EXEMPTING THE SEVERELY MENTALLY ILL FROM THE DEATH PENALTY IN THE UNITED STATES OF AMERICA: THE CONCEPT OF HUMAN DIGNITY

by

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ABSTRACT

This thesis argues that severely mentally ill individuals should be exempt from the death penalty in the United States of America. Arguments in favour of the exemption of severely mentally ill individuals have traditionally focused on the lack of culpability of a severely mentally ill individual, or on the fact that the primary purposes of punishment – retribution and deterrence – are not met when a severely mentally ill individual is executed. This thesis proposes a new approach: that the use of the death penalty for severely mentally ill individuals is in direct conflict with the concept of human dignity. Dignity is an intrinsic characteristic that all humans have by virtue of being human, and dignity forms the basis for all human rights. Respecting an individual's dignity involves acknowledging that all humans have equal rights and the autonomy to exercise those rights. In the specific case of severely mentally ill individuals facing the death penalty, however, the exercise of certain rights by a severely mentally ill individual could operate to their detriment, more so than when compared to individuals who are not severely mentally ill. The ability to waive appeals and “volunteer” for execution is an example of such a right; a severely mentally ill individual may wish to volunteer as a result of the illness that he suffers from and it is not, therefore, possible to respect his dignity by acknowledging the exercise of that right, as it would appear to be in direct conflict with his dignity. The exemption is required due to the range of challenges faced by severely mentally ill individuals during the capital trial process; these issues may actually increase the likelihood that such individuals will receive a death sentence. The exemption of severely mentally ill individuals needs to be a federal exemption, due to the lack of action at state level.

For Tom

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With all its “slings and arrows of outrageous fortune,”

life is yet sweet and death is always cruel.

Justice Musmanno

Supreme Court of Pennsylvania, 1952

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Chapter 1: Introduction to the Death Penalty in the United States of America

Introduction

On 5 August 2013, John Ferguson was executed in Florida. Ferguson had suffered from severe mental illness for more than four decades; he was diagnosed as paranoid schizophrenic, delusional, aggressive, and had experienced visual hallucinations as far back as 1965. Ferguson believed that he was the "Prince of God" and was being executed so that he could save the world. Nevertheless, in the state's view, as Ferguson was aware that he was being put to death and was aware that he had committed murder, Ferguson was competent to be executed. Ferguson's case is just one of many examples where individuals in the United States have been executed despite evidence that they suffered from a severe mental illness.[1]

Despite recent trends towards curtailing the use of the death penalty, such as the exemption of intellectually disabled individuals in 2002[2] and juveniles in 2005,[3] the issue of severe mental illness remains under-addressed by legislatures and courts. At present, no state prohibits the execution of severely mentally ill individuals, and although eleven states[4] have introduced Bills that would exempt severely mentally ill individuals from the death penalty, it is by no means certain that any of these Bills will be enacted. This lack of legislative action at state level means that there is a

[1] Death Penalty Information Center (DPIC), 'Mentally Ill Prisoners Who Were Executed' <https://deathpenaltyinfo.org/policy-issues/mental-illness/mentally-ill-prisoners-who-were-executed> accessed 10 July 2019
[2] *Atkins v Virginia* 536 U.S. 304 (2002)
[3] *Roper v Simmons* 543 U.S. 551 (2005)
[4] Arizona, Arkansas, Indiana, Kentucky, Missouri, North Carolina, Ohio, South Dakota, Tennessee, Texas and Virginia.

corresponding inability (or, at least, a lack of will) for the United States Supreme Court[5] to exempt severely mentally ill individuals from the death penalty. This is problematic because there appear to be many severely mentally ill individuals on death row and facing execution. The Death Penalty Information Center's[6] end of year report for 2019 estimates that at least 9 out of the 22 individuals executed in 2019 had a mental illness.[7] One study found that 43 per cent of those executed between 2000 and 2015 had received a mental illness diagnosis at some point in their lives.[8]

The original contribution of this thesis is that it sets out an argument for the exemption of severely mentally ill individuals on the grounds of human dignity. Many people, including lawyers, academics and medical professionals have long argued that the death penalty should be abolished for people with severe mental illness,[9] but much discussion around this area to date has been focused on the lack of culpability of severely mentally ill defendants, and the argument that the primary purposes of punishment – retribution and deterrence[10] – are not served by executing these

[5] The United States Supreme Court will be referred to throughout this thesis as the Supreme Court. Where a state Supreme Court is being referred to, the name of the state will be included, i.e. Supreme Court of Florida.

[6] The DPIC describes itself on its website as "a national non-profit organization serving the media and the public with analysis and information on issues concerning capital punishment. Founded in 1990, the Center promotes informed discussion of the death penalty by preparing in-depth reports, conducting briefings for journalists, and serving as a resource to those working on this issue. The Center releases an annual report on the death penalty, highlighting significant developments and featuring the latest statistics. The Center also produces groundbreaking reports on various issues related to the death penalty such as arbitrariness, costs, innocence, and race." See 'About Us' <https://deathpenaltyinfo.org/about/about-us> accessed 4 November 2019

[7] DPIC, 'The Death Penalty in 2019: Year End Report' <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report> accessed 13 January 2020

[8] Frank Baumgartner et. al., 'Deadly Justice: A Statistical Portrait of the Death Penalty' (Oxford University Press 2018), p.238.

[9] For example, in 2006, the American Bar Association, in conjunction with the American Psychiatric Association, the American Psychological Association, the National Alliance on Mental Illness, and other experts, adopted a detailed policy opposing the use of the death penalty for individuals with serious mental illness, even though the American Bar Association does not adopt a position for or against the death penalty generally. See American Bar Association, 'Serious Mental Illness Initiative' <www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/serious-mental-illness-initiative-/> accessed 8 July 2019.

[10] See *Furman v Georgia* 408 U.S. 238 (1972) and *Gregg v Georgia* 428 U.S. 153 (1976); see also Bruce J Winick, 'The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier' (2009) 50 Boston College Law Review 785.

individuals.[11] However, as will be explored in this thesis, these approaches have shortcomings. For example, the problem with an argument based on the culpability of the individual is that it only applies to severely mentally ill individuals who had a severe mental illness at the time of the offence, and excludes those individuals who develop a severe mental illness subsequently. The position of this thesis is that *all* severely mentally ill individuals should be exempt from the death penalty, regardless of the point in time at which their severe mental illness manifests itself. A focus on culpability also invites an analysis of the extent to which an individual's severe mental illness actually affected his[12] actions at the exact moment of the offence, which is very difficult for the individual to prove. An argument on the grounds of human dignity provides a stronger basis for the exemption of severely mentally ill individuals, and also paves the way for the abolition of the death penalty altogether.

The remainder of this chapter will first set out a brief history of the death penalty in the United States, which will consider its evolution from being primarily a state matter, to regulation by the Supreme Court. This historical analysis will also include an examination of the original purposes of the punishment, which is necessary in order to understand how the purposes of retribution and deterrence have survived to this day and serve to legitimise the continuing use of the death penalty. The chapter will then consider the current use of the death penalty in the United States, and in particular will analyse the efforts by the Supreme Court towards reform and discuss the issues with this piecemeal approach. This is important, because the argument for the exemption of

[11] See, for example, Winick (n 10) and Lyn Entzeroth, 'The Challenge and Dilemma of Charting a Course to Constitutionally Protect the Severely Mentally Ill Capital Defendant from the Death Penalty' (2011) 44 Akron Law Review 529.
[12] For the reader's ease, the male pronoun will be used throughout this thesis. It is also the case that the majority of death row inmates in the United States are male.

severely mentally ill individuals may be rejected on the basis that it would constitute a reform of the death penalty, and it has been argued[13] that each time a reform is implemented by the Supreme Court, it reinforces the use of the death penalty. In other words, this is a question over whether incremental abolition through individual reforms is desirable, or whether, instead, efforts should be focused on total abolition, rather than on areas of reform. It is the position of this thesis that incremental reforms are necessary and it could, in fact, be argued that there is a "moral imperative"[14] to pursue such reforms. This is because, whilst there is some evidence to suggest that the use of the death penalty in the United States is in decline,[15] there is no certainty that the punishment will be abolished in the near future and, therefore, it is vital that every individual who should not be subject to the death penalty – in this thesis, because of severe mental illness – is exempted from the punishment. Finally, the draft Bills proposed by eleven states to exempt severely mentally ill individuals from the death penalty will be considered in detail, with a view to demonstrating that a federally imposed categorical exemption is necessary. The fact that only eleven states have proposed such legislation, together with the fact that, as will be discussed, there is little indication that any of the Bills will become law in the near future, demonstrates the difficulties with efforts to exempt severely mentally ill individuals at state level. Even if the Bills were passed, all ten Bills only apply to individuals who were severely mentally ill at the time of the crime, which, in the view of this thesis, does not go far enough.

[13] See Carol S Steiker and Jordan M Steiker, 'Should Abolitionists Support Legislative "Reform" of the Death Penalty?' (2002) 63 Ohio State Law Journal 417 and Peter Hodgkinson, 'Capital punishment: improve it or remove it?' in Peter Hodgkinson and William A Schabas (eds.), *Capital punishment: strategies for abolition* (Cambridge University Press 2004)
[14] Steiker and Steiker (n 13), at 431.
[15] DPIC, 'The Death Penalty in 2019: Year End Report' (n 7)

A Brief History of the Death Penalty in the United States

The existence of the death penalty in the United States of America is unusual, as it is the only western democracy to retain the punishment. Currently, 28 states use the death penalty, along with the federal government. The Death Penalty Information Center's End of Year Report for 2019 recorded that 34 death sentences were handed down in 2019, although the report also notes that this is the second lowest recorded number in the modern era of capital punishment (since 1976).[16] The federal structure of the United States has made it hard to impose nationwide abolition, as criminal matters are generally left to the discretion of the states (which will be discussed further below). In order to understand why the punishment continues to endure, the modern use of the death penalty in the United States needs to be understood in its historical context. This historical analysis will demonstrate both why and how the United States came to retain the punishment, and the modern challenges that exist with its use, including its use on those with severe mental illnesses. This includes a discussion of the perceived purposes of capital punishment; both historically and in the modern day context. It will be seen that, whilst the operation of the punishment may have evolved (from public hangings to private executions, for example), at least two of the purposes of punishment – retribution and deterrence – remain significant to this day. In addition, however, other factors have contributed to the existence of the death penalty, such as the fact that it is viewed as a key policy issue by both of the major political parties.[17] All

[16] Ibid.
[17] The New York Times, 'Democrats Rethink the Death Penalty, and Its Politics' (7 April 2019)

of this has implications for attempts to restrict its use on those with a severe mental illness.

The use of capital punishment can be traced back to the seventeenth and eighteenth centuries, when the death penalty was brought to the United States by English settlers.[18] At the time, the death penalty could be used for a wide range of offences, and what would be considered an offence varied depended on the area; for example, theological concerns in mid-seventeenth-century Boston led to offences such as idolatry and blasphemy, whereas in the Southern colonies, crimes by slaves, such as plotting a revolt, were the primary focus of the death penalty.[19] As noted by Steiker and Steiker, from its introduction right through to the twentieth century, capital punishment was very much considered to be a local issue, and not subject to significant regulation at a federal level.[20] This changed from around the 1960s, when the Supreme Court began a process of constitutional intervention,[21] with power over the exercise of the death penalty moving from states to the federal government, and from political branches to the courts.[22]

The developments in the use of the death penalty, from its historical beginnings through to modern day, began with shifting societal attitudes. In the mid-twentieth century, the Supreme Court made a number of significant decisions, developing its

<www.nytimes.com/2019/04/07/us/politics/death-penalty-democrats.html> accessed 21 May 2020

[18] Kenneth Williams, 'Most Deserving of Death? An Analysis of the Supreme Court's Death Penalty Jurisprudence' (Ashgate Publishing Limited 2012), p.5.

[19] Carol S Steiker and Jordan M Steiker, 'Courting Death: The Supreme Court and Capital Punishment' (The Belknap Press of Harvard University Press 2016), p.7.

[20] Ibid, pp.6-7.

[21] Ibid, p.8.

[22] Ibid.

interpretation of the Eighth Amendment as it applies to the death penalty. The Supreme Court's Eighth Amendment analysis will be explored in detail in chapter 3 of this thesis. These decisions led to a dramatic decline in the use of the death penalty during the 1950s and 1960s.[23] For example, the death penalty is generally reserved for the crime of murder, although there are other crimes that carry the sentence of death, such as treason and drug trafficking.[24] The restriction over time regarding which crimes carry a death sentence has followed several major challenges in the Supreme Court, leading to a consensus that the death penalty should generally only be used for the crime of murder, and only when one or more aggravating factors are present. This will be discussed in further detail below.

Although the death penalty in the United States is viewed as being in decline,[25] as stated above it is still in use in 28 out of the 50 states, which is a significant proportion. In November 2016, Nebraska voted to reintroduce the death penalty after the state's unicameral legislature had voted to ban it in May 2015 by 31 to 15, and Oklahoma voted to reaffirm the state's commitment to the death penalty after lethal injections were suspended following concerns over the procedure.[26] It remains, therefore, a serious contemporary issue, and examples of states renewing their support for the punishment

[23] Stuart Banner, 'The Death Penalty: An American History' (Harvard University Press 2002), p.230.
[24] There are other crimes punishable by death under both state and federal law, although no-one is currently on death row for these. State Law: Treason (Arkansas, Calif., Colorado, Georgia, Illinois, Louisiana, Mississippi, Missouri, Washington); Aggravated kidnapping (Co., Idaho, Il., Missouri, Mont.); Drug trafficking (Fl., Missouri); Aircraft hijacking (Ga., Mo.); Placing a bomb near a bus terminal (Mo.); Espionage (New Mexico); Aggravated assault by incarcerated, persistent felons, or murderers (Mont.)
Federal Law: Espionage (18 U.S.C. 794); Treason (18 U.S.C. 2381); Trafficking in large quantities of drugs (18 U.S.C. 3591(b)); Attempting, authorizing or advising the killing of any officer, juror, or witness in cases involving a Continuing Criminal Enterprise, regardless of whether such killing actually occurs (18 U.S.C. 3591(b)(2)). From DPIC, 'Death Penalty for Offenses Other Than Murder' <https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death/death-penalty-for-offenses-other-than-murder> accessed 21 May 2020
[25] DPIC, 'The Death Penalty in 2019: Year End Report' (n 7)
[26] The Independent, 'Nebraska votes to reintroduce the death penalty after backing Donald Trump to become president' (9 November 2016) <http://www.independent.co.uk/news/world/americas/us-elections/nebraska-reinstate-death-row-us-election-trump-president-win-2016-hillary-clinton-a7406166.html> accessed 13 January 2020

demonstrate that total abolition seems unlikely at present.

The continued support for the death penalty in the modern day United States is due to a complex mixture of social and political forces, as identified by Garland:

> "…the practice of capital punishment in America today is as much about discourse as it is about death, and as much about cultural politics as about the punishment of crime."[27]

The fact that the death penalty was reinstated and has endured to the present day can perhaps best be explained by the purposes that the death penalty is seen to serve. These purposes, both historically and in the modern era, will now be considered in detail.

The Purposes of the Punishment

In the seventeenth and eighteenth centuries capital punishment was viewed as a necessary punishment for all serious crimes, because it served three main purposes: deterrence, retribution and repentance. It was considered, in fact, to be the *only* appropriate punishment for a variety of serious crimes, particularly at a time when prisons were not used to the same extent as they are now.[28] The historical justification of retribution and deterrence can be illustrated by taking into consideration the much

[27] David Garland, 'Peculiar Institution: America's Death Penalty in an Age of Abolition' (Oxford University Press 2010), p.7.
[28] John D Bessler, 'Cruel & Unusual: The American Death Penalty and the Founder's Eighth Amendment' (Northeastern University Press 2012), p.67.

shorter periods of time that existed between sentencing and the execution itself, as it was thought that the deterrent and retributive effects would be weakened if there was any delay between sentence and execution. This is further emphasised by the very public nature of historical executions. Hundreds, often thousands, of people would attend executions, which were public and held outdoors.[29] The fact that executions were public and so well attended furthered the belief that capital punishment had a deterrent effect. Not only was the period between sentencing and execution brief, but the trial itself was historically also dealt with quickly, as illustrated by Banner:

> "[o]n March 15, 1673, Virginia's General Court tried Richard Thomas and Mary Blades from start to finish, in two separate trials for unrelated murders, and then sentenced them to death, and that was only a small part of the day's business, which also included ruling on some land claims and a civil suit."[30]

The retributive purpose of capital punishment came from a belief that if an individual committed a crime, he deserved punishment, because it was that individual's fault for not controlling a natural human tendency towards evil.[31] This also formed the basis for the importance given to repentance as another purpose of punishment, because it was thought vital that an individual repent for his crime, as his eternal fate after death depended on it, and a death sentence was "uniquely able to facilitate repentance."[32]

The two purposes of deterrence and retribution have been confirmed by the Supreme

[29] Banner (n 23), p.24.
[30] Ibid, p.15.
[31] Ibid, p.13.
[32] Ibid, p.23.

Court in modern cases still to be the "two principal social purposes"[33] for the death penalty. It is important to consider these two purposes in a modern day context to understand their continued justification, particularly as the way in which the death penalty is administered has changed considerably since the death penalty's inception. An examination of these purposes is also necessary in the context of arguing that neither of these purposes continue to be satisfied, particularly in relation to individuals with a severe mental illness. This provides further support for the argument that severely mentally ill individuals should be exempt from the death penalty, due to the fact that such purposes will not be satisfied by individuals who are not culpable for their crimes.

The idea behind retribution is that it re-establishes justice by providing an appropriate punishment that fits the seriousness of the crime:

> "punishment is justified because, and only to the extent that, the criminal deserves to be punished in virtue of the wrongfulness of his act."[34]

Indeed, in the case of a particularly heinous crime such as murder, a death sentence could be regarded by some as the only appropriate punishment:

> "wherever the death penalty is the ultimate punishment permitted by law, any lesser sentence – even one of life imprisonment without parole – can appear

[33] *Gregg v Georgia* 428 U.S. 153 (1976), at 183. The Court also referred to another purpose of "the incapacitation of dangerous criminals", also at 183, footnote 28.
[34] Claire Finkelstein, 'Death and Retribution' (2002) 21 Criminal Justice Ethics 12, at 13.

> grievously lacking to those who hope for proper retribution following a heinous crime."[35]

The purpose of retribution could, therefore, appear justified, but is not without its problems; retribution can be seen to walk a fine line between being a legitimate reason for punishment, while on the other hand displaying no more than a distasteful need for vengeance:

> "capital punishment is intended to express harsh condemnation and to deliver fitting retribution ... [but] there is a strict prohibition on the expression of vengeful emotion and on any suggestion of pleasure in contemplating the death of capital offenders."[36]

Justice Marshall, in his dissenting opinion in *Gregg v Georgia* (a case that will be discussed in detail in chapter 3 of this thesis), rejected retribution as a legitimate purpose of punishment, on the basis that it directly conflicts with the requirement to respect human dignity, which he stated was a requirement under the Eighth Amendment: "the taking of life 'because the wrongdoer deserves it' surely must fall, for such a punishment has as its very basis the total denial of the wrongdoer's dignity and worth."[37]

This conscious rejection of pure vengeance is arguably important, but at the same

[35] Garland (n 27), p.291.
[36] Ibid, p.56.
[37] *Gregg v Georgia* 428 U.S. 153 (1976), at 240-241.

time, it could call into question the whole idea of retribution as a valid purpose for capital punishment:

> "...why, if the aim is to produce deterrence or retribution or victim satisfaction, are executions held in private, often decades after the crime, with such a minimum of display and so much concern to ensure that the condemned feels no pain?"[38]

The secrecy of modern executions appears to be in contrast with the purposes of retribution and deterrence:

> "the low-visibility character of executions is surprising because it would seem to undermine the institution's avowed purposes of deterrence and retribution. As Jeremy Bentham put it, 'A real punishment, which is not an apparent punishment, is lost to the public.' If the motivating idea is to deter potential offenders or to express public sentiment, we would expect the punishment to be given maximum publicity, not the reverse."[39]

However, if there was a return to public executions and/or more barbaric forms of execution, states may then run the risk of turning supporters of the death penalty against it; the average member of society may support the death penalty in theory, but presenting them with the gruesome reality of taking a life is a very different thing:

[38] Garland (n 27), p.39.
[39] Ibid, p.54.

> "executions are now carried out in private, away from the public eye – a change initiated by nineteenth-century legislators who, history reveals, found executions to be *brutalizing*."[40]

Both the retributive and deterrent purposes of the death penalty appear lessened when considering the practice of "killing softly" in modern day executions:

> "the death penalty is intended in part to deter others from committing crimes, but we inflict it in private. It is often justified in retributive terms, and yet we take great care to make it as painless as possible."[41]

Great care is taken to ensure that the execution is carried out in the most humane way possible:

> "…today's executions are conducted out of sight of the crowd, according to a protocol that aims to avoid physical suffering, leave the prisoner's body unmarked, and prohibit the circulation of photographic images."[42]

States have continuously sought to use the most painless method of execution possible, which is why the primary method of execution has changed over the years:

[40] Bessler (n 28), p.248.
[41] Banner (n 23), p.3.
[42] Garland (n 27), p.13.

> "…hanging was initially adopted in the 1600s as an alternative to corporal torture; the electric chair came in the 1800s as a quicker, less painful, and more successful (that is, a more certain) alternative to hanging; and the twentieth century witnessed the births of the gas chamber and lethal injection."[43]

A state may wish to display its total dominance over its citizens, but not in a way that would be considered excessively cruel – particularly as this may lead to accusations of violating the Eighth Amendment. However, the more emphasis that is placed by a state on secretive, humane executions, the weaker the argument that the death penalty remains a legitimate punishment due to its retributive and deterrent nature. On that basis, it is difficult to see why capital punishment should continue to be used at all. Conversely, however, Bonnie argues that the "sanitized" nature of executions may, in effect, be contributing to the continued existence of the death penalty, even when used against severely mentally ill individuals:

> "By avoiding the 'cruel spectacle,' however, these changes also reduce the emotional costs of carrying out executions, including the marginal cost of executing a madman."[44]

Another difficulty with regarding retribution as a legitimate purpose for the death penalty is in cases where, by reason of a mental illness, for example, an individual is not able to understand their punishment, as argued by the American Bar Association in

[43] Judith Randle, 'The Cultural Lives of Capital Punishment in the United States', in Austin Sarat and Christian Boulanger (eds.), *The Cultural Lives of Capital Punishment* (Stanford University Press 2005), p. 94.
[44] Richard J Bonnie, '*Panetti v Quarterman*: Mental Illness, the Death Penalty, and Human Dignity' (2007) 5 Ohio State Journal of Criminal Law 257, at 277.

a 2006 report:

> "the retributive purpose of capital punishment is not served by executing an offender who lacks a meaningful understanding that the state is taking his life in order to hold him accountable for taking the life of one or more people. Holding a person accountable is intended to be an affirmation of personal responsibility. Executing someone who lacks a meaningful understanding of the nature of this awesome punishment and its retributive purpose offends the concept of personal responsibility rather than affirming it."[45]

The Supreme Court considered the issue of retribution when it determined that the execution of an "insane" individual was prohibited under the Eighth Amendment in the landmark 1986 case of *Ford v Wainwright*, which will be discussed in chapters 2 and 3 of this thesis. However, as will be explored in chapter 2, the Supreme Court has determined as recently as 2019[46] that retribution can still be satisfied even when, as a result of severe mental illness, the individual has no memory of the crime that he committed.

Whether or not retribution is accepted as a legitimate purpose for the death penalty, the purpose of deterrence is no more straightforward to justify. Put simply, the argument behind deterrence is that the execution of individuals who commit particular crimes will deter other individuals from also committing those crimes. This can certainly be

[45] American Bar Association, 'Recommendation and Report on the Death Penalty and Persons with Mental Disabilities' (2006) 30 Mental and Physical Disability Law Reporter 668
[46] *Madison v Alabama* 139 S.Ct. 718 (2019)

understood historically, when considering the very public nature of executions and the effect that witnessing an execution may have had on those present. More recently,

> "the U.S. Supreme Court, viewing deterrence as a rationale for executions, has stated that '[t]he theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct.'"[47]

However, the argument that the death penalty serves a deterrent effect has been heavily criticised; here by Bessler:

> "the modern deterrence debate traces its origins to a 1975 article by economist Isaac Ehrlich claiming that every execution averts eight murders. Ehrlich's flawed study has been thoroughly discredited by social scientists, but the persistent if misguided belief that killing can somehow stop killing has not gone away."[48]

Part of the criticism arises from the fact that executions are now carried out in secret, as discussed earlier in this chapter, and here identified by Bessler:

> "even if one accepts the convoluted argument that killing can convince others to stop killing, the rarity of executions and the lack of publicity associated with them

[47] Bessler (n 28), p.248.
[48] Ibid, p.247.

makes any deterrent effect highly improbable, to say the least."[49]

Any deterrent effect that may arise from the punishment of criminals can, arguably, be equally served by long sentences in prison, as argued by Bessler:

> "death penalty states' homicide rates, however, have long been – and continue to be – much higher than those of non-death penalty states, with no credible evidence showing that executions deter homicides better than life sentences."[50]

This is particularly so in the case of life without parole sentences:

> "in short, no persuasive proof exists that executions deter homicides any more effectively than a very real and viable substitute: life-without-parole sentences."[51]

Of course, life without parole sentences have also been heavily criticised, with some viewing such sentences as excessive and in breach of the Eighth Amendment.[52] It is difficult to say with certainty if the debate surrounding the possible deterrent effect of capital punishment will ever be settled definitively, and

> "in many ways it only obscures questions surrounding the morality of executions and impedes the human rights discourse that should be taking place regarding

[49] Ibid, p.248.
[50] Ibid, p.247.
[51] Ibid, p.248.
[52] The issue of life without parole is outside the scope of this thesis. For a discussion of life without parole, see, for example, Brenda L Vogel, 'Support for life in prison without the possibility of parole among death penalty proponents' (2003) 27 American Journal of Criminal Justice 263; Christopher Seeds, 'Disaggregating LWOP: Life Without Parole, Capital Punishment, and Mass Incarceration in Florida, 1972–1995' (2018) 52 Law and Society Review 172

state-sanctioned killing."[53]

The use of the death penalty in the United States can be understood, therefore, as historically serving a number of important purposes, which were considered necessary for the proper and effective functioning of society as a whole. However, the collective understanding of human behaviour increased enormously in the nineteenth and twentieth centuries, and it is now possible to appreciate the various factors that can contribute to an individual committing a crime (such as, for example, abusive or neglected childhoods, drug and alcohol abuse, and untreated mental health issues).[54]

Despite the importance historically attributed to the death penalty, as early as the seventeenth century it was recognised by some commentators, such as Coke, Hale and Blackstone, that it would not be an appropriate punishment for an individual who was insane.[55] Blackstone's view was that an individual who suffered from a mental disability[56] should not be executed. In relation to mental illness, this applied whether the individual suffered from a mental illness at the time he committed the crime, or if the individual subsequently developed a mental illness at trial or when incarcerated.[57] This historical attitude was discussed more recently by the Supreme Court in *Ford v*

[53] Bessler (n 28), p.247.
[54] Banner (n 23), pp.208-209.
[55] Jonathan L Entin, 'Psychiatry, Insanity and the Death Penalty: A Note on Implementing Supreme Court Decisions' (1988) 79 Journal of Criminal Law and Criminology 218, at 220.
[56] The term "mental disability" is a broad term referring to both mental illness and intellectual disability.
[57] 1 William Blackstone & George Chase Commentaries on Laws of England in Four Books 860 1877, Book Four, Chapter II, p.864: "…in criminal cases therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution."

Wainwright,[58] where the majority stated that they "know of virtually no authority condoning the execution of the insane at English common law" and that "this solid proscription was carried to America, where it was early observed that 'the judge is bound' to stay the execution upon insanity of the prisoner."[59]

The Modern Day Use of the Death Penalty in the United States

The use of the death penalty in the United States is notable in two respects: the first is that the United States is the only Western country still to retain the practice. The second aspect is that the United States has engaged in a period of reform of the death penalty, beginning in earnest after the reinstatement of the death penalty in 1976[60] after (what turned out to be) a temporary suspension of the punishment in 1972.[61] Historically, the death penalty was considered to be a state matter, with the Supreme Court reluctant to interfere. However, the "modern" death penalty has been, as described by Steiker and Steiker, "subject to ongoing extensive regulation,"[62] primarily by the Supreme Court, with this regulation acting as a "novel third course between the options of retention and abolition."[63] This shift to regulation of the death penalty by the Supreme Court culminated in the landmark decision in 1972 of *Furman v Georgia*,[64] where the Supreme Court declared the death penalty to be unconstitutional. This case will be discussed in detail in the next chapter of this thesis. The case was seen as bringing an end to the death penalty in the United States altogether, but it turned out to

[58] 477 U.S. 399 (1986)
[59] 477 U.S. 399 (1986), at 408.
[60] *Gregg v Georgia* 428 U.S. 153 (1976)
[61] *Furman v Georgia* 408 U.S. 238 (1972)
[62] Steiker and Steiker (n 19), p.40.
[63] Ibid.
[64] 408 U.S. 238 (1972)

be a temporary suspension. As identified by Steiker and Steiker:

> "whether inspired by genuine commitment to the punishment or by the political advantages flowing from renouncing *Furman*, political leaders loudly and clearly communicated their desire to preserve the death penalty."[65]

The crux of the Supreme Court's judgment was that the death penalty was applied arbitrarily by the states; one issue being that total discretion was given to the jury as to whether or not a death sentence should be given. In response to *Furman*, in a "virtual stampede,"[66] 37 states enacted new death penalty statutes, the intention of which was to address the concern that the punishment was applied arbitrarily, and, at the same time, "public support skyrocketed in the aftermath of *Furman*."[67] This support was, at least in part, likely the result of a backlash to federal intervention into what had historically been a state matter. The death penalty, therefore, became a symbol of state rights in a federal system. Most states introduced a "guided discretion" approach, which involved the consideration of aggravating and mitigating factors, and the requirement of bifurcated proceedings.[68] As a result, the death penalty was reinstated by the Supreme Court just four years later in *Gregg v Georgia*.[69]

The intention of such regulation by the Supreme Court appears to be to ensure that the death penalty is being used legitimately; in other words, that only those individuals truly

[65] Steiker and Steiker (n 19), p.65.
[66] Bessler (n 28), p.5.
[67] Ibid, p.283.
[68] Steiker and Steiker (n 19), p.62.
[69] 428 U.S. 153 (1976)

deserving of the punishment will receive it. Steiker and Steiker consider that the intention of the Supreme Court is that reforms "will make the administration of the death penalty fairer, more reliable, or simply narrower in scope, and therefore unquestionably good in and of itself."[70] To that end, both the scope of the offences that carry a death sentence and the eligible individuals themselves have been limited, so that murder (where one or more aggravating factors are present) remains the only crime punishable by death,[71] and whole classes of individuals have been excluded from the death penalty, as identified above. The exemption of severely mentally ill individuals from the death penalty could, therefore, be considered as a natural next step in the Supreme Court's regulation of the death penalty, but this has proved to be a more complex issue than it perhaps first appears.

Before looking at the Supreme Court's Eighth Amendment jurisprudence in detail in chapter 3, it is first important to consider the Eighth Amendment and why it has developed so much significance in the context of capital punishment. The United States Bill of Rights was ratified in 1791 and constitutes the first ten amendments to the United States Constitution. The drafters of the Bill of Rights had been influenced by the English Bill of Rights of 1689. The purpose of the Bill of Rights, amongst other things, was to guarantee certain rights and freedoms for all citizens and to set out limitations on the government's power in judicial proceedings. The death penalty is

[70] Steiker and Steiker (n 13), at 421.
[71] See *Gregg v Georgia* 428 U.S. 153 (1976), *Coker v Georgia* 433 U.S. 584 (1977) and *Kennedy v Louisiana* 554 U.S. 407 (2008). As noted above (n 24), there are other crimes still punishable by death under state and federal law, but no-one is currently on death row for these.

permitted under the Fifth and Fourteenth Amendments to the Constitution,[72] subject to the Eighth Amendment's prohibition against cruel and unusual punishment. It is the Eighth Amendment that is crucial to understanding how the Supreme Court has developed its reasoning in death penalty cases. The Eighth Amendment simply states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." [73] This is almost identical to a provision in the English Bill of Rights of 1689. The Eighth Amendment originally applied to the federal government, and the Supreme Court has since ruled that the Eighth Amendment also applies to individual states.[74] In its interpretation, the Supreme Court has ruled that the Eighth Amendment prohibits the use of some punishments entirely,[75] and prohibits other punishments that are excessive in relation to the crime,[76] or are excessive when taking into account the competence of the perpetrator.[77] These cases will be discussed in detail in chapter 3.

Abolition or Reform?

The use of extensive regulation by the Supreme Court has raised an interesting issue: are these reforms of the death penalty positive developments, or are they diverting attention from efforts for total abolition? In other words, is incremental abolition desirable, or should the focus remain on total abolition? For example, each time a

[72] The Fifth Amendment states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury…nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law…" The Fourteenth Amendment states: "…nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
[73] U.S. CONST. amend. VIII
[74] Bessler (n 28), p.308.
[75] *Wilkerson v Utah* 99 U.S. 130 (1878)
[76] *Weems v United States* 217 U.S. 349 (1910); *Trop v Dulles* 356 U.S. 86 (1958); *Furman v Georgia* 408 U.S. 238 (1972).
[77] *Atkins v Virginia* 536 U.S. 304 (2002)

category of defendants is exempted from the death penalty, this could in fact be seen to legitimise the use of the death penalty for everyone else. Bedau argues that

> "these reforms rationalize every death sentence and every execution; they have made what remains of capital punishment in the United States more, not less, acceptable."[78]

Steiker and Steiker have also raised the concern that:

> "the choice to reform also carries the distinct possibility that it will normalize the underlying practice and avert the very critical gaze that gave rise to the reforming impulse, thus delaying, or even permanently preventing, full-scale abolition of capital punishment."[79]

If visible reforms of the death penalty take place, then the concern is that the public will become more comfortable with the use of the death penalty, and less likely to scrutinise it or to campaign for abolition.[80] It also means that this will become a general cycle: a particular issue, such as the method of execution, will be focused on, and once it has been addressed, any push for abolition will disappear until the next issue arises. This is a point raised by Hodgkinson[81], who further states that:

> "such an approach could considerably delay the process of replacing the death

[78] Hugo Adam Bedau, 'The Death Penalty in America: Yesterday and Today (1991) 95 Dickinson Law Review 759, at 767.
[79] Steiker and Steiker (n 13), at 418.
[80] Steiker and Steiker (n 13), at 424.
[81] Hodgkinson (n 13), p.32.

> penalty for all crimes in all circumstances and is in any event achieved at the expense of unacceptable compromises. Such a piecemeal approach offers governments an opportunity for delay in confronting the total removal of the death penalty."[82]

Whilst these concerns are understandable, the main issue with this argument against reforming practices is that it assumes that the death penalty will indeed be abolished in the United States of America, and that the question is not if, but when. However, there is no guarantee that abolition will happen, and given the current position in the United States with a majority conservative Supreme Court, any arguments regarding death penalty 'reform' should not be made on this assumption. Perhaps just as importantly, it could be argued that there is a moral imperative to save every life that it is possible to save, and reform by way of categorical exemptions, for example, is one way of doing that. As Bedau put it, the death penalty "deserves our condemnation and all the resistance we can muster."[83] Unless and until abolition does happen, any efforts to 'reform' the death penalty to reduce the number of death-eligible defendants must be seen as a positive development.

An additional argument against the use of categorical exemptions in particular is that exempting an entire class will then also exclude individuals for the death penalty who arguably do have the requisite culpability. In her dissenting judgment in *Roper v Simmons*, Justice O'Connor argued that "at least some 17-year-old murderers are

[82] Ibid.
[83] Bedau (n 78), at 772.

sufficiently mature to deserve the death penalty in an appropriate case."[84] However, when considering cases in which the defendants are either juveniles, intellectually disabled, or insane, the Supreme Court's decision to exempt these defendants entirely from the death penalty reflected the fact that these defendants need special constitutional protection, and all defendants in these categories are equally entitled to it. The Supreme Court identified this is *Atkins* when it stated that "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution."[85] Prosecutors often presented youth and intellectual disability as aggravating factors, which may have increased the likelihood of a death sentence being given to these defendants. The Supreme Court identified this in *Atkins v Virginia*, when it stated that:

> "reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury."[86]

In addition, these individuals would have experienced difficulties effectively assisting in their own defence, which was again identified in *Atkins*:

> "Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes."[87]

[84] 543 U.S. 551 (2005), at 588.
[85] 536 U.S. 304 (2002), at 321.
[86] Ibid, at 321.
[87] Ibid, at 320-321.

It is arguably preferable to exclude entire classes of defendants from the death penalty, thereby protecting against the risk of death sentences being given when it is not appropriate, and accept that some individuals who might arguably have the requisite culpability will avoid a death sentence as a result of the blanket exclusion. In any event, if the Supreme Court focused on the concept of human dignity when reaching such decisions, this would remove the difficulty with trying to determine whether or not an individual has the appropriate level of culpability; instead, the question would be whether a particular practice is compatible with respect for human dignity.

In the specific context of severely mentally ill individuals, an argument that has been raised against the exemption of such individuals as a class is that the sheer number of mental illnesses and the varying degree of severity of individual mental illness means that there are potentially a huge number of individuals who could be covered by the exemption.[88] The argument in favour of exemption was called by a district attorney in Oregon (who was, at the time, chairman of the capital litigation committee of the National Association of District Attorneys) as an

> ""incredibly incremental abolitionist argument," because due to the number of people suffering from a mental illness, introducing a categorical exemption would mean that "nobody would ever be given the death penalty...it creates a standard

[88] Liliana Lyra Jubilut, 'Death Penalty and Mental Illness: The Challenge of Reconciling Human Rights, Criminal Law, and Psychiatric Standards' (2007) 6 Seattle Journal for Social Justice 353, at 367: the "vast variety of diseases may be a factor in creating opposition to the adoption of a categorical exemption due to the sheer numbers of individuals with these conditions."

that would effectively exempt anyone.””[89]

Of course, abolitionists may argue that that is precisely the point; so many defendants suffer from some form of mental illness, either before or after incarceration, that there is no guarantee of ensuring that a severely mentally ill individual will not be executed, even if a categorical exemption were to be introduced; total abolition is the only way to avoid this.

Alongside the above arguments in favour of reform generally, more specifically it must also be considered what the alternative to categorical exemption would be; in other words, if no groups of defendants were excluded from the death penalty as a class, this would mean that state courts would be required to consider such cases on an individual basis. This could clearly lead to uncertainty and inconsistency across states, and even across cases within individual states. The risk that a case-by-case approach could lead to wide inconsistencies across the states for similar cases would also have strengthened the argument that the death penalty was being applied arbitrarily, which is something that the Supreme Court – and death penalty retentionists – would wish to avoid. It must be noted at this point that there is still some inconsistency across states in relation to those classes of individuals subject to categorical exemptions; for example, although the Supreme Court excluded intellectually disabled individuals from the death penalty in 2002, the Supreme Court left the assessment of intellectual disability up to individual states. As will be explored in chapter 3 of this thesis, this has led to

[89] D Malone, ‘Cruel and Inhumane: Executing the Mentally Ill’ (2005) Amnesty International 20-23, at 22, quoting Joshua Marquis, district attorney of Clatsop County, Oregon and the chairman of the capital litigation committee of the National Association of District Attorneys.

challenges in the Supreme Court against individual state practices. This inconsistency across states would be even more problematic without the use of categorical exemptions.

This chapter will now consider the efforts made so far to exempt severely mentally ill individuals from the death penalty, primarily through the introduction of draft bills in eleven states.

Exemption of Severely Mentally Ill Individuals at State Level – Draft Bills

No state currently prohibits the execution of severely mentally ill individuals, although in recent years there has been a positive development in the form of draft bills introduced by eleven states. Those states are: Arizona,[90] Arkansas,[91] Indiana,[92] Kentucky,[93] Missouri,[94] North Carolina,[95] Ohio,[96] South Dakota,[97] Tennessee,[98] Texas[99] and Virginia.[100] All bills refer to "severe" or "serious" mental illness, except North Carolina, which refers to "severe mental disability". All of the bills specify that, in order to be eligible for exemption from the death penalty, the defendant must have a severe mental illness at the time of the offence, which means that the bills would not apply to defendants whose severe mental illness develops subsequently. Seven of the bills

[90] Arizona Senate Bill 1250 (2020)
[91] Arkansas House Bill 1494 (2019)
[92] Indiana Senate Bill 155 (2017)
[93] Kentucky Senate Bill 154 (2020)
[94] Missouri House Bill 2509 and Senate Bill 1081 (2018)
[95] North Carolina Senate Bill 668 (2019)
[96] Ohio House Bill 136 and Senate Bill 54 (2019)
[97] South Dakota Senate Bill 64 (2020)
[98] Tennessee House Bill 1455 and Senate Bill 1124 (2019)
[99] Texas House Bill 1936 (2019)
[100] Virginia House Bill 280, House Bill 1386 and Senate Bill 116 (2019)

state that the severe mental illness must impair the defendant's ability to (1) appreciate the nature, consequences, or wrongfulness of his or her conduct, (2) exercise rational judgement in relation to the person's conduct, or (3) conform his or her conduct to the requirements of the law. Tennessee and Texas only set out the first two limbs, and Kentucky and South Dakota do not refer to this test at all. There is some disparity across the states regarding who should determine whether or not the individual has a severe mental illness, and how this should be carried out. Arizona, Arkansas, Indiana and Missouri specify that the court must order an evaluation by experts, before the court makes a determination of whether or not the individual has a severe mental illness. Kentucky and South Dakota simply state that the court must make this determination. North Carolina and Ohio both state that this assessment must be carried out at a pretrial hearing. Tennessee specifies that the court must make the determination at a hearing prior to the adjudication of the charges. Texas states that the defendant must file a notice of his intention to submit evidence that he suffered from a severe mental illness at the time of the offence, and this issue must be decided by a jury prior to the trial. Finally, Virginia states that the assessment of severe mental illness will be determined by the judge or the jury as part of the sentencing proceeding (depending on whether the trial was before a judge or a jury).

Although the introduction of these bills is a positive development, the above examination of the draft bills reveals a few issues. Firstly, the bills do not go far enough, in terms of the fact that the bills only apply to individuals who suffer from a severe mental illness at the time of the offence, and not where the illness has

developed subsequently (i.e. during the trial or while on death row). As will be argued in this thesis, *all* severely mentally ill individuals should be exempt from the death penalty, regardless of when the illness manifests itself. Secondly, as identified, the bills differ between states even in terms of the description of what the bill covers (using "severe" or "serious", and one bill referring to "disability" rather than "illness"). More significantly, there are also differences regarding who should determine if the individual in question has a severe mental illness, differing between the court, the judge or the jury. Not only will this disparity lead to inconsistency across the states, but it also raises a more serious issue: how qualified would the judge or jury be to make this determination? In states where the court is left to make the determination of whether or not the individual had a severe mental illness, is it envisaged that expert witnesses would be involved to assist with this assessment? What evidence would be acknowledged as indicating that the individual has a severe mental illness, and how would the court address the issue of juries treating evidence of severe mental illness as an aggravating, rather than a mitigating, factor?

The fact that states have, so far, been unable to reach a consensus regarding the exemption of severely mentally ill individuals suggests that a categorical exemption needs to be made at a federal level. If the Supreme Court declared the execution of severely mentally ill individuals to be unconstitutional, states would have to enact legislation which, so far, only the eleven states named above have attempted to do, and none have yet done so successfully.

Introduction to the Concept of Human Dignity

As stated above, this thesis argues for the exemption of severely mentally ill individuals on the grounds of human dignity. It is the position of this thesis that the use of the death penalty is fundamentally inconsistent with respect for human dignity, particularly in relation to the execution of severely mentally ill individuals. It is important, therefore, to understand what is meant by human dignity in this context, which will be explored in depth in chapter 4 of this thesis. This thesis adopts a broadly Kantian[101] approach, in two key respects.[102] The first is Kant's argument that dignity is an inherent characteristic that all human beings have simply by virtue of being human. Dignity cannot, therefore, be given to someone or taken away from him. The second argument based on Kant's approach is that dignity is the basis for all human rights; it is because human beings have dignity that they have rights. Respecting human dignity means, therefore, acknowledging that all human beings have equal rights, and the autonomy to exercise those rights.

The importance of the concept of human dignity, and its utility in relation to an argument for the exemption of severely mentally ill individuals, is that human dignity has a clear legal basis. As will be explored in chapter 4, the concept features in a number of International Conventions.[103] In relation to the United States specifically, although 'dignity' is not expressly referred to in the United States Constitution, arguably it is

[101] See Immanuel Kant, 'Groundwork for the Metaphysics of Morals' (Yale University Press 2002) and Immanuel Kant, 'The Metaphysics of Morals' (Mary Gregor tr, 2nd edn, Cambridge University Press 2017)
[102] This thesis only adopts a Kantian approach to a certain point; whilst this thesis agrees that dignity is inherent in all human beings, Kant went on to argue that the death penalty *must* be used, which this thesis does not agree with.
[103] See pages 172-177 of this thesis.

implied through the protection of other rights. Human dignity also features in two state constitutions – Louisiana and Montana – and, again, it is possible to see that the protection of human dignity is implied in all of the other state constitutions.[104] Even more significantly, dignity has featured in a number of key United States Supreme Court decisions in relation to the Eighth Amendment.[105] This demonstrates that the Supreme Court does attach importance to the concept; indeed, in the 1958 case of *Trop v Dulles*, the Supreme Court stated that "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[106] The strongest way to attain exemption of severely mentally ill individuals is by way of a Supreme Court judgment prohibiting the practice, rather than relying on individual states to exempt severely mentally ill individuals. The use and interpretation of dignity by the Supreme Court is, therefore, crucial to achieving exemption. However, the Supreme Court has not set out a clear definition of what it means by 'dignity'. A key challenge with exemption will be that of convincing the Supreme Court that it should be using the Kantian approach argued for in this thesis; in other words, acknowledging that human dignity is an inherent characteristic, and that there is a clear link between human dignity and human rights. It is suggested this would lead the Supreme Court to the inevitable conclusion that it is not possible to respect the human dignity of severely mentally ill individuals facing the capital trial process and execution and that such individuals should, therefore, be exempt from the death penalty.

[104] See pages 179-184 of this thesis.
[105] See pages 184-196 of this thesis.
[106] 356 U.S. 86 (1958), at 100.

As will be explored in depth in chapter 5 of this thesis, a clear example of the inability to respect a severely mentally ill individual's human dignity in the death penalty context is the ability to 'volunteer' for execution. This is the situation where an individual chooses to waive his appeals in order to bring forward the date of his execution. All death row inmates are entitled to volunteer for execution, if found competent to do so. However, where the individual suffers from a severe mental illness, there is a risk that the individual may be choosing to volunteer as a result of the illness that he suffers from; for example, if he has severe depression and a history of suicide attempts. By allowing that individual the right to volunteer, this will potentially operate more to his detriment than in the case of individuals who are not severely mentally ill. However, because respect for human dignity requires acknowledging the autonomy of all human beings to exercise equal rights, denying a severely mentally ill individual the right to volunteer would be in contravention with their human dignity. The only real option is to exempt severely mentally ill individuals from the death penalty altogether.

Thesis Outline

The thesis will proceed as follows. Chapter 2, Challenges for Severely Mentally Ill Defendants Facing the Death Penalty, aims to explore in detail why severely mentally ill individuals have not yet been exempted from the death penalty, but also why they should be. The chapter will begin by considering the issues with defining severe mental illness itself. This is a key obstacle to categorical exemption, because there is no one universally accepted definition of severe mental illness, so identifying what exactly

would qualify as a severe mental illness for exemption from the death penalty is complex. The chapter will next consider the current legal framework and the options seemingly available to severely mentally ill individuals – namely, the insanity defence; a plea of guilty but mentally ill; and the presentation of evidence of mental illness in mitigation – and will demonstrate the inadequacies of each of these options. For example, the insanity defence is rarely used and only applies to those severely mentally ill individuals classified as 'insane', which is a very narrow legal definition. The chapter will then turn to consider the inadequacy of the test of competency to stand trial, along with the challenges posed by the jury, the prosecution and even by defence counsel. The prosecution may argue that any evidence of severe mental illness is actually an aggravating factor, rather than a mitigating factor, especially if the defendant has a history of violence associated with his severe mental illness. Defence counsel may have little experience of representing a severely mentally ill individual, and/or may not have the time or funds to investigate evidence of the individual's severe mental illness. The jury may struggle to empathise with the defendant, and may be suspicious that the individual is faking symptoms of severe mental illness in order to avoid a death sentence; or, the jury could misperceive evidence of severe mental illness as indicative that the individual is dangerous – particularly if the prosecution has presented such evidence as an aggravating factor – which may lead the jury to consider that the death penalty is the most appropriate punishment. This could be exacerbated if the individual chooses to represent himself, which will be the final issue explored in the chapter. The right of self-representation is available to all defendants under the Sixth Amendment, but the exercise of that right by a severely mentally ill individual may operate to his

detriment. The individual may struggle to present a strong defence; the individual may not even recognise or acknowledge that he suffers from a severe mental illness and refuse to present evidence in mitigation; and the jury may respond negatively to any behaviour of the individual that is not considered 'normal'.

Chapter 3, The United States Supreme Court's Eighth Amendment Jurisprudence and Categorical Exemptions, will consider the Supreme Court's Eighth Amendment jurisprudence in depth.[107] This is necessary in order to understand how the Supreme Court has determined that certain classes of individuals should be exempt from the death penalty, and how the Supreme Court can also, therefore, exempt severely mentally ill individuals. As mentioned above, exemption at a federal level is required, due to the difficulties with trying to achieve exemption at state level. The chapter will begin with an examination of the originalist approach and "evolving standards of decency" approach to the Eighth Amendment used by the Supreme Court. The key Eighth Amendment decisions of the Supreme Court will be explored, with an examination of the factors that influence the Supreme Court in its decisions, including the use of dignity. The chapter will also consider the groups currently exempt from the death penalty – the insane, the intellectually disabled and juveniles – and how the concept of dignity was used in those decisions, with a view to demonstrating how the Supreme Court can use dignity to exempt severely mentally ill individuals as a natural next step in its Eighth Amendment jurisprudence.

[107] Death penalty challenges to the Supreme Court are generally brought under the Eighth Amendment, which prohibits cruel and unusual punishment. This will be explored in detail in chapter 3 of this thesis.

Chapter 4 will then focus on the concept of human dignity, drawing on both moral and legal philosophy. The concept of human dignity has been a topic of debate between philosophers and academics for centuries.[108] As referred to above, this thesis draws on a Kantian approach and takes the position that human dignity is inherent in all human beings, and that there is a clear link between human dignity and human rights. This means that respecting human dignity entails recognising that everyone has equal rights as a result of their status as human beings. In the context of severely mentally ill individuals facing a death sentence, it can be seen that a greater challenge exists in ensuring the protection of and respect for human dignity. This is because recognition of equal rights inevitably will have a detrimental impact on those individuals. For example, a severely mentally ill death row inmate may choose to exercise the right to "volunteer" for execution (an issue that will be explored in depth in chapter 5 of this thesis), but this decision may in fact be as a result of his or her mental illness, and it is not, therefore, possible to say with certainty that the right has been freely exercised and that the dignity of the individual is actually being respected. The inability to recognise the equal rights of severely mentally ill death row inmates while, at the same time, providing those individuals with sufficient constitutional protection provides a convincing argument that all severely mentally ill individuals should be exempt from the death penalty. As set out above, a Kantian view of human dignity is adopted by this thesis, which means that dignity is viewed as inherent to all human beings simply by virtue of being human. Further, human dignity is a key foundation for all human rights; respect for dignity, therefore, means recognising that all humans have equal rights, and the autonomy to

[108] See, for example, Michael Rosen, 'Dignity: Its History and Meaning' (Harvard University Press 2012) and Christopher McCrudden (ed.), 'Understanding Human Dignity' (Oxford University Press 2014).

exercise their rights. The chapter will consider the contentious nature of the concept of human dignity. A contrasting view of dignity, "dignity as constraint", will then be considered. This view argues that it is sometimes necessary to deny an individual the ability to exercise his rights, if to do so would appear to be contrary to respect for his dignity. Although this would be an attractive argument in the context of, for example, volunteers for execution (discussed in chapter 5 of this thesis), this argument must ultimately be rejected. The protection of dignity in a variety of international conventions will be identified, with a view to demonstrating the recognition of the importance of the concept at an international level. The chapter will then demonstrate that "dignity" is central to the legal framework in the United States; dignity may not be expressly referred to in the United States Constitution, but it is clearly implied through the protection of other rights, and, in fact, is the basis for the very acknowledgement and protection of rights in the first place. The chapter will also consider the protection of dignity in the individual state Constitutions, both as an express and an implied right. The chapter will end with an examination of the use of the concept of dignity by the Supreme Court in its Eighth Amendment case law.

Chapter 5 will then present the specific issue of so-called volunteers for execution as a case study of human dignity. The chapter will begin by considering the test for competency to volunteer for execution, identifying the problems with the competency standard. The chapter will then examine dignity issues raised by the ability to volunteer for execution, and will discuss the view that respecting an individual's dignity means allowing him to volunteer; an argument that this thesis rejects. The Supreme Court's

key case on assisted suicide will be considered, as the Supreme Court was arguably concerned with dignity in this case and it is, therefore, possible to draw comparisons with volunteering for execution. Finally, the chapter will examine the cases of a number of volunteers, drawing out common themes such as the inadequacy of the test for competency to volunteer for execution, with a view to demonstrating that dignity should form a key part of the process, but currently is not considered.

Chapter 6, the concluding chapter, will consider the case for full abolition of the death penalty. This is because even if severely mentally ill individuals are exempted by the Supreme Court, the likelihood is that severely mentally ill individuals will still be at risk of execution. This can be inferred from the fact that, as will be discussed in chapter 3 of this thesis, the Supreme Court exempted intellectually disabled individuals in 2002; however, there are examples of intellectually disabled individuals being executed as recently as 2018.[109] The main issue is that the Supreme Court left the determination of 'intellectual disability' to individual states, and the states have adopted different levels of proof; for example, in Georgia, intellectual disability must be proved 'beyond a reasonable doubt,' which, as will be discussed, is almost impossible to achieve. This issue will potentially be even more problematic in the case of severely mentally ill individuals, as 'severe mental illness' is much harder to define than 'intellectual disability'. The exemption of severely mentally ill individuals is, therefore, necessary, but must be viewed as a temporary measure before full abolition of the death penalty. The chapter will then set out both short term and longer term proposals for reform, in

[109] Rodney Berget, South Dakota. See The Intercept, 'Rodney Berget Says He Wants to Die. South Dakota Plans to Kill Him. But Experts Say His Execution Would Violate the Law.' (29 October 2018) <https://theintercept.com/2018/10/28/south-dakota-rodney-berget-execution/> accessed 14 January 2020

order to achieve the exemption of severely mentally ill individuals. In the short term, the test for competency to volunteer for execution needs to be reformed; as will have been explored in chapter 5 of the thesis, the test is currently too broad, meaning that only a very low level of competence is required. Another short term reform would be to prevent severely mentally ill individuals from volunteering for execution; or, ideally, to remove the option of volunteering from *all* individuals. In the longer term, the public needs to be made more aware of all issues associated with the death penalty, particularly in relation to severely mentally ill individuals. In addition, the Supreme Court needs to elevate its considerations of dignity in its Eighth Amendment jurisprudence, so that it is always the first factor in its deliberations. Finally, the death penalty needs to be removed from the political agenda, as the death penalty should not be used as a tool by political parties to gain favour with voters.[110]

Conclusion

This introductory chapter has sought to explain the current status of the death penalty in the United States of America. The United States is unusual in its continued use of the death penalty, which is chiefly justified on the basis that it serves the purposes of deterrence and retribution. The United States appeared to be close to total abolition of the death penalty altogether following *Furman v Georgia* in 1972, but, instead, this judgment led to renewed support for the use of the death penalty, with states amending their death penalty statutes to address the concerns of the Supreme Court. Since the

[110] See The New York Times, 'Democrats Rethink the Death Penalty, and Its Politics' (7 April 2019) <www.nytimes.com/2019/04/07/us/politics/death-penalty-democrats.html> accessed 21 May 2020

reinstatement of the death penalty in 1976, the Supreme Court has engaged in an extensive period of reform of the death penalty, which raises the question over whether such reforms should be welcomed by abolitionists, as potentially amounting to an incremental abolition of the death penalty, or if, instead, such reforms only serve to delay total abolition of the death penalty. The view of this thesis is that such reforms are necessary, and the next reform should be the exemption of severely mentally ill individuals from the death penalty. Severely mentally ill individuals face a number of significant challenges throughout the capital trial process, which put such individuals at a greater risk of receiving a death sentence. These challenges will now be examined in the next chapter of this thesis, beginning with the difficulty of defining "severe mental illness" in the first place.

Chapter 2: Challenges for Severely Mentally Ill Individuals Facing the Death Penalty

Introduction

This chapter will now explore in detail the challenges facing severely mentally ill individuals in the capital trial process, in order to explain both the reasons why the severely mentally ill are not yet exempt from the death penalty, and, even more importantly, the reasons why they should be. The controversies with the death penalty outlined in chapter 1 are exacerbated in cases involving severe mental illness, because "severe mental illness" is difficult to define, polarizing opinion further. The chapter will begin by considering the difficulties with defining "severe mental illness" itself; this is an important starting point, as the exemption of severely mentally ill individuals requires being able to identify those individuals in the first place. The chapter will then move on to consider the challenges faced by severely mentally ill individuals throughout the capital trial process. Those who object to the exemption of severely mentally ill individuals from the death penalty may support their position by arguing that severely mentally ill individuals do already receive protection from execution in a number of ways: the individual's competency to stand trial and competency to be executed can be assessed; the insanity defence may be available; and a severely mentally ill individual can present evidence of his or her mental illness as a mitigating factor during the penalty phase of proceedings, which takes place once a defendant has been found guilty at trial. However, as this discussion will demonstrate, none of these options guarantee adequate protection of a severely mentally ill individual from execution. As

will be explored, the standard for competency is very low, so severely mentally ill individuals can be found competent on dubious grounds. Once at trial, the severely mentally ill individual must face a jury that may not understand severe mental illness and/or be unable to empathise with the individual, and in the worst cases may view severe mental illness as an aggravating, rather than a mitigating, factor. Similarly, the prosecution may treat the severe mental illness as an aggravating factor, or may accuse the individual of feigning his severe mental illness. The individual's defence attorney may have little experience of representing a severely mentally ill individual, coupled with limited experience of capital trials. At the same time, the individual may not even recognise that he is suffering from a severe mental illness, or simply refuse to present such evidence,[111] which could influence whether or not evidence of the severe mental illness is presented in mitigation. Even if evidence of a severe mental illness is presented, the jury may view it as an aggravating factor, rather than a mitigating factor, especially if there is evidence of previous violent behaviour attributable to the mental illness. Finally, an individual whose severe mental illness manifests itself after the trial can make a claim that he is not competent to be executed; however, again, the test for competence sets a very low bar, which the recent case of *Madison v Alabama*[112] vividly demonstrates. All of these factors taken together mean that the severely mentally ill individual faces many more challenges at trial as a result of his severe mental illness, and it appears impossible that all of these issues can be overcome. As a consequence, there is no other option but to exempt severely mentally ill individuals from the death penalty; otherwise, as has been said in relation to intellectually disabled

[111] Kamela Nelan, 'Restricting Waivers of the Presentation of Mitigating Evidence by Incompetent Death Penalty Volunteers' (2008) 27 Developments in Mental Health Law 23, at 26.
[112] 139 S.Ct. 718 (2019)

defendants, severely mentally ill defendants face a "special risk of wrongful execution."[113]

An Introduction to Severe Mental Illness – the Definitional Problem

The National Alliance on Mental Illness (NAMI), which describes itself as America's "largest grassroots mental health organization"[114] defines mental illness as "a condition that impacts a person's thinking, feeling or mood and may affect his or her ability to relate to others and function on a daily basis" and lists such conditions as including anxiety disorders, depression, post traumatic stress disorder and schizophrenia.[115] Insanity has been described as "a severe form of mental illness"[116] and refers to someone who "does not understand the reason for, or the reality of, his or her punishment."[117] It was estimated by the Bureau of Justice Statistics in 2015 that 56 percent of state prisoners, 45 percent of federal prisoners, and 64 percent of jail inmates have a mental health problem.[118]

A clear obstacle to exempting severely mentally ill individuals is the difficulty with defining severe mental illness in the first place. There is no single universally accepted definition, due to the fact that the understanding of mental illness continues to change

[113] *Atkins v Virginia* 536 U.S. 304 (2002), at 321. The Court considered that: "…reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. Mentally retarded defendants in the aggregate face a special risk of wrongful execution."
[114] National Alliance on Mental Illness (NAMI), 'About NAMI' <www.nami.org/About-NAMI> accessed 21 January 2020
[115] NAMI, 'Mental Health Conditions' <www.nami.org/Learn-More/Mental-Health-Conditions> accessed 21 January 2020
[116] Death Penalty Information Center (DPIC), 'Mental Illness' <http://www.deathpenaltyinfo.org/mental-illness-and-death-penalty> accessed 21 January 2020
[117] Amnesty International, 'Death Penalty and Mental Illness' <http://www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/death-penalty-and-mental-illness> accessed 21 January 2020
[118] KiDeuk Kim, Miriam Becker-Cohen and Maria Serakos, 'The Processing and Treatment of Mentally Ill Persons in the Criminal Justice System: A Scan of Practice and Background Analysis' (March 2015) <www.urban.org/sites/default/files/alfresco/publication-pdfs/2000173-The-Processing-and-Treatment-of-Mentally-Ill-Persons-in-the-Criminal-Justice-System.pdf> accessed 21 January 2020

and evolve over time, coupled with the fact that it covers such a broad and complex range of conditions. This means that "what is perceived as a mental disorder today may not be in a few years and vice versa"[119] because "scientific definitions are not fixed and exact but rather evolving and mutable."[120]

A clear demonstration of this evolution can be seen in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM), currently in its Fifth Edition (DSM-5), which is a frequently invoked text in capital cases by both the Supreme Court and lower courts.[121] On its website, the American Psychiatric Association describes the DSM-5 as

> "the product of more than 10 years of effort by hundreds of international experts in all aspects of mental health. Their dedication and hard work have yielded an authoritative volume that defines and classifies mental disorders in order to improve diagnoses, treatment, and research."[122]

The first edition of the DSM was published in 1952, with the intention of providing mental health professionals in the United States with one reference point when diagnosing mental disorders.[123] The DSM-I (as it subsequently became known) contained 128 diagnostic categories over 132 pages. In contrast, the DSM-5, published

[119] Liliana Lyra Jubilut, 'Death Penalty and Mental Illness: The Challenge of Reconciling Human Rights, Criminal Law, and Psychiatric Standards' (2007) 6 Seattle Journal for Social Justice 353, at 366.
[120] Ibid, at 366.
[121] An article in 2011 stated that the DSM-IV had been cited in court opinions over 5,500 times – see Ralph Slovenko, 'The DSM in Litigation and Legislation' (2011) 39 The Journal of the American Academy of Psychiatry and the Law 6, at 6.
[122] American Psychiatric Association, 'Diagnostic and Statistical Manual of Mental Disorders (DSM-5)' <www.psychiatry.org/psychiatrists/practice/dsm> accessed 21 January 2020
[123] The DSM refers to mental 'disorders', so that terminology will be used in this discussion.

in 2013, contains 541 categories over 947 pages.[124] This shows just how much the scientific understanding of mental disorders has increased over a relatively short period of time.

An important point to note about the DSM-5 is that it is not intended to be used as a forensic document; the expectation is that only mental health professionals would use the DSM-5 as a useful reference point, rather than it being used in legal proceedings. The DSM-5 contains a specific warning to that effect:

> "When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis."[125]

However, as noted above, the DSM-5 is, nevertheless, frequently used as a forensic document in court proceedings, the problem being that there is no guarantee that it is being used appropriately.

The DSM-5 describes mental illness as:

> "a syndrome characterized by clinically significant disturbance in an individual's

[124] See Roger K Blashfield, Jared W Keeley, Elizabeth H Flanagan and Shannon R Miles, 'The Cycle of Classification: DSM-I Through DSM-5' (2014) Annual Review of Clinical Psychology 25.
[125] American Psychiatric Association, 'Diagnostic and Statistical Manual of Mental Disorders (DSM-5)' (5th edn, American Psychiatric Publishing 2013), p.25.

> cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities.[126]

For each of the categories of mental disorder, a range of symptoms is given; however, the DSM-5 states that these symptoms alone would not be sufficient for a diagnosis, and a careful clinical history would also need to be taken:

> "The case formulation for any given patient must involve a careful clinical history and concise summary of the social, psychological, and biological factors that may have contributed to developing a given mental disorder. Hence, it is not sufficient to simply check off the symptoms in the diagnostic criteria to make a mental disorder diagnosis. Although a systematic check for the presence of these criteria as they apply to each patient will assure a more reliable assessment, the relative severity and valence of individual criteria and their contribution to a diagnosis require clinical judgment."[127]

The description of a mental disorder cannot be treated, therefore, as a checklist; it is simply part of the wider context, taking into account all of the circumstances of the individual and his specific disorder.

[126] DSM-5, p.20.
[127] DSM-5, p.19.

A key change in the DSM-5, compared to the previous version DSM-IV (published in 1994) is that the DSM-IV specifically identified and defined "severe mental illness", whereas in the DSM-5, there is no separate category of "severe mental illness"; instead, any mental illness can range from mild to severe in strength.[128] This could provide a further challenge for severely mentally ill individuals, because as there is no clearly defined list or category of severe mental illness, a determination of severe mental illness would be almost entirely dependent on an expert witness's subjective interpretation of the DSM-5 for the jury. If the defence expert and prosecution expert both differ on how to interpret the DSM-5, this could confuse the jury, and make it even harder for the jury to understand the illness and/or empathise with the severely mentally ill individual.

Another definitional point that needs to be noted at this stage is the fact that "insanity" and "severe mental illness" are often conflated, so there is a misguided belief that severely mentally ill individuals cannot be executed in the United States, following the Supreme Court's judgment in the 1986 case of *Ford v Wainwright*; however, *Ford v Wainwright* only exempted individuals classified as "insane". The first point to note here is that "insanity" is a legal, rather than medical, definition in this context, and essentially means that the defendant did not understand that he had committed a criminal act, or was unable to act within the confines of the law.[129] Whilst this will, undoubtedly, apply to some severely mentally ill individuals, it is likely to be only a small number of the most severely afflicted, and would certainly not apply to all severely mentally ill individuals.

[128] See Appendix to DSM-5, "Highlights of Changes from DSM-IV to DSM-5," pp.809-816. See also Darrel A. Regier, Emily A. Kuhl and David J. Kupfer, 'The DSM-5: classification and criteria changes' (2013) 12 World Psychiatry 92.
[129] This is from the Model Penal Code test, which is one of four tests that can be used to determine insanity, along with M'Naghten Rule, Durham Rule and irresistible impulse test; which test is used depends on the state. See <www.justia.com/criminal/defenses/insanity/> accessed 3 December 2019. This will be discussed later in this chapter.

The risk with conflating the concepts of “insanity” and “severe mental illness” in this way is that it could lead to some complacency with achieving full exemption, as the perception may be that severely mentally ill individuals are already exempt from the death penalty, when that is not the case.

A lack of a clear definition of severe mental illness raises a number of issues: the first, as referred to in chapter 1 of this thesis, is that a wide definition might result in de facto abolition of the death penalty, which supporters of the death penalty would be opposed to. Alternatively, however, there might be the opposite effect (as discussed in chapter 1) that any reforms of the death penalty could delay total abolition. Third, the lack of consensus on definitions of severe mental illness makes it difficult for a federal court to impose a rule, as it is more legitimate to let individual states come to their own determinations. However, fourth, this approach would result in unequal laws and practices across the states. The delicate balancing act that the Supreme Court would need to perform between the third and fourth issues may deter the Supreme Court from exempting severely mentally ill individuals, especially given that, when it exempted intellectually disabled individuals, the Supreme Court chose to leave to individual states how to determine intellectual disability, but has then declared two state practices as unconstitutional.[130] This will be explored in chapter 3. The Supreme Court may well be influenced by this and decide that it needs to set out a definition of severe mental illness that the states are required to follow, but, of course, how it arrives at a definition will not be an easy matter.

[130] See *Hall v Florida* 134 S.Ct. 1986 (2014) and *Moore v Texas* 581 U.S. ___ (2017).

Criminalising the Mentally Ill

As noted in chapter 1 of this thesis, severe mental illness is prevalent amongst the death row population.[131] The first step to formulating an argument for the exemption of severely mentally ill individuals from the death penalty is understanding why this is an issue in the first place; in other words, why there are so many severely mentally ill individuals on death row.

The treatment of severely mentally ill individuals in the United States of America has evolved from placement in asylums, to treatment within the community, including the use of psychotropic medicines, and more recently the use of imprisonment.[132] Asylums for the mentally ill were established in the United States in the 1800s[133], but by 1900 these psychiatric hospitals had developed a bad reputation for having poor conditions and became a "symbol of disorder and exclusion."[134] In addition, such hospitals were expensive to run.[135] In the 1950s, a process of deinstitutionalisation began, where severely mentally ill individuals were no longer treated in psychiatric hospitals but were, instead, released into the community for treatment.[136] Deinstitutionalisation was considered to be "an enlightened, more humane way of treating the severely mentally

[131] See Death Penalty Information Center (DPIC), 'The Death Penalty in 2019: Year End Report' <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report> accessed 13 January 2020 and Frank Baumgartner et. al., 'Deadly Justice: A Statistical Portrait of the Death Penalty' (Oxford University Press 2018)
[132] For an overview of the historical treatment of mental illness globally, see A. M. Foerschner, 'The History of Mental Illness: From Skull Drills to Happy Pills' (2010) 9 Inquiries Journal 1. In relation to the United States of America specifically, see Alisa Roth, 'Insane: America's Criminal Treatment of Mental Illness' (Basic Books 2018) and Patricia Erickson, 'Crime, Punishment and Mental Illness: Law and the Behavioural Sciences in Conflict' (Rutgers University Press 2008)
[133] Psychology Today, 'The American Mental Asylum: A Remnant of History' (13 July 2018) <www.psychologytoday.com/us/blog/freud-fluoxetine/201807/the-american-mental-asylum-remnant-history> accessed 25 January 2020
[134] Erickson (n 132), p.30.
[135] Ibid, p.27.
[136] Ibid, pp.25-26.

ill."[137] The issue, however, is that state legislatures were not willing to spend money on mental health services[138] and, even if services were available, a lack of proper supervision meant that it became much harder to ensure that individuals received the treatment they needed in the community, an issue that exists to this day. Roth notes that, without proper treatment, many individuals with a mental illness engaged in behaviour that resulted in being arrested, until large numbers of mentally ill individuals ended up in the criminal justice system. In this way, "jails and prisons became the new asylums,"[139] with Roth describing the jails in Chicago, Los Angeles and New York City as the largest providers of psychiatric care in the United States.[140] Roth notes that in 1950, around 450,000 mentally ill people lived in health care facilities; this number had dropped to around 170,000 people by the year 2000.[141] At the same time, there was a huge growth in the prison population, increasing by 600 per cent between 1971 to 2004 (from around 200,000 prisoners to 1.4 million).[142]

Alongside the effects of deinstitutionalisation, Erickson notes a modern emphasis on personal responsibility, and argues that mental illness is considered to reflect a failure to exercise that responsibility. This has led to a more punitive policy for all criminal offenders, including those who are mentally ill, with "explanations for criminal conduct related to mental illnesses … viewed with heavy scepticism."[143] If a severely mentally ill individual commits a crime, therefore, the emphasis is on punishing that individual,

[137] Corinna Barrett Lain, 'Madison and the Mentally Ill: the Death Penalty for the Weak, Not the Worst' (2019) 31 Regent University Law Review 209, at 216.
[138] Ibid.
[139] Roth (n 132), p.74.
[140] Ibid, p.2.
[141] Ibid, p.74.
[142] Ibid, p.74.
[143] Erickson (n 132), p.179.

rather than on providing treatment for him. Erickson summarises the issue as follows:

> "When we interpret mental illness as a medical problem, confinement to a mental hospital serves the goal of treatment because of an underlying societal value of compassion for a person who has an illness. Alternatively, when we interpret mental illness as a criminal justice problem, confinement serves the goals of incapacitation because of the underlying value of keeping the community safe from someone who has committed a crime."[144]

These issues are magnified if a severely mentally ill individual commits a capital crime, where the need for punishment outweighs a desire to provide treatment for that individual. As will be discussed below, the severely mentally ill individual then has to face a jury who may be unable to empathise with him, and may view his illness as either meaning that the individual is dangerous, or that he is faking his symptoms; either way, a death sentence then becomes more likely. This chapter will now explore the existing procedures in place during the capital trial process that are intended to provide safeguards for severely mentally ill individuals: the test for competency to stand trial, the insanity defence, and the ability to submit evidence of severe mental illness in mitigation. This discussion will demonstrate that none of these measures are adequate and a severely mentally ill individual is still, therefore, at a high risk of receiving a death sentence.

[144] Ibid, p.7.

Challenges for Severely Mentally Ill Individuals during the Capital Trial Process

Before the trial commences, all criminal defendants have the right to an evaluation to determine whether or not they are competent to stand trial. Seeds describes the importance of such an evaluation as being directly relevant to the individual's dignity, stating that:

> "testing for a defendant's or prisoner's capacity to understand the legal proceedings and ability to appreciate the relationship of those proceedings to his or her own case has long protected the dignity of the defendant and the criminal justice system."[145]

The test for competence is found in the 1960 Supreme Court case of *Dusky v United States*, and is

> "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him."[146]

In other words, the defendant must understand why he is being charged, and must be able to assist counsel in his defence. The issue lies with determining what "rational" actually means here, which the Supreme Court did not elaborate on in its judgment in

[145] Christopher Seeds, 'The Afterlife of Ford and Panetti: Execution Competence and the Capacity to Assist Counsel' (2009) 53 Saint Louis University Law Journal 309
[146] 362 U.S. 402 (1960)

Dusky. In addition, although the judge, prosecution and defence counsel can all request a competency evaluation, it may not be obvious that a defendant requires such an evaluation. Even if a competency evaluation is requested and carried out, competency evaluations are by no means perfect, with one study finding that, when asked to look at a hypothetical competency scenario, nearly half of the forensic psychiatrists and psychologists taking part considered that the defendant would be competent, whilst the other half thought that the defendant would not, even though all of the forensic psychiatrists and psychologists were looking at the same hypothetical facts and applying the same *Dusky* competency standard.[147] Unfortunately, this would seem to suggest, as this same study noted, that: "the defendant's fate depends only upon who performed the evaluation."[148]

Whether or not a competency evaluation is carried out, this raises another important issue: the ability of defence counsel to represent a severely mentally ill individual. Hood and Hoyle identify this: "…some states such as Missouri and Kentucky do not require key legal actors in capital punishment proceedings to receive adequate training regarding mental illness."[149] All criminal defendants have the right to the assistance of counsel under the Sixth Amendment to the United States Constitution,[150] and the Supreme Court in *Strickland v Washington* confirmed that this means *effective* assistance of counsel.[151] However, there is little guidance around what would amount

[147] Grant H. Morris, Ansar M. Haroun and David Naimark, 'Competency to Stand Trial on Trial' (2004) 4 Houston Journal of Health Law and Policy 193.
[148] Ibid, at 216. See also Sara Longtain, 'The Twilight of Competency and Mental Illness: A Conciliatory Conception of Competency and Insanity (2007) 43 Houston Law Review 1563 and Michael L Perlin, 'Pretexts and Mental Disability Law: The Case of Competency (1993) 47 University of Miami Law Review 625
[149] Roger Hood and Carolyn Hoyle, 'The Death Penalty: A Worldwide Perspective' (5th edn., Oxford University Press 2015), p.256.
[150] *Gideon v Wainwright* 372 U.S. 335 (1963)
[151] 466 U.S. 668 (1984)

to *ineffective* assistance; all counsel seemingly has to do is provide assistance that is "reasonable" in the circumstances. In addition, *Strickland* has come under criticism; an individual claiming that he did not have effective assistance of counsel has to show two separate elements: first, that the representation by counsel was not effective, and, second, that it had an impact on the jury, i.e. the case would have been decided differently. Challenges often fail on this second limb, with courts seemingly reluctant to find that the behaviour of counsel actually had a significant impact on the jury.

In the case of severely mentally ill individuals specifically, it is unlikely that counsel will have received any specific training or guidance around representing a severely mentally ill individual. The American Bar Association has published guidelines to assist defence counsel in death penalty cases,[152] which, while providing one source of support, also acknowledges the difficulties experienced by defence counsel. These difficulties include the investigation of relevant mitigating evidence, where the ABA Guidelines recommend the importance of hiring a mitigation specialist: "mitigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have."[153] However, it may not be possible for counsel to hire a mitigation specialist, depending on the finances available to represent the defendant. This will leave the task of investigating any evidence in mitigation to counsel, who may not be experienced enough or even simply have enough time to carry out this task in sufficient depth.

[152] American Bar Association, 'Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases' (2003) 31 Hofstra Law Review 913
[153] Ibid, at 959.

Even if defence counsel has the ability to investigate mitigating evidence, defence counsel may decide not to present evidence of the defendant's mental illness for tactical reasons, because it may have a 'double-edged' effect that could disadvantage the defendant. As will be discussed further below, the risk with presenting evidence of the defendant's mental illness could be exploited by the prosecution as an aggravating rather than a mitigating factor, particularly if the defendant has a history of violence connected with his or her mental illness. Even if the prosecution does not refer to evidence of severe mental illness in this way, the jury may still interpret it as an aggravating factor, as identified by Bonnie:

> "jurors all too often seem to discount mitigating claims of mental illness in the face of the intensity or brutality that may be associated with homicidal violence by mentally disordered offenders."[154]

If defence counsel chooses not to present evidence of the defendant's mental illness and the defendant subsequently alleges that his or her counsel has been ineffective by not presenting the evidence, the court will only find that this has been ineffective assistance if it considers that the outcome would have been considerably different, as discussed above. In other words, if the court decides that the same decision would have been reached by the jury, then it will not matter that the defendant's counsel did not present the evidence in mitigation,[155] because if counsel had presented evidence of the defendant's severe mental illness, the jury may have interpreted it as an

[154] Richard J Bonnie, '*Panetti v Quarterman*: Mental Illness, the Death Penalty, and Human Dignity' (2007) 5 Ohio State Journal of Criminal Law 257, at 282.
[155] Christopher Seeds, 'Strategery's Refuge' (2009) 99 Journal of Criminal Law and Criminology 987, at 989.

aggravating factor, rather than mitigating factor, anyway.[156] This also reflects upon the judge's own views of evidence of severe mental illness and whether or not the judge considers it to be mitigating or aggravating:

> "if a judge is more likely to find mental health evidence aggravating...he or she is more likely to assert that a reasonable attorney would see it as double-edged and choose not to investigate; a judge more inclined to find evidence of mental health issues mitigating will emphasize the need for counsel to pursue the information."[157]

In one case, the trial judge used the defendant's paranoid schizophrenia as a reason to impose the death penalty, saying that:

> "the only certain punishment and the only assurance society can receive that this man never again commits to another human being what he did to [the victim], is that the ultimate sentence of death be imposed."[158]

This demonstrates the extremely challenging position a severely mentally ill individual will find themselves in; either potentially mitigating evidence of their severe mental illness is not presented at all, which could be detrimental to the effectiveness of the defence, or the evidence is presented, but this runs the risk that such evidence will be misinterpreted and/or used against the defendant. Lyon argues that "the natural

[156] Ibid, at 989.
[157] Ibid, at 992.
[158] *Miller v State* 373 So. 2d 882, 885 (Fla, 1979). The death sentence was vacated on appeal to the Supreme Court of Florida, following a finding that the trial judge had considered a non-statutory aggravating factor.

human reaction" is to view the presentation of evidence about the individual's mental illness as an "excuse" or a "con."[159] This is, therefore, a difficult decision to make and, clearly, severely mentally ill individuals may not be in any position to make such a decision, which leaves it to defence counsel, who equally may not be able to determine the best course of action.

Alongside that is the recognised phenomenon that many severely mentally ill defendants do not recognise that they are mentally ill,[160] which may lead the defendant to refuse to allow counsel to present evidence of his or her mental illness in mitigation.[161] This would create a conflict for defence counsel, who will want to present the best possible defence, while also respecting the instructions of their client. There is also a risk that any fundamental disagreement between the defendant and counsel could lead to the defendant deciding to exercise their right to self-representation, which ultimately could be extremely detrimental to the severely mentally ill individual. The issue of the right to self-representation where the defendant is severely mentally ill is discussed in chapter 4 of this thesis.

As referenced above, the use of mental illness in mitigation may be exploited by the prosecution, who may introduce any evidence of dangerous or violent behaviour that led to treatment for severe mental illness.[162] Introducing any evidence of mental illness

[159] Andrea D Lyon, 'The Blame Game: Public Antipathy to Mental Health Evidence in Criminal Trials' (2018) 21 New Criminal Law Review 247, at 250.
[160] Erickson (n 132), p.35.
[161] Nelan (n 111), at 26.
[162] Ibid, at 32.

may lead to an argument about future dangerousness,[163] and allow the prosecution the opportunity to "portray the [defendant] as a psychopath or otherwise support a propensity for violence."[164] It is possible to draw a parallel here with the treatment of age as a mitigating factor. In *Roper v Simmons*, the majority noted that the prosecutor had argued that the defendant's youth was aggravating rather than mitigating, and that, therefore, any mitigating arguments made regarding youth would be overcome by the brutal nature of the crime. In rebuttal, the prosecutor had argued: "think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."[165] Similarly, if a severely mentally ill individual commits a brutal crime, the prosecution may well emphasise the nature of the offence, and use this and any unpredictability of the defendant's behaviour as evidence that the defendant could commit similar crimes again and, therefore, a death sentence is the only appropriate punishment. Lyon discusses representing a severely mentally ill defendant and states that:

> "the level of prosecutorial distrust of mental health evidence, the insanity defense, and the certainty of the prosecutors that he was faking it somehow was astonishing to see."[166]

Turning now to the jury, the problem with the perception of the jury towards severely

[163] Three states have "future dangerousness" as a statutory aggravating factor: Idaho, Oklahoma and Virginia. Eleven other states allow the prosecution to make an argument about the defendant's "future dangerousness": Alabama, California, Georgia, Louisiana, Missouri, Nevada, North Carolina, Ohio, Pennsylvania, South Carolina and Utah. See Carla Edmondson, 'Nothing is Certain but Death: Why Future Dangerousness Mandates Abolition of the Death Penalty' (2016) 20 Lewis and Clark Law Review 3.
[164] Seeds (n 155), at 990.
[165] 543 U.S. 551 (2005), at 558: "Defense counsel argued that Simmons' age should make 'a huge difference to [the jurors] in deciding just exactly what sort of punishment to make.' In rebuttal, the prosecutor gave the following response: 'Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary.'"
[166] Lyon (n 159), at 248-249.

mentally ill individuals can be divided into two categories: the perception of "dangerousness" and the perception of "truthfulness". In other words, the jury may interpret the defendant's severe mental illness as an aggravating factor, rather than a mitigating factor, and that is only if the jury believes that the defendant is genuinely suffering from a severe mental illness and not simply 'faking':

> "[the] defendants' history of mental impairments may be perceived by jurors as stigmatizing, threatening, or not believable. Jurors respond differently and more punitively to some types of mental illness and addiction, than to cognitive impairments. Their personal attributes and criminal justice attitudes may affect their receptivity."[167]

The different factors that a jury will take into consideration when determining whether or not a defendant's severe mental illness has diminished their responsibility include:

> "the mental state of that person at the time when he or she is assessed by a psychiatrist (usually a considerable time after the offence); the sympathy of the jury towards the mentally ill; the heinousness of the crime; and the competence, authority, and persuasiveness of the psychiatrists before the court."[168]

It is important to note that the same jury that will determine the guilt of the individual on trial will also be tasked with determining the appropriate punishment, and there is

[167] Leona Deborah Jochnowitz, 'How Capital Jurors Respond to Mitigating Evidence of Defendant's Mental Illness, Retardation and Situational Impairments: An Analysis of the Legal and Social Science Literature' (2011) 47 Criminal Law Bulletin 839, at 840.
[168] Hood and Hoyle (n 149), p.251.

evidence to suggest that a jury that has found a defendant guilty will be biased against the defendant at the sentencing stage and more likely to impose a death sentence.[169] The next issue is around the jury's understanding of aggravating and mitigating factors and how the jury interprets their respective importance, as identified by Jubilut:

> "…juries not only tend to misunderstand the meaning of the word mitigating, but also tend to attribute to it the opposite meaning, understanding the word to mean aggravating and believing the existence of mental illness contributes to a 'greater likelihood of being dangerous in the future.'"[170]

Perlin also identifies the fact that juries may treat mitigating evidence as aggravating evidence, with the negative influence of "invalid and unreliable testimony by alleged 'experts' [that] paints pictures of universal 'future dangerousness.'"[171] The consequence of the potential for the jury to treat mental illness as an aggravating factor rather than a mitigating factor is that it may be even more likely that a mentally ill individual will, therefore, receive a death sentence, as stated by Winick:

> "when mental illness is raised as a mitigating factor at the penalty phase, it sometimes proves to be a double-edged sword, leading capital juries to assume that the offender is dangerous and that the death penalty is an appropriate

[169] William J Bowers, 'The Capital Jury: Is it Tilted Toward Death*?'* (1996) 79 Judicature 220
[170] Jubilut (n 119), at 357, referring to Ronald J Tabak, 'Overview of Task Force Proposals on Mental Disability and the Death Penalty' (2005) 54 Catholic University Law Review 1123.
[171] Michael L Perlin,' Mental Disability and the Death Penalty: The Shame of the States' (Rowman & Littlefield Publishers 2013), p.viii.

means of community protection."[172]

The perception that a severely mentally ill defendant is dangerous most likely stems from a general inability of the jury to empathise with a severely mentally ill individual. As discussed earlier in this chapter, the sheer number of mental disorders and the varying levels of severity mean that no two people will likely exhibit the exact same symptoms for the same diagnosis. If a severely mentally ill individual is loud and aggressive, this could lead the jury to consider that the defendant is dangerous, as stated by Lyon:

> "the very fact that your client is in the criminal justice system reinforces the widely and erroneously held belief that people with mental health problems are inherently dangerous."[173]

Equally, however, if a severely mentally ill individual is quiet and passive, this could also turn the jury against the defendant, as stated by Perlin:

> "a significant percentage of actual jurors saw certain aspects of a defendant's demeanor – whether he looked passive, unremorseful, or emotionless – as a critical operative factor in determining whether or not to return a death sentence."[174]

[172] Bruce J Winick, 'The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier' (2009) 50 Boston College Law Review 785, at 816.
[173] Lyon (n 159), at 251.
[174] Perlin (n 171), p.111.

The use of psychiatric testimony regarding any alleged future dangerousness of the defendant could also have a significant impact upon whether or not the jury decides to impose the death penalty, because:

> "where a psychiatrist is asked to assess not only those features of the defendant's mental state that might mitigate the penalty but also those that might indicate his potential as 'a continuing serious threat to society', the testimony can obviously have quite opposite effects on the decision whether or not to impose the death penalty."[175]

This again can mean that mental illness is viewed as an aggravating factor, and "'efforts to show diminished capacity' may be 'self-defeating.'"[176] A clear theme that arises from the evidence of juror responses to severely mentally ill defendants is, therefore, the association with "dangerousness", as "...research shows that future dangerousness plays a part in almost all jury determinations to impose a death sentence."[177] The emphasis on "dangerousness" is concerning, because it is frequently used as an aggravating factor in capital cases[178] and in relation to severely mentally ill individuals, "irrelevant, stereotypical negative information"[179] may be used to determine any supposed future dangerousness. The obvious issue with presenting "dangerousness" as a consideration in relation to the appropriateness of the death penalty is that it assumes that "dangerousness" is a tangible factor that can accurately

[175] Hood and Hoyle (n 149), p.251, quoting from George E Dix, 'Psychological Abnormality and Capital Sentencing: The New "Diminished Responsibility"' (1984) 7 International Journal of Law and Psychiatry 249-67, at 265.
[176] Ibid.
[177] Perlin (n 171), p.26.
[178] Seeds (n 155), at 990.
[179] Michael L Perlin, 'The Jurisprudence of the Insanity Defense' (Carolina Academic Press 1993), pp.295-296.

be predicted. In addition, if evidence of "dangerousness" is presented at trial, an assumption is clearly being made that the jury will be able to understand and assess the importance and accuracy of the testimony, but there is no way to ascertain that this is in fact the case.[180]

The nature of the crime itself may also influence the jury's consideration of the defendant's mental illness, as identified by Bonnie:

> "jurors all too often seem to discount mitigating claims of mental illness in the face of the intensity or brutality that may be associated with homicidal violence by mentally disordered offenders, and they may actually regard mental illness as an aggravating factor."[181]

This concern was reflected in *Atkins v Virginia*,[182] where the Supreme Court commented that

> "mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes"[183]

and that this "may enhance the likelihood that the aggravating factor of future

[180] Perlin (n 171), p.19.
[181] Bonnie (n 154), at 282.
[182] 536 U.S. 304 (2002)
[183] 536 U.S. 304 (2002), at 320-321.

dangerousness will be found by the jury."[184] Although these comments were directed at intellectually disabled defendants, it is possible to draw parallels with severely mentally ill individuals, both in terms of the potential to appear lacking in remorse and of the risk of the jury perceiving that such defendants will pose a future risk of dangerousness.

As well as the perception of dangerousness, the perception of truthfulness – or untruthfulness – is another factor that may be taken into account by the jury; in other words, the jury may suspect that the individual is not in fact mentally ill at all, and is only attempting to feign mental illness to avoid responsibility for the crime and potentially to avoid a death sentence:

> "under the current criminalization-of-mental-illness construction, we react to a claim of mental illness by a person who has committed a crime with suspicion...A common reaction is that the person is malingering and even able to fool psychiatrists and psychologists."[185]

Again, the concern that a defendant is just pretending to be severely mentally ill is likely to arise from a lack of empathy with the defendant. If the members of the jury have no prior experience of severe mental illness, either personally or in the case of family members or friends, then the symptoms (or lack of symptoms) exhibited by the defendant may be difficult to understand. The jury may have a preconception of what a

[184] 536 U.S. 304 (2002), at 321.
[185] Erickson (n 132), p.8.

severely mentally ill individual will look like or act, and if, for example, the defendant did not exhibit any obvious symptoms, the view may be that the defendant "seems fine." Lyon observes that:

> "the expert testifying to the accused's insanity may be technically correct, but may fail to convince the jury if the crime doesn't fit preconceived notions of madness."[186]

However, the notion that a defendant could fool psychiatrists or psychologists into believing that he suffers from a severe mental illness when he or she does not is likely to be a rare occurrence, and displays more a lack of empathy by the jury than a real concern borne out by evidence. It is also arguably preferable that a few individuals who are faking symptoms of severe mental illness avoid a death sentence, rather than risk executing genuinely severely mentally ill individuals.

The Insanity Defence

A severely mentally ill defendant could plead an insanity defence in almost all of the death penalty states[187] which, if successful, means that the defendant can be acquitted of the crime. A full discussion of the insanity defence is outside the scope of the thesis, but it is necessary to consider the defence briefly in order to understand its limitations. There are four types of insanity defence that operate across the states: the M'Naghten

[186] Lyon (n 159), at 265.
[187] Idaho, Kansas, Montana and Utah do not allow the insanity defence.

rule,[188] the Irresistible Impulse test,[189] the Durham rule,[190] and the Model Penal Code.[191] The majority of death penalty states use the M'Naghten rule,[192] which has two parts: first, the defendant must be suffering from a mental defect at the time of the offence, which is referred to as either a "defect of reason" or a "disease of the mind" (depending on the jurisdiction), and, second, the defendant must either have not known the "nature and quality" of the act, i.e. he did not understand what he did, or he did not know that the act was wrong. Erickson describes the basis for the insanity defence as resting on

> "a socially constructed belief that we should punish persons for criminal acts only when they are blameworthy for those acts."[193]

The limitations of the test are apparent: essentially, the question is whether or not the individual knew right from wrong. If, therefore, an individual commits murder because, for example, that individual hears voices telling him that he must do so, the insanity defence would still likely fail if the individual knew that murder was wrong, regardless of the reason for why he committed murder.

An important point to consider is that "insanity" is a legal test, rather than a medical test, yet the views of medical experts are key to determining whether or not a particular

[188] The M'Naghten rule is used in Alabama, Arizona, California, Colorado, Florida, Georgia, Louisiana, Mississippi, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina and South Dakota. Texas and Virginia use the M'Naghten rule together with the Irresistible Impulse test.
[189] Texas and Virginia use the M'Naghten rule together with the Irresistible Impulse test.
[190] The only state that uses the Durham standard is New Hampshire, which is not a death penalty state.
[191] Arkansas, Indiana, Kentucky, Oregon, Tennessee and Wyoming.
[192] US Legal, 'The Insanity Defense Among The States' <https://criminallaw.uslegal.com/defense-of-insanity/the-insanity-defense-among-the-states/> accessed 4 December 2019
[193] Erickson (n 132), p.83.

individual satisfies the limbs of the insanity defence. Jubilut identifies this conflict between legal and medical concerns:

> "while the concepts of insanity and competence are legal rather than medical, the concept of suffering from mental illness is medical. As a result, conflicting approaches to assessing mental illness arise between the medical and legal experts."[194]

Erickson describes this as a conflict between the "language of psychiatry" and the "language of law", with psychiatrists discussing disorders and syndromes, while the law is concerned with criminal responsibility.[195] At trial, the jury must try to navigate these potentially conflicting interests and decipher the opinions of the psychiatrist, while also making a legal determination of the individual's claim of insanity. Jubilut points out that judges and jurors have a "vast level of discretion" to ascertain the defendant's mental state, as there is no mandatory requirement for the judge or jury to follow the conclusions of the medical experts.[196]

The insanity defence is in fact rarely used and even more rarely successful; Perlin found that a verdict of "not guilty by reason of insanity" is returned by a jury in "less than one-tenth of one percent of all felony cases."[197] However, there is evidence of

[194] Jubilut (n 119), at 356.
[195] Erickson (n 132), p.85.
[196] Jubilut (n 119), at 358.
[197] Michael L Perlin, '"The Borderline Which Separated You From Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment' (1997) 82 Iowa Law Review 1375, at 1377. An eight-state study of the insanity defence commissioned by the National Institute of Mental Health in 1991 found that the insanity defence is used in just one per cent of felony cases, and is successful in less than a quarter of the cases it is used in – see Lisa A Callahan, Henry J Steadman, Margaret A

public mistrust towards the use of the insanity defence, with a common misperception that the insanity defence is regularly invoked by individuals seeking to evade justice and to be released back into the community. The reality, however, is that most individuals who are able to raise an insanity defence successfully are hospitalised for treatment, not simply released. Kachulis argues that sensationalized media reports contribute to this misperception, with Perlin considering that the use of the insanity defence "is seen as a reflection of a breakdown of the entire criminal justice system."[198]

An alternative verdict is a finding by the jury that the defendant is "guilty but mentally ill". This means that the defendant would receive medical treatment, and then would serve their sentence when considered fit to do so. Kachulis describes this as a "watered-down" verdict, and points out that in some states, the sentence for a "guilty but mentally ill" verdict could still be a death sentence.[199]

Competency to be Executed

Once an individual has been convicted and sentenced to death, it is possible for him to raise an argument that he is not competent to be executed; this should be the case even if he was found competent to stand trial. It may be, for example, that the individual was not suffering from a mental illness at the time of the crime or at trial, but subsequently develops a severe mental illness that now renders him incompetent.

McGreevy and Pamela Clark Robbins, 'The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study' (1991) 19 Bulletin of the American Academy of Psychiatry and the Law 4

[198] Perlin (n 197), at 1377.

[199] Louis Kachulis, 'Insane in the Mens Rea: Why Insanity Defense Reform is Long Overdue' (2017) 26 Review of Law and Social Justice 245, at 250.

However, as will be discussed, the standard of competence is arguably low, which means that it is not as effective a safeguard as it may appear to be. It is, instead, yet another challenge for a severely mentally ill individual to face, with Bonnie arguing that "indifference to claims of incompetence on the eve of execution is only the last link in a long chain of indifference and neglect."[200]

The standard for competency to be executed comes from the Supreme Court case of *Ford v Wainwright*,[201] a landmark decision in which the Supreme Court determined that it is unconstitutional to execute an individual who is insane. The Supreme Court stated that the test for whether or not an individual is "insane" under the Eighth Amendment is whether the individual is aware of his impending execution, and the reason that he is being executed.[202]

The Supreme Court gave several reasons for this decision. First, the Supreme Court noted that common law prohibited the execution of insane individuals:

> "the bar against executing a prisoner who has lost his sanity bears impressive historical credentials; the practice consistently has been branded 'savage and inhuman.'"[203]

Second, the Supreme Court considered that the retributive function of the death penalty is not met in the case of an insane individual:

[200] Bonnie (n 154), at 257.
[201] 477 U.S. 399 (1986)
[202] 477 U.S. 399 (1986), at 422.
[203] 477 U.S. 399 (1986), at 406, referring to 4 W. Blackstone, Commentaries *24-*25.

> "for today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life."[204]

Similarly, an insane individual "has no capacity to come to grips with his own conscience or deity"[205] and therefore the individual is "deprived...of an opportunity to prepare, mentally and spiritually, for his death."[206] The Supreme Court also considered "the evolving standards of society" and "noted as evidence of the public attitude against the execution of the criminally insane that not one state in the Union permitted the execution of the insane."[207]

In *Panetti v Quarterman*[208] the Supreme Court elaborated on the test set down in *Ford*. In this case, the Supreme Court, in a close 5-4 decision, overturned a finding of competency by the Court of Appeal, which had established competency on the basis that the petitioner knew that he was going to be executed, and understood that the reason for his execution was because he had been convicted of capital murder. The Court of Appeal considered that it was "irrelevant" that the petitioner considered that the reason for his execution was a "sham" and that he was in fact being executed in order to stop him from preaching. The Supreme Court disagreed with the finding of competency by the Court of Appeal, stating that "a prisoner's awareness of the State's

[204] 477 U.S. 399 (1986), at 409.
[205] Ibid.
[206] Kenneth Williams, 'Most Deserving of Death? An Analysis of the Supreme Court's Death Penalty Jurisprudence' (Ashgate Publishing Limited 2012), at 104.
[207] Kevin E Cox, 'Execution of the Insane Criminal: *Ford v Wainwright* (1987-1988) 41 Southwestern Law Journal 745, at 750.
[208] 551 U.S. 930 (2007)

rationale for an execution is not the same as a rational understanding of it."[209] The Supreme Court also stated that the "beginning of doubt" about an individual's competence would be a "psychotic disorder."[210] The Supreme Court therefore indicated that "psychosis" would be the required level of severe mental illness that would cause doubts about an individual's competency. This is a view that appears to be shared by state courts, which will be explored in chapter 5 of this thesis. Despite this clarification of the competency test in *Panetti*, which could be viewed as a positive development by the Supreme Court, the fact remains that the level of required competency to be executed is still a low bar.

Following on from *Panetti v Quarterman*, the Supreme Court considered in *Madison v Alabama*,[211] a case from last year, whether the prohibition against the execution of a prisoner whose mental illness prevents him from a "rational understanding" of why the state seeks to impose that punishment, as held in *Panetti*, applied to an individual who was suffering from dementia and could not remember the crime for which he had been convicted. Vernon Madison has been on death row in Alabama for 30 years, following a conviction for the murder of a police officer, and in that time has suffered from multiple strokes, which caused brain damage resulting in dementia and long-term memory loss. As a consequence, Madison cannot remember the crime.[212] The trial court had found Madison competent to be executed, referring in its order to the opinion of the court-appointed psychologist, who had stated that Madison did not suffer from

[209] 551 U.S. 930 (2007), at 959.
[210] Ibid, at 960.
[211] 139 S.Ct. 718 (2019)
[212] Ibid, at 723.

paranoia and was not delusional or psychotic.[213] The trial court therefore considered that Madison had not demonstrated that he did not have a rational understanding of the punishment and why he was to receive it. The Supreme Court considered two questions: first, whether the Eighth Amendment forbids the execution of an individual who can demonstrate that a mental disorder has left him without any memory of committing his crime, and second, if the Eighth Amendment applies similarly to a prisoner suffering from dementia as to one experiencing psychotic delusions. The Supreme Court decided that an individual can still be considered competent to be executed even if they cannot remember the crime, because:

> "loss of memory of a crime does not prevent rational understanding of the State's reasons for resorting to punishment"[214]

The Supreme Court further considered that:

> "a person who can no longer remember a crime may yet recognize the retributive message society intends to convey with a death sentence."[215]

This demonstrates the continued importance that is placed on retribution as a purpose of the death penalty, as discussed in chapter 1 of this thesis. However, it is difficult to understand how executing a severely mentally ill individual, who has no memory of the crime he committed, can satisfy a perceived need for retribution. The ability of an

[213] Ibid, at 724.
[214] Ibid, at 727.
[215] Ibid.

individual to understand in the abstract that the state wishes to execute him for a crime, but yet have no memory of that crime, should not be a sufficient basis to declare that that individual has a "rational understanding" and is, therefore, competent to be executed.

On a perhaps more encouraging note, the Supreme Court determined that the Eighth Amendment does apply equally to an individual suffering with dementia as it does to an individual suffering from psychotic delusions, stating that:

> "in evaluating competency to be executed, a judge must therefore look beyond any given diagnosis to a downstream consequence ... [dementia] can cause such disorientation and cognitive decline as to prevent a person from sustaining a rational understanding of why the State wants to execute him."[216]

The Supreme Court's view was that an evaluation of whether or not the individual has a "rational understanding" under *Panetti* will need to be determined by considering the individual circumstances of the case, regardless of the particular "mental disorder" in question.[217] It remains to be seen, however, if this determination is a signal that the Supreme Court is prepared to recognise a broader range of severe mental illness, beyond psychosis, that would have a significant impact on an individual; or if by drawing a comparison between dementia and psychosis specifically, the Supreme Court was in fact confirming its view that psychosis is the required level for a finding of

[216] Ibid, at 729.
[217] Ibid.

incompetency.

Conclusion

This chapter has sought to demonstrate the numerous difficulties faced by severely mentally ill individuals in capital trials. A severely mentally ill individual can have his competence to stand trial assessed, but as has been discussed, it effectively only requires a low standard of competency. Once at trial, the severely mentally ill individual has to face a jury who may be unable to empathise with his condition, whilst the prosecution may present the severe mental illness as an aggravating factor and the defendant as therefore more deserving of the harshest punishment. Although criminal defendants are entitled to be represented, there is no guarantee of the quality of assistance that defence counsel will provide. Evidence of the defendant's severe mental illness may not in fact be presented, as defence counsel may be unable or unwilling to do so due to inexperience, financial constraints or tactical reasons, or the defendant himself may refuse to allow such evidence to be admitted. There are too many issues in the aggregate to rectify in order to ensure sufficient constitutional protection for severely mentally ill defendants, and there can be no doubt that

> "as currently implemented...state and federal laws not only violate the spirit of the Constitution by failing to take proper account of a person's mental illness, they allow misperceptions and prejudices about the condition to *increase* the

possibility that a death sentence will be imposed."[218]

The only solution is the categorical exemption of severely mentally ill defendants from the death penalty, and for this to be a federal exemption. In order to understand how the Supreme Court could (and should) exempt severely mentally ill individuals, the next chapter will now examine the Supreme Court's Eighth Amendment jurisprudence, in order to understand the range of factors it takes into account when making determinations about the constitutionality of the death penalty. This analysis will include an examination of the classes of individuals that the Supreme Court has already exempted from the death penalty; namely, the insane, the intellectually disabled and juveniles.

[218] Christopher Slobogin, 'Mental Illness and the Death Penalty' (2000) 24 Mental and Physical Disability Law Reporter 667, at 672.

Chapter 3: The United States Supreme Court's Eighth Amendment Jurisprudence and Categorical Exemptions

Introduction

Chapter 1 of this thesis identified a key challenge to the exemption of severely mentally ill individuals: the Eighth Amendment jurisprudence of the United States Supreme Court. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*" (emphasis added). In order for a death penalty practice to be considered by the Supreme Court as "cruel and unusual" under the Eighth Amendment and subsequently prohibited, the Supreme Court considers a range of factors to make this determination, and a factor that continues to be persuasive is the number of states that already prohibit the practice in question. If the majority of states do not prohibit the practice, then the Supreme Court will consider that, consequently, there is no "evolving standard of decency" against the practice; or, in other words, that it continues to be acceptable, and the Supreme Court will not rule it as unconstitutional. No state currently prohibits the execution of severely mentally ill individuals, so on this limited basis the Supreme Court can determine that the practice is still acceptable. Another key factor that the Supreme Court appears to find influential is the attitude of juries; as long as severely mentally ill individuals continue to be sentenced to death, the Supreme Court will interpret that as an acceptance by juries of the execution of severely mentally ill individuals, and the cycle will continue.

However, on a positive note, the Supreme Court has demonstrated in a number of key decisions that it also considers the concept of dignity to be an important factor. Those cases will be explored in detail in chapter 4 of this thesis. If the Supreme Court shifted its focus towards dignity as the most important factor in its Eighth Amendment deliberations, this could have significant ramifications for the application of the death penalty, possibly even leading to total abolition.

This chapter will begin with an overview of the different approaches to Eighth Amendment interpretation; namely, the originalist approach and the "evolving standards of decency" approach. The chapter will then examine the significant capital case law where the Eighth Amendment has been interpreted and applied by the Supreme Court, with a view to understanding the range of factors, including dignity, that the Supreme Court takes into account as part of this analysis. The chapter will then examine the groups of defendants that are currently exempted from the death penalty – the insane, juveniles and the intellectually disabled – and identify how the Supreme Court used the concept of human dignity in its analysis in those cases, and how dignity could therefore be used to exempt severely mentally ill defendants as a next step in the Supreme Court's Eighth Amendment jurisprudence.

Approaches to the Eighth Amendment

The death penalty is permitted under the Fifth and Fourteenth Amendments to the

United States Constitution, subject to the Eighth Amendment's prohibition against cruel and unusual punishment. The Fifth Amendment states:

> "no person shall be held to answer for a capital...crime, unless on a presentment or indictment of a grand jury...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...nor be deprived of life, liberty, or property, without due process of law..."[219]

The Fourteenth Amendment includes a clause that states: "...nor shall any State deprive any person of life, liberty, or property, without due process of law..."[220] The Fifth and Fourteenth Amendments do not expressly state that capital punishment is permitted, but the references to deprivation of life are taken to imply the validity of the punishment under these clauses. These Amendments suggest that the death penalty is only permissible following "due process", but it has long been held that, in addition, the imposition of the death penalty must meet the requirements of the Eighth Amendment. The Eighth Amendment simply states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[221] The application of the Eighth Amendment and the development of its interpretation by the Supreme Court has been extremely influential in death penalty cases. The Supreme Court has, over time, attempted to determine what exactly constitutes "cruel and unusual punishment" in death penalty cases.[222] The difficulty with applying the

[219] U.S. CONST. amend. V
[220] U.S. CONST. amend. XIV
[221] U.S. CONST. amend. VIII
[222] See, for example, *Rudolph v Alabama* 375 U.S. 889 (1963), *Witherspoon v Illinois* 391 U.S. 510 (1968), *Furman v Georgia* 408 U.S. 238 (1972), *Gregg v Georgia* 428 U.S. 153 (1976), *Coker v Georgia* 433 U.S. 584 (1977).

Eighth Amendment lies in its simplistic wording. The framers of the Constitution did not provide any further definition or explanation of this and it is therefore open to a range of interpretations. The Supreme Court has previously observed that "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted"[223] and that "[t]he exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court."[224]

There are two prominent approaches to Eighth Amendment interpretation. A narrow or originalist approach to the Eighth Amendment means, in essence, that only practices that were deemed cruel and unusual at the time the Eighth Amendment was drafted should be considered cruel and unusual today. Originalism can be divided into two separate categories: textualism and intentionalism.[225] Textualists look at what the words themselves mean and attempt to apply their ordinary meaning. This may involve an examination of both the linguistic and social contexts; so, for example, applying this approach to the Eighth Amendment, it would need to be considered if the word "cruel" itself had the same literal meaning when the Amendment was drafted as it does now, and, if so, what would have been considered to be "cruel" at that time. Intentionalists, in contrast, try to ascertain what the drafter intended by the words used, even if those intentions are not set out expressly. Adopting an originalist approach to the Eighth Amendment has been justified as serving two primary purposes; the first is that the Constitution is so important that it should be preserved as far as it is possible to do so,

[223] *Wilkerson v Utah* 99 U.S. 130, 135- 136 (1879), cited in *Furman v Georgia* 408 U.S. 238 (1972).
[224] *Trop v Dulles* 356 U.S. 86 (1958), at 99, cited in *Furman v Georgia* 408 U.S. 238 (1972).
[225] See generally Paul Brest, 'The Misconceived Quest for the Original Understanding' (1980) 60 Boston University Law Review 204.

and judges should not be able to apply their own interpretation to it if that will risk interfering with its overall sovereignty.[226] These originalists believe that the Constitution left it to policy-makers and legislatures to make such changes, and that the judiciary is the least powerful branch. The second justification is that closely following the original meaning of the text of the Constitution will ensure consistency in the law, as it limits the individual discretion of decision makers.[227]

The main objection to this approach is that it suggests that the law is static and does not evolve; it necessarily involves a rigid interpretation of the law at the time the Constitution was drafted, when, arguably, it is not possible to know with complete certainty what the drafters intended. The fact that the wording of the Eighth Amendment is not accompanied by a detailed definition or explanation is just as likely to indicate that the drafters expected that this would be interpreted on a case by case basis, rather than suggesting that the drafters wanted it to be taken as at the date of the document. One only has to consider the fact that, at the time the Eighth Amendment was drafted, children as young as seven could be eligible for execution, which would clearly be abhorrent in modern day society. Justice Stevens, in his concurring judgment in *Graham v Florida*, referred to this inevitable consequence of an originalist (and, specifically, textualist) approach:

> "while Justice Thomas would apparently not rule out a death sentence for a $50 theft by a 7-year-old...the Court wisely rejects his static approach to the law.

[226] Ibid, at 204.
[227] Ibid.

> Standards of decency have evolved since 1980. They will never stop doing so."[228]

In recent decades, an "evolving standards of decency" approach has emerged, which means that determinations of what is cruel and unusual depends upon the changing attitudes of society over time. The Supreme Court signalled its shift towards an evolving standards of decency approach in two significant non-capital cases: *Weems v United States* and *Trop v Dulles*. Although they were not capital cases, Williams describes these judgments as a time when the Supreme Court "set the stage for future successful challenges to certain aspects of the death penalty."[229] In *Weems v United States*,[230] the Supreme Court discussed the Eighth Amendment, commenting that "what constitutes a cruel and unusual punishment has not been exactly decided."[231] The Supreme Court recognised that "the words of the [Eighth] Amendment are not precise" and "their scope is not static."[232] The Clause "may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[233] In finding the sentence of 15 years hard labour plus disqualification from a number of civil rights to be disproportionate to the defendant's crime of falsifying a minor government record, the Supreme Court "for the first time established the proposition that a sentence that is so disproportionate to the crime can violate the Eighth Amendment."[234] Weems was in fact "the first time that the

[228] *Graham v Florida* 560 U.S. 48 (2010), at 85.
[229] Kenneth Williams, Most Deserving of Death? An Analysis of the Supreme Court's Death Penalty Jurisprudence (Ashgate Publishing Limited 2012), p.10.
[230] 217 U.S. 349 (1910)
[231] Ibid, at 368.
[232] *Trop v Dulles* 356 U.S. 86 (1958), at 100-101.
[233] 217 U.S. 349 (1910), at 378.
[234] Williams (n 229), p.10.

Court invalidated a penalty prescribed by a legislature for a particular offense."[235] The Supreme Court explained that "the Eighth Amendment is protection against disproportionate punishment."[236] The requirement for the punishment to be proportionate reflects the argument that

> "when a punishment is disproportionate – and an individual's liberty is unnecessarily restrained – the government fails to live up to its most basic duty: to affirm the basic human dignity of every person, even those who commit serious transgressions."[237]

This case is, therefore, also notable due to its reference to human dignity as a factor that needs to be taken into consideration. Further, the Supreme Court began to take

> "a more holistic consideration of proportionality; that is, the fit between the culpability of the defendant and the purpose of the punishment. In so doing, the Court [began] to overtly refer to principles of liberty and dignity as driving these constitutionally directed proportionality determinations."[238]

In 1958 the Supreme Court decided in *Trop v Dulles* that

> "…the words of the Amendment are not precise, and…their scope is not static.

[235] 408 U.S. 238 (1972), at 325.
[236] Robert J Smith and Zoe Robinson, 'Constitutional Liberty and the Progression of Punishment' (2017) 102 Cornell Law Review 413, at 432.
[237] Ibid, at 432-433.
[238] Ibid, at 438.

> The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[239]

The Supreme Court in this case decided that statelessness was an excessive punishment and, therefore, unconstitutional. Historically, the Supreme Court did not intervene in death penalty cases generally, but after *Trop* was decided, abolitionists thought this could be used to challenge the constitutionality of the death penalty in the courts. This "evolving standards of decency" approach "expressly recognizes that Courts must interpret the Eighth Amendment in a 'flexible and dynamic manner'"[240], which means that contemporary views on what constitutes 'cruel and unusual' need to be established; in other words, the standard for extreme cruelty "itself remains the same, but its applicability must change as the basic mores of society change."[241] This was the first time that the Supreme Court had made reference to the importance of "evolving standards of decency" and this decision was therefore set to inform the Supreme Court in the landmark case of *Furman v Georgia* (discussed below).

In contrast to a strictly originalist approach, an evolving standards of decency approach is much more flexible and means that judges can take into account a whole range of factors as part of their deliberations, meaning that the law can adapt and develop alongside an ever-changing society. This has remained the key approach of the Supreme Court to this day. The challenge here lies in how to measure contemporary views. The Supreme Court has adopted a variety of approaches in its judgments,

[239] *Trop v Dulles* 356 U.S. 86 (1958), at 100-101.
[240] Kevin E Cox, 'Execution of the Insane Criminal: *Ford v Wainwright*' (1987-1988) 41 Southwestern Law Journal 745, at 749.
[241] *Furman v Georgia* 408 U.S. 238 (1972), at 382.

shifting from "personal judgment"[242] to "national consensus"[243] to somewhere in between.[244] This is significant in the context of exempting severely mentally individuals from the death penalty, because the Supreme Court's analysis of the evolving standards of decency led to the decisions in later cases that juveniles and the intellectually disabled should not be executed. Any decision by the Supreme Court regarding the exemption of the severely mentally ill is likely, therefore, to involve a similar analysis.

Of course, the approach to Eighth Amendment interpretation adopted by the Supreme Court will inevitably be influenced by the political makeup of the Justices of the Supreme Court themselves. This political makeup will, of course, reflect the politics of the day, because the Justices of the Supreme Court are nominated by the President and confirmed by the Senate, so a conservative President and Senate will nominate and confirm a conservative-leaning judge. The current President, for example, has nominated two Justices to the Supreme Court during his term so far, both of whom are conservative. A conservative-leaning judge will tend to adopt an originalist approach, because conservatives believe in minimal government interference and, therefore, conservative judges will intervene with political decisions as little as possible. Justice Scalia was an originalist and wrote an article describing originalism as the "lesser evil", stating that:

> "even if one assumes (as many nonoriginalists do not even bother to do) that the

[242] *Furman v Georgia* 408 U.S. 238 (1972)
[243] *Coker v Georgia* 433 U.S. 584 (1977); *Stanford v Kentucky* 492 U.S. 361 (1989).
[244] *Kennedy v Louisiana* 554 U.S. 407 (2008); *Hall v Florida* 134 S.Ct. 1986 (2014).

> Constitution was originally meant to expound evolving rather than permanent values … I see no basis for believing that supervision of the evolution would have been committed to the courts."[245]

The current Justices of the Supreme Court include a minimum of five originalists,[246] and, of those, Justice Thomas and Justice Kavanaugh (the most recent appointment to the Supreme Court) describe themselves as textualists. Those five Justices are, perhaps unsurprisingly, conservative-leaning in their political views. Interestingly, the remaining four Justices[247] are considered to be liberal leaning, and yet Justice Ginsburg has called herself an originalist[248] and Justice Kagan has stated that all of the Justices are originalists.[249] However, by referring to originalism, both Ginsburg and Kagan appear to be acknowledging the importance of the Constitution's text as a starting point, before applying an "evolving standards of decency" approach, because in contrast to conservative judges, they also view the Constitution as a document that champions liberalism. What is significant is the split between conservative and liberal Justices currently in the Supreme Court; the fact that the majority of the Justices are conservative-leaning will inevitably have an impact on their interpretation of the Eighth Amendment and its application to capital cases. This can be seen clearly in the recent case of *Bucklew v Precythe*, discussed in detail below. The individual views and approaches of the Justices and their affect on Eighth Amendment jurisprudence cannot

[245] Antonin Scalia, 'Originalism: the Lesser Evil' (1988-1989) 57 Cincinnati Law Review 849, at 862.
[246] Kavanaugh, Gorsuch, Roberts, Thomas and Alito.
[247] Breyer, Sotomayer, Kagan and Ginsburg
[248] Quartz, 'What is "originalism?" Why Trump wants an originalist on the Supreme Court' (8 July 2018) <https://qz.com/1323253/what-is-originalism-why-trump-wants-an-originalist-on-the-supreme-court/> accessed 25 July 2019 and Constitution Center Daily blog, 'At 80, Justice Ginsburg emerges as the court's new originalist' (5 August 2013) <https://constitutioncenter.org/blog/at-81-justice-ginsburg-emerges-as-the-courts-new-originalist> accessed 25 July 2019
[249] The Blog of Legal Times, 'Kagan: "We Are All Originalists"' (29 June 2010) <https://legaltimes.typepad.com/blt/2010/06/kagan-we-are-all-originalists.html> accessed 25 July 2019

be overstated.

The Suspension and Reinstatement of the Death Penalty

The case of *Furman v Georgia*[250] in 1972 was of particular significance in the context of Eighth Amendment interpretation by the Supreme Court, and was even "widely seen as a death sentence for the death penalty,"[251] when the constitutionality of the death penalty itself was called into question by the Supreme Court. The Supreme Court determined that the use of the death penalty constituted "cruel and unusual punishment" and was therefore in violation of the Eighth and Fourteenth Amendments to the United States Constitution. What was significant, and perhaps paved the way for *Gregg v Georgia* just four years later, is that each of the five justices wrote a separate opinion, demonstrating that whilst the justices were in agreement that the death penalty was unconstitutional, they did not agree on why they believed that to be the case. The Supreme Court's constitutional position, therefore, was not clear.[252] Two justices – Brennan and Marshall – held that the death penalty is always cruel and unusual, albeit for slightly different reasons. Three justices – Stewart, White and Douglas – held that the death penalty as then applied was cruel, because there were no guidelines. Four justices – Burger, Blackmun, Powell and Rehnquist – held that the death penalty is not cruel, largely because the public generally supports it. The case, therefore, provided an interesting discussion regarding the Eighth Amendment's application to capital

[250] 408 U.S. 238 (1972)
[251] John D Bessler, 'Cruel & Unusual: The American Death Penalty and the Founder's Eighth Amendment' (Northeastern University Press 2012), p.283.
[252] Carol S Steiker and Jordan M Steiker, 'Courting Death: The Supreme Court and Capital Punishment' (The Belknap Press of Harvard University Press 2016), p.49.

cases, but was not conclusive about how the Eighth Amendment should be interpreted. The case was also significant due to the Supreme Court's use of 'personal judgment' to measure contemporary views, and, therefore, provides a good example of the fact that approaches to the application of the Eighth Amendment will vary according to judicial philosophy.

Three Justices in *Furman* – Stewart, White and Douglas – were concerned that the application of the death penalty was arbitrary and therefore unconstitutional, which formed the plurality view of the judgment. Justice Douglas was concerned that the penalty would be discriminatorily applied against unpopular groups, stating that:

> "...we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position."[253]

Justice Douglas also observed that:

> "it is 'cruel and unusual' to apply the death penalty – or any other penalty – selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would

[253] 408 U.S. 238 (1972), at 255.

not countenance general application of the same penalty across the board."[254]

Justice Douglas went on to note that Furman himself suffered from a 'mental deficiency' with 'psychotic episodes', and one of the other defendants in the two cases[255] heard alongside Furman's case was "a borderline mental deficient."[256] This was not discussed in further detail, but demonstrates the Supreme Court's awareness that the death penalty could be used disproportionately against mentally ill defendants, along with other minority groups.

Justices Stewart and White considered that the death penalty was arbitrarily applied, as it was used infrequently and there were a lack of legal guidelines. Justice Stewart described the death sentences under consideration as being: "cruel and unusual in the same way that being struck by lightning is cruel and unusual"[257] and that "the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."[258]

Justice Brennan and Justice Marshall took their analysis of the death penalty even further than the plurality, as they both considered that the death penalty itself was cruel and unusual; in other words, it was not just the application of the punishment, which had concerned the other Justices, but the fact that the death penalty was in use at all. It is also notable that Justice Brennan referred to the concept of dignity in his analysis

[254] *Furman v Georgia* 408 U.S. 238, at 245.
[255] *Jackson v Georgia* and *Branch v Texas*.
[256] 408 U.S. 238 (1972), at 252-253.
[257] 408 U.S. 238 (1972), at 309.
[258] 408 U.S. 238 (1972), at 309-310.

of the Eighth Amendment, which will be discussed below and in chapter 4 of this thesis. Justice Brennan began by remarking that:

> "almost a century ago, this Court observed that '[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted.'"[259]

Later on in the judgment he noted that "the elasticity of the constitutional provision under consideration presents dangers of too little or too much self-restraint."[260] Justice Brennan then recognised that:

> "the Clause imposes upon this Court the duty, when the issue is properly presented, to determine the constitutional validity of a challenged punishment, whatever that punishment may be. In these cases, '[t]hat issue confronts us, and the task of resolving it is inescapably ours.'"[261]

This demonstrated a willingness by Justice Brennan to employ his personal judgment when interpreting the Eighth Amendment. Justice Brennan went further, referring to originalist principles when he considered that: "nor did [the Framers] intend simply to forbid punishments considered 'cruel and unusual' at the time. The 'import' of the Clause is, indeed, "indefinite," and for good reason."[262]

[259] 408 U.S. 238 (1972), at 258, quoting from *Wilkerson v Utah* 99 U. S. 130 (1879), at 135-136.
[260] Ibid, at 315.
[261] Ibid, at 258, quoting from *Trop v Dulles* 356 U.S. 86 (1958), at 103.
[262] Ibid, at 263.

Justice Brennan then discussed the importance of dignity in his judgment (which will be explored in more detail in chapter 4):

> "the basic concept underlying the [Clause] is nothing less than the dignity of man. While the State has the power to punish, the [Clause] stands to assure that this power be exercised within the limits of civilized standards.'"[263]

Justice Brennan considered that "the primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings"[264] and that "the fundamental premise of the Clause [is] that even the vilest criminal remains a human being possessed of common human dignity."[265] In determining whether or not a punishment is consistent with human dignity, Justice Brennan referred to the importance of the views of society, stating that "rejection by society, of course, is a strong indication that a severe punishment does not comport with human dignity."[266] Justice Brennan also referred to "the existence of the punishment in jurisdictions other than those before the Court"[267], along with "the historic usage of the punishment"[268] as factors to be considered.

After identifying the importance of the views of society when determining the acceptability of a punishment, Justice Brennan turned to the issue of how this can be assessed:

[263] Ibid, at 270, quoting from *Trop v Dulles* 356 U.S. 86 (1958), at 100.
[264] Ibid, at 271.
[265] Ibid, at 273.
[266] Ibid, at 277.
[267] Ibid, at 278, referring to *Weems v United States* 217 U. S. 349 (1910), at 380, and *Trop v Dulles* 356 U.S. 86 (1958), at 102-103.
[268] Ibid, at 278, referring to *Wilkerson v Utah* 99 U.S. 130 (1879).

> "The question under this principle, then, is whether there are objective indicators from which a court can conclude that contemporary society considers a severe punishment unacceptable. Accordingly, the judicial task is to review the history of a challenged punishment and to examine society's present practices with respect to its use. Legislative authorization, of course, does not establish acceptance. The acceptability of a severe punishment is measured, not by its availability, for it might become so offensive to society as never to be inflicted, but by its use."[269]

Justice Brennan noted that "it is significant that nine States no longer inflict the punishment of death under any circumstances, and five others have restricted it to extremely rare crimes"[270] and concluded that "the evolution of this punishment evidences, not that it is an inevitable part of the American scene, but that it has proved progressively more troublesome to the national conscience."[271] Justice Brennan went even further and considered the negative impact upon society as a result of using capital punishment:

> "furthermore, it is certainly doubtful that the infliction of death by the State does in fact strengthen the community's moral code; if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life

[269] Ibid, at 278-279.
[270] Ibid, at 298.
[271] Ibid, at 299.

and brutalize our values."[272]

In a separate concurring judgment, Justice Marshall also referred to the importance of public opinion in the context of determining the acceptability of a punishment:

> "...judges are not free to strike down penalties that they find personally offensive. But...it is [not] improper for judges to ask themselves whether a specific punishment is morally acceptable to the American public."[273]

Justice Marshall considered that:

> "...if the evidence clearly demonstrated that capital punishment served valid legislative purposes, such punishment would, nevertheless, be unconstitutional if citizens found it to be morally unacceptable. A general abhorrence on the part of the public would, in effect, equate a modern punishment with those barred since the adoption of the Eighth Amendment."[274]

Justice Marshall considered that "[capital punishment] violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history."[275] Justice Marshall then went on to state that:

> "the question with which we must deal is not whether a substantial proportion of

[272] Ibid, at 303.
[273] Ibid, at 369.
[274] Ibid, at 332.
[275] Ibid, at 360.

> American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available."[276]

Justice Marshall's reference to an "informed citizenry"[277] came to be known as 'the Marshall hypothesis.'[278] His view was that public support for the death penalty largely arose out of the fact that most people simply do not know enough about the death penalty and, if they did, they would not support it. This hypothesis has come under criticism for being "arrogant"[279] for suggesting that supporters of the death penalty are just ignorant, but arguably Justice Marshall had a point. Justice Marshall pointed out a number of different issues relating to the death penalty and queried the extent to which the general public was aware of all of them:

> "...that the death penalty is no more effective a deterrent than life imprisonment; that convicted murderers are rarely executed, but are usually sentenced to a term in prison; that convicted murderers usually are model prisoners, and that they almost always become lawabiding citizens upon their release from prison; that the costs of executing a capital offender exceed the costs of imprisoning him for life; that while in prison, a convict under sentence of death performs none of the useful functions that life prisoners perform; that no attempt is made in the sentencing process to ferret out likely recidivists for execution; and that

[276] Ibid, at 362.
[277] Ibid, at 361, footnote 145.
[278] See Neil Vidmar and Austin Sarat, 'Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis' (1976) 1976 Wisconsin Law Review 171 and Carol Steiker, 'The Marshall Hypothesis Revisited' (2008-2009) 52 Howard Law Journal 525
[279] Steiker (n 278), p.528.

the death penalty may actually stimulate criminal activity."[280]

The decision in *Furman* was significant as it marked a change in attitude by the Supreme Court towards its ability to involve itself in the operation of the death penalty, which had previously been viewed as a state-level issue. The Supreme Court "went from barely regulating the administration of the death penalty to declaring every death penalty statute in the nation unconstitutional."[281] However, the fact that the concurring Justices did not all share the same reasoning for the decision, and all filed separate opinions, arguably left the judgment vulnerable to challenge. In addition, the view of Justice Brennan and Justice Marshall, that the death penalty itself was cruel and unusual, was unfortunately a minority view. Crucially, four of the Supreme Court Justices thought that the death penalty was constitutional.

Steiker and Steiker discuss the fact that states may have chosen simply to abolish the death penalty after *Furman*, instead of otherwise attempting to address the concerns of the Supreme Court, but, instead, "national and state leaders greeted *Furman* with vehement objection."[282] In response to this decision, over the next four years, 35 states enacted new death penalty legislation to address the issues identified by the Supreme Court.[283] The legislation either introduced mandatory bifurcated proceedings – where the guilt phase and penalty phase of the trial are dealt with separately – and/or provided guidance to judges and juries to help them determine when the death penalty would be an appropriate punishment in each case. For example, as guidance for

[280] 408 U.S. 238 (1972), at 362-363.
[281] Williams (n 229), p.12.
[282] Steiker and Steiker (n 252), p.60.
[283] See *Gregg v Georgia* 428 U.S. 153 (1976), at 179-180; see also Steiker and Steiker (n 252), p.61.

imposing a capital sentence, the legislation specified that in order to seek a capital sentence, the prosecution must prove the existence of at least one aggravating factor, such as that the crime was particularly heinous or that the murder was committed during the commission of a specified felony (for example, robbery or arson).[284] As a consequence, just a few years later, the death penalty was reinstated in *Gregg v Georgia*[285], when seven Justices of the Supreme Court[286] "affirmed the validity of these new statutes, making explicit its faith that these procedural protections could ensure rationality and produce consistent results."[287] The Supreme Court considered the fact that 35 states had amended their death penalty practices to be an indication that "all of the post-*Furman* statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people,"[288] and that the public had endorsed the use of the death penalty, declaring that "a large proportion of American society continues to regard [capital punishment] as an appropriate and necessary criminal sanction."[289] The decision in *Gregg* was significant, not only because the Supreme Court found that the newly enacted statutes were constitutional, but also that the use of the death penalty itself was constitutional: "the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe."[290] The Supreme Court discussed the purposes behind the use of the death penalty when reaching this decision, seeming to consider that the death penalty satisfies the perceived need for retribution:

[284] DPIC, 'Aggravating Factors by State' <https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death/aggravating-factors-by-state> accessed 22 January 2020
[285] 428 U.S. 153 (1976)
[286] Justices Stewart, Powell and Stevens delivered the opinion of the Supreme Court. Chief Justice Burger and Justices Rehnquist, White and Blackmun filed concurring judgments. Justices Brennan and Marshall dissented.
[287] Smith and Robinson (n 236), at 440.
[288] 428 U.S. 153 (1976), at 180-181.
[289] Ibid, at 179.
[290] Ibid, at 187.

> "indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."[291]

The Supreme Court did, however, also state that punishment must not be "excessive", which means that it "must not involve the unnecessary and wanton infliction of pain"[292] and it "must not be grossly out of proportion to the severity of the crime."[293] The death penalty will therefore be "cruel and unusual" (and in violation of the Eighth Amendment) if it is disproportionate, and it will be disproportionate if it is imposed on the "less" culpable and on those who have not committed the most serious of crimes.

The Supreme Court stated that "the Eighth Amendment has not been regarded as a static concept"[294] and that "...an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment."[295] The Supreme Court considered that "this assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction."[296] The objective indicia are primarily "legislative judgments, evidenced by state statutes and jury sentencing."[297] The

[291] Ibid, at 184.
[292] Ibid, at 173.
[293] Ibid, at 173.
[294] Ibid, at 172-173.
[295] Ibid, at 173.
[296] Ibid, at 173.
[297] Susan Raeker-Jordan, 'Kennedy, Kennedy and the Eighth Amendment: "Still in Search of a Unifying Principle"?' (2011) 73 University of Pittsburgh Law Review 107, at 131.

Supreme Court considered that legislative judgments were important because "...the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards."[298] The Supreme Court also explained the significance of jury decisions for gauging contemporary standards: "the jury also is a significant and reliable objective index of contemporary values because it is so directly involved."[299]

The Supreme Court appeared to backtrack from its strong decision in *Furman*, reflecting upon its own limitations regarding the extent to which it could interpret the Eighth Amendment in capital cases:

> "of course, the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the Courts. This does not mean that judges have no role to play, for the Eighth Amendment is a restraint upon the exercise of legislative power."[300]

The Supreme Court further stated that

> "[the Court's] judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardised when Courts become embroiled in the passions of the day and assume primary

[298] 428 U.S. 153 (1976), at 175.
[299] Ibid, at 181.
[300] Ibid, at 174.

> responsibility in choosing between competing political, economic and social pressures."[301]

Along with noting this restriction on the Supreme Court itself, the Supreme Court also pointed out that:

> "considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe."[302]

The decision in *Gregg* "set the stage for the modern era of capital punishment."[303] It was following *Gregg* that the Supreme Court embarked upon extensive regulation of the death penalty, such as the use of categorical exemptions for whole classes of individuals, and this regulation continues to this day.

The Modern Era of Reform – the Expansion of the Supreme Court's Eighth Amendment Application to Death Penalty Issues

Although the death penalty had been reinstated, the Supreme Court's Eighth

[301] Ibid, at 175, quoting Frankfurter J in *Dennis v United States* 341 U. S. 494 (1951), at 525.
[302] Ibid, at 186-187.
[303] Williams (n 229), p.15.

Amendment analysis had really only just begun. The Supreme Court next turned its attention to determining the constitutionality of different aspects of the death penalty, and in so doing limited the use of the punishment. The Supreme Court applied the Eighth Amendment to a variety of different issues, including the execution of juveniles, the intellectually disabled and the insane (which will be discussed in the next part of this chapter), and also the application of the death penalty for non-lethal crimes.

Following *Gregg v Georgia*, the Supreme Court determined in a close 5-4 judgment[304] in *Woodson v North Carolina*[305] that mandatory death penalties are unconstitutional. The Supreme Court referred to *Gregg* and stated that "indicia of societal values identified in prior opinions include history and traditional usage, legislative enactments, and jury determinations."[306] The Supreme Court specifically referenced 'evolving standards of decency' and stated that

> "the two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society – jury determinations and legislative enactments – both point conclusively to the repudiation of automatic death sentences."[307]

In keeping with *Gregg v Georgia*, the Supreme Court considered that:

[304] Justices Stewart, Powell and Stevens delivered the opinion of the Supreme Court, with Justices Brennan and Marshall delivering concurring opinions. Chief Justice Burger and Justices White, Rehnquist and Blackmun dissented.
[305] 428 U.S. 280 (1976)
[306] Ibid, at 288.
[307] Ibid, at 293.

> "legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency. The consistent course charted by the state legislatures and by Congress since the middle of the past century demonstrates that the aversion of jurors to mandatory death penalty statutes is shared by society at large."[308]

The Supreme Court discussed the importance of jury decisions in some detail, noting that "continuing evidence of jury reluctance to convict persons of capital offenses in mandatory death penalty jurisdictions resulted in legislative authorization of discretionary jury sentencing."[309] The Supreme Court considered that:

> "further evidence of the incompatibility of mandatory death penalties with contemporary values is provided by the results of jury sentencing under discretionary statutes...various studies indicate that even in first-degree murder cases juries with sentencing discretion do not impose the death penalty 'with any great frequency.'"[310]

The Supreme Court concluded that "the actions of sentencing juries suggest that under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers."[311]

In a dissenting judgment, Justice Rehnquist appeared to reject the majority opinion, at

[308] Ibid, at 294-295.
[309] Ibid, at 293.
[310] Ibid, at 295.
[311] Ibid, at 295-296.

least in part, on the interpretation of the Eighth Amendment; instead seeming to support an originalist position:

> "The plurality's insistence on individualized consideration of the sentencing, therefore, does not depend upon any traditional application of the prohibition against cruel and unusual punishment contained in the Eighth Amendment. The punishment here is concededly not cruel and unusual, and that determination has traditionally ended judicial inquiry in our cases construing the Cruel and Unusual Punishments Clause."[312]

The Supreme Court again revisited the issue of how to measure contemporary views in *Coker v Georgia*,[313] where the Supreme Court determined that the death penalty is an unconstitutional punishment for the rape of an adult woman when the victim was not killed. The Eighth Amendment was again key to the Supreme Court's analysis, with the focus on national consensus, although the Supreme Court also referenced international law and its own personal judgment as factors for consideration. The Supreme Court stated that:

> "...Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence-history and

[312] Ibid, at 323-324 (Rehnquist J, dissenting).
[313] 433 U.S. 584 (1977)

> precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted."[314]

The Supreme Court declared that it would "seek guidance in history and from the objective evidence of the country's present judgment"[315] and noted that "...at no time in the last 50 years have a majority of the States authorized death as a punishment for rape."[316] The Supreme Court went on to observe that:

> "in the light of the legislative decisions in almost all of the States and in most of the countries around the world, it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States' criminal justice system."[317]

This statement indicates not only the importance placed on legislative actions in other states, but also hints at the significance of the actions of the international community. This is again referenced later, when the Supreme Court referred to *Trop v Dulles*, noting that in that case:

> "the plurality took pains to note the climate of international opinion concerning the acceptability of a particular punishment. It is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death

[314] Ibid, at 592.
[315] Ibid, at 593.
[316] Ibid, at 593.
[317] Ibid, at 593, footnote 4.

penalty for rape where death did not ensue."[318]

The Supreme Court did not suggest that its decision had been in any significant way based on international opinion, but this recognition of its potential significance may have led to international views being picked up by the Supreme Court in later cases.

As part of its legislative review, the Supreme Court considered that:

> "...4 of the 16 States did not take the mandatory course and also did *not* continue rape of an adult woman as a capital offense. Further, as we have indicated, the legislatures of 6 of the 11 arguably mandatory States have revised their death penalty laws since *Woodson* and *Roberts* without enacting a new death penalty for rape. And this is to say nothing of 19 other States that enacted nonmandatory, post-Furman statutes and chose not to sentence rapists to death."[319]

An emphasis was therefore again placed by the Supreme Court on 'national consensus', leading to a discussion regarding how contemporary views might be measured. Justice White considered that both state legislation and the attitudes of juries should be considered: "it is...important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an

[318] Ibid, at 596, footnote 10, referring to United Nations, Department of Economic and Social Affairs, Capital Punishment 40, 86 (1968).
[319] Ibid, at 595.

appropriate penalty for the crime being tried."[320] The Supreme Court referred to *Gregg v Georgia*, noting that:

> "it was also observed in Gregg that '[t]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved,' and that it is thus important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried."[321]

Justice White did also consider, however, that these factors only served to provide the Supreme Court with some guidance and that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."[322] This was criticised in a dissenting judgment, however, by Chief Justice Burger, who argued that:

> "our task is not to give effect to our individual views on capital punishment; rather, we must determine what the Constitution permits a State to do under its reserved powers. In striking down the death penalty imposed upon the petitioner in this case, the Court has overstepped the bounds of proper constitutional adjudication by substituting its policy judgment for that of the state legislature."[323]

[320] Ibid, at 596.
[321] Ibid, at 596, referencing *Gregg v Georgia* 428 U. S. 153 (1976), at 181.
[322] Ibid, at 597.
[323] Ibid, at 604 (Burger CJ, dissenting).

In *Enmund v Florida,*[324] the Supreme Court applied *Coker v Georgia* to invalidate the death penalty for a defendant who had served as the getaway car driver in a felony murder but who had neither participated in the killing, nor attempted nor intended to kill. The Supreme Court again applied its own judgment to the decision over whether or not the punishment was constitutional in these circumstances. The Supreme Court noted that in *Coker:*

> "the Court looked to the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made before bringing its own judgment to bear on the matter. We proceed to analyze the punishment at issue in this case in a similar manner."[325]

The Supreme Court considered the fact that the defendant had not actually taken a life and that only eight jurisdictions allowed the death penalty to be imposed because the defendant had participated in a robbery where someone was killed.[326] The Supreme Court also considered as significant the fact that juries had only sentenced three such defendants to death in the post-*Furman* era.[327] Interestingly, the Supreme Court

> "[appeared] to create a hierarchy among legislative data by noting particularly that none of the eight *most recently enacted* death penalty statutes authorized use of the penalty in such circumstances. Moreover, the Court acknowledged that prosecutorial charging decisions (though harder to document than jury

[324] 458 U.S. 782 (1982)
[325] Ibid, at 788-789.
[326] Ibid, at 792.
[327] Ibid, at 795.

verdicts) also constitute relevant objective evidence of changing societal values."[328]

The Supreme Court's decision in *Enmund* was subsequently qualified in *Tison v Arizona*,[329] where the Supreme Court determined that the death penalty could be imposed on an individual who had not actually taken a life where that individual was reckless as to whether or not a life would be taken:

> "in bringing its own judgment to bear, the Court explained that the mental state of reckless disregard for human life was equivalent in moral culpability to an intent to kill and noted that both the common law and the Model Penal Code treated a high degree of recklessness as a legal equivalent to intent in their definitions of murder."[330]

The Supreme Court also noted as significant the fact that only 11 jurisdictions with the death penalty rejected its use in such circumstances.

Over 30 years after *Coker v Georgia*, the Supreme Court again turned to another non-lethal crime, this time considering the constitutionality of the death penalty for the rape of a child. In *Kennedy v Louisiana*[331] the Supreme Court struck down as unconstitutional the Louisiana statute that allowed the death penalty for the rape of a

[328] Carol S Steiker and Jordan M Steiker, 'Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly' (2008) 11 Journal of Constitutional Law 155, at 179.
[329] 481 U.S. 137 (1987)
[330] Steiker and Steiker (n 328), at 180.
[331] 554 U.S. 407 (2008)

child where the victim did not die, on the grounds that it was in violation of the Eighth Amendment. This was another close decision, with a 5-4 split in the Supreme Court. The defendant in this case had been sentenced to death for the rape of a child and challenged his death sentence as being in violation of the Eighth Amendment, taking into consideration how rarely the punishment had been handed down for that type of offence. The Supreme Court held that all such laws, where the crime was against an individual and no murder was committed, were contrary to the national consensus restricting the death penalty to the worst offences. The Supreme Court considered that "the evidence of a national consensus with respect to the death penalty for child rapists...shows divided opinion but, on balance, an opinion against it"[332] and noted that the defendant had been sentenced to death under a law that was embraced by only six out of the 50 states.[333] The Supreme Court considered that its review of national consensus "is not confined to tallying the number of States with applicable death penalty legislation"[334] and that "statistics about the number of executions may inform the consideration whether capital punishment for the crime of child rape is regarded as unacceptable in our society."[335] The Supreme Court's view was that the statistics "confirm our determination from our review of state statutes that there is a social consensus against the death penalty for the crime of child rape."[336]

In the Supreme Court's application of the Eighth Amendment, Justice Kennedy appeared to say that not so much weight should be placed on state legislation and

[332] 554 U.S. 407 (2008), at 426.
[333] Ibid, at 426.
[334] Ibid, at 426.
[335] Ibid, at 433.
[336] Ibid, at 433.

public opinion, and that the judge's own view on proportionality should play a larger role. Justice Kennedy considered that the Supreme Court's Eighth Amendment analysis and whether, therefore, the death penalty is disproportionate to the crime committed "is informed by our precedents and our own understanding of the Constitution and the rights it secures"[337] and requires that the Supreme Court interprets the Eighth Amendment's "text, history, meaning, and purpose."[338] However, Justice Scalia, one of the dissenting Justices, referred to this quote later in a statement denying a petition for a rehearing and said that "of course the Constitution contemplates no such thing; the proposed Eighth Amendment would have been laughed to scorn if it had read 'no criminal penalty shall be imposed which the Supreme Court deems unacceptable.'"[339] The view of the Justices delivering the majority opinion was, therefore, rejected by the dissenting Justices partly on grounds of originalism; Justice Alito, delivering the dissenting judgment, referred to the majority's holding that the Eighth Amendment prohibits the application of the death penalty for the crime of child rape and stated that "this holding is not supported by the original meaning of the Eighth Amendment."[340]

Justice Kennedy, writing for the 5-4 majority, stated:

> "based both on consensus and our own independent judgment, our holding is that a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth

[337] Ibid, at 434.
[338] Ibid, at 421.
[339] *Kennedy v Louisiana* 554 U.S. ___ (2008) (Petition for rehearing), pp.1-2.
[340] 554 U.S. 407 (2008), at 469.

and Fourteenth Amendments."[341]

Kennedy pointed to "evolving standards of decency" which he considered "must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule."[342] This case is therefore another example of the concept of dignity being utilised by the Supreme Court. Kennedy concluded that:

> "after reviewing the authorities informed by contemporary norms, including the history of the death penalty for this and other nonhomicide crimes, current state statutes and new enactments, and the number of executions since 1964, we conclude there is a national consensus against capital punishment for the crime of child rape."[343]

The Supreme Court also noted that:

> "there are, moreover, serious systemic concerns in prosecuting the crime of child rape that are relevant to the constitutionality of making it a capital offense. The problem of unreliable, induced, and even imagined child testimony means there is a 'special risk of wrongful execution' in some child rape cases."[344]

The Supreme Court concluded that "these considerations lead us to conclude, in our independent judgment, that the death penalty is not a proportional punishment for the

[341] Ibid, at 421.
[342] Ibid, at 420.
[343] Ibid, at 434.
[344] Ibid, at 443.

rape of a child."[345]

On a more general note, the Supreme Court pointed to the danger in laws such as Louisiana's, which allowed the death penalty where no murder was committed: "when the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint."[346] This case therefore confirmed that the death penalty should be reserved for the crime of murder:

> "difficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim"[347]

and that "as it relates to crimes against individuals...the death penalty should not be expanded to instances where the victim's life was not taken."[348]

Exempting the Insane

A landmark case in the Supreme Court's Eighth Amendment jurisprudence was *Ford v Wainwright*,[349] where the Supreme Court held that it is unconstitutional to execute an individual who is insane. The Supreme Court noted that

[345] Ibid, at 446.
[346] 554 U.S. 407 (2008), at 420.
[347] Ibid, at 447.
[348] Ibid, at 437.
[349] 477 U.S. 399 (1986)

> "since this Court last had occasion to consider the infliction of the death penalty upon the insane, our interpretations of the Due Process Clause and the Eighth Amendment have evolved substantially"[350]

and that

> "the Eighth Amendment has been recognized to affect significantly both the procedural and the substantive aspects of the death penalty, [and therefore] the question of executing the insane takes on a wholly different complexion."[351]

The Supreme Court acknowledged that it had "never addressed" the issue of "whether the Constitution places a substantive restriction on the State's power to take the life of an insane prisoner."[352]

The Supreme Court began its analysis by confirming that

> "there is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted."[353]

[350] Ibid, at 405, referring to *Solesbee v Balkcom* 339 U. S. 9 (1950).
[351] Ibid, at 405.
[352] Ibid, at 405.
[353] Ibid, at 405.

However, the Supreme Court then made it clear that "the Eighth Amendment's proscriptions are not limited to those practices condemned by the common law in 1789"[354] and that "the Amendment also recognizes the 'evolving standards of decency that mark the progress of a maturing society.'"[355] In order to determine this, the Supreme Court needs to consider "objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects."[356] Here, the Supreme Court acknowledges the fact that human dignity is protected under the Constitution, although not explicitly.

The Supreme Court noted that "the bar against executing a prisoner who has lost his sanity bears impressive historical credentials; the practice consistently has been branded 'savage and inhuman.'"[357] The Supreme Court went on to quote from Blackstone in full:

> "[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it: because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he

[354] Ibid, at 406, referring to *Gregg v Georgia* 428 U.S. 153 (1976), at 171 (opinion of Stewart, Powell, and Stevens, JJ).
[355] Ibid, at 406, referring to *Trop v Dulles* 356 U.S. 86 (1958), at 101 (plurality opinion).
[356] Ibid, at 406, referring to *Coker v Georgia* 433 U.S. 584 (1977), at 597 (plurality opinion).
[357] Ibid, at 406, referring to 4 W. Blackstone, Commentaries *24-*25.

> becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution."[358]

It is notable that the Supreme Court included this quote, as it arguably suggests that the Supreme Court agrees with the fact that a severely mentally ill individual should not be executed regardless of the point at which his severe mental illness manifested itself.

Prior to this case, the execution of insane individuals was a common law issue and a decision not to execute an individual on this basis was seen to reflect an "act of mercy"[359] by the state. The Supreme Court referred to this common law principle and stated that they knew "of virtually no authority condoning the execution of the insane at English common law."[360] Now, however, the Supreme Court recognised that the right not to be executed on the basis of insanity was a constitutional right and an insane individual therefore could expect "greater procedural protection."[361] The Supreme Court concluded that

> "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 [on executing the insane] finds

[358] Ibid, at 406-407, referring to Blackstone (footnotes omitted).
[359] Patricia L Dysart, 'The Eighth Amendment and Procedures for Determining Death Row Inmate Insanity: *Ford v Wainwright* 106 S. Ct. 2595 (1986)' (1988) 33 Washington University Journal of Urban and Contemporary Law 203, at 214.
[360] 477 U.S. 399 (1986), at 408.
[361] Dysart (n 359), at 213.

enforcement in the Eighth Amendment."[362]

However, even if "no State sanctions execution of the insane,"[363] as Justice Rehnquist declared in his dissenting judgment, one issue that still remains today is that "the state may well be executing insane inmates if its procedures are unreliable because they give little or no chance for judges or psychiatrists to evaluate the inmate's condition."[364] As will be seen later in this chapter, there is evidence[365] that the Supreme Court is now prepared to look specifically at state procedures to determine whether or not those procedures comply with the Constitution, although arguably this needs to take place on a much more systematic basis in order to have a significant impact on state practices and ensure sufficient Constitutional protection for exempt groups.

Exempting the Intellectually Disabled

In the 1989 case of *Penry v Lynaugh*[366] the Supreme Court stated that imposing a death sentence on a mentally retarded[367] defendant was not *per se* cruel and unusual punishment and thus did not violate the Eighth Amendment. The Supreme Court again considered that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures. We have also looked to

[362] 477 U.S. 399 (1986), at 410.
[363] Ibid, at 435 (Rehnquist J, dissenting).
[364] Gordon L Moore, '*Ford v Wainwright*: A Coda in the Executioner's Song' (1986-1987), 72 Iowa Law Review 1461, at 1473.
[365] See *Hall v Florida* 134 S.Ct. 1986 (2014) and *Moore v Texas* 581 U.S. ___ (2017).
[366] 492 U.S. 302 (1989)
[367] Intellectual disability was formerly termed "mental retardation". See Rosa's Law, 124 Stat. 2643 (changing entries in the US Code from "mental retardation" to "intellectual disability") and Robert L Schalock et. al., 'The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability' (2007) 45 Intellectual and Developmental Disabilities 116, referred to in *Hall v Florida* 134 S.Ct. 1986 (2014). This thesis will use both of the terms "intellectual disability" and "mental retardation" according to their use in individual cases.

data concerning the actions of sentencing juries."[368] The Supreme Court rejected Penry's argument that there was objective evidence of an emerging national consensus against the execution of the mentally retarded,[369] noting that "only one State...currently bans execution of retarded persons who have been found guilty of a capital offense."[370] The Supreme Court contrasted this to its recognition in *Ford v Wainwright* of a national consensus against the execution of the insane, as it considered that there had been "considerably more" evidence of a national consensus in that case: "no State permitted the execution of the insane, and 26 States had statutes explicitly requiring suspension of the execution of a capital defendant who became insane."[371] The Supreme Court acknowledged that the execution of mentally retarded individuals was proscribed in two states, but considered that "in our view, the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus."[372] In relation to the argument put forward by Penry that "execution of a mentally retarded person like himself with a reasoning capacity of approximately a 7- year-old would be cruel and unusual because it is disproportionate to his degree of personal culpability,"[373] the Supreme Court considered that it could not be stated definitively

> "that all mentally retarded people of Penry's ability – by virtue of their mental retardation alone, and apart from any individualized consideration of their

[368] 492 U.S. 302 (1989), at 331.
[369] Ibid, at 333-334.
[370] Ibid, at 334.
[371] Ibid, at 334.
[372] Ibid, at 334.
[373] Ibid, at 336.

personal responsibility – inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty."[374]

The Supreme Court therefore concluded that, on the information available at that time, it could not be said that executing intellectually disabled capital murderers violated the Eighth Amendment's proportionality requirement.

In his dissenting judgment, Justice Brennan argued that the execution of mentally retarded offenders did violate the Eighth Amendment. Justice Brennan was concerned that "the sentencer is free to weigh a mentally retarded offender's relative lack of culpability against the heinousness of the crime and other aggravating factors and to decide that even the most retarded and irresponsible of offenders should die."[375] Justice Brennan also considered that the execution of mentally retarded offenders "does not measurably further the penal goals of either retribution or deterrence"[376] on the basis that "mentally retarded offenders as a class lack the culpability that is a prerequisite to the proportionate imposition of the death penalty."[377]

Thirteen years later, the Supreme Court determined in the 2002 case of *Atkins v Virginia*[378] that the execution of the intellectually disabled was prohibited by the Eighth Amendment and was, therefore, unconstitutional. The Supreme Court justified its

[374] Ibid, at 338.
[375] Ibid, at 347 (Brennan J, dissenting).
[376] Ibid, at 348 (Brennan J, dissenting).
[377] Ibid, at 348 (Brennan J, dissenting).
[378] 536 U.S. 304 (2002)

decision to revisit the issue as it considered that there had been a "dramatic shift in the state legislative landscape"[379] in the thirteen years since it had decided *Penry*. The Supreme Court was influenced in its decision by considerations of national consensus, which had been demonstrated either by states passing legislation prohibiting the practice, or states not passing legislation that would have enabled such executions to take place. The Supreme Court considered that legislation was significant, as the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[380] Importantly, after noting that fifteen states had recently barred the execution of the intellectually disabled, the Supreme Court held that "it is not so much the number of these States that is significant, but the consistency of the direction of change."[381] This observation was important, as "significant trend evidence is more sensitive to the realities of legislation than a count of the absolute number of states that legislatively prohibit a punishment."[382] The Supreme Court also confirmed that "in cases involving a consensus, our own judgment is 'brought to bear,' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators."[383]

The Supreme Court again noted that "a claim that punishment is excessive is judged not by the standards that prevailed in 1685...when the Bill of Rights was adopted, but rather by those that currently prevail."[384] The majority of the Supreme Court, therefore, again rejected an originalist approach to Eighth Amendment interpretation. The

[379] Ibid, at 310.
[380] Ibid, at 312, quoting from *Penry v Lynaugh* 492 U.S. 302 (1989), at 331.
[381] Ibid, at 315.
[382] Smith and Robinson (n 236), at 453.
[383] 536 U.S. 304 (2002), at 313, referring to *Coker v Georgia* 433 U.S. 584 (1977), at 597.
[384] Ibid, at 311.

Supreme Court concluded that:

> "…the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition. Moreover, even in those States that allow the execution of mentally retarded offenders, the practice is uncommon."[385]

These considerations, taken together, all evidenced that "the practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it."[386]

In *Atkins* the Supreme Court introduced the importance of relying on expert opinion, as part of the Supreme Court's analysis as to whether or not a punishment is contrary to evolving standards of decency.[387] Importantly, and perhaps disappointingly given subsequent cases, the Supreme Court stated that it would "leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."[388] Although arguably recognising the importance of the sovereignty of individual states and allowing for a degree of flexibility, there is also a

[385] Ibid, at 316.
[386] Ibid, at 316.
[387] Ibid, at 308, footnote 3, and at 316, footnote 21.
[388] Ibid, at 317, quoting from *Ford v Wainwright* 477 U.S. 399 (1986) at 405, 416-417.

risk of inconsistency and a difference in treatment of intellectually disabled defendants across the states.

This issue was later the subject of the Supreme Court decisions in *Hall v Florida* in 2014 and *Moore v Texas* in 2017, when, following its decision in *Atkins*, the Supreme Court subsequently turned its attention to individual state practices for determining whether or not an individual is intellectually disabled. Although in *Atkins* the Supreme Court had made specific reference to leaving to individual states the task of determining intellectual disability, the decision in *Hall v Florida*[389] indicates that the Supreme Court is willing to intervene when it considers that a state practice may be in conflict with the Eighth Amendment. In its judgment the Supreme Court emphasised the importance of protecting human dignity. Justice Kennedy noted that through "protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."[390] Justice Kennedy was here making the important point that *all* human beings have dignity, including criminals. The Supreme Court also referred to the importance of the views of the medical community in such cases, introducing expert opinion as a key consideration. The Supreme Court commented that it was "unsurprising" that the Supreme Court, state courts and legislatures "are informed by the work of medical experts in determining intellectual disability"[391] and that it was "proper to consult the medical community's opinions"[392] in this determination.

[389] 134 S.Ct. 1986 (2014)
[390] Ibid, at 1992 (quoting *Roper v Simmons* 543 U.S. 551 (2005), at 560).
[391] Ibid, at 1993.
[392] Ibid, at 1993.

The Supreme Court examined Florida's use of the IQ test as solely determinative of intellectual disability, taking psychiatric and professional studies on IQ scores as a starting point. The Supreme Court considered that these studies would enable the Supreme Court to understand the individual state legislative policies and determine if a consensus exists. The Supreme Court also considered that it "must express its own independent determination reached in light of the instruction found in those sources and authorities."[393] The Supreme Court determined that Florida's law disregarded established medical practice in two ways:

> "it takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise."[394]

The use of an IQ score as final and conclusive evidence of a defendant's intellectual capacity was not acceptable, as in the Supreme Court's view:

> "pursuant to this mandatory cutoff, sentencing courts cannot consider even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant's failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school

[393] Ibid, at 1993.
[394] Ibid, at 1995.

> tests and reports, and testimony regarding past behavior and family circumstances. This is so even though the medical community accepts that all of this evidence can be probative of intellectual disability, including for individuals who have an IQ test score above 70."[395]

The Supreme Court took into account the fact that every state legislature, save Virginia's, to have considered the issue after *Atkins* and whose law has been interpreted by its courts has taken a position contrary to Florida's.[396] The rejection of a strict 70-point cutoff in the vast majority of states and a "consistency in the trend"[397] toward recognising the standard error of measurement provided strong evidence of consensus that society did not regard this strict cutoff as proper or humane. The Supreme Court confirmed that *Atkins* acknowledges the inherent error in IQ testing and provides substantial guidance on the definition of intellectual disability. Although the states play a critical role in advancing the protections of *Atkins* and providing the Supreme Court with an understanding of how intellectual disability should be measured and assessed, *Atkins* did not give states unfettered discretion to define the full scope of the constitutional protection. When a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the Supreme Court considered that the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits. The Supreme Court appeared to expressly reject the concept of complete state autonomy, stating that:

[395] Ibid, at 1994.
[396] Ibid, at 1998.
[397] Ibid, at 1998 (quoting *Roper v Simmons* 543 U.S. 551 (2005), at 567).

> "if the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality,"[398]

concluding that

> "Florida's law contravenes our Nation's commitment to dignity…The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects."[399]

The Supreme Court therefore acknowledged both the Constitutional protection of dignity and the "nation's commitment" to it; confirming again the underlying importance of the concept of human dignity.

The Supreme Court noted that:

> "in 41 States an individual in Hall's position – an individual with an IQ score of 71 – would not be deemed automatically eligible for the death penalty. These aggregate numbers are not the only considerations bearing on a determination of consensus. Consistency of the direction of change is also relevant."[400]

[398] Ibid, at 1999.
[399] Ibid, at 2001.
[400] Ibid, at 1997.

The Supreme Court concluded that "in this Court's independent judgment, the Florida statute, as interpreted by its courts, is unconstitutional."[401] The Supreme Court stated that "this determination is informed by the views of medical experts,"[402] although these views had not dictated the Supreme Court's decision. The Supreme Court referred to its "duty to interpret the Constitution," which it considered it did not have to do "in isolation" but could employ the assistance of the medical community.[403] The Supreme Court noted that Florida could not "point to a single medical professional who supports this cutoff."[404] Although the Supreme Court made it clear that the views of the medical community simply provided guidance, it is apparent that the Supreme Court found those views very persuasive and that they formed the basis of the Supreme Court's judgment.

In *Moore v Texas*,[405] the Supreme Court again turned its attention to an individual state practice for determining intellectual disability, relying to a significant extent on its judgment in *Hall v Florida*. The Supreme Court noted that "as we instructed in Hall, adjudications of intellectual disability should be 'informed by the views of medical experts'"[406] and that "not aligned with the medical community's information, and drawing no strength from our precedent, the Briseno factors 'creat[e]an unacceptable risk that persons with intellectual disability will be executed.'"[407] The Supreme Court again confirmed that it would not be solely led by medical opinion in its judgment, but that it had to be taken into consideration: "Hall indicated that being informed by the

[401] Ibid, at 2000.
[402] Ibid, at 2000.
[403] Ibid, at 2000.
[404] Ibid, at 2000.
[405] 581 U.S. ___ (2017)
[406] Ibid, at 2, referring to *Hall v Florida* 134 S.Ct. 1986 (2014), at 2000.
[407] Ibid, at 2, referring to *Hall v Florida* 134 S.Ct. 1986 (2014), at 1990.

medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards."[408] The Supreme Court confirmed that, as in *Hall*, it required

> "that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits."[409]

The Supreme Court's issue was that "the CCA [Texas Court of Criminal Appeal]'s consideration of Moore's adaptive functioning also deviated from prevailing clinical standards and from the older clinical standards the court claimed to apply"[410] and that "Texas cannot satisfactorily explain why it applies current medical standards for diagnosing intellectual disability in other contexts, yet clings to superseded standards when an individual's life is at stake,"[411] because it was noted that Texas did not use the same standards to determine if an individual is intellectually disabled in other contexts. The Supreme Court considered that

> "by rejecting the habeas court's application of medical guidance and clinging to the standard it laid out in Briseno, including the wholly nonclinical Briseno factors, the CCA failed adequately to inform itself of the 'medical community's diagnostic framework.'"[412]

[408] Ibid, at 10.
[409] Ibid, at 12.
[410] Ibid, at 12.
[411] Ibid, at 16.
[412] Ibid, at 18, referring to *Hall v Florida* 134 S.Ct. 1986 (2014), at 2000.

The decision is likely to have an impact on states which use legal definitions of intellectual disability that are not specifically based on current medical standards.

Chief Justice Roberts wrote a dissenting judgment, in which he argued that the roles of judges and clinicians had been confused:

> "the Court…crafts a constitutional holding based solely on what it deems to be medical consensus about intellectual disability. But clinicians, not judges, should determine clinical standards; and judges, not clinicians, should determine the content of the Eighth Amendment."[413]

Chief Justice Roberts further argued that

> "the Eighth Amendment, under our precedent, is supposed to impose a moral backstop on punishment, prohibiting sentences that our society deems repugnant. The Court, however, interprets that constitutional guarantee as turning on clinical guidelines that do not purport to reflect standards of decency."[414]

Chief Justice Roberts pointed to the "central significance of state consensus"[415] and argued that no national consensus had been demonstrated, which he considered was

[413] Ibid, at 2 (Roberts CJ, dissenting).
[414] Ibid, at 10.
[415] Ibid, at 7.

an issue because "without looking to any such 'objective evidence of contemporary values,' there is a real danger that Eighth Amendment judgments will embody 'merely the subjective views of individual Justices.'"[416] However, the rejection by Chief Justice Roberts of the views of experts seems unreasonable. He himself points out the different roles of clinicians and judges, and it is natural and even inevitable that the Supreme Court will need to seek the guidance of clinicians in its judgment, as clinicians are best placed to advise on these issues. It has also long been recognised by the Supreme Court that it does need to employ its own views when reaching a judgment, but this does not mean that this will result in judgments based on the subjective views of individual Justices. Also, it is arguable that clinical guidelines do purport to reflect standards of decency, which is consistent with the approach that the Supreme Court has frequently adopted towards Eighth Amendment interpretation in general.

Exempting Juveniles – a Gradual Evolution of Eighth Amendment Analysis

The exemption of juveniles from the death penalty was a gradual process by the Supreme Court, beginning with the recognition in the 1988 case of *Thompson v Oklahoma*[417] that individuals aged under 16 should not be executed. It took almost another 20 years for the Supreme Court to raise this exemption to individuals aged 18 and under in *Roper v Simmons* in 2005.

In *Thompson v Oklahoma*, the Supreme Court began its analysis with a reference to

[416] Ibid, at 16, quoting from *Atkins v Virginia* 536 U.S. 304 (2002), at 312 and *Coker v Georgia* 433 U.S. 584 (1976), at 592.
[417] 487 U.S. 815 (1988)

"evolving standards of decency" as first set out in *Trop v Dulles*, noting that:

> "the authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the 'evolving standards of decency that mark the progress of a maturing society.'"[418]

In order to determine the constitutionality of executing individuals aged under 16 at the time of the offence, the Supreme Court considered that it should

> "review relevant legislative enactments, then refer to jury determinations, and finally explain why these indicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty."[419]

The Supreme Court considered the fact that no state at the time allowed a 15-year-old to vote or serve on a jury and most states prohibited 15-year-olds from driving or getting married. The Supreme Court considered this to be significant because "all of this legislation is consistent with the experience of mankind, as well as the long history of our law, that the normal 15-year-old is not prepared to assume the full

[418] Ibid, at 821, referring to *Trop v Dulles* 356 U.S. 86 (1958), at 101.
[419] Ibid, at 821-823.

responsibilities of an adult."[420] This led the Supreme Court to consider that:

> "the very assumptions we make about our children when we legislate on their behalf tells us that it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully rational, choosing agent, who may be deterred by the harshest of sanctions and toward whom society may legitimately take a retributive stance."[421]

In her concurring judgment, Justice O'Connor also referred to the importance of legislation as an indicator of the acceptability of a punishment, stating that "the most salient statistic that bears on this case is that every single American legislature that has expressly set a minimum age for capital punishment has set that age at 16 or above."[422]

As well as considering legislation, the Supreme Court turned to other factors, such as the views of professional bodies and even the wider international community:

> "the conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community. Thus, the American

[420] Ibid, at 824-825.
[421] Ibid, at 825, footnote 23.
[422] Ibid, at 849.

> Bar Association and the American Law Institute have formally expressed their opposition to the death penalty for juveniles."[423]

The Supreme Court concluded that

> "the road we have traveled during the past four decades – in which thousands of juries have tried murder cases – leads to the unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community."[424]

The Supreme Court also considered in its discussion the purposes of the death penalty, namely retribution and deterrence, concluding that neither would be satisfied by the execution of a juvenile aged under 16. The Supreme Court considered that such an individual would be less culpable than an adult, and pointed to factors such as

> "inexperience, less education, and less intelligence [which] make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult."[425]

The Supreme Court further stated that "the reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible

[423] Ibid, at 830.
[424] Ibid, at 832.
[425] Ibid, at 835.

conduct is not as morally reprehensible as that of an adult."[426] The Supreme Court referred to its view in *Gregg v Georgia* that retribution is not inconsistent with its respect for the "dignity of men," considering in contrast that "the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children, [means that] this conclusion is simply inapplicable to the execution of a 15-year-old offender."[427] In terms of the punishment having a deterrent effect, the Supreme Court considered that "the likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent"[428] and that "it is fanciful to believe that [a 15-year-old] would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century."[429] The Supreme Court concluded that it was

> "not persuaded that the imposition of the death penalty for offenses committed by persons under 16 years of age has made, or can be expected to make, any measurable contribution to the goals that capital punishment is intended to achieve. It is, therefore, 'nothing more than the purposeless and needless imposition of pain and suffering,' and thus an unconstitutional punishment."[430]

A year later, the Supreme Court considered the constitutionality of executing juveniles

[426] Ibid, at 835.
[427] Ibid, at 836-837.
[428] Ibid, at 837.
[429] Ibid, at 838.
[430] Ibid, at 838, quoting from *Coker v Georgia* 433 U. S. 584, at 592.

aged under 18 in *Stanford v Kentucky*,[431] which would have effectively extended its decision in *Thompson*. Here, however, the Supreme Court held that executing individuals who had committed capital crimes when they were 16 or 17 years old did not violate the Constitution. The Supreme Court focused its main assessment of the Eighth Amendment on national consensus, and considered that the petitioners in the case had failed to establish a national consensus against the practice. The Supreme Court confirmed its view that the pattern of enacted laws was the "primary and most reliable indication of consensus"[432] and considered that:

> "even if it were true that no federal statute permitted the execution of persons under 18, that would not remotely establish – in the face of a substantial number of state statutes to the contrary – a national consensus that such punishment is inhumane, any more than the absence of a federal lottery establishes a national consensus that lotteries are socially harmful."[433]

The petitioners also claimed that "contemporary society views capital punishment of 16- and 17-year-old offenders as inappropriate,"[434] which they considered was evidenced by "the reluctance of juries to impose, and prosecutors to seek, such sentences."[435] The petitioners supported this argument with statistics demonstrating this view, including the fact that the last execution of a person who committed a crime when they

[431] 492 U.S. 361 (1989)
[432] Ibid, at 373.
[433] Ibid, at 372-373.
[434] Ibid, at 373.
[435] Ibid, at 373.

were under 17 years of age occurred in 1959.[436] However, the Supreme Court was not persuaded by this argument, stating that it did "not establish the requisite proposition that the death sentence for offenders under 18 is categorically unacceptable to prosecutors and juries."[437] The Supreme Court also referred to the petitioners' use of "public opinion polls, the views of interest groups, and the positions adopted by various professional associations"[438] to support their arguments, but "decline[d] the invitation to rest constitutional law upon such uncertain foundations."[439]

The Supreme Court emphasised that it can only identify what the 'evolving standards of decency' are, and not what they should be, and as a result the Supreme Court "emphatically reject[ed the] petitioner's suggestion that the issues in this case permit us to apply our 'own informed judgment.'"[440] The Supreme Court therefore concluded that it could

> "discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment."[441]

In his dissenting judgment, Justice Brennan identified a number of factors to support his view that the execution of juveniles under the age of 18 violated the Eighth Amendment:

[436] Ibid, at 374.
[437] Ibid, at 374.
[438] Ibid, at 377.
[439] Ibid, at 377.
[440] Ibid, at 378.
[441] Ibid, at 380.

> "there are strong indications that the execution of juvenile offenders violates contemporary standards of decency: a majority of States decline to permit juveniles to be sentenced to death; imposition of the sentence upon minors is very unusual even in those States that permit it; and respected organizations with expertise in relevant areas regard the execution of juveniles as unacceptable, as does international opinion."[442]

Justice Brennan concluded that: "juveniles so generally lack the degree of responsibility for their crimes that is a predicate for the constitutional imposition of the death penalty that the Eighth Amendment forbids that they receive that punishment."[443]

The Supreme Court did not address this issue again until the landmark decision of *Roper v Simmons*,[444] where the Supreme Court held that the use of the death penalty for juvenile offenders aged under 18 at the time of their crimes was in violation of both the Eighth and Fourteenth Amendments to the United States Constitution. The Supreme Court referred to the "evolving standards of decency" in society to determine that the use of the death penalty against juveniles was so disproportionate as to be "cruel and unusual". The Supreme Court identified three "general differences between juveniles under 18 and adults [which] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders"[445] and that they should therefore be exempt from the death penalty: "a lack of maturity and an underdeveloped sense of

[442] Ibid, at 404 (Brennan J, dissenting).
[443] Ibid, at 394 (Brennan J, dissenting).
[444] 543 U.S. 551 (2005)
[445] Ibid, at 569.

responsibility,"[446] the view that juveniles "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"[447] and "the character of a juvenile is not as well formed as that of an adult."[448]

By the time of the *Roper* decision, the Supreme Court determined that since *Stanford*, a national consensus had developed against executing juveniles. The Supreme Court considered a range of factors in reaching its decision, such as evidence from social sciences, psychiatry and international opinion. The Supreme Court explained that the primary criterion for determining whether a particular punishment violates society's evolving standards of decency is objective evidence of a national consensus as expressed by legislative enactments and jury practices. The majority opinion found significant that 30 states prohibit the juvenile death penalty, including 12 that have rejected the death penalty altogether.[449] The Supreme Court counted the states with no death penalty, pointing out that "a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles."[450] The Supreme Court further noted that, in the remaining 20 states, juries sentenced juvenile offenders to death only in rare cases and the execution of juveniles was infrequent.[451] The Supreme Court found a consistent trend toward abolition of the practice of executing juveniles: "since Stanford, no State that previously prohibited capital punishment for juveniles has reinstated it"[452] and ruled that the impropriety of executing juveniles had gained wide recognition. The Supreme

[446] Ibid, at 569.
[447] Ibid, at 569.
[448] Ibid, at 570.
[449] Ibid, at 564.
[450] Ibid, at 572.
[451] Ibid, at 564-565.
[452] Ibid, at 566.

Court considered that it was logical for the decision in *Thompson* to extend up to the age of 18, stating that "the age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest."[453]

In addition to considering evidence of a national consensus as expressed by legislative enactments and jury practices, and in contrast to its decision in *Thompson v Oklahoma*, the Supreme Court recognised that it must also apply its own independent judgment in determining whether a particular punishment is disproportionately severe.[454] When ruling that juvenile offenders cannot with reliability be classified as among the worst offenders, the Supreme Court found significant that juveniles are vulnerable to influence, and susceptible to immature and irresponsible behaviour. In light of the diminished culpability of juveniles, neither retribution nor deterrence provides adequate justification for imposing the death penalty. Justice Kennedy, writing for the majority, said:

> "whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason

[453] Ibid, at 574.
[454] Ibid, at 564.

of youth and immaturity."[455]

The Supreme Court drew a similar conclusion regarding deterrence, stating that "...the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence."[456] Further, the Supreme Court considered that, in addition to their reduced culpability, juveniles are also not eligible for the death penalty because "the reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."[457] The Supreme Court was also concerned that a defendant's youth can often be treated as an aggravating factor rather than a mitigating one – and, indeed, the prosecutor in this case had argued that fact[458] – and considered that, although a particular rule could be introduced to try and correct this, it would address the Supreme Court's concerns more effectively if there was constitutional protection in place – in other words, if juveniles were exempt from the death penalty altogether.[459]

The Supreme Court addressed the decision in *Stanford*, noting that the objective indicia of consensus had changed since then. The Supreme Court also argued that the Supreme Court in *Stanford* should have included those states that had abolished the death penalty altogether in its consideration of whether or not a consensus existed against the juvenile death penalty, because "a State's decision to bar the death penalty

[455] Ibid, at 571.
[456] Ibid, at 571.
[457] Ibid, at 570.
[458] Ibid, at 558. The prosecutor argued: "Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."
[459] Ibid, at 573.

altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles."[460] The Supreme Court specifically addressed the rejection by the Supreme Court in *Thompson* that the Supreme Court's own judgment should not be taken into account when considering the proportionality of the death penalty for a particular class of crimes or offenders, arguing that "this rejection was inconsistent with prior Eighth Amendment decisions."[461]

In addition, the Supreme Court turned its attention to international practices, noting that "at least from the time of the Supreme Court's decision in *Trop*, the Supreme Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"[462] The Supreme Court considered the fact that only seven countries other than the United States have executed juvenile offenders since 1990, and that those countries had since either abolished capital punishment for juveniles or publicly rejected the practice.[463] This led the Supreme Court to conclude that "the stark reality [is] that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."[464] The Supreme Court considered international opinion to be notable as

> "it is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the

[460] Ibid, at 574.
[461] Ibid, at 574-575, referring to *Thompson v Oklahoma*, *Enmund v Florida, Coker v Georgia* and *Atkins v Virginia*.
[462] Ibid, at 575.
[463] Ibid, at 577. The seven countries are Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China.
[464] Ibid, at 575.

> understanding that the instability and emotional imbalance of young people may often be a factor in the crime...The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[465]

In his concurring judgment, Justice Stevens declared that:

> "perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court's interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today...The evolving standards of decency that have driven our construction of this critically important part of the Bill of Rights foreclose any such reading of the Amendment."[466]

Justice Stevens thereby rejected an originalist approach to the Eighth Amendment, highlighting the importance of interpreting the Eighth Amendment in light of modern attitudes to a particular practice.

[465] Ibid, at 578.
[466] Ibid, at 587 (Stevens J, concurring).

A Recent Application of the Eighth Amendment

In *Bucklew v Precythe*,[467] the Supreme Court considered a challenge regarding the method of execution as being "cruel and unusual" under the Eighth Amendment.[468] The appellant, Russell Bucklew, argued that the state should not be able to use lethal injection as a method of execution in his case, due to a rare medical condition he suffered from that would make lethal injection very painful. In a disturbing decision, the Supreme Court declared that "the Eighth Amendment does not guarantee a prisoner a painless death,"[469] and that the Eighth Amendment would only operate to prohibit methods of execution that involved the intentional "superaddition" of pain. What is especially notable is that Justice Gorsuch, who delivered the opinion on behalf of the Supreme Court, wrote a book in 2006 about assisted suicide and euthanasia, in which he discussed the intrinsic value of human beings and stated that the basis of equality comes from "the belief that all persons *innately* have dignity and are worthy of respect."[470] However, the word "dignity" only appears once in the judgment, as a brief reference to a quote from the 2008 case of *Baze v Rees*,[471] about the importance of "preserving the dignity of the procedure."[472] There is no reference to the dignity of individuals and no mention of *Trop v Dulles*, quoted so often before by the Supreme Court, with Epps arguing that "the majority opinion pretended that *Trop* did not exist."[473] It is difficult to see how the Supreme Court could have reconciled this opinion with

[467] 587 U.S. ___ (2019)
[468] The issue of method of execution again raises questions around dignity; however, a full discussion of methods of execution is outside the scope of this thesis.
[469] 587 U.S. ___ (2019), at 12.
[470] Neil Gorsuch, The Future of Assisted Suicide and Euthanasia (Princeton University Press 2006), p.159.
[471] 553 U.S. 35 (2008)
[472] 587 U.S. ___ (2019), at 14, quoting from 553 U.S. 35 (2008), at 66.
[473] The Atlantic, *Unusual Cruelty at the Supreme Court* (4 April 2019) <www.theatlantic.com/ideas/archive/2019/04/bucklew-v-precythe-supreme-court-turns-cruelty/586471/> accessed 1 December 2019

concerns regarding human dignity, and so the Supreme Court has simply ignored the concept. If, however, the concept of dignity moved to the forefront of the Supreme Court's considerations, judgments like this simply could not be made. The difficulty, of course, is how to persuade the Supreme Court to prioritise the concept of dignity in its Eighth Amendment jurisprudence, which will be considered briefly in the concluding chapter to this thesis.

Severe Mental Illness – Drawing Comparisons with the Supreme Court's Exemption of the Intellectually Disabled and Juveniles

As set out in the introductory chapter to this thesis, arguments in favour of the exemption of severely mentally ill individuals from the death penalty have, to-date, been based on either the culpability of a severely mentally ill individual, or on the purposes of punishment (principally being retribution and deterrence). Although this thesis proposes the concept of human dignity as an alternative to these arguments, it is helpful to consider culpability and punishment in the context of the Supreme Court's exemption of intellectually disabled individuals and juveniles. Such an analysis serves two purposes: the first is to enable the drawing of comparisons between severely mentally ill individuals on the one hand, and intellectually disabled individuals and juveniles on the other, in order to observe how the exemption of severely mentally ill individuals is a natural next step in the Supreme Court's Eighth Amendment jurisprudence; the second is to understand why the Supreme Court has not, however, felt able to reach the same conclusions regarding culpability and punishment for severely mentally ill individuals,

and why arguments based on the concept of human dignity are necessary instead.

The discussion by the Supreme Court in both *Atkins* and *Roper* of the culpability of intellectually disabled and juvenile defendants can arguably also apply to severely mentally ill individuals. For example, a severely mentally ill individual who, at the time he or she committed the crime, was suffering from severe psychosis with delusions, cannot be considered to have the same culpability as an individual who was not psychotic and/or delusional:

> "all mental illness, or at least all major mental illnesses, such as schizophrenia, bipolar disorder, or even substance abuse disorders, diminish culpability in a significant way. Persons with such diminished capacity ought not be eligible for the death penalty, and with respect to statutory reform, major mental illness is the standard…legislatures ought to adopt for categorical exemption."[474]

In the same way, if the Supreme Court considers that the primary purposes of punishment – namely retribution and deterrence – are not fulfilled by either the execution of intellectually disabled or juvenile defendants, it is difficult to see how either of these punishments can operate by the execution of severely mentally ill defendants. Just as intellectually disabled individuals are unlikely to be deterred from committing a criminal act because of their lack of cognitive reasoning, in the same way a severely mentally ill individual may be unable to make a rational, informed decision about an

[474] John H Blume and Sheri Lynn Johnson, 'Killing the Non-Willing: *Atkins*, the Volitionally Incapacitated, and the Death Penalty' (2003) 55 South Carolina Law Review 93, at 143.

action and its likely consequences, including the potential severity of any punishment: "like juvenile offenders and mentally retarded offenders, the severely mentally ill often lack or have diminished impulse control and have difficulty comprehending the consequences of their actions."[475] In addition, the execution of a severely mentally ill individual can surely not be said to serve any meaningful retributive function:

> "when severe mental illness impairs judgment, rationality, and the ability to foresee consequences and control behavior, similar to mental retardation and juvenile status, it is similarly less justifiable to impose the death penalty as retribution for past crimes or as a deterrent to future ones."[476]

It has in fact been argued that to exclude intellectually disabled individuals from the death penalty, but not severely mentally ill individuals, could amount to a form of discrimination against severely mentally ill individuals:

> "after establishing a categorical bar for the mentally retarded, the failure to do so for the seriously mentally ill would violate their equal protection rights, by discriminating against them on the basis of mental disability."[477]

In both *Atkins* and *Roper*, the Supreme Court was able to point to a 'national consensus' against the execution of intellectually disabled individuals and juveniles, by

[475] Lyn Entzeroth, 'The Challenge and Dilemma of Charting a Course to Constitutionality Protect the Severely Mentally Ill Capital Defendant from the Death Penalty' (2011) 44 Akron Law Review 529, at 559.
[476] Bruce J Winick, 'The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier' (2009) 50 Boston College Law Review 785, at 814.
[477] Robert Batey, 'Categorical Bars to Execution: Civilizing the Death Penalty' (2009) 45 Houston Law Review 1493, at 1527.

way of existing legislation in some states prohibiting such executions. In the case of severely mentally ill individuals, no state currently prohibits the execution of defendants with a severe mental illness. However, there is some argument to be made that a national consensus is forming against this practice, because eleven states have proposed Bills that would, if passed into law, prohibit the execution of severely mentally ill defendants.[478] Although just Bills at this time, it should be remembered that the Supreme Court pointed out, as noted above, in *Atkins* that "it is not so much the number of these States that is significant, but the consistency of the direction of change."[479] If the Bills in these eleven states are passed into law, particularly if this happens in quick succession, there will be a strong argument to be made that for the number of states prohibiting the execution of severely mentally ill individuals to change from zero to eleven in a short space of time demonstrates a clear direction of change. This approach of the Supreme Court in *Atkins* has been criticised, however, as "national consensus now may be understood simply as a significant trend" and "a trend does not a consensus make."[480] However, the Supreme Court's interpretation of national consensus in this way is perhaps indicative of the Supreme Court's desire to move away from the prominence given previously to simply counting the number of states with legislation relating to the matter at hand, when there are a host of other factors to be taken into account. Indeed, the importance of the Supreme Court moving away from simply counting state legislation in relation to severely mentally ill individuals

[478] Those states are Arizona, Arkansas, Indiana, Kentucky, Missouri, North Carolina, Ohio, South Dakota, Tennessee, Texas and Virginia. All specify that the defendant must have been severely mentally ill at the time of the offence. There is a slight variation in the definition of severe mental illness between each Bill, but almost all of the Bills say that the severe mental illness must impair the defendant's ability to (1) appreciate the nature, consequences, or wrongfulness of his or her conduct; (2) exercise rational judgment in relation to the person's conduct; or (3) conform his or her conduct to the requirements of the law (although note that Tennessee and Texas only set out the first two limbs, and Kentucky and South Dakota do not refer to this test at all). This three-prong test mirrors a recommendation set out in American Bar Association, 'Recommendation and Report on the Death Penalty and Persons with Mental Disabilities' (2006) 30 Mental and Physical Disability Law Reporter 668 (2006).
[479] 536 U.S. 304 (2002), at 315.
[480] Richard Broughton, 'The Second Death of Capital Punishment' (2006) 58 Florida Law Review 639, at 647.

is that:

> "an individual, who is not sufficiently culpable to be punished by death when viewed in comparison with other protected groups, will be executed under the counting regime to which the Court adheres."[481]

As will be discussed in the next chapter of this thesis, the Supreme Court should, in any event, shift its focus away from national consensus and towards the concept of human dignity, which would force the Supreme Court to conclude that the execution of severely mentally ill individuals is fundamentally inconsistent with respect for human dignity. The Supreme Court in *Ford v Wainwright*, when it declared that the Eighth Amendment prohibits the execution of the insane, referred to the dignity of society itself as a reason for the prohibition:

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

[481] Entzeroth (n 475), at 579.

> 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.[482]

A major challenge with the argument that severely mentally ill individuals should be exempt from the death penalty is the difficulty with making an accurate diagnosis, coupled with a common suspicion that a defendant exhibiting symptoms of severe mental illness may be malingering. The sheer number of recognised mental illnesses and the varying range of severity for each condition, together with the fact that the onset of severe mental illness can occur at any time and is often not until a person is at least in his or her twenties, provides a particular challenge to those arguing for exemption. In comparison, a juvenile is simply defined as an individual under 18 years of age, and there is, at least, a recognised three-part test for intellectual disability[483] (although that is not to say that it is always straightforward to make a diagnosis of intellectual disability). However, the fact that there can be challenges with diagnosis should not mean that the case for exempting severely mentally ill individuals should be ignored, as stated by Slobogin: "the state is not acting reasonably if it justifies execution of people with mitigating mental illness simply on the ground that it has difficulty identifying who they are."[484]

It could be considered that, despite not being categorically exempt, severely mentally ill

[482] *Ford v Wainwright* 477 U.S. 399 (1986), at 409-410.
[483] American Psychiatric Association, 'Diagnostic and Statistical Manual of Mental Disorders (DSM-5)' (5th edn, American Psychiatric Publishing 2013), p.33.
[484] Christopher Slobogin, 'What *Atkins* Could Mean for People with Mental Illness' (2003) 33 New Mexico Law Review 293, at 308.

individuals do receive protection from execution in a number of ways, as discussed in the previous chapter of this thesis: the defendant's competency to stand trial and competency to be executed can be assessed; the insanity defence may be available to them; and a severely mentally ill individual can present evidence of his or her mental illness as a mitigating factor during the penalty phase of proceedings, which takes place once a defendant has been found guilty at trial. There are a number of issues with each of these options, however, which means that there remains a real risk that these options will not adequately protect a severely mentally ill individual from execution. For example, in terms of the presentation of mitigating evidence, a severely mentally ill individual may, by virtue of the mental illness itself, refuse to present such evidence. Even if evidence of a severe mental illness is presented, the jury may view it as an aggravating factor, rather than a mitigating factor, especially if there is evidence of previous violent behaviour attributable to the mental illness. These issues are discussed in chapter 2.

Conclusion

The above cases demonstrate both the importance of Eighth Amendment interpretation in capital cases and the range of factors that the Supreme Court is prepared to take into account when reaching its decision. As the Supreme Court appears ever more willing to expand its Eighth Amendment jurisprudence to consider individual state practices and non-capital cases, the exemption of the severely mentally ill from the death penalty seems achievable, as a next step following the exemption of the insane,

juveniles and the intellectually disabled. The Supreme Court continues to place significance on legislative practices and the decisions of juries, but more recently has also emphasised the importance of expert opinion, such as from the medical community, and, crucially, considerations of dignity. The Supreme Court needs to bring its consideration of dignity issues to the forefront of its analysis in death penalty cases. The fact that the Supreme Court does refer to the importance of dignity issues and also makes reference to the protection of dignity under the Constitution signals the importance it places on the concept. The next chapter of this thesis will now consider the concept of human dignity, and how it can be used to formulate an argument for the exemption of severely mentally ill individuals from the death penalty.

Chapter 4: The Concept of Human Dignity

Introduction

The exemption of severely mentally ill defendants from the death penalty has been advocated for by a number of organisations, members of the medical community, and academics;[485] however, as this thesis has so far sought to demonstrate, the question over how this can be achieved has proved to be problematic. The focus of the arguments in favour of exemption has so far been on either the lack of culpability of the severely mentally ill individual,[486] or on the fact that the primary purposes of punishment – retribution and deterrence[487] – are arguably not satisfied when a severely mentally ill individual is executed.[488] These are undeniably compelling arguments, but the issue is that neither of these approaches has advanced the movement in favour of the exemption of severely mentally ill individuals far enough. A new approach is needed on this issue, and this thesis argues that the approach that should be taken is to focus on the concept of human dignity. The argument for dignity in this thesis is as follows: human dignity is an intrinsic characteristic that all human beings have, simply by virtue of being human. Human dignity is the basis for all human rights. Acknowledging and respecting the dignity of others involves recognising that all

[485] For example, in 2006, the American Bar Association (ABA), in conjunction with the American Psychiatric Association, the American Psychological Association, the National Alliance on Mental Illness, and other experts, adopted a detailed policy opposing the use of the death penalty for individuals with serious mental illness, even though the ABA does not adopt a position for or against the death penalty generally. See 'Serious Mental Illness Initiative' <www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/serious-mental-illness-initiative-/> accessed 8 July 2019.

[486] See Lyn Entzeroth, 'The Challenge and Dilemma of Charting a Course to Constitutionality Protect the Severely Mentally Ill Capital Defendant from the Death Penalty' (2011) 44 Akron Law Review 529.

[487] See *Gregg v Georgia* 428 U.S. 153 (1976), at 183; subsequently referred to in *Atkins v Virginia* 536 U.S. 304 (2002), at 319, and in *Roper v Simmons* 543 U.S. 551 (2005), at 571.

[488] See Bruce J Winick, 'The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier' (2009) 50 Boston College Law Review 785.

humans have equal rights, and the autonomy to exercise those rights. However, in the specific context of severely mentally ill individuals in capital trials and on death row, the recognition of the equal rights of those individuals may in fact operate to their detriment. Removing the ability of severely mentally ill individuals to exercise their rights, however, is not possible, as this would run counter to respecting their dignity. Therefore, severely mentally ill individuals must be exempt from the death penalty altogether, in order to ensure that their dignity is protected and respected. There are two clear examples of rights that, if exercised by a severely mentally ill individual, could operate to his detriment more than in the case of an individual who is not severely mentally ill. Those rights are: (1) the right to self-representation in a capital trial, and (2) the right to volunteer for execution. As will be explored in this chapter, the right to self-representation provides a clear demonstration that recognising such individuals' equal rights, while at the same time ensuring that their dignity is respected, is not possible in this context. If a severely mentally ill individual chooses to represent himself at trial, he may struggle to formulate the strongest defence, as a result of the severe mental illness he suffers from. The individual may behave erratically, or otherwise behave in a way that would very likely alienate the jury.[489] This means that the jury may, in fact, be even more likely to vote for a death sentence. In the case of volunteering for execution – which will be explored in detail in chapter 5 of this thesis – a severely mentally ill individual's decision to volunteer may well be influenced by his severe mental illness. In such cases, enabling a severely mentally ill individual to volunteer is arguably akin to a form of state-assisted suicide.

[489] See, for example, Death Penalty Information Center (DPIC), 'The Case of Scott Panetti' <https://deathpenaltyinfo.org/policy-issues/mental-illness/the-case-of-scott-panetti> accessed 23 January 2020.

This chapter will begin with an exploration of the meaning of dignity, drawing upon both moral and legal philosophy, and will discuss, in particular, the views of the philosopher Immanuel Kant and why this thesis considers his concept of dignity to be the most compelling. The chapter will explore why the concept of dignity is in fact a contested concept, with many different accounts of it and some critics even arguing that it is pointless, but why ultimately this thesis considers it to be a vital basis for all human rights; in other words, "human dignity is the heart and soul of our human race."[490] The chapter will also consider the opposing view to human dignity as being related to autonomy, which is the theory of "dignity as constraint." This view essentially means that protecting an individual's dignity means preventing that individual from exercising a right that is seen to offend that individual's dignity. However, as will be discussed, this thesis rejects the theory of dignity of constraint, due to the link between human dignity and human rights. In order to demonstrate the significance of dignity in relation to human rights, the chapter will then consider the recognition of dignity in international law and also in the individual state constitutions in the United States. The chapter will then examine the Supreme Court's approach to human dignity, primarily in its Eighth Amendment jurisprudence, with a view to highlighting the importance that the Supreme Court has accorded to the concept. The chapter will consider the particular challenges in relation to preserving the dignity of severely mentally ill defendants, using the example of the right to self-representation to illustrate these difficulties. The chapter will then conclude that respecting the dignity of a severely mentally ill individual during the capital trial process and on death row is not possible and, therefore, severely

[490] Jackie Jones and Catherine Dupré, 'Introduction to the Special Issue on Dignity' (2012) 33 Liverpool Law Review 173, at 173.

mentally ill individuals must be exempted from the death penalty.

Formulating a Definition of Human Dignity

Historically, there have been three main interpretations of dignity: dignity as an intrinsic value, dignity as status or social rank, and dignity referring to behaviour or character (in other words, "she acted with great dignity").[491] The term has also been used to distinguish between human beings and other creatures.[492] The concept of dignity features strongly in religious traditions; for example, in Christianity, in both the Old and New Testaments[493] the basis of human dignity is the fact that humans were created in the image of God.[494]

This thesis takes its starting point on the definition of dignity from the philosopher Immanuel Kant, who wrote about dignity most predominantly in his works, *Groundwork of the Metaphysics of Morals* and, later, *The Metaphysics of Morals*. Kant believed that dignity is an inherent value or intrinsic quality that all human beings have simply by virtue of their status as human beings. Importantly, dignity can neither be given nor taken away. One of Kant's main arguments is that man should never be treated as a means to an end, but always as an end in itself.[495] Kant argued that:

"humanity itself is a dignity; for a human being cannot be used merely as a

[491] Michael Rosen, 'Dignity: Its History and Meaning' (Harvard University Press 2012), p.54.
[492] Joern Eckert, 'Legal Roots of Human Dignity in German Law' in David Kretzmer and Eckart Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002), p.43.
[493] See, for example, Genesis 1:27; Ephesians 4:24.
[494] Klaus Dicke, 'The Founding Function of Human Dignity in the Universal Declaration of Human Rights' in David Kretzmer and Eckart Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002), p.113.
[495] Kant also argued that the state *mus*t impose the death penalty on a murderer, which is not an argument supported in this thesis.

> means by any human being...but must always be used at the same time as an end. It is just in this that his dignity (personality) consists, by which he raises himself above all other beings in the world that are not human beings and yet can be used, and so over all *things*."[496]

Humanity, therefore, has a higher status than any other being, but importantly, all human beings have an equal status to each other, and are entitled to equal respect. Kant wrote that man

> "is under obligation to acknowledge, in a practical way, the dignity of humanity in every other human being. Hence there rests on him a duty regarding the respect that must be shown to every other human being."[497]

Dworkin further states that:

> "you cannot act in a way that denies the intrinsic importance of any human life without an insult to your own dignity."[498]

Importantly, this applies to *all* people, including those who commit crimes. It could be argued that an individual who commits a criminal act, particularly a serious crime such as murder, has forfeited his right to be treated with dignity, as that individual did not respect the dignity of his victim. However, as described by Hill, Kant considered that

[496] Immanuel Kant, 'The Metaphysics of Morals' (Mary Gregor tr, 2nd edn, Cambridge University Press 2017), p.225.
[497] Ibid, p.225.
[498] Ronald Dworkin, 'Is Democracy Possible Here?: Principles for a New Political Debate' (Princeton University Press 2008), p.16.

even when an individual commits a criminal act,

> "by doing wrong we do not forfeit our fundamental status as human beings, even though by criminal acts we may forfeit various civil rights."[499]

This recognition that even individuals who commit crimes should be accorded respect for their human dignity has continued to find support, with Waldron arguing that

> "*everyone's* maltreatment — maltreatment of the lowliest criminal, abuse of the most despised of terror suspects — can be regarded as a sacrilege, a violation of human dignity, which (in the words of Edmund Burke) ten thousand swords must leap from their scabbards to avenge."[500]

This was a view shared by Justice Brennan, who discussed the inherent dignity of the individual offender. Arguably, this means that an argument should not be made that the dignity of a person who has committed a crime is less important compared to the dignity of someone who has not, or that it is acceptable not to respect the criminal's dignity because the victim's dignity is being respected instead; the dignity of all humans must be valued. As Hill argues:

> "dignity is 'without equivalent' even among other things with dignity in the sense that one cannot justify violations of dignity by claiming they are a necessary

[499] Thomas E Hill Jr., 'Kantian Perspectives on the Rational Basis of Human Dignity, in Marcus Düwell, Jens Braarvig, Roger Brownsword and Dietmar Mieth (eds.), *Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014), p.216.
[500] Jeremy Waldron, 'Dignity, Rank and Rights' (Oxford University Press 2012), pp.69-70.

sacrifice to promote 'more' dignity elsewhere."[501]

The way to respect an individual's human dignity is to recognise that every individual is entitled to the same rights. This is a view that has been discussed by Dworkin,[502] who described these rights as "true" or "genuine" human rights, which are rights that all human beings have just by virtue of being human.[503] Dworkin described as "the fundamental human right" the

> "right to be treated with a certain *attitude*: an attitude that expresses the understanding that each person is a human being whose dignity matters."[504]

It follows that the way to acknowledge a person's dignity is to recognise his equal rights with every other human being. Beyleveld and Brownsword identified this link between dignity and rights in Kant's work, stating that:

> "…it is the best-known articulation of the idea of intrinsic human dignity, and it suggests a natural anchoring point for theories of human rights and duties."[505]

Bedau also discusses the link with human rights, setting out that "human dignity is intimately related to human *autonomy*," and that it "provides the basis for equal human

[501] Hill (n 499), p.205.
[502] See also Alan Gewirth, 'Human Dignity as the Basis of Rights', in Michael J Meyer and William A Parent (eds.), *The Constitution of Rights: Human Dignity and American Values* (Cornell University Press 1992), p.10 and Louis Henkin, 'Human Dignity and Constitutional Rights' in Meyer and Parent, p.211.
[503] Dworkin (n 498), p.29. These "true" or "genuine" human rights are in contrast to rights set out in various international treaties, charters and covenants, the protection of which are subject to interpretation of those documents.
[504] Dworkin (n 498), p.35.
[505] Deryck Beyleveld and Roger Brownsword, 'Human Dignity in Bioethics and Biolaw' (Oxford University Press 2001) p.52.

rights."[506] Bedau concludes that

> "the (Kantian) idea of human dignity...confer[s] on persons a certain *status*...[which] is constituted by the equal worth and capacity for autonomy and rationality of all persons, a status not shared with other things or even other creatures."[507]

This link between human dignity and human rights has also been identified by Gewirth, who states that

> "the close connection between human dignity and human rights has often been remarked... it is because humans have dignity that they have human rights,"[508]

while Henkin says that

> "links between individual rights and human dignity...[are] now commonly assumed."[509]

If the close connection between dignity and rights is accepted (which this thesis argues it should be), this means that, even where "dignity" is not expressly referred to in legal instruments, it is possible to infer its existence purely from the protection of individual rights: it is because all humans have dignity that human rights exist in the first place. In

[506] Hugo Adam Bedau, 'The Eighth Amendment, Human Dignity and the Death Penalty' in Meyer and Parent (n 502), p.154.
[507] Ibid, p.155.
[508] Gewirth (n 502), p.10.
[509] Henkin (n 502), p.211.

other words, dignity is the very basis for the existence of human rights.

It should be noted at this point that, whilst this thesis agrees with the Kantian conception of dignity as an inherent characteristic and the fact that it forms the basis for all human rights, this thesis does not adopt an entirely Kantian approach. There are two main respects in which this thesis does not agree with Kant: the first is that Kant considered that only "rational" human beings have dignity, which would potentially mean that severely mentally ill individuals could be considered as lacking dignity. Beyleveld and Brownsword describe Kant's ideas as meaning that

> "what has value is the capacity for moral thought and action, and it is only those beings (humans, so Kant assumes) who have this capacity who have dignity."[510]

Reconciling the notion that human dignity is intrinsic with the viewpoint that only rational and autonomous beings have dignity is, therefore, potentially problematic in the context of severely mentally ill individuals. Beyleveld and Brownsword consider that

> "this version of human dignity...is not universal in applying to *all* human beings; strictly speaking, it applies contingently only to those humans who have the capacity for autonomy"[511]

and, therefore, "...strictly speaking, human dignity and, concomitantly, human rights are

[510] Beyleveld and Brownsword (n 505), p.54.
[511] Ibid, p.23.

not enjoyed universally by all members of the human species."[512] Neal also identifies the conflict between describing dignity as an intrinsic value, but then ascribing it to rational beings, saying that:

> "if we adopt an account of dignity in which, following Kant, dignity equals intrinsic worth (''no price''), and if we source that intrinsic worth in broadly Kantian notions of autonomy and rational self-determination, then we find ourselves drawn inexorably toward the conclusion that, far from being able to understand dignity as ''an intrinsic element of being human'' or as signifying the ''intrinsic value of each human life'', the kind of intrinsic worth denoted by ''human dignity'' must be confined only to those who possess the relevant capacities or properties."[513]

A severely mentally ill individual may not always act rationally, which from a Kantian view suggests that they may not always possess human dignity; or at least, they do not have human dignity at times when they are not behaving rationally. This would suggest that the human dignity of a severely mentally ill individual is either intermittent or non-existent, an argument that should be rejected.

The second criticism of Kant is that Kant believed that considerations of dignity mean that the death penalty must be imposed against a murderer, which, again, is not a view supported in this thesis. Potter suggests that it is possible to support Kant's views in

[512] Ibid, p.23.
[513] Mary Neal, ''Not Gods But Animals'': Human Dignity and Vulnerable Subjecthood (2012) 33 Liverpool Law Review 177, at 184.

other respects, whilst rejecting Kant's views specifically on capital punishment.[514] Potter proposes a number of interesting theories that could be used to explain Kant's views on capital punishment; the first being that Kant's support of capital punishment is simply a reflection of the historical views of the punishment at the time;[515] for example, correctional institutions were not used to the same extent then, so Kant may not have considered that there was a real alternative to the death penalty.[516] Second, Potter argues that Kant appears to support capital punishment due to its retributive value, but it could be argued that, in the modern day, retribution is not an acceptable reason to inflict the death penalty.[517] As explored in chapter 1 of this thesis, retribution and deterrence are still considered to be the primary purposes of punishment in the United States, but the issue with retribution is that it could be viewed as simply an act of vengeance, and it is certainly questionable if revenge should be encouraged in the criminal justice system of a civilised society. Third, Potter notes that Kant supported punishments which were "symbolically equivalent" to the crime and gives the example that, rather than rape the rapist, Kant would support castration as a punishment. Therefore, Potter argues, this shows that "Kant is willing to adjust the punishment when a literally like punishment is either impossible or morally objectionable."[518] In the context of the death penalty, Potter considers that if it could be shown that the punishment is morally objectionable in contemporary society, a Kantian should accept a long prison sentence as an alternative punishment.[519]

[514] Nelson T Potter Jr., 'Kant and Capital Punishment Today' (2002) 36 The Journal of Value Inquiry 267
[515] Ibid, at 272-273.
[516] Ibid, at 278.
[517] Ibid, at 271-272.
[518] Ibid, at 274.
[519] Ibid, at 274.

The Contested Nature of Human Dignity

A challenge with formulating an argument against the constitutionality of a particular practice on the basis of human dignity – in this case, the exemption of severely mentally ill individuals – is the fact that the concept of human dignity could, itself, be viewed as problematic. There is no universal definition of what "dignity" embodies, which has led to the concept being a subject of much debate for centuries.[520] Macklin argues that the concept is "hopelessly vague" and that it simply means "respect for persons or for their autonomy."[521] Without one single definition, dignity can be interpreted to have a number of meanings, with Rosen stating that this "ambiguity leaves it open to exploitation."[522] Jones and Dupré identify that criticisms of the concept come from the fact that, as with other legal concepts, dignity can be used in a negative way, with "judges and lawmakers [using] concepts to mean what they desire or believe the outcome should be."[523] It is not so much an issue with the concept of human dignity itself, but when it is used in a way that is perceived as negative. The issue that this raises, as identified by Malkani, is that "dignity" can be used to "justify a range of diametrically opposed opinions,"[524] and, indeed, this is exactly the case with individual Justices on the Supreme Court, who have invoked dignity for different purposes (as will be discussed below).

However, the flexible nature of the concept of human dignity and the fact that there is

[520] For an in-depth discussion of the history of dignity and alternative interpretations of the concept, see Rosen (n 491).
[521] Ruth Macklin, 'Dignity is a useless concept' (2003) 327 British Medical Journal 1419, at 1420.
[522] Michael Rosen, 'Dignity: The Case Against' in Christopher McCrudden (ed.), *Understanding Human Dignity* (Oxford University Press 2014), p.153.
[523] Jones and Dupré (n 490), at 174.
[524] Bharat Malkani, 'Dignity and the Death Penalty in the United States Supreme Court' (2017) 44 Hastings Constitutional Law Quarterly 145, at 168.

not a rigid definition could be viewed as a strength; as Dupré notes, "rather than being an obstacle to understanding...the unfinished nature of human dignity is a crucial sign of its dynamism and usefulness."[525] The fact that judges would be required to interpret and apply a concept without a clear definition is what judges have always been required to do, as argued by Barak, when he said that the role of judges:

> "obligates them to furnish content to vague concepts. This is what they have done in the past, giving meaning to vague concepts such as liberty and equality. They must do so again now when they encounter the concept of human dignity as part of their constitution."[526]

These arguments put forward by both Barak and Dupré are convincing: the fact that dignity is not a fixed concept simply means that judges are required to determine how to apply the concept in individual cases. This can be seen in the judgments of the Supreme Court, which considers "evolving standards" in its Eighth Amendment analysis and frequently refers to dignity to its interpretation of the Eighth Amendment in capital cases. These cases will be considered later on in this chapter.

Dignity as Constraint

Before moving on to consider examples of dignity in the legal framework, there is another theory of human dignity to consider: the theory of "dignity as constraint," and it

[525] Catherine Dupré, 'Constructing the Meaning of Human Dignity: Four Questions', in McCrudden (n 522), p.121.
[526] Aharon Barak, 'Human Dignity: The Constitutional Value and the Constitutional Right' in McCrudden (n 522), p.361.

means that respecting an individual's dignity may involve preventing that individual from exercising his rights, or making certain decisions, which could be considered detrimental to his dignity. Beyleveld and Brownsword discuss this as an alternative to the "dignity as autonomy" theory[527] and note that "...appeals to human dignity can serve to confine rather than to support one's freedom."[528] In the context of severely mentally ill individuals in a capital trial or on death row, this theory could appear attractive: for example, if a severely mentally ill individual wishes to exercise his Sixth Amendment right to represent himself in a capital trial, he could be prevented from doing so, with the argument that it is necessary to preserve his dignity. The argument would be that allowing him to represent himself could have more negative consequences for him, compared to an individual who is not severely mentally ill, and so he must not be allowed to make that decision.[529] However, if one accepts the link between human dignity and autonomy, as advocated for in this thesis, the "dignity as constraint" theory is clearly at odds with any link between dignity and autonomy, and should therefore be rejected. In addition, there is a clear "slippery slope" risk with this argument: if severely mentally ill individuals are prevented from exercising certain rights in a criminal justice context, then why not in other contexts too? Perhaps other decisions a severely mentally ill individual makes in his lifetime could be considered as ultimately detrimental to him and, specifically, to his dignity, so an argument could be made that he should be prevented from making those decisions; for example, decisions around where to live, or whether or not to get married. It may appear to be a rather big

[527] See Beyleveld and Brownsword (n 505), chapter 2. Their discussion is focused on the issue of biomedicine, but it is possible to see that the "dignity as constraint" theory could have much broader application.
[528] Beyleveld and Brownsword (n 505), p.28.
[529] See, for example, the case of Scott Panetti – Death Penalty Information Center, 'The Case of Scott Panetti' <https://deathpenaltyinfo.org/policy-issues/mental-illness/the-case-of-scott-panetti> accessed 1 October 2019

leap from the specific death penalty context to other decisions, but there is at least some risk of this happening, and it should not be the case that severely mentally ill individuals could have their rights curtailed simply by reason of their illness. On a wider basis, there is the question over whether or not it is right for the state to determine what individuals should not be allowed to do, as being in conflict with their own dignity. Beyleveld and Brownsword cite a few cases here that illustrate this very issue.[530] Ultimately, the state should not be allowed to use "human dignity" as a means to restrict the rights of individuals within the state. The civil and criminal law already regulates conduct, without using dignity as a means for the state to prohibit activity which it simply disapproves of.[531]

The rejection of "dignity as constraint" in this thesis may appear at odds with the discussion in chapter 5 of so-called "volunteers" for execution. It is the view of this thesis that no-one should be able to volunteer for execution, especially severely mentally ill individuals. It is simply too risky that a severely mentally ill individual volunteering for execution may be choosing to do so as a result of the illness they suffer from; even if that is not the case, allowing individuals to volunteer can only be viewed as state-assisted suicide. On that basis, the "dignity as constraint" model could be invoked to prevent a severely mentally ill individual from volunteering for execution, by stating that such a decision does not respect that individual's dignity and so that individual has to be prevented from making that decision. However, for the reasons set out above, the "dignity as constraint" model is not desirable. Instead, the position that

[530] Beyleveld and Brownsword (n 505), pp.33-36.
[531] See, for example, the so-called "dwarf-throwing cases": Conseil d'Etat (October 27, 1995) req. nos. 136-727 (Commune de Morsang-sur-Orge) and 143-578 (Ville d'Aix-en-Provence). This is discussed in Beyleveld and Brownsword (n 505), pp.25-27 and pp.33-34.

should be adopted is that no-one should be able to volunteer. The fact that any individual chooses to do so is more a reflection of the conditions on death row than anything else; allowing an individual to volunteer becomes the "easy" option, rather than trying to address these conditions. For example, individuals on death row are normally not provided with education and/or work opportunities and are also regularly subject to the use of solitary confinement; such conditions will inevitably lead many individuals to feel that there is no hope, and ending their lives may appear the only solution.[532] If no-one is able to volunteer, then the link between dignity and rights is still maintained (rather than resorting to the use of dignity to constrain individuals' decisions) – it is not possible to volunteer, so everyone's right in this regard is equal; it is not the case that severely mentally ill individuals cannot volunteer but individuals not suffering from a severe mental illness can – no-one can take this course of action.

Human Dignity in International Law

It is possible to observe the protection of dignity in many legal instruments, even if the word "dignity" is not used expressly. Rosen considers that dignity is "central to modern human rights discourse" and notes that it is "embedded in numerous constitutions, international conventions, and declarations."[533] The importance of the protection of human dignity can be seen at an international level. It has been argued by Schachter that

[532] See the case of Scott Dozier, who committed suicide after his execution was postponed – Las Vegas Review Journal, 'Scott Dozier calls life on Nevada's death row "a dishonorable existence"' (20 December 2018) <www.reviewjournal.com/crime/courts/dozier-calls-life-on-nevadas-death-row-a-dishonorable-existence-1555901/> accessed 27 January 2020

[533] Rosen (n 491), pp.1-2.

> "political leaders, jurists and philosophers have increasingly alluded to the dignity of the human person as a basic ideal so generally recognized as to require no independent support...no other ideal seems so clearly accepted as a universal social good."[534]

More specifically, the terms "dignity," "human dignity" and "inherent dignity" appear in a number of international Conventions, demonstrating the importance of the concept in the context of a wide range of rights. It has been argued by Henkin that the authors of the Conventions in fact "justified human rights by relating them to human dignity"[535] as that would be "acceptable to all peoples, cultures, and political ideologies."[536] The preamble to the Charter of the United Nations in 1945 refers to "the dignity and worth of the human person." The United Nations Universal Declaration of Human Rights 1948 states in the preamble that:

> "recognition of the *inherent dignity* and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world..." (emphasis added).[537]

In Article 1 it also expressly states that "all human beings are born free and equal in dignity and rights." The UDHR in fact refers to dignity five times in total; as well as

[534] Oscar Schachter, 'Human Dignity as a Normative Concept' (1983) 77 American Journal of International Law 848, at 848-849.
[535] Henkin (n 502), p.211.
[536] Henkin (n 502), p.211.
[537] As with the Charter of the United Nations (1945), the Universal Declaration of Human Rights (1948) also refers in the preamble to "the dignity and worth of the human person."

twice in the preamble and in Article 1, it refers to dignity in the context of social and economic rights in Articles 22 and 23. The International Covenant on Civil and Political Rights in 1966 (ICCPR) refers expressly to "inherent dignity" twice in the preamble and once in Article 10 regarding imprisonment, and the International Covenant on Economic, Social and Cultural Rights in 1966 (ICESCR) also refers to "inherent dignity" twice in the preamble, and then a further reference to "dignity" is made in Article 13 regarding the right to education. In addition, the Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment from 1984 (CAT) refers to "the inherent dignity of the human person" in the preamble, and there are also several references to dignity in the preamble to the Convention on the Elimination of All Forms of Discrimination Against Women from 1979 (CEDAW). In the Convention on the Rights of the Child from 1989 (CRC), dignity is referred to eight times in a number of Articles,[538] which could suggest that the protection of a child's dignity is viewed as especially important, or that a child's dignity requires extra protection.

The Convention on the Rights of Persons with Disabilities (CRPD) applies to

> "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others" (Article 1).

Article 3 of the CRPD lists the principles of the CRPD; the first being "respect for inherent dignity, individual autonomy including the freedom to make one's own choices,

[538] Articles 23, 28, 37, 39, 40, in addition to the preamble.

and independence of persons." In addition, Article 12 states at paragraph 2 that "States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life." The CRPD, therefore, and Article 12 in particular, appear to support a view of human dignity that equates with autonomy. At the same time, Article 12 would reject a view of "dignity as constraint", discussed above. The General Comment to Article 12, written by the Committee on the Rights of Persons with Disabilities, begins by stating that

> "Equality before the law is a basic general principle of human rights protection and is indispensable for the exercise of other human rights."[539]

The General Comment goes on to state that:

> "The right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others."[540]

Here, there is arguably a clear link between respect for dignity and the recognition of equal rights amongst all persons. The General Comment also makes clear that the operation of Article 12 is to ensure that individuals with disabilities can make their own decisions, and not have decisions made on their behalf. The emphasis in Article 12 is very much on the importance of autonomy and the exercise of equal rights. However,

[539] Committee on the Rights of Persons with Disabilities, 'General comment No.1 (2014) Article 12: Equal recognition before the law' located at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement> accessed 23 January 2020, paragraph 1.
[540] General Comment No.1 (n 539), paragraph 8.

as will be explored later in this chapter, in the specific context of severely mentally ill individuals in capital trials and on death row, the recognition of equal rights can be problematic. There is a risk that the exercise of particular rights will be detrimental to a severely mentally ill individual, and yet denying the equal application of rights to a severely mentally ill individual would be in direct conflict with respect for his dignity.

In relation to the United States specifically, the American Convention on Human Rights from 1978 states that

> "no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."[541]

The frequent references to dignity in the above Conventions indicate the international importance accorded to the concept of human dignity, and also suggest the commitment of the United States to dignity as well, at least to an extent. The United States has ratified both the ICCPR[542] and the CAT[543], and has signed (although not ratified) the ICESCR, CEDAW, CRC and the CRPD. As has been examined in the previous chapter of this thesis, the Supreme Court does consider international law as part of its Eighth Amendment deliberations.[544] However, there is no guarantee of the

[541] American Convention on Human Rights, Article 5, paragraph 2. In addition to these Conventions, human dignity also features prominently in the Constitution of individual nations; most notably, in Germany and in South Africa. Article 1 of the German Constitution states that "human dignity shall be inviolable" and the South Africa Constitution refers to dignity as one of the values on which the state is founded on, as well as stating in Article 10 that "everyone has inherent dignity and the right to have their dignity respected and protected."
[542] With 5 reservations.
[543] With 2 reservations.
[544] *Coker v Georgia* 433 U.S. 584 (1977)

weight that will be accorded to international law by the Supreme Court; for example, in the 2004 case *Sosa v Alvarez-Machain*, the Supreme Court noted the limitations of both the UDHR and the ICCPR, stating that the UDHR "does not of its own force impose obligations as a matter of international law."[545]

Human Dignity in the United States

Dignity is not expressly referred to in the United States Constitution, so the question could arise as to why courts and legislators should give the concept primacy. The view of this thesis is that the concept of human dignity may not be expressly set out in the Constitution, but it is clearly implied. Human dignity may not feature as a separate, specific right in the United States Constitution, but that does not mean that dignity is not protected under United States law. On the contrary, it is clear to see the protection of dignity featuring implicitly in both the Constitution and the Bill of Rights. This is a view supported by Barak, who stated that "consideration of the constitutional text in its entirety leads to the conclusion that the value is included within the constitution."[546] In Bedau's view, "it is virtually impossible to argue that the Bill of Rights and the Constitution as a whole are indifferent to human dignity,"[547] explaining that

> "we cannot argue that although our constitutional law certainly acknowledges various equal human rights, it has no interest in the value of human autonomy or

[545] 542 U.S. 692 (2004), at 734.
[546] Barak (n 526), p.362.
[547] Bedau (n 506), p.156.

the worth of human persons or – in a phrase – in human dignity."[548]

Henkin suggests that the Framers of the Constitution considered human dignity to be a "self-evident truth,"[549] which was not set out expressly because:

> "...the Framers were content with such respect for human dignity as is implied in the liberal state, as summarized in the Declaration of Independence and reflected in the Ninth Amendment."[550]

Parent argues that several Amendments to the Constitution "unquestionably" protect the right to human dignity, including the Eighth Amendment[551] and further argues that the very presence of equal rights demonstrates a concern for dignity.[552] Similarly, Goodman states that "human dignity...is a core value underlying express and un-enumerated constitutional rights and guarantees."[553]

Justice Brennan, who has frequently referred to the concept of dignity in his judgments (which will be discussed further below), wrote an article in 1986 in which he stated his belief that

> "the Declaration of Independence, the Constitution, and the Bill of Rights

[548] Ibid, p.157.
[549] Henkin (n 502), p.214.
[550] Ibid, p.225.
[551] William A. Parent, 'Constitutional Values and Human Dignity', in Meyer and Parent (n 502), p.69. Parent also names the First, Fifth, Sixth, Thirteenth, Fifteenth and Nineteenth Amendments as protecting human dignity.
[552] Parent (n 551), p.70.
[553] Maxine D. Goodman, 'Human Dignity in Supreme Court Constitutional Jurisprudence' (2005-2006) 84 Nebraska Law Review 740, at 743.

> solemnly committed the United States to be a country where the dignity and rights of all persons were equal before all authority"[554]

and that

> "...the Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being."[555]

Justice Brennan further considered that

> "if our free society is to endure, those who govern must recognize human dignity and accept the enforcement of constitutional limitations on their power conceived by the Framers to be necessary to preserve that dignity and the air of freedom which is our proudest heritage."[556]

Just as the protection of dignity can be seen as implied in the Constitution, dignity also features, either as an express or implied right, in the individual state constitutions. This is also significant, because it demonstrates a commitment to the protection of human dignity, which could form the basis of future challenges in favour of exempting severely mentally ill individuals. One potential way to bring about the reform (and eventual abolition) of the death penalty is to get as many states as possible to agree with a particular course of action (in this case, the exemption of severely mentally ill

[554] William J. Jr. Brennan, 'The Constitution of the United States: Contemporary Ratification' (1986) 27 South Texas Law Review 433, at 433.
[555] Ibid, at 433.
[556] Ibid, at 440.

individuals), which should in turn influence the Supreme Court. An argument based on the concept of human dignity becomes easier to apply when it is already present (in some form) in the state constitutions.

The table below identifies the form that dignity takes in each constitution. The states highlighted in bold in the far left column are those that have not abolished the death penalty. Two states, Louisiana and Montana (both, as it happens, death penalty states), refer to an express right to dignity; Section 3, Article I of Louisiana's constitution is titled "Right to Individual Dignity"[557] and Section 4, Article II of the Montana constitution is headed "Individual Dignity" and begins by stating that "the dignity of the human being is inviolable."[558] In almost all of the other states – with the exceptions of Delaware, Minnesota and New York – there is a reference to either inherent, inalienable or individual rights, or a reference to the fact that all men are created equally, or a reference to dignity in the context of victims' rights. This last category, that of victims' rights, is interesting, not least because many of the constitutions set out the rights of perpetrators of crime, but the protection of dignity does not feature there; it is only in the context of victims that dignity is referenced expressly.

As has been argued earlier in this chapter, human dignity is the basis for all human

[557] "No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime."

[558] "The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas." See also Matthew O. Clifford and Thomas P. Huff, 'Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity Clause" with Possible Applications' (2000) 61 Montana Law Review 301

rights. References to inherent/inalienable rights, therefore, and also references to equality, can be seen to reflect the importance of the protection of dignity. The acknowledgement and protection of individual rights is simply an acknowledgement of the inherent dignity of all people.

As part of the process of exempting severely mentally ill individuals from the death penalty, an argument based on the concept of human dignity would be strengthened by the express reference to dignity in all state constitutions. It is possible for amendments to be made to constitutions, as can be seen through the introduction of provisions relating to victims' rights, which have been added into many state constitutions in relatively recent times. If all of the state constitutions expressly referred to the concept of human dignity, this may prove to be persuasive to the Supreme Court, which already refers to dignity in a number of its judgments, and may then be more inclined to do so consistently.

	Dignity right	Inherent/inalienable/individual rights	Equality	Victims' right to dignity
Alabama		✓	✓	
Alaska		✓	✓	✓
Arizona		✓		✓
Arkansas		✓	✓	
California		✓		
Colorado		✓		
Connecticut			✓	
Delaware				
Florida		✓	✓	✓
Georgia		✓	✓	
Hawaii		✓	✓	
Idaho		✓	✓	✓
Illinois		✓		
Indiana		✓	✓	
Iowa		✓	✓	
Kansas		✓	✓	
Kentucky		✓	✓	
Louisiana	✓	✓	✓	✓
Maine		✓	✓	
Maryland				✓

Massachusetts		✓	✓	
Michigan			✓	✓
Minnesota				
Mississippi				✓
Missouri		✓	✓	
Montana	✓	✓	✓	
Nebraska		✓		
Nevada		✓	✓	✓
New Hampshire		✓	✓	
New Jersey		✓		
New Mexico		✓		✓
New York				
North Carolina		✓	✓	✓
North Dakota		✓		✓
Ohio		✓		✓
Oklahoma		✓		✓
Oregon		✓	✓	✓
Pennsylvania		✓		
Rhode Island			✓	✓
South Carolina			✓	✓

South Dakota		✓		✓
Tennessee		✓		
Texas			✓	✓
Utah		✓		✓
Vermont		✓		
Virginia		✓		✓
Washington		✓		✓
West Virginia		✓		
Wisconsin		✓		✓
Wyoming		✓	✓	

Human Dignity and the Eighth Amendment

The Supreme Court has referred to "dignity" in a number of capital cases,[559] but has not applied the concept in every case, and nor has it provided a clear explanation of what exactly it means by "dignity". Goodman is critical of the Supreme Court's use of the term "dignity" in its Eighth Amendment decisions, stating that:

> "the Court's treatment of human dignity of a value has been inconsistent and sporadic. These decisions are inconsistent with the Court's strong rhetoric regarding human dignity and sporadic in that the Court appeared to follow public

[559] See *Louisiana v Resweber* 329 U.S. 459 (1947), *Trop v Dulles* 356 U.S. 86 (1958), *Miranda v Arizona* 384 U.S. 436 (1966), *Furman v Georgia* 408 U.S. 238 (1972), *Gregg v Georgia* 428 U.S. 153 (1976), *Woodson v North Carolina* 428 U.S. 280 (1976), *Ford v Wainwright* 477 U.S. 399 (1986), *Atkins v Virginia* 536 U.S. 304 (2002), *Hope v Pelzer* 536 U.S. 730 (2002), *Roper v Simmons* 543 U.S. 551 (2005), *Kennedy v Louisiana* 554 U.S. 407 (2008), *Hall v Florida* 134 S Ct. 1986 (2014)

> opinion and/or the executive branch's agenda in deciding the strength to give human dignity as a value in its decision-making, rather than treating dignity as invariant, an independent constitutional precept that should be factored into its decision-making regardless of public opinion."[560]

However, the fact that the Supreme Court has referred to it at all demonstrates that it is considered to be an important factor in its deliberations. This is clearly evident in the writings of the late Justice William Brennan; for example, he discussed the importance of dignity at length in his concurring judgment in the landmark case of *Furman v Georgia* in 1972.[561] In addition, the lack of a clear definition of human dignity enables the Supreme Court to apply the concept as it considers appropriate in individual cases and, crucially, for the application of the concept to evolve over time.

The Supreme Court has referred to "dignity" in a number of key decisions. The most detailed discussion of dignity can be found in the 1972 landmark decision of *Furman v Georgia*,[562] which will be discussed in detail below. Significantly, the Supreme Court has discussed the dignity of all people, including convicted felons.[563] In capital cases, the Supreme Court has often referred to dignity as part of its determination of whether or not a particular practice is in violation of the Eighth Amendment.

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[560] Goodman (n 553), at 757-758.
[561] 408 U.S. 238 (1972)
[562] 408 U.S. 238 (1972)
[563] See Carter Snead, 'Human Dignity in US Law' in Marcus Düwell, Jens Braarvig, Roger Brownsword and Dietmar Mieth (eds.), *Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014), p.389: the Supreme Court has "repeatedly appealed to the intrinsic human dignity of all people – including convicted felons. In each case, intrinsic human dignity was deployed as a normative good to anchor the Court's analysis, though it did not constitute the applicable legal standard itself."

Although it is positive that the Supreme Court does refer to dignity in its deliberations, there are three issues that arise from this. The first is that the Supreme Court does not refer to dignity in *all* of its Eighth Amendment decisions, and instead the concept appears rather sporadically across the Supreme Court's Eighth Amendment jurisprudence. Goodman notes the "inconsistent and sporadic"[564] treatment of human dignity by the Supreme Court and argues that the Supreme Court needs to develop a test or standard for consistent decision-making in this area.[565] The importance of the protection of dignity would be stronger if it was referred to consistently in every judgment; in addition, if the Supreme Court repeatedly considered the concept in death penalty cases, there may be a gradual move closer towards abolition, as dignity moves to the forefront of the Supreme Court's considerations and the Supreme Court consequently finds that it is unable to reconcile the use of the punishment with respect for human dignity.

The second issue is that the Supreme Court does not set out one clear definition of its understanding of the concept. Again, the weight attached by the Supreme Court to human dignity would be stronger and more consistent if the Supreme Court articulated in clear terms what they considered to be encompassed by the concept. It may, for example, be an acknowledgement of the link between human dignity and human rights, supported by the references to rights and equality that appear in almost all of the individual state constitutions, discussed earlier in this chapter.

[564] Goodman (n 553), at 757.
[565] Ibid, at 778.

The third issue, related to the second issue above, is that the Justices of the Supreme Court have different conceptions of dignity and apply it in different ways.[566] Malkani suggests that there are two possible factors contributing to this inconsistency of approach to human dignity by the Justices: either it is a result of difficulties the Supreme Court has with interpreting the Eighth Amendment, or simply a result of the difficulties with dignity as a concept.[567] Another explanation for this difference of interpretation is down to the Justices' own views shaping how they apply the concept of human dignity. Dworkin also considered how the Justices' own views inevitably shape how they apply the concept of human dignity, when he writes about the "moral reading" of the Constitution:

> "once judges have identified the principle the framers enacted, then they must enforce it *as* a principle, according to their *own* judgment about what it requires in particular cases, even if that means applying it not only in circumstances the framers did not contemplate, but in ways they would not have approved had they been asked."[568]

As discussed earlier in this thesis, the political views of the Justices will naturally influence their interpretation and application of different rights and principles. In the case of dignity, both Justice Brennan and Justice Kennedy recognised the existence of human dignity and its importance, but diverge as to how it applies. For Justice Brennan, respecting human dignity cannot be reconciled with the use of the death

[566] See Malkani (n 524), p.165.
[567] Ibid, p.166.
[568] Ronald Dworkin, 'Freedom's Law: The Moral Reading of the American Constitution' (Oxford University Press 1996), p.268.

penalty; whereas for Justice Kennedy, human dignity requires the use of the punishment in some circumstances. Interestingly, they could both be considered as adopting a Kantian view, just in different respects; Kant believed that human dignity was inherent, but also that the punishment *must* be used in some circumstances. In this thesis, it is Justice Brennan's view that is supported: there is a fundamental inconsistency between protecting an individual's human dignity and subjecting them to capital punishment. It is this application of dignity that should be used by all justices of the Supreme Court; dignity should not be used as a means of justification for the death penalty.

In order to understand the approach of the Supreme Court to dignity, it is important to consider in detail the key cases where it is referenced. In *Louisiana v Resweber*,[569] the Supreme Court was asked to consider whether or not attempting to electrocute an individual for a second time, after the first attempt had failed, would violate the Fourteenth Amendment to the United States Constitution, in conjunction with the Fifth and Eighth Amendments. The Supreme Court determined that it would not violate the Constitution. In his concurring judgment, Justice Frankfurter considered that the Fourteenth Amendment prevented states from acting "in ways that are offensive to a decent respect for the dignity of man.[570]

These words were then echoed in *Trop v Dulles*,[571] in which the Supreme Court ruled that revoking the citizenship of a United States citizen as a punishment was

[569] 329 U.S. 459 (1947)
[570] Ibid, at 468.
[571] 356 U.S. 86 (1958)

unconstitutional. Chief Justice Warren, delivering the opinion of the Supreme Court, stated that "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[572] Although not a capital case, significantly this judgment has been frequently invoked by the Supreme Court in subsequent decisions. Also in a non-capital case, in *Miranda v Arizona* in 1966 the Supreme Court stated that

> "the constitutional foundation underlying the privilege [against self-incrimination] is the respect a government – state or federal – must accord to the dignity and integrity of its citizens."[573]

The most detailed discussion of dignity by the Supreme Court can be found in the concurring opinion of Justice Brennan in *Furman v Georgia*,[574] who stated that the United States is "a society [in] which the dignity of the individual is the *supreme value*"[575] (emphasis added) and concluded that considerations of dignity mean that death can never be an acceptable punishment. Justice Brennan referred to the principle from *Trop v Dulles* and went on to say that, when considering if a punishment is acceptable under the Eighth Amendment,

> "the State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity."[576]

[572] Ibid, at 100.
[573] 384 U.S. 436 (1966), at 460.
[574] 408 U.S. 238 (1972), from 270 onwards.
[575] Ibid, at 296.
[576] Ibid, at 270.

Justice Brennan considered that *all* humans have dignity, stating that:

> "the fundamental premise of the [Cruel and Unusual Punishments] Clause [is] that even the vilest criminal remains a human being possessed of common human dignity."[577]

Justice Brennan further argued that if society rejected the use of a particular punishment, this would be "a strong indication that a severe punishment does not comport with human dignity."[578]

The passion that Justice Brennan felt for the importance of human dignity was not just evident in this one case; when the death penalty was reinstated four years later in *Gregg v Georgia*, he wrote a dissenting opinion that again set out in strong terms the importance he placed on considerations of human dignity, calling it

> "the *primary moral principle* that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings"

and that

> "a judicial determination whether the punishment of death comports with human

[577] Ibid, at 273.
[578] Ibid, at 277.

dignity is therefore not only permitted but *compelled* by the Clause" (emphasis added).[579]

Justice Marshall also dissented, referring to the concept of dignity in *Trop v Dulles* and concluding that the death penalty "has as its very basis the total denial of the wrongdoer's dignity and worth."[580] The majority of the Supreme Court in *Gregg*, meanwhile, acknowledged that the concept of human dignity is at the "core"[581] of the Eighth Amendment, but decided that the use of the death penalty was not inconsistent with human dignity, determining that

"the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe."[582]

The Supreme Court has referred to dignity in the context of considering appropriate punishments. In *Woodson v North Carolina* the Supreme Court considered that respect for human dignity requires consideration of aspects of the character of the individual offender and the circumstances of the particular offense before deciding to impose a death sentence,[583] and in *Ford v Wainwright* the Supreme Court said that it must

"[take] into account objective evidence of contemporary values before

[579] 428 U.S. 153 (1976), at 229-230.
[580] 428 U.S. 153 (1976), at 240-241.
[581] 428 U.S. 153 (1976), at 182.
[582] 428 U.S. 153 (1976), at 187.
[583] 428 U.S. 280 (1976), at 303-305.

> determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects."[584]

Justice Marshall referred to dignity in his separate opinion, saying that states are prohibited from executing insane prisoners under the Eighth Amendment

> "to protect the dignity of society itself from the barbarity of exacting mindless vengeance."[585]

The Supreme Court, in the landmark 2002 decision *Atkins v Virginia* exempting intellectually disabled individuals from the death penalty, briefly referred to *Trop v Dulles*:

> "As Chief Justice Warren explained in his opinion in Trop v. Dulles: 'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man...'[586]

In a non-capital case, the Supreme Court again referred to *Trop v Dulles*, declaring as unconstitutional the punishment of tying an inmate to a hitching post, stating that the individual "was treated in a way antithetical to human dignity."[587]

The Supreme Court again referred to the dignity of all people in *Roper v Simmons*,

[584] 477 U.S. 399 (1986), at 406.
[585] Ibid, at 410.
[586] 536 U.S. 304 (2002), at 311.
[587] *Hope v Pelzer* 536 U.S. 730 (2002), at 745.

where the Supreme Court stated that

> "by protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."[588]

The Supreme Court discussed the importance of the Constitution, commenting that it contains "broad provisions to secure individual freedom and preserve human dignity."[589] This comment provides support for the argument that the protection of dignity is implied in the Constitution. In her dissenting judgment, Justice O'Connor referred to the fact that dignity is not a static concept, saying that

> "this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries."[590]

The Supreme Court again considered dignity in connection with punishment in *Kennedy v Louisiana*, where the Supreme Court considered that

> "evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule."[591]

[588] 543 U.S. 551 (2005), at 560.
[589] Ibid, at 578.
[590] Ibid, at 605.
[591] 554 U.S. 407 (2008), at 420.

In *Hall v Florida*, the Supreme Court referred to *Trop v Dulles* and said that

> "to enforce the Constitution's protection of human dignity, this Court looks to the 'evolving standards of decency that mark the progress of a maturing society.'"[592]

The Supreme Court stated that

> "the Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be. This is to affirm that the Nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force."[593]

The Supreme Court went on to say that

> "to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being."[594]

In determining that Florida's test for intellectual disability was unconstitutional, the Supreme Court stated that

> "if the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in Atkins could become a nullity, and the

[592] 134 S.Ct. 1986, at 1992.
[593] Ibid, at 1992, quoting *Trop v Dulles* 356 U.S. 86 (1958), at 100-101.
[594] Ibid, at 1992.

Eighth Amendment's protection of human dignity would not become a reality."[595]

It concluded that

> "Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects."[596]

The Supreme Court followed *Hall v Florida* in *Moore v Texas*, in which a state's determination of intellectual disability was again brought into question. The Supreme Court quoted from *Hall*, stating that the Eighth Amendment "reaffirms the duty of the government to respect the dignity of all persons,"[597] and referred to the need "to enforce the Constitution's protection of human dignity."[598] The Supreme Court further referred to *Hall*, declaring that states cannot have complete discretion to define intellectual disability, because this would go against both the principle from *Atkins v Virginia* and the Eighth Amendment's protection of human dignity.[599]

The above cases demonstrate the importance placed by the Supreme Court on the concept of human dignity, and also reveals the Supreme Court's views that dignity is protected by the Constitution and is one of the most important principles requiring legal

[595] Ibid, at 1999.
[596] Ibid, at 2001.
[597] 581 U.S. ___ (2017), at 9.
[598] 581 U.S. ___ (2017), at 9.
[599] 581 U.S. ___ (2017), at 17 (quoting from *Hall v Florida* 134 S.Ct. 1986 (2014), at 1999).

recognition and protection. However, at the same time, it is clear that the Justices adopt different conceptions of dignity; for example, Justice Brennan appeared to consider that dignity is an intrinsic characteristic, whereas Justice Kennedy considered that dignity requires the use of the death penalty in some circumstances. The Supreme Court needs to refer to dignity in every death penalty case, ensuring that respect for dignity features prominently in its Eighth Amendment decisions.

The Right of Self-Representation

The right of self-representation provides a clear example of where it is not possible to respect an individual's human dignity when that individual wishes to exercise certain rights. In the 1975 case of *Faretta v California*,[600] the Supreme Court held that criminal defendants who are deemed competent to stand trial have a constitutional right under the Sixth Amendment to refuse counsel and to represent themselves in state criminal proceedings. The right will ordinarily be guaranteed under the Constitution even if the defendant exercises this right to his detriment.[601] Competence to stand trial and competence to waive counsel are two separate determinations; however, in *Godinez v Moran*[602] in 1993 the Supreme Court ruled that the test for competence in both scenarios is the same and, therefore, if a defendant was found competent to stand trial, they would also be held competent to waive counsel. As set out in chapter 2 of this thesis, the test for competence to stand trial is from the 1960 case of *Dusky v United States*, based on whether the defendant understands why he has been charged and is

[600] 422 U.S. 806 (1975)
[601] 422 U.S. 806 (1975), at 834: "although [the defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored."
[602] 509 U.S. 389 (1993)

also able to assist in his defence.[603] The issue with this test, however, is that

> "many commentators have suggested that the standard is unreasonably low and allows individuals whose ability to reason is severely clouded by a mental illness or other disability to be found competent."[604]

It has even been argued that

> "...the *Faretta* right has allowed, even encouraged, mentally ill, often paranoid criminal defendants to forego court-appointed counsel. In this way, the *Faretta* right often corrupts the criminal process by replacing trained and experienced counsel with an autonomous yet ineffective advocate."[605]

In 2008, however, the Supreme Court recognised the particular difficulty with granting the right of self-representation to a defendant who is not mentally competent. The Supreme Court ruled that a state can force a severely mentally ill defendant to be represented at trial:

> We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon

[603] 362 U.S. 402 (1960)
[604] Martin Sabelli and Stacey Leyton, 'Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System' (2000-2001) 91 Journal of Criminal Law and Criminology 161, at 170.
[605] Ibid, at 169.

> representation by counsel for those competent enough to stand trial under Dusky but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.[606]

This could be seen as a positive development in the Supreme Court's jurisprudence, from the perspective that the Supreme Court recognised the particular difficulties that may arise for severely mentally ill individuals in criminal proceedings. However, despite the Supreme Court's acknowledgment that it may not be appropriate to allow a severely mentally ill individual to elect to represent himself, the Supreme Court did not elaborate upon how lower courts could determine if a defendant was competent to stand trial but not competent to waive counsel; the "competent but not competent" defendant.[607] As a result, severely mentally ill individuals are still being allowed to elect to represent themselves, with Blume and Clark finding that

> "given the lack of guidance, trial judges are reluctant to deny the right to proceed pro se, and appellate courts are, for the most part, deferring to the decisions of the trial judges."[608]

It does appear that, generally in such cases, courts remain willing to allow a defendant to choose to represent himself, regardless of whether or not that decision was made as a result of the severe mental illness that individual has, as found by Sabelli and Leyton:

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[606] *Indiana v Edwards* 554 U.S. 164 (2008), at 177-178.
[607] John H Blume and Morgan J Clark, 'Unwell: *Indiana v. Edwards* and the Fate of Mentally Ill Pro Se Defendants' (2011) 21 Cornell Journal of Law and Public Policy 151, at 162.
[608] Ibid, at 164.

> "while in the past there was some recognition that a mentally ill defendant was not in the position to decide to forego presentation of such evidence, increasingly since the 1970s, courts have proved unwilling to override a defendant's autonomy and have therefore afforded respect to a defendant's choices."[609]

The issue is that a severely mentally ill individual should arguably be afforded the same rights as all other defendants, meaning that a severely mentally ill individual should be able to represent himself if he so chooses and to make decisions about the presentation of evidence, as stated by Nelan:

> "it is argued that defendants should be free to direct their own defense, and forcing the introduction of mitigating evidence on them would violate this autonomy."[610]

In his dissenting opinion in *Indiana v Edwards*, Justice Scalia objected to the Supreme Court's majority opinion that the right to self-representation could be denied, and argued that the Supreme Court "should respect the autonomy of the individual by honoring his choices knowingly and voluntarily made."[611] However, this ignores the fact that the Supreme Court made this decision in the context of mentally incompetent defendants, and it is questionable if a severely mentally ill individual could be said to have "knowingly and voluntarily" made such a decision whilst also suffering from the

[609] Sabelli and Leyton (n 604), at 171-172.
[610] Kamela Nelan, 'Restricting Waivers of the Presentation of Mitigating Evidence by Incompetent Death Penalty Volunteers' (2008) 27 Developments in Mental Health Law 23, at 35.
[611] 554 U.S. 164 (2008), at 187.

effects of their severe mental illness.

A severely mentally ill individual may, therefore, opt to represent himself – and is highly likely to be allowed by the court to do so – but this quite clearly may not be in his best interests in terms of presenting the best possible defence that he can. As discussed in chapter 2 of this thesis, considerations of "future dangerousness" regularly influence the jury, and there is clearly a risk that any "abnormal" behaviour exhibited by the defendant could lead the jury to believe that the defendant is in fact more dangerous and, therefore, more deserving of the death penalty. The difficulty, then, is in ensuring respect for the dignity of the severely mentally ill defendant, balanced against the potentially negative consequences of allowing him to exercise his right of self-representation.

The case of *Panetti v Quarterman*[612] provides an illustration of the detrimental impact that an individual exercising his right to self-representation can have when that individual suffers from a severe mental illness. Panetti was charged with the murder of his estranged wife's parents in 1992. During his original trial in 1995,

> "it appears that the trial judge did not hold a hearing on Panetti's competence to proceed to trial, with or without counsel, and allowed him to waive his right to counsel and represent himself."[613]

[612] 551 U.S. 930 (2007)
[613] Richard J Bonnie, '*Panetti v. Quarterman:* Mental Illness, the Death Penalty, and Human Dignity' (2007) 5 Ohio State Journal of Criminal Law 257, at 260.

Panetti "acted bizarrely"[614] during the trial; for example, he "dressed as a cowboy throughout the trial and attempted to subpoena President John F. Kennedy, Jesus Christ, and Pope John Paul II, among hundreds of other unavailable witnesses with no relevant knowledge."[615] Panetti was subsequently convicted and sentenced to death. Two clear issues arose as a result of Panetti representing himself at trial, which it has been argued meant that the trial was "devoid of moral dignity."[616] The first was that "Panetti had a strong, valid claim that he was insane at the time of the offense but was unable to present the defense in any effective way because of his own mental illness and lack of legal training."[617] The second issue was that, following the death sentence, one juror claimed in an affidavit that

> "the jury would not have sentenced Panetti to death if he had been represented by counsel...the juror claimed that the jury believed that Panetti was severely mentally ill, and that his conduct in the courtroom scared the jurors into believing that death was the only option."[618]

This reflects the difficulties experienced by juries in being able to empathise with a severely mentally ill individual, as discussed in chapter 2 of this thesis. This case, therefore, clearly demonstrates the issues faced by severely mentally ill individuals who choose to represent themselves, as they "often subvert all of the procedural safeguards our system affords them, frustrating or angering judges, prosecutors and jurors in the

[614] Amy J Dillard, 'Madness Alone Punishes the Madman: The Search for Moral Dignity in the Court's Competency Doctrine as Applied in Capital Cases' (2012) 79 Tennessee Law Review 461, at 485.
[615] Ibid, at 486.
[616] Ibid, at 487.
[617] Ibid, at 486.
[618] Ibid, at 486-487.

process."[619]

Commenting on the case, Bonnie considered that

> "courts trivialize mental illness, disserve the important principle of autonomy protected by *Faretta*, and compromise the dignity of the law when they allow defendants as disturbed as Panetti to represent themselves in criminal trials"[620]

and argued that "it is horrifying that judges would allow such a spectacle in a capital trial."[621] Bonnie concludes that

> "the case reflected an utter disregard for the constitutional principles designed to take into account the clinical realities of severe mental illness – to prevent gross injustice at trial and inhumanity on death row."[622]

Further, it has been argued that "the pathetic spectacle of the trial of an incompetent defendant diminishes society's respect for the dignity of the criminal justice process,"[623] so it is not just the dignity of the individual that is affected.

[619] Bonnie (n 613), at 282.
[620] Ibid, at 262.
[621] Ibid, at 262.
[622] Ibid, at 283.
[623] BJ Vernia, 'The Burden of Proving Competence to Stand Trial: Due Process at the Limits of Adversarial Justice' (1992) 45 Vanderbilt Law Review 199, at 201.

Conclusion

The concept of human dignity, based on the Kantian conception that it is an inherent characteristic and that it is the basis for all human rights, provides an effective argument against the execution of severely mentally ill individuals. Human dignity has not only been the subject of philosophical discussion for hundreds of years, but also features prominently in international conventions and even expressly in the constitution of some nations. In the United States Constitution, dignity is not explicitly referred to, but it is implicit in the Constitution through the recognition and protection of a wide range of rights. Similarly, two of the state constitutions contain provisions referring to the specific right to dignity, and in almost all of the constitutions the protection of dignity is again implied through the protection of a range of rights, and the recognition of the equality of all people. In the United States Supreme Court, dignity has featured repeatedly in many of its judgments, including in its Eighth Amendment jurisprudence. It is time, however, that the concept of human dignity moved to the forefront of the Supreme Court's discussion of the Eighth Amendment and what constitutes cruel and unusual punishment, as this emphasis on dignity will lead to the conclusion that the death penalty as a whole is inconsistent with respect for human dignity and should be abolished. Prior to total abolition, a focus by the Supreme Court on human dignity will support the argument that severely mentally ill defendants should be exempt from the death penalty. Continuing to execute severely mentally ill defendants not only violates their individual human dignity, but also offends the dignity of society as a whole. At this point, it is important to reflect again upon the views of Justice Brennan, who continued

his passionate writings about human dignity long after his key judgment in *Furman*. In an article in 1986, Justice Brennan stated in the opening paragraph that:

> the Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being. The Declaration of Independence, the Constitution, and the Bill of Rights solemnly committed the United States to be a country where the dignity and rights of all persons were equal before all authority.[624]

Justice Brennan concluded in that article that: "if we are to be as a shining city upon a hill, it will be because of our ceaseless pursuit of the constitutional ideal of human dignity."[625] The Supreme Court now needs to ensure that it continues this "ceaseless pursuit" of human dignity, and recognises that the exemption of severely mentally ill individuals is an important part of that. The next chapter of this thesis will consider a case study demonstrating the issues raised by dignity considerations: volunteers for execution.

[624] Brennan (n 554), at 433.
[625] Ibid, at 445.

Chapter 5: Volunteers for Execution: a Case Study of Human Dignity

Introduction

On 15 March 2018, Michael Wayne Eggers was executed in Alabama. Eggers was one of three so-called volunteers executed in 2018, having stated in 2016 that he wished to expedite his execution and waive his appeals. Eggers was deemed competent to waive his appeals, despite evidence from his attorneys that he was severely mentally ill. Just a few days before Eggers was due to be executed, his attorneys filed a petition for writ of certiorari, asking the United States Supreme Court to review the decision of the United States Court of Appeals for the Eleventh Circuit that Eggers was competent to waive his appeals and to be executed. In the petition, his attorneys argued that Eggers was

> "...a mentally ill death-sentenced inmate using Alabama's system as his method of suicide because he cannot get anyone to believe that his delusions are not delusions."[626]

The petition further detailed that Eggers believed that there were "thousands of conspirators,"[627] including his attorneys, involved in a plot against him, and that his overarching argument was that he would rather be executed than continue to be

[626] *Michael Eggers (Petitioner) v Alabama (Respondent)*, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, 12 March 2018, p.18.
[627] Ibid, p.2.

represented by these attorneys.[628] Despite these disturbing allegations of Eggers's severe mental illness, the Supreme Court denied the petition on 15 March 2018, and Eggers was executed later that same day.

Eggers's case is just one example of an individual who has been permitted to waive his appeals and "volunteer" for execution, despite evidence that he is suffering from a severe mental illness. Since the reinstatement of the death penalty in 1976, the Death Penalty Information Center has identified 149 inmates who have volunteered for execution,[629] and a study in 2017 found that at least 63 per cent of volunteers were alleged to have been suffering from a severe mental illness.[630] In order to volunteer for execution, the individual must be found competent to do so; the fact that severely mentally ill individuals are able to volunteer reveals significant issues with the test for competency itself, which will be discussed below. The ability to volunteer for execution also raises difficult questions regarding the dignity of the individual concerned, particularly in the context of severely mentally ill individuals; namely, how do considerations of dignity align with the ability to volunteer for execution? A Kantian conception of dignity (as explored in chapter 4 of this thesis) means that respect for human dignity involves a recognition that all individuals are entitled to equal rights, which in this case would allow even severely mentally ill individuals to volunteer for execution. However, in that case, the exercise of that right may prove to be more to the detriment of a severely mentally ill individual (compared to an individual not

[628] Ibid, p.6.
[629] The DPIC lists 149 volunteers up to November 2019: 'Execution Volunteers' <https://deathpenaltyinfo.org/executions/executions-overview/execution-volunteers> accessed 2 January 2020
[630] The Washington Post, 'Does the death penalty target people who are mentally ill? We checked' (3 April 2017) <https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/03/does-the-death-penalty-target-people-who-are-mentally-ill-we-checked/?noredirect=on&utm_term=.631d3efd80fe> accessed on 26 April 2019.

suffering from a severe mental illness), as the decision may be directly linked to the severe mental illness they suffer from; it therefore seems directly contrary to respect for an individual's dignity to enable him to volunteer for execution in these circumstances. This leads to the conclusion that either volunteering for execution should be removed as an option for all individuals – not just the severely mentally ill – or severely mentally ill individuals should be exempt from the death penalty altogether.

The chapter will begin with an examination of the test for competency to volunteer, and its associated limitations. The first issue is that an assessment of an individual's competency to volunteer for execution is not always carried out, because it is considered unnecessary if an individual was found competent to stand trial. This is problematic, however, given the typically lengthy periods between trial and execution, during which time an individual's competence may have diminished, perhaps entirely. An assessment of the individual's competency to volunteer should be carried out as a matter of routine, and certainly in cases where there is any evidence that the individual may have a severe mental illness which has developed while on death row. The next issue is the competency test itself, which sets a very low bar for competency; this chapter will argue that the test for competency is so vague that it is not fit for purpose and needs to be reformed. Competency to volunteer should have to be demonstrated to a much higher level, with any evidence of severe mental illness properly taken into account. In addition, as part of its competency assessment, the court is able to consider irrelevant factors such as the intelligence or demeanour of the individual. It could, in fact, be argued that the current test for competence indicates that courts are

more concerned with pushing through executions where individuals have volunteered, rather than ensuring that the death penalty is properly applied and only those individuals with genuine competence are executed.

The chapter will then consider the Supreme Court case of *Washington v Glucksberg*, which is the Supreme Court's key case on assisted suicide. This case is discussed because when an individual is allowed to volunteer for execution, this could be viewed as state-assisted suicide, as has been referenced in state courts.[631] The Supreme Court's discussion in *Washington v Glucksberg* reveals interesting observations by the Supreme Court of both assisted suicide and suicide more generally. This analysis will aim to demonstrate the rejection by the Supreme Court of all forms of suicide on dignity grounds, and will argue that this could, therefore, apply equally to death row volunteers.

Finally, the chapter will move on to consider individual cases of volunteers, examining the hearings where it was determined that the individual in question was competent to volunteer. The purpose of these case studies is to consider the following: first, whether the current test for competency takes into account concerns with dignity; second, whether the test for competency should take into account the idea of dignity; and third, the extent to which respect for dignity can ever permit a severely mentally ill individual to volunteer for execution. This chapter will argue that it is not possible to reconcile respect for human dignity with the ability to volunteer for execution, especially in the

[631] See, for example, *Commonwealth v McKenna* 476 Pa. 428, 439-41, 383 A.2d 174, 180-81 (1978) and *Grasso v Oklahoma* 857 P.2d 802 (1993) (discussed below).

case of severely mentally ill individuals. As a result, severely mentally ill individuals should not be able to volunteer for execution.[632]

Competency to Volunteer for Execution

The test of competency to volunteer for execution comes from the 1966 Supreme Court case of *Rees v Peyton*, which states that competency depends on:

> "whether [the defendant] has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises."[633]

This was further elaborated in the 1996 case of *State v Berry*, where the Supreme Court of Ohio considered that:

> "a capital defendant is mentally competent to abandon any and all challenges to his death sentence, including appeals, state post-conviction collateral review, and federal habeas corpus, if he has the mental capacity to understand the choice between life and death and to make a knowing and intelligent decision not to pursue further remedies."[634]

[632] In fact, this argument applies to the ability of any individual to volunteer for execution, but the focus of this chapter (and of the thesis as a whole) is on severely mentally ill individuals in particular.
[633] *Rees v Peyton* 384 U.S. 312 (1966), at 314.
[634] *State v Berry* 74 Ohio St.3d 1504 (1996), at 1504.

As can be seen from these cases, the test for competency sets a low bar of competence, only involving a "rational choice" and a "knowing and intelligent decision," as well as an understanding of the difference between life and death. Rountree discusses the fact that in the 2008 case of *Indiana v Edwards*, the Supreme Court

> "recognized that this standard permits even severely mentally ill defendants to be found competent. Many lawyers casually refer to competence as requiring only that their clients be 'oriented times three,' i.e., are aware of time, place, and person, screening out only the most psychotic defendants."[635]

The issue with the competency to volunteer test is that it sets the bar for competency so low that individuals can be found competent when, arguably, they are not. A competency test that only requires an awareness of time, place and person will not be of any real use to severely mentally ill individuals who are not psychotic. The issue is that determining conclusively an inmate's competence to waive his appeals and bring forward his execution is difficult to begin with; add to that an inmate's severe mental illness and the very real possibility that his decision to waive his appeals is inextricably linked to the severe mental illness itself, and it becomes almost impossible to determine if an individual should be able to volunteer. For example, in 2000 Pernell Ford was executed in Alabama after waiving his appeals. Ford suffered from depression and a personality disorder, and had attempted suicide on more than one occasion. Ford was found competent to waive his appeals, despite the fact that he

[635] Meredith Martin Rountree, 'I'll Make Them Shoot Me: Accounts of Death Row Prisoners Advocating for Execution' (2012) 46 Law and Society Review 589, at 593, referring to *Indiana v Edwards* 554 U.S. 164 (2008).

believed that after he died he would sit at God's left hand and be an "important person." Ford also described how he had the power of "translation," which he said meant that he could leave his body and travel around the world, and that through this power he had 400,000 wives and millions of pounds of investments.[636] On the face of it, this would clearly suggest that Ford was not fully competent; however, the district court found that Ford was competent, which was later affirmed by the Eleventh Circuit Court of Appeals. As Rountree points out, this is clearly a low bar of competence and the evaluation will therefore be highly subjective.[637] Strafer considers that the standard of competency in *Rees* is equivalent to the standard used to determine competence to stand trial,[638] which he argues is

> "inadequate to satisfy the strict procedural protection required for a death sentence to be constitutionally executed."[639]

In terms of the requirement for "rationality" in the competency test, it is entirely possible for a severely mentally ill individual to be considered to have acted "rationally" when deciding to waive his appeals, despite evidence of the severe mental illness suggesting the contrary. For example, in the case of *Rumbaugh v Procunier* from 1985, Rountree identifies the fact that

> "this 'rational decision-making process' [to volunteer for execution] took place

[636] *Ford v Haley* 195 F.3d 603 (11th Cir. 1999), at 611-613.
[637] Rountree (n 635), at 593.
[638] The standard for competency to stand trial is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." – *Dusky v United States* 362 U.S. 402 (1960).
[639] G. Richard Strafer, 'Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention' (1983) 74 Journal of Criminal Law and Criminology 860, at 878.

> within a severe depression that 'contribute[d] to his invitation of death' [which] was legally irrelevant so long as he was aware of his situation and his options."[640]

The fact that the test requires a "knowing and intelligent" decision has led to the courts focusing on the intelligence of the individual to determine his competency to volunteer, which will be demonstrated in the case studies below. The court satisfies itself that the defendant is competent by simply stating that the defendant appears to be intelligent. However, intelligence is arguably irrelevant to considerations of competency; the real question is if the individual's severe mental illness affects his or her ability to make the decision to volunteer for execution. Lyon notes that

> "there is a tendency to view someone who is intelligent, or who is able to plan their actions, as not mentally ill, which is a false assumption, but again, viscerally appealing."[641]

This focus by the court on intelligence suggests a fundamental misunderstanding of the impact severe mental illness can have on an individual's competency; an individual may appear intelligent but still hold certain beliefs, and make decisions based on those beliefs, which are a product of the severe mental illness he suffers from.

A further issue with the competency test is that there is some evidence that such tests

[640] Rountree (n 635), at 592, discussing *Rumbaugh v Procunier* 753 F.2d 395 (1985).
[641] Andrea D Lyon, 'The Blame Game: Public Antipathy to Mental Health Evidence in Criminal Trials' (2018) 21 New Criminal Law Review 247, at 257.

are not being carried out with sufficient regularity, meaning that an individual's competency to volunteer may not be considered at all. One reason that the court may decide that the test is not necessary is because the individual has been found competent to stand trial (which is discussed in chapter 2 of this thesis); in a case from 1993 the Supreme Court of Florida stated that "a presumption of competence attaches from a determination of competency to stand trial,"[642] suggesting that it is not always considered necessary for a separate competency test to be carried out. This is problematic given the typically long periods of time between trial and execution, during which time the individual's competence may have diminished. Relying solely on the competence to stand trial determination also assumes that there were no issues with that assessment; if, however, there was a problem with the finding of competence to stand trial, this will be further compounded by the finding of competence being essentially "carried through" to later competency determinations. An additional concern, as will be seen in the case studies later in this chapter, is that where the district court has determined a competency assessment is not necessary, the higher courts will usually defer to this judgment, thereby granting the district court a wide discretion on this issue.

A final issue to consider regarding the competency evaluation is that the individual may be unwilling or unable to make a claim of incompetency himself. In such cases, an individual or organisation may wish to challenge an individual's competency to

[642] *Durocher v Singletary* 623 So. 2d 482 (Fla. 1993), at 484.

volunteer, by way of filing a "next friend" petition.[643] This means that the individual himself cannot or will not pursue legal action, such as appealing the conviction and sentence, and so the "next friend" wishes to proceed on his behalf. The test for "next friend" status was set out by the Supreme Court in the 1990 case of *Whitmore v Arkansas*:

> "first, a 'next friend' must provide an adequate explanation – such as inaccessibility, mental incompetence, or other disability – why the real party in interest cannot appear on his own behalf to prosecute the action...Second, the 'next friend' must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate."[644]

Next friend petitions frequently are dismissed on the basis that the next friend is determined to have no standing, in many cases on the basis that the person seeking to be the "next friend" fails the second part of the test (as will be demonstrated in the case studies below). This is because the "next friend" opposes the individual's decision to volunteer, so the court will conclude that the "next friend" cannot be acting in the best interests of that individual.[645] The court does not attempt to address the issues of competency raised in those petitions and/or the evidence of severe mental illness of the defendant. This disregards the very fact that the next friend is needed because the

[643] See Paul F Brown, 'Third Party Standing – Next Friends as Enemies: Third Party Petitions for Capital Defendants Wishing to Waive Appeal' (1991) 81 The Journal of Criminal Law & Criminology 981; Jane L McClellan, 'Stopping the Rush to the Death House: Third-Party Standing in Death-Row Volunteer Cases' (1994) 26 Arizona State Law Journal 201; Anthony J Casey, 'Maintaining the Integrity of Death: An Argument for Restricting a Defendant's Right to Volunteer for Execution at Certain Stages in Capital Proceedings' (2002) 30 American Journal of Criminal Law 75

[644] *Whitmore, Individually and as Next Friend of Simmons v Arkansas et al.* 495 U.S. 149 (1990), at 163.

[645] See, for example, *Durocher v Singletary* 623 So. 2d 482 (Fla. 1993) and *Hauser, by his next friends Zainna Fawnn Crawford, and Gregory C Smith, Capital Collateral Counsel v Michael Moore, Secretary, Florida Department of Corrections, and James Crosby, Warden, Florida State Prison*, Supreme Court of Florida, Nos. 00-1664 and 00-1665, 18 August 2000 (discussed in the case studies below).

defendant is not competent to make the decision; naturally the defendant will object that the next friend is trying to oppose his or her decision but that is why the petition, along with the reasons why the next friend feels that he or she has to intervene, needs to be considered in detail by the court.

Competency and Dignity

The issue of whether or not to enable an individual to volunteer for execution raises complex issues around respect for that individual's dignity; this issue is even more complex where the individual has a severe mental illness. The conflict between respect for an individual's dignity and simultaneously enabling them to volunteer for execution has been well summarised by Strafer:

> ...the determination of voluntariness must take into account the significance and finality of the death decision and the coercive nature of the forces uniquely pressing upon a condemned prisoner on death row. As a society we must face the hypocrisy of stripping the condemned of their humanity, of everything that normally permits an individual to make autonomous decisions, and then almost unblinkingly recognizing the suffering inmate's decision to 'die with dignity' as a free and voluntary choice of an autonomous individual.[646]

As discussed in detail in chapter 4 of this thesis, this thesis adopts a Kantian approach to dignity; namely, that dignity is inherent in all human beings, and it forms the basis for

[646] Strafer (n 639), at 894.

all human rights. Respecting an individual's dignity therefore means acknowledging and respecting that everyone has equal rights. However, as discussed in chapter 2 of this thesis, the exercise of some rights may in fact be to the detriment of a severely mentally ill individual, and volunteering for execution is one example of such a right. A severely mentally ill individual may decide to volunteer for execution as a direct result of the illness that he suffers from; for example, if he suffers from a severe depression that causes him to feel suicidal, such as in the case of Pernell Ford, discussed above. The risk that an individual may be influenced by his severe mental illness when making the decision to volunteer seems directly contrary to respecting that individual's dignity, which leads to the inevitable conclusion that such individuals should not be able to volunteer. However, this would mean denying severely mentally ill individuals a right available to everyone else, which would mean that their autonomy is being denied, and their dignity is not, therefore, being respected. The only way to ensure that the dignity of severely mentally ill individuals is being respected while, at the same time, those individuals are not able to exercise a right to their own detriment, is either for the option of volunteering to be removed from all individuals, regardless of whether or not they suffer from a severe mental illness, or for severely mentally ill individuals to be exempt from the death penalty altogether.

The Dignity Argument in Support of Volunteering

However, there is an argument that respecting an individual's dignity means allowing that individual to volunteer for execution, as stated by Bonnie: "I would not demean the

dignity of the condemned as a price for society's failure to abolish the death penalty."[647] Milner also draws on dignity to make this argument, saying that

> "many death row inmates choose to waive their appeals in order to die as dignified a death as can possibly be had under such trying circumstances."[648]

The first point to note is that it is difficult to envisage how an execution can ever be considered to be a "dignified" death, regardless of the way in which the execution is carried out. This is because executions always involve the degradation of the human body.[649] Milner also identifies that

> "one theory is that capital defendants per se are unable to make rational decisions about being executed; another is that severe conditions on death row impede the defendant's decision-making ability,"[650]

but then goes on to say that these theories are flawed because "they strip the client of his or her autonomy"[651] and "personal dignity."[652] However, as discussed above, the argument against the ability to volunteer for execution, particularly in the case of severely mentally ill individuals, is based on the need to protect the dignity of all

[647] Richard Bonnie, 'Grounds for Professional Abstention in Capital Cases: A Reply to Brodsky' (1990) 14 Law and Human Behavior 99, at 102.
[648] Julie Levinsohn Milner, 'Dignity or Death Row: Are Death Row Rights to Die Diminished – A Comparison of the Right to Die for the Terminally Ill and the Terminally Sentenced' (1998) 24 New England Journal on Criminal and Civil Confinement 279, at 305.
[649] For a discussion of dignity in relation to different methods of execution, see Imogen Jones and Bharat Malkani, 'Beastly Humans: The Welfare Model of Executions' (2017) Law, Culture and the Humanities 1-21, and in relation to lethal injection in particular (currently the primary method of execution), see, for example, Deborah Denno, 'The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty' (2007-2008) 76 Fordham Law Review 49; Timothy V Kaufman-Osborn, 'The Death Of Dignity' in Austin Sarat and Jürgen Martschukat (eds), *Is the Death Penalty Dying?: European and American Perspectives* (Cambridge University Press 2011), p. 204.
[650] Milner (n 648), at 307-308.
[651] Ibid, at 308.
[652] Ibid, at 308.

individuals. Milner here in fact identifies the compelling argument that an individual's ability to make a rational, informed decision on death row will be impeded, and that applies to *all* individuals; this decision will be even more complex if the individual is severely mentally ill. This is precisely why the idea of assessing an individual's competence to volunteer is so difficult.

Milner further argues that it is possible to draw clear comparisons between the decision of a terminally ill individual to refuse life-sustaining treatment and a death row inmate's decision to volunteer for execution. Milner describes individuals in these situations as the "terminally ill" and the "terminally sentenced." Whilst it is possible to draw comparisons between the "right to die" of an inmate who awaits an impending execution and the "right to die" of a terminally ill individual, the "death is different"[653] mantra cannot be ignored. The circumstances of a death row inmate are so unique that all associated issues also have to be treated as such. Milner in fact identifies the bleak conditions on death row as a reason for why it is "not so irrational"[654] for an inmate to volunteer for execution. However, these conditions can equally be used in support of the argument that an individual is not strictly competent when choosing to waive his appeals.[655] That individual may feel forced to "choose death" instead of living in those conditions; this is more a reflection on the poor conditions of death row rather than an indication that the individual has made a rational decision to volunteer. Strafer argues that all decisions to volunteer are questionable due to conditions on death

[653] See *Furman v Georgia* 408 U.S. 238 (1972), at 287-289 (Brennan J, concurring) and at 306 (Stewart J, concurring).
[654] Milner (n 648), at 305.
[655] That is not to say that there is a uniform high standard of care in care homes for the terminally ill, but the position of this thesis is that conditions on death row are uniquely challenging. The standard of care for terminally ill patients is outside the scope of this thesis, but for more information see, for example, Jeanne S Katz and Sheila M Peace (eds), 'End of Life in Care Homes: A Palliative Care Approach' (Oxford University Press 2003).

row,[656] and it is certainly questionable if the ability to volunteer should be available to anyone. These poor conditions have to be taken together with the fact that the individual will live under the constant knowledge that death is inevitable, which may lead to a feeling of hopelessness. The individual may also be feeling deep remorse about their criminal actions and concern for their own family. All of these factors can lead to "death row syndrome," described as a form of mental illness.[657] Inevitably, a severely mentally ill individual can only suffer even more greatly when subjected to those conditions on death row.[658]

Washington v Glucksberg – Assisted Suicide and Dignity

The Supreme Court case of *Washington v Glucksberg* in 1996 considered the issue of assisted suicide, in which the Supreme Court made some interesting observations that indicated a concern for considerations of human dignity and that could, arguably, also apply in the case of a volunteer for execution. The Supreme Court stated that bans on assisted suicide are: "longstanding expressions of the States' commitment to the protection and preservation of all human life."[659] The Supreme Court specifically referred to individuals under a death sentence, stating that "prohibitions against assisting suicide never contained exceptions for those who were near death"[660] and then quoting from an 1872 case of the Supreme Court of Ohio where the Court there

[656] Strafer (n 639).
[657] The term "death row phenomenon" was coined in the European Court of Human Rights case of *Soering v UK* (1989) 11 EHRR 439, to describe the mental anguish that people face on death row when they have been confined there for many years, waiting to die. The term "death row syndrome" has subsequently been used to describe the psychological effects of death row phenomenon on individuals – see Amy Smith, 'Not "Waiving" But Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution' (2007-2008) 17 The Boston University Public Interest Law Journal 237.
[658] For a discussion of this point, see Elena De Santis, 'Life with the Imposition or Exacerbation of Severe Mental Illness and Chance of Death: Why This Distinct Punishment Violates the Eighth Amendment' (2019) 56 American Criminal Law Review 235
[659] *Washington v Glucksberg* 521 U.S. 702 (1996), at 710.
[660] *Washington v Glucksberg* 521 U.S. 702 (1996), at 714.

stated that "…even the lives of criminals condemned to death, [were] under the protection of the law."[661]

The Supreme Court went on to consider the issue of suicide more generally, stating that

> "all admit that suicide is a serious public-health problem, especially among persons in otherwise vulnerable groups .... The State has an interest in preventing suicide, and in studying, identifying, and treating its causes."[662]

In the death penalty context, the risk of volunteering being used as a form of suicide has been raised in some cases; for example, in 1978, the Supreme Court of Pennsylvania noted that

> "the waiver concept was never intended as a means of allowing a criminal defendant to choose his own sentence. Especially is this so where, as here, to do so would result in state aided suicide. The waiver rule cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue – the propriety of allowing the state to conduct an illegal execution of a citizen."[663]

The Court of Criminal Appeals in Oklahoma also referred to this in a 1993 case, when

[661] *Washington v Glucksberg* 521 U.S. 702 (1996), at 714-715, quoting from *Blackburn v State* 23 Ohio St. 146, 163 (1872)
[662] *Washington v Glucksberg* 521 U.S. 702 (1996), at 730.
[663] *Commonwealth v McKenna* 476 Pa. 428, 439-41, 383 A.2d 174, 180-81 (1978). In this case, the Court considered that the execution would be illegal as the Court considered the statutory provision under which the death sentence was authorized was void, for the reason that it gave complete discretion to the finders of fact over whether a death sentence or life imprisonment would be the most appropriate punishment.

Judge Chapel, in a specially concurring judgment specifically focusing on the issues raised by volunteering for execution, stated that

> "the State must not become an unwitting partner in a defendant's suicide by placing the personal desires of the defendant above the societal interests in assuring that the death penalty is imposed in a rational, non-arbitrary fashion."[664]

Chapel went on to acknowledge that

> "many individuals facing the death penalty may very well be burdened by mental or emotional problems that would render them incompetent to waive their appeals...the record before us today [would not] be adequate for someone with a history of mental illness or who had been diagnosed with a mental illness such as paranoid schizophrenia...I conclude that a separate competency evaluation conducted by an appropriate mental health professional should be conducted to specifically determine competency to waive one's appeals."[665]

Chapel's comments, while encouraging, were not shared by the majority. The issue, therefore, is that considerations such as this rarely seem to occur, and the fact that volunteering for execution could be a suicidal wish directly resulting from a mental illness is not acknowledged. All that the inmate has to demonstrate is a low level of "competence"; any possible link between the inmate's mental illness and the request to

[664] *Grasso v Oklahoma* 857 P.2d 802 (1993), at 811 (Chapel J, specially concurring).
[665] *Grasso v Oklahoma* 857 P.2d 802 (1993), at 813 (Chapel J, specially concurring).

volunteer for execution is rarely explored in detail.

Turning now to consider a comparison between individuals on death row and individuals considering suicide, the first point to note is the recorded high rates of suicide on death row. A study published in 2016 reported that, between 1978 and 2010, the mean rate of suicide on death row was "substantially higher" than the suicide rate outside prison for males over the age of 15.[666] An individual may experience feelings of depression and/or hopelessness, which eventually lead to suicidal ideation. A similarity can be drawn here with death row inmates experiencing "death row syndrome."[667] It also needs to be considered that if an individual experiences suicidal thoughts, this is often – although not always – a symptom of a mental illness. The DSM-V lists suicide as a symptom for a number of illnesses, such as psychotic disorders. As a result, suicide is viewed as something that should be prevented, in a "larger culture that has historically criminalized and stigmatized desires to die."[668]

Having said this, when a death row inmate wishes to volunteer, it can be viewed as that individual simply accepting his punishment, rather than it being treated as a suicidal act. There is no clear reason why expressing a wish to die should be treated differently in a criminal justice context. Indeed, as noted above, the Supreme Court has specifically observed that the protection of life by the law should apply equally to

[666] Christine Tartaro and David Lester, 'Suicide on Death Row' (2016) 61 Journal of Forensic Sciences 1656, at 1657. See also Smith (n 656), at 238: "within one week in 2008, two individuals awaiting death in Texas committed suicide, reflecting the heightened suicide rates on death row, estimated at ten times greater than those in society at large and several times greater than those in a general prison population."
[667] See n 657.
[668] Rountree (n 635), at 594.

condemned criminals.[669] In addition, the process of appeals is in place precisely because it is important to ensure that the death penalty is being administered only to those truly deserving of it; it is by no means clear why an individual seemingly accepting his punishment should be given such importance that the system of appeals is no longer considered necessary. Strafer identifies this issue as follows:

> With autonomy necessarily curtailed and the inmate under the custody of the State, the condemned inmate's right to refuse legal assistance is far less than that of a free citizen or even of a defendant not yet convicted. Because the government's interests in preserving life, safeguarding the integrity of the proceedings and the legal profession, and protecting the rights of third parties affected by 'suicidal' decisions is substantial, the individual's right to personal autonomy is insufficient to prove clearly and convincingly a significant countermeasure.[670]

The fact that individuals may end up on death row for decades waiting for the outcome of their appeals lends more weight to the argument for abolition of the death penalty in its entirety, rather than providing a reason to enable individuals to volunteer for execution.

[669] *Washington v Glucksberg* 521 U.S. 702 (1996), at 714-715, quoting from *Blackburn v State* 23 Ohio St. 146, 163 (1872)
[670] Strafer (n 639), at 908.

Volunteers for Execution – Case Studies

As set out in the introduction to this chapter, the DPIC lists 149 volunteers since 1976 in 30 different states and at federal level. The table below sets out the total number of executions in each state,[671] the number of volunteers and the percentage of the total number executed who were volunteers.

State	Executions*	Volunteers	Percentage
Texas	567	**32**	5.64
Nevada	12	**11**	91.67
Florida	99	**9**	9.09
South Carolina	43	**9**	20.93
Virginia	113	**9**	7.96
Alabama	66	**8**	12.12
Ohio	56	**7**	12.5
Oklahoma	112	**7**	6.25
Delaware	16	**5**	31.25
Indiana	20	**5**	25
Arizona	37	**4**	10.81
Arkansas	31	**4**	12.90
Missouri	89	**4**	4.49
North Carolina	43	**4**	9.30

[671] That is, for each state that had one or more volunteers. Not all states with the death penalty have recorded volunteers for execution.

Utah	7	**4**	57.14
Pennsylvania	3	**3**	100
South Dakota	5	**3**	60
Washington	5	**3**	60
California	13	**2**	15.38
Illinois	12	**2**	16.67
Kentucky	3	**2**	66.67
Oregon	2	**2**	100
Connecticut	1	**1**	100
Georgia	75	**1**	1.33
Idaho	3	**1**	33.33
Louisiana	28	**1**	3.57
Maryland	5	**1**	20
Montana	3	**1**	33.33
Nebraska	4	**1**	25
New Mexico	1	**1**	100
Tennessee	12	**1**	8.33
Federal	3	**1**	33.33
Total	**1489**	**149**	**10.00**

*Executions recorded between 1976-2019[672]

The table shows the number of executed individuals in each state who were

[672] DPIC, 'Executions by State and Region Since 1976' <https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976> accessed 8 January 2020

volunteers, along with what that number translates to as a percentage. The raw totals of volunteers, and the percentage of volunteers in each state, both provide interesting and important insights. The focus of this analysis is on the raw totals, so that a relatively large sample can be considered. However, those states with high percentages are also worthy of study, because it indicates that the death penalty system is not really working in those states, as people are only having their final sentences carried out if the person on death row volunteers for execution. As the table shows, Texas has the highest number of volunteers – 32 – and also the highest number of executions, by some distance, at 567. The next highest number of volunteers is in Nevada, which has had 11 volunteers. Interestingly, this is out of a total of 12 executions, which does raise the question why such a high proportion of death row inmates have chosen to volunteer. After Nevada, there are nine volunteers each in Florida, South Carolina and Virginia, eight in Alabama, and seven each in Arizona, Ohio and Oklahoma. Even those states that have a relatively low number of volunteers reveal some interesting numbers; for example, all three of the individuals executed in Pennsylvania since 1976 were volunteers, both of the executed individuals in Oregon were volunteers, and three out of five in Washington and four out of seven in Utah were also volunteers.

The DPIC list contains the name of the individual, the year of execution and the state in which he or she was executed, along with an "indication of volunteer status from news article."[673] In order to find individual cases for the purposes of this review, Texas was

[673] DPIC, 'Execution Volunteers' <https://deathpenaltyinfo.org/executions/executions-overview/execution-volunteers> 6 January 2020

discounted due to the fact that the figures for both executions and volunteers were so significantly higher than any other state. The state with the next highest number of volunteers was Nevada, with 11 volunteers for execution, followed by Florida, South Carolina and Virginia, which each had nine volunteers. The intention was to focus specifically on those volunteers where it was alleged that the individual suffered from a severe mental illness. This information was difficult to find, because it does not appear to be kept by state authorities, or by NGOs who focus on severe mental illness and the death penalty. The names of the individuals were researched chronologically,[674] and by using the inmate's name and the state, for example "Cole v State of Nevada." There were also separate searches of the words "Cole v Supreme Court of Nevada", "Cole v State of Nevada waive appeals", along with searches of the full name such as "Carroll Cole" and "Carroll Cole waive appeals". This was to ensure the search results would include the hearing(s) specifically looking at the request to waive appeals and, therefore, to volunteer for execution.

The available information varied; it was sometimes only possible to find the state Supreme Court decision affirming the death sentence, but not the hearing(s) addressing the defendant's wish to volunteer and associated competency evaluations. In other cases it was possible to find petitions submitted by a "next friend" on behalf of the defendant, requesting a stay of execution and for the competency of the defendant to be addressed by the court, for the reason that the defendant is suffering from a severe mental illness and this is impacting on his ability to make that decision. The

[674] The searches were carried out initially on legal databases such as Heinonline and Lexis; this did not produce any results, so the searches were then carried out on the internet search engine Google.

variation of available information could simply be a matter of the approach of different states as to whether the hearings are uploaded to the internet; for example, there appeared to be more information available about some of the Florida cases, compared to relatively little information available for cases in South Carolina. There were also occasions where it appeared that the hearings could have been available online at one time, but have subsequently been taken down.

However, despite the fact that it was not possible to locate copies of certain court decisions or case filings for every individual identified as a volunteer, there were a number of clear trends that emerged from the available information. The first issue is that competency tests were not carried out as a matter of routine, even where there was evidence that the individual suffered from a severe mental illness. The second issue is that, where a competency assessment was made, the level of competency required was low, and the court would often consider irrelevant factors such as the demeanour of the individual and if the individual appeared to be intelligent. The case studies also demonstrate the state courts' views of what constitutes severe mental illness; as will be discussed below, the courts appear to look for evidence of psychosis as a necessary criterion for a declaration of severe mental illness; if there is no evidence of psychosis, the court may consider that the illness is not severe enough to warrant a competency evaluation.

The Competency Test is Not Carried Out with Sufficient Regularity

Where there is evidence that an individual may suffer from a severe mental illness, a hearing to determine competency to volunteer for execution should be a routine requirement; however, the case studies demonstrate that competency hearings are not always carried out. The case studies reveal that if the District Court decides that a competency hearing is not necessary, its decision will be deferred to by the higher courts.

Thomas Baal

In the case of Thomas Baal, who was executed in Nevada in 1990, the district court declined to hold a competency hearing, despite evidence that Baal suffered from a range of mental health issues including depression and schizophrenia.[675] The Court of Appeals subsequently granted a stay of execution, as they considered a competency hearing should have been held; however, the Supreme Court lifted the stay, following an application by the State of Nevada, declaring that the district court's decision should not have been overturned, and that this should only occur in certain, limited circumstances.[676] This decision of the Supreme Court highlights the fact that competency hearings do not always take place, even in situations where the defendant may be suffering from severe mental illness, in part because deference is given to the trial court's judgment on this: "a state court's conclusion regarding a defendant's

[675] *Demosthenes v Baal* 495 U.S. 731 (1990), at 740 (Brennan J, dissenting).
[676] *Demosthenes v Baal* 495 U.S. 731 (1990), at 737.

competency is entitled to such a presumption."[677]

The Court stated that the psychiatric examiners had not considered Baal to be "psychotic" ("the record contains evidence that although Baal has a personality disorder, he is not psychotic"[678]), which could indicate that the Court would consider psychosis to amount to a severe mental illness, but anything less than psychosis would not be. However, a severe mental illness can impact an individual's competency even if the illness does not cause the individual to be psychotic. The Court also referred to "Baal's intelligent responses during the plea canvass" and concluded that

> "there was not substantial evidence which raised a reasonable doubt as to Baal's competency to enter a plea. Thus, the district court was not required to conduct a competency hearing."[679]

Justice Brennan, in a dissenting judgment, noted that the Court of Appeals had

> "not ruled on the merits of Baal's competency or even on the question of whether an evidentiary hearing is required to determine whether Baal is competent"[680]

even though there was evidence in the record that

[677] *Demosthenes v Baal* 495 U.S. 731 (1990), at 735.
[678] *Baal v State* 787 P.2d 391 (1990), at 395.
[679] *Baal v State* 787 P.2d 391 (1990), at 394.
[680] *Demosthenes v Baal* 495 U.S. 731 (1990), at 738-739 (Brennan J, dissenting).

> "Baal has been hospitalized for behavioral and mental problems on numerous occasions since he was fourteen years old, has attempted suicide on at least four occasions since 1987, and has been diagnosed in the past as a latent schizophrenic, a borderline personality, depressed, and as suffering from organic brain syndrome."[681]

Justice Brennan also referred to the opinion of board-certified psychiatrist Jerry Howle who had considered that there was reason to believe that Baal may not be competent to waive his legal remedies,[682] and that there was, therefore, "an arguable basis for finding that a full evidentiary hearing on competence should have been held by the district court."[683]

Thomas Wayne Akers

The case of Thomas Wayne Akers demonstrates that the trial court may decide not to hold a hearing to determine the defendant's competency to waive his appeals and that this decision will be given deference by higher courts. In 1999 Akers pleaded guilty to capital murder with an accomplice. Akers had a history of brain damage, prior suicide attempts, severe child abuse, substance abuse and depression.[684] After he was given a death sentence, Akers filed a notice with the Supreme Court of Virginia stating that he wished to waive his appeals. The Supreme Court of Virginia remanded the case

[681] *Demosthenes v Baal* 495 U.S. 731 (1990), at 740 (Brennan J, dissenting).
[682] *Demosthenes v Baal* 495 U.S. 731 (1990), at 740 (Brennan J, dissenting, referring to the Order in *Baal v Godinez*, No. 90-15716 (June 2, 1990), pp. 4-5 (footnote omitted)).
[683] *Demosthenes v Baal* 495 U.S. 731 (1990), at 740 (Brennan J, dissenting, referring to the Order in *Baal v Godinez*, No. 90-15716 (June 2, 1990), pp. 4-5 (footnote omitted)).
[684] John H Blume, 'Killing the Willing: "Volunteers," Suicide and Competency' (2005) 103 Michigan Law Review 939, at 995.

back to the circuit court to determine if the waiver by Akers was knowing, intelligent and voluntary. The circuit court subsequently determined that Akers was competent, which was affirmed by the Supreme Court of Virginia. A next friend petition was then filed in the Supreme Court of Virginia by counsel, Robert Lee, for habeas corpus relief, and an evidentiary hearing was requested to determine if Akers was competent. The Supreme Court of Virginia dismissed the petition without holding a hearing. Lee then filed a petition in the District Court, alleging that Akers was not competent at the time he had pleaded guilty and that Akers remained not competent.[685] The District Court dismissed the petition on the basis that Lee lacked standing. On the issue that the Supreme Court of Virginia had not held an evidentiary hearing on Akers's competence, the District Court stated that "the failure to conduct a competency hearing is not tantamount to a failure to find competency,"[686] and referred to the 2000 case of *Mackey v Dutton*, where the Sixth Circuit of the United States Court of Appeals affirmed the trial court's decision not to order a psychiatric examination for the defendant, because in the trial court's view there was "no sufficient indication" that the defendant was incompetent.[687]

The Competency Test is Too Broad

The case studies provide vivid examples of the fact that the test for competency to volunteer is too broad; or, in other words, that it sets a low bar of competency. In

[685] *Thomas Wayne Akers, by appointed counsel, Robert Lee, as next friend v Ron Angelone, Director, Virginia Department of Corrections,* Civil Action No. 7:01-CV-00141
[686] *Thomas Wayne Akers, by appointed counsel, Robert Lee, as next friend v Ron Angelone, Director, Virginia Department of Corrections*, Civil Action No. 7:01-CV-00141, p.4.
[687] *Mackey v Dutton* 217 F.3d 399 (6th Cir. 2000), at 414.

addition, the courts, and court-appointed psychiatrists, often take into account arguably irrelevant factors as part of the competency determination; for example, the intelligence of the individual, and the individual's appearance.

Alvaro Calambro

In 1996 Alvaro Calambro was convicted of murder in Nevada and sentenced to death. Calambro's father had been diagnosed as schizophrenic, and, while on death row, Calambro exhibited symptoms of schizophrenia,[688] claiming that he heard voices and thought he was a vampire.[689] Calambro was prescribed antipsychotic medication, but after a few weeks he refused to take it.[690] Following the death sentence, Calambro informed the District Court that he wanted to waive his appeals and proceed to execution;[691] the District Court determined that Calambro was competent to waive his appeals, which was then confirmed by the Supreme Court of Nevada. The Supreme Court of Nevada did, however, discuss the fact that the District Court had only made an oral statement to that effect, when, following the 1991 case of *Kirksey v State*,[692] the District Court should have provided a formal, written statement of Calambro's competency. A written report is required so that the Supreme Court of Nevada may review the District Court's decision. The Supreme Court of Nevada, however, stated that requiring the District Court to provide a written statement now would "serve little

[688] Blume (n 684), at 993.
[689] Franklin D Master, 'Alvaro Calambro: Competency to be Executed' (1999) 20 American Journal of Forensic Psychiatry 17, at 19-20.
[690] Ibid, at 20.
[691] *Calambro v State* 111 Nev. 1015 (1995), at 1019.
[692] *Kirksey v State* 107 Nev. 499 (1991)

purpose"[693] in this case. This demonstrates that a District Court will not necessarily have to follow the "mandatory"[694] procedures for the competency evaluation, even where, in this case, the procedure in question serves the important function of enabling a review by the Supreme Court of Nevada of the defendant's competency. This case may even suggest that the Supreme Court of Nevada does not take its responsibility to review the District Court's determination of competency seriously, because it simply dispensed with the requirement in this case. This further undermines the effectiveness of the whole competency evaluation.

It is also interesting to consider the written report of a psychiatrist, Dr Franklin Master, who had been asked by Federal Judge Howard McKibbon to interview Calambro to determine his competency to be executed.[695] Calambro's mother had filed a "next friend" petition alleging that Calambro was not competent to be executed, and had subsequently filed suit in the court of Federal Judge Howard McKibbon, suing the warden of Nevada State Prison and the Nevada Attorney General, to prevent the execution. Master had been given by the Judge a series of questions to ask Calambro,[696] none of which were aimed at investigating any severe mental illness, despite evidence that Calambro had "exhibited several behavioral problems"[697] in prison for which he had been prescribed antipsychotic medication.[698] Master also

[693] *Calambro v State* 111 Nev. 1015 (1995), at 1019, note 4.
[694] *Calambro v State* 111 Nev. 1015 (1995), at 1019, note 4.
[695] Master (n 689).
[696] Master (n 689), at 21-22: 1) Is he competent to litigate his own cause if he wants to do so or is he unable to litigate his cause due to a mental incapacity? 2) Does he have the capacity to knowingly, intelligently, and voluntarily waive his right to proceed to challenge his conviction and sentence of death in the state and federal courts? 3) Does he understand that he is about to be put to death and what that means? 4) Does he understand why he is being put to death? 5) Does he understand that it is possible for him to challenge his conviction and sentence and post conviction proceedings in state and federal courts and, that if he pursues such a challenge, he is entitled to a stay of execution? 6) Does he want to forego any further challenges and be put to death?
[697] Master (n 689), at 19.
[698] Master (n 689), at 20.

included in his report his observation that

> "[Calambro's] clothing was clean, he had no body odor, his face was clean-shaved, his teeth were brushed, and his hair was neatly combed and parted."[699]

Master does not elaborate on the significance of this observation, but Calambro's appearance would arguably be irrelevant to a competency evaluation, so it is questionable why Master included it in his report. Calambro's case again demonstrates the serious issues with the competency evaluation, where only very basic questions around the defendant's awareness of the crime and the fact that he is about to be executed are taken into account, while evidence of a severe mental illness is not thoroughly investigated.

Carroll Cole

Carroll Cole was executed in Nevada in 1985, after being convicted of two counts of first degree murder. Cole was the eighth recorded volunteer since 1976. Cole was alleged to suffer from PTSD, alcohol abuse, and had a history of serious childhood abuse.[700] In his early twenties, Cole voluntarily admitted himself to hospital for psychiatric treatment, after telling police officers that he felt urges to rape and strangle women. This was followed by further hospital stays after Cole requested psychiatric help, and one stay on a psychiatric ward following a suicide attempt. However, Cole

[699] Master (n 689), at 22.
[700] Blume (n 684), at 989.

did not receive any proper treatment, and later described himself as "the person who slid through the cracks in the medical and psychiatric system."[701] The Supreme Court of Nevada did not refer to any evidence of Cole's history of mental illness in its determination of his competency, instead saying that:

> "the threshold issue in this appeal concerns Cole's obvious desire not to engage in any activity (particularly an appeal) which might delay or prevent his execution. In order to stand, Cole's decision to forego any appeal of his death sentence must be shown to be intelligently made and with full comprehension of its ramifications."[702]

The Supreme Court of Nevada concluded that "from the record it appears that Cole is a fairly intelligent individual..."[703]

This raises another issue explored in chapter 4 of this thesis: the difficulties faced by severely mentally ill defendants who choose to represent themselves. The defendant may decide not to present evidence in mitigation of a severe mental illness, either because he does not recognise that he has such an illness, or because he does not want to admit to it. The court will not, therefore, have all of the relevant information, as it would not be aware of the individual's severe mental illness; that said, even if such evidence is presented, as these case studies demonstrate, the courts do not appear particularly swayed by evidence of severe mental illness (particularly if the

[701] Los Angeles Times, 'Claims He Killed 3 S.D. Women, Many Others: Death Row Inmate Won't Appeal Dec. 6 Execution' (28 November 1985) <https://www.latimes.com/archives/la-xpm-1985-11-28-me-9130-story.html> accessed 8 January 2020
[702] *Cole v State of Nevada* 707 P.2d 545 (1985), at 588.
[703] *Cole v State of Nevada* 707 P.2d 545 (1985), at 588.

manifestation of the severe mental illness falls short of psychosis).

Terry Jess Dennis

Terry Jess Dennis was convicted of murder in Nevada in 1999. At the penalty phase of his trial, evidence was presented that Dennis suffered from mental illness, including bipolar disorder and post-traumatic stress disorder. Evidence was also presented that Dennis had attempted suicide on multiple occasions, and had been abused by his family.[704] Dennis was sentenced to death by a three-judge panel. In an appeal to the Court of Appeals for the Ninth Circuit against the district court's denial of a petition for writ of habeas corpus, the Court of Appeals noted that evidence had been presented at the penalty hearing that Dennis suffered from mental illness, along with the history of suicide attempts and childhood abuse.[705] The district court had, however, determined that Dennis was competent to enter a guilty plea, as he understood the nature of the charges, knew that the death penalty was a potential punishment, and was able to assist in his own defence.[706] In response to a claim that evidence of Dennis's severe mental illness had not been taken into consideration, the Court of Appeals stated that

> "we disagree that either court disregarded evidence that Dennis's decision was 'directly a consequence' of his mental condition. The point was argued to both courts, and both rejected its significance."[707]

[704] *Terry Jess Dennis, by and through Karla Butko, as next friend v Michael Budge, Warden Brian Sandoval, Attorney General of the State of Nevada*, 378 F.3d 880 (9th Cir. 2004), at 2.
[705] Ibid.
[706] Ibid.
[707] Ibid, at 29.

The fact that the Court of Appeals specifically referred to the range of mental health issues suffered by Dennis, but then agreed with the lower courts that this was not significant, provides a strong indication that courts are quick to dismiss evidence of severe mental illness. As previously noted, the main concern of the courts is whether or not the individual can be considered competent, and the courts are prepared to answer this in the affirmative even where the presence of a severe mental illness is documented. Here, the Court of Appeals specifically stated:

> evidence showing that a prisoner's decision is the product of a mental disease does not show that he lacks the capacity to make a rational choice. It is the latter — not the former — that matters. The question under *Rees* and *Whitmore* is not whether mental illness substantially affects a decision, but whether a mental disease, disorder or defect substantially affects the prisoner's capacity to appreciate his options and make a rational choice among them... Thus, *Whitmore* does not ask whether the prisoner's choice is rational, but whether he has the capacity to have a rational understanding with respect to continuing or abandoning further litigation. If the mental disease, disorder or defect does not substantially affect this capacity, then the prisoner is competent under *Rees* and *Whitmore*.[708]

This approach of the court is difficult to understand; the court is making a distinction between the decision itself and the ability to make a decision in the first place, arguing

[708] Ibid, at 30.

that it is only the latter that is significant. In a concurring judgment, Justice Berzon identified the issue with this approach:

> When, if ever, can it be said that an individual is making a decision of the greatest consequence of his own free will, rather than a decision determined by a mental infirmity from which he suffers? Indeed, how can a mental infirmity or disorder be distinguished from the myriad of memories, experiences and genetic predispositions that go to make up each individual's unique personality? We as judges and lawyers attempt to capture these philosophical dilemmas in words that can have very different meanings to different people, and that often may not respect the concepts that mental health professionals would use to capture cognitive and volitional capacity.[709]

Justice Berzon further considered:

> If a “next friend” establishes that a prisoner's mental disorder determinatively programmed his decision regarding whether to seek to avoid execution, then any purported “choice” to forego legal proceedings is illusory. In effect, such a prisoner, though otherwise lucid, rational and capable of making reasonable choices is, in a Manchurian Candidate-like fashion, volitionally incapable of making a choice other than death when faced with the specific question here at issue — namely, whether to pursue legal proceedings that could vacate the death penalty or to abandon them. If so, I don't know what it means to say that

[709] Ibid, at 50 (Berzon J, concurring in the judgment).

> he retains the capacity to make a rational choice. To make a "choice" means to exercise some measure of autonomy or free will among the available options, at least to the degree that an individual who does not suffer from a mental disorder is able to do so.[710]

Justice Berzon identifies the whole issue with the competency evaluation; specifically, the erroneous distinction made by the majority between being able to make a decision, and the decision itself. The majority appear to all but ignore the evidence of Dennis's severe mental illness, focusing only on whether or not Dennis is able to make a decision. The emphasis needs to be placed on the decision itself, because, as Justice Berzon identifies, the idea of an individual being able to make a "free choice" to volunteer for execution when under the influence of a severe mental illness is really illusory.

Although perhaps not surprising, any regard for the individual's dignity is absent from the courts' deliberations. However, Justice Berzon, writing a concurring judgement for the Court of Appeals for the Ninth Circuit in Dennis's case, seemed to hint at the concept, without expressly referring to dignity, when he said that an important guiding principle should be

> "[w]hether we who administer the law will treat ordinary mortals with the candor and respect they deserve as human beings. There is, I suggest, something worse than being tried and punished for one's crimes, and that is being treated

[710] Ibid, at 79.

by our legal system as less than human, a thing to be manipulated, supposedly for one's own good."[711]

If dignity was a standard consideration of the court, this could have a significant impact on the way competency evaluations are carried out, with emphasis on respecting the dignity of that individual meaning that the enquiry becomes much more in-depth, and evidence of severe mental illness is taken more seriously.

Michael Durocher

Michael Durocher was convicted in Florida in 1992 of the murder of his former girlfriend and her two children, having decided to plead guilty shortly after the trial began. In 1993, a petition was filed by the Capital Collateral Representative[712] on behalf of Durocher, which alleged that there was evidence of Durocher suffering from severe mental illness, but that counsel had been denied access to expert reports and medical records in the state post-conviction proceedings. Counsel further alleged that there was a "wealth" of evidence regarding Durocher's severe mental illness, but that

"none of this evidence was presented to the jury, the co-sentencer who recommended the death sentence. It is unclear whether the mental health

[711] Ibid, at 88.
[712] The Capital Collateral Representative (known as the Capital Collateral Regional Counsel since 1997) represents death row prisoners who have exhausted their direct appeals and seek to challenge their capital punishment on other grounds. See TCPalm, 'Capital Collateral Regional Counsel: A death row inmate's last defense' (7 October 2012) <http://archive.tcpalm.com/news/capital-collateral-regional-counsel-a-death-row-inmates-last-defense-ep-381917765-342957702.html> accessed 9 January 2020

experts were provided this information at the time of their evaluations."[713]

For example, Counsel stated that

> even in the limited investigation that counsel has been able to start, he has learned that Mr. Durocher has a long history of mental difficulties. Mr. Durocher has attempted suicide in excess of five occasions. Several mental health reports indicate that Mr. Durocher had a brain lesion which accounted for serious mental difficulties. Mr. Durocher was also diagnosed as suffering a borderline personality disorder. Throughout his legal proceedings, Mr. Durocher exhibited erratic behavior...These red flags of severe mental illness and mental deficits warrant further investigation. They raise questions about competency, sanity, mental health mitigation, and knowing voluntary waivers.[714]

Counsel requested access to those records in the petition, including

> "a mental health evaluation [that] was prepared by Dr. Jethro Toomer. Reportedly, Dr. Toomer found significant mental health problems; however, his report has not been released to undersigned counsel."[715]

However, the Supreme Court of Florida considered that counsel had no standing to represent Durocher, stating that:

[713] *Durocher v Singletary*, Petition For Extraordinary Relief and for a Writ of Habeas Corpus, Motion for a Stay of Execution, Petition for a Writ of Mandamus, and Request for Extension of Rule 3.581 Time Limit (filed 25 June 1993), p.9.
[714] Ibid, pp.1-2.
[715] Ibid, p.5.

> "because Durocher is apparently competent to do so, we hold that he may waive representation by [the Capital Collateral Representative] and that [the Capital Collateral Representative] has no duty or right to represent a death row inmate without that inmate's permission."[716]

The Supreme Court of Florida ordered that the trial judge evaluate Durocher to determine

> "if he understands the consequences of waiving collateral counsel and proceedings. If the judge finds a proper waiver by Durocher, he shall report that finding to this Court and the instant petition will be dismissed."[717]

Durocher was executed just two months later. This example demonstrates that the issue of whether or not a next friend has standing appears to be a rather convenient way for the court to circumvent considering other important issues, such as any evidence of the individual's severe mental illness, and the impact this may have had on the individual's decision to volunteer for execution.

Daniel Patrick Hauser

Daniel Patrick Hauser was convicted in Florida in 1995 of first degree murder. In 1997,

[716] *Durocher v Singletary* 623 So. 2d 482 (Fla. 1993), at 484-485.
[717] Ibid, at 485.

the Supreme Court of Florida heard an appeal from the sentence and penalty of death imposed by the trial court on Hauser. The Supreme Court of Florida considered why automatic review of a defendant's death sentence is necessary, stating that the point of such appeal is not "to prevent a defendant's state-assisted 'suicide.'"[718] Notably, the trial court in Hauser's case found that Hauser had suffered from mental health problems since he was 14 years old, but the Supreme Court of Florida did not discuss this in detail; the fact that the Supreme Court of Florida did not consider this a significant part of its review is indicated by the fact that the Supreme Court of Florida only mentioned this in a footnote to its opinion.

Hauser filed a waiver of his appeals and, after the court appointed an attorney to represent him, Hauser requested permission to represent himself. The court appointed a psychologist to evaluate Hauser's competency and a Faretta[719] hearing was subsequently held. Following the hearing, the court found Hauser competent to represent himself. In a subsequent next friend petition filed by Hauser's mother and the Capital Collateral Regional Counsel (CCRC)[720], the Supreme Court of Florida referred the issue of Hauser's competency back to the trial court, as it stated that it was not contested that Hauser had been:

> "diagnosed as a manic-depressive, was placed on lithium therapy, has suicidal ideations, has received both in- and out-patient treatment for mental health

[718] *Hauser v State*, Supreme Court of Florida, No. 87580, decided 18 September 1997.
[719] In *Faretta v California* 422 U.S. 806 (1975), the Supreme Court held that criminal defendants who are deemed competent to stand trial have a constitutional right under the Sixth Amendment to refuse counsel and to represent themselves in state criminal proceedings. The right will ordinarily be guaranteed under the Constitution even if the defendant exercises this right to his detriment. This is discussed in chapter 4 of this thesis.
[720] CCRC is an entity created by the Florida Legislature to provide post-conviction representation to indigent death row inmates in that state; see *Sanchez-Velasco v Secretary of the Department of Corrections*, No. 01-13969, Decided: April 02, 2002

problems, has chronically abused drugs and alcohol, and was discharged from the Army after six months for mental health reasons."[721]

As set out earlier in this chapter, in the 1966 case of *Rees v Peyton*[722] the Supreme Court established the test for determining a petitioner's competency to waive post-conviction proceedings in a capital case, which questioned whether or not the defendant suffers from a mental disorder, disease or defect. The United States Court of Appeals for the Eleventh Circuit applied this test in the 1993 case of *Lonchar v Zant*, identifying three parts to the analysis:

"...(1) whether that person suffers from a mental disease, disorder, or defect; (2) whether a mental disease, disorder, or defect prevents that person from understanding his legal position and the options available to him; and (3) whether a mental disease, disorder, or defect prevents that person from making a rational choice among his options."[723]

The United States Court of Appeals for the Eleventh Circuit considered that Hauser "clearly satisfies *Lonchar's* second and third prongs,"[724] and was therefore competent to waive his appeals and represent himself. The Court explained their reasons as follows:

[721] *Hauser, by his next friends Zainna Fawnn Crawford, and Gregory C Smith, Capital Collateral Counsel v Michael Moore, Secretary, Florida Department of Corrections, and James Crosby, Warden, Florida State Prison*, Supreme Court of Florida, Nos. 00-1664 and 00-1665, 18 August 2000.
[722] 384 U.S. 312 (1966)
[723] *Lonchar v Zant* 978 F.2d 637 (11th Cir. 1993), at 641.
[724] *Hauser, by his next friends Zainna Fawnn Crawford, and Gregory C Smith v Michael W Moore, Secretary Florida Department of Corrections, James Crosby, Warden, Florida State Prison*, 223 F.3d 1316 (11th Cir. 2000), at para 29.

> "the state trial court on several occasions determined that Hauser is competent to proceed pro se due to his repeated statements that he wished to proceed pro se; his letters to the court expressing his wishes; his statements during the telephonic hearing that he understood the ramifications of his wish to proceed pro se, that he knew he would be executed by lethal injection, and that the evidence CCRC wanted to submit was really evidence of mitigation."[725]

The difficulty faced by Hauser's mother and the CCRC with the claim that Hauser was not competent was that Hauser himself repeatedly insisted that he was competent, which clearly influenced the Court. The Court decided that Hauser's mother and the CCRC did not have sufficient standing to bring the claim on Hauser's behalf, and agreed with Hauser that his mother and the CCRC did not have Hauser's best interests at heart, and instead were trying to further their own agenda to abolish the death penalty.[726] However, in the process, the Court completely disregarded the evidence of Hauser's mental illness.

David Mark Hill

David Mark Hill was convicted in 2000 of the murder of his family's case worker and two other employees after losing custody of his children. The Supreme Court of South Carolina confirmed that Hill was competent to waive his appeals, even though evidence had been presented at the hearing that Hill was not competent as he suffered from

[725] Ibid.
[726] *Hauser, by his next friends Zainna Fawnn Crawford, and Gregory C Smith, Capital Collateral Counsel, v Michael Moore, Secretary, Florida Department of Corrections, and James Crosby, Warden, Florida State Prison*, Supreme Court of Florida, Nos. 00-1664 and 00-1665, 18 August 2000

depression, post-traumatic stress disorder and anxiety attacks. The Supreme Court of South Carolina specified that, when determining whether or not a defendant is competent to volunteer, the Court reviews:

> ...the defendant's history of mental competency; the existence and present status of mental illness or disease suffered by the defendant, if any, as shown in the record of previous proceedings and in the competency hearing; the testimony and opinions of mental health experts who have examined the defendant; the findings of the circuit court which conducted a competency hearing; the arguments of counsel; and the capital defendant's demeanor and personal responses to the Court's questions at oral argument regarding the waiver of appellate or [post-conviction relief] rights.[727]

The Supreme Court of South Carolina then went on to discuss the evidence of a forensic psychiatrist, Dr Schwartz-Watz, who was a witness at Hill's competency hearing. Dr Schwartz-Watz said that Hill had previously suffered from "very severe depressions and anxiety disorders,"[728] and had some "brain damage and neurological impairments"[729] as a result of a self-inflicted gunshot wound (inflicted following the murders for which Hill was convicted). Dr Schwartz-Watz also diagnosed a "cognitive disorder,"[730] but concluded that Hill was competent to waive his appeals, stating that Hill is "incredibly intelligent and in possession of his faculties."[731] Dr Schwartz-Watz

[727] *Hill v State* 377 S.C. 462 (2008), at 468.
[728] Ibid.
[729] Ibid.
[730] Ibid, at 469.
[731] Ibid.

said that Hill's decision to waiver his appeals was made on a "rational"[732] basis and that Hill "understands what he was convicted for, his sentence, and the nature of the punishment, and that he clearly knows the rights he is giving up."[733] Hill was found competent by the Judge, even though Hill had

> "testified that he previously suffered depression, posttraumatic stress disorder, and anxiety attacks, but that he did not feel he was currently suffering from any of those illnesses."[734]

This highlights an issue explored in an earlier chapter of this thesis, which is where an individual does not acknowledge that he is suffering from a severe mental illness, either because he does not realise that fact, or does not want to admit it. It is questionable how much weight the judge in a competency hearing should give to the defendant's view that he does not "feel" mentally ill. In Hill's case, the Judge considered that Hill was competent to waive his appeals, stating that he

> "understands the nature of the proceedings, the crimes for which he was sentenced, and the nature of the punishment."[735]

The Supreme Court of South Carolina affirmed the finding of competency, stating that: "we found Hill to be articulate, intelligent, and very well aware of his present

[732] Ibid.
[733] Ibid.
[734] Ibid.
[735] Ibid, at 471.

circumstances, as well as the events which gave rise to his incarceration"[736] and that Hill's decision to waive his appeals was "knowing and voluntary."[737]

This again demonstrates the emphasis on the defendant's intelligence, along with the low bar that the defendant only needs to understand that he committed a crime and that he is being punished for it, and that death is the punishment. The fact that the defendant has previously suffered from a severe mental illness, and could possibly still be suffering from it, is given little weight compared to the defendant's intelligence and the defendant's views that he does not feel mentally ill.

Conclusion

The ability for individuals to volunteer for execution raises complex issues around whether or not individuals should be able to volunteer at all and, if so, how to ensure that only individuals who are fully competent can volunteer. This determination becomes even more complex in the case of severely mentally ill individuals. The case studies considered above have sought to demonstrate the clear issues around determining the competency of an individual to volunteer for execution where that individual is alleged to suffer from a severe mental illness. The first issue is that the district court may not always order a competency evaluation, and the higher courts will often defer to this decision. The decision to volunteer for execution is, however, so critical that competency evaluations should be carried out as a matter of routine,

[736] Ibid, at 472.
[737] Ibid.

particularly where there is any suggestion of the individual suffering from a severe mental illness. In addition, there should be no reliance on whether a competency decision was made prior to trial, as the severe mental illness may have developed during the individual's time on death row. The second issue regarding competency evaluations is that the bar for competency is so low that it is easy for state authorities to argue that an individual is competent. The courts at all levels focus only on whether or not the individual is able to make a decision as being determinative of competency, and the courts often rely on irrelevant considerations such as whether or not the individual is or appears to be intelligent in order to make a finding of competency. The decision itself is not scrutinised in detail by higher courts, and as demonstrated above, courts do not even appear to consider that the decision itself is particularly relevant to the individual's competency. It is disturbing that the courts will make reference to evidence of the individual suffering from a severe mental illness but, again, do not appear to consider that this is relevant.

The position of this thesis is that severely mentally ill individuals should not be able to volunteer for execution, and this can be achieved by courts focusing on a Kantian conception of human dignity. If courts did take dignity considerations into account, competency evaluations would necessarily have to change, in order to ensure that an individual's dignity is provided sufficient protection. As demonstrated above, the Supreme Court appears to consider dignity in its key decision on assisted suicide, and the Supreme Court's observations in that case can, arguably, also apply to individuals on death row. State courts, too, have referenced the tension between respect for

dignity and volunteering for execution. Importantly, a routine emphasis on dignity considerations would lead to the inevitable conclusion that it is impossible to respect the dignity of an individual who has a severe mental illness while at the same time allowing that individual to volunteer for execution. As has been explored in chapter 4 of this thesis, respecting an individual's dignity entails recognising the equal rights of that individual with all other human beings; however, allowing a severely mentally ill individual to volunteer, purely on the basis that all other competent death row inmates have that right, results in an outcome that is arguably in direct conflict with respect for human dignity. It is impossible to avoid the risk that a severely mentally ill defendant may decide to waive his appeals as a result of the severe mental illness he is suffering from. One solution would be to remove the option of volunteering for execution from all individuals, whether severely mentally ill or not, because that would avoid the problematic competency evaluation altogether. Alternatively, or perhaps in addition, another solution would be to exempt severely mentally ill individuals from the death penalty altogether.

Chapter 6: Conclusion

Introduction

The execution of severely mentally ill individuals in the United States is a disturbing practice, and efforts to bring such executions to an end need to be advanced as a matter of urgency. The solution as to how this can be achieved is no easy task, but this thesis has sought to demonstrate that an argument based on the concept of human dignity could hold the key to this; and, indeed, to the argument in favour of full abolition of the death penalty.

The introductory chapter to this thesis examined the continued use of the death penalty in the United States of America. The historical justifications for the use of the punishment – retribution and deterrence – have continued to this day. However, there is evidence that casts doubt on whether or not the death penalty is in fact an effective deterrent, and arguably any retributive purpose could equally be served by a long prison sentence; in any case, citing retribution as a reason for the death penalty raises an uncomfortable question over whether this is, in fact, simply a form of revenge, and it is doubtful that a civilised society should support that. Chapter 1 also considered the extensive regulation of the death penalty that the United States Supreme Court has been engaged in since 1976, apparently seeking to "reform" the death penalty; however, such reforms may not be welcomed by some abolitionists who consider that their effect is to legitimise the death penalty and detract attention from total abolition.

The view of this thesis is that all reforms of the death penalty are necessary, because there is no guarantee that the death penalty will be abolished in the United States. In addition, each reform – whether it is an exemption of a class of individuals from the death penalty, or a narrowing of the offences that carry a death sentence – will save lives, which can only be viewed as a positive consequence of reform. Chapter 1 also considered the efforts at state level to exempt severely mentally ill individuals, by way of introducing draft Bills for exemption; however, such Bills have only been introduced by eleven states, and the progress has been slow. This could indicate a hesitancy by those states to commit to such an exemption, and demonstrates that a federal exemption is, therefore, required.

Chapter 2 then set out the wide range of issues faced by a severely mentally ill individual during the capital trial process, with a view to demonstrating why the exemption of severely mentally ill individuals is necessary. The chapter began by identifying the difficulties with reaching a firm definition of "severe mental illness" itself. The Diagnostic and Statistical Manual of Mental Disorders (DSM-5) contains a comprehensive description of mental disorders over which there is consensus by the American Psychiatric Association; however, the DSM-5 also illustrates the fact that the understanding of mental illness has evolved considerably since the first Diagnostic and Statistical Manual of Mental Disorders (DSM-I) was drafted, and it very likely will continue to evolve. This poses a challenge for the Supreme Court if it did decide to exempt severely mentally ill individuals from the death penalty; the Supreme Court may instead decide to leave this determination to individual states, which would itself be

problematic as it would very likely lead to inconsistency and uncertainty. Chapter 2 then considered why there are so many severely mentally ill individuals on death row and in the wider criminal justice system, an issue that has been described as the "criminalisation" of the mentally ill. The issue really began to take hold after the process of deinstitutionalisation, beginning in the 1950s, when psychiatric hospitals fell out of favour and mentally ill individuals were instead treated in the community. A lack of state funding for mental health services, combined with a lack of supervision of the mentally ill, led to a risk of some mentally ill individuals engaging in criminal behaviour. At the same time, a more punitive culture emerged, with an emphasis on personal responsibility; this led to a practice of punishment, rather than treatment, for severely mentally ill individuals who had committed crimes.

Chapter 2 then investigated the range of issues faced by a severely mentally ill individual at trial; first, the individual's competency to stand trial can be assessed, but it is a low standard. The prosecution and the jury may view any evidence of mental illness as an aggravating, rather than a mitigating factor, or may be suspicious that the individual is fabricating his symptoms. The individual's defence counsel may not have experience of representing a client with a severe mental illness, and may, therefore, neglect to present evidence of mental illness at all. The severely mentally ill individual himself may refuse to allow his counsel to present evidence of mental illness. The insanity defence is technically available, but it is not often used and is treated with suspicion; there is evidence that the jury could be concerned that the individual would be released immediately without treatment, coupled with a view that the individual

should receive punishment. Finally, after conviction and sentence, the individual may be able to raise a claim that he is not competent to be executed. It may be the case that the individual did not experience symptoms of mental illness until after the trial, and so was unable to raise a claim of incompetency earlier. The Supreme Court held in the 1986 case of *Ford v Wainwright* that an individual cannot be executed if he is insane, and he will be "insane" if he does not understand that he is going to be executed or the reason why. The Supreme Court later clarified this test in *Panetti v Quarterman* in 2007, stating that the individual must have a "rational" understanding of why he is going to be executed. Although potentially a positive decision, the Supreme Court indicated that it would consider "psychosis" as the level of mental illness that would affect an individual's competency, which has led critics to argue that the case only has a narrow application. In addition, the recent Supreme Court decision of *Madison v Alabama* in 2019 gives cause for concern, where the Supreme Court said that an individual who cannot remember the crime for which he has been convicted – in this case, due to mental illness – may still be found competent to be executed under the Eighth Amendment.

Chapter 3 then considered in detail the Eighth Amendment jurisprudence of the Supreme Court. The purpose of this chapter was to chart the evolution of the Supreme Court's regulation of the death penalty, and to consider the variety of factors that the Supreme Court is prepared to take into account as part of its deliberations. Traditionally, the Supreme Court has been primarily influenced by the number of states that legislate against a particular practice, in order to determine whether or not it is

unconstitutional under the Eighth Amendment, along with the attitude of juries. Over time, the Supreme Court has found other factors persuasive, such as international law and the opinions of the medical community. Significantly, the Supreme Court has referred to considerations of dignity in a number of its key Eighth Amendment decisions, although it has never formulated a definition of dignity. Justice Brennan set out the most detailed explanation of dignity in *Furman v Georgia*, in an opinion that declared that the death penalty was unconstitutional in all circumstances. Justice Brennan appeared to adopt a Kantian view of dignity; in other words, he considered that dignity was an inherent characteristic shared by all human beings.

Chapter 4 explored the concept of human dignity. This thesis argued that the Kantian view of human dignity is to be preferred in two respects: first, it is an inherent characteristic that all humans have by virtue of being human, and, second, human dignity forms the basis of all human rights. There are a number of international instruments that specifically refer to human dignity, and "dignity" also appears in a number of state constitutions. Although "dignity" does not appear in the United States Constitution, there are compelling arguments that the protection of it is implied. The chapter also considered, and rejected, the competing theory of "dignity of constraint," which argues that individuals will sometimes need to be denied certain rights in order to respect their dignity. This theory is rejected on the basis that, in the case of severely mentally ill individuals, it could be used to deny such individuals rights that are available to everyone else. The state should not be able to deny its citizens the exercise of rights and justify that interference by claiming that it is in order to protect the dignity of its

citizens. The chapter ended with the example of the right to self-representation as an illustration of the difficulty of respecting a severely mentally ill individual's dignity in the capital trial process.

Chapter 5 examined the issue of volunteering for execution, as a case study of the concept of human dignity and the death penalty. The chapter began with an assessment of the test for competency to volunteer, and argued that it is not fit for purpose, because the test sets such a low bar for competency that it is likely that only the most psychotic of individuals would not be found competent. The chapter then considered the issue of dignity, formulating an argument as follows: as explored in chapter 4, this thesis adopts an approach to human dignity based on the philosophy of Immanuel Kant; that is, dignity is an inherent characteristic that all humans have, and it forms the basis for all human rights. The way to respect an individual's dignity, therefore, is to acknowledge that everyone has the autonomy to exercise equal rights with everyone else. However, in the specific context of severely mentally ill individuals who wish to volunteer for execution, it is not possible to respect their dignity. This is because respect for that individual's dignity would involve recognising his right to volunteer, but the exercise of that right may be to the individual's detriment if the decision has been influenced by the severe mental illness that he suffers from, which seems to be in direct conflict with a genuine concern for the protection of that individual's dignity. This means that either the ability to volunteer needs to be removed from all individuals – whether severely mentally ill or not – or severely mentally ill individuals need to be exempt from the death penalty altogether.

The chapter then examined a number of hearings from states where individuals have chosen to volunteer for execution, but there is evidence that those individuals are suffering from a severe mental illness. The purpose of this examination was to demonstrate common issues with the ability to volunteer for execution; namely, that competency tests are not carried out consistently, particularly where the individual was assessed as competent to stand trial; the bar for competency is so low that individuals who are arguably clearly not competent are still being assessed as such; and state courts often take into account irrelevant factors as part of the competency determination, such as the individual's intelligence and demeanour.

The Need for Abolition

It is clear that the death penalty in the United States needs to be abolished once and for all. There are significant issues with the use of the punishment, with the Death Penalty Information Center noting in its year-end report for 2019 that:

> "every prisoner executed in 2019 had either a significant mental impairment (mental illness, brain damage, or chronic trauma), a serious innocence claim, or demonstrably faulty legal process."[738]

In addition, there are signs that support for the punishment is gradually diminishing, with

[738] DPIC, 'The Death Penalty in 2019: Year End Report' <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report> accessed 13 January 2020

the latest Gallup poll revealing that a majority of Americans now favour life without the possibility of parole over the death penalty.[739] The death penalty should not have been reinstated after *Furman*, and hopefully the period of prolonged reform of the punishment since then will one day lead to the death penalty being regulated out of existence. The problem, of course, is that this process of gradual regulation is too slow, which is leading to the even greater problem that individuals are being executed who should not be; severely mentally ill individuals are a clear example of that. The use of the concept of human dignity in death penalty decisions could pave the way for this total abolition.

In fact, full abolition is arguably the only guaranteed solution to achieve the exemption of severely mentally ill defendants from the death penalty. The unfortunate reality is that, even if exemption was achieved, severely mentally ill individuals would still be at risk of execution. This assumption can be made by considering the exemption of intellectually disabled individuals. As discussed in chapter 3 of this thesis, in the 2002 landmark case of *Atkins v Virginia*,[740] the Supreme Court ruled that the execution of intellectually disabled individuals was in breach of the Eighth Amendment to the United States Constitution[741] and was, therefore, prohibited. Critically, the Supreme Court stated that it would "leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."[742] In other words, the Supreme Court considered that states could set their own rules for determining whether or not an individual was intellectually disabled. However, since

[739] Gallup, 'Americans Now Support Life in Prison Over Death Penalty' (25 November 2019) <https://news.gallup.com/poll/268514/americans-support-life-prison-death-penalty.aspx> accessed 16 January 2020
[740] 536 U.S. 304 (2002)
[741] U.S. CONST. amend. VIII - "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."
[742] 536 U.S. 304 (2002), at 317, quoting from *Ford v Wainwright* 477 U.S. 399 (1986) at 405, 416-417.

that decision, the Supreme Court has felt compelled to intervene in *Hall v Florida*[743] in 2014 and in *Moore v Texas*[744] in 2017, to declare that practices used by those states to determine intellectual disability were unconstitutional. There are also examples of individuals being executed, with evidence of intellectual disability either being rejected by the court, or not properly investigated by the individual's defence attorney at trial. Warren Lee Hill was executed in Georgia on 27 January 2015, after failing to prove his intellectual disability "beyond a reasonable doubt", as required in Georgia. Georgia is the only state that requires proof to this standard, but it is arguably very difficult, if not impossible, to satisfy this level of proof. In post-conviction proceedings, Hill submitted a variety of evidence to the Eleventh Circuit Court supporting his claim of intellectual disability. This included evidence from seven experts, three of whom had testified on behalf of the prosecution at trial, who now all agreed that Hill was intellectually disabled, but this evidence was rejected by the Court on the basis that Hill should have presented the evidence at trial. On 29 October 2018, Rodney Berget was executed in South Dakota, despite evidence that came to light in post-conviction proceedings that Berget was intellectually disabled – a fact that was not investigated by Berget's trial attorney.[745] Berget then decided to waive his appeals and volunteer for execution.[746]

This chapter will now consider potential reforms to current death penalty practices, in both the short term and longer term, as a starting point to achieve this much needed

[743] 134 S.Ct. 1986 (2014)
[744] 581 U.S. ___ (2017)
[745] The Intercept, 'Rodney Berget Says He Wants to Die. South Dakota Plans to Kill Him. But Experts Say His Execution Would Violate the Law.' (29 October 2018) <https://theintercept.com/2018/10/28/south-dakota-rodney-berget-execution/> accessed 14 January 2020
[746] Argus Leader, 'Read a South Dakota death row inmate's letter asking to die' (2 February 2017) <https://eu.argusleader.com/story/news/crime/2017/02/02/read-south-dakota-death-row-inmates-letter-asking-die/97392606/> accessed 14 January 2020

exemption.

Proposals for Reform – Long Term

In order to achieve the exemption of severely mentally ill individuals, campaigning groups need to bring this issue to the attention of the public. This is a process that will take some time, but it is likely to be the most effective means of achieving total exemption of severely mentally ill individuals from the death penalty. As examined in chapter 3, whilst the Supreme Court considers a range of factors in its Eighth Amendment jurisprudence, arguably it is still predominantly influenced by the views of the public; in other words, what are the views of the public about a particular practice (in this case, the execution of severely mentally ill individuals)?[747] If it is clear that the public no longer accepts a practice, the Supreme Court is then likely to declare that "evolving standards of decency" dictate that a practice should be prohibited by the Supreme Court altogether. This goes hand in hand with the "Marshall hypothesis", briefly explored in chapter 3, which argues that if the public really understood all of the issues associated with the death penalty, they would not accept it.[748] Arguably, therefore, if the public understood that individuals with a genuine severe mental illness are being put to death, and that many of those individuals are clearly out of touch with reality – recalling the example of John Ferguson who believed that he was the "Prince of God" and that after execution he would return to save the world[749] – then the public could not continue to support such executions. As the Supreme Court has been at

[747] See page 107 onwards.
[748] See page 102.
[749] See page 10 of this thesis.

pains to demonstrate with its intensive regulation of the death penalty since 1976, the death penalty can only be considered a “legitimate” punishment if it is used against only those individuals who are the most deserving of it. An individual suffering with a severe mental illness may commit a truly terrible crime, but it is extremely difficult to argue that the individual is truly deserving of the death penalty when their actions may well be dictated by the illness they suffer from. Even if it is difficult to determine with absolute certainty the extent to which the individual was influenced by his illness, it is too great a risk that an individual with a severe mental illness could be executed when, by all accounts, he is clearly not competent to be executed.

Connected to this, there should be a review of the extent to which the death penalty is discussed in educational institutions across the states. It is vitally important that children and young people are educated about the use of the death penalty; both its perceived purposes, and the issues with the use of the punishment. This will ensure an increased awareness of the death penalty in society, which, as suggested above, will eventually lead to greater opposition to the practice.

At the same time, the Supreme Court needs to elevate its discussions of dignity, so that it becomes the most important factor in its Eighth Amendment jurisprudence. This thesis has sought to highlight the protection of human dignity that is implied in the United States Constitution and in the individual state constitutions, and, as discussed in chapter 4 of this thesis, the Supreme Court has in fact stated that dignity is the “basic

concept underlying the Eighth Amendment"[750] and referred to the "Nation's commitment to dignity."[751] The constitutional protection of dignity, combined with these references to the importance of dignity by the Supreme Court in previous cases, could persuade the Supreme Court in the future that it already considers dignity to be the most important factor in its Eighth Amendment deliberations. It now needs to ensure that it always takes dignity into consideration when making decisions about the death penalty under the Eighth Amendment. How to persuade the Supreme Court to rethink the emphasis it places on the concept of human dignity is no easy task; that said, it is notable that, as referred to in chapter 3 of this thesis, Justice Gorsuch wrote a book in 2006 about assisted suicide and euthanasia, in which he discussed the intrinsic value of human beings and stated that the basis of equality comes from "the belief that all persons *innately* have dignity and are worthy of respect."[752] Statements such as this suggest that, even in a majority-conservative Supreme Court, arguments about the importance of dignity may find favour amongst the Justices, whatever their political persuasion. The challenge here will be to persuade the Supreme Court to adopt a unified view of dignity; preferably a view focusing on the intrinsic nature of dignity. Realistically, this may not occur until the composition of the Supreme Court has changed, with more Justices sharing the views of Justice Brennan and Justice Marshall. It is impossible to say if or when this will happen, and it seems unlikely to be within the next decade given the age of certain Justices.

Another step towards exemption is for the death penalty to be removed from the political

[750] *Trop v Dulles* 356 U.S. 86 (1958), at 100.
[751] *Hall v Florida* 134 S.Ct. 1986 (2014), at 2001.
[752] Neil Gorsuch, 'The Future of Assisted Suicide and Euthanasia' (Princeton University Press 2006), p.159.

agenda. Too often, the death penalty becomes an issue over which a political candidate vying for re-election can use to demonstrate that they are “tough on crime” and will ensure the proper punishment of “evil” criminals. One example is that of President Bill Clinton, who during the 1992 presidential campaign flew back to Arkansas, where he was Governor at the time, to witness personally the execution of Ricky Ray Rector, a man who was clearly not competent to be executed as a result of a brain injury (caused by a self-inflicted gunshot wound).[753] Mello describes representing a mentally ill client who had been granted a stay of execution by the governor, but Mello did not withdraw a stay application that was proceeding in the Supreme Court because he did not trust the governor’s motives:

> “[the governor] was a master at the chess game of capital punishment politics. In my opinion, he had built a political career on the corpses of my clients.”[754]

Prosecutors, too, will often want to pursue the death penalty to increase their own popularity, and it could be argued that indigent defendants who are also suffering with a severe mental illness are easy “wins” for ambitious prosecutors, especially in cases where, as discussed in chapter 2, individuals with a severe mental illness refuse to allow evidence of their severe mental illness to be presented in mitigation.

Removing the death penalty as a topic from the political agenda will be a difficult reform to implement. In 2019, the Governor of California, Gavin Newsom, signed an executive

[753] It was reported at the time that Rector saved his piece of pie from his last meal, saying that he would eat it later, after his execution.
[754] Michael Mello, ‘Executing the Mentally Ill - When Is Someone Sane Enough to Die?’ (2007) 22 Criminal Justice 30, at 39.

order instituting a moratorium on the death penalty. The New York Times reported that "[a]lmost immediately, Democratic presidential candidates lined up in support, calling capital punishment a moral outrage infected with racial bias" and commented that

> "[t]he moment marked a generational shift for a party where some candidates long supported the death penalty to protect themselves from being portrayed as soft on crime."[755]

Although a potential shift by the Democrats towards opposition of the death penalty is undoubtedly a positive development, the fact that media attention was gained by some Democratic candidates voicing opposition to the death penalty demonstrates that this issue is still very much part of the political agenda. The key to the success of this reform is that, as public support for the death penalty diminishes, it is likely that there will also be less focus on the death penalty in politics. However, it is unlikely to be removed entirely from the political agenda until the death penalty is abolished (and, even then, there may be political candidates who argue for the reinstatement of the death penalty as one of their policies). This suggested reform therefore ties in with the need for campaigning groups to raise public awareness of the death penalty (as discussed above), with a view to increasing public opposition to the practice.

[755] The New York Times, 'Democrats Rethink the Death Penalty, and Its Politics' (7 April 2019) <www.nytimes.com/2019/04/07/us/politics/death-penalty-democrats.html> accessed 21 May 2020

Proposals for Reform – Short Term

The test for determining competency to be executed needs to be overhauled. At present, the bar for competency is so low that an individual who, objectively speaking, is clearly not competent, can still be found competent under the test. As discussed in chapter 2 of this thesis, the test for competency was first set out in the 1986 case of Ford v Wainwright, where the Supreme Court stated that the question is whether the individual is aware of his impending execution, and the reason that he is being executed.[756] This was developed further in 2007 in Panetti v Quarterman, where the Supreme Court considered that the individual must have a "rational" understanding of the execution.[757] However, this thesis has identified examples of individuals who arguably should not have been considered to have a rational understanding of the execution, and yet were nonetheless deemed competent to be executed.[758] It is also important that the Supreme Court expands its consideration of severe mental illness that can affect an individual's competence beyond "psychosis", as it discussed in Panetti v Quarterman.[759] The Supreme Court appeared receptive to this in Madison v Alabama,[760] but there will need to be more examples in the Supreme Court Eighth Amendment jurisprudence before it can be said that the Supreme Court has, in fact, expanded the competency test in this way. The test needs to be more rigorous, taking into account evidence of severe mental illness, and examining any thoughts or beliefs of the individual that would appear inconsistent with a finding of competency.

[756] 477 U.S. 399 (1986), at 422.
[757] 551 U.S. 930 (2007), at 959.
[758] See, for example, the discussion of John Ferguson on page 10.
[759] 551 U.S. 930 (2007), at 960.
[760] 139 S.Ct. 718 (2019)

Ideally, another aspect of reform would be for evidence of severe mental illness to be introduced in mitigation, even where the individual objects to the presentation of the evidence, where the individual's attorney considers that there is clear evidence of the severe mental illness. This would avoid the issue, discussed in chapter 2, that severely mentally ill individuals may either not recognise that they are suffering from a severe mental illness, and/or they may expressly forbid their attorney from offering evidence of the severe mental illness in mitigation. There are, however, two problems with this. The first is that the attorney will obviously feel conflicted about submitting such evidence when their client objects to it. The attorney will need to determine what is in the best interests of their client, which would involve taking into account their client's wishes, while at the same time balancing this with what the attorney considers is actually in their client's best interests (which may be in direct conflict with their client's instructions). The second problem, as explored in chapter 2, is that evidence of severe mental illness can often be viewed as an aggravating factor, rather than as a mitigating factor. This is related to the much broader issue of the public perception of severe mental illness, which needs to be addressed through the proper education of the public about severe mental illness, and, further, the regulation of how severe mental illness is presented in the media. This is a broad and complex issue that is outside the scope of this thesis.

Another reform that could happen relatively quickly would be to prohibit severely mentally ill individuals from volunteering for execution. The ability for individuals to volunteer is too often viewed simply as that individual accepting his punishment, when

in reality the individual may be influenced by his severe mental illness, even to the point of being suicidal. The appeals process is necessary to ensure the proper administration of the death penalty, so an individual should not be able to waive his right to such a vital process. The fact that the process can take a long time – years, if not decades – demonstrates a serious issue with the death penalty itself, and lends support to the argument for total abolition; allowing individuals to volunteer should not be the "solution" to this issue. This is especially the case with severely mentally ill individuals, who may be more vulnerable to making decisions that are not in their best interest, where their severe mental illness effectively clouds their judgement. This thesis has sought to demonstrate the inadequacy of the competency to volunteer standard, including the apparent lack of consideration given by the courts to the severe mental illness suffered by the individual, and the impact that the illness may have on the individual's decision to volunteer.[761] The difficulty with this proposed reform is that it could be seen to discriminate against severely mentally ill individuals, by denying them a right that individuals who do not have a severe mental illness are entitled to. This, in turn, means that it is also inconsistent with the rejection in this thesis of the 'dignity as constraint' argument.[762] As discussed in chapter 4 of this thesis, respect for an individual's dignity involves acknowledging the equal rights of that individual with all other individuals, and the autonomy of that individual to exercise his rights. If a severely mentally ill individual is denied the right to volunteer, this prevents that individual from exercising his autonomy, and, therefore, his dignity is not respected. However, although not an ideal

[761] See chapter 5 of this thesis; particularly the case studies from page 224 onwards.
[762] See pages 169-172.

solution, there is arguably a "moral imperative"[763] to save every life where possible, which in this case means preventing severely mentally ill individuals from volunteering for execution. It could be regarded as simply a temporary measure on the road to full exemption of severely mentally ill individuals from the death penalty, or even total abolition of the death penalty altogether.

Conclusion

The concept of human dignity can form the basis for an effective argument in favour of the exemption of severely mentally ill individuals; furthermore, it could form the basis of an argument to abolish the death penalty once and for all. As this thesis has made clear, the concept of human dignity can be seen to form the very basis of human rights; it is because all humans have dignity that we are all entitled to the protection of such rights in the first place. Even where dignity is not mentioned expressly in legislation, it is possible to see the exercise of the concept in practice. This is certainly the case in the United States; as explored in chapter 4 of this thesis, there are strong arguments that the protection of dignity is implied in both the Constitution and the Bill of Rights. Further, two state constitutions expressly refer to the right to individual dignity, and in the remaining constitutions it is possible to see the concept of dignity implied by references to "inalienable rights" and the equality of all people. The United States Supreme Court has referred to dignity in a number of key judgments, even referencing the protection of it under the Constitution, which indicates a clear recognition of the

[763] See Carol S Steiker and Jordan M Steiker, 'Should Abolitionists Support Legislative "Reform" of the Death Penalty?' (2002) 63 Ohio State Law Journal 417, at 431.

importance of dignity in its deliberations. The next step is for the Supreme Court to elevate the prominence of dignity further, using it consistently as a starting point in its Eighth Amendment decisions, and for the Supreme Court to adopt one interpretation of dignity; namely, that it is inherent in all human beings. The Supreme Court can then conclude that the death penalty is fundamentally inconsistent with the protection of human dignity, and must, therefore, be abolished.

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