaho, 568 U.S. 1038, 1040 (2012) (Breyer, J., dissenting from denial of certiorari).

139. *Id.*

140. *Id.*

141. *See* State v. Searcy, 798 P.2d 914, 917-19 (Idaho 1990); State v. Card, 825 P.2d 1081, 1084-86 (Idaho 1991); State v. Delling, 267 P.3d 709, 711-12 (Idaho 2011).

142. *Searcy*, 798 P.2d at 923 (McDevitt, J., dissenting).

143. *See id.* at 917-18.

144. *Id.* at 935 (McDevitt, J., dissenting) (quoting ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 337 (1984).

145. Finger v. State, 27 P.3d 66, 84 (Nev. 2001).

standard for determining insanity, legal insanity is a "well-established and fundamental principle of the law of the United States."[146] In reaching this conclusion, the Nevada Supreme Court looked in part to the comments made by Justice O'Connor in *Penry v. Lynaugh*:

> The common law prohibition against punishing "idiots" for their crimes suggests that it may indeed be "cruel and unusual" punishment to execute persons who are profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions. Because of the protections afforded by the insanity defense today, such a person is not likely to be convicted or face the prospect of punishment.[147]

The Nevada Supreme Court found that the importance placed on the insanity defense as a safeguard against the death penalty in *Penry* indicated that it is a fundamental aspect of our criminal justice system.[148]

This question of due process raised by Justice McDevitt and the Nevada Supreme Court was recently decided by the United States Supreme Court.[149] In *Kahler v. Kansas*, the petitioner challenged the constitutional adequacy of Kansas's statutory scheme, which is very similar to Idaho's.[150] Like Idaho, Kansas does not provide for an insanity defense, but rather provides for evidence of mental illness to negate the element of *mens rea*. [151]

In *Kahler*, the petitioner claimed that both the Eighth and Fourteenth Amendments require that states have the insanity defense.[152] First, the petitioner argued that the Fourteenth Amendment's Due Process Clause provides heightened scrutiny for fundamental rights.[153] The Court has defined fundamental rights as those "which are, objectively, 'deeply rooted in this Nation's history and tradition. . . .'[154] and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[155]

Historically, defendants with mental illness were afforded heightened protections.[156] The idea that mentally ill defendants should not be held criminally liable is deeply rooted in English common law.[157] In the late 1700s, Blackstone

146. *Id.*

147. Penry v. Lynaugh, 492 U.S. 302, 333 (1989); *see also Finger,* 27 P.3d at 83.

148. *Finger,* 27 P.3d at 83.

149. Kahler v. Kansas, 140 S. Ct. 1021, 1025 (2020).

150. Brief for Petitioner, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135).

151. KAN. STAT. ANN. § 21-5209 (2019).

152. *See,* Brief for Petitioner at 15-16, *Kahle*r, 140 S. Ct. 1021, (No. 18-6135).

153. *Id.* at 16-29.

154. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

155. *Id.* at 720-21 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

156. Brief for Petitioner at 18-27, *Kahler,* 140 S. Ct. 1021 (No. 18-6135).

157. *See* WILLIAM BLACKSTONE, COMMENTARIES *21, *24-25.

wrote that "idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offense, and before arraignment for it, he becomes mad, he ought not to be arraigned for it. . . ."[158] The Supreme Court relied on the latter half of this excerpt when deciding that the execution of a person who is insane violates the Eighth Amendment in *Ford v. Wainwright*.[159] However, Blackstone clearly goes a step further and states that, in English common law, individuals with severe mental illness, or "lunatics", could not be held criminally liable even for the most severe crimes.[160]

This idea persisted in America at the time of the founding; early American courts held that "insanity is an excuse for the commission of every crime, because the party has not the possession of that reason, which includes responsibility."[161] The tradition of the insanity defense has continued on to modern America because it is so integral to our criminal justice system.[162] Currently, all but four states have some form of the insanity defense.[163] Because individuals with mental illness have historically been afforded heightened protections in America, these protections could be considered a fundamental right under the Fourteenth Amendment's Due Process Clause.[164]

While the petitioner in Kahler brought persuasive arguments, the Supreme Court decided in favor of Kansas—the insanity defense is not required by due process.[165] In so holding, the Supreme Court found that states are better equipped to define both crimes and defenses:

> Defining the precise relationship between criminal culpability and mental illness involves examining the workings of the brain, the purposes of the criminal law, the ideas of free will and responsibility. It is a project demanding hard choices among values, in a context replete with uncertainty, even at a single moment in time. And it is a project, if any is, that should be open to revision over time, as new medical knowledge emerges and as legal and moral norms evolve. Which is all to say that it is a project for state governance, not constitutional law.166

Even though the abolition of the insanity defense in states such as Kansas and Idaho has been held constitutional, sentencing individuals with severe mental illness to death still violates the Eighth Amendment. The approach used in these states does not adequately protect defendants who have diminished moral culpability due to their mental illness yet are still able to form the necessary intent to satisfy the *mens rea* of capital murder. Thus, these states must implement some

158. *Id.*
159. Ford v. Wainwright, 477 U.S. 399, 406-07 (1986).
160. BLACKSTONE, *supra* note 157.
161. United States v. Drew, 25 F. Cas. 913, 913 (C.C.D. Mass. 1828).
162. Brief for Petitioner at 49, *Kahler,* 140 S. Ct. 1021 (2020) (No. 18-6135).
163. *Id.*
164. *Id.* at 52.
165. *See* Kahler v. Kansas, 140 S. Ct. 1021, 1037 (2020).
166. *Id.* at 1037.

other statutory protection during the sentencing stage of capital trials to ensure that defendants with severe mental illness are not sentenced to death.

B. Protections at the Guilt Stage: The Insanity Defense

While forty-six states have the insanity defense, there is substantial variation in how each state implements the defense. In *Leland v. Oregon*, the Court ruled that states are not required to adopt a specific test for insanity.[167] Thus, there are many different variations of the insanity defense across the United States. The two most common iterations of the insanity defense currently in the United States are the *M'Naghten* test and the Model Penal Code (MPC) standard.[168] Though the MPC approach appears to provide more encompassing protections, jurors are hesitant to find a defendant not guilty by reason of insanity no matter the standard used.[169] Thus, the insanity defense may not be the best protection for defendants with severe mental illness in capital trials.

Nearly half of the states employ some iteration of the *M'Naghten* test for insanity.[170] Under the *M'Naghten* test, a defendant is not criminally liable if he was "laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."[171] There are two prongs under this test: cognitive incapacity and moral incapacity.[172]

The *M'Naghten* test fails to protect defendants who may know that a certain act is wrong but are unable to control their actions. The *M'Naghten* test requires that the defendant not know that their actions were wrong.[173] First, this standard requires that the defendant be completely unable to appreciate the wrongfulness of their conduct.[174] Additionally, this standard does not capture many defendants suffering from severe delusions. For example, a defendant, suffering from paranoid schizophrenia, who believes that the government implanted a chip in his brain and forced him to kill may not be protected by the *M'Naghten* test if he still somewhat understood that murder was wrong.[175]

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167. *See* Leland v. Oregon, 343 U.S. 790, 798-99(1952).

168. Shipley, *supra* note 32

169. *See* Jennifer L. Skeem, & Stephen L. Golding, *Describing Jurors' Personal Conceptions of Insanity and Their Relationship to Case Judgments,* 7 PSYCH. PUB. POL. & L. 561, 563 (2001).

170. Shipley, *supra* note 32

171. M'Naghten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718, 722 (1843).

172. *See id.* However, some states have eliminated the cognitive incapacity prong, which asks whether the defendant was able to understand the nature and quality of the act. *See* Clark v. Arizona, 548 U.S. 735 (2006). The Supreme Court held that because due process does not require any singular formation of the insanity defense, the cognitive prong was not necessary. *Id*. at 779.

173. M'Naghten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718, 722 (1843).

174. *See id.*

175. This example is based off of Kelsey Patterson, a Texas capital defendant referred to earlier in this paper. *Case Study: Kelsey Patterson*, TEX. COAL. TO ABOLISH THE DEATH PENALTY, https://tcadp.org/wp-

Other states have adopted the more liberal Model Penal Code (MPC) approach.[176] Under the MPC test, a person may successfully invoke the insanity defense if at the time of the crime "as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."[177] The language of the MPC test allows for a more flexible approach, as it moves away from the total incapacity required by the *M'Naghten* test towards "lacks substantial capacity," and recognizes volitional, as well as cognitive, incapacity.[178] The volitional aspect of the MPC approach expands the protections offered by the insanity defense to defendants who may recognize that their actions were wrongful, but were not able to control their actions, such as the defendant who believed that the government was controlling their actions.

While the MPC standard may offer more protection than *M'Naghten*, it may not matter which test a state adopts. Research suggests that the success of an insanity defense does not depend upon which standard is used.[179] Rather, jury members seem to use their own conception of insanity in making their decisions.[180] Because jurors rely on their own experiences, they may base their decisions upon "preconceived notions of how an insane person would likely behave," despite expert testimony to the contrary.[181]

Additionally, jurors may have difficulty looking past the severity of the crime. The insanity defense is often perceived by the public as an over-used "loophole" for dangerous criminals to escape liability.[182] When the insanity defense is invoked in a violent murder, jurors may believe that a not guilty verdict will automatically release the defendant back into the community, and reject the insanity plea.[183] This research supports the idea that jurors often consider evidence of severe mental illness as aggravating, as discussed in Part 0.

However, this is not to say that the insanity defense provides no benefits. Research has shown that juries tend to make up their mind about the imposition of the death penalty during the guilt stage of a capital trial.[184] Thus, evidence of severe mental illness only presented during the sentencing stage of a trial will likely not be given its full effect.[185] However, the presence of the insanity defense allows for that

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content/uploads/2010/06/kelsey-patterson-Case-Study2.pdf (last visited Dec. 15, 2019). Despite Kelsey Patterson's decade-long history of paranoid schizophrenia, the jury rejected his insanity defense. *Id.* Texas has the *M'Naghten* test for insanity. *Id.*

176. *See* HAW. REV. STAT. § 704-402 (2019); MD. CODE ANN., CRIM. PROC. § 3-110 (West 2019); MICH. COMP. LAWS § 768.20(a) (2019); N.Y. PENAL LAW §40.15 (McKinney 2019).

177. MODEL PENAL CODE § 4.01 (AM. LAW INST., Proposed Official Draft 1962).

178. *Id.*

179. *See* Rebecca K. Helm, Stephen J. Ceci & Kayla A. Burd, Cornell Univ., *Unpacking Insanity Defence Standards: An Experimental Study of Rationality and Control Tests in Criminal Law*, 8 num. 2 EUR. J. PSYCHOL. APPLIED TO LEGAL CONTEXT 63 (2016).

180. *Id.* at 64.

181. Scott Brooks, *Guilty by Reason of Insanity: Why a Maligned Defense Demands a Constitutional Right of Inquiry on Voir Dire*, 20 GEO. MASON L. REV. 1183, 1202 (2013).

182. *See* Jennifer L. Skeem & Stephen L. Golding, *Describing Jurors' Personal Conceptions of Insanity and Their Relationship to Case Judgments,* 7 num. 3 PSYCHOL., PUB. POL., & L. 561, 563 (2001).

183. *See supra* Part I Section C.0.

184. Wanda D. Foglia*, They Know Not What They Do: Unguided and Misguided Decision-Making in Pennsylvania Capital Cases*, 20 JUST. Q. 187, 191-92 (2003).

185. *See id.*

evidence to be introduced during the guilt stage of a capital trial, allowing for the jury to consider it before making up their mind.

Because jurors are not likely to reliably give effect to an insanity defense, neither the *M'Naghten*, nor the MPC approach to insanity can adequately protect defendants from severe mental illness during the guilt stage of a capital trial. However, states with an insanity defense still allow for jurors to contemplate the issue of severe mental illness earlier in the trial, and perhaps give better effect to such evidence during sentencing. While this may provide more benefits than no insanity defense at all, it still leaves defendants with severe mental illness vulnerable to the death penalty. Thus, adopting a categorical bar during the sentencing of a capital trial would be a more effective protection.

C. Protections at Sentencing: A Categorical Bar

States such as Kansas and Idaho that have abolished the insanity defense, yet still allow for the death penalty, must provide some statutory safeguard during sentencing to ensure that defendants with severe mental illness are not executed in violation of the Eighth Amendment principles disused previously. Likewise, even states with an insanity defense should expand their protections in order to protect defendants with severe mental illness who cannot successfully invoke an insanity plea. The most practical and adequate safeguard during sentencing would be the implementation of a categorical bar against sentencing a defendant with severe mental illness to death.

Only two states have passed a categorical bar against the sentencing of individuals with severe mental illness to death. First, under Connecticut's statute, a defendant could not be sentenced to death if the jury found that "the defendant's mental capacity was significantly impaired or the defendant's ability to conform the defendant's conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution." Thus, even if the defendant did not successfully raise the insanity defense, the jury was specifically directed not to impose a death sentence if the defendant suffered from severe mental illness. However, this statute was rendered moot when Connecticut abolished the death penalty in 2012.

More recently, Ohio passed H.B. 136, which bars the imposition of the death penalty on defendants suffering from severe mental illness.[186] Unlike Connecticut, Ohio chose to define "severe mental illness" by diagnosis, requiring that the individual demonstrate that they have schizophrenia, schizoaffective disorder, bipolar disorder, or delusional disorder.[187] If a defendant raises this issue, the court

186. *See* H.B. 136, 133rd Leg., Gen. Sess. (Ohio 2021); *see also* Michael Monks, *The Future of the Death Penalty in Ohio*, OHIO PUBLIC RADIO (January 12, 2021), https://www.wvxu.org/post/future-death-penalty-ohio#stream/0.

187 H.B. 136, 133rd Leg., Gen. Sess. (Ohio 2021).

will hold a pre-trial hearing on the matter.[188] At this hearing, the defendant has the burden of establishing, by a preponderance of the evidence, that they suffer from one of the aforementioned conditions, and that due to their condition, were significantly impaired at the time of the alleged murder.[189]

At least ten other states have proposed legislation which would create a categorical bar against sentencing an individual with severe mental illness to death.[190] Some states have proposed approaches which would allow the defendant to raise the issue of severe mental illness during a pretrial hearing, in which a jury would decide whether the defendant suffered from severe mental illness at the time of the crime, and thus not eligible for death.[191] If the jury finds that the defendant suffered from severe mental illness, then the case will proceed as a non-capital case.[192] If the jury does not find that the defendant suffered from severe mental illness, then the defendant would still be able to present evidence of mental illness as mitigation during sentencing but would not receive the benefit of the categorical bar.[193]

For states such as Idaho that have abolished its insanity defense, a categorical bar may be an attractive option for legislators.[194] First, the insanity defense bars criminal liability for the offense, and so, while the defendant may go to a mental health hospital, they will not go to prison.[195] However, under a categorical bar, the defendant would not be eligible for death, but could still face life in prison for the crime.[196] Thus, this approach may alleviate some of the concerns which motivated states such as Idaho to abolish the insanity defense.[197] Likewise, juries may be more likely to find that the defendant is suffering from severe mental illness if the defendant will still face criminal liability and face a lengthy prison sentence, rather than potentially be released back into the community.[198]

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188. *Id.*

189. *Id.* This legislation goes into effect on April 12, 2021. *Id.*

190. H.B. 2509, 99th Leg., 2nd Reg. Sess. (Mo. 2018); S.B. 107, 2018 Leg., Reg. Sess. 107 (Ky. 2018); S.B. 666, 2017 Leg., Reg. Sess. (N.C. 2017); H.B. 3080, 85th Leg., Reg. Sess. (Tex. 2017)); S.B. 378, 110th Gen. Assemb., First Reg. Sess. (Tenn. 2017); H.B. 1123, 93d Leg., Reg. Sess. (S.D. 2018); S.B. 802, 2018 Leg., Reg. Sess. (Va. 2018); S.B. 155, 120th Gen. Assemb., First Reg. Sess. (Ind. 2017); H.B. 2170, 91st Gen. Assemb., Reg. Sess. (Ark. 2017).

191. *See* S.B. 666, 2017 Leg., Reg. Sess. (N.C. 2017); H.B. 3080, 85th Leg., Reg. Sess. (Tex. 2017); H.B. 2170, 91st Leg., Reg. Sess. (Ark. 2017).

192. *See* H.B. 3080, 85th Leg., Reg. Sess. (Tex. 2017); S.B. 378, 110th Gen. Assemb., First Reg. Sess. (Tenn. 2017); H.B. 1123, 93d Leg., Reg. Sess. (S.D. 2018); S.B. 802, 2018 Leg., Reg. Sess. (Va. 2018); S.B. 155, 120th Gen. Assemb., First Reg. Sess. (Ind. 2017).

193. *See* S.B. 166 2017 Leg., Reg. Sess. (N.C. 2017); H.B. 3080, 85th Leg., Reg. Sess. (Tex. 2017); H.B. 2170, 91st Leg., Reg. Sess. (Ark. 2017).

194. There have been efforts to try and garner support for a categorical bar in the Idaho State Legislature in 2018 and 2019, but there has been little progress so far. *Ending the Death Penalty for Persons with Severe Mental Illness*, ACLU OF IDAHO, https://www.acluidaho.org/en/campaigns/ending-death-penalty-persons-severe-mental-illness (last visited Jan. 22, 2021).

195. Shipley, *supra* note 38.

196. *See* S.B. 666, 2017 Leg., Reg. Sess. (N.C. 2017); H.B. 3080, 85th Leg., Reg. Sess. (Tex. 2017); H.B. 2170, 91st Leg., Reg. Sess. (Ark. 2017).

197. *See* Geis & Meier, *supra* note 42.

198. Defendants found not guilty by reason of insanity are not generally released right back into the community; however, research has shown that this perception influences juries in cases where the insanity defense has been invoked. *See* Skeem & Golding, *supra* note 169.

Additionally, the lack of a categorical bar on the execution of individuals with severe mental illness is creating a financial burden on states. In general, states with capital punishment spend significantly more than states without capital punishment.[199] In 2014, the Idaho Legislature commissioned a report to examine the costs of the death penalty in the state.[200] Though this report was not comprehensive, as many departments do not keep track of associated costs, it indicated that trying capital cases requires significant funds from multiple departments, such as the Department of Corrections, county prosecutors and public defenders, law enforcement offices, and the State Appellate Public Defenders Office, among others.[201]

Likewise, reports focusing on other states have demonstrated that creating a categorical exception for severe mental illness would create substantial financial savings.[202] The American Bar Association estimated that the state of Tennessee would save between $1.4 million and $1.9 million per year if the state implemented a categorical exception for individuals with severe mental illness.[203]

While Idaho's death row is significantly smaller than Tennessee's, it is likely that Idaho would still see a significant decrease in costs.[204] For example, David Leslie Card was sentenced to death in 1989 for the murder of a husband and wife in Nampa, Idaho, despite suffering from paranoid schizophrenia.[205] Over the past three decades, Card has repeatedly appealed his sentence under claims of ineffective assistance of counsel for failing to properly introduce evidence of mental illness.[206] Consistently, mental health professionals have voiced their opinions that Card suffered from severe mental illness.[207] In February 2019, almost thirty years after first being sentenced to death, Card was removed from death row.[208] However, a federal district judge has stated that if Card ever regains competency,

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199. *Potential Cost-Savings of a Severe Mental Illness Exclusion from the Death Penalty: An Analysis of Tennessee Data*, AM. BAR ASS'N DEATH PENALTY DUE PROCESS REV. PROJECT, (June 2018), https://www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/2018-smi-cost-analysis-w-tn-data.pdf.

200. OFFICE OF PERFORMANCE EVALUATIONS IDAHO LEG., FINANCIAL COSTS OF THE DEATH PENALTY (March 2014).

201. *Id.* at 29-31.

202. AM. BAR ASS'N DEATH PENALTY DUE PROCESS REV. PROJECT, *supra* note 199.

203. *Supra* note 199.

204. Tennessee currently has 50 inmates on death row. *Death Row Offenders,* TENN. DEPT. OF CORRECTIONS, https://www.tn.gov/correction/statistics-and-information/death-row-facts/death-row-offenders.html (last visited Jan. 22, 2021). Comparatively, Idaho only has 8 inmates on death row. *Death Row*, IDAHO DEPT. OF CORRECTIONS, https://www.idoc.idaho.gov/content/prisons/death_row (last visited Jan. 22, 2021).

205*Idaho death row inmate David Card mentally ill, will serve life instead*, KBOI-TV CBS (Feb. 7, 2019), https://idahonews.com/news/local/idaho-death-row-inmate-david-card-mentally-ill-will-serve-life-instead.

206. *Id.*

207. *Id*.

208. *Id*.

the possibility of a death sentence could be reopened.[209] If Idaho had a categorical exception for severe mental illness, Card, and other inmates like him, likely never would have been sentenced to death, and the state could have avoided decades of litigation and appeals costs.

Justice O'Connor did not see a need for a categorical bar in *Penry* because of the protection offered by the insanity defense.[210] Because states such as Idaho have abolished this insanity defense, and thus do not provide this protection, they must implement a categorical bar during sentencing. However, if the insanity defense is not adequately protecting defendants with severe mental illness from the death penalty—and it does not seem like it is—then Justice O'Connor's reliance on the insanity defense may be unfounded. To better protect defendants from being unconstitutionally sentenced to death, even states with some form of the insanity defense should implement a categorical bar.

IV. CONCLUSION

Under the Eighth Amendment, defendants with severe mental illness must be afforded heightened protections to ensure that they are not sentenced to death. However, those protections could be implemented during the guilt or the sentencing stages of a capital trial. The majority of states have implemented safeguards during the guilt stage of a capital trial through the insanity defense. If a state, such as Idaho, chooses to abolish the insanity defense, then that state must implement some safeguards during the sentencing of a capital trial, such as a categorical bar. However, it is unclear whether the insanity defense is the most effective protection for defendants with severe mental illness. Thus, to best ensure that defendants with severe mental illness are not sentenced to death, even states with some form of the insanity defense should consider implementing a categorical bar.

209. *Id.*

210. *See* Penry v. Lynaugh, 492 U.S. 302, 330 (1989).