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WHAT ATKINS COULD MEAN FOR PEOPLE WITH MENTAL ILLNESS

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INTRODUCTION

This essay expands on an argument I briefly made a few years ago,¹ to the effect that states that prohibit execution of mentally retarded people or juveniles violate the Equal Protection Clause if they continue to authorize imposition of the death penalty on people with mental illness. At the time the earlier article was written, only thirteen states banned execution of people with retardation,² and a somewhat greater number prohibited execution of children under sixteen.³ Now, of course, thanks to Jim Ellis et al.⁴ and the Supreme Court's decision in *Atkins v. Virginia*,⁵ no state is permitted to impose a death sentence on someone who suffers from mental retardation. While the constitutional status of imposing the death penalty on children remains somewhat murky,⁶ the holding in *Atkins* barring execution of people with retardation, by itself, should dictate that execution of people who were suffering from serious mental illness at the time of their offense is also banned nationwide, if the equal protection argument is accepted.

One hurdle for this argument is likely to be the Supreme Court's consistent holding that laws that differentiate based on disability need only meet the "rational basis" test, which is generally an extremely easy test to meet.⁷ But that hurdle might not be as significant as many think. First, read carefully, the Supreme Court's equal protection case law can be said to require not only a plausible reason but a good reason for discrimination based on disability.⁸ Second, if—as *Atkins* seems to indicate—the most important factors in determining which murderers may be put to death are relative culpability and deterrability, there may even not be any *plausible* reasons for differentiating between execution of people with mental illness and execution of people with mental retardation or juveniles.⁹ Finally, it is worth noting that the death penalty is a special context that often produces surprising results; after all, as recently as two years ago, very few people would have predicted *Atkins* would be decided the way it was.

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1. See Christopher Slobogin, *Mental Illness and the Death Penalty*, 1 CAL. CRIM. L. REV., art. 3, ¶¶ 5-13 (2000), available at <http://www.boalt.org/CCLR/v1/v1toc.htm>; 24 MEN. & PHYS. DIS. L. REP. 667, 667-69 (2000) (subsequent citations will be to the latter version).

2. *Id.* at 667.

3. See *Thompson v. Oklahoma*, 487 U.S. 815, 829 (1988) (Stevens, J., plurality opinion) (reporting that, as of 1988, eighteen states had adopted such a prohibition).

4. Together with Charles E. Haden and Robert E. Lee, James Ellis, Professor at the University of New Mexico School of Law, wrote the briefs for Daryl Renard Atkins. Professor Ellis's heroic efforts on behalf of people with mental retardation, in and out of the death penalty context, are well-known. He was involved in all three prominent equal protection cases involving mental disability. See *infra* notes 43-74.

5. 536 U.S. 304 (2002).

6. See *infra* text accompanying notes 38-39.

7. See *infra* text accompanying notes 47-50.

8. See *infra* text accompanying notes 43-76.

9. See *infra* text accompanying notes 77-136.

Part I of this essay examines the Court's Eighth Amendment analysis, not only in *Atkins*, but also in *Thompson v. Oklahoma*,¹⁰ which intimates that the Court will eventually prohibit execution of children in their mid-teens and below. It concludes that the best explanation for these decisions is the Court's recognition that developmentally disabled and youthful murderers are less culpable and less deterrable than the average murderer. On the assumption that the same can be said for people with significant mental illness who commit murder, part II looks at the Court's Equal Protection case law to determine how persuasive the evidence of similarity must be in order to enforce a ban on execution of people with mental illness. Finally, part III investigates more thoroughly how similar the three groups are, not just in terms of relative culpability and deterrability but also with respect to other possibly relevant variables, such as ease of identification and dangerousness. The ultimate conclusion is that distinguishing between people with significant mental illness, people with mental retardation, and juveniles in the application of capital punishment violates the Equal Protection Clause.

I. EIGHTH AMENDMENT ANALYSIS

Ever since *Trop v. Dulles*,¹¹ the Court has held that the Eighth Amendment's ban on "cruel and unusual" punishment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹² When the Court has gone looking for these "evolving standards," it has generally focused on the judgments of state legislatures as the most "objective" measure of American values.¹³ It did so in *Atkins* as well and relied heavily on the fact that eighteen of the thirty-eight states that have the death penalty have outlawed execution of people with mental retardation in the past fourteen years.¹⁴ The majority also found evidence of consensus in the low number of people with retardation actually executed and in the opinions of a wide array of organizations and of people surveyed in polls.¹⁵

As Justice Scalia's dissenting opinion pointed out, however, this evidence is not very impressive when compared to the level of consensus typically required in Eighth Amendment cases. Most significantly, the proportion of states that prohibited execution of those with retardation prior to *Atkins* was positively paltry compared to the usually overwhelming legislative rejection of practices the Court has labeled "cruel and unusual."¹⁶ In Scalia's words, "[w]hat the Court calls evidence of

10. 487 U.S. 815 (1988) (plurality opinion).

11. 356 U.S. 86 (1958).

12. *Id.* at 100-01.

13. See *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991) (evolving standards should be informed by "'objective factors to the maximum possible extent'"); *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) ("[the] clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures").

14. 536 U.S. at 313-15.

15. *Id.* at 316 ("[I]t appears that even among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided *Penry*"); *id.* at n.21 (listing national and international organizations).

16. See, e.g., *Coker v. Georgia*, 433 U.S. 584 (1977) (finding only one state permitted the death penalty for rape); *Solem v. Helm*, 463 U.S. 277 (1983) (stating only one state permitted a life sentence without parole for the types of crimes at issue); *Ford v. Wainwright*, 477 U.S. 399 (1986) (noting no state authorized execution of those

'consensus' in the present case (a fudged forty-seven percent) more closely resembles evidence that we found inadequate to establish consensus in earlier cases."¹⁷ Scalia was equally dismissive of the majority's other evidence of consensus. He disputed the majority's assumption that executions of people with mental retardation are rare,¹⁸ and noted that, even if this were so, it likely resulted from the fact that mental retardation is a constitutionally mandated mitigating factor,¹⁹ rather than from the stance that people with retardation should be immune from execution under all circumstances.²⁰ To the majority's reliance on non-legal sources of support for such a ban he awarded "the Prize for the Court's most Feeble Effort to fabricate 'national consensus'"²¹ and cross-referenced to Chief Justice Rehnquist's opinion questioning the methodology of the polls and the representativeness of professional and religious organizations.²²

In the context of these rebuttals, which have some bite to them, the most crucial statement in Justice Stevens' majority opinion might be the following: "[O]bjective evidence, though of great importance, [does] not 'wholly determine' the controversy, 'for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'"²³ Although other cases had adopted the same position (the subquotation comes from *Coker v. Georgia*²⁴), the gist of those opinions was that the Court's judgment can only confirm popular consensus, not trump it.²⁵ In these earlier cases, the opinion of the Court on the matter was largely makeweight.²⁶ In *Atkins*, in contrast, one gets the sense that the Court's

who are incompetent); *Enmund v. Florida*, 458 U.S. 782 (1982) (finding only eight out of thirty-six death penalty states permitted the death penalty for a robbery in which an accomplice took a life).

17. 536 U.S. at 343 (emphasis added). Scalia's use of the word "fudged" referred to the fact that one of the eighteen state laws relied on by the majority, New York's, continued to permit execution of persons with mental retardation who committed murder "while the defendant was confined or under custody in a state correctional facility or local correctional institution," N.Y. CRIM. PROC. LAW § 400.27.12(d) (McKinney 2001-2002 Interim Pocket Part), and the additional fact that eleven states prohibited execution of those with mental retardation only if the murder occurred after the effective date of the statute. *Id.* at 323-24. Scalia then noted that the Court had upheld the death penalty for major participation in a felony with reckless indifference to life when eleven of thirty-seven death penalty states (thirty percent) prohibited such punishment, *Tison v. Arizona*, 481 U.S. 137 (1987), and for people who commit murder at age sixteen when fifteen of thirty-six (forty-two percent) death penalty states prohibited capital punishment for such offenders. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

18. 536 U.S. at 346 (Scalia, J., dissenting) (reporting, *inter alia*, a source that indicated that ten percent of those on death row suffer from mental retardation). Other reports estimate up to thirty percent of those on death row have mental retardation. See, e.g., Clive A. Stafford-Smith & Remy Voisin Starns, *Folly by Fiat: Pretending that Death Row Inmates Can Represent Themselves in Post-Conviction Proceedings*, 45 LOY. L. REV. 55, 70 n.92 (1999).

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

20. 536 U.S. at 347 (Scalia, J., dissenting).

21. *Id.*

22. *Id.* at 321-36 (Rehnquist, C.J., dissenting).

23. *Id.* at 312 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

24. 433 U.S. at 597.

25. In *Coker* itself, for instance, the Court made the quoted statement after noting that the national legislative consensus was clearly against imposing the death penalty for rape. *Id.* It then went on to state, "the legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman." *Id.*

26. As the Court stated in *Stanford v. Kentucky*,

To say, as the dissent says, that "it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty,"—and to mean that as the dissent means it, *i.e.*, that it

"independent evaluation,"²⁷ to use Stevens' language, was more important in justifying the decision than the legislative nose-counting. Indeed, in light of the relatively slim legislative consensus against execution of people with retardation, Scalia called this evaluation "[t]he genuinely operative portion of the opinion."²⁸

While this latter remark may be an overstatement, there is no doubt that the majority's "independent evaluation" is an essential part of the opinion. For present purposes, its importance lies in the clues it provides as to how the Supreme Court evaluates the proper scope of the death penalty as it applies to people with mental disability. The core of this evaluation in *Atkins* was that, because people with mental retardation have "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others,"²⁹ their execution does not "measurably contribute[]" to either the retributive or the deterrence goal of capital punishment.³⁰ Noting that precedent had established that the death penalty was reserved for the most culpable murderers, Stevens stated, "the lesser culpability of the mentally retarded offender surely does not merit that form of retribution."³¹ Similarly, compared to the typical person who contemplates murder, people with mental retardation are "less likely [to] process the information of the possibility of execution as a penalty" and thus less likely to be deterred by that information.³²

Fourteen years earlier, a four-member plurality of the Court engaged in a similar analysis in concluding that the Eighth Amendment prohibits execution of juveniles

is for us to judge, not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what we perceive the society through its democratic processes now overwhelmingly disapproves, but on the basis of what we think "proportionate" and "measurably contributory to acceptable goals of punishment"—to say and mean that, is to replace judges of the law with a committee of philosopher-kings.

492 U.S. 361, 379 (1989).

27. 536 U.S. at 321.

28. *Id.* at 349 (Scalia, J., dissenting).

29. *Id.* at 318.

30. The Court's emphasis on retribution and general deterrence comes from *Gregg v. Georgia*, 428 U.S. 153 (1976), one of the Supreme Court decisions that reinvigorated the death penalty after *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), had cast its constitutionality in doubt. As Stevens noted in *Atkins*, *Gregg* "identified 'retribution and deterrence of capital crimes by prospective offenders' as the social purposes served by the death penalty." 536 U.S. at 313. These two purposes have been the centerpiece of the Court's Eighth Amendment analysis in death penalty cases. See, e.g., *Enmund v. Florida*, 458 U.S. 782, 792 (1982) ("Unless the death penalty...contributes to one or both of these goals it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment.").

31. 536 U.S. at 319.

32. *Id.* The Court also averred that people with mental retardation are more likely to confess falsely and less able to assist counsel at trial, so that "in the aggregate [they] face a special risk of wrongful execution." *Id.* at 320. I don't focus on this issue in this essay because it amounts to an attack not on executions per se but on *all* criminal prosecutions of people with retardation. Nonetheless, in line with the Equal Protection analysis undertaken in this essay, it is worth noting relevant comparisons with people suffering from mental illness. While a number of people with retardation have apparently given false confessions, see Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 452-90 (1998) (detailing cases), people with mental illness have also confessed to crimes they apparently did not commit. *Id.* at 453, 465. And clearly mental illness is a primary reason for findings of incompetency to proceed. See GARY MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS & LAWYERS* 136-37 (2d ed. 1997) (summarizing data showing that "psychoticism" is highly correlated with incompetency).

under sixteen. Justice Stevens began the plurality opinion in *Thompson v. Oklahoma*³³ by canvassing the “objective” measures of consensus on execution of juveniles (noting, most significantly, that of the eighteen death penalty states that had addressed the issue, none permitted execution of youth below the age of sixteen³⁴). But, as he would do in *Atkins* when discussing people with mental retardation, Justice Stevens also stressed the compromised culpability and behavioral control of youth. The lesser culpability of juveniles, Justice Stevens stated, “is too obvious to require extended explanation.”³⁵ He continued:

Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.³⁶

As to deterrability, “[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.”³⁷ Without the crucial fifth vote,³⁸ the *Thompson* opinion is only an indication of where the Court may draw the line for execution of juveniles, but it is likely to place it no lower than the age of fifteen, especially now that *Atkins* has banned execution of people with developmental disabilities.³⁹

The same types of assertions that *Atkins* and *Thompson* make about people with retardation and juveniles can be made about people with significant mental illness. That does not mean, of course, that the Eighth Amendment bars the latter’s execution. For despite the Court’s willingness to look at more “subjective” factors, a determination that evolving standards of decency have been abridged still requires some evidence of statutory evolution,⁴⁰ and that evidence simply does not exist with respect to the execution of people with mental illness. In contrast to the legislative sentiment ranged against execution of those with mental retardation and juveniles,

33. 487 U.S. 815 (1988).

34. *Id.* at 826. The plurality also looked at other indicia of consensus. *Id.* at 830-33 (canvassing positions of national organizations and other countries and the behavior of juries).

35. *Id.* at 835.

36. *Id.*

37. *Id.* at 837.

38. Justice O’Connor was the fifth vote for the result in *Thompson* reversing the death sentence, but her position stemmed from her belief that the “objective” evidence left unclear whether Oklahoma’s legislature intended to impose a death sentence in such cases. *Id.* at 858. As to the plurality’s position, she stated, “I am reluctant to adopt [its] conclusion as a matter of constitutional law without better evidence than we now possess.” *Id.* at 849.

39. See Victor L. Streib, *Adolescence, Mental Retardation, and the Death Penalty: The Siren Call of Atkins v. Virginia*, 33 N.M. L. Rev. 183 (2003). See also *In re Stanford*, 537 U.S. 968 (2002). There, four Justices (Stevens, Souter, Ginsburg, and Breyer) dissented to a denial of a writ of habeas corpus brought by a capital offender who committed his offense at age sixteen, on the ground that the Eighth Amendment prohibits execution of juveniles under eighteen. As one explanation for doing so, Justice Stevens stated, “The reasons supporting [*Atkins*], with one exception [*i.e.*, the number of states that prohibit the practice] apply with equal or greater force to the execution of juvenile offenders.” *Id.*

40. Cf. *Penry*, 492 U.S. at 334 (concluding that “even when added to the fourteen States that have rejected capital punishment completely, [the two state statutes that banned execution of people with mental retardation at the time of that decision] do not provide sufficient evidence at present of a national consensus”).

only *one* state—Connecticut—has banned imposition of the death penalty on those with mental illness who are competent to be executed.⁴¹ At the present time, no other state is contemplating following Connecticut's lead.

On the other hand, the assertion that people with mental illness are similar to people with mental retardation and juveniles in terms of relative culpability and deterrability is very relevant to Equal Protection analysis.⁴² How strong that similarity must be to force an equivalent ban on execution for people with mental illness depends upon how one reads the three Court decisions that apply that analysis to classifications based on disability. Unfortunately, those cases are not at all clear on that score.

II. EQUAL PROTECTION AND MENTAL DISABILITY

At first glance, the Supreme Court's application of equal protection analysis to cases involving disability all seem to say the same thing: Mental disability is neither a suspect or a quasi-suspect classification, and the state needs only a rational basis, not a compelling or significant one, for discriminating on that ground. But that would be a misleading characterization of the three most pertinent decisions in this area. In the first of these cases, the Court appeared to be applying a more rigorous test than rational basis analysis requires. In the second, it never addressed the proper standard of review for cases involving disability, and in any event gave reasons for upholding the state scheme that might satisfy more heightened scrutiny. In the third, the Court's statement that the rational basis test was the correct one for disability cases appears to have been endorsed firmly by only three of its members, hardly a resounding affirmance.

41. CONN. GEN. STAT. § 53a-46a(h) (2002) (prohibiting imposition of the death penalty when the jury or judge finds, by special verdict, 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"). Note that even before *Ford v. Wainwright*, 477 U.S. 399 (1986), constitutionalized the requirement, *every* state banned the execution of people whose mental illness rendered them unable to understand the nature of the death penalty. *Id.* at 408. But that rule focuses entirely on the individual's mental state at the time of execution, not at the time of the offense, which is the appropriate focus of the retributive and deterrence queries addressed in *Atkins* and this essay.

42. Some people who have read this essay are uncomfortable with this tack. One or two have objected that litigants should not be able to accomplish through the Equal Protection Clause what they would be denied under the Eighth Amendment (or some other constitutional provision). But that happens all the time, when members of burdened classes are accorded privileges not because they are fundamentally entitled to them but because others have them. *See, e.g.,* *Whren v. United States*, 517 U.S. 806, 813 (1996) (recognizing an equal protection claim against police investigative practices that do not violate the Fourth Amendment); *Plyer v. Doe*, 457 U.S. 202 (1982) (finding that even though there is no constitutional right to education, an undocumented immigrant child is entitled to education along with resident children); *Glonn v. American Guarantee & Liability, Ins. Co.*, 391 U.S. 73 (1968) (holding that a state cannot, consistent with the Equal Protection Clause, prevent mothers from suing for wrongful death of illegitimate children when it allows such suits for legitimate children, even though there is presumably no general "right" to wrongful death actions); *Skinner v. Oklahoma*, 316 U.S. 535, 539-40 (1942) (passing on the issue of whether criminal offenders may be sterilized but finding that laws that permit sterilization of three-time larcenists when three-time embezzlers are not subject to sterilization violated equal protection). Others have objected that an equal protection argument cannot be based on an inequality created by the Court's efforts to implement a constitutional right rather than by legislative action or inaction. But there is precedent for that result as well. In *Eisenstadt v. Baird*, 405 U.S. 438, 453-55 (1972), the Supreme Court held that Connecticut violated the Equal Protection Clause by banning the sale of contraceptives to single individuals when it permitted their sale to married couples, even though the only reason the state permitted sale of contraceptives to the latter was because it had been required to do so by the Supreme Court in *Griswold v. Connecticut*, 381 U.S. 475 (1965).

The Supreme Court's first case directly addressing application of the Equal Protection Clause to people with disability was *City of Cleburne, Texas v. Cleburne Living Center*.⁴³ There the Cleburne Living Center sued the City of Cleburne for denying it a permit to build and operate a group home for people with mental retardation. The denial occurred under authority of an ordinance that required such permits for "hospitals for the insane or feeble-minded or alcoholics or drug addicts" and for "penal institutions" but did not require permits for other multi-person units such as medical hospitals, nursing homes, apartment houses, fraternities and sororities, and private clubs.⁴⁴ The Living Center's principal contention was that these distinctions violated the Equal Protection Clause because mental retardation was either a suspect classification like race or a quasi-suspect classification like gender.⁴⁵ But the Court refused to find that mental retardation was either of these.⁴⁶

Usually, that would have been the end of the analysis. Under the rational basis test, the Court has stated that a law "must be upheld against Equal Protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification" made by the law.⁴⁷ Further, "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."⁴⁸ Indeed, the "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."⁴⁹ Laws that do not rely on suspect classifications are accorded this strong presumption of validity because the judiciary should not "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."⁵⁰

In short, losing the suspect classification battle usually means losing the equal protection war. But in *Cleburne*, surprisingly, the Court went on to hold that the Living Center should prevail. The majority stated that the permit requirement

43. 473 U.S. 432 (1985). In an earlier case, *Schweiker v. Wilson*, 450 U.S. 221 (1981), the Court confronted an argument that mental illness is a suspect classification for equal protection purposes, but stated that "[w]e have no occasion to reach this issue because we conclude that this statute does not classify directly on the basis of mental health." *Id.* at 231.

44. 473 U.S. at 436-37 n.3.

45. *Id.* at 437.

46. *Id.* at 442-47. More specifically, the Court gave four reasons for holding that mental retardation is not even a quasi-suspect classification. First, people with mental retardation—in contrast, for instance, to people of minority ethnic background or women—have a "reduced ability to cope with and function in the everyday world," so discrimination is more likely to be justified. *Id.* at 442-43. Second, many state and federal laws redress inequities aimed at people with retardation "in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." *Id.* at 443. Third, this legislation also shows that people with mental retardation are not politically powerless. *Id.* at 445. Finally, a contrary holding would open the door to arguments by a host of other groups, among them the mentally ill, that they too are entitled to special Fourteenth Amendment protection. *Id.* at 445-46.

47. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). *Beach Communications* summarized years of precedent on this issue. See, e.g., *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 1 (1980) ("Where...there are plausible reasons for Congress's action, our inquiry is at an end."); *Vance v. Bradley*, 440 U.S. 93, 97 (1979) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.").

48. *Beach Communications*, 508 U.S. at 315.

49. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973).

50. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam).

violated the Equal Protection Clause because it rested on "an irrational prejudice against the mentally retarded"⁵¹ and on "mere negative attitudes, or fear, unsubstantiated by factors which are properly considered in a zoning proceeding."⁵²

In context, these statements belie a rational basis analysis. The trial court had found that the ordinance, as written and applied, was rationally related to the city's legitimate interests in "the legal responsibility of CLC and its residents,...the safety and fears of residents in the adjoining neighborhood," and the number of people to be housed in the home.⁵³ These justifications—particularly the first two—could be said to rely on the same sort of behavioral assumptions that the *Atkins* Court relied upon in banning execution of people with mental retardation. If, as the *Atkins* Court stated, people with mental retardation have diminished abilities "to control impulses, and to understand the reactions of others," one could reasonably infer that people with mental retardation living in the community are more likely to behave antisocially, or at least offensively, and thus pose an increased risk of civil and criminal liability. Rational basis review does not require empirical research to back up this kind of inference, but in fact people with mental retardation are at least slightly more likely to engage in violent behavior than members of the general population (albeit probably not as likely to do so as people who abuse substances and those who are housed in penal institutions, the other two groups subjected to the permit process in *Cleburne*).⁵⁴

These observations suggest that, even if the permit denial was based on prejudice, it was not irrational prejudice, as "irrational" is usually defined in equal protection analysis. The denial may have been based on fear of people with mental retardation. But there was a "rational" basis for that fear, and danger is a factor that "may properly be considered in a zoning proceeding."⁵⁵ As others have asserted, the Court in *Cleburne* appeared to be judging the City's action more rigorously than it normally does in rational basis cases; it was applying, at the least, a test that some have called "rational basis with bite."⁵⁶

The second case in which the Court confronted an equal protection challenge to treatment of people with disabilities was *Heller v. Doe*.⁵⁷ There the comparison was not between mentally disabled people and others but rather involved the same sort

51. 473 U.S. at 450.

52. *Id.* at 448.

53. *Id.* at 437.

54. James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 426 (1985) ("The best modern evidence suggests that the incidence of criminal behavior among people with mental retardation does not greatly exceed the incidence of criminal behavior among the population as a whole."); Craig Smith et al., *Prison Adjustment of Youthful Inmates with Mental Retardation*, 28 MENTAL RETARDATION 177, 179 (June 1990) (finding that a group of offenders with mental retardation had twice as many disciplinary reports involving assault than a matched group without retardation).

55. See, e.g., 3A KENTUCKY PRACTICE: METHODS OF PRACTICE § 25.5 (3d ed. 1990) ("land use and zoning regulations may be employed to...prevent...danger and congestion in the circulation of people....").

56. See, e.g., Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 793-99 (1987) (noting that the *Cleburne* Court's placement of the burden on the city to explain the law and its detailed analysis of the city's reasons was inconsistent with traditional rational basis review); WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 1161-62 (8th ed. 1996). See also 473 U.S. at 458 (Marshall, J., concurring) ("however labeled, the rational basis test invoked today is most assuredly not the rational-basis test [applied in earlier cases]").

57. 509 U.S. 312 (1993).

of comparison made in this essay, between people with mental retardation and people with mental illness. Under Kentucky law, the standard of proof for commitment of the first group is clear and convincing evidence, while for the second group the standard is proof beyond a reasonable doubt.⁵⁸ A second difference between the two commitment schemes is that, in proceedings for people with retardation, close relatives and guardians may participate as parties—with the ability to hire lawyers, cross-examine witnesses, and appeal—whereas in commitment proceedings for people with mental illness the respondent is confronted only by the state.⁵⁹ The claim in *Heller* was that both of these differences disadvantaged people with retardation by making it easier to commit them to an institution.

As in *Cleburne*, the Court purported to apply rational basis review in *Heller*. But the way it did so was curious. Given the disability of their clients, advocates for Doe argued for a heightened standard of review.⁶⁰ In dismissing that argument, one would think the Court would simply have cited the eight-year-old decision in *Cleburne*, which supposedly established that rational basis review was the proper standard in such cases. Instead, the Court noted that the argument for a heightened review standard had not been presented in the lower courts⁶¹ and that applying such a standard for the first time at the Supreme Court level would disadvantage the state, which had not presented extensive evidence justifying its statutory scheme on the assumption that rational basis review was all that was required in such cases.⁶² Reference to *Cleburne* was nowhere to be found in this discussion, suggesting at least some ambivalence about whether the Court meant what it said in that case about disability not being a suspect classification.

Furthermore, in upholding both challenged aspects of Kentucky's commitment scheme, the Court gave reasons that could conceivably meet even a heightened scrutiny standard, at least at the rational-basis-with-bite level. Assuming that mental retardation is easier to diagnose than mental illness,⁶³ the Court noted that a state might want to protect against the greater risk of error thereby associated with commitment of the latter group through imposition of the heavier, reasonable doubt burden on the state.⁶⁴ In other words, the Kentucky scheme could easily be characterized as an attempt to protect people with mental illness, not the result of bias against people with mental retardation, a position that is bolstered by the fact that the clear and convincing standard Kentucky applied to the latter group is clearly constitutionally adequate.⁶⁵ Relatively good reasons also can be given for granting

58. *Id.* at 317-18.

59. *Id.* at 317.

60. *Id.* at 318-19.

61. *Id.* at 319.

62. *Id.*

63. *Id.* at 321. *See infra* text accompanying notes 95-106 (exploring further the accuracy of this assumption).

64. *Id.* at 322 ("If diagnosis is more difficult in cases of mental illness than in instances of mental retardation, a higher burden of proof for the former tends to equalize the risks of an erroneous determination that the subject of a commitment proceeding has the condition in question.").

65. *Addington v. Texas*, 441 U.S. 418 (1978). The Court also asserted that commitment visits more serious consequences on people with mental illness, in the guise of powerful anti-psychotic medication. *Heller*, 509 U.S. at 324-25. The dissent argued to the contrary, noting that many people with retardation receive medication and that they often spend their whole life in an institution, while people with mental illness are often released within a short period of time. *Id.* at 342-43 (Souter, J., dissenting). While the dissent's contentions are worth considering, it

party status to relatives and guardians of people with mental retardation. As the Court pointed out,⁶⁶ given the stable nature of retardation and its very early onset, relatives and guardians of people with that condition are likely to have more probative insights about behavioral and dispositional issues than relatives and guardians of people with mental illness, a condition that often strikes for the first time in early adulthood or later and is more changeable.⁶⁷

The final Supreme Court decision addressing the equal protection implications of laws that classify based on mental disability is *Board of Trustees of the University of Alabama v. Garrett*.⁶⁸ There, several states argued, inter alia, that the provisions in the Americans with Disabilities Act (ADA) that require state employers to make "reasonable accommodations" for employees with mental disability are an unconstitutional exercise of Congress's authority, under Section V of the Fourteenth Amendment, to enforce the equal protection guarantee.⁶⁹ In agreeing with that proposition, the Court once again concluded that the appropriate standard of review in disability cases was the rational basis test, and this time it relied heavily on *Cleburne* in doing so.⁷⁰ On authority of that case, a five-member majority flatly stated that "states are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational."⁷¹ This language sounds as if the Court has unequivocally settled that disability classifications are governed by traditional rational basis review.

But it hasn't. First, the Court had no occasion to explicate what it meant by "rational," since it did not address any particular factual situation in *Garrett*; perhaps, as it did in *Cleburne*, application of rational basis review to people with mental disability will morph into "rational basis with bite." More importantly, two members of the majority wrote a concurring opinion that did not even mention *Cleburne*. Rather, after noting that "[t]here can be little doubt...that persons with mental...impairments are confronted with prejudice which can stem from

remains a fact that the "treatment" of people with mental illness is more likely to involve use of invasive medications. *Id.* at 324-35. Further, under constitutionally correct procedures, prolonged detention must be periodically reviewed, *see Fasulo v. Arafah*, 378 A.2d 553 (Conn. 1977); *Matter of Harhut*, 385 N.W.2d 305 (Minn. 1986), so that the consequence of any given commitment are not exceedingly different for the two groups.

66. *Heller*, 509 U.S. at 329.

67. Of course, as the dissent in *Heller* noted, if the primary goal is to assure that relatives and guardians give testimony, the state could simply subpoena them. *Id.* at 347 (Souter, J., dissenting). Testimony may not be the only goal, however. Relatives who have spent years caring for people with retardation may have very strong preferences for a particular disposition (*e.g.*, community versus institution) that is most likely to be implemented through giving them party status. The question in most cases involving people with retardation is not whether commitment will take place but where it will occur. *See Leonard E. Heller, Sec'y, Ky. Cabinet for Human Res., Petitioner v. Samuel Doe, by His Mother and Next Friend, Mary Doe, et al., Respondents*, No. 92-351, October Term, 1992, Feb. 23, 1993, Reply Brief for Petitioner. The dissent's assumption that family members who are given party status are more likely to act as a "second prosecutor," *Heller*, 509 U.S. at 348 (Souter, J., dissenting), is generally not true in this context.

68. 531 U.S. 356 (2001).

69. *Id.* at 360. The states' specific contention in *Garrett*, with which the Court agreed, was that suits for money damages under the ADA are barred by the Eleventh Amendment. *Id.* The Eleventh Amendment prevents suits against nonconsenting states unless Congress has abrogated state immunity "pursuant to a valid grant of constitutional authority," *see Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000), and the *Garrett* Court found that there was no such authority for suits alleging discrimination based on disability under its cases (including *Cleburne*), 531 U.S. at 367.

70. *Garrett*, 531 U.S. at 366-67.

71. *Id.* at 367.

indifference or insecurity as well as from malicious ill will,"⁷² Justices Kennedy and O'Connor emphasized the absence of proof that any state had engaged in "a pattern or practice" that was "designed" to discriminate against people with disability.⁷³ When the views of these two justices are combined with the views of the four-member dissent, which expressed a more expansive view of *Cleburne* than the majority,⁷⁴ the equal protection status of mental disability remains in some doubt, at least where the state intentionally discriminates based on that classification.

Under such circumstances, there is even precedent for an explicit move to heightened scrutiny. Referring to the Court's gender cases, Professor Weber points out that "[h]istory suggests that an erratic pattern of decisions, combined with protests by the Court that it is applying a rational-basis test, may lead to an eventual use of intermediate scrutiny."⁷⁵ At least as significant, the Court's caselaw indicates that when the state's differential treatment affects life or liberty, as it obviously does in the death penalty context, heightened scrutiny is more likely.⁷⁶ In short, a strong case can be made that states that continue to execute people with mental illness now that *Atkins* has been decided need to demonstrate not just a plausible reason, but a good reason, for doing so.

III. WHY EXECUTION OF PEOPLE WITH MENTAL ILLNESS IS UNCONSTITUTIONAL

Combining the conclusions of the previous two sections, execution of people with mental illness should not be permitted unless there is good reason to believe that people with mental illness are more culpable or deterrable than people with mental retardation or juveniles. That demonstration might be possible with respect to many forms of "mental illness." But it cannot be made when mental illness is equated with psychosis at the time of the crime.

The classic psychotic diagnosis is schizophrenia. As defined in the American Psychiatric Association's Diagnostic and Statistical Manual (DSM),⁷⁷ people who suffer from schizophrenia experience "a range of cognitive and emotional dysfunctions that include perception, inferential thinking, language and communication, behavioral monitoring, affect, fluency and productivity of thought and speech,

72. *Id.* at 375 (Kennedy, J., concurring).

73. *Id.*

74. *Id.* at 381-82 (Breyer, J., dissenting) (arguing that the ADA's prohibition of discrimination based on mental disability implements the Court's holding in *Cleburne*).

75. Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1128 (2002).

76. See, e.g., *Foucha v. Louisiana*, 504 U.S. 71 (1992). A four-member plurality found that the Equal Protection Clause was violated by continued confinement, on dangerousness grounds, of an insanity acquittee who was no longer mentally ill when other persons who committed criminal acts could not be confined on those grounds. *Id.* at 84-86. As Justice White stated for the plurality, "[f]reedom from physical restraint being a fundamental right, the State must have a particularly convincing reason...for [confinement of] insanity acquittees who are no longer mentally ill." *Id.* Justice O'Connor wrote a separate opinion in *Foucha* stating, "Although I think it unnecessary to reach equal protection issues on the facts before us, the permissibility of holding an acquittee who is not mentally ill longer than a person convicted of the same crimes could be imprisoned is open to serious question." *Id.* at 88 (O'Connor, J., concurring in part and concurring in judgment).

77. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter DSM].

hedonic capacity, volition and drive, and attention.”⁷⁸ The specific symptoms include delusions, hallucinations, disorganized speech, and grossly disorganized behavior.⁷⁹ Put even more functionally, people with schizophrenia have difficulty focusing on essential information, are easily distracted by irrelevant stimuli, often experience “thought blocking” (involving a complete halt to thinking), attribute elaborate meaning to what they see and hear, engage in combinative thinking (involving the reduction of impressions into unrealistic beliefs), and have difficulty forming abstract concepts correctly.⁸⁰

Recall that *Atkins* considered people with mental retardation ineligible for the death penalty because of their “diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”⁸¹ The *Thompson* plurality reached the same conclusion with respect to juveniles because juveniles are less able than adults “to evaluate the consequences of their actions” and because “[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.”⁸² The brief description of schizophrenic symptoms above makes clear that people who suffer from psychosis also have great difficulty in communicating with and understanding others, engaging in logical cost-benefit analysis, and evaluating the consequences of and controlling their behavior. As noted in my earlier article, “[i]f anything, the delusions, command hallucinations, and disoriented thought process of those who are mentally ill represent greater dysfunction than that experienced by most ‘mildly’ retarded individuals (the only retarded people likely to commit crime) and by virtually any non-mentally ill teenager.”⁸³

Of course, psychotic symptoms can have mitigating impact during the criminal process. The various insanity tests,⁸⁴ the diminished capacity and diminished responsibility defenses,⁸⁵ and capital sentencing law itself⁸⁶ recognize that these symptoms may significantly affect the ability to understand the nature of one’s actions, to differentiate between right and wrong, to formulate intent, and to control

78. *Id.* at 274.

79. *Id.* at 285.

80. ROBERT SCHOPP, AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY: A PHILOSOPHICAL INQUIRY 185-87 (1991) (describing these and other symptoms).

81. See *supra* text accompanying notes 29-30.

82. See *supra* text accompanying notes 36-37.

83. Slobogin, *supra* note 1, at 669.

84. Generally, these tests recognize an excuse for people who, as a result of mental disease, have substantial difficulty differentiating right from wrong or controlling their behavior. See MELTON ET AL., *supra* note 32, at 190-93 (describing the tests).

85. The phrase “diminished capacity defense” refers to the claim that the defendant did not have the requisite *mens rea* due to the effects of mental disease or defect. A successful diminished responsibility defense leads to the reduction of charge, usually in murder cases, based on the volition-impairing effects of mental disorder. Both are distinct from the insanity defense. See generally *id.* at 204-08 (describing and distinguishing these defenses).

86. Every death penalty state stipulates that mental illness at the time of the offense is to be considered as a possible mitigating circumstance. Ellen Fels Berkman, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 296-98 (1989). The most common method of framing that concept is through recognition of “extreme mental or emotional stress” as a mitigating factor. *Id.*

behavior. Thus, one might assume, a ban on execution of people with significant mental illness at the time of the offense is likely to have no practical impact.

That assumption would be wrong. Just as people with retardation and juveniles have ended up on death row despite mitigating characteristics, many people who experienced psychotic symptoms at the time of their crime are sentenced to death. The insanity defense is rarely successful, even (or especially) in murder cases.⁸⁷ In most jurisdictions, other defenses that in theory could give mitigating impact to mental illness are either not recognized or are very narrowly defined.⁸⁸ And while extreme mental or emotional distress and other abnormal mental conditions are usually explicitly recognized as mitigating factors in capital sentencing statutes,⁸⁹ research suggests that presentation of such evidence often acts as an *aggravating* factor.⁹⁰ Apparently, sentencing juries and judges focus more on the perceived dangerousness of such individuals than on their diminished culpability and deterrability.⁹¹ Whatever the reason, the available evidence suggests that a sizeable number of people with psychotic symptomatology are on death row.⁹² Reported cases also indicate that, as was the case with offenders suffering from mental retardation before *Atkins*, many courts are unwilling to reverse death sentences simply because of credible evidence of significant mental illness at the time of the crime.⁹³

87. MELTON ET AL., *supra* note 32, at 188 (surveying studies that roughly suggest a twenty-five percent success rate with insanity claims that go to trial); Henry J. Steadman et al., *Factors Associated with a Successful Insanity Plea*, 140 AM. J. PSYCHIATRY 401, 402-03 (1983) (insanity defense no more successful in murder cases than in cases involving other crimes).

88. RALPH REISNER, CHRISTOPHER SLOBOGIN & ARTI RAI, *LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 563-64 (3d ed. 1999) (noting that only half the states recognize the diminished capacity defense and no state has adopted a diminished responsibility defense based explicitly on mental abnormality); WAYNE LAFAYE, *CRIMINAL LAW* 711 (3d ed. 2000) (noting that in many states a provocation defense based on "special mental qualities" is not recognized). Even if recognized, a diminished capacity defense is seldom plausible because most people with mental illness who commit a crime intend to commit it. *See* State v. Herrera, 895 P.2d 359, 374 (Utah 1995) ("As to crimes requiring intent, an insane person will virtually always have the mental state required by the law...even though the defendant suffers from severe mental derangement, such as an extreme and bizarre psychotic delusion.").

89. *See supra* note 86.

90. The evidence for this point is assembled at Slobogin, *supra* note 1, at 669-70. In general, the research shows that one of the best predictors of a death sentence is assertion of an insanity defense at trial, and that presentation of evidence supporting a claim of extreme mental or emotional stress is much more likely to correlate with a death sentence than a life sentence. *Id.*

91. *Id.* at 670. As argued in my earlier article, this fact, in itself, could be grounds for a separate, due process challenge to execution of people with mental illness. Because every state makes mental disability a mitigating factor, the apparent tendency of capital sentencing bodies to use mental disability as an aggravator evidences a failure to follow state statutory provisions, which is a due process violation. *Id.* Another reason people with mental illness may be sentenced to death is because they do not "look" ill to jurors. *See* Michael L. Perlin, "Life is in Mirrors, Death Disappears": Giving Life to Atkins, 33 N.M. L. REV. 315 (2003).

92. Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 BEHAV. SCI. & L. 191, 193, 200 (2002) (noting that incidence of schizophrenia on death row is at least five percent and perhaps higher); Dorothy O. Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 840 (1986) (finding that forty percent of fifteen adult death row inmates were *chronically* psychotic, evidencing, e.g., loose, illogical thought processes, delusions, and hallucinations).

93. *See, e.g.,* Illinois v. Haynes, 737 N.E.2d 169, 193-96 (Ill. 2000) (Harrison, C.J., dissenting) (noting five of six experts found defendant to be delusional at time of trial and well before it); Walton v. Angelone, 2002 U.S. Dist. LEXIS 5240, 20-24, 45-49, 62-63, 76 (W.D. Va. 2002) (upholding death sentence despite very strong evidence of schizophrenia at time of offense and at trial); Feguer v. United States, 302 F.2d 214, 228-36 (8th Cir. 1962) (same

These facts have diametrically opposed implications for the two constitutional doctrines most relevant to the proper scope of the death penalty. They undercut an Eighth Amendment claim because, if they show any consensus, it is that significant mental illness at the time of the crime should not be a bar to execution. But they bolster the equal protection argument, because they show an “irrational prejudice” against people with mental illness that is not justified by any legitimate state goal.

To state the strongest possible equal protection case against execution of people with mental illness, the following discussion will be framed in terms of traditional rationality review. Under that standard, it will be recalled, a state practice “must be upheld against equal protection challenge if there is any *reasonably* conceivable state of facts that could provide a rational basis for the classification.”⁹⁴ There are three conceivable bases for supporting continued execution of people with mental illness after *Atkins*, to wit: compared to mental retardation and youth, mental illness is (1) harder to diagnose, (2) less characterological and more avoidable, and (3) more likely to lead to violent behavior. Good arguments can be made that all three of these distinctions are specious (and are therefore *unreasonable*), and they certainly do not withstand the more heightened scrutiny represented by *Cleburne*.

A. Definition and Proof

Taking a cue from *Heller*,⁹⁵ advocates for continued execution of people with mental illness in the wake of *Atkins* and *Thompson* might contend that mental illness is harder to define than “youth” or mental retardation. Mental retardation is measured primarily through objective tests that produce quantified results.⁹⁶ Age is even more easily verifiable. Diagnosing mental illness, on the other hand, is a more seat-of-the pants assessment known to be difficult to carry out reliably.⁹⁷ It could be

outcome); *People v. Rittger*, 355 P.2d 645 (Cal. 1960) (same outcome); *People v. Crews*, 522 N.E.2d 1167 (Ill. 1988) (upholding death sentence for defendant found guilty but mentally ill, with mental illness defined as “a substantial disorder of thought, mood, or behavior which afflicted a person at the time of the commission of the offense and which impaired that person’s judgment”); *Illinois v. Scott*, 594 N.E.2d 217 (Ill. 1992) (same outcome); *State v. Wilson*, 413 S.E.2d 19 (S.C. 1992) (same outcome); *Colburn v. Texas*, 966 S.W.2d 511, 512 (Tex. Crim. App. 1998) (rejecting argument that an “extensive history of paranoid schizophrenia” prevents the imposition of the death penalty); *Hernandez v. Johnson*, 248 F.3d 344 (5th Cir. 2001) (upholding death sentence despite admission from prosecution witness that schizophrenia was “primary” diagnosis and jury instructions that did not call attention to mental illness as a mitigating factor but rather merely told jury to consider all the evidence and determine whether defendant “deliberately” killed and was dangerous); *State v. Berry*, 686 N.E.2d 1097, 1103-04 (Ohio 1997) (upholding death sentence of offender who was diagnosed with schizophrenia and psychosis prior to the offense and “confessed” on condition the state would execute him); *Corcoran v. Indiana*, 2002 Ind. LEXIS 688 (2002) (upholding death sentence over a dissent that cited *Atkins* in concluding that “because Corcoran is obviously severely mentally ill, he should be sentenced to life without the possibility of parole, not death”). See generally Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 27, 66-78, nn.218, 231 (1997) (stating that “courts frequently employ the guilt-phase insanity test as the standard by which to judge a defendant’s punishment-phase mitigating evidence of mental illness” and citing and describing cases).

94. See *supra* text accompanying note 47 (emphasis added).

95. See *supra* text accompanying notes 63-64.

96. See DSM, *supra* note 77, at 39 (noting that mental retardation is measured in part through an assessment of “general intellectual functioning,” which is defined by the intelligence quotient, which in turn is obtained by use of “one or more of the standardized, individually administered intelligence tests”). But see *infra* text accompanying notes 103-106.

97. Field studies of inter-rater reliability on specific diagnoses of serious mental illness indicate a relatively low rate of agreement. See, e.g., Paul Lieberman & Frances Baker, *The Reliability of Psychiatric Diagnosis in the*

argued, consequently, that the state would not be able to implement a ban on execution of people with mental illness in a sensible manner. Furthermore, the amorphous nature of mental illness makes malingering easier. In combination, these difficulties could be said to undermine the state's ability to achieve both the retributive and the deterrence goals of the death penalty. Mistakes would be made as to who is culpable or deterrable enough to warrant execution, and would-be offenders might calculate that, if caught, they can successfully feign illness and at least escape the death penalty.

There is no doubt that mental illness is an exceedingly vague term. Even when one confines mental illness to psychosis, as I have done in this article, the diagnostic nomenclature is slippery. For instance, with respect to delusions, a principal symptom of schizophrenia, the DSM admits that "[t]he distinction between a delusion and a strongly held idea is sometimes difficult to make and depends on the degree of conviction with which the belief is held despite clear contradictory evidence."⁹⁸ Similarly, assessment of the "bizarreness" of delusions, also important to a diagnosis of schizophrenia, "may be difficult to judge, especially across different cultures."⁹⁹

All of this seriously undermines the equal protection argument against execution of people with mental illness if the comparison group is juveniles. Age is hard to get wrong. Thus, there is an obvious distinction between youth and mental illness in terms of ease of "diagnosis."

But none of the foregoing supplies a good reason for differentiating between people with significant mental illness and those with mental retardation. *Heller*, which assumed that mental illness is more difficult to discern than mental retardation, may appear to hold otherwise, but it does not. The type of mental disorder that can provide the basis for civil commitment, which was the legal context at issue in that case, is much broader than the psychoses at issue here.¹⁰⁰ When focused solely on gross impairment related to psychosis, studies show a much higher rate of reliability (*i.e.*, agreement between diagnosticians) despite the softness of the criteria,¹⁰¹ and other research indicates that successful malingering is very

Emergency Room, 36 HOSP. & COMM. PSYCHIATRY 291 (1985) (finding forty-one percent agreement on schizophrenia, fifty percent agreement on mood disorders; thirty-seven percent agreement on organic disorders).

98. *Id.* at 275.

99. *Id.*

100. The typical civil commitment statute defines mental disorder in language that often sounds like psychosis. *See, e.g.*, N.M. STAT. ANN. § 43-1-3(N) (2002) (defining mental disorder as "the substantial disorder of the person's emotional processes, thought or cognition which grossly impairs judgment, behavior or capacity to recognize reality"). However, people with non-psychotic personality disorders and depression are routinely committed under these statutes. Mary L. Durham, *Civil Commitment of the Mentally Ill: Research, Policy and Practice*, in MENTAL HEALTH AND LAW: RESEARCH, POLICY & SERVICES 17, 19 (Bruce Sales & Saleem Shah, eds., 1996). *See also* Matter of D.C., 679 A.2d 634 (N.J. 1996) (upholding constitutionality of amended New Jersey commitment statute clarifying that "mental illness" does not require that a person be psychotic).

101. The low ratios for inter-rater reliability cited earlier, *see supra* note 97, came from emergency room settings, which are quite different from the considered evaluation process that would occur in death penalty contexts. Research on the diagnosis of schizophrenia in more sedate environs has found agreement rates above eighty percent. *See* REISNER, SLOBOGIN & RAI, *supra* note 88, at 418. *See also* Kenneth K. Fukunaga et al., *Insanity Plea: Inter-Examiner Agreement and Concordance of Psychiatric Opinion and Court Verdict*, 5 LAW & HUM. BEHAV. 325 (1981) (finding ninety-two percent inter-rater agreement on gross impairment); Michael R. Phillips et al., *Psychiatry and the Criminal Justice System: Testing the Myths*, 145 AM. J. PSYCHIATRY 605 (1988) (finding seventy-six percent agreement on psychosis).

difficult.¹⁰² More importantly, contrary to common belief, diagnosis of mental retardation does not consist simply of adding up scores on an intelligence test to see if the person has an IQ above or below seventy (the widely accepted presumptive cut-off score¹⁰³). Putting aside questions about the reliability of such tests,¹⁰⁴ the DSM notes that "it is possible to diagnose Mental Retardation in individuals with IQs of seventy and seventy-five who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than seventy if there are no significant deficits or impairments in adaptive functioning."¹⁰⁵ As suggested by some of the other articles in this symposium,¹⁰⁶ "adaptive functioning" is at least as amorphous a term as "delusion," "hallucination," or "disorganized speech."

Let us assume, however, that the nuances just discussed do not dissuade courts from adopting the holding in *Heller* that there is a rational basis for believing psychosis is harder to diagnose than mental retardation. The proper response to that concern, as *Heller* itself acknowledged, is to require more convincing proof that the person suffers from significant mental illness.¹⁰⁷ Just as the diagnostic challenge does not prevent the state from committing people with mental illness if they are dangerous to self or others, it should not permit the state to execute them when they are no more culpable or deterrable than children or people with retardation.

A related objection to equating the two groups, also suggested by *Heller*,¹⁰⁸ is based on the notion that mental illness is a highly variable condition, whereas mental retardation is a permanent status, with relatively constant symptomatology throughout life. As a consequence, the contention might be that a diagnosis of

102. See MICHAEL PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* 238-41 (1994). Perlin states that "there is virtually no evidence that feigned insanity has ever been a remotely significant problem of criminal procedure," *id.* at 238, that advances in detection of malingering can discern faking in over ninety percent of the cases in which it does occur, *id.* at 240, and that seriously mentally disabled criminal defendants will often feign sanity in an effort to avoid stigmatization as mentally ill, even where such evidence might serve as powerful mitigating evidence in death penalty cases. *Id.* at 240-41 (noting that "juveniles imprisoned on death row were quick to let Dr. Dorothy Lewis and her associates, 'I'm not crazy,' or 'I'm not a retard.'").

103. DSM, *supra* note 77, at 39.

104. See *id.* at 73-74 (discussing how tests may be biased against minorities or by examiner behavior); David L. Rumley, *A License to Kill: The Categorical Exemption of the Mentally Retarded from the Death Penalty*, 24 ST. MARY'S L.J. 1299, 1329-40 (1993) (discussing the unreliability of IQ tests and stating that, as a result, "the obtained score is only one of a number of possible scores that may be achieved with different sample questions or with the same questions at different times"); Jonathan L. Bing, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Penry and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59, 67-70 (1996) (discussing debates about whether the cut-off score should be seventy or as high as eighty-five).

105. DSM, *supra* note 77, at 39-40.

106. See Douglas Mossman, *Atkins v. Virginia: A Psychiatric Can of Worms*, 33 N.M. L. REV. 255 (2003); Jeffrey Fagan, *Atkins, Culpability and the Jurisprudence of Adolescent Punishment*, 33 N.M. L. REV. 207 (2003). See also Bing, *supra* note 104, at 70 (discussing the various definitions of "adaptive functioning").

107. For instance, Oklahoma's newly promulgated rules for implementing *Atkins* provide that the defendant bears the burden of showing mental retardation by a preponderance of the evidence. See *Murphy v. State*, Okla. No. PCD-2-2-1197 (2002); 71 CRIM. L. REP. 658 (2002). If a legislature or court is concerned that mental illness is more difficult to discern accurately, the defendant can be required to show its existence by clear and convincing evidence or proof beyond a reasonable doubt. There are many examples of cases where such proof is not forthcoming, despite some evidence of mental illness. See, e.g., *Bottoson v. Moore*, 234 F.3d 526 (11th Cir. 2000) (finding that careful assessment of offender's psychiatric history and behavior around time of the offense revealed no symptoms of schizophrenia at or near that time despite defense expert's conclusory testimony that he was psychotic when the crime was committed).

108. See *supra* text accompanying notes 66-67.

retardation provides probative evidence on mental state at the time of the offense regardless of when it is made (*i.e.*, well before the offense, at the time of trial, or at any time in between), whereas a diagnosis of psychosis is only relevant to the sentencing question if it pertains to the time of the offense. This contention attributes an impermanency to psychosis that is all too rare. As the DSM states, “[s]chizophrenia tends to be chronic,”¹⁰⁹ and “[c]omplete remission (*i.e.*, a return to full premorbid functioning) is probably not common.”¹¹⁰ In any event, the proper response to any concerns about variability is, once again, to place a heavier burden on defendants alleging mental illness to show that they suffered from psychotic symptoms during the relevant time period, rather than simply assume they are more deserving of the death penalty than people with mental retardation.¹¹¹

Given the alternative of raising the standard of proof, the difficulty-of-diagnosis rationale for continuing to allow execution of people with mental illness after *Atkins* clearly does not satisfy heightened scrutiny, which requires that the government’s solution be narrowly tailored to the problem.¹¹² Indeed, the rationale does not even satisfy rational basis review’s requirement that the government’s aims and the way it chooses to implement them be reasonably related. The state is not acting reasonably if it justifies execution of people with mitigating mental illness simply on the ground that it has difficulty identifying who they are.

B. Accountability for Status

The second possible objection to equating mental illness, mental retardation, and youth for purposes of administering the death penalty more directly compares the impact of those conditions on culpability and deterrability. Building on the relative variability notion previously discussed, the contention would be something like this: Even if we have sufficient proof of psychosis at the time of the offense, that condition is not as mitigating as mental retardation or youth because the mentally ill person is more “responsible” for the situation in two ways. First, adults with mental illness, while impaired, are not *developmentally* impaired; thus, they have greater capacity and more opportunity than juveniles or people with retardation to develop an understanding of the rules of society and human interaction. Second, mental illness, in particular psychosis, is more easily treatable than either retardation or youth, making the person with mental illness at the time of the offense more at “fault” for the impairment and its consequences.¹¹³

109. DSM, *supra* note 77, at 282.

110. *Id.*

111. *Cf. Atkins*, 536 U.S. at 317 (“As with our approach in *Ford v. Wainwright*, with regard to insanity, ‘we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.’”).

112. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 518-19 (2002) (1997) (noting that rational basis analysis will strike down a law only if it is “not a reasonable way to attain the end” whereas intermediate scrutiny strikes down a law unless the means chosen is “narrowly tailored to achieve the goal”).

113. *Cf. David Wexler, Inducing Therapeutic Compliance Through the Criminal Law*, 14 L. & PSYCHOL. REV. 43 (1990) (suggesting that mentally ill persons who fail to take medication knowing the possible consequences are guilty of the crime of “reckless endangerment”).

These maturity and treatment differences do exist. But they do not provide good grounds for making distinctions in punishment. With respect to the first difference, it is true that, on average, mentally ill adults are more advanced developmentally than either people with mental retardation or juveniles, because the onset of psychosis usually does not occur until the late teens or early twenties.¹¹⁴ But, as noted above, once psychosis takes hold, it seldom disappears. More importantly, the cognitive and volitional impairment associated with active schizophrenia is likely to be much more severe than that which occurs with mental retardation or immaturity. Consider again the symptoms of psychosis, using the language of the DSM. Delusions involve "misinterpretations of perceptions and experiences."¹¹⁵ They are usually "clearly implausible and not understandable and do not derive from ordinary life experiences."¹¹⁶ Hallucinations are usually auditory and often consist of "pejorative or threatening voices."¹¹⁷ The speech of people with schizophrenia is "tangential" and full of "loose associations," indicating a high degree of disorganized thought.¹¹⁸ Their behavior ranges from "childlike silliness to unpredictable agitation," is rarely "goal-directed," and leads "to difficulties in performing activities of daily living."¹¹⁹ As these descriptions indicate, once psychotic symptoms set in, any "real-world" knowledge and learning gained from earlier experiences has little influence.¹²⁰

Nor should differences in treatability affect retributive or utilitarian analysis. Anti-psychotic medication has vastly improved the treatment of the psychoses, and in many people it can eliminate or substantially reduce the most conspicuous psychotic symptoms in a short period of time.¹²¹ In contrast, habilitation of people with retardation and counseling of wayward juveniles is more time-consuming and less dramatically successful.¹²² But to conclude from these facts that people who are psychotic at the time of an offense could have more easily avoided their impaired condition and thus are more justly held accountable is too great a leap; in the usual case, a failure to obtain treatment for psychosis cannot seriously be characterized either as "blameworthy" or as behavior that imposition of the death penalty would

114. DSM, *supra* note 77, at 282.

115. *Id.* at 275.

116. *Id.*

117. *Id.*

118. *Id.* at 276.

119. *Id.*

120. I have argued that people with mental illness usually retain some sense of right and wrong, and thus should not be found insane when they intentionally commit crime unless their motivating delusions, if assumed to be true, would sound in justification or duress. Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199 (2000). In the death penalty context, however, the issue is not whether culpability is so diminished that the person should be acquitted, but rather whether it is diminished sufficiently to make the ultimate punishment unwarranted.

121. See generally Herbert Y. Meltzer & S. Hossein Fatemi, *Treatment of Schizophrenia*, in *ESSENTIALS OF CLINICAL PHARMACOLOGY* 399, 406 (Alan F. Schatzberg & Charles B. Nemeroff eds., 2001) ("Conventional neuroleptics and the atypical antipsychotics are effective in treating an acute exacerbation of schizophrenia...and effect remission of psychosis in about 75% of patients within days to months....Most patients show a near maximal response by 6 weeks of treatment.").

122. *TEXTBOOK OF PSYCHIATRY* 710-11 (John A. Talbott et al. eds., 1988) (discussing the need for "long-term" programs for those with mental retardation); SCOTT W. HENGGELE ET AL., *MULTISYSTEMIC TREATMENT OF ANTISOCIAL BEHAVIOR IN CHILDREN AND ADOLESCENTS* 3-20 (1998) (describing state of the art treatment designed to reduce recidivism in youth that takes approximately four months).

somehow change. First, many people with psychosis are not capable of recognizing the benefits of medication or the risks of not taking it.¹²³ Second, those who do have such capability may nonetheless resist medication because they know it can have serious side effects, requires long-term maintenance, and is unevenly successful.¹²⁴ Finally, even those who might want medication can have good reasons for not being on it. As one study indicated, most people with mental disorders do not seek treatment because they "do not realize that effective treatments exist,...fear discrimination because of the stigma attached to mental illness[, or are unable to] afford treatment because they lack insurance that would cover it."¹²⁵

In any event, if there are some cases in which people with mental illness could be said to be "on notice" that a failure to seek or maintain treatment might result in a serious crime, there are certainly similar cases involving people with mental retardation and youth. Many people with mental retardation know they have a disorder but deny it rather than seek help.¹²⁶ Juveniles who commit violent crimes have generally been given several opportunities to obtain treatment through previous involvement in the juvenile justice system.¹²⁷ There can be no rational distinction between these groups, or at least no distinction that passes a rational-basis-with-bite test, on the ground that people with mental illness are somehow more accountable for their condition.

C. Dangerousness

In both *Atkins* and *Thompson*, the Court's "independent evaluation" of whether imposition of the death penalty violated the Eighth Amendment focused on the two purposes of punishment already mentioned, retribution and deterrence.¹²⁸ As Justice Scalia pointed out in *Atkins*, there is at least one other purpose of punishment that the imposition of the death penalty might seek to accomplish: (permanent) incapacitation.¹²⁹ And, as indicated earlier, research suggests that it is the perceived

123. A principal symptom of psychosis is "lack of insight" into the nature of one's mental condition. DSM, *supra* note 77, at 279 ("Lack of insight is common and may be one of the best predictors of poor outcome, perhaps because it predisposes the individual to noncompliance with treatment.").

124. See Meltzer & Fatemi, *supra* note 121, at 413-21 (describing complications of psychotropic drugs, including hypertension, muscle spasms, Parkinsonism, seizures, and tardive dyskinesia); Patricia L. Gilbert et al., *Neuroleptic Withdrawal in Schizophrenia Patients: A Review of the Literature*, 52 ARCH. GEN. PSYCHIATRY 173, 182 (1995) ("approximately half of all the patients withdrawn from neuroleptic therapy remained stable without relapse over average follow-up periods of 6.3 to 9.7 months, while, despite neuroleptic maintenance, 15.6 percent patients [sic] relapsed over an average follow-up period of 7.9 months"); Ebrahim M. Gul, *Patient Response to Clozapine in a Forensic Psychiatric Hospital*, 45 HOSP. & COMM. PSYCHIATRY 271 (1994) (finding that thirty percent of forensic patients did not have a "clinically effective response" from administration of clozapine, a new, highly touted anti-psychotic medication).

125. Robert Pear, *Few Seek to Treat Mental Disorders Common, U.S. Says; Many Not Treated*, N.Y. TIMES, Dec. 13, 1999, at A1.

126. Ellis & Luckasson, *supra* note 54, at 430, 439 ("Many mentally retarded individuals expend considerable energy attempting to avoid this stigma, even though proper teaching can equip most retarded persons to tailor their actions to social expectations.").

127. HOWARD N. SNYDER & M. SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT (Juvenile Justice Clearinghouse 1999) (finding that forty percent of males with a violent career and thirty-four percent of females with an antisocial career come into contact with the justice system before age thirteen).

128. *Atkins*, 536 U.S. at 319; *Thompson*, 487 U.S. at 836.

129. 536 U.S. at 350 (Scalia, J., dissenting) ("The Court conveniently ignores a third 'social purpose' of the death penalty—'incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future.'").

dangerousness of the offender, not his or her blameworthiness and not concern about deterrence goals, that is the most influential factor for many involved in making death sentence determinations.¹³⁰ Thus, a final argument for continuing to execute people with mental illness in the wake of *Atkins* and *Thompson* is that they are more dangerous than people with retardation or juveniles.

A first response to this argument is that Justice Scalia's assertion about the relevance of dangerousness in death penalty cases is incorrect, at least when mental disability is at issue. Mental retardation, mental illness, and youth are all universally recognized mitigating factors.¹³¹ Therefore, presumably, they cannot be aggravating factors.¹³² Yet that is precisely what they become when one tries to justify execution on the ground that these conditions make people more dangerous.

Even if incapacitation is a valid consideration in determining the scope of the death penalty for people with mental disability, the claim that people with mental illness are super dangerous is easily debunked. Admittedly, the base rate for violence among the most severely mentally ill is more elevated than the violence base rate for the general population.¹³³ But the more relevant comparison in the death penalty context is between mentally ill and non-disordered offenders, and research indicates that the former group is no more, and probably less, dangerous than the latter.¹³⁴ Most relevant to the equal protection analysis, people with mental illness are no more likely to recidivate than offenders who suffer from mental retardation¹³⁵ and are clearly less likely to reoffend than juvenile offenders.¹³⁶

130. See *supra* text accompanying note 90. See also Aletha Claussen-Schulz et al., *Attitudes, Evidence, Jury Instructions, and Offender Dangerousness: Which Paths Point to Death?* (manuscript in preparation) (finding, in a study using mock jurors, that concerns about future violent conduct accounted for more variance in the sentencing decision than did other aggravating circumstances); Sally Costanzo & Mark Costanzo, *Life or Death Decisions: An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework*, 18 L. & HUM. BEHAV. 151 (1994) (finding, based on interviews of capital sentencing jurors, that jurors tended to spend most of their deliberation time deciding whether the defendant would be violent if not executed).

131. Even before *Atkins*, the Supreme Court had held that mental retardation is a constitutionally mandated mitigating factor. *Penry*, 492 U.S. at 328. The Court has also strongly suggested that the Constitution requires that mental illness and youth be considered in mitigation. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record."). In any event, every state does so. See *supra* note 86; *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

132. I elaborate on this argument in Slobogin, *supra* note 1, at 670. See also *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (stating, in dictum, that it would be constitutionally impermissible to give aggravating effect to factors such as "race, religion or political affiliation or...conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness").

133. See REISNER, SLOBOGIN & RAI, *supra* note 88, at 653-55 (summarizing studies).

134. James Bonta et al., *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta Analysis*, 123 PSYCHOL. BULL. 123 (1998) (meta-analysis finding that the major predictors of recidivism were the same for mentally disordered offenders as for nondisordered offenders, and that psychopathology should be deemphasized as a predictor); Marnie E. Rice & Grant T. Harris, *A Comparison of Criminal Recidivism Among Schizophrenic and Nonschizophrenic Offenders*, 15 INT'L J.L. & PSYCHIATRY 397 (1992) (finding that schizophrenic subjects were less likely to commit offenses upon release than their nonschizophrenic counterparts).

135. Compare *supra* note 134 (regarding data describing recidivism among offenders with mental illness) with *supra* note 54 (regarding data describing recidivism among offenders with mental retardation); Health Evidence Bulls. (Dec. 31, 1999), at <http://hebw.uwcm.ac.uk/learningdisabilities/chapter6.htm> (citing several studies concerning recidivism of "intellectually disabled" offenders and concluding that "[s]tudies have found re-offending rates of untreated offenders of between 40 and 70%....A range of studies have found re-offending rates following treatment to be between 20 and 55% depending on the type of treatment and the offence."); EMILY F. REED, THE

CONCLUSION

A credible Eighth Amendment argument against the execution of people who are mentally ill cannot be made, because only one legislature in a death penalty state has barred such executions. But that fact simply strengthens the equal protection argument. Because murderers with proven significant mental illness at the time of the offense are no more culpable or deterrable, nor any more dangerous, than juvenile murderers or murderers who suffer from mental retardation, the only possible basis for the states' continued willingness to execute members of the first group is the type of "irrational prejudice" against which *Cleburne* inveighed.

Up to this point in this essay, the evidence of such prejudice has been primarily negative in nature, in the sense that it consists of rebutting possible "rational" explanations for continued execution of people with mental illness. But there is plenty of *positive* evidence of irrational prejudice as well. Research about attitudes toward individuals with mental illness strongly suggests that most of us view such people to be abnormally dangerous.¹³⁷ Although, as indicated above, this perception is clearly inaccurate, if held by legislators and jurors bent on ensuring public safety through executions,¹³⁸ it explains both why there is no legislative momentum toward barring their execution and why mental illness, supposedly a mitigating factor, is so highly correlated with death sentences.

These findings also suggest the nature of the irrational prejudice at work, which research from the mammoth Capital Jury Sentencing Project clarifies.¹³⁹ In one aspect of that study, 187 jurors who served on fifty-three capital cases tried in South Carolina between 1988 and 1997 were queried about their emotional reactions to capital offenders.¹⁴⁰ Regression analysis of their responses revealed that, of the eight emotions studied (including fear, sympathy, anger, and disgust), only "fear" of the offender correlated significantly with the final vote on sentence.¹⁴¹ The researchers also found that the most feared type of offender was one perceived to be a

PENRY PENALTY: CAPITAL PUNISHMENT AND OFFENDERS WITH MENTAL RETARDATION 17 (1993) (describing data showing a link between mental retardation and crime).

136. Compare SNYDER & SICKMUND, *supra* note 127, at 62 (finding that, nationally, juveniles committed twenty-seven percent of violent victimizations in the years surveyed) and Dep't Human Services, Victoria, Aust., *Recidivism Among Victorian Juvenile Justice Clients, 1997-2001* 12 (2002), available at <http://www.dhs.vic.gov.au> (Juvenile Justice) (last modified Feb. 13, 2003) (stating that recidivism rate of children ages eleven through sixteen ranges from eighty percent to 40.8 percent) with Henry Steadman et al., *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 ARCH. GEN. PSYCHIATRY 393 (1998) (finding no significant differences between the prevalence of violence by patients with mental illness and by others living in the same neighborhood).

137. See, e.g., Bernice A. Pescosolido et al., *The Public's View of the Competence, Dangerousness, and Need for Legal Coercion of Persons with Mental Health Problems*, 89 AM. J. PUB. HEALTH 1339, 1341 (1999) (reporting that while seventeen percent of a random sample of citizens felt that a "troubled person" was "very likely" or "somewhat likely" to be violent, 33.3 percent said the same of the depressed person, and sixty percent said the same of a person with schizophrenia); Linda Teplin, *The Criminality of the Mentally Ill: A Dangerous Misconception*, 142 AM. J. PSYCHIATRY 593, 597-98 (1985).

138. As noted earlier, see *supra* text accompanying notes 90 and 130, dangerousness seems to be the predominant factor in death penalty decision making.

139. For a description of the Capital Jury Sentencing Project, see William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995).

140. Steven P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000).

141. *Id.* at 64.

“madman” or “vicious like a mad animal.”¹⁴² The type of offender most likely to fit the “madman” category, of course, is one who exhibits symptoms of mental illness at the time of the offense. Even an offender with mental retardation is likely to be less feared and thus less likely to be irrationally sentenced to death than the person with significant mental illness. Indeed, the researchers found that while jurors were “likely to have felt sympathy or pity” for people with both types of disability, they were more likely to be simultaneously “disgusted or repulsed” only by the latter type of defendant.¹⁴³

Now that people with mental retardation cannot be executed, execution of people who have significant mental illness at the time of the offense is difficult to defend on rational grounds, whether the forum is judicial, legislative, or executive.¹⁴⁴ The primary reason such executions continue is a disproportionate fear of people with mental illness. Prohibiting imposition of the death penalty on these people would dramatically highlight the irrationality of that fear.

142. *Id.* at 59-61 (tbls. 8, 9).

143. *Id.* at 56 (tbl. 7).

144. As Connecticut has demonstrated, legislative action is possible. *See supra* note 41. Similarly, state governors, through implementation of executive clemency, can recognize the mitigating effects of mental illness. *See, e.g.,* Elizabeth Rapaport, *Straight Is the Gate: Capital Clemency in the United States from Gregg to Atkins*, 33 N.M. L. REV. 349 (2003) (describing Governor Gilmore's 1999 commutation of the death sentence of Calvin Eugene Swann, who allegedly suffered from schizophrenia at time of offense, *see Swann v. Virginia*, 441 S.E.2d 195, 203 (Va. 1994), and clearly did at time of commutation).