Introduction

A severely mentally ill defendant faces special challenges and considerations at every stage of the criminal process, from investigation through punishment. Such defendants might not fully appreciate their rights during police investigation, for example, and are particularly vulnerable to police pressure that could lead to their waiving these rights or even giving false confessions.\(^1\) The mentally ill may also distrust their own defense counsel or others trying to help them, preventing them from meaningfully participating in their own defense or from pursuing appeals of unfavorable verdicts. At trial, their unusual affect or behavior may be misinterpreted as an indication of guilt or a lack of remorse. From the perspectives of both humanitarianism and penal theory, we must also consider if it is ever justifiable to punish people who may not understand or be fully able to control their actions, or whether their condition should justify more lenient sentencing. Efforts to protect the individual defendant and the fairness of the trial process, however, must be carefully balanced against the need to protect society from potentially dangerous individuals.

These issues are most pronounced in capital trials, where the ultimate, irreversible penalty may be applied, and the criminal activity was extremely serious. The topic is not merely of academic interest either, with an estimated 5-10% of all death row inmates in America thought to be severely mentally ill.\(^2\) Although this is not a new problem, there are significant gaps in the legal protections afforded to severely mentally ill persons facing capital punishment in the U.S., and the law often lacks unified standards across the several states.

Generally, American courts recognize the special legal significance of a criminal defendant’s mental disorder at three points in time: the time of the unlawful conduct (insanity defense), the time of trial and sentencing (competency to stand trial)\(^3\) and, in death penalty cases, the time of execution (competency to be executed). The type of mental impairment necessary to give rise to a legal consequence, the procedures for establishing a mental disorder and the consequences of mental disorders at each of these stages vary considerably. The overview presented in this chapter first briefly introduces some of the issues concerning mental disorders relevant to all criminal cases through analysis of a recent Supreme Court opinion, and then discusses two cases with special significance for the death penalty: *Panetti v. Quarterman*,\(^4\) concerning the

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\(^2\) Mental Health America, *Death Penalty and People with Mental Illness* (available at www.nmha.org/go/position-statements/54 (formerly known as National Mental Health Association).

\(^3\) This includes all important proceedings following the filing of formal criminal charges.

competency of mentally ill individuals on death row to be executed, and Atkins v. Virginia,\(^5\) creating a categorical prohibition on the execution of the mentally retarded.

I. Background: Consideration of Mental Illness in All Criminal Cases

A. The Insanity Defense: Mental Illness at the Time of the Offense as Reducing Criminal Responsibility

The most popularly known method of obtaining legal consideration of defendant’s mental illness in the American criminal justice system is probably the “insanity defense,” also known as the Not Guilty by Reason of Insanity (NGRI) plea, by which a defendant attempts to demonstrate at trial that, although he committed criminal acts, his mental impairment excuses his conduct and he should not bear criminal responsibility for his actions. This defense is based on the belief that a person should only be punished for acts that are the product of his free will, and that a person who cannot understand his own actions or conform his conduct to the law cannot be found morally blameworthy for his actions.

From the perspective of penal theory, an insanity defense is necessary because punishment of the mentally ill would not promote the normal goals of criminal punishment: deterrence, rehabilitation and retribution. A mentally ill person who is truly unable to control his actions, or who lacks the capacity to comprehend the connection between his actions and possible punishment, would not be deterred from committing crimes by any penalty, no matter how extreme. Mentally ill offenders also do not suffer from an ethical defect that lends itself to rehabilitation through punishment and education, but rather suffer from a mental disease that requires medical treatment. Implicit to retribution is the idea that offenders should receive punishment proportionate to the seriousness of their offense and the degree to which they are blameworthy; disproportionate punishment or punishment of those who are not considered blameworthy by reason of mental disability runs the risk of being viewed as unjust or inhumane. Although the insanity defense is actually used in an exceedingly small number of criminal cases,\(^6\) it remains an extremely contentious area of criminal law. In the 1980s, following the controversial acquittal by reason of insanity of failed presidential assassin John Hinkley Jr., many U.S. jurisdictions’ laws were amended to narrow the scope of the insanity defense and have made it increasingly challenging for defendants to use the defense successfully.\(^7\) Today, in all but a handful of jurisdictions, the burden of proving insanity is placed on the defendant,\(^8\) who

\(^6\) Heny F. Fradella, From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era, 18 U. Fla. J.L. & Pub. Pol’y 7, 12 (2007) (insanity defense is used in less than one percent of all felony cases and successful only about twenty-five percent of the time).
\(^8\) Wayne R. LaFave, Criminal Law 45 (5th ed. 2010). The Federal statute, 18 USC §17(b), is typical, saying “The defendant has the burden of proving the defense of insanity by clear and convincing evidence.” In those states that place the burden on the state to prove sanity, an initial minimal showing of insanity is required of the defendant, which then shifts the burden to the state to prove sanity. For example, in West Virginia, courts have held that, “[t]here exists in the trial of an accused a presumption of sanity. However, should the accused offer evidence that he was insane, the presumption of sanity disappears and the burden of proof is on the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time of the offense.” State ex rel. Repass v. Hoke, 2012 WL 2979077, 28 (W. Va. 2012) (unpublished).
usually must provide advance notice to the prosecution of his intent to raise an insanity defense.\(^9\) Courts will often order defendants who intend to use the insanity defense to undergo mandatory evaluation by non-partisan\(^10\) mental health experts,\(^11\) and some jurisdictions empower courts to order defendants to submit to evaluation by prosecution experts when requested by the state.\(^12\) Indigent defendants who seek to plead insanity are constitutionally entitled to have an expert appointed to assist them when their mental health is likely to be an issue at trial.\(^13\)

As a procedural matter, a minority of jurisdictions allow for the separation of trials involving the insanity defense into two distinct phases, first determining the defendant’s guilt or innocence, and if reaching a guilty verdict, then considering the insanity issue.\(^14\) This bifurcation of the factual guilt and insanity questions allows the defendant to first argue innocence without sacrificing the insanity defense, which implicitly concedes guilt, and also prevents possible confusion of the two decisions by the jury.

In keeping with this text’s emphasis on understanding through comparative case-analysis, the case below and the notes that follow attempt to illustrate the ways in which U.S. courts address many of the most controversial issues regarding the insanity defense: defining legal insanity, assigning the standard of proof for the insanity defense, the role of expert testimony in proving insanity, and the disposition of those found legally insane. Unlike most cases included in this book, the following homicide case was not a death penalty case, but it does present the Supreme Court’s most recent discussion of the insanity defense, which applies equally in capital trials and normal criminal prosecutions. The Court’s opinion presents not only a detailed discussion of the various ways that legal insanity is defined and proven across the many states, but also provides a discussion of the relationship between the insanity defense and the *mens rea*, or intent, component of all crimes.

1. **Case and Analysis - Insanity Defense**


a. **Case Facts**

In the early hours of June 21, 2000, Officer Jeffrey Moritz of the Flagstaff Police responded in uniform to complaints that a pickup truck with loud music blaring was circling a residential block. When he located the truck, the officer turned on the emergency lights and siren of his

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\(^9\) See, e.g., Fed. R. Crim. P. 12.2(a) (failure to provide advance notice of intent to use insanity defense may preclude reliance on that defense at trial).

\(^{10}\) See *United States v. Rinchack*, 820 F.2d 1557, 1565 n. 10 (11th Cir. 1987).

\(^{11}\) See, e.g., Fed. R. Crim. P. 12.2(c)(1)(B) (requiring court to order mental examination when insanity defense will be raised and the prosecution so requests). Note that any statements made during the course of such an evaluation are inadmissible for purposes other than proving the mental condition of the defendant. Fed. R. Crim. P. 12.2(c)(4).

\(^{12}\) See, e.g., Cal. Penal Code § 1054.3(b)(1). Granting court’s discretionary authority to order defendant’s to submit to examination by prosecution experts.

\(^{13}\) *Ake v. Oklahoma*, 470 U.S. 68, 76-83 (1985) (expert is provided not only to examine the defendant, but may also assist in understanding and disparaging the testimony of the state’s expert witnesses).

\(^{14}\) See, e.g., Me. Rev. Stat. tit. 17-A, § 40 (Maine offers defendants the option of choosing either a bifurcated or a unified trial on the issues of guilt and insanity, requiring that guilt be tried first in a bifurcated trial).
marked patrol car, which prompted petitioner Eric Clark, the truck’s driver (then 17), to pull over. Officer Moritz got out of the patrol car and told Clark to stay where he was. Less than a minute later, Clark shot the officer, who died soon after but not before calling the police dispatcher for help. Clark ran away on foot but was arrested later that day with gunpowder residue on his hands; the gun that killed the officer was found nearby, stuffed into a knit cap.\(^{15}\)

Defendant Eric Clark was charged with first-degree murder for knowingly or intentionally killing a police officer in the line of duty.\(^{16}\) Rather than contest the evidence at trial, Clark instead argued that he suffered from schizophrenia, and that this should excuse his conduct. Alternatively, he argued that, as a result of his schizophrenia, he was unable to have truly intended to kill a police officer as required to establish this crime. Specifically, Clark presented lay and expert testimony showing that his illness led him to believe, at the time of the shooting, that some of the people around him, including police officers, were not people at all, but aliens impersonating humans, and that these aliens were trying to kill him. Although the prosecution conceded that Clark was schizophrenic, the trial court concluded that the disorder did not prevent him from bearing criminal responsibility. Under existing Arizona precedent, the court further ruled that Clark could not rely on evidence of his mental disease or capacity short of insanity to demonstrate a lack of criminal intent. Clark was found guilty and sentenced to life imprisonment with no possibility of parole for twenty-five years. The conviction was upheld on appeal and Clark appealed to the Supreme Court.

On appeal, Clark presented two major arguments: 1) That the Arizona insanity defense was too restrictive and did not provide constitutionally sufficient protections for mentally ill defendants, and 2) that he had been improperly prevented from presenting expert evidence about his mental illness to demonstrate that he was incapable of forming the requisite level of criminal intent to establish his criminal responsibility.

b. Case Analysis

1. Defense Argument that the Constitution Requires a More Expansive Insanity Defense than That Provided Under Arizona Law

On review in the Supreme Court, Clark argued that the Arizona statute authorizing an insanity defense fell short of Constitutional minimum standards for protecting the rights of mentally ill criminal defendants. The Arizona statute required that a defendant seeking to establish an insanity defense must prove by “clear and convincing evidence” that “at the time of the commission of the criminal act [he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong.”\(^{17}\)

This narrow definition of legal insanity essentially comprises the second prong of what is called the *M’Naghten* standard for legal insanity, which was first established in England in 1843, and is the basis of a majority of U.S. states’ insanity defense rules today. The original phrasing of the *M’Naghten* standard reads:

… to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused 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.\(^{18}\)

While the U.S. Constitution has no articles directly addressing the rights of mentally ill defendants and does not explicitly require an insanity defense, Clark argued that through years of practice and societal reliance, an affirmative defense of insanity had become a fundamental part of American criminal procedure and was now part of the Due Process of Law guaranteed by the Fifth and Fourteenth Amendments to the Constitution. Moreover, he contended that due process requires that a broader definition of “insanity” be used than that found in the Arizona statute’s “moral incapacity test,” which required only that a defendant be unable to understand the wrongness of his actions. At the very least, Clark argued, the “cognitive” portion of the \textit{M’Naghten} test, concerning whether or not the defendant understood the nature and quality of his acts, must also be included.

\section*{2. The Supreme Court’s Review of the Arizona Statute and Consideration of Constitutional Requirements for state Insanity Defenses}

- State Differences in Definitions of Legal Insanity

Consideration of Clark’s argument provided the Supreme Court with an opportunity to discuss whether a consensus on the insanity defense had been established amongst the States, an essential first step in deciding whether the defense had become such standard practice that it is now considered a fundamental principle of fairness and, therefore, part of constitutionally guaranteed due process. The Court reviewed the legal definitions of insanity used across the country and found that while some variation or combination of four major tests could be found in almost all states, there was no single unified standard for the circumstances under which mental illnesses should excuse criminal conduct:

Even a cursory examination of the traditional Anglo-American approaches to insanity reveals significant differences among them, with four traditional strains variously combined to yield a diversity of American standards. The main variants are the cognitive incapacity, the moral incapacity, the volitional incapacity, and the product-of-mental-illness tests. The first two emanate from the alternatives stated in the \textit{M’Naghten} rule. The volitional incapacity or irresistible-impulse test, which surfaced over two centuries ago (first in England, then in this country), asks whether a person was so lacking in volition due to a mental defect or illness that he could not have controlled his actions. And the product-of-mental-illness test was used as early as 1870, and simply asks whether a person’s action was a product of a mental disease or defect. Seventeen States and the Federal Government have adopted a recognizable version of the \textit{M’Naghten} test with both its cognitive incapacity and moral incapacity components. One State has adopted

only *M’Naghten’s* cognitive incapacity test, and 10 (including Arizona) have adopted the moral incapacity test alone. Fourteen jurisdictions, inspired by the Model Penal Code, have in place an amalgam of the volitional incapacity test and some variant of the moral incapacity test, satisfaction of either (generally by showing a defendant’s substantial lack of capacity) being enough to excuse. Three States combine a full *M’Naghten* test with a volitional incapacity formula. And New Hampshire alone stands by the product-of-mental-illness test. [...] Finally, four States have no affirmative insanity defense [...]19

- **State Differences in the Effect of a Successful Insanity Defense**

In addition to recognizing the wide variation in state tests for determining legal insanity, the Court also noted that states differ in their treatment of those found to have been mentally ill at the time of the offense. In most states, a successful insanity defense results in a verdict of Not Guilty by Reason of Insanity (NGRI), which prohibits conviction and punishment. A defendant found NGRI may instead be placed in compulsory medical treatment, either automatically or at the discretion of the judge following an initial hearing, until he is deemed well enough to safely reenter society. This determination is usually made at periodic legal hearings to reassess the acquittee’s mental state, and he must be released unless found to still be both mentally ill and a continued danger to others or society.20 An insanity acquittee may permissibly bear the burden of proving that he is now sane or no longer dangerous, and the Supreme Court has held that the period of compulsory treatment may constitutionally be indefinite, even if it ultimately extends beyond the maximum possible prison sentence for the alleged crime.21

Some states have replaced or supplemented the NGRI verdict with a verdict of Guilty Except Insane (or Guilty but Mentally Ill, GBMI), after which the defendant is punished just as if found guilty, but must receive a mental health evaluation and treatment as deemed necessary by medical personnel, possibly including detention within a psychiatric facility.22 The instructions for reaching such a verdict generally state that it is appropriate where factfinders believe that a defendant is mentally ill, but not to a sufficient degree, under the relevant state insanity standard, to relieve him of criminal responsibility. Again, a GBMI verdict does not automatically reduce the punishment of the convict in any way, leading some to argue that the GBMI verdict misleads jurors who mistakenly view it as a compromise between acquittal and a full finding of guilt and criminal responsibility.23 Even if a GBMI convict’s mental illness is cured during his

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22 Some state statutes require that treatment be provided to those found GBMI, but the decision of what treatment, if any, is to be provided, is generally within the discretion of the prison medical officials. See Linda C. Fentiman, “Guilty But Mentally Ill”: The Real Verdict is Guilty, 26 B.C. L. Rev. 601, 621-635 (1985) (available at http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1325&context=lawfaculty). Courts in some jurisdictions have found that the GBMI verdict does not create a right to treatment beyond the duty of medical care owed to all prisoners. See, e.g., People v. Manning, 863 N.E. 2d 289, 296 (Ill. 2007) (“pleading—or being adjudicated—guilty but mentally ill vests a prisoner with no right that he or she does not otherwise have as a result of being imprisoned.”)
23 Fentiman, at 635- 641.
imprisonment, he must complete the remainder of his prison sentence, and those found GBMI are still eligible for the death penalty.  

Given the lack of a single, universally accepted standard for determining and addressing legal insanity, the Supreme Court in Clark held that no fundamental principles regarding the insanity defense had yet emerged. Therefore, constitutional due process cannot be said to limit states’ selection of their own standards for determining when mental illness precludes criminal responsibility, and Clark’s argument was rejected.

3. Defendant’s Argument that Expert Evidence on Mental Illness Must be Permitted on Both the Issue of Insanity and on Mens Rea

The second part of Clark’s challenge to Arizona’s laws questioned the extent to which a state government may fairly limit the use and consideration of some types of expert psychological testimony. In order to find a person guilty of any offense it must be shown not only that the accused committed the charged acts (actus reus) but also that he acted with the requisite mental intent, or mens rea. The Arizona courts had limited Clark’s use of expert psychological testimony to proving the insanity defense, and Clark argued that this meant he was unfairly prevented from offering expert evidence on his mental illness to prove his incapacity to form the criminal intent required by the Arizona murder law, specifically, that he “knowingly or intentionally” killed a police officer. If he could prove, for example, that he believed all police officers were actually aliens in disguise, he could not be said to have “knowingly” killed a police officer.

- Distinguishing Mens Rea and the Insanity Defense

A rule established in the Arizona case of State v. Mott (the Mott Rule) held that mental health experts’ professional opinions on defendants’ mental capacity could be considered only as proof for an insanity defense, and could not be used to disprove the mens rea element of a crime. In deciding whether such a rule was constitutional, the U.S. Supreme Court in Clark first acknowledged that these different uses of expert testimony on mental illness implicate different rights and evidentiary standards.

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25 The Court also noted that the “moral incapacity” test essentially encompassed and went beyond the “cognitive incapacity” test, in that any defendant able to prove that he was unable to appreciate the nature of his actions would also have proven that he did not understand the “wrongness” of those actions. As such, the Arizona Insanity law did not truly reduce the scope of the full M’Naghten test, a long-standing and widely accepted standard.
27 The U.S. Supreme Court found that the Mott Rule only prevented “opinion” evidence, which would take the form of an expert’s professional diagnosis or estimation of defendant’s mental illness and capacity. The Court went to great pains to distinguish “observation” testimony - that which might be offered by any witnesses, including experts, based on their own sensory perceptions, which would be admissible on the issue of mens rea even under the Mott decision. The questions of whether “observation” testimony could be constitutionally excluded on the issue of mens rea, or whether the Arizona courts had failed to make this distinction at trial, were not before the Court.
“An insanity rule gives a defendant already found guilty the opportunity to excuse his conduct by showing he was insane when he acted, that is, that he did not have the mental capacity for conventional guilt and criminal responsibility.”28 There is a general *presumption of sanity* in U.S. criminal law, which means that the prosecution need not prove the defendant’s mental capacity in every case, and that the burden of proving an insanity defense may be fairly placed on the defendant. States are also free to choose the standard of proof necessary to establish insanity, and some have allowed that defendants need only raise doubt as to their sanity to shift the burden to the prosecution (to prove sanity) while, at the other extreme, states like Arizona require the defense to put forth “clear and convincing evidence” of insanity to prove the defense. *Mens rea*, by contrast, is an essential element of every crime, and, like the defendant’s criminal conduct itself, it must be proven by the prosecution “beyond a reasonable doubt” before a defendant can be found guilty at all. The four states which have abolished the insanity defense now consider evidence of mental illness only in the context of disproving the *mens rea* component of the offense.29

- States May Limit the Use of Defense Evidence for Legitimate Purposes

The Court in *Clark* recognized that defendants generally have the right to present any favorable evidence on all elements that must be proven to convict them, but explained that this right is not absolute:

> “While the Constitution … prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.”30

Following this logic, the court continued:

> And if evidence may be kept out entirely, its consideration may be subject to limitation, … [Arizona] law says that evidence of mental disease and incapacity may be introduced and considered, and if sufficiently forceful to satisfy the defendant’s burden of proof under the insanity rule it will displace the presumption of sanity and excuse from criminal responsibility. But mental-disease and capacity evidence may be considered only for its bearing on the insanity defense, and it will avail a defendant only if it is persuasive enough to satisfy the defendant’s burden as defined by the terms of that defense. The mental-disease and capacity evidence is thus being channeled or restricted to one issue and given effect only if the defendant carries the burden to convince the factfinder of insanity; the evidence is not being excluded entirely, and the question is whether

28 *Clark v. Arizona*, at 773.
29 *Id.* at 751.
reasons for requiring it to be channeled and restricted are good enough to satisfy the standard of fundamental fairness that due process requires.\textsuperscript{31}

The Court found two reasons sufficient to justify Arizona’s limiting the use of expert opinion evidence on mental illness to proving the insanity defense and forbidding its use in arguing mens rea. First, allowing such evidence to be used for mens rea would undermine the state policy of placing the burden of proving an insanity defense on the defendant. Under Arizona’s insanity defense, the defendant had to prove his “moral incapacity” (the inability to know his actions were wrong) by clear and convincing evidence to counter a general presumption of sanity. By contrast, mens rea is an element of the crime that must always be proven by the prosecution beyond a reasonable doubt, so the defendant need only raise some doubt as to the existence of the required level of intent to defeat the prosecution’s case. As the same expert opinion evidence would likely be presented on both of these issues, essentially creating two standards for evaluating the same evidence, it might confuse the jury, and undermine the high burden the state had chosen to place on defendants seeking to prove an insanity defense.

The Court noted, however, that the state purpose in protecting its insanity defense policy would not alone suffice as a basis for restricting defendants’ right to present evidence on the mens rea element of the crime, because it does not address the distinct purposes of the evidence— that insanity excuses guilt, while lack of mens rea disproves guilt entirely. Given the differences between the insanity and mens rea questions, defendants should generally be allowed to present evidence on both.

- Potential Problems with Expert Psychological Testimony

Arizona’s second ground for limiting the use of evidence was that expert opinion in the form of a diagnosis or an estimate of a defendant’s mental capacity might unduly confuse or mislead a factfinder deciding the mens rea issue. First, diagnoses of mental disorders sound very definite and authoritative to laypersons, but conceal underlying disagreements in the medical community as to what constitutes a disorder and what symptoms are reliably associated with a disorder. Simply put, even medical diagnoses of mental illness are actually subjective and shifting, but can sound absolute when coming from a doctor. Second, because the legal questions of mens rea and insanity are quite different from the medical questions usually confronting a mental health professional, the expert is in many ways no more qualified than a layperson to determine the ultimate legal issues (i.e.: the defendant’s ability to understand the wrongfulness of his actions, or his degree of intentionality in committing a crime), but may nonetheless be given more credence due to an expert’s presumed authority. The court quoted the American Psychiatric Association’s own statement on this issue:

“When … ‘ultimate issue’ questions are formulated by the law and put to the expert witness who must then say ‘yea’ or ‘nay,’ then the expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the probable relationship between medical concepts and legal or moral constructs

\textsuperscript{31} Clark v. Arizona, at 770-71
such as free will. These impermissible leaps in logic made by expert witnesses confuse the jury.”

Given these important concerns, the court found that it was permissible under due process fairness standards to limit expert psychiatric testimony to the issue of the insanity defense even though it limited defendants’ ability to challenge an important part of the alleged offense.

c. Questions and Comments on the Insanity Defense

1. Relationship of Mental Illness and Legal Insanity: For purposes of the insanity defense, the question of whether a mental disorder affects the defendant’s capacity for criminal culpability is a legal question, separate from the medical diagnosis of a mental disorder. Thus, even though prosecutors agreed that Clark suffered from schizophrenia, this alone was not enough to establish an insanity defense under Arizona’s law, which used a “moral capacity” test, asking whether Clark understood the “wrongness” of his actions. Even where a state uses the broader “product of a mental disorder” test, a defendant must still establish not only that he suffers from a mental illness, but also that his criminal conduct resulted from that disorder.

   a. In the 1980’s, as many jurisdictions further restricted their insanity defense rules, federal insanity defense legislation added a requirement that the defendant’s reduced capacity must result from a “severe” mental disorder. How should one understand what mental disorders are severe?

   b. Should the tests for mental illness be more medically based and consider certain mental illnesses, such as schizophrenia, as per se proof of insanity? The Court notes that medical understanding of mental illness is a contentious subject, with experts disagreeing on the diagnoses and symptoms of many disorders, but are these diagnoses less clear than the legal tests used by the states? Is it important to leave this determination with the jury in all situations?

2. What is the role, then, of expert psychiatric or psychological testimony in establishing an insanity defense? Should experts be limited to diagnosing the patient and explaining the symptoms of the medical diagnosis to the court or should they directly offer an opinion on the “ultimate issue” as to whether a defendant’s insanity defense should succeed? Consider whether ordinary medical personnel are likely to understand a legal standard, and whether their opinions will be unduly influential.

   a. Do the reasons that the court finds for justifying Arizona’s limited use of psychological evidence in this case also suggest that expert evidence might always carry undue influence, no matter how it is used? How can this problem be minimized? Will adversarial proceedings at which both sides present conflicting expert testimony


33 18 U.S.C. § 17(a).
and challenge the other party’s expert witnesses help prevent the jury’s blind following of a single expert? Will such a hearing further confuse the factfinder, who lacks expert medical knowledge?

3. **Knowing Right from Wrong:** The *M’Naghten* test mentioned above is the basis of over half of states’ insanity defense laws, although many, like Arizona, use only the “moral incapacity” prong, which asks whether the defendant knew the wrongness of his acts, to determine insanity. What does it mean for someone to understand their actions were wrong? Is appreciating moral wrongness the same as appreciating legal wrongness or illegality?

   a. What factors might a judge look to in determining whether a person understands his actions were wrong? Does evidence that a defendant attempted to evade police always mean that he understood that his actions were wrong, and that he is thus not insane? Do displays of remorse indicate that a defendant understood his actions were wrong? If so, might defendants seeking an insanity defense be discouraged from expressing remorse in order to establish the defense?

4. **What should the consequences be when a defendant is found to be too mentally ill to bear criminal responsibility?** Most states require that defendants acquitted based on an insanity defense be subjected to involuntary commitment until they are deemed safe to return to society or are no longer mentally ill, but what if the defendant is found to have suffered from only a temporary insanity which affected him at the time of the crime, but by the time of trial he is already well enough to return to society? Usually, an initial period of observation is required for all insanity acquittees before they may establish their sanity and become eligible for release.

5. **Mental Illness as Diminished Capacity.** Although it is quite difficult to successfully prove an insanity defense, and even persons diagnosed with serious mental disorders, like Clark, may be unable to establish legal insanity, capital defendants have another opportunity to present evidence of their mental illness—in the penalty phase. As discussed in earlier chapters of this text, the Constitution has been interpreted as requiring that capital defendants be provided an opportunity to present any relevant mitigating evidence at sentencing. How this evidence is evaluated, however, will ultimately depend on the death penalty scheme of the state hearing the case. Additionally, in at least one state, the courts have found that where there has been a verdict of Guilty but Mentally Ill, the defendant is still eligible for the death penalty, but the mental illness finding must be considered a mitigating factor as a matter of law.34

Unfortunately, there is some evidence that juries may do exactly the opposite and sometimes treat mental illness as an aggravating factor. This may be true for several reasons. First, they might conclude that defendants’ mental illness increases the likelihood that they will commit future crimes and that they remain a danger to society.35 Juries might also perceive the

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defendant’s unusual affect as a lack of remorse for his offenses. Finally, they may even fear reprisals if the defendant is not put to death and is somehow ultimately released from prison.

**B. Mental Illness at the Time of Trial: Competency to Proceed, Plead Guilty, Waive Counsel and Represent Oneself in all Criminal Trials**

Fundamental to the adversarial system is a prohibition on trying a defendant who lacks the capacity to understand the nature and object of proceedings against him, and provisions allowing for the delay of trial because a defendant is incompetent to proceed have long been a part of legal due process. The English common law called for a stay of arraignment or trial if the defendant was “mad” so as to be unable to cautiously evaluate his plea or prepare his own defense. Diverse rationales support such a rule.

First, it ensures the accuracy of the proceedings by requiring that the defendant be fully capable of exercising his rights to verify evidence by questioning witnesses, examining evidence and testifying on his own behalf. Second, it ensures fairness, by requiring that the defendant be able to protect his own interests. Third, it maintains the dignity of the courts by avoiding situations where a defendant who is unable to conform his behavior to a courtroom setting disrupts the proceedings with bizarre or inappropriate conduct. Finally, many of the goals of our penal system can only be served when the defendant is aware of why he is being punished, and this requires his knowing participation in the trial process.

The modern standard for competency to stand trial was first articulated by the U.S. Supreme Court in 1960, when it held that the “test must be whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him.” Conviction of a defendant who was legally incompetent at trial, or failure to evaluate his competence when it is sufficiently brought into question, is a violation of his constitutional right to a fair trial.

One can immediately see that the standard for competency is quite different from any of those used in determining the merits of an insanity defense. Insanity is concerned with responsibility, while competence relates to the defendant’s functional ability to understand the proceedings against him. Rather than question the defendant’s moral, cognitive or volitional capacities at the time of the offense, the competency standard asks only whether a defendant is currently able to meaningfully participate in and prepare for his own defense at legal proceedings. It is thus possible that someone who is currently suffering from a severe mental illness that leaves him unable to understand the wrongness of his actions or makes him dangerous to society, could still

36 Sundby, at 1168-69.
40 Id., citing 4 William Blackstone, Commentaries *24.
43 See Drope v. Missouri, at 172-83.
be quite competent to stand trial. It is also possible that someone who understood the wrongness of his actions at the time of an offense might not be competent to stand trial.

While the standard for competency to stand trial may be more functional in its focus than the insanity tests, it is still quite vague and difficult to put into operation. How should one understand or assess “sufficient present ability to consult with his lawyer” or “rational as well as factual understanding”? While competency evaluations will ultimately depend on a specific case’s facts, case law and individual jurisdictions’ statutes generally require that a defendant be able to understand the charges against him, the possible verdicts and the defenses available to him. Another critical issue for competency is a defendant’s ability to relate relevant facts to his attorney and critique witness testimony, as well as to comport himself in the courtroom. Memory loss alone, however, even relating to the facts of the case, will usually not result in an immediate finding of incompetency if the defendant’s facilities are otherwise intact and he can generally follow the proceedings against him. As for cooperating with his attorney, a competent defendant need not be able to plan his own legal strategy, but should be able to make simple choices between clearly explained alternatives. Great emphasis is placed upon a defendant’s ability to understand what rights or options are sacrificed in choosing a defense strategy.

The competency issue is raised much more frequently than the insanity defense, with perhaps more than 60,000 evaluations being conducted annually in the U.S., or an estimated 3-8% of all felony defendants being referred for evaluation. Competency inquiries are most frequently initiated by the defense attorney, but may also be raised by the prosecution or by the court itself. The Supreme Court has held that the competency issue must be raised by the court if there exists sufficient doubt as to the defendant’s competence. Such doubt might be created by a defendant’s irrational behavior, his demeanor at trial, his prior medical history, or other evidence presented by either side requesting a competence hearing. Because a defendant must be competent throughout the entire course of proceedings, the issue of competence can be raised at any time during the criminal process, although it is usually considered before trial. Even a defendant already found competent to stand trial may become incompetent during the course of trial, and courts should remain alert to this possibility and allow re-examination as necessary. The standard for assessing competence, regardless of whether a defendant seeks to defend himself at trial or plead guilty and forgo his right to trial, is the same.

This is also the standard used in determining if the defendant is competent to waive his right to

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44 40 Am. Jur. Proof of Facts 2d 171; Defendant’s Competency to Stand Trial §5.
45 See, e.g., State v. Snyder, 98-1078 (La. 04/14/99); 750 So.2d 832.
46 See 46 A.L.R. 3d 544 Amnesia as affecting capacity to commit crime or stand trial §§ 4, 7 for list of cases from various U.S. jurisdictions where it was held that amnesia did not render the defendant unable to receive a fair trial, either per se, or on the specific facts of the case.
48 State v. Odenbaugh, 82 So. 3d 215, 228 (La. 2011).
50 Drope v. Missourit, at 180-82.
51 Id.
52 Id. at 181.
counsel, but if he seeks to represent himself at trial, a higher level of competency may be required and states may insist upon representation by counsel of those who are competent to stand trial, but whose mental illness makes them unable to navigate trial proceedings by themselves.\textsuperscript{54}

The consequences of a determination that a defendant is incompetent to stand trial are also quite different from those of a finding of legal insanity.\textsuperscript{55} Unlike insanity, which concerns the defendant’s capacity at the time of the offense, incompetence to stand trial questions the defendant’s present ability to understand court proceedings, and it is thus possible that a defendant’s competence might be restored, allowing him to be tried at a later date. In light of this and the government’s interest in bringing an accused to trial, the law has long allowed the government to commit an incompetent defendant to custody in order to render him competent to stand trial. To prevent this type of treatment from becoming its own form of pre-trial punishment, the Constitution requires that defendants only be held for a reasonable time necessary to determine whether there is a substantial probability that he will attain competency, and that their treatment must be aimed at actively working towards rehabilitating them for trial.\textsuperscript{56}

A person found incompetent to proceed under the federal law’s competency scheme must be transferred to a suitable treatment facility.\textsuperscript{57} This initial hospitalization seeks “to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward.”\textsuperscript{58} The evaluation hospitalization is limited to a reasonable period necessary to make the evaluation and must under no circumstances exceed four months.\textsuperscript{59} If after this period, the court finds that there is a substantial probability that the defendant will attain capacity required for proceedings to go forward, it may authorize an additional reasonable period of treatment.\textsuperscript{60} If at any time after a determination of incompetency the director of the treatment facility determines that the defendant is now competent to stand trial, he must inform the court which will hold a new hearing on defendant’s competence.\textsuperscript{61} If after the authorized treatment period, it is found likely that a defendant will never be well enough to stand trial and the state wishes to continue holding him in compulsory treatment, the state must follow the quite demanding procedures for involuntary civil commitment under the controlling law.\textsuperscript{62}

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\textsuperscript{55} It should be noted that a determination of incompetency may be subject to appeal. \textit{United States v. Friedman}, 366 F.3d 975 (9th Cir. 2004).
\textsuperscript{57} 18 U.S.C. §§ 4241(d), 4247(a)(2). The federal law is flexible in determining what facility might be suitable, clarifying only that the defendant shall be committed to the “custody of the Attorney General” for transfer to “a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant.”
\textsuperscript{58} 18 U.S.C. § 4241(d)(1).
\textsuperscript{59} Id.
\textsuperscript{60} 18 U.S.C. § 4241(d)(2); this additional reasonable period of confinement must end if the defendant either attains competency or if the “pending charges against him are disposed of according to law.”
\textsuperscript{61} 18 U.S.C. § 4241(e).
\textsuperscript{62} Id.; The federal law at 18 U.S.C. § 4246(d) requires a showing at hearing, by clear and convincing evidence, that the defendant’s release would create a substantial likelihood of bodily injury to another person or serious damage to another’s property. Involuntary civil commitment generally requires a showing by clear and convincing evidence, see \textit{Addington v. Texas}, 441 U.S. 418, 423–27 (1979) that as a result of an individual’s mental illness, they pose a substantial risk of dangerousness to themselves or others, including being unable care for themselves even with available assistance. \textit{O’Connor v. Donaldson}, 422 U.S. 563, 576 (1975).
\end{flushleft}
In some situations, the Constitution allows that a defendant’s competency may be restored through the involuntary administration of medication. The use of compulsory medication, solely for the purpose of restoring trial competence, however, is limited to rare circumstances. The Supreme Court created a four part standard for considering when compulsory medication may be appropriate: 1) there must be an important governmental interest (such as bringing defendant to trial for a serious crime), 2) the administration of drugs is substantially likely to render the defendant competent (and unlikely to have side effects that obstruct his access to a fair trial), 3) there are no less intrusive methods by which to achieve the same results, and 4) the use of these drugs is medically appropriate. The Court has also noted, however, that where there are other purposes in medicating the defendant, such as when it is essential to reducing his dangerousness to himself or others, a less rigorous analysis might be necessary, though such treatment must always be medically appropriate.

While capital defendants, like any other criminal defendants, may argue that they are incompetent to proceed with trial, there is no special standard used in capital cases. The generally low standard for competence means that most capital defendants, even those clearly suffering from mental illness, will eventually be found competent to proceed with trial.

II. Considerations of Mental Illness Unique to Death Penalty Cases

A. Mental Illness at the time of Execution: Competency to be Executed

One type of competency issue unique to capital cases involves consideration of a death row inmate’s competence to be put to death. In the 1986 case of Ford v. Wainwright, the Supreme Court first clearly stated that the mental illness of some death row convicts makes it manifestly cruel and unconstitutional to carry out a death sentence against them:

[W]e may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life ... Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment [to the U.S. Constitution] prohibits a State from carrying out a sentence of death upon a prisoner who is insane.

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64 Id. at 180-81.
67 Id. at 409-10 (1986).
The *Ford* decision, however, neither articulated a clear rationale for this prohibition nor created a clear standard for when a convict was so “insane” that the death penalty was forbidden. The quote above indicates that a defendant must understand why he is being punished and be able to comprehend and accept his fate, but lower courts were left without much guidance as to how to make this determination. The Court instead only indicated that the state procedure under review was unacceptable because it 1) allowed executive branch actors to determine competency,68 2) did not provide the defendant an opportunity to offer materials supporting his incompetence69 and 3) denied the defendant an opportunity to challenge the state’s expert evidence establishing his competency.70 Further guidance was recently offered by the Supreme Court in the case of *Panetti v. Quarterman*, which interpreted and refined the *Ford* holding, but still left many questions unanswered.

1. **Case and Analysis – Competence to be Executed**


a. **Case Facts**

On a morning in 1992 petitioner [Panetti] awoke before dawn, dressed in camouflage, and drove to the home of his estranged wife’s parents. Breaking the front-door lock, he entered the house and, in front of his wife and daughter, shot and killed his wife’s mother and father. He took his wife and daughter hostage for the night before surrendering to police.71

At his trial in 1995, Panetti sought to represent himself. The court felt there was a risk that he was not competent to do so, and ordered a competency evaluation which revealed that Panetti had a decade long history of fragmented personality, delusions, and hallucinations which had frequently resulted in hospitalization. In Panetti’s persistent delusions, he envisioned himself as part of a spiritual battle between godly and satanic forces, causing him to behave in unpredictable ways. He had periodically been on medication which helped to reduce these symptoms, but had stopped taking it prior to trial. The trial court nonetheless found that Panetti was both competent to stand trial and to represent himself (although standby counsel was appointed). Yet at trial, Panetti’s affect was bizarre, his questioning of witnesses was incomprehensible, his demeanor was sometimes trance-like and he clearly frightened some of the jurors.72 Following trial the jury convicted, rejecting an attempted insanity defense, and sentenced Panetti to death.

Less than two months later, Panetti was found incompetent to waive his right to counsel in pursuit of further appeals. With the assistance of newly appointed counsel and following further

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69 Id. at 413-14.
70 *Ford v. Wainwright*, at 415.
state court proceedings, the issue of Panetti’s competence to be executed became the subject of an appeal to the federal court system that eventually made its way to the Supreme Court.

b. Case Analysis

The Supreme Court considered Panetti’s claim from both a procedural and a substantive perspective. Procedurally, it asked what type of process was due to someone already convicted and sentenced to death at trial, who later claims that they are incompetent to be executed. The court then considered what standard of competence was actually required before an execution may be carried out.

1. What procedures are required to determine the competency of a convicted felon before he may be executed?

Quoting precedent from the Ford case mentioned above, the Court held that, “Once a prisoner seeking a stay of execution has made ‘a substantial threshold showing of insanity,’ the protection afforded by procedural due process includes a ‘fair hearing’ in accord with fundamental fairness. This protection means a prisoner must be accorded an ‘opportunity to be heard,’ though ‘a constitutionally acceptable procedure may be far less formal than a trial.’”73 This means that because the inmate has already been convicted and is no longer presumed innocent, he is owed fewer or less stringent procedural protections than a criminal defendant, but the constitutional issue of his fitness for execution must still be fully and fairly explored.

This mere “opportunity to be heard” means that while discovery, cross-examination of witnesses, and other formal trial procedures might not be constitutionally required in such hearings, certain basic requirements of due process must still be met. “These basic requirements include an opportunity to submit evidence and argument from the prisoner’s counsel, including expert psychiatric evidence that may differ from the State’s own psychiatric examination.”74 As the Court had said in Ford, failure to allow a person facing the death penalty to present his own psychiatric evidence on the issue of competency to be executed “invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State’s examinations.”75

The Court found that after Panetti had made the required, “substantial showing of insanity” in his motion to reconsider the issue, the State courts were then obligated to provide him with an adequate opportunity to present his case:

The state court failed to provide petitioner with a constitutionally adequate opportunity to be heard. After a prisoner has made the requisite threshold showing, Ford requires, at a minimum, that a court allow a prisoner’s counsel the opportunity to make an adequate response to evidence solicited by the state court. In petitioner’s case this meant an opportunity to submit psychiatric evidence as a

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73 Panetti v. Quarterman. at 949.
74 Id. at 949, 50.
75 Id. at 949.
counterweight to the report filed by the court-appointed experts. Yet petitioner failed to receive even this rudimentary process.\textsuperscript{76}

Because the State’s failure to provide even this minimal level of process already amounted to a constitutional violation, the Court declined to consider whether further formal processes might also be required in other cases.

2. \textit{What Substantive Standard is Used to Determine Whether a Prisoner Sentenced to Death is Competent to be Executed?}

- On the proper understanding of the \textit{Ford} standard

Panetti’s appeal to the federal courts also reopened the substantive question of what standard should be applied in determining whether someone is competent to be executed. The circuit court reviewing the case had applied a test for competence based on its understanding of the rule set forth in \textit{Ford}, that allowed execution to proceed if the prisoner was aware: 1) that he was going to be executed, and 2) of why he was going to be executed. On appeal to the Supreme Court, Panetti challenged the adequacy of this test as applied to his case.

There was little controversy that Panetti was aware that he was being put to death, and seemed to fully understand what this meant, so the first part of this test was generally uncontroversial. As to the second portion, however, while Panetti acknowledged that the state’s purported reason for executing him was the murder of his in-laws, he repeatedly stated that he believed this was only an excuse, and that he was actually being killed in the service of demonic forces so as to prevent him from preaching the gospel. The circuit court had found that Panetti’s ability to identify the state’s reason for executing him demonstrated sufficient competency to be executed under its test, even if he actually held irrational beliefs, based on schizophrenic delusions, as to the real reason for his execution.

The Supreme Court rejected the circuit court’s application of its test as a misunderstanding of \textit{Ford}, finding that it was too concerned with Panetti’s factual knowledge, as opposed to considering his subjective, rational understanding of the situation he faced. The Court relied on expert psychological testimony suggesting that some mentally ill persons may harbor severe delusions about the world around them even while maintaining seemingly normal cognitive and reasoning capacity. This might make it possible for such persons to interact normally and recite facts about the world around them while still laboring under severe delusions that prevent a rational understanding. Panetti may thus have been able to identify or articulate his wrongful conduct, the state’s announced reasons for wanting to execute him, and the punishment awaiting him, but, as a result of his mental illness, still have believed that the stated reasons for his punishment were lies, and that he was actually being punished for reasons totally unrelated to his offense. Under the circuit court test, Panetti’s rational understanding of the situation was irrelevant.

\textsuperscript{76} \textit{Panetti v. Quarterman}, at 952.
The Supreme Court summarized the failings of the circuit court test as follows:

Circuit precedent required the District Court to disregard evidence of psychological dysfunction that, in the words of the judge, may have resulted in petitioner’s “fundamental failure to appreciate the connection between the petitioner’s crime and his execution.” To refuse to consider evidence of this nature is to mistake Ford’s holding and its logic. Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose. It is therefore error to derive from Ford, and the substantive standard for incompetency its opinions broadly identify, a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted.77

3. The Rationale for Considering Prisoners’ Delusional Beliefs as Part of Competency to be Executed

To help illuminate the relevancy of evidence of severe delusions to the competency determination, the Court went on to clarify the reasons why the execution of a person like Panetti would not serve the purposes of punishment:

Explaining the prohibition against executing a prisoner who has lost his sanity, [the Ford case] set forth various rationales, including recognition that “the execution of an insane person simply offends humanity,” that it “provides no example to others,” that “it is uncharitable to dispatch an offender into another world, when he is not of a capacity to fit himself for it,” that “madness is its own punishment,” and that executing an insane person serves no retributive purpose.

Considering the last—whether retribution is served—it might be said that capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime and to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed. The potential for a prisoner’s recognition of the severity of the offense and the objective of community vindication are called in question, however, if the prisoner’s mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole. This problem is not necessarily overcome once the test set forth by the Court of Appeals is met. And under a similar logic the other rationales set forth by Ford fail to align with the distinctions drawn by the Court of Appeals.78

77 Panetti v. Quarterman, at 960.
78 Id. at 958-59.
The Court cautioned, however, that a prisoner was not necessarily incompetent simply because he failed to accept the connection between his acts and his punishment. The lack of understanding must be the result of a mental disorder that prevents the prisoner from having a sensible understanding of the crime and the world around him. “Someone who is condemned to death for an atrocious murder may be so callous as to be unrepentant; so self-centered and devoid of compassion as to lack all sense of guilt; so adept in transferring blame to others as to be considered, at least in the colloquial sense, to be out of touch with reality.”79 From a layman’s perspective, such persons would be clearly abnormal or irrational, but only when a mental disorder creates an impediment to their understanding of reality is a stay of their execution justified.

Having decided that evidence of delusions such as that presented by Panetti was relevant to the decision of his competence to be executed, the Court returned the case to the district court to determine whether the evidence was persuasive and probative under these standards.

c. Questions on Competence to be Executed:

1. In considering what procedures were necessary for evaluating a prisoner’s competency to be executed, the Court put great weight on the prisoner’s right to present his own expert’s evaluation of his mental state. Given the potential for bias in experts that regularly work with police and prosecutors and are hired by the government, this seems like a valid way to protect the prisoner’s rights. Yet, how can judges neutrally evaluate the credibility of conflicting psychological testimony, given their own lack of expertise in this area? Might having conflicting expert testimony increase arbitrariness, as judges will presumably have expert testimony supporting whatever conclusion they reach?

2. The Court declined to consider whether more formal trial procedures such as cross-examination and discovery of evidence were required at hearings to determine whether a prisoner was competent to be executed. The court only held that prisoners should have an opportunity to present evidence and challenge state evidence on this issue. Do you think it is necessary to have more involved procedures? Would the cost in judicial resources be justified by the increased transparency and fairness that might result? Given that the prisoner faces the death penalty, should we always err on the side of further procedures in capital cases?

3. The Court has found that it is permissible in limited situations for a mentally ill defendant to be medicated against his will for the purpose of making him competent to stand trial. What if medication would make a prisoner competent to be executed? Is it in line with moral, medical and ethical values to “cure” a patient of his mental illness solely for the purpose of ending his life?

79 Panetti v. Quarterman. at 959-60.
III. A Categorical Ban on Executing the Mentally Retarded

Are there ever certain mental health diagnoses that should be an absolute bar to imposition of the death penalty or execution? In the 2002 landmark case of *Atkins v. Virginia*, the Supreme Court found that this may sometimes be the case when it held that the Constitution always prohibits death sentences for mentally retarded defendants.

1. Case and Analysis: Mentally Retarded Defendants and the Death Penalty


a. Case facts

The facts of the case were largely undisputed:

Petitioner, Daryl Renard Atkins, was convicted of abduction, armed robbery, and capital murder, and sentenced to death. At approximately midnight on August 16, 1996, Atkins and William Jones, armed with a semi-automatic handgun, abducted Eric Nesbitt, robbed him of the money on his person, drove him to an automated teller machine in his pickup truck where cameras recorded their withdrawal of additional cash, then took him to an isolated location where he was shot eight times and killed.80

Defendant Jones pleaded guilty to a lesser offense in exchange for giving testimony against Atkins and the two defendants were tried separately.

Jones and Atkins both testified in the guilt phase of Atkins’ trial. Each confirmed most of the details in the other’s account of the incident, with the important exception that each stated that the other had actually shot and killed Nesbitt. Jones’ testimony, which was both more coherent and credible than Atkins’, was obviously credited by the jury and was sufficient to establish Atkins’ guilt. At the penalty phase of the trial, the state introduced victim impact evidence and proved two aggravating circumstances: future dangerousness and “vileness of the offense.”81

At the penalty phase, the defense called an expert witness, psychologist Evan Nelson, who testified that Atkins was “mildly mentally retarded” and had an Intelligence Quotient (IQ) of only 59.82 Regardless, the jury sentenced Atkins to death. Due to a procedural error the state supreme court ordered a rehearing on sentencing, and this time the state also offered testimony from its own expert to demonstrate that Atkins was not, in fact, retarded. Atkins was again sentenced to death.

81 *Id.* at 307-308.
82 *Id.* at 308, n. 3 & 5 (The test that Dr. Nelson administered measures IQ on a scale from 45 to 155, with 100 being an average [mean] score. A score of 50-70 is generally considered “mild retardation.”)
b. Case Analysis

1. Eighth Amendment Analysis Generally

In his final challenge to his sentence in the Virginia Supreme Court, Atkins argued only that “he is mentally retarded and thus cannot be sentenced to death,” and this was his argument again before the U.S. Supreme Court. Under U.S. constitutional law and jurisprudence, this argument is rephrased as raising the question of whether or not his execution would violate the Eighth Amendment to the U.S. Constitution’s prohibition of “cruel and unusual punishment.” As the Court explained:

The Eighth Amendment succinctly prohibits “excessive” sanctions. It provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

The Court explained that the Eighth Amendment’s “excessiveness” standard is one of proportionality to the offense, and that while a punishment might not appear either “cruel” or “unusual” on its face, it might still violate the Eighth Amendment if it was viewed as extremely severe in light of the conduct it was meant to punish. The Atkins Court cited an earlier opinion which held that although imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual, it may not be imposed as a penalty for the “status” of narcotic addiction (rather than narcotics possession or use), because such a sanction would be excessive. “Even one day in prison would be cruel and unusual punishment for the ‘crime’ of having a common cold.”

The Court went on to explain that when considering whether a punishment is excessive, the relevant law should not be considered as of the time of its writing, but should reflect “evolving standards of decency.” As perceptions of fairness change, the courts should reevaluate whether punishments once found acceptable are now viewed as cruel and unusual. The question then is whether today’s American society views the punishment as excessive.

2. Finding a National Consensus

Unfortunately, trying to find objective measures of societal values across a nation as large and diverse as the United States is no easy task. The Court has long established that the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” Each state and the federal system’s laws are made by democratically elected and accountable legislatures, and should, in theory, represent the will and values of their constituencies. The Court thus first determines whether a consensus has developed amongst the laws of the several jurisdictions as to whether a specific punishment is permissible.

83 Atkins v. Virginia, at 310.
84 Id. at 311; U.S. Const. amend.VIII.
86 Id. at 312, quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989).
In the 1989 case of *Penry v. Lynaugh* the Supreme Court first performed this type of analysis on the specific issue of whether the Eighth Amendment precluded sentencing the mentally retarded to death. At that time, only two states and the federal government had legislation expressly forbidding the execution of mentally retarded defendants, and the court found that these two enactments, “even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus.”\(^{87}\) The *Atkins* Court, however, felt that the situation had changed considerably since the *Penry* case. In the short time between the two cases, sixteen more states had passed legislation expressly forbidding the execution of the mentally retarded:

> It is not so much the number of these States that is significant, but the consistency of the direction of change. Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.\(^{88}\)

3. **Considering the Rationale behind a Prohibition on Executing the Mentally Retarded**

The Court’s Eighth Amendment analysis does not end with the identification of a national consensus, however. After “review[ing] the judgment of [the] legislatures” the Court must then “consider reasons for agreeing or disagreeing with their judgment.”\(^{89}\)

In the *Atkins* case, the Supreme Court, after finding a significant national legislative consensus, explored at great length the penal value of executing the mentally retarded.

>[The mentally retarded] 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. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.\(^{90}\)

The Court continued to discuss whether the specific goals of capital punishment would be furthered by the execution of mentally retarded defendants.

\(^{87}\) *Atkins v. Virginia*. at 334.

\(^{88}\) *Id*. at 315.

\(^{89}\) *Id*. at 313.

\(^{90}\) *Id*. at 318.
[The case of] *Gregg v. Georgia*[^91] identified “retribution and deterrence of capital crimes by prospective offenders” as the social purposes served by the death penalty. Unless the imposition of the death penalty on a mentally retarded person “measurably contributes to one or both of these goals, it ‘is nothing more than the purposeless and needless imposition of pain and suffering,’ and hence an unconstitutional punishment.”

With respect to retribution -- the interest in seeing that the offender gets his “just deserts” -- the severity of the appropriate punishment necessarily depends on the culpability of the offender. Since *Gregg*, our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes. For example, in *Godfrey v. Georgia*[^92] we set aside a death sentence because the petitioner’s crimes did not reflect “a consciousness materially more ‘depraved’ than that of any person guilty of murder.” If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.

With respect to deterrence -- the interest in preventing capital crimes by prospective offenders -- “it seems likely that ‘capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.’” Exempting the mentally retarded from that punishment will not affect the “cold calculus that precedes the decision” of other potential murderers. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders. The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable -- for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses -- that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence.[^93]

[^91]: *Gregg v. Georgia*, 428 U.S. 153 (1976), see Chapter 1 for a detailed discussion of this case.

[^92]: *Godfrey v. Georgia*, 446 U.S. 420 (1980). In the Godfrey case, a man whose wife had filed for divorce became enraged and shot his daughter, wife and mother-in-law, killing the latter two. The Court found that the state statute for imposing the death penalty did not provide juries sufficient guidance for narrowing the range of defendants eligible for the death penalty. The statute allowed death sentences for offences that were “outrageously or wantonly vile, horrible or inhuman,” a standard the Court found too vague to truly limit the death penalty to only the most culpable offenders.

In addition to finding that the mentally retarded were, as a rule, less culpable than most offenders and that prohibiting their execution would not undermine the retributive or deterrent value of capital punishment, for either the mentally retarded themselves or for other offenders, the Court also found that the symptoms of this type of mental impairment might also lead to unfair, and incorrectly decided, trials.

The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. The risk “that the death penalty will be imposed in spite of factors which may call for a less severe penalty” is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. … [M]oreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. Mentally retarded defendants in the aggregate face a special risk of wrongful execution.94

Given the increased fear of wrongful conviction and the minimal value of executing the mentally retarded for capital punishment’s major goals of deterrence and retribution, the Supreme Court found that it is always unconstitutional to impose the death penalty on mentally retarded individuals.

c. Questions on Execution of Mentally Retarded Defendants

1. **Evolving Standards of Decency:** In deciding whether the Eighth Amendment to the U.S. Constitution permits the execution of mentally retarded offenders, the Court first tried to ascertain whether there is a societal consensus that such a punishment is “excessive” and contrary to “evolving standards of decency.” To explore this, the Court looked at legislative trends in the nation’s fifty states and in the federal courts.

   a. To what extent should current social values or public opinion be allowed to determine a legal issue such as when to apply the death penalty? Even the slow-moving democratic legislative process is highly responsive to current events, and major crimes or news stories might cause radical and rapid shifts in the law. Is consideration of such factors a type of interference with judicial independence?

   b. The U.S. federal system provides the Supreme Court with one measure of public values: individual state legislation. If the courts of a nation like China, following a more centralized governmental organization, also wanted to consider contemporary social values, how might they ascertain what those values are?

c. The Eighth Amendment concerns cruel and unusual punishment. In determining whether a punishment is unusual, should courts consider international and foreign law, or only the domestic law that reflects national conditions? Should the Court look for a “global consensus” as well as a national consensus?

2. **Furthering Penal Goals:** In *Atkins*, the Court found that sentencing mentally retarded defendants to death did not further the death penalty’s objectives of retribution and deterrence. Do you agree with the Court’s description of these goals and its conclusion?

   a. These two objectives had been identified in earlier cases before the Supreme Court as the “principal social purposes of the death penalty,” so the Court addressed only these two specific goals. Such precedent, however, has also mentioned the goal of incapacitation—the removal of an offender from society for the protection of others. Is it possible that a mentally retarded offender could ever be so violently dangerous as to justify his execution on incapacitation grounds, or do you agree that his reduced culpability, as identified by the court in *Atkins*, always make it cruel and excessive to execute him? Consider also whether the incapacitation goal could be reached through secure, compulsory treatment or other means.

   b. The rationales for prohibiting the execution of the mentally retarded are strikingly similar to the reasons for prohibiting execution of the severely mentally ill (competency for execution) and even the rationale for the insanity defense. What, if anything, makes mental retardation different so as to justify a blanket prohibition on death sentences?

3. **Defining Mental Retardation:** Although the Supreme Court did not define mental retardation, it tacitly accepted the definitions of the disorder used by the leading relevant professional associations, the American Association of Mental Retardation and the American Psychiatric Association. These definitions are essentially similar, requiring (a) significantly sub-average general intellectual functioning, that is (b) accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, academic skills, work, leisure, health and safety, and (c) that manifests before age eighteen.95 Following the *Atkins* decision, many states followed these definitions.

   a. Does this definition adequately include the deficits identified by the Court as reducing the defendant’s culpability and minimizing the deterrent value of capital punishment, namely “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”? Is this professional definition broader than the court’s reasoning?

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requires, so that it might be over-inclusive and exempt some people that should not be considered to have reduced culpability?

b. Are there other mental disorders that might reduce the key capacities of a criminal defendant in a similar fashion, also reducing the deterrent and retributive value of capital punishment? What should the legal ramifications be of severe intellectual impairments following a traumatic head injury or dementia that are indistinguishable from retardation but arose when a defendant was well past age eighteen?

c. In the portion of this chapter discussing the insanity defense, legal insanity was seen to be distinct from a diagnosis of any specific mental disorder, but the court seemingly embraced a specific diagnosis in the *Atkins* case when considering exemption from the death penalty under the Eighth Amendment. What should the relationship between legal standards for the mentally ill and medical diagnoses be?