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I. Introduction

This symposium primarily focuses on the extraordinary legal and personal saga of one man, Joe Giarratano, his decades-long heroic struggle to overturn his death sentence and, ultimately, to obtain his release and exoneration. Prior to the conference, my only acquaintance with the Giarratano case was the decision in *Murray v. Giarratano*[1]—the U.S. Supreme Court decision holding that the Sixth Amendment right to appointed counsel does not extend to the post-conviction stages of death penalty litigation.[2] The symposium provided a much broader perspective on the saga of Joe Giarratano, whose own legal skills parallel those of the many lawyers involved in his representation. My particular panel was one focused on mental illness and the death penalty, which, as other panelists made evident, was deeply implicated in the Giarratano case as well. My participation in the panel, however, was intended to offer a broader perspective on the issue, indeed the only international law perspective on the array of issues discussed during the symposium. This Article addresses the question of what international human rights law has to say about the death penalty in general, as well as the evolving views of the international community as to how mental illness may, or should, bar the imposition and carrying out of the death penalty.

Issues about mental illness and the death penalty remain unresolved at the constitutional level in the United States, despite a number of U.S. Supreme Court decisions addressing the topic, as will be addressed below.[3] It is conservatively estimated that some five to ten percent of all inmates on death row suffer from some

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1. 492 U.S. 1 (1989).

2. *Id.* at 12.

3. *See* Glossip v. Gross, 135 S. Ct. 2726, 2746 (2015) (upholding the particular controversial drug combination used to carry out executions in Oklahoma and other states despite the appellant's Eighth Amendment challenge). *See generally* Hall v. Florida, 134 S. Ct. 1986 (2014) (striking down Florida's rigid calculus of intellectual disability as a bar to execution); Panetti v. Quarterman, 551 U.S. 930 (2007) (holding that a defendant must have a rational understanding of the reason for his or her execution); Roper v. Simmons, 543 U.S. 551 (2005) (prohibiting capital punishment for those under eighteen years of age at the time of the offense); Atkins v. Virginia, 536 U.S. 304 (2002) (prohibiting the death penalty for those with intellectual disabilities); Ford v. Wainwright, 477 U.S. 399 (1986) (prohibiting the imposition of the death penalty against the legally insane).

form of mental illness.[4] In a book published in 2014, I predicted that the next issue to be addressed by the U.S. Supreme Court—in its gradual chipping away at the death penalty in the United States—would be whether mental illness, other than insanity, should bar the imposition of capital punishment under the Eighth Amendment to the Constitution.[5] I am not alone in this prediction.[6] Despite the death of Justice Antonin Scalia, and the apparent impasse as to the Senate review and confirmation of his successor, I continue to believe that the Court will soon take up this important question.

The Court again addressed the contentious issue of lethal injection as a method of execution in its 2015 decision *Glossip v. Gross*[7]—a decision more noteworthy for its dissents than its majority opinion. In a far-reaching and exhaustive analysis, Justice Breyer, joined by Justice Ginsburg, concluded that "the death penalty, in and of itself, now likely constitutes a legally prohibited 'cruel and unusual punishmen[t].'"[8] That opinion coincides with the arc of justice in the international community where the law, standards, and practice bend strongly toward abolition.[9] This Article will broadly examine the question of how international human rights law looks at the death penalty generally, as well as the context of those who are mentally ill on

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4. *See Position Statement 54: Death Penalty and People with Mental Illness*, MENTAL HEALTH AM., http://www.nmha.org/positions/death-penalty (last visited Sept. 19, 2016) (noting the California Appellate Project's estimate regarding the mental health of death row inmates) (on file with the Washington and Lee Law Review).

5. *See generally* Richard J. Wilson, *The Transformative Influence of International Law and Practice on the Death Penalty in the United States*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 157, 174–75 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 3d ed., 2014).

6. *See generally* Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C.L. REV. 785 (2009) (noting the U.S. Supreme Court's movement toward barring the imposition of the death penalty against those with a mental illness).

7. 135 S. Ct. 2726 (2015).

8. *Id.* at 2756 (Breyer, J., dissenting).

9. It should be noted that capital punishment is legally permitted in narrow circumstances within the international community. *See, e.g.*, International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171 (noting the limits placed on the death penalty, but not banning it completely).

death row.[10] The question arises from a consistent approach adopted by the European Union and other countries, filing as amici curiae in the U.S. Supreme Court, to express the views of the international community to that tribunal.[11]

This Article unfolds in six Parts. Part II briefly reviews the state of the law on the death penalty and mental illness in the United States today, largely through the lens of the jurisprudence arising under the Eighth Amendment's prohibition of cruel and unusual punishments rather than a systematic study of practice in the states.[12] Part III examines the state of the death penalty in international human rights law today.[13] While the penalty is still permitted under various human rights treaties, the strong and worldwide trend is toward complete abolition of capital punishment.[14] Part IV examines some of the methodological difficulties in examining the practice of nations and international bodies with regard to the death penalty and mental illness,[15] while Part V summarizes the current views of the world community on this important question.[16] Finally, Part VI provides brief concluding remarks.[17]

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10. This Article will not address the complex legal question of whether mentally ill defendants may be medicated to bring about a forced competency to stand trial or to face execution in a drugged condition. There is virtually no data on that issue at the international law level.

11. I appeared as counsel of record for the European Union and other countries as amici curiae in the U.S. Supreme Court cases of *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (prohibiting the death penalty for those with intellectual disabilities), and *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (prohibiting capital punishment for those under eighteen years of age at the time of the offense). In each case, the views of the international community were relevant and persuasive to the Court's majorities.

12. *See infra* Part II (discussing case law surrounding competency to be executed).

13. *See infra* Part III (discussing the global trend towards the abolition of the death penalty).

14. *Infra* Part III.

15. *See infra* Part IV (arguing that, while there may be significant methodological difficulties in analyzing the use of the death penalty on a global scale, the trend against execution of persons with mental illness is nonetheless overwhelming).

16. *See infra* Part V (comparing two contemporaneous international law norms regarding execution of persons with mental illnesses).

17. *See infra* Part VI (concluding that international law provides promising alternatives through which the United States can more fully and specifically

II. A Brief Review of U.S. Supreme Court Jurisprudence on the Death Penalty and Mental Illness

If a defendant, due to a mental illness, is found incompetent to stand trial or insane at the time of the offense, that defendant obviously will not be sentenced to death.[18] He will be removed from the judicial process for treatment and returned for trial only if competence is regained.[19] If found to be insane at the time of the offense, he will be remitted for treatment in custody.[20] Cases involving the death penalty and mental illness have therefore focused primarily on what is commonly referred to as "competence to be executed," and that is the focus of this Article.[21]

The classic articulation of a rule—however rustic and rudimentary—regarding the death penalty, mental illness, and competence for execution came in the U.S. Supreme Court's 1986 decision in *Ford v. Wainwright*,[22] which held that "the Eighth Amendment prohibits a State from carrying out a sentence of

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define the range of severity of mental illness sufficient to bar the death penalty).

18. *See* Ford v. Wainwright, 477 U.S. 399, 409–10 (1986) ("[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.").

19. In the landmark case of *Dusky v. United States*, the Supreme Court held, in a brief per curium opinion, that for a defendant to be competent to stand trial, he must have "a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." 362 U.S. 402, 402 (1960). If not competent, the defendant is to be hospitalized until he regains competency to stand trial. Andrew D. Reisner et al., *Competency to Stand Trial and Defendants Who Lack Insight into Their Mental Illness*, 41 J. AM. ACAD. PSYCHIATRY & L. 85, 86 (2013) ("The topic of rationality is significant because it bears directly on the ability of a defendant to assist legal counsel.").

20. The paradigmatic case is that of John Hinckley Jr., who was acquitted by reason of insanity in the shooting of President Ronald Reagan. *See generally* Lincoln Caplan, *The Insanity Defense, Post-Hinckley*, N.Y. TIMES (Jan. 17, 2011), http://www.nytimes.com/2011/01/18/opinion/18tue4.html?_r=0 (last visited Sept. 19, 2016) (on file with the Washington and Lee Law Review). The public was outraged at the acquittal, but Hinckley remained in custody in a psychiatric ward, with limited permission for family visits until recently. *Id.* Data suggest that the defense is rarely invoked, and that defendants who use it are rarely acquitted on that ground. *Id.*

21. John H. Blume et al., *Killing the Oblivious: An Empirical Study of Competency to be Executed Litigation*, 79 UMKC L. REV. 1, 1 n.2 (2013).

22. 477 U.S. 399 (1986).

death upon a prisoner who is insane."[23] The majority's decision, written by Justice Thurgood Marshall, was not a beacon of clarity. It used the term "insanity" to describe a mental state as execution approached; a condition not—in the traditional and narrow legal meaning of insanity—limited to a state of mind of the defendant at the time of the offense sufficient to excuse the offense.[24] Because of this lack of clarity and precision, subsequent decisions on this issue have tended to rely on the more detailed, if still imprecise, concurrence by Justice Powell in *Ford*, who famously stated that "the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it."[25]

A 2007 Supreme Court decision on this issue, *Panetti v. Quarterman*,[26] provided much heat and little light on the topic of competence for execution. There, the majority used due process analysis to conclude that Scott Panetti had been denied the opportunity to present evidence of his incompetence for execution.[27] Panetti suffered from delusions that made him believe that Texas wanted to execute him, not because he had committed murder but because he was preaching the Gospel, according to the

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23. *Id.* at 409–10.

24. *See id.* at 401–02 (noting that there was no suggestion that Ford was incompetent at the time of the offense, but that his behavior gradually changed following the offense).

25. *Id.* at 422 (Powell, J., concurring). Further efforts to provide greater definitional clarity have substituted the term "competence to be executed" for that of "insanity" in carrying out the sentence. *See* Blume, *supra* note 21, at 1 n.2 ("The Court [in *Ford v. Wainwright*] actually used the term 'insane' but it is in fact competence that is the issue and post-*Ford*, it is ubiquitously referred to as 'competency to be executed' as opposed to 'sanity to be executed.'"). This term, too, suffers from a lack of precision, because "competence" is also a term of art normally referring to the defendant's ability to understand the proceedings and assist his counsel so that he can stand trial for an offense. An incompetent defendant's trial can be postponed or avoided entirely if incompetence is permanent. I will nonetheless adopt this terminology myself as the dominant mode of discourse on the topic.

26. 551 U.S. 930 (2007).

27. *See id.* at 934–35 ("Under *Ford* [*v. Wainwright*], once a prisoner makes the requisite preliminary showing that his current mental state would bar his execution, the Eighth Amendment, applicable to the States under the Due Process Clause of the Fourteenth Amendment, entitles him to an adjudication to determine his condition.").

trial court's own appointed experts.[28] In order to be competent for execution, the Court held that the defendant must have "a rational understanding of the reason for the execution."[29] In the absence of such an understanding due to his delusions, it was possible that Panetti was not aware of the link between his crime and the approaching execution. The Court found that "gross delusions stemming from a severe mental disorder may put that awareness in a context so far removed from reality that the punishment can serve no proper purpose."[30] The Court reversed and remanded the case for further proceedings, which are ongoing as of this writing.[31]

In its recent decisions, the closest the Justices have come to the issue of mental illness as a bar to execution came in 2014, in *Hall v. Florida*,[32] clarifying its 2002 judgment in *Atkins v. Virginia*.[33] *Atkins* struck down the execution of persons with intellectual disabilities—then referred to as "retardation"—as cruel and unusual under the Eighth Amendment.[34] In *Hall*, the Court struck down Florida's rigid calculus of intellectual disability as a bar to execution.[35] Florida law required imposition of the death penalty for anyone scoring above 70 on standard IQ tests.[36] The courts in Florida had interpreted this provision strictly, finding that a person who scores higher than 70 is barred from submitting further evidence regarding his mental faculties and is eligible for the death penalty on grounds of mental state.[37] In language that seems to apply with equal force to those with mental illnesses, the Court found that "intellectual disability is a condition, not a number," and required that Florida consider

28. Panetti v. Dretke, 448 F.3d 815, 817–18 (5th Cir. 2006).

29. *Panetti*, 551 U.S. at 958.

30. *Id.* at 933.

31. *Id.* at 934. At the time of this writing, the *Panetti* case is pending review on remand in the U.S. Court of Appeals for the Fifth Circuit, under the name *Panetti v. Stephens*. 586 Fed. Appx. 163 (5th Cir. Tex. 2014) (granting a stay of execution). Oral argument was heard on September 23, 2015.

32. 134 S. Ct. 1986 (2014).

33. 536 U.S. 304 (2002).

34. *Id.* at 321.

35. *Hall*, 134 S. Ct. at 2001.

36. *See id.* at 1990 ("If, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed.").

37. *See id.* at 1992 ("The Florida Supreme Court rejected Hall's appeal and held that Florida's 70-point threshold was constitutional.").

broader evidence of the disability.[38] The Court relied heavily on its Eighth Amendment jurisprudence respecting "the dignity of all persons," looking to "evolving standards of decency that mark the progress of a maturing society" for interpretation of what is cruel and unusual.[39] This language, which resonates strongly in the international law of human rights, looks to broad concepts such as deterrence as a justification for capital punishment, and there *Hall* holds that the Florida law falls short.[40] People with intellectual disabilities are "likely unable to make the calculated judgments that are the premise for the deterrence rationale."[41] Such persons have "'diminished ability' to 'process information, to learn from experience, to engage in logical reasoning, or to control impulses,'" thus resulting in their inability to control their conduct or conform it to the law.[42] It is but one small step from this rationale to a similar one barring the execution of those suffering from mental illnesses.[43]

While the U.S. Supreme Court's articulation of standards has not been a model of clarity, the American Bar Association (ABA) adopted a detailed resolution on mental illness and the death penalty in 2006, which addresses exactly that lacuna.[44] The resolution articulates an exemption from the death penalty for a range of mental disabilities between those encompassed in the

38. *Id.* at 2001.

39. *Id.* at 1992.

40. *Id.* at 1993.

41. *Id.*

42. *Id.* at 2009 (quoting Atkins v. Virginia, 536 U.S. 304, 320 (2002)).

43. The National Mental Health Association reached this same conclusion immediately after the decision in *Atkins*. *See* Ronald J. Tabak, *Overview of the Task Force Proposal on Mental Disability and the Death Penalty*, 54 CATH. U.L. REV. 1123, 1123 (2005) ("Within hours after the decision in *Atkins* was announced, the National Mental Health Association stated that the same principles and reasoning that *Atkins* applied to the mentally retarded were equally applicable to many with mental illness, who the Association said should also be categorically exempted from capital punishment.").

44. *See generally* Symposium, *Recommendations of the American Bar Association Section on Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty*, 54 CATH. U.L. REV. 1115, 1115–16 (2005) [hereinafter *Recommendations*]. The recommendations were subsequently adopted by the ABA House of Delegates as Recommendation 122A. *See generally* AM. BAR ASS'N, MENTAL ILLNESS RESOLUTION (2006), http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/2006_am_122a.authcheckdam.pdf.

vague "insanity" standard and the bar on execution of those with intellectual disabilities, under the robust *Hall* standard.[45] The drafters concluded that an exemption from the death penalty also should apply to those persons whose mental disorders are "functionally the same as mental retardation," such as very serious head injuries, or to persons with "such serious mental illness that their culpability is as diminished as those with mental retardation."[46] "This lesser extent of culpability arises from such effects of their mental illnesses as delusions, hallucinations, significant thought disorders, and highly disorganized thinking."[47] It would apply to those with "such disorders as schizophrenia and psychosis."[48] This typology is helpful in distinguishing the various categories of mental illness and their legal consequences in the context of capital punishment.

III. The Death Penalty in International Human Rights Law and Practice: Toward Abolition

Justice Breyer, in his dissent in *Glossip v. Gross*, discussed above, asserted that more than two-thirds of the world's nations (he counted 137 of the 193 countries of the world) have abolished the death penalty as of the end of 2014.[49] While this data is impressive, more recent statistics suggest an even more aggressive pattern of abolition.[50] In August 2014, Ban Ki-moon, the U.N. Secretary General, documented "approximately 160 of the 193 Member States" of the United Nations as having abolished the death penalty or having adopted a moratorium on its use in any

45. *See generally Recommendations*, *supra* note 44; *see also* Hall v. Florida, 134 S. Ct. 1986, 1990 (2014) (discussing Florida courts' use of IQ scores to determine eligibility for the death penalty).

46. Tabak, *supra* note 43, at 1127–28.

47. *Id.* at 1128.

48. *Id.*

49. Glossip v. Gross, 135 S. Ct. 2726, 2775 (2015) (Breyer, J., dissenting) ("I note, however, that many nations—indeed, 95 of the 193 members of the United Nations—have formally abolished the death penalty and an additional 42 have abolished it in practice.").

50. *See, e.g.*, G.A. Res. 67/176, Moratorium on the Use of the Death Penalty, at ¶ 8 (Dec. 20, 2012) (noting the growing number of countries moving away from the death penalty).

circumstance.[51] That is more than eighty percent of the world's nations.[52] The worldwide trend is moving rapidly toward abolition.[53]

In December 2014, the U.N. General Assembly passed its fifth resolution—the first of which was adopted in 2007—calling for all retentionist countries to adopt a moratorium on the death penalty, and for those countries that continue to apply it, not to impose a sentence of death "on persons with mental or intellectual disabilities."[54] Within the United Nations, opposition to the death penalty is widespread, with growing agitation for abolition from several fronts.[55] The U.N. High Commissioner for Human Rights has convened high-level panels on the question of the death penalty between 2012 and 2015.[56] The last of these panels, in July 2015, formally emphasized "the international community's responsibility to move towards universal abolition of the death penalty."[57] The U.N. Special Rapporteur on Extrajudicial,

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51. U.N. Secretary-General, *Moratorium on the Use of the Death Penalty*, ¶ 7, U.N. Doc. A/69/288 (Aug. 8, 2014). While no sources are offered for that statistic in his report, a report from an international watchdog group on the death penalty supports the tally. *See Country Status on the Death Penalty*, HANDS OFF CAIN, http://www.handsoffcain.info/bancadati/index.php?tipotema=arg&idtema=20000702 (last visited Sept. 19, 2016) (documenting 161 countries as abolitionist in law or practice, with thirty-seven retentionist countries) (on file with the Washington and Lee Law Review).

52. *Country Status on the Death Penalty*, *supra* note 51.

53. *See id.* (noting the growing number of countries moving away from the death penalty); G.A. Res. 67/176, *supra* note 50, at ¶ 8 (same).

54. G.A. Res. 69/186, ¶ 5(d) (Feb. 4, 2015). The vote was 117 in favor of the resolution, 38 against (including the United States), and 34 abstentions. AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS: 2014 (2015), http://www.amnestyusa.org/pdfs/DeathSentencesAndExecutions2014_EN.pdf.

55. *See generally* U.N. HIGH COMM'R FOR HUMAN RIGHTS GLOB. PANEL, MOVING AWAY FROM THE DEATH PENALTY: ARGUMENTS, TRENDS, AND PERSPECTIVES (2014), http://www.ohchr.org/Lists/MeetingsNY/Attachments/52/ Moving-Away-from-the-Death-Penalty.pdf [hereinafter *Arguments, Trends, and Perspectives*] (discussing the growing opposition to the death penalty throughout the international community); U.N. HIGH COMM'R FOR HUMAN RIGHTS GLOB. PANEL, MOVING AWAY FROM THE DEATH PENALTY: LESSONS FROM NATIONAL EXPERIENCES (2012), http://www.ohchr.org/Lists/MeetingsNY/Attachments/27/moving_away_from_death_penalty_web.pdf [hereinafter *Lessons from National Experience*] (same).

56. *See generally Arguments, Trends, and Perspectives*, *supra* note 55; *Lessons from National Experience*, *supra* note 55.

57. U.N. High Commissioner for Human Rights, *High-Level Panel Discussion on the Question of the Death Penalty*, at ¶ 45, U.N. Doc. A/HRC/30/21

Summary or Arbitrary Executions[58] and the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment[59] support a moratorium or abolition of the death penalty, respectively.[60] The Special Rapporteur on Torture explicitly extends his recommendation on abolition to those "persons with mental disabilities."[61] Finally, in his 2012 report to the U.N. General Assembly, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions notes that, in addition to calls from the General Assembly, a moratorium on the death penalty has been issued by "the Council of Europe, the Organization for Security and Cooperation in Europe, the African Commission on Human and Peoples' Rights and, in August 2012, the Inter-American Commission on Human Rights."[62] Globally and regionally, calls for moratoria and abolition are on the rise.

The twenty-eight countries of the European Union have a combined population of over 503 million persons, making it the third largest world population after China and India.[63] The death penalty has been abolished for all purposes within the Union.[64] All E.U. Member States are also members of the larger Council of Europe, with a total of forty-seven countries[65] and a combined

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(July 16, 2015).

58. *See* U.N. Secretary-General, *Extrajudicial, Summary or Arbitrary Executions*, ¶ 118, U.N. Doc. A/67/275 (Aug. 9, 2012) (calling for a moratorium in retentionist states).

59. *See* U.N. Secretary-General, *Interim Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment*, ¶ 74–75, U.N. Doc. A/67/269 (Aug. 9, 2012) (finding that the prohibition on torture may bar the death penalty as a developing norm of customary international law).

60. *Id.*; *Extrajudicial, Summary or Arbitrary Executions*, *supra* note 58.

61. *Interim Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment*, *supra* note 59, at ¶ 80(a).

62. *Extrajudicial, Summary or Arbitrary Executions*, *supra* note 58, at ¶ 22.

63. *Living in the EU*, EUROPEAN UNION, http://europa.eu/about-eu/facts-figures/living/index_en.htm (last updated Sept. 19, 2016) (last visited Sept. 19, 2016) (on file with the Washington and Lee Law Review).

64. *Background: The Death Penalty and the EU's Policy on Its Abolition*, EUROPEAN UNION, https://eeas.europa.eu/human_rights/adp/docs/death_penalty_background_en.pdf.

65. *EU Member Countries*, EU, https://europa.eu/european-union/about-eu/countries/member-countries_en (last visited Sept. 19, 2016) (on file with the Washington and Lee Law Review). Member countries include: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia,

population of some 820 million persons.[66] Membership in the Council of Europe, in turn, is conditioned on the abolition of, or a moratorium on, the death penalty, including Protocols 6 and 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), which together abolish the death penalty in all circumstances.[67]

The European Court of Human Rights applies the ECHR.[68] In 2010, the court decided a case involving two Iraqi nationals held in British custody who faced the death penalty if turned over to the national courts of Iraq.[69] The court took as its starting point the following formulation regarding the death penalty:

> Judicial execution involves the deliberate and premeditated destruction of a human being by the State authorities. Whatever the method of execution, the extinction of life involves some physical pain. In addition, the foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering. The fact that the imposition and use of the death penalty negates fundamental human rights has been recognised by the member States of the Council of Europe.[70]

The court went on to find that the applicants' "well-founded fear" of being executed by Iraqi courts "must have given rise to a significant degree of mental suffering," thus violating Article 3 of the ECHR, which prohibits torture and inhumane or degrading

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Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, The Former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom. *Id.*

66. *Living in the EU*, *supra* note 63.

67. EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS 38, 52 (2010) http://www.echr.coe.int/Documents/Convention_ENG.pdf. All countries save Russia have ratified Protocol 6, and Russia has adopted a de facto moratorium since 1999. AMNESTY INT'L, *supra* note 54, at 65 n.173. The same is true for Protocol 13, which also has not been ratified by Armenia and Azerbaijan, but where a moratorium is in effect in both countries. *Id.* at 67.

68. *Id.*

69. Al-Saadoon and Mufdhi v. United Kingdom, App. No. 61498/08, Eur. Ct. H.R., ¶ 120 (Apr. 10, 2010).

70. *Id.* at ¶ 120.

treatment or punishment.[71] The individuals in question could not be surrendered to face a sentence of death without violation of the ECHR.[72] That ECHR standard is similar to the prohibition on cruel and unusual punishments in the U.S. Constitution's Eighth Amendment.[73] Moreover, the European Court has recognized and approved the practice of requiring that the United States and other retentionist countries provide diplomatic assurances against the death penalty prior to allowing the extradition of a Council of Europe national to that country, thus further limiting the death penalty in the United States.[74]

This widespread movement of the world community toward abolition of the death penalty suggests that the United States should follow that trend, if not through legislation, then through brave and courageous positions such as those expressed by Justices Breyer and Ginsburg in their joint *Glossip* dissent.[75] The death penalty itself is cruel and unusual, as the Eighth Amendment is understood in the Supreme Court's jurisprudence.

IV. Some Methodological Challenges in Documentation of Mental Illness and Death Penalty Issues in International Law

There are three basic challenges to the documentation of issues regarding the more limited issue of imposition of the death penalty for those with mental illness. First, the death penalty itself is severely limited, but still permitted, under international treaties, global and regional. While detailed constraints on the penalty are articulated in the treaties, none of them explicitly creates an exception for the execution of persons with mental

71. *Id.* at ¶ 137.

72. *See EU Policy on Death Penalty*, *supra* note 64 (stating that cruel and inhumane treatment violates the ECHR).

73. *Compare* EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, *supra* note 67, *with* U.S. CONST. amend. VIII.

74. *See, e.g.*, Rrapo v. Albania, App. No. 58555/10, Eur. Ct. H.R., ¶ 73 (Sept. 25, 2012) (finding that diplomatic assurances from the United States to the Albanian government, barring the application of the death penalty, were adequate to permit extradition of the applicant to the United States).

75. *See* Glossip v. Gross, 135 S. Ct. 2726, 2756 (2015) (Breyer, J. dissenting) (concluding that "the death penalty, in and of itself, now likely constitutes a legally prohibited 'cruel and unusual punishmen[t]'").

illness. Second, terms of reference differ widely, and cultural and legal practice varies extremely widely among countries. Third, information on the death penalty and mental illness is not easily available from national reports to U.N. treaty bodies, as is often the case with other data on human rights compliance. I will discuss each of these issues in turn, then argue in Part IV that the trend against execution of persons with mental illness is nonetheless overwhelming.

The International Covenant on Civil and Political Rights (ICCPR), a global human rights treaty to which the United States is a party,[76] is typical of the treaties limiting the death penalty. It includes a provision, in Article 6, regarding the right to life.[77] Within the treaty, that right is qualified as to the application of the death penalty.[78] The relevant language reads as follows:

> Article 6
>
> 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.
>
> 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. . . . This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
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> . . . .
>
> 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 persons below eighteen years of age and shall not be carried out on pregnant women.

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76. For reports regarding United States compliance with its human rights treaty obligations, see *U.S. Treaty Reports*, U.S. DEP'T OF STATE, http://www.state.gov/j/drl/reports/treaties/index.htm#ftn2 (last visited Sept. 19, 2016) (on file with the Washington and Lee Law Review).

77. International Covenant on Civil and Political Rights art. 6, *supra* note 9.

78. *Id.*

> 6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.[79]

The Human Rights Committee—which oversees compliance with the ICCPR—issues General Comments regarding treaty interpretation based on its experience with the treaty. The Committee has commented on the death penalty language in the treaty on only one occasion, in its General Comment 6, issued in 1982.[80] There, it states that Article 6 "refers generally to abolition in terms which strongly suggest . . . that abolition is desirable."[81] The Committee also states that "the expression 'most serious crimes' must be read restrictively to mean that the death penalty should be a quite exceptional measure."[82] The treaty itself articulates only two groups for whom execution is explicitly barred: persons below eighteen years of age and pregnant women.[83] That explicit exception came into play, for example, in the case of *Roper v. Simmons*,[84] which struck down the death penalty for those minors under eighteen at the time of their offenses.[85] No language appears on the face of this treaty or any other international human rights treaty that explicitly addresses or prohibits the execution of persons with intellectual or mental disabilities. Other sources have to suffice. As the next Part shows, they are ample.

The second limiting issue is that of consistency of terminology and cultural or legal limitations on proper medical diagnosis around the world. Examples that appear in the reported cases use a staggering variety of terms for mental illness itself, and hardly ever with medical precision: "madness," "impairment of mind" or "cognitive impairment," "disorder," "handicap," "abnormality," and "disability" provide just a few examples.[86] Often, issues of limited

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79. *Id.*

80. International Covenant on Civil and Political Rights, General Comment 6 (1982), at ¶¶ 6, 7.

81. *Id.*

82. *Id.*

83. International Covenant on Civil and Political Rights art. 6, *supra* note 9.

84. 543 U.S. 551 (2005).

85. *Id.* at 568 ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.").

86. *See, e.g.*, *id.* at 573 ("disorder"); Hall v. Florida, 134 S. Ct. 1986, 1990

intellectual capacity (associated with lower IQ scores) are conflated with those of mental illness in reports or judicial decisions.[87] Achieving an accurate medical and psychiatric assessment of the accused or convicted capital defendant, whether on trial or in prison, is often difficult in many countries.[88] The U.N. Secretary General himself noted this in his 2009 periodic report to the General Assembly regarding capital punishment.[89] There, he reviewed the standards for imposition of the death penalty, noting that what was then called the U.N. Human Rights Commission had called for U.N. member states "not to impose capital punishment on or to execute 'a person suffering from any mental or intellectual disabilities.'"[90] His seemingly frustrated response states:

> Whereas with juvenile offenders or pregnant women, the determination that a person belongs to the protected category is relatively straightforward, there is an enormous degree of subjectivity involved when assessing such concepts as insanity, limited mental competence and "any form of mental disorder." The expression "any form of mental disorder" probably applies to a large number of people sentenced to death.[91]

Finally, there are simple issues regarding lack of accurate reporting on state practice. In its widespread reforms of 2007, the United Nations redesigned a number of processes regarding human rights reporting.[92] The Human Rights Commission was abolished and replaced by a new Human Rights Council and the new Council was charged with administration of a process called Universal Periodic Review (UPR), which requires that all member states of the United Nations submit a periodic report regarding their compliance with human rights norms, regardless of the

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(2014) ("disability"); Ford v. Wainwright, 477 U.S. 399, 407 (1986) ("madness").

87. *See, e.g.*, *Hall*, 134 S. Ct. at 1990 (discussing Florida courts' use of IQ scores to determine eligibility for the death penalty).

88. *See generally* U.N. Secretary-General, *Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, ¶ 93, U.N. Doc. E/2010/10 (Dec. 18, 2009).

89. *Id.*

90. *Id.* at ¶ 90.

91. *Id.* at ¶ 93.

92. *See generally* G.A. Res. 5/1 (June 18, 2007).

formal instruments adopted by that nation.[93] In his first report after the adoption of the UPR process, the U.N. Secretary General again expressed his frustration to the General Assembly in his ninth quinquennial report on the death penalty of 2015.[94] He concluded: "There is virtually no information on [execution of persons with mental disabilities] in the replies to the questionnaires, in the materials generated by the universal periodic review process or in the work of the treaty bodies."[95] While the conclusions of the Secretary General parallel those of the author's own research on U.N. treaty and universal periodic review reports, the body of jurisprudence on this issue—as the next Part documents—is robust and conclusive. The death penalty is inappropriate for those suffering from mental illness. The question is one of the degree and specificity of the illness to justify the bar.

V. The Evolving Jurisprudence on the Death Penalty and Mental Illness Under International Human Rights Law

The bar on execution of the insane long predates the U.S. Supreme Court's decision in *Ford v. Wainwright*.[96] In the late eighteenth century, Sir Edward Coke, the great English jurist, said that "by intendment of law the execution of the offender is for example . . . but so it is not when a mad man is executed, but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others."[97] Coke spoke of those prisoners who were found not to be legally insane at the time of trial, but became "mad" as execution approached.[98] The passage from Coke's *Institutes* is repeated in Justice Marshall's opinion in *Ford*, which notes, from the very outset, its debt to the history of the common law on execution of the "insane:" "For

93. *Id.* at § I.

94. *See generally* U.N. Secretary-General, *Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, ¶ 86, U.N. Doc. E/2015/49 (July 21–22, 2015).

95. *Id.*

96. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 6 (1797).

97. *Id.*

98. *Id.*

centuries *no jurisdiction* has countenanced the execution of the insane, yet this Court has never decided whether the Constitution forbids the practice. Today we keep faith with our common-law heritage in holding that it does."[99]

As early as 1962, scholars in the United States had concluded that under the common law and, "as far as we know, the law of all civilized nations, a person who is insane cannot be punished."[100] Later in the same article, the authors made their finding more precise: "for practical purposes we can think of the rule [on insanity] in its common law form as an exemption from capital punishment."[101] While these scholars provided no data to support their conclusion, later scholars have reached the same conclusion through careful analysis of international law and practice.[102] Some empirical support for that conclusion is found in the first report of the United Nations on the death penalty, conducted in the early 1960s.[103] That study, which surveyed all U.N. member countries, noted:

> Under the law of some countries, a person may not be executed if he is insane, whether at the time of the sentence or at the time when it is to be carried out; this is the case, for example, in the Central African Republic, China, Iraq, Greece and Yugoslavia.[104]

There was enough conclusive evidence of the widespread bar by 2002 that Professor William Schabas, in his definitive book on abolition of the death penalty in international law, concluded that it is "a norm of customary law that the insane may not be executed."[105]

The recently adopted *UN Convention on the Rights of Persons with Disabilities* ("CRPD")—signed but not ratified by the United States—does not address the precise question of the use of capital

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99. Ford v. Wainwright, 477 U.S. 399, 401 (1986) (emphasis added).

100. Geoffrey C. Hazard, Jr. & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 381 (1962).

101. *Id.* at 382.

102. *See, e.g.*, Marc Ancel, *Capital Punishment*, ¶ 71, U.N. Doc. ST/SOA/SD/9 (1962).

103. *See generally id.*

104. *Id.*

105. WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 375 (3d ed. 2002).

punishment on persons with mental illness; it does, however, provide some definitional guidance that can be helpful here.[106] The CRPD includes, in the category of persons with disabilities, "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."[107] Similarly, the regional treaty of the Americas on persons with disabilities defines "disability" as "a physical, mental, or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment."[108] Notably, in neither treaty is a distinction made between mental illness and intellectual disability, and the term "mental illness" is not used; "mental impairment" is the chosen referent.[109]

Another baseline of international law for the treatment of mentally ill prisoners in general can be found in the United Nations' *Standard Minimum Rules for the Treatment of Prisoners*.[110] These baseline rules were adopted sixty years ago by the First U.N. Congress on the Prevention of Crime and the Treatment of Prisoners, held in 1995, and were subsequently approved by the U.N. Economic and Social Council ("ECOSOC") in 1957 and again, with revisions, in 1977.[111] Of particular relevance is Standard 22(1), which recommends that every prison "include a

106. *See generally* Convention on the Rights of Persons with Disabilities art. 1, Mar. 30, 2007, 2515 U.N.T.S. 3.

107. *Id.*

108. Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities art. 1, June 8, 1999, AG/RES. 1608 (XXIX-O/99). The treaty entered into force on September 14, 2001, and has nineteen states parties at present. *Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities*, OAS, http://www.oas.org/juridico/english/sigs/a-65.html (last visited Sept. 19, 2016) (on file with the Washington and Lee Law Review). The United States has not signed the treaty. *Id.*

109. *See* Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, supra note 108, art. 1 (noting the use of the term "mental impairment" throughout the treaty); Convention on the Rights of Persons with Disabilities, *supra* note 106, at 3 (same).

110. *See generally* Economic and Social Council Res. 663 C (XXIV) (July 31, 1957), Res. 2076 (LXII) (May 13, 1977).

111. *Id.*

psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality."[112] Standards 24 and 25 govern the examination, treatment and rehabilitation of mentally impaired individuals.[113] Standard 24 mandates examination by a medical officer "as soon as possible after his admission and thereafter as necessary," and documentation of "mental defects which might hamper rehabilitation."[114] Finally, Standard 25 sets out rigorous standards requiring that the medical officer report to the prison director when a prisoner's mental health "has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment."[115] The director is admonished to "take immediate steps to give effect to those recommendations," or to seek assistance from higher authorities to do so.[116] The Standard Minimum Rules, as now written, do not address the question of the execution of the insane or mentally impaired individual.[117]

The question remains, therefore, as to what international human rights law has to say about the prisoner awaiting execution who is not legally insane, but who suffers from some form of mental illness or impairment. Two distinct lines of authority have developed, one which argues that any mental illness should exempt the defendant from execution,[118] while another argues that only certain serious or severe mental illnesses should bar the death penalty.[119] I will address each of these lines of authority separately in the following subsections.

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112. *Id.* at 22(1).

113. *Id.* at 24, 25.

114. *Id.* at 24.

115. *Id.* at 25.

116. *Id.* at 26(2).

117. *See* G.A. Res. 70/175 (Dec. 17, 2015) (noting that the new U.N. Standard Minimum Rules have been renamed as the Nelson Mandela Rules).

118. *Supra* Part V.A.

119. *Supra* Part V.B.

A. Support for a Ban on Execution of Persons with Any Mental Impairment

This line of authority appears to have emerged from the strong advocacy of the European Union within the United Nations and its influence on the development of international policies within the United Nations and other bodies.[120] The E.U. policy on the death penalty and mental illness is set out fully in the E.U. Council's guidelines on the death penalty.[121] There, the Council sets out minimum standards for those countries that retain the death penalty, in Section III.[122] Subsection (iv) in that section states that capital punishment "shall not be imposed on . . . persons suffering from *any mental illness* or having an intellectual disability."[123] The term "mental illness" is not defined in the guidelines, although it is distinguished from intellectual disabilities, so more general definitions such as those discussed above must be applied.

Beginning in 2000, the U.N. Commission on Human Rights, then the principal deliberative body of the United Nations on human rights issues, adopted annual resolutions specifically addressing the question of the execution of those with mental illness.[124] The resolutions consistently call on states "[n]ot to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person."[125] Similar resolutions containing identical language were passed each year until the year before the Commission was abolished and replaced by the newly reformed U.N. Human Rights Council in 2006.[126] There is no evidence that the resolutions of the Commission were adopted by the U.N. General Assembly, at least as to the "any

120. *See generally* Council Common Guidelines on Death Penalty (EU) No. 8416/13 Annex of 12 Apr. 2013, at 5, http://data.consilium.europa.eu/doc/document/ST-8416-2013-INIT/en/pdf (stating the European Union's policy on the death penalty).

121. *Id.*

122. *See id.* § 3 ("While continuing to state its strong opposition to the death penalty and advocate for its full abolition, the EU shall insist that those countries that still maintain executions respect the following minimum standards . . . .).

123. *Id.* § 3(iv) (emphasis added).

124. C.H.R. Res. 2000/65 (Apr. 26, 2000). The United States voted against the resolution each year.

125. *Id.* § 3(e).

126. Each resolution contained virtually identical language. *Id.*

form" language. However, it should be noted that the United Nations' resolutions on the death penalty, adopted by the U.N. General Assembly from 2007—the year after the last Commission resolution—through 2015, use generic language admonishing retentionist countries not to impose a sentence of death "on persons with mental or intellectual disabilities."[127] The gravity or severity of the mental disability is not specified and can therefore be read to be general and inclusive of any such disability, if the resolutions are to be read consistently with prior action within U.N. bodies.

Support for the "any mental illness" position is also found in two important death penalty decisions affecting multiple individuals, one from the Commission on Human Rights and the other from the Supreme Court of India. Each applies the "any mental illness" standard as a limitation on execution of the mentally ill death row inmate.[128]

The Inter-American Commission on Human Rights ("IACHR" or "Commission") is a principal and autonomous human rights body representing the thirty-five countries making up the Organization of American States, including the United States.[129] During its long tenure, but particularly in the last twenty years, it has expressed growing concerns about the death penalty in the hemisphere.[130] In 2011, the Commission produced a significant report calling for a moratorium on the death penalty "as a step toward the gradual disappearance of this penalty."[131] Moreover, in connection with its adoption of the regional convention on disability rights, discussed above, the IACHR adopted a specific recommendation calling on member states of the Organization of American States to establish laws that "guarantee respect for the

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127. G.A. Res. 69/186 (Dec. 18, 2014).

128. *See infra* pp. 1489–93 (providing the "any mental illness" position used by the IACHR and the Supreme Court of India).

129. *See generally What Is the IACHR?*, OAS, http://www.oas.org/en/iachr/mandate/what.asp (last visited Sept. 19, 2016) (on file with the Washington and Lee Law Review).

130. *See, e.g.*, *25 Years After the Adoption of the Protocol, the IACHR Urges States to Abolish the Death Penalty or Take Steps Toward its Abolition*, OAS (June 8, 2015), http://www.oas.org/en/iachr/media_center/PReleases/2015/062. asp (last visited Sept. 19, 2016) (noting the organization's efforts to abolish the death penalty) (on file with the Washington and Lee Law Review).

131. Inter-Am. C.H.R., *The Death Penalty in the Inter-American System: From Restrictions to Abolition*, OEA/Ser.L/V/II, doc. 68 rev. ¶ 143 (Dec. 31, 2011).

fundamental freedoms and human rights of persons with mental disability . . . incorporating international standards and the provisions of human rights conventions that protect the mentally ill."[132]

One of the most significant international cases on capital punishment in recent years comes from the IACHR and involves the application of the death penalty in the United States. In 2013, the Commission decided the case of *Lackey v. United States*.[133] In *Lackey*, the Commission took the unusual step of consolidating the cases of sixteen separate defendants in death penalty cases who had petitioned the system, arising from convictions in six different states: North Carolina, South Carolina, Georgia, Missouri, Texas, and Utah.[134] By the time the Commission decided the case, six individuals had been executed, despite a request by the Commission that the U.S. government take precautionary measures to assure that executions not be carried out while the cases were pending at the IACHR.[135] The Commission focused its attention on a group of five claims common to all of the cases, one of which is relevant to the discussion here: mental illness as a bar to execution.[136] The Commission found that five of the petitioning inmates suffered from mental disorders of varying degrees of severity.[137]

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132. Inter-Am. C.H.R., *Recommendation of the Inter-American Commission on Human Rights for the Promotion and Protection of the Rights of the Mentally Ill*, OAS/Ser L/V/II.111 doc. 20 rev. ¶ 3 (Apr. 4, 2011).

133. *See generally* Cases 11.575, 12.333 & 12.341, Inter-Am. C.H.R., Report No. 52/13 (2013).

134. *Id.*

135. *Id.* at ¶ 1.

136. *Id.*

137. Two of the inmates, David Leisure and James Wilson Chambers, were found to have mental disabilities associated with low IQ, and are not discussed here, although the violations recognized by the Commission applied equally to them. *Id.* The five inmates with mental disorders, and the state in which they were convicted, were James Brown of Georgia (paranoid schizophrenia, acute psychosis with visual and audio hallucinations); *Id.* at ¶ 28; Robert Karl Hicks of Georgia (microcephaly with frontal lobe dysfunction); *Id.* at ¶ 39; Troy Albert Kunkle of Texas (schizophrenia and serious childhood abuse); *Id.* at ¶ 45; Jaime Elizalde Jr. of Texas (unspecified mental disorder not raised timely by defense counsel); *Id.* at ¶ 59; and Angel Maturino Resendiz of Texas (schizophrenia, hallucinations and self-mutilation). *Id.* at ¶ 63.

At the beginning of the discussion on mental disorders and the death penalty, the Commission stated the following:

> It is a principle of international law that persons with mental disabilities, either at the time of the commission of the crime or during trial, cannot be sentenced to the death penalty. Likewise, international law also prohibits execution of a person sentenced to death if that person has a mental disability at the time of execution.[138]

The Commission then cites, with approval, the recommendation of the U.N. Commission on Human Rights, referred to above, which, it notes, "called upon all States that still have the death penalty '[n]ot to impose the death penalty on a person suffering from any mental or intellectual disabilities or to execute any such person.'"[139] The IACHR found violations of the right to life and to protection against "cruel, infamous or unusual punishment," language that comes from the American Declaration on the Rights and Duties of Man, to which the Commission has repeatedly found that the United States is bound.[140] Their conclusion on the issue reads as follows:

> As the right to life is the ultimate right, and given the heightened degree of scrutiny required in capital cases, the Inter-American Commission considers that *persons with mental disability cannot be subjected to capital punishmen*t, as these individuals are unable to comprehend the reason for or consequence of their execution.[141]

The Commission does not qualify "mental disability" in any way, although the facts in the cases before it suggest certain gravity in the illnesses of the designated death row inmates.[142]

Other cases involving the death penalty and mental illness are in the process of resolution and reflect the serious attention to be given by the Commission to the issue of mental illness and the death penalty. They include an admissibility decision—a decision to hear the merits of a petition—from a death row inmate in

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138. *Id.* at ¶ 213.

139. *Id.* at ¶ 214.

140. *Id.* at ¶ 220.

141. *Id.* at ¶ 218 (emphasis added).

142. *See id.* (listing various mental illnesses involved in cases before the Commission).

Tennessee who exhibits severe mental illness,[143] and the issuance of two requests in 2014 for precautionary measures to the U.S. government to prevent executions while the cases are pending before the Commission. The first case arises in Ohio, where the condemned defendant exhibits significant brain damage and other mental illness,[144] and the other in Arizona, where the defendant alleges "crippling mental illness" and traumatic brain injury.[145]

Similar to the Commission, the Indian Supreme Court dealt with a consolidated case involving twelve petitioners convicted of capital crimes, all of whom had extended stays on death row.[146] There, the unanimous court commuted the death sentences of two men treated for "chronic psychotic illnesses."[147] In support of its legal conclusion, the court relied primarily on the standard articulated in the 2005 resolution of the U.N. Commission on Human Rights, which, as the previous resolutions had, called on "all States that still maintain the death penalty . . . not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person."[148]

Here, then, we have U.N. bodies repeatedly adopting the "any mental illness" formulation of the European Union over a number of years, as well as the IACHR and the highest court of India. Support for that formulation is extensive.

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143. *See* Thompson v. United States, Case 194-04, Report No. 132/11, at 2, Inter-Am. C.H.R. (2011) (noting that Mr. Thompson was allegedly "diagnosed with bipolar affective disorder, schizo-affective disorder, and schizophrenia").

144. *See generally* Moreland v. United States, Inter-Am. Comm'n H.R., Resolution No. 32/2014, Precautionary Measure No. 37-14 (2014).

145. Rogovich v. United States, Inter-Am. Comm'n H.R., Resolution No. 4/2014, Precautionary Measure No. 57-14 (Mar. 4, 2014).

146. Shatrughan Chauan v. Union of India (2014) 3 SCC 1 (India).

147. *Id.* at ¶ 71.

148. *Id.* at ¶ 73. The court concluded that "[i]n view of the well-established laws both at national as well as international sphere, we are inclined to consider insanity as one of the supervening circumstances that warrants for commutation of death sentence to life imprisonment." *Id.* at ¶ 79.

B. Support for a Ban on Execution of Persons with Severe Mental Impairment

The primary articulation of a standard regarding the limitation on execution of persons with severe or serious mental illness is found in the American Bar Association's 2006 recommendation, discussed above.[149] Some U.N. standards and recommendations articulate a measure of gravity of the mental illness when calling on countries to end the practice of the death penalty for those with mental illness. Those sources are examined below.

In the 1980s, the U.N. Economic and Social Council adopted safeguards concerning the application of the death penalty.[150] The earliest version of the Safeguards called for prohibition of the execution of "persons who have become insane," thus contributing to the worldwide consensus on execution of the insane discussed earlier in this article.[151] The Safeguards were endorsed by the U.N. General Assembly in the same year.[152] In 1988, the Safeguards were updated and made more specific, admonishing states where the death penalty was not in force to eliminate the death penalty "for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution."[153] The resolution was adopted without a vote.[154] It articulates a relatively high bar of "extremely limited" competence, which I read to mean a severe level of mental illness.[155]

The language regarding the execution stage in both versions of the Safeguards makes clear that the United Nations was attempting to deal with ongoing mental illness and not sanity at the time of the offense, or competency at the time of trial. This is

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149. AM. BAR ASS'N, *supra* note 44.

150. *See* Economic and Social Council Res. 1984/50, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (1984) (providing the first iteration).

151. *Id.* at ¶ 3. *See generally supra* Part III.

152. *See* G.A. Res. 39/118, ¶ 2, Human Rights in the Administration of Justice (1984) (endorsing "the recommendations contained in Economic and Social Council resolutions 1984/47 and 1984/50 on procedures . . . and safeguards guaranteeing protection of the rights of those facing the death penalty").

153. Economic and Social Council Res. 1989/64, ¶ 1(d) (1989).

154. SCHABAS, *supra* note 105, at 173 n.155.

155. Economic and Social Council Res. 1989/64, ¶ 1(d) (1989).

borne out by the 2010 report of the U.N. Secretary General, who concluded that:

> The norm protecting insane and mentally disabled persons from execution applies even when there is no question of competency at the time the crime was committed or at trial. It is not uncommon for a person to become insane subsequent to conviction and sentence of death, and in such cases execution is forbidden by the third safeguard.[156]

The Safeguards have been widely endorsed by other U.N. bodies in subsequent reporting. For example, in his 2000 report to the General Assembly, the United Nations' Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions commented in detail as follows:

> The Special Rapporteur wishes to stress that in resolution 1989/64 the Economic and Social Council also recommended that States strengthen the protection of the rights of those facing the death penalty by eliminating the death penalty for persons suffering from mental handicap or *extremely limited mental capacity*. Moreover, the Safeguards guaranteeing protection of the rights of those facing the death penalty stipulate that the death penalty shall not be carried out on persons who have become insane. The Special Rapporteur strongly supports these recommendations and urges States to take action to reflect these restrictions in domestic law.[157]

In its concluding observations to the report of the United States under the International Covenant on Civil and Political Rights, submitted in 2006, the Human Rights Committee welcomed the decision by the Supreme Court in *Atkins v. Virginia*, and encouraged the United States "to ensure that persons suffering from *severe forms* of mental illness not amounting to mental retardation are equally protected."[158] Here, the Committee

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156. U.N. Secretary-General, *Capital Punishment and the Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, ¶ 91, U.N. Doc. E/2010/10 (Dec. 18, 2009).

157. Comm'n on H.R., Econ. & Soc. Council, Civil and Political Rights, Including Questions of Disappearances and Summary Executions, ¶ 69, UN Doc. E/CN.4/2000/2 (Jan. 25, 2000) (emphasis added).

158. H.R. Comm., Concluding Observations of the Human Rights Committee: United States of America, ¶ 7, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (Dec. 18, 2006) (emphasis added).

adopts language similar to that of the ABA recommendation on mental illness and the death penalty.[159]

International human rights bodies, as well as national courts, have addressed the question of mental illness of death row prisoners. Their results uniformly require or call for elimination of the death sentence and recognition of the need for treatment of the affected prisoner. Examples come primarily from the deliberations of the Human Rights Committee, which oversees individual complaints under the First Optional Protocol to the International Covenant on Civil and Political Rights, and state practice in the Caribbean and Japan.

In 1994, the Human Rights Committee decided *Francis v. Jamaica*,[160] one of the first international cases to raise the issue of mental illness and capital punishment. Over the course of more than a decade on death row, many years of which were spent in solitary confinement, Mr. Francis' defense counsel and a prison chaplain noticed deterioration in his mental state.[161] He was reported to have "a high level of cognitive impairment" as well as "general mental disturbance and paranoia."[162] While the government was said to have examined the prisoner, no results were made public or shared with the Committee.[163] Petitioner's counsel cited to both the 1984 and 1989 versions of the ECOSOC Resolutions cited here.[164] The Committee found that the petitioner's "mental health seriously deteriorated during incarceration on death row."[165] It found violations of the prohibition on cruel, inhuman, or degrading treatment (Art. 7), and the requirement of humane treatment when deprived of liberty (Art. 10.1),[166] and requested the government to provide

159. *See Recommendations*, *supra* note 44 and accompanying text (explaining the standard used by the ABA).

160. Francis v. Jamaica, H.R. Comm. No. 606/1994, U.N. Doc. CCPR/C/54/D/606/1994 (1995).

161. *Id.* at ¶ 3.7.

162. *Id.*

163. *Id.* at ¶ 3.7, 3.8, 4.5.

164. *Id.* at ¶ 4.6.

165. *Id.* at ¶ 9.2.

166. *Id.* at ¶ 9.2.

appropriate treatment of the illness and consideration for early release.[167]

A similar result occurred in another Jamaican case two years later**,** *Williams v. Jamaica*.[168] There, however, mental instability began as early as trial.[169] The defendant's "mental condition seriously deteriorated" during his confinement on death row, and the government failed to carry out its commitment to conduct a mental examination in prison.[170] Defense experts found that Mr. Williams exhibited auditory hallucinations and paranoid schizophrenia.[171] The Committee recommended an appropriate remedy, particularly medical treatment.[172]

Finally, in 2002, the Committee heard another case from the Caribbean and found similar violations. In *R.S. v. Trinidad and Tobago*,[173] defense counsel submitted an affidavit based on his visits with his death-sentenced client, a psychiatrist's visit, and indications from a prison guard, that his client was "experiencing auditory hallucinations and [was] probably suffering from *severe* mental illness."[174] In its conclusions, the Committee noted that "the author's mental state at the time of the reading of the death warrant was obvious to those around him and should have been apparent to the prison authorities."[175] That is, his mental illness was serious. The Committee took particular note of the fact that the claim was one having to do with competence for execution and not mental illness at the time of the offense or trial, and found that issuance of a warrant for execution in such circumstances would violate the prohibition on cruel, inhumane, or degrading treatment or punishment and called for his treatment or release.[176]

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167. *Id.* at ¶ 11.

168. Williams v. Jamaica, H.R. Comm. No. 609/1995, U.N. Doc. CCPR/C/61/D/609/1995 (1997).

169. *See id.* at ¶ 2.3 ("Counsel indicates that at the time of the trial in December 1988, the author already displayed signs of mental disturbance.").

170. *Id.* at ¶ 6.5.

171. *Id.* at ¶ 2.4.

172. *Id.* at ¶ 8.

173. R.S. v. Trinidad & Tobago, H.R. Comm. No. 684/1996, U.N. Doc. 684/1996 (2002).

174. *Id.* at ¶ 2.3–2.6 (emphasis added).

175. *Id.* at ¶ 7.2.

176. *Id.* at ¶ 7.2, 9.

Two brief examples of state practice are further illustrative of the trend toward limitation of the death penalty as it is applied to persons with serious mental illness. First, in 2012, the Eastern Caribbean Court of Appeals vacated a death sentence against the defendant and substituted manslaughter, where experts for the prosecution and defense agreed that he "was suffering from an abnormality of mind" sufficient to require the lesser, non-capital penalty.[177] And finally, in Japan, in March 2014, a district court released Iwao Hakamada, "who had been on death row since 1968 and developed mental illness as a result of the decades he had spent in isolation."[178] In each of these cases, it appears that the illness was sufficiently severe to require mitigation of the death penalty.

VI. Conclusion

The U.S. Supreme Court needs to more fully and specifically define the range of severity of mental illness sufficient to bar the carrying out of the death penalty. The "insanity" test of *Ford v. Wainright* is not rigorous enough, and the jumbled conclusions of *Panetti v. Quarterman* give little concrete guidance to the lower courts in their determination of where to draw the line regarding mental illness among those on death row. If anything, a standard like that adopted by the Court in *Hall v. Florida*, which finds that "intellectual disability is a condition, not a number"[179] can serve as guidance to the courts with regard to mental illness as well. There may be a range of conditions that satisfy the courts that the mental illness in question mitigates capital punishment. This Article suggests that the United Nations, regional human rights bodies, and national courts alike have articulated tests, and provides a range of options from which to choose.

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177. Shorn Samuel v. The Queen, No. 22 of 2008 (E. Carib. Ct. App., 31 May 2012).

178. Referred to without further citation in the 2014 report of the Secretary General to the U.N. General Assembly on the death penalty. UN Secretary-General, H.R. Comm'n, *Question of the Death Penalty*, U.N. Doc. A/HRC/27/23, ¶ 62 (June 30, 2014).

179. Hall v. Florida, 134 S. Ct. 1986, 2001 (2014).

Blackstone's *Commentaries* notes the case of Edward Arnold, who was found competent to stand trial and convicted for the shooting of a British lord.[180] However, Blackstone concludes, "being half a madman, [he] was never executed, but confined in prison, where he died about thirty years after."[181] In using the term "half a madman," Blackstone meant to distinguish Mr. Arnold from the condemned person who is insane. Today, all of humanity has no qualms in exempting the insane from the death penalty; such has been the case in this country for the thirty years that have passed since the decision in *Ford v. Wainwright*. Yet the prohibition on cruel and unusual punishment also should bar the sentence of death for those who are "half-mad." Surely the court can fashion a remedy that recognizes that class of offender.

180. *See generally* Brief Amici Curiae of Legal Historians in Support of Petitioner, Panetti v. Quarterman, No. 06-6407 (U.S., 2007), 2007 WL 579308, at *10–11 (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 208 (1st English ed. 1769)).

181. *Id.*