LINCOLN MEMORIAL UNIVERSITY
LAW REVIEW

VOLUME 7 FALL 2020 ISSUE 2

NOTE: LIMITING THE DEADLY IMPACT OF POST-TRAUMATIC STRESS DISORDER (PTSD):

OFFENDERS SUFFERING FROM PTSD AT THE TIME OF THE OFFENSE SHOULD BE EXCLUDED FROM THE DEATH PENALTY.

Alexandria Patterson Tipton

I. INTRODUCTION

The Constitution of the United States prohibits the infliction of "cruel and unusual punishments."[1] However, a consistently asked question is what constitutes cruel and unusual punishment. In 1958, the Supreme Court stated that "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man,"[2] and recognized that the "words of the [Eighth] Amendment are not precise, and that [the Court's] scope is not static."[3] Thus, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[4] Accordingly, the constitutionality of the death penalty—specifically the

[1] U.S. CONST. amend. VIII.

[2] Trop v. Dulles, 356 U.S. 86, 100 (1958).

[3] *Id*. at 100-01.

[4] *Id*. at 101.

implementation of it—depends on what society deems appropriate at a given time.

To date, the death penalty does not *per se* constitute cruel and unusual punishment in violation of the Eighth Amendment. However, as society's standard of decency has narrowed, certain impositions of the death penalty have been found to constitute cruel and unusual punishment. Specifically, a death sentence is only warranted for offenders who have committed first-degree murder.[5] Additionally, the death penalty cannot be imposed on intellectually disabled individuals or juveniles because these specific classes of offenders essentially have a reduced criminal culpability, rendering the punishment of death disproportionate. [6]

Recently, there has been a growing controversy in the United States as to whether executing an offender suffering from a severe mental defect constitutes cruel and unusual punishment. Post-traumatic stress disorder (PTSD) is a severe mental defect that has historically carried little weight as a defense in the criminal justice system. However, as the American people develop a better understanding of PTSD and the effect it can have on an offender's criminal culpability, its role in a criminal defense should be weighed more heavily. For PTSD to play a valid role in the criminal justice system it must be accurately understood, diagnosed, and deemed admissible. Furthermore, an admissible PTSD diagnosis must be appropriately placed in a defense.

Initially, PTSD must be diagnosed by a qualified mental health physician, and that physician must testify as an expert witness at trial for the offender's PTSD diagnosis to be admissible. While the admissibility of an offender's PTSD is essential, appropriately placing a PTSD diagnosis in the offender's defense is equally important. There are three potential places for PTSD to fit within a defense. First, PTSD

---

[5] Coker v. Georgia, 433 U.S. 584 (1977).

[6] *See* Atkins v. Virginia, 536 U.S. 304 (2002) (Court holding it unconstitutional to execute intellectually disabled individuals, and creating an exclusionary category exempting those offenders from the death penalty); Roper v. Simmons, 543 U.S. 551 (2005) (Court finding that executing any offender under the age of eighteen unconstitutional, and creating an exclusionary category exempting that specific class of offenders from the death penalty).

seemingly would fit within the insanity defense. However, PTSD would fall in-between the cracks of the inconsistent tests applied in various jurisdictions throughout the United States. Second, it seems appropriate to consider PTSD as a mitigating circumstance to be weighed against the case's aggravating circumstances at the sentencing phase of trial. However, an offender's mental illness does not generally carry much weight as a mitigating circumstance in a capital case, and PTSD is such a severe mental defect that it should carry a significant amount of weight. Thus, according to today's standards of human decency, an exclusionary category should be created to exempt offenders who were suffering from PTSD at the time of the offense from the death penalty.

II. UNDERSTANDING PTSD

Until recently there has been little information regarding PTSD and the effect it commonly has on those who have it. Now that this information has become readily available, what PTSD is and who can have it is better understood. Thus, it has become apparent that PTSD reduces an offender's criminal culpability.

A. ANYONE CAN HAVE PTSD

PTSD is an anxiety disorder that occurs "exclusively in persons who have experienced an emotional or physical trauma of the highest magnitude."[7] When one hears the term PTSD, they automatically think about combat veterans. While combat veterans are historically considered the majority of those who fall victim to PTSD, this disorder is not limited to veterans alone.
Rather, overwhelming stressors that may lead to PTSD include "war, rape, assault, accidents, fires, and natural disasters."[8]

---

[7] Marjorie A. Shields, Annotation, *Posttraumatic Stress Disorder (PTSD) as a Defense to Murder, Assault, or other Violent Crime*, 4 A.L.R. 7th 5 (2020).

[8] *Id*.

The earliest information on PTSD came from studies of male combat veterans, specifically Vietnam Veterans.[9] Eventually, researchers began to see a parallel between the trauma of male combat veterans and the trauma of women who suffered from sexual assault, and ultimately found that a women's sexual trauma experience also can lead to PTSD similar to that of a combat veteran.[10] Retired army colonel, Dr. Elspeth Cameron Ritchie, stated that "[i]n some ways, the trauma from sexual assault may be worse than the trauma from combat because normally, soldiers are prepared and trained for combat."[11] Similarly, researchers found that children and teens can develop PTSD if they have lived through a trauma that could have caused them or someone else to be killed or severely injured.[12] Thus, under the right traumatic circumstances, anyone—regardless of age, gender, or profession—can have PTSD.

B. PTSD TRIGGERS

When an individual suffers from PTSD, certain triggers can cause that individual to act irrationally as if he or she were re-living the traumatic event that initially caused his or her PTSD, resulting in the victim reacting to that trigger without realizing exactly what he or she is doing. Specifically, "being 'triggered' more narrowly refers to the experience of people with [PTSD] re-experiencing symptoms of a traumatic event (such as exposure to actual or threatened death, serious injury,

---

[9] *PTSD: National Center for PTSD*, U.S. DEPARTMENT OF VETERANS AFFAIRS, https://www.ptsd.va.gov/understand/common/common_women.asp (last visited Mar. 10, 2020).

[10] *Id.*

[11] Heather Mayer Irvine, *The Most Common PTSD Triggers – and How to Manage Them*, HEALTH (Apr. 3, 2020, 1:45 PM), https://www.health.com/condition/ptsd/ptsd-triggers.

[12] *PTSD: National Center for PTSD*, U.S. DEPARTMENT OF VETERANS AFFAIRS, https://www.ptsd.va.gov/understand/common/common_children_teens.asp (last visited Mar. 10, 2020).

or sexual violation) after being exposed to a trigger that is a catalyst or reminder."[13]

Commonly, sights, sounds, smells, and emotions that a PTSD victim associates with their trauma are considered PTSD triggers.[14] Veterans suffering from PTSD are often triggered by the smell of burning meat, which resembles the smell of charred flesh during action, and diesel fuel that is used in military trucks.[15] Such veterans are also commonly triggered by the sound of helicopters or loud bangs.[16] Likewise, sexual assault victims suffering from PTSD are commonly triggered by sounds, smells, or any other circumstance that reminds the victim of the assault.[17]

Even though it has yet to be determined exactly how these triggers are formed, it is known "that triggers can cause an emotional reaction before a person realizes why they have become upset."[18] Thus, any person with PTSD, when triggered, may make a bad choice or partake in a bad act without knowing the magnitude of what he or she is doing.

III. ADMISSIBILITY OF PTSD

When a person suffering from PTSD commits an offense, the PTSD is relevant to the offender's criminal culpability. However, before the offender's PTSD can be considered by the court, it must first be deemed admissible. Accordingly, for the offender's PTSD to be deemed admissible, it must be appropriately diagnosed and meet the legal standard.

---

[13] Arlin Cuncic, *What Does it Mean to Be 'Triggered'*, VERYWELLMIND (Apr. 3, 2020, 2:20 PM), https://www.verywellmind.com/what-does-it-mean-to-be-triggered-4175432.

[14] *Id*.

[15] Heather Mayer Irvine, *supra* note 11.

[16] *Id*.

[17] *Id*.

[18] Arlin Cuncic, *supra* note 13.

A. DIAGNOSING PTSD

As the understanding of who can have PTSD has broadened, the theories and processes of how PTSD is diagnosed have evolved accordingly. Currently, PTSD must be diagnosed by a mental health care physician by determining that eight criteria are present.[19] Specifically, the criteria look to the existence of a person's stressor(s), the existence of intrusion symptoms, the person's avoidance of trauma-related stimuli after the trauma, negative alterations in the person's cognition and mood, trauma-related arousal and reactivity, the duration of the person's symptoms, the person's distress or functional impairment, and the absence of any other causes.[20]

B. LEGAL STANDARD

Even after a mental health care physician has made an official medical PTSD diagnosis, the diagnosis must satisfy the legal standard to be admissible at trial. For a diagnosis of PTSD to be considered valid according to the legal standard, the diagnosing physician must testify and qualify as a credible and reliable expert witness under the applicable evidentiary rules. For example, Federal Rule of Evidence 702 states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably

---

[19] *DSM-5 Criteria for PTSD*, BRAINLINE, https://www.brainline.org/article/dsm-5-criteria-ptsd (last visited Mar. 10, 2020).

[20] *Id.*

> applied the principles and methods to the facts of the case.[21]

Furthermore, the Supreme Court has enumerated a list of nonexclusive factors that a trial court might consider in determining whether an expert's reasoning and methodology is reliable: (1) whether the theory or technique has been or could be tested; (2) whether the theory or technique has been subject to peer review and publication; (3) what the rate of error of the technique or theory was when applied; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the theory or technique has been generally accepted in the scientific community.[22]

Accordingly, so long as a PTSD diagnosis and the diagnosing physician meet these elements, the offender's PTSD should be admissible. Once an offender's PTSD has been deemed admissible, the next issue regarding this mental defect is its place in a case. Specifically, where and offender's PTSD will most appropriately fit in a defensive argument when the offender is subject to the death penalty.

IV. PTSD AND THE INSANITY DEFENSE

There has been an ongoing debate about where PTSD fits within an offender's defense in a capital case. One argument is that PTSD should be covered within the insanity defense. Throughout much of the nineteenth and twentieth centuries, the insanity defense evolved significantly.[23] At common law, the applicable insanity defense test was the M'Naughten Test, which solely focused on an offender's cognitive impairment.[24] In the 1970s, the American Law Institute (ALI) established a

---

[21] Fed. R. Evid. 702 (2020).

[22] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593-94 (1993).

[23] Major Jeremy A. Ball, *Solving the Mystery of Insanity Law: Zealous Representation of Mentally Ill Servicemembers,* 2005 ARMY LAW. 1, 16 (2005).

[24] W. Chris Jordan, *Conditioned to Kill: Volition, Combat Related PTSD, and the Insanity Defense – Providing a Uniform Test for Uniformed Trauma*, 16 RUTGERS J.L. & PUB. POL'Y 22, 35-37 (2019).

broader test that expanded beyond a mere cognitive test and also looked to volitional impartments, known as the Model Penal Code (MPC) Test.[25] However, Congress largely resurrected the M'Naughten Test by passing the Insanity Defense Reform Act of 1984, when many jurisdictions began rejecting the MPC Test on the basis that it was too lenient.[26] The gradual expansion—and again narrowing—of the insanity defense has led to the development of various insanity defense tests among jurisdictions, which can lead to arbitrariness and conflict among courts in different jurisdictions. Specifically, various jurisdictions follow different insanity defense tests, and a jurisdiction's applicable test will affect the criminal culpability of an individual suffering from PTSD.[27] Accordingly, PTSD does not appropriately fit in the insanity defense in capital cases.

A. THE M'NAUGHTEN TEST

According to the M'Naughten Test, to establish an insanity defense, it must be clearly proven that, at the time the offender committed the act, the offender was "laboring under such a defect of reason, from 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."[28] Particularly, the M'Naughten Test solely focuses on an offender's ability to know his or her actions were wrong, which fails to acknowledge the modern understanding of mental illness that affects an offender's ability to know or even be aware of the wrongfulness of his or her actions when committed.[29] In other words, the narrow language of the M'Naughten Test "ignores most contemporary knowledge of

---

[25] *Id*. at 37-39.

[26] Insanity Defense Reform Act, Ch. IV, Pub. L. No. 98-473, 98 Stat. 2057 (1984).

[27] Thomas L. Hafemeister & Nicole A. Stockey, *Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Posttraumatic Stress Disorder*, 85 IND. L.J. 87, 112 (2010).

[28] W. Chris Jordan, *supra* note 24, at 36.

[29] *Id*. at 37.

psychiatry."[30] Thus, the M'Naughten Test fails to recognize PTSD as a valid insanity defense because the jurisdictions that still use this test apply it in a way that is essentially unchanged despite the advancements in the psychiatry field.[31]

B. THE MPC TEST

Through the MPC Test, the ALI rejected the outdated and narrow language of the M'Naughten Test, which solely focused on cognitive impairments, and presented a broader standard that looked to cognitive and volitional impairments.[32] The MPC Test established a much broader legal concept of insanity, which recognized more mental defects as a defense, including PTSD.[33] The MPC Test states that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirement of law."[34] Accordingly, in applying the MPC Test, PTSD would likely be grounds for a valid insanity defense because the effects of PTSD would cause the offender to lack substantial capacity to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirement of law. However, the MPC Test was abandoned at the federal level and in many states following the passage of the Insanity Defense Reform Act of 1984.

C. INSANITY DEFENSE REFORM ACT OF 1984

After John W. Hinckley, Jr. was acquitted based on insanity for the attempted assassination of President Reagan, many people began to reject the MPC Test because they viewed

---

[30] *Id.*

[31] *Id.*

[32] *Id.* at 38.

[33] *Id.* at 39.

[34] *Id.* at 38 (citing Am. Law. Inst., Model Penal Code and Commentaries pt. I §§ 3.01-5.07 at 163 (1985)).

it as too lenient.[35] As a result, Congress passed the Insanity Defense Reform Act of 1984, which again substantially narrowed the insanity defense in the federal criminal court system.[36] The Insanity Defense Reform Act of 1984 is now codified in 18 U.S.C. § 17, and treats the insanity defense as an affirmative defense:

> It 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.[37]

The language used in the Insanity Defense Reform Act of 1984 largely resembles the narrow and outdated language of the M'Naughten Test that distinctly rejects an insanity defense on the grounds of PTSD.

The applicable test for insanity is inconsistent throughout the United States. In federal courts, the insanity defense is governed by the Insanity Defense Reform Act, and many states have followed suit and adopted its provisions.[38] The majority of the remaining states continued following the MPC standards.[39] However, there are notable exceptions including states using the Durham Product Test or the diminished capacity standard.[40] Accordingly, PTSD does not appropriately fit within the insanity defense because the array of tests used in various jurisdictions to determine an offender's

---

[35] *Id*. at 39-40.

[36] Insanity Defense Reform Act, Ch. IV, Pub. L. No. 98-473, 98 Stat. 2057 (1984).

[37] 18 U.S.C. § 17 (2020).

[38] Louis Kachulis, Note, *Insane in the Mens Rea: Why Insanity Defense Reform is Long Overdue*, 26 S. CAL. REV. L. & SOCIAL JUSTICE 245, 250 (2017).

[39] *Id*.

[40] *Id*.

legal sanity leads to inconsistency and arbitrariness in capital cases involving offenders suffering from PTSD.

V. PTSD AS A MITIGATING CIRCUMSTANCE

As previously stated, the effectiveness of the insanity defense in regard to offenders suffering from PTSD facing the death penalty, is dependent upon the specific test applied in a given jurisdiction. Thus, the insanity defense would only be a sufficient place for such an argument in approximately half of the jurisdictions throughout the United States. Therefore, because the insanity defense does not provide an adequate place for PTSD as a defense, it has been argued that PTSD should be considered as a mitigating circumstance to be weighed against aggravating circumstances at the sentencing phase of a capital case.[41]

A. THE RISE OF MITIGATING CIRCUMSTANCES

The rise of mitigating circumstances for individualized penalty determination began in the 1970s with *Furman v. Georgia* and *Gregg v. Georgia*. Together, the Supreme Court's decisions in *Furman* and *Gregg* "established that a state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal character, and the circumstances of his crime."[42]

Additionally, in *Woodson v. North Carolina*, the Supreme Court found that a mandatory death penalty scheme is unconstitutional, and determined that a sentencer is required to look to specific mitigating circumstances to establish an

---

[41] *See* Debra D. Burke and Mary Anne Nixon, *Post-Traumatic Stress Disorder and the Death Penalty*, 38 HOW. L.J. 183, 183 (1994); Jeffery L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 OR. L. REV. 631, 676 (2004).

[42] Kansas v. Marsh, 548 U.S. 163 (2006) (*citing* Furman v. Georgia, 408 U.S. 238 (1972) and Gregg v. Georgia, 428 U.S. 153 (1976)).

individualized penalty determination.[43] The Supreme Court went even further in *Lockett v. Ohio* by stating that the sentencer may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[44]

Essentially, these cases emphasized the role of mitigating circumstances or factors in the sentencer's process of establishing an individualized penalty determination. Specifically, *Lockett* articulated that the defendant's character, prior record, and the circumstances of the offense must be considered by the jury when determining the penalty, and weighed against the death penalty.[45] However, mental illness was excluded from this list. Even though mental illness was excluded, some courts have held that an offender's mental health plays a mitigating role.

B. MENTAL ILLNESS AS A MITIGATING CIRCUMSTANCE

Weighing the aggravating and mitigating circumstances of a given offender in a capital case is a mere balancing test that gives little weight to one specific factor. Accordingly, in applying this balancing test, courts have developed inconsistent decisions. Specifically, some courts have used mental health as a mitigating circumstance to render the death penalty disproportionate,[46] while other courts have determined that mental health does not carry enough weight to find the death penalty disproportionate.[47]

---

[43] Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

[44] Lockett v. Ohio, 438 U.S. 586, 604 (1978).

[45] *Id*.

[46] *See* State v. Claytor, 574 N.E.2d 472 (Ohio 1991).

[47] *See* State v. Ross, 849 A.2d 648 (Conn. 2004); Davis v. State, 148 So. 3d 1261 (Fla. 2014).

1. MENTAL ILLNESS SUCCESSFULLY BARRING THE DEATH PENALTY

In *State v. Claytor*, the death sentence of a paranoid schizophrenic was overturned on the basis that his mental health as a mitigating factor outweighed the aggravating factors.[48] A psychiatrist and psychologist testified during the penalty phase of the trial that the defendant was mentally ill, and "as a result of that illness he lacked the substantial capacity to conform his conduct to the requirements of the law."[49] Additionally, the state's expert witness testified and agreed that the defendant was "suffering from chronic paranoid schizophrenia, which occasionally became acute."[50] The Supreme Court of Ohio reversed the initial death sentence stating that more weight should have been given to the mitigating circumstance of the defendant's mental health.[51]

2. MENTAL ILLNESS FAILING TO BAR THE DEATH PENALTY

However, other courts have held that mental health does not carry a substantial amount of weight as a mitigating factor. Specifically, during the penalty phase of the trial of *State v. Ross*, defense counsel claimed, as statutory mitigating factors, that at the time of the offense the defendant's mental capacity was significantly impaired, but not so impaired as to rise to the level of a defense to prosecution.[52] Defense counsel further presented evidence from a psychiatric expert that the defendant suffered from the mental illness that significantly impaired his ability to control his actions.[53] However, the defendant was sentenced to death based on a finding that the aggravating factors outweighed the statutory mitigating factor of mental

---

[48] *See Claytor*, 574 N.E.2d at 482.

[49] *Id.* at 481.

[50] *Id.*

[51] *Id.*

[52] *Ross*, 849 A.2d at 695.

[53] *Id.*

illness, and the Supreme Court of Connecticut ultimately upheld the defendant's death sentence.[54]

Similarly, in *Davis v. State*, the defendant claimed that his death sentence was disproportionate punishment based on the existence of substantial mental illness, which he argued made the "aggravating circumstances qualitatively less significant and the mitigation weightier."[55] Although the Florida Supreme Court took note of the mental health mitigation, it ultimately rejected Davis' argument and upheld the death sentence.[56]

Even though mental defects have been successfully used to mitigate the criminal culpability of a defendant as to render the death penalty disproportionate, it is more common that an offender's mental illness is not viewed heavily enough to outweigh the aggravating factors in a capital case. Thus, PTSD should carry more weight than a mere mitigating factor.

VI. EXCLUSIONARY CATEGORY FOR OFFENDERS WITH PTSD

As the trend towards better understanding PTSD continues, offenders with PTSD should be viewed similarly to intellectually disabled individuals and juveniles. Particularly, offenders with PTSD at the time of committing the offense should also be excluded from the death penalty.

A. THE RISE OF EXCLUSIONARY CATEGORIES

The establishment of exclusionary categories exempting specific classes of offenders from the death penalty began with intellectually disabled individuals and juveniles. However, whether intellectually disabled individuals and juveniles should be subject to the imposition of the death penalty was a topic of controversy from the 1980s until the Supreme Court decided in favor of such exclusionary categories in *Atkins v. Virginia* and *Roper v. Simmons* in the early-to-mid 2000s.[57]

---

[54] *Id.* at 759.

[55] *Davis*, 148 So. 3d at 1280.

[56] *Id*.

[57] *See* Atkins v. Virginia, 536 U.S. 304 (2002); Roper v. Simmons, 543 U.S. 551 (2005).

1. INTELLECTUALLY DISABLED INDIVIDUALS

In the 1989 case of *Penry v. Lynaugh*, the Supreme Court held that it was not a violation of the Eighth Amendment to sentence mentally incompetent adults to death.[58] At a competency hearing before Penry's murder trial, a clinical psychologist testified that Penry was "mentally retarded."[59] Specifically, it was brought to light that Penry had been diagnosed with an organic brain injury, had an IQ of 54, had the mental age of a 6 ½-year-old, and the social maturity of a 9-or-10-year-old.[60] This evidence was raised as mitigating factors during the penalty phase of trial because the jury did not find this evidence strong enough to rise to an insanity defense.[61] Nonetheless, the court held that Penry's mental disability did not prohibit the imposition of the death penalty, and sentenced him to death.[62] Even though the Supreme Court ultimately held death sentences of intellectually disabled individuals to be constitutional, the Supreme Court overturned Penry's conviction based on the way Texas considered the issue of executing defendants with such mental defects.[63] After a new trial, Penry was again sentenced to death, but in 2001, "the Supreme Court threw out Penry's new death sentence because the jury was still not properly instructed about mental retardation."[64]

The Court revisited the issue of imposing death sentences on intellectually disabled individuals in the 2002 case of *Atkins v. Virginia.* In August of 1996, Atkins shot and killed a

---

[58] *See* Penry v. Lynaugh, 492 U.S. 302 (1989).

[59] *Id*. at 307.

[60] *Id*. at 307-08.

[61] *Id*. at 309-12.

[62] *Id*. at 312.

[63] *Johnny Paul Penry's Death Sentence Overturned for Third Time*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/news/johnny-paul-penrys-death-sentence-overturned-for-third-time (last visited Mar. 10, 2020).

[64] *Id*.

man after robbing and abducting him.[65] During the penalty phase of the trial, the defense relied on a forensic psychologist's testimony that Atkins was "mildly mentally retarded."[66] The psychologist based his conclusion of Atkins' mental state on interviews of Atkins' friends, family, and acquaintances; review of school and court records; and the results of an intelligence test that indicated Atkins had an IQ of 59.[67] Nonetheless, the jury sentenced Atkins to death.[68] After appealing, Atkins' case made its way to the Supreme Court, and the Court determined that capital punishment of intellectually disabled individuals constitutes cruel and unusual punishment in violation of the Eighth Amendment.[69]

2. JUVENILES

Similarly, in the 1989 case of *Stanford v. Kentucky*, the Supreme Court held that sentencing juvenile murderers—ages 16 and 17—to death was not a violation of the Eighth Amendment.[70] In *Stanford*, two cases were consolidated.[71] In the first case, a 17-year-old boy shot and killed a man, and was sentenced to death.[72] In the second case, a 16-year-old boy stabbed and killed a convenient store owner, and was sentenced to death.[73] The Supreme Court ultimately upheld both death sentences and held that there was "neither a historical nor a modern society consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age."[74]

---

[65] Atkins v. Virginia, 536 U.S. 304, 307 (2002).

[66] *Id*. at 308.

[67] *Id*. at 308-09.

[68] *Id*. at 309.

[69] *Id.* at 321.

[70] Stanford v. Kentucky, 492 U.S. 361, 265-67 (1989).

[71] *Id.* at 364.

[72] *Id*. at 365-66.

[73] *Id.* at 366-68.

[74] *Id*. at 380.

However, the Supreme Court revisited the issue of sentencing a juvenile to death in the 2005 case of *Roper v. Simmons*, when an approximately 17-year-old boy was sentenced to death for murder.[75] In applying the concept established in *Atkins*, the Supreme Court determined that the imposition of the death sentence on anyone under the age of 18 is disproportionate punishment, thus cruel and unusual punishment in violation of the Eighth Amendment.[76]

B. TWO-PART TEST ESTABLISHED IN *ATKINS* AND *ROPER*

Through *Atkins* and *Roper*, the Supreme Court established a two-part test for analyzing whether the death penalty is an appropriate form of punishment for a certain class of offenders under the Eighth Amendment.[77] Specifically, there must be objective evidence of societal discontent with sentencing a certain class of offenders to death and the court must subjectively weigh the factors in a given case to determine whether the death penalty is proportionate.

1. OBJECTIVE EVIDENCE OF SOCIETAL DISCONTENT

First, in determining whether to impose the death penalty, the Court will look to whether the punishment of death is proportionate and within the boundaries of the "evolving standards of decency that mark the progress of a maturing society."[78] In determining if the punishment is proportionate and along the lines of human decency, the court examines "objective evidence of contemporary values."[79] Accordingly, evidence of disfavor and intolerance for the execution of a specific class of offenders weighs in favor of a categorical exemption from the death penalty.[80] As seen in *Atkins* and

---

[75] Roper v. Simmons, 543 U.S. 551, 555 (2005).

[76] *Id*. at 578.

[77] *See Atkins,* 536 U.S. at 564-79; *Roper,* 543 U.S. at 311-321.

[78] *Trop*, 356 U.S. at 101.

[79] *Penry*, 492 U.S. at 331.

[80] *Atkins*, 536 U.S. at 310.

Roper, the national consensus plays a major role in death penalty reform. Specifically, the Court generally focuses on legislative statistics and practices, and the trend of the national consensus.

In the years following *Penry*, a national consensus against the executions of intellectually disabled individuals developed.[81] This consensus was evidenced by the fact that many states prohibited such executions, many states chose to not reinstate the power to conduct such executions, and such executions were extremely rare in the states that allowed them.[82] Thus, the Court compared the national consensus during the time of *Penry* to the national consensus during the time of *Atkins*, determining that when *Atkins* was presented to the Court there was an overwhelmingly larger amount of discomfort with and intolerance for the executions of intellectually disabled individuals than when *Penry* was presented.[83] Accordingly, the Court, following the "evolving standards of decency," created an exclusionary category exempting a specific class of offenders—intellectually disabled individuals—from the death penalty.[84]

Similarly, in the years following *Stanford*, there was evidence of a national consensus against imposing the death penalty on juveniles.[85] This national consensus was parallel to the evidence used in *Atkins* to establish a national consensus among Americans against the imposition of the death penalty on intellectually disabled individuals.[86] Likewise, this consensus provided sufficient evidence that society viewed juveniles as categorically less culpable than the average criminal.[87] Specifically, the consensus was based on the idea that a juvenile's character is not as well-formed as an adult's, and because juveniles have a lack of maturity and an under-developed sense of responsibility, they are more vulnerable to

---

[81] *Id.* at 314-16.

[82] *Id.*

[83] *Id.* at 310.

[84] *Trop,* 356 U.S. at 101.

[85] *Roper*, 543 U.S. at 564.

[86] *Id*.

[87] *Id*. at 567.

negative influences.[88] Again, by following the "evolving standards of decency" the court created another exclusionary category exempting juvenile offenders from the death penalty.[89]

2. SUBJECTIVE FACTORS

The second part of the two-part test in determining the proportionality of the death penalty as applied to a specific class of offenders is that the Court is to "determine, in the exercise of [its] own independent judgment, whether the death penalty is disproportionate punishment for [the specified class of offenders]."[90] Specifically, the Court is able to use its own judgment and subjectively consider factors, including penological goals of punishment, specific mitigating factors that may entitle a class of offenders to a categorical exclusion, and whether there is an unacceptable likelihood that a sentencer could disregard those mitigating factors to still arrive at a death sentence.[91]

In *Atkins*, the Court outlined two rationales as to why intellectually disabled individuals should be exempt from capital punishment. First, the Court stated that there was a serious question as to whether retribution or deterrence applied to intellectually disabled individuals.[92] Second, the Court looked to the reduced mental capacity of intellectually disabled individuals as a basis for exempting that specific class of offenders from a death sentence.[93] The Court based its reasoning for creating a categorical exception for intellectually disabled individuals on the facts that such individuals have a reduced capacity and lesser criminal culpability, thus the general justifications for the imposition of the death penalty—deterrence and retribution—cannot be satisfied where the

---

[88] *Id*. at 569.

[89] *Trop,* 356 U.S. at 101.

[90] *Roper*, 543 U.S. at 546.

[91] *See Atkins*, 536 U.S. at 312-13; *Roper*, 543 U.S. at 564-79.

[92] *Atkins*, 536 U.S. at 318-19.

[93] *Id*. at 320.

defendant is an intellectually disabled individual.[94] Additionally, the Court found there was an unacceptable risk that evidence of intellectual disability presented in mitigation could too easily be construed by a sentencer as an aggravating factor.[95]

Similarly, in *Roper*, the Court questioned the general justifications for the death penalty. The Court stated that "retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity"[96] and that "it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles."[97] Additionally, the Court found that there was an unacceptable risk that a sentencer may ignore mitigating arguments based on age and impose the death penalty.[98] Accordingly, in both *Atkins* and *Roper*, the Court used its own judgment and subjectively considered specific factors in determining the fairness of imposing the death penalty on intellectually disabled individuals and juveniles.

Thus, by looking to the national consensus and subjectively weighing relevant factors, the Court found it necessary to create exclusionary categories exempting intellectually disabled individuals and juveniles from the death penalty.

C. TWO-PART TEST APPLIED TO OFFENDERS WITH PTSD

Based on the rationale of the two-part test established in *Atkins* and *Roper*, there should be a categorical exclusion from the death penalty for offenders suffering from PTSD at the time of the offense.

1. Objective Evidence Showing Societal Discontent for Executing Offenders with PTSD

---

[94] *Id*. at 304.

[95] *Id*. at 320-21.

[96] *Roper*, 543 U.S. at 571.

[97] *Id*.

[98] *Id*. at 573.

First, by looking to the national consensus, supported by legislative efforts and social trends, it seems that there is growing discomfort with and intolerance for imposing the death penalty on those who suffer from severe mental illness at the time of the offense, including PTSD. States have so far been reluctant to adopt categorical bans on the death penalty for those who have a mental illness.[99] Currently, only Connecticut has a categorical ban that exempts offenders with mental illness from the death penalty.[100] However, many states have considered death penalty exemption bills for mentally ill offenders that have yet to be enacted.[101] Specifically, in early 2020, seven states proposed legislation that would exempt offenders with severe mental illness from the death penalty.[102] Additionally, the fact that twenty-one states have abolished the death penalty all together is evidence of society's disfavor for it.[103] Furthermore, additional states have proposed legislation to abolish the death penalty.[104] Similarly, the fact that seven states have proposed legislation that would exempt offenders with mental illness from the death penalty also shows a societal trend towards intolerance of the death penalty—at the very least intolerance for the current implementation of it. Therefore, according to today's societal standards, imposing the death penalty on someone who suffers from PTSD is viewed as disproportionate punishment and beyond the boundaries of the evolving standards of decency.

---

[99] *Mental Health*, Death Penalty Information Center, https://deathpenaltyinfo.org/policy-issues/mental-illness (last visited Mar. 10, 2020).

[100] Conn. Gen. Stat. § 53a-46a (2020).

[101] *Mental Health*, *supra* note 99.

[102] *Recent Legislative Activity*, Death Penalty Information Center, https://deathpenaltyinfo.org/facts-and-research/recent-legislative-activity (last visited Mar. 10, 2020).

[103] *See* Death Penalty Information Center, https://deathpenaltyinfo.org (last visited Mar. 10, 2020).

[104] *Id.*

2. SUBJECTIVE FACTORS IN FAVOR OF CREATING AN EXCLUSIONARY CATEGORY FOR OFFENDERS WITH PTSD

Additionally, based on the second prong of the two-part proportionality test, the Court would use its own independent judgment in determining whether the death penalty is disproportionate punishment for offenders suffering from PTSD at the time the offense was committed.[105] As previously seen in *Atkins* and *Roper*, the Court would look to deterrence and retribution.[106] Accordingly, the Court should create a categorical exception for offenders suffering from PTSD at the time of committing the offense based on the idea that such a mental defect lessens an offender's criminal culpability. Specifically, the general justifications for the imposition of the death penalty, which are retribution and deterrence, cannot be satisfied where the offender suffers from PTSD at the time of the offense. In *Atkins* and *Roper*, the Court put a lot of weight on the concept that it is disproportionate to put an offender to death when that offender has a reduced criminal culpability. In *Atkins*, the Court determined that the criminal culpability of an intellectually disabled individual was so reduced that putting an intellectually disabled offender to death would be cruel and unusual punishment.[107] Similarly, in *Roper*, the Court said that it would constitute cruel and unusual punishment to sentence a juvenile offender to death because juveniles are impressionable, easily influenced, and not yet completely developed mentally.[108] Accordingly, offenders suffering from PTSD at the time of the offense have an equally reduced criminal culpability. When PTSD is triggered, the offender acts without adequate intent, knowledge, or purpose. Rather, the offender acts as if he or she is re-living the traumatic event that caused his or her PTSD in the first place.[109] Thus, an offender with PTSD is—at that moment—like an intellectually disabled

---

[105] *Roper*, 543 U.S. at 546.

[106] *See Atkins*, 536 U.S. at 318-19; *Roper*, 543 U.S. at 602.

[107] *Atkins*, 536 U.S. at 320.

[108] *Roper*, 543 U.S. at 571.

[109] Arlin Cuncic, *supra* note 13.

individual or juvenile because PTSD reduces the offender's criminal culpability. Therefore, offenders with PTSD should be exempt from the death penalty because sentencing such offenders to death does not adhere to the general justifications of retribution and deterrence.

Furthermore, the Court can use its own judgment and subjectively consider specific mitigating factors that may entitle a class of offenders to a categorical exclusion, and consider whether there is an unacceptable likelihood that a sentencer could disregard those mitigating factors to still arrive at a death sentence.[110] In considering the parallels between intellectually disabled offenders, juvenile offenders, and offenders suffering from PTSD at the time of the offense, the Court should, through their own subjective judgment, find there to be an unacceptable risk that a sentencer may ignore the presence of PTSD, or find an unacceptable risk that the evidence of PTSD would be viewed as an aggravating factor rather than a mitigating factor.

Therefore, based on the offender's reduced criminal culpability and likelihood that the sentencer may disregard relevant mitigating factors and nonetheless sentence the offender to death, the Court should subjectively find the death penalty to be disproportionate punishment for offenders suffering from PTSD at the time of the offense.

VII. CONCLUSION

In light of the evolving meaning of cruel and unusual punishment, an offender suffering from PTSD at the time of committing the offense should be excluded from the death penalty. Specifically, offenders with PTSD at the time of the offense should be viewed equivalently to intellectually disabled individuals and juveniles, rather than the offender's PTSD be viewed as a piece of the insanity defense or a mere mitigating circumstance in capital cases. The Supreme Court has established a two-part test for creating an exclusionary category exempting a specific class of offenders from the death penalty. First, there must be objective evidence of societal discontent regarding the execution of the specified class of offenders. Second, the Court must use their own independent judgment

---

[110] *See Atkins*, 536 U.S. at 312-13; *Roper*, 543 U.S. at 564-79.

and consider subjective factors that would lead to the conclusion that sentencing the specified offenders to death would be disproportionate punishment. By applying this two-part test to offenders suffering from PTSD at the time of the offense, there should be an exclusionary category created for this specific class of offenders from the death penalty. The need to create such an exclusionary category is supported by the facts that there is strong objective evidence of societal discontent for executing offenders who were suffering from PTSD at the time of the offense and the Court should subjectively find sentencing such offenders to death to be disproportionate punishment.