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## **Death Penalty and Mental Illness: The Challenge of Reconciling Human Rights, Criminal Law, and Psychiatric Standards**

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Liliana Lyra Jubilut<sup>1</sup>

*I remind myself that many of the mistakes in mental health care come from a helping attitude. But they want to help without asking you, without understanding you, without involving you, “in your best interest.”<sup>2</sup>*

### INTRODUCTION

Over the years, gains made under international human rights law have resulted in an expanding realm of people protected by its norms. Early efforts focused on the assurance of individual rights and evolved to encompass “traditional and visible minorities”; more recently, efforts are focused on addressing concerns about “invisible, underprotected minorities,” including people with disabilities in general and people who suffer from mental disorders<sup>3</sup>—especially mental disabilities and mental illness<sup>4</sup>—in particular.<sup>5</sup> Focus on this last group is due to the fact that “[f]rom a human rights perspective, the intellectually disabled rank among the world’s most vulnerable and at-risk populations, both because they are different and because their disability renders them less able either to assert their rights or to protect themselves against blatant discrimination.”<sup>6</sup>

The focus of the protection has been to establish that people who suffer from mental disorders, being “different but equal”<sup>7</sup> in dignity and rights, are entitled to all human rights “simply because of their humanity.”<sup>8</sup> Thus far, most of the battles have been attempts to ensure that the people who suffer from mental disorders have equal opportunities and are protected while in treatment and confinement.<sup>9</sup> Recently, the scope of protection sought has expanded to include an attempt to carve out an exemption from the death

penalty for people who suffer from mental disorders. This article examines those efforts in the United States through the lens of international human rights law.

In 2002, the United States Supreme Court in *Atkins v. Virginia*<sup>10</sup> exempted people who suffer from mental retardation from the death penalty. Following this decision, Amnesty International (AI)<sup>11</sup> and the American Bar Association (ABA)<sup>12</sup> began independent efforts to advocate for the extension of this exemption to people who suffer from mental illness.<sup>13</sup> These initiatives are valuable because they bring to light an important topic and initiate debate on the issue. Unfortunately, however, both proposals fall short of advocating for comprehensive protection for the human dignity of people who suffer from mental illness<sup>14</sup> in legal systems that retain capital punishment. In this article, the limitations of the ABA and AI proposals will be addressed so as to highlight the main problems that arise in attempting to provide the most effective protection from the death penalty to people who suffer from mental illness.

The proposals are inadequate in two ways. First, because the issue of mental health and the death penalty involves the convergence of medicine and law, providing protection from capital punishment to people who suffer from mental illness will only be feasible through an interdisciplinary approach that encompasses human rights, criminal law, and psychiatry. In both the AI and ABA proposals, such collaboration exists only superficially.

Second, in addressing the issue of capital punishment and mental illness, one can emphasize one of two approaches: abolishing the death penalty altogether or protecting the people who suffer from mental illness while maintaining the death penalty in general. The resulting proposals depend on which approach is chosen. Both the ABA and the AI proposals focus on an abolitionist position, with the protection of people who suffer from mental illness playing a supporting role. Although this focus is consistent with both organizations' goals to limit the scope of the use of capital

punishment,<sup>15</sup> this article argues that in relation to the death penalty and mental illness in the United States, the proposals are ultimately too limited to effectively exempt people who suffer from mental illness from capital punishment.

In light of the complexities of focus and approach, this article aims to highlight the most relevant problems that arise from the current attempts to exempt people who suffer from mental illness from the death penalty and is an effort to stimulate discussions to the end of enhancing effective protection. Part I will address two background issues: whether new standards are needed, and whether law and psychiatry are compatible enough to allow for an interdisciplinary approach. Part II of the article will briefly highlight the main aspects of the ABA's and AI's proposals. Part III will analyze the shortcomings of the existing proposals, focusing on the use of a categorical and a time-framed approach. Finally, Part IV proposes alternate paths to more effectively protect people who suffer from mental illness—focusing on due process and fair resolution as well as improving access to medical care.

## I. BACKGROUND ISSUES IN ASSESSING THE PROPOSALS

Two background issues need to be addressed before examining the positive and negative aspects of the ABA and AI proposals. First, given that there are already safeguards built into criminal legal systems—particularly in the United States—such as rules regarding competence and the plea of insanity, this section will explore whether a need exists for a new set of protective rules.<sup>16</sup> Second, this section will examine whether an interdisciplinary approach is feasible.

### *A. The Need for New Safeguards*

In criminal law in the United States there are three avenues of protection for the “insane.” First, it is possible to present claims of insanity or lack of competency in several phases of trial. Second, in the sentencing phase of a

capital trial, the defense can introduce evidence of mental disorder as a mitigating factor. Finally, after sentencing, the argument can be made that the defendant belongs to one of the categories exempt from the death penalty. After the resumption of the death penalty in the United States in the wake of the 1976 Supreme Court decision in *Gregg v. Georgia*,<sup>17</sup> exemptions from capital punishment have been granted to the “insane” (*Ford v. Wainwright*),<sup>18</sup> to children (*Roper v. Simmons*),<sup>19</sup> and to the mentally retarded (*Atkins v. Virginia*).<sup>20</sup>

In practice, however, these guarantees are insufficient.<sup>21</sup> Although *Ford v. Wainwright* established an exemption for the “insane,” it did not establish a specific definition of competence, of insanity, or of the procedures to determine these two concepts.<sup>22</sup> Besides, as the AI report makes clear, despite these legal protections, several people with obvious mental disorders have been sentenced and put to death in the United States<sup>23</sup>—calling into question the effectiveness of the existing protection.<sup>24</sup> Specifically, the lack of a constitutionally protected full competency hearing on supervening insanity<sup>25</sup> and differences in lexical usages between the legal and medical fields demonstrate the inadequacies of the current system.

In addition to the problems raised by the lack of a constitutionally protected competency hearing, the difficulty posed by interdisciplinary communication also hampers the effort to protect people who suffer from mental illness from the death penalty. As a result of lexical usage, communication about mental health between law and medicine is difficult. While the concepts of insanity and competence are legal rather than medical, the concept of suffering from mental illness is medical. As a result, conflicting approaches to assessing mental illness arise between the medical and legal experts.

For instance, it is common in the classification of mental disorders to use adjectives such as mild or severe to determine the level of the existing disease. From a psychiatric perspective, the inclusion of such adjectives

comes after the determination that the disease exists; the adjective serves to qualify it. On the other hand, for a person outside the medical profession, the inclusion of the words mild or severe may be the decisive factor in the perception of the existence of the disease itself and not merely a qualifying factor. Such modifiers have also led to the perception that mild diminished capacity may still be enough capacity to be executed.

Currently, the threshold for mental disease used in legal procedures seems to be higher than those used in medicine; only severe mental disorders are perceived as diseases from a legal perspective, whereas from a medical standpoint, even mild disorders are diseases. Given that this assessment will lead to the establishment of whether or not the person is “insane” and/or competent, this difference is extremely relevant. Yet, as a result of the difference in lexical usage, sometimes very little weight is given to the psychiatrist’s expert opinion about the condition of the defendant in relation to his or her mental status because the court’s focus is on legal thresholds rather than on the medical condition.

Another example of communication difficulties related to lexical usage is the fact that juries not only tend to misunderstand the meaning of the word *mitigating*, but also tend to attribute to it the opposite meaning, understanding the word to mean *aggravating* and believing the existence of mental illness contributes to a “greater likelihood of being dangerous in the future.”<sup>26</sup>

Given the above, even if current legal safeguards covered all grounds of legal and psychiatric concepts of insanity, they would still fail to adequately protect people who suffer from mental illnesses and/or diseases from the death penalty.

#### *B. A Closer Dialogue Between Law and Psychiatry*

The second background issue is whether an effective collaboration between law and psychiatry, the foundation of an interdisciplinary approach to the issue of the death penalty and mental illness, is possible. There are

two likely barriers to such collaboration. First, as a general principle, the legal field is hesitant to rely on other fields of knowledge. Second, there is the question as to whether law and psychiatry are compatible.

Although legal arguments carry the most weight in legal analysis, law is incomplete by itself. Thus, there needs to be space for arguments based on other types of knowledge such as economics, social science, and political science, as well as expertise in technical areas such as the use of DNA in paternity tests and the assessment of environmental damages. While specialized testimony and opinions may be allowed, the legal system remains unreceptive to some sciences.<sup>27</sup> This lack of receptiveness<sup>28</sup> often results in expert testimony of nonlegal experts being disregarded. This is true in the case of psychiatrists' opinions in relation to people who suffer from mental illness.

Even though it seems logical that medical professionals are in a better position to ascertain the mental health of a defendant, the law allows the legal actors (such as judges and jurors) a vast level of discretion by not requiring that they follow the experts' conclusions. Courts, thus, tend to use expert data as they see fit, misapplying or misusing data when they believe the data will enhance the persuasiveness of their opinions, ignoring or rejecting data despite its dependence on empirically testable statements in support of its holdings, and disparaging data when the research does not support their views.<sup>29</sup> An example of this practice is the rejection by the Supreme Court of social psychology studies and empirical research in *Lockhart v. McCree* in 1986.<sup>30</sup>

Thus, courts sometimes accept the influence of other fields so long as this influence is filtered by the law itself. This feature is important for the analysis of the issue at stake here insofar as no matter how logical or convincing a psychiatric argument is, one will always need to find legal arguments to support it.

As to whether law and psychiatry are compatible, it has been argued that because law and medicine have opposing methods and aims, collaboration

will be difficult. For example, while law uses an adversarial methodology, medicine uses a cooperative one<sup>31</sup>—a difference that could lead to very different outcomes. As to goals:

[s]ometimes the aims of medicine and law may be perceived as conflicting. This may occur insofar as law may be viewed as concentrating on rights whereas medicine may be seen as concentrating on needs. Similarly, law functions primarily to recompense or avoid harm while the primary aim of medicine is directed towards conferring benefits.<sup>32</sup>

While these incompatibilities may exist within a classic and formalist concept of law, if one adds to the relationship an international human rights legal perspective, those incompatibilities become surmountable. The aim of international human rights law is to protect the individual and assure his or her fundamental rights while focusing on needs, avoiding harm, and conferring benefits. International human rights law, therefore, combines the aims of medicine (conferring benefits) and of traditional concepts of law (recompensing or avoiding harm). In addition, international human rights law employs a more cooperative rather than adversarial methodology, for the main value to be protected is human dignity.<sup>33</sup> This approach implies that the most protective standards possible should be chosen and that an interest (even an obligation) by states to find the ideal solution to each case should exist. From this perspective, the burden of assessing the existence of mental illness would be shared between the state and the individual, as it would be in the interest of both to ensure that the right conclusion is reached.<sup>34</sup>

Thus, in addressing the protection of people who suffer from mental illness from the death penalty, when the perspective and principles of international human rights law are brought to bear, law and psychiatry are not only compatible but are also complementary.<sup>35</sup> For instance, the American Psychiatric Association guidelines address both human rights issues such as interrogation of detainees<sup>36</sup> and the death penalty,<sup>37</sup> but they

also assert that human rights and human dignity are to be observed in the conduct of psychiatrists.<sup>38</sup>

One can say that law and psychiatry can work together and also that, in the issue of the death penalty and mental illness, they must do so if the peculiarities involved are to be taken into consideration in an attempt to provide the most protective system possible.

## II. THE ABA'S AND AI'S PROPOSALS

In the wake of *Atkins v. Virginia*,<sup>39</sup> which established an exemption to the death penalty for the mentally retarded, the ABA and AI began, as previously mentioned, to advocate a similar exemption for people who suffer from mental illness. Given that the "insane" exemption did not protect people who suffer from mental disorders from the death penalty, the proposal focuses on the concept of *diminished culpability* to exempt people with mental retardation from the death penalty and, to a lesser extent, on the lack of humanity in killing sick people<sup>40</sup> to advance a similar exemption to people who suffer from mental illness.

The idea of using limitations as a way to progressively achieve the goal of abolition is, in fact, a common trend around the world. This goal is carried out either through the existence of moratoria in the application of death sentences, or through a variety of exemptions including limitations on both what crimes<sup>41</sup> and which people<sup>42</sup> are subject to the death penalty and what methods of imposition are acceptable.<sup>43</sup> The movement in the United States to exempt people who suffer from mental illness from the death penalty is a clear example of the desire to establish a categorical limitation for a particular group of people.

AI published a report on January 31, 2006, on the issue of mental illness and the death penalty.<sup>44</sup> Consistent with the organization's general practice, the report relies on the persuasive power of practical examples; it narrates several cases of people in the United States who suffer from mental illness and who either were executed or are on the death row as a way to

demonstrate that the system is failing and that action needs to be taken to remedy the situation.

According to the report, its aims are twofold. On the one hand, it shows that people who suffer from mental illness continue to be executed, and thus, that the existing safeguards are not enough.<sup>45</sup> On the other hand, it demonstrates that there is no reason why mental illness and mental retardation should be treated differently in relation to an exemption from the death penalty.<sup>46</sup> The report also states that establishing which individuals should be exempt from capital punishment due to the existence of a mental illness at the time of the crime is not one of its goals.<sup>47</sup>

The shortcomings of the report exist both in relation to the internal consistency of the report and to the adequacy of the report in addressing mental illness and the death penalty. In relation to the internal consistency, there are two problems. First, although the report acknowledges the difference between mental retardation and mental illness, it tries to analogize these two mental disorders. This is inconsistent and has the potential to backfire once the important differences in these concepts arise.

*Mental disorder* is the broad term encompassing all mental diseases.<sup>48</sup> Within the general concept of mental disorders, there are two axes of diseases.<sup>49</sup> The first encompasses the so-called *process disorders* and the second the so-called *development disorders*. Process disorders, generally called mental illnesses, exist when the illness is a result of an event that changes the behavior of the individual. Mental illness causes episodes of the disease rather than a continuous state of being mentally ill; accordingly, there could be periods where the disease exists but is dormant. On the other hand, a development disorder exists when the illness is inherent to the person and does not appear in episodes but rather can be permanently verified. This is the case of people suffering from mental retardation,<sup>50</sup> for instance.<sup>51</sup>

In light of these differences, the use of the same approach for two different situations is problematic, especially given that the perception and

diagnosis of mental retardation is much more constant than one of mental illness, as will be seen in Part III of this article.

Second, although the AI report says that it does not occupy itself with people who suffer from mental illness at the time of the crime, several examples in the report include people in this category; thus it uses examples that do not support its thesis or recommendations. Moreover, if the idea is to carve out an exemption from the death penalty for people who suffer from mental illness, determining who is encompassed by such an exemption, notwithstanding its difficulty, is an issue that cannot be avoided.

In relation to the adequacy of the mental illness topic, there are several issues—such as the use of a categorical approach and a time-framed evaluation of mental illness—that, as will be seen later in this article, are not as developed as they should be, which may lead to suboptimal solutions. The problem of adequacy seems related to the lack of a deep interdisciplinary approach to the topic. Adding to this is the problem of giving more weight to advancing the abolition of the death penalty than to trying to ensure the most protective system possible for people who suffer from mental illness within the existing retentionist framework.

The deficiency of this approach is exemplified in the main solution proposed by the AI report. AI calls for both the respect of the *United Nations Principles for the Protection of People with Mental Illness* and the *Improvement of Mental Health Care*<sup>52</sup> and other measures.<sup>53</sup> Its main focus, however, is on the need for a norm—either through a Supreme Court decision or legislation—that categorically exempts people who suffer from mental illness from the death penalty. As will be seen in the following sections, this solution is inadequate given that people with mental illness are still being executed despite the exception for the “insane.”

The ABA created the Task Force on Mental Disability and the Death Penalty within its Section of Individual Rights and Responsibilities, which proposed three recommendations regarding people with mental retardation or dementia and mental disorder or disability.<sup>54</sup> Although also focusing on

a categorical exemption, the ABA proposal is more detailed than the one presented by AI because it includes criteria to limit the application of the exemption in practice.<sup>55</sup> The ABA proposal also has the advantage<sup>56</sup> of having been accepted by the American Psychiatric Association;<sup>57</sup> in addition, the American Psychological Association is currently analyzing the proposal and will likely endorse it.<sup>58</sup> These acceptances add legitimacy to the debate; on the other hand, they may lead to the false conclusion that the ABA proposes an interdisciplinary approach that is sufficient to adequately deal with the issue of the death penalty and mental illness.

Another issue is the significantly different language adopted by the ABA and the American Psychiatric Association. The American Psychiatric Association's proposal does not use a time-framed concept, as it does not mention the existence of a mental illness at the time of the offense; it does not mention a severe mental illness, but only mental illness; it uses the broader idea of a fair resolution of the case, rather than focusing on more limited legal concepts; and it clarifies that for a person to be mentally competent, he or she has to both be aware of and appreciate the nature of the punishment. Such differences make the conclusion that the ABA proposal brings a sufficient interdisciplinary approach unfounded.

Both the ABA and AI should be commended for trying to limit the use of capital punishment and for bringing to the public's attention the lack of effective protection of people who suffer from mental illness from the death penalty. Nevertheless, the current proposals are insufficient to ensure effective protection.

### III. SHORTCOMINGS OF THE PROPOSALS

Both the AI and ABA proposals demonstrate that the current system is not always effective in protecting people who suffer from mental illness from the death penalty; therefore, new standards are justified. Because these proposals do not take an interdisciplinary approach, their

recommended solutions will not sufficiently enhance protections to ensure that people with mental illness are not executed.

This part will examine the shortcomings of the two proposals. It will begin with an evaluation of the core idea of the proposals: the use of the categorical approach in advocating an exemption from the death penalty for people who suffer from mental illness. Next, it will examine the time-framed approach, which provides protection for people who suffer from mental illness at the time of the crime, at the time of the trial, and at the time of execution.

#### *A. The Use of a Categorical Approach*

The core idea of the proposals is to advance a categorical approach to exempt people who suffer from mental illness. This categorical approach builds on international law and practice as abolition of the death penalty is increasingly<sup>59</sup> advocated in international law,<sup>60</sup> and the right to life<sup>61</sup> is already a part of the core of international human rights law. Although these efforts could lead to outlawing capital punishment, it is not currently prohibited.<sup>62</sup>

The different international law approaches to the death penalty are reflected by two sets of international law documents. Some international documents such as the *Second Additional Protocol to the International Covenant on Civil and Political Rights* (ICCPR) advocate total abolition of capital punishment; states that ratify the Second Additional Protocol to the ICCPR<sup>63</sup> commit to abolishing the death penalty.<sup>64</sup>

However, other international documents, while supporting the aspirational character of this goal—total abolition of capital punishment<sup>65</sup>—only go so far as to impose categorical limitations on the death penalty. This approach is reflected by both Article 6 of the ICCPR and the United Nations Safeguards that guarantee protection of the rights of those facing the death penalty.<sup>66</sup> Article 6 of the ICCPR, for example, states that the death penalty cannot be imposed on people under eighteen years of age or

pregnant women; it can only be imposed for the most serious crimes, after a final judgment by a competent court, and without retroactive application of law.<sup>67</sup> Article 6 thus utilizes categories or closed classes of people that are exempted from capital punishment.

Additionally, in 1984, nine UN Safeguards were adopted by the Economic and Social Council<sup>68</sup> and embraced by the General Assembly.<sup>69</sup> Among other goals, the UN Safeguards aim to “exempt those under 18 years of age at the time of the commission of the crime, pregnant women, new mothers and those who are or have become ‘insane.’”<sup>70</sup>

Protection of the “insane” is ensured by the 1989 revision of Safeguard 3, which also led to the inclusion of the aged as a category of people exempted from capital punishment.<sup>71</sup> Although the original text only exempted from the death penalty people who had become “insane,” the revision expanded this exemption to include people “suffering from mental retardation or extremely limited mental competence, whether at the sentencing stage or at execution.”<sup>72</sup>

Even though the UN safeguards are not legally binding, they are relevant because they set a trend towards categorical exemptions for children, pregnant women, new mothers, and the “insane.” Exemptions such as these have been adopted in isolation or in groups by some countries and have inspired national movement, which advocate gradual limitations of the death penalty by focusing on increasing categorical exemptions. The AI and ABA proposals adopt this approach.<sup>73</sup> Although the categorical approach may be effective in limiting the death penalty for certain groups, in relation to people who suffer from mental illness, the feasibility of such a path is questionable for several reasons, which are explored below.

### **1. Mental Illness as the Identification Factor of a Distinguishable Group**

The first challenge in using a categorical approach in creating a mental illness exception to the death penalty is that defining mental illness as the

aggregate factor of an identifiable group may be a complex (and possibly insurmountable) task.

All the other categories in which exemptions to the death penalty have been carved out—namely pregnant women, new mothers, children, aged people, and the mentally retarded—are categories whose definitions and determination are easier because, to some extent, they form closed classes. It is not difficult to determine whether a woman is pregnant or has recently had a baby, or whether a person is under the age of eighteen or over a certain age. Although there are some controversies about assessing whether a person suffers from mental retardation, the general concept of mental retardation is not problematic.<sup>74</sup>

However, when it comes to mental illness, defining a closed class presents many challenges. First, mental illness involves the complexity of the human mind, which is far from totally understood, and scientific definitions are not fixed and exact but rather evolving and mutable.<sup>75</sup> Second, diagnoses and prognoses of mental disorders vary historically<sup>76</sup> based on changing social perceptions<sup>77</sup> and on new medical discoveries; what is perceived as a mental disorder today may not be in a few years and vice versa.<sup>78</sup> Third, because the diagnoses of mental disorders are not made in a vacuum but by a human prone to cultural bias, the diagnoses may be biased as well.<sup>79</sup> This means that what may be perceived as a mental disorder in one culture may be perceived as a common social practice or reaction in another.<sup>80</sup> In this sense, diagnoses of mental disorders are historically and culturally constructed<sup>81</sup> concepts.<sup>82</sup> Therefore, they are not easily standardized to enable a categorical definition of people who suffer from mental illness.

Exemplifying the difficulty in establishing a categorical definition are the two equally credible classification tools currently being applied in relation to mental disorders:<sup>83</sup> the *International Classification of Diseases* (ICD) created by the World Health Organization<sup>84</sup> and the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) published by the

American Psychiatric Association.<sup>85</sup> This duplicity shows that there is no universal standard for classification of mental disorders; even among the expert community, there is no consensus on standards for classification. Such duplicity presents a serious challenge in creating a categorical exemption based on a closed class of mental illness.

## 2. The Broad Range of Diseases that Are Mental Illnesses

Furthermore, the mental illnesses that are grouped together in both the ICD and the DSM-IV are diverse diseases ranging from schizophrenia and personality disorders to anorexia and sleep disorders.<sup>86</sup> This vast variety of diseases may be a factor in creating opposition to the adoption of a categorical exemption due to the sheer numbers of individuals with these conditions.

Given that psychiatry is an evolving and flexible science, and that diagnosis of mental illness is culturally and socially constructed, it is not surprising that there are competing statistics on the prevalence of mental illness. The more conservative studies find that up to 10 percent of inmates on death row suffer from serious mental illness.<sup>87</sup> However, other studies suggest that the proportion of prisoners on death row who have been treated for some kind of psychiatric disorder can be as high as one-third.<sup>88</sup> This wide range of percentages reflects the ranges of the total general population; comprehensive studies suggest that “32% of the population have or have had a psychiatric disorder (lifetime prevalence), . . . that 20% had an active disorder (meaning that they had met criteria for a disorder at some time in the person’s life and had at least one symptom in the year prior to the interview),”<sup>89</sup> and that “48% of the population ha[d] at least one psychiatric disorder at some time in their life and 29% in the past year.”<sup>90</sup>

In view of these high percentages, having a categorical approach might be problematic for two additional reasons. First, from the point of view of criminal law, because a large percentage of the inmates on death row would be exempted by the adoption of this standard, it would create a *de facto*

abolition of the death penalty, which is not currently feasible within the United States' retentionist framework. This is especially true if one takes into consideration that mental illness diagnoses<sup>91</sup> and death sentences<sup>92</sup> are higher among African Americans, who currently represent 42 percent of the population on death row.<sup>93</sup> Thus, in light of the fact that the United States is retentionist, the advocacy of such an abolitionist policy does not seem feasible.

Second, even from a human rights approach, if the death penalty is abolished and not replaced by a more humane form of punishment, the result could be widespread impunity. This is due to the fact that the human rights system also has to consider victims' rights,<sup>94</sup> which means that it is not in favor of criminal acts going unpunished.<sup>95</sup> Thus, a situation in which huge numbers of crimes will go unpunished is unacceptable under international human rights law. Obviously, other forms of punishment could—and from a human rights perspective should—substitute the death penalty to prevent both impunity *and* application of capital punishment.

### **3. Mental Illness and Criminal Responsibility**

A third problem with adopting a categorical approach is determining which relevant assessment criteria should be used to establish criminal responsibility and, therefore, which groups would be exempted.

The ABA and AI proposals focus on the concept of diminished capacity due to mental illness; they argue that such diminished capacity demonstrates a lack of criminal responsibility and, thus, should be a basis for an exemption from the death penalty.<sup>96</sup> If one expects a result that is both just and feasible, a dialogue between criminal law and psychiatry is required in order to determine which individuals are not criminally responsible due to diminished capacity. One solution would be to distinguish among diseases that affect the cognitive abilities of the individual, jeopardizing his or her capacity to understand what is right or wrong. This qualification of the mental illness category appears in the ABA

recommendation<sup>97</sup> and may be more feasible in a retentionist country than a categorical exemption for people who suffer from mental illness because it limits the number of people that would benefit from the exemption.

However, in the same way that diagnoses of mental illnesses are fluid, determinations of whether a mental illness impairs the ability to tell right from wrong also may be fluid. Thus, the acceptance of a categorical exemption, even with a qualification that limits the number of people to which it applies, may still be too broad a norm and may not mark an evolution from the current “insane” exemption.

The arbitrariness of drawing distinctions is exemplified by the ABA recommendations, which suggest that “[a] disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder.”<sup>98</sup> This assertion is problematic because, on the one hand, there are studies that show that most people (some say 70 percent)<sup>99</sup> who suffer from mental illness and who are in the criminal system are not violent,<sup>100</sup> but rather were arrested for behavior linked to the illness.<sup>101</sup> In addition, other studies demonstrate that repeated criminal conduct can be symptomatic of a disease; for example, there are four times as many people who suffer from mental illness in prison than in hospitals on any given day.<sup>102</sup> On the other hand, it has been established that the use of alcohol and drugs can lead to schizophrenia and other psychotic disorders. From a medical point of view, these disorders, once established, are as much a disease as any other mental disorder—regardless of their original causes.<sup>103</sup>

Besides the above-mentioned problems with determining the relevant assessment criteria to establish criminal responsibility (due to the particularities of mental illness), there is also a general divergence between criminal law and psychiatry about the basis of competence. Criminal law attempts to draw the line by focusing on *criminal competency*, a notion that is based on the belief of free will and conscience; given the retributive character of punishment, when an individual commits a crime and is

conscious of his or her act, that person can and should be punished.<sup>104</sup> However, it has been argued by psychiatrists that this notion is inadequate since “free will is a legal fiction.”<sup>105</sup> “[B]ehavior is not so unfettered. It is determined as a result of the confluence of genetic endowment and life experiences. In that view, . . . there are no heroes and there are no villains.”<sup>106</sup> In adopting an interdisciplinary approach, as proposed by this article, the divergence between the two systems could paralyze the criminal system, as each approach to determining competency bases itself on a different ideology. As this is not the desired outcome, one has to focus on more nuanced, practical solutions while trying to encourage a dialogue between criminal law and psychiatry to find common ground.

#### *B. Time-framed Evaluations of Mental Illness*

Another problematic aspect of both the existing and proposed standards of protection is that they focus on the existence of a mental illness at the time of the commission of the crime, sentencing, or execution. Although these time-framed evaluations *seem* to protect people who suffer from mental illness from capital punishment, in reality, they do not.

The main flaw with using a time-framed evaluation arises when a person suffers from mental illness but the disease is not present at the time of the commission of the crime, at sentencing, or at execution. Generally, if a person commits a crime while mentally ill, the legal concept of insanity or incompetence and the “insane” exemption will be sufficient to protect against a death sentence because his or her mental capacity will be deemed diminished. The same is true if a person becomes mentally ill either after being sentenced or at the time of execution. Such a development is possible according to the etiology of mental disorders; mental disorders can be a result of genetically inherited trends or can result from external factors such as brain damage or traumatic experiences such as the tension of living on death row.<sup>107</sup> On the other hand, if a person is not mentally ill at the specific times established by the law, he or she will receive no protection

whatsoever from capital punishment. This situation is possible because mental illness is considered a process disorder rather than a development disorder, which means the illness may not be in place at a specific time but may exist and impair the person's cognitive skills nonetheless.

Given that mental illness is a process disorder, trying to capture the existence of the disease in specific time frames may lead to the conclusion that the disease does not exist when, in fact, the person is simply not having an episode at that time. If the court accepts that reasoning, then it will assume that the person has the competence to understand the reasons and consequences of his or her act and, therefore, could deem the defendant legally competent and subject to capital punishment.

Another troubling factor is that some mental illnesses have sequelae, which means that although the person is not having an episode at a given time, his or her competence and conscience level is still diminished.<sup>108</sup> This could be a case of approximation of a process disorder and a development disorder in which the person has a permanent lower level of reasoning even though the disease does not seem to be present. Sequelae are significant in light of the notion of free will and conscience as the basis of criminal responsibility.

Currently, the criterion used in the United States to determine whether a person is "insane" is one of awareness. According to the threshold established in *Ford v. Wainwright*, as long as the person is aware of what is going to happen to him or her (i.e., execution) and why (i.e., because of the commission of a crime), the person is considered sufficiently competent to be executed.<sup>109</sup>

The practical problem that arises from the current "insanity" definition is the notion that a person who suffers from a mental illness can be forcibly treated and restored to competence, which would ultimately lead to his or her execution. This presents the alarming prospect of "healing" a mentally ill person solely to execute him or her. Another aspect of this situation is the possibility that this restored conscience is likely only due to the

administration of medicines and is not a real cure. Were the medicines to be withdrawn, the person would once again be considered “insane” and therefore not subject to execution.

Although a situation where one might be “cured” solely to be executed is legally permitted, if approached from a medical perspective, the same situation would not be permissible. Medical treatment considers the best interest of the patient; the restoration to competency in order to execute would contravene medical goals—it would not be in the best interest of anyone to be treated in order to be executed. An interdisciplinary approach to mental illness and capital punishment would avoid this appalling situation because the existence of the disease at *any* time would result in exemption from capital punishment.

Therefore, the time-framed evaluation of mental illness has a fatal flaw. This flaw arises when a person suffers from a mental illness but the disease is not in place at the time of the commission of the crime, sentencing, or execution. If this approach is retained, many people who suffer from mental illness will be executed.

#### IV. ALTERNATE PATHS

Based on the foregoing, focusing on preexistent abolitionist tactics will not increase protection from the death penalty for people who suffer from mental illness. Thus, a change of focus is necessary. The focus should be on protecting people who suffer from mental illness rather than on abolishing the death penalty. This focus better provides intervention alternatives that ensure effective protection from capital punishment. The following sections of this article explore two of these interventions: (1) due process and fair resolution, and (2) improving access to medical care.

##### *A. Focusing on Due Process and Fair Resolution*

This section will discuss how traditional due process protections are often functionally lacking in cases involving mental illnesses.<sup>110</sup> Although both

the ABA's and AI's proposals lack emphasis on the procedural aspects involved in a capital case, focusing on enhancing procedural guarantees to ensure adequate application of rules would be a step toward a more protective framework. This section will first establish why such a focus may be the best way to protect people who suffer from mental illness from the death penalty and then will argue that people who suffer from mental illness should have additional due process protection. Finally, this section proposes specific improvements to due process protections and fair resolution.

Because there is little likelihood that the death penalty will be abolished in the immediate future in the United States, improving the effectiveness of due process protections is likely the best way to protect people who suffer from mental illness from the death penalty. The death penalty will unlikely be abolished due to the high legal standard and the climate of the current Supreme Court—while having stayed some executions, it is not keen on improving existing guarantees.<sup>111</sup>

Most challenges to the death penalty are based on categorical approaches and arise under the Eighth Amendment, which prohibits cruel and unusual punishment. For a claim to be successful, excessive punishment must be established either under the criterion existing at the time the Bill of Rights was adopted or against the evolving standard of decency.<sup>112</sup> A broad exemption for people who suffer from mental illness would not survive either of these standards. Although lunatics—as the “insane” were called at the time of the adoption of the Bill of Rights—are excluded from the death penalty, the criterion used then was a time-framed analysis, which leads to the above-mentioned problem of underinclusiveness.<sup>113</sup> The evolving standard of decency test adopted by the U.S. Supreme Court is based in part on the number of states that have abolished the death penalty. So far only one state, Connecticut, has statutes that prohibit the execution of people who suffer from mental illness at the time of the commission of the crime.<sup>114</sup> Only one other state, New Jersey, has repealed the death penalty

after the 1976 Supreme Court decision in *Gregg v. Georgia*.<sup>115</sup> And only one other state, Indiana, seems keen to start debates on a similar proposition.<sup>116</sup> Thus, because so few states have banned the death penalty, a claim that the practice—applied to people who suffer from mental illness—offends the U.S. evolving standard of decency would not be successful.

As to the current Supreme Court, there is reason to believe that it is not open to expanding the category of insanity. According to the *Associated Press*, “[u]ntil now, the high court has avoided challenges to insanity defense laws”<sup>117</sup> and “seem[s] uninterested . . . in broadly addressing the constitutional rights of psychotic criminal defendants whose lawyers want them sentenced to psychiatric facilities instead of prisons.”<sup>118</sup> In a recent case, *Panetti v. Quaterman*, the Supreme Court was unwilling to diminish the reach of the death penalty.<sup>119</sup> In that case, the Court refused to establish new standards for the competency of people to be executed; instead, it referred the case back to the federal district court, holding that the existing standards had not been met.<sup>120</sup> This likely means that present attempts to advance a categorical ban for people suffering from mental illness would be unsuccessful.

To ensure effective protection, special standards of due process would have to be established specifically for people who suffer from mental illness. Establishing special standards might be opposed based on the belief that creating new rights for a specific population would be a violation of equality. This perception, however, is misplaced. The concept of equality encompasses both formal equality (i.e., treating all people equally) and substantive equality (taking differences into consideration as necessary for actual protection).<sup>121</sup> As the above-mentioned problems show, existing standards are not enough; thus, these special protections would simply afford people who suffer from mental illness the same level of protections as others. This claim could be read as a reversal from the idea of different but equal—which has served as a basis for ensuring human rights to

disabled people—to a formula of *equal but different*, whereby people who suffer from mental illness are entitled to the same human rights as other individuals (with some adaptation of the guarantees to effectuate them) in light of their specific needs and particularities.<sup>122</sup>

Another problem with current fair trial and due process protections is that they suffer from arbitrariness, as shown by the cases included in the AI report.<sup>123</sup> If there is arbitrariness, the death penalty cannot be imposed; Article 6 of the ICCPR states, among other things, that “no one shall be arbitrarily deprived of his life.”<sup>124</sup> According to the *UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*,<sup>125</sup> if the perception of arbitrariness appears, then the state has to try to avoid arbitrary executions by judicial or other means.<sup>126</sup>

The approach of having special due process protections in order to protect vulnerable people is supported by several Supreme Court decisions stating that due process does not have a single formula and can be “flexibilized” in different categories.<sup>127</sup> Also, as the right to due process is protected by the U.S. Constitution,<sup>128</sup> if the strengthened procedural guarantees were established by a Supreme Court decision, they would enhance uniformity of capital punishment decisions and further advance limitations on the practice. This conclusion is supported by a recent practice in China, whose high court has assumed a more centralized role by reviewing all capital punishment cases, which has resulted in a decrease in death penalty verdicts.<sup>129</sup>

The idea proposed by this article is to improve existing standards in the regular criminal procedure rather than create a new system to deal with people who suffer from mental illness. A new system—a mental health court model—is inconsistent with the broader arguments being made here because it preconditions jurisdiction of the court on a guilty plea, which is contrary to the idea that a person who suffers from mental illness has diminished capacity and is therefore not guilty of criminal acts. Further, having a separate system may lead to increased stigma and prejudice,

further eroding the human rights of people who suffer from mental illness.<sup>130</sup>

Thus, having a special set of standards of fair trial and due process to accommodate the needs of people who suffer from mental illness would not be a violation of the principle of equality. In addition, the creation of these special standards would not only benefit people who suffer from mental illness but also quell fears among those who worry that a defendant could fake the existence of a mental illness in order to escape the death penalty—a common fear among those who defend the death penalty in general.<sup>131</sup>

Given that people who suffer from mental illness are currently subject to the death penalty and likely will be for the foreseeable future, improving due process protections and fair resolution is critical. Some procedural protections for people who suffer from mental illness exist, but they could be improved at the following three stages: trial, sentencing, and execution.

Past and continuing executions of people with clear mental disorders<sup>132</sup> demonstrate that the existence of a general exemption is not a guarantee against inadequate application of that exemption. Problems have occurred when applying the rule in cases that have led to the conviction and execution of people that clearly met the definition of “insane.”

Apart from the issue of competency, defendants with mental illness contribute to a range of procedural problems related to their illness, such as not allowing their attorneys to present facts related to the existence of the illness, not cooperating with their attorneys, and not being willing to participate in an appeal. In addition, defendants with mental illness are sometimes willing to be executed,<sup>133</sup> which jeopardizes the application of safeguards because arguments for diminished capacity and for incompetence then cannot be made. One possible solution that would address many of these concerns is to allow another person to act in the best interests of the defendant. This solution is stated in the ABA recommendation<sup>134</sup> and seems to improve the treatment of people who suffer from mental illness. Some advocates of mental health rights,

however, criticize this proposal and, instead, maintain that the goal in dealing with mental disorders is autonomy for those who suffer from mental disorders.<sup>135</sup>

Juries pose additional problems—specifically, the existence of prejudice<sup>136</sup> and lack of understanding of the real impact of mental illnesses on behavior.<sup>137</sup> First, as much as 75 percent of the public view people with mental illness as violent.<sup>138</sup> Given that the perception of danger plays a role in “convincing” jurors of defendants’ guilt in criminal proceedings, this perception, coupled with fear and misunderstanding, can lead to guilty verdicts. Second, jury decisions are often impacted by jury members’ perceptions as to whether and to what degree the defendants feel remorse.<sup>139</sup> This is problematic for defendants that suffer from mental illness, as they may be unable to show remorse as a result of their disease because they may lack the cognitive skills to understand their actions and to separate right from wrong.<sup>140</sup>

Additionally, jurors often mistakenly believe that the alternative to a death sentence is liberty rather than life imprisonment or commitment to a psychiatric institution. There is still pervasive stigma and fear of people who suffer from mental illness due to lack of knowledge about various disorders; this stigma and fear may influence jurors to believe that the behavior of the defendant will lead to future violent behavior.<sup>141</sup> Ensuring that society will not be at risk if the death penalty is not applied—for the defendant will not be set free, but rather sent to a treatment facility—can substantially change the mood of the jurors to reject the death penalty and sentence a person to life.

Moreover, both due process and fair trial are long-established civil and political rights dating back to the ratification of the Fifth Amendment. If more concern for the proper application of due process protections and fair trial were present, more people who suffer from mental illness would be protected from the death penalty. This is the idea expressed, for instance, in

the *United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, which also focuses on the right to a fair trial.<sup>142</sup>

In light of the above, adding attention to the procedural aspects of criminal cases should be a part of the effort to limit the imposition of the death penalty to people who suffer from mental illness. Adequate procedural protections would, at a minimum, involve a panel of doctors to evaluate the disease (to avoid personal bias and prejudice and guarantee an opinion less fallible than the one obtained by relying on just one expert). The evaluation should: (1) involve meeting not only the defendant but also people connected to him or her (to gather more information and also because the mere existence of the disease sometimes prevents the defendant from being able or willing to assist in his or her own evaluation); (2) be a product of more than one interview with the defendant (so to be true to the process-like features of diagnosis and of the disease); (3) not be the result of just a standard test but rather a combination of personal interviews, interviews with relatives or members of the personal circle, and tests (because experts seem to diverge on which of these strategies is the best one); and (4) should not be focused only on pretrial, in-trial, and preexecution procedures (to avoid the above-mentioned underinclusiveness of time-framed diagnosis), and a follow-up evaluation. The panel should be composed of: (1) both men and women with diverse ethnic backgrounds (because diagnoses are culturally influenced, it is important to have a more comprehensive panel in order to minimize the possibility of prejudices interfering with the result), and (2) either disinterested doctors or doctors chosen by both the defendant and the state (to avoid biased opinions depending on who hired the doctor and also due to the burden-sharing notion mentioned above). Adequate procedural protections should also include a mandatory psychiatric evaluation in all capital cases (due to the fact that the disease may be of such a type that the defendant or his or her defense counsel do not recognize the fact that he or she is sick, or because

lack of money is often an obstacle in assessing the mental health of a defendant).

*B. Improving Access to Medical Care*

A second avenue for improving protection of people who suffer from mental illness is improvement of access to medical care. Some studies show that most people who suffer from a mental disorder<sup>143</sup> in general, and those who suffer from a mental illness and committed a crime in particular, lacked adequate medical care in the past.<sup>144</sup> Other studies have found evidence of the even more perverse situation where people who suffer from mental illness commit crimes as a cry for help but do not receive medical care.<sup>145</sup> In addition, many incarcerated people who suffer from mental illness do not receive adequate medical treatment.<sup>146</sup>

It is harmful for society as a whole to criminalize being sick,<sup>147</sup> especially given the effectiveness of current treatment. According to the American Psychiatric Association, the success rate for treatment of mental illnesses is high: for major depression, 65 percent; for schizophrenia, 60 percent; for obsessive-compulsive disorder, 60 percent; for bipolar disorder, 80 percent; and for panic disorder, 80 percent.<sup>148</sup> With rates this high, focusing on treatment may be an effective strategy for achieving in practice an exemption from the death penalty for people who suffer from mental illness, especially given that the right to enjoyment of the highest attainable standard of physical and mental health has already been recognized in international law.<sup>149</sup>

Focusing on access to medical care to protect people who suffer from, mental illness from the death penalty will require advocating for economic and social rights and will present new challenges. One of the problems that may arise is the cost of providing adequate medical care; however, it is extremely expensive to keep people in prison and to execute them, so the question seems to be more a choice of how to use resources. In any event, if the goal is to protect people who suffer from mental illness from capital

punishment, adequate medical care would curtail the death penalty and dedicate resources to treating the illness.

## V. CONCLUSION

Three changes would ensure better protection from the death penalty for people who suffer from mental illness. First, because mental illness is a medical condition, an interdisciplinary approach would ensure that the needs of people who suffer from these diseases are effectively addressed. Second, procedural guarantees should be enhanced in order to better address the needs of people who suffer from mental illness in capital punishment cases. Finally, improving access to medical care would provide people who suffer from mental illness needed treatment and help prevent criminalization due to mental illness.

This article demonstrates that no single solution will be able to strike the required balance in protecting people who suffer from mental illness within systems that maintain the death penalty. However, with creative and interdisciplinary initiatives, it is possible to reconcile the goals of human rights, criminal law, and psychiatry to achieve a system that protects people who suffer from mental illness from the death penalty.

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<sup>2</sup> KERRY KENNEDY CUOMO, SPEAK TRUTH TO POWER 227 (2000) (quoting Gabor Gamos).

<sup>3</sup> The terminology "people who suffer from mental disorders" is adopted in this article not to victimize this group of people but rather to expand "people with mental illness" to include people who have a mental disorder whether or not it is in place at a particular time.

<sup>4</sup> As will be seen later in this article, the expression "mental disorders" is the broad term that encompasses both cases of mental retardation and mental illness.

<sup>5</sup> Harold H. Koh, *Different but Equal: The Human Rights of People with Intellectual Disabilities*, 63 MD. L. REV. 1 (2004).

<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> Lawrence O. Gostin & Lance Gable, *The Human Rights of People with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health*, 63 MD. L. REV. 20, 22 (2004).

<sup>9</sup> This can be exemplified by the set of rights accorded to people who suffer from mental disabilities in international human rights instruments. Principles for the Protection of People with Mental Illness and the Improvement of Mental Health Care, G.A. Res. 46/119, U.N. Doc. GA/Res/ 46/119 (Dec. 17, 1991); Declaration on the Rights of Mentally Retarded People, G.A. Res. 2856 (XXVI), U.N. Doc. GA/RES/2856 (XXVI) (Dec. 20, 1971).

<sup>10</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>11</sup> See AMNESTY INT'L, USA: THE EXECUTION OF MENTALLY ILL OFFENDERS - SUMMARY REPORT (2006), <http://web.amnesty.org/library/Index/ENGAMR510022006>. All subsequent citations refer to the full report. See generally AMNESTY INT'L, USA: THE EXECUTION OF MENTALLY ILL OFFENDERS (2006), <http://web.amnesty.org/library/Index/ENGAMR510032006>. See AMNESTY INT'L, USA: THE EXECUTION OF MENTALLY ILL OFFENDERS - SUMMARY REPORT (2006), <http://web.amnesty.org/library/Index/ENGAMR510022006>. All subsequent citations refer to the full report.

<sup>12</sup> See generally Symposium, *Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty*, 54 CATH. U. L. REV. 1115 (2005) [hereinafter *ABA Recommendations*].

<sup>13</sup> Insofar as this article proposes an interdisciplinary approach to the issue of mental illness and the death penalty, and that among the psychiatric community it is understood that a classification of mental disorders should not be a classification of people, the expression "mentally ill" will be avoided whenever possible and will be only used to express a situation in which the person is having an episode of a mental illness at that precise moment. See AM. PSYCHIATRIC ASS'N., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, DSM-IV xxxi (4th ed. 2000). Following the same logic, the word "insane" will be used between quotation marks or inverted commas and only when it appears in the text of legal documents.

<sup>14</sup> Some philosophers base humanness on an ability to reason. Because this ability is lacking in some people suffering from mental disorders, some might believe that people suffering from mental disorders are not entitled to human rights. This article does not debate the philosophical base of our humanity. Insofar as this article adopts a human rights perspective, it will be based on the legal notion that all human beings, including people suffering from mental disorders, are holders of human rights.

<sup>15</sup> The mission of Amnesty International is "to undertake research and action focused on preventing and ending grave abuses of these rights" enshrined in the Universal Declaration of Human Rights and other international human rights. Statute of Amnesty International § 1 (Aug. 11, 2007), <http://web.amnesty.org/pages/aboutai-statute-eng>. Because it feels that "the death penalty is the ultimate cruel, inhuman and degrading punishment," Amnesty International "works for an end to executions and the abolition of

the death penalty everywhere.” Amnesty International, *The Death Penalty*, <http://web.amnesty.org/pages/deathpenalty-index-eng> (last visited Oct. 31, 2007). The commitment of the ABA against the death penalty is derived from its motto (“defending liberty, pursuing justice”) and is realized through the Death Penalty Representation Project and the Death Penalty Moratorium Implementation Project. *See generally* American Bar Association, <http://www.abanet.org>.

<sup>16</sup> ROGER HOOD, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 121 (3d ed. 2002).

<sup>17</sup> *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

<sup>18</sup> *Ford v. Wainwright*, 477 U.S. 399 (1986).

<sup>19</sup> *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

<sup>20</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>21</sup> ROGER HOOD, *supra* note 16, at 92.

<sup>22</sup> Ralph Slovenko, *On the Execution of the Death Penalty*, 31 J. AM. ACAD. PSYCHIATRY & L. 282, 282–83 (2003); *see also* Ralph Blumenthal, *Supreme Court Blocks Execution of Delusional Killer*, N.Y. TIMES, June 29, 2007, at A25.

<sup>23</sup> According to the Amnesty International report, of the more than eight hundred people who have been put to death in the United States since 1992, dozens were diagnosed with mental retardation, mental illness, or a combination of both. AMNESTY INT’L, *supra* note 11, at 5. In the same document, Amnesty International lists one hundred cases of individuals who were subjected to the death penalty since 1977—each suffered from serious mental disorders. *Id.* at 6.

<sup>24</sup> A person who rolls around in the exercise area of a prison shouting and batting away imaginary persecutors, and a person who believes that he has superhuman powers that will prevent him from dying, both clearly have some sort of mental disorder and should be protected by the insanity defense or diminished capacity. However, these were features presented by Harold Barnard and Michael Poland, respectively—both were executed. AMNESTY INT’L, *supra* note 11, at 28, 36.

<sup>25</sup> That full competency hearings for supervening insanity are not constitutionally protected was established long ago and confirmed by the Supreme Court decisions in *Nobles v. Georgia*, 168 U.S. 398 (1897); in *Solesbee v. Balkcom*, 339 U.S. 9 (1950); and in *Caritativo v. California*, 357 US 549 (1958). Slovenko, *supra* note 22, at 282.

<sup>26</sup> Ronald J. Tabak, *Overview of Task Force Proposals on Mental Disability and the Death Penalty*, 54 CATH. U. L. REV. 1123, 1129 (2005).

<sup>27</sup> Donald N. Bersoff, *The Differing Concepts of Culpability in Law and Psychology*, 11 WIDENER L. REV. 83, 85 (2004).

<sup>28</sup> *Id.* at 87.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 85–86.

<sup>31</sup> HAROLD I. KAPLAN & BENJAMIN J. SADOCK, *SYNOPSIS OF PSYCHIATRY: BEHAVIORAL SCIENCES CLINICAL PSYCHIATRY* 662 (5th ed. 1985).

<sup>32</sup> Margaret A. Somerville, *Changes in Mental Health Legislation as Indicators of Changing Values and Policies*, in *PSYCHIATRY, HUMAN RIGHTS AND THE LAW* 156, 196 (Martin Roth & Robert Bluglass eds., 1985).

<sup>33</sup> Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848 (1983); see also HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 402 (2d ed. 2000).

<sup>34</sup> This would be similar to the situation in interviews for eligibility under the refugee framework protection whereby state or UN officials share the burden of assessing and proving the statements by the asylum seeker with the asylum seeker himself.

<sup>35</sup> A similar complementary relationship is said to exist between human rights and mental health. See Gostin & Gable, *supra* note 8, at 28.

<sup>36</sup> AM. PSYCHIATRIC ASS'N., Position Statement, *Psychiatric Participation in Interrogation of Detainees* (2006), available at [http://www.psych.org/edu/other\\_res/lib\\_archives/archives/200601.pdf](http://www.psych.org/edu/other_res/lib_archives/archives/200601.pdf).

<sup>37</sup> See, e.g., AM. PSYCHIATRIC ASS'N., Position Statement, *Death Sentences for People with Dementia or Traumatic Brain Injury* (2005), available at [http://www.psych.org/edu/other\\_res/lib\\_archives/archives/200508.pdf](http://www.psych.org/edu/other_res/lib_archives/archives/200508.pdf); AM. PSYCHIATRIC ASS'N., Position Statement, *Mentally Ill Prisoners on Death Row* (2005), available at [http://www.psych.org/edu/other\\_res/lib\\_archives/archives/200505.pdf](http://www.psych.org/edu/other_res/lib_archives/archives/200505.pdf); AM. PSYCHIATRIC ASS'N., Position Statement, *Diminished Responsibility in Capital Sentencing* (2004), available at [http://www.psych.org/edu/other\\_res/lib\\_archives/archives/200406.pdf](http://www.psych.org/edu/other_res/lib_archives/archives/200406.pdf).

<sup>38</sup> See, e.g., AM. PSYCHIATRIC ASS'N., *Endorsement of the Declaration of Professional Responsibility: Medicine's Social Contract with Humanity* (2002), available at [http://www.psych.org/edu/other\\_res/lib\\_archives/archives/200208.pdf](http://www.psych.org/edu/other_res/lib_archives/archives/200208.pdf) ("We, the members of the world community of physicians, solemnly commit ourselves to: I. Respect human life and the dignity of every individual."); see also AM. PSYCHIATRIC ASS'N., *Human Rights Position Statement* (1992), available at [http://www.psych.org/edu/other\\_res/lib\\_archives/archives/199207.pdf](http://www.psych.org/edu/other_res/lib_archives/archives/199207.pdf).

<sup>39</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>40</sup> Focusing on exempting the sick from the death penalty is an avenue that should be analyzed given that: (1) from the criminal law point of view, it would mean that, due to the existence of a sickness, if a person was sentenced to death instead of being sent to a treatment facility, punishment would not be excessive and therefore would be more just; (2) from a psychiatric point of view, this approach would mean that no lines would be drawn among people equally situated and without regard to their medical condition; and (3) from a human rights point of view, it would make sense insofar as sickness is listed as a condition demanding protection.

<sup>41</sup> For instance, in the United States, the death penalty can only be imposed for the most serious crimes.

<sup>42</sup> For instance, in China, children until the age of sixteen are totally exempt from the death penalty, whereas teenagers between sixteen and eighteen years old can be submitted to it if the crime committed is considered to be heinous (although the execution will only take place after the completion of the eighteenth birthday). RITA J. SIMON & DAGNY A. BLASKOVICH, A COMPARATIVE ANALYSIS OF CAPITAL PUNISHMENT: STATUTES, POLICIES, FREQUENCIES, AND PUBLIC ATTITUDES THE WORLD OVER 28 (2002).

<sup>43</sup> For instance, in some American states, the introduction of lethal injections was the result of a campaign to abolish the use of the electric chair. Also, it is interesting to note

that the United States Supreme Court has just opened up the possibility of challenges to the use of lethal injections, which is the most common method used in the United States in the carrying out of capital sentences, and because of this has stayed all executions since September, 2007. Linda Greenhouse, *Prisoners Gain in Suit Attacking Lethal Injection*, N.Y. TIMES, June 12, 2006, at A1.

<sup>44</sup> AMNESTY INT'L, *supra* note 11.

<sup>45</sup> *Id.* at 20.

<sup>46</sup> *Id.* at 21.

<sup>47</sup> *Id.* at 18.

<sup>48</sup> The explanation about mental disorders and its division into process disorders (including mental illness) and development disorders (including mental retardation) is based on an interview with Carmem Santana, MD, in March 2006.

<sup>49</sup> AM. PSYCHIATRIC ASS'N., *supra* note 13, at 27.

<sup>50</sup> It is relevant to note that mental retardation and mental illness are technically not in the same category of mental disorders; this could be an argument against using the same criteria to exempt both categories from capital punishment.

<sup>51</sup> It is said that in cases of "development disorders," the disease has no cure; in contrast, a "process disorder" can be controlled (rather than cured) via the administration of medicines. This is significant because it may lead to the anti-human rights position that, if the aim of the criminal system is rehabilitation, then it is acceptable to execute people suffering from development disorders because they cannot be rehabilitated.

<sup>52</sup> AMNESTY INT'L, *supra* note 11, at 167.

<sup>53</sup> The proposed measures include, *inter alia*, training programs for capital defense lawyers and prosecutors to help them to recognize signs and symptoms of serious mental illness, the imposition of a moratorium on federal executions, and legislation abolishing the death penalty. *Id.* at 167–69.

<sup>54</sup> The recommendations state, *inter alia*, that

1. Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury. 2. Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences, and wrongfulness of their conduct; (b) to exercise rational judgment in relation to conduct; or (c) to conform their conduct to the requirements of the law.

*ABA Recommendations*, *supra* note 12, at 1115.

<sup>55</sup> The limiting criteria involved a connection between the existence of the disease and the time of commission of the crime. *Id.*

<sup>56</sup> In fact, the Amnesty International report itself acknowledges the ABA proposals. AMNESTY INT'L, *supra* note 11, at 189–90.

<sup>57</sup> *See supra* note 37.

<sup>58</sup> AMNESTY INT'L, *supra* note 11, at 48.

<sup>59</sup> The 2006 Amnesty International annual report states that six countries—namely China, Iran, Iraq, Sudan, Pakistan, and the United States—accounted for 91 percent of the executions in the world that year. *Pakistan ‘Tops Death Row League,’* BBC NEWS, Apr. 27, 2007, [http://news.bbc.co.uk/go/pr/fr/-/2/hi/south\\_asia/6597507.stm](http://news.bbc.co.uk/go/pr/fr/-/2/hi/south_asia/6597507.stm).

<sup>60</sup> Such practice can be found with the United Nations, *inter alia*, in Security Council resolutions 808 (1993) and 955 (1994); General Assembly resolutions 2393 (XXIII), 2857 (XXVI); and 39/118, the Human Rights Committee comment on Article 6 of the International Covenant of Civil and Political Rights, <http://www.ohchr.org/english/issues/executions/issues.htm>.

<sup>61</sup> The right to life is listed in Article 3 of the Universal Declaration of Human Rights and in Article 6 of the International Covenant of Civil and Political Rights, whereby it is said to be an “inherent right.” Universal Declaration of Human Rights, G.A. Res. 217A, at art. 3, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). See also International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at art. 6, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

<sup>62</sup> STEINER ET AL., *supra* note 33, at 32–33.

<sup>63</sup> Although the United States has not ratified the Second Additional Protocol to the ICCPR, given that this article is written through the lens of international human rights law, it is important to note the total ban on the death penalty imposed by this document.

<sup>64</sup> As of October 2007, there are thirty-five signatories and sixty-four states party to the protocol. These numbers exemplify the divisiveness of the issue of the death penalty among states, which jeopardizes the claim that even if there are no written norms on the abolition of the death penalty, at least there is an international custom in that direction—it shows that the practice lacks the generalization criterion to be seen as such. Office of the United Nations High Commissioner for Human Rights, <http://www.ohchr.org/english/countries/ratification/12.htm> (last visited Nov. 25, 2007).

<sup>65</sup> This can be exemplified by Article 6 (6) of the International Covenant of Civil and Political Rights: “Nothing in this Article shall be invoked to delay or to prevent abolition of capital punishment by any State party to the present Covenant.” ICCPR, *supra* note 61.

<sup>66</sup> The UN Safeguards state that:

1. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences;
2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
3. People below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on people who have become insane;
4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts;
5. Capital punishment may only be carried out pursuant to a final judgment rendered by a

competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings; 6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory; 7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment; 8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence; 9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.

Office of the United Nations High Commissioner for Human Rights, <http://www.ohchr.org/english/law/protection.htm> (last visited Nov. 25, 2007).

<sup>67</sup> (2) “In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention of the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court”; (4) “Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases”; (5) “Sentence of death shall not be imposed for crimes committed by people below eighteen years of age and shall not be carried out on pregnant women.” ICCPR, *supra* note 61.

<sup>68</sup> U.N. Econ. & Soc. Council [ECOSOC], *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, U.N. Doc. RES/1984/50 (May 25, 1984).

<sup>69</sup> G.A. Res. 39/118, U.N. Doc. A/RES/30/118 (Dec. 14, 1984).

<sup>70</sup> ECOSOC, *supra* note 68 (internal quotes added).

<sup>71</sup> HOOD, *supra* note 21, at 85. The author also notes that safeguards 6 and 7 were strengthened. *Id.* at 119, 125.

<sup>72</sup> *Id.* at 85.

<sup>73</sup> See AMNESTY INT’L, *supra* note 11, at 21; see also *ABA Recommendations*, *supra* note 12, at 1115.

<sup>74</sup> There are, however, controversies on whether or not an IQ test is the best way to assess mental retardation. Richard J. Bonnie, *The American Psychiatric Association’s Resource Document on Mental Retardation and Capital Sentencing: Implementing Atkins v. Virginia*, 32 J. AM. ACAD. PSYCHIATRY & L. 305, 305–06 (2004).

<sup>75</sup> AM. PSYCHIATRIC ASS’N., *supra* note 13, at xxx.

<sup>76</sup> See JEAN BENARD LEON FOUCAULT, *MADNESS AND CIVILIZATION – A HISTORY OF INSANITY IN THE AGE OF REASON* (Richard Howard trans., Vintage Books 1988) (1965), for an assessment on how the concept of insanity was historically produced.

<sup>77</sup> Nicole A. King, *The Role of Culture in Psychology: A Look at Mental Illness and the Cultural Defense*, 7 TULSA J. COMP. & INT’L L. 206 (1999).

<sup>78</sup> An example of this is the fact that homosexuality was listed as a disease in the ninth version of the International Classification of Diseases (ICD) of the World Health Organization, but is not in the current (tenth) edition. World Health Organization, <http://www.who.int/classifications/icd/en/> (last visited Nov. 25, 2007).

<sup>79</sup> King, *supra* note 77, at 212.

<sup>80</sup> *Id.* at 213.

<sup>81</sup> It is interesting to note that the DSM-IV recognizes this feature of psychiatric diagnoses; it has a section on culture, age, and gender features, which states that “a clinician who is unfamiliar with the nuances of an individual’s cultural frame of reference may incorrectly judge as psycho-pathology those normal variations in behavior, belief, or experience that are particular to the individual’s culture.” AM. PSYCHIATRIC ASS’N., *supra* note 13, at xxxiv.

<sup>82</sup> It is interesting to note that human rights are also said to be historically and culturally constructed.

<sup>83</sup> AM. PSYCHIATRIC ASS’N., *supra* note 13, at xxxiii.

<sup>84</sup> World Health Organization, *supra* note 78.

<sup>85</sup> AM. PSYCHIATRIC ASS’N., *supra* note 13.

<sup>86</sup> *Id.*; World Health Organization, *supra* note 78.

<sup>87</sup> See, e.g., Dan Malone, *Cruel and Inhumane: Executing the Mentally Ill*, AMNESTY INT’L MAG., Fall 2005, at 20, 23, available at [http://www.amnestyusa.org/magazine/cruel\\_and\\_inhumane\\_executing\\_the\\_mentally\\_ill.html](http://www.amnestyusa.org/magazine/cruel_and_inhumane_executing_the_mentally_ill.html).

<sup>88</sup> See Malone, *supra* note 87, at 23; see also Amanda C. Pustilnik, *Prisons of the Mind: Social Value and Economic Inefficiency in the Criminal Justice Response to Mental Illness*, 96 J. CRIM. L. & CRIMINOLOGY 217, 226–27 (2005) (stating that the number of incarcerated people (adults or children) in state or federal prisons, jails, and juvenile facilities in the United States that suffer from mental illness each year is said to be three hundred thousand).

<sup>89</sup> Roger C. Bland, *Book Reviews*, 17 (1) J. PSYCHIATRY NEUROSCI., 34–36 (1992) (reviewing PSYCHIATRIC DISORDERS IN AMERICA: THE EPIDEMIOLOGICAL CATCHMENT AREA STUDY (Lee N. Robins & Darrel N. Reiger eds. 1991)).

<sup>90</sup> R. Kessler, *The National Comorbidity Survey of the United States*, 6 INT’L REV. PSYCHIATRY 365 (1994).

<sup>91</sup> King, *supra* note 77, at 212.

<sup>92</sup> Richard C. Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, June 1998, <http://www.deathpenaltyinfo.org/article.php?scid=45&did=539>.

<sup>93</sup> Although 42 percent of the population on death row in the United States is made up of African Americans, they are just 13 percent of the overall population. SIMON & BLASKOVICH, *supra* note 42, at 18.

<sup>94</sup> Victims’ rights movements are increasing in significance both in the United States and internationally. In the international arena, they played an important role in the establishment of the International Criminal Court. As far as nationally, they have been able to ensure legislation—such as the Code of Practice for Victims of Crimes in the United Kingdom—and form institutions—such as the Office for Victim of Crimes within the United States Department of Justice—to protect their rights.

<sup>95</sup> Avoiding impunity is said to be part of the victim's right not to be victimized once again in criminal procedures. See Laurence H. Tribe, *In Support of a Victims' Rights Constitutional Amendment*, 9 LEWIS & CLARK L. REV. 659 (2005).

<sup>96</sup> See *ABA Recommendations*, *supra* note 12, at 1115–16; see also Amnesty International, *supra* note 11.

<sup>97</sup> See *ABA Recommendations*, *supra* note 12, at 1115.

<sup>98</sup> *Id.*

<sup>99</sup> AM. PSYCHIATRIC ASS'N., *Mental Illness and the Criminal Justice System: Redirecting Resources Toward Treatment, Not Containment*, Resource Document, 1 (2004), available at [http://www.psych.org/edu/other\\_res/lib\\_archives/archives/200401.pdf](http://www.psych.org/edu/other_res/lib_archives/archives/200401.pdf).

<sup>100</sup> It is interesting to note that people who suffer from mental illness are eleven times more likely than the general population to be victims of violence. Linda A. Teplin et al., *Crime Victimization in Adults with Severe Mental Illness: Comparison with the National Crime Victimization Survey*, 62 ARCHIVES GEN. PSYCHIATRY 911 (2005).

<sup>101</sup> See Ronald S. Honberg, *The Injustice of Imposing Death Sentences on People with Severe Mental Illnesses*, 54 CATH. U. L. REV. 1153, 1154–55 (2005).

<sup>102</sup> *Id.* at 1154.

<sup>103</sup> AM. PSYCHIATRIC ASS'N., *supra* note 13, at xxxi.

<sup>104</sup> Bersoff, *supra* note 27, at 84; Adam Candeb, *Consciousness and Culpability*, 54 ALA. L. REV. 113 (2002).

<sup>105</sup> Bersoff, *supra* note 27, at 84.

<sup>106</sup> *Id.*

<sup>107</sup> See AMNESTY INT'L, *supra* note 11, at 143–48.

<sup>108</sup> The possibility of sequelas can be derived from the possibility of recurrence where “individuals after a period of time in which the full criteria for the disorder are no longer met [...] may develop symptoms that suggest a recurrence of their original disorder but that do not yet meet the full threshold for that disorder as specified in the criteria set.” AM. PSYCHIATRIC ASS'N., *supra* note 13, at 3.

<sup>109</sup> Slovenko, *supra* note 22, at 282.

<sup>110</sup> Honberg, *supra* note 101, at 1163.

<sup>111</sup> Blumenthal, *supra* note 22.

<sup>112</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>113</sup> See WILLIAM BLACKSTONE, *THE AMERICAN STUDENTS' BLACKSTONE COMMENTARIES ON THE LAWS OF ENGLAND* 864 (George Chase ed., Banks Law Publishing 1922) (1877).

<sup>114</sup> AMNESTY INT'L, *supra* note 11, at 42.

<sup>115</sup> Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8*, N.Y. TIMES, Dec. 18, 2007, at B3.

<sup>116</sup> Joel Schumm, *Mental Illness and the Death Penalty*, 49 RES GESTAE 43 (2005).

<sup>117</sup> Gina Holland, *Supreme Court Takes up Insanity Defense*, ASSOCIATED PRESS (AP) NEWSWIRE, Apr. 20, 2006.

<sup>118</sup> *Id.*

<sup>119</sup> *Panetti v. Quaterman*, 127 S.Ct. 2842 (2007).

<sup>120</sup> *Id.* at 2848.

- <sup>121</sup> Koh, *supra* note 5, at 3.
- <sup>122</sup> Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250, 251 (1989).
- <sup>123</sup> The issue of the arbitrariness of capital punishment trials involving people who suffer from mental illness is also raised in the Amnesty International report. See AMNESTY INT'L, *supra* note 11.
- <sup>124</sup> "(1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." ICCPR, *supra* note 61.
- <sup>125</sup> See Office of the United Nations High Commissioner for Human Rights, <http://www.ohchr.org/english/law/executions.htm>, (last visited Nov. 25, 2007).
- <sup>126</sup> Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, U.N. Econ. & Soc. Council Res. 1989/65, ¶4 (May 24, 1989), available at <http://www.ohchr.org/english/law/executions.htm>.
- <sup>127</sup> See, e.g., *Gilbert v. Homar*, 520 U.S. 924 (1997); *Parham v. J.R.*, 442 U.S. 584 (1979); *Mathews v. Eldridge* 424 U.S. 319 (1976).
- <sup>128</sup> U.S. CONST., amend. V.
- <sup>129</sup> *China Death Penalty Verdicts Drop*, BBC NEWS, June 8, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/6733279.stm>.
- <sup>130</sup> See Nancy Wolff & Wendy Pogorzelski, *Measuring the Effectiveness of Mental Health Courts: Challenges and Recommendations*, 11 PSYCHOL. PUB. POL'Y & L. 539 (2005) (discussing mental health courts and how they are an attempt to try to solve the perceived unfairness of the criminal justice system towards people who suffer from mental illness); see also Tammy Seltzer, *Mental Health Courts: A Misguided Attempt to Address the Criminal Justice System's Unfair Treatment of People with Mental Illness*, 11 PSYCHOL. PUB. POL'Y & L. 570 (2005).
- <sup>131</sup> The feeling of fear can be mixed with feelings of outrage and vengeance, especially in cases that touch on sensitive issues, such as the terrorist attacks on 9/11, and the reactions to the claim of mental illness by Zacarias Moussaoui show. It is interesting to note, however, that both in the case of Moussaoui and of the Belan school terrorist attacks, jurors voted against the death penalty.
- <sup>132</sup> See generally AMNESTY INT'L, *supra* note 11; *ABA Recommendations*, *supra* note 12.
- <sup>133</sup> Honberg, *supra* note 101, at 1163; AM. PSYCHIATRIC ASS'N., *supra* note 37, at 1.
- <sup>134</sup> *ABA Recommendations*, *supra* note 12, at 1115.
- <sup>135</sup> One scholar that places great value on autonomy is Amanda C. Pustilnik. See generally Amanda C. Pustilnik, *Prisons of the Mind: Social Value and Inefficiency in the Criminal Justice Response to Mental Illness*, 96 J. CRIM. L. & CRIMINOLOGY 217 (2005).
- <sup>136</sup> Honberg, *supra* note 101, at 1163.
- <sup>137</sup> In this area, it would be relevant to point out to jurors that the inexistence of previous diagnosis of mental illness or previous commitments should not weigh against the defendant and that, conversely, the fact that there are previous diagnoses or previous requests for state aid due to mental conditions should be taken into consideration in favor of the defendant.

<sup>138</sup> Patrick W. Corrigan & Amy C. Watson, *Findings from the National Comorbidity Survey on the Frequency of Violent Behavior in Individuals with Psychiatric Disorders*, 136 PSYCHIATRY RES. 153, 153 (2005).

<sup>139</sup> Adam Candeub posits that we judge others based on motives, which means that remorse is a factor taken into consideration when we pass judgments. Candeub, *supra* note 104, at 141.

<sup>140</sup> *Id.*

<sup>137</sup> John W. Parry, *The Death Penalty and People with Mental Disabilities: A Lethal Dose of Stigma, Sanism, Fear of Violence and Faulty Predictions of Dangerousness*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 667 (Sep./Oct., 2005).

<sup>142</sup> See generally Office of the U.N. High Comm'r for Human Rights [OHCHR], *Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Report*, [http://www.unhcr.ch/html/menu2/7/b/execut/exe\\_mand.htm](http://www.unhcr.ch/html/menu2/7/b/execut/exe_mand.htm).

<sup>143</sup> According to the United Nations “more than 60 percent” of people globally who suffer from mental disorders are not receiving treatment. *Ban Ki-moon Calls for Scaling up Resources for Mental Health Services*, UN NEWS SERVICE, Oct. 10, 2007, <http://www.un.org/apps/news/story.asp?NewsID=24249&Cr=mental&Cr1=health>.

<sup>144</sup> AM. PSYCHIATRIC ASS'N., *supra* note 99, at 3.

<sup>145</sup> See AMNESTY INT'L, *supra* note 11, at 56–59.

<sup>146</sup> AM. PSYCHIATRIC ASS'N., *supra* note 99, at 4.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 6.

<sup>149</sup> International Covenant on Economic, Cultural and Social Rights, G.A. Res. 2200A, at art. 12, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), available at [http://www.unhcr.ch/html/menu3/b/a\\_cescr.htm](http://www.unhcr.ch/html/menu3/b/a_cescr.htm).