Drawing the Line at Atkins and Roper: The Case Against Additional Categorical Exemptions from Capital Punishment for Offenders with Conditions Affecting Brain Function

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I. INTRODUCTION .......................................................... 1222
II. BACKGROUND: THE SUPREME COURT’S EIGHTH AMENDMENT JURISPRUDENCE REGARDING CAPITAL OFFENDERS WITH CONDITIONS AFFECTING BRAIN FUNCTION .................................................. 1225
   A. Ford and Panetti: Exemptions for Offenders with Insufficient Mental Capacity .................................................. 1227
   B. Atkins and Roper: Exemptions for Offenders with Insufficient Moral Culpability .................................................. 1230
III. ADDITIONAL CLASSES OF OFFENDERS PROPOSED FOR CATEGORICAL EXEMPTION FROM CAPITAL PUNISHMENT AND WHY THEY SHOULD NOT BE EXEMPTED ........................................ 1232
   A. Offenders with Severe Psychiatric Illnesses .......................................................... 1232
   B. Offenders with Traumatic Brain Injuries .......................................................... 1235
   C. Offenders with Genetic Predispositions Toward Violence .......................................................... 1238
IV. OTHER ARGUMENTS AGAINST ADDITIONAL CATEGORICAL EXEMPTIONS .................................................. 1242
   A. Conditions Affecting Brain Function Are Largely Irrelevant in Capital Cases .................................................. 1244
      1. Capital Punishment Is Regularly Restricted to Cases of Premeditated and Deliberated Murder .......................................................... 1244
      2. Society’s Penological Goals of Deterrence and Retribution are Often Achievable Even When Offenders Have Conditions Affecting Brain Function .................................................. 1245
   B. Current Eighth Amendment Jurisprudence Already Provides Sufficient Constitutional Protection for Offenders with Conditions Affecting Brain Function .................................................. 1248
      1. Capital Sentencing Authorities Are Required To Consider All Evidence of Conditions Affecting Brain Function .......................................................... 1248
      2. Capital Sentencing Authorities Are Exempting Offenders with Truly Insufficient Culpability .................................................. 1249
   C. The Categorical Exemptions in Atkins and Roper are Sui Generis .................................................. 1250

DRAWING THE LINE AT ATKINS AND ROPER: THE CASE AGAINST ADDITIONAL CATEGORICAL EXEMPTIONS FROM CAPITAL PUNISHMENT FOR OFFENDERS WITH CONDITIONS AFFECTING BRAIN FUNCTION
D. Categorical Exemptions Unfairly Stigmatize Persons Afflicted
with Conditions Affecting Brain Function As Morally Inferior... 1252

V. CONCLUSION ................................................................. 1253

I. INTRODUCTION

It is a fundamental principle of the American criminal justice system that the punishment for a crime should be proportional to the blameworthiness of the individual who committed that crime.\(^1\) Put differently, the less blameworthy an individual is, the less severe his punishment should be. Yet, recent advances in science and medicine indicate that the traditional bases that the criminal justice system uses for evaluating a defendant’s blameworthiness, and therefore his sentence, may be inadequate.

Traditionally, the American criminal justice system presupposed free will and autonomy and held all citizens equally accountable for their actions. However, it is now increasingly apparent that the American people, heretofore considered equal under the law, actually have vastly different mental capacities for making decisions about criminal conduct.\(^2\) Experts now know that diseases, injuries, and genetics affect each citizen’s brain and brain development in individually different ways. Consequently, providing appropriate punishment is increasingly more difficult. In no context is this dilemma more obvious, nor its consequences more grave, than in that of capital sentencing.

Anglo-American common law has long prohibited the execution of offenders afflicted with certain mental conditions.\(^3\) In 1986, the Supreme Court of the United States endorsed this tradition, holding that the execution of offenders who are “mentally insane” is barred by the Eighth Amendment’s ban on cruel and unusual punishment.\(^4\) The basis for this decision, according to the Court, was that in order for a sentence of death to have its proper effect, offenders must have such mental capacity as to be “[a]ware of the punishment they are about to suffer and why they are about to suffer it.”\(^5\)

In 2002, however, the Court fundamentally altered this jurisprudence. It held that the Eighth Amendment prohibits an offender from being executed if


\(^5\) Id. at 422 (Powell, J., concurring).
the offender has been diagnosed as “mentally retarded.”6 The Court reasoned that if an offender’s mental state is such that he is unable 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” then he is “less morally culpable” and not deserving of the ultimate punishment.7 With this ruling, the Court made it clear that it was not just an offender’s capacity that was essential in determining the constitutionality of his death sentence, but his culpability as well.8

Furthermore, by banning the execution of offenders with one specific diagnosis, the Court opened the door for other offenders with other diagnoses to challenge their death sentences on the basis of insufficient culpability as well. This door has been opened even wider by the aforementioned advances in science and medicine, which have suggested that disease, injury, and genetics affect brain development, perhaps rendering offenders less culpable, or less blameworthy, for their crimes. In light of these advances, which suggest that criminal choices and biology are “inseparable” from one another for the purposes of considering blameworthiness and appropriate sentencing,9 many experts from the medical and legal communities have already gone on the record contending that courts and legislatures should extend categorical exemption for all offenders who suffer from various other conditions that affect the functioning of the brain.10

If courts and legislatures decide to adopt the positions offered by these experts and extend categorical Eighth Amendment protections to any or all offenders with conditions affecting brain function, capital punishment could be for all intents and purposes abolished without the benefit of an up-or-down vote on capital punishment itself. Such indirect prohibition would effectively overcome the will of the people in capital punishment states and would fly in the face of traditional democratic principles. This outcome seems particularly possible in light of recent studies that have shown that the prevalence rate of these conditions among capital offenders is extraordinarily high.11 In other words, if additional categorical exemptions are provided for offenders with various other conditions affecting brain function, almost no offenders will be

7 Id. at 320.
8 Id.; see also Roper v. Simmons, 543 U.S. 551, 569, 571 (2005) (exempting death row offenders who were under 18 years of age at the time of their capital offense, noting that as a class, juveniles are categorically “less culpable than adults” because of their “lack of maturity” and “underdeveloped sense of responsibility”).
9 Eagleman, supra note 2.
10 See infra Part III.
left eligible for the death penalty. In short, the groundwork has been laid for an indirect prohibition of the death penalty on the grounds that offenders with certain conditions affecting brain function are less morally culpable for their crimes and thus less deserving of the ultimate punishment.

This is a very attractive option for death penalty opponents who have struggled for years to successfully carry out a direct attack on capital punishment. Accordingly, it can be expected that courts and legislatures will soon have to decide whether offenders with various other conditions affecting brain function, such as severe psychiatric illnesses, traumatic brain injuries, and genetic predispositions should receive the same categorical exemption from capital punishment that mentally retarded offenders receive.

This Note argues that categorical exemption from capital punishment should not be extended to additional classes of offenders because, as one legal scholar put it, "[i]t is a fact that among those who are sane and legally responsible there are appreciable degrees of mental impairment." While recent advances in science and medicine may raise legitimate constitutional concerns as to the true culpability of offenders afflicted with severe psychiatric illnesses, traumatic brain injuries or genetic predispositions, these concerns can be adequately addressed through individualized sentencing that takes into account all of the factors of a given murder and a given murderer. Additional categorical exemptions will likely only succeed in protecting a number of murderers who are actually culpable enough to deserve capital punishment or who would otherwise be deterred from committing a heinous capital murder. Accordingly, with regard to capital sentencing, "there can and should be a substantial measure of individualization."

This Note is limited in two respects. First, while the significance of conditions affecting brain function is highly relevant at the guilt phase of any capital prosecution, this Note's analysis is strictly limited to the sentencing phase. In other words, while it can be fairly claimed that a condition affecting brain function renders an offender not responsible, this Note is not concerned with legal responsibility. Rather, this Note is concerned with offenders' legal culpability. Second, this Note recognizes that the constitutionality of capital punishment, in general, is highly controversial and hotly debated. Nevertheless, this Note accepts capital punishment's constitutionality as a premise of its analysis.

Part II of this Note provides an overview of the Court's Eighth Amendment jurisprudence as it presently relates to offenders with conditions

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13 Id.
15 Id. (internal quotations omitted).
affecting brain function. This provides the framework for understanding what the Court takes into account when determining whether a particular offender, or class of offenders, should be exempted from capital punishment. Furthermore, it sheds light on what factors need to be considered with regard to future demands for categorical exemptions. Part III provides an overview of popular arguments for additional categorical exemptions for offenders afflicted with conditions affecting brain function and highlights the frailties of those arguments. Part IV provides further support for the argument that offenders with conditions affecting brain function, beyond those already exempted, should not be provided categorical exemption from capital punishment. Part IV also argues that individualized review is the proper way to determine appropriate punishment. Ultimately, this Note concludes that additional categorical exemptions for offenders with conditions affecting brain function should not be adopted, but rather, each offender’s case should be reviewed on an individual basis.

II. BACKGROUND: THE SUPREME COURT’S EIGHTH AMENDMENT JURISPRUDENCE REGARDING CAPITAL OFFENDERS WITH CONDITIONS AFFECTING BRAIN FUNCTION

The Eighth Amendment to the United States Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”\(^{16}\) The Supreme Court has upheld the constitutionality of capital punishment under the Eighth Amendment in general;\(^{17}\) however, some uses of it have been deemed either excessive or cruel and unusual. In determining whether a particular use of capital punishment is unconstitutional, the Court has historically taken many factors into account. These factors include the method of punishment,\(^{18}\) society’s penological goals,\(^{19}\) and the proportionality between the punishment and the offense.\(^{20}\) Of particular importance, however, in cases such as those discussed here, is the proportionality between the punishment and the offender’s culpability.\(^{21}\)

\(^{16}\) U.S. CONST. amend. VIII.


\(^{19}\) See John F. Stinneford, Rethinking Proportionality Under the Cruel and Unusual Punishments Clause, 97 VA. L. REV. 899, 914 (2011) (“There are four primary theories of punishment that might serve as a touchstone for proportionality review: retribution, deterrence, incapacitation and rehabilitation. The Supreme Court has used these theories to determine the proportionality of punishments . . . .”).


\(^{21}\) See Roper v. Simmons, 543 U.S. 551, 590 (2005) (O’Connor, J., dissenting) (“[T]he magnitude of the punishment imposed must be related to the degree . . . of the defendant’s blameworthiness” (citation omitted)).
In evaluating proportionality, the Court requires "consideration of the character and record of the individual offender and the circumstances of the particular offense." Additionally, the Court's own jurisprudence requires it to undertake both subjective and objective considerations. While it is true that "in the end [the justices'] own judgment will be brought to bear on the question of the acceptability of the death penalty" in a given case, such judgments "should not be, or appear to be, merely the subjective views of individual justices." Rather, an Eighth Amendment claim of cruel and unusual punishment must also be informed by objective factors to the maximum extent possible. In other words, the constitutionality of a particular capital sentence can never be solely root of the Justices' own subjective opinions or upon the subjective opinions of qualified experts. The Court must consider objective elements as well.

Specifically, in considering the constitutionality of a particular capital sentence, a court must look to the "evolving standards of decency that mark the progress of a maturing society," the clearest and most reliable source of which is the legislation enacted by the legislatures of the fifty states. In short, the Court has adopted a process of "counting states" to find national consensus on decency. If a majority of states, through their own legislative action, have prohibited a particular use of the death penalty, then the Court deems that use to be in violation of society's evolving standards of decency, and therefore unconstitutional. It has been through this process that the Court has recently gone about establishing categorical exemptions for particular classes of offenders. To date, using this process, the Court has carved out capacity-based exemptions for the mentally insane and culpability-based exemptions for the mentally retarded and for offenders who were under the age of 18 at the time of the offense. In order to best understand why additional categorical exemptions should not be granted, it is instructive to analyze what has guided the Court as it has gone about creating past exemptions.

Id.
Coker, 433 U.S. at 603.
A. Ford and Panetti: Exemptions for Offenders with Insufficient Mental Capacity

In the case of Ford v. Wainwright, the petitioner, Ford, was convicted of murder and sentenced to death. At the time of his conviction and sentencing, Ford was apparently fully mentally competent, and no issue as to his competence was ever raised. However, once he had been on death row for a number of years, Ford began to exhibit signs of mental disturbance, including severe delusions. Consequently, his counsel invoked a state statute, which set in motion a series of psychiatric examinations for the purpose of determining Ford's competency. After examination by five different psychiatrists, all five doctors concluded that Ford suffered from severe mental illness. Nevertheless, the Governor signed the death warrant. Counsel then sought habeas corpus relief in the federal courts without success, until ultimately arriving at the Supreme Court.

The Court concluded that executing an offender who was mentally insane was a violation of the Eighth Amendment's ban on cruel and unusual punishment. Relying on common law principles, the Court focused on capital punishment's historical justification of retribution. Specifically, in a concurring opinion, Justice Powell found that capital punishment's "retributive force[] depends on the defendant's awareness of the penalty's existence and purpose." Therefore, he concluded, offenders are incompetent to be executed when they are "unaware of the punishment they are about to suffer and why they are about to suffer it." Accordingly, in light of Ford's

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33 477 U.S. 399 (1986).
34 Id. at 401.
35 Id.
36 Id. at 402.
37 Id. at 403.
38 Id. at 404.
39 Id.
40 Id.
41 See id. at 399.
42 Id.
43 Justice Marshall's opinion only commanded a four-vote plurality. Therefore, Justice Powell's concurring opinion was, at the time, considered to be Ford's rule in accordance with the Marks rule. Marks v. United States, 430 U.S. 188, 193 (1977) (holding that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds").
44 Ford, 477 U.S. at 421 (Powell, J., concurring).
45 Id. at 422 (Powell, J., concurring).
condition, the lower court rulings were reversed, and Ford's case was remanded for a determination of his competency. In arriving at this conclusion, Powell looked to "the modern practices of the States" and found that a focus on the offender's awareness was the "prevailing test." This approach, known as the "cognitive test," was later cited as Ford's controlling precedent in many subsequent rulings because it states the narrowest ground supporting the ruling in the case. This viewpoint, however, would soon change.

In Panetti v. Quarterman, the Court undertook its first direct interpretation of Ford. In that case, the petitioner, Panetti, was convicted of capital murder and sentenced to death in spite of a well-documented history of mental illness that included a "fragmented personality, delusions, and hallucinations." Through counsel, Panetti claimed that his delusions rendered him mentally incompetent to be executed under Ford because they made him incapable of "understand[ing] the reasons [why] he was about to be executed." This claim failed in the state courts.

Upon seeking habeas relief in the federal courts, the district court similarly rejected Panetti's claim, explaining that the circuit precedent was Justice Powell's "cognitive test." That is, to be eligible for execution, an offender need "know no more than the fact of his impending execution and the factual predicate for the execution;" he need not "understand the reasons [why] he [is] about to be executed." The Fifth Circuit Court of Appeals affirmed and Panetti appealed to the Supreme Court.

Altering existing Eighth Amendment jurisprudence, the Court declared that Powell's "cognitive test" for competency was not Ford's rule. Rather, the

46 Ford did not believe that he was going to be executed. Id. at 422. Rather, he was under a delusion that his family members were being held hostage and that he was the Pope. Id. at 402.
47 Id. at 418.
48 Id. at 419 (Powell, J., concurring).
49 Id. at 422 n.3.
50 Theuman, supra note 3.
51 See supra text accompanying note 43.
53 Id. at 936–37.
54 Panetti believed that his execution was part of spiritual warfare between angels and demons. See id. at 954.
55 Id. at 938.
56 Id. at 937.
57 Id. (citing Panetti v. Dretke, 401 F. Supp. 2d 702, 711 (W.D. Tex. 2004)).
58 Id. at 942 (citing Panetti v. Dretke, 401 F. Supp. 2d 702, 711 (W.D. Tex. 2004)).
59 Id. at 938.
Court indicated that Justice Marshall’s plurality opinion was Ford’s rule and referred to it in determining Panetti’s competency. The Court dismissed Justice Powell’s Ford concurrence and the Fifth Circuit’s reliance on it as “too restrictive to afford a prisoner the protections granted by the Eighth Amendment,” noting that “Justice Powell wrote only for himself when he articulated specific criteria.”

The Court then went on to find that Panetti’s delusions, and his failure to understand why he was to be executed, rendered him incompetent for execution. In doing so, the Court took guidance from Justice Marshall’s Ford plurality, specifically noting the “questionable retributive value of executing a person who has no comprehension of why he [is being] stripped of his fundamental right to life.”

Although the Panetti Court added the new requirement that an offender comprehend why he is being executed to the competency determination, the Court nevertheless expressly “decline[d] to set down a rule governing all competency determinations.” Instead, the Court left in place Ford’s requirement that trial courts have “substantial leeway” to determine exactly what conditions render an offender incompetent for execution. As such, after Panetti, a court reviewing an offender’s mental competency for execution must, at a very minimum, determine that the offender is aware that he is going to be put to death, that he understands that he is going to be put to death for committing a murder, and that he is able to recognize that society views death as an appropriate punishment for murder because of the “severity of the offense and the objective of community vindication.”

While Panetti clarified how to handle situations involving an offender with deficient mental capacity, another intervening case had already established a new basis upon which offenders with conditions affecting brain function could challenge their death sentences. This case would drastically alter the Court’s Eighth Amendment jurisprudence.

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60 Justice Thurgood Marshall, writing for a four-vote plurality, concluded, first, that the execution of an insane prisoner is of “questionable retributive value.” *Ford v. Wainwright*, 477 U.S. 399 (1986). Second, he added, such an execution “presents no example to others, and thus has no deterrence value.” *Id.* at 399. Third, Marshall found that such an execution “simply offends humanity” because of the “natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience.” *Id.* at 399, 409–10. Finally, Marshall emphasized the need to “protect the condemned from fear and pain without comfort of understanding” and the need to “protect the dignity of society itself from the barbarity of exacting mindless vengeance.” *Id.*


62 *Id.* at 957 (citing *Ford*, 477 U.S. at 399, 409–410).

63 *Id.* at 960–61.

64 *Ford*, 477 U.S. at 427 (Powell, J., concurring).

65 *Panetti*, 551 U.S. at 958.
B. Atkins and Roper: Exemptions for Offenders with Insufficient Moral Culpability

In Atkins v. Virginia,\(^6\) the Court for the first time provided categorical exemption from capital punishment to a specific class of offenders on the basis of a medical diagnosis alone. There, the petitioner, Daryl Atkins, had been convicted of abduction, armed robbery, and capital murder.\(^7\) At the sentencing phase, the defense relied on a forensic psychologist who testified that Atkins was "mildly mentally retarded," citing interviews, school records, court records, and a standard intelligence test that indicated that the petitioner had an IQ of fifty-nine.\(^8\) In spite of this testimony, the jury sentenced Atkins to death.\(^9\) On appeal to the Virginia Supreme Court, Atkins contended that his mental retardation rendered him less morally culpable and that, as such, he should be precluded from a sentence of death. Rejecting this argument, the Virginia Supreme Court affirmed the death sentence.\(^10\) Atkins appealed to the Supreme Court of the United States.

In evaluating Atkins's claim, the Court first addressed the general constitutionality of executing an offender with mental retardation. In so doing, the Court examined society's values on the matter, emphasizing that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the [States'] legislatures."\(^11\) Upon completing a thorough review of the state legislative action on the topic of executing mentally retarded offenders, the Court discovered not only that there was a "large number of States prohibiting the execution of mentally retarded persons,"\(^12\) but also that there was a "complete absence of States passing legislation reinstating the power to conduct such executions."\(^13\) Taking this into account, along with the fact that all the legislatures that had elected to prohibit the execution of mentally retarded offenders had done so overwhelmingly, the Court gleaned "powerful evidence that . . . society views mentally retarded offenders as categorically less culpable than the average criminal" and that accordingly, execution of such offenders was cruel.\(^14\) Additionally, the Court added that even among those states that did not prohibit the execution of mentally retarded


\(^{67}\) Id. at 307.

\(^{68}\) Id. at 308-09.

\(^{69}\) Id. at 309.

\(^{70}\) Id. at 310.

\(^{71}\) Id. at 312 (citing Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).

\(^{72}\) At the time of the Court's ruling, 18 of 38 death penalty jurisdictions prohibited the execution of mentally retarded offenders. Atkins, 536 U.S. at 315-16.

\(^{73}\) Id.

\(^{74}\) Id. at 316.
offenders, only five states had actually executed an offender with an IQ below seventy in the thirteen years preceding the Atkins ruling.\textsuperscript{75} Accordingly, the Court found such executions to be "truly unusual."\textsuperscript{76}

Further propelling the Court's conclusion was the majority's own subjective belief that mentally retarded offenders have such a diminished mental capacity that they cannot "understand and process information," "abstract from mistakes and learn from experience" or otherwise "engage in logical reasoning."\textsuperscript{77} Therefore, the Court reasoned, the execution of such offenders fails to serve society's penological interests of retribution and deterrence.\textsuperscript{78} Specifically, the Court noted, these "cognitive and behavioral impairments . . . make it less likely that [mentally retarded offenders] can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."\textsuperscript{79} As such, having found the execution of mentally retarded offenders to be "cruel and unusual" under both an objective and subjective analysis of Eighth Amendment jurisprudence, the Court invalidated the practice and expanded constitutional protection to a new class of offenders. However, the practice of extending categorical exemptions to specific classes of offenders did not end there.

Using similar reasoning in the 2005 case of Roper v. Simmons,\textsuperscript{80} the Court extended categorical Eighth Amendment protection to offenders who were under eighteen years of age at the time of their capital offense.\textsuperscript{81} In addition to finding a national consensus that such an execution violated evolving standards of decency,\textsuperscript{82} the Court also found that as a class, juveniles are categorically "less culpable than adults" because of their "lack of maturity" and "underdeveloped sense of responsibility."\textsuperscript{83}

While Roper is not directly pertinent to the medical and scientific matters with which this Note is primarily concerned, it is, considered in tandem with Atkins, indicative of the Court's increasing willingness to extend categorical exemptions to additional classes of offenders. At the same time that the Court has shifted its Eighth Amendment jurisprudence to this culpability-based analysis, advances in science and medicine have increased awareness of the biological causes of human behavior and suggested that even more

\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 304.
\textsuperscript{79} Id. at 305.
\textsuperscript{80} 543 U.S. 551 (2005).
\textsuperscript{81} Id. at 578.
\textsuperscript{82} Id. at 552 (noting that thirty states prohibited capital punishment for those offenders who were under the age of 18 at their time they committed a capital offense).
\textsuperscript{83} Id. at 569, 571.
offenders may have reduced culpability. Consequently, there has been a cacophony of calls for additional categorical exemptions from capital punishment.\textsuperscript{84} Specifically, there have been calls for categorical exemptions for offenders with severe psychiatric illnesses, for offenders with traumatic brain injuries, and for offenders with genetic predispositions toward violence and aggressive behavior. In order to best understand these arguments, the scientific basis underlying each of them, and the reasons why they fail, it is instructive to review each of the arguments in turn.

III. ADDITIONAL CLASSES OF OFFENDERS PROPOSED FOR CATEGORICAL EXEMPTION FROM CAPITAL PUNISHMENT AND WHY THEY SHOULD NOT BE EXEMPTED

A. Offenders with Severe Psychiatric Illnesses

In the wake of the Atkins and Roper decisions, the categorical exemption most often advocated has been for capital offenders afflicted with severe psychiatric illnesses.\textsuperscript{85} For example, former president of the American Psychiatric Association, Dr. Alan Stone, has argued that “mental illness and mental retardation have similar causes” and that “the mentally ill suffer from many of the same limitations that diminish the blameworthiness of retarded persons.”\textsuperscript{86} Accordingly, he said, “it is equally indecent to execute the mentally


\textsuperscript{85} See supra note 84 and accompanying text.

\textsuperscript{86} Alan A. Stone, Supreme Court Decision Raises New Ethical Questions for Psychiatry, PSYCHIATRIC TIMES (Sept. 1, 2002), http://www.psychiatrtictimes.com/p020901b.html (last visited Apr. 11, 2013).
Offering similar sentiments, psychologists Dr. Mark D. Cunningham and Dr. Mark P. Vigen have suggested that “the death penalty is intended to punish those murderers who are most morally culpable” and that as such, “there is a miscarriage of that intent when it is visited upon individuals who are manifestly damaged, deficient, or disturbed in their psychological development and functioning.” The American Psychiatric Association, the American Psychological Association, and the National Alliance for the Mentally Ill have all adopted virtually identical positions.

Arguments calling for Atkins-type protection for capital offenders with severe psychiatric illnesses have also emanated from legal scholarship. Recently, the American Bar Association also recommended a prohibition on the imposition of the death penalty against persons with severe psychiatric illnesses.

Bolstering these arguments are recent advances in neuroimaging technologies. Historically, psychiatric disorders, or diseases of the mind, were largely diagnosed through observation, interviewing, and psychotherapy rather than through physical means. However, it is now known that psychiatric disorders are not always rooted in experiences, but also in the “biological details of the brain.” As such, even diseases of the mind can be diagnosed with brain imaging technologies such as computer tomography (“CT”) scanning, functional magnetic resonance imaging (“fMRI”), positron emission tomography (“PET”) scanning, electroencephalography, and magnetoencephalography.

These technologies have enabled doctors to “literally look at, and into, the brain[,]” helping them to “make inferences about the brain processes underlying perceptual, cognitive, and motor processes.” More specifically, these technologies make brain problems more detectable and more easily linked to aberrant behavior. The technologies do this by showing whether brain structures are “intact” and by “reveal[ing] damage, atrophy, intrusions, and
developmental abnormalities.” 97 For example, over the last twenty-five years, brain imaging technologies have shown that persons with schizophrenia have demonstrable decreases in brain matter. 98 Accordingly, “psychiatrists no longer think that schizophrenia is caused by traumatic experiences or failure to negotiate childhood phases of psychological development. Instead, the symptoms of schizophrenia are believed to reflect disrupted brain circuity . . .” 99

Brain imaging technologies have also indicated a biological basis for other psychiatric disorders, such as Attention-Deficit/Hyperactivity Disorder (“ADHD”) and low serotonin activity. 100 These disorders, prevalent among prison populations, cause patients to exhibit impulsivity, inability to follow rules, difficulties in social and professional settings, participation in dangerous activities without regard for possible consequences, and other actions that frequently underlie criminal behavior. 101

Brain imaging technologies, however, do not actually demonstrate any degree of culpability. As one scholar put it, “legal responsibility for behavior is a legal conclusion, not a scientific finding.” 102 Moreover, “[t]o say that brain features influence behavior relevant to crime does not mean that brain features can necessarily explain why certain individuals behaved criminally.” 103 This is because “[e]ach person’s brain . . . is both anatomically and functionally specialized” and because “behavior is a complex phenomenon, neither attributable to single causes, nor easily parsed among multiple causes.” 104 As such, however useful brain imaging technologies are in revealing the biological bases of psychiatric illness, they only reveal a small fraction of what contributes to criminal behavior. Therefore, it makes little sense to prohibit one entire category of punishment based on a mere fraction of considerations when a myriad of other considerations could quite well justify that punishment.

Furthermore, while some offenders afflicted with severe psychiatric illnesses may suffer from many of the same limitations that diminish the blameworthiness of retarded persons, this is not always true for all such offenders. While mentally retarded persons are constantly impaired by their condition, the severely mentally ill “may have periods of relative lucidity and

97 Jones et al., supra note 93, at 13.
98 Mossman, supra note 12, at 281.
99 Id. (internal citations omitted).
100 Id. at 283–84.
101 Id. at 283 (internal quotations omitted).
102 Jones et al., supra note 93, at 28.
103 Id.
104 Id.
lack of impairment."105 Put differently, offenders with severe psychiatric illness "tend to have some good days; whereas, the judgment and foresight of a mentally retarded person is always comparatively impaired."106 For example, an offender with bipolar disorder may be "relatively normal much of the time" but then turn psychotic during a manic phase.107 Similarly, a schizophrenic can often socially interact with others quite lucidly so long as the interaction is "unrelated to some area of delusional significance."108 Accordingly, as one legal commentator put it, "[g]iven the fluctuating nature of the symptoms of mental illness," it is inappropriate to say that a severely mentally ill murderer can "never, as a matter of law, be as culpable as a 'normal' murderer."109 As such, severely mentally ill murderers should not be categorically exempted from capital punishment. Rather, their cases should be examined on an individualized basis.

B. Offenders with Traumatic Brain Injuries

Other offenders offered as possible candidates for categorical exemption from the death penalty are those who have suffered traumatic brain injuries, particularly to the frontal lobe of the brain.110 The frontal lobe is the part of a person's brain that "regulate[s] socially appropriate behavior and suppresses impulses."111 When it is damaged, often by trauma, tumor, or stroke,112 the afflicted person may suffer from “impairment[s] in judgment” or become more likely to “commit impulsive or violent acts even though such acts normally would be against that person’s nature.”113 Because frontal lobe damage to the brain contributes to “emotionally impulsive actions,”114 some have posited that it might be "a possible causal factor in violent crime."115

106 Id.
107 Id.
108 Id.
109 Id.
110 See Farahany, supra note 84, at 859; see also Corena G. Larimer, Equal Protection From Execution: Expanding Atkins to Include Mentally Impaired Offenders, 60 CASE W. RES. L. REV. 925 (2010).
112 Id.
113 Redding, supra note 11, at 60–61.
114 Barth, supra note 111, at 503.
115 Redding, supra note 11, at 57.
Not surprisingly, like claims that the severely mentally ill should be exempted from capital punishment, calls for the exemption of offenders with traumatic brain injuries have also been supported by neuroimaging evidence. In fact, many neuroimaging studies of murderers have "consistently found frontal lobe abnormalities." Accordingly, brain images such as fMRIs and PET scans are often offered in capital post-conviction relief proceedings in support of arguments that, due to a traumatic brain injury, the offender was insufficiently culpable to be executed.

However, due to difficulties in defining the boundaries of a traumatic brain injury category, proponents have not advocated for a categorical exemption per se. Rather, proponents have asserted that it is the Equal Protection Clause of the Fourteenth Amendment that exempts offenders with traumatic brain injuries from execution because such offenders have "identical cognitive, behavioral, and adaptive impairments" as the mentally retarded offenders protected under Atkins.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." This, according to the Supreme Court, requires states to "treat like cases alike," and "unlike cases accordingly." As such, advocates of the traumatic brain injury exemption assert that to treat these "like" cases differently is to deny offenders with traumatic brain injuries the equal protection of the laws. However, the argument that offenders with traumatic brain injuries should be exempted from capital punishment because they are identical to offenders with mental retardation is flawed.

116 Barth, supra note 111, at 504.
117 See, e.g., Roberts v. State, 102 S.W.3d 482, 499 (Ark. 2003); Cooper v. State, 739 So. 2d 82 (Fla. 1999); Coe v. State, 17 S.W.3d 193 (Tenn. 2000).
118 Many jurisdictions require a brain impairment to be "significant[]" before it can be asserted as a reason to foreclose a sentence of death. See, e.g., 18 U.S.C. § 3592(a)(1) (2006) ("significantly impaired"); ALA. CODE § 13A-5-51 (1981) ("substantially impaired"); COLO. REV. STAT. ANN. § 18-1.3-1201(4) (West 1996) ("significantly impaired"); IND. CODE ANN. § 50-2-2-9(c) (West 2010) ("substantially impaired"); N.H. REV. STAT. ANN. § 630:5(VI) (1990) ("significantly impaired"); PA. STAT. ANN. § 9711(e) (West 2010) ("substantially impaired"); VA. CODE ANN. § 19.2-264.4 (West 2010) ("significantly impaired"). To satisfy this threshold, a capital offender must present "expert testimony that establishes a strong connection" between the defendant's frontal lobe dysfunction and his conduct. Barth, supra note 111, at 521. Additionally, capital offenders must also present neuroimaging evidence to support the claim. Id. Accordingly, a condemned offender is limited in that he cannot reasonably insist on categorical exemption when the injury to his frontal lobes is not "significant" or "substantial."
119 Farahany, supra note 84, at 859.
120 U.S. CONST. amend XIV, § 1.
First, for the same reasons that brain imaging technologies are of questionable value in assessing the culpability of the severely mentally ill, they are of equally questionable value in assessing the culpability of offenders with traumatic brain injuries. Second, while offenders with mental retardation and offenders with traumatic brain injuries may be functionally and cognitively similar, they are not functionally and cognitively equivalent in all cases. Among individuals who are mentally retarded, there are separate categories of mental retardation, but the categories “represent degrees of impairment rather than different kinds of impairment.” In other words, “a person with mild retardation [as in Atkins] may be less impaired than one with moderate retardation, but the nature of the impairment is fundamentally the same.” The same is not true for those with traumatic brain injuries. With mental retardation, the symptoms remain common even if they vary in degree, yet with traumatic brain injury a wide variety of injuries could occur, resulting in different symptoms. As such, many people with traumatic brain injuries retain the ability to restrain their actions. Put simply, offenders with mental retardation and offenders with traumatic brain injuries are not alike. While mentally retarded offenders, with their common symptoms, can be fairly said to uniformly share a reduced level of culpability, the same cannot be said of offenders with traumatic brain injuries, who may have varying symptoms and degrees of culpability. Therefore, the two groups can be treated differently under the law.

Even assuming, arguendo, that the two groups are “alike,” a state legislature may nevertheless be warranted in classifying them separately. In general, all government classifications of citizens must have a rational relationship to a legitimate state interest. Some classifications, such as those based on race, however, are considered “suspect” and must be strictly scrutinized. The Supreme Court has held that the mentally disabled are not a “suspect class” for equal protection purposes and that as such, legislative classification of them does not require heightened judicial scrutiny. Rather, legislation classifying mentally disabled persons differently is “presumed valid

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122 See supra Part III.A.
123 Wilkins, supra note 105, at 442.
124 Id.
125 Id.
126 Barth, supra note 111, at 514
127 Id.
129 Id.
130 Id. at 442.
and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."  

The rational basis for classifying persons with mental retardation separately from persons with traumatic brain injuries is the state’s need to prevent malingering among capital offenders.  

Unlike traumatic brain injury, part of the diagnostic criteria for mental retardation is onset before the age of eighteen.  

"[B]y requiring that [capital offenders] provide some evidence that [they] had cognitive deficiencies early in life,” a state can prevent them from malingering.  

Without such a requirement, capital offenders could conceivably feign mental retardation as adults, “simply to escape capital punishment.”  

Put simply, if offenders with traumatic brain injuries and offenders with mental retardation are amalgamated into one classification, the age of onset requirement for mental retardation will evaporate. This is because an age requirement cannot be applied to those with traumatic brain injuries.  

This all-encompassing classification would deprive the states of a key method of verifying offenders’ medical claims and pave the way for rampant malingering. Given that the states have a legitimate interest in ensuring that “only those who truly have a diminished culpability escape the death penalty under Atkins” and that “requiring juvenile onset appears to be rationally related to preventing any such fraud,” such rationale is sufficient for classifying the mentally retarded separately from those with traumatic brain injuries.  

The claim that the Equal Protection Clause categorically exempts offenders with traumatic brain injuries from execution must fail. This is because offenders with traumatic brain injuries are not identical to those with mental retardation. Additionally, even in those cases where they are cognitively the same, the state nevertheless has a rational basis for treating them differently. Therefore, the appropriateness of imposing a sentence of death upon a capital offender who has suffered a traumatic brain injury should continue to be evaluated on an individualized basis.  

C.  

Offenders with Genetic Predispositions Toward Violence  

Many capital offenders argue that they should be exempted from capital punishment because they have a genetic predisposition toward violence  

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131  id. at 441–442.  
132  Larimer, supra note 110, at 943–944.  
133  Farahany, supra note 84, at 884.  
134  Larimer, supra note 110, at 943–944.  
135  id.  
136  id. at 944.
or aggression, which purportedly reduces their culpability. Such genetics-based claims, while not nearly as prevalent as calls for other categorical exemptions, have also been suggested in legal commentaries. Advocates supporting the notion that some criminals are less morally culpable for their crimes because of their genetic makeup overwhelmingly point to four separate studies to back up their claims: (1) the XYY Chromosome studies, (2) twin studies, (3) adoption studies, and (4) studies of the gene for monoamine oxidase A.

In the 1960s, genetic scientists discovered that there is a "strong correlation or causal connection between antisocial behavior and the presence of an extra Y chromosome." Human females have two X chromosomes and most human males have one X chromosome and one Y chromosome. However, some males receive an extra Y chromosome, resulting in what is known as the "XYY chromosome configuration." Some studies suggest that males with this XYY chromosome configuration are four times more likely to have criminal records than males with the normal XY configuration. These studies also indicate that many men with the XYY chromosome configuration have "intellectual capacities, sexual instincts, aggressive impulses, and emotional responses" that result in "immaturity, defective development, or inadequate control."

Claims that violent criminal behavior may be rooted in genetics have also been supported by studies of twins raised apart from one another. In one such study, scientists assessed over 100 sets of twins, both identical and

137 See Mobley v. State, 455 S.E.2d 61 (Ga. 1995); see also Deborah W. Denno, Revisiting the Legal Link Between Genetics and Crime, 69 LAW & CONTEMP. PROBS. 209, 239 (2006) (detailing twenty capital cases between 1994 and 2004 in which offenders challenged a death sentence on the basis of genetic conditions).

138 See Evansburg, supra note 1, at 1573–74; see also Price-Huish, supra note 84, at 603.

139 See D.A. Price & A.J. Whatmore, Behavior Disorders and the Pattern of Crime Among XYY Males Identified at a Maximum Security Hospital, 1 BRIT. MED. J. 533 (1967).


145 See id. at 460–61.

146 Id.

147 Coffey, supra note 143, at 361.
fraternal, and measured the similarities and differences in their behavior characteristics and personality traits. The idea was that, given that identical twins have identical genetic composition, and that fraternal twins have different genetic makeup, there would be "a greater correlation between the behavioral patterns of identical twins than between those of fraternal twins." Each set of twins was raised separately so as to avoid any suggestion that environmental influences steered their behavior. Ultimately, the scientists' suspicions were confirmed. The separated identical twins exhibited virtually identical behavior characteristics while the separated fraternal twins did not. Accordingly, the scientists concluded that "genetic factors exert a pronounced and pervasive influence on behavioral variability."  

A very similar study of adopted children revealed analogous results, further bolstering the notion that genes have a prominent influence on the development of violent criminal behavior. The Danish study, conducted over several decades, monitored the behavior of over 13,000 adoptees, their biological parents and their adoptive parents. In the end, it was revealed that adoptees whose biological parents had a criminal conviction were more likely to have a criminal conviction themselves than were adoptees whose biological parents had never had a criminal conviction. Although adoptive parents with a criminal conviction also tended to produce adopted children with criminal records, the scientists concluded that "only the biological parent's criminality was associated with a statistically significant increment in the son's criminality."  

Another study, by Dutch scientist H.G. Brunner, discovered that males who carry a mutated gene for monoamine oxidase, an enzyme that triggers certain neurotransmitters in the brain, have distorted reactions to external stimuli and have difficulty coping with stressful situations that people with the normal gene find easy to manage. Accordingly, these males have shown to be considerably more likely to exhibit impulsive, aggressive criminal behavior such as rape, arson, and assault. This study has led many to believe that there might possibly be a gene for aggression and that there is a "correlative effect between certain genes and violence."  

148 See Evansburg, supra note 1, at 1573–74.
149 Johnson, supra note 144, at 455–56.
150 Evansburg, supra note 1, at 1574.
151 Id. at 1575.
152 Johnson, supra note 144, at 459–60.
153 Evansburg, supra note 1, at 1575.
154 Id. at 1572.
156 Id.
In light of studies such as these, many experts have speculated that criminals are born, not made, and that genetic makeup diminishes moral culpability.\textsuperscript{157} Furthermore, these studies have led more and more criminal defendants to offer evidence of genetic predispositions to challenge death sentences after a finding of guilt.\textsuperscript{158} As one scholarly article succinctly put it, these defendants are arguing that they do not deserve capital punishment by saying “it’s not my bad character; it’s my bad genes.”\textsuperscript{159}

However useful these arguments are for purposes of mitigation, though, they in no way support the case for categorical exemption. First, the science of genetics “does not support the perspective that human actions are fixed or caused by genes.”\textsuperscript{160} Rather, human behavior is a product of “a complex interaction of biology and the environment.”\textsuperscript{161} As such, having a genetic predisposition toward violence does not automatically render an offender less culpable. Too many other factors must be taken into account, including some that could very well render an offender more culpable. For example, if the offender were a racist, and his crime was motivated by racial animus, his culpability would actually be higher, regardless of his genetics. Second, having a genetic predisposition toward a certain behavior does not necessarily mean that one will exhibit that behavior. This is because gene expression can actually “be turned on and off by life events.”\textsuperscript{162} For example, some people have a gene known as 5-HTT, which is associated with depression, suicide, and aggression. Yet, unless persons carrying the gene are actually exposed to stressful life events, they are no more likely to exhibit depression, suicide, or aggression than persons without the gene.\textsuperscript{163} Put differently, a person could have a genetic predisposition toward violence without ever acting violently. At the same time, one could have a genetic predisposition toward violence and be violent for reasons other than the genetic predisposition. Ultimately, the point is that “genetic differences alone do not explain behavioral differences between individuals.”\textsuperscript{164} As such, it makes little sense to afford genetic differences so much weight in determining appropriate sentencing among individuals. Put simply, individual differences should be considered on an individualized basis.

\textsuperscript{157} See Coffey, supra note 143, at 361.
\textsuperscript{158} See Farahany & Coleman, supra note 84, at 128–30.
\textsuperscript{159} \textit{Id.} at 128.
\textsuperscript{160} \textit{Id.} at 116.
\textsuperscript{161} \textit{Id.}
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} Farahany & Coleman, supra note 84, at 117.
The foregoing Part has analyzed some of the specific arguments presented by proponents of additional categorical exemptions and offered rebuttals to those specific arguments accordingly. There are, however, additional arguments against categorical exemptions, in general. The following Part outlines those arguments.

IV. OTHER ARGUMENTS AGAINST ADDITIONAL CATEGORICAL EXEMPTIONS

The current state of the Supreme Court's Eighth Amendment jurisprudence indicates that there are two legal avenues by which condemned offenders afflicted with one of the aforementioned conditions can seek to have their death sentences invalidated. First, under the Ford-Panetti line of cases, offenders can claim that they lack sufficient mental capacity to be executed. That is, that they cannot understand "the punishment they are about to suffer and why they are about to suffer it," or otherwise recognize that society views death as an appropriate punishment for murder because of the "severity of the offense and the objective of community vindication." While this avenue is not a categorical exemption per se, and therefore is not directly relevant to the ensuing analysis, it is important to keep in mind because, as a viable option for offenders with conditions affecting brain function, it stands for the idea that even without categorical exemption, such offenders are not entirely without recourse.

The second avenue, an Atkins-type claim of insufficient culpability, is where the aforementioned arguments over categorical exemption come to the forefront of modern Eighth Amendment jurisprudence. Atkins and Roper suggest that offenders with conditions affecting brain function may be less morally culpable and therefore less deserving of capital punishment. More specifically, the Atkins Court's reasoning suggests that if one diagnosis can categorically preclude offenders from execution, then the same might apply for other diagnoses as well. In fact, some experts have already suggested that "if a psychiatric diagnosis is all that is required to lead courts to believe that retarded defendants are not fully accountable for their acts, then consistency requires courts to exempt [other] defendants from execution too."

Nevertheless, as mentioned above, for a sentence of death to be constitutionally proportional to a given offender, it need only comport with

165 See supra Part II.
166 See supra Part II.A.
169 See supra Part II.B.
170 Mossman, supra note 12, at 279–80 (internal citations omitted).
basic, objective standards of decency.171 Again, in determining whether this is the case, "state action is often determinative."172 The Court has consistently looked to state legislative action as the bellwether of decency. This has been seen in cases such as where the Court sanctioned the modern death penalty system,173 prohibited capital punishment for rape,174 prohibited capital punishment for offenders who are insane at the time of execution,175 prohibited capital punishment for juvenile offenders under the age of eighteen,176 prohibited capital punishment for mentally retarded offenders,177 and prohibited capital punishment for the rape of a child.178 As one expert put it, "the future of the constitutional death penalty exemption . . . is as dependent on the state legislative process as it is on the Court."179

Presently, however, not a single capital punishment state provides categorical exemptions for offenders afflicted with specific severe psychiatric illnesses, traumatic brain injuries, or genetic predispositions. Accordingly, under current Eighth Amendment jurisprudence, the likelihood for the Court to extend categorical exemptions for offenders afflicted with these conditions is exceedingly low. Therefore, if proponents of additional categorical exemptions ultimately want them at the constitutional level, the Court is going to insist that they first obtain enough state-level exemptions to constitute a national standard of decency. As suggested above in response to the specific arguments for categorical exemptions, and elaborated upon here, the capital punishment states should not provide such exemptions.

171 Entzeroth, supra note 29, at 550 (internal citations omitted).
172 Id. at 550 n.113 (internal citations omitted).
174 Coker v. Georgia, 433 U.S. 584, 593 (1977) (noting that only three states provided the death penalty for rape of an adult in their revised post-Furman statutes).
175 Ford v. Wainwright, 477 U.S. 399, 408 (1986) (noting that no state allowed the execution of an offender who was deemed insane at the time of his execution).
179 Entzeroth, supra note 29, at 581.
A. Conditions Affecting Brain Function Are Largely Irrelevant in Capital Cases

1. Capital Punishment Is Regularly Restricted to Cases of Premeditated and Deliberated Murder

The Supreme Court has held that the states’ use of capital punishment must be limited to a “narrow category of the most serious crimes.” In defining the parameters of this “narrow category,” the Court has already banned capital punishment for many crimes for which it has deemed death to be a disproportionate punishment. Consequently, the capital punishment states have been forced to restrict their capital crimes to a few isolated charges. In fact, the majority of capital punishment states only allow capital punishment for first-degree murder. To be guilty of first-degree murder, an offender must “not only intend to kill, but in addition he must premeditate the killing and deliberate about it.” More specifically, the murderer must have a “cool mind . . . capable of reflection” and he must “reflect, at least for a short period of time before his act of killing.”

In light of these considerations, scientific evidence that suggests that offenders with traumatic brain injuries or genetic disorders are prone to “impulsive, aggressive criminal behavior” or “impulsive . . . violent acts,” is irrelevant. Put simply, what difference does it make, for purposes of determining culpability, if an offender is prone to impulsivity when he has been convicted of, and sentenced for, a crime that required premeditation and deliberation?

180 Roper, 543 U.S. at 568.
181 See Kennedy, 554 U.S. at 408 (banning capital punishment for rape of a child); Enmund v. Florida, 458 U.S. 782 (1982) (banning capital punishment for felony-murder in which the offender did not kill, attempt to kill, or intend for anyone to kill the victim); Coker v. Georgia, 433 U.S. 584 (1977) (banning capital punishment for rape).
183 See supra note 182 and accompanying text.
185 Wayne R. LaFave & Austin W. Scott, CRIMINAL LAW § 73, at 563 (2d ed. 1986).
186 Jones, supra note 155, at 1040.
The same can be asked about psychiatric disorders that are characterized by impulsivity such as ADHD, Post-Traumatic Stress Disorder, and low serotonin function.\textsuperscript{187} How can a propensity toward impulsivity matter for the purposes of determining culpability when it has already been established during the guilt-phase that the offender acted with “cool reflection”?\textsuperscript{188}

In determining proportionality under the Eighth Amendment, “the Constitution demands that the punishment be tailored both to the nature of the crime itself and to the defendant’s ‘personal responsibility and moral guilt.”\textsuperscript{188} Therefore, if an offender has been convicted of a crime during which his actions were not impulsive but cool and calculated, it is hard to see how his culpability is diminished in any way even if he did suffer from a condition that could arguably result in impulsivity. As such, the states that restrict their use of capital punishment to cases of premeditated and deliberate murder have no need to provide a categorical exemption for offenders with severe psychiatric illnesses, traumatic brain injuries, or genetic predispositions because they do not sentence murderers to death for impulsive murders in the first place.

2. Society’s Penological Goals of Deterrence and Retribution are Often Achievable Even When Offenders Have Conditions Affecting Brain Function

In response to the above argument that biological conditions causing impulsivity are irrelevant to many states’ use of capital punishment, it could be argued that these conditions nevertheless preclude the fulfillment of any of society’s penological goals. The Supreme Court has held that if a given use of capital punishment cannot “measurably contribute” to society’s penological goals of deterrence and retribution, then “it is nothing more than the purposeless and needless imposition of pain and suffering” and hence an unconstitutional punishment.\textsuperscript{189}

With regard to deterrence, it could be argued that in light of the recent advances in science and medicine that suggest that a condition affecting brain function can render an offender so impulsive that he cannot “process the information of the possibility of execution”\textsuperscript{190} and conform his conduct accordingly, society’s penological interest in deterrence cannot be served. This argument, however, is demonstrably flawed. According to the Supreme Court, “[t]he theory of deterrence in capital sentencing is predicated upon the notion that increased severity of the punishment will inhibit criminal actors from

\textsuperscript{187} Mossman, supra note 12, at 281.
\textsuperscript{188} Roper v. Simmons, 543 U.S. 551, 603 (2005) (O’Connor, J., dissenting) (emphasis added) (internal quotations omitted).
\textsuperscript{190} Atkins v. Virginia, 536 U.S. 304 (2002).
carrying out murderous conduct.\textsuperscript{191} This is particularly true, the Court has noted, in cases where "the murder is the result of premeditation and deliberation."\textsuperscript{192} In other words, if the murderer can take the time to premeditate and deliberate over his crime, then he can also take the time to consider the severity of his punishment and potentially be inhibited from carrying out the murderous conduct. If one is so cool and calculating that he can premeditate and deliberate a murder, it is difficult to see how he is simultaneously so impulsive that he cannot take pause to consider the consequences of his crime.

With regard to retribution, the Court has indicated that society has an "interest in seeing that [an] offender gets his 'just deserts.'"\textsuperscript{193} That is, certain punishments are justified simply because the offender deserves it.\textsuperscript{194} At the same time, some punishments are not justified because the offender does not deserve it. It could be argued, then, that offenders whose culpability is reduced because they are afflicted with a condition affecting brain function can never be truly deserving of death. This argument, too, is flawed. Culpability and deservedness do not depend entirely on an offender's mental state but also on the circumstances of the crime. In other words, sometimes an offender deserves death even when his mental state might have arguably reduced his culpability.

The case of Timothy McVeigh is instructive. In 1997, McVeigh was convicted and sentenced to death on eleven counts stemming from the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, that resulted in the deaths of 168 people.\textsuperscript{195} Although his lawyers did not raise the issue at sentencing nor on appeal, it was later learned that McVeigh likely suffered from Post-Traumatic Stress Disorder resulting from of his service in the Gulf War.\textsuperscript{196} Under the theory that an offender with a condition affecting brain function can never be culpable enough to be truly deserving of a sentence of death, Timothy McVeigh would be exempted from capital punishment. Yet this theory ignores the facts of the Oklahoma City bombing.

Angered at the federal government's April 19, 1993, siege of the Branch Davidian Compound in Waco, Texas, McVeigh plotted to "take some type of positive offensive action against the federal government" on the two

\textsuperscript{191} Id. at 320.
\textsuperscript{192} Enmund, 458 U.S. at 799.
\textsuperscript{193} Atkins, 536 U.S. at 319.
\textsuperscript{194} Wilkins, supra note 105, at 447.
\textsuperscript{195} United States v. McVeigh, 153 F.3d 1166, 1176 (10th Cir. 1998).
year anniversary of that siege. For more than six months before the bombing, McVeigh carefully and deliberately planned the attack, buying or stealing whatever he needed to construct the bomb. On three separate occasions in September and October of 1994, McVeigh traveled to multiple states and, using various aliases, purchased large quantities of ammonium nitrate and nitromethane, major chemical components ultimately used in the construction of the bomb. On other occasions during the same time period, again using an alias, he sought to purchase additional bomb ingredients both in person and through a prepaid telephone calling card. Unable to personally fund these expensive purchases, McVeigh robbed gun dealers to obtain additional money and stole whatever other ingredients he could not buy. Once all the bomb components were assembled, McVeigh, using an alias, rented a number of storage lockers across Kansas and stored the components there. As the date of the planned attack drew closer, McVeigh made a special trip to Oklahoma City to scout out his pre-selected target and determine how to best attack it. On April 14, 1995, McVeigh purchased a getaway car and rented a Ryder truck. Using carefully drawn diagrams of the truck, the chemicals, the explosives, and the fusing system, he constructed the bomb in the back of the truck. Then, just days before the attack, McVeigh, with a co-conspirator, positioned the getaway car in an alley near the Murrah building. He had deliberately parked the car in that spot so a building would shield him from the explosion as he made his escape. Additionally, he placed a sign in the car, deceptively indicating that the car was disabled and asking that it not be towed. Finally, on the day of the attack, McVeigh drove the Ryder truck to Oklahoma City, parked it in front of the Murrah building, lit the fuse, and sprinted to the getaway car. Among the 168 people killed were 15 children in the building's day care center, which was visible from the front of the building. McVeigh later told a psychiatrist that although he had seen that

197 McVeigh, 153 F.3d at 1177.
198 Id.
199 Id.
200 Id.
201 Id.
202 Id.
203 Id. at 1178.
204 Id.
205 Id.
206 Id.
207 Id.
208 Id.
209 Id. at 1177.
there was a day care center in the building, he proceeded with the attack anyway because “the date was too important to put off.”

In light of all of these facts, it is clear that one can fairly make the claim that Timothy McVeigh deserved a sentence of death. Even if McVeigh’s Post-Traumatic Stress Disorder did reduce his moral culpability some degree, the other facts of the case, namely the months of extensive premeditation and planning, the careful plotting and deliberation, and the wanton, depraved nature of the crime still support the idea that McVeigh’s execution achieved appropriate retribution. Put differently, the case of Timothy McVeigh demonstrates that at some point, some crimes are so heinous that the offender deserves a sentence of death even when he is afflicted with a condition affecting brain function. While the McVeigh case is perhaps the clearest example of how society’s penological goal of retribution can be achieved, this rationale has been applied in many state cases where courts considered conditions affecting brain function as mitigating factors, but nevertheless upheld a death sentence.

To reiterate, the point of the foregoing analysis is that however compelling advances in science and medicine are to understanding the biological causes of human behavior, the fact of the matter remains that they are simply not relevant in a large number of capital cases. Nevertheless, even if one insisted that they were relevant, such as in cases of an impulsive, non-premeditated, and non-deliberated “felony-murder,” the law can still provide appropriate protection without resorting to categorical exemptions.

B. Current Eighth Amendment Jurisprudence Already Provides Sufficient Constitutional Protection for Offenders with Conditions Affecting Brain Function

1. Capital Sentencing Authorities Are Required To Consider All Evidence of Conditions Affecting Brain Function

The Court has held that, under the Eighth Amendment, the sentencing authority in every capital case must consider “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” Accordingly, the capital offender afflicted with a condition affecting brain function is not

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entirely without recourse. If such an offender believes that his condition significantly reduces his culpability, he need only introduce evidence in support thereof and the sentencing authority must consider it. Furthermore, even if such an offender fails in convincing the sentencing authority that his condition is sufficiently mitigating, he can still seek post-conviction relief on a claim that capital punishment is disproportionate in his case in light of his condition. In fact, while the Court has never found that an offender’s severe psychiatric illness, traumatic brain injury, or genetic predisposition warranted a finding that the death penalty was disproportionate in a particular case, the state courts have.

For example, in Crook v. State, the Supreme Court of Florida found death to be a disproportionate punishment because mitigating circumstances, including damage to the frontal lobe of the offender’s brain, outweighed the aggravating circumstances of the murder. In doing so, the court deftly identified the case’s position along the spectrum of Eighth Amendment culpability, noting that although the frontal lobe damage did not “rise to the level of insanity so as to bar Crook’s conviction for murder,” and it did not “rise to the level of mental retardation that would constitutionally limit his sentence,” the mental deficiency was so substantial that it merited “great consideration in evaluating [the] defendant’s culpability in a proportionality assessment.” Other state courts have reached similar conclusions in analogous cases. These cases show that the Supreme Court’s requirement that capital sentencing authorities give “full effect” to all mitigating factors provides ample constitutional protection without having to go as far as categorical exemption.

2. Capital Sentencing Authorities Are Exempting Offenders with Truly Insufficient Culpability

In recent years, death sentences in the United States have been in “steady nationwide decline... even though the capital murder rate has remained relatively constant.” In fact, in almost each year from 1996–2010, the number of death sentences handed down has decreased from the year

213 Crook v. State, 908 So. 2d 350, 358 (Fla. 2005).
214 Id.
before, culminating in an all-time low of 104 death sentences in 2010.\textsuperscript{217} This decline has been consistent across all of the death penalty states and not a single state has shown an upward trend in the number of death sentences it has handed down during that time.\textsuperscript{218} Additionally, according to one commentator, "what has been particularly striking about this decline is that it has been achieved essentially on a case-by-case basis."\textsuperscript{219} That is, not a single major capital punishment state has abolished the death penalty and even the \textit{Atkins} and \textit{Roper} exemptions removed only a small number of offenders from the death-eligible pool.\textsuperscript{220} Therefore, given that this steady decline in death sentences has occurred concurrently with the rise of scientific understanding of human behavior, one can reasonably infer that capital sentencing authorities, using individualized review, are already protecting those offenders with truly insufficient culpability from death. This is especially true in light of the fact that jurors in capital cases have reported "giving considerable weight to neuroimaging evidence."\textsuperscript{221} At the same time, this also suggests that those offenders who are sentenced to death despite being afflicted with conditions affecting brain function, are actually truly deserving of it.

\textbf{C. The Categorical Exemptions in Atkins and Roper are Sui Generis}

One could challenge this Note's contention that individualized sentencing provides sufficient constitutional protection for death row offenders with severe psychiatric illnesses, traumatic brain injuries, and genetic predispositions on the basis that analogous arguments from the \textit{Atkins} and \textit{Roper} dissents were rejected.\textsuperscript{222} However, the categorical exemptions the Court extended in \textit{Atkins} and \textit{Roper} are not analogous to those proposed for offenders with severe psychiatric illnesses, traumatic brain injuries, or genetic predispositions. The exempted categories in \textit{Atkins} and \textit{Roper} share two obvious characteristics: constancy and definability. First, as Professor Pamela Wilkins put it, "[t]he mentally retarded are impaired 24/7, so to speak."\textsuperscript{223} Similarly, she pointed out, young people are "at all times... immature as compared to most adults."\textsuperscript{224} Yet, she has noted, the severely mentally ill are not constantly impaired; they "may have periods of relative lucidity and lack of

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\textsuperscript{218} Sundby, \textit{supra} note 216, at 1955.
\textsuperscript{219} \textit{Id.}
\textsuperscript{220} \textit{Id.} at 1955–1956.
\textsuperscript{221} Redding, \textit{supra} note 11, at 78.
\textsuperscript{223} Wilkins, \textit{supra} note 105, at 443.
\textsuperscript{224} \textit{Id.}
\end{flushleft}
Impairment."225 Along the same lines, gene expression does not constantly appear either, it "may be turned on or off by life events."226 Admittedly, traumatic brain injuries seem to be "constant" in the sense that mental retardation and juvenility are, yet they are not definable in the way that mental retardation and juvenility are.

In Atkins, the Court cited multiple psychiatry manuals in determining the bounds of the class for which it was providing an exemption. Specifically, the Court cited the Diagnostic and Statistical Manual of Mental Disorders for the purposes of showing that "mild mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70."227 Additionally, the Court cited the Essentials of WAIS III Assessment 60 to show that "an IQ between 70 and 75 or lower... is typically considered the cutoff IQ score for the intellectual functioning prong of the mental retardation definition."228 While the Court left the task of defining "mental retardation" to the states,229 the Court’s reference to the quantifiable measurements in these scientific manuals goes a long way toward drawing boundaries around the exempted class. Even more obviously, in Roper, the Court drew the line of the exempted class at the age of eighteen.230

The exempted categories in Atkins and Roper are clearly defined and the boundaries are easily judicially administrable. The same cannot be said for any potential class of offenders with severe psychiatric illnesses or traumatic brain injuries. With psychiatric illnesses, there is a wide variety of diagnoses that one could label "severe" that have different symptoms.231 The same can be said for offenders with traumatic brain injuries who have been referred to as a "far more diffuse and much harder to define" class of people than those with mental retardation.232 The science simply provides no quantifiable way to draw boundaries around a potential class. These two potential classes are too broad, too diverse, and too nebulous to warrant a categorical exemption.

It could be argued that, rather than exempting the severely mentally ill or those with traumatic brain injuries generally, an exemption could be crafted for specific psychiatric diagnoses, such as schizophrenia. In fact, the state of Indiana is currently considering such an exemption.233 However, the problem still remains that unlike persons with mental retardation who share common

225 Id.
226 Beecher-Monas, supra note 162, at 255.
228 Id.
229 Id. at 317.
231 Wilkins, supra note 105, at 443.
233 Entzeroth, supra note 29, at 552.
characteristics, persons with schizophrenia can demonstrate vastly differently characteristics and behaviors. Therefore, even a diagnosis-specific exemption, like the one proposed in Indiana, does little good for the purposes of providing a workable boundary. Admittedly, a boundary could conceivably be drawn around a genetic predisposition category, but as mentioned earlier, such a category lacks the constancy that the Atkins and Roper categories have. To fall within the Atkins and Roper framework, any category that could potentially be exempted needs both constancy and definability.

Therefore, because the proposed categories of severe psychiatric illnesses, traumatic brain injuries, and genetic predispositions are not all characterized by both constancy and definability, individualized review remains the only way to ensure fair and efficient administration of justice. Moreover, individualized review will stand as a “limiting principle” that will serve to prevent the Court from becoming what Justice Thurgood Marshall famously warned against: “the ultimate arbiter of the standards of criminal responsibility” under the “aegis of the Cruel and Unusual Punishments Clause.”

D. Categorical Exemptions Unfairly Stigmatize Persons Afflicted with Conditions Affecting Brain Function As Morally Inferior

Psychiatrist Dr. Douglas Mossman has criticized categorical exemptions as the erroneous approval of the practice of basing opinions about moral capacities on peoples’ biological conditions. Even in protecting people with conditions affecting brain function, categorical exemptions simultaneously “stigmatize[] those citizens as morally inferior by virtue of their mental condition.” Admittedly, the very same argument could be fairly leveled against the Atkins decision, which this Note supports leaving in place, yet the argument presents a very legitimate concern, which states should take into account when considering the extension of categorical exemptions to additional classes of offenders. Categorical exemptions, it seems, are “tantamount to class discrimination.” Worse yet, they fly in the face of the Americans with Disabilities Act, which illegalizes “blanket decisions about people because of mental disability—for example, denying them jobs, accommodations, or public services out of the belief that their disability makes them less responsible.”

235 Mossman, supra note 12, at 256.
236 Id.
237 Id. at 273 (quoting APA Council on Psychiatry and Law, Position Statement on Discrimination Against Persons with Previous Psychiatric Treatment, 154 AM. J. PSYCHIATRY 1042 (1997)).
238 Id.
Making the same point, psychologist (and attorney) Donald Bersoff has pointed out that “[a]s important as it is to protect those who cannot protect themselves, it is equally important to promote the right of all persons to make their own choices, and, as a corollary, to be accountable for those choices.” Moreover, he recognizes, to do otherwise is to relegate persons with conditions affecting brain function to “second-class citizenship, potentially permitting the State to abrogate the exercise of such fundamental interests as the right to marry, to have and to rear one’s children, to vote, or such every day entitlements as entering into contracts or making a will.”

A more “progressive” approach Dr. Mossman notes, would be “to make individualized decisions about a defendant, taking into account his mental condition, but not allowing it to determine his moral worth.” Despite progressive arguments such as this, opponents of capital punishment have elected to repudiate this approach, and have instead adopted a position that is an affront to the millions of Americans afflicted with conditions affecting brain function who, in their moral capacities, have chosen not commit atrocious capital murders.

V. CONCLUSION

There is little doubt that increased knowledge of the biological underpinnings of human behavior has raised genuine concerns as to the constitutionality of capital punishment for some offenders afflicted with severe psychiatric illnesses, traumatic brain injuries, or genetic predispositions toward violence. Indeed, conditions affecting brain function may very well reduce the culpability of some, if not many of these offenders, to the point that death is not an appropriate punishment for them. However, the categorical exemption of one hundred percent of these offenders from capital punishment is not the proper response to these constitutional concerns. As indicated throughout this Note, the reasons for this are as follows.

First, the science suggesting that there are biological roots beneath criminal behavior simply does not support the claim that murderers with conditions affecting brain function can “never, as a matter of law, be as culpable as a ‘normal’ murderer.” Rather, the science indicates that many conditions affecting brain function express themselves periodically rather than constantly. Therefore, even if a murderer does have a condition affecting

239 Id. (quoting Donald N. Bersoff, Some Contrarian Concerns About Law, Psychology, and Public Policy, 26 LAW & HUM. BEHAV. 565, 568 (2002)).
240 Id. (quoting Donald N. Bersoff, Some Contrarian Concerns About Law, Psychology, and Public Policy, 26 LAW & HUM. BEHAV. 565, 568 (2002)).
241 Id.
242 Wilkins, supra note 105, at 443.
243 See generally supra Part III.
brain function, the condition does not necessarily play a role in the murder or otherwise automatically render the murderer less culpable. Put differently, it is entirely possible for at least some murderers afflicted with severe psychiatric illness, traumatic brain injury, or a genetic predisposition to be sufficiently culpable to deserve capital punishment in an appropriate case.\textsuperscript{244} The fact that the science suggests that many murderers with these conditions are generally less culpable for their misconduct than others does not necessarily mean that some of them are not sufficiently culpable to deserve capital punishment.

Second, any class that seeks to receive categorical constitutional protection needs to be clearly defined so that judicial administration can be accomplished with ease. Some of the classes of capital offenders proposed for additional categorical exemptions, unlike those classes already exempted, cannot be clearly defined.\textsuperscript{245}

Third, there is no reason for many states to extend categorical exemptions to offenders with conditions affecting brain function because those states restrict the use of capital punishment to crimes in which those conditions are largely irrelevant.\textsuperscript{246} Specifically, capital punishment is regularly restricted to cases of premeditated and deliberated murder. Biological conditions affecting impulse control or causing uncontrolled, aggressive behavior do not matter for the purposes of considering appropriate punishment for a person who has already been convicted of premeditated and deliberated murder. That crime is not characterized by impulsive or uncontrolled behavior. Rather, its main feature is its cold and calculated nature.

Moreover, in many capital punishment states, the states' penological goals of deterrence and retribution are often achievable.\textsuperscript{247} Regarding deterrence, it should be noted that when a murderer has been convicted of committing a murder which he took the time to premeditate and deliberate, it logically follows that he also had the time and capacity to consider the severity of the potential punishment. Additionally, none of the scientific evidence supports the idea that all offenders with conditions affecting brain function are inherently incapable of being deterred by the prospect of capital punishment. The fact that capital punishment may be less likely to deter many of these offenders from committing a capital crime does not necessarily mean that the threat cannot effectively deter some such offenders. It is entirely plausible for a legislature considering providing categorical exemption to these offenders to reasonably conclude that at least some of them can be deterred by the threat of execution. This is especially important given that the deterrent effect of a penalty is adequately vindicated if it successfully deters some, even if not all,
of a target class. As for retribution, it must be remembered that culpability does not depend solely on the mental capacity of the offender, it also depends upon the circumstances of the crime. Therefore, as demonstrated by the case of Oklahoma City bomber Timothy McVeigh, the circumstances of a given crime can often justify the use of capital punishment and achieve society’s goal of retribution even when the murderer suffers from a condition affecting brain function.

Fourth, additional categorical exemptions from capital punishment are not necessary because the Court’s Eighth Amendment jurisprudence already provides sufficient protection for offenders with conditions affecting brain function. Specifically, the law already requires capital sentencing authorities to consider all evidence of such conditions. In fact, statistical evidence of rapidly declining death sentences, despite static capital murder rates, indicates that capital sentencing authorities are, through individualized review, in fact exempting those murderers who truly lack sufficient culpability to warrant a sentence of death. Simultaneously, this evidence suggests that those murderers who actually are sentenced to death are truly deserving of it.

Lastly, persons with conditions affecting brain function have fought for years to establish themselves as equal, productive members of society who are capable of making, and being wholly accountable for, their own choices. Categorically exempting all murderers afflicted with conditions affecting brain function unjustly brands all people with those conditions as morally inferior. This is an insult to those citizens with conditions affecting brain function who are not depraved murderers.

In conclusion, the appropriate alternative to categorically exempting offenders with severe psychiatric illnesses, traumatic brain injuries, or genetic predispositions from capital punishment is individualized review. This approach takes into account all of the characteristics of a given murder and a given murderer. Individualized review is judicially administrable, it is scientifically and legally sensible, and it affords proper and adequate respect to the moral worth of all citizens. Better yet, it is statistically shown to be effective at distinguishing those without sufficient culpability from those who are truly morally culpable and deserving of the ultimate punishment.

The categorical exemptions proposed for murderers with severe psychiatric illnesses, traumatic brain injuries or genetic predispositions are neither judicial administrable nor sensible. Worse, the proposed categorical exemptions threaten to protect a number of murderers who are actually

249 Id. at 350 (Scalia, J., dissenting).
250 See supra Part IV.B.1.
251 See supra Part IV.B.2.
252 See supra Part IV.D.
culpable enough to deserve capital punishment or who would otherwise be deterred from committing heinous capital murders.

States considering crafting statutory categorical exemptions from capital punishment for offenders with conditions affecting brain function should not do so. Instead, they should continue to use individualized review.

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