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MADISON AND THE MENTALLY ILL: THE DEATH PENALTY FOR THE WEAK, NOT THE WORST

Corinna Barrett Lain*†

INTRODUCTION

Regent’s symposium on mental health and the law offers an opportunity to pause and think about a particularly acute issue within that larger framework: the treatment of those with severe mental illness¹ in our capital justice system. A case currently pending before the United States Supreme Court, *Madison v. Alabama*,² is an apt place to start, as the Court just heard oral arguments in early October.³ The question in *Madison* is whether the condemned inmate is competent to be executed.⁴ I will begin by telling you a bit about the facts of *Madison*, and then I will use the case to launch a larger discussion about how the severely mentally ill get caught in the capital justice system and why that is a problem.

Vernon Madison was sentenced to death for killing a police officer back in 1985, and has now spent over 30 years on death row.⁵ *Why so long*, you ask. The answer is reversible error. First, Madison’s conviction was

* S.D. Roberts and Sandra Moore Professor of Law, University of Richmond School of Law. I thank the *Regent Law Review* for inviting me to give this address and for its hard work in publishing my remarks. I also thank MaryAnn Grover for her invaluable research assistance, and Erin Collins, Jessica Erickson, Jim Gibson, Michael Meltsner, Luke Norris, Scott Sundby, and Allison Tate for their helpful comments and suggestions along the way.

† The following are remarks from the keynote speech given at Regent University’s 31st Annual Law Review Symposium on mental health and the law, on November 2, 2018. For a full schedule of symposium panels and events, see <https://www.regent.edu/app/uploads/sites/3/2018/10/Regent-University-Law-Review-Symposium-Schedule-2018.pdf>.

¹ Some use the term “serious mental illness,” while others use the term “severe mental illness.” These terms tend to be used interchangeably, but given that all mental illness is serious, while only a discreet subset is severe, I use the latter term here. See generally Kenneth T. Kinter, *What’s in a Name: “Serious”, “Severe”, and “Severe and Persistent”*, 21 INT’L J. PSYCHOL. REHABILITATION 52–54 (2017), https://www.psychosocial.com/IJPR_21/What_is_in_a_Name_Kinter.html (differentiating serious mental illness from severe mental illness and explaining that severe mental illness is a subset of serious mental illnesses). For further discussion on what the term “severe mental illness” entails, see *infra* notes 36–37 and accompanying text.

² See 138 S. Ct. 1172, 1172 (2018) (granting Madison’s petition for writ of certiorari). See Editor’s note on *Madison*, which was decided February 27, 2019, at the end of this essay.

³ Transcript of Oral Argument at 1, *Madison v. Alabama*, No. 17-7505 (U.S. argued Oct. 2, 2018) [hereinafter Oral Argument].

⁴ See 17-7505 *Madison v. Alabama Question Presented*, SUPREME COURT OF THE U.S. (Feb. 26, 2018), <https://www.supremecourt.gov/qp/17-07505qp.pdf> (summarizing one issue in *Madison* as whether the State can legally execute “a prisoner whose mental disability leaves him without memory of his commission of the capital offense”).

⁵ Petition for Writ of Certiorari at 1, 4, *Madison*, No. 17-7505 (U.S. filed Jan. 18, 2018) [hereinafter Petition].

overturned because prosecutors unconstitutionally excluded black jurors from his trial.⁶ Then on retrial, it was overturned because the prosecution put on expert testimony in the case that was so obviously inadmissible that it constituted plain error.⁷ At Madison's third trial, the jury actually recommended life, but Alabama was one of very few states that allowed a judge to override a jury's recommended sentence,⁸ and that is exactly what the judge in Madison's case did: he overrode the jury's recommendation of life and imposed a death sentence instead.⁹

Suffice it to say that for Madison, it has been a long road. But here we are, over 30 years later. Madison is now 68 years old and has had a series of strokes, two of them nearly fatal, which have left him with permanent brain damage and a condition called Vascular Dementia, a cerebral vascular disorder that is degenerative, so it is progressively getting worse.¹⁰ On MRIs, you can actually see the areas of Madison's brain where the tissue is dead, and when you compare multiple MRIs over the years, you can see that the area of dead tissue in his brain is growing.¹¹

Madison's disorder has manifested itself in a number of ways. He has suffered an IQ loss over the years that now puts him in the borderline range of intellectual functioning.¹² He slurs his speech.¹³ He cannot recite the alphabet past the letter "G."¹⁴ He cannot count by threes, and he

⁶ *Madison v. State*, 545 So. 2d 94, 99 (Ala. Crim. App. 1987).

⁷ *Madison v. State*, 620 So. 2d 62, 73 (Ala. Crim. App. 1992) (reversing the conviction due to erroneously admitted expert testimony based on facts not in evidence, despite the fact that the defendant did not object at trial, because it "constituted an error so obvious that the failure to notice it seriously affected the fairness or integrity of the proceedings").

⁸ *Madison v. State*, 718 So. 2d 90, 94, 103–04 (Ala. Crim. App. 1997); see EQUAL JUSTICE INITIATIVE, THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE 4 (2011), <https://eji.org/sites/default/files/death-penalty-in-alabama-judge-override.pdf> (noting that as of 2011, judicial override is legal only in Alabama, Delaware, and Florida). Alabama finally abandoned judicial overrides in 2017; it was the last state in the country to do so. See Kent Faulk, *Alabama Gov. Kay Ivey signs bill: Judges can no longer override juries in death penalty cases*, AL.COM (Apr. 11, 2017), https://www.al.com/news/birmingham/index.ssf/2017/04/post_317.html (showing that the Alabama Governor signed a bill into law doing away with judicial overrides in capital murder cases).

⁹ *Madison*, 718 So. 2d at 94. The same judge overrode jury recommendations for the imposition of life sentences in five other capital cases—this was more than any other judge in Alabama. Petition, *supra* note 5, at 6 n.3.

¹⁰ Petition, *supra* note 5, at 1–2, 9–10, 12.

¹¹ Brief of Petitioner at 8, *Madison v. Alabama*, No. 17-7505 (U.S. filed May 22, 2018).

¹² *Id.* at 10. Borderline intellectual functioning refers to IQ scores in the 70 to 75 range, which places a person on the borderline of criteria for the diagnosis of intellectual disability under the Diagnostic and Statistical Manual of Mental Disorders (DSM) V. See Amy Logsdon, *Borderline Intellectual Functioning*, VERYWELLMIND (Apr. 1, 2019), <https://www.verywellmind.com/what-is-borderline-intellectual-functioning-2161698>.

¹³ Oral Argument, *supra* note 3, at 29.

¹⁴ Brief of Petitioner, *supra* note 11, at 11.

cannot walk without assistance.¹⁵ He is disoriented as to time and place, so he cannot tell you the date, or the month, or even the day of the week.¹⁶ He continually soils himself because he does not remember that there is a toilet right next to his bed and he is legally blind so he does not see it sitting there.¹⁷ Most significantly in this particular case, Madison has no memory of his crime—and I want to take a moment to name that. Madison’s crime was the murder of a police officer, someone who gave his professional life to protecting others. At this point in time, Madison has no memory of that; he has no recall of the murder that put him on death row.¹⁸ The area of his brain where tissue is dying is the area that controls memory; that is why his disorder is a form of dementia.¹⁹

Importantly, none of this is contested.²⁰ There is no claim that Madison is malingering, no claim that he is making this up.²¹ You can see the brain damage on the MRIs; the evidence is quite clear. Madison’s condition is not in question.

Also not contested is the legal standard governing competence to be executed, at least in the abstract. Both parties agree that competency to be executed requires an inmate to have a rational understanding of the reason for his or her execution.²² Madison says he lacks that understanding because he cannot remember the crime, and thus cannot understand the punishment. Alabama argues that Madison’s failure to remember the crime for which he is being executed does not, in and of itself, render him incompetent.²³ By Alabama’s view, Madison understands that the state wants to put him to death as punishment for a murder that he was found to have committed, and that is enough.²⁴ He may not remember the murder. He may even deny that it happened (which, he does).²⁵ The state may have to keep telling him about it because he keeps forgetting. But the bottom line is that Madison understands that the state says he killed someone and wants to execute him as a result, and that rational understanding is (at least according to Alabama) all that the

¹⁵ *Id.* at 1, 11.

¹⁶ Oral Argument, *supra* note 3, at 6.

¹⁷ *Id.* at 17; Brief of Petitioner, *supra* note 11, at 4–5.

¹⁸ Brief of Petitioner, *supra* note 11, at 10.

¹⁹ Petition, *supra* note 5, at 9–10.

²⁰ *See* Brief of Petitioner, *supra* note 11, at 9 (discussing that evidence of Madison’s medical condition and dementia was unrebutted); *see also* Brief of Respondent at 13, *Madison v. Alabama*, No. 17-7505 (U.S. filed July 31, 2018) (conceding the fact of Madison’s dementia and arguing that, even if Madison does not remember the offense, he is not thereby rendered incompetent).

²¹ Brief of Petitioner, *supra* note 11, at 12.

²² *Id.* at 22–23; Brief of Respondent, *supra* note 20, at 13.

²³ Brief of Respondent, *supra* note 20, at 13, 20.

²⁴ Brief of Respondent, *supra* note 20, at 22.

²⁵ Oral Argument, *supra* note 3, at 19; Brief of Respondent, *supra* note 20, at 22.

Supreme Court requires.²⁶ The trial court apparently agreed, although the basis for its ruling was not as clear as one might have hoped.²⁷

That is a basic recitation of the facts and what is at stake. At oral arguments, Justice Sotomayor summarized all of this quite nicely when she said:

So we have a man here who . . . can't move on his own, can't remember where the bathroom is next to him, can't see, slurs his words. He's really not quite there. But he knows that someone says he committed a murder and that they're trying to kill him, but he doesn't understand why. He can't be present enough in time to rationally understand or reflect on what he has done because he can't retain information for long.²⁸

And why is it, she asked counsel for the State of Alabama, that the law says it is okay to execute this man?²⁹

Madison v. Alabama is a fascinating case, and the question that Justice Sotomayor asks—the question that the Supreme Court is currently grappling with—is a worthy one. But in this address, I am going to take a step back and ask a more fundamental question, a question about how someone in Madison's position from the start—someone suffering from severe mental illness not only at the end of the capital justice process, but from the beginning (and Madison may well fit that bill too)³⁰—could be at risk of receiving the death penalty in the first place. One might not care what happens to someone who has their full faculties at the time of

²⁶ Brief of Respondent, *supra* note 20, at 22.

²⁷ See Order, *State of Alabama v. Madison*, No. 1985-001385.80 (Cir. Ct. Mobile Cnty., Ala., Jan. 16, 2018) (ruling that Madison did not satisfy the substantial threshold of insanity required by the United States Supreme Court for a stay of execution). There appears to be some dispute over what the trial court held and over what the state's position was before the trial court. Compare Brief of Petitioner, *supra* note 11, at 21, 23–24 (asserting that the circuit court reasoned that vascular dementia does not constitute a medical condition that meet the standard for incompetency) with Brief of Respondent, *supra* note 20, at 22 (asserting that the circuit court found that Madison rationally understood his punishment even though he suffered from dementia). The clearest recitation of the trial court's holding appears to be the district court's denial of habeas relief, which states that the trial court based its finding of competency, at least in part on the evidence that Madison did not suffer from paranoia, delusion or psychosis. *Madison v. Dunn*, No. 16-00191-KD-M, 2016 WL 2732193, at *9, *11 (S.D. Ala. May 10, 2016), *rev'd sub nom. Madison v. Comm'r. Ala. Dep't of Corr.*, 851 F.3d 1173 (11th Cir. 2017). The Eleventh Circuit Court of Appeals, which reversed the district court on this issue, also understood Alabama to argue that which it steadfastly denies arguing in the Supreme Court. See *Madison v. Comm'r, Ala. Dep't of Corr.*, 851 F.3d 1173, 1178, 1188 (11th Cir. 2017) (“[T]he State suggests that only a prisoner suffering from gross delusions can show incompetency under [the established standard].”).

²⁸ Oral Argument, *supra* note 3, at 45.

²⁹ *Id.*

³⁰ See Petition, *supra* note 5, at 5 (“Mr. Madison’s struggles with mental illness had been observed since he was an adolescent, including by prison psychiatrists in Mississippi as documented in medical records introduced by the defense. To control his illness, Mr. Madison had been prescribed numerous anti-psychotic medications.”).

the crime and throughout the trial and sentencing phase, but then loses those faculties at the end (although I would hope we would care here too)—but for every Madison, there are dozens of capital offenders who suffer from severe mental illness when they come into the capital justice system, and they are my interest here. My question is how it is that we—and I use “we” here intentionally, because when the state executes, it executes in our name—so how is it that we would even be thinking about executing the severely mentally ill, given that the death penalty is supposed to be for the worst of the worst offenders?

The premise here is worth pausing to underscore. The Supreme Court has said time and again that the death penalty is not just for any murderer; it is for the worst of the worst offenders.³¹ On this point, the Court has not budged. The fact that the death penalty was palpably not being meted out in this fashion was what led the Supreme Court to strike it down in 1972.³² And the states’ adoption of so-called “guided discretion” statutes that promised to channel jury discretion to remedy this deficiency is what led the Court to reinstate the death penalty four years later in 1976.³³ As the Supreme Court stated in its 2008 decision *Kennedy v. Louisiana*, “[C]apital punishment must ‘be limited to those offenders who commit a “narrow category of the most serious crimes” and whose extreme culpability makes them “the most deserving of execution.”’”³⁴ This is the core constitutional proviso that comes with the state’s power to put people to death: it is reserved for the worst, most culpable offenders and the worst, most serious crimes.

And that brings me back to my question: how is it that we are in the position of executing the severely mentally ill in the first place? By definition, they are not the worst offenders; they are severely mentally ill.

³¹ *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (“Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

³² *See Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (invalidating the death penalty in certain cases as a violation of the prohibition on cruel and unusual punishment); *see also id.* at 293–94 (Brennan, J., concurring) (“When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system. . . . When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment.”).

³³ *See Gregg v. Georgia*, 428 U.S. 153, 187, 195 (1976) (stating that reinstating the death penalty is “an extreme sanction, suitable to the most extreme of crimes,” and explaining that “the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance”).

³⁴ 554 U.S. 407, 420 (2008) (quoting *Roper*, 543 U.S. at 568).

By “severely mentally ill,” I mean those who have a diagnosed severe mental illness in the DSM-5—the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders.³⁵ The DSM-5 is the gold standard, and it defines severe mental illness as a clinically recognized, significant disturbance in cognition, regulating emotion, or behavior that reflects a severe impairment or dysfunction in mental functioning and is relatively persistent over time.³⁶ I am talking about illnesses like schizophrenia, bipolar disorder, that sort of thing.³⁷ These are people who are seriously sick; they are not just having a bad day.

Now that we know *who* I am talking about, I can turn to the *what*. What I will be talking about is how the severely mentally ill could be at risk of the death penalty in the first place. In some ways, Madison is an anomaly. Although there is reason to think that he suffered from a severe mental illness all along,³⁸ his case before the Supreme Court considers only his condition as it has developed and deteriorated from his stay on death row. But in other ways Madison is not an anomaly; he is but one example of a much larger phenomenon. As I will discuss, states impose the death penalty on people with severe mental illness all the time; in fact, they are a good chunk of the demographic of the people we execute.³⁹ What I want to do is rewind and start from the beginning; I want to figure out how we could get to this place where it is okay to condemn someone like Madison in the first place. Then, more briefly, at the end of the talk, I will ask what it is that we think we are accomplishing when we condemn and execute the severely mentally ill.⁴⁰ That is to say, what societal purposes does this serve? This is an important question because, as I said, the state is executing in our name. So we ought to know, we ought to be able to articulate, what it is we are getting out of it when we put these people to death. Then finally, I will close my remarks with an observation about

³⁵ See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 20 (5th ed. 2013).

³⁶ See *id.* at 20 (defining mental illness as a “clinically significant disturbance in an individual’s cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning”); AM. PSYCHOL. ASS’N, PROFICIENCY IN PSYCHOLOGY: ASSESSMENT AND TREATMENT OF SERIOUS MENTAL ILLNESS 5 (2009) (“[Serious mental illness] refers to mental disorders that carry certain diagnoses, such as schizophrenia, bipolar disorder, and major depression; that are relatively persistent (e.g., lasting at least a year); and that result in comparatively severe impairment in major areas of functioning . . .”).

³⁷ See generally AM. BAR ASS’N, DEATH PENALTY DUE PROCESS REVIEW PROJECT, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY 9–14 (2016) (discussing the difference between mental illness and severe mental illness, as well as the major types of severe mental illness) [hereinafter AM. BAR ASS’N].

³⁸ See *supra* note 32.

³⁹ See *infra* notes 114–148 and accompanying text.

⁴⁰ See *infra* Part II.

what all this says about us, because how we treat those who we might justifiably despise says as much about us as it does about them.⁴¹

I. HOW THE SEVERELY MENTALLY ILL END UP IN THE CAPITAL JUSTICE SYSTEM AND WHY THEY CANNOT GET OUT

How is it that the severely mentally ill end up in the snare of the capital justice system in the first place? Answering this question is the main focus of this talk, and so I will be spending the bulk of my time here. In this regard, there are four pieces of the puzzle that are critical to understand. *Madison* is a snapshot of the end of the line, the last piece of the puzzle. I want to start at the beginning, and in the beginning was deinstitutionalization.

A. Deinstitutionalization

To have a cohort of severely mentally ill people in the capital justice system, you have to have a cohort of severely mentally ill people committing aggravated murder. And to understand how that has come to pass, you have to understand deinstitutionalization in the 1970s and reinstitutionalization thereafter through the criminal justice system. There is much to say about deinstitutionalization, but this is just the first stop on our journey. There are other stops we need to get to as well, and Dr. Hudacek has done a nice job of providing some of the details on this issue during her panel,⁴² so my overview comments will suffice.

Deinstitutionalization refers to a phenomenon that began in the 1960s, and went into high gear in the 1970s, to move the severely mentally ill out of state institutions and into the community.⁴³ As a result of deinstitutionalization, the number of people committed to public psychiatric hospitals in 1955 had dropped by 87 percent in 1994.⁴⁴ That is an astonishingly high percentage. By way of sheer numbers, in 1955, there were roughly 558,000 severely mentally ill people living in the nation's public psychiatric hospitals.⁴⁵ By 1994, that number was under 72,000—and this was forty years later, when the country's population had

⁴¹ See *infra* Part III.

⁴² Kristen Hudacek, Doctor of Psychology, Dir. of Psychology and Pretrial Forensic Servs. at E. State Hosp., Panel 2: Mental Health within the Court System at the Regent University Law Review Annual Symposium (Nov. 2, 2018).

⁴³ See E. FULLER TORREY, OUT OF THE SHADOWS: CONFRONTING AMERICA'S MENTAL ILLNESS CRISIS 8 (1997) (defining deinstitutionalization and explaining that the practice began in 1955, when antipsychotic medication was first introduced, and heightened around 1965, when Medicaid and Medicare funding became available).

⁴⁴ See *id.* (explaining that the number of mentally ill patients admitted to hospitals dropped from 558,239 in 1955 to 71,619 in 1994).

⁴⁵ *Id.*

grown by over 50 percent, and its mentally ill population had grown along with it.⁴⁶

Who were these people who were deinstitutionalized? For starters, one had to be significantly mentally ill to be institutionalized in the first place. Here are the general contours: between 50 to 60 percent of those who were deinstitutionalized had been diagnosed with schizophrenia.⁴⁷ Another 10 to 15 percent had organic brain diseases; they were brain-damaged as a result of trauma, strokes, Alzheimer's, that sort of thing.⁴⁸ Vernon Madison would fall into this category. Another 10 to 15 percent were diagnosed with manic-depressive disorders or severe depression.⁴⁹

The idea behind deinstitutionalization was to treat these patients in the least restrictive setting possible.⁵⁰ As President Jimmy Carter's Commission on Mental Health explained, "[T]he objective [is] maintaining the greatest degree of freedom, self-determination, autonomy, dignity, and integrity of body, mind, and spirit for the individual while he or she participates in treatment or receives services."⁵¹ Deinstitutionalization was intended to be a progressive policy—an enlightened, more humane way of treating the severely mentally ill.

The problem was that state legislatures around the country were not willing to spend the money to give these people, who were now back out in the community, the mental health services they needed.⁵² Part of the reason fiscal conservatives had joined progressives in supporting deinstitutionalization was to reduce the stress on the public coffers, so funding for community services did not enjoy the same support that

⁴⁶ *Id.* Between 1955 and 1994, the nation's population grew from 164 million to 260 million, and assuming that the proportion of severely mentally ill stayed roughly the same, the number of patients in mental hospitals absent deinstitutionalization would have been around 885,000. *Id.*

⁴⁷ *Id.* at 10.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 10–11.

⁵² *See id.* at 10 (discussing how deinstitutionalization aggravated the incidence of mental illness by discharging patients without ensuring that they received the medicine and medical services necessary for their reintegration into society); *see also* Newt Gingrich & Van Jones, Opinion, *Mental Illness is No Crime*, CNN (May 27, 2015, 7:57 AM), <https://www.cnn.com/2015/05/27/opinions/gingrich-jones-mental-health/index.html> ("When governments closed state-run psychiatric facilities in the late 1970s, it didn't replace them with community care . . .").

deinstitutionalization did.⁵³ The mentally ill went without, resulting in a national mental health crisis.⁵⁴

And we are still in it today. Over 2.2 million severely mentally ill people—2.2 million people who are not just suffering from mental illness, but suffering on the scale of extreme mental impairment and dysfunction—are out in the community and not receiving psychiatric treatment.⁵⁵ They say that the road to hell is paved with good intentions, and deinstitutionalization is Exhibit A for the old adage being true. Sadly, most of these people just ended up on the streets.⁵⁶

And from there, they ended up in correctional facilities. The phenomenon has been called the “criminalization of the mentally ill,”⁵⁷ and California is a perfect example. Progressive California was at the forefront of the deinstitutionalization movement, passing legislation to effectuate the policy in 1969.⁵⁸ In its first year of deinstitutionalization, the number of mentally ill people entering its criminal justice system doubled.⁵⁹ By 1975, the number of severely mentally ill individuals in California’s prisons and jails had grown 300 percent.⁶⁰ As one prison psychiatrist in California explained:

We are literally drowning in patients, running around trying to put our fingers in the bursting dikes, while hundreds of men continue to deteriorate psychiatrically before our eyes into serious psychoses. . . . The crisis stems from recent changes in the mental health laws allowing more mentally sick patients to be shifted away from the mental health department into the department of corrections.⁶¹

Treating the mentally ill in a least restrictive setting turned out to be not so progressive after all. These people were taken out of mental hospitals

⁵³ Harold Pollack, *What Happened to U.S. Mental Health Care After Deinstitutionalization?*, WASH. POST (June 12, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/06/12/what-happened-to-u-s-mental-health-care-after-deinstitutionalization/?noredirect=on&utm_term=.9a53398b4454.

⁵⁴ Samantha Raphelson, *How the Loss of U.S. Psychiatric Hospitals Led to a Mental Health Crisis*, NPR (Nov. 30, 2017, 1:15 PM), <https://www.npr.org/2017/11/30/567477160/how-the-loss-of-u-s-psychiatric-hospitals-led-to-a-mental-health-crisis>.

⁵⁵ Jonaki Bose et al., Key Substance Use and Mental Health Indicators in the United States: Results from the 2017 National Survey on Drug Use and Health, SAMHSA (Sept. 2018), <https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHFFR2017/NSDUHFFR2017.pdf>.

⁵⁶ See TORREY, *supra* note 43, at 11 (explaining that deinstitutionalized persons did not successfully reintegrate back to society, but instead they ended up homeless or incarcerated).

⁵⁷ See Anastasia Cooper, Note, *The Ongoing Correctional Chaos in Criminalizing Mental Illness: The Realignment’s Effects on California Jails*, 24 HASTINGS WOMEN’S L.J., 339, 342 (1988).

⁵⁸ TORREY, *supra* note 43, at 36.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

and left on the streets, where many eventually made their way back to secure beds—but in correctional facilities instead.

Fast forward to today, when jails and prisons are the single largest residential mental institution in our country.⁶² A 2010 study concluded that there are now more than three times more severely mentally ill persons in jails and prisons than in hospitals.⁶³ In Virginia, for a local perspective, the Hampton Roads Regional Jail is the state's largest repository for the mentally ill.⁶⁴ Forty-three other states and the District of Columbia have a similar story to tell.⁶⁵

Where does all this leave us? When you put these people back in the community without treatment, they do not have their illness under control and have little chance of functioning as productive members of society, so there are going to be issues. Then when you add in substance abuse—and you have to, because if these people are not on their meds like they need to be, they are going to be suffering and you can bet they are going to self-medicate⁶⁶—what you get is severely mentally ill people who are off their meds and on substances that impair their judgment and reduce their inhibitions, and that is going to result in some capital murders. It is worth noting that people with mental illness are much more likely to be the victims of violent crime than the perpetrators.⁶⁷ Indeed, people with severe mental illness are eleven times more likely to be the victims of a violent crime than members of the general population.⁶⁸ But a slice of this population is also going to victimize; some of the severely mentally ill will end up committing capital murder.

Of course, to get to death row, capital offenders who are severely mentally ill first have to get convicted and sentenced to death. One would think that the capital justice system would weed these people out, but it

⁶² See Gingrich, *supra* note 52 (“The estimated number of inmates with mental illness outstrips the number of patients in state psychiatric hospitals by a factor of 10.”).

⁶³ E. FULLER TORREY, ET AL., MORE MENTALLY ILL PERSONS ARE IN JAILS AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES 1, 8 (2010).

⁶⁴ Dave Ress, *Hampton Roads Regional Jail: By Default, Virginia's Largest Mental Hospital*, DAILYPRESS (July 9, 2016, 5:40 PM), <https://www.dailypress.com/news/politics/dp-nws-regional-jail-20160710-story.html>.

⁶⁵ Gingrich, *supra* note 52 (“Today, in 44 states and the District of Columbia, the largest prison or jail holds more people with serious mental illness than the largest psychiatric hospital.”).

⁶⁶ AM. PSYCHOL. ASS'N, *supra* note 36, at 3 (“It has been estimated that half of individuals with SMI will have a co-occurring substance abuse problem at some point in their lives. Compared with the general population, for example, people with schizophrenia are more than four times as likely to have a substance use disorder; those with bipolar disorder are more than five times as likely.”).

⁶⁷ AM. BAR ASS'N, *supra* note 37, at 17.

⁶⁸ *Id.*

does not. Why that is so is the second piece of the puzzle, and the topic I turn to next.

B. The Capital Litigation Process

The second piece of the puzzle is that the capital litigation process not only fails to screen out those with severe mental illness, but in many ways, it does just the opposite—it pulls these people into the dragnet even more. Both aspects of the problem are important. The first concerns legal doctrines that one would think would screen out the severely mentally ill, but often do not. Two, in particular, come to mind.

One is competency to stand trial. This doctrine is grounded in due process and designed to ensure that defendants can adequately participate in their defense.⁶⁹ It turns out to be a very low standard, requiring only a minimal ability to consult with a lawyer and understand the proceedings.⁷⁰ Importantly, a person can have a severe mental illness and still be legally competent to stand trial.⁷¹

A prime example is Scott Panetti, the capital defendant in *Panetti v. Quarterman*.⁷² I will be returning to *Panetti v. Quarterman* because it is one of the two leading cases governing competency to be executed,⁷³ but for now my focus is competency to stand trial. Here are the facts. Scott Panetti was found competent to stand trial even though he had been hospitalized more than a dozen times for mental health-related reasons, diagnosed with schizophrenia, and was suffering from hallucinations.⁷⁴ He chose to represent himself in his capital trial in Texas in 1995, and showed up dressed in a purple cowboy outfit.⁷⁵ He tried to subpoena the Pope. He tried to subpoena John F. Kennedy (who, it goes without saying, had long been dead). He tried to subpoena Jesus Christ.⁷⁶ As to the latter, I cannot

⁶⁹ See *Pate v. Robinson*, 383 U.S. 375, 385–86 (1966) (holding that the issue of a defendant’s competency to stand trial implicates his right to a fair trial because it puts in question his ability to assist in his own defense); *Dusky v. United States*, 362 U.S. 402, 402 (1960) (holding that competence to stand trial requires more than mere recollection of events and looks at the defendant’s ability to consult with counsel with a reasonable degree of rational understanding).

⁷⁰ *Dusky*, 362 U.S. at 402 (“[T]he test must be whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.”).

⁷¹ AM. BAR ASS’N, *supra* note 37, at 19.

⁷² 551 U.S. 930 (2007).

⁷³ See AM. BAR ASS’N, *supra* note 37, at 19–22 (highlighting case studies on the trials of Scott Panetti and Kelsey Patterson, respectively, to discuss a mentally ill defendant’s competency to stand trial and the effect of raising an insanity defense).

⁷⁴ *Panetti*, 551 U.S. at 936, 940–42.

⁷⁵ *Id.* at 935–36; AM. BAR ASS’N, *supra* note 37, at 20.

⁷⁶ *Panetti v. Quarterman*, No. A-04-CA-042-SS, 2008 WL 2338498, at *35 (W.D. Tex. Mar. 26, 2008); AM. BAR ASS’N, *supra* note 37, at 20.

help but think—and I will go ahead and say it since I am here at Regent—that Jesus was whispering softly in his ear, “Hey Panetti, you don’t have to subpoena me. I’m always with you.” But Panetti could not hear that voice, perhaps because he was hearing other voices instead. All this, and Panetti was found competent to stand trial.⁷⁷ It is a stunning indictment of our capital justice system, and a vivid example of just how low the competency bar actually is. As one might have guessed, Panetti was convicted and sentenced to death.⁷⁸

The second doctrine is the insanity defense. The insanity defense is an affirmative defense to a crime; a defendant pleads not guilty by reason of insanity (“NGRI”).⁷⁹ The standard for asserting this defense varies from state to state, but most states require some showing that as a result of a mental illness, the defendant did not know the nature of the act that he or she was doing, or did not know it was wrong, or, in a small number of states, that the defendant could not control his or her actions.⁸⁰ Whatever the version, that is a very narrow test, and it is not going to weed out people with most mental illnesses, even severe ones.⁸¹ You can see this in how much the doctrine is used: NGRI is asserted in just 1 percent of all criminal cases, and even then, it is successful only 25 percent of the time.⁸²

NGRI is an especially risky defense in a capital trial, because jurors tend to view it as a legal loophole that could put the defendant back out on the streets.⁸³ In practice, that is not what happens; states are pretty good about involuntarily committing people when they are mentally ill and have gone out and killed somebody.⁸⁴ But the fact remains that NGRI is a complete defense—as in the verdict, if the jury buys it, is not guilty. That is a tough pill to swallow in a murder trial where the person has obviously killed the victim. In a moment, I will talk more about how both doctrines, NGRI and competency to stand trial, end up working against the severely mentally ill, but for now, the point is that NGRI is rarely applicable and rarely successful, so it is rarely ever used.

⁷⁷ *Panetti*, 551 U.S. at 936.

⁷⁸ *Id.* at 937.

⁷⁹ AM. BAR ASS’N, *supra* note 37, at 20 (discussing the affirmative defense of NGRI).

⁸⁰ *Id.*

⁸¹ *Id.* at 21.

⁸² *Id.*

⁸³ *Id.* Although state practice varies, the Supreme Court has held that at least under federal law, including general federal criminal practice, courts are not required to inform juries that defendants found not guilty by reason of insanity will be involuntarily committed and not released into society, rejecting a defendant’s claim that an instruction was needed to counter jurors’ mistaken perception to the contrary. *See Shannon v. United States*, 512 U.S. 573 (1994).

⁸⁴ *See id.* (explaining that the successful use of the NGRI defense normally results in a defendant being sent to a psychiatric institution).

By way of example, we could go back to Panetti, as he also pled NGRI⁸⁵—unsuccessfully, obviously—but, an equally powerful example is the case of Kelsey Patterson. Patterson had been diagnosed with paranoid schizophrenia in 1981 and was in and out of mental hospitals multiple times in the 1980s.⁸⁶ In 1992, Patterson walked into a store and randomly shot a businessman and his administrative assistant.⁸⁷ He then dropped his gun, stripped down to his socks—and I mean he took off *everything* except for his socks—and paced the floor, mumbling incoherently, until the police arrived.⁸⁸ At trial, the jury rejected Patterson’s insanity defense.⁸⁹ He was found guilty and sentenced to death.⁹⁰ So clear was the evidence of Patterson’s severe mental illness that the Texas Board of Pardons and Paroles recommended clemency by a vote of five-to-one.⁹¹ It was only the second recommendation for clemency in the Board’s entire history.⁹² That recommendation went to the governor, who was Rick Perry at the time, and he rejected it.⁹³ The State of Texas executed Patterson the next day.⁹⁴

Those are the two doctrinal failsafes, the safety valves for those with serious mental health problems to escape the capital justice system, and neither does much work in screening out capital offenders with severe mental illness. The question then becomes whether the capital litigation process provides other ways to sift out those who are severely mentally ill, and the reality is that being severely mentally ill in the capital litigation process actually cuts the other way. Rather than making it less likely that a defendant will be convicted and sentenced to death, severe mental illness makes it more so.

There are a number of reasons why this is true. First, the severely mentally ill are more likely to confess, even to crimes they did not commit.⁹⁵ The last panel of today’s symposium is dedicated to understanding why those with intellectual disabilities and mental illness are more likely to be falsely convicted so I will not go into detail here, but it is worth noting that the National Registry of Exonerations lists 103

⁸⁵ Panetti v. Quarterman, 551 U.S. 930, 936 (2007).

⁸⁶ Patterson v. Cockrell, 69 F. App’x 658, at *1 (5th Cir. 2003); AM. BAR ASS’N, *supra* note 37, at 22.

⁸⁷ Patterson, 69 F. App’x at *1; AM. BAR ASS’N, *supra* note 37, at 22.

⁸⁸ Patterson, 69 F. App’x at *1.

⁸⁹ *Id.*; AM. BAR ASS’N, *supra* note 37, at 22.

⁹⁰ Patterson, 69 F. App’x at *1; AM. BAR ASS’N, *supra* note 37, at 22.

⁹¹ AM. BAR ASS’N, *supra* note 37, at 22.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Robert Perske, *False Confessions from 53 Persons with Intellectual Disabilities: The List Keeps Growing*, 46 INTELL. AND DEVELOPMENTAL DISABILITIES 468, 468 (2008).

exonerations by those with mental illness or intellectual disability; of those 103, nearly three-quarters—72 percent—had falsely confessed to the crime.⁹⁶ We might have guessed this would be true; the mentally infirm are more susceptible to manipulation and suggestion, and that makes them more susceptible to confessing in response to police interrogation.⁹⁷ Whether the confession is true or false, the point here is that the severely mentally ill are more likely to come to trial having given one, and that makes them more likely to be convicted, which in turn puts them more at risk of being sentenced to death.

Second, it is more difficult for the severely mentally ill to cooperate with their lawyer to mount an effective defense.⁹⁸ For example, they often have confused and disordered thinking and have difficulty communicating in ways that make sense, particularly when trying to explain the details of what happened on a given occasion or when answering questions that can help piece together a mitigation case based on their social history.⁹⁹ Sometimes they suffer from paranoia, so they do not trust their lawyers and as a result, do not share things with them, or even worse, work in passive-aggressive ways to undermine the representation.¹⁰⁰ Sometimes they do not want to talk about their mental illness, especially if it was caused by trauma; they just do not want to relive those memories, so they are utterly uncooperative in building a defense based on their mental illness.¹⁰¹ And sometimes they also have a personality disorder of some sort that makes them just plain difficult to work with and, well, difficult

⁹⁶ Samuel Gross & Maurice Possley, *For 50 Years, You've Had "The Right to Remain Silent"*, MARSHALL PROJECT (June 12, 2016), <https://www.themarshallproject.org/2016/06/12/for-50-years-you-ve-had-the-right-to-remain-silent>; Mary Kelly Tate, Dir., Inst. for Actual Innocence, and Professor, Univ. of Richmond, Closing Remarks: Mental Health and Wrongful Convictions/Sentencing at the Regent University Law Review Annual Symposium (Nov. 2, 2018).

⁹⁷ Perske, *supra* note 95, at 468; Saul M. Kassin et. al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. HUM. BEHAV. 3, 21 (2010), https://www.jstor.org/stable/40608053?seq=1&cid=pdf-reference#references_tab_contents (“[P]ersons with mental illness are over-represented in these [false confession] cases. Psychological disorder is often accompanied by faulty reality monitoring, distorted perception, impaired judgment, anxiety, mood disturbance, poor self-control, and feelings of guilt.”).

⁹⁸ Scott E. Sundby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 WM. & MARY BILL RTS. J. 487, 512–13 (2014). This factor is one of several that support what Professor Scott Sundby calls the “unreliability principle”—the notion that if the jury cannot reliably take into account certain factors in mitigation, then the death penalty cannot constitutionally be imposed. AM. BAR ASS'N, *supra* note 37, at 31–32 (discussing the unreliability principle and referring to the *Atkins* and *Roper* factors as Sundby factors); Sundby, *supra* note 98, at 505, 511.

⁹⁹ AM. BAR ASS'N, *supra* note 37, at 23; Sundby, *supra* note 98, at 514.

¹⁰⁰ AM. BAR ASS'N, *supra* note 37, at 23; Sundby, *supra* note 98, at 514.

¹⁰¹ AM. BAR ASS'N, *supra* note 37, at 23; Sundby, *supra* note 98, at 513.

to like.¹⁰² All this makes effective representation of severely mentally ill capital defendants really, really hard. My hat goes off to the very special class of lawyers who do capital defense work, especially when it involves representing the severely mentally ill.

Third, and relatedly, there are some decisions in the capital litigation process that only the defendant can make. The right to waive the right to an attorney and represent oneself at trial, the right to waive an appeal, the right to testify, and the right to plead not guilty, even when the evidence is overwhelming and a plea deal would take death off the table—all these are decisions that belong to the defendant alone.¹⁰³ As the *Panetti* case showed, severe mental illness can lead to some really bad decisions, and that can mean the difference between life and death.

Fourth and finally, the drugs that severely mentally ill people need to take in order to get their illness under control tend to make their emotional affect appear flat, which is particularly bad in a capital trial because it can be mistakenly interpreted as a lack of remorse.¹⁰⁴ That said, the alternative may be worse. If mentally ill capital defendants do not take their meds because they do not want their affect to be flat, they run the risk of showing up at trial looking agitated, disruptive, and out of control.¹⁰⁵ Then they are dangerous looking, and that is the last thing they want to be, at least if they want the jury to choose life.¹⁰⁶

Everything I have said thus far has been about the trial process, but the sentencing phase of a capital trial poses special dangers for the severely mentally ill as well. Under the law, mental illness is a mitigating circumstance—something the jury considers in determining whether a convicted murderer is among the worst of the worst for whom a death sentence is appropriate.¹⁰⁷ But research shows that juries often use severe mental illness as an aggravator instead.¹⁰⁸ You may have heard of the Capital Jury Project; it is a National Science Foundation-funded project

¹⁰² See Sam Glover, *Learn to Deal with Mentally-Ill Clients*, LAWYERIST.COM (Feb. 19, 2014), <https://lawyerist.com/deal-with-mentally-ill-clients/> (providing a candid discussion of the challenges of representing the mentally ill).

¹⁰³ See *Godinez v. Moran*, 509 U.S. 389, 398–99 (1993) (holding that a defendant who is competent to stand trial is competent to make decisions belonging to client alone, such as whether to plead guilty and whether to waive the right to an attorney and proceed pro se).

¹⁰⁴ AM. BAR ASS'N, *supra* note 37, at 32; Sundby, *supra* note 98, at 515.

¹⁰⁵ AM. BAR ASS'N, *supra* note 37, at 23.

¹⁰⁶ See *id.* (discussing how jurors are more likely to find the death sentence appropriate if they perceive a defendant as dangerous).

¹⁰⁷ *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (treating a defendant's mental and emotional development as a mitigating factor for sentencing); e.g., *Lockett v. Ohio*, 438 U.S. 586, 607 (1978) (recognizing mental deficiency as a mitigating circumstance).

¹⁰⁸ See Ellen Fels Berkman, Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 299 (1989) (explaining that once mental illness is introduced in mitigation, the prosecution may use it as an aggravating factor because of a likelihood of future dangerousness).

aimed at finding out how capital jurors think—when they choose death and why, that sort of thing.¹⁰⁹ What the Capital Jury Project’s research has shown is that a claim of either insanity or incompetence to stand trial is one of the strongest correlates with a death sentence.¹¹⁰ That does not prove causation, of course; it is just a strong association. But when you think about the reasons that jurors choose death—and a finding of “future dangerousness” is right up there¹¹¹—this makes complete sense. When a jury sees a killer with a severe mental illness, someone so sick as to plead insanity or to say he or she is not even competent to stand trial, there is a good chance the jury is going to check the box for future dangerousness.¹¹² If mental illness makes a person dangerous (and if the illness played any part in the murder, there is reason to think that is true), then it makes sense for a jury to think that the person is going to be dangerous going forward. That is just intrinsic to the nature of the person’s mental illness. It is a part of who that person is.¹¹³

All the factors I have discussed result in a substantial proportion of severely mentally ill people in our prisons generally, and on death row specifically. By way of comparison, around 4 percent of the general population suffers from a severe mental illness.¹¹⁴ When you look at the percentage of those with severe mental illness in our correctional facilities, that figure jumps to around 10 percent—more than double what you see in the general population.¹¹⁵ And when you look at death row, that percentage doubles again; at least 20 percent of the condemned on death row suffer from a severe mental illness.¹¹⁶ That brings me to death row.

¹⁰⁹ *What is the Capital Jury Project*, U. ALBANY SCH. CRIM. JUST., <https://www.albany.edu/scj/13189.php> (last visited Feb. 3, 2019).

¹¹⁰ See DAVID BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 644–45 app. L, sched. 9 (1990) (providing the statistical models from the *McCleskey v. Kemp* case that was relied upon by Christopher Slobogin to support the assertion that the insanity defense is correlated to the death sentence at a very high level of statistical significance); Christopher Slobogin, *Mental Illness and the Death Penalty*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 667, 669–70 (2000) (discussing similar findings in other studies).

¹¹¹ Sundby, *supra* note 98, at 519 n.175 (discussing research in which “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”). So important is future dangerousness to the capital sentencing decision that Scott Sundby calls it part of the capital jury’s “hippocratic oath”—that having convicted the defendant of capital murder, their duty is “ensuring that, above all else, the defendant will never kill again.” Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 HASTINGS L.J. 103, 117 (2010).

¹¹² *Id.* at 519.

¹¹³ See *id.* (summarizing a jury’s decision to vote in favor of imposing the death penalty as based on the incurable nature of the defendant’s mental illness).

¹¹⁴ *Mental Illness*, NAT’L INST. MENTAL HEALTH (Nov. 2017), <https://www.nimh.nih.gov/health/statistics/mental-illness.shtml> (estimating the prevalence of serious mental illness among the U.S. adult population at 4.2% as of 2016).

¹¹⁵ AM. BAR ASS’N, *supra* note 37, at 15.

¹¹⁶ *Id.* at 16.

C. Death Row

If a capital offender is not suffering from mental illness before arriving on death row, there is a good chance he or she will develop one just as a result of being there. In virtually every state, death row consists of solitary confinement where the condemned are kept for at least 22 hours each day in the confines of a windowless cell the size of a standard parking lot space.¹¹⁷ Take a moment to think about just how small that is. They are monitored by cameras, spoken to through intercoms, and fed through a slot in the door.¹¹⁸ They have limited access to books and magazines, and virtually no contact with other human beings.¹¹⁹ These are the conditions of solitary confinement on death row, and the condemned are subject to its hallmarks—extreme isolation and forced idleness—for agonizingly long periods of time.

How long, you are probably wondering. In 1987, the average time between death sentence and execution was seven years.¹²⁰ In 1997, the average time between death sentence and execution was 11 years.¹²¹ In 2007, it was a little less than 13 years.¹²² And in 2017, the average time on death row of those executed that year was 19 years.¹²³ Nineteen years in solitary confinement. Just take a moment to let that sink in.

One might respond by saying, “Then just hurry the heck up.” And that would be a reasonable response, except for the fact that two-thirds of all death sentences are reversed, and the top two reasons for reversal are prosecutorial misconduct and ineffective assistance of counsel.¹²⁴ Those are not mere legal technicalities; those are serious errors that go to the very heart of the capital justice system and the state’s ability to put someone to death. Then there is the estimated 4 percent of factually

¹¹⁷ Corinna Barrett Lain, *Following Finality: Why Capital Punishment Is Collapsing Under Its Own Weight*, in FINAL JUDGMENTS: THE DEATH PENALTY IN AMERICAN LAW AND CULTURE 30, 40 (Austin Sarat, ed., 2017).

¹¹⁸ *Id.*

¹¹⁹ See David. R. Dow, *Life Without Parole: A Different Death Penalty*, THE NATION, (Oct. 26, 2012), <https://www.thenation.com/article/life-without-parole-different-death-penalty/>.

¹²⁰ See *Time on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/time-death-row> (last visited Jan. 31, 2019) (averaging time between sentencing and execution at 86 months in 1987).

¹²¹ See *id.* (averaging time between sentencing and execution at 133 months in 1997).

¹²² See *id.* (averaging time between sentencing and execution at 153 months in 2007).

¹²³ See *Execution List 2017*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/execution-list-2017> (last visited Jan. 31, 2019) (providing a list of condemned inmates executed in 2017 and the amount of time each spent on death row).

¹²⁴ James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1850 (2000); Fox Butterfield, *Death Sentences Being Overturned in 2 of 3 Appeals*, N.Y. TIMES ON THE WEB, <https://archive.nytimes.com/www.nytimes.com/library/national/061200death-penalty.html> (June 12, 2000).

innocent people still sitting on death row.¹²⁵ So no, I do not think the right answer is to just cut off appeals and speed up the back end of the process.

In any event, what extreme isolation for extreme periods of time produces is something psychologists call “isolation sickness.”¹²⁶ In the context of the condemned, it is also known as “death row syndrome.”¹²⁷ Research shows that even a few days in solitary confinement will cause a shift in EEG patterns indicative of cerebral dysfunction.¹²⁸ Over time, the effects are debilitating, and what psychologists are seeing among those on death row is similar to the damage suffered by victims of severe sensory deprivation torture techniques.¹²⁹ One study reported that of prisoners in isolation, 91 percent suffered from anxiety, 88 percent suffered from ruminations or intrusive thoughts, 86 percent suffered from hypersensitivity to stimuli, 84 percent had difficulty with concentration and memory, 84 percent had confused thought process, 71 percent experienced severe mood and emotional swings, 61 percent had violent fantasies, 44 percent experienced perceptual distortions, and 41 percent had hallucinations.¹³⁰ In the same study, 34 percent of the prisoners experienced all eight of these effects, and 56 percent experienced at least five of them.¹³¹

For those with severe mental illness coming in, the adverse effects of solitary confinement are even more damaging. Studies show that the stressors of extreme isolation make everything worse for those with preexisting mental health problems; it exacerbates the problems they already have.¹³² As one federal judge put the point, “[P]utting mentally ill prisoners in isolated confinement ‘is the mental equivalent of putting an asthmatic in a place with little air.’”¹³³ The sick get sicker, and they just languish that way, getting sicker and sicker, until it is time for them to

¹²⁵ Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT’L ACAD. SCI. 7230, 7230, 7234 (2014), <https://www.pnas.org/content/pnas/111/20/7230.full.pdf>.

¹²⁶ Lain, *supra* note 117, at 40; see also Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124, 134–37 (2003), <https://journals.sagepub.com/doi/pdf/10.1177/0011128702239239> (discussing death row syndrome and isolation sickness outside of the capital context).

¹²⁷ Lain, *supra* note 117, at 40.

¹²⁸ Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U.J.L. & POL’Y 325, 331 (2006).

¹²⁹ Haney, *supra* note 126, at 131–32.

¹³⁰ *Id.* at 136–37.

¹³¹ *Id.* at 137.

¹³² Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY L. 104, 104–05 (2010).

¹³³ *Id.* at 105 (quoting *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995)).

die. And that brings me to the last piece of the puzzle, competency to be executed.

D. Competency to be Executed

I have finally made my way back to *Madison v. Alabama*, where our journey began,¹³⁴ and now we know a lot more about how the severely mentally ill could be at risk of execution in the first place. But there is still one more legal failsafe, one more safety net that could spare the severely mentally ill, and that is the requirement that they be competent to be executed.

At the moment, there are just two Supreme Court cases on this issue; *Madison* will make three. The first of those is *Ford v. Wainwright*, which the Court decided in 1986.¹³⁵ Ford was convicted of murder in 1974, and by 1982, after eight years on death row, his mental health had deteriorated.¹³⁶ He started referring to himself as Pope John Paul III, he boasted of thwarting a Klu Klux Klan conspiracy to bury dead prisoners inside the prison walls, and he claimed to have appointed nine new justices to the Florida Supreme Court (which, by the looks of it, did not help him much).¹³⁷ Ford also claimed that he could control the governor through mind waves, and that executing him was part of a Satanic conspiracy to keep him from preaching the gospel.¹³⁸ The Supreme Court looked at all this and said that it has always been clear that you could not execute the insane, because, well, they are insane.¹³⁹ But even here, the Court did not go on to hold that Ford was insane; the Court just said there had to be a process for figuring this out, and there was not a process here.¹⁴⁰ So, they sent the case back to Florida to figure out a process, and in the meantime, Ford, who was still languishing on death row, died of natural causes. At the time of his death, he was just 37 years old.¹⁴¹

The other case on competency to be executed is *Panetti v. Quarterman*.¹⁴² I have already talked about the facts—Panetti was the guy who showed up at trial wearing a purple cowboy outfit and tried to subpoena Jesus Christ¹⁴³—so here I will cut to the chase. The Supreme

¹³⁴ For a discussion of *Madison*, see *supra* notes 2–28 and accompanying text.

¹³⁵ 477 U.S. 399 (1986).

¹³⁶ *Id.* at 401–02.

¹³⁷ *Id.* at 402.

¹³⁸ *Id.* at 403.

¹³⁹ *Id.* at 407–08.

¹⁴⁰ *Id.* at 416–18.

¹⁴¹ *Alvin Ford, 37, Dies; Stricken on Death Row*, N.Y. TIMES (Mar. 9, 1991), <https://www.nytimes.com/1991/03/09/obituaries/alvin-ford-37-dies-stricken-on-death-row.html>.

¹⁴² 551 U.S. 930 (2007).

¹⁴³ For further details, see *supra* notes 72–78 and accompanying text.

Court in *Panetti* did not say that Panetti could not be executed. What the Court said is that to be competent, Panetti needed a rational understanding of the reason the state wanted to execute him, and as was the case in *Ford*, the state had failed to provide an adequate process for figuring that out.¹⁴⁴ Fast forward to today, and the State of Texas is still trying to execute Scott Panetti, who appears to be sick as ever.¹⁴⁵

Now you know the standard governing competency to be executed—a capital offender must have a rational understanding of the reason that the state wants to put him or her to death—and you know how it has played out. Knowing that, you also know that competency to be executed does not do much to keep the severely mentally ill from being executed. If there is any doubt about that, just look at who it is we execute in this country. One study looking at executions from the years 2000 to 2015 found that 43 percent of those executed had been diagnosed with a severe mental illness.¹⁴⁶ In 2015 alone, seven of the 28 people executed suffered from a diagnosed severe mental illness, while another seven suffered from serious intellectual impairment or brain injury.¹⁴⁷ In short, fully half of the people we executed in 2015 had some sort of serious intellectual impairment or dysfunction. When it comes to “volunteers”—condemned inmates who wave their appeals and say just execute me, I cannot take this anymore—more than 75 percent have some sort of documented mental illness.¹⁴⁸

This is who we execute. The question that naturally follows is *why*—why would we want to do that? What purpose does it serve?

¹⁴⁴ See *Panetti*, 551 U.S. at 948, 959 (defining competency to be executed and reversing finding of competency by state court for its failure to provide adequate means by which to submit expert psychiatric evidence supporting Panetti's claim).

¹⁴⁵ See Jolie McCullough, *Texas Death Row Inmate Scott Panetti to Get Further Competency Review*, TEX. TRIB. (July 11, 2017 8:00 PM), <https://www.texastribune.org/2017/07/11/texas-death-row-inmate-scott-panetti-get-further-competency-review/> (reporting that the Fifth Circuit reversed and remanded the district court's denial of relief for Panetti on his claim of incompetence to be executed, and noting that “prison guards have noticed Panetti acting delusional and he has claimed to be the father of singer Selena Gomez and said CNN anchor Wolf Blitzer showed his stolen prison ID card on the news”).

¹⁴⁶ Frank R. Baumgartner & Betsy Neill, *Does the Death Penalty Target People Who are Mentally Ill? We Checked.*, WASH. POST (Apr. 3, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/03/does-the-death-penalty-target-people-who-are-mentally-ill-we-checked/?noredirect=on&utm_term=.9cca739b0bae.

¹⁴⁷ *2015 Executions: A Broken Capital Punishment System*, CHARLES HAMILTON HOUS. (2015), <https://charleshamiltonhouston.org/wp-content/uploads/2015/12/2015-CH-HIRJ-Death-Penalty-Report.pdf>.

¹⁴⁸ John H. Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 MICH. L. REV. 939, 962 (2005).

II. WHAT PURPOSE DOES EXECUTING THE SEVERELY MENTALLY ILL SERVE?

What is it that we are trying to accomplish when we execute the severely mentally ill? This is an important question, because as I mentioned at the beginning of this talk, the state is executing in our name. So we ought to be able to answer that question. We ought to be able to articulate what it is that we are getting out of it when we put these people to death.

This was the question I found myself asking in *Madison*. I mean, who is even pushing to execute this guy? He is blind, he is disoriented, he urinates on himself, and he cannot remember what he did.¹⁴⁹ He is completely pathetic. It is hard to imagine that even staunch death penalty supporters are eager to push this rock uphill; the last thing they want is for people to feel sorry for the guy who gets executed. So where is all this going?

Here is Alabama's answer to that question from oral arguments in *Madison*: "The state would still have a strong interest in seeking retribution for a horrible crime . . . even if [the condemned inmate] can't remember the crime."¹⁵⁰ Later in the argument, the state's representative says it again: "[N]othing about Mr. Madison's conditions impact the state's interest in seeking retribution for a . . . heinous crime."¹⁵¹ At least Alabama was clear: its interest is retribution.

To be fair, in the state's brief, Alabama also makes an argument about deterrence,¹⁵² but it is hard to think that is what is really at stake because the claim does not even get mentioned at oral argument. After the National Research Council's 2012 report on deterrence and the death penalty, it is easy to see why—as the 2012 report states, the evidence does not support the claim that the death penalty deters murder, so we should leave deterrence out of the debate.¹⁵³ Besides, what does that deterrence argument look like—we execute even the severely mentally ill, so we sure as heck will execute you? As the Supreme Court concluded when it

¹⁴⁹ See *supra* notes 16–18 and accompanying text.

¹⁵⁰ Oral Argument, *supra* note 3, at 44.

¹⁵¹ *Id.* at 48.

¹⁵² Brief of Respondent, *supra* note 20, at 38–40 (arguing that impairments diminish the deterrent effect of capital punishment only if the impairment took hold prior to the commission of the crime).

¹⁵³ See generally NAT'L RESEARCH COUNCIL, DETERRENCE AND THE DEATH PENALTY 2 (Daniel S. Nagin & John V. Pepper eds., 2012) ("The committee concludes that research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide. . . . [and] should not influence policy judgments about capital punishment.").

invalidated the death penalty for the intellectually disabled (as opposed to the mentally ill) in the 2002 case *Atkins v. Virginia*, exempting the intellectually disabled from the death penalty will not harm whatever deterrent effect it might have for everyone else, and including them will not further it because they are not operating at a level that deterrence requires.¹⁵⁴ I have to think that Alabama did not mention deterrence at oral argument because after *Atkins* and the National Research Council's 2012 report, there was not much to say.

That brings me back to retribution, and I do believe that is what is really at stake here, just as that is what the death penalty is about more broadly. Today's death penalty is not about deterrence, or incapacitation, and it is certainly not about saving money. It is about retribution.¹⁵⁵ It is about avenging the lives of those who were mercilessly slain.

Now, I do not claim to know how the Supreme Court will come out in *Madison*, and the issue there is not whether retribution is a legitimate state interest in executing the severely mentally ill (although it is not unrelated). But it merits mention that what the Supreme Court in *Atkins* had to say about retribution in the context of executing the intellectually disabled is equally applicable to the severely mentally ill. There the Court stated:

[Intellectually disabled] persons frequently know the difference between right and wrong and are competent to stand trial. . . . [B]y definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. . . . Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.¹⁵⁶

¹⁵⁴ 536 U.S. 304, 320 (2002) (“The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution.”).

¹⁵⁵ Polling data supports the point. See *Death Penalty*, GALLUP, <https://news.gallup.com/poll/1606/death-penalty.aspx> (last visited Feb. 3, 2019) (reporting the reasons why proponents of the death penalty support using the death penalty, and that the number one reason for supporting the death penalty is “[a]n eye for an eye/[t]hey took a life/[f]its the crime”).

¹⁵⁶ *Atkins*, 536 U.S. at 318. The 2002 *Atkins* opinion used the term “mentally retarded” to refer to this class of individuals. However, in 2010, President Barack Obama signed a bill into law, which removed “mentally retarded” from the U.S. Code and replaced it with the

The Court went on to say that the state's interest in retribution "necessarily depends on the culpability of the offender," and when it came to the death penalty, that interest was legitimate only to the extent "the most deserving of execution are put to death."¹⁵⁷ The defendant in *Atkins* had committed a capital crime; his convictions for abduction, armed robbery, and capital murder were deserving.¹⁵⁸ But for the death penalty, that was not enough. "Because of their disabilities in areas of reasoning, judgment, and control of their impulses," the Court explained, "[the intellectually disabled] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct."¹⁵⁹ *Atkins* may have committed the worst crime, but he was not in the category of the worst offenders. As such, he was not among the worst of the worst for whom death was appropriate.

Based on *Atkins*—what it said about the intellectually disabled having diminished moral culpability applies with full force to the severely mentally ill too—there is good reason to think that the state's interest in retribution is not legitimate when it comes to executing the severely mentally ill. But if that is true, then I am back to my question: what is it that we get out of it when we execute the severely mentally ill?

I have a view—a fear actually—and I am going to share it. It comes from *Ford*, the case in which the Supreme Court first held that executing the insane was unconstitutional (and then did next to nothing to stop it).¹⁶⁰ In *Ford*, the Court paused to consider what purpose the state could possibly have in executing the insane in the first place, and its observation as to the answer is one that I have always found deeply disturbing, haunting even. It was what the Court called "the barbarity of exacting mindless vengeance."¹⁶¹

Mindless vengeance. It fits all too well in the context of executing the severely mentally ill. It is vengeance, a dark twist on retribution,¹⁶² and it

term "intellectually disabled." Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010) (codified as amended at 20 U.S.C. § 1140(2)(A) (2012)).

¹⁵⁷ *Atkins*, 536 U.S. at 319.

¹⁵⁸ *See id.* at 307 (recognizing that defendant *Atkins* was sentenced to death for his conviction of abduction, armed robbery, and capital murder).

¹⁵⁹ *Id.* at 306.

¹⁶⁰ *See supra* notes 135–141 and accompanying text.

¹⁶¹ *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

¹⁶² For a discussion of the difference between retribution, which is viewed as a legitimate penological purpose, and vengeance, which is not, and an argument that the two are not so different after all, see Corinna Barrett Lain, *The Highs and Lows of Wild Justice*, 50 TULSA L. REV. 503, 515 (2015) ("Revenge, social scientists tell us, involves the emotional pleasure of retaliating past wrongs by making the offender suffer. Retribution can embody that concept, but it can also embody the closely related principle of just deserts, which aims to restore some sense of balance by imposing punishment proportional to the wrong committed. One is about retaliation, the other about restoration, but the distinction is a thin reed. The restorative principle at work in just deserts is the talion—an eye for an eye, life

is mindless. It is mindless in the sense of recognizing the lack of full mental capacity of the offender, and it is mindless in the way that states have shown no interest in recognizing the reduced culpability of the severely mentally ill. Blood has been shed and a price must be paid; the victim must be avenged, no matter how pathetic the offender. As the Supreme Court in *Ford* recognized, there is indeed a barbarity in that endeavor, which leads me to my last point.

III. WHAT EXECUTING THE SEVERELY MENTALLY ILL SAYS ABOUT US

The fact that we execute the severely mentally ill in this country might seem bizarre to outsiders, but it (unfortunately) makes more sense when considered in the larger death penalty context. Here, I am reminded of what Henry Schwarzschild, who led the ACLU's Capital Punishment Project in the early 1970s and later founded the National Coalition to Abolish the Death Penalty,¹⁶³ once said about the death penalty. He wrote:

[W]e have always picked quite arbitrarily a tiny handful of people among those convicted of murder to be executed, not those who have committed the most heinous, the most revolting, the most destructive murders, but always the poor, the black, the friendless, the life's losers, those without competent, private attorneys, the illiterate, those despised or ignored by the community for reasons having nothing to do with their crime. . . . The penalty of death is imposed almost entirely upon members of what the distinguished social psychologist Kenneth B.

Clark has referred to as "the lower status elements of American society."¹⁶⁴

If you spend any time at all studying the American death penalty, you know this to be true. It was true back in 1972, when the Supreme Court invalidated the death penalty *for the very reason that this was true*.¹⁶⁵ It was true in 1976, when the Court reinstated the death penalty under the promise that it would no longer be true.¹⁶⁶ And it is true today. The reality of the death penalty is that it is not for the worst of the worst. It is for *the weak among the worst*—the most vulnerable capital offenders in a variety

for a life—and that is also what gives rise to the anticipated emotional satisfaction of revenge. In that sense, retribution and revenge are just two sides of the same coin; what the state does as retribution, the victim experiences as revenge.”)

¹⁶³ For a more detailed description of Schwarzschild's work in this area, see HERBERT H. HAINES, *AGAINST CAPITAL PUNISHMENT* 61–62 (1996), <https://ebookcentral-proquest-com.ezproxy.regent.edu/lib/regent-ebooks/detail.action?docID=270937>.

¹⁶⁴ Henry Schwarzschild, *In Opposition to Death Penalty Legislation*, in *THE DEATH PENALTY IN AMERICA* 364, 366–67 (Hugo Adam Bedau 3d ed. 1982).

¹⁶⁵ See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (holding that the imposition of the death penalty constituted cruel and unusual punishment); *id.* at 240, 255–57 (Douglas, J., concurring) (reasoning that the death penalty amounts to a cruel and unusual punishment because it is imposed discriminatorily—selectively being applied to the poor, suspect classes, and unpopular minorities—thereby violating the equal protection clause, which is implicit in the ban against such punishments).

¹⁶⁶ See *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (holding that the concerns in *Furman* regarding the discriminatory imposition of the death penalty may be addressed through a precisely worded statute).

of ways—and executing those with severe mental illness is just Exhibit A for my claim.

What, then, does this say about us? As Bryan Stevenson told the Justices during his oral argument in the *Madison* case, “[T]he Eighth Amendment isn’t just a window. It’s a mirror.”¹⁶⁷ It says something about us as a society.

What, then, does it say that not a single death penalty state in the Union exempts the ultimate punishment for the severely mentally ill? Not one.¹⁶⁸ Since 2006, the American Psychological Association, the American Psychiatric Association, and the National Alliance on Mental Illness have opposed the death penalty for mentally ill offenders.¹⁶⁹ The ABA has likewise issued a statement saying these people are seriously sick; they are not the worst of the worst murderers and should not be executed.¹⁷⁰ One observer noted, “[T]o my knowledge, this is the very first time in history that those four organizations have adopted the same position on anything.”¹⁷¹ People paying attention, people in the know—they find this indefensible. And by and large, we don’t defend it. We don’t need to; it is just what we do. What does that say about our thirst for “exact[ing] mindless vengeance”?¹⁷²

Over 150 years ago Dostoyevsky wrote, “The degree of civilization in a society can be judged by entering its prisons.”¹⁷³ Justice Kennedy quoted

¹⁶⁷ Oral Argument, *supra* note 3, at 60.

¹⁶⁸ See generally ELIZABETH DAVIS & TRACY L. SNELL, U.S. DEP’T OF JUST., BUREAU OF JUST. STATS., CAPITAL PUNISHMENT, 2016 (2018), <https://www.bjs.gov/content/pub/pdf/cp16sb.pdf> (summarizing the states that allow the death penalty without recognizing any specific exception for the severely mentally ill). *But see* Terence Lenamon, *Terry Lenamon’s List of State Death Penalty Mitigation Statutes*, JDSUPRA (May 10, 2010), <https://www.jdsupra.com/post/documentViewer.aspx?fid=d61d8c7b-896b-4c1a-bd87-f86425206b45> (listing the mitigating factors, one of which is mental illness, for each state that still allows the imposition of the death penalty).

¹⁶⁹ See AM. BAR ASS’N, *supra* note 37, at 34–36 (discussing opposition to the death penalty for severely mentally ill offenders by leading professional organizations); AM. PSYCHOL. ASS’N, REPORT OF THE TASK FORCE ON MENTAL DISABILITY AND THE DEATH PENALTY 12 (2005) (advocating a policy that automatically commutes a death sentence to a lesser punishment for those individuals found incompetent for execution); see also E. Packard, *Associations Concur on Mental Disability and Death Penalty Policy*, MONITOR ON PSYCHOL. 14, 14 (2007) (discussing how the American Psychological Association, the American Bar Association, the American Psychiatric Association, and the National Alliance on Mental Illness drafted a policy excluding persons with severe mental disorders from capital punishment).

¹⁷⁰ AM. BAR ASS’N, RECOMMENDATION 122A: MENTAL ILLNESS RESOLUTION pmbl. (2006), available at https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/mental_illness_policies.authcheckdam.pdf.

¹⁷¹ See AM. BAR ASS’N, *supra* note 37, at 8.

¹⁷² *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

¹⁷³ THE YALE BOOK OF QUOTATIONS 210 (Fred R. Shapiro ed. 2006) (reproducing a translation of a portion of Fyodor Dostoyevski’s *The House of the Dead*).

this language in a 2015 concurrence and added, “There is truth to this in our own time.”¹⁷⁴ At the time, Justice Kennedy was writing about how we treat those on death row,¹⁷⁵ but those words are also true when it comes to *who* we put on death row in the first place.

Maybe, just maybe, the facts of *Madison* will be over the line; maybe the Supreme Court will finally say that a state has gone too far. But, in my mind, we should have never come this close to the line in the first place. To do so says more about our moral failings, our barbarity, than it says about those who we execute.

Thank you.

***Editor’s note: Subsequent to this keynote speech, the Supreme Court decided Madison, holding that in evaluating competency to be executed, a court must look not at the diagnosis, but rather at its downstream consequence—namely, whether it precluded the inmate from having a rational understanding of why the state wants to execute—and remanded for the court to determine that in the first instance under the clarified standard. See Madison v. Alabama, 139 S.Ct. 718 (2019).*

¹⁷⁴ Davis v. Ayala, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring).

¹⁷⁵ *Id.* at 2209.