

TOO ILL TO BE KILLED: MENTAL AND PHYSICAL COMPETENCY TO BE EXECUTED PURSUANT TO THE DEATH PENALTY

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Abstract

Mentally ill individuals are being housed in prisons and jails throughout the country. Due to decreased funding and overpopulation of correctional facilities, individuals with pre-existing illnesses, as well as others who develop illnesses, are in severe need of mental health services and punished for their ailments through the use of solitary confinement, long prison sentences, and lack of care. The stress created by such conditions is amplified for mentally ill prisoners who are awaiting execution or the dismissal of their death row sentences. These individuals must show that they are competent to stand trial, exhibit the mental state required for the committal of the alleged crime, be subject to the death penalty, and finally, be executed. Without a showing of competency for each time-sensitive element, prolonged prison stays are in order for these mentally ill inmates. The speed of the justice system, combined with outlawed execution drugs, has left these prisoners aging and helpless as they await their untimely sentences, categorized by some as cruel and unusual punishment.

Keywords: mentally ill, competency, trial, mental health, death penalty, death row, insanity defense, mental state, aging

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I. INTRODUCTION

There are several stages in criminal proceedings when the defendant's mental state must be evaluated.¹ It would seem likely, with so many processes, that no one who is mentally ill by mental health standards would end up in a prison cell, much less on death row, rather than in a mental institution receiving treatment. The reality is quite different, however.² Individuals for whom mental health professionals would agree are mentally ill are often processed in the criminal justice system, and increasingly so as publicly available mental health services and institutional openings have diminished.³ Jails and prisons have absorbed these individuals whenever there is a chance that they might do harm to themselves or others, and even if neither harm is likely or probable.⁴

These are only the individuals who have pre-existing mental illness prior to the criminal charge. Another segment of the prison population may become mentally ill while in jail or prison.⁵ Overcrowding, long prison sentences, solitary confinement, and inferior physical and mental health services in prison are sufficiently stressful that it is hardly surprising that mental health and physical health problems may ensue.⁶ Although adequate medical and psychological services, in theory, are available at least in the state and federal prison systems, the expanding need for such services may

1. See generally Am. Bar Ass'n, *Criminal Responsibility/Mitigation in Sentencing*, 25 MENTAL & PHYSICAL DISABILITY L. REP. 371 (2001).

2. See generally ALISA ROTH, *INSANE: AMERICA'S CRIMINAL TREATMENT OF MENTAL ILLNESS* (2018). See also Jan Hoffman, *She Went to Jail for a Drug Relapse. Tough Love or Too Harsh?*, N.Y. TIMES (June 4, 2018), <https://www.nytimes.com/2018/06/04/health/drug-addict-relapse-opioids.html> (explaining that even though mentally ill individuals are still jailed, treatment and medication are more effective).

3. See ROTH, *supra* note 2, at 135 (mentally ill Virginian who stole \$5 worth of food treated like a "circus animal" and died of starvation; schizophrenic Floridian boiled to death in a 160-degree shower); Hoffman, *supra* note 2.

4. Sam Dolnick, *The 'Insane' Way Our Prison System Handles the Mentally Ill*, N.Y. TIMES (May 22, 2018), <https://www.nytimes.com/2018/05/22/books/review/insane-alisa-roth.html>; see ROTH, *supra* note 2, at 58 (many offenders committed minor violations yet ended up in prisons rather than receiving mental health related treatments). Roth states, "[T]housands of desperately sick people receiving minimal treatment for their mental health problems, being cared for by people with little training for that aspect of the job, and all this at great expense—simply because they have been charged with a crime." ROTH, *supra* note 2, at 58.

5. See Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325 (2006).

6. *Id.* at 354 ("[R]estriction of environmental stimulation and social isolation . . . are strikingly toxic to mental functioning, producing a stuporous condition associated with perceptual and cognitive impairment and affective disturbances.").

not be met due to decreases in funding for such services and the expanding prison population.⁷

In addition to these general problems, the unique stress of being on death row cannot be overestimated. Long years of appeals, other proceedings, and death sentences stayed only to be upheld are endemic.⁸ Death row prisoners have walked to their execution only to be told it is delayed.⁹ Dates are set for executions and dates are changed.¹⁰ More recently, how a prisoner is to be killed has become a serious issue as drugs have become unavailable.¹¹ Death rows have also become the geriatric wards of prisons, with more prisoners old enough and physically ill enough that imposing any method of execution is fraught with medical uncertainties and the possibility of excessive suffering.¹² As some of these problems seem inherent and unavoidable in a criminal justice system that recognizes the death penalty, is it an acceptable cost to society, much less the individual defendant? However one answers this question, the increasing incidence of death row prisoners who are physically or mentally ill is a growing epidemic that presents disturbing questions of execution in a way that satisfies the most basic of humane considerations.¹³ The last bastion of the purposes of criminal punishment—retribution—has become the argument of last resort in such cases before the Supreme Court. What has not been fully evaluated in opinions over how to kill, like *Glossip v. Gross*,¹⁴ is whether retribution is even served when the standard for mental competency for execution is set so low.

7. Max Hutton, *The Lack of Federal Funding for Mental Health and the Criminalization of Mental Illness*, PSYCHE, <https://psyche.media/the-lack-of-federal-funding-for-mental-health-and-the-criminalization-of-mental-illness> (last visited Jan. 2, 2019) (showing federal funding cuts in the 1980s and 1990s has contributed to approximately “20% of all state and federal prisoners [who] suffer from a mental illness”) (citing *Mental Health by the Numbers*, NAT’L ALLIANCE ON MENTAL ILLNESS, <https://www.nami.org/learn-more/mental-health-by-the-numbers> (last visited Jan. 2, 2019)).

8. See generally Caycie D. Bradford, *Waiting to Die, Dying to Live: An Account of the Death Row Phenomenon from a Legal Viewpoint*, 5 INTERDISC. J. HUM. RTS. L. 77 (2010).

9. See Bradford, *supra* note 8, at 81–85 (describing that the delay between sentencing and execution is cruel and unusual punishment, in violation of the Eighth Amendment; in the United States, the average wait time is twelve years); Margaret Renkl, *America Has Stopped Being a Civilized Nation*, N.Y. TIMES (Aug. 12, 2018), <https://www.nytimes.com/2018/08/12/opinion/death-penalty-billy-ray-irick.html>.

10. Bradford, *supra* note 8, at 86 (delays are not the fault of the prisoners, and prisoners have been known to waive their rights to appeals in order to be executed sooner).

11. Jennifer Horne, *Lethal Injection Drug Shortage*, COUNCIL ST. GOVERNMENTS (Aug. 2017), http://www.csg.org/pubs/capitolideas/enews/issue65_4.aspx (“[N]ationwide shortage of sodium thiopental, an anesthetic that is part of the three-drug cocktail used in lethal injections, has thrown capital punishment in the United States into disarray, delaying executions and forcing the change of execution protocols in several states.”).

12. *America’s Geriatric Prison Population Is Growing*, ECONOMIST (May 26, 2018), <https://www.economist.com/united-states/2018/05/26/americas-geriatric-prison-population-is-growing>.

13. See *id.*

14. *Glossip v. Gross*, 135 S. Ct. 2726 (2015). See generally Linda A. Malone, *The Death Knell for the Death Penalty and the Significance of Global Realism to Its Abolition from Glossip v. Gross to Brumfield v. Cain*, 11 DUKE J. CONST. L. & PUB. POL’Y 107 (2016).

II. MENTAL COMPETENCY

A. Competency to Stand Trial

There are four different contexts in which mental competency is evaluated in criminal proceedings: (1) competency to stand trial; (2) competency to be convicted of the criminal offense (the required *mens rea* and the defense of insanity); (3) competency to be subject to the death penalty (exclusion of juveniles and the “intellectually disabled”); and (4) competency to be executed. Different legal tests have been devised for each competency context at the Supreme Court level but only in a relatively limited number of decisions (compared, for example, to specific First or Fourth Amendment issues), and often leaving application of a very generalized test explicitly to the lower courts to refine.¹⁵

The first context before trial is competency to stand trial. In *Dusky v. United States*, the defendant was a thirty-three-year-old man with a prior diagnosis of schizophrenia, depression, hallucinations, and alcoholism.¹⁶ Despite an evaluation by the psychiatric staff that he was suffering from the above, that he could not remember most of the crime, and that he had been drinking extensively and taking tranquilizers before the crime, he was found competent to stand trial and the competency determination was affirmed on appeal.¹⁷ The Supreme Court reversed, requiring that for competency to stand trial the defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the proceedings against him.”¹⁸ The 1960 decision is one of several in which mental incompetency seems compellingly demonstrated but that did not preclude a conviction or affirmation on appeal.¹⁹

B. Competency to be Convicted

During the trial itself, mental state, and thus competency, arises in the requirement (if any) for the crime charged of *mens rea*, or the mental state

15. Adam Liptak, *Supreme Court Won't Hear Challenges to Arizona's Death Penalty Law*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/us/supreme-court-death-penalty.html>; see *Indiana v. Edwards*, 554 U.S. 164, 172 (2008) (explaining that if not competent to represent oneself in court, a defendant may be assigned legal counsel by the court); *Godinez v. Moran*, 509 U.S. 389, 396 (1993) (pleading guilty requires competency as required under *Dusky*); *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (holding a defendant must “understand the nature and object of the proceedings”); *Dusky v. United States*, 362 U.S. 402, 403 (1960) (per curiam) (discussing whether defendant has sufficient understanding of consultation with attorney and the proceedings against him).

16. See *Dusky v. United States*, 271 F.2d 385, 388 (8th Cir. 1959), *rev'd per curiam*, 362 U.S. 402 (1960).

17. *Id.*

18. *Dusky*, 362 U.S. at 402.

19. *Id.*

required for the crime.²⁰ The complexities of *mens rea* and its offense-specific nature relates to mental competency particularly with the so-called subjective *mens rea* offenses as opposed to objective *mens rea* offenses.²¹ *Mens rea*, as outlined in the American Law Institute's Model Penal Code, delineates four categories of purpose, knowledge, recklessness, and criminal negligence.²² The first three require deliberateness in the sense of purpose and subjective awareness of a very high degree of risk (knowledge) or high degree of risk (recklessness), in contrast to the risk of which a reasonable person would have been cognizant (criminal negligence).²³ Purpose, knowledge, and recklessness, therefore, require the judge or jury, essentially, to read the mind of the defendant. These subjective standards necessarily entail assessment of the accused's mental capacity, ranging through a multitude of factors, such as education or verbal skills to cultural or religious background.²⁴ Intellectual disabilities, such as a low IQ or mental illness, are directly relevant to the subjective standards.²⁵ Their relevance to negligence gets into the thorny and disputed issue of what personal characteristics of the defendant may be taken into consideration in assessing what a "reasonable" person would have known.²⁶ The Model Penal Code suggests that the physical characteristics of the accused can be incorporated into the assessment.²⁷ Nevertheless, the lines inevitably blur between physical and mental characteristics.²⁸ To what extent can the age of a twelve-year-old be considered without entailing a subjective assessment of the minor's mental capabilities?

Obviously, a defendant may be competent to stand trial under the *Dusky* test but not have the necessary *mens rea*.²⁹ Less evidently, a defendant may be incompetent to stand trial but have had the requisite *mens rea* for the

20. Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Legal Insanity and Mens Rea: Beyond Clark v. Arizona*, 97 J. CRIM. L. & CRIMINOLOGY 1071, 1074 (2007) ("Crimes are defined by their 'elements,' which always include a prohibited act and in most cases a mental state, a [*mens rea*], such as intent.").

21. See generally MODEL PENAL CODE & COMMENTARIES § 2.02 at 225–52 (AM. LAW INST. 1985); Kevin Jon Heller, *The Cognitive Psychology of Mens Rea*, 99 J. CRIM. L. & CRIMINOLOGY 317, 317–21 (2009) (describing the uncertainties and difficulties that arise when distinguishing different mental states and elements in the Model Penal Code); Morse & Hoffman, *supra* note 20, at 1090 (highlighting the complexities of the subjective and objective standards by stating that "even if [a] mental disorder does [not] negate subjective mental states such as purpose, intention, knowledge, or conscious awareness of risk, it would never negate the objective negligence standard").

22. MODEL PENAL CODE AND COMMENTARIES § 2.02(1) at 225.

23. *Id.* § 2.02(2) at 225–26.

24. See generally Morse & Hoffman, *supra* note 20 (discussing other factors that should be considered when analyzing the *mens rea* of a crime).

25. See generally *id.*

26. MODEL PENAL CODE AND COMMENTARIES § 2.02 at 242.

27. *Id.*

28. *Id.*

29. See generally *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam) (discussing whether the defendant has sufficient understanding of the proceedings against her as well as her ability to consult with an attorney).

crime.³⁰ Each of the four contexts for mental competency are time-specific.³¹ Competency to stand trial is an ongoing evaluation until the accused is tried or released.³² The accused may have become incompetent to stand trial before trial begins but may have been perfectly capable of forming the necessary *mens rea* at the time of the crime.³³ A defendant found incompetent to stand trial may, at some point in time, become competent to stand trial.³⁴ For example, if the defendant has been failing to take medication to treat a mental problem or illness, but accepts such medication while being detained, the medication may sufficiently correct the problem for the *Dusky* standard to be met. When the defendant refuses to accept medication, the issue of when a defendant may be forced to take medication, especially when the medication is only necessary to make the defendant competent to stand trial, has been addressed in several cases, including at the Supreme Court level.³⁵ Also, the courts have had to struggle with how long a pre-trial detainee may be held to restore competency to stand trial.³⁶

The affirmative defense of insanity, like determinations of *mens rea*, is time-specific to the time of the alleged offense.³⁷ There are a number of variations of the insanity defense, such as those laid out in *Clark v. Arizona*.³⁸

30. *See generally id.*

31. 18 U.S.C. § 4241 (2006); 18 U.S.C. § 3481 (1998).

32. *Id.* § 4241.

33. *Id.* §§ 4241–4242.

34. *Id.* § 4241.

35. *See Sell v. United States*, 539 U.S. 166, 186 (2003) (vacating the decision of the Eighth Circuit and remanding the case for further proceedings, in holding the Eighth Circuit Court erred in authorizing the forced administration of medication solely for the purpose of making the defendant competent to stand trial. The government may, however, “pursue its request for forced medication” if the defendant poses a danger to himself or others.); *Riggins v. Nevada*, 504 U.S. 127, 138 (1992) (reversing the decision of the Nevada Supreme Court and remanding for further proceedings, in holding when a defendant seeks to end administration of antipsychotic medication, the State must then establish a reason for needing the drug. The Court held that the record contained “no finding that might support a conclusion that administration of antipsychotic medication was necessary.”); *Washington v. Harper*, 494 U.S. 210, 236 (1990) (reversing the decision of the Washington Supreme Court and remanding for further proceedings, in holding the procedures of the state did not violate the defendant’s due process right when it comes to the right to refuse treatment).

36. *See Mitch Mitchell, Insane System? Arlington Man Bounces Between Jail, State Hospital*, STAR-TELEGRAM (May 9, 2016, 4:23 PM) <https://www.startelegram.com/news/local/community/arlington/article76594692.html> (discussing an inmate’s lack of trial as a result of “the state’s merry-go-round for the criminally insane” from prison to mental hospitals—never seeing trial); *see also* N.M. SENTENCING COMM’N, EFFECT OF COMPETENCY AND DIAGNOSTIC EVALUATION ON LENGTH OF STAY IN A SAMPLE OF NEW MEXICO DETENTION FACILITIES 4 (2013) (“Arrestees with competency proceedings had a longer median length of stay in jail.”).

37. 18 U.S.C. § 17 (1986).

38. *Clark v. Arizona*, 548 U.S. 735, 749–52 (2006) (“Even a cursory examination of the traditional Anglo-American approaches to insanity reveals significant differences among them, with four traditional strains variously combined to yield a diversity of American standards. The main variants are the cognitive incapacity, the moral incapacity, the volitional incapacity, and the product-of-mental-illness tests.”) (footnote omitted).

The Insanity Defense Reform Act of 1984 provides:

(a) Affirmative Defense—

It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) Burden of Proof—

The defendant has the burden of proving the defense of insanity by clear and convincing evidence.³⁹

This test for the defense of insanity in federal courts is a good example of the confusion that can occur between the affirmative defense of insanity (i.e., all the elements of the criminal charge have been proven) and not guilty because the *mens rea* required for the crime has not been proven beyond a reasonable doubt. The central aspect of every test for insanity is that to some extent the defendant was too mentally ill to understand, know, or appreciate the wrongfulness of the criminal offense.⁴⁰ The federal test and many others have a second prong requiring that the defendant “was unable to appreciate the nature and quality . . . of his acts.”⁴¹ The quintessential classroom example satisfying this prong is the defendant that thought he was wringing out a towel, but he was actually wringing someone’s neck, killing the victim. Technically, however, the defendant in that circumstance lacks the necessary *mens rea* of intent (as in purposely or knowingly) for murder because he did not mean to kill.⁴² It is not necessary to establish an affirmative defense of insanity because the elements of the crime, including *mens rea*, have not been demonstrated beyond a reasonable doubt.⁴³ In that sense, statutes that include this second prong do so unnecessarily because a defendant in the circumstance of mental illness does not have the *mens rea* for the crime.⁴⁴ In contrast, consider a defendant who admits to killing a victim and wanting to do so, but the defendant did so because he was directed to by the devil or

39. 18 U.S.C. § 17.

40. See, e.g., *Clark*, 548 U.S. 735. While there have been many variations and tests over the years when it comes to the insanity defense, the *M’Naghten* case laid out a universal idea, or standard, that is still, in some varying degree, used in the United States today; it looks at the cognitive ability to distinguish between right and wrong. See *M’Naghten’s Case*, 8 Eng. Rep. 718 (1843); Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. FLA. J.L. & PUB. POL’Y 7, 15–19 (2007).

41. 18 U.S.C. § 17(a).

42. See *id.*

43. See Linda A. Malone, *Is There Really a Difference Between Justification and Excuse, or Did We Academics Make It Up?*, 42 TEX. TECH L. REV. 321, 321–22 (2009).

44. See *id.*; e.g., 18 U.S.C. § 17(a) (containing the second prong).

because he thought the victim was conspiring with aliens.⁴⁵ The defendant in both circumstances had intent to kill, but may be found not guilty by virtue of insanity.

C. Excluded Categories of Defendants Subject to the Death Penalty

With regard to the third context, the Supreme Court has determined that two categories of individuals are ineligible for the death penalty. In *Roper v. Simmons*, the Court concluded that no one eighteen or under at the time of the crime could be subject to the death penalty.⁴⁶ In *Atkins v. Virginia*, the Court held that the “mentally retarded” (subsequently replaced in *Hall v. Florida* by the term intellectually disabled⁴⁷) could not be subject to the death penalty.⁴⁸ In *Atkins*, the defendant, despite an IQ of 59, had been convicted of murder and his conviction was affirmed.⁴⁹ The underlying rationale in both decisions for the exclusionary categories was twofold: (1) the difficulties and inequities for the intellectually disabled and juveniles to assist in their defense, and (2) no purpose, including retribution and deterrence, would be served by executing individuals whose moral fault for their crimes was attributable to insufficiently developed competency.⁵⁰ Presumably, the first

45. See generally *Clark*, 548 U.S. 735 (involving a defendant charged with murder arguing that aliens were trying to get him); *State v. Medina*, 227 Conn. 456 (1993) (involving a defendant charged with murder arguing that the devil made him do it).

46. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

47. *Hall v. Florida*, 572 U.S. 701, 707–11 (2014).

48. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the execution of the mentally retarded is excessive and that the Constitution restricts a state’s power to impose such a penalty on the mentally retarded). The Court held there to be a consistent history in exempting mentally retarded offenders from the death penalty due to the overwhelming view in society that those who are mentally retarded are “less culpable than the average criminal”; some states still allow this practice, but it is very uncommon. *Id.* at 316. The Court outlines two reasons for why the mentally retarded should be excluded from execution. *See id.* at 318. First, the Court is “not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty.” *Id.* at 321. Second, the Court finds that mentally retarded offenders are more at risk for wrongful execution due to their reduced ability to make a persuasive showing of mitigation. *See id.* at 352.

49. *See id.* at 309–10.

50. *Id.* at 320; *see Hall*, 572 U.S. at 707–11.

The Court in *Atkins v. Virginia* declared that the execution of mentally retarded offenders is cruel and unusual for purposes of the Eighth Amendment. The petitioner, Daryl Atkins, was convicted for the abduction, armed robbery, and capital murder of Eric Nesbitt. The petitioner argued, by way of IQ testing, that he was mentally retarded and argued that his execution would be a violation of his Eighth Amendment rights. The jury concluded, and the Virginia Supreme Court affirmed, that although Atkins may be mildly retarded, this fact did not mitigate the violent nature of the offense, and sentenced him to death. The United States Supreme Court remanded the case to the Virginia Supreme Court, holding that the execution of mentally retarded offenders is “excessive” and violates the Eighth Amendment protection against cruel and unusual punishment.

The Court, in an opinion authored by Justice Stevens, focused on several factors in reaching this outcome. First, the Court discussed the growing national consensus against executing mentally retarded individuals, shown by new state legislation on the matter, jury polls, and national opinion polls on society’s “evolving standards of decency.” Second, the

rationale could be adequately served by a more thorough and demanding application of the *Dusky* test for competency for the intellectually disabled. By incorporating intellectual disability as an exclusion from the death penalty, rather than as a disqualification entirely from trial and thus conviction, the intellectually disabled can stand trial, be convicted, and receive all punishments but the most serious sanction of the death penalty.⁵¹ The aftermath of the *Atkins* decision, discussed *infra*, reveals how minimal the exclusionary protection of *Atkins* can be for those with significant intellectual disabilities, even from the death penalty.

D. Mental Competency to Be Executed

The fourth context is the most recently problematic of any context, and is before the current term of the Court in multiple decisions.⁵² The death row prisoner must be, ultimately, competent to be killed.⁵³ The Orwellian nature of the term “competence to be executed” is an indication of the immense legal and moral complications of the standard.⁵⁴ In *Ford v. Wainwright*, in 1986, the Court adopted the common law rule that the “insane” could not be executed.⁵⁵ The defendant was determined to be legally competent at the time of the offense, at trial, and at sentencing.⁵⁶ The three psychiatrists who

Court focused on the effects of mental retardation on the understanding of the legal system and on a mentally retarded offender’s capacity to protect successfully his rights. The Court reasoned that a mentally retarded offender, while competent to stand trial, has “diminished capacities to understand and process information, to communicate . . . and to understand the reactions of others.” Although their diminished capacity does not render the offenders exempt from all criminal sanction, it does “diminish their personal culpability.” Furthermore, the Court found that the death penalty fails to serve a deterrent purpose in the case of mentally retarded offenders in that most mentally retarded offenders cannot be deterred by that which they cannot comprehend as a possible punishment.

Perhaps the Court’s most compelling argument . . . is that mentally retarded offenders may be sentenced to death due to procedural errors that damage the offender’s opportunity to mitigate the aggravating factors required for a death sentence. For instance, the Court points out that mentally retarded offenders are more likely to give false or coerced confessions, and may be less able to assist in the defense. Furthermore, because such an offender often cannot process and understand the proceedings, he is more likely to exhibit a lack of remorse, which juries will take into consideration during sentencing.

Linda A. Malone, *From Breard to Atkins to Malvo: Legal Incompetency and Human Rights Norms on the Fringes of the Death Penalty*, 13 WM. & MARY BILL RTS. J. 363, 391–92 (2004) (footnotes omitted).

51. See Malone, *supra* note 50, at 392.

52. See, e.g., *Dunn v. Madison*, 138 S. Ct. 9, 11–12 (2017) (notwithstanding the defendant’s memory loss, the Court held that he was competent to be executed); *Madison v. Ala. Dep’t of Corr.*, 851 F.3d 1173, 1189–90 (11th Cir.) (determining defendant’s competence to be executed), *cert. granted sub nom.* *Dunn v. Madison*, 138 S. Ct. 9 (2017).

53. See *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

54. See *id.* at 418.

55. *Id.* at 410.

56. *Id.* at 401.

examined him for execution, however, agreed that he was insane.⁵⁷

The Court in *Ford* gave no further delineation of how to determine if a defendant was too insane to be executed.⁵⁸ It did state that neither the purposes of retribution nor deterrence would be served, and that such an execution “offends humanity”; specifically, the Court said: “Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.”⁵⁹ It would be over twenty years before the Court would provide any guidance as to who is too insane to be executed.⁶⁰

In a 5–4 decision, the Court in *Panetti v. Quarterman* reversed a Fifth Circuit holding that Scott Panetti could be executed despite his belief that Texas was executing him to stop him from preaching.⁶¹ The Fifth Circuit Court of Appeals had determined he was competent to be executed because he was aware of his pending execution and the “factual predicate” for the execution.⁶² This approach was deemed too restrictive, as it deemed irrelevant Panetti’s mentally delusional belief as to why he was being executed as long as he merely knew why the state said he was being executed.⁶³ At the very least, according to the Court, the inmate must have a “rational understanding” of the reason for the execution, to some extent echoing the rational understanding aspect of the *Dusky* competency-to-be-tried test.⁶⁴ As discussed *infra*, Panetti has not yet been executed.⁶⁵ If anything, his mental condition appears to have deteriorated as one of the geriatric prisoners of death row.⁶⁶

A recurrent observation can be drawn from all of these cases and rationales. The filter for various forms of mental incompetency pre-trial and during trial are doing little or nothing to filter out those more in need of treatment than incarceration.⁶⁷ The fact-specific discussion of just a few cases

57. *Id.* at 413.

58. *See id.*

59. *Id.* at 409–10.

60. *See Panetti v. Quarterman*, 551 U.S. 930, 934 (2007).

61. *Id.* at 962.

62. *Id.* at 942.

63. *Id.* at 956–58.

64. *Id.* at 956; *see supra* notes 16–18 and accompanying text (explaining that in order to stand trial, a defendant must have the ability to consult with his lawyer as well as a rational and factual understanding of the proceedings against him).

65. *See infra* notes 99–104 and accompanying text (detailing instances from Panetti’s trial and evidence of his incompetency). As of September 2018, one of the more recent decisions to be filed in regard to Panetti occurred in March 2018. *See In re Panetti*, 714 F. App’x 449, 450 (5th Cir. 2018) (denying petitioner’s request for writ of mandamus).

66. *See generally* Editorial, *Scott Panetti*, TEX. DEFENDER SERV. (Sept. 25, 2015), <http://www.texasdefender.org/scott-panetti/>.

67. *See generally Ex parte Moore*, 548 S.W.3d 552 (Tex. Crim. App. 2018). *See also Atkins v. Virginia*, 536 U.S. 304 (2002) (discussing the reasons why mentally ill individuals should not be given the death penalty).

that follow makes this observation more compelling in the current circumstances of death row cases.

In *Hall v. Florida* in 2014, the Supreme Court imposed a limit on how the states could measure mental disability for purposes of the *Atkins* exclusion from the death penalty.⁶⁸ According to the Court, where an IQ score is close to but above 70, courts must account for the test's standard error of measurement.⁶⁹ In *Moore v. Texas*, decided three years later by the Court in a 5–3 vote, Moore had an IQ range of 69–79.⁷⁰ After he had spent thirty years on death row, the state habeas court concluded he had a mental disability under *Atkins*.⁷¹ The Texas Court of Criminal Appeals, the final state court for habeas review, conducted its own hearing and held he could be executed under *Atkins*.⁷² The appellate court, using the “*Briseno* factors,”⁷³ determined that Moore's adaptive abilities were beyond those indicated by his IQ.⁷⁴ Justice Ginsburg, joined by Justices Kennedy, Breyer, Sotomayor, and Kagan, agreed that the *Briseno* “lay” factors were an insufficient substitute for recognized medical criteria.⁷⁵ In June 2018, however, the Texas Court of Criminal Appeals again held that Moore had failed to demonstrate intellectual disability.⁷⁶ In doing so, the court seems to have ignored not only the Supreme Court but also the agreement of Texas state prosecutors that Moore is intellectually disabled.⁷⁷

Perhaps the strangest twist of events followed the Supreme Court's landmark opinion in *Atkins v. Virginia*.⁷⁸ On remand in 2006, a Virginia jury found that Atkins was not intellectually disabled.⁷⁹ The jury was convinced that Atkins had spent so much time with his lawyers that his IQ had been raised above 70 so that he could be subject to the death penalty.⁸⁰ In 2008,

68. *Hall v. Florida*, 572 U.S. 701, 721–24 (2014).

69. *Id.* at 724.

70. *Moore v. Texas*, 137 S. Ct. 1039, 1049 (2017).

71. *Id.* at 1044.

72. *Ex parte Moore*, 548 S.W.3d 552.

73. *Id.* at 556–57. The *Briseno* non-exclusive factors used to determine whether adaptive deficits are due to intellectual disability include: (1) “Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?”; (2) “Has the person formulated plans and carried them through or is his conduct impulsive?”; (3) “Does his conduct show leadership or does it show that he is led around by others?”; (4) “Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?”; (5) “Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?”; (6) “Can the person hide facts or lie effectively in his own or others' interests?”; (7) “Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?” *Id.*

74. *Id.* at 575.

75. *Moore*, 137 S. Ct. at 1050–51.

76. *Ex parte Moore*, 548 S.W.3d 552.

77. *Id.* at 579.

78. *Atkins v. Virginia*, 536 U.S. 304 (2002).

79. *Atkins v. Commonwealth*, 631 S.E.2d 93, 101–02 (Va. 2006).

80. *Id.* at 154.

however, a state circuit court judge held that there had been prosecutorial misconduct in Atkins's hearing.⁸¹ Instead of ordering a new trial, the judge reduced his sentence to life.⁸² Finally, in 2009, the Virginia Supreme Court held that neither mandamus nor a writ of prohibition were available to overturn the circuit court judge's sentencing.⁸³

III. THE SUPREME COURT STRUGGLING WITH THE AFTERMATH OF *FORD* AND *PANETTI*

On October 2, 2018, the United States Supreme Court heard oral arguments in the case of *Madison v. Alabama*.⁸⁴ The death row inmate had dementia and cannot remember any of the crime for which he is to be executed.⁸⁵ This summary barely begins to describe Mr. Madison's mental and physical deterioration. Vernon Madison, age sixty-seven, has suffered two strokes, is blind, and incontinent.⁸⁶ His slurred speech often does not make sense.⁸⁷ For example, "[h]e has asked that his mother be told of his strokes," although he has been told that his mother is dead.⁸⁸ He soils himself because he says the guards will not let him out to use the bathroom, although there is a toilet in his cell.⁸⁹ He talks of plans to move to Florida and can only recite the alphabet to the letter G.⁹⁰ According to the Alabama Attorney General, however, Madison's conviction was justified because he "understood what he was accused of and how the state planned to punish him."⁹¹ Is that a "rational understanding" of the execution?⁹²

Mr. Madison's thirty-year case exemplifies other recurrent problems in death penalty cases. His first conviction was overturned because prosecutors excluded all the black jurors.⁹³ His second conviction was overturned for prosecutorial misconduct.⁹⁴ In his third trial, the jury voted for life in prison, but the trial judge overrode that verdict and imposed the death penalty.⁹⁵ The judge has overridden six jury verdicts of life to impose the death penalty.⁹⁶

81. *In re Commonwealth*, 677 S.E.2d 236, 237–38 (Va. 2009).

82. *Id.*

83. *Id.* at 244.

84. *Madison v. Alabama*, No. 17-7505 (S. Ct. argued Oct. 2, 2018).

85. Adam Liptak, *Too Old to Be Executed? Supreme Court Considers an Aging Death Row*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/us/politics/old-death-row-executions-supreme-court.html>.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam).

93. Liptak, *supra* note 85.

94. *Id.*

95. *Id.*

96. *Id.*

Shortly after Justice Scalia's death, the Supreme Court deadlocked 4–4 on overturning the appellate court's stay of the death sentence.⁹⁷ If Justice Scalia had been on the bench, the outcome presumably would have been different.⁹⁸

Panetti's current outcome has been unsatisfactory, whether from the perspective of a proponent or opponent of the death penalty. In his case prior to the Supreme Court ruling, the Fifth Circuit Court of Appeals said his delusions were irrelevant so long as Panetti was aware that the State had "link[ed]" his crime to the punishment.⁹⁹ It should be noted that Panetti, who represented himself, called the Pope, Jesus, and John F. Kennedy as witnesses for his defense.¹⁰⁰ On remand, the district court for Texas concluded Panetti, despite a long history of paranoid schizophrenia, "failed to show that his mental health had substantially changed" since the 2007 evaluation; therefore, he could be killed.¹⁰¹ This time the appellate court, in September 2018, ordered the lower court to re-evaluate his competency because a decade had passed.¹⁰² The court noted that, since his last mental evaluation, prison guards (guards!) have claimed he is delusional, saying he is the father of Selena Gomez and that Wolf Blitzer showed his prison card on television.¹⁰³ The appellate court, however, refused to address the merits of his claim of incompetency.¹⁰⁴

Clearly, Panetti is a prison inmate who should not be in the general population. However, that is not even remotely the question. Should he be in prison? Executed? Or treated? The answer depends on two words; that is, what constitutes a "rational understanding"?¹⁰⁵

IV. PHYSICAL INCOMPETENCY FOR THE DEATH PENALTY

A. *The Supreme Court Struggling with the Aftermath of Glossip v. Gross*

Death row prisoners are not the only inmates growing old in prison and in need of medical care. In fiscal year 2016, the Bureau of Prisons spent \$1.3 billion on health care with roughly 12% of prisoners being age fifty-five or

97. *Id.*

98. *Id.* "Mr. Madison is one among a growing number of aging prisoners who remain on death row in this country for ever longer periods of time . . ." *Id.*

99. *Panetti v. Quarterman*, 551 U.S. 930, 960 (2007).

100. Jolie McCullough, *Texas Death Row Inmate Scott Panetti to Get Further Competency Review*, TEX. TRIB. (July 11, 2017, 8:00 PM), <https://www.texastribune.org/2017/07/11/texas-death-row-inmate-scott-panetti-get-further-competency-review/>.

101. *Panetti v. Davis*, 863 F.3d 366, 373 (5th Cir. 2017) (summarizing the district court's reason for denying Panetti's motion for a stay of execution).

102. *Id.* at 376.

103. McCullough, *supra* note 100.

104. *Panetti*, 863 F.3d at 376.

105. *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam).

older.¹⁰⁶ Federal inmates include prisoners in their nineties.¹⁰⁷ For those not on death row who are very sick or very old, “compassionate release” is theoretically available.¹⁰⁸ The reality, however, is that the Bureau of Prisons approves only 6% of the applications, often denying applications over the opinions of doctors and wardens.¹⁰⁹ However, this theoretical option is not available to elderly, seriously ill death row inmates.¹¹⁰ The result is that prisons increasingly find themselves providing life-saving medical treatment to death row inmates so they can be eventually executed.¹¹¹

Against these statistics, the Court’s 2015 decision in *Glossip v. Gross* seems a notable victory, as it were, for the death penalty, despite the physical difficulties and possible suffering caused for the ailing prisoner.¹¹² In the then-almost-inevitable 5–4 split, the Court refused to find that the specific method of execution, a three-drug protocol begun with Midazolam, constituted cruel and unusual punishment.¹¹³ However, the decision is at best a limited victory for the death penalty given the specificity of the method in question and the construction of an Eighth Amendment test that necessarily prompted a current of additional Eighth Amendment claims.¹¹⁴ More importantly, the majority opinion was largely eclipsed by Justice Breyer’s dissent, joined by Justice Ginsburg, which called for total abolition of the death penalty.¹¹⁵ The method of execution itself was the unavoidable result of a refusal of drug suppliers outside the United States to continue supplying drugs for execution purposes, and Justice Breyer’s dissent brought to the forefront, once again, the isolation of the United States’ acceptance of the death penalty.¹¹⁶

Justice Kennedy was notably silent beyond joining in the opinion.¹¹⁷ On a normative level, the majority opinion offers two reasons for affirming the

106. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-17-379, BUREAU OF PRISONS: BETTER PLANNING AND EVALUATION NEEDED TO UNDERSTAND AND CONTROL RISING INMATE HEALTH CARE COSTS 49 (2017), <https://www.gao.gov/assets/690/685544.pdf>.

107. See generally HUMAN RIGHTS WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES (2012), https://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf.

108. KIDEUK KIM & BRYCE PETERSON, AGING BEHIND BARS: THE TRENDS AND IMPLICATIONS OF GRAYING PRISONERS IN THE FEDERAL PRISON SYSTEM 23 (2014), <https://www.urban.org/sites/default/files/publication/33801/413222-Aging-Behind-Bars-Trends-and-Implications-of-Graying-Prisoners-in-the-Federal-Prison-System.PDF>.

109. Christie Thompson, *Old, Sick, and Dying in Shackles*, MARSHALL PROJECT (Mar. 7, 2018, 5:00 AM), <https://www.themarshallproject.org/2018/03/07/old-sick-and-dying-in-shackles>.

110. KIM & PETERSON, *supra* note 108.

111. David Delgado, *State Is Wasting Money on Death-Row Health Care*, MAIL TRIB. (June 14, 2009), <http://mailtribune.com/opinion/state-is-wasting-money-on-death-row-health-care>.

112. See *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015).

113. *Id.* at 2733.

114. *Bucklew v. Precythe*, 138 S. Ct. 1706 (2018) (mem.); *Smith v. Ryan*, 137 S. Ct. 1283 (2017).

115. *Glossip*, 135 S. Ct. at 2776–77 (Breyer, J., dissenting).

116. *Id.* at 2775.

117. See *id.* at 2730 (majority opinion).

court of appeals's decision denying the prisoners' application for a preliminary injunction against execution:

For two independent reasons, we also affirm. First, the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims. Second, the District Court did not commit clear error when it found that the prisoners failed to establish that Oklahoma's use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain.¹¹⁸

To obtain any preliminary injunction, the petitioners must establish a likelihood of success on the merits.¹¹⁹ The plurality opinion in *Baze v. Rees* provided so little guidance as to the constitutional limits on methods of execution that no outcome on the merits might be deemed likely.¹²⁰ According to the majority, with respect to this specific method of execution, the district court did not commit clear error in its factual determination that the evidence failed to establish that the protocol entailed a substantial risk of severe pain.¹²¹ Procedurally, this case, on its facts, failed to meet the standard for a preliminary injunction or to provide the necessary evidentiary basis as to pain inflicted by the protocol.¹²²

The significant normative precedent of the *Glossip* majority opinion is the imposition of a requirement on prisoners to identify a "known and available alternative method of execution"¹²³ It is this purported requirement, supported only by a "see" citation to the plurality opinion in *Baze*, that triggered the dissenting opinion of Justice Sotomayor (joined by Justices Kagan, Breyer, and Ginsburg), which necessitated the footnote in Justice Alito's opinion elaborating on the holding in *Baze*, given that only Justices Kennedy and Alito joined in the reasoning of the Chief Justice's opinion.¹²⁴

Beyond procedural hurdles and searching for some common thread in a fractured plurality Court decision, *Baze* is a very slender reed on which to find a method of execution (which Justice Ginsburg twice compares to the chemical equivalent of being burned alive)¹²⁵ or the death penalty to be sufficiently humane under the Eighth Amendment.¹²⁶ Justices Scalia, Thomas, and Alito dismiss years of credible empirical evidence on the

118. *Id.* at 2731 (citation omitted).

119. *Id.* at 2737.

120. *See Baze v. Rees*, 553 U.S. 35, 61–62 (2008) (plurality opinion).

121. *Id.*

122. *Id.*

123. *Glossip*, 135 S. Ct. at 2737.

124. *Id.* at 2731, 2738 n.2; *id.* at 2780–97 (Sotomayor, J., dissenting).

125. *Baze*, 553 U.S. at 114 (Ginsburg, J., dissenting).

126. U.S. CONST. amend. VIII; *Baze*, 553 U.S. at 48 (plurality opinion).

discriminatory and otherwise arbitrary imposition of the death penalty, yet require of prisoner-petitioners in *Glossip* to advance clear evidence, medically and scientifically, that the proposed method of execution imposes a severe level of pain and that the “known and available alternative” imposes less pain.¹²⁷

It is not surprising, then, that a challenge to a method of execution based on its physical effects on the inmate is again before the Court. In *Bucklew v. Precythe*, argued in the October 2018 term, the Missouri inmate suffers from a rare medical condition, cavernous hemangioma, which he alleges will cause him to choke on his own blood in excruciating pain if put to death by lethal injection.¹²⁸ In this case, unlike *Glossip*, he proposed an alternative of death by lethal gas.¹²⁹ The Eighth Circuit Court of Appeals, however, determined that the inmate had not shown this alternative would be less painful.¹³⁰ Therefore, the court of appeals used the second prong of *Glossip* and the demanding evidentiary standard of evidence it imposes on the prisoner to require a showing of scientific uncertainty on complex issues of medical science.¹³¹ In other words, the death row inmate must demonstrate with medical evidence that the court committed clear error when it found that Oklahoma’s use of a massive dose of Midazolam in its execution protocol did not entail a substantial risk of severe pain and that the prisoner failed to establish there was a known, available, and less painful alternative.¹³²

As difficult as these requirements are in the abstract, they involve the courts making case-by-case, fact-specific medical evaluations in relation to complex determinations of the particular prisoner’s medical condition. The grant of certiorari thus compels the Court to do the same or double-down on the high evidentiary bar it has imposed on such claims.

Three states—Oklahoma, Alabama, and Mississippi—have authorized the use of nitrogen gas and are developing protocols for its use.¹³³ Ironically, lethal injection was substituted for the electric chair and lethal gas forty years ago as more efficient and humane.¹³⁴ In February 2018, an Alabama execution team tried for more than two hours to find a vein on an inmate whose veins were damaged by chemotherapy and drug use before giving up.¹³⁵

127. *Glossip*, 135 S. Ct. at 2731–46; *id.* at 2746–55 (Scalia, J., concurring).

128. *Bucklew v. Precythe*, 883 F.3d 1087 (8th Cir.), *cert. granted*, 138 S. Ct. 1706 (2018) (mem.).

129. *Id.* at 1093.

130. *Id.* at 1096.

131. *Id.*

132. *Id.*

133. Kim Chandler, *Alabama 3rd State to Allow Execution by Nitrogen Gas*, AP NEWS (Mar. 22, 2018), <https://www.apnews.com/9d8ea52c7fa242b7b98a060709380698>.

134. *See A Glance at the 5 Execution Methods Allowed in the US Today and How They Work*, FOX NEWS (May 23, 2014), <https://www.foxnews.com/us/a-glance-at-the-5-execution-methods-allowed-in-the-us-today-and-how-they-work>.

135. Denise Grady & Jan Hoffman, *States Turn to an Unproven Method of Execution: Nitrogen Gas*, N.Y. TIMES (May 7, 2018), <https://www.nytimes.com/2018/05/07/health/death-penalty-nitrogen>.

Nebraska and Nevada plan to start using the notorious opioid Fentanyl as a sedative before giving the injections that paralyze and stop the heart of the inmate.¹³⁶ In August 2018, Nebraska used the opioid for the first time in the United States to execute a man who had been on death row for thirty-eight years.¹³⁷ Journalists' eyewitness accounts indicate something may have gone wrong, as the execution might have taken longer than expected, and there were descriptions of Moore coughing and his face reddening.¹³⁸ A German pharmaceutical company that produces two of the other drugs used in the execution sued unsuccessfully to prevent the execution, arguing that its reputation would be harmed if its drug was used to kill and its contracts prohibit sales to prisons for executions, so Nebraska must have obtained the drugs illegally.¹³⁹ Nebraska has fought to not disclose the source of the drugs.¹⁴⁰ Pharmaceutical companies have filed similar suits against Nevada.¹⁴¹ Alabama, Arkansas, Arizona, Florida, Georgia, Idaho, Indiana, Louisiana, Missouri, Nebraska, Oklahoma, South Carolina, Tennessee, Texas, and Utah filed an amicus brief in one of the cases in support of Nevada.¹⁴²

V. POPE FRANCIS AND THE SUPREME COURT

From my November 2015 article for a Duke Law Review symposium on the death penalty, the demise of the death penalty by a 5–4 vote seemed possible, even likely.¹⁴³ Justices Breyer and Ginsburg dissented in *Glossip*, calling for abolition of the death penalty as cruel and unusual punishment.¹⁴⁴

executions.html; Sandee LaMotte, *Death Row Inmate Sues After 'Botched' Execution*, CNN, <https://www.cnn.com/2018/03/07/health/alabama-execution-lawsuit/index.html> (last updated Mar. 7, 2018, 6:31 PM).

136. Mark Berman, *Nebraska Cleared to Carry Out America's First Fentanyl Execution, Judge Says*, INDEP. (Aug. 12, 2018, 12:28 AM), <https://www.independent.co.uk/news/world/americas/fentanyl-execution-nebraska-lethal-injection-fresenius-kabi-capital-punishment-moore-a8488021.html>.

137. *Nebraska Carries Out First US Execution Using Opioid Fentanyl*, AL JAZEERA (Aug. 14, 2018), <https://www.aljazeera.com/news/2018/08/nebraska-carries-execution-opioid-fentanyl-180814185512400.html>.

138. Mitch Smith, *Fentanyl Used to Execute Nebraska Inmate, in a First for U.S.*, N.Y. TIMES (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/us/carey-dean-moore-nebraska-execution-fentanyl.html>.

139. Richard A. Oppel Jr., *Nebraska Plans First Execution in 21 Years. Not So Fast, Drug Company Says*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/us/nebraska-execution-lawsuit.html>; *German Drug Maker Sues to Halt Planned Execution in Nebraska*, GUARDIAN (Aug. 8, 2018, 5:09 PM), <https://www.theguardian.com/us-news/2018/aug/08/german-drug-maker-sues-to-halt-planned-execution-in-nebraska>.

140. See *German Drug Maker Sues to Halt Planned Execution in Nebraska*, *supra* note 139.

141. *Id.*

142. See Associated Press, *15 States, Including Arkansas, Side with Nevada over Drugmaker Delay of Execution*, ARK. DEMOCRAT GAZETTE (Aug. 7, 2018, 8:11 AM), <https://www.arkansasonline.com/news/2018/aug/07/15-states-including-arkansas-side-nevada-drugmaker/?f=news-arkansas>.

143. See Malone, *supra* note 14, at 109.

144. *Glossip v. Gross*, 135 S. Ct. 2726, 2755–80 (2015) (Breyer, J., dissenting).

Justices Sotomayor and Kagan also wrote a blistering dissent, comparing the possible complications from the proposed method of execution to suffocating and being burned alive.¹⁴⁵ Justice Kennedy was the principal author of a sequence of decisions limiting the availability of the death penalty, and joined the *Glossip* majority without writing a separate opinion.¹⁴⁶ With the right case, Justice Kennedy's swing vote seemed possibly poised to swing toward abolition, and the litmus test cases seemed to be in the pipeline on its way to the Supreme Court.¹⁴⁷

What a difference one year and an election can make. Three months after President Trump's election, Justice Scalia unexpectedly passed away on February 13, 2016.¹⁴⁸ In the last year of his presidency, President Obama nominated D.C. Circuit Court of Appeals Judge Merrick Garland.¹⁴⁹ The rest, as they say, is history. Judge Garland's Senate consideration was delayed until President Trump was able to nominate Neil Gorsuch, who was confirmed by the Republican-controlled Senate.¹⁵⁰ The possibility that Justice Kennedy might vote for abolition became moot when he announced he would retire at the end of July 2018, handing President Trump the opportunity to nominate another D.C. Circuit Court of Appeals judge, Brett Kavanaugh, to the Court.¹⁵¹ The political race was on to block or confirm his nomination before the November 2018 midterm elections.¹⁵²

In short, it was a significant reversal for opponents of the death penalty before the Court. The only encouraging development for opponents came not from the political system or the judicial system, but from an unexpected source. In August 2018, Pope Francis decreed that the death penalty was wrong in all cases, changing the Catholic catechism that accepted the death penalty if it was the only practicable way to defend lives.¹⁵³ The catechism

145. *Id.* at 2780–97 (Sotomayor, J., dissenting).

146. *Id.*

147. See generally Malone, *supra* note 14 (“Julius Murphy was sentenced to death for robbing and killing a stranded motorist in Texas. One of his lawyers is Neal Katyal, an experienced Supreme Court litigator and former Acting Solicitor General of the United States (and former law clerk to Justice Breyer). The brief to the Texas Court of Criminal Appeals included a general challenge to the death penalty.”).

148. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>.

149. President Barack Obama, Remarks by the President Announcing Judge Merrick Garland as His Nominee to the Supreme Court (Mar. 16, 2016, 11:04 AM), <https://obamawhitehouse.archives.gov/the-press-office/2016/03/16/remarks-president-announcing-judge-merrick-garland-his-nominee-supreme>.

150. Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html>.

151. Nina Totenberg & Noel King, *Trump Picks Kavanaugh to Replace Retiring Justice Kennedy*, NPR (July 10, 2018, 5:06 AM), <https://www.npr.org/2018/07/10/627588065/trump-picks-brett-kavanaugh-to-replace-retiring-justice-kennedy>.

152. Tina Nguyen, *The Democratic Endgame in the Fight to Block Kavanaugh*, VANITY FAIR (Sept. 5, 2018, 3:21 PM), <https://www.vanityfair.com/news/2018/09/democratic-strategy-brett-kavanaugh-confirmation>.

153. Cindy Wooden, *Update: Pope Revises Catechism to Say Death Penalty Is 'Inadmissible'*, CATH. NEWS SERV. (Aug. 2, 2018, 7:37 AM), <http://www.catholicnews.com/services/englishnews/2018/pope->

now says that the death penalty “is an attack on the inviolability and dignity of the person”¹⁵⁴

The expansive debate over whether religious views do, or should, influence judicial decision-making is far beyond the scope of this article. The religious composition of the Court, nevertheless, has made speculation inevitable.¹⁵⁵ Statistically, there is a linkage between religious affiliations and support or opposition to the death penalty.¹⁵⁶ A poll of the Pew Research Center conducted in April and May 2018 found that 73% of white, evangelical Christians supported the death penalty.¹⁵⁷ According to the poll, 53% of Catholics also supported the death penalty for murder.¹⁵⁸ What effect will the Pope’s decree have on these beliefs, and what does the Pope’s decree mean, if anything, for the predominantly Catholic Supreme Court? Justices Roberts, Thomas, Alito, and Sotomayor are Catholic, as is Justice Kavanaugh.¹⁵⁹ Justice Gorsuch was raised Catholic but attends an Episcopal church.¹⁶⁰ Will Justices Roberts, Thomas, Alito, possibly Gorsuch, and Kavanaugh be influenced by the Pope’s decree? Justices Breyer, Ginsburg, and Kagan are Jewish, and along with Justice Sotomayor are generally characterized as the “liberal” votes on the Court.¹⁶¹ Before his death and the Pope’s decree, Justice Scalia (whose brother is a Catholic priest) felt the need to explain his belief that the catechism allowed for the death penalty in some cases.¹⁶² In 2015, while in the United States, Pope Francis spoke specifically to the American death penalty as being illegitimate because of erroneous convictions and badly conducted executions.¹⁶³ The

revises-catechism-to-say-death-penalty-is-inadmissible.cfm.

154. *Id.*

155. See Sarah McCammon & Domenico Montanaro, *Religion, the Supreme Court and Why It Matters*, NPR (July 7, 2018, 11:42 AM), <https://www.npr.org/2018/07/07/626711777/religion-the-supreme-court-and-why-it-matters>.

156. Baxter Oliphant, *Public Support for the Death Penalty Ticks Up*, PEW RES. CTR. (June 11, 2018), <http://www.pewresearch.org/fact-tank/2018/06/11/us-support-for-death-penalty-ticks-up-2018/>.

157. *Id.*

158. *Id.*

159. Michael S. Rosenwald, *Judge Brett Kavanaugh – a Catholic – Faces a Historical Struggle Between Canon and Constitutional Law*, WASH. POST (July 9, 2018), <https://www.washingtonpost.com/news/retropolis/wp/2018/07/08/catholics-on-the-court-the-historic-struggle-between-canon-and-constitutional-law/>.

160. Daniel Burke, *What Is Neil Gorsuch’s Religion? It’s Complicated*, CNN, <https://www.cnn.com/2017/03/18/politics/neil-gorsuch-religion/index.html> (last updated Mar. 22, 2017, 2:37 PM).

161. Ephrat Livni, *The Historic Shift in the US Supreme Court’s Religious Makeup (Plus or Minus a Gorsuch)*, QUARTZ (May 3, 2017), <https://qz.com/972686/the-religions-of-the-us-supreme-court-justices-tell-the-tale-of-a-changing-nation/>.

162. Elisabetta Povoledo & Laurie Goodstein, *Pope Francis Declares Death Penalty Unacceptable in All Cases*, N.Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/world/europe/pope-death-penalty.html>.

163. *Id.*

second concern is at the very heart of the two death penalty cases to be heard and decided during this Term.¹⁶⁴

VI. CONCLUSION: THE HUMPTY DUMPTY DEATH PENALTY

The trajectory of death penalty jurisprudence before the Supreme Court has been erratic at best, chaotic at worst. In just the four years from 1972 to 1976, the Court foreclosed this form of punishment only to reinstate it.¹⁶⁵ Just one year later, the Court began a process of categorical exclusions from the death penalty, and what one commentator described as an “unparalleled level of constitutional micromanagement” as to how the death penalty can be imposed procedurally and when it can be imposed based on the nature of the offense and the status of the offender.¹⁶⁶

Now the Court finds itself mired in the intricacies of methods of execution and fact-specific determinations of the level of suffering inflicted on the prisoner within the Eighth Amendment demands of proportionality and penological purposes.¹⁶⁷ Absent compelling empirical evidence that executions, particularly of those offenders with minimal understanding of the process and its purpose, and the growing recognition that decision-making in capital sentencing is arbitrarily applied, whatever the procedures followed, determined instead by extraneous factors such as geography and prosecutorial agendas, public perceptions of the American criminal justice system, within and outside the United States, are teetering on the ledge of a lack of objectivity and integrity.¹⁶⁸

In 2016, I wrote that with the death of Justice Scalia, Congress had a much needed opportunity to salvage the public image of the Supreme Court and renew much needed respect for the highest court in the land.¹⁶⁹ As those words were being written, however, the “political fracas” over whether Judge Garland would even get a confirmation hearing was brewing and would result in the political outcome discussed above.¹⁷⁰ As these words were being written, a hearing was taking place on allegations of sexual assault by then-Judge, now Justice, Kavanaugh, who was confirmed by a vote the following

164. See *Bucklew v. Precythe*, 138 S. Ct. 1706 (2018) (mem.); *Madison v. Alabama*, 138 S. Ct. 1172 (2018) (mem.).

165. Compare *Woodson v. North Carolina*, 428 U.S. 280 (1976) (holding that North Carolina’s mandatory death sentence for first degree murder is unconstitutional), and *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (holding that the death penalty violated the petitioner’s Eighth and Fourteenth Amendment rights), with *Gregg v. Georgia*, 428 U.S. 153 (1976) (stating that the death penalty did not violate the Constitution).

166. Scott E. Sundby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty’s Unraveling*, 23 WM. & MARY BILL RTS. J. 487, 489 (2014).

167. See *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

168. See generally *Malone*, *supra* note 14.

169. *Id.* at 141.

170. See *id.*

day.¹⁷¹ At this juncture, death penalty jurisprudence, and perhaps the reputation of the Court itself, is beyond repair. All the king's horses and all the king's men (and women) cannot rule, tinker, or micromanage the death penalty in a way that ensures compliance with the evolving standards of decency and humanity the Court has in the past recognized as the fundamental norm of the Eighth Amendment. Its reinstatement in *Gregg v. Georgia* is a failed experiment with human life that has devolved into human experimentation in methods of execution of often feeble and otherwise impaired prisoners.

171. Clare Foran & Stephen Collinson, *Brett Kavanaugh Sworn in as Supreme Court Justice*, CNN, <https://www.cnn.com/2018/10/06/politics/kavanaugh-final-confirmation-vote/index.html> (last updated (Oct. 6, 2018, 8:02 PM)).