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INTRODUCTION TO THE PRESENTATIONS: THE PATH TO AN EIGHTH AMENDMENT ANALYSIS OF MENTAL ILLNESS AND CAPITAL PUNISHMENT

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I would first like to congratulate the Columbus School of Law and the Catholic University of America for sponsoring this important Symposium. In particular, the editors of the *Law Review* deserve praise for focusing on what is clearly a groundbreaking area of the law, and one that we will be hearing more about in the not-too-distant future.

This Symposium occurs at the intersection of two critical developments in our understanding of the law and human responsibility. On one road, the Supreme Court and the country as a whole are in the midst of a re-evaluation of the death penalty because of the mistakes and injustices that have been revealed in recent years. Questions about innocence, about who should be excluded from the death penalty, and what process is due before such a sentence is imposed are being re-opened, after years of appearing settled.[1]

At the same time, our understanding of the human mind and the intricacies of mental illness is making enormous strides. Technology is allowing us to look more deeply and precisely into the physiology of the human brain.[2] New drugs are altering human behavior in dramatic ways, underscoring the chemical basis for what earlier was considered immutable deviance. Today's Symposium takes place where this re-evaluation of the death penalty crosses paths with the new insights into mental illness.

Yet even as our discussions today break new ground, they also find their roots in the law much further back in our country's history. I would

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1. *See, e.g.*, Ring v. Arizona, 536 U.S. 584, 607-09 (2002) (finding a law requiring that a judge, rather than a jury, determine the existence of aggravating factors unconstitutional); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding the death penalty for the mentally retarded unconstitutional). On the issue of innocence, Justice John Paul Stevens recently questioned the wisdom of the death penalty at the Seventh Circuit Bar Association dinner in Chicago: "'We cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated.'" Abdon M. Pallasch, *High Court Justice: U.S. Would Be Better Off Without Death Penalty*, CHI. SUN-TIMES, May 12, 2004, at 12.

2. *See, e.g.*, Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rate*, WASH. POST, Feb. 1, 2005, at A1 (citing a study done by the National Institutes of Health about growth in areas of the brain at different ages).

like to briefly examine some of that history to help put today's topic in context.

Thomas Jefferson was one of the first to underscore the importance of adjusting our laws and updating our understanding of legal principles in accord with the times in which we live. He did not see the Constitution as unchangeably written in stone:

> Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. . . . [L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.[3]

Although Supreme Court decisions relying on the Eighth Amendment were rare during most of the Court's history, the justices did show an appreciation for Jefferson's advice when examining the cruelty of certain sanctions. Prior to the early 1960s when the Court held that the Eighth Amendment was applicable to the states through the Fourteenth Amendment,[4] the Court found only two instances of legally sanctioned punishments to be cruel and unusual. Neither involved the death penalty, but both represented important milestones in the Court's interpretation of the Eighth Amendment.

In *Weems v. United States*,[5] the Supreme Court overturned a sentence of fifteen years of hard labor imposed on an officer in the Philippines who had defrauded the federal government.[6] Fifteen years in prison would not have been considered a torturous punishment when the Constitution was written, given that much harsher sentences were allowable at that time. But rather than focus only on what would have been outlawed in 1789, or on what was clearly a barbaric form of punishment, the Court found that the punishment given Weems violated the Eighth Amendment because the legislature had established a penalty that was grossly disproportionate to the crime committed.[7]

The Court signaled its progressive approach by declaring that the Eighth Amendment should not be "fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane

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3. Furman v. Georgia, 408 U.S. 238, 409 n.7 (1972) (quoting Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* 15 THE WRITINGS OF THOMAS JEFFERSON 40-42 (Memorial ed. 1904)).

4. Robinson v. California, 370 U.S. 660, 666-67 (1962).

5. 217 U.S. 349 (1910).

6. *Id.* at 357-58, 382.

7. *Id.* at 382.

justice."[8] It examined the punishments administered for other crimes in various jurisdictions and decided that the punishment given Weems was particularly excessive.[9]

The second time the Court overturned a lawful sanction also provided valuable insight into determining whether a punishment was cruel and unusual. In *Trop v. Dulles*,[10] the Court considered the punishment of expatriation for the crime of desertion.[11] Trop had gone AWOL for one day during his military service in World War II.[12] For this offense, he was stripped of his U.S. citizenship.[13] Again, the punishment was not Draconian like being drawn and quartered, nor even as final as being hung, which would have been permissible in the Constitution's early days. Nevertheless, a plurality of the Court held that the punishment was shocking by modern standards: it represented "the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development."[14] In arriving at this judgment, the Court stated what has become the guiding principle for interpreting the cruel and unusual clause of the Eighth Amendment: it is to be understood in light of "the evolving standards of decency that mark the progress of a maturing society."[15]

The Court looked not only at the mores in the U.S. at that time, but also at what punishments other countries applied in similar circumstances.[16] The use of international norms in interpreting the standards of decency that should apply continues in the Court's jurisprudence to this day,[17] though not all of the justices would concur in their relevance.[18]

Once it was clearly established that the Eighth Amendment applied to the states and that their application of capital punishment was subject to such analysis, the number of Eighth Amendment judicial decisions multiplied appreciably. Using this "standards of decency" approach, the

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8. *Id.* at 378.
9. *Id.* at 375-82.
10. 356 U.S. 86 (1958).
11. *Id.* at 87.
12. *Id.*
13. *Id.*
14. *Id.* at 101 (plurality opinion).
15. *Id.* (plurality opinion).
16. *Id.* at 102-03.
17. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (citing Brief of Amicus Curiae European Union, *Atkins* (No. 00-8452)).
18. *See id.* at 324-25 (Scalia, J., dissenting) (criticizing the use of international standards).

Court outlawed the death penalty for the crime of rape of an adult,[19] for accomplices to murder where the defendant intended no bodily harm and did not exhibit reckless indifference to human life,[20] for the insane,[21] for those under the age of eighteen at the time of their crime,[22] and for the mentally retarded.[23]

It is *Atkins v. Virginia*[24] that perhaps brings us closest to the issue we are considering today. Here, the Court did not find that the punishment of death was disproportionate to the heinous murder of which Atkins had been convicted. Rather, as in *Ford v. Wainwright*[25] and *Thompson v. Oklahoma*,[26] the punishment was excessive for this kind of *defendant.*[27] After the death penalty was allowed to resume in 1976, the paradigm for death sentencing was that it should only be applied to the worst offenders.[28] Society had reached a consensus, as evidenced in laws and declining death sentences for the mentally retarded, that those with limited mental capacity are not among the worst offenders, regardless of the seriousness of their crimes. The Supreme Court confirmed that consensus under the protection of the Constitution and the Eighth Amendment.

What we hope to explore today is whether defendants with mental illness, or at least some definable subset of that group, also suffer from mental limitations that should preclude society's ultimate sanction. If the Court should address this issue in the future, it will not only examine the neurological impulses and chemical deficiencies that may be present in the mentally ill, but it will also examine society's response to such knowledge. It will look for concrete legislation that has been passed to protect the mentally ill, and it will analyze the actions of juries, prosecutors, and judges in arriving at the appropriate sentences for such individuals convicted of capital murder.[29]

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19. Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion).
20. Enmund v. Florida, 458 U.S. 782, 801 (1982).
21. Ford v. Wainwright, 477 U.S. 399, 401, 417-18 (1986) (plurality opinion).
22. Roper v. Simmons, 125 S. Ct. 1183, 1200 (2005).
23. *Atkins*, 536 U.S. at 321.
24. 536 U.S. 304 (2002).
25. 477 U.S. 399, 417-18 (1986) (plurality opinion).
26. 487 U.S. 815, 838 (1988) (plurality opinion).
27. *Atkins*, 536 U.S. at 320-21.
28. *See* Zant v. Stephens, 462 U.S. 862, 877 (1983) ("[A]ggravating [factors] must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.").
29. *See Atkins*, 536 U.S. at 316-17 (assessing the actions of state legislatures and the infrequency of the use of the death penalty for those with mental retardation).

Outside the area of insanity, there is little legislation today protecting the mentally ill from the death penalty. There is, however, evidence that the public's standards are indeed evolving on this issue. The cases of Andrea Yates and Deanna Laney in Texas, though disturbing for the fact that the death penalty was considered for at least one of these seriously ill mothers who killed her children, represent change because the death penalty was not imposed in either case.[30] On the whole, death sentences are declining sharply around the country.[31] Some governors have granted clemencies because of the mental illness of the defendant.[32] I believe that discussions such as this will become more common in the future and that eventually state and federal legislation will emerge to provide the Court with an objective basis for sparing the mentally ill from the death penalty. I look forward to hearing from the experts on this important subject.

30. Lisa Falkenberg, *Two Child Killers, Two Verdicts*, PITT. POST-GAZETTE, Apr. 6, 2004, at A9.

31. *See* Thomas P. Bonczar & Tracy L. Snell, *Capital Punishment, 2003*, BUREAU OF JUST. STAT. BULL. (U.S. Dep't of Justice, Office of Justice Programs, Washington, D.C.), Nov. 2004, at 1, app. at 14 tbl.2, *available at* http://www.ojp.gov/bjs/pub/pdf/cp03.pdf.

32. *See* DEATH PENALTY INFO. CTR., CLEMENCY, http://www.deathpenaltyinfo.org/article.php?did=126&scid=13 (last visited Apr. 14, 2005) (clemencies granted with reasons stated).