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# The True Legacy of *Atkins and Roper*: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling

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**THE TRUE LEGACY OF *ATKINS* AND *ROPER*:  
THE UNRELIABILITY PRINCIPLE,  
MENTALLY ILL DEFENDANTS, AND THE  
DEATH PENALTY'S UNRAVELING**

Scott E. Sundby\*

ABSTRACT

In striking down the death penalty for intellectually disabled and juvenile defendants, *Atkins v. Virginia* and *Roper v. Simmons* have been understandably heralded as important holdings under the Court's Eighth Amendment jurisprudence that has found the death penalty "disproportional" for certain types of defendants and crimes. This Article argues, however, that the cases have a far more revolutionary reach than their conventional understanding. In both cases the Court went one step beyond its usual two-step analysis of assessing whether imposing the death penalty violated "evolving standards of decency." This extra step looked at why even though intellectual disability and youth were powerful mitigators, juries were not able to reliably use them in their decisionmaking. The Court thus articulated expressly for the first time what this Article calls the "unreliability principle:" if too great a risk exists that constitutionally protected mitigation cannot be reliably assessed, the unreliability means that the death penalty cannot be constitutionally imposed. In recognizing the unreliability principle, the Court has called into serious question the death penalty for other offenders to whom the principle applies, such as mentally ill defendants. And, unlike with the "evolving standards" analysis, the unreliability principle does not depend on whether a national consensus exists against the practice. This Article identifies the six *Atkins-Roper* factors that bring the unreliability principle into play and shows why they make application of the death penalty to mentally ill defendants unconstitutional. The principle, which finds its constitutional home in the cases of *Woodson v. North Carolina* and *Lockett v. Ohio*, has profound implications for the death penalty, and if taken to its logical endpoint calls into question the Court's core premise since *Furman v. Georgia*, that by providing individualized consideration of a defendant and his crime, the death penalty decision will be free of arbitrariness.

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INTRODUCTION .....	488
I. THE EVOLUTION OF THE "UNRELIABILITY PRINCIPLE" .....	493
A. <i>The Conventional Account: Atkins and Roper as Proportionality Cases</i> .....	493
B. <i>The "Unreliability Principle" Gets a Foothold: The Additional Analytical Step in Atkins and Roper</i> .....	495
C. <i>The History: Individualized Consideration as the Guarantor of Reliability</i> .....	498
D. <i>The Unreliability Principle: The Next Step in the Precedent</i> .....	505
E. <i>The Next Step in the Evolution: The Effect of the Unreliability Principle</i> .....	509
II. CATEGORICAL EXCLUSIONS UNDER THE UNRELIABILITY PRINCIPLE AND MENTALLY ILL DEFENDANTS .....	511
A. <i>Applying the Atkins-Roper Unreliability Factors to Mental Illness</i> ...	512
1. Mental Illness and the Impairment of the Defendant's Cooperation with his Lawyer and of the Lawyer's Ability to Prepare a Defense .....	512
2. The Mentally Ill Defendant as a "Poor Witness" .....	515
3. Mental Illness and Distortion of the Defendant's Decisionmaking .....	516
4. Mental Illness as the "Two-Edged Sword" Turning Mitigation into Aggravation .....	518
5. Mental Illness, Experts, and Scientific Uncertainty .....	520
6. The Crime's "Brutality" and the Mentally Ill Defendant .....	522
B. <i>Defining Mental Illness as a Categorical Exclusion from the Death Penalty</i> .....	523
III. THE UNRELIABILITY PRINCIPLE AND THE UNRAVELING OF THE DEATH PENALTY .....	524
CONCLUSION .....	528

## INTRODUCTION

After the Supreme Court in 1972 condemned the death penalty framework in use at the time as unconstitutionally arbitrary and capricious in *Furman v. Georgia*,<sup>1</sup> many, including at least several Justices, expected the punishment to fade away in the aftermath.<sup>2</sup> In the next four years, however, thirty-five states and Congress rushed to pass new death penalty schemes,<sup>3</sup> leaving the Court with the bewildering task of

<sup>1</sup> See generally 408 U.S. 238 (1972).

<sup>2</sup> JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 413–14 (1994) (noting Justices Stewart and White believed states would not enact new death penalty statutes); see also Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 33–34 (2007) (documenting the ebbing public support for the death penalty leading up to *Furman*).

<sup>3</sup> See *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976).

trying to figure out if a way existed to correct the fundamental flaws that it had identified in *Furman*.<sup>4</sup> The Court's struggles in the ensuing decades to design and maintain a constitutional system of capital punishment has consumed more of the Court's docket and energy than perhaps any other constitutional controversy.<sup>5</sup>

Out of fairness to the Court, it is hard to imagine a task of greater difficulty and immensity—how does one bring rationality, reliability, and consistency to the moral and highly emotional judgment by one human being over another as to whether that person should live or die? The challenge would be difficult enough for a philosopher or a theologian, but it is especially daunting for a Court tasked with bringing the decision within the bounds of the rule of law. In fact, but a year before *Furman*, Justice Harlan had suggested that the task was impossible: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."<sup>6</sup> Yet, despite Justice Harlan's warning, five years later the Court found itself trying to do exactly what Harlan had declared as "beyond present human ability," and, as a result, the Court has found itself engaged in an unparalleled level of constitutional micromanagement.

Indeed, in dealing with the aftermath of *Furman*, the Court has resembled more of an overwhelmed constitutional triage unit than a solemn body of judgment as it has rushed to each newly identified constitutional breach and erected a new rule. We now have constitutional rules specific to capital punishment governing aggravating factors,<sup>7</sup> mitigating factors,<sup>8</sup> the weighing of mitigating and aggravating factors,<sup>9</sup> victim

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<sup>4</sup> See *Furman*, 408 U.S. at 256–57, 295 (Brennan, J., concurring) (describing these fundamental flaws).

<sup>5</sup> See, e.g., *infra* notes 7–33.

<sup>6</sup> *McGautha v. California*, 402 U.S. 183, 204 (1971). In making this statement, the Court was using the impossibility of the task to explain why it was not requiring the states to provide guidance to capital sentencers to meet Due Process, i.e., the task was "beyond present human ability." *Id.* The Court's decision a year later in *Furman* that the failure to provide such guidance violated the Eighth Amendment, meant, therefore, that the states now had to undertake the very task that *McGautha* had declared "beyond present human ability" in order to meet *Furman*'s objections.

<sup>7</sup> See, e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980) (ruling that the aggravating circumstance that murder "was outrageously or wantonly vile, horrible or inhumane in that it involved torture, depravity of mind, or an aggravated battery to the victim" was impermissibly vague as applied).

<sup>8</sup> See, e.g., *Lockett v. Ohio*, 438 U.S. 586 (1978) (requiring that the sentencer be allowed to consider all mitigating evidence concerning the defendant or the crime that might serve as a "basis for a sentence less than death").

<sup>9</sup> See, e.g., *Boyde v. California*, 494 U.S. 370 (1990) (approving jury instruction that told the jury "[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death").

impact evidence,<sup>10</sup> rape of an adult,<sup>11</sup> rape of a child,<sup>12</sup> felony murder,<sup>13</sup> intellectual disability,<sup>14</sup> age,<sup>15</sup> lethal injection,<sup>16</sup> future dangerousness,<sup>17</sup> incompetence to be executed,<sup>18</sup> jurors who have doubts about the death penalty,<sup>19</sup> jurors who are too strongly for the death penalty,<sup>20</sup> jurors where race is an issue,<sup>21</sup> how individual jurors should consider mitigation,<sup>22</sup> not diminishing a juror's sense of responsibility in imposing the death penalty,<sup>23</sup> what jurors must be told about alternative penalties,<sup>24</sup> deadlocked juries,<sup>25</sup> lesser included offense instructions,<sup>26</sup> equal protection claims at sentencing,<sup>27</sup>

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<sup>10</sup> See, e.g., *Payne v. Tennessee*, 501 U.S. 808 (1991) (finding victim impact evidence, which tells the sentencer about the victim and the impact of the victim's loss, constitutionally permissible).

<sup>11</sup> See *Coker v. Georgia*, 433 U.S. 584 (1977) (holding the death penalty invalid for the rape of an adult without murder).

<sup>12</sup> See *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding the death penalty unconstitutional for the rape of a child under the age of twelve without death or the intent to result in death).

<sup>13</sup> See *Enmund v. Florida*, 458 U.S. 782 (1982) (ruling the death penalty unconstitutional for felony-murder where defendant neither kills nor knew death was highly likely to occur).

<sup>14</sup> See *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding the death penalty unconstitutional for the intellectually disabled).

<sup>15</sup> See *Roper v. Simmons*, 543 U.S. 551 (2005) (concluding that "evolving standards" of decency barred imposition of the death penalty on juveniles).

<sup>16</sup> See *Baze v. Rees*, 553 U.S. 35 (2008) (holding that lethal injection did not constitute cruel and unusual punishment unless gratuitously painful).

<sup>17</sup> See *Barefoot v. Estelle*, 463 U.S. 880 (1983) (concluding that future dangerousness as an aggravator was not impermissible despite risk of error).

<sup>18</sup> See *Ford v. Wainwright*, 477 U.S. 399 (1986) (establishing that, to be executed, the condemned must be aware of "the punishment [he is] about to suffer and why [he is] to suffer it").

<sup>19</sup> See, e.g., *Wainwright v. Witt*, 469 U.S. 412 (1985) (holding that a juror can be dismissed only if the juror's beliefs would "substantially impair" ability to follow the law).

<sup>20</sup> See, e.g., *Morgan v. Illinois*, 504 U.S. 719 (1992) (ruling that defendant has right during voir dire to inquire whether venire persons would automatically impose the death penalty).

<sup>21</sup> See *Turner v. Murray*, 476 U.S. 28 (1986) (defendant has right to question prospective jurors about racial bias when accused of an interracial capital crime).

<sup>22</sup> See, e.g., *Mills v. Maryland*, 486 U.S. 367 (1988) (jury unanimity requirements for considering mitigating evidence violate *Lockett*).

<sup>23</sup> See *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (jury's "sense of responsibility" for death penalty must not be diminished).

<sup>24</sup> See *Jones v. United States*, 527 U.S. 373 (1999) (no constitutional right exists for jury instruction on what happens if the jury cannot agree on a sentence, unless there is a "reasonable likelihood" the jury will be "affirmatively misled" as to the consequence).

<sup>25</sup> See *Lowenfield v. Phelps*, 484 U.S. 231 (1988) (concluding that dynamite charges, if directed at furthering deliberation, do not violate the Constitution when the jury is deadlocked on the sentence).

<sup>26</sup> See, e.g., *Beck v. Alabama*, 447 U.S. 625 (1980) (a capital defendant is entitled to jury instruction on possible lesser-included offenses).

<sup>27</sup> See *McCleskey v. Kemp*, 481 U.S. 279 (1987) (requiring a showing of intentional discrimination for equal protection violation).

*Miranda* as applied to psychiatric exams for capital defendants,<sup>28</sup> claims of innocence,<sup>29</sup> ineffective assistance,<sup>30</sup> prosecutorial misconduct,<sup>31</sup> and clemency.<sup>32</sup>

And lest one think that these rules are simple clear-cut statements of law, each rule has spawned its own elaborate subset of cases where the Court has tried to clarify, refine, and spot-fix the problems that inevitably spring up with the announcement of a new rule.<sup>33</sup> The result has been the creation of a tangle of rules and rules-that-clarify rules unlike any other area of the Constitution as the Court has strained to contain the death penalty decision within the rule of law. And in the background of all these rulings still looms the question that Justice Harlan posed on the eve of *Furman*: does the very nature of the death penalty question simply defy the rule of law and the ability to ensure reliability and consistency?

This Article returns to that question, as have many articles and cases through the years, but through a prism of cases that generally have not been thought of as bearing directly on the question: the Court's landmark holdings in *Atkins v. Virginia*<sup>34</sup> and

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<sup>28</sup> See *Estelle v. Smith*, 451 U.S. 454 (1981) (ruling that *Miranda* warnings apply to a psychiatric exam to be used at death penalty sentencing).

<sup>29</sup> See, e.g., *Schlup v. Delo*, 513 U.S. 298 (1995) (claim of constitutional error, normally barred because of procedural default, can be heard if newly discovered evidence of fact exists such that "no reasonable juror would have found [him] guilty beyond a reasonable doubt").

<sup>30</sup> See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984) (announcing standard for ineffective assistance).

<sup>31</sup> See, e.g., *Darden v. Wainwright*, 477 U.S. 168 (1986) (prosecutor's comments constitute violation if rendered sentencing fundamentally unfair).

<sup>32</sup> See *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998) (concluding that clemency processes are subject to at least "minimal procedural safeguards" of Due Process).

<sup>33</sup> To provide examples of how a case announcing a constitutional rule governing the death penalty is then elaborated upon in numerous later cases might result in the longest footnote in the history of law reviews. In fact, the Court's capital decisionmaking could be used by a mathematics teacher to illustrate the concept of exponential growth. To provide just one example, the holding in *Godfrey v. Georgia*, 446 U.S. 420 (1980), invalidating the "wantonly vile" aggravator as too vague, in turn begat *Maynard v. Cartwright*, 486 U.S. 356 (1988) (concluding that "especially heinous, atrocious or cruel" was too vague as applied); *Shell v. Mississippi*, 498 U.S. 1 (1990) (Marshall, J., concurring) (per curiam) (merely explaining that "heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means to inflict a high degree of pain with indifference to, or even enjoyment of[,] the suffering of others" does not adequately narrow terms); *Walton v. Arizona*, 497 U.S. 639 (1990) (holding Arizona's "heinous and cruel" aggravating circumstances constitutional where limited to intended or foreseeable infliction of mental anguish or physical abuse"); and *Arave v. Creech*, 507 U.S. 463 (1993) (upholding an "utter disregard for human life" factor as constitutional when interpreted as meaning a "cold-blooded, pitiless slayer"). This process of elaboration has been repeated for almost every case the Court has decided.

<sup>34</sup> 536 U.S. 304 (2002). In keeping with the changing terminology as used by mental health professionals, this Article will use the term "intellectually disabled" rather than "mentally retarded" unless "mentally retarded" is the phrase used in a quotation. See *Hall v. Florida* 134 S. Ct. 1986 (2014) ("Previous opinions of this Court have employed the term

*Roper v. Simmons*,<sup>35</sup> the cases that struck down the death penalty for intellectually disabled and juvenile defendants. While those cases have been properly heralded as important holdings under the Court's continuing Eighth Amendment jurisprudence that has found the death penalty "disproportional" for certain types of defendants and crimes, it turns out that their holdings also contain reasoning with the potential for a far greater impact on the death penalty. Indeed, this Article will show that, properly understood, the cases are less about proportionality and more about a different line of cases, a series of holdings that have focused on individualized sentencing and the need for heightened reliability in capital sentencing. Looked at from this perspective, *Atkins* and *Roper* are anything but conventional Eighth Amendment proportionality cases, and instead involve the Court acknowledging for the first time that certain types of mitigation are simply beyond the ken of the capital sentencer.

This acknowledgment, which we will call the "unreliability principle," has profound implications for the death penalty if applied honestly in future cases. At a minimum, the cases call into serious question the death penalty for other offenders where the unreliability principle applies, such as the category of mentally ill defendants.<sup>36</sup> And if taken to its logical endpoint, the unreliability principle simply cannot

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"mental retardation." This opinion uses the term "intellectual disability" to describe the identical phenomenon.").

<sup>35</sup> 543 U.S. 551 (2005).

<sup>36</sup> Strong arguments have been made that *Atkins*'s and *Roper*'s reasoning requires a finding that the death penalty cannot be applied to the mentally ill. These arguments tend to be focused on *Atkins* and *Roper* as proportionality cases and the lack of a legitimate retributive or deterrent effect in applying the death penalty to mentally ill defendants. See, e.g., Bethany C. Bryant, Comment, *Expanding Atkins and Roper: A Diagnostic Approach to Excluding the Death Penalty as Punishment for Schizophrenic Offenders*, 78 MISS. L.J. 905, 911–12 (2009) (discussing the Court's approach to the principle of proportionality and arguing that the death penalty for mentally ill defendants could not advance the penological goal of deterrence); Laurie T. Izutsu, *Applying Atkins v. Virginia to Capital Defendants with Severe Mental Illness*, 70 BROOK. L. REV. 995, 999–1000 (2005) (noting that the Court has found the death penalty has little deterrent effect against defendants with reduced capacity for reasoned choice); Helen Shin, *Is the Death of the Death Penalty Near? The Impact of Atkins and Roper on the Future of Capital Punishment for Mentally Ill Defendants*, 76 FORDHAM L. REV. 465, 477–78, 480–81 (2007) (discussing how excessive punishments are judged by currently prevailing standards and how defendants with diminished capacity are not likely to be deterred); Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785 (2009) (discussing how the death penalty is a disproportionate punishment for defendants with mental illness because it does not meet the penological goals of retribution and deterrence).

Professor Christopher Slobogin has made important arguments using Equal Protection and Due Process principles to expand *Atkins* to mentally ill defendants. See Christopher Slobogin, *Mental Illness and the Death Penalty*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 667 (2000) (discussing the death penalty for the mentally ill through the lens of equal protection and due process); Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293 (2003) [hereinafter Slobogin, *What Atkins Could Mean*] (2003) (viewing *Atkins* through the lens of an Equal Protection argument). For a comprehensive

be reconciled with the very premise that underlies the Court's efforts to construct a constitutional death penalty: the premise that the death penalty decision can be a rational decision-making process while still fully considering the capital defendant as an individual.

## I. THE EVOLUTION OF THE "UNRELIABILITY PRINCIPLE"

### A. The Conventional Account: *Atkins* and *Roper* as Proportionality Cases

The Court's zig-zagging death penalty jurisprudence is on full display when looking at the Court's cases addressing the constitutionality of applying the death penalty to intellectually disabled and juvenile defendants. In holding that intellectually disabled defendants are beyond the death penalty's reach, *Atkins* came a mere thirteen years, barely a blink of an eye in constitutional time, after the Court in *Penry v. Lynaugh*<sup>37</sup> had rejected the very same claim.<sup>38</sup> And *Roper* constituted only a slightly longer Eighth Amendment about-face, removing juveniles from death-penalty eligibility sixteen years after the Court had declined to do so in *Stanford v. Kentucky*.<sup>39</sup> Given that the Court's Eighth Amendment proportionality jurisprudence is premised on the notion of "evolving standards of decency,"<sup>40</sup> the relative brevity of time suggests that the two cases are not simply new branches on the Eighth Amendment evolutionary tree, but represent a significant development in the very course of evolution in the death penalty area.

This change in evolutionary course is not self-evident upon first reading *Atkins* and *Roper*. The Court appears to simply follow the established framework for looking at whether a category of cases violates the Eighth Amendment because the punishment is so disproportionate that it "violates evolving standards of decency."<sup>41</sup>

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bibliography on materials regarding mental illness and the death penalty, see Jean Mattimoe, *The Death Penalty and the Mentally Ill: A Selected and Annotated Bibliography*, 5 CRITICAL LEGAL STUD. J. 1 (2012).

<sup>37</sup> 492 U.S. 302 (1989).

<sup>38</sup> See generally *id.* (holding that a death sentence imposed on an intellectually disabled defendant was not a per se violation of the Eighth Amendment).

<sup>39</sup> 492 U.S. 361 (1989).

<sup>40</sup> *Id.* (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>41</sup> The doctrinal roots of the Eighth Amendment principle that a punishment must be proportional traces to a 1910 case where the Court held "that it is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Weems v. United States*, 217 U.S. 349, 367 (1910) (striking down the punishment of *cadena temporal*, hard labor in chains, for the crime of falsifying records). Chief Justice Warren first tied the Eighth Amendment into an "evolving standards" analysis when he stated in *Trop v. Dulles*, 356 U.S. at 100–01, "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."



Since approving in 1976 the "guided discretion"<sup>42</sup> death penalty schemes that purported to cure the arbitrariness identified in *Furman*,<sup>43</sup> the Court has utilized a two-step process in assessing whether any specific category of capital cases violates "evolving standards." In the first step, the Court looks to "objective factors" such as legislative trends, the number of death sentences imposed, and executions carried out, to see if a consensus has emerged against the practice.<sup>44</sup> After undertaking the first step and giving the objective evidence "great importance,"<sup>45</sup> the Court takes a second step in which "the Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."<sup>46</sup> Under this second step, the Court looks at whether the death penalty would fulfill the penological purposes of retribution and deterrence and, therefore, if "there is reason to disagree with the judgment reached by the citizenry and its legislators."<sup>47</sup> Leading up to *Atkins* and *Roper*, the Court had used the proportionality principle to bar the death penalty from being applied to crimes such as non-homicidal rape and simple felony murder.<sup>48</sup>

And it was to this familiar two-step formula that the Court turned in *Atkins* and *Roper*. In applying the first step in *Atkins*, Justice Stevens explained that a look at "objective factors" showed that a "dramatic shift in the state legislative landscape . . . ha[d] occurred" since *Penry*, and that a public sentiment against executing the intellectually disabled had emerged.<sup>49</sup> In *Roper*, Justice Kennedy looked to "the rejection

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<sup>42</sup> See *Gregg v. Georgia*, 428 U.S. 153, 197 (1976) (upholding Georgia's new statutory scheme as adequately guiding the jury in its exercise of discretion).

<sup>43</sup> Most states used the Model Penal Code as a blueprint to hammer together "guided discretion" statutes that attempted to meet *Furman*'s critique. These statutes tried to constrain sentencer discretion by specifying certain "aggravating factors" that had to be found before a defendant became eligible for the death penalty (for example, that the killing was of a police officer during the course of her duties), and by then requiring the aggravating factors to be weighed against mitigating factors that also were often specified in the statute. See generally Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1152-53 (1991) (examining the Court's Eighth Amendment jurisprudence in relation to guided discretion statutes).

<sup>44</sup> *Atkins v. Virginia*, 536 U.S. 304, 311-14 (2002).

<sup>45</sup> *Id.* at 312.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 313.

<sup>48</sup> See *Enmund v. Florida*, 458 U.S. 782 (1982) (holding the death penalty unconstitutional for felony-murder where the defendant neither kills nor knew death was highly likely to occur); *Coker v. Georgia*, 433 U.S. 584 (1977) (holding the death penalty invalid for rape of an adult without murder). The Court also had held that the Eighth Amendment barred executing a condemned defendant who did not understand "the punishment [he is] about to suffer and why [he is] about to suffer it." *Ford v. Wainwright*, 477 U.S. 399, 422 (1986). An individual under *Ford*, however, would have been sentenced to death for a crime for which he could be executed were it not for later becoming mentally incompetent.

<sup>49</sup> *Atkins*, 536 U.S. at 310-12.

of the juvenile death penalty in the majority of States; the infrequency of its use . . . ; and the consistency in the trend toward abolition” to find that “today our society views juveniles” as “‘categorically less culpable than the average criminal.’”<sup>50</sup> While the dissenters took issue with how the majorities in *Atkins* and *Roper* took the nation’s pulse to see if a consensus existed,<sup>51</sup> on the whole the examination of the “objective factors” was in line with the Court’s prior disproportionality analysis.

Pursuant to its precedent, the Court next “exercise[d] . . . [its] own independent judgment” under the second step by looking at whether the death penalty served capital punishment’s retributive and deterrent purposes. In *Atkins*, the majority concluded that, retributively, intellectually disabled individuals did not possess the culpability necessary to place them among “the narrow category” of those “most deserving” of the death penalty.<sup>52</sup> Moreover, their impairments meant that they could not engage in the “cold calculus” necessary for a punishment to have a deterrent effect.<sup>53</sup> In *Roper*, Justice Kennedy followed the same analytical path in concluding that juveniles’ immaturity meant that they “cannot with reliability be classified among the worst offenders,”<sup>54</sup> and that “[t]he 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.”<sup>55</sup> Based on the classic two-step “evolving standards” analysis, each majority opinion thus concluded that the death penalty was a violation of the Eighth Amendment.

#### *B. The “Unreliability Principle” Gets a Foothold: The Additional Analytical Step in Atkins and Roper*

If *Atkins*’s analysis had concluded at this point as in prior proportionality cases, the opinion would have added by accretion to the Court’s body of “evolving standards” case law, but would not have broken any new constitutional analytical ground. Justice Stevens, however, did not stop there, but proceeded to offer an additional “justification” to the conventional two-step analysis:

The risk “that the death penalty will be imposed [on intellectually disabled defendants] in spite of factors which may call for a less severe penalty,” *Lockett v. Ohio*, 438 U.S. 586, 605 (1978), is

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<sup>50</sup> *Roper v. Simmons*, 543 U.S. 551, 567 (2005) (quoting *Atkins*, 536 U.S. at 316).

<sup>51</sup> The *Atkins* dissenters, for instance, objected to the majority’s reliance on opinion polls and the views of professional organizations. 536 U.S. at 322–23 (Rehnquist, C.J., dissenting). In *Roper*, the dissent objected to the majority’s references to the rarity of the juvenile death penalty among other nations. 543 U.S. at 626–28 (Scalia, J., dissenting).

<sup>52</sup> *Atkins*, 536 U.S. at 319.

<sup>53</sup> *Id.* at 319–20.

<sup>54</sup> *Roper*, 543 U.S. at 569, 589.

<sup>55</sup> *Id.* at 572 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988) (plurality opinion)).

enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. . . . [M]oreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. [Penry v. Lynaugh, 492 U.S. 302, 323–25 (1989)] Mentally retarded defendants in the aggregate face a special risk of wrongful execution.<sup>56</sup>

While the full meaning of this justification will be unpacked in detail later,<sup>57</sup> this additional justification planted the seed of a very powerful Eighth Amendment concept that this Article calls the “unreliability principle”: if too great a risk exists that constitutionally protected mitigation cannot be properly comprehended and accounted for by the sentencer, the unreliability that is created means that the death penalty cannot be constitutionally applied.

Perhaps if the Court had not returned to the idea, the unreliability principle would have remained a nascent idea lying dormant in *Atkins*’s holding. The Court, however, invoked the principle again but three years later in *Roper*. In *Roper*, the State had argued in part that a categorical ban on the death penalty for juveniles was unnecessary because jurors already were allowed to take youth into account as a mitigating circumstance on a case-by-case basis.<sup>58</sup> In rejecting this argument for the majority, Justice Kennedy again invoked the idea that the mitigation at stake was beyond the sentencer’s ken, arguing that the very nature of a capital crime made it almost impossible for a jury to properly assess the mitigating circumstance:

An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant’s youth may even be counted against him. In this very case, as we noted above, the prosecutor argued Simmons’ youth was aggravating rather than mitigating.<sup>59</sup>

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<sup>56</sup> *Atkins*, 536 U.S. at 320–21 (footnote omitted).

<sup>57</sup> See *infra* notes 102–26 and accompanying text.

<sup>58</sup> *Roper*, 543 U.S. at 572.

<sup>59</sup> *Id.* at 573.

Importantly, the Court further elaborated that while theoretically it might be possible to add yet another rule requiring jurors to be instructed to consider youth as mitigation, any such piecemeal fix could not ensure sufficient reliability:

While this sort of overreaching could be corrected by a particular rule to ensure that the mitigating force of youth is not overlooked, that would not address our larger concerns. It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others. If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty. When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.<sup>60</sup>

*Roper* thus strongly reinforced *Atkins*'s recognition that if circumstances prevent a juror from being able to give proper consideration to constitutionally protected mitigation, the death penalty *categorically* cannot be imposed. And here is the interesting aspect of *Atkins* and *Roper*'s recognition of the unreliability principle: while on the one hand this principle constitutes a significant new development in Eighth Amendment law, the principle itself has roots deeply imbedded in the Court's constitutional doctrine. Indeed, by taking a step back and looking at the unreliability principle's place in the overall constitutional scheme, one can see that the principle is but a natural step in the evolution of the Court's Eighth Amendment doctrine. The key to understanding this evolution, however, is to look at *Atkins* and *Roper* not as proportionality cases, but, rather, as the logical and inevitable progression of a different line of Eighth Amendment cases, the Court's requirement that the death penalty only be imposed after a sentencer has given a defendant full "individualized consideration."<sup>61</sup>

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<sup>60</sup> *Id.* at 573–74 (citations omitted).

<sup>61</sup> *Id.* at 572.

*C. The History: Individualized Consideration as the Guarantor of Reliability*

On the same day in 1976 that the Court approved guided discretion schemes in *Gregg v. Georgia*,<sup>62</sup> the method by which most states attempted to address arbitrariness by listing aggravating and mitigating factors for the jury to weigh,<sup>63</sup> the Court struck down the mandatory death penalty. Several states, like Louisiana and North Carolina, had responded to *Furman* by abolishing discretion all together and mandating the death penalty for certain capital crimes.<sup>64</sup> In ruling such efforts unconstitutional in *Woodson v. North Carolina*, Justice Stewart's plurality opinion laid out the Eighth Amendment principle of individualized consideration:

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death. . . .

[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long.<sup>65</sup>

*Woodson* along with its companion case of *Roberts v. Louisiana*,<sup>66</sup> thus not only allowed but required as a constitutional rule the consideration of "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind,"<sup>67</sup>

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<sup>62</sup> 428 U.S. 153 (1976).

<sup>63</sup> See *supra* note 43 (examining states' response to *Furman*).

<sup>64</sup> See *Roberts v. Louisiana*, 428 U.S. 325, 329 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 286 (1976).

<sup>65</sup> *Woodson*, 428 U.S. at 304–05 (citation omitted).

<sup>66</sup> 428 U.S. 325 (holding Louisiana's mandatory death penalty statute unconstitutional).

<sup>67</sup> *Woodson*, 428 U.S. at 304.

an elegiac command of law not often seen in a profession accustomed to thinking in terms of dryly stated rules.<sup>68</sup>

The full scope of *Woodson* and *Roberts*'s constitutional imperative of "individualized consideration" was not made clear until two years later in *Lockett v. Ohio*.<sup>69</sup> In *Lockett*, the Court addressed Ohio's "guided discretion" statute that limited the capital sentencer's consideration of mitigating factors to a list of only three circumstances.<sup>70</sup> Ohio had argued that the limited list of mitigators was its effort to comply with *Furman* by guiding the sentencer's discretion not only as to what factors made the defendant eligible for death, but also as to those that could be considered as weighing against the death sentence.<sup>71</sup> The *Lockett* Court, however, ruled that limiting what mitigating factors could be considered was irreconcilable with the necessity of allowing individualized consideration before an individual could be sentenced to death.<sup>72</sup> As a result, *Lockett* issued a broad constitutional mandate that the sentencer must be allowed to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."<sup>73</sup>

*Lockett* was to have a profound impact on capital sentencing. The requirement that the jury be allowed to consider "any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death"<sup>74</sup> has led to a wide variety of mitigation being presented to juries. Evidence ranges from evidence documenting the hardships and impairments that the defendant has faced in his lifetime, such as child abuse, to evidence aimed at demonstrating to the sentencer that the defendant will function well in prison if given a life sentence.<sup>75</sup> And while the Court's

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<sup>68</sup> Imagine, for instance, how such a holding might be placed in a capital punishment treatise's index by a professional indexer unfamiliar with death penalty law: "Well, of course I cross-indexed it under 'compassion' and 'diverse human frailties,' where else would you have had me put it?"

<sup>69</sup> 438 U.S. 586 (1978).

<sup>70</sup> As the *Lockett* Court explained,

Once a verdict of aggravated murder with specifications had been returned, the Ohio death penalty statute required the trial judge to impose a death sentence unless, after "considering the nature and circumstances of the offense" and Lockett's "history, character, and condition," he found by a preponderance of the evidence that (1) the victim had induced or facilitated the offense, (2) it was unlikely that Lockett would have committed the offense but for the fact that she "was under duress, coercion, or strong provocation," or (3) the offense was "primarily the product of [Lockett's] psychosis or mental deficiency."

*Id.* at 593–94 (alteration in original).

<sup>71</sup> *Id.* at 599–600 n.7.

<sup>72</sup> *Id.* at 606.

<sup>73</sup> *Id.* at 604 (emphasis added).

<sup>74</sup> *Id.*

<sup>75</sup> See generally *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677 (2008).

standard for ineffective assistance of counsel still lags behind the realities of capital representation, the Court has begrudgingly come to recognize that a thorough investigation of a capital defendant's life history is required.<sup>76</sup>

*Lockett's* long-term importance, however, lay not only in how it affected courtroom practice, but also in its rationale. In justifying the holding's expansive definition of mitigation, the Court explicitly tied together the need for full consideration of mitigating evidence with the requirement of heightened reliability in capital cases. The *Lockett* majority began by holding that capital sentencing "call[ed] for a greater degree of reliability" because "the penalty of death is qualitatively different from any other sentence."<sup>77</sup> Crucially, the Court then expressly linked the heightened reliability with *Woodson's* requirement of individualized consideration:

Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. . . . The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.<sup>78</sup>

And, the Court observed, the need for greater reliability based on individualized consideration means that a death sentence cannot stand if the sentencing carried the "risk" that the sentencer did not fully hear or consider mitigation:

[P]revent[ing] the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed *in spite of factors* which may call for a less severe penalty.

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<sup>76</sup> See *Porter v. McCollum*, 558 U.S. 30, 39 (2009) ("It is unquestioned that under the prevailing professional norms at the time of Porter's trial, counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'" (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000))).

<sup>77</sup> *Id.* (internal quotation marks omitted). The Court elaborated, "The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques—probation, parole, work furloughs, to name a few—and various postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases."

*Id.* at 605.

<sup>78</sup> *Id.*

When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.<sup>79</sup>

This strong embracing of individualized consideration as the linchpin to reliability thus placed the focal point of the Eighth Amendment squarely on the sentencer's ability (or inability) to consider constitutionally mandated mitigating evidence.

The Court cemented the constitutional relationship between individualized consideration and reliability in a number of subsequent cases. In *Eddings v. Oklahoma*,<sup>80</sup> the Court reversed a death sentence where the lower courts had believed that they were not allowed to consider a defendant's troubled youth as mitigation.<sup>81</sup> In explaining *Woodson* and *Lockett*'s mandates of individualized consideration of mitigation, the Court elaborated on the principle's importance by stressing that not only is individualized consideration essential for the reliability of a death sentence for a particular defendant, but individualized consideration is a crucial part of satisfying *Furman*'s overall command that death sentences throughout the capital punishment system be consistent: "By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency."<sup>82</sup> Without reliable individualized consideration, the capital punishment system as a whole creates an unacceptable risk of reverting to the arbitrariness and capriciousness that brought the system down in *Furman v. Georgia*.<sup>83</sup>

The link between the principle of individualized consideration and the reliability necessary to satisfy *Furman* also formed a critical part of the Court's rationale in *Skipper v. South Carolina*.<sup>84</sup> In *Skipper*, the trial court had excluded testimony that the defendant had exhibited good behavior in his seven months while in jail awaiting trial.<sup>85</sup> With a hint of impatience, the majority noted that "there is no disputing" that it is "now well established" that the defendant has the constitutional right to have "any relevant mitigating evidence" considered.<sup>86</sup> And the majority had no trouble

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<sup>79</sup> *Id.* (emphasis added).

<sup>80</sup> 455 U.S. 104 (1982).

<sup>81</sup> *Id.* at 109, 117.

<sup>82</sup> *Id.* at 112.

<sup>83</sup> *Id.*

<sup>84</sup> 476 U.S. 1 (1986).

<sup>85</sup> *Id.* at 3.

<sup>86</sup> *Id.* at 4 (internal quotation marks omitted). The Court showed similar impatience in striking down a Florida death sentence where the trial court had viewed itself as limited to a list of statutory mitigating factors. *Hitchcock v. Dugger*, 481 U.S. 393 (1987). *Hitchcock* evidences how entrenched *Lockett* had become by this point. After the Court found that the record made clear that the judge had viewed himself as limited to only statutory mitigating factors, Justice Scalia for a unanimous Court treated the finding as constitutional game, set, and match:



finding that "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination."<sup>87</sup> As in *Eddings*, the *Skipper* Court further explained that the specific mitigating evidence at stake also worked to make the capital sentencing system as a whole more reliable: "Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing . . . ."<sup>88</sup> In fact, the Court drew a direct parallel to its earlier approval of "future dangerousness" as a legitimate aggravating factor because "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose."<sup>89</sup>

The case, though, that perhaps most firmly wedded the principle of individualized responsibility with the need for reliability was *Penry v. Lynaugh*.<sup>90</sup> In *Penry*, the defendant had introduced evidence of his intellectual disability, but under Texas's capital punishment scheme at the time, the jury had no legal way to give consideration to his condition.<sup>91</sup> Under the Texas scheme, the jury had simply been asked three questions: "Did Penry act deliberately when he murdered Pamela Carpenter? Is there a probability that he will be dangerous in the future? Did he act unreasonably in response to provocation?"<sup>92</sup> If the jury answered "yes" to all three questions, they were to return a death sentence; if they answered "no" to one or more questions, they were to return a verdict of life.<sup>93</sup>

Given the nature of the three questions, however, the jury had no meaningful way to give effect to Penry's evidence of intellectual disability. Indeed, because the evidence was that his impairment meant he had poor impulse control, if anything, his mitigating evidence made it *more likely* that the jury would answer "yes" to the second question of whether he posed a future danger.<sup>94</sup> Because intellectual disability was undeniably mitigating evidence under *Lockett*, and because the jury had no "vehicle"

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We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper v. South Carolina*, 476 U.S. 1 (1986), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion).

*Id.* at 398–99.

<sup>87</sup> *Skipper*, 476 U.S. at 7.

<sup>88</sup> *Id.* at 5.

<sup>89</sup> *Id.* (quoting *Jurek v. Texas*, 428 U.S. 262, 275 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

<sup>90</sup> 492 U.S. 302 (1989).

<sup>91</sup> *Id.* at 312.

<sup>92</sup> *Id.* at 320.

<sup>93</sup> *Id.* at 310.

<sup>94</sup> The prosecutor, in fact, argued to the jury that Penry's psychiatric history made him a danger in prison. *Id.* at 323–24 (quoting prosecutor's closing argument).

through which it could have given effect to the mitigation, the Court reversed Penry's death sentence.<sup>95</sup>

Especially important, however, for the evolution of the unreliability principle was the opinion's express tying together of the *Woodson-Lockett* individualized consideration requirement with the need for reliability.<sup>96</sup> Justice O'Connor's majority opinion traced in step-by-step detail the Court's evolving precedent. The opinion began with the Court's now obligatory observation that individualized consideration was bedrock Eighth Amendment doctrine.<sup>97</sup> Next, the opinion emphasized the lesson of *Eddings* that "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer[; t]he sentencer must also be able to consider and give effect to that evidence in imposing sentence."<sup>98</sup> Finally, the opinion explained that the full presentation and consideration of mitigation was constitutionally essential, and it was essential because of reliability:

Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human bein[g]" and has made a reliable determination that death is the appropriate sentence. [*Woodson v. North Carolina*, 428 U.S. 280, 304, 305 (1976)]. "Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime."<sup>99</sup>

And just in case the link between individualized consideration and reliability had not been made abundantly clear, the opinion forcefully returned to the theme later in rejecting the state's argument that allowing the jury to consider broad mitigation would cast the system back into the unfettered discretion that *Furman* condemned:

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<sup>95</sup> *Id.* at 328.

<sup>96</sup> *Id.*

<sup>97</sup> The opinion explained that "[u]nderlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant" and that such "individualized assessment" turns upon the "defendant's background and character." *Id.* at 319.

<sup>98</sup> *Id.* (emphasis added).

<sup>99</sup> *Id.* (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). Justice O'Connor first coined the phrase "reasoned moral response" in a case that initially might appear at odds with the evolutionary theme of broad mitigation. She invoked the concept as a way of explaining why an "anti-sympathy" instruction at the penalty phase did not undermine *Lockett*'s mandate of broad mitigation. *Brown*, 479 U.S. at 545 (arguing such an instruction did not violate the Eighth Amendment because mitigation was meant to be evaluated as a "reasoned moral response" rather than an emotional or sympathetic response). The idea of a "reasoned moral response," however, is quite congruous with the idea that individualized consideration is crucial to reliability, since a sentencer cannot begin to have a "reasoned," let alone a "moral," response unless she is in possession of complete information about the defendant and personally capable of considering it.

[I]t is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a "reasoned moral response to the defendant's background, character, and crime." "In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case," the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime.

In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision. Our reasoning in *Lockett* and *Eddings* thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."<sup>100</sup>

Thus through a series of cases that relentlessly hammered the point home, the Court sent the unambiguous message that the Eighth Amendment right to individualized consideration was to be construed broadly because it was a critical underpinning of the Court's efforts to construct a constitutional death penalty system after *Furman*.<sup>101</sup>

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<sup>100</sup> *Penry*, 492 U.S. at 327–28 (citations omitted); see also *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (*Penry II*) (describing the "give effect to" language of the other *Penry* case as "the key" to that decision).

<sup>101</sup> A bit astonishingly, given the clear mandate of the *Lockett* line of cases through *Penry*, the Court still had to clarify the point for the Fifth Circuit in the case of *Tennard v. Dretke*, 542 U.S. 274 (2004). The Fifth Circuit had upheld the Texas courts' and lower federal court's finding that the inability of the jury to give effect to the defendant's evidence that he had an IQ of 67 was not sufficient to warrant a certificate of appealability. *Id.* at 279–81. The Fifth Circuit had imposed a threshold requirement requiring mitigating evidence to be "'constitutionally relevant' . . . that is, evidence of a 'uniquely severe permanent handicap with which the defendant was burdened through no fault of his own,' and evidence that 'the criminal act was attributable to this severe permanent condition.'" *Id.* at 281 (quoting the Fifth Circuit

And it is within this line of cases that *Atkins* can be seen as adding a critical further elaboration on the underlying principle of reliability and individualized consideration.

*D. The Unreliability Principle: The Next Step in the Precedent*

That *Atkins* constitutes an important development in the *Woodson-Lockett* line of cases may at first seem odd since it arose through an Eighth Amendment disproportionality challenge. Upon reflection, however, it makes sense that *Atkins* would be the case to give voice to the principle that the death penalty categorically cannot be imposed if too great a risk exists that constitutionally protected mitigation will not be properly comprehended and accounted for by the sentencer.

Prior to *Atkins*, the Court had not been forced to directly face the deep systemic question of whether juries could adequately assess intellectual disability as mitigation. It is true that the Court in *Penry* had suggested that a categorical ban on the death penalty for intellectually disabled individuals was unnecessary in part because a jury in any individual case could take into account the defendant's intellectual disability as mitigation.<sup>102</sup> And, as we have seen, this rationale actually produced an opinion in *Penry* that resoundingly sang *Woodson* and *Lockett*'s praises and strongly reinforced the constitutional requirement that a sentencer must be able to give effect to mitigation for a death sentence to be constitutionally reliable. But because the Court reversed *Penry*'s death sentence since the Texas three-question scheme at the time did not adequately allow the jury to give effect to his evidence of intellectual disability,<sup>103</sup> the *Penry* Court never had to directly confront the deeper systemic question: what if the very nature of the intellectual disability meant that the sentencer might not be able to properly assess how the mitigation affected the defendant's moral culpability sentence and precluded a reliable assessment?

In *Atkins* the Court could no longer avoid the systemic question. As in *Penry*, the State was arguing that no need for a categorical ban existed because a jury in an individual case could consider intellectual disability as mitigation, and the Virginia system, unlike the Texas scheme, did not preclude its consideration.<sup>104</sup> The *Atkins* Court was thus forced to confront the larger reliability question, and, as we know, determined that an assessment of an intellectually disabled individual's culpability is beyond a jury's ken. Given the Court's repeated mantra from *Woodson* through *Penry* and beyond that the death penalty is not constitutionally acceptable unless there is reliable individualized consideration, the Court could reach no other logical

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opinion) (internal quotation marks omitted). The Supreme Court made clear that the Fifth Circuit's restrictive standard "has no foundation in the decisions of this Court," and, in fact, was contrary to the Court's cases, which had always spoken of mitigation in the "most expansive terms." *Id.* at 284.

<sup>102</sup> 492 U.S. at 340.

<sup>103</sup> See *supra* notes 92–95 and accompanying text.

<sup>104</sup> *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002).

conclusion: if a reliable assessment of constitutionally protected mitigation lies beyond the jury's ability, the jurors cannot even be asked to consider a death sentence.

It was through these circumstances, then, that *Atkins* took its place as the latest chapter in the Court's line of *Woodson-Lockett* individualized consideration cases. Consequently, far from residing solely in the Court's line of proportionality cases, *Atkins* also became an important part of the Court's "individualized consideration" precedent by recognizing that where mitigation defied reliable assessment, the only constitutional answer was a categorical removal of those cases from the death penalty.

*Roper* took this melding of proportionality and individualized consideration yet a step further as the Court even more explicitly linked its Eighth Amendment ban on the juvenile death penalty with the unreliability of the sentencer's capability to assess youth as mitigation.<sup>105</sup> As noted earlier, the Court observed that while one response might be to craft yet another rule to try and spot fix the unreliability,<sup>106</sup> such an effort would be doomed to failure: "If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty."<sup>107</sup> To the Court's credit, once it determined that jurors were unable to reliably assess how juvenile status affected a defendant's culpability, the Court acknowledged that the unreliability required categorical exclusion rather than attempting to affix yet another procedural patch. And in coming to that recognition, the Court expressly invoked *Lockett*'s individualized consideration language as it concluded that the risk that the death penalty will be imposed on juveniles in spite of factors which may call for a less severe penalty was simply too great to allow the death penalty to be decided by the jury.<sup>108</sup>

With *Atkins* and *Roper*, therefore, the discourse on individualized consideration re-entered the Court's Eighth Amendment dialogue with renewed vigor. That the Court's reliance on the unreliability principle in *Atkins* and *Roper* would not be isolated instances became evident when the Court next invoked it in the non-capital case of *Graham v. Florida*.<sup>109</sup> In striking down life without parole sentences for juveniles

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<sup>105</sup> *Roper v. Simmons*, 543 U.S. 551, 573 (2005).

<sup>106</sup> "While this sort of overreaching [of the prosecutor arguing youth as an aggravator] could be corrected by a particular rule to ensure that the mitigating force of youth is not overlooked, that would not address our larger concerns." *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 572–73.

<sup>109</sup> 130 S. Ct. 2011 (2010). Professor Richard Bierschbach has written an excellent piece arguing that *Graham* is more of an individualized-consideration case than a proportionality case in a manner that is very compatible with this Article's reading. Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745 (2012). Because he is primarily focused on how parole plays a role in fulfilling the requirement of individualized consideration, he does not view *Atkins* and *Roper* as having a similar connection to *Woodson* and *Lockett*. *Id.* at 1749, 1766–67 ("Parole thus conceptually severs *Graham* from *Roper*, *Atkins*, and other classic proportionality cases . . ."). Once the unreliability principle of *Atkins* and

who had committed nonhomicide crimes, the Court invoked the unreliability principle to reject the idea that the states could rely on a “case-by-case proportionality” approach to decide if a life without parole sentence violated the Eighth Amendment.<sup>110</sup> Specifically, the *Graham* Court brought the unreliability principle into play by turning to *Atkins* and *Roper*’s theme that the very nature of the mitigation rendered an assessment of the defendant’s culpability unreliable:

[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense. These factors are likely to impair the quality of a juvenile defendant’s representation.<sup>111</sup>

The Court concluded that these “special difficulties” meant that the risk was simply too great that the sentencer would not be able to reliably assess how any particular juvenile defendant might act in the future:

For even if we were to assume that some juvenile nonhomicide offenders might have “sufficient psychological maturity, and at the same time demonstrate sufficient depravity” to merit a life without parole sentence, it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.

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*Roper* is recognized, however, *Graham* in fact becomes a conceptual extension of *Atkins* and *Roper*, rather than a severance, through its recognition that no procedural rule can guarantee sufficient reliability in the context of life without parole for juveniles. See also Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397 (2013) (drawing connection between *Graham*, *Miller*, *Apprendi*, and *Woodson-Lockett*); Janet C. Hoefel, *The Jurisprudence of Death and Youth: Now the Twain Should Meet*, 46 TEX. TECH L. REV. 29, 51–53 (2013) (drawing connection between *Graham*, *Miller*, and *Woodson-Lockett*).

<sup>110</sup> *Graham*, 130 S. Ct. at 2032. The case-by-case approach was advocated by Chief Justice Roberts in his concurrence. *Id.* at 2037 (Roberts, C.J., concurring).

<sup>111</sup> *Id.* at 2032 (internal citation omitted). The majority at this point provided a “*cf.*” citation to *Atkins*. *Id.* (“*Cf. Atkins*, 536 U.S., at 320, 122 S. Ct. at 2242 (“Mentally retarded defendants may be less able to give meaningful assistance to their counsel”))”).

. . . A categorical rule [barring life without parole sentences thus] avoids the risk that, as a result of these difficulties, a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a non-homicide.<sup>112</sup>

The *Graham* Court's categorical exclusion of juveniles who committed nonhomicide crimes from a sentence of life without parole thus relied on the Eighth Amendment unreliability principle and the danger that such a severe sentence might be erroneously imposed because of the sentencer's inability to make a reliable assessment on a case-by-case basis.<sup>113</sup>

And although the unreliability principle was not directly at issue in *Hall v. Florida*,<sup>114</sup> the case in which the Court struck down Florida's rule that *Atkins* could not apply unless a defendant had an IQ test of 70 or under, the Court expressly acknowledged "protect[ion] [of] the integrity of the trial process" as one of *Atkins*'s key rationales.<sup>115</sup> Moreover, the *Hall* opinion revolved around the idea that because

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<sup>112</sup> *Id.* (alteration in original) (internal citations omitted). The *Graham* majority additionally observed that barring life without parole "gives all juvenile non-homicide offenders a chance to demonstrate maturity and reform." *Id.* Although not as self-evident, this justification also ties into the unreliability principle, because it highlights the inability to predict in the future whether the defendant might in fact change:

Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal and rehabilitation . . . A categorical rule against life without parole for juvenile nonhomicide offenders avoids the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term.

*Id.* at 2032–33.

<sup>113</sup> In the next juvenile defendant case, *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the Court expressly invoked the *Woodson-Lockett* line of individualized sentencing cases. The sentence at issue was a mandatory sentence of life without parole for a juvenile convicted of homicide, making, as the Court noted, "relevant . . . a second line of our precedents, demanding individualized sentencing when imposing the death penalty." *Miller*, 132 S. Ct. at 2467. The Court's opinion is important for expressly importing the *Woodson-Lockett* line of cases into a non-capital context, but because the sentence was mandatory, the Court was able to strike down the mandatory nature of the life without parole sentence without addressing underlying issues of unreliability in the discretionary setting. Indeed, because the Court found that striking down the mandatory sentencing feature was "sufficient" to decide the cases before it, they did not "consider [the petitioners'] alternative argument that the Eighth Amendment requires a categorical bar." *Id.* at 2469. The Court then added that given "children's diminished culpability and heightened capacities for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.*

<sup>114</sup> 134 S. Ct. 1986 (2014).

<sup>115</sup> *Id.* at 1993 (quoting *Atkins* as to the "special risks" that intellectually disabled defendants face at trial and sentencing).

Florida's "rigid rule" of a hard cut-off of a 70 IQ ignored how medical professionals use and understand the role of IQ tests, the state "create[d] an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional."<sup>116</sup> Indeed, given that part of *Atkins*'s reasoning is that juries are not able to reliably assess whether an intellectually disabled individual deserves the death penalty, it is hard to see how the Court had any choice but to reassert constitutional control over how the category of intellectual disability is defined. Otherwise, Florida, through its under-inclusive definition of intellectual disability, would have once again been exposing defendants who had the attributes that *Atkins* had singled out as creating "special risks of wrongful execution" to the possibility of an erroneously imposed death sentence.<sup>117</sup>

### *E. The Next Step in the Evolution: The Effect of the Unreliability Principle*

Once it is understood that *Atkins* and *Roper* are not in fact conventional proportionality cases, their far broader impact on the Eighth Amendment and the death penalty can be seen. Most fundamentally, the unreliability principle is not bound by the first step of the "evolving standards" test that requires a finding of a "national consensus" before the Court can proceed with its proportionality analysis.<sup>118</sup> Rather,

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<sup>116</sup> *Id.* at 1990.

<sup>117</sup> Whether or not deliberate, the majority's manner of recounting the facts in *Hall* has the rhetorical effect of making *Atkins*'s point about the dangers of erroneously imposed death sentences on the intellectually disabled. After recounting Hall's intellectual struggles from childhood on through adulthood and how those interacting with him daily clearly viewed him as intellectually disabled, Justice Kennedy notes, "Hall's upbringing appeared to make his deficits in adaptive functioning all the more severe." *Id.* at 1991. The opinion then relates "the most horrible family circumstances imaginable," including how "retardation did not garner any sympathy from his mother, but rather caused much scorn to befall him." *Id.* Hall was "[c]onstantly beaten because he was 'slow' or because he made simple mistakes." His mother "would strap [Hall] to his bed at night, with a rope thrown over a rafter. In the morning, she would awaken Hall by hoisting him up and whipping him with a belt, rope, or cord." Hall was beaten "ten or fifteen times a week sometimes." His mother tied him "in a 'croaker' sack, swung it over a fire, and beat him," "buried him in the sand up to his neck to 'strengthen his legs,' " and "held a gun on Hall . . . while she poked [him] with sticks."

*Id.* at 1990 (alterations in original) (quoting from lower court opinions and findings).

After such a recounting, one is tempted to read Justice Kennedy's next line, "The jury, notwithstanding this testimony, voted to sentence Hall to death, and the sentencing court adopted the jury's recommendation," *id.* at 1991 (emphasis added), as a tacit suggestion that the Court got it right in *Atkins*, i.e., if this type of evidence could not persuade a jury to return a life sentence, there simply is too great a "risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Atkins v. Virginia*, 536 U.S. 304, 320 (quoting *Lockett*).

<sup>118</sup> As noted earlier, *supra* notes 44–48 and accompanying text, under the Court's conventional proportionality analysis, the Court's second step of an "independent" analysis



because the unreliability principle is an expression of the *Woodson-Lockett* line of cases rather than the evolving standards cases, the prerequisite of a national consensus simply has no bearing on the constitutional inquiry. As has been recounted, the *Woodson-Lockett* line of cases instituted the Eighth Amendment mandate that the sentencer must be able to give effect to constitutionally protected mitigation because it was a necessary “cure” to the arbitrariness *Furman* identified: without proper consideration of mitigation, the death penalty is not sufficiently reliable to satisfy the Eighth Amendment.<sup>119</sup> This requirement, however, has no logical nexus to whether or not a national consensus has coalesced about the mitigation. If a sentencer cannot reliably give effect to the protected mitigation, the Court’s constitutional promise is broken. The only question, therefore, is whether the challenged practice runs afoul of the constitutional requirement that the sentencer be able to competently and reliably make a “reasoned moral response.”

Once it is recognized that the *Atkins-Roper* unreliability principle is not tethered to the “national consensus” requirement but stands on its own, the principle’s applicability to other contexts becomes far more expansive. The principle’s application might be thought of as occurring on two different levels. The first level involves identifying other specific mitigating circumstances that pose the same dangers of unreliability as intellectual disability and juvenile status. The second level entails using the unreliability principle to mount a global investigation of whether our system of capital punishment can in reality deliver death sentences only after a sentence has reliably given effect to mitigating evidence.

This Article will attempt to sketch out the basic outlines of each of these applications of the unreliability principle. It will look at the first level by thinking about how the uncertainty principle might apply to defendants suffering from serious mental illness. A number of attempts have been made to extend *Atkins* and *Roper* to mentally ill defendants through traditional proportionality analysis,<sup>120</sup> but it is a difficult task given the lack of a clear national consensus similar to what existed for intellectually disabled and juvenile capital defendants. The unreliability principle, on the other hand, presents a much stronger argument that the risk of a death sentence being erroneously imposed upon a mentally ill defendant simply is too great for the Constitution to bear. Second, as a means of beginning to think about the global examination, the Article will use findings concerning implicit bias to see how the unreliability principle calls into question the entire framework of the Court’s post-*Furman* assumptions on the reliability of the death penalty.

In undertaking this review, we can look at the three cases in which the Court has utilized the unreliability principle—*Atkins*, *Roper*, and *Graham*—and identify six

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follows a threshold inquiry of whether a national consensus has developed against a practice. The first step is intended to provide “objective evidence” that the practice is excessive based on evolving standards. *Atkins*, 536 U.S. at 311–12.

<sup>119</sup> *Furman v. Georgia*, 408 U.S. 238, 274 (1972) (Brennan, J., concurring).

<sup>120</sup> See *supra* note 36.

factors that the Court has used for flagging “special difficulties” that might place a mitigating factor beyond a sentencer’s reliable evaluation. These factors, which we will call the *Atkins-Roper* unreliability factors are: (1) where the mitigation impairs the defendant’s cooperation with his lawyer and the lawyer’s ability to prepare a defense;<sup>121</sup> (2) where the mitigation makes the defendant into a “poor witness,” in part because of the likelihood that their demeanor would make them appear to be remorseless;<sup>122</sup> (3) where the mitigation causes distortions in the defendant’s thinking process that are likely to produce bad decisions;<sup>123</sup> (4) when the mitigation has a double-edged nature that poses the risk that it will be improperly turned into aggravation;<sup>124</sup> (5) when the complexity and conflicting views of experts in the area are likely to generate confusion and misunderstanding among the jurors;<sup>125</sup> and (6) when the risk that the sheer “brutality” of the crime will preclude jurors from properly considering the mitigation.<sup>126</sup> And if those six criteria are applied to mentally ill defendants, each factor could be recited almost verbatim with a cutting and pasting of “mentally ill defendant” in for “intellectually disabled” in *Atkins* or “juvenile” defendant in *Roper* and *Graham*.

## II. CATEGORICAL EXCLUSIONS UNDER THE UNRELIABILITY PRINCIPLE AND MENTALLY ILL DEFENDANTS

Among mitigating circumstances, mental illness is one of the most widely recognized as a characteristic arguing for a sentence less than death. Serious mental illness is a standard statutory mitigating factor in those states that list mitigators in their capital punishment statute.<sup>127</sup> States also often provide by statute for the appointment of a mental health expert simply at the request of a capital defendant,<sup>128</sup> and the Supreme Court has recognized a combined due process–equal protection right to appointment of a mental health expert as an “essential tool” of the defense where mental health is at issue.<sup>129</sup> The “best practices” of capital defendant attorneys require a thorough mental health history and a scouring of the defendant’s past looking for signs of mental illness as a basic prerequisite to building the defense’s “case for

<sup>121</sup> *Atkins*, 536 U.S. at 320–21; see also *Graham v. Florida*, 130 S. Ct. 2011, 2032 (2010).

<sup>122</sup> *Atkins*, 536 U.S. at 321.

<sup>123</sup> *Graham*, 130 S. Ct. at 2032.

<sup>124</sup> *Roper v. Simmons*, 543 U.S. 551, 573 (2005).

<sup>125</sup> *Atkins*, 536 U.S. at 308–09.

<sup>126</sup> *Roper*, 543 U.S. at 573.

<sup>127</sup> See Ellen Fels Berkman, Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 297–98 (1989) (detailing “[t]he high percentage of statutory mitigating circumstances that have mental illness components”).

<sup>128</sup> See VA. CODE ANN. §19.2-264.3:1 (West 2014).

<sup>129</sup> *Ake v. Oklahoma*, 470 U.S. 68 (1985) (defendant entitled to appointment of a psychiatrist “when the State has made the defendant’s mental condition relevant to his criminal culpability and to the punishment he might suffer”).

life.”<sup>130</sup> Over half of capital jurors identify a defendant’s “history of mental illness” as making them less likely to give a death sentence, with more than a quarter of jurors stating that it would make them “much less” likely.<sup>131</sup>

But while mental illness may be recognized in the abstract by jurors as a powerful mitigator, the unreliability principle requires that the courts also ask if they can reliably apply the mitigator in practice. Both intellectual disability and juvenile status, after all, were a key part of any defense attorney’s preparation for the “case for life” if they were present in the case. Moreover, like mental illness, capital jurors readily identified a defendant’s intellectual disability and juvenile status as having a strong mitigating effect.<sup>132</sup> In fact, the only characteristic that jurors identified as even more likely to sway them towards a life sentence than mental illness was intellectual disability, with almost three-quarters of jurors saying that it would make them less likely to impose death.<sup>133</sup> Jurors identified juvenile status as the fourth most likely characteristic (following intellectual disability, mental illness, and lack of institutional help) to sway them towards a life sentence.<sup>134</sup> The problem in *Atkins* and *Roper*, as we have seen, was that although everyone recognized that intellectual disability and youth in the abstract were powerful mitigators, sentencers could not reliably evaluate them in practice, creating the unacceptable risk of an erroneously imposed death sentence. Those factors that made the risk unacceptable in *Atkins* and *Roper* are also present with mentally ill defendants as the six *Atkins-Roper* factors show.

#### *A. Applying the Atkins-Roper Unreliability Factors to Mental Illness*

##### 1. Mental Illness and the Impairment of the Defendant’s Cooperation with his Lawyer and of the Lawyer’s Ability to Prepare a Defense

Under the Court’s analysis, a key aspect that brings the unreliability principle into play is if the mitigator itself impairs the defense attorney’s ability to provide

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<sup>130</sup> See *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, *supra* note 75.

<sup>131</sup> See Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1559 (1998) (detailing Capital Jury Project findings that when asked how “a history of mental illness” would affect their decision, 26.7% of capital jurors stated it would make them “much less” likely to impose a death sentence and 29.5% said “slightly less likely”).

<sup>132</sup> See *id.* at 1564.

<sup>133</sup> *Id.* at 1559 (29.5% stating “slightly less” likely and 44.3% stating “much less”). The strongest mitigator identified by jurors was not a defendant characteristic but a “lingering doubt” over the defendant’s guilt. *Id.* (16.8% stating lingering doubt would make them “slightly less” likely and 60.4% stating they would be “much less” likely to vote for death). Jurors, however, rarely had lingering doubts in the cases that they sat on. See Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998).

<sup>134</sup> Garvey, *supra* note 131, at 1559 (defendant being under eighteen would make 27.9% of jurors “slightly less” likely and 13.6% “much less” likely to impose the death penalty).

effective representation.<sup>135</sup> This impairment may be because, as in *Atkins*, the defendant is “less able to give meaningful assistance”<sup>136</sup> even if wanting to, or, as in *Roper* and *Graham*, because the mitigator impedes the attorney-client relationship.<sup>137</sup> As the *Graham* Court observed:

[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense. These factors are likely to impair the quality of a juvenile defendant’s representation.<sup>138</sup>

Given the critical role that defense counsel plays in crafting the “case for life” that has become the central focus of the modern capital sentencing proceeding, the Court unsurprisingly has viewed such impairment as imperiling the ability of the defense to “make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors.”<sup>139</sup> While this impediment is undeniably true for intellectually disabled and juvenile defendants, a mentally ill defendant is arguably even more debilitated as a client and witness than an intellectually disabled or juvenile defendant.<sup>140</sup>

The cooperation issue with counsel can be particularly troublesome when the client is suffering from paranoia, delusions, or deep depression.<sup>141</sup> Sometimes the client will strongly resist the “label” of mentally ill, making it impossible for the lawyer to properly represent the defendant because the mitigating circumstance itself (the mental illness) creates a distrust towards the lawyer and ultimately precludes effective presentation of the mental illness to the jury.<sup>142</sup> The saga of the trial of

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<sup>135</sup> See *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002).

<sup>136</sup> *Id.* at 320.

<sup>137</sup> See *Graham v. Florida*, 130 S. Ct. 2011, 2032 (2010).

<sup>138</sup> *Id.* (citations omitted).

<sup>139</sup> *Atkins*, 536 U.S. at 320.

<sup>140</sup> For a remarkably insightful look at the practical and ethical issues facing an attorney representing a mentally ill defendant, see John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 AM. U. L. REV. 207 (2008).

<sup>141</sup> *Godinez v. Moran*, 509 U.S. 389, 410, 416–17 (1993) (Blackmun, J., dissenting) (explaining how the defendant’s depression caused him to fire his lawyers and seek the death penalty).

<sup>142</sup> See *United States v. Kaczynski*, 239 F.3d 1108, 1111–13 (9th Cir. 2001) (recounting the numerous times the defendant prevented his lawyers from raising the defense).

Theodore Kaczynski, the so-called "Unabomber," vividly highlights how mental illness gravely impacts an attorney's ability to carry out his or her constitutional duties. Kaczynski was represented by a talented and experienced team of lawyers, but he repeatedly tried to dismiss them because they wanted to present his mental illness as mitigation, the evidence that presented the best chance for a life sentence.<sup>143</sup> As a result, the lawyers had to walk a perilous tightrope of honoring their client's autonomy while trying to present the strongest case for life.<sup>144</sup> The government eventually agreed to forego seeking the death penalty in return for a plea, and Kaczynski pled guilty, but then almost immediately tried to withdraw his plea.<sup>145</sup>

Moreover, because the bar for finding a defendant competent to stand trial is placed so low, even if the client wants to cooperate, he may be unable to provide meaningful assistance because of a disjointed thought process, an inability to remember events accurately, or difficulty communicating. Nor will it be uncommon for a mentally ill defendant to be on medication. But while the medication may subdue some of the psychotic symptoms, the price often comes at the ability to assist his attorney. As Justice Kennedy insightfully recognized in arguing against the forced medication of a capital defendant to make him competent to stand trial:

Concerns about medication extend also to the issue of cooperation with counsel. We have held that a defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer. The defendant must be able to provide needed information to his lawyer and to participate in the making of decisions on his own behalf. The side effects of antipsychotic drugs can hamper the attorney-client relation, preventing effective communication and rendering the defendant less able or willing to take part in his defense. The State interferes with this relation when it administers a drug to dull cognition. See Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 42 ("[T]he chemical flattening of a person's will can also lead to the defendant's loss of self-determination undermining the desire for self-preservation which is necessary to engage the defendant in his own defense in preparation for his trial").<sup>146</sup>

As with intellectually disabled and juvenile defendants, the very characteristic that diminishes the mentally ill defendant's culpability jeopardizes his attorney's ability to prepare and present the case that would persuade the jury to return a life sentence.

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<sup>143</sup> See *id.*

<sup>144</sup> See *id.*

<sup>145</sup> For a summary of the events surrounding his guilty plea, see generally *id.* Kaczynski challenged his plea as involuntarily entered and as a violation of his rights to pro se representation under *Faretta v. California*. *Id.*

<sup>146</sup> *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring) (citation omitted).

## 2. The Mentally Ill Defendant as a "Poor Witness"

In addition to concerns over how a mitigating factor impairs trial preparation, the Court has focused on how a mitigating factor may adversely affect the defendant's ability to have his mitigation heard at the trial itself. As with the intellectually disabled defendant, the mentally ill client also is especially likely to make a "poor witness."<sup>147</sup> The defendant's mental illness may manifest itself through outbursts, an inability to control his movements, or by making inappropriate comments or gestures, such as the defendant who cursed at his jurors, called them "Antichrists," and told them that he would see them in hell where they would worship him.<sup>148</sup> Jurors who have witnessed such disruptive behavior are likely to interpret the defendant's actions as demonstrating a lack of remorse and an impulsivity that is dangerous.<sup>149</sup>

On the other hand, if the defendant is placed on antipsychotic medication to moderate the defendant's behavior, the side effects are likely to, in the *Atkins* Court's words, "create an unwarranted impression of lack of remorse for their crimes."<sup>150</sup> The *Atkins* Court was quite correct to focus on the devastating effect that a jury's perception of a lack of remorse has on the defendant's case for life, because the most common theme of jurors who voted for a death sentence was that the defendant showed no remorse.<sup>151</sup> And in trying to determine whether the defendant was remorseful, jurors relied heavily on the defendant's demeanor in trying to divine his state of mind.<sup>152</sup> Not surprisingly, a perceived lack of emotion made it extremely difficult for the jurors to be receptive to the defendant's case for life (one juror's comment captured well the jurors' search for signs of remorse: "We would have liked to have spoken to him because he showed so little emotion and so little remorse. We just wanted to kind of figure out, *are you human?* We were kind of looking for anything, anything to find remorse.")<sup>153</sup> As Justice Kennedy has observed, therefore, while medicating a mentally ill defendant may reduce overt psychotic symptoms, because the side-effect is often a flat demeanor, the "cure" is likely to mislead a jury into returning a death sentence out of a mistaken conclusion that the defendant was remorseless.<sup>154</sup>

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<sup>147</sup> *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002).

<sup>148</sup> *State v. LeGrande*, 487 S.E.2d 727, 730 (N.C. 1997).

<sup>149</sup> See Sundby, *supra* note 133, at 1563 & n.22 (describing jurors' reactions to defendants who had outbursts during trial). As one capital juror explained, watching the defendant engage in shouting matches with the judge led him to conclude that the defendant was "utterly remorseless." *Id.*

<sup>150</sup> *Atkins*, 536 U.S. at 321.

<sup>151</sup> See Sundby, *supra* note 133, at 1563–65.

<sup>152</sup> Jurors typically described the defendant's demeanor as emotionless, which shocked them given that the evidence often was gruesome and highly emotional. As one juror described it, the defendant was "blasé, an expressionless person. When we were ready to go out and give the verdict, I was almost ready to cry, and yet there was never any expression from him. It was like doing a trial on a wooden plank." *Id.* at 1563.

<sup>153</sup> *Id.* at 1564–65.

<sup>154</sup> *Riggins v. Nevada*, 504 U.S. 127, 143–44 (1992) (Kennedy, J., concurring) ("As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's

### 3. Mental Illness and Distortion of the Defendant's Decisionmaking

In addition to the concerns over how a mitigator can imperil a defense lawyer's ability to provide effective representation, the Court in *Graham* highlighted the unreliability produced by a juvenile's "[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel . . . lead[ing] to poor decisions . . ."<sup>155</sup> As with a juvenile defendant, the reliability of the penalty phase can be jeopardized because of the necessity of relying on a mentally ill defendant to make key strategic decisions involving constitutional rights. While the unreliability can manifest itself in a number of ways, two examples highlight the problem.

The first is interference with the defendant's decision whether to plead guilty. The Court's decision in *Godinez v. Moran*<sup>156</sup> highlights how the unreliability principle provides an alternative way to deal with a situation that threatens the integrity of the

capacity to react and respond to the proceedings and to demonstrate remorse or compassion. The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies.")

In one rather remarkable case, the following exchange took place during trial:

Counsel Crow: Do any of the drugs that are used to treat paranoid schizophrenics make them sleepy?

Dr. Quijano: Yes.

Counsel Crow: And that sleep would be pronounced if the drug were taken within the recent past?

Dr. Quijano: Yes. These antipsychotic medications have a sedating effect. So agitated people like in jail you would inject them to give them a good night's rest for a day or two.

Counsel Crow: Judge, can I approach the bench a minute, please?

The Court: Yes, Sir.

(Whereupon the following was had at the bench)

Counsel Crow: Judge, I don't know that it matters, but I think I need a break to walk my client around the room a little bit. He's snoring kind of loud—

Counsel Stover: They apparently injected him last time night (sic) to calm him down and I appreciate it. But he's sleeping right now.

Counsel Crow: I don't know if it's going to matter too much, but I think it would be better if we had a minute to walk him around to wake him up.

*Colburn v. Cockrell*, 37 Fed. Appx. 90, at \*6 n.10 (5th Cir. 2002). In part what is remarkable is the defense counsel expressing "appreciation" that his client has been drugged to "calm him down" even though the effect was to have his client loudly during the trial. The Fifth Circuit dismissed Colburn's "sleepiness" as evidence of incompetence to stand trial without any recognition that Colburn was in that condition because of the state's medical treatment or of the likely effect that Colburn's sleeping and snoring had on those observing him. *Id.* at \*6.

<sup>155</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2032 (2010).

<sup>156</sup> 509 U.S. 389 (1993).

system. In *Godinez*, the defendant murdered three people in two episodes—the second episode involved killing his ex-wife, immediately after which he attempted to commit suicide.<sup>157</sup> Three months later, deeply depressed and taking four medications, Godinez fired his lawyers, pled guilty, and at the sentencing refused to present any mitigating evidence.<sup>158</sup> His explanation to the judge of why he wanted to represent himself was that he wanted to prevent the presentation of any mitigating evidence, in essence fulfilling a wish to die.<sup>159</sup>

In upholding Moran's death sentence, the majority focused solely on the legal meaning of "competency" and whether the term should have different meanings depending on whether a defendant is proceeding to trial, pleading guilty, or representing himself.<sup>160</sup> Looming in the background but unaddressed was the issue that *Atkins* and *Roper* now directly call into question: whether a death sentence can be treated as constitutionally reliable when imposed on an individual who is suffering from a profound mental illness, who is taking a prescribed cocktail of anti-psychotic medications (phenobarbital, dilantin, inderal, and vistaril), who has fired his lawyer, and who presents no evidence in mitigation "because he opposed all efforts to mount a defense."<sup>161</sup>

The *Atkins-Roper* unreliability principle now requires that constitutional conversation to take place. The focus switches from a wringing of judicial hands over the meaning of competency as applied to a hypothetical series of situations to the bedrock Eighth Amendment question of whether mental illness causes, in the words of *Graham*, a "difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel . . . lead[ing] to poor decisions . . ."<sup>162</sup> When, as in *Godinez*, the mental illness results in a complete void in mitigation for the sentencer to consider,<sup>163</sup> it is difficult to imagine a more fundamental failing of the central premise of the *Woodson-Lockett* individualized consideration cases: without a full accounting of the defendant's "diverse frailties," a "reasoned moral response" by the sentencer is literally impossible.<sup>164</sup>

A second example of how a mental illness can distort the death penalty decision-making process is by interfering with the defendant's constitutional right to testify.<sup>165</sup>

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<sup>157</sup> *Id.* at 391.

<sup>158</sup> *Id.* at 410 (Blackmun, J., dissenting).

<sup>159</sup> *Id.* (Blackmun, J., dissenting)

<sup>160</sup> See *id.* at 396–402. Indeed, if one read only Justice Thomas's majority opinion, the reader would barely be aware of the full factual context that raises the question whether the death penalty was reliable. Although Justice Blackmun's dissent also is focused on the proper standard for competency, his dissent provides a far fuller factual accounting. See generally *id.* at 409–12 (Blackmun, J., dissenting).

<sup>161</sup> *Id.* at 410, 417 (Blackmun, J., dissenting).

<sup>162</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2032 (2010).

<sup>163</sup> See *supra* notes 156–59 and accompanying text.

<sup>164</sup> See *supra* notes 97–99 and accompanying text.

<sup>165</sup> See *Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (Kennedy, J., concurring).



The right to testify is, in the Court's words, "essential to our adversary system."<sup>166</sup> If unmedicated, the defendant while suffering from symptoms such as delusions or profound depression will have to weigh the consequences of taking the stand—a weighing that in theory would involve an ability to lucidly assess how his unmedicated testimony is likely to be perceived by a jury whose foremost concern will be future dangerousness.<sup>167</sup> If medicated, on the other hand, the medication's effects will cast "grave doubt" on the legitimacy of the waiver of his constitutional right to testify.<sup>168</sup> And, of course, if he should testify, the side effects of the prescriptions create the serious risk that the jury will perceive his manner, demeanor, and tone as projecting remorselessness, dangerousness, or both.<sup>169</sup> In sum, the distorted decision-making that troubled the Court so much in the juvenile cases pose equally grave challenges to reliability in the context of mentally ill defendants.

#### 4. Mental Illness as the "Two-Edged Sword" Turning Mitigation into Aggravation

Part of *Atkins*'s rationale in finding that intellectually disabled defendants faced a "special risk of wrongful execution" was the potential for mental retardation to be used as a "two-edged sword."<sup>170</sup> The *Atkins* Court noted that a defendant who raises intellectual disability as mitigation may perversely undermine his case for life by also "enhanc[ing] the likelihood that the aggravating factor of future dangerousness will be found by the jury."<sup>171</sup> *Roper* focused even more directly upon the double-edged risk that "a defendant's youth may even be counted against him."<sup>172</sup> In *Roper*, the prosecutor in his rebuttal closing argument had responded to defense counsel's invocation of Simmons's youth as mitigation by arguing to the jury, "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."<sup>173</sup>

Double-edged mitigators—factors that are constitutionally mitigating under *Lockett* but of a nature that allows them to be improperly flipped into aggravation—pose a special problem when it comes to future dangerousness.<sup>174</sup> Capital jurors have made

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<sup>166</sup> *Id.* at 144. (Kennedy, J., concurring).

<sup>167</sup> See Sundby, *supra* note 133, at 1590 n.78 (discussing that jurors are most concerned with a defendant's future dangerousness).

<sup>168</sup> See *Riggins*, 504 U.S. at 145 (Kennedy, J., concurring).

<sup>169</sup> See *supra* notes 150–54 and accompanying text.

<sup>170</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (citing *Perry v. Lynaugh*, 492 U.S. 302, 323–25 (1989)).

<sup>171</sup> *Id.* The concern over constitutionally protected mitigation being improperly turned into aggravation first arose in *Penry*. See *supra* notes 90–95 and accompanying text. As described earlier, under Texas's three-question scheme, *Penry*'s intellectual disability actually made the jury *more likely* to sentence him to death by funneling the use of his disability towards a "yes" answer to whether he posed a future danger. See *supra* notes 90–95 and accompanying text.

<sup>172</sup> *Roper v. Simmons*, 543 U.S. 551, 573 (2005).

<sup>173</sup> *Id.* at 558.

<sup>174</sup> For an insightful discussion of the "two-edged sword" problem, see RALPH REISNER & CHRISTOPHER SLOBOGIN, *LAW AND THE MENTAL HEALTH SYSTEM* 580–83 (2d ed. 1990).

clear that of all aggravating factors, the defendant's future dangerousness is always going to constitute their foremost concern.<sup>175</sup> In many ways jurors view themselves as having taken a Hippocratic Oath upon being sworn in, an oath that above all else they will not allow the defendant to kill again.<sup>176</sup> Consequently, no matter how compelling the mitigating circumstances, the jurors will return a death sentence unless assured that the defendant will not pose a danger in the future. As the Supreme Court recognized in *Skipper v. South Carolina*, a jury's belief that a defendant will adapt well to prison is crucial to a successful case for life.<sup>177</sup>

And when it comes to future dangerousness, mental illness is the classic 'two-edged sword' from the juror's perspective. Especially where the mental illness is tied directly into the commission of the crime (for example, the defendant killed the victim because of his delusional thinking), jurors are likely to view the illness as an aggravator. One can see just how easily mental illness can be used by jurors to justify a sentence of death from a case that involved a defendant who everyone agreed suffered from severe mental illness (the state's psychiatrist conceded that the defendant suffered from severe mental illness).<sup>178</sup> Even though all of the jurors agreed that the defendant was very ill and they all had found his long struggle with schizophrenia to be heart wrenching, the jury still voted for death; as one juror explained:

We discussed that if he were given life he would be in an eight by eight cell for the rest of his life but might be, with good behavior, released for exercise and have to be around other prisoners and that could be dangerous. . . . What we decided was that regardless of his illness, if he was a danger to society, then the only solution would be the capital punishment.<sup>179</sup>

Another juror later summarized the jury's decision in the case even more succinctly when asked about the strongest factors for and against the death penalty: "For: His incurability. Against: His illness."<sup>180</sup> In weighing that risk—a risk assessment that went well beyond the evidence presented—the jury was so concerned over the defendant's mental illness that they, in effect, used his illness as the reason he could not be allowed to continue living.<sup>181</sup>

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<sup>175</sup> By a significant margin, jurors cited the concern that "the defendant might pose a future danger to society" as the factor that made them most likely to impose a death sentence. See Garvey, *supra* note 131, at 1559 (37.9% stating it would make them "much more likely" and 20% "slightly more likely" to vote for death).

<sup>176</sup> SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 36–37 (2005) (examining how jurors focus on the concern that the defendant will kill again).

<sup>177</sup> See *supra* notes 84–87 and accompanying text.

<sup>178</sup> See Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1165–66 (1997).

<sup>179</sup> *Id.* at 1167.

<sup>180</sup> *Id.*

<sup>181</sup> See *id.* at 1165–70.

## 5. Mental Illness, Experts, and Scientific Uncertainty

In developing the unreliability principle, the *Roper* Court relied heavily on the fact that the mental health field itself was far from settled in understanding juvenile behavior.<sup>182</sup> As the Court succinctly concluded, “If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty.”<sup>183</sup> Similar concerns run throughout the use of experts and diagnoses when it comes to mental illness, and not surprisingly the uncertainty and conflicting expert views often manifest themselves at the capital penalty phase.

In *Ake v. Oklahoma*,<sup>184</sup> the Court held that a psychiatrist was an “essential tool” for the defense under the Due Process Clause when the defendant’s sanity is at issue. A primary rationale for the Court was that the field of psychiatry was so riven with uncertainty and disagreement that jurors needed to hear the competing views:

Psychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness. Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party. When jurors make this determination about issues that inevitably are complex and foreign, the testimony of psychiatrists can be crucial and “a virtual necessity if an insanity plea is to have any chance of success.”<sup>185</sup>

But while it may be a necessity to have jurors make the determination of insanity at the guilt-innocence phase,<sup>186</sup> *Atkins* and *Roper* now require the courts to confront whether asking jurors to decide mental health issues that “inevitably are complex and foreign”<sup>187</sup> introduces too much unreliability when it comes to imposing the death penalty.

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<sup>182</sup> See *Roper v. Simmons*, 543 U.S. 551, 573 (2005).

<sup>183</sup> *Id.*

<sup>184</sup> 470 U.S. 68 (1985).

<sup>185</sup> *Id.* at 81.

<sup>186</sup> The *Ake* Court was careful to not be seen as endorsing the use of psychiatric experts, but as only reacting to the reality of the growing use of experts: “In so saying, we neither approve nor disapprove the widespread reliance on psychiatrists but instead recognize the unfairness of a contrary holding in light of the evolving practice.” *Id.* at 82.

<sup>187</sup> *Id.* at 81.

The concern is particularly heightened at the capital sentencing phase for two reasons. First, capital jurors tend to be intensely skeptical of mental health experts and mental health defenses presented in mitigation in a way that generally does not extend to the prosecution's mental health experts.<sup>188</sup> While defense experts tend to be viewed as hired guns who are offering up "excuses" in the form of a psychiatric diagnosis, jurors tend not to discount the testimony of the prosecution's experts in the same way.<sup>189</sup> The question of course is not whether experts' diagnoses may sometimes be incorrect, but whether jurors are capable of sifting through the competing psychiatric testimony to determine which testimony is reliable and which is not.<sup>190</sup> And after *Atkins* and *Roper*, the unreliability principle commands categorical exclusion if the jurors are discounting defense experts when faced with complex and conflicting psychiatric testimony because such discounting simply creates too much of a "risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'"<sup>191</sup> Indeed, given that the Court has justified that a *state* can severely curtail the insanity defense on the rationale that psychiatric evidence can be too unreliable for jurors to assess,<sup>192</sup> it is difficult to fathom how jurors can be seen as capable of reliably assessing the same evidence in imposing a death sentence.

A second reason exists why mental illness is at special risk of being unreliably discounted as mitigation by the jury at the sentencing phase. While a defendant's intellectual disability or juvenile status normally will not have been an issue at the guilt-innocence phase,<sup>193</sup> jurors often will already have considered the defendant's mental illness at the guilt-innocence phase in the form of an insanity defense. Most

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<sup>188</sup> See generally Sundby, *supra* note 178, at 1125–44; Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 477 (1980) ("The factfinder is likely to view with considerable skepticism the defendant's claim that he did not function as would a normal person under the circumstances.").

<sup>189</sup> Sundby, *supra* note 178, at 1126–30 (discussing prosecutorial advantage in presentation of experts at capital sentencing phase).

<sup>190</sup> It may be that, as *Ake* suggested, it is unavoidable having a jury determine the legitimacy of a diagnosis of schizophrenia or bipolar at the guilt-innocence phase in order to implement an insanity defense. The Court, however, has repeatedly stressed that a risk of error that is tolerable in a non-capital case can become unconstitutional in the capital sentencing context. As the *Lockett* Court observed early on, "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases," and the Court has built on that premise repeatedly over the ensuing years. See *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

<sup>191</sup> *Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (quoting *Lockett*, 438 U.S. at 605).

<sup>192</sup> See *Clark v. Arizona*, 548 U.S. 735, 774 (2006) (justifying Arizona's restrictions on the insanity defense because of "the controversial character of some categories of mental disease; . . . the potential of mental-disease evidence to mislead, and . . . the danger of according greater certainty to capacity evidence than experts claim for it").

<sup>193</sup> Intellectual disability could possibly be an issue at the guilt-innocence phase if the state recognizes diminished capacity. See *id.* at 772–73.

states now use some variation of the *M'Naghten* test for insanity,<sup>194</sup> requiring a defendant to make the extremely difficult showing that he did not know the difference between “right” and “wrong.” And while mental illness under *Lockett* still qualifies as powerful mitigation even if the illness did not prevent him from understanding the difference between “right” and “wrong,” jurors are often confused on this point.<sup>195</sup> As a result, the distinct risk arises that jurors, already having deliberated on the defendant’s mental illness and having “rejected” it in the form of the insanity defense, will improperly dismiss or discount it at the penalty phase.

## 6. The Crime’s “Brutality” and the Mentally Ill Defendant

Part of *Roper*’s finding of unreliability rested on the grounds that “the brutality or cold-blooded nature of any particular crime would overpower . . . even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.”<sup>196</sup> The danger is especially acute for a mentally ill defendant, because the illness sometimes will result in crimes being committed in a particularly bizarre, brutal, or sadistic manner.

One need not search far in the case reports to find capital crimes committed by mentally ill defendants in particularly frightening or gruesome ways that would make for sensationalistic headlines: A defendant who heard voices through clocks uttering Old Testament apocalyptic warnings; one who consumed his own bodily wastes; another who cut out the organs of his two little children and wife in order to kill the demons living inside them, and who then placed the organs in his pockets and returned home and tried to commit suicide.<sup>197</sup> And although a juror is likely to react to these crimes by thinking to themselves, that is “sick” or “crazy,” the pure repugnancy of the crime and the fear that is triggered may “overpower” the mitigation. And, of course, the brutality and bizarreness of the crime is especially likely to raise the double-edged sword dilemma of the mitigating evidence playing directly into the jurors’ fears over future dangerousness.<sup>198</sup> The *Roper* Court’s worry that a crime’s brutality would overpower the mitigation of a defendant’s juvenile status, therefore, is an even greater concern with the mentally ill defendant.

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<sup>194</sup> See *id.* at 750–51 (reviewing different states’ approaches to the insanity defense).

<sup>195</sup> See John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1063–64 & n.117 (2008) (explaining the potential difficulties posed by statutory mitigating factors).

<sup>196</sup> *Roper v. Simmons*, 543 U.S. 551, 573 (2005).

<sup>197</sup> See Marc Bookman, *13 Men Condemned to Die Despite Severe Mental Illness*, MOTHER JONES (Feb. 12, 2013, 7:02 AM), <http://www.motherjones.com/politics/2013/01/death-penalty-cases-mental-illness-clemency> (summarizing cases where mentally ill defendants have been sentenced to death).

<sup>198</sup> See *supra* notes 174–75 and accompanying text.

*B. Defining Mental Illness as a Categorical Exclusion from the Death Penalty*

Application of the unreliability principle to mentally ill defendants demonstrates that once *Atkins* and *Roper* are properly understood as a natural progression in the *Woodson-Lockett* individualized consideration line of cases, other categories of mitigation become subject to the unreliability inquiry regardless of national consensus. Freed from the national consensus threshold, the inquiry becomes one focused entirely on whether the constitutionally protected class of mitigation can be reliably assessed by the sentencer based on the six *Atkins-Roper* factors.

As with most categorical exclusions, the boundaries of the mental illness category will need to be defined and refined as it is implemented. The experience with *Atkins* and intellectual disability has shown that the lack of a bright-line boundary like age is not an insurmountable barrier to implementing the exclusion. The Court in *Hall v. Florida*<sup>199</sup> was able to look at various standards for defining intellectual disability, draw upon expertise in the field establishing that intellectual disability is not simply an IQ number applied in cookie cutter fashion, and provide further guidance as states work at implementing *Atkins*.<sup>200</sup>

That the need will exist to define what constitutes mental illness and that the definition will engender both legislative and judicial debate is thus not an objection in itself. Moreover, as Professor Slobogin has pointed out, despite the elasticity of the phrase “mental illness” as a general term, when the focus is on psychosis with gross impairments, diagnostic agreement is relatively high.<sup>201</sup> Questions of fact may exist in any one case as to whether a defendant has crossed the threshold of mental illness, but as *Atkins* illustrates, fact finding and litigation is the inevitable byproduct of any line drawing endeavor.

Nor will states be starting from scratch in fashioning a mental illness exclusion as several standards already have been proposed or utilized. Prior to abolishing capital punishment, Connecticut by statute excluded an individual whose “mental capacity was

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<sup>199</sup> 134 S. Ct. 1986 (2014) (striking down Florida’s rule that a defendant could not make an *Atkins* claim unless he had an IQ test of seventy or below).

<sup>200</sup> See *id.* at 1994–95, 2000–01.

<sup>201</sup> Slobogin, *What Atkins Could Mean*, *supra* note 36, at 307–08 & n.101. The relatively high agreement on diagnosis does not undermine the fifth *Atkins-Roper* factor concerning the uncertainty surrounding the use of psychiatric evidence. Even with intellectual disability, mental health professionals often disagree over whether a defendant has, say, an IQ of sixty or sixty-five, but that disagreement would not change the fact that an IQ of that level would constitute “intellectual disability” placing the defendant outside the death penalty; as *Atkins* makes clear, once beyond the threshold of “intellectual disability,” even if disagreement might exist over the effects of the disability on the individual defendant, the risk of mistaken application of the death penalty is simply too great. Likewise, with mental illness, once the determined threshold has been crossed, the risk of confusion when psychiatrists present conflicting opinions about the effects of a mental illness on the defendant would present too great a risk of error for the death penalty to be considered. *Cf. Atkins v. Virginia*, 536 U.S. 304, 320 (2002).

significantly impaired or [his] ability to conform [his] conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution.”<sup>202</sup> The American Bar Association has recommended barring the death penalty from being imposed on those who “had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law.”<sup>203</sup> From the perspective of the unreliability principle, the key is that whatever standard is ultimately adopted, the legislative (or judicial) line be drawn in a manner that always excludes defendants whose mental illness poses a risk that the jury’s “reasoned moral response” cannot reliably assess the defendant’s individual culpability.

### III. THE UNRELIABILITY PRINCIPLE AND THE UNRAVELING OF THE DEATH PENALTY

The focus up to this point has been on how the *Atkins-Roper* constitutional prohibition against imposing the death penalty because of the unreliability principle applies to categories of mitigation in addition to intellectual disability and juvenile status. What is particularly intriguing about the unreliability principle, however, is that it also holds the possibility of allowing a global challenge to the death penalty in a manner that has not been available since *McCleskey v. Kemp*<sup>204</sup> in 1987. It was Justice Scalia in *Roper* who saw this logical endpoint to where the Court’s reasoning leads:

The Court concludes . . . that juries cannot be trusted with the delicate task of weighing a defendant’s youth along with the other mitigating and aggravating factors of his crime. This startling conclusion undermines the very foundations of our capital sentencing system, which entrusts juries with “mak[ing] the difficult and uniquely human judgments that defy codification and that ‘buil[d] discretion, equity, and flexibility into a legal system.’” *McCleskey, supra*, at 311 (quoting H. Kalven & H. Zeisel, *The American Jury* 498 (1966)). The Court says, . . . that juries will be unable to appreciate the significance of a defendant’s youth when faced with details of a brutal crime. . . .

Nor does the Court suggest a stopping point for its reasoning. If juries cannot make appropriate determinations in cases involving murderers under 18, in what other kinds of cases will the Court find jurors deficient? We have already held that no jury may consider whether a mentally deficient defendant can receive the death penalty, irrespective of his crime. See *Atkins*, 536 U.S.,

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<sup>202</sup> CONN. GEN. STAT. § 53a-46a(h)(3) (2009).

<sup>203</sup> ABA Comm. on Mental and Physical Disability Law, Res. 122A (2006).

<sup>204</sup> 481 U.S. 279 (1987).

at 321. Why not take other mitigating factors, such as considerations of childhood abuse or poverty, away from juries as well? Surely jurors “overpower[ed]” by “the brutality or cold-blooded nature” of a crime, . . . could not adequately weigh these mitigating factors either.<sup>205</sup>

And Justice Scalia is correct: *Atkins* and *Roper*’s reasoning calls into question the Court’s most fundamental post-*Furman* promise that reliability can be assured because jurors are able to give full individualized consideration to each defendant.

By recognizing that the death penalty cannot be imposed if mitigation is beyond the sentencer’s ability to reliably assess the evidence, *Atkins* and *Roper* call for re-examination of all aspects of the “delivery” and “receipt” of mitigation for reliability and consistency.<sup>206</sup> Justice Scalia’s dissent raises an initial question to be explored: if empirical research shows that jurors are often not giving mitigation full consideration once they have convicted the defendant of a brutal crime, how can the constitutional promise of *Woodson* and *Lockett* be seen as being kept?<sup>207</sup> Numerous other questions come readily to mind: Do particular types of cases in aggravation, for example the murder of a child, “overpower” the jurors’ ability to be receptive to mitigation?<sup>208</sup> Is the aggravator of future dangerousness that the Court sanctioned over thirty years ago despite the lack of reliability in predicting dangerousness now ripe for reconsideration?<sup>209</sup> Or might the systemic lack of resources for the investigation and presentation of mitigation provide a viable claim under the unreliability principle since the *Woodson-Lockett* cases are premised upon the idea that juries in all capital cases are hearing a full and effective presentation of mitigation before deciding to impose the death penalty?<sup>210</sup>

These are but a few possible avenues of exploration that arise once the jury’s ability to reliably consider mitigation is placed under constitutional scrutiny, and the

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<sup>205</sup> *Roper v. Simmons*, 543 U.S. 551, 620–21 (Scalia, J., dissenting). Justice Scalia’s awareness of the implications of the majority’s reasoning may result from his own candid acknowledgement as far back as *McCleskey* that, “it is my view that the unconscious operation of irrational sympathies and antipathies including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable.” See Scott E. Sundby, *The Loss of Constitutional Faith: McCleskey v. Kemp and the Dark Side of Procedure*, 10 OHIO ST. J. CRIM. L. 5, 33 (2012).

<sup>206</sup> See generally *Roper*, 543 U.S. 551 (2005); *Atkins*, 536 U.S. 304 (2002).

<sup>207</sup> See generally SUNDBY, *supra* note 176, at 125–29 (describing how some jurors after hearing about brutality of crime are not receptive to mitigation).

<sup>208</sup> The Capital Jury Project, for instance, has found that jurors find a crime involving a child victim as extremely aggravating. See Garvey, *supra* note 131, at 1556 tbl. 3.

<sup>209</sup> See *Barefoot v. Estelle*, 463 U.S. 880, 899 (1983) (rejecting challenge to predictions of dangerousness because the majority was not convinced such evidence was “almost entirely unreliable,” a drastically lower standard than the *Atkins-Roper* unreliability standard would require to pass constitutional muster).

<sup>210</sup> Cf. *Maples v. Thomas*, 132 S. Ct. 912, 917–18 (2012) (detailing the shortcomings in Alabama’s system of capital representation).



issues that need to be explored will only expand as scientific knowledge of how we make decisions reveals problems that were not even anticipated at the time that *Furman* and *Gregg* were decided. As just one example, the burgeoning research on implicit bias (also referred to as “unconscious prejudice”) raises serious questions about whether jurors can provide the “reasoned moral response” that is the essential linchpin of the Court’s post-*Furman* cure to arbitrariness.<sup>211</sup>

Research on implicit bias has revealed through a variety of techniques in a wide range of situations how decisions that we very much would like to believe are purely “rational” and fact-based are often influenced by unconsciously held attitudes on matters such as race, gender, and age.<sup>212</sup> In fact, emerging evidence shows that the decision-making locus in our brains actually shifts between different regions depending on how strongly we can identify with the person who is being judged or evaluated.<sup>213</sup> Consequently, without any conscious recognition that they are doing so, individuals will vary their judgments and decisions based on whom they are judging or assessing. As researchers in the area have demonstrated, the role of implicit bias in decisionmaking has significant implications for important everyday decisions such as who is hired,<sup>214</sup> how talent is assessed,<sup>215</sup> or even how medical treatment is dispensed.<sup>216</sup>

The implications of implicit bias for capital decisionmaking are far reaching, and already some studies have begun to pull back the veil on how sentencers are affected. While a comprehensive examination is beyond this Article’s scope, one

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<sup>211</sup> See *supra* notes 99–100 and accompanying text.

<sup>212</sup> See generally Irene V. Blair, *Implicit Stereotypes and Prejudice*, in COGNITIVE SOCIAL PSYCHOLOGY 359 (Gordon B. Moskowitz ed., 2001) (reviewing the relevant literature); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006).

<sup>213</sup> See generally Sergi G. Costafreda, Michael J. Brammer, Anthony S. David & Cynthia H. Y. Fu, *Predictors of Amygdale Activation during the Processing of Emotional Stimuli: A Meta-Analysis of 385 PET and fMRI Studies*, 58 BRAIN RES. REV. 57 (2008); Frank Van Overwalle, *Social Cognition and the Brain: A Meta-Analysis*, 30 HUM. BRAIN MAPPING 829 (2009); Elizabeth A. Phelps, Kevin J. O’Connor, William A. Cunningham, E. Sunnie Funayama, J. Christopher Gatenby, John C. Gore & Mahzarin R. Banaji, *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729 (2000).

<sup>214</sup> See, e.g., Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 998 (2004) (job applicants with white-sounding names such as Emily or Greg were 50% more likely to receive callback job interviews in Boston and 49% more likely in Chicago than applicants with black-sounding names like Jamal).

<sup>215</sup> See, e.g., Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 738 (2000) (having musicians audition behind a screen increases by 50% the chances that a female musician will advance out of preliminary rounds).

<sup>216</sup> See, e.g., Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 19–20 (1995) (calling for a method to detect unconscious stereotyping and exploring potential methods).

study gives a sense of how findings in the area eventually may force courts to step back and reassess the assumptions underlying the reliability of post-*Furman* capital punishment schemes. In the study, researchers obtained photographs of African-American males who had been convicted of murdering white victims.<sup>217</sup> They then showed the photos to subjects who were unaware that the photos were of convicted murderers and asked the subjects to rate the photographs based on “the stereotypicality of each Black defendant’s appearance and were told they could use any number of features (e.g., lips, nose, hair texture, skin tone) to arrive at their judgments.”<sup>218</sup> After controlling for variables such as severity of the murder and the strength of mitigating circumstances, the study found that defendants who had murdered a white victim and who had been rated by the subjects in the top half of being stereotypically black had *double* the chance of receiving a death sentence than those defendants who were in the bottom half of appearing stereotypically black.<sup>219</sup> As the researchers concluded, “[t]he present research demonstrates that in actual sentencing decisions, jurors may treat [Black physical] traits as powerful cues to deathworthiness.”<sup>220</sup>

Studies like this emphasize not only the need to readdress the role of race in the death penalty, they come at a time when new constitutional tools exist that can better incorporate the findings of unconscious bias. The Court’s last effort to directly address the role of race was in 1987 when, in *McCleskey v. Kemp*, it refused by a slender 5–4 margin to provide constitutional relief despite strong statistical evidence that the race of the victim was influencing capital outcomes.<sup>221</sup> Driven in part by a deep distrust of statistics, Justice Powell for the majority refused to infer that bias was at work and instead required individual defendants to make the almost impossible showing that his sentencer was affirmatively acting out of racial animus.<sup>222</sup>

With the insights provided by implicit bias research, the empirical basis now exists to connect the statistical dots that the *McCleskey* majority declined to connect because it said it lacked a reason to believe that the statistics were explained by

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<sup>217</sup> Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 384 (2006).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* By contrast, a heightened death sentencing rate did not exist where the victim was also African-American; an outcome that the researchers suggest might be due to the jury viewing a black-on-black killing as more of an interpersonal rather than intergroup conflict. *Id.* at 385.

<sup>220</sup> *Id.* An intriguing body of research consistent with the capital sentencing study is finding that it is Afrocentric features more than race that appears to be influencing sentencing generally. See generally William T. Pizzi, Irene V. Blair & Charles M. Judd, *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327 (2005) (finding bias in criminal sentencing against persons who had facial features culturally marked as Afrocentric, regardless of whether they were racially identified as white or black).

<sup>221</sup> 481 U.S. 279 (1987).

<sup>222</sup> See *id.* at 297; Sundby, *supra* note 205, at 6–7 (using Justice Powell’s papers to examine the writing of the *McCleskey* opinion).

jurors' biases.<sup>223</sup> Moreover, the *Atkins-Roper* unreliability principle now makes it constitutionally clear that intentional racial animus is not necessary for a constitutional violation: If a jury is unable to give effect to constitutionally protected evidence because of bias, whether conscious or unconscious, then the system has failed to provide the reliability and consistency that the *Woodson-Lockett* line of cases promised was the fundamental cure for *Furman* arbitrariness. In short, the unreliability principle provides an express constitutional invitation to revisit *McCleskey*.

### CONCLUSION

*Atkins v. Virginia* and *Roper v. Simmons* have been lauded as important cases under the Court's Eighth Amendment disproportionality analysis. And the cases are undoubtedly significant milestones along the "evolving standards of a civilized society" continuum. This Article has argued, however, that the cases' more lasting impact may very well come from a different constitutional direction that looks not towards disproportionality, but to the Court's long-standing emphasis on the constitutional relationship between individualized consideration and reliability. By articulating what this Article has called the "unreliability principle," the cases take the *Woodson-Lockett* line of cases to their next logical step: if a category of mitigation is constitutionally protected because it is necessary to individualized consideration but the sentencer is unable to reliably assess and consider the mitigation, then categorical exclusion is constitutionally required.

It is this aspect of *Atkins* and *Roper*'s reasoning that places individuals with serious mental illness beyond the death penalty's jurisdiction, whether or not a national consensus against such executions exists. The six *Atkins-Roper* factors that identify when mitigation is beyond reliable assessment apply to mentally ill defendants with equal if not greater force. The potential impact of the *Atkins-Roper* unreliability principle, however, extends beyond mental illness and other categories of constitutionally protected mitigation.<sup>224</sup> The reasoning behind the principle calls into question the reliability of the entire system in a manner that has not been examined for decades and opens a constitutional door for the courts to begin taking into account the advances over the past forty years in our understanding of the dynamics of human decision-making. And this may prove to be the true legacy of *Atkins v. Virginia* and *Roper v. Simmons*: the raising of old questions about the reliability of the capital punishment system with a new vigor and a new perspective.

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<sup>223</sup> Interestingly, it was Justice Scalia who, of the *McCleskey* majority, was willing to candidly acknowledge that implicit biases were at work. See *supra* note 205 (recounting Justice Scalia's proposed concurrence in *McCleskey*).

<sup>224</sup> If mentally ill individuals are removed from the pool of death-eligible defendants, the number of death sentences will shrink yet again. In a capital punishment system that already is imposing significantly fewer than 100 death sentences annually, Justice Scalia may well be proven correct in predicting that we are in the process of the "incremental abolition" of capital punishment. *Atkins v. Virginia*, 536 U.S. 304, 353 (2002) (Scalia, J., dissenting).