Rethinking Categorical Prohibitions on Capital Punishment: How the Current Test Fails Mentally Ill Offenders and What to Do About It

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I. INTRODUCTION

Consider two vignettes.

First consider the story of Christopher, a seventeen-year-old high school junior. Christopher, later described by psychologists as very impulsive, very immature, and coming from a difficult home environment, hatches a scheme to commit murder. He broaches the idea with two friends, both of whom are younger than he, proposing they all break into a woman’s house, commit burglary, then tie the woman up and throw her off a bridge. Christopher assures his friends that, because they all are under eighteen, they can get away with the crime.

Ultimately, Christopher and one of the other boys break into a woman’s home in the middle of the night to execute their plan. They abduct the woman who lives there, tying her hands and covering her eyes and mouth with duct tape. They drive her to a state park, where they cover her head with a towel and walk her to a bridge overlooking a river. They then bind her hands and feet with electrical wire, wrap her entire head in duct tape, and throw her from the bridge. She drowns. Her body is recovered the next day. In the meantime, Christopher brags to several friends about the murder, talking about the “bitch” he killed.¹

Now consider the story of Scott, an adult male. Scott has an eleven-year history of severe mental illness. In the past eleven years, he has been hospitalized for mental illness fourteen different times at six different hospitals. His diagnoses have varied but have included schizophrenia, schizoaffective disorder, and manic depression, with paranoia, homicidal and suicidal ideation, and visual and auditory hallucinations among his consistent (and persistent) symptoms. His behavior over the years has been consistent with his symptoms: one year, Scott buried some of the furniture from his family’s home, apparently believing the devil was in the furniture; on another occasion, Scott washed all the walls of his house because he believed the devil’s blood was running down the walls.

¹ This account is taken from Roper v. Simmons, 543 U.S. 551 (2005), in which the Court held the Eighth Amendment bars the death penalty for juvenile offenders.
Scott has been committed involuntarily for threatening to kill his wife and child and also has claimed that residents of his town were plotting against him. Perhaps not surprisingly, Scott's wife has grown to fear him and has sought and received protective orders against him. In fact, she and her daughter (who is his child as well) have moved in with her parents.

In one of the years in which he was involuntarily committed for threats against his family (during this psychiatric hospitalization, Scott was diagnosed with schizoaffective disorder), Scott dresses in fatigues, shaves his head, saws off a shotgun, and goes to the home of his in-laws. He breaks into the home through the glass of a sliding door. After chasing his wife, Scott ultimately corners her and her parents and asks the wife whether she wants to die first or watch her parents die. In his wife's presence, Scott shoots (and kills) his wife's parents at close range. Scott's young daughter enters the room during the exchange, witnesses the shootings, and, like Scott's wife, is splattered with the blood of her grandparents.

Next, Scott claims he cannot kill his wife because his weapon has jammed. He takes her and their daughter back to the bunkhouse where he is living and has them clean themselves up. He has his wife read aloud from the protective order she obtained against him and then reloads his weapon. Ultimately, he explains to his wife and daughter that he had only wanted to provide for them. When the wife asks him to let her and the child go, Scott does so and tells her he just may get himself killed in a shoot-out with police.²

Now consider three questions:

1. Does either person present a serious risk of future dangerousness? If so, why? Which facts are relevant to future dangerousness? Disregard issues of moral culpability except as they are relevant to the future dangerousness calculation.

2. Disregarding the question of future dangerousness, which facts are relevant to a determination of each person's moral

culpability for the acts in question? Which facts do you consider mitigating as to each person? Aggravating?

3. Finally, and still disregarding the question of future dangerousness, which of these two persons is morally more culpable for the act he committed? Why?

My aim in this short Article is both specific and general. Specifically, I examine whether the Eighth Amendment should be held to prohibit imposition of death sentences upon offenders with severe mental illnesses, as is the case with mentally retarded and juvenile offenders. More generally, and perhaps more importantly, I examine the current Eighth Amendment test for categorical prohibitions, find it wanting, and propose a different test that, at least in my view, more neatly captures what the Eighth Amendment is intended to accomplish.

I believe the key to an Eighth Amendment analysis of categorical prohibitions lies in two dilemmas that arise from the likely answers to the three questions posed above.

The first dilemma revealed by these questions arises from the double bind in which certain categories of capital defendants find themselves. To understand the double bind, reconsider questions one and two. The very facts that suggest Scott is likely to be dangerous in the future also point to his reduced culpability. For example, Scott’s persistent irrationality, paranoia, and hallucinations regarding the devil, all of which are attributes of his mental illness, make one queasy about his potential to be dangerous in the future; at the same time, however, it is this very irrationality that reduces (at least somewhat) his blameworthiness for the murder of his in-laws. The same is true for Christopher. His relative youth, with the characteristic impulsivity and poor judgment that persist into early adulthood, suggests he may have a few violent years

3. I am referring principally to schizophrenia and other psychotic-spectrum disorders. See infra Part VI.C.

4. A “categorical prohibition” or “categorical exclusion” simply is a prohibition on imposition of the death penalty upon some category of offenders (e.g., the mentally retarded).

5. The Supreme Court recognized the existence of this double bind as early as 1989, when it observed that John Penry’s mental retardation functioned at his capital trial as “a two-edged sword... that may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future.” Penry v. Lynaugh, 492 U.S. 302, 324 (1989), overruled by Atkins v. Virginia, 536 U.S. 304 (2002).
ahead of him, but it is his youth that at least raises the question of whether his crime stemmed in part from the confusion of a troubled adolescent rather than from a purely cold, amoral, formed character. In short, the very traits that should be mitigating are, in another sense, aggravating. What is one to make of this as a jurisprudential matter? Should one of the questions simply yield to the other, or should we allow them to coexist in this current uneasy tension?

The second dilemma stems from the question of comparative deserts. Reconsider question three regarding the relative culpability of Christopher and Scott. Most readers probably consider Christopher more culpable for his crime or, at the least, deem the comparative deserts question (i.e., who is more blameworthy?) a toss up. Ironically, the United States Supreme Court has held that people in Christopher’s class of offenders—juveniles—are insufficiently culpable as a matter of constitutional law ever to merit the death penalty for any crime, while the same constitutional test almost certainly would not yield a similar conclusion for those in Scott’s class—that is, the severely mentally ill. If the popular assessment of comparative deserts differs from how the constitutional test assesses such deserts, might the constitutional test be flawed? Or is deserts—or should it be—the focus of an Eighth Amendment test for categorical prohibitions? To paraphrase Tina Turner, what’s deserts got to do with it?²

In a nutshell, my argument boils down to the following. First, moral deserts absolutely should be the focus for a categorical prohibitions test. Second, the double bind, which represents a clash of deserts-based (retributive) principles and utilitarian principles, is the key to categorical prohibitions. Given the primacy of deserts, utilitarian concerns like future dangerousness must yield to deserts determinations. When the traits of a particular condition are such that the same traits that make one less likely to deserve death make a death sentence at least potentially more appropriate on utilitarian grounds, a categorical prohibition on death is warranted. A more detailed version of my argument contains six steps.

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First, the best reading of the Eighth Amendment, at least as applied to capital cases, is that it incorporates a deserts-limitation principle. That is, punishment is cruel and unusual if it exceeds what an offender deserves. Utilitarian concerns may be considered when determining someone’s sentence, but they may not be allowed to trump retributive (deserts-based) concerns. Several scholars, most notably Scott Howe in 1998, have argued that a deserts-based view of the Eighth Amendment not only satisfies originalist concerns but also best explains (albeit still imperfectly and incompletely) the Court’s capital jurisprudence.

Second, the Court’s recent categorical prohibitions cases accept the deserts-limitation model of the Eighth Amendment. Although they render lip service to deterrence (and possibly, to a lesser degree, other utilitarian notions) as rationales for capital punishment, *Atkins v. Virginia,* *Roper v. Simmons,* and now *Kennedy v. Louisiana* embrace a deserts-limitation view of the Eighth Amendment’s role in capital cases. Other commentators, notably Youngjae Lee, have made this argument, and I believe it is correct. In short, *Atkins, Roper,* and *Kennedy* get the big thing—the general role of the Eighth Amendment in categorical prohibitions cases—right.

Third, although they get the big thing right, *Atkins, Roper,* and *Kennedy* get the small things wrong. If the Eighth Amendment is intended in capital cases to impose a deserts limitation on

7. The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. This Article is principally concerned with the Cruel and Unusual Punishments Clause of the Eighth Amendment.


12. Youngjae Lee, *The Constitutional Right Against Excessive Punishment,* 91 Va. L. Rev. 677, 724 (2005) (examining categorical prohibitions cases and concluding “it is difficult to avoid the conclusion that retributivism as a side constraint, and especially its comparative deserts aspect, is the perspective from which the Supreme Court has addressed the question of excessiveness in the death penalty cases”).
punishment, the evolving standards test\textsuperscript{13} used by the Court in the categorical prohibitions cases does not effectively achieve this aim. Both in theory and as it has been applied, the evolving standards test is too blunt an instrument to determine with accuracy which categories of offenders should be exempt from capital punishment based on moral deserts. Among other things, society’s standards may evolve away from capital punishment for certain categories of offenders for reasons unrelated to the moral deserts of the offenders in question. Conversely, society may retain capital punishment for certain categories of offenders principally because of utilitarian concerns like fear of violence by the class in question.

Moreover, although the Court’s more recent use of “its own judgment”\textsuperscript{14} as part of the Eighth Amendment test for categorical prohibitions does capture (perhaps better than does the evolving standards test) a deserts-limitation principle, nothing renders the Court more qualified than any particular jury to determine what kind of punishment a category of offenders may merit (even if the Court may find that category of offender less culpable than another more “normal” category). Indeed, for the Court to undertake such an analysis raises serious questions about separation of powers and the constitutional role of the judiciary.\textsuperscript{15} In short, the tests used by the Court to determine whether a categorical prohibition is appropriate do a poor job of accomplishing what should be the ultimate aim of the test—determining when a particular class of persons does not merit death even for serious crimes.

Fourth, it is a mistake to claim that the “problem” with the double bind is that juries treat as aggravating evidence that is somehow “supposed” to be mitigating. If the Supreme Court in \textit{Gregg v. Georgia}\textsuperscript{16} correctly found that both retribution and deter-

\textsuperscript{13} The Court first explicitly used the evolving standards test in \textit{Trop v. Dulles}, 356 U.S. 86 (1958), in which the Court held that the punishment of expatriation was contrary to society’s evolving standards of decency and, for that reason, violated the Eighth Amendment. For a fuller description of the test, see \textit{infra} Part II.

\textsuperscript{14} For a fuller description of this prong of the test for categorical prohibitions, see \textit{infra} Part II.

\textsuperscript{15} \textit{See}, e.g., J. Richard Broughton, \textit{The Second Death of Capital Punishment}, 58 FLA. L. REV. 639, 648–51 (2006) (arguing that by using its own independent judgment, the Court is substituting its own political judgments for those of elected legislators).

\textsuperscript{16} 428 U.S. 153 (1976).
rence/incapacitation (utilitarian rationales) justify imposition of death sentences, then there appears to be nothing problematic with a jury considering evidence in two different lights: first, in the light it sheds on the offender's moral deserts (the retributive justification); second, in the light it sheds on the need to incapacitate the offender (the utilitarian justification).

Fifth, if, however, one accepts the broader principle of Roper and Atkins as embracing a deserts-limitation principle, then the double bind becomes problematic. A deserts-limitation view of the Eighth Amendment insists upon the primacy of retribution: utilitarian arguments about deterrence and incapacitation must yield in the face of deserts-based arguments. The double bind is problematic because it represents a direct clash between utilitarian aims (future dangerousness in particular) and retributive questions (moral deserts).

Sixth, and finally, the Eighth Amendment test for categorical prohibitions should, therefore, focus directly on whether the characteristics of a particular condition or status are such that there is a substantial risk that the fact-finder will privilege utilitarian aims over retributive aims. That is, the Eighth Amendment should bar imposition of the death penalty upon a particular category of offender when (a) the members of the category share a condition that points simultaneously to significantly reduced culpability and to future dangerousness, and (b) there is a substantial risk that the fact-finder will give more weight to future dangerousness than to culpability. Empirical research has demonstrated that this is almost certainly the case when juries encounter severely mentally ill defendants, and, for that reason, I conclude that the Eighth Amendment should be held to prohibit death sentences for those

17. See, e.g., 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) (describing Capital Jury Project interviews demonstrating juror confusion regarding how to consider evidence of major mental illness and indicating that, although jurors at issue believed the evidence of mental illness, they ultimately selected death in part out of a belief in the defendant's future dangerousness); cf. Michael L. Perlin, The Sanist Lives of Juries in Death Penalty Cases: The Puzzling Role of "Mitigating" Mental Disability Evidence, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 239, 246 (1994) (alluding to studies finding "a mental illness defense is rated as a less effective strategy than other alternatives at the penalty phase (even including the alternative of raising no defense at all)").
suffering from severe mental illness—specifically, from any psychotic spectrum disorder\textsuperscript{18}—at the time of their crimes.

This Article is organized as follows. Part II provides a general overview of the Court's current test for categorical prohibitions and demonstrates that the test is unlikely to protect those with major mental illnesses. Parts III and IV, drawing on the work of a number of scholars and on the Supreme Court's capital jurisprudence (particularly its categorical prohibitions decisions), explain the concept of deserts limitation and state the case for a deserts-limitation model of the Eighth Amendment. I then argue in Parts V and VI that the Eighth Amendment requires a categorical prohibitions test built around the double bind rather than around evolving standards of decency or the Court's own necessarily subjective comparative deserts analysis; Part V criticizes the current test, and Part VI articulates the test I would apply, shows how it would exempt from death-eligibility those with major mental illnesses, and explores its own potential shortcomings. I conclude that, despite its possible shortcomings, the proposed test better serves the purposes of the Eighth Amendment than either the current test or an approach that would jettison categorical prohibitions entirely.

II. THE CURRENT EIGHTH AMENDMENT TEST FOR CATEGORICAL PROHIBITIONS AND ITS POTENTIAL APPLICATION TO THE SEVERELY MENTALLY ILL

A categorical prohibition excludes from death eligibility either a particular class of offenders or a particular crime. More simply put, the Eighth Amendment forbids the death penalty for some offenders and for some offenses.\textsuperscript{19} To date, the Supreme Court has found two classes of offenders exempt from the death penalty. In \textit{Atkins v. Virginia}, the Court held the Eighth Amendment bars imposition of the death penalty upon mentally retarded offenders.\textsuperscript{20} In \textit{Roper v. Simmons}, relying on its reasoning in

\textsuperscript{18} See infra Part VI.C (describing kinds of disorders that should be subject to a categorical prohibition).

\textsuperscript{19} For example, the Supreme Court has held the Eighth Amendment forbids the death penalty for the crime of rape, whether rape of a child or of an adult. See \textit{Kennedy v. Louisiana}, 128 S. Ct. 2641 (2008) (barring death sentences for crime of child rape); \textit{Coker v. Georgia}, 433 U.S. 584 (1977) (barring death sentences for crime of rape of adult woman).

\textsuperscript{20} 536 U.S. 304 (2002).
Atkins, the Court held the Eighth Amendment also bars imposition of the death penalty upon juvenile offenders (those who committed crimes while under the age of eighteen). Many commentators have argued that the seriously mentally ill also should be exempt from the death penalty. However, as some have acknowledged, such a result is unlikely under the Court’s current Eighth Amendment test for categorical prohibitions.

In determining whether the Eighth Amendment bars the death penalty for a particular class of offenders, the Court applies a two-pronged test. The Court first asks whether the punishment in question as applied to a particular class of offenders violates the “evolving standards of decency that mark the progress of a maturing society.” In ascertaining society’s evolving standards, the Court looks principally to legislation and sentencing practices: if


22. See, e.g., Christopher Slobogin, What Atkins Could Mean for People with Mental Illness, 33 N.M. L. Rev. 293 (2003) (arguing, inter alia, that in capital cases equal protection principles likely require the mentally ill to receive the same protection enjoyed by the mentally retarded).


24. Although there was some initial disagreement about the proper test for categorical prohibitions, see Stanford, 492 U.S. at 379 (Scalia, J., dictum) (finding Court’s independent judgment irrelevant to Eighth Amendment test for categorical prohibitions), the test now appears well established. The Court applied this test in both Atkins and Roper, and more recently in Kennedy, which concerned a categorical prohibition on death for the crime of child rape.

25. See Kennedy v. Louisiana, 128 S. Ct. at 2649 (stating test); Roper, 543 U.S. at 561; Atkins, 536 U.S. at 311–12. For a fuller discussion of the pitfalls of the evolving standards test, see infra Part V.

26. Kennedy, 128 S. Ct. at 2650; Roper, 543 U.S. at 564 (“The beginning point [in evolving standards analysis] is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question.”); Atkins, 536 U.S. at 312 (focusing on legislation as the
American society has turned its face against a punishment as disproportionate or otherwise inhumane, presumably that will be reflected in the legislative and sentencing practices prevalent in the various jurisdictions. As should be apparent from the nature of the test itself, a punishment that was permissible at one point may come to violate the Eighth Amendment if society ultimately rejects the punishment. In such cases, the consistency of the direction of change (of evolution) supposedly is as important as the amount of evolution that has taken place. In Roper, for example, only five jurisdictions had (through legislation) abolished the juvenile death penalty between the time of Stanford and Roper, but the Court relied on (a) the aggregate number of jurisdictions that had rejected the juvenile death penalty, both before and after Stanford, and (b) the fact that several jurisdictions had abolished the juvenile death penalty since Stanford but none had reinstated it.

The second prong of the test requires the Court to rely on its "own independent judgment" in determining whether the punishment at issue is disproportionate given the characteristics of the offender class. The Court has stated, "Consensus [evidence of evolving standards] is not dispositive. Whether the death penalty is disproportionate to the crime committed depends as well upon the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose." In applying its "own independent judgment," the Court principally considers whether the punishment in question serves the ends permissibly

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27. Compare Stanford, 492 U.S. at 361 (holding death penalty for sixteen- and seventeen-year-olds does not violate the Eighth Amendment), with Roper, 543 U.S. at 576 (noting that juvenile death penalty violates the Eighth Amendment because societal standards of decency had evolved since Stanford was decided).

28. Roper, 543 U.S. at 566.

29. Id. at 564–65.

30. Id. at 566 ("Since Stanford, no State that previously prohibited capital punishment for juveniles has reinstated it.").

31. Kennedy, 128 S. Ct. at 2650; see also Roper, 543 U.S. at 564; Atkins, 536 U.S. at 312–13 (affirming the Court’s exercise of its own judgment in categorical prohibitions cases).

32. Kennedy, 128 S. Ct. at 2650.
served by capital punishment, retribution and deterrence. Basic-

ly, the Court undertakes an assessment of comparative deserts, asking whether the class of offenders at issue is categorically less culpable (owing to the traits of the class) than more "normal" offenders who have committed the same crime. For example, in finding juveniles categorically exempt from the death penalty, the Court noted that because of their immaturity, juvenile offenders are as a class less culpable than adult offenders who commit substantially similar crimes.

As noted above, this two-pronged test has resulted in categorical exclusions for juvenile and mentally retarded offenders. First, on pretty slim evidence in my view, the Court concluded society has rejected death sentences for such offenders. Second, the Court's independent assessment found that such offenders are insufficiently culpable (as a class) to merit death.

One can argue convincingly that persons suffering from major mental illnesses, particularly from psychotic disorders, at the time they commit murder are no more blameworthy (and probably

33. Kennedy, 128 S. Ct. at 2661–62 (analyzing retributive and deterrent function of death penalty for rape of a child); Roper, 543 U.S. at 569–74 (discussing reduced culpability of adolescents and limited ability of capital punishment to deter juvenile offenders); Atkins, 536 U.S. at 318–19 ("[T]here is a serious question as to whether either justification that we have recognized as a basis for the death penalty applies to mentally retarded offenders.").

34. In Kennedy, of course, the comparative deserts assessment focused not on the characteristics of the offender but on the characteristics of the offense. That is, the comparative deserts assessment focused on the nature of the harm caused and whether that quantum of harm could merit death.

35. Roper, 543 U.S. at 569. Of course, as Justice O'Connor pointed out (accurately, in my view), even if the Court technically was correct about the assessment of comparative deserts, that did not answer the question about the ultimate deserts of individuals within the class. Id. at 588 (O'Connor, J., dissenting). That is, one can acknowledge that juvenile murderers are as a class less culpable than adult murderers, but such an acknowledgment does not require one to find that juvenile murderers never deserve death. For a fuller discussion of the Court's flawed reasoning, see infra Part V.

36. Roper, 543 U.S. at 568 (finding consensus against juvenile death penalty when the practice was forbidden in thirty states); Atkins, 536 U.S. at 316 ("The practice [of sentencing the mentally retarded to death] . . . has become truly unusual, and it is fair to say that a national consensus has developed against it.").

37. Roper, 543 U.S. at 571; Atkins, 536 U.S. at 321.
far less culpable) than, say, juvenile offenders who have committed substantially similar crimes. Nevertheless, the Court is unlikely to find that the Eighth Amendment bars death sentences for those suffering from major mental illnesses at the time of their offenses.

First, even taking into account the Court's generous interpretations of when a standard has evolved, there is precious little direct legislative evidence that American society has turned its face against sentencing to death all those suffering from major mental illness.

See, e.g., Slobogin, supra note 22, at 297 ("The same types of assertions that Atkins and Thompson make about people with retardation and juveniles can be made about people with significant mental illness."); see also id. at 303 ("[E]xecution of people with mental illness should not be permitted unless there is good reason to believe that people with mental illness are more culpable or deterrable than people with mental retardation or juveniles. That demonstration . . . cannot be made when mental illness is equated with psychosis at the time of the crime."); Ronald J. Tabak, Executing People with Mental Disabilities: How We Can Mitigate an Aggravating Situation, 25 ST. LOUIS U. PUB. L. REV. 283, 290 (2006) ("Generally, [the psychotic mentally ill] are more impaired in their ability to avoid committing serious crimes than are juveniles under age eighteen, whom Roper categorically exempts from capital punishment.").

Most commentators agree that such a ban, even if appropriate, is not likely in the near future. See, e.g., Blume & Johnson, supra note 23, at 131-32 ("[T]wo state court justices have expressed the view that the rationale of Atkins likewise precludes the execution of severely mentally ill offenders. . . . Whether one takes the real-politik approach that the Supreme Court would never invalidate so many death sentences, or makes the more respectful observation that there is no 'evolving standard of decency' for such a broad categorical exemption, the bottom line is the same: not any time soon."); see also Shin, supra note 23, at 470-71 (noting that while a consensus against death sentences for those with major mental illnesses "is already present in the foreign arena and among legal, mental health, and medical experts, the laws in this country have not yet caught up to science and the rest of the world, impeding a clear domestic consensus on this issue").

Additionally, I should note that I do not believe the Court's decision in Panetti v. Quarterman, 551 U.S. 930 (2007), which concerns the legal standard for competency for execution, answers the categorical prohibitions question. Nonetheless, some of Justice Kennedy's language, particularly his invocations of Atkins and Roper, could be read as pointing toward an eventual categorical prohibition.

See infra Part V.
illnesses or even the psychotic mentally ill. Of the death penalty jurisdictions, only Connecticut has enacted legislation barring the death penalty for those who, despite legal guilt, suffered from significant mental impairment:

The court shall not impose the sentence of death on the defendant if the jury . . . finds . . . that . . . (3) the defendant’s mental capacity was significantly impaired or the defendant’s ability to conform the defendant’s conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution . . . .

Additionally, one could argue that the inclusion of mental illness as a mitigating circumstance in most states’ capital punishment statutes signals societal acceptance that some mentally ill offenders will, in fact, be death eligible.43

The existence of the insanity defense does not indicate that states invariably reject sentencing the mentally ill to death. Of course, some of those suffering from major mental illnesses will be exempted from eligibility for death sentences because they will be deemed legally insane and, therefore, not criminally responsible. However, as commentators have noted (and as should be obvious to those familiar with various definitions of legal insanity),44 the most commonly used test for insanity, the M’Naghten test,45 is so

41. For additional detailed discussions of the absence of legislative support for such a ban, see generally Shin, supra note 23, at 494–96, and 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).
42. CONN. GEN. STAT. ANN. § 53a-46a(h)(3) (West 2007).
43. Most states’ capital punishment statutes specifically include mental illness as a mitigating circumstance. For a listing and examination of such statutes, see Laurie T. Izutsu, Note, Applying Atkins v. Virginia to Capital Defendants with Severe Mental Illness, 70 BROOK. L. REV. 995, 1004–06 (2005).
44. See, e.g., Pamela A. Wilkins, Competency for Execution: The Implications of a Communicative Model of Retribution, 76 TENN. L. REV. 713 (2009).
45. This test, which is used by a majority of jurisdictions, provides, [T]he defendant cannot be convicted if, at the time he committed the act, he was laboring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, as not to know he was doing what was wrong.
restrictive that many very ill individuals will be found sane and, therefore, not exempt from death under this standard.

Similarly, the behavior of prosecutors and of jurors does not suggest that the standards extant in American society have evolved past imposing death sentences on those with major mental illnesses. There is no precise data addressing the rates at which prosecutors seek the death penalty against mentally ill defendants or at which juries impose the death sentence upon such offenders (when the offenders are found criminally responsible). Nevertheless, the nation’s death rows do not suffer from a lack of inmates suffering from serious mental illness, and given the chronic nature of many psychotic disorders, it is safe to assume many of these inmates suffered from such illnesses long before they committed the crimes for which they were sentenced.

Moreover, some studies suggest those with major mental illnesses who are convicted of capital crimes may be more likely than “normal” defendants to be sentenced to death for a variety of reasons. Jurors may be more frightened of obviously unusual defendants. Also, despite recognizing such defendants’ reduced

46. See Shin, supra note 23, at 502 (“Unfortunately, there is little data available that directly addresses how many times or how often juries are asked to consider the death penalty for mentally ill offenders, and how often they do, in fact, sentence severely mentally ill offenders to death.”); cf. Blume & Johnson, supra note 23, at 133 (noting there is “no obvious way” to count the number of persons who have been sentenced to death despite suffering from psychotic disorders).


48. For a summary of such studies, see generally Christopher Slobogin, Mental Illness and the Death Penalty, 24 MENTAL & PHYSICAL DISABILITY L. REP. 667, 669–70 (2000).

49. This apparently happened in the case of Scott Panetti, whose severe mental illness was on full display at his capital trial. Although Panetti represented himself, his stand-by counsel later testified that it was obvious that Panetti’s illness may well have been the principal reason the jury actually imposed the death penalty. See Joint Appendix, Vol. I, Panetti v. Quarterman, 551 U.S. 930 (2007) (No. 06-6407), 2007 WL 609374, at *25 (“Unfortunately, [the jurors] were also scared to death of Scott and they were fearful that somehow,
Culpability, jurors may nevertheless impose death sentences because they believe mentally ill defendants are more likely to be dangerous in the future. Additionally, psychotropic medication may give a psychotic defendant a flat affect, causing jurors to believe the defendant lacks remorse.

Notwithstanding the absence of a legislative trend, there are some indications that society's standards may be moving away from the acceptance of death sentences for those with severe mental illnesses. The Atkins Court, even though it relied primarily on the legislative and court records, nevertheless noted the opinions of professional groups in reaching its conclusions that society had evolved beyond death sentences for the mentally retarded. Specifically, the Court relied in part on the views of the American Association on Mental Retardation and the American Psychological Association in its evolving standards analysis. This indicates that even if the views of such organizations may not be the principal determinant of evolving standards, such views do matter in the calculus.

50. See, e.g., Sundby, supra note 17, at 1166.
51. See, e.g., id. at 1168 & nn.125-26 (documenting and describing dilemmas for defense lawyers when clients are heavily medicated). Findings of the Capital Jury Project confirm that the presence or absence of remorse frequently is an important consideration for capital jurors in their sentencing decision. See Theodore Eisenberg et al., But Was He Sorry? The Role of Remorse in Capital Sentencing, 83 CORNELL L. REV. 1599, 1631 (1998) (“Do jurors' beliefs about the defendant's remorse correlate with the sentence they impose? We examine this question using both bivariate and multivariate analysis. The short answer is yes. The more subtle answer is that remorse matters, but not as much as the perceived viciousness of the crime. If jurors think the crime is extremely vicious, their belief that the defendant is remorseful is unlikely to convince them to impose a life sentence. On the other hand, if jurors do not think the crime is extremely vicious, then remorse can make a difference.”).
53. Id.
54. Moreover, the Court's independent judgment is informed by the opinions of specialists in determining whether the traits of a particular condition significantly reduce culpability. See id. at 318 nn.23-24 (relying on psychological and cognitive studies in its evaluation of the culpability of mentally retarded capital defendants).
Professional groups concerned with the topic oppose the death penalty for seriously mentally ill offenders. In 2006, the House of Delegates of the American Bar Association ("ABA") adopted a Report and Recommendation concerning the Death Penalty and Persons with Mental Disabilities. This Report and Recommendation, which was prepared by the ABA Task Force on Mental Disability and the Death Penalty, a group comprised of luminaries in both the legal and psychiatric fields, urges state legislatures to enact legislation banning the death penalty for certain severely mentally ill defendants:

Defendants should not be executed or sentenced to death if, at the time of the offense, they 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. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.

Obviously, legislation modeled after this language would not categorically ban the death penalty for the mentally ill in the same way that Atkins and Roper ban death for the mentally retarded and for juveniles. Nevertheless, professional organizations have begun to urge that the severely mentally ill not be subject to the death penalty. Notably, both the American Psychiatric Association and the American Psychological Association have endorsed the Report and

Note 55. See infra notes 59–60 and accompanying text.


Note 58. ABA Resolution 122A, supra note 56, at 1.
Recommendation. Additionally, the National Alliance for the Mentally Ill takes the position that death is an excessive punishment for severely mentally ill (but still criminally responsible) offenders. The opinion of these informed professional groups suggests that society's standards may be moving away from the allowance of death for those suffering from serious mental illnesses at the time of their offenses.

Additionally, the Court itself recently has suggested (albeit in a non-capital case) that the mentally ill may need special protections in the criminal justice system. Specifically, in Indiana v. Edwards, the Court held that the United States Constitution allows states to require counsel for mentally ill criminal defendants who, though competent to stand trial, cannot competently represent themselves (and despite such defendants' desires not to be represented by counsel). In contrast, states may not require counsel for "normal" criminal defendants who desire to represent themselves, despite such defendants' inability to represent themselves competently. Although Edwards is not directly relevant to the categorical prohibitions question, it does suggest the Court's increasing sensitivity to the handicapping effect of mental illness. Nevertheless, given the legislative record and the absence of any significant evidence that jurors have rejected death sentences for the mentally ill, the Supreme Court would be hard pressed to find a categorical exemption under the evolving standards test.

On the other hand, one could argue that in the case of major mental illness, society's evolving standards should not be measured by either legislation or jury behavior. Why not? It is possible that many legislators are opposed to death sentences for the severely mentally ill but see no need for a categorical ban because they believe the insanity defense accomplishes the same purpose. In other words, state lawmakers may view a categorical ban as redun-


dant: the insanity defense screens out those with major mental illnesses. In this respect, mental illness is fundamentally unlike mental retardation or juvenile status. Similarly, jurors who have rejected a defendant's claim of insanity may not understand that the defendant's mental illness remains relevant as mitigation during the sentencing phase of trial. Again, in this respect mental illness is different from either mental retardation or juvenile status.

Although I think these differences are real, the Court probably would not disregard legislation and jury behavior in its analysis of evolving standards. First, the inclusion of mental illness as a statutory mitigating circumstance suggests legislators do understand that many mentally ill defendants may not meet the definition of legal insanity. Second, jurors are instructed to take a defendant's mental illness into account in the sentencing phase, and the Court likely will presume they will do as instructed. Both of these reasons suggest the Court will continue to consider legislative and jury practices in this context.

The Court's independent review could yield the conclusion that death is a disproportionate punishment for the severely mentally ill. As Christopher Slobogin has noted, it is hard to argue that someone suffering from paranoid schizophrenia at the time of a crime is likely to be more culpable than the average seventeen-year-old defendant (who is part of a class deemed insufficiently culpable, as a matter of law, to merit death): the schizophrenic's ability to consider consequences and to control his conduct and emotions is at least as compromised as that of the seventeen-year-


63. Of course, this may be yet another problem with the "evolving standards" test. For a fuller criticism of the use of an "evolving standards" test under the Eighth Amendment, see infra Part V.A.

64. See Slobogin, supra note 22, at 303–05 (describing how those with symptoms of psychosis at the times of their crimes are no more culpable than juvenile or mentally retarded offenders). Others have noted that the rationale of Atkins and Roper concerning the reduced culpability of the offender category applies equally to the severely mentally ill. See, e.g., Ronald S. Honberg, The Injustice of Imposing Death Sentences on People with Severe Mental Illnesses, 54 CATH. U. L. REV. 1153 (2005) (describing, inter alia, how Atkins principles concerning reduced culpability might apply to the severely mentally ill).
old offender whose frontal lobes are insuffciently developed and who may be receiving inadequate (or no) guidance from the adults in his life. As for deterrence, the same holds true: one easily could find that those suffering from schizophrenia are no more likely to be deterred from committing murder by the prospect of a death sentence than are seventeen-year-olds. If the Court, exercising its “independent judgment,” found no penological justification for imposing the death penalty upon minors, then surely it could find no such justification for imposing it on those with major mental illnesses.

Not so fast, though. What appears simple is not, unfortunately. How does one define the class to which the categorical prohibition would apply? With juveniles, even if there is a slightly arbitrary character to the line drawing—everyone knows that some seventeen-year-olds are more mature than some eighteen-year-olds—the line is at least clear. Similarly, although there are separate categories of mental retardation, the categories represent degrees of impairment rather than different kinds of impairment; that is, a person with mild retardation may be less impaired than one with moderate retardation, but the nature of the impairments is fundamentally the same.

This is not true for severe mental illnesses. Unlike mental retardation, which has common symptoms (even if they vary in degree)—and unlike youth, which also has common “symptoms” (even if a sixteen-year-old’s symptoms are more severe than a seventeen-year-old’s)—there are a variety of mental illnesses one could characterize as severe that nevertheless have different symptoms. Someone with Bipolar (I) Disorder should look, act, feel, and think quite differently from someone with Schizophrenia, Dis-

65. As will become clear in infra, Parts IV–VI, I do not think utilitarian factors are valid considerations under the Eighth Amendment, and I would jettison any analysis of deterrence issues. Nevertheless, at present the Court at least pays lip service to deterrence (and incapacitation) as justifications for capital punishment.

66. Manic episodes (not explained by drug or alcohol abuse, another mental health diagnosis, or another medical condition) are the defining feature of Bipolar I Disorder. See AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 382 (4th ed. 2000) [hereinafter DSM-IV-TR] (“The essential feature of Bipolar I Disorder is a clinical course that is characterized by the occurrence of one or more Manic Episodes or Mixed Episodes.”).
organized Type.\textsuperscript{67} These differences may be relevant to the comparative deserts determination. Does one draw the line by diagnosis or by constellation of symptoms?\textsuperscript{68} Both methods are problematic.

Moreover, even if one can agree upon the classes to which a potential prohibition should apply, mental illness remains different from mental retardation and youth in another significant way. The mentally retarded are impaired 24/7, so to speak. Similarly, although young people display more maturity and better judgment at some times than they do at others, at all times they are immature as compared to most adults. In contrast, the severely mentally ill may have periods of relative lucidity and lack of impairment.\textsuperscript{69} For example, a person with bipolar disorder may be relatively normal much of the time but during a manic phase may be psychotic. A paranoid schizophrenic may be able to carry on a lucid conversation about a variety of topics unrelated to some area of delusional significance. Even those who are very ill tend to have some good days; whereas, the judgment and foresight of a mentally retarded person is always comparatively impaired. Given the fluctuating nature of the symptoms of mental illness, it may not be appropriate to say, for example, that a schizophrenic (or a person with bipolar disorder, schizoaffective disorder, etc.) can never, as a matter of law, be as culpable as a "normal" murderer.

Additional differences also may be significant either for comparative deserts determinations or for the practical barriers they present. For example, unlike youth and mental retardation,

\textsuperscript{67} According to the DSM-IV-TR, "[t]he essential features of the Disorganized Type of Schizophrenia are disorganized speech, disorganized behavior, and flat or inappropriate affect. . . . This subtype is also usually associated with poor premorbid personality, early and insidious onset, and a continuous course without significant remissions." \textit{id}. at 314.

\textsuperscript{68} The standard proposed by the ABA Task Force focuses not on diagnosis, but on the degree of impairment and kind of symptoms. \textit{See} Tabak, \textit{supra} note 57, at 1128 ("[H]aving a severe mental disorder such as schizophrenia or psychosis at the time of the crime would not be sufficient to exempt an individual from capital punishment under prong two.").

\textsuperscript{69} \textit{See}, \textit{e.g.}, DSM-IV-TR, \textit{supra} note 66, at 308–09 ("Most studies of course and outcome in Schizophrenia suggest that the course may be variable, with some individuals displaying exacerbations and remissions, whereas others remain chronically ill."); \textit{id}. at 386 (noting that "the majority of individuals with Bipolar I Disorder experience significant symptom reduction between episodes").
most mental illnesses are treatable, albeit with varying levels of success. If a disorder like Bipolar I is highly treatable, why should we categorically exempt from execution a class whose symptoms largely can be controlled with medication? On the other hand, noncompliance with treatment—typically in the form of failing to take one's medications—is a defining characteristic of many serious mental illnesses.\textsuperscript{70} Given that, should treatability matter?

Finally, as a practical matter, it is probably harder to diagnose a mental illness than it is mental retardation. Mental retardation is a developmental disorder, meaning it manifests early in life.\textsuperscript{71} Although there is a blurry line separating the mildly mentally retarded from those with borderline intellectual functioning (those who are merely dull), by the time someone reaches a capital trial, there is likely to be a substantial paper trail to assist in the determination: school records, including scores on standardized tests; medical records showing developmental delays; and perhaps even disability evaluations. In contrast, serious mental illness often strikes young adults (the most crime-prone age group), so there may not be a paper trail by the time someone commits a potentially capital crime. In fact, it may be years before the diagnostic picture is clear. Even if one can agree in theory on who belongs in a particular class, the actual determination as to any one person may be quite difficult.

Accordingly, it is hard to know what the Court's "independent judgment" would yield in this context. Moreover, in past cases the Court has found that its analysis of evolving standards and its independent judgment have yielded the same conclusion.\textsuperscript{72}

\textsuperscript{70} For example, the DSM-IV-TR notes that "[a] majority of individuals with Schizophrenia have poor insight regarding the fact that they have a psychotic illness," that this "poor insight is a manifestation of the illness itself," and that "[t]his symptom predisposes the individual to noncompliance with treatment." Id. at 304; cf. \textsc{Kay Redfield Jamison, An Unquiet Mind} 91 (Alfred A. Knopf 2000) (describing how, despite being one of the world's foremost experts on Bipolar Disorder, Jamison herself failed for years to comply with the treatment necessary for her own severe Bipolar I Disorder).

\textsuperscript{71} DSM-IV-TR, supra note 66, at 41 (including Mental Retardation in chapter on disorders manifesting during childhood and requiring for diagnosis onset before the age of eighteen).

\textsuperscript{72} See, e.g., Thompson v. Oklahoma, 487 U.S. 815 (1988) (finding that both evolving standards and Court's independent judgment supported finding the death penalty is a disproportionate punishment for fifteen-year-old offend-
Even were the Court to determine death is a disproportionate punishment for the severely mentally ill, it would be hard pressed to find a societal consensus against the practice. What would the Court do? Would the Court’s independent judgment trump its finding of no societal consensus against the practice? Although the best answer to that question is probably yes, the Court may not wish to face that question at all, particularly given the practical difficulties in crafting a meaningful ban.

In sum, under the current Eighth Amendment test for categorical prohibitions, the Court probably will not find (at least in the near future) that death sentences for the severely mentally ill violate the Eighth Amendment. This leads to an obvious question: if the same test that exempts juveniles fails to protect the severely mentally ill, might something be wrong with the test? To answer that question, one first must determine what the Court’s test for categorical prohibitions (a combination of the evolving standards test and the independent judgment test) is designed to accomplish: what question is this test meant to answer?

I will argue in Part IV that the constitutional test for categorical prohibitions is intended to identify classes of defendants who, because of the traits of the class, do not deserve death as a punishment. The question, of course, is whether the current test accomplishes its purpose, and I argue in Part V that it does not. Parts III and IV set the stage for Part V, with Part III providing a

ers). As one commentator has noted, in earlier cases like Thompson, the evolving standards analysis assumed primacy, whereas in the more recent cases, the Court’s independent judgment appears to have been the driving factor. See Slobogin, supra note 22 at 295–96. Nevertheless, the Court has not found a categorical exemption without also finding a societal consensus supporting the exemption.

73. See, e.g., Winick, supra note 41, at 813 (arguing, inter alia, that the majority of the Court “has embraced an independent conception of proportionality that the Court could apply in the context of severe mental illness to conclude, even in the absence of objective legislative, jury, judicial, or prosecutorial indicia of a social consensus that the death penalty is inappropriate for this population”); see also J. Richard Broughton, Kennedy and the Tail of Minos, 69 LA. L. REV. 593, 605 (2009) (“But even if we assume the integrity of the Court’s national consensus conclusion, it appears not to ultimately matter—either in Kennedy or in the Court’s other categorical prohibition cases—because the ‘Constitution contemplates’ . . . that the Court’s independent judgment about the acceptability of the death penalty must ultimately govern . . .”).
brief overview of modern views of retribution as a deserts-based theory and Part IV making the case that the Eighth Amendment incorporates a deserts-limitation principle. My argument in Part V follows from my assumption that the Eighth Amendment is intended as a deserts limitation.

III. AN OVERVIEW OF PUNISHMENT THEORY, DESERTS, AND DESERTS LIMITATION

To determine what might constitute "cruel and unusual" punishment and why the Court might embrace the notion of categorical prohibitions in the first place, one must begin with simple questions: why do we (the State) punish anyone in the first place? What justifies the institution of punishment? What ends does punishment serve? What do we hope to achieve? What does it mean to punish someone in the first place? Unless we have a coherent theory of what punishment is, what justifies the imposition of punishment, and our aims of punishment, we cannot begin to identify circumstances under which punishment may be cruel and unusual. In particular, we cannot articulate a coherent theory for why some classes of offenders should be exempt from certain punishments.

The catechistic answers to the aims of and justifications for criminal punishment are simple and well known: broadly put, there are utilitarian (consequentialist) and retributive justifications for punishment.\textsuperscript{74} Utilitarian justifications, which include deterrence, incapacitation, and rehabilitation, look to the future benefits of present punishment: by punishing an offender, society is safer, more honest, and more orderly because (a) others are deterred from similar acts for fear they will be punished like the offender in question (deterrence), (b) for at least a period of time, the isolated or confined offender is unable to commit similar acts (incapacitation), and (c) during his period of punishment, the offender is trained so that he will be a law-abiding citizen upon his reintegration into the community (rehabilitation).\textsuperscript{75}


\textsuperscript{75} \textit{Id.} ("Punishment for a past offense is justified by the future benefits it provides.").
In contrast to utilitarianism, retributivism looks to the past. As Stephen Garvey notes, "[i]n contrast to forward-looking consequentialist approaches that justify punishment in the name of what might be, retributivism justifies punishment in the name of what has been." But what is retribution? Although it is tempting to conflate it with revenge, most legal scholars insist upon the distinctiveness of retribution. Many modern legal scholars equate retribution with moral deserts: as Dan Markel notes, "[d]eserved punishment lies at the center of virtually all theories of retribution." For many, the theory is simple: punishment is justified because wrongdoers deserve punishment, period. Deserts-oriented retributivists do not concern themselves with whether a punishment gratifies the wrongdoer's victims (which really is a utilitarian concern: will the punishment benefit those who suffered at the wrongdoer's hands?), whether it makes the community safer by deterring others, or whether the wrongdoer finds the Lord, repents, and sins no more. Instead, if deserved, the punishment is good in itself and needs no further justification. Offenders should receive no less and no more punishment than they merit.

To say society should give criminal offenders "what they deserve" may puzzle some readers, but I suspect many readers will agree that wrongdoing merits punishment without regard to any greater societal benefits the punishment may achieve. Alice Ri-
stroph, no fan of deserts-based theories of punishment, has acknowledged that “deserts intuitions are . . . widely and deeply held . . . [and even] seem part of the basic structure of our moral views.” Indeed, the notion of deserts transcends the criminal justice arena; ideas about deserts—what kind of treatment is deserved—are central to debates about topics as varied as affirmative action and pay for CEOs of failed companies.

Nevertheless, widespread agreement that deserts-based punishment generally is appropriate does not suggest equally widespread agreement about the method and quantum of punishment that an offender may in fact deserve. As Ristroph has observed (and as one easily may intuit), beliefs about what kind and quantum of punishment are appropriate for a particular offense or offender are highly elastic. Such beliefs are shaped by cultural mores, historical circumstances and trends, and individual predictions.

In addition to a widespread misconception that retribution is vengeance-based, there is a widespread misconception that retribution (specifically, modern deserts-oriented theories of retribution) invariably is harsh. However, deserts-based punishment need not be harsh and, in fact, frequently results in far more lenient punishment than would be permitted under a utilitarian model of punishment. For example, consider the so-called three strikes legislation enacted in several states. As scholars have observed, these harsh statutes are justified by utilitarian considerations, notably the desire to incapacitate repeat offenders. In contrast, many if not most visions of retributivism would reject these harsh pu-

81. Ristroph, supra note 78, at 1338.
82. Id. at 1301–02.
83. Cf. id. at 1308–12 (describing various factors that may shape popular conceptions of deserts).
86. See, e.g., Michael Vitiello, Three Strikes: Can We Return to Rationality?, 87 J. CRIM. L. & CRIMINOLOGY 395, 422 (1997) (asserting that three strikes laws are “premised on factual, utilitarian benefits”).
Rethinking Categorical Prohibitions (particularly for relatively minor offenses) as undeserved. Additionally, many retributivists would argue that deserts-based punishments are more respectful of criminal offenders: such punishments treat offenders as moral agents and ends in themselves rather than a means to broader societal ends (such as deterrence).

Of course, in "distributing" criminal punishments, one may reach different conclusions depending on whether one justifies punishment on utilitarian or deserts-based terms. For example, a utilitarian would fix a criminal punishment at a particular level by taking into account the ability of the punishment to deter others or to incapacitate the offender: impose too little punishment and risk failing to deter others; impose too much punishment and sacrifice certain nonpenological utilitarian goals. In contrast, a modern retributivist would fix punishment according to deserts. However, punishment usually is not fixed by legal and moral philosophers but by pragmatic legislators who, like most people, rely at times on deserts intuitions, at other times on utilitarian arguments, and perhaps most of the time on some combination of deserts-based and utilitarian justifications for punishment.

Enter the notion of deserts as a limiting principle. As described earlier, the notion of deserts is elastic and somewhat indeterminate: reasonable people may disagree about the quantum of punishment an offender deserves. In a particular society, however, one may achieve agreement about the upper and lower limits of punishment for certain offenses. For example, I suspect most Americans would agree that a two-week suspended sentence would be less punishment than a murderer merits and that a sentence of life imprisonment without parole would be more punishment than


88. Alice Ristroph, though not necessarily herself a retributivist, has summarized this view succinctly: "Retributivists have long argued that we fail to respect the convicted criminal if we punish him for consequentialist reasons." Alice Ristroph, Respect and Resistance in Punishment Theory, 97 CAL. L. REV. 601, 604 & n.12 (2009) (providing sources for proposition).
a first time check bouncer merits. To use deserts as a limiting principle for distributing punishment means that deserts supplies the upper and lower limits of punishment for a particular offense: punishment may not be less than \( x \), because a lower level would be less than an offender would merit; similarly, punishment may not be more than \( y \), because a higher level would exceed the offender's just deserts. Once those limits are established, actual punishment levels within that range may reflect utilitarian considerations: if level \( A \) and level \( B \) of punishment both fall within a particular range permitted by deserts, lawmakers may select the level that best satisfies interests in deterrence or incapacitation. In short, "deserts as a limiting principle seems to allow us to pursue both deontological and utilitarian aims, so we can have our cake and eat it too."\(^8\)

A deserts-limitation view of punishment currently enjoys widespread support in the legal academy. Notably, the American Law Institute's proposed revisions to the Model Penal Code endorse deserts as a limiting principle.\(^9\) The statutory trend, at least as urged by many in the academy, seems to point to greater use of deserts in this manner. Moreover, as the next section will describe, there are grounds for finding that—at least as applied to capital cases—the Eighth Amendment bars states from imposing punishment beyond what offenders deserve.

IV. THE EIGHTH AMENDMENT AS A DESERTS-LIMITATION PRINCIPLE

Although there are a variety of theories about what the Eighth Amendment is designed to accomplish,\(^9\) my discussion

89. Ristroph, supra note 78, at 1304.
90. MODEL PENAL CODE § 1.02(2) cmt. b (Tentative Draft No. 1, 2007) ("Deontological concerns of justice or 'deserts' place a ceiling on government's legitimate power to attempt to change an offender or otherwise influence future events.").

assumes that the Eighth Amendment imposes a deserts limitation on the State’s ability to punish: that is, at least in capital cases, the Eighth Amendment forbids imposing more punishment than offenders deserve. Again, this is an assumption of my discussion, and I do not aim to prove this proposition; others have already made the case more thoroughly and more cogently than I am capable of doing. However, for the sake of readers unfamiliar with the materials, I will summarize the most commonly made arguments.

There are three principal arguments for finding that the Eighth Amendment (at least in the capital context) imposes a deserts limitation on the State’s ability to punish. First, the history of the Eighth Amendment suggests that part of its purpose was to prevent lawmakers from imposing excessive punishments—excessive in relation to the crime committed (and therefore undeserved) rather than merely inhumane in type. Second, Coker, Atkins, Roper, Kennedy, and the Court’s other categorical prohibition cases embrace the concept of proportionality and, in so doing,
implicitly accept a deserts-limitation model. 95 Third, a deserts-limitation model best explains, though imperfectly, the rest of the Court’s unwieldy capital jurisprudence.

Making the historical argument, Tom Stacy points to several reasons as to why an originalist can embrace a deserts-limitation model of the Eighth Amendment. 96 First, the history of the provision of the English Bill of Rights upon which the Eighth Amendment’s Cruel and Unusual Punishments Clause is based demonstrates that the provision was intended to prohibit disproportionate punishments. 97 Second, Stacy notes that at the time of the drafting and ratification of the Bill of Rights, the ordinary meanings of the Eighth Amendment’s key terms, “cruel” and “unusual,” were consistent with a requirement that punishment be proportionate:

[T]he common understanding of a “cruel” punishment is one that is unnecessarily harsh. Part and parcel of that same understanding is that a punishment may be unnecessarily harsh for one purpose

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95. See infra Part IV.
96. See Stacy, supra note 92, at 509 (“A wide array of considerations—the English Bill of Rights, the text, paradigm examples, the Founders’ acceptance of proportionality, and their distrust of government—lead to the conclusion that Justice Scalia’s reading conflicts with the original understanding.”). Much of Stacy’s discussion rebuts Justice Scalia’s originalist position (described in his dissenting opinion in Atkins) that the Cruel and Unusual Punishments Clause was meant only to prohibit punishments that are “always and everywhere unacceptable,” but not to prohibit disproportionate punishments. See id. at 514–15, 519. My discussion of Stacy’s position excludes many of his points that simply rebut points made by Scalia; rather, I focus (quite briefly) on the affirmative originalist case for a deserts-limitation model of the Cruel and Unusual Punishments Clause.
97. Id. at 510. Of course, Justice Scalia has interpreted the corresponding provision of the English Bill of Rights quite differently. Specifically, Justice Scalia has argued that the English Bill of Rights only prohibited punishments that were not authorized by statute or common law. See Harmelin v. Michigan, 501 U.S. 957, 966–90 (1991) (Scalia, J., dictum) (setting forth view of scope of Eighth Amendment). As Stacy points out, however, this reading of the English Bill of Rights and the cases preceding it “completely subvert[] Scalia’s . . . position [that the Cruel and Unusual Punishments Clause only prohibits punishments that are always and everywhere unacceptable]. Stacy, supra note 92, at 511. “If the English Bill of Rights merely requires that harsh punishments be authorized by statute or common law precedent, then the category of punishments that are ‘always-and-everywhere’ unacceptable becomes an empty set.” Id.
but not for another. . . . This same understanding traces back through to the Founders’ world to at least seventeenth century England . . . .

Third, Stacy asserts that the “idea of proportionate punishments appears to have been entirely uncontroversial” to the Founders, and “it does not seem at all likely that the Founders accepted the doctrine of proportionality but wished to deny judges authority to implement it” (as arguably would be the case if the Cruel and Unusual Punishments Clause does not reject disproportionate punishments).

In addition to the originalist argument for the deserts-limitation model of the Eighth Amendment, there are the jurisprudential arguments. Scott Howe and Youngjae Lee both argue that the Court’s capital categorical prohibition cases at least implicitly interpret the Eighth Amendment as a deserts-limitation principle. Additionally, they (and others, including myself) argue that a deserts-limitation model is the best lens through which to understand the rest of the Court’s capital Eighth Amendment jurisprudence.

Howe argues that in *Coker v. Georgia* the Court embraced a deserts-limitation model of the Eighth Amendment. In *Coker*, the Court held that the Eighth Amendment categorically bars the

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99. *Id.* at 515; see also Malcolm E. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 853–55 (1972) (arguing that proportionality was central to Framers’ understanding of the Eighth Amendment).

100. Stacy, *supra* note 92, at 515.


102. *See* Wilkins, *supra* note 44, at 752 (noting that “[m]ost of the Court’s Eighth Amendment jurisprudence addresses the moral deserts prong of retribution”).

103. *See* Howe, *supra* note 8, at 832–34 (describing how “in most ways [the Court’s] capital-sentencing holdings are best explained by appeal to the deserts limitation”); Howe, *Resolving the Conflict, supra* note 92, at 418 (describing his conclusion that “the only coherent Eighth Amendment theory for governing the capital sentencing decision lies in a protection against punitive excess rooted in retributive ideals”); Lee, *supra* note 12, at 725–26 (justifying his conclusion that “retributivism as a side constraint as a theory of excessive punishment . . . provides the framework within which the concerns behind much of the death penalty jurisprudence can be understood”).
death penalty for the rape of an adult woman. In addition to concluding that society had rejected the death penalty for rape, the Court, using its independent judgment, concluded "death is indeed a disproportionate penalty for the crime of raping an adult woman." In so finding, the Court relied on notions of comparative deserts, reasoning that if the death penalty was to be reserved only for the worst crimes, rape did not fall within that category: "Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life." In arguing "[t]he retributive basis for the plurality's conclusion was clear," Howe points out the plurality's failure to mention that "punishing rape with death might serve utilitarian ends." Howe interpreted the Court's holding as standing for the broad principle that "capital punishment is limited [under the Eighth Amendment] by the moral culpability of an offender for the charged offense, uninfluenced by the societal benefits of executing her." Of course, Howe's 1998 article preceded the Court's decisions in Atkins, Roper, and Kennedy, and the Court's opinions in those cases cast some doubt on Howe's conclusion that the Court has unambiguously embraced a deserts-limitation model of the Eighth Amendment. It is true that the plurality in Coker ignored utilitarian considerations in analyzing the Eighth Amendment issue. Moreover, in Atkins, Roper, and Kennedy, the Court employed a proportionality analysis similar to that used in Coker
and concluded that mentally retarded offenders, juvenile offenders, and child rapists (respectively) are insufficiently culpable to merit the death penalty. To that extent, the Court's methodology and conclusions in the post-\textit{Coker} cases appear consistent with Howe's deserts-limitation model of the Eighth Amendment. Notably, however, in addition to assessing such offenders' comparative deserts (that is, in addition to determining that the mentally retarded are categorically less culpable than those of normal intelligence), the Court's proportionality analysis in \textit{Atkins}, \textit{Roper}, and \textit{Kennedy} included an assessment of a utilitarian question—deterrence. This inclusion of the utilitarian question may undermine Howe's position that the underlying and lasting principle from \textit{Coker} is that the Eighth Amendment imposes a deserts-based limitation on punishment.

However, other language from the pertinent opinions makes clear that the culpability question does enjoy primacy in the Court's determination. For example, in \textit{Kennedy}, the most recent of the three cases, the Court held that the Eighth Amendment forbids the death penalty for the crime of child rape. After conducting its evolving standards analysis, the Court turned to its independent analysis of proportionality. The overwhelming focus of the Court's inquiry concerned a culpability issue, the question of comparative deserts: invoking \textit{Coker}, the Court found that "there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other." Because, according to the Court, a child rapist is categorically less culpable than a murderer, death is a disproportionate punishment for child rape. Notably, the Court found the punishment disproportionate even as it acknowledged "it cannot be said with any certainty that the death penalty for child rape serves no deterrent . . . function." Rather, the Court found a

\begin{itemize}
\item \textbf{114.} See \textit{Kennedy}, 128 S. Ct. at 2664; \textit{Roper}, 543 U.S. at 571; \textit{Atkins}, 536 U.S. at 321.
\item \textbf{116.} \textit{Kennedy}, 128 S. Ct. at 2646.
\item \textbf{117.} \textit{Id.} at 2658–61.
\item \textbf{118.} \textit{Id.} at 2660.
\item \textbf{119.} \textit{Id.} at 2661.
\item \textbf{120.} \textit{Id.} Interestingly to me, the Court also treated its analysis of whether the punishment served a retributive function as separate from its analysis of
\end{itemize}
punishment could be struck *either* as disproportionate *or* because it failed to be justified by the traditional functions of capital punishment, retribution and deterrence (of course, in my view, the analysis of retribution is an analysis of proportionality).\(^1\)

*Atkins* and *Roper* follow a similar line of reasoning. In both of those cases, the Court focused principally upon the comparative deserts determination, concluding the death penalty was a disproportionate punishment for mentally retarded and juvenile murderers, because such offenders were categorically less culpable than adult murderers of normal intelligence.\(^2\) Admittedly, the Court also found in those cases that the deterrent value of the death penalty was lower for the mentally retarded and for juveniles than for adults,\(^3\) but it seems clear that the Court’s independent conclusion (apart from its evolving standards analysis) rested principally upon the deserts determination. That is, I think the Court would have reached the same decision even had it found that, say, the death penalty *did* deter juvenile offenders from committing murder. The very facts of *Roper* support this. Christopher Simmons, the juvenile offender in *Roper*, persuaded other youth to commit the crime with him upon the assurance that their youth would protect them from the most severe penalties!\(^4\) The facts of the very case the Court decided seem to support the notion that the prospect of death might deter juvenile offenders, but the Court still struck down the penalty as disproportionate. Thus, although the picture is clouded by the analysis of the deterrence question, these cases are consistent with Howe’s description of *Coker* as incorporating a deserts-limitation principle.\(^5\)

\(^{10}\)comparative deserts. *Id.* at 2661–62. I find the divorce of retribution from comparative deserts odd and inappropriate.

\(^{11}\) *Id.* at 2661.


\(^{13}\) *Roper*, 543 U.S. at 571–72; *Atkins*, 536 U.S. at 319–20.

\(^{14}\) *Roper*, 543 U.S. at 601 (O’Connor, J., dissenting) (‘‘And Simmons’ prediction that he could murder with impunity because he had not yet turned 18—though inaccurate—suggests that he *did* take into account the perceived risk of punishment in deciding whether to commit the crime.’’).

\(^{15}\) See Lee, *supra* note 12, at 721–24 (examining the Court’s categorical prohibitions cases including *Atkins* and *Roper* and concluding that “retributivism as a side constraint, and especially its comparative deserts aspect, is the perspec-
Finally, when surveying the terrain of all of the Court’s capital Eighth Amendment jurisprudence, one can best impose some kind of order upon the material by viewing it through the lens of a deserts-limitation principle. In other words, even as it has used words like “consistency,” “arbitrariness,” and so forth, the Court—perhaps without being aware of it—has been employing deserts as a central guiding principle. Howe has discussed at length how the Court’s jurisprudence is best understood through the lens of moral deserts. For example, according to Howe (and I agree), a deserts-oriented model of the Eighth Amendment perhaps best explains the Court’s requirements that an individual sentencing hearing be held in each capital case and that the capital defendant have wide latitude to introduce mitigating evidence. To be fair, portions of the Court’s Eighth Amendment capital jurisprudence—the various cases concerning the unique Texas capital punishment statute immediately come to mind—cannot be tive from which the Supreme Court has addressed the question of excessiveness in the death penalty cases”).

126. See Howe, supra note 8; Howe, Resolving the Conflict, supra note 92; see also Lee, supra note 12, at 725–27 (describing how many of the Court’s central holdings in capital cases appear to rest on notions of comparative deserts).

127. Howe, supra note 8, at 832–34 (examining how the deserts-limitation principle best explains many of the Court’s seminal capital rulings).


129. Lockett v. Ohio, 438 U.S. 586, 604 (1978) (holding that capital sentencer may not “be precluded from considering, as a mitigating factor, 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” (emphasis omitted)).

squared with a deserts-limitation model: if the focus is moral deserts, why allow for consideration of future dangerousness or adaptability to life imprisonment? Nevertheless, although a deserts-limitation model cannot explain all of the Court's capital jurisprudence, in my view it does a better job than any competing Eighth Amendment theory.

In sum, I accept the deserts-limitation model of the Eighth Amendment. I am persuaded principally by the jurisprudential arguments. The capital proportionality cases clearly appear to accept such a model, and the rest of the capital jurisprudence appears at least implicitly to accept that model. Additionally, as Tom Stacy has demonstrated, there is some originalist and perhaps even textual support for a deserts-limitation model. Finally, the position is intuitively appealing (at least to me): something in me recoils at the notion that the Constitution would permit death sentences for those not deserving death merely because the sentence served some utilitarian end.

A deserts-limitation model of the Eighth Amendment suggests that the Supreme Court should bar the death penalty for classes of defendants who, because of the traits of the class, do not or at least are not likely to merit death as a punishment. I believe the current test, which combines an assessment of society's evolving standards with the Court's independent assessment of proportionality, is intended to accomplish precisely that purpose. Unfortunately, for the reasons described in Part V, I conclude the current

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133. Stacy's examination of the phrase "cruel and unusual" is lengthy, and a discussion of it goes beyond the scope of this Article. See generally Stacy, supra note 92 (discussing at length the varying interpretations of the Eighth Amendment's Cruel and Unusual Punishments Clause).
test does not yield a reliable answer to the question it is intended to address.

V. DESERTS LIMITATION AND THE CURRENT TEST FOR CATEGORICAL PROHIBITIONS

Neither prong of the current test for categorical prohibitions furnishes an adequate deserts-limitation test. The evolving standards prong is burdened with a dubious history, but, more importantly, does a poor job measuring the public’s deserts intuitions. Though focused more directly on deserts than the evolving standards prong, the independent judgment prong falsely assumes the members of the Supreme Court are better able than jurors to determine capital offenders’ deserts. The current test for categorical prohibitions has failed and should be abandoned.

A. The Evolving Standards Prong

Despite its fairly long history, the Court’s “evolving standards” test is deeply problematic. Some criticisms of the evolving standards test should be familiar to anyone with even a casual acquaintance with Eighth Amendment scholarship. It is bad enough, for example, that the Supreme Court has adopted a majoritarian test when the Eighth Amendment should serve as a countermajoritarian check.135 Perhaps it is even worse, if unsurprising, that the Court has applied the test so loosely that it now appears devoid of any real meaning or content.137

134. The “evolving standards” language dates back to Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion), and the concept dates at least as far back as Weems v. United States, 217 U.S. 349, 373 (1910).

135. See, e.g., Stacy, supra note 92, at 523–24 (arguing that majoritarian “evolving standards” test fails to take into account the constitutional need for the Eighth Amendment to serve as a countermajoritarian check); see also Howe, supra note 8, at 851–52 (arguing the “Eighth Amendment . . . does not require [near unanimity of public opinion], and this position largely abandons any role for a constitutional check on legislative action”).

136. Cf. Corinna Barrett Lain, Deciding Death, 57 DUKE L.J. 1, 5 (2007) (describing “disconnect between majoritarian doctrine and majoritarian results” and suggesting that Court jettisons the majoritarian evolving standards doctrine in order to reach politically majoritarian results).

137. See infra Part V.A.2 (describing judicial misuse of evolving standards test).
But worst of all, at least from my perspective, is the lack of a snug fit between what the evolving standards test actually does and what the Eighth Amendment should be doing. "Form ever follows function"; or, as Samuel Lutz has said, "we first must decide what functional purpose the Eighth Amendment should serve, and then structure our jurisprudence to achieve [that] social value." If, as I maintain, the functional purpose of the Eighth Amendment is to constrain the State from punishing beyond an offender's moral deserts, any test for categorical prohibitions should identify accurately whether a particular class of offenders can ever merit the punishment of death. I am sympathetic to the usual complaints about the evolving standards test, but, as discussed in more detail below, my real beef is that it simply does not function very well as a deserts-limitation test.

1. The Failure of Evolving Standards as a Deserts-Limitation Principle

The evolving standards prong of the Court's current test for categorical prohibitions fails as a deserts-limitation test. Notably, some deny that the evolving standards test even purports to determine when society has rejected a punishment as beyond the moral deserts of a class of offenders. In a student note, Samuel Lutz describes three normative baselines for interpreting the Eighth Amendment: a majoritarian baseline, in which a punishment is excessive if a national majority has rejected it (the evolving standards test); a utilitarian baseline, in which a punishment is excessive if its social costs exceed its expected benefits (typically deterrence of crime by others); and a retributive baseline, in which punishment is excessive if it is disproportionate to the offender's moral deserts. Lutz specifically notes the potential for conflict between a majoritarian approach and a proportionality (i.e.,

140. Id. at 1868–70.
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deserts-based retributive) approach.\textsuperscript{141} Lutz’s clear implication is that the evolving standards test and a deserts-oriented, Court-conducted proportionality analysis run on largely parallel tracks: in short, the majoritarian evolving standards test has little to do with assessments of moral deserts.

In contrast, others claim—or come close to claiming, in any case—that the evolving standards test captures the deserts intuitions and deserts consensus of a national majority and is, therefore, consistent with a deserts-limitation model of the Eighth Amendment. Scott Howe seems to fall (at least to a degree) into this camp. Howe has argued that the “Supreme Court lacks the ability to manage the capital sentencing inquiry to ensure good deserts assessments because the Court cannot define in detail when an offender deserves the death penalty.”\textsuperscript{142} Given this inability, argues Howe, the “Court should not have tried to specify the rules of capital sentencing if the societal consensus about deserts did not allow the Justices to be specific.”\textsuperscript{143} If I understand him correctly, his argument appears to assume that virtually any societal consensus about the appropriateness of the death penalty under various circumstances represents a consensus about deserts.

Lutz’s porridge is too cold for me, but Howe’s is too hot. Unlike Lutz, I certainly would concede that the evolving standards test tries to capture, at least in part, the majority’s intuitions about offenders’ moral deserts. Michael Moore has described the Court’s two-part test for categorical prohibitions as representing essentially two sides of the same coin.\textsuperscript{144} The Court’s independent proportionality review, in which the Court considers whether death may exceed the moral deserts of a particular category of offenders, requires the exercise of critical morality, a first person judgment about what is right.\textsuperscript{145} The evolving standards test is an exercise in moral sociology, which requires a third person judgment about what some other group (here, a national majority) believes is mo-

\textsuperscript{141} \textit{Id.} at 1870–71 (arguing that both utilitarian and retributive approaches to the Eighth Amendment’s excessiveness prohibition conflict with a pure majoritarian approach).


\textsuperscript{143} \textit{Id.} at 465 (emphasis added).


\textsuperscript{145} \textit{Id.}
rally right. In both instances, the focus is on the moral appropriateness of punishing a particular category of offenders in a particular way, and, for almost everyone, the moral appropriateness of punishment is at least somewhat tied to notions of deserts. Thus, I would concede some relationship between the evolving standards test and the deserts intuitions of a majority of the population.

But to suggest more than a rough, somewhat vague relationship between the evolving standards test and national assessments of deserts is to concede far too much. Recall that legislation is the principal stick by which the Court measures society’s evolving standards. To accept that the evolving standards test accurately measures a national consensus on the moral deserts of categories of offenders requires one to accept (1) that legislation itself is the best measuring stick for determining the public’s deserts intuitions, and (2) that criminal legislation, or at least death penalty legislation, principally embodies deserts determinations anyway. I reject both assumptions.

First, legislation itself probably is not the best tool for measuring public opinion about the propriety of capital punishment in a variety of contexts. Corinna Lain made this point recently in an article explaining why the Court (paradoxically) tends to reach majoritarian results in capital cases even when the majoritarian evolving standards doctrine would point to a different result. In describing the “causal disconnect between majoritarian doctrine and majoritarian results,” Lain observes that “[s]tate legislatures are about the last institutional actors to reflect changes in cultural norms (especially where protections for capital defendants are concerned) so it makes little sense to focus on them as the primary indicators of ‘evolving standards.’” More simply put, actual public opinion often runs well ahead of legislation.

Even more importantly, legislation concerning criminal justice, and perhaps especially concerning capital punishment, cannot credibly be said to represent “pure” assessments of moral deserts.

146. Id.
147. See supra note 26 and accompanying text.
148. Lain, supra note 136.
149. Id. at 54.
150. Id. at 55 (citing, inter alia, William J. Bowers et al., Too Young for the Death Penalty: An Empirical Examination of Community Conscience and the Juvenile Death Penalty from the Perspective of Capital Jurors, 84 B.U. L. REV. 609, 619–20 (2004)).
There may or may not be atheists in foxholes, but surely there are no anti-utilitarian Kantians in state legislatures. (Among other things, they would not get elected.) My point, of course, is that legislators generally are pragmatists who, in considering criminal legislation, rely at times on deserts intuitions, at other times on utilitarian arguments, and perhaps most of the time on some combination of deserts-based and utilitarian justifications for punishment. Given that, it is possible—in fact, probable—that legislative bodies may either reject or retain certain kinds of punishment for certain classes of defendants for reasons unrelated to deserts intuitions. If the Eighth Amendment imposes a deserts limitation on the quantum of punishment that may be imposed, it makes very little sense to look to legislation motivated in part by utilitarian or other non-retributive concerns to measure what the public thinks about deserts.

Assume, for example, that within the next five years, ninety percent of the retentionist states enact legislation abolishing the death penalty for all offenders. Does this legislation illustrate a consensus that no offenders merit death, that death is simply a disproportionate punishment for murder? Not at all. One state’s legislation barring capital punishment may have resulted from an analysis of the financial impact of capital cases on state and county budgets.  


152. It is unrealistic to expect complete agreement about the precise number of innocent persons who have been sentenced to death in the United States. That being said, there is little doubt that many innocent persons have, in fact, been convicted of capital murder and sentenced to death. For a description of a few such cases and a discussion of the factors that lead to wrongful convictions, see generally BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).

153. For an excellent historical overview of the role of race in America’s use of capital punishment, see generally STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2002).
purposes for bans have little to do with beliefs about offender deserts.

Just as the presence of bans on death may not speak directly to beliefs about offender deserts, even the absence of such bans may say little about the public’s deserts intuitions. Consider, for example, the group under consideration in this Article, seriously mentally ill offenders. I do not think it is fair to see the absence of legislation barring the death penalty for the seriously mentally ill as principally representing a judgment that the severely mentally ill are likely to merit death for serious crimes. Rather, the absence of such legislation could just as easily reflect (1) a judgment that the violent mentally ill are dangerous and should be incapacitated, (2) a mistaken legislative belief that the really mentally ill are screened out through competency evaluations and insanity verdicts, or even (3) lack of any legislative consideration of the issue.

In sum, the evolving standards test fails as a means for measuring society’s beliefs about offenders’ moral deserts. The relationship between the test itself and the public’s deserts assessments about offenders simply is too attenuated for the test to function as an effective, accurate Eighth Amendment test. This alone is a sufficient justification for abandoning the test. Additionally, as the next section will illustrate, the test should be abandoned because it has lost any credibility it once had.

2. The Collapse of Evolving Standards as a Credible Test

In addition to the imperfect theoretical fit between the evolving standards test and the Eighth Amendment as a deserts limitation, there are practical reasons to reject the evolving standards test. First, beginning at least with Atkins, the Court has interpreted and applied the evolving standards test so loosely and liberally that one grows cynical about the continuing utility of this

154 To be sure, probably no legislative body or individual lawmaker would say that the class of defendants should be subject to death even if that class does not actually merit death: one will hear instead that some defendants merit death notwithstanding their mental illnesses and that juries should retain the decision as to the appropriate sentence in any individual case. However, it is likely that the legislative assessment of the moral deserts of the mentally ill murderer is likely to be colored by the assessment of the threat posed (or believed to be posed) by the mentally ill murderer. See infra notes 174–76 and accompanying text.
exceedingly elastic standard. This is true even if one accepts the theoretical validity of the evolving standards test. William Heffernan, a defender of the evolving standards test as a constitutional historicist test, has opined that “new values and practices [should] achieve constitutional standing only when they . . . have gained wide acceptance over a substantial period of time.” That is, courts should not constitutionalize what may be “transient changes,” but may grant constitutional standing to “enduring ones” that are nonetheless consistent with the specific constitutional value (e.g., avoidance of cruel punishments) embraced by the Framers.

It is not always clear how much time must have elapsed before a change is “enduring” or how much societal agreement must be present for a change to have achieved “wide” acceptance. As Heffernan observes, “How, then, are courts to determine whether there is a broad consensus concerning a specific punitive practice? . . . [A] difficult problem of fact turns out to be critical to the implementation of an interpretive framework. Moreover . . . judges can inject their personal biases in deploying the methodology.”

However, even taking into account the often blurry lines concerning when a consensus truly exists and when a change is sufficiently enduring to merit constitutional status, the Court’s application of the evolving standards test in Atkins, Roper, and now Kennedy is highly suspect. Heffernan and others—including, not unimportantly, the dissenters in the three cases—say as much. In

156. Id. at 1377–78 (emphasis added).
157. Id. at 1369.
158. Id. at 1370.
159. See id. at 1390 (noting that the constitutional historicist method “is grounded in a normative premise that doctrine ought to be adjusted to take into account enduring, widespread changes in fundamental values when those changes are consistent with the direction charted by the framers”).
160. Id. at 1385; see also Stacy, supra note 92, at 521 (arguing that it “is by no means obvious that . . . reliance on custom effectively limits judicial subjectivity” precisely because of the difficulty of determining when a practice has become “customary”).
161. See Heffernan, supra note 155, at 1386 (noting that Atkins and Roper “pose a . . . serious problem of justification for a historicist because the exis-
Atkins, the Court found that standards had evolved enough for Eighth Amendment purposes when there was a virtually even split between death penalty jurisdictions that allowed death sentences for the mentally retarded and those that prohibited the practice. The Court also found support for a constitutional ban in Roper, where eighteen death penalty jurisdictions had banned the juvenile death penalty and twenty had not. A fifty-fifty split is not the kind of "wide acceptance" Heffernan and other constitutional historicists see as required before new values merit constitutional stature.

Additionally, there are serious questions about whether the legislative changes described in Atkins and Roper had the opportunity to stand the test of time before being constitutionalized. Time matters because some legislative changes may fail the test of time and be repealed for perfectly good reasons. For the constitutional historicist, only settled questions—that is, those that have stood the test of time—properly gain constitutional status. In Atkins, for example, most of the statutes enacted barring death sentences for the sentence of a settled consensus relevant to each is open to challenge); see also Broughton, supra note 15, at 647 (opining that after Roper and Atkins, "[n]ational consensus now may be understood simply as a significant trend"); Wayne Myers, Note, Roper v. Simmons: The Collision of National Consensus and Proportionality Review, 96 J. CRIM. L. & CRIMINOLOGY 947, 949 (2006) (arguing, inter alia, that "the Roper decision is problematic because it is based on an unconvincing measure of what constitutes a national consensus").

162. Atkins v. Virginia, 536 U.S. 304, 321-22 (2002) (Rehnquist, C.J., dissenting) ("The Court pronounces the punishment cruel and unusual primarily because 18 States recently have passed laws limiting the death eligibility of certain defendants based on mental retardation alone, despite the fact that the laws of 19 other States besides Virginia continue to leave the question of proper punishment to the individuated consideration of sentencing judges or juries familiar with the particular offender and his or her crime.").

163. Roper v. Simmons, 543 U.S. 551, 564 (2005) (comparing number of jurisdictions to those in Atkins); see id. at 609 (Scalia, J., dissenting) ("Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus.").

164. See Heffeman, supra note 155, at 1386 ("Proponents of a living constitution might be willing to accept a recently-reached consensus. Historicism, however, requires more, for otherwise constitutional doctrine could be based on trends indistinguishable from those underlying many legislative majorities."); see id. at 1409 (finding that "Atkins and Roper . . . are contestable because they may well have been premature" (emphasis added)).
juveniles were less than thirteen-years-old, less than an entire generation and hardly a sufficient amount of time to indicate a settled question.\footnote{See Atkins, 536 U.S. at 313–15 (describing state statutes barring death sentences for the mentally retarded).}

None of this proves the evolving standards test is bad in theory. Nevertheless, it has proven quite bad in practice, and one must question the continuing utility of a test whose margins are so elastic. Some commentators, who already may be skeptical about the merits of an “evolving standards” test, have concluded, perhaps justifiably, that the Court’s manipulation of the test has adverse effects for separation of powers: “The Court’s new understanding of the national consensus standard (to the extent it can be called that) thus eviscerates any possibility of further democratic action on these subjects within the political branches, short of a federal constitutional amendment.”\footnote{Broughton, supra note 15, at 647; see also Myers, supra note 161, at 949 (asserting that Roper and Atkins “tread on state autonomy” by usurping the decisions of state legislatures and of capital jurors).}

When someone like me (a committed abolitionist) rolls my eyes upon reading, say, the evolving standards portion of \textit{Kennedy}\footnote{Kennedy v. Louisiana, 128 S. Ct. 2641, 2651–53 (2008) (applying evolving standards test).} (the ultimate result of which I felt was correct), the Court has a problem with its credibility. Even those who defend the test in theory must concede the Court’s application of the test leaves much to be desired.

Finally (and briefly), many would argue that even theoretically the evolving standards test leaves much to be desired. Heffernan has mounted an eloquent historicist defense of the evolving standards test, and I do agree with him that if there is genuinely widespread and longstanding societal agreement that a particular punitive practice is impermissible, such a practice should be found to violate the Eighth Amendment. But many argue the evolving standards test alone fails to provide the protection the Eighth Amendment requires. As Tom Stacy points out, the evolving standards test is decidedly a majoritarian approach and, as such, fails to take into account the constitutional need for the Eighth Amendment to serve as a countermajoritarian check.\footnote{Stacy, supra note 92, at 523; see also Howe, supra note 8, at 851–52 (arguing the “Eighth Amendment . . . does not require [near unanimity of public
the Court's use of prevailing practices "runs contrary to the independent role [the Court] regularly assumes in interpreting other countermajoritarian rights." Stated more simply, if all the Eighth Amendment is meant to do is to prohibit practices that the vast majority of jurisdictions already have found are obsolete, why does anyone need the Eighth Amendment? For the one or two "outlier" jurisdictions that cling to barbaric practices? What if the great majority of jurisdictions cling to barbaric practices? The evolving standards test would appear to tolerate that.

In summary, the first prong of the Court's test for categorical prohibitions, the evolving standards test, is fatally flawed. It fails to serve as a check on majoritarian excesses. The Court has not applied it very honestly. And most importantly, the evolving standards test does not fully or accurately measure societal beliefs about offender deserts. The question, then, is whether the second prong of the Court's test for categorical prohibitions picks up the slack by functioning effectively as a deserts-limitation test.

B. The Independent Judgment Prong

Unfortunately, the second prong of the Court's test for categorical prohibitions does not pick up the slack left by the first prong. Indeed, the Court's use of its "own independent judgment" may be even more problematic than its use of the evolving standards test. As described earlier in Part II, this portion of the categorical prohibitions test requires the Court to use its own judgment in determining whether death is a disproportionate punishment either for a particular class of offenders or for a particular crime (without regard to the identity of the offender). If the Eighth Amendment limits punishment to offender deserts, then at first blush the Court's analysis looks like a step in the right direction: the Court is trying to look directly at the nexus between the punishment at issue and the potential culpability of the offender class.

But one must pose the obvious question: why should nine Supreme Court justices be more qualified than, say, twelve jurors

opinion], and this position largely abandons any role for a constitutional check on legislative action").

to determine who deserves to live or die?\textsuperscript{170} As Justice O'Connor's dissenting opinion in \textit{Roper} pointed out, it may be true that juvenile offenders generally are less culpable than the "average" or "normal" capital murderer.\textsuperscript{171} And because there tends to be remarkable agreement about assessments of comparative deserts,\textsuperscript{172} most jurors probably would agree with the Court's conclusion that a juvenile (or mentally retarded, or mentally ill, or whatever) offender generally is less culpable than the average Joe Perp. The more difficult question remains unanswered, however: notwithstanding the comparative deserts assessment, what should be an offender's \textit{ultimate} deserts?\textsuperscript{173} It is a squishy metaphysical question, the answer to which requires a balancing of a variety of factors. Although most of us may agree about what \textit{does not} qualify (I suspect most Americans would not consider death deserved for, say, a pickpocket), any case of murder is more complicated. Even if a juvenile offender is less culpable than Joe Perp, can they not both merit death? And why should Supreme Court justices take this inherently indeterminate decision from jurors? If both prongs of the Court's current test for categorical prohibitions are flawed,

\begin{itemize}
  \item \textsuperscript{170} As Justice Scalia observed in \textit{Roper}, "By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?" \textit{Roper v. Simmons}, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting).
  \item \textsuperscript{171} \textit{Roper}, 543 U.S. at 588 (O'Connor, J., dissenting).
  \item \textsuperscript{172} See \textit{Ristroph}, supra note 78, at 1303 ("In fact, many empirical studies have found a substantial degree of consensus about the relative severity of different offenses, even in the face of disagreement over the absolute level of punishment . . . "); \textit{id.} at 1303 n.33 (listing empirical studies about comparative deserts assessments); see also \textit{Lee}, \textit{supra} note 12, at 716 n.170 (noting that "social scientific studies have consistently shown widely shared views on relative seriousness of crimes" and citing such studies).
  \item \textsuperscript{173} An example may help illustrate the relationship between comparative and ultimate deserts. Many in society may agree that armed robbers deserve more punishment than pickpockets; in other words, there is general agreement about the comparative deserts assessment. However, this general agreement that pickpockets deserve less punishment than armed robbers does not answer the question just how much punishment (ultimate deserts) either group deserves. Does an armed robber ultimately deserve twenty years in prison, while a pickpocket deserves only three months? The question of ultimate deserts is relatively indeterminate.
\end{itemize}
how, then, should the Court determine whether a category of offenders should be exempt from the death penalty?  

VI. DESERTS LIMITATION, CATEGORICAL PROHIBITIONS, AND MAJOR MENTAL ILLNESS

A. Proposed Test

In my view, the test for categorical prohibitions should focus principally on barriers to the sentencer's ability to determine the moral deserts of a particular defendant-class rather than on the actual moral deserts of that category of offenders. This is where the double bind becomes significant. When the characteristics of a condition point simultaneously to reduced culpability and to potentially enhanced future dangerousness, sentencers' deserts-determinations as to members of the class are compromised—skewed in the direction of death when death may not be deserved—and a categorical bar to the death penalty may, therefore, be warranted. Broadly put, the Eighth Amendment test for categorical prohibitions should ask whether the characteristics of a particular condition are such that there is a substantial risk that the fact-finder will privilege utilitarian aims over retributive aims. More simply put, is there a substantial risk that when the characteristics of a condition point simultaneously to significantly reduced culpability and to future dangerousness, the jury will give more weight to the future dangerousness issue than to the moral deserts issue?

The test contains four elements. First, the class in question must consist of those with a particular condition. I define condition as a state or status not chosen by the members of the class and not principally defined by a set of past experiences. Under this definition, youth is a condition: one does not choose her age. Mental retardation meets this definition. Most importantly for the

174. This question assumes that the deserts-limitation principle of the Eighth Amendment should result in certain categories of offenders being exempt from the death penalty. I realize that some might question that assumption.

175. Note that I would limit the test to conditions whose characteristics are significantly mitigating rather than simply mitigating. Although one might argue that what is “significantly mitigating” is subjective, I would note that there is ample evidence (for example, the insanity defense, the requirement that defendants be competent to stand trial) that the law already views major mental illness as significantly mitigating.
purposes of this Article, the major mental illnesses also qualify as conditions. In contrast, a class comprised of those with a history of child abuse would not have a condition as defined here: to say one was abused as a child is simply to describe a set of experiences the person has had.

Second, the features of the condition must be both inherently and significantly mitigating from a retributive (deserts-oriented) perspective. Mental retardation illustrates the point well. As described by the Court in Atkins, the features of mental retardation include (a) a severely sub-normal intellect, (b) reduced impulse control, (c) a diminished ability to learn from experience, and (d) a tendency to be a follower. I believe the inherently mitigating force of these features is obvious. Contrast this with one’s racial status. Although one’s race qualifies as a condition under my definition, nothing about the condition itself is especially relevant to questions of culpability.

The requirement that the features of the condition be significantly mitigating presents a thorny question. How does one determine whether a feature is significantly (as opposed to merely) mitigating? Nevertheless, for reasons I will describe shortly, psychotic-spectrum disorders should fall within this category.

Third, the same features that point to reduced culpability from a retributive perspective should, at least potentially, point to an enhanced possibility of future dangerousness. For example, the mentally retarded person’s reduced impulse control and diminished ability to consider alternatives suggest both reduced culpability for the crime in question and enhanced likelihood that the individual may commit a similar crime in the future. Put another way, the class in question must face the double bind described earlier in this Article.

Fourth, there must be a substantial risk that the sentencing body will privilege the (perceived) enhanced possibility of future dangerousness over the mitigating features of the condition, thereby compromising its judgment as to the offender’s deserts. In my view, what constitutes a substantial risk may be answered empirically (rather than simply speculatively). If the empirical answer is that the risk in question is not substantial, a categorical prohibition is not warranted.

177. See supra note 5 and accompanying text.
B. Justifications for Proposed Test

I believe this test is more consistent with a deserts-limitation model of the Eighth Amendment than are (a) the present test for categorical prohibitions; (b) a categorical prohibitions test focusing directly on the deserts of the offender category in question; and (c) an approach that would jettison categorical prohibitions altogether in favor of giving effect to the jury’s deserts determinations (sentences) in otherwise death-eligible cases.

The present test for categorical prohibitions fails for the reasons described in Part V. And a categorical prohibitions test focusing directly on the deserts of the offender category inevitably suffers from the same flaws as the independent judgment prong of the Court’s current categorical prohibitions test: agreement about comparative deserts does not require agreement about ultimate deserts.178 Even if a particular category of otherwise death-eligible offenders may generally be less culpable than other death-eligible offenders, many members of the category in question may nevertheless be sufficiently culpable to merit death (at least in the view of some fact finders).

Of the three proposed alternatives, abandoning the idea of categorical prohibitions entirely presents the most serious challenge to my proposed test. First, some persons suffering from major mental illness at the time of their crimes may nevertheless deserve to die for such crimes (to the extent anyone “deserves to die,” of course). By this I mean simply that some persons suffering from major mental illnesses may be at least as culpable as some more “normal” death-eligible murderers. This is likely to be rare, but I do not consider it impossible, and my proposed rule would protect even these killers (the rule is prophylactic). Additionally, as discussed above, although the members of the Supreme Court are as capable as ordinary citizens of assessing comparative deserts (and it is probably true that mentally ill murderers generally are less culpable than other murderers), they are no more capable than ordinary citizens of assessing any particular offender’s ultimate deserts.

Taken both jointly and severally, these points appear to militate against finding a categorical prohibition for those with major mental illness. After all, if some persons may be as culpable as other death-eligible murderers and the Supreme Court brings no

178. See supra Part V.B.
particular expertise to the question of a particular offender's moral deserts, why not simply leave the decision in the hands of jurors who can take the mental illness into account in determining how culpable the particular defendant may be and make the life or death decision based on the traits of the killer in question?

Despite its intuitive force, however, the argument against recognizing any categorical prohibitions suffers from its own significant flaws under a deserts-limitation model of the Eighth Amendment. Specifically, the argument assumes juries are able to make untainted deserts determinations about offenders within certain offender classes. I believe this assumption is false.

This is where the double bind becomes significant. Simply put, the double bind prevents jurors from being able to make accurate deserts-determinations about certain groups of offenders. Although jurors’ ability to make decisions based purely on deserts may be problematic in all capital cases (more on that later), the problem is particularly acute in the kinds of cases in which lawyers have urged that categorical prohibitions are appropriate. This is so because there is no effective way to separate what is mitigating from a retributive perspective from what is aggravating from a utilitarian perspective.

A deserts-limitation theory of the Eighth Amendment likely would embrace rulings like Woodson v. North Carolina\(^\text{179}\) and Lockett v. Ohio,\(^\text{180}\) which require individualized consideration of the defendant in question and allow for consideration of a wide range of facts about the defendant or crime that may be said to mitigate the defendant’s guilt for the murder in question. Facts about a defendant’s mental state and influences are deserts bases; that is, these facts are relevant to the defendant’s level of culpability for the crime in question and, consequently, also relevant to what punishment the defendant deserves for committing the crime.\(^\text{181}\) With juvenile, mentally retarded, and mentally ill offenders, certainly the traits that accompany their conditions (youth, mental retardation, and mental illness) are appropriate deserts bases in a capital case: even if one ultimately concludes that a particular mentally

\(^\text{181.}\) For a helpful discussion of deserts and the bases for deserts, see JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY (1970).
A retarded offender is just as culpable as an offender with an average IQ, would you not find the first offender's mental retardation highly relevant to your assessment of his culpability? And is the same not true for juvenile and mentally ill offenders? So, such information not only should be admissible under a deserts-limitation Eighth Amendment model but may also be the most important mitigating evidence such a defendant can offer. I would go so far as to say that without hearing such evidence, a jury cannot arrive at an accurate, integrity-based assessment of the offender's ultimate deserts. Thus, one might argue that this evidence is necessary in a constitutional sense. The evidence is not only mitigating, but significantly mitigating.

Unfortunately, this evidence—on the one hand essential to an accurate determination of the offender's moral deserts—simultaneously taints the sentencing trial through introduction of utilitarian considerations antithetical to deserts. (This, of course, is why such evidence is described as "double-edged.") In other kinds of cases, it might be possible to exclude or limit the scope of evidence related to utilitarian considerations like future dangerousness and so forth without necessarily sacrificing evidence genuinely relevant to deserts. Here, however, because the same evidence is mitigating as viewed through the lenses of moral deserts but aggravating as viewed through utilitarian frames, that separation simply is not possible. Alas, this atom cannot be split.

Indeed, an attempt to split the atom through cautionary instructions, specific deserts-based questions, or other such measures probably would not succeed. However conscientiously jurors may try to follow such instructions, I doubt they can so easily cabin off one aspect of the evidence. While acknowledging a dearth, if not absence, of longitudinal studies on the subject, Alice Ristroph notes that "the available psychological and public opinion research does seem to support the claim that deserts conceptions are elastic

182. I recognize, of course, that current jurisprudence allows for consideration of evidence relevant to future dangerousness, adaptability, and other issues based in utilitarian justifications for the death penalty. However, as I explain in infra, Part VI.D., in my view acceptance of a deserts-limitation model of the Eighth Amendment requires reconsideration of, if not outright jettisoning of, several precedents, particularly those stemming from the various incarnations of the Texas capital punishment statute, TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 2006 & Supp. 2009).
in the face of changing utilitarian considerations." In describing deserts as "elastic," Ristroph means that "deserts conceptions are strongly influenced by non-deserts considerations." Ristroph is referring specifically to larger societal beliefs about deserts shifting in response to changes in sentencing policy, even when such changes were motivated by utilitarian (rather than deserts-based) considerations. However, I believe it reasonable that the notion of elasticity would apply on a micro-level as well: that is, one's view of a particular offender's deserts is likely to be influenced heavily by utilitarian considerations like one's ideas about the person's future dangerousness. In other words, you may not be determining whether the person is dangerous in the future, but your belief that the defendant presents a risk of future violence will influence your beliefs about the defendant's degree of culpability for the crime in question. If this is true, a limiting instruction would be useless and the answers to specific questions would be influenced by utilitarian considerations even if the questions facially excluded such considerations.

This risk that conceptions of deserts will be influenced by utilitarian considerations is particularly acute given the empirical evidence suggesting the centrality of future dangerousness to jurors' deliberations in the typical capital case. As John Blume, Stephen Garvey, and Sheri Johnson have documented, the findings of the Capital Jury Project suggest that even when the prosecution does not raise the issue in any overt way, the question of future dangerousness plays a leading role in capital jurors' deliberations. In fact, early Capital Jury Project studies suggest that future dangerousness is the second most frequently discussed issue in jury deliberations, eclipsed only by discussion of the crime itself, and, importantly, overshadowing mitigating evidence.

183. Ristroph, supra note 78, at 1310.
184. Id. at 1308.
185. Id.
187. Id. at 398–99 ("Based on the results of interviews . . . conducted in connection with the nationwide Capital Jury Project . . . future dangerousness is on the minds of most capital jurors, and is thus 'at issue' in virtually all capital trials . . . ." (footnote omitted)).
188. Id. at 404 (citing Eisenberg & Wells, supra note 62, at 6).
Unlike an approach that would eliminate categorical bans altogether, my proposed test takes into account the difficulties juries have with determining offenders' deserts when the double bind is present. In my view, the choice between recognizing categorical prohibitions and jettisoning them boils down to a decision about how to allocate the risk of a flawed or otherwise inaccurate assessment of offender deserts. The double bind suggests that without categorical prohibitions as to certain offender groups, juries will sentence some defendants to death who may not really merit death: that is, the defendants bear the risk of mistakes. Under my test, some defendants who may be sufficiently culpable to merit death will nonetheless be exempt from receiving the death penalty: that is, the State is taxed with the burden that some criminals may not receive the full measure of their just deserts. Given that the Eighth Amendment prohibits excessive punishments, the failure to recognize any categorical prohibitions risks violating the Constitution in some cases, whereas the Constitution is indifferent to potential under-punishment. For that reason alone, it makes more sense to categorically prohibit the death penalty for some classes of offenders.

The relevant question, however, is which classes should be categorically exempt from the death penalty. More specifically, should those with major mental illnesses be exempt?

C. Categorical Prohibitions: Banning the Death Penalty for Those with Psychotic-Spectrum Mental Illnesses

Under my proposed test, those suffering from psychotic-spectrum disorders, particularly schizophrenia and schizoaffective disorder, at the times of their crimes would be immune from the death penalty.

First, such disorders constitute conditions under my definition.189

Second, the very features of psychotic-spectrum disorders—principally a compromised or distorted perception of reality (characterized by hallucinations and delusions)—are mitigating. Moreover, I doubt many would dispute that such features are significantly mitigating, as the test requires.190 Indeed, existing law

189. See supra Part VI.A.
190. In contrast, evidence of mental illnesses like depression, which do not have psychosis as a principal or prominent feature, may not be significantly
supports the notion that evidence of psychosis is significantly mitigating: the very existence of the insanity verdict demonstrates legal acceptance of the idea that some degrees of impairment exclude one from any criminal responsibility. It stands to reason that a level of impairment similar in kind and perhaps only slightly less in degree than that required to exempt one entirely from criminal responsibility should nonetheless be considered significantly mitigating. That most death penalty statutes specifically include mental illness as a statutory mitigating circumstance further supports this notion.\textsuperscript{191}

Third, the same features that are mitigating from a retributive perspective are potentially aggravating from a utilitarian perspective. The fact that the defendant was influenced by delusions or hallucinations at the time of a crime is mitigating; however, the presence of such delusions (and the stubborn nature of psychotic disorders and the to-date incomplete treatments for such disorders) does not inspire juror confidence in the mentally ill defendant's ability to change his conduct in the future.

Finally, the empirical evidence strongly suggests that jurors privilege the potentially aggravating (future dangerousness) features of psychotic-spectrum conditions over the mitigating (deserts-oriented) features. As noted above, the Capital Jury Project data suggests that evidence of future dangerousness is more important to jurors than is mitigating evidence about mental illness.\textsuperscript{192}

Importantly, as to mental illnesses, the categorical prohibition line probably stops at psychotic-spectrum disorders—that is, disorders whose defining or prominent features include psychosis. This line stops here both because psychotic-spectrum disorders are significantly mitigating (in a way that may not be true of, say, an adjustment disorder) and because this is where the double bind is most acute, making the risk of an impaired deserts determination substantial. Those with psychotic-spectrum conditions have the

\textsuperscript{191} Alabama's death penalty statute, ALA. CODE § 13A-5-51(2) (Lexis-Nexis 2005), which includes as a mitigating circumstance the defendant's "extreme mental or emotional disturbance" at the time of the crime, is fairly typical.

\textsuperscript{192} See supra note 188 and accompanying text.
most compelling cases in mitigation (I am referring only to the mental health aspect of their cases in mitigation): their symptoms may include hallucinations, delusions, and disorganized behavior and speech.\textsuperscript{193} To show the defendant’s grip on reality is significantly compromised by illness is powerfully mitigating. At the same time, however, those with psychotic-spectrum conditions are likely to be “scariest” and most foreign to ordinary jurors. Presumably most jurors have some direct or indirect experience with depression, anxiety disorders, and other common mental illnesses; however, many lack experience with persons with, say, schizophrenia. Moreover, the characteristics of psychosis combined with the (to date) unsatisfactory or incomplete treatments available likely make a jury’s focus on future dangerousness inevitable. Although the risk that utilitarian factors may overshadow other factors may exist as to all mental illnesses, I would posit that the risk is \textit{substantial} only as to psychotic-spectrum conditions. Where the risk is substantial, a categorical prohibition is warranted.

Additionally, unlike the rule in ABA Resolution 122A,\textsuperscript{194} the categorical prohibition I propose would not require proof of actual impairment at the time of the crime; instead, proof that the person had the disorder at the time of the crime would be sufficient. The reasons for this difference are largely practical. First, my rule is prophylactic and may protect some defendants for whom a death sentence would not constitute cruel and unusual punishment. Given the already prophylactic nature of the rule, it seems easier and more efficient to focus on the diagnostic question of whether the person suffered from schizophrenia at the time of the crime than to ask the thornier question regarding how the person was affected by the disorder when the crime occurred. Furthermore, someone who suffers from schizophrenia at the time of a crime usually is affected by the illness at the time of the crime, even when proof of the effect is hard to determine or quantify. In short, why ask a narrow, hard to determine question (the effect of a mental illness on a crime), when a broader, somewhat easier to answer question (whether a person suffered from a certain mental

\textsuperscript{193} See DSM-IV-TR, \textit{supra} note 66, at 297–98 (describing characteristics of psychotic conditions).

\textsuperscript{194} See \textit{supra} note 56 and accompanying text.
illness at the time of the crime) will yield largely the same results?

I believe the proposed rule for categorical prohibitions as well as a categorical ban on death sentences for those with psychotic conditions furthers the purposes of the Eighth Amendment. Nevertheless, given the current state of Eighth Amendment jurisprudence, the proposed rule may raise as many questions as it answers. The next section will discuss some of the difficulties presented by the proposed rule.

D. Weaknesses and Objections to Proposed Categorical Prohibitions Test

I see two principal objections to my proposed test for categorical prohibitions. The first objection is jurisprudential, and the second is practical.

First, the test is in some respects inconsistent with the Supreme Court's Eighth Amendment jurisprudence concerning future dangerousness. Recall that the proposed test would exempt certain classes of offenders because of the substantial risk that jurors would privilege their assessments of future dangerousness over their assessments of an offender's deserts. In short, the test imposes a categorical prohibition to ensure that the jury's life-or-death determination is not based principally on future dangerousness.

The problem, of course, is that the Supreme Court has specifically and repeatedly affirmed the legitimacy of future dangerousness as a relevant sentencing factor—in fact, even as a principal sentencing factor. From *Jurek v. Texas* to *Barefoot v. Estelle* to *Simmons v. South Carolina* and its progeny, the Court consistently has refused to condemn jurors' consideration of future dangerousness. Given this, a critic might say a categorical prohibi-

195. Importantly, however, I do envision a role for the ABA Resolution. Persons may become seriously delusional or psychotic when suffering from major depression and other psychiatric conditions whose principal and defining features do not include psychosis. The categorical prohibition I propose would not exempt such persons from the death penalty, but they may nonetheless be insufficiently culpable to merit death. The ABA Resolution, if adopted by jurisdictions, would serve as a valuable stop gap for the kinds of cases that categorical prohibitions do not embrace.

tions test focused on preventing reliance on future dangerousness is inconsistent with this line of Supreme Court precedent. The proposed test may well be guilty of this charge: arguably, it is inconsistent with the cases approving serious consideration of future dangerousness.

Nevertheless, this potential inconsistency does not justify jettisoning the proposed test. In the first place, although the proposed test may be in tension with the line of cases approving future dangerousness, much of the rest of the Court’s Eighth Amendment jurisprudence also is in tension with the future dangerousness cases. The tortured history of the Texas capital punishment statute, which directly focuses on future dangerousness, illustrates the Court’s ambivalence about (and even disapproval of) the possibility that future dangerousness may overshadow deserts determinations. Furthermore, several of the justices have opined that retributive concerns—not utilitarian concerns—furnish the principal justification for the death penalty. Most importantly, the very idea that the Eighth Amendment imposes a deserts limitation on punishment is inconsistent with allowing future dangerousness a central place in jurors’ deliberations: that is, the Jurek-Barefoot line of cases is inconsistent with a deserts-limitation model of the Eighth Amendment.

Rather than jettisoning the proposed test, which is consistent with a deserts-limitation model of the Eighth Amendment, I would overhaul capital punishment jurisprudence by jettisoning the cases approving future dangerousness as a legitimate sentencing factor. Others have also proposed such an overhaul. In proposing various reforms to capital sentencing, Scott Howe has suggested that,

199. For a representative sample of cases interpreting TEX. CODE CRM. PROC. ANN. art. 37.071 (Vernon 2006 & Supp. 2009), see supra note 130.


201. See supra Part IV (describing deserts-limitation theory of the Eighth Amendment).
Rethinking Categorical Prohibitions

Statutory aggravating circumstances that focus only on utilitarian concerns should be prohibited. An aggravating circumstance focused on future danger not only fails to narrow the group of death-eligible defendants to the more deserving, but also may greatly increase the odds at the final stage of decision-making that capital sentencers will impose a death sentence on persons who do not deserve that sanction.

Regardless of whether a state continues to articulate statutory aggravating circumstances, prosecutors should generally not present capital sentencers with utilitarian evidence or arguments to justify death sentences.

The test I have proposed would be perfectly consistent with an Eighth Amendment reformed in the ways Howe envisions.

The second objection to the proposed test is far more practical: why so zealously ensure that the severely mentally ill, juveniles, and the mentally retarded are not subjected to a "tainted" sentencing hearing (tainted because a consideration of utilitarian factors almost is inevitable) while being so sanguine about other defendants? Is it not likely—if not a virtual certainty, based on the findings of the Capital Jury Project—that jurors in cases involving "normal" defendants also may privilege utilitarian considerations over deserts-based considerations? And if that is the case, is the problem not far greater simply than the test for categorical prohibitions? Might the problem be the death penalty period? Is there not always a risk that defendants undeserving of death will be sentenced to death based on jurors' fears about future dangerousness?

I am sympathetic to this objection. Even assuming capital jurisprudence is reformed to exclude consideration of future dangerousness in any capital case, the risk remains that utilitarian or other non-deserts-related factors may worm their way into jurors' considerations.


203. Such factors might include conscious or unconscious racism. In demonstrating this point, Alice Ristroph points to McCleskey v. Kemp, 481 U.S. 279 (1987), in which the Court rejected the notion that Georgia's death penalty scheme violated the Eighth Amendment by injecting an arbitrary factor into sentencing, even though the scheme had been found in the Baldus study to be
deliberations about "normal" defendants. As noted before, the evidence from the Capital Jury Project suggests that future dangerousness is one of the most important questions considered by jurors, even when the prosecution has not raised the issue and even when the state's statutory death penalty scheme does not address future dangerousness as an aggravating circumstance.

Again, though, this is no reason to reject the proposed test for categorical prohibitions. The risk that utilitarian factors may overshadow retributive factors is particularly acute in cases in which defendants have conditions subject to the double bind. In cases with more normal defendants, it may be possible to minimize (though perhaps not eliminate entirely) the influence of utilitarian considerations through limiting instructions, exclusion of evidence and of certain arguments, and perhaps "special question" verdicts. As explained in Part VI.C., these limitations are unlikely racially biased against African-Americans (or at least against those who killed Caucasians). See Ristroph, supra note 78, at 1336. Another way of saying "arbitrary factor" is to say "factor not legitimately related to deserts": apart, perhaps, from the most aggressively racist among us, most would agree that a person's race is not directly relevant to his culpability for a crime (although it is possible that one's experiences because of one's race might be relevant to culpability). Yet, as Ristroph observes, in capital sentencing "race seems to matter." Id. at 1329. This is her conclusion:

Thus, research on death sentencing indicates that deserts may serve as a "placeholder" for prejudice and bias. Of course, the substitution of deserts judgments for racial animus, xenophobia, or other bases of dislike almost certainly operates subconsciously most of the time. This subconscious substitution is one of the perverse consequences of the opacity of deserts. . . . Deserts thus serves as a vehicle to give legal effect and moral authority to our subconscious dislikes.

Id. at 1331 (internal citations omitted).

204. See supra note 187 and accompanying text.

205. For example, South Carolina's statute does not include future dangerousness as an aggravator (and did not at the time in question), yet the South Carolina jurors interviewed for the Capital Jury Project disclosed that future dangerousness was central to their deliberations. See Blume, Garvey & Johnson, supra note 186, at 404-08.

206. Scott Howe has proposed a set of reforms aimed to ensure jurors' decisions are based on deserts rather than on utilitarian factors. See Howe, supra note 142, at 476-79 (listing proposed reforms). Given what Ristroph describes as the "opacity of deserts" determinations, I have my doubts about whether Howe's proposed reforms would succeed, and the question becomes
to work in cases involving the double bind; given that, special prophylactic protections for certain categories of offenders is warranted.

VII. CONCLUSION

Contrary to what some might claim, the incoherence of the Supreme Court’s jurisprudence on categorical prohibitions is not a good or sufficient reason to eliminate such prohibitions altogether. Certain categories of offenders are generally less culpable than are “normal” offenders and, for a variety of reasons, are nonetheless likely to be sentenced to death despite their reduced culpability. Those with psychotic disorders constitute such a category, and sooner or later the Court will accept a petitioner’s invitation to consider whether the Eighth Amendment permits death sentences for those with such severe mental illnesses at the time of their crimes. When the Court does accept that invitation, it should use the opportunity not only to find a categorical exclusion for those suffering from psychotic disorders but also to rethink its test for categorical exclusions in light of deserts. Mentally ill offenders—indeed, all offenders—deserve at least that much.

what then: declare capital punishment unconstitutional because it cannot be administered in a way that ensures sentences are based solely on deserts? I do not have a good answer. However, a comprehensive overhaul and rethinking of the entire American death penalty system is beyond the scope of this Article.