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DEATH IS DIFFERENT NO LONGER: ABOLISHING THE INSANITY DEFENSE IS CRUEL AND UNUSUAL UNDER GRAHAM V. FLORIDA

Elizabeth Bennion*

INTRODUCTION

The attempted assassination of Congresswoman Gabrielle Giffords, which left six dead and fourteen wounded at the outset of 2011, thrust mental illness issues into the national spotlight.¹ The nation turned a momentary gaze on its severely mentally ill because a mentally imbalanced person had committed a horrific act that shocked, outraged, and saddened the public.² The fact that mental illness rarely acquires broad-based media attention except under similar circumstances can distort both popular conceptions of the issues and the laws legislatures pass in reaction to a public outcry.³ For example, when the mentally imbalanced John Hinckley was found not guilty by reason of insanity after his attempted assassination of then-President Ronald Reagan, legislatures in several states eliminated the insanity defense alto-

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3. Because of this trend in media coverage, it may seem to the public that the mentally ill are a rare and violent breed, but statistics show just the opposite. See DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf; Michael J. Fitzpatrick, The Arizona Tragedy and Mental Health Care, Nat’l Alliance on Mental Illness (NAMI), http://www.nami.org/Template.cfm?Section=press_room&template=/ContentManagement/ContentDisplay.cfm&ContentID=113184 (last visited July 1, 2011) (“The U.S. Surgeon General has reported that the likelihood of violence from people with mental illness is low. In fact, the overall contribution of mental disorders to the total level of violence in society is exceptionally small. Acts of violence are exceptional. They are a sign that something has gone terribly wrong, usually in the mental healthcare system.”) (internal quotation marks omitted)); Mental Illness: Facts and Numbers, NAMI, http://www.nami.org/template.cfm?Section=About_Mental_Illness&Template=/ContentManagement/ContentDisplay.cfm&ContentID=53155 (last visited July 1, 2011).
gether, while other lawmakers (including Congress) severely restricted the defense. Some of these changes are arguably unconstitutional, especially given the logic of a 2010 U.S. Supreme Court case: *Graham v. Florida.* This Article argues that, at minimum, the absolute abolishment of insanity as an independent defense is unconstitutionally cruel and unusual under *Graham*'s reasoning.

*Graham* did not address the mentally ill, but much of its reasoning is remarkably applicable to that population. Indeed, in some instances, the reasoning provided in *Graham* makes the severely mentally ill stronger candidates for special protections than the juveniles to whom protection was awarded. Justice Thomas foresaw such extensions of its reasoning when he decried in dissent: “‘Death is different’ no longer.” *Graham* held only that juveniles who have not been convicted of homicide must not be sentenced to life in prison without the possibility of parole. But Justice Thomas recognized that this broke new ground in Supreme Court jurisprudence; never before had a defined category of people been protected by constitutional rule from a specific punishment other than death. Justice Thomas stated that “[t]he Court now claims not only the power categorically to reserve the ‘most severe punishment’ for those the Court thinks are ‘the most deserving of execution,’ but also to declare that ‘less culpable’ persons are categorically exempt from the ‘second most severe penalty.’” Joined only by Justice Scalia in this part of his dissent, Justice Thomas further objected that “[n]o reliable limiting principle remains to prevent the Court from immunizing any class of offenders from the law’s third, fourth, fifth, or fiftieth most severe penalties as well.”

While this Article argues that Justice Thomas is mistaken in his conclusion that there are no limiting principles to the types of classes that may be protected and the severity of penalties that may be imposed under *Graham,* it also argues that he is correct that the case’s reasoning logically leads to constitutional protection of another group: those

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5. *Id.*
7. *Id.* at 2046 (Thomas, J., dissenting).
8. *Id.* at 2034 (majority opinion).
9. *Id.* at 2046 (Thomas, J., dissenting) (citation omitted) (quoting *Roper v. Simmons,* 543 U.S. 551, 568 (2005)).
10. Justice Alito also dissented in a separate opinion but joined Parts I and III of Justice Thomas's dissent. *Id.* at 2043, 2058.
11. *Id.* at 2046 (Thomas, J., dissenting).
suffering from severe mental illness. Part II examines the historical development of the Cruel and Unusual Punishment Clause jurisprudence, highlighting the battles within the Court that led to the Justices' positions in *Graham* as well as noting relevant references to mental illness. Part III presents an in-depth analysis of the principles and rules arising out of *Graham* and how the case has changed the playing field. Part IV applies the rules and principles derived from *Graham* to show why the case logically requires the conclusion that abolition of insanity defenses is unconstitutionally cruel and unusual. It also briefly examines which states have abolished the defense and why the reasoning of their supreme court opinions cannot withstand a *Graham* analysis.

II. **CRUEL AND UNUSUAL PUNISHMENT BEFORE **

*Graham v. Florida*

*Graham* broke new ground. Its significance is best understood in context of the historical tensions in Eighth Amendment jurisprudence that existed before Justice Kennedy wrote the five-Justice majority opinion in that case. This Part examines that history while also highlighting references to mental illness within the cases preceding *Graham*. Fascinatingly, even when mental illness is in no way related to the facts of a case, it is often brought up in passages discussing the proper reach of constitutional protections. As Part IV discusses, the reason for this seemingly irrelevant inclusion of mental illness discussions in cases where no defendant suffered from such an affliction is that prosecution of the severely mentally ill goes to the heart of questions central to determining what constitutes cruel and unusual punishment—questions regarding levels of accountability and proper purposes of punishment. These are questions that legal scholars have grappled with for centuries, often turning to varying examples of

12. See infra notes 15–165 and accompanying text.
13. See infra notes 166–236 and accompanying text.
14. See infra notes 237–368 and accompanying text.
15. Chief Justice Roberts concurred in the judgment but did not join in Justice Kennedy's opinion, technically making *Graham* a 6–3 decision. *Graham*, 130 S. Ct. at 2017, 2036. The concurrence is based on dramatically different reasoning. Although Chief Justice Roberts agreed that it would be cruel and unusual punishment to sentence the juvenile in *Graham* to life-without-parole, he did so on the basis of a specific analysis of the facts and circumstances, and did not support the idea of a categorical protection of juveniles from that sentence. See *id.* at 2041 (Roberts, C.J., concurring).
17. See infra notes 237–368 and accompanying text.
mental illness to demonstrate where proper boundaries should be drawn.

A. Noncapital Eighth Amendment Cases Before the Birth of the "Death Is Different" Doctrine

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."18 Before Graham, when cases challenged a sentence as cruel and unusual, the Supreme Court struggled over whether, and to what extent, a proportionality principle should apply.19 The nation’s highest court first employed a proportionality principle in the early twentieth century.20 In Weems v. United States, the appellant had been convicted of falsifying a public document.21 His sentence included 15 years of "hard and painful labor" in chains at the ankle and wrist both night and day, as well as the permanent loss of certain civil rights.22 In that case, the Supreme Court rejected the argument that the "cruel and unusual" prohibition only applied to such punishments as being disemboweled, burned alive, or ones that "involve torture or a lingering death."23 Although the Court noted that the Eighth Amendment may refer to "something inhuman and barbarous,"24 such as torture, it also approvingly cited language stating that the phrase prohibits "all punishments which by their excessive length

18. U.S. Const. amend. VIII.
20. Earlier cases had suggested that such a principle should be employed. See, e.g., Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878) ("[I]t is safe to affirm that punishments of torture,... and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." (emphasis added)); O’Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting).
21. Weems v. United States, 217 U.S. 349, 362-63 (1910). "Weems is a landmark case because it represents the first time that the Court invalidated a penalty prescribed by a legislature for a particular offense. The Court made it plain beyond any reasonable doubt that excessive punishments were as objectionable as those that were inherently cruel." Furman v. Georgia, 408 U.S. 238, 325 (1972) (Marshall, J., concurring). An earlier case, Howard v. Fleming, seemed also to employ a proportionality analysis in considering the nature of the crime as compared to the punishment, but it upheld the ten-year sentence for conspiracy to defraud. 191 U.S. 126, 135-36 (1903). Wilkerson v. Utah had also commented on the difficulty of defining the boundaries of cruel and unusual punishments, but asserted that "torture, ... and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." 99 U.S. at 135-36 (emphasis added).
23. Id. at 370-71.
24. Id. at 368.
or severity are greatly disproportioned to the offenses charged. . . . The whole inhibition is against that which is excessive either in the bail required or fine imposed, or punishment inflicted.”

The Court observed that “[t]he clause of the Constitution . . . may be . . . progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.” In examining a more proportionate sentence for a like crime, the Court stated that “[t]he purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal.”

These themes—inherently barbarous treatment, a proportionality principle, evolving concepts of humane justice, hope for reformation, and the purposes of punishment—would recur repeatedly in the Supreme Court’s Eighth Amendment cases with varying results. More than 50 years later, the Court reasserted the proportionality principle in another noncapital case. The Court held that the Eighth Amendment prohibited punishing an individual for the status of being an addict in Robinson v. California. However, the Court also clarified that the act of consuming illegal drugs could be criminalized. The dominant theory seemed to be that it was unconstitutional to punish the status of being an addict because that status is beyond an addict’s control.

As Justice Stewart explained:

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper . . . . A State might determine that the general health and welfare require that the victims of these . . . human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel

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25. Id. at 371 (quoting O’Neil, 144 U.S. at 339–40 (Field, J., dissenting)). The O’Neil majority did not reach the question of cruel and unusual punishment, but the dissent argued that there should be a proportionality principle that goes beyond outlawing such punishments “as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like, which are attended with acute pain and suffering.” O’Neil, 144 U.S. at 339 (Field, J., dissenting). The dissent argued that the prohibition against cruel and unusual punishments should prevent “all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.” Id. at 339–40.

27. Id. at 381.
28. See infra notes 29–236 and accompanying text.
30. Id.
31. See infra notes 32–38 and accompanying text.
and unusual punishment in violation of the Eighth and Fourteenth Amendments.\textsuperscript{32}

Justice Stewart further explained that drug addiction is "an illness which may be contracted innocently or involuntarily," and therefore, any imprisonment would be cruel and unusual: "Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold."\textsuperscript{33}

Interestingly, most Justices—whether concurring or dissenting in Robinson—reiterated the importance of control in their analyses. Justice Douglas, concurring, drew comparisons between drug addicts and the mentally ill. He quoted a nineteenth-century doctor: "Nothing can more strongly illustrate the popular ignorance respecting insanity than the proposition, equally objectionable in its humanity and its logic, that the insane should be punished for criminal acts, in order to deter other insane persons from doing the same thing."\textsuperscript{34} The implication being that there can be no deterrence where there is no control. Justice Douglas admitted, "[W]e have our differences over the legal definition of insanity. But however insanity is defined, it is in end effect treated as a disease. While afflicted people may be confined either for treatment or for the protection of society, they are not branded as criminals."\textsuperscript{35}

Likewise, Justice Clark emphasized the importance of control in his dissent when he stated, "There was no suggestion that the term 'narcotic addict' as here used included a person who acted without volition or who had lost the power of self-control."\textsuperscript{36} Justice White's dissent did the same, stating, "If appellant's conviction rested upon sheer status, condition or illness or if he was convicted for being an addict who had lost his power of self-control, I would have other thoughts about this case."\textsuperscript{37} Justice Harlan alone was unclear whether lack of control ought to play a role in the analysis. He concluded that the statute at issue was unconstitutional in that it "authorize[d] crimi-

\textsuperscript{32} Robinson, 370 U.S. at 666 (emphasis added).
\textsuperscript{33} Id. at 667.
\textsuperscript{34} Id. at 668 (Douglas, J., concurring) (quoting ISAAC RAY, TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 56 (5th ed. 1871)).
\textsuperscript{35} Id. at 668–69. Justice Douglas further stated, "If addicts can be punished for their addiction, then the insane can also be punished for their insanity. Each has a disease and each must be treated as a sick person." Id. at 674 (emphasis added). "We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action." Id. at 678.
\textsuperscript{36} Id. at 680 (Clark, J., dissenting).
\textsuperscript{37} Id. at 685 (White, J., dissenting).
nal punishment for a bare desire to commit a criminal act” without any accompanying illegal act.\textsuperscript{38}

Some have argued that the Court soon backed away from this control emphasis in \textit{Powell v. Texas}.\textsuperscript{39} That retreat, however, was largely illusory. A careful analysis of the one-Justice concurrence and the four-Justice dissent in \textit{Powell} reveals that, even though the three-Justice lead opinion (and a concurrence by two of the same Justices who joined the lead opinion) dismissed the idea of capacity to control one’s actions as playing a role in the analysis, a majority of the Justices did not do so. Because the lead opinion decided the case’s outcome, some have overemphasized its reasoning, failing to note that the dissent’s reasoning (combined with a concurrence) actually held a majority in declaring that the uncontrollable consequences of a disease cannot be punished.

\textit{Powell} involved a law that outlawed public drunkenness.\textsuperscript{40} The majority decided that such a law was not an unconstitutional punishment of alcohol addiction in violation of \textit{Robinson}.\textsuperscript{41} The dissent insisted that \textit{Robinson} included a principle that “[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change.”\textsuperscript{42} As discussed above, \textit{Robinson} dwelt on the concept of self-control, its relation to accountability, and the purposes of punishment. The lead opinion in \textit{Powell} rejected any capacity-based analysis and adopted another principle from \textit{Robinson}: “penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing . . . .”\textsuperscript{43}

Despite disavowing any relevance self-control had to the analysis, the lead opinion spent a remarkable amount of space arguing that there was insufficient evidence to conclude that chronic alcoholics truly lack free will in their actions.\textsuperscript{44} It was just after such a passage that the three-Justice lead opinion inserted dicta regarding insanity that would be relied upon by state supreme courts in upholding an abolishment of the insanity defense more than three decades later.\textsuperscript{45}

\textsuperscript{38} \textit{Robinson}, 370 U.S. at 679 (Harlan, J., concurring).
\textsuperscript{40} \textit{Powell v. Texas}, 392 U.S. 514, 517 (1968) (plurality opinion).
\textsuperscript{41} \textit{Id.} at 537.
\textsuperscript{42} \textit{Id.} at 567 (Fortas, J., dissenting).
\textsuperscript{43} \textit{Id.} at 533 (plurality opinion).
\textsuperscript{44} See, e.g., \textit{Id.} at 518–35.
\textsuperscript{45} The four state supreme courts that have upheld an abolishment of the insanity defense are Montana, Utah, Kansas, and Idaho. \textit{See infra} notes 353–68 and accompanying text.
And in any event this Court has never articulated a general constitutional doctrine of *mens rea*.

... The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. Yet, that task would seem to follow inexorably from an extension of *Robinson* to this case. If a person in the "condition" of being a chronic alcoholic cannot be criminally punished as a constitutional matter for being drunk in public, it would seem to follow that a person who contends that, in terms of one test, his unlawful act was the product of mental disease or mental defect, would state an issue of constitutional dimension with regard to his criminal responsibility had he been tried under some different and perhaps lesser standard, *e.g.*, the right-wrong test of *M'Naghten's Case*. [F]ormulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.46

The reasons that this dicta should not support a finding that abolishment of the insanity defense is constitutional are explored later in this

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46. *Powell*, 392 U.S. at 535–37 (plurality opinion) (citations omitted) (internal quotation marks omitted). Justice Harlan, who had joined the majority opinion, also joined Justice Black’s concurring opinion that stated:

- [A] form of the insanity defense would be made a constitutional requirement throughout the Nation, should the Court now hold it cruel and unusual to punish a person afflicted with any mental disease whenever his conduct was part of the pattern of his disease and occasioned by a compulsion symptomatic of the disease. Such a holding would appear to overrule *Leland v. Oregon*, 343 U.S. 790 (1952), where the majority opinion and the dissenting opinion in which I joined both stressed the indefensibility of imposing on the States any particular test of criminal responsibility.

- [T]he proposed new constitutional rule would be devastating, for constitutional questions would be raised by every state effort to regulate the admissibility of evidence relating to "disease" and "compulsion," and by every state attempt to explain these concepts in instructions to the jury.

*Ibid.* at 545–46 (Black, J., concurring) (emphases added) (footnote omitted) (citation omitted). Again, the language regarding insanity was dicta and not the majority view in *Powell*. Justice Black expressed no opinion as to whether it would be constitutional to abolish the insanity defense altogether. The implication of some of Justice Black’s reasoning—including the notion that moral blameworthiness should not be a constitutional requirement for criminal behavior—was certainly not supported by a majority of the Justices. See *id.* at 541, 544–45.
Article, but as an initial point, the lead opinion's reasoning regarding insanity did not carry a majority—despite carrying the day in terms of its conclusion regarding the constitutionality of the law at issue. Furthermore, the passage only argued for no mandated form of the insanity defense; it did not address whether states could abolish the defense altogether.

In Justice White's concurrence in Powell, he rejected the idea that self-control played no role in the constitutional analysis and the idea that it should simply be left to state experimentation with forms of mens rea. Justice White opined, "Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion." Justice White did, however, believe that an addict could control the place of his consumption—or that, at least in this case, there was nothing to suggest the defendant "could not have done his drinking in private." Therefore, Justice White agreed that this defendant's Eighth Amendment claim failed, but his entire analysis rested on a control theory.

The four-Justice dissent argued for reversal because the defendant was a chronic alcoholic who violated the law at issue not out of volition, "but under a compulsion symptomatic of [his] disease." The dissenting Justices found the case indistinguishable from Robinson because "in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid." Regardless of whether Mr. Powell had the capacity to control his actions in becoming drunk and appearing in public, it is significant that a five-Justice majority based their conclusions on whether volition was involved—seeing that issue as one of constitutional concern and not a mens rea issue best left to the states.

47. See infra notes 307–68 and accompanying text; see also State v. Herrera, 895 P.2d 359, 379 (Utah 1995) (Stewart, Associate C.J., dissenting) ("Not one of the cases cited deals with the right of the United States or of a state to abolish the defense of insanity.").
48. See Powell, 392 U.S. at 535–37 (plurality opinion).
49. See id. at 548–54 (White, J., concurring).
50. Id. at 548.
51. Id. at 553.
52. See id.
53. Id. at 568 (Fortas, J., dissenting).
54. Powell, 392 U.S. at 568.
B. Birth of the "Death Is Different" Doctrine and Related Insanity References

Not long after the dueling decisions of Robinson and Powell, and in the Supreme Court's first occasion to revisit the Cruel and Unusual Punishment Clause after Powell, the doctrine of "death is different" arose. It first made its appearance in Justice Stewart's concurring opinion in Furman v. Georgia.55 This case's 5-4 per curiam opinion effectively halted capital punishment in the United States for a brief period of years.56 Justice Stewart's concurrence stated:

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.57

Using this idea that death is uniquely set apart from all other types of punishment, the Supreme Court later required certain procedural safeguards58 and exempted several categories of people from the death penalty's reach.59 Some of these categories dealt with the severity of the crime committed,60 but more relevant to the current analysis are those cases that made distinctions based only on the qualities of

56. The approximately four-year moratorium came to an end with the decision in Gregg v. Georgia, 428 U.S. 153 (1976) (holding that the punishment of death for the crime of murder does not always violate the Eighth and Fourteenth Amendments).
57. Furman, 408 U.S. at 306 (Stewart, J., concurring). The reasoning among those concurring with the per curiam judgment varied widely, and only Justices Marshall and Brennan believed the death penalty was an unconstitutional violation of the Eighth Amendment in all cases. Id. at 305-06 (Brennan, J., concurring), 358-59 (Marshall, J., concurring). In evaluating the cruelty of the death penalty, Justice Brennan noted that "the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon." Id. at 288-89 (Brennan, J., concurring) (quoting Solesbee v. Balkcom, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting)). Justice Marshall also pointed to the costly process of detecting and curing insanity in order to execute convicts because of the "formally established policy of not executing insane persons." Id. at 358 (Marshall, J., concurring).
58. See, e.g., Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (requiring that a sentencer be empowered to take into account all mitigating circumstances); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (prohibiting the death penalty as the mandatory punishment for any crime).
60. See, e.g., Kennedy v. Louisiana, 554 U.S. 407, 437 (2008) ("As it relates to crimes against individuals, ... the death penalty should not be expanded to instances where the victim's life was not taken."); Enmund v. Florida, 458 U.S. 782, 801 (1982) (prohibiting the death penalty for felony murder absent a showing that the defendant possessed a sufficiently culpable state of mind); Coker v. Georgia, 433 U.S. 584, 592 (1977) (prohibiting capital punishment for rape of an adult woman).
the people facing the punishment. The death penalty cannot presently be imposed as a punishment on those who committed their crimes (whatever they may be) before age 18,\(^61\) nor on those who are mentally retarded as clinically defined in *Atkins v. Virginia*.*\(^62\)* Furthermore, although sentenced to death, a person may not be executed while insane.*\(^63\)

The first case introducing categorical exclusions based on the qualities of the defendant was *Ford v. Wainwright*. The case involved a defendant who did not claim to have been insane at the time he committed his crime, nor at the time of his trial.*\(^64\)* The Court considered only the narrow question of whether people may be executed while they are insane and, if not, what procedural rights attached in the determination of insanity.*\(^65\)* Relying heavily on the fact that "[f]or centuries no jurisdiction has countenanced the execution of the insane,"*\(^66\)* the Court held that the Eighth Amendment would be violated by such an execution.*\(^67\)* The Court not only found that centuries of consensus in Anglo-American law on this point provided an originalist argument that the founding fathers would have meant to include this prohibition within the meaning of "cruel and unusual" treatment, but also acknowledged that it may look to modern national values with respect to the practice.*\(^68\)* As evidence of these "impressive historical credentials,"*\(^69\)* the majority opinion quoted Sir William Blackstone, an eighteenth-century British scholar studied by multiple American founding fathers:*\(^70\)

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

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63. See *Ford*, 477 U.S. at 410 (plurality opinion).
64. *Id.* at 401–02.
65. See *id.* at 410.
66. *Id.* at 401.
67. *Id.* at 408–10.
68. *Id.* at 405–06.
judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.\textsuperscript{71}

The opinion also quotes Sir Edward Coke, who had earlier expressed similar views regarding English common law. He wrote that punishment is meant as an example to society “but so it is not when a mad man is executed, but should be a miserable spectacle, both against Law, and of extre[me] inhumanity and cruelty, and can be no example to others.”\textsuperscript{72}

The majority of Justices agreed that although there was consensus against the practice of executing people while insane, there was variation in the reasoning behind the prohibition,\textsuperscript{73} including society’s concept of humanity; the lack of deterrence value; the questionable retributive value of executing people who lack comprehension of why society is punishing them; and the natural abhorrence of executing people who are unable to prepare themselves mentally and spiritually for death.\textsuperscript{74} “Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.”\textsuperscript{75}

The other two cases involving categorical, characteristics-based prohibitions were all the more remarkable in that they overturned recent Supreme Court precedent. On the same day in 1989, the Supreme Court handed down two opinions regarding the death penalty: \textit{Stanford v. Kentucky}\textsuperscript{76} (which allowed the death penalty for 16- and 17-year-olds) and \textit{Penry v. Lynaugh}\textsuperscript{77} (which allowed the death penalty for the mentally retarded). Thirteen years later, \textit{Atkins v. Virginia} overturned \textit{Penry} based on a “death is different” analysis.\textsuperscript{78} Three years after \textit{Atkins}, \textit{Roper v. Simmons} overturned \textit{Stanford}.\textsuperscript{79}

In justifying the sea change \textit{Atkins} represented, Justice Stevens, delivering the 6–3 opinion of the Court, explained:

\begin{itemize}
  \item \textit{Ford}, 477 U.S. at 406–07 (plurality opinion) (alteration in original) (quoting 4 \textsc{William Blackstone}, \textit{Commentaries on the Laws of England} 24–25 (1769)).
  \item Id. at 407 (quoting 3 \textsc{Edward Coke}, \textit{Institutes} 6 (6th ed. 1680)).
  \item See id. at 407–10.
  \item Id. at 407–09.
  \item Id. at 410.
  \item See \textit{Atkins}, 536 U.S. at 318–21.
  \item See \textit{Roper}, 543 U.S. at 578.
\end{itemize}
Those mentally retarded persons who meet the law’s requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants. Presumably for these reasons, in the 13 years since we decided Penry v. Lynaugh, the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case: whether such executions are “cruel and unusual punishments” prohibited by the Eighth Amendment to the Federal Constitution.\textsuperscript{80}

The implication of Justice Stevens’s opening words was that the reversal was justified at least in part by a shift in the national consensus. While even Justice Scalia’s scathing dissent (joined by Chief Justice Rehnquist and Justice Thomas) would not disagree that a true shift in national consensus would justify expansion of the cruel and unusual prohibitions,\textsuperscript{81} the Justices vehemently disagreed on whether an actual shift had occurred.

Both sides relied on the same numbers: 18 states had recently passed legislation barring execution of the mentally retarded;\textsuperscript{82} 20 states allowed sentencing judges or juries to decide whether execution was warranted;\textsuperscript{83} and 12 states barred capital punishment altogether.\textsuperscript{84} Thus, it was true that a 30-state majority did not allow execution of the mentally retarded. But Justice Scalia emphasized that only 47\% of the 38 states that permitted capital punishment barred execution of the mentally retarded.\textsuperscript{85} This seemed a strained way to interpret the statistics because clearly the states opposed to capital punishment altogether were also opposed to capital punishment of the mentally retarded.

Nevertheless, the majority also seemed uncomfortable relying on a 30-state majority alone to find national consensus.\textsuperscript{86} They therefore drew from several other sources for determining a consensus, includ-

\textsuperscript{80.} Atkins, 536 U.S. at 306–07 (citation omitted).
\textsuperscript{81.} See id. at 339–40 (Scalia, J., dissenting).
\textsuperscript{82.} See id. at 314–16 (majority opinion), 322 (Rehnquist, C.J., dissenting), 342 (Scalia, J., dissenting).
\textsuperscript{83.} See id. at 322 (Rehnquist, C.J., dissenting).
\textsuperscript{84.} See id. at 314–15 (majority opinion), 342 (Scalia, J., dissenting).
\textsuperscript{85.} Id. at 342 (Scalia, J., dissenting).
\textsuperscript{86.} See Atkins, 536 U.S. at 315 (majority opinion) (“It is not so much the number of these States that is significant, but the consistency of the direction of change.”).
ing "the consistency of the direction of change" among legislatures; the fact that this movement happened despite anticrime legislation being far more popular than legislation protecting those who commit violent crimes; the "overwhelming[ ]" votes among state legislatures in favor of prohibition; the uncommon practice of actually executing the mentally retarded even in those states that allowed it; the positions taken by medical, religious, and international groups; and nationwide polls of American citizens.

Justice Scalia and his fellow dissenters objected to going so far beyond the "statutes passed by society's elected representatives" in searching for national consensus. Indeed, Atkins was a dramatic departure from precedent in that respect. Even the majority acknowledged that "evolving standards should be informed by objective factors to the maximum possible extent" and that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." The bolstering of the national-consensus argument with other factors beyond legislation seemed to indicate the majority's discomfort with equating national consensus with a bare majority consensus among states.

While the dissent was unhappy with these forays into new territory in finding national consensus, it was even more disturbed by the majority's conclusion, drawn from Coker v. Georgia, "that the objective evidence, though of great importance, did not 'wholly determine' the controversy, 'for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'" While the dissent viewed this as free license to dictate the law according to personal biases, the majority seemed to view this as an important constitutional check on mass opinion. In this independent analysis, the Court found two reasons to support the perceived shift in national consensus. First, the Court questioned whether either of the two recognized penal purposes of the death penalty—retribution and deter-

87. Id.
88. Id. at 315–16.
89. Id. at 316.
90. Id.
91. Id. at 316 n.21.
93. Id. at 312 (majority opinion) (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).
94. Id. (internal quotation marks omitted).
95. Id. (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977)).
96. Id. at 348–49 (Scalia, J., dissenting).
97. Id. at 321 (majority opinion).
DEATH IS DIFFERENT NO LONGER

rence—applied to the mentally retarded. These individuals' diminished culpability undermined retributive goals, and the impairments that resulted in this reduced culpability also made it less likely that the threat of capital punishment would deter them from crimes.

Second, those same qualities interfered with their ability to assist in their own defense, thus increasing the likelihood of wrongful executions. The Court seemed careful to tie its independent findings to the national consensus, stating, "Our independent evaluation of the issue reveals no reason to disagree with the judgment of the legislatures that have recently addressed the matter and concluded that death is not a suitable punishment for a mentally retarded criminal."

Justice Scalia made an interesting criticism of the majority's unwillingness to leave the matter of execution of the mentally retarded in the hands of judges and juries. He said the majority position contradicts the immemorial belief, here and in England, that judges and juries play an indispensable role in such matters: "It is very difficult to define the indivisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes . . . ."

This is a clear endorsement of the position that insanity determinations should be a jury question. At the end of his dissent, Justice Scalia reiterated that

[n]othing has changed the accuracy of Matthew Hale's endorsement of the common law's traditional method for taking account of guilt-reducing factors, written over three centuries ago: "[Determination of a person's incapacity] is a matter of great difficulty, partly from the easiness of counterfeiting this disability . . . and partly from the variety of the degrees of this infirmity, whereof some are sufficient, and some are insufficient to excuse persons in capital offenses. . . . "Yet the law of England hath afforded the best method of trial, that is possible, of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony

99. Id. at 320 ("[T]he same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—. . . also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.").
100. Id. at 320–21.
101. Id. at 321 (internal quotation marks omitted).
102. Id. at 349 (Scalia, J., dissenting) (alterations in original) (quoting 1 Matthew Hale, Pleas of the Crown 30 (1st Am. ed. 1847)).
of witnesses . . . , and by the inspection and direction of the judge."\textsuperscript{103}

This quote goes even further in acknowledging that the worst forms of insanity will excuse even otherwise capital offenses.

Three Terms after \textit{Atkins} was decided, the Supreme Court had the opportunity to reconsider whether the oldest juveniles could be executed. In 1988, a plurality of the Court determined that evolving standards of decency prohibited the execution of offenders under age 16 at the time of their crime.\textsuperscript{104} But the following year, the Court held in a 5–4 decision that the Eighth Amendment did not prohibit the execution of juveniles aged 16 and 17.\textsuperscript{105} In the latter case, \textit{Stanford v. Kentucky}, the Court rejected the idea that any national consensus had developed against the practice, noting that 15 of the 37 death-penalty-allowing states prohibited the punishment for 16-year-olds and 12 states prohibited it for 17-year-olds.\textsuperscript{106} Three Justices joined Justice Scalia in adamantly rejecting any suggestion that the Court should exercise independent judgment as to whether juvenile executions were cruel and unusual.\textsuperscript{107}

Only 15 years had passed since that decision when \textit{Roper v. Simmons} came before the Court, and not much had changed in the national legislative picture regarding juvenile death penalties.\textsuperscript{108} However, there had been significant changes in the boundaries of the Court’s Eighth Amendment jurisprudence in those intervening years, and \textit{Roper} would further expand those boundaries.

Relying on the much-loosened standards for establishing national consensus that had been introduced in \textit{Atkins}, \textit{Roper} loosened those standards further still. The majority opinion correctly highlighted some significant similarities in the numbers. In both \textit{Atkins} and \textit{Roper}, 30 states prohibited the death penalty for the relevant population.\textsuperscript{109} Of those 30 states, 12 rejected the death penalty altogether and 18 generally allowed a death penalty but excluded the relevant population from its reach by either express legislation or judicial interpretation.\textsuperscript{110} In both cases only a small number of states had actually executed offenders in the respective classes in the recent past—6 states had executed juveniles in the 16 years since \textit{Stanford}, and 5

\begin{itemize}
\item \textsuperscript{103} \textit{Id.} at 354 (alterations in original) (quoting \textit{Hale}, \textit{supra} note 102, at 32–33).
\item \textsuperscript{104} See Thompson v. Oklahoma, 487 U.S. 815, 832, 838 (1988) (plurality opinion).
\item \textsuperscript{106} See \textit{id.} at 370–71.
\item \textsuperscript{107} See \textit{id.} at 377–78.
\item \textsuperscript{109} \textit{Id.} at 564 (majority opinion) (comparing the relevant numbers to \textit{Atkins}).
\item \textsuperscript{110} \textit{Id.}
states had executed mentally retarded individuals in the 13 years prior to Atkins.\footnote{111} But the similarities ended there. Atkins had actually downplayed the numbers issue (presumably because so many state legislatures had laws on the books contradicting the "national consensus") by pointing to the astounding pace and consistency of legislation—16 states had banned execution of the mentally retarded in the 13 years prior to that decision, and there was "virtually no countervailing evidence of affirmative legislative support for this practice."\footnote{112} By contrast, in Roper only 5 states that previously permitted juvenile capital punishment had reversed course,\footnote{113} and 2 states had reaffirmed their support of the practice by enacting statutes that allowed 16-year-olds to face the possibility of execution.\footnote{114} At least 7 states had statutes explicitly allowing capital punishment for 16- and 17-year-olds, and 5 of the 7 had juveniles on death row.\footnote{115} When the Court heard Roper, there were over 70 juveniles on death row in 12 states.\footnote{116} Thus, there were considerable differences in the momentum and direction of change between the cases—differences that Atkins had highlighted and relied on to justify national consensus and that Roper downplayed to achieve the same result.\footnote{117} The majority in Roper made the strong point that the difference in pace of state reversals might simply be due to the fact that society broadly recognized "the inappropriateness of the death penalty for juveniles . . . sooner than it was recognized for the mentally retarded" and that "[i]t would be the ultimate in irony" if this were to become a reason for continuing the execution of juveniles while protecting the mentally retarded from such a fate.\footnote{118} However, it could not and did not attempt to account for the differences regarding affirmative legislative acts by certain states regarding juvenile executions. The fact

\footnotesize{111. Id. at 595 (O'Connor, J., dissenting).
112. Id. at 595–97.
113. Four of these states implemented new legislation banning the death penalty for all juveniles, and one reached the same result through judicial interpretation. Id. at 565 (majority opinion). The federal government implemented similar legislative bans in the same era. Id. at 597 (O'Connor, J., dissenting).
114. Roper, 543 U.S. at 596.
115. Id. at 595–96.
116. Id. at 596.
117. Compare Atkins v. Virginia, 536 U.S. 304, 315 (2002) ("It is not so much the number of these States that is significant, but the consistency of the direction of change."), with Roper, 543 U.S. at 566 ("Any difference between this case and Atkins with respect to the pace of abolition is thus counterbalanced by the consistent direction of the change.").
118. Roper, 543 U.S. at 567 (quoting State ex rel. Simmons v. Roper, 112 S.W.3d 397, 408 n.10 (Mo. 2003)).}
was that both Atkins and Roper involved numeric analyses that seemed to leave the Justices somewhat uncomfortable because the requirements of national consensus were straying so far from any semblance of near unanimity among the nation’s legislatures. Justice O’Connor’s dissent in Roper acutely observed that the only rational explanation for the outcome in both Atkins and Roper was that something else was tipping the scales: the independent judgment of the Court as to what the Constitution required.119

Justice O’Connor’s dissent was particularly interesting in that she switched sides from Atkins to Roper. She supported finding the death penalty as cruel and unusual for the mentally retarded, but did not support the same finding for capital punishment of the oldest juvenile offenders. Although she objected to the weaker evidence of national consensus in Roper as giving “reason for pause,”120 she believed neither case’s punishment could have qualified as cruel and unusual without the majority’s independent constitutional analysis of moral proportionality121—which includes “the notion that the magnitude of the punishment imposed must be related to the degree of the harm inflicted on the victim, as well as to the degree of the defendant’s blameworthiness.”122 This independent analysis, according to Justice O’Connor, was not simply “a rubber stamp on the tally of legislative and jury actions. Rather, it is an integral part of the Eighth Amendment inquiry—and one that is entitled to independent weight in reaching [the Court’s] ultimate decision.”123

She did not, however, completely divorce the concepts of national consensus and independent judicial review in this dissent. She wrote that “the force of the proportionality argument in Atkins significantly bolstered the Court’s confidence that the objective evidence in that case did, in fact, herald the emergence of a genuine national consensus.”124 So although she was giving judicial analysis independent weight, this comment suggested that the judicial analysis, in her view, was to simply confirm otherwise shaky grounds for national consensus and could not be grounds for an Eighth Amendment violation completely divorced of some finding of national consensus. There was no need for her to make this distinction more explicit, however, for in

119. See id. at 597 (O’Connor, J., dissenting).
120. Id. Justice O’Connor believed that there was no “genuine national consensus” in Roper. Id. at 604.
121. See id. at 597.
122. Id. at 590 (quoting Enmund v. Florida, 458 U.S. 782, 815 (1982) (O’Connor, J., dissenting)).
123. Id. at 597.
124. Roper, 543 U.S. at 598.
Roper she differed with the majority both on grounds of national consensus and moral proportionality.125

In the majority’s moral proportionality analysis, the Court in Roper found juveniles to be less culpable than adult offenders and therefore less deserving of the death penalty on three grounds.126 First, the Court reasoned that “as any parent knows and as the scientific and sociological studies . . . tend to confirm,”127 youth are generally less mature and responsible than adults, “often result[ing] in impetuous and ill-considered actions and decisions.”128 The Court emphasized that such behavior is “more understandable among the young.”129 Second, the young “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” partly due to “have[ing] less control, or less experience with control, over their own environment.”130 Third, “the character of a juvenile is not as well formed as that of an adult. [Their] personality traits . . . are more transitory, less fixed.”131 Juveniles who commit crimes are thus less likely than adults to have an “irretrievably depraved character.”132

All these factors led the Court to conclude that a juvenile’s bad acts are “not as morally reprehensible” as the same acts by adults.133 The Court gave great weight in this analysis to the fact that juveniles have a greater possibility of reformation than adults because the impetuous, reckless inclinations of youth often subside in later years.134

The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth . . . , even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.135

In their dissents, both Justice O’Connor and Justice Scalia differed from the majority on this point; both thought the question of capital punishment for the oldest juveniles should be properly left with legis-
latures, then with juries on a case-by-case basis only if legislatures so authorize. Justice O'Connor's reasons for supporting the moral proportionality of barring capital punishment for the mentally retarded, but not supporting such a bar for juveniles aged 16 and 17, is relevant to the degree of culpability of the severely mentally ill. *Atkins* had cited several definitions of mental retardation, including one from the American Association of Mental Retardation. It stated:

_Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skills areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18._

This definition prompted Justice O'Connor to see the mentally retarded and 17-year-olds as being in classes that were both "qualitatively and materially different." The mentally retarded, she said, "are defined by precisely the characteristics which render death an excessive punishment. A mentally retarded person is, 'by definition,' one whose cognitive and behavioral capacities have been proved to fall below a certain minimum." These characteristics make it "highly unlikely" that such an individual would be "culpable enough to deserve the death penalty or that he could have been deterred by the threat of death." Thus, both of the primary penological goals relevant to the death penalty—retribution and deterrence—fail to be sufficient justifications for an execution.

By contrast, while Justice O'Connor certainly agreed that juveniles are generally less mature and less culpable than adults, she did not think this "necessarily mean[t] that a 17-year-old murderer cannot be sufficiently culpable to merit the death penalty." Justice O'Connor conceded that there must be some "age below which no offender, no matter what his crime, can be deemed to have the cognitive or emotional maturity necessary to warrant the death penalty," but refused to draw that line "at the margins between adolescence and adulthood" where there can be such varying degrees of culpability and deterrent potential. The reasoning of both the majority and Justice

139. Id.
140. Id.
141. Id. at 599.
142. Id. at 600.
O'Connor's dissent in *Roper* support extending certain protections to the severely mentally ill.\textsuperscript{143}

But there were important hurdles that were left for *Graham* to cross—first and foremost, the death is different doctrine, which was alive and well in *Roper*. The majority opinion explicitly relied on that doctrine in its reasoning:

Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force. Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution."\textsuperscript{144}

Furthermore, in justifying the abolishment of the death penalty for juveniles, the opinion explicitly pointed to the deterrent effect of the then-still-possible life imprisonment without possibility of parole as "itself a severe sanction, in particular for a young person."\textsuperscript{145} *Roper* thus gave no indication that a majority of the Justices would soon be willing to cross the death barrier and address in a categorical fashion the second most severe sanction that courts impose.

C. The Question of Proportionality Outside the "Death Is Different" Doctrine

By the time *Graham* appeared before the Supreme Court, the scope of a proportionality analysis outside the context of death was unclear. In *Rummel v. Estelle*, the Court had held in a 5–4 opinion that a mandatory life sentence for a defendant under a Texas recidivist statute was not cruel and unusual.\textsuperscript{146} The defendant received his third conviction after obtaining $120.75 by false pretenses. His earlier crimes had been felonies for fraudulently spending $80 on a credit card and passing a forged check for $28.36.\textsuperscript{147} The opinion pointed out that "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."\textsuperscript{148} The Court attempted to "draw a 'bright line' between the punishment of death and the various other permutations and commutations of punishments short of that ultimate sanction."\textsuperscript{149} The Court was reluctant to enter the murkier waters of "constitutional
distinction[s] between one term of years and a shorter or longer term of years” and chose to leave such decisions to legislatures.

But only three years later, the Court reversed course with Solem v. Helm. That case involved a defendant who was facing life imprisonment—this time without possibility of parole—due to another recidivist statute. The defendant had passed a bad check for $100 and had six prior felony convictions of varying severities. In another 5-4 opinion, the Court reiterated that proportionality of punishment to crime is a “principle . . . deeply rooted and frequently repeated in common-law jurisprudence.” The Court held that the punishment was cruel and unusual but avoided actually overruling Rummel, distinguishing it because in Rummel parole had been potentially available after twelve years.

The Court swung back again in the opposite direction in another 5-4 opinion in Harmelin v. Michigan. There, the Court held that a mandatory life sentence without possibility of parole was not cruel and unusual for a defendant who was convicted of possessing more than 650 grams of cocaine, despite the defendant having no prior felony convictions. The Court again tried to limit proportionality review, this time even more forcefully than in Rummel. As Justice Scalia’s opinion stated, “Proportionality review is one of several respects in which we have held that ‘death is different,’ and have imposed protections that the Constitution nowhere else provides.” But Justice Kennedy’s concurrence would not allow for a total abolishment of proportionality from noncapital cases. Joined by two other Justices (and therefore most of the Justices on the prevailing side), he defended a “narrow proportionality principle” that applies to noncapital sentences. He said there was no need for “strict proportionality between crime and sentence,” but “extreme sentences that are ‘grossly disproportionate’ to the crime” were prohibited by the Eighth Amendment.

150. Id.
152. Id. at 279-82.
153. Id. at 279-81.
154. Id. at 284.
155. Id. at 284.
157. Id. at 961, 994-96.
158. Id. at 994 (emphasis added).
159. Id. at 996-98 (Kennedy, J., concurring).
160. Id. at 1001 (quoting Solem, 463 U.S. at 288).
The 5–4 opinions continued with *Ewing v. California*.161 The Court held that it was not cruel and unusual to sentence a defendant to twenty-five years to life for stealing three golf clubs under California’s three strikes law.162 Justice O’Connor delivered the judgment of the Court, which had a majority, but her opinion garnered the support of only three Justices. Her opinion explicitly adopted the reasoning of Justice Kennedy’s concurrence in *Harmelin*,163 acknowledging a “narrow proportionality principle” that “applies to noncapital sentences.”164 But the opinion also emphasized that “[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.”165

Thus, when *Graham* came before the Supreme Court, there was division among the Justices as to whether, and to what extent, a proportionality principle should apply outside the death is different doctrine. A careful analysis of the Justices’ positions—whether in the majority, concurrences, or dissents—shows that most thought a proportionality principle should apply to some extent, but there was great divergence on how narrow that review should be. No case outside the death is different context had ever used a proportionality analysis to exclude a specific population from a certain punishment based on the characteristics of that group.

### III. The New Cruel and Unusual Punishment Analysis from *Graham v. Florida*

#### A. The Changed Rules Under Graham

Argued at the end of 2009 and decided in 2010, *Graham* marks the beginning of a new chapter in Eighth Amendment jurisprudence. Justice Thomas, in his dissent, and legal scholars immediately recognized that the case crossed new boundaries and could potentially have application far beyond its own holding.166

Justice Kennedy delivered the judgment and opinion of the Court. The judgment had a majority of six votes, and his opinion a majority of five. The difference stemmed from Chief Justice Roberts’s view

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162. Id. at 30–31.
163. Id. at 23–24.
164. Id. at 20 (quoting *Harmelin*, 501 U.S. at 966–97 (Kennedy, J., concurring)).
165. Id. at 21 (alteration in original) (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)).
166. See *Graham v. Florida*, 130 S. Ct. 2011, 2057 (2010) (Thomas, J., dissenting); see also Smith & Cohen, supra note 19, at 86–87 (“*Graham* contains the ingredients to be of transformative significance to the Supreme Court’s Eighth Amendment jurisprudence. . . . [Graham] could have far greater significance in the life of the law than in the life of child defendants toiling, for instance, in the fields of the Florida Penitentiary.”).
that, while life-without-parole was cruel and unusual for this particular juvenile defendant, there should be no categorical rule emerging from the case. Justice Kennedy's opinion did create a categorical exclusion: people who commit nonhomicide crimes before turning age 18 may not receive a sentence of life-without-parole. They must have some meaningful opportunity of release, even though they may never actually achieve freedom. "The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society."168

Unlike some previous categorical exclusions that instantly removed certain inmates from death row, this holding could theoretically have no substantial effect on any inmate's prison sentence. Those juvenile offenders who have not killed and yet are facing life-without-parole in prison may never actually qualify for the "meaningful opportunities of parole" that must now be provided. What constitutes a "meaningful opportunity" and at what point it must be offered were left unclear. Furthermore, for juveniles who have committed homicide, this opinion has no effect whatsoever. It is the novelty of the reasoning and outcome, not the immediate consequence of the holding itself, that makes Graham a turning point in Eighth Amendment jurisprudence.

Most important among the new lines crossed by Graham was that "'bright line' between the punishment of death and the various other permutations and commutations of punishments short of that ultimate sanction."169 Graham is the first Supreme Court case to categorically exclude a population from a specific punishment other than death.170 Before Graham, categorical bans of this type had been premised on the fact that death is the severest of punishments—utterly irrevocable and unique in kind—and it should be reserved only for the worst of criminals.171 Thus, the lesser culpability of the mentally retarded172 or juveniles,173 as compared to other convicted criminals, could justify a categorical ban, but only because death was at stake. By breaking the death barrier, Graham opens the possibility of categorically protecting

168. Id. at 2030 (majority opinion).
171. See id. at 2046 (Thomas, J., dissenting) (explaining the standard for "categorical proportionality rulings" before Graham).
other “less culpable” populations from punishments beyond execution.\textsuperscript{174}

Rather than openly acknowledging its destruction of the death is different doctrine, the majority in \textit{Graham} endeavored to redefine lines of demarcation in Eighth Amendment jurisprudence as well as clarify previously established and surviving ones.\textsuperscript{175} Justice Kennedy still seemed to be searching for the lacking “unifying principles”\textsuperscript{176} he sought in an earlier case, where he had observed that “[t]he tension between general rules and case-specific circumstances has produced results not altogether satisfactory.”\textsuperscript{177}

Instead of explaining that the majority was reversing precedent in determining that categorical exceptions to a punishment were no longer limited to capital cases, Justice Kennedy simply stated that the previous cases using categorical rules to define Eighth Amendment standards had happened to involve the death penalty.\textsuperscript{178} “The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence.”\textsuperscript{179}

\textit{Graham} redefined Eighth Amendment proportionality jurisprudence not along the previous lines of capital versus noncapital cases, but categorical versus individual challenges to punishments. Before \textit{Graham}, some of the controversy among the Justices involved whether proportionality applied at all outside a death penalty case.\textsuperscript{180} It seemed that outside capital punishment cases the proportionality principle would survive, but on a very limited basis; there could only be individual case-by-case analyses of challenges to term-of-years sentences, and such challenges would very rarely succeed.\textsuperscript{181} However, \textit{Graham} clearly cemented the fact that not only does proportion-

\textsuperscript{174} While \textit{Robinson} also provided some precedent for such categorical protections, \textit{Robinson} is distinguishable from \textit{Graham} in key aspects. \textit{Robinson} did not protect a category of people (regardless of their crimes) from a specific penalty or range of penalties: \textit{Robinson} simply did not allow a state to criminalize the status of addiction. \textit{See Robinson v. California}, 370 U.S. 660, 667–68 (1962). \textit{Graham}, on the other hand, protects a specified population from a specific penalty regardless of the range of crimes for which they are convicted—so long as those crimes do not include homicide. \textit{See Graham}, 130 S. Ct. at 2034.

\textsuperscript{175} \textit{See Graham}, 130 S. Ct. at 2021–23.


\textsuperscript{177} \textit{Id}. at 436.

\textsuperscript{178} \textit{Graham}, 130 S. Ct. at 2022.

\textsuperscript{179} \textit{Id}.


\textsuperscript{181} \textit{See}, e.g., \textit{Ewing}, 538 U.S. at 21 (plurality opinion); \textit{Harmelin}, 501 U.S. at 996–1001 (Kennedy, J., concurring); \textit{Rummel v. Estelle}, 445 U.S. 263, 272 (1980).
ality apply outside the death penalty context, but also that such a challenge to a sentence can be successful on a categorical basis.

Justice Kennedy outlined two separate forms of analysis for individual versus categorical challenges to sentences.\textsuperscript{182} There has been criticism of \textit{Graham}'s divide between individual and categorical protection calling the distinction "more semantic than substantive"\textsuperscript{183} and questioning whether the "two different modes of analysis are necessary."\textsuperscript{184}

While this criticism is correct in that the distinction may not always affect a case's outcome, there are circumstances in which the consequences of the distinction could be substantial. This is because, unlike individual tests that require comparison of the details of a specific crime to a specific sentence to determine proportionality (and only if the sentence appears grossly disproportional does a court look to other people's sentences for the same type of crime), categorical tests do not require consideration of all the details of a particular crime in determining proportionality.\textsuperscript{185}

This is reasonable because when developing a categorical rule, the individual details of a specific crime (such as aggravating and mitigating factors) are not all relevant.\textsuperscript{186} For nature-of-offense categorical rules, the type of crime tends to only matter in broad terms;\textsuperscript{187} for nature-of-offender categorical rules, the type of crime may not matter at all—or may be described in extremely broad negative terms (as was the case in \textit{Graham}).\textsuperscript{188}

It logically follows that a convict who has committed a particularly horrific crime in terms of aggravating factors would probably fare better under a categorical than an individual analysis because the aggravating factors may become irrelevant. Conversely, a convict whose

\textsuperscript{182} See \textit{Graham}, 130 S. Ct. at 2021–22.
\textsuperscript{183} Smith & Cohen, supra note 19, at 90.
\textsuperscript{184} Id. at 91.
\textsuperscript{185} See \textit{Graham}, 130 S. Ct. at 2021–22.
\textsuperscript{186} See id. at 2022.
\textsuperscript{187} Examples of nature-of-offense categorical rules include \textit{Kennedy v. Louisiana}, 554 U.S. 407, 421 (2008) (prohibiting capital punishment for rape of a child); \textit{Enmund v. Florida}, 458 U.S. 782, 797 (1982) (prohibiting capital punishment for felony murder without proof of intent to kill); and \textit{Coker v. Georgia}, 433 U.S. 584, 598–660 (1977) (prohibiting capital punishment for rape). Some nature-of-offense categorical rules may be even more broad as to the type of crime committed; for example, \textit{Kennedy}'s rule that, "[a]s it relates to crimes against individuals, . . . the death penalty should not be expanded to instances where the victim's life was not taken." \textit{Kennedy}, 554 U.S. at 437.
crime has strong mitigating factors may fare better under an individ-
ual analysis that takes into account specific details surrounding the
crime.\textsuperscript{189}

For categorical challenges, \textit{Graham} outlined the following
approach:

The Court first considers objective indicia of society’s standards, as
expressed in legislative enactments and state practice to determine
whether there is a national consensus against the sentencing prac-
tice at issue. Next, guided by the standards elaborated by control-
ling precedents and by the Court’s own understanding and
interpretation of the Eighth Amendment’s text, history, meaning,
and purpose, the Court must determine in the exercise of its own
independent judgment whether the punishment in question violates
the Constitution.\textsuperscript{190}

These elements of analysis are familiar from previous cases apply-
ing a categorical proportionality challenge to death penalty cases.\textsuperscript{191}
It is in essence a two-step analysis involving (1) national consensus
and (2) the Court’s independent judgment. The Court’s analysis
seems to imply that one without the other cannot stand. In examining
how the Court applied these principles, however, there were surprises
beyond the breaking of the death barrier.

\textbf{B. Application of the New Rules to Graham with a Few Surprises}

\textit{1. National Consensus Versus the Court’s Independent Judgment}

The first surprise in \textit{Graham}’s application of law concerned national
consensus; \textit{Graham} represents the first Supreme Court case to find
national consensus when an actual minority of the fifty states’ legisla-
tion supported the judgment.\textsuperscript{192} At the time \textit{Graham} was heard,
thirty-seven states, the District of Columbia, and federal law all per-
mitted a life-without-parole sentence for juvenile, nonhomicide of-
fenders.\textsuperscript{193} The case did not reject previous precedent claiming that
the country’s legislatures’ enactments provide “[t]he clearest and most
reliable objective evidence of contemporary values.”\textsuperscript{194} But the ma-
majority, following the example of several previous cases, refused to be

\textsuperscript{189} Therefore, now that the death penalty no longer determines what type of analysis is
available, an interesting outcome of \textit{Graham} may be that litigants try to frame their Eighth
Amendment challenges as categorical or individual depending on which form of analysis they
think more likely to succeed.

\textsuperscript{190} \textit{Graham}, 130 S. Ct. at 2022 (citations omitted) (internal quotation marks omitted).

\textsuperscript{191} See, e.g., \textit{Kennedy}, 554 U.S. at 421; \textit{Roper}, 543 U.S. at 572; \textit{Atkins}, 536 U.S. at 321.

\textsuperscript{192} See \textit{Graham}, 130 S. Ct. at 2023.

\textsuperscript{193} \textit{Id}.

\textsuperscript{194} \textit{Id.} (quoting \textit{Atkins}, 536 U.S. at 312) (internal quotation marks omitted).
limited to that measure.\textsuperscript{195} It justified finding national consensus through "an examination of actual sentencing practices in jurisdictions where the sentence . . . is permitted by statute."\textsuperscript{196} The Court took into consideration that only 123 juveniles were then serving life-without-parole sentences for nonhomicide offenses in 11 jurisdictions.\textsuperscript{197}

Acknowledging the departure of this case from previous standards of national consensus "in terms of absolute numbers," the Court further justified its finding of national consensus by pointing out the relatively small proportion of life-without-parole sentences given to juveniles in comparison with the opportunities for its imposition.\textsuperscript{198} Graham's majority attempted no response to Justice Thomas's criticism that perhaps the fact "[t]hat a punishment is rarely imposed demonstrates nothing more than a general consensus that it should be just that—rarely imposed. It is not proof that the punishment is one the Nation abhors."\textsuperscript{199}

The second surprise in Graham was the assertion that national consensus is not always necessary to a successful proportionality challenge. Although there were also implications in Graham to the contrary,\textsuperscript{200} the majority stated, "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."\textsuperscript{201} In doing so, it suggested a scenario in which national consensus could be irrelevant to the Court's independent judgment. In fact, given the weak evidence of national consensus, Graham may be that very case.

Earlier cases seemed to subordinate the Court's independent judgment to the finding of national consensus. The Court's independent judgment had simply "bolstered the Court's confidence that the objective evidence in that case did, in fact, herald the emergence of a genuine national consensus."\textsuperscript{202} But Graham does the opposite—national consensus is an important but nondecisive factor within the Court's analysis. "Community consensus," the Court explained, "while entitled to great weight, is not itself determinative of whether a punishment is cruel and unusual. In accordance with constitutional design,

\textsuperscript{195} Id. at 2023--26; see also Roper, 543 U.S. at 564--67; Atkins, 536 U.S. at 315--16.
\textsuperscript{196} Graham, 130 S. Ct. at 2023.
\textsuperscript{197} Id. at 2015--16.
\textsuperscript{198} Id. at 2025.
\textsuperscript{199} Id. at 2051 (Thomas, J., dissenting).
\textsuperscript{200} See supra notes 190--91 and accompanying text.
\textsuperscript{201} Graham, 130 S. Ct. at 2028.
\textsuperscript{202} Roper v. Simmons, 543 U.S. 551, 598 (2005) (O'Connor, J., dissenting) (explaining her view of the Atkins majority, which she had joined).
the task of interpreting the Eighth Amendment remains our responsibility.” Still, the Court has never found a punishment cruel and unusual without also determining there was national consensus—even if on weak evidence.

2. The Factors in the Court’s Independent Judgment

In fulfilling its independent, interpretive role, the Court considered (1) “the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question” and (2) “whether the challenged sentencing practice serves legitimate penological goals.” The following discussion turns to Graham’s assessment of these factors.

a. Degrees of Culpability

Unsurprisingly, Graham relied on Roper to find that juveniles were less culpable for crimes than adults and on Kennedy v. Louisiana to establish less culpability for those who commit nonhomicide offenses. The Court explained, “[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.”

Graham accepted Roper’s three bases for diminished juvenile culpability without change: immaturity and irresponsibility; increased vulnerability to outside influences, such as peer pressure; and a character more likely to be reformed. Before Graham was decided, scholars argued over whether, and to what extent, the Court should consider the neuroscientific and psychological research presented by the defense attorneys. On this subject the Court stated:

No recent data provide reason to reconsider the Court’s observations in Roper about the nature of juveniles. As petitioner’s amici point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. Juveniles are more capa-

203. Graham, 130 S. Ct. at 2026 (citations omitted) (internal quotation marks omitted).
204. Id.
205. Id. at 2027; see also Kennedy v. Louisiana, 554 U.S. 407, 437 (2008) (“As it relates to crimes against individuals, ... the death penalty should not be expanded to instances where the victim’s life was not taken.”).
206. Graham, 130 S. Ct. at 2027.
207. Id. at 2026–27.
ble of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults.\textsuperscript{209}

Thus, the Court took a middle-of-the-road approach. The neuroscience and psychology arguments were deemed worthy of consideration.\textsuperscript{210} The Court considered that evidence but only relied on it insofar as to decide to confidently follow its own precedents on the subject.\textsuperscript{211}

b. The Severity of the Sentence

After finishing the moral proportionality analysis of culpability, the Court turned to the severity of the sentence. It concluded that outside the death penalty, life-without-parole is the severest sentence available to courts and is especially harsh for juveniles who face many more potential years in prison than significantly older inmates facing the same sentence.\textsuperscript{212} It also shares certain unique qualities with the death penalty in terms of the punishment’s rejection of any hope for the convict to reenter society.\textsuperscript{213}

c. The Valid Purposes of Punishment

Next, addressing the valid purposes for punishment—retribution, deterrence, incapacitation, and rehabilitation—the Court concluded that no penological theory was adequate to justify life-without-parole sentences for juvenile nonhomicide offenders.\textsuperscript{214} As discussed earlier, this holding alone could be sufficient to create a categorical ban of the punishment.\textsuperscript{215} The degree-of-culpability issue was a key factor in dismissing each penological justification for the sentence.

The Court rejected retribution because the right to condemn the crime and "seek restoration of . . . moral imbalance"\textsuperscript{216} could not outweigh "[t]he heart of the retribution rationale," which states that "a criminal sentence must be directly related to the . . . culpability of the criminal offender."\textsuperscript{217} The juvenile’s diminished culpability, as compared to adults, prevailed over the need "to express the community’s

\textsuperscript{209} Graham, 130 S. Ct. at 2026 (citations omitted) (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)).
\textsuperscript{210} See id.
\textsuperscript{211} See id.
\textsuperscript{212} Id. at 2027–28.
\textsuperscript{213} See id. at 2027–30.
\textsuperscript{214} Id. at 2028–30.
\textsuperscript{215} Graham, 130 S. Ct. at 2028 ("A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.").
\textsuperscript{216} Id.
\textsuperscript{217} Id. (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)).
... outrage or ... attempt to right the balance for the wrong to the victim.”218

Deterrence could not justify the sentence because “the same characteristics that render juveniles less culpable than adults suggest ... that juveniles will be less susceptible to deterrence.”219 “Even if the punishment has some connection to a valid penological goal, it must be shown that the punishment is not grossly disproportionate in light of the justification offered.”220 The Court concluded that “any limited deterrent effect” was outweighed by the “juvenile nonhomicide offenders’ diminished moral responsibility.”221

Incapacitation was likewise insufficient to justify a life-without-parole sentence. The Court admitted that recidivism poses a serious danger for society, but still found incapacitation inadequate to justify life-without-parole for juveniles who had not committed homicide.222 Although the Court did not explicitly say this was linked to a lack of culpability, it did explicitly link its finding to factors it had considered in determining juveniles are less culpable; namely, a juvenile’s capacity to change and the difficulty in determining which juveniles are irreparably corrupt and which are subject only to “transient immaturity.”223 The severe sentence at issue “improperly denies the juvenile offender a chance to demonstrate growth and maturity.”224 The Court seemed to acknowledge this penological purpose was the closest to being valid when it said, “Incapacitation cannot override all other considerations, lest the Eighth Amendment’s rule against disproportionate sentences be a nullity.”225

And finally, rehabilitation was irrelevant because a life-without-parole sentence allows for no goal to return the inmate to society. Furthermore, the implied judgment that such an inmate’s character is irredeemable “is not appropriate in light of a juvenile nonhomicide offender’s capacity for change and limited moral culpability. ... For juvenile offenders, who are most in need of and receptive to rehabilitation, the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.”226

218. Id. (quoting Roper v. Simmons, 543 U.S. 551, 571 (2005)).
219. Id. (alteration in original) (quoting Roper, 543 U.S. at 571).
220. Id.
221. Graham, 130 S. Ct. at 2028.
222. Id.
223. Id.
224. Id.
225. Id.
226. Id. at 2030 (citation omitted).
Thus, each penological goal was found to be invalid, with the core reason being that juveniles who have not committed homicide are generally less culpable than others who commit the same crimes. However, there was no claim that the same goals could be valid for a sentence less severe than life-without-parole, and at times the reasoning specifically relied on the unique nature of life-without-parole in never giving a juvenile the chance to reenter society.

Because the Court had earlier stated that a sentence is inherently disproportionate when there was no valid penological purpose,227 its rejection of each penological justification was on its own sufficient to uphold the judgment. But the Court did not say so explicitly. Instead, it said that its consideration of this factor, along with its consideration of the level of culpability and the severity of sentence, led to a conclusion that the punishment is cruel and unusual for juvenile nonhomicide offenders.228 Interestingly, there was no link at this point in the opinion back to national consensus. The Court’s independent judgment seemed to be sufficient to sustain the judgment.

3. When Categorical Rules Are Appropriate Rather than a Case-by-Case Analysis

In the following section of Graham, the Court expounded on the reasons a categorical rule in this case was justified, rather than taking a case-by-case analysis. This was a clear response to Chief Justice Roberts’s concurrence, which called for the opposite approach.229 The Court’s lengthy discussion can be reduced to three main points.

First, the risk was too great that a judge or jury would not be able to accurately determine those juveniles who were insufficiently culpable and who had capacity for change. It was too likely “that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth.”230 Given the “marked and well understood” differences between juveniles and adults, the Court would not allow for this risk.231

Second, the Court pointed to “special difficulties encountered by counsel in juvenile representation.”232 Some of the same factors that led the Court to determine juveniles are not as culpable as adults con-

227. Graham, 130 S. Ct. at 2028 (“A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.”).
228. Id. at 2030.
229. See id. at 2036–42 (Roberts, C.J., concurring).
230. Id. at 2032 (majority opinion).
231. Id.
232. Id.
tributed to problems with juvenile representation: their limited understanding of relevant institutions and proceedings; their immaturity; their “[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and [their] reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions.”

A categorical rule was seen as protecting youth who might otherwise be wrongfully sentenced to life-without-parole only because of these problems with representation.

Third and finally, the categorical rule would protect opportunities for a whole list of potentially positive outcomes, including “maturity and reform”; “remorse, renewal, and rehabilitation”; and “self-recognition of human worth and potential.” The Court lamented the lack of services and education in prisons for those ineligible for parole. It aimed to “avoid[] the perverse consequence in which the lack of maturity that led to an offender’s crime is reinforced by the prison term.”

Justice Kennedy’s opinion was without question the first of its kind in multiple respects. The death barrier was broken, the categorical cases redefined, and the national consensus requirement appeared to be no longer strictly required. Although the Court made an effort to find national consensus in this case, the rather unconvincing attempt and the independent holding greatly diminished its importance, despite language regarding its “great weight.” But contrary to Justice Thomas’s criticisms, there were limiting principles established; namely, those regarding determination of culpability, validity of punishment, and circumstances that warrant categorical rules. The next Part applies these limiting principles to a different but logically deserving group.

IV. **Graham Implicitly Prohibits Abolishment of the Insanity Defense**

A. **Relevant Definitions of the Severely Mentally Ill and the Insanity Defense**

Before applying the principles of *Graham* to show why they logically prohibit abolishment of the insanity defense, this Article must define what it means by the notoriously nebulous terms of the “severely mentally ill” and the “insanity defense.”

234. *Id.*
235. *Id.* at 2033.
236. *Id.* at 2026 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 434 (2008)).
I. The Severely Mentally Ill

Mental illness can vary widely in form and severity. The National Institute of Mental Health (NIMH) estimates that in any given year one quarter of adults living in the United States are diagnosable for one or more mental disorders.\(^{237}\) However, the main societal costs come from a much smaller but significant population suffering from seriously debilitating mental illness—approximately 6% of adults (1 in 17) in the United States.\(^{238}\) The statistics are significantly higher for children—the U.S. Surgeon General estimates that 1 in 10 children live with a serious mental or emotional disorder.\(^{239}\) The most recent studies released from the U.S. Department of Justice support the contention that prisons have become this country’s primary national mental health facilities—with 56% of state prisoners, 45% of federal prisoners, and 64% of jail prisoners suffering from mental illness.\(^{240}\) U.S. jails and prisons “hous[e] well over 350,000 inmates with serious mental illness compared to approximately 70,000 patients with serious mental illness in hospitals.”\(^{241}\)

The problem with all these common references to serious or severe mental illness is that not all reputable organizations or studies define the category in the same manner. Some may define severe mental illness as including only schizophrenia, bipolar disorder, or severe depression;\(^{242}\) while another expands the group to include various other disorders;\(^{243}\) and yet another may base the definition on a more behavioral, impairment, or time-frame basis.\(^{244}\)

Even in areas where a group of the severely mentally ill is more specifically defined, there is ambiguity. For example, researchers seem to agree that approximately one percent of the global and U.S. populations suffer from schizophrenia, one of the severest forms of


\(^{238}\) Id.

\(^{239}\) Mental Illness: Facts and Numbers, supra note 3.

\(^{240}\) JAMES & GLAZE, supra note 3, at 1, 4.


\(^{242}\) See id.


\(^{244}\) See Prevalence of Serious Mental Illness Among U.S. Adults by Age, Sex, and Race, NIMH, http://www.nimh.nih.gov/statistics/SMI_AASR.shtml (last visited June 20, 2011) (relying on the National Survey on Drug Use and Health’s definition of a serious mental illness).
mental illness.\textsuperscript{245} Such studies agree the proportion of population is consistent across ethnic groups, but also acknowledge that “[s]chizophrenia is an incredibly complex disorder that has increasingly been recognized as a collection of different disorders. It has also increasingly been viewed from a developmental perspective, with full psychosis representing a late stage of the disorder . . . .”\textsuperscript{246} There may come a time when doctors will be able to diagnose and differentiate among different types and stages of brain disease through techniques such as brain image scans or blood tests.\textsuperscript{247} Although scientists are already able to study fascinating differences between sample studies of healthy and schizophrenic populations, medical science is not yet able to make consistently reliable diagnoses through such processes.\textsuperscript{248}

In the meantime the diseases causing mental illness are diagnosed based on their outward manifestations. For example, schizophrenics may experience symptoms such as severe and disabling deficits in thought processes, perceptions, and emotional responsiveness; delusions; hallucinations; hearing voices; a belief that others are plotting to harm them; difficulty distinguishing reality from fantasy; disorganized thoughts; poor ability to understand information or use it to make decisions; poor working memory; trouble focusing; speaking little or confused speech; reduced ability to begin and sustain planned activities; movement disorders; and flat expressions.\textsuperscript{249} But schizophrenia is not diagnosed by any one determinative symptom, nor need a patient have any certain combination of them; all of its symptoms may also be

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\item \textsuperscript{245}See, e.g., Schizophrenia, NIMH, \url{http://www.nimh.nih.gov/health/publications/schizophrenia/complete-index.shtml} (last visited Feb. 11, 2012) (“About 1 percent of Americans have this illness.”).
\item \textsuperscript{246}Schizophrenia, NIMH, \url{http://www.nimh.nih.gov/statistics/1SCHIZ.shtml} (last visited June 20, 2011).
\end{itemize}
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part of other diseases.250 Diagnoses are made over a period of time looking at the trajectory of the symptoms involved and taking into account the symptoms' periodic manifestation and dormancy.251 Schizophrenia generally first becomes evident between adolescence and early adulthood, though the age range can vary quite widely.252 Due to loss of rational capacities, many patients attempt to avoid any diagnosis—"the majority of those living with schizophrenia do not believe themselves to be ill."253 Some doctors are also hesitant to provide a diagnosis (because of the associated stigma) or treatment (because of legal constraints when a patient is unwilling).254 All the causes are not yet understood, but like other diseases, schizophrenia seems to be caused by a combination of "genetic vulnerability and environmental factors."255 It has been tentatively associated with infection or malnutrition before or at birth, as well as with gene malfunction in producing important brain chemicals.256 "The World Health Organization has identified schizophrenia as one of the ten most debilitating diseases affecting human beings,"257 but it is certainly not among the ten best understood.

Perhaps due in part to this ambiguity surrounding severe mental illness in the medical world, the law has not turned to any specific diagnosis in determining insanity. There is an understanding in the medical world that mental illness rests on a vast continuum with some only moderately affected, others completely losing capacity for rational thought or behavior, and many falling at every step between the extremes.258 The legal world has not yet achieved a sufficiently
DEATH IS DIFFERENT NO LONGER

260. See, e.g., Jennifer S. Bard, Re-arranging Deck Chairs on the Titanic: Why the Incarceration of Individuals with Serious Mental Illness Violates Public Health, Ethical, and Constitutional Principles and Therefore Cannot Be Made Right by Piecemeal Changes to the Insanity Defense, 5 Hous. J. Health L. & Pol'y 1, 5 (2005) (“Most individuals affected by some degree of mental illness are excluded from insanity defense consideration because the inquiry is limited to the narrow issue of whether a person can be excused from all responsibility due to mental illness.”).
including in solitary confinement, on the basis that their mental illness prevents them from conforming to prison rules or leads them to act out. A federal court determined that half of the mentally ill inmates in one state were living in the segregation units of their prisons. Inmates with serious mental illnesses are often haphazardly released into the community without having received needed treatment, making them likely to recidivate. Such practices effectively penalize the mentally ill for their illness.

These grave health concerns are not the only implications of a criminal conviction. A severely mentally ill person who does not qualify for a traditional insanity defense may face the death penalty (so long as not deemed insane at the moment of execution) or any other sentence applicable to the crime committed. If released after serving time in prison, a mentally ill individual faces huge hurdles not only in terms of finding treatment to manage the disease, but also in carrying a criminal record and the stigma that it entails.

The idea that insane individuals should not face such criminal consequences has its origins in antiquity—Muslim, Hebraic, and Roman law all recognized the doctrine in some form. For centuries Anglo-American legal societies have recognized that someone deprived of rational capacity should not face criminal consequences. In a 1724 English case, *Rex v. Arnold*, the jury was instructed

> to acquit by reason of insanity where the defendant was “a mad man,” that is, “a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than a brute, or a wild beast, such a one is never the object of punishment.”

This has come to be known as the “wild beast test” and has been criticized for its emphasis on total depravity—leaving no protection for those influenced by lesser degrees of severe mental illness.

But the most influential English case on present American insanity laws occurred in the following century. In 1843, Daniel M’Naghten shot and killed the Prime Minister’s secretary, Edward Drummond.

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267. Id. at 1398 n.113.

268. March, supra note 265, at 1493 (citing M’Naghten’s Case, (1843) 10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L.)).
M’Naghten had mistaken Drummond for Prime Minister Robert Peel, who he believed was part of a conspiracy against him. Because of M’Naghten’s delusions, he was found not guilty by reason of insanity. The public outcry over this verdict, influenced also by an attempt on the Queen’s life by another person acquitted for insanity, prompted the House of Lords’ request that judges verify the legal standard of insanity. The result is what has come to be known as the M’Naghten test:

[T]o establish a defence on the grounds of insanity, it must be conclusively proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from the disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

This is also commonly referred to as the “right-wrong” or the cognitive test because it focuses on the ability of defendants to understand the nature of their own actions or understand that those actions are legally or morally wrong.

The M’Naghten test, however, garnered criticism because it did not consider whether defendants could control their actions, regardless of any moral awareness. Some jurisdictions thus added to M’Naghten a control, or “irresistible impulse,” test whereby a defendant is also acquitted if, “as a result of mental disorder, the defendant was unable at the time of the crime to control his conduct or to conform his conduct to the requirements of the law.”

The most lenient form of an insanity defense to take root in the United States was known as the “product test,” or Durham rule, getting its name from a 1950s D.C. Circuit case. The court rejected both the cognitive and control tests, holding “that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.” The court rejected the cognitive and

269. Id.
270. Id.
271. Id.
272. Id. (alteration in original) (quoting M’Naghten’s Case, 8 Eng. Rep. at 722).
274. See id. at 72.
275. See, e.g., id.
276. Morse & Hoffman, supra note 39, at 1092.
277. Durham v. United States, 214 F.2d 862, 874–75 (D.C. Cir. 1954), overruled by United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). The Durham court, however, gave credit to New Hampshire as being the first to articulate a similar rule. Id., 214 F.2d at 874 (citing State v. Pike, 49 N.H. 399 (1870)).
278. Id. at 874–75.
control tests as inadequate because they require that the defendant “display[] particular symptoms that medical science has long recognized do not necessarily, or even typically, accompany even the most serious mental disorder.”

A severely mentally ill defendant may have some understanding that an action is criminal; the action may even “be coolly and carefully prepared; yet it is still the act of a madman.”

In the eighteen years before *Durham* was overturned, only Maine adopted the case’s insanity test. But despite this apparent failure to influence the nation’s approach to legal insanity, *Durham* had widespread influence in prompting national debate on the topic. At least one commentator has credited *Durham*’s influence with “paving the way for many jurisdictions’ adoption of the reform-oriented insanity standard proposed by the American Law Institute [ALI].” The ALI’s Model Penal Code presented an insanity test that included both a cognitive and control prong but allowed for a defendant suffering from mental disease to “lack[ ] substantial capacity” to appreciate conduct as wrong or to conform conduct to the law. This softened the “all-or-none, bright-line language [of] standard insanity rules.”

Prior to 1979, all fifty states had an insanity defense. By 1982, when John Hinckley successfully used the insanity defense to escape conviction for his attempted assassination of President Ronald Reagan, most states and all but one federal circuit had adopted the Model Penal Code test.

Hinckley’s attempt to assassinate Reagan had been captured on film and was repeatedly replayed on national television along with de-
tails regarding the would-be killer's motive to impress movie star Jodi Foster.\textsuperscript{288} His acquittal caused public outrage and swift political consequences.\textsuperscript{289} Hinckley had been acquitted under the Model Penal Code test, and many states reverted from that test to the purely cognitive \textit{M'Naghten} test.\textsuperscript{290} Congress also did so, passing the Insanity Defense Reform Act of 1984, which established the first uniform test in federal trials\textsuperscript{291} and is a variation of the \textit{M'Naghten} test.\textsuperscript{292} Congress and many states also changed the burden of persuasion—instead of the government having to show a person was not insane in a criminal trial (once that issue was put reasonably in question), the defendant would have to show insanity.\textsuperscript{293} In 1979, two years before the Hinckley incident, Montana was the first state to abolish the insanity defense,\textsuperscript{294} and in the post-Hinckley outrage four other states—Utah, Kansas, Idaho, and Nevada—joined Montana in abolishing the defense.\textsuperscript{295} Nevada's Supreme Court has since found the abolishment unconstitutional,\textsuperscript{296} while the supreme courts of four other states have

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\item \textsuperscript{289} See Covey, supra note 266, at 1418–19.
\item \textsuperscript{290} Morse & Hoffman, supra note 39, at 1092.
\item \textsuperscript{291} Covey, supra note 266, at 1419; Morse & Hoffman, supra note 39, at 1092; see also 18 U.S.C. §§ 4241–4247 (2006).
\item \textsuperscript{292} Compare 18 U.S.C. § 17 (laying out the federal test), with \textit{M'Naghten's Case}, (1843) 10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L.) 722 (laying out the \textit{M'Naghten} test). The federal test provides that
\begin{quote}
[i]t is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
\end{quote}
18 U.S.C. § 17(a). The federal test also puts the burden on the defendant to prove insanity by clear and convincing evidence. \textit{Id.} § 17(b).
\item \textsuperscript{293} Morse & Hoffman, supra note 39, at 1092.
\item \textsuperscript{294} Covey, supra note 266, at 1419; Stephanie C. Stimpson, Note, \textit{State v. Cowan: The Consequences of Montana's Abolition of the Insanity Defense}, 55 MONT. L. REV. 503, 510 (1994) (explaining that the 1979 change made mental illness relevant only to the post-conviction phase of criminal proceedings); see also MONT. CODE ANN. § 46-14-102, -103, -311, -312 (2011).
\item \textsuperscript{295} Morse & Hoffman, supra note 39, at 1092. Insanity legislation regarding options such as "guilty but mentally ill," allowing for mitigation consideration in sentencing, or negating the \textit{mens rea} element of the crime do not provide nearly the extent of protection provided by the traditional insanity defenses. See, e.g., infra notes 362–64 and accompanying text.
\item \textsuperscript{296} Finger v. State, 27 P.3d 66, 84 (Nev. 2001).
\end{itemize}
\end{footnotesize}
thus far upheld the abolishment despite constitutional challenges and vehement dissents.\textsuperscript{297}

Thus, currently forty-six states have an insanity defense—and forty-five of those have insanity tests based on some variant of the \textit{M'Naghten} or Model Penal Code tests.\textsuperscript{298} States with the Model Penal Code test generally include a control element, and some states using the \textit{M'Naghten} test have added an “irresistible impulse” or control element, but no state has solely a control test.\textsuperscript{299} The burden-of-proof requirements vary among the states, and only New Hampshire retains the lenient product-of-mental-illness test.\textsuperscript{300}

The Supreme Court has found no constitutional barrier to requiring defendants to prove that they are insane beyond a reasonable doubt rather than requiring the state to carry that burden.\textsuperscript{301} Nor has the Supreme Court found a due process concern with a \textit{M'Naghten} test that focuses solely on whether the defendant could distinguish between right and wrong, while eliminating the prong regarding understanding the nature of one’s acts.\textsuperscript{302} The Court has examined the varied standards for determining insanity among the states and has concluded “that no particular formulation has evolved into a baseline for due process . . . . [The] insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice.”\textsuperscript{303} But the Court has never considered or ruled on whether abolishment of the defense is constitutional.\textsuperscript{304} The words “substantially open to state choice” suggest states are not completely free to abolish it.

It is true there are significant differences among the details of the insanity tests currently employed in this country, but the core principles are the same—each test attempts to evaluate whether a defen-

\begin{footnotesize}
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\item \textsuperscript{297} See State v. Searcy, 798 P.2d 914 (Idaho 1990); State v. Bethel, 66 P.3d 840 (Kan. 2003); State v. Korell, 690 P.2d 992 (Mont. 1984); State v. Herrera, 895 P.2d 359 (Utah 1995); see also Korell, 690 P.2d at 1007 (Sheehy, J., dissenting) (“I do not hold with the majority that there is no independent constitutional right to plead insanity. I consider that position the ultimate insanity.”).
\item \textsuperscript{298} The Insanity Defense Among the States, \textsc{FindLaw}, http://criminal.findlaw.com/crimes/more-criminal-topics/insanity-defense/the-insanity-defense-among-the-states.html (last visited Sept. 29, 2011).
\item \textsuperscript{299} Morse & Hoffman, supra note 39, at 1092; see also Clark v. Arizona, 548 U.S. 735, 749–52 (2006); The Insanity Defense Among the States, supra note 298.
\item \textsuperscript{300} See The Insanity Defense Among the States, supra note 298 (noting New Hampshire’s retention of the \textit{Durham} standard).
\item \textsuperscript{301} See Leland v. Oregon, 343 U.S. 790, 798–99 (1952).
\item \textsuperscript{302} See Clark, 548 U.S. at 748, 756.
\item \textsuperscript{303} Id. at 752. The portion of this Article discussing national consensus issues with the underlying reasoning of the statement that no fundamental baseline for an insanity defense has evolved. See infra notes 307–26 and accompanying text.
\item \textsuperscript{304} Morse & Hoffman, supra note 39, at 1092.
\end{enumerate}
\end{footnotesize}
dant was so mentally deranged at the time of the act in question that he or she lacked mental capacity to obey the law and should not be held legally responsible for that action. For ease of discussion, the terms “severely mentally ill” and “insane,” as used in the remainder of this Article, will incorporate people unable to (1) understand the wrongfulness of their actions, (2) understand the nature or quality of their acts, or (3) conform their conduct to the requirements of the law. In essence, this Article argues this is a constitutional minimum for state-defined insanity defenses.

States are and should be free to experiment with protections above and beyond this minimum. This Article acknowledges that the constitutional minimum definition is far too restrained in terms of discussing who should be protected under our laws due to their lack of rational capacity. And there are certainly many of the severest mentally ill people who would not qualify for this legally defined insanity test. This Article focuses on a constitutional minimum and not on the ideal definition of an insanity defense. It focuses on those who should be protected as the law currently stands and not on how laws and policies should be changed and developed.

B. Graham Logically Prohibits Abolishment of the Insanity Defense

1. National Consensus Favors Insanity Defenses

For categorical challenges the Court in Graham acknowledged that it must “consider[ ] ‘objective indicia of society’s standards, as expressed in legislative enactments and state practice’ to determine whether there is national consensus against the sentencing practice at issue.” The insanity defense does not even require the increasingly relaxed standards of Atkins, Roper, and Graham to cross this hurdle.

While Atkins and Roper counted 30 states on their side in terms of supporting legislation and Graham counted a paltry 13, 46 states and the federal government have an independent insanity defense. Thus, relying on state legislation alone, which the Supreme Court has recognized as “[t]he clearest and most reliable objective evidence of

306. See Bard, supra note 260, at 5 (arguing that there is a “moral obligation to consider the whole range of mental illness in assessing criminal responsibility”).
contemporary values," there is plainly national consensus that some form of a complete insanity defense is required.

Although some cases have tried to diminish the appearance of a national consensus in a due process context by highlighting the differences between the insanity defenses among the states, the similarities are far more striking. Clark v. Arizona pointed out that there are four major strains in insanity defenses: cognitive incapacity (understanding the nature and quality of one's actions), moral incapacity (understanding the difference between right and wrong), volitional incapacity (the ability to control one's actions), and the product-of-mental-illness tests.

What Clark failed to emphasize was how two of these four strains are common to all of the traditional forms of the insanity defense and how the strains can overlap conceptually. For example, 45 of the 46 states with an insanity defense employ some form of the M'Naghten or Model Penal Code test—both of these tests incorporate protections regarding moral incapacity, although there is a difference in the degree of incapacity required by the two tests. Both tests also require that the action be the product of a mental disease. Thus any person able to show lack of moral capacity because of mental disease will pass all the traditional forms of the insanity tests—whether it is the Model Penal Code, M'Naghten, or the product-of-mental-illness (Durham) test.

These similarities cannot be overshadowed by differences of who carries the burden of proof, the availability of guilty-but-mentally-ill verdicts, or the fact that some states add the additional protections that if individuals cannot control or do not understand the nature and quality of their actions there is no crime. The Supreme Court upheld the constitutionality of keeping only the moral prong of the M'Naghten test in part because the evidence regarding the defendant's

312. Id. at 749.
315. Unlike the Model Penal Code test, the M'Naghten test does not have a volitional element regarding control of one's actions unless a state has opted to add it. And unlike the M'Naghten test, the Model Penal Code test does not incorporate a separate cognitive element regarding understanding the nature and quality of one's actions apart from the moral strain. See supra note 313 and accompanying text.
understanding of his acts would still be relevant in deciding whether the defendant understood the moral nature of his acts.\textsuperscript{316} In other words, the cognitive strain can be seen as a subset of the moral strain in insanity tests.

Only one of the forty-five states using the Model Penal Code or \textit{M'Naghten} tests does not incorporate a moral strain—the requirement that defendants are able to understand the wrongfulness of their actions to at least some degree.\textsuperscript{317} These statistics suggest there does seem to be broad consensus over the types of factors that should be considered in determining insanity.\textsuperscript{318}

A dissent from the Utah Supreme Court case that upheld abolishing the defense summarized the issue well. Associate Chief Justice Stewart, with Justice Durham's support, explained that while clearly the Federal Constitution does not mandate one specific form of the defense, there is consensus across the states and across the centuries regarding key fundamental elements that cannot be abolished without violating the Constitution.\textsuperscript{319}

[T]he essence of the defense, however formulated, has been that a defendant must have the mental capacity to know the nature of his act and that it was wrong. Whether the test has been termed the wild beast test, the \textit{M'Naghten} test, the Durham test, the ALI test, the federal test, or some other test, it has always had at its core the proposition that those who are so mentally deranged as to lack the mental capacity to comply with the law are not subject to punishment under the criminal law for acts performed as a result of the derangement.\textsuperscript{320}

Other factors considered by recent Supreme Court cases also support finding that there is a national consensus; for example, the pace

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\textsuperscript{316} See Clark, 548 U.S. at 753–56.
\textsuperscript{317} See id. at 750–51; see also Alaska Stat. § 12.47.010.
\textsuperscript{318} See Trent Echard, Note, Clark v. Arizona: Has the Court Painted Itself into a Corner?, 1 Phoenix L. Rev. 213, 239 (2008) ("[O]ne might argue that a consideration of moral incapacity in the judgment of guilt has risen to the level of a fundamental right because of the widespread acceptance of moral incapacity defenses among the states. Further, because the Clark Court asserted that cognitive incapacity is a subset of moral incapacity, one could argue that a consideration of cognitive incapacity is also a fundamental right."). Furthermore, the Model Penal Code test (used in some form by approximately 20 states) incorporates a volitional strain, and several states using the \textit{M'Naghten} test have added an "irresistible impulse" element to also exempt those that cannot control their actions. See Model Penal Code § 4.01 (Proposed Official Draft 1962); The Insanity Defense Among the States, supra note 298. Although these numbers do not approach literal consensus among the states, they certainly dwarf the number of states whose legislation was similar in Graham, where the Supreme Court still found national consensus, albeit based in part on other factors. See Graham v. Florida, 130 S. Ct. 2011, 2023 (2010).
\textsuperscript{320} Id.
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and consistency of legislation discussed in Atkins and Roper weigh in favor of recognizing national consensus.\footnote{See, e.g., Atkins v. Virginia, 536 U.S. 304, 315 (2002); Roper v. Simmons, 543 U.S. 551, 566 (2005).} In subsequent decades no state has joined the four that abolished the insanity defense in relatively quick succession. Even under political pressure to abolish it, the federal government resisted doing so.\footnote{See Herrera, 895 P.2d at 378 ("The abolition approach was proposed and rejected after lengthy hearings in which numerous legal scholars, psychiatrists, and others testified, because Congress 'felt that concerns about the dangers of an insanity defense were overstated and because abolition would alter that fundamental basis of Anglo-American criminal law: the existence of moral culpability as a prerequisite for punishment.'" (quoting United States v. Pohlot, 827 F.2d 889, 900 (3d Cir. 1987))).} Such resistance, coupled with the "fact that anticrime legislation [was] far more popular than legislation [protecting perpetrators]," is another factor weighing in favor of national consensus, as first recognized by Atkins.\footnote{Atkins, 536 U.S. at 315–16.} Roper and Graham both stand for the proposition that national consensus is possible even where there exists expressly contrary legislation in a much more significant number of states than are at issue with the insanity defense.

It is also important to remember that the national consensus principle in determining constitutionality is a concession to the fact that the definition of "cruel and unusual" may change over time. The reason for incorporating the principle was to protect society against practices that may have been acceptable at the time of the writing of the Constitution, but are no longer palatable to modern society—the practice of executing a seven-year-old being one example highlighted in Graham.\footnote{See Graham v. Florida, 130 S. Ct. 2011, 2036 (2010) (Stevens, J., concurring) (observing that "the Court wisely rejects [a] static approach to the law" that would "not rule out a death sentence for a $50 theft by a 7-year-old").} However, the principle does not work in reverse. This author has not located an instance where those practices that were considered cruel and unusual at the time the Constitution was penned have been found to be no longer outlawed by the Constitution today due to the hardening of current sympathies in the opposite direction. Thus, the fact that insanity defenses had long been recognized in some related or recognizable form in Anglo-American jurisprudence at the time the Constitution was created is also highly relevant in determining that abolishment of the defense results in cruel and unusual punishment.

To quote arguably the most famous of originalists, Justice Scalia, it is an "immovable belief, here and in England" that whether an alleged criminal is truly insane "must rest upon circumstances duly to be
weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes.\textsuperscript{325} Without an insanity defense, such considerations by a judge or jury do not necessarily take place at all, for loss of rational capacity that qualifies a defendant for an insanity defense is not generally relevant to the mental element in common law crimes.\textsuperscript{326}

2. Factors Considered in the Court’s Independent Judgment Require an Insanity Defense: Is Proportional Punishment Possible for the Legally Insane?

After national consensus, \textit{Graham} requires the Court to “determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.”\textsuperscript{327} That consideration should be “guided by 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.”\textsuperscript{328}

a. Consideration of Culpability

When \textit{Graham} considered the degree of culpability of juveniles and the severity of the sentence at issue, it was just breaking down the elements considered in proportionality. Culpability is defined by \textit{Black’s Law Dictionary} as “[b]lameworthiness.”\textsuperscript{329} Proportionality broadly requires that a defendant be sufficiently blameworthy to merit whatever sentence is imposed.\textsuperscript{330} \textit{Graham} supports the proposition that the punishment must fit not only the criminal act but also the blameworthiness of the alleged criminal actor. The question here is whether any punishment can be proportional for a person who committed an act while legally insane. By this Article’s constitutional minimum definition of insanity, a legally insane person, because of a diseased mind, did not understand the nature of the act, the wrongful-
ness of the act, or was incapable of controlling the act in question. In other words, under this definition a legally insane person is not blameworthy, and any punishment therefore violates the principle of proportionality. "One is a moral agent only if one is a rational agent."  

This conclusion is abundantly clear when comparing the requirements of legal insanity to other contexts. It is for the very same reasons that society generally shields infants and very young children from any criminal responsibility. A two-year-old may purposely pick up a gun, point it at a person, and shoot. A four-year-old may even understand that the action will kill the person. But the law will not generally hold these children accountable because the degree of mental capacity is insufficient to warrant criminal blame. Similarly, when an adult has so lost rational capacity as to qualify as insane under the stringent threshold used by most states, there is no criminal blameworthiness. Despite later arguments to the contrary, Robinson was correct in explaining that loss of control (whether mental or physical) through no fault of an individual's own equates to loss of culpability and loss of any constitutional justification for punishment.

This conclusion is also clear from the type of factors Supreme Court cases have considered in determining levels of culpability. All of the factors thus considered in Atkins, Roper, and Graham were attempting to measure the level of culpability by measuring the level of rational capacity and control. For example, Atkins justified outlawing capital punishment for the mentally retarded because of diminished capacity "in areas of reasoning, judgment, and control of their impulses," which caused them "not [to] act with the level of moral culpability" of other adult criminals. Likewise, Roper and Graham considered juveniles' "impetuous and ill-considered actions and decisions" as products of an immature mind; their "less[er] control, or less experience with control, over their own environment" and accompanying increased susceptibility to peer pressure (presumably at least in part because of their lesser ability to rationally reject bad suggestions pushed by peers); and their character, which is more likely to be re-

331. This Article's "constitutional minimum definition" takes elements from the Model Penal Code and M'Naghten tests used in some variation by the vast majority of states, but requires more than substantial impairment.


formed than that of adults as the juveniles’ brains mature. All these factors are to some extent examining culpability through the lens of rational capacity.

As Atkins, Roper, and Graham were dealing in degrees of rational capacity and corresponding degrees of culpability. Legal insanity, by contrast, examines loss of rational capacity so extreme as to result in loss of culpability. Justice O’Connor recognized that the strongest case for Eighth Amendment categorical protection exists where a class of people is defined precisely by the characteristics that reduce, or in the current context, eliminate culpability.

b. Consideration of Valid Purposes of Punishment

In its independent analysis of Graham, the Court considered each of the valid purposes of punishment: retribution, deterrence, incapacitation, and rehabilitation. Graham recognized that “[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense” and thus unconstitutional. The following further explains why the legally insane’s lack of culpability undermines every valid purpose for punishment.

First, retribution falls short because “[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.” Where there is no culpability, society loses entitlement to any form of criminal payment. Punishing those who lack culpability would upset rather than restore any moral imbalance.

Second, deterrence is irrelevant. People who are legally insane are, by definition, incapable of rationally considering their actions and possible consequences and appropriately conforming their actions based on that reasoning. As Justice Douglas explained, “Nothing can more strongly illustrate the popular ignorance respecting insanity than the proposition, equally objectionable in its humanity and its logic, that the insane should be punished for criminal acts in order to deter other insane persons from doing the same thing.”

Third and fourth, incapacitation and rehabilitation fail to justify punishment of the insane. While it is important to protect society

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336. See Roper, 543 U.S. at 602 (O’Connor, J., dissenting).
338. Id. (alteration in original) (quoting Tison, 481 U.S. at 149).
from those whose sickness has caused violence or danger to others and to promote the healing of diseased minds, both goals are better served by civil commitment. John Hinckley was still in a psychiatric ward nearly thirty years later.340 There, he could get the medical help that prevented further violence—help that is often completely absent in the criminal prison system.341 Where an actor lacks culpability, the incapacitation and rehabilitation theories cannot trump all, “lest the Eighth Amendment’s rule against disproportionate sentences be a nullity.”342

With no valid penal justification for sentences punishing the insane, such sentences are inherently disproportionate and therefore unconst-itutional under the Eighth Amendment. Accordingly, a state cannot constitutionally abolish the insanity defense altogether. The national consensus against abolishment of an insanity defense adds “great weight”343 to this finding under Graham, but is ultimately unnecessary once it is determined that no valid penal justification exists.

3. Categorical Protection Is Necessary for the Insane

Finally, the Graham Court analyzed the situation in which categorical protections are appropriate under the Eighth Amendment. The legally insane clearly fall within the bounds of this analysis.

Without an insanity defense, the insane are vulnerable to being found guilty of crimes even when lacking rational capacity and culpability because their actions and mental state will generally meet all the common requirements of criminal law. Furthermore, when the mens rea required for a crime is negligence or recklessness rather than intent, an insane person will always be found guilty because these assume comparison to the behavior of reasonable people—a showing the insane cannot make by definition.

Even in cases where the insanity defense exists, there is always the danger, as expressed in Graham, “that the brutality or cold-blooded

341. See supra note 263 and accompanying text.
342. See Graham, 130 S. Ct. at 2029. Graham only makes this comment regarding incapacitation, but the logic naturally extends to rehabilitation as well.
343. Id. at 2026 (quoting Kennedy v. Louisiana, 554 U.S. 407, 434 (2008)).
nature of any particular crime would overpower mitigating arguments,“344 “despite insufficient culpability.”345 The press was full of such concerns and debates regarding the potential trial of the man accused in the attempted assassination of Representative Gabrielle Giffords.346

The “special difficulties” outlined in Graham, which often face counsel in juvenile representation and justify a categorical approach regarding juveniles, are yet more applicable to representation of the severely mentally ill.347 These include “limited understanding[] of the criminal justice system and the roles of the institutional actors within it”; decreased likelihood “to work effectively with their lawyers to aid in their defense”; “[d]ifficulty in weighing long-term consequences”; “impulsiveness”; and a “reluctance to trust defense counsel.”348 Add to these further problems outlined by a 2010 American Civil Liberties Union (ACLU) report on the mentally ill:

Prior to arrest, mentally ill defendants are more vulnerable to police pressure and thus more likely to confess. Once charged with a capital crime, courts or juries routinely find that severely mentally ill defendants, including capital defendants, meet the basic test of competency. Delusional mentally ill defendants are more likely to insist on representing themselves at trial, literally daring juries to sentence them to death. Many mentally ill defendants are prone to outbursts in front of their juries and some are so heavily medicated that they appear to their juries devoid of any remorse. Juries frequently reject insanity defenses in capital cases despite strong evidence that the defendants were suffering from serious mental illnesses at the time of the crime. As the United States Supreme Court observed of those with mental retardation, mentally ill defendants are “less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.” For these reasons, juries are often scared into recommending a sentence of death for mentally ill persons and fail to treat their mental illness as the mitigating circumstance that it is. Mentally ill defendants who have been sentenced to death often waive their appeals and seek to volunteer for execution.

344. Id. at 2032.
345. Id. (quoting Roper v. Simmons, 543 U.S. 551, 572–73 (2005)).
346. See, e.g., Dahlia Lithwick, The Insanity Defense, Slate (Jan. 11, 2011, 6:59 PM), http://www.slate.com/id/2280694. As this Article was being prepared for publication, the perpetrator in the Giffords case was found mentally incompetent to stand trial—at least for the present. See Marc Lacey, Suspect Is Ruled Incompetent for Trial in Giffords Shooting, N.Y. Times, May 26, 2011, at A1. But see Carol J. Williams, Judge Orders 4 More Months of Treatment for Tucson Shooting Suspect, L.A. Times (Feb. 7, 2012), http://articles.latimes.com/2012/feb/07/nation/la-na-jared-loughner-20120207 (stating that he may soon be competent to stand trial).
348. Id. at 2032.
Although constitutional law prohibits the execution of the mentally incompetent, the death sentences imposed on and executions of numerous mentally ill people demonstrate that these laws are insufficient safeguards for capital defendants with severe mental impairments.\(^{349}\)

Facing this multitude of disadvantages in the criminal system, the insane, like juveniles, need a categorical rule to avoid risking that, “as a result of these difficulties, a court or jury will erroneously conclude” that an insane person “is sufficiently culpable” for a criminal sentence.\(^{350}\)

And finally, like the juveniles in *Graham*, the mentally ill merit a categorical rule to give offenders a chance to demonstrate reform, renewal, and rehabilitation, and to achieve “self-recognition of human worth and potential.”\(^{351}\) While juveniles are a sympathetic case in this arena because of their youth, immaturity, and increased tendency to reform, the insane are a sympathetic case because of their lack of culpability for their condition and actions, as well as their great likelihood to reform with proper medication. In both cases, a prison can “become[ ] complicit” in stopping potential healing or growth due to the lack of necessary resources.\(^{352}\)

Thus, the factors considered by *Graham* in creating a categorical, rather than a case-by-case, protection of juveniles under the Eighth Amendment weigh equally or more heavily in favor of creating a similar categorical protection for the mentally ill. Having determined that *Graham* logically requires finding abolishment of insanity defenses unconstitutional, the following discussion turns to those states that have abolished them and examines why their respective supreme court analyses fail to justify any exception.

4. Overturning State Supreme Courts that Have Abolished the Insanity Defense

Many of the holdings under previous challenges to the constitutionality of abolishment or manipulation of the insanity defense are somewhat irrelevant to our analysis here because those opinions generally


\(^{350}\) See *Graham*, 130 S. Ct. at 2032.

\(^{351}\) Id.

\(^{352}\) Id. at 2032–33; see also supra note 263 and accompanying text (discussing the lack of resources in prisons for the mentally ill).
focused on due process rather than Eighth Amendment concerns. As previously explained, the U.S. Supreme Court has never directly considered whether abolishment of the defense is constitutional, so any related reasoning to the subject is purely dicta. Although Supreme Court precedent suggests that states should have some freedom in determining the boundaries of insanity defenses, never has there been a majority of Justices suggesting that there can be no constitutional minimum requirement in that sphere on Eighth Amendment grounds. Indeed, even when the federal government was interested in abolishing the defense after the attempted Reagan assassination, they did not do so “because Congress felt that concerns about the dangers of an insanity defense were overstated and because abolition would alter that fundamental basis of Anglo-American criminal law: the existence of moral culpability as a prerequisite for punishment.”

Of the five states that have abolished the insanity defense, only Montana and Kansas originally relied on the Eighth Amendment in upholding the constitutionality of abolishment. Idaho and Utah initially upheld constitutionality on other grounds without considering whether punishing someone who was insane at the time of the crime is cruel and unusual (although a strong dissent of two of the five Justices in the Utah opinion argued it was unconstitutional on those grounds). Nevada found the abolishment of the insanity defense unconstitutional on due process grounds. Kansas considered the defendant’s Eighth Amendment claim under Robinson. The court decided, under the totality of the circumstances, that the defendant was not suffering from severe mental illness when he gave a confession. Montana is therefore the only state that initially abolished the insanity defense while giving substantial consideration to Eighth Amendment concerns. Later state supreme court cases from places like Idaho and Utah followed Montana’s lead in also upholding the constitutionality of abolishment under an Eighth Amendment analysis. Because these later cases adopted similar reasoning to Montana’s ground-breaking

354. Herrera, 895 P.2d at 378 (Stewart, Associate C.J., dissenting) (emphasis added) (quoting United States v. Pohlot, 827 F.2d 889, 900 (3d Cir. 1987)) (internal quotation marks omitted).
355. Searcy, 798 P.2d at 918-19; Herrera, 895 P.2d at 371 (majority opinion).
356. See Herrera, 895 P.2d at 372, 385-87 (Stewart, Associate C.J., dissenting).
357. Finger, 27 P.3d at 84.
case, we will focus on why Montana’s reasoning in Korrell is not in line with Supreme Court precedent.

Montana argued its laws were in compliance with Robinson, in that the Montana criminal code prohibited punishment of the insane if they committed no criminal act. As discussed at the beginning of this Article, this is not enough to comply with that case, for Robinson clearly also requires that defendants are able to have some control over the conduct for which they are being punished. Even under Powell—the case whose plurality opinion tried to define Robinson in the same fashion as Montana—a majority of Justices (when combining the dissent and a concurrence) agreed that if defendants cannot control their actions through no fault of their own, they should not be held criminally responsible.

Montana’s argument that allowing a sentencing judge freedom to put an insane individual in a mental hospital avoids cruel and unusual punishment is absurd. The sentencing judge by definition is delivering a sentence for a convicted crime. Criminal conviction in and of itself is punishment—carrying real consequences for those who carry a criminal record. And such systems still involve incarceration of individuals if they are cured of their mental illness with time still remaining on their original sentences.

Equally absurd is the idea that allowing for consideration of mental illness in the mens rea element of a crime abolishes the need for any insanity defense under the Eighth Amendment. The mens rea element of a crime generally assesses only whether persons intended to complete the act performed. For example, did the person intend to kill a human? It does not assess whether the person was so delusional that they did not understand the act was wrong. Such a standard does not protect the delusional person who believes, for example, the act

360. State v. Korell, 690 P.2d 992, 1001 (Mont. 1984). The one main issue that Korrell did not address, which later relevant cases did, see, e.g., State v. Cowan, 861 P.2d 884, 888–89 (Mont. 1993), was whether finding someone competent to stand trial is sufficient to allay concerns about abolishing an insanity defense. It is not sufficient because such competency hearings only consider whether a person is mentally capable of meaningful participation in a trial, not whether mental incapacities affected culpability at the time of an alleged offense.
361. Korell, 690 F.2d at 1001.
362. See Robinson v. California, 370 U.S. 660, 666–67 (1962); see also supra notes 29–54 and accompanying text (discussing the importance of control in the Eighth Amendment analysis).
364. See Korell, 690 P.2d at 1001.
365. See id. at 996–1002.
was in mortally required self-defense or defense of others—beliefs that would qualify for an insanity defense under the M'Naghten or Model Penal Code tests. "[A]n insane person will virtually always have the mental state required by the law under [this type of mens rea standard], even though the defendant suffers from severe mental derangement, such as an extreme and bizarre psychotic delusion." Thus, the mens rea standard still allows for punishment of those not culpable for their actions—in direct contradiction to principles of Graham.

Furthermore, the Montana Supreme Court did not subject the issue to a full Graham-like analysis, and the parts of the Graham analysis that it did employ were faulty. The court erroneously argued that the lack of penal justification could be overcome because the concern over protecting society trumps the concern over punishing the innocent. The case even approvingly quotes a dissenting Justice from the Tennessee Supreme Court in State v. Stacy: "In a very real sense, the confinement of the insane is the punishment of the innocent; the release of the insane is the punishment of society." Such reasoning cannot stand under more recent Supreme Court precedents such as Graham that explain: "[i]ncapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity." Any punishment of the legally insane is disproportional. Montana's analysis also ignores the fact that this tension is easily fixed because civil commitment in a mental hospital without criminal conviction both protects society and avoids punishment.

V. Conclusion

Thus, abolishment of the insanity defense cannot survive a Graham analysis. Where, because of a diseased brain, people "are so mentally deranged as to lack the mental capacity to comply with the law," there is no penal justification sufficient for punishment. Any punish-

366. State v. Herrera, 895 P.2d 359, 374 (Utah 1995) (Stewart, Associate C.J., dissenting). The opinion quotes Pohlot, which explains that only in very rare cases will a legally insane defendant fail to pass a purely mens rea test. "As the House Report stated: 'Mental illness rarely, if ever, renders a person incapable of understanding what he or she is doing. Mental illness does not, for example, alter the perception of shooting a person to that of shooting a tree.'" United States v. Pohlot, 827 F.2d 889, 900 (3d Cir. 1987) (quoting 130 Cong. Rec. H9674 n.23 (daily ed. Sept. 18, 1984)). It is the true context of actions and the ability to rationalize that are generally affected by severe mental illness. See id. ("Similarly, a man who commits murder because he feels compelled by demons still possesses the mens rea required for murder.").

367. Korell, 690 P.2d at 1002 (quoting State v. Stacy, 601 S.W.2d 696, 704 (Tenn. 1980) (Henry, J., dissenting)).


369. Herrera, 895 P.2d at 372 (Stewart, Associate C.J., dissenting).
The lack of a penal justification is independently sufficient to find criminal conviction of the insane cruel and unusual. The fact that the principles underlying an insanity defense have been acknowledged in at least some recognizable legal form for centuries is also an independently sufficient originalist ground for finding the abolishment of the insanity defense unconstitutionally cruel and unusual.\textsuperscript{371}

The Court's obliterating of the death is different doctrine in \textit{Graham} has opened the door for Eighth Amendment-based categorical protections from punishments beyond death. Among the first through that door should be this nation's severely mentally ill—beginning with categorical protection from any criminal punishment for those who did not understand the nature of their actions, did not understand the wrongfulness of their actions, or could not control their actions at the time of their alleged crimes. Such constitutional protection of insanity defenses is logically required by \textit{Graham} and would be an important first step in stemming the insanity of some American insanity laws.

\textsuperscript{370} See \textit{Graham}, 130 S. Ct. at 2026.
\textsuperscript{371} See supra notes 265–76 and accompanying text.