

TRACING THE MORAL CONTOURS OF THE EVOLVING STANDARDS OF DECENCY: THE SUPREME COURT'S CAPITAL JURISPRUDENCE POST-*ROPER*

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INTRODUCTION

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.

– Justice Harry Blackmun¹

The new evangelization calls for followers of Christ who are unconditionally pro-life: who will acclaim, celebrate and serve the Gospel of life in every situation. A sign of hope is the

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¹ Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

increasing recognition that the dignity of human life must never be taken away, even in the case of someone who has done great evil. Modern society has the means of protecting itself, without definitely denying criminals the chance to reform.

—Pope John Paul II²

I have reached the point where I can no longer participate in a legal system that intentionally takes human life in capital punishment cases

We continue to demonstrate that no human is wise enough to decide who should die

—Justice Robert Utter, Washington State Supreme Court³

The dawn of the new millennium witnessed two significant Supreme Court decisions that have given a new dimension to the death penalty debate in the United States. In *Atkins v. Virginia*,⁴ the Court held capital punishment unconstitutional for persons with mental retardation,⁵ while in *Roper v. Simmons*,⁶ the Court imposed constitutional bans on the execution of juveniles.⁷ These two decisions marked a quantum jump in the highest Court's maturation process since the watershed moment of its capital punishment jurisprudence in *Furman v. Georgia*,⁸ banning all executions.⁹ But, the two decisions also signaled, perhaps, for the first time in thirty years, an abolitionist end of this evolutionary process. These decisions coincided with significant historic shifts in the Catholic Church's stance on capital punishment. Under the leadership of Pope John Paul II, the Church finally extricated itself from years of confusion over

² Ccap.org, Catholics Against Capital Punishment: What the Vatican Has Said, <http://ccap.org/vaticandocuments.html> (last visited Aug. 25, 2006) (quoting Pope John Paul II, Homily Delivered at the Papal Mass, St. Louis, Mo. (Jan. 27, 1999), http://www.vatican.va/holy_father/john_paul_ii/travels/documents/hf_jp-ii_hom_27011999_stlouis_en.html (last visited Aug. 29, 2006)).

³ Jack Hopkins, *Death Penalty Inequities Prompt State High Court Justice To Retire*, SEATTLE POST-INTELLIGENCER, Mar. 30, 1995, at A1.

⁴ 536 U.S. 304 (2002).

⁵ *See id.* at 321.

⁶ 543 U.S. 551 (2005).

⁷ *See id.* at 578–79. (“The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”).

⁸ 408 U.S. 238 (1972) (per curiam).

⁹ *See id.* at 239–40 (finding the imposition of three death penalty sentences cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments).

the issue of state-sanctioned killings as it took a principled stance.¹⁰ Now, more than ever, the Catholic Church has shown

¹⁰ There has been some confusion within the Catholic Church on the death penalty topic. The past reflects the confusion over whether or not the Church should support capital punishment or state-sanctioned killings. This confusion is evident in such statements that refer to the fuzziness within the Catholic community for nearly twenty-five years on the death penalty. Adding to the confusion, the statement also notes a specific charge to work toward ending the death penalty.

The statement makes note of a shift over the last 25 years to growing public distrust for how the death penalty is applied and decreasing support for its use. It also said the goal of the statement is “not just to proclaim a position, but to persuade Catholics and others to join us in working to end the use of the death penalty.”

Patricia Zapor, *New Statement Calls for the Rejection of “Illusion” of Death Penalty*, CATH. NEWS SERV., Nov. 1, 2005, available at <http://www.catholicnews.com/data/stories/cns/0506545.htm> (quoting UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *A Culture of Life and the Penalty of Death* (Nov. 2005), <http://www.acat.asso.fr/execute/images/penaltyofdeath.pdf> (last visited Aug. 29, 2006)). The confusion continues as here again in a 1980 statement that reads in part:

[T]he bishops . . . acknowledge that the Christian tradition has for a long time recognized a government's right to protect its citizens by using the death penalty in some serious situations. The bishops ask, however, if capital punishment is still justifiable in the present circumstances in the United States.

In this context, the bishops enter the debate about deterrence and retribution. They acknowledge that capital punishment certainly prevents the criminal from committing more crimes, yet question whether it prevents others from doing so. Similarly, concerning retribution, the bishops support the arguments against death as an appropriate form of punishment. The bishops add that reform is a third reason given to justify punishment, but it clearly does not apply in the case of capital punishment. And so they affirm: “We believe that in the conditions of contemporary American society, the legitimate purposes of punishment do not justify the imposition of the death penalty.”

Kenneth R. Overberg, S.J., *The Death Penalty: Why the Church Speaks a Countercultural Message*, CATH. UPDATE MAG., available at <http://www.american.catholic.org/Newsletters/CU/ac0195.asp> (quoting UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Capital Punishment* (Nov. 1980), <http://www.usccb.org/sdwp/national/criminal/death/uscc80.htm> (last visited Aug. 29, 2006)). This confusion has, in a sense, helped the Church and its leaders to be more public and precise in their position on the death penalty. If we compare the Catholic Catechism pronouncements between 1992 and 1997, we find the following changes. While the original 1994 edition 2265 stated, “Legitimate defense can be not only a right but a grave duty for someone responsible for another’s life, the common good of the family or of the state,” the definitive Latin edition (issued in September 1997) of the Catechism is different. CATECHISM OF THE CATHOLIC CHURCH ¶ 2265 (1994). Specifically, the 1997 edition of 2265 states:

Legitimate defense can be not only a right but a grave duty for one who is responsible for the lives of others. The defense of the common good requires that an unjust aggressor be rendered unable to cause harm. For this

principled opposition towards the death penalty. This opposition can be seen percolating through the *Evangelium Vitae* and the

reason, those who legitimately hold authority also have the right to use arms to repel aggressors against the civil community entrusted to their responsibility.

CATECHISM OF THE CATHOLIC CHURCH ¶ 2265 (2d ed. 1997). Similarly, in his general audience in St. Peter's Square, the Pope expressed his hope that "there no longer be recourse to capital punishment, given that states today have the means to efficaciously control crime, without definitively taking away an offender's possibility to redeem himself." See *Cacp.org*, *supra* note 2 (referencing Pope John Paul II, General Audience, St. Peter's Square (Sept. 13, 2000), http://www.vatican.va/holy_father/john_paul_ii/audiences/2000/documents/hf_jp-ii_aud_20000913_en.html (in left hand corner click "Audiences," go to year "2000" tab and then scroll down to "September 13 2000" tab) (last visited Aug. 29, 2006)). This was followed by his homily in St. Louis, Mo., where he chastised the practice of the death penalty to be both cruel and unnecessary while pronouncing to his followers:

The new evangelization calls for followers of Christ who are unconditionally pro-life: who will acclaim, celebrate and serve the Gospel of life in every situation. A sign of hope is the increasing recognition that the dignity of human life must never be taken away, even in the case of someone who has done great evil. Modern society has the means of protecting itself, without definitively denying criminals the chance to reform.

Id. (quoting Pope John Paul II, Homily Delivered at the Papal Mass, St. Louis, Mo. (Jan. 27, 1999), http://www.vatican.va/holy_father/john_paul_ii/travels/documents/hf_jp-ii_hom_27011999_stlouis_en.html (last visited Aug. 29, 2006)). Later, the Vatican termed the death penalty "a sign of desperation" in a declaration to the first World Congress on the Death Penalty held June 21–23, 2001 in Strasbourg, France. *Cacp.org*, *supra* note 2 (quoting The Vatican, Declaration to the First World Congress on the Death Penalty, Strasbourg, France (June 21, 2001)). The Vatican continued on to lend its support towards an abolitionist policy, as it characterized the abolition of capital punishment as:

[A]n integral part of the defense of human life at every stage of its development. . . . The universal abolition of the death penalty would be a courageous reaffirmation of the belief that humankind can be successful in dealing with criminality and of our refusal to succumb to despair before such forces, and as such it would regenerate new hope in our very humanity.

Id. Similar sentiments have been echoed throughout the religious Catholic community beginning in the late 1990s. For example, in a June 20, 2001 address to members of the organization *Priests for Life*, Archbishop Renato Martino, the Holy See's ambassador to the United Nations, said: "Our voice must be heard not only in the fight against abortion, but in the fight against euthanasia and capital punishment as well. We can never condone the deliberate taking of human life created in love by God and redeemed in Jesus Christ." *Id.* (quoting Archbishop Renato R. Martino, Remarks to the United Nations at the Blessing of the John Cardinal O'Connor International Headquarters of Priests for Life (June 20, 2001)). Also significant is the current Pope Benedict's earlier view on the death penalty. While he was the Cardinal Joseph Ratzinger, Prefect of the Congregation for the Doctrine of the Faith, he noted that in modern society it would be "practically impossible" to fulfill the Catechism's criteria for a death sentence. *Cacp.org*, *supra* note 2.

new Catholic Catechism.¹¹ Therefore, an issue we are interested in exploring is whether the Catholic Church's change in attitude towards the death penalty signaled the recent shift in the capital jurisprudence of the Supreme Court.

This inquiry is motivated by the appearance of a causal relationship between the Papal jurisprudence of Pope John Paul II and an evolutionary shift in Supreme Court jurisprudence. Because the current Catholic viewpoint, under the leadership of the late Pope, fosters an increasing recognition of the dignity of human life,¹² the Supreme Court's opinion in both *Roper* and *Atkins* echo a similar tone. Through these opinions, a renewed scope and expanded dimension of the domestic judiciary's understanding of the Eighth Amendment is revealed. This research proceeds on multiple threads. In the first, I examine the evolution of death penalty jurisprudence for juveniles in *Roper*, as it traces the tension between the two competing arguments. The first argument centers on the psychological analysis of law¹³ that reduces the culpability of the offender and advances both the morality and the disproportionality arguments. The other argument insulates the domestic national consensus from being consumed by the strong tides of the rising world constitutionalism. The second cluster of issues is the set of ethical visions that influenced the judiciary in their journey from *Penry v. Lynaugh*¹⁴ to *Atkins* while we witnessed the emergence of a newer constitutional interpretation of Cruel and Unusual Punishment in the Court's proclamation in *Atkins*. As the two parallel themes converge in my analysis, I argue the success in advancing a capital jurisprudence of qualitative difference does not require the finding of support in history or domestic tradition. Rather, it depends on our

¹¹ See JOHN PAUL II, ENCYCLICAL LETTER *EVANGELIUM VITAE* ¶¶ 27, 40–41, 56 (1995) [hereinafter *EVANGELIUM VITAE*] (discussing the inviolability of life); CATECHISM OF THE CATHOLIC CHURCH ¶ 2267 (2d ed. 1997) (indicating that cases in which the execution of an offender is absolutely necessary are “practically non-existent”).

¹² Inherent dignity is, in my mind, the life force of making the human person inviolable. Throughout the text, I refer to the scope and meaning of inherent human dignity. For further discussion, see discussion *infra* note 239.

¹³ See Elizabeth Cauffman, Jennifer Woolard, & N. Dickon Reppucci, *Justice for Juveniles: New Perspectives on Adolescents' Competence and Culpability*, 18 QUINNIPIAC L. REV. 403, 407–08 (1999) (referencing the effort to identify cognitive factors that might help explain one's culpability).

¹⁴ 492 U.S. 302 (1989).

willingness to engage in an inquiry into society's evolving standards, especially if the historical tradition is infected with a flawed analysis of proportionality and entangled in the inequality of Due Process. Herein lies perhaps the greatest of all legacies of Pope John Paul II. The Catholic Church can at last stand alongside those human rights group that oppose, unequivocally, state-sanctioned killing of humans.

In seeking the path of unqualified opposition to abortion and unyielding ban on almost all types of medical intervention to fertility, Catholic jurisprudence has embarked on a collision course in the U.S. where the majority's view fosters the converse viewpoint of both the evolving Supreme Court and the contemporary standards of law in other parts of the civilized world. Against this backdrop, my paper examines whether there exists any normative alignment between the Catholic Church's position of principled opposition to the death penalty and the recent Supreme Court's judicial metamorphosis in its capital sentencing jurisprudence. In this context, I am interested to explore the Court's evolution since *Furman* through the prism of morality, as I explore in detail the coupling between morality and jurisprudence. Of particular interest in this inquiry is the moral consciousness rising within the Court which, at times, gets subsumed in the majority's contrarian viewpoint. This, in turn, helps us understand whether it is a manifestation of the Court's journey towards moral consistency, or whether is it simply tracing the moral contours in its adjudication of Constitutional text.

As we bear witness to both a heightened awareness and escalating controversy surrounding the death penalty, the corpus of capital jurisprudence is replete with arguments and analysis revolving around political, philosophical, racial, and social dimensions. In my view, however, the exploration of the religious traditions and theological perspectives has not gone beyond the hackneyed debate of "eye for an eye"¹⁵ justice. It is,

¹⁵ The reference to the "eye for an eye" concept is being used here as a driver for vengeance and retribution within the various fundamental religious values, as well as governmental systems. These aspects are important to understand since many in Christianity also support capital punishment. These aspects are described by Pollock-Byrne:

Religious ethics have been used to support and to condemn capital punishment. Old Testament law supporting the taking of an eye for an eye is used by retentionists, while the commandment, "Thou shalt not kill," is

therefore, my objective in this essay to provide some unique perspectives and significant reflective dimensions that highlight less traveled roads of capital punishment. With an examination of post-*Furman* American capital jurisprudence, through an in depth understanding of the human person based on explicit recognition for inherent human dignity, I wish to illuminate how moral beliefs and institutionalized jurisprudence can shape the concept of ultimate justice. This is, especially within the framework of a pluralistic democratic society, where the strict

used by the abolitionists. . . It is a telling commentary that for as long as society has used capital punishment to punish wrongdoing, critics have defined it as immoral.

J.M. POLLOCK-BYRNE, *ETHICS IN CRIME AND JUSTICE: DILEMMAS AND DECISIONS* 140 (1989). Further outlined by authors Allen and Simonson is the historical relevance of vengeance as noted:

The idea of vengeance is not new, nor is it unique in any fashion. Roughly four thousand years ago the Hammurabi Code (1750 B.C.) prescribed specific punishments for Babylonia. Examples include:

If a man knocks out the tooth of a man of his own rank, they shall knock out his tooth.

If a son strikes his father, they shall cut off his fingers.

If a man destroys the eye of another man, they shall destroy his eye.

If a man of higher social rank destroys the eye of a man of lower rank, the man shall pay a fine.

See H.E. ALLEN & CLIFFORD E. SIMONSEN, *CORRECTIONS IN AMERICA* 6 (1989). Moving beyond the Babylonia example, there are historical codes designed with vengeance and retribution in mind. For example, Modern American society was more influenced by the Laws of Moses—the Old Testament rules of conduct and penalties. These laws were specific and vengeful, recommending executions and restitution, even for conduct that, today, may seem less than serious. See *Exodus* 20–22 (New American) (discussing penalties for various crimes); ALLEN & SIMONSEN, *supra*. But, it is not necessary to rely only on history to witness this retributive “eye for an eye” punishment. As a cursory scan of media archives will provide the stark reminders of stoning, beheading, or cutting of appendages as punishments ordered in such places as the Middle East. The retributive concept of “eye for an eye” has imprinted its mark on many Christians, and the history of retribution and vengeance within Christianity is unavoidable. This historical doctrine has influenced the modern-day Church. I propose, more than the actual dogma of the Church, but the individual Christian that reinterprets his or her personal morals to coincide with modern law and to comport with the majority opinion in vogue (i.e., pro-death penalty). But, this individual reinterpretation causes a great disconnect between the faith of the individual and the actual teaching of the Church. Additionally, the disconnect makes acceptance of the “eye for an eye”-style punishment normal among the masses. This cycle is repeated over and over, until it becomes internalized as a Christian belief within the widespread followers of Christianity. This lends credence to the question, “Of the over 72 percent of the population in favor of the death penalty in the United States, how many simultaneously profess a Christian belief system?” S. WALKER, *SENSE AND NONSENSE ABOUT CRIME AND DRUGS* (1989).

boundaries between matters of private faith and political life are not only encouraged but also often enforced. Therefore, this article is segmented as follows:

Part I of my article examines the impact of *Roper* and *Atkins* by tracing the trajectory of the Court from *Furman* and examining what it means for the judiciary. Part II delves into the evolutionary process of the Supreme Court's capital punishment jurisprudence to understand whether a moral case exists for an abolitionist future, while extracting the pitfalls and road bumps the Court faced over the years. Part III investigates whether the similarity between the Court's positions in *Roper* and *Atkins* and Pope John Paul II's principled opposition to capital punishment signals a normative alignment between the two entities or a mere coincidence. In Part IV, I explore the long-term implications of *Atkins* and *Roper*, while tracing the trajectory for an abolitionist future. By analyzing the full scope of the moral persuasion presented with the Supreme Court's legal discourse in Part V, I identify the challenges the Court faces as it continues to provide moral leadership in establishing the death penalty's doctrinal differences and uniqueness. Finally, I conclude by summarizing my personal convictions and a reflective dimension of these inquires.

I. WHAT DID *ATKINS* AND *ROPER* MEAN FOR EIGHTH AMENDMENT JURISPRUDENCE?

In its path-breaking opinions of *Atkins* and *Roper*, the Supreme Court has revitalized the death penalty debate, by seeking to maximize human dignity through categorical exemptions from capital punishment based on certain class of individuals. Long before the landmark 2005 *Roper* decision, however, we witnessed the introduction of "qualitative difference" of death penalty jurisprudence in *Furman v. Georgia*, where the Court took an expansive view of the Constitution's Eighth Amendment protection of Due Process.¹⁶ This qualitative difference doctrine has survived and evolved within the evolutionary process of the Supreme Court's capital

¹⁶ See *Furman v. Georgia*, 408 U.S. 238, 286, 289 (1972) (per curiam) (Brennan, J., concurring) ("Death is a unique punishment Death . . . is in a class by itself."); *id.* at 306 (Stewart, J., concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind.").

jurisprudence for its robust reasoning and timeless appeal on a number of grounds.¹⁷ The first line of reasoning focuses on death's finality, which compels us to recognize that the consequence of any procedural error is both irrecoverable and immutable.¹⁸ Procedural errors can range from prosecutorial

¹⁷ In addition to *Furman*, the qualitative difference of the death penalty has been established throughout the post-*Furman* era. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting) (arguing that the majority opinion holding it cruel and unusual to punish retarded persons with death is the “pinnacle of . . . death-is-different jurisprudence”); *Ring v. Arizona*, 536 U.S. 584, 605–06 (2002) (noting that “there is no doubt that death is different”); *id.* at 614 (Breyer, J., concurring) (“[T]he Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty.”) (citing *Gregg v. Georgia*, 428 U.S. 153, 153 (1976)); *McCleskey v. Kemp*, 481 U.S. 279, 340 (1987) (Brennan, J., dissenting) (“It hardly needs reiteration that this Court has consistently acknowledged the uniqueness of the punishment of death.”); *Wainwright v. Witt*, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting) (referencing that the death penalty is qualitatively different from other punishments) (citing *Spaziano v. Florida*, 468 U.S. 447, 468 (1984)); *Spaziano*, 468 U.S. at 459 (citing the Court’s prior recognition of the “‘qualitative difference’ of the death penalty”); *id.* at 468 (Stevens, J., concurring in part and dissenting in part) (“[T]he death penalty is qualitatively different . . . and hence must be accompanied by unique safeguards.”); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that the death penalty is “qualitatively different”) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)); *Gregg*, 428 U.S. at 188 (joint opinion of Stewart, Powell, and Stevens, JJ.) (finding that the “penalty of death is different in kind from any other punishment” and emphasizing its “uniqueness”); *Woodson*, 428 U.S. at 305 (joint opinion of Stewart, Powell, and Stevens, JJ.) (“[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long.”).

¹⁸ The finality and irreversibility of the death penalty is indoctrinated throughout the post-*Furman* era capital jurisprudence in the Supreme Court. *See Ring*, 536 U.S. at 616–17 (Breyer, J., concurring) (noting that DNA evidence indicating that the convictions of numerous persons on death row are unreliable is especially alarming since “death is not reversible”); *Wainwright*, 469 U.S. at 463 (Brennan, J., dissenting) (referencing irrevocability) (quoting *Spaziano*, 468 U.S. at 468); *Spaziano*, 468 U.S. at 460 n.7 (referencing irrevocability) (citing *Gregg*, 428 U.S. at 187); *id.* at 468 (Stevens, J., concurring in part and dissenting in part) (referencing irrevocability); *Gregg*, 428 U.S. at 187 (joint opinion of Stewart, Powell, and Stevens, JJ.) (referencing irrevocability) (citing *Furman*, 408 U.S. at 286–291); *Woodson*, 428 U.S. at 305 (joint opinion of Stewart, Powell, and Stevens, JJ.) (referencing finality); *Furman*, 408 U.S. at 290 (Brennan, J., concurring) (“[T]he finality of death precludes relief.”); *id.* at 306 (Stewart, J., concurring) (finding death “unique in its total irrevocability”). While giving primacy to procedural safeguards, the Court has sought to reshape the scope of the Eighth Amendment’s Cruel and Unusual Punishment Clause in several cases. *See, e.g.*, *Atkins*, 536 U.S. at 306 (holding it cruel and unusual to execute the mentally retarded because they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct); *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (finding it cruel and unusual to pronounce death upon a defendant who was under sixteen at the time of his crime); *Enmund v. Florida*, 458 U.S. 782, 789–93 (1982) (finding it cruel

misconduct to ineffective defense counsel, and from jury manipulation to misleading instructions, all of which call for additional procedural safeguards.¹⁹ The second line of reasoning relies on the implicit recognition that ultimate punishment on an individual deprives that human being of his or her inherent dignity.²⁰ Death's finality and the attendant legal discourse's inability to fully encapsulate all the dimensions of its immutability invites us to engage in a different kind of debate—one that has not gained much currency, yet obtains legitimacy from Justice Stevens's dissent in *Spaziano*.²¹ In my view, the death penalty doctrine must find a new trajectory which melds within it an ethical vision, a vision that guarantees that the

and unusual to punish felony murder with death absent a showing that the defendant possessed a sufficiently culpable state of mind); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding it cruel and unusual to punish the crime of rape with death).

¹⁹ See *Banks v. Dretke*, 540 U.S. 668, 675–76 (2004) (discussing prosecutorial misconduct); *Wiggins v. Smith*, 539 U.S. 510, 537–38 (2003) (finding ineffective assistance of counsel where counsel failed to investigate the accused's background and to present mitigating evidence); *Miller-El v. Cockrell*, 537 U.S. 322, 327, 347–48 (2003) (ordering new hearing for death row inmate who had presented substantial prima facie evidence of unconstitutional race-based challenges to jurors in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986)); *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994) (finding error by the trial court on the grounds of faulty jury instruction by refusing to instruct the jury that, under state law, defendant would be ineligible for parole if sentenced to life imprisonment); Linda Greenhouse, *Prosecutorial Misconduct Leads Justices to Overturn Death Sentence in Texas*, N.Y. TIMES, Feb. 25, 2004, at A14 (discussing Supreme Court's decision to overturn death sentence because prosecutors withheld evidence that would have made jurors less likely to impose the death sentence.)

²⁰ See *Furman*, 408 U.S. at 286 (Brennan, J., concurring) (describing capital punishment as the “ultimate sanction”); *id.* at 287 (describing the “uniqueness of death” due to its “extreme severity”); *id.* (referring to death as an unusual punishment in its “enormity”); *id.* at 290 (referring to death as a “truly . . . awesome punishment”); see also *Gregg*, 428 U.S. at 187 (plurality opinion) (describing death as “unique in its severity” and an “extreme sanction”); *Spaziano*, 468 U.S. at 460 n.7 (categorizing the uniqueness of the death sentence by its “severity”); *id.* at 468 (Stevens, J., concurring in part and dissenting in part) (referring to the “severity” of the death penalty as “qualitatively different from any other punishment”); *Wainwright*, 469 U.S. at 463 (Brennan, J., dissenting) (referring to the severity of the death penalty as its unique characteristic).

²¹ Professor Abramson believes: “In the words of Justice Stevens, the death sentence ‘is the one punishment that cannot be prescribed by a rule of law as judges normally understand rules,’ but is instead an ethical judgment expressing the conscience of the community as to whether ‘an individual has lost his moral entitlement to live.’” Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 119 (2004) (quoting *Spaziano*, 468 U.S. at 481 (Stevens, J., concurring in part and dissenting in part)).

forfeiture of life is not hostage to the legislative rule of law. Accordingly, I seek to reexamine the moral contours of the Constitutional framework from the days of *Furman v. Georgia*, with a view to predict a future course for capital punishment jurisprudence.

In the 1972 landmark *Furman* case, the Court sought to establish moral consistency for the first time by invalidating existing laws regarding the death penalty. The Court decided that, on the grounds of the uniqueness of the death penalty, a broader Eighth Amendment analysis was required. Since *Furman*, however, we witnessed a significant shift in the Court, as emotion replaced deliberation via instruments such as victim impact statements.²² Along the way, the morality-irrelevant retributive philosophy swept aside the *Furman* morality-based human-dignity centric jurisprudence. After a series of deliberately unresolved, narrowly doctrinalized death penalty decisions, the Court finally began to walk in stride with the existing global social norms²³ in its *Atkins* decision.

Relying upon *Trop v. Dulles*,²⁴ the Court in *Atkins* and *Roper* held that the Eighth Amendment forbids some practices, such as executing mentally retarded individuals or juveniles, on the grounds that these practices are inconsistent with the “evolving standards of decency that mark the progress of a maturing society.”²⁵ In arguing for a categorical ban on imposing capital punishment upon a particular class of offenders, the Court promulgated that its “own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”²⁶ In establishing a category of exemption

²² See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 817 (1991) (referencing the use of victim impact statements).

²³ See *Spaziano*, 468 U.S. at 468–70 (Stevens, J., concurring in part and dissenting in part) (discussing “current consensus of opinion”); see also Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047, 1048–49 (1991) (asserting that death penalty “decision[s] must occur past the point to which legalistic reasoning can carry”).

²⁴ 356 U.S. 86, 101 (1958).

²⁵ *Id.* at 101. There exist books and articles further discussing the historical context of the addition of “evolving standards of decency” into the case opinions. See ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 359 (1997) (describing the standard); see also Charles Hobson, *Atkins v. Virginia, Federalism, and Judicial Review*, 11 WIDENER L. REV. 23, 39–41 (2004) (discussing “evolving standards of decency”).

²⁶ *Roper v. Simmons*, 543 U.S. 551, 563 (2005) (quoting *Atkins v. Virginia*, 536

from capital punishment for the mentally retarded in *Atkins*, the Court based its conclusion on the evolving national consensus against such a practice;²⁷ this was a sharp departure from its rejection of similar Eighth Amendment relief earlier. This evolving national consensus, however, does not reflect a clear and convincing majority of States that prohibit execution of the mentally retarded.²⁸ Instead, this consensus incorporates the Court's vision of implementing the "consistency of the direction of change"²⁹ since *Penry*.³⁰

The Court's reasoning on the grounds of a national consensus against execution was even weaker in *Roper* than in *Atkins*. Despite the weakness of the argument in *Roper*, the Court was emboldened to invalidate the findings of *Stanford v. Kentucky*,³¹ and articulated a newer national consensus standard based on the same "consistency of the direction of change" that has been demonstrated.³² The *Roper* Court recognized significant differences between youth and adult offenders. Among other things, the Court acknowledged that young people exhibit less maturity of judgment, are more vulnerable to peer pressure, and tend to have an undeveloped sense of responsibility.³³ This reasoning raises a host of pertinent and significant issues. Can the rationale in *Atkins* be extended for mentally ill capital murderers by taking them off death row? Will the opinion in *Roper* be the groundwork to categorically ban executions for other classes of criminal capital defendants? This article will explore the answer while dissecting the obstacles the Supreme Court must overcome if it truly wants to make significant adjustments to capital jurisprudence of the land.

The Court's invalidation of its earlier holdings in *Penry* and *Stanford* established new standards of national consensus against the death penalty. The Court's earlier holding in

U.S. 304, 312 (2002)).

²⁷ See *Atkins*, 536 U.S. at 313–16.

²⁸ See *id.* (stating that thirty-three states prohibited capital punishment for the mentally retarded, which included fourteen states that have completely rejected capital punishment, and seventeen states that preclude capital punishment for the mentally retarded).

²⁹ *Atkins*, 536 U.S. at 315.

³⁰ *Penry v. Lynaugh*, 492 U.S. 302 (1989).

³¹ 492 U.S. 361 (1989), *overruled by* *Roper v. Simmons*, 543 U.S. 551 (2005).

³² *Roper*, 543 U.S. at 566 (quoting *Atkins*, 536 U.S. at 315).

³³ See *id.* at 569.

Stanford searched for a national consensus as an enforcing mechanism. With the Court's newer decision, the framework of *Stanford* was not invalidated but the measuring standard was relaxed in favor of a more expansive analysis of the Eighth Amendment, which now must qualify for just a "significant trend."³⁴ This broadened scope of Eighth Amendment jurisprudence came in against the domestic tide of a strong retributive impulse. This is especially true when the Court dictates, "in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."³⁵ The historical practice becomes subordinate to the Court's own moral preference, and the national consensus analysis becomes a defacto vehicle for the Court's moral contour. Further evidence of the *Atkins* court's independence is evidenced from the description of the Court's own framework: "[B]y our approach in these cases, we shall first review the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded and then consider reasons for agreeing or disagreeing with their judgment."³⁶ This constitutionalization of the Eighth Amendment is either contentious, as some commentators characterized it as a "jurisprudential train wreck," or simply moral philosophizing.³⁷ This article argues that within this current evolution of the Supreme Court's capital jurisprudence lies the seeds of a larger system of morality that is, perhaps, best understood through the Papal doctrine of John Paul II.

Neither are the moral contours traversed by the Justices in *Roper* and *Atkins* unique, nor is the exploration of a humanity-laden legal discourse unprecedented. The history of the U.S. Supreme Court's modern jurisprudence on the constitutionality of the death penalty has been punctuated by cases where the moral discourse was heavily impregnated within the legal discourse.³⁸ Relentless dissent by Justices against the death

³⁴ See *id.* at 566.

³⁵ See *id.* at 563; *Atkins*, 536 U.S. at 312; *Thompson v. Oklahoma*, 487 U.S. 815, 823 n.8 (1988).

³⁶ *Atkins*, 536 U.S. at 313.

³⁷ See Benjamin Wittes, *What is "Cruel and Unusual"?*, 134 POL'Y REV. 15, 15 (2005).

³⁸ The Supreme Court's legal landscape since *McGautha v. California* has changed course as death-is-different-jurisprudence is advanced through moral and constitutional debates about capital punishment. See *McGautha v. California*, 402

penalty not only brings to focus the moral overtones of penological practice, but also begs the question, whose morality is being upheld as we continue to impose the death penalty?³⁹

U.S. 183 (1971). From the beginning, the Supreme Court recognized capital punishment as lawful, as it asserted, “[t]he Constitution itself poses the first obstacle to [the] argument that capital punishment is *per se* unconstitutional.” *Furman v. Georgia*, 408 U.S. 238, 418 (1972) (per curiam) (Powell, J. dissenting). The Fifth Amendment, adopted in 1791, refers in specific terms to capital punishment and, thus, implicitly recognizes its validity. The Fourteenth Amendment, adopted in 1868, while obligating the States not to deprive any person of life, liberty, or property, without the due process of law, implicitly recognizes the right of States to make laws for such purposes. *Id.* at 285 (discussing the Fourteenth Amendment and noting that, in the past, the Court has presumed death to be a constitutional punishment). Constitutional challenges to capital punishments are based on the Eighth Amendment, which prohibits cruel and unusual punishment. Despite the fact that the Eighth Amendment “has not been regarded as a static concept,” *Gregg v. Georgia*, 428 U.S. 153, 173 (1996) (opinion of Stewart, Powell, and Stevens, JJ.), and it draws its meaning “from the evolving standards of decency that mark the progress of a maturing society,” *Trop v. Dulles*, 356 U.S. 86, 101 (1958), the very fact that the Constitution recognizes the lawfulness of capital punishment has proven to be an obstacle to fully accepting this argument. As a result, post-*Furman* judgments increasingly contained arguments where we witnessed moral discourse impregnating legal analysis. See *Furman*, 408 U.S. at 283–287. (Brennan, J., concurring) (referring to human dignity); *People v. Anderson*, 493 P.2d 880, 887 (Cal. 1972) (considering the importance of the lives of the criminals sentenced to death), *superseded by statute*, CA CONST. art. 1, § 28(d). In this context, Professor Perry notes: “The penetration of legal discourse by moral discourse is not surprising. Moral controversy is often at the center of legal controversy; in particular, controversy about whether one or another practice (abortion, homosexual sexual conduct, physician-assisted suicide, etc.) is, at least in some instances . . . legally permissible.” See Michael J. Perry, *What Is “Morality” Anyway?* 3 (Villanova Univ. Sch. Law Pub. Law & Legal Theory Working Paper Series, Paper No. 2000-03, 2000), available at <http://ssrn.com/abstract=208673>.

³⁹ While tracing the genesis of death penalty jurisprudence of the Supreme Court, I examine in this article the views taken by several Justices in some of the significant post-*Furman* era cases, in which their opinions, either in concurrence or in dissent, have significantly shaped the moral contours of the Court. In my view, sustained dissent by two Justices—Brennan and Marshall—in capital penalty cases, produced a rich body of legal literature where the issues of morality and ethics have shaken the very core of the doctrine of *stare decisis*. These Justices’ relentless unwillingness to accommodate the views of the majority signals a clarion call to change the law in a certain direction within the capital penalty jurisprudence. In a direct confrontation to Justice Brandeis’ timeless observation, “[i]t is usually more important that a rule of law be settled than that it be settled right.” *Di Santo v. Pennsylvania*, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting), the continued dissents by Justices in cases upholding the death penalty perhaps signals that the law of capital punishment is far from being settled. I would argue that this abiding conviction to settle the law correctly drove Justices to dissent in landmark cases. See generally William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTING L.J., 427 (1986) (discussing the relevance of dissenting opinions). I will show in this article that Justices Brennan and Marshall have repeatedly questioned the morality of the

These are some of the most profound and controversial questions that will continue to buffet society's collective consciences, and the answers can never satisfy all constituents. This article, however, will not seek absolute answers. Rather, these questions will be positioned within a relevant framework.⁴⁰ In order to provide such a framework for the relevancy of moral arguments in *Roper* and *Atkins*, I will attempt to sketch the historical evolution of moral contours and its attendant humanity in selected Supreme Court cases.⁴¹

II. THE ROAD TO *ROPER*: AN ABOLITIONIST OUTCOME OR BUILDING A MORAL CONTOUR?

The Court's confrontation with the issue of moral vulnerability in its deliberation on the constitutionality of the death penalty dates back to *McGautha v. California*,⁴² decided in 1971.⁴³ Although the debate over the constitutionality of the death penalty brewed for over a decade prior to the *McGautha* ruling, the Court, for the first time, embarked on a significant moral discourse on the issue. In *McGautha*, the Court deconstructed defendant McGautha's reasoning that the Fourteenth Amendment's Due Process Clause called for the standardization in capital sentence discretion and that the lack of standards in narrow jury instructions, as a result, caused a breakdown in the protection provided by the Fourteenth

death penalty in their dissents, which leads us to explore the larger question as to whose morality is being upheld in those majority decisions.

⁴⁰ The death penalty gets complicated while viewing it through the prism of morality. In any morality-laden discourse, the inevitable issue before the scholars is to answer the focused question of whose morality the legal discourse should doctrinalize. See Perry, *supra* note 38, at 3–4 (explaining that the sword of moral discourse can cut both ways into a legal doctrine's development, as opposing sides lobby for either banning or upholding the relevant law in question). This article, therefore, attempts to navigate this issue by first tracing a moral contour involving death penalty and then proposing a robust framework supporting the abolitionist viewpoint that can transcend narrow doctrinal considerations.

⁴¹ See *infra* Part II (discussing the moral contours of the "evolving standards of decency"). Here I refer to a select number of Supreme Court cases that have been path-breaking in establishing a moral discourse within the Supreme Court's death penalty jurisprudence.

⁴² 402 U.S. 183 (1971), *superseded on other grounds by statute*, Fed. R. Evid. 609(a), *as recognized in* United States v. Oakes, 565 F.2d 170, 173 n.11 (1977).

⁴³ See *id.* at 207–08 (noting the problems with creating "standards" for the death penalty and discussing the great responsibility of jurors in death penalty cases).

Amendment.⁴⁴ Though the majority rejected this line of argument, the *McGautha* decision stands significant in the evolution of capital jurisprudence for a number of reasons. First and foremost, perhaps for the first time, the Court confronted moral vulnerability in the death penalty jurisprudence as it engages in a rational discourse. Justice Harlan noted:

In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless “boiler-plate” or a statement of the obvious that no jury would need.⁴⁵

The Court consolidated the *McGautha* decision with a petition from an Ohio defendant by the name of Crampton.⁴⁶ Though *McGautha* raised fundamental constitutional issues regarding the death penalty,⁴⁷ we cannot shy away from also

⁴⁴ See *id.* at 196.

⁴⁵ *Id.* at 207–08.

⁴⁶ *Id.* at 185. The *McGautha* Court relayed the details of the crime for which the jury found Crampton guilty and sentenced him to death. *Id.* at 191–95.

⁴⁷ See *id.* at 185 (“We granted certiorari in the *McGautha* case limited to the question whether petitioner’s constitutional rights were infringed by permitting the jury to impose the death penalty without any governing standards.”). I will argue that *McGautha* raised a host of constitutional as well as moral issues that mostly remain unresolved today. First, in *McGautha*, the petitioners challenged the constitutionality of the death penalty on account of the Due Process violation of the Fourteenth Amendment: Petitioners asked a focused question on whether the jury can impose death penalty while deliberating outside the guiding standards. See *supra* text accompanying note 43. Even though the Court upheld *McGautha*’s death sentence, the majority opinion reflected the apparent discomfort by Justice Harlan in upholding the sentence on constitutional grounds, as he noted:

To fit their arguments within a constitutional frame of reference petitioners contend that to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless and therefore violates the basic command of the Fourteenth Amendment that no State shall not

reviewing the moral issues that emerged.⁴⁸ McGautha and Crampton based their respective challenges on the claim that constitutional Due Process was violated because there was no clear explication within the law that clearly ascertained where and who received the death penalty. Although the Court rejected this Due Process claim, even while still conceding that there was an apparent lack of standards to guide juries in their decision, they never completely dismissed the issue of inconsistency in the imposition of the death penalty.⁴⁹ Justice Harlan further reinforced this viewpoint in his citation of the tentative draft of the Model Penal Code in which he admitted that sentencing guidelines are neither possible nor constitutionally required: “[T]he factors which determine whether the sentence of death is

deprive a person of his life without due process of law.

McGautha, 402 U.S. at 196.

Second, in *McGautha*, defendant Crampton challenged the constitutionality of Ohio’s single unitary proceeding on the grounds that the defendant was unable to offer testimony on his own behalf on account of his exposure to prosecutorial cross-examination. *See id.* at 213 (“[T]he single-verdict procedure unlawfully compels the defendant to become a witness against himself on the issue of guilt by the threat of sentencing him to death without having heard from him.”). In his dissent, Justice Douglas conceded this point very eloquently:

If a defendant wishes to testify in support of the defense of insanity or in mitigation of what he is charged with doing, he can do so only if he surrenders his right to be free from self-incrimination. Once he takes the stand he can be cross-examined not only as respects the crime charged but also on other misdeeds. In Ohio impeachment covers a wide range of subjects: prior convictions for felonies and statutory misdemeanors, pending indictments, prior convictions in military service, and dishonorable discharges. Once he testifies he can be recalled for cross-examination in the State’s case in rebuttal.

Id. at 228 (Douglas, J., dissenting). As indicated in note 42, *supra*, after the enactment of rule 609(a) of the Federal Rules of Evidence, Justice Douglas’ recitation of the relevant law is no longer accurate. This, however, does not alter the *nature of the issues* as raised by the parties in *McGautha*.

Additionally, for a general understanding of pre-*Furman* litigation strategy against the death penalty, see MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973).

⁴⁸ Having established my rationale for tracing the moral contours of the Supreme Court’s death penalty jurisprudence in the introduction to this paper, *supra*, and also in note 39, *supra*, I attempt to extract the implicit concession of Justice Harlan, and the dissents of Justices Brennan and Marshall, to show the moral discourse attendant with the *McGautha* decision.

⁴⁹ *See supra* text accompanying notes 44 and 45 (failing to directly address the possibility of inconsistent sentences resulting from the jury’s “untrammelled discretion” in sentencing criminals to death).

the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula.”⁵⁰

True moral discourse is possible when the legal process acknowledges its vulnerability and weakness. This is a required step to correct any flaws within the constitutional adjudication process; therefore, it is explored in the next path-breaking Supreme Court case of *Furman v. Georgia*.⁵¹ *McGautha* should be remembered not only for its attempt to trace the moral contours of the judicial process, but also for its embrace of human fallibility, a necessary stepping stone to comprehend the inherent dignity of the human person. This is made evident by Justice Harlan as he exposed his soul in *McGautha* and grappled with the inevitability of human limitations: “To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.”⁵²

If Justice Harlan’s majority opinion skimmed the surface of a morality-laden reasoning on constitutionality adjudication of capital punishment, Justice Douglas’ scathing dissent from the majority, for using history as a guide, called for a critical moral evaluation, as he noted:

The Court has history on its side—but history alone. Though nations have been killing men for centuries, felony crimes increase. The vestiges of law enshrined today have roots in barbaric procedures. Barbaric procedures such as ordeal by battle that became imbedded in the law were difficult to dislodge. Though torture was used to exact confessions, felonies mounted. Once it was thought that “sanity” was determined by ascertaining whether a person knew the difference between “right” and “wrong.” Once it was a capital offense to steal from the person something “above the value of a shilling.”⁵³

The appeal of *McGautha* is more pronounced in Justice Douglas’ dissent than it is in the majority opinion penned by Justice Harlan. While Justice Douglas’ dissent signaled a need

⁵⁰ *McGautha*, 402 U.S. at 205 (quoting MODEL PENAL CODE § 201.6 cmt. 3 (Tentative Draft No. 9, 1959)).

⁵¹ 408 U.S. 238 (1972) (per curiam).

⁵² *McGautha*, 402 U.S. at 204.

⁵³ *Id.* at 241 (citations omitted).

for an evolutionary trend in capital jurisprudence, Justice Harlan's opinion denied the petitioners' claims while conceding the absence of detailed standards in capital punishment and the lack of explicit protections to all parties subject to State control.⁵⁴ *McGautha* is also significant because both dissents indicated the future events to unfold, as we shall see in *Furman*.⁵⁵

The decision in *Furman* was one of the watershed moments of American Supreme Court jurisprudence on death penalty for multiple reasons. First, in a 5–4 vote, the Court found that sentencing defendants under the death penalty statutes under review was cruel and unusual punishment, and unconstitutional, in violation of the Eighth and Fourteenth Amendments.⁵⁶ Second, with 232 pages, it is not only the longest Supreme Court decision on the death penalty, but also consisted of nine separate opinions.⁵⁷ Third, by virtue of these separate opinions, the decision encapsulated a wide range of complex and indeterminate issues.⁵⁸ Justices Douglas, Marshall, Brennan, Stewart, and

⁵⁴ See *id.* at 207.

⁵⁵ *McGautha* and *Furman* are forever linked in the storied history of the U.S. Supreme Court's capital jurisprudence for various reasons. *McGautha*'s implicit findings pointing to the impossibility of the formulation of death sentencing standards, when pitted against *Furman*'s direct assault on the constitutionality of the death penalty on the grounds of chaotic sentencing discretion, triggered an avalanche of redrafting by states to reinstate the death penalty; Florida was the first state in line to try to respond to *Furman*'s challenge. See generally Charles W. Ehrhardt & L. Harold Levinson, *The Aftermath of Furman: The Florida Experience* (pt. II), 64 J. CRIM. L. & CRIMINOLOGY 10 (1973) (discussing Florida's response to *Furman*); Tim Thornton, Note, *Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism*, 2 FLA. ST. U. L. REV. 108 (1974) (discussing Florida's response to *Furman*). Many states followed Florida in passing a statute that standardized guided discretion by specifying both aggravating and mitigating factors that must be taken into consideration in imposing the death penalty. See *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976) (indicating that some thirty-five states enacted similar statutes). Several of the dissenting opinions in *Furman* reflected the tension between *McGautha* and *Furman*, an issue further explored by various legal scholars. See *Furman*, 408 U.S. at 399–400 (Burger, C.J., dissenting) (expressing disappointment in the Court's differing outcomes); *id.* at 427 (Powell, J., dissenting) (pointing out the differing outcomes in the two cases); see also Daniel D. Polsby, *The Death of Capital Punishment? Furman v. Georgia*, 1972 SUP. CT. REV. 1, 2–4 (1972) (discussing *Furman* and *McGautha*); Ernest A. Rende, Note, *The Bitter Fruit of McGautha: Eddings v. Oklahoma and the Need for Weighing Method Articulation in Capital Sentencing*, 20 AM. CRIM. L. REV. 63, 65–67 (1982).

⁵⁶ See *Furman*, 408 U.S. at 239–40.

⁵⁷ See *id.* at 240. See Polsby, *supra* note 55, for a general analysis of the opinions in *Furman*.

⁵⁸ See MICHAEL A. FOLEY, *ARBITRARY AND CAPRICIOUS: THE SUPREME COURT, THE CONSTITUTION, AND THE DEATH PENALTY* 62–87 (2003) (referencing and

White voted with the majority, while Justices Powell, Blackmun, Rehnquist, and Chief Justice Burger dissented.⁵⁹ Subsequently, however, two of the dissenters, Powell and Blackmun, announced their unequivocal opposition to the death penalty.⁶⁰ The *Furman*

illustrating the complexity of the issues permeating the death penalty debate); *see generally* MELTSNER, *supra* note 47 (describing the Supreme Court's history regarding capital punishment).

⁵⁹ *See Furman*, 408 U.S. at 240.

⁶⁰ While the abolitionist position of Justices Brennan and Marshall centered within the context of the Cruel and Unusual Punishment Clause's apparent lack of consonance with the overriding principle of human dignity, *see, e.g., Furman*, 408 U.S. at 270–71 (Brennan, J., concurring), Justices Harry Blackmun and Lewis Powell Jr. joined the abolitionist camp years later. Blackmun joined later in his career while Powell joined after his retirement. After two decades of debating the unconstitutionality of the death penalty with his jurisprudential self-justification, and while grappling with the efficacies of capital punishment's fail-safe mechanism, Blackmun finally succumbed to his disillusion to the death penalty as he articulated in his dissent:

Perhaps one day this Court will develop procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability in a capital sentencing scheme. I am not optimistic that such a day will come. I am more optimistic, though, that this Court eventually will conclude that the effort to eliminate arbitrariness while preserving fairness "in the infliction of [death] is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether." I may not live to see that day, but I have faith that eventually it will arrive. The path the Court has chosen lessens us all.

Callins v. Collins, 510 U.S. 1141, 1159 (1994) (Blackmun, J., dissenting) (citation omitted). Although it took over twenty-three years for Justice Blackmun to grapple with the inner conflicts between morality and constitutionality, the seeds of an abolitionist viewpoint were sewn as far back as can be witnessed in his principled opposition to capital punishment—a sentiment articulated in his dissent in *Furman*, in which he stated:

Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood's training and life's experiences, and is not compatible with the philosophical convictions I have been able to develop. It is antagonistic to any sense of "reverence for life."

Furman, 408 U.S. at 405–06 (Blackmun, J., dissenting). Needless to say, Justice Blackmun has dissented from the imposition of the death penalty in every capital punishment case since February 22, 1994, the day of his dramatic dissent in *Callins*. Justice Powell's journey towards an abolitionist position, on the contrary, began after his retirement from the Court. According to his biographer, after his retirement Justice Powell began to endorse the abolitionist position. In 1991, the following is ascribed to then-retired Justice Lewis Powell as told to his biographer, "I have come to think that capital punishment should be abolished." It "serves no useful purpose." JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451–52 (1994). Such strong conviction by Justice Powell is indeed the culmination of a long

decision is significant not only because of complex constitutional issues explicated therein, but more so due to the Justices' willingness to embed morality-laden argumentation within contemporary legal discourse. *Furman* sets itself apart by the manner in which all five Justices in the majority arrived at the conclusion to ban capital punishment via different routes. While Justice Brennan saw the death penalty as an anathema to human dignity, Justice Marshall argued against it based on a morally unacceptable path for achieving penological objectives. The three other Justices in the majority, however, shied away from either engaging in any moral discourse or digression on humanity; rather they saw death penalty to be unnecessarily harsh and constitutionally illegitimate because of its arbitrary and capricious application. Echoing the concerns of the petitioners in *McGautha* and *Crampton*,⁶¹ Justice Douglas noted that standardized discretion in sentencing jurors would lead to race and class bias.⁶² Justice White followed suit, observing that

journey through his Supreme Court jurisprudence. His justicial philosophy on the bench is highlighted by his extreme reverence to the constitutionality of the death penalty as well as judicial restraint, as echoed in his dissent in *Furman*: "When asked to encroach on the legislative prerogative we are well counseled to proceed with the utmost reticence." *Furman*, 408 U.S. at 431 (Powell, J., dissenting).

⁶¹ See *McGautha v. California*, 402 U.S. 183, 183 (1971) (Douglas, J., dissenting) (including a petition from Crampton, an Ohio defendant), *superseded by statute*, FED. R. EVID. 609(a). Decided on May 3, 1971, this case finds its importance in the history of Supreme Court jurisprudence as the precursor to the path-breaking *Furman* decision. In this context, the dissenting opinions by Justices Douglas and Brennan were noteworthy as the trailblazers to the majority's opinion invalidating the death penalty in *Furman*.

⁶² In his majority opinion in *Furman*, Justice Douglas held that the death penalty is unconstitutional on grounds of violating the Cruel and Unusual punishment Clause of the Eighth Amendment. See *Furman*, 408 U.S. at 239–40. His concern was that the selective and discriminatory application of the death penalty was inconsistent with the constitutional objective of achieving fundamental legal equality among the citizens. Therefore, he argued that any deviation from the application of law that fosters inequality was unconstitutional, as he asserted, "[i]t would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices." *Id.* at 242 (Douglas, J., concurring). Throughout the length of his *Furman* opinion, Justice Douglas was highly dismissive of the death penalty, while establishing his position on constitutionality squarely on the indeterminate and haphazard application, as he concluded: "Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." *Id.* at 256–57. In this context, we must note the genesis of Justice Douglas' principled

death sentences were so rarely imposed that they lacked any retributive or deterrent objectives.⁶³ Focusing less on lack of standardization, or not so much on the penological goals, Justice Stewart's opinion perhaps will forever be remembered for its

opposition to capital punishment. What we see as an eloquent repudiation of the death penalty on constitutional grounds is an extension of his stinging dissent to the upholding of the death sentence in *McGautha*. See *McGautha*, 402 U.S. at 241–42 (Douglas, J., dissenting). In his dissent, Justice Douglas examined the procedural defects of the Ohio trial procedure where the determination of guilt, punishment, and sanity phases were packed in one. This unitary trial proceeding, according to Douglas, “does not satisfy the requirements of procedural Due Process under the Fourteenth Amendment.” *Id.* at 226. His dismissal of the majority's upholding of the death sentences in *McGautha* comes from his observation that the unitary trial proceedings are fundamentally biased to return the punishment of death in reasonable circumstances, as he noted:

[T]he rules governing and restricting its administration of the unitary trial system, place the weights on the side of man's sadistic drive. The exclusion of evidence relevant to the issue of “mercy” is conspicuous proof of that lopsided procedure; and the hazards to an accused resulting from mingling the issues of guilt, insanity, and punishment in one unitary proceeding are multiplied. Whether this procedure would satisfy due process when dealing with lesser offenses may be debated. But with all deference I see no grounds for debate where the stake is life itself.

Id. at 248.

⁶³ In almost every aspect, *Furman*'s individual decisions represent the Justices' evolution towards a greater understanding of the death penalty's inherent, structural deficiencies. Justice White's concurrence is of no exception as he pondered over the question whether the death sentence is a cruel, inhuman, or degrading punishment in the ordinary meaning of these words, or whether it is a cruel, inhuman, or degrading punishment within the meaning of the Constitution. It, therefore, comes as no surprise when Justice White said in *Furman*: “The imposition and execution of the death penalty are obviously cruel in the dictionary sense.” *Furman*, 408 U.S. at 312 (White, J., concurring). Ironically, however, the very same Justice was one of the Justices who held, in *Gregg v. Georgia*, that capital punishment was not per se cruel and unusual punishment within the meaning of the Fifth and Fourteenth Amendments of the United States Constitution. See *Gregg v. Georgia*, 428 U.S. 153, 207 (1976) (White, J., concurring). In light of his reversal in *Gregg*, therefore, we must focus on White's concern about the constitutionality of the death penalty centering on the widely held social objectives of retribution and deterrence. With regards to the retributive effects of the death penalty, Justice White points out the infrequency with which the punishment is carried out, thereby making any legitimate claims of retribution absurd. Therefore, he concluded, “there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.” *Furman*, 408 U.S. at 313 (White, J., concurring). On the other hand, Justice White accepted, on face value, the utilitarian ideals of the death penalty's deterrent effects on society, but he was skeptical about its explicit utilitarian impact, as he noted that deterrence, like retribution, is undermined by the infrequency with which the death penalty is imposed. “[The deterrence of] others by punishing the convicted criminal . . . would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others.” *Id.* at 311–12.

timeless wisdom as he emphasized the random nature of capital sentences while noting:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.⁶⁴

Justice Brennan's concurring opinion proceeded in multiple layers, as he developed his reasoning for an unqualified and unequivocal abolitionist position.⁶⁵ First, he detoured from his *McGautha* position, a trajectory he never abandoned.⁶⁶ Second, he traced the roots of the Framers' deliberation on formulating

⁶⁴ *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring) (citation omitted).

⁶⁵ Justice Brennan's concurring opinion in *Furman* developed the first comprehensive test to determine whether a punishment is cruel and unusual within the meaning of Constitution's Eighth Amendment. The first principle dictates that the punishment should not be so severe that it degrades human dignity by inflicting enormous mental or physical pain, such that the human subject is treated as an inanimate object to be discarded at will. The second principle prohibits the imposition of the death penalty in an arbitrary fashion. The third principle dictates that infliction of a severe punishment must comport with the norms of contemporary society, whether the legislative bindings of such punishment can be superseded by the evolving standards of civilization. The fourth, and final, principle is that the punishment cannot be determined as excessive in proportion to the social purpose of the punishment. *See id.* at 269–82 (Brennan, J., concurring) (discussing the principles underlying the Cruel and Unusual Punishments Clause and noting that, “[a]t bottom [the clause] prohibits the infliction of uncivilized and in-human punishments”).

⁶⁶ In *McGautha*, Justice Brennan called for protective measures against the imposition of the death penalty in an arbitrary and haphazard manner, as he noted: “I see no reason whatsoever to believe that the nature of capital sentencing is such that it cannot be surrounded with the protections ordinarily available to check arbitrary and lawless action.” *McGautha*, 402 U.S. at 287 (Brennan, J., dissenting). In *Furman*, Justice Brennan concluded that the death penalty is unconstitutional in violation of the Eighth Amendment's Cruel and Unusual Punishment Clause—a position of principled opposition to capital punishment he never relinquished. *Furman*, 408 U.S. at 305–06 (Brennan, J., concurring).

the Cruel and Unusual Clause and he showed that this particular clause was introduced specifically for the purpose of restraining the legislation from exercising unbridled power to impose punishments of their choice.⁶⁷ Third, the structural complexity and constitutional difficulty attendant in the death penalty puts the Court in a unique position to inject new life into the meaning of the death penalty and the scope of constitutional deliberation.⁶⁸ For the explicit purpose of my present discourse,

⁶⁷ In *Furman*, Justice Brennan spoke at length of the historical events preceding the Framers' drafting of the Cruel and Unusual Punishment Clause, showing historical events as evidence towards his hypothesis that the Cruel and Unusual Punishment Clause was inserted "precisely because the legislature would otherwise have had the unfettered power to prescribe punishments for crimes." *Furman*, 408 U.S. at 263 (Brennan, J., concurring).

⁶⁸ Here, we are confronted with the issue of stare decisis versus constitutional interpretation. Brennan argued for limited judicial activism for constitutional interpretation as the need to expand the constitutional clause emerges due to changing values and complex sociological dimensions. I will argue later on in the paper that the uniqueness of the death penalty makes it incumbent upon all of us to extricate ourselves from the frozen, static-in-time version of the Constitution, to embrace a more dynamic Constitution. By referring to a dynamic Constitution, attention is drawn to the process by which the Constitution adapts to the changing conditions in the society. As the frontiers of freedom of speech, freedom of religion, the rights to privacy, and sexual practices among consenting adults continue to expand within the meaning of our Constitution, we are confronted with its dynamic aspect. In most parlances, the dynamic Constitution and the living Constitution are used synonymously. See RICHARD H. FALLON, JR., *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW* 1-2, 12-13, 269 (2004) (describing the role that social, cultural, and political processes have played in constitutional law). The term living is used to denote that the Constitution is still evolving in consonance with the evolving needs of society, rather than possessing a fixed in time, definitive meaning. The concept of a living Constitution was noted by the Court in *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958), when the majority noted that "the words of the [Eighth] Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." The concept further gained currency in a 1987 lecture by Justice Thurgood Marshall titled, *The Constitution: A Living Document*, where he argued that the Constitution must be interpreted in light of the moral, political, and cultural climate of the age of interpretation. See Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association In Maui, Hawaii (May 6, 1987) (indicating that the Constitution is a concept vastly different from that the Framers began to construct two centuries ago), available at http://www.thurgoodmarshall.com/speeches/constituional_speech.htm; see also Dr. Saby Ghoshray, *To Understand Foreign Court Citation: Dissecting Originalism, Dynamism, Romanticism, and Consequentialism*, 69 ALB. L. REV. 3, 709-43; Ruth Bader Ginsburg, *A Decent Respect to the Opinions of [Human] Kind: The Value of a Comparative Perspective in Constitutional Adjudication*, AM. SOC'Y INT'L L., Apr. 1, 2005, <http://www.asil.org/events/AM05/ginsburg050401.html> (discussing the importance of developments

however, I want to focus more on the next layer of reasoning in Justice Brennan's opinion, which formed the backbone of his argumentation, as he proposed a benchmark for Cruel and Unusual punishment.⁶⁹

For Brennan, the preservation of human dignity lies at the very core of our human existence and thus must shape the constitutional framework of liberty. As a consequence, Justice Brennan draws the meaning and scope of the Cruel and Unusual Punishment Clause from the Court's findings in *Trop v. Dulles*,⁷⁰ as it held: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁷¹ Although it was not a death penalty case, this single phrase in *Trop* has become an enduring guiding principle in the Supreme Court's capital punishment jurisprudence.⁷² Under this principle, according to Brennan, an

in international law and their affect on American Constitutional Law).

⁶⁹ Here, I refer to Justice Brennan's natural law based jurisprudence which was exhibited in his reliance on moral discourse and giving primacy to human dignity, while departing from the original meaning of the Constitutional text in his adjudication of the constitutionality of the death penalty. Since Brennan focused more on such fundamental values as the innate characteristics of human nature or essential human rights, he was freed from the constraints of history, which in turn allowed him to develop a steadfast abolitionist stance against the death penalty that stood the test of time against all forms of sociological jurisprudence, while insisting that the meaning of the "cruel and unusual" punishment must comport with the overriding principle of human dignity in *Furman*. See *Furman*, 408 U.S. at 257, 285 (Brennan, J., concurring) (referring to the importance of human dignity). Justice Brennan noted elsewhere, "[t]he constant for Americans, for our ancestors, for ourselves, and we hope for future generations, is our commitment to the constitutional ideal of libertarian dignity protected through the law." William J. Brennan, Jr., *Justice Thurgood Marshall: Advocate for Human Need in American Jurisprudence*, 40 MD. L. REV. 390, 394-95 (1981). For a discussion of Brennan's natural law philosophy, see C.M.A. McCauliff, *Constitutional Jurisprudence of History and Natural Law: Complementary or Rival Modes of Discourse?*, 24 CAL. W. L. REV. 287, 289-91 (1988).

⁷⁰ 356 U.S. 86 (1958).

⁷¹ *Id.* at 101.

⁷² The phrase "evolving standards of decency" is taken from the opinion of the Chief Justice Warren in *Trop* where, speaking for the Court, the Chief developed the measure of permissible punishment under the Eighth Amendment of the Constitution by referencing "the evolving standards of decency that mark the progress of a maturing society." *Id.* Since then, various Justices have used this as the guiding principle for deciding claims of Cruel and Unusual Punishment. Sometimes "evolving standards of decency" has been used synonymously with "contemporary standards of decency." For example, in *People v. Anderson*, 493 P.2d 880 (Cal. 1972), *superseded by statute*, CAL. PENAL CODE § 190.2 (Deering 1985), Chief Justice Wright, speaking for the Supreme Court of California, said: "Public

enlightened society must move forward in its penological practices the same way the maturing society moves ahead in cultural, social, and economical practices.⁷³ Therefore, the “evolving standards of decency”⁷⁴ threshold makes it incumbent on a maturing society to undergo strict moral human scrutiny. The confrontation with evolving standards of morality allowed for the abolishment of slavery and the elimination of torture as punishment as Western civilization marched towards maturity. The issue we must confront, therefore, is when society, as it has done in the past with slavery and torture, will be able to leave behind yet another draconian practice of yesteryears and extricate itself from tinkering with the machinery of death⁷⁵ as a form of punishment? Justice Brennan tackled this issue head on in his concurrence in *Furman*, as he searched for the guiding principle in overturning a practice spanning centuries:

At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and in-human punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is “cruel and unusual,” therefore, if it does not comport with human dignity.⁷⁶

Legal discourse centering on human dignity forms the very core of Justice Brennan’s jurisprudential philosophy, which shaped his perpetual opposition to the death penalty as he sees

acceptance of capital punishment is a relevant but not controlling factor in assessing whether it is consonant with contemporary standards of decency.” *Id.* at 893. In this context, Justice Scalia’s comment in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), is noteworthy: “Of course, the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one’s own views.” *Id.* at 865 (Scalia, J., dissenting).

⁷³ Here, Justice Brennan beckons us to move away from the practice of the death penalty—a point on which Justice Brennan and I completely agree. There is ample objective evidence that evolving standards of civilization manifest in the rejection of the death penalty in countries that are, or aspire to be, free and democratic societies. Most democratic countries in this regard have either abolished the death penalty, or are heading towards a practice of non-existent usage without deleting it from the Constitution. For Justice Brennan’s relevant ideology, see *Furman*, 408 U.S. at 279 (Brennan, J., concurring), where he opined that the death penalty is excessive and unnecessary if there exists any less intrusive means by which to achieve punishment’s goals.

⁷⁴ *Trop*, 356 U.S. at 101.

⁷⁵ See *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (“From this day forward, I no longer shall tinker with the machinery of death.”).

⁷⁶ *Furman*, 408 U.S. at 270 (Brennan, J., concurring).

the denial of human dignity not to be in conformity with the concept of a maturing society.⁷⁷ According to Brennan, therefore, a punishment such as the death penalty must be unconstitutional on account of being cruel and unusual in all circumstances, as he noted:

A punishment must not be so severe as to be utterly and irreversibly degrading to the very essence of human dignity. Death for any crime whatsoever, and under all circumstances, is a truly awesome punishment. The calculated killing of a human being by the state involves, by its very nature, an absolute denial of the executed person's humanity. The most vile murder does not, in my view, release the state from constitutional restraints on the destruction of human dignity. Yet an executed person has lost the very right to have rights, now or ever. For me, then, the fatal constitutional infirmity of capital punishment is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded.⁷⁸

Brennan's problem with the death penalty, therefore, comes from the fundamental disconnect between the severity of death as a punishment and the denial of intrinsic human dignity. Brennan finds that the denial of basic human dignity or intrinsic humanity to all persons does not comport with the evolution of contemporary society, as he noted in *Furman*:

The question, then, is whether the deliberate infliction of death is today consistent with the command of the Clause that the State may not inflict punishments that do not comport with human dignity. I will analyze the punishment of death in terms

⁷⁷ See *id.* at 279 (noting that punishment cannot comport with human dignity when it is unnecessary and excessive). I would contend that Justice Brennan's concept of the prevailing characteristics of a maturing society is fully consistent with the views espoused by some other Justices who came before Brennan. This value-driven, morality-laced understanding of the constitutional framework is implicit in Justice Brandeis' dissenting opinion in *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), *overruled on other grounds by Katz v. United States*, 389 U.S. 347 (1967), where he makes the role of the state very clear: "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." A similar sentiment is echoed by Justice Schaefer of the Supreme Court of Illinois: "The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged." *Coppedge v. United States*, 369 U.S. 438, 449 (1962) (citing Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956)).

⁷⁸ William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 444 (1986).

of the principles set out above and the cumulative test to which they lead: It is a denial of human dignity for the State arbitrarily to subject a person to an unusually severe punishment that society has indicated it does not regard as acceptable, and that cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment.⁷⁹

The goal of this paper has not been to explicate the procedures by which we determine when a punishment does not comport with Brennan's "human dignity" test.⁸⁰ Nor is it intended to digress on his cumulative tests to determine cruel and unusual punishment.⁸¹ It is intended to capture Justice Brennan's human dignity-centric jurisprudence⁸² that requires building a moral contour around the evolution of the Court's capital jurisprudence—a task impossible to complete without delving into Justice Marshall's morality-laden legal discourse in *Furman*.⁸³

In *Furman*, Justice Marshall presented a lengthy opinion that examined the efficacy of the death penalty under the

⁷⁹ *Furman*, 408 U.S. at 285–86 (Brennan, J., concurring).

⁸⁰ Here, I refer to Justice Brennan's concurrence in *Furman*, asserting that any remaining "cruel and unusual" punishment must comport with the overriding principle of human dignity. *See Furman*, 408 U.S. at 270 (Brennan, J. concurring).

⁸¹ Here, I refer to the principle applied by Justice Brennan in *Furman*:

The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.

Id. at 282.

⁸² *See id.* at 269–82 (discussing the Cruel and Unusual Punishment Clause in the context of "the dignity of man").

⁸³ *See, e.g., Furman*, 408 U.S. at 360 (Marshall, J., concurring) (indicating that the death penalty violates the constitution because it is morally unacceptable). The contemporary legal discourse on the death penalty cannot escape the moral overtones that come with it. While the issue of constitutionality requires defining legal statements, reasoning utilized to arrive at any conclusion can be driven by moral overtones. I argue in this paper that Justice Marshall's principled opposition to the constitutionality of the death penalty is based on moral values. *See id.* at 344–45 (commenting that the Eighth Amendment provides insulation from the cry of vengeance that our "baser selves" would ordinarily demand in response to certain crimes).

doctrines of retribution,⁸⁴ deterrence,⁸⁵ and recidivism,⁸⁶ while expounding upon the economics, as well as the political process, underneath the punishment.⁸⁷ Inquiry into Marshall's opinion centers on two relationships the Justice holds as guiding principles to rendering the death penalty unconstitutional. These are: (i) the relationship between the death penalty and our society's self-respect, and (ii) the relationship between the death penalty and our society's sense of morality.⁸⁸

⁸⁴ In *Furman*, Justice Marshall analyzed the social purposes for the imposition of the death penalty: retribution, deterrence, recidivism, eugenics, economy, and encouraging guilty pleas and confessions. *See id.* at 343–58; *see also* *Gregg v. Georgia*, 428 U.S. 153, 236–42 (1976) (Marshall, J., dissenting) (discussing the concepts of retribution and deterrence and their relationship to capital punishment). He systematically considered and eliminated each one of them. First, he eliminated retribution by itself as a legitimate penological objective as he contended: “[T]he Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.” *Furman*, 408 U.S. at 343 (Marshall, J., concurring). Second, he rejected arguments that the death penalty is a necessary deterrent to crime in society. Citing research, and supporting the idea that the death penalty is no more effective a deterrent than life imprisonment, Justice Marshall asserted that “[i]n light of the massive amount of evidence before us, I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect.” *Id.* at 345–54. Third, Marshall examined evidence contending that convicted murderers rarely commit murder again even if they are not sentenced to die. *See id.* at 355. Next, Justice Marshall established the economic argument that the death penalty is more expensive than life imprisonment. *See id.* at 358. Additionally, he felt the leverage used by the invocation of the death penalty to encourage guilty pleas and confessions is morally repugnant and a violation of the defendant's Sixth Amendment right to a jury trial. This led him to believe that life imprisonment is penologically sufficient as it “can be used as leverage for bargaining for pleas or confessions in exchange either for charges of lesser offenses or recommendations of leniency.” *Id.* at 356.

⁸⁵ *See Furman*, 408 U.S. at 354 (Marshall, J., concurring).

⁸⁶ *See id.* at 355.

⁸⁷ *See id.* at 356–58 (opining that capital punishment is, in practice, used not only to punish but also as a bargaining tool).

⁸⁸ As mentioned earlier, morality takes an important stage in Marshall's jurisprudence. *See supra* note 83. Justice Marshall used moral discourse in establishing the legal validity of his abolitionist position in several instances during his *Furman* opinion. According to him, the death penalty “violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.” *Furman*, 408 U.S. at 360 (Marshall, J., concurring). Marshall further contended that a punishment is morally acceptable “unless ‘it shocks the conscience and sense of justice of the people.’” *Id.* (quoting *United States v. Rosenberg*, 195 F.2d 583, 608 (2d Cir. 1952)). Justice Marshall then concluded that, by abolishing the death penalty, “[w]e achieve ‘a major milestone in the long road up from barbarism’ and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment.” *Id.* at 371 (quoting RAMSEY CLARK, *CRIME IN AMERICA* 336 (1970)).

If Justice Brennan's concurrence in *Furman* opens up American jurisprudence's disconnect with the inherent dignity of humankind, Justice Marshall's argument presents society with a mirror to confront its moral vulnerability. Justice Marshall's assault on the constitutionality of the death penalty under the Clause proceeds in multiple threads. He begins by quietly posing the haunting Eighth Amendment question—one that goes straight to the heart of society's attitude—by commenting that “[t]he question . . . is not whether we condone rape or murder, for surely we do not; it is whether capital punishment is ‘a punishment no longer consistent with our own self-respect’ and, therefore, violative of the Eighth Amendment.”⁸⁹ Thurgood Marshall went to great lengths “examining the historical derivation of the Eighth Amendment,”⁹⁰ as well as systematically deconstructing the social purposes of capital punishment,⁹¹ to arrive at the unconstitutionality of capital punishment on account of being “excessive,”⁹² “serv[ing] no valid legislative purpose,”⁹³ and because “popular sentiment abhors it.”⁹⁴ Although, he does not delve deeper into the relationship between self-respect and capital punishment, his invocation of “popular sentiment”⁹⁵ opens the door to introduce his second layer of reasoning, based on a good citizenry argument, to consolidate his abolitionist hypothesis.

Justice Marshall introduces the issue of self-respect primarily to jolt the collective consciousness of our society and to lift us from buried confinement in a false consciousness⁹⁶ manifested in the belief, although false, that the penological practice of state-sanctioned killings can serve value-driven social goods in contemporary society. Justice Marshall views the Court as being enmeshed in a jurisprudence that lacks moral consistency. Thus, he is driven to correct the moral compass of

⁸⁹ *Furman*, 408 U.S. at 315 (Marshall, J., concurring).

⁹⁰ *Id.*

⁹¹ *See id.* at 342–59 (demonstrating the inadequacy of the most widely relied upon purposes of capital punishment).

⁹² *Id.* at 331.

⁹³ *Id.*

⁹⁴ *Id.* at 332

⁹⁵ *Id.*

⁹⁶ I have discussed this concept of false consciousness and collective consciousness in an upcoming work. *See* SABY GHOSHRAY, SYMMETRY, RATIONALITY AND CONSCIOUSNESS: REVISITING MARCUSEAN REPRESSION IN AMERICA'S WAR ON TERROR (Forthcoming).

the Court by posing such poignant questions. Even if, however, we reject Justice Marshall's view on the coupling between the collective self-respect and retentionist positions, can we divorce ourselves from his morally laden legal viewpoints on capital punishment? In particular, when he asserts that "[i]f retribution alone could serve as a justification for any particular penalty, then all penalties selected by the legislature would by definition be acceptable means for designating society's moral approbation of a particular act,"⁹⁷ Justice Marshall clearly challenges us to probe deeper into our collective humanity and confront the morality of vengeance. Implicit in our recognition of the morality of vengeance is the clarion call to correct our moral compass by determining the scope of vengeance out of which we shape our existing penological practices. This revelation, therefore, compels us to make value judgments on whether the call to evolve our civilization's march to maturity comports with the penological fundamentals that revolve around vengeance. In this context, Justice Marshall provides us with concrete and qualitative guidelines as he encourages us to adhere to the Constitution's Eighth Amendment while shielding against societal debasement from the wrongful application of vengeance:

[T]he Eighth Amendment is our insulation from our baser selves. The 'cruel and unusual' language limits the avenues through which vengeance can be channeled. Were this not so, the language would be empty and a return to the rack and other tortures would be possible in a given case.⁹⁸

While trumpeting the constitutional safeguards of the Eighth Amendment, Justice Marshall reminds the citizenry of their moral vulnerability against the imposition of the death penalty.⁹⁹ This moral vulnerability-based reasoning allows Marshall to declare the death penalty unconstitutional on moral grounds, as it "nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history."¹⁰⁰ In support of his argument, Marshall noted that the Court held that a type of punishment is morally acceptable "unless 'it shocks the

⁹⁷ *Furman*, 408 U.S. at 344 (Marshall, J., concurring).

⁹⁸ *Id.* at 345.

⁹⁹ *See id.* at 344 ("At times a cry is heard that morality requires vengeance.").

¹⁰⁰ *Id.* at 360.

conscience and sense of justice of the people.’”¹⁰¹ Here, again, Justice Marshall referred to the collective consciousness of the citizenry which must be awakened from its deep slumber to have any moral validity in the penological practice in question. Having developed a multi-pronged attack against the constitutionality of the death penalty on account of moral vulnerability, societal consciousness, and collective self-respect, Justice Marshall then advanced his final argument when he commented that “people who [are] fully informed as to the purpose of the [death] penalty and its liabilities would find the penalty shocking, unjust, and unacceptable.”¹⁰² Could people’s abhorrence towards capital punishment, therefore, help in advancing Marshall’s hypothesis further? Marshall believed “the question with which [the Court] must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.”¹⁰³ Here, Justice Marshall argued that the kind of information needed for the public to develop conscientious opinions against the death penalty may not be easily accessible to it.¹⁰⁴ Even if such information is widely available, and easily accessible, we still may not achieve the abolitionist conclusion Marshall was seeking.¹⁰⁵ Despite the majority of Justices missing the moral connotations of *Furman*, can we escape the inevitable morality argument impregnated within the death penalty’s legal discourse?

The morality of capital punishment did not acquire a consistent footing in *Furman*, as it took only four years for the Supreme Court to bring back the constitutional legitimacy of the death penalty¹⁰⁶ in *Gregg v. Georgia*.¹⁰⁷ The decision in *Gregg*

¹⁰¹ *Id.* (quoting *United States v. Rosenberg*, 195 F.2d 583, 608 (2d Cir. 1952)).

¹⁰² *Id.* at 361.

¹⁰³ *Id.* at 362.

¹⁰⁴ *See id.* at 362–63 (pointing out the existence of statistical information about convicted felons during their time in prison, after their release into society, and while on death row of which the public is largely unaware).

¹⁰⁵ *See supra* notes 84 and 88 (discussing Justice Marshall’s abolitionist position). For a more comprehensive discussion of the Justice Marshall’s objections to capital punishment, see MICHAEL MELLO, *AGAINST THE DEATH PENALTY: THE RELENTLESS DISSENTS OF JUSTICES BRENNAN AND MARSHALL*, 11–13, 143–44, 182–84, 187–89 (1996).

¹⁰⁶ *See Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion) (affirming the death penalty as an appropriate form of punishment under certain

served two purposes. First, it affirmed the constitutional hurdle presented in *Furman*, which hinged fundamentally on the arbitrary and capricious application of the death penalty.¹⁰⁸ Second, *Gregg* sought to overcome that by pointing to both Georgia's newly legislated bifurcating trial procedure,¹⁰⁹ as well as comparative review,¹¹⁰ and thus eliminating the capricious and arbitrary element from the process to make it more predictable and fair.¹¹¹ In trying to give the appearance of consistency with regards to the death sentence, the Court again got lost in its attempt to develop a moral consistency surrounding the process. Justice Stewart brought up a vague moral argument to advance a retributive justification of capital punishment: "The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective

circumstances). Some challenges under state constitutions were temporarily successful, holding that the death penalty was a form of cruel and unusual punishment, before later being superseded by amendments. *See* *People v. Anderson*, 493 P.2d 880, 899 (Cal. 1972) (stating that the death penalty was determined to be "impermissibly cruel" by six of the seven judges of the California Supreme Court because "[i]t degrades and dehumanizes all who participate in its processes. It is unnecessary to any legitimate goal of the state and is in incompatible with the dignity of man and the judicial process."), *superseded by statute*, CAL. CONST. art. 1, § 27; *Dist. Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1283 (Mass. 1980) (plurality opinion) (stating that "the death penalty is unacceptable under contemporary standards of decency in its unique and inherent capacity to inflict pain. The mental agony is, simply and beyond question, a horror."), *superseded by statute*, MASS. CONST. pt. 1, art. XXVI. "[A]rbitrariness and discrimination . . . inevitably persist even under a statute which meets the demands of *Furman* . . ." *Id.* at 1286. "[T]he supreme punishment of death, inflicted as it is by chance and caprice, may not stand." *Id.* "The death sentence itself is a declaration that society deems the prisoner a nullity, less than human and unworthy to live." *Id.* at 1293 (Liacos, J., concurring).

¹⁰⁷ 428 U.S. 153 (1976).

¹⁰⁸ *See id.* at 189–90 (plurality opinion) (stating that a jury's discretion in imposing the death penalty should be limited to minimize the risk of arbitrary and capricious action).

¹⁰⁹ The bifurcated proceeding was inserted in the Georgia statute to overcome the randomness and arbitrariness of *Furman*. Therefore, the penalty phase was separately considered after the adjudication of guilt, where the jury was required to hear both aggravating and mitigating evidence. *See id.* at 162–64 (referencing the bifurcated procedure). Additionally, the statute made it mandatory for the jury to make specific findings of certain permissible, aggravating circumstances to justify the death penalty. *See id.* at 164–66. Incorporating a mandatory appeal process in which the Supreme Court of Georgia was required to compare the penalty to similar cases ensured the proportionality of the punishment of crime. *See id.* at 166–67.

¹¹⁰ *Id.* at 167.

¹¹¹ *Id.* at 195 (summarizing that it is possible to construct a standard that ensures the death penalty will not be imposed unfairly).

offenders. In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct."¹¹² On the other hand, Justice Powell clearly understood the weakness of his "moral outrage"¹¹³ theory as he backpedaled immediately by commenting that "[t]his function may be unappealing to many, but it is essentially in an ordered society that asks its citizen to rely on legal processes rather than self-help to vindicate their wrongs."¹¹⁴

The Supreme Court got it wrong in *Gregg* when it tried to advance a fairness argument to establish the constitutionality of the death penalty without including the issues of race and class.¹¹⁵ Since neither issue can ever be eliminated from the death penalty equation, the Court can never eradicate the arbitrary and capricious elements established in *Furman*.¹¹⁶ Additionally, by linking the death penalty's retributive appeal with the orderliness of contemporary society, the Court failed the "evolving standards of decency"¹¹⁷ test of *Trop*. Justice Stewart further complicated his position by developing a misplaced value judgment on human dignity as he echoed the dissenting opinion of Chief Justice Burger in *Furman*,¹¹⁸ noting: "Indeed, the

¹¹² *Id.* at 183.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ I would argue that the variety of subjective dimensions, ranging from the divergences between severe and lenient judges, and the difference between judges on either side of the abolitionist debate, to the qualitative differences between good and bad prosecution and defense, influence heavily the outcome of a death penalty case. These subjective dimensions are further shaped by race and class in a way that can never fully eradicate the influencing factors because the evidence on record, and the findings made, have been influenced by these factors, and there is nothing that can be done on appeal to remedy their influence. Some state courts acknowledged this before being superseded by constitutional amendments. See *Dist. Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1282 (Mass. 1980) (plurality opinion) (holding that the death penalty is unconstitutionally cruel under the Massachusetts State Constitution and stating that "[w]hile [the] Court has the power to correct constitutional or other errors retroactively . . . it cannot, of course, raise the dead"), *superseded by statute*, MASS. CONST. pt. 1, art. XXVI. Therefore, the possibility of error is always present in a justice system that deals with the punishment of death, and, as a result, we can never completely eliminate the elements of arbitrariness and randomness from the capital justice system.

¹¹⁶ See *id.* at 1283–86 (commenting, among other things, that the death penalty will inevitably be applied arbitrarily).

¹¹⁷ *Gregg*, 428 U.S. at 190 (plurality opinion) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

¹¹⁸ *Furman v. Georgia*, 408 U.S. 238, 383–84 (1972) (per curiam) (Burger, C.J., dissenting).

decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."¹¹⁹ The Court's inconsistency in its morality-laced and human dignity-centric argument becomes more pronounced as we examine Justice Brennan's *Gregg* dissent, in which he steadfastly holds his ground in *Furman*, "that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings—a punishment must not be so severe as to be degrading to human dignity."¹²⁰

The Court's fragmented and vacillating consciousness came to light again in *Woodson v. North Carolina*,¹²¹ a case decided the same day as the *Gregg* decision.¹²² Here, the Court held mandatory death sentences to be unconstitutional on the grounds of violating the Eighth and Fourteenth Amendment.¹²³ The Court painted a humane face to counter death penalty, as it rightly asserted that the death penalty deprives individual humans from exhibiting their unique and inherent characteristics.¹²⁴ It denigrates death's equalizing effect on all humans by debasing them into a faceless, dehumanized mass of insignificance as "[i]t treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to

¹¹⁹ *Gregg*, 428 U.S. at 184 (plurality opinion).

¹²⁰ *Id.* at 229.

¹²¹ 428 U.S. 280 (1976).

¹²² See *Gregg*, 428 U.S. at 153 (indicating the case was decided on July 2, 1976); *Woodson*, 428 U.S. at 280 (indicating the case was decided on July 2, 1976).

¹²³ *Woodson*, 428 U.S. at 305 (plurality opinion).

¹²⁴ The *Woodson* case confronted the imposition of the death penalty as a mandatory punishment for capital crimes. North Carolina legislators attempted to overcome the *Furman* condition of the arbitrary and wanton jury discretion by legislating mandatory death penalty sentences for the commission of a capital offense. The statute read as follows: "*Murder in the first and second degree defined; punishment.*—A murder which shall be perpetrated by . . . any . . . willful, deliberate and premeditated killing . . . shall be deemed to be murder in the first degree and shall be punished with death." *Id.* at 286. Justices in the plurality, however, saw it differently. They argued that the *Furman* arbitrariness shifted to the guild phase of the trial as greater discretion is introduced as a result of fixing the outcome of the penalty phase of the trial. This, again, violates the *Furman* court's findings that sentences must reflect the character of the individual, thereby embracing the inherent uniqueness of individual humans. See *id.* at 304 (acknowledging that fundamental respect for humanity requires consideration of the character and record of the individual defendant).

the blind infliction of the penalty of death.”¹²⁵ Despite developing schizophrenic doctrinal themes surrounding moral discourse, the Supreme Court maintained its constitutional guarantees of individualized sentencing through *Furman*, *Gregg*, and *Woodson*. I would argue that this consistency in understanding the uniqueness of individual human personhood resides in a unique disposition of moral contour in a more Aristotelian sense¹²⁶ that has continued through *Lockett v. Ohio*,¹²⁷ until the Supreme Court lost its moral contour while subsumed by a new kind of legal discourse influenced by emotionalism¹²⁸ and jury

¹²⁵ *Id.* at 304.

¹²⁶ The normative ethical perspective of moral equity was originated by Aristotle, and defined by Rawls: “All social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored.” JOHN RAWLS, A THEORY OF JUSTICE 303 (1971). Here, Rawlsian legal justice attempts to bring equitable application across all constituents, but law’s inherent deficiencies sometimes make equitable application untenable, the same way *Furman*’s prescribed consistency in death sentences has become untenable in the long run. This, therefore, calls for developing actions that can correct the defects in moral consistency and trace a path of moral contour along the rigid lines of law. This is what Aristotle described as moral contour formation. See ARISTOTLE, NICOMACHEAN ETHICS 140–43 (Martin Ostwald trans., Macmillan Publ’g Co. 1962) (opining that law is not always equitable and this is why not all things are determined by law).

¹²⁷ 438 U.S. 586 (1978). Here, the Supreme Court overturned the petitioner’s death sentence on the grounds that the legislators in Ohio failed to leave a sufficient spectrum of categories from which the right mitigating factors could be selected to either counter balance the aggravating factors, or recognize the unique individuality of criminal defendants. Here, *Lockett*’s attempt to form moral contours by finding appropriate law that provides unbridled judge or jury discretion can be traced back to *Furman*’s endeavor to attain moral consistency in death sentencing.

¹²⁸ In 1986, in *Booth v. Maryland*, 482 U.S. 496, 509 (1987), the Supreme Court considered for the first time whether the Eighth Amendment of the Constitution disallows victim impact evidence from being introduced in capital sentencing. The *Furman* court found cruel and unusual and, thus, unconstitutional, any factor rendering a death sentence “arbitrary.” As a result, the Court in *Booth*, 482 U.S. at 509, and, two years later, in *South Carolina v. Gathers*, 490 U.S. 805, 810–12 (1989), held that victim impact evidence appeals to the emotions of the sentencing jury thus rendering them incapable of imposing a rational, non-arbitrary judgment. In a historical reversal similar to the *Furman-Gregg* dyad, the Court made an about-face in *Payne v. Tennessee*, 501 U.S. 808 (1991), and held incorrect its rulings in both *Booth* and *Gathers*. *Payne*, 510 U.S. at 825–27. While dissecting the argument for the *Payne* court’s decision to violate the principle of stare decisis, Professor Jeffrey Abramson established moral relevancy as the primary theme, as he noted:

[T]he Court faulted the *Booth* court’s theory of moral relevancy as one that “unfairly weighted the scales in a capital trial” But the Court’s larger point was that evidence of the harm done by a murder is morally relevant to the blameworthiness of he who would murder. One who murders

deliberation in capital cases.¹²⁹ As the accompanying footnotes suggest, these cases fueled the constitutional debate over the tension between universalizing and individualizing the death penalty judgments. As more research is undertaken to understand how juries function in capital cases,¹³⁰ our conscience

necessarily accepts the risk that the victim may have relatives and that his death by homicide will hurt and harm others. Thus *Payne* thought that *Booth* was simply mistaken in rejecting the moral relevance of victim impact testimony to the individual moral guilt of the defendant. . . . In many if not most death penalty hearings, *Payne* asserted, victim impact testimony places “moral force” behind the state’s evidence and helps the capital sentencer [sic] appreciate concretely and in context the actual harm caused by the defendant.

Abramson, *supra* note 21, at 132 (quoting *Payne*, 501 U.S. at 822, 825). For an informative discussion on VIS, see JENNIFER L. CULBERT, *The Sacred Name of Pain: The Role of Victim Impact Evidence in Death Penalty Sentencing Decisions*, in PAIN, DEATH AND THE LAW 103–19 (Austin Sarat & Ann Arbor eds., Univ. Press 2001). According to Professor Abramson, *Payne*’s emotionalism “stood in stark contrast to the promise of *Furman* to create procedures that would foster reasoned uses of moral discretion.” Abramson, *supra* note 21, at 134.

¹²⁹ Jurors’ confusion as a result of faulty instructions or partial guidance has been the driving theme in several high profile Supreme Court cases. Abramson noted that “a substantial number of capital jurors reported that the wording of judicial instructions misled them into believing that they *must* sentence the defendant to death once they found the presence of a statutory aggravating circumstance.” Abramson, *supra* note 21, at 135. In this context, Justice Marshall noted the extremely difficult position faced by capital penalty jurors as, according to him, they are given “only partial guidance” and afforded “substantial discretion.” See *Caldwell v. Mississippi*, 472 U.S. 320, 333 (1985). For Justice Marshall, the problem is compounded as the jury instructions makes it possible that a jury can feel less responsible about sentencing or adjudicating error if they have the knowledge that any error can be overcome during the appellate process. *Id.* at 331–32. For a detailed discussion on interjecting *Furman* arbitrariness in death sentencing via inadequate jury instructions, see MELLO, *supra* note 105, at 180–95.

¹³⁰ In his article, William Bowers described the findings from the 1990s Capital Jury Project, which interviewed 1155 capital jurors from 340 trials in fourteen states. See William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1077–86 (1995) (outlining how the study was conducted). Bower’s revelation in another article confronts us with the *Furman* arbitrariness all over again.

In their interviews, some jurors explicitly stated that it was their belief that aggravation required death; others used language that more indirectly conveyed the same impression. Accordingly, jurors reported that at the penalty deliberations, they arrived at a death sentence based on the presence of one or more aggravating factors that, to their minds, led necessarily to that penalty.

Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1032 (2001); see also Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 2

is being jolted by the continued prevalence of arbitrariness and capriciousness¹³¹—the twin pillars of evil identified in *Furman*. On the other hand, victim impact statements continue to inject the randomness decision-making process in death penalty deliberations.¹³²

Although the arbitrariness of the death penalty was examined by various Justices during the post-*Locket* era, the Court somewhat backtracked from its path of developing a moral consistency, which centered on the cruel and unusual nature of death penalty. This is partly because the majority of Justices either did not subscribe to a human dignity centric value,¹³³ or did not engage in an “evolving standards of decency”¹³⁴ argument surrounding the violability of human life.¹³⁵ In part, this is due to contemporary society’s view on capital punishment.¹³⁶ I

(1993) (indicating how jury instructions regarding the death penalty affect the jury’s verdict).

¹³¹ See Bentele & Bowers, *supra* note 130, at 1032 (describing some jurors’ belief that the finding of an aggravating factor necessitates a sentence of death).

¹³² See discussion *supra* note 128 (describing the emotional impact of victim impact statements on jurors).

¹³³ See discussion *infra* note 239 (outlining the concept of human dignity).

¹³⁴ See *supra* note 72 (explaining “evolving standards of decency”).

¹³⁵ See *supra* notes 71–76 and accompanying text (discussing evolving standards of decency and its relationship to human dignity and worth).

¹³⁶ Against the 10-year death penalty moratorium, new death penalty laws ushered in more aggressive death penalty jurisprudence. On January 17, 1977, Gary Gilmore faced his firing squad by proclaiming, “Let’s do it.” He became the first prisoner since 1976 to be executed under the new death penalty laws. Whereas, Kenneth Boyd, on December 2, 2005, became the 1000th person to be executed since the death penalty was reintroduced. See Recent Legal History of the Death Penalty in America: Executions Resume, <http://usgovinfo.about.com/library/weekly/bldeathpenalty.htm> (last visited Aug. 30, 2006); see also Bureau of Justice Statistics, Attitudes Toward the Death Penalty for Persons Convicted of Murder, United States, Selected Years 1953–2006, <http://www.albany.edu/sourcebook/pdf/t2512006.pdf> (last visited Aug. 30, 2006) (demonstrating society’s acceptance of capital punishment). Numerous opinion polls have been conducted to gauge the public position on the death penalty. Consistently, polls dictate that a majority of the American public supports the death penalty. Consider the following: In May 2005, a Gallup poll stated that 74% of respondees are in “favor of the death penalty for a person convicted of murder.” The poll highlights that when life imprisonment without parole was given as an option instead of the death penalty, 56% supported the death penalty, and 39% supported life imprisonment. Again, in May 2003, 37% of Gallup poll respondees chose “Eye for an Eye Punishment” as the reason they favor the death penalty. This same poll noted that 61% of respondees in May of 2005 believe the “death penalty is applied fairly in this country.” Public Opinion and the Death Penalty, Public Opinion Polls, <http://www.clarkprosecutor.org/html/death/opinion.htm> (last visited Aug. 30, 2006).

contend, however, that neither Justice Brennan nor Justice Marshall accepted the conventional moral position of the majority.¹³⁷ Therefore, it was in their relentless dissents against the death penalty¹³⁸ that the moral contour of the Supreme Court remained intact. While Brennan gave primacy to the intrinsic morality of the Eighth Amendment,¹³⁹ Marshall put great expectations in the moral values of the informed citizenry.¹⁴⁰ During later years, this moral contour became further solidified through the moral reasoning and human-value laden arguments of Justices Stevens,¹⁴¹ Kennedy,¹⁴² and Breyer,¹⁴³ which has

¹³⁷ See *supra* notes 83 and 88 (noting the role of morality in Marshall's death penalty opinions).

¹³⁸ See generally MELLO, *supra* note 105 (offering a detailed discussion of both Justices' sustained dissents to opinions upholding the death penalty).

¹³⁹ See *supra* notes 68, 69, 73, 77 (referencing Brennan's focus on human dignity and fundamental human worth).

¹⁴⁰ See *Furman v. Georgia*, 408 U.S. 238, 332 (1972) (per curiam) (Marshall, J., concurring) (noting that a punishment may be invalid if "popular sentiment abhors it").

¹⁴¹ Perhaps our greatest challenge is to untangle the jurisprudence of Justice Stevens within the death penalty debate. Besides a paucity of available opinions from which to extricate Stevens' tendencies, his narrow decision-making and "one case at a time" policy makes it rather irrelevant to engage in scholarship to develop groundwork for foreign court citation analysis. At times, Stevens' apparent liberalism tempts us to delve deeper into his jurisprudence for indications of a predilection toward an abolitionist position, yet his unpredictability thwarts us from doing so. Stevens' engaged in judicial minimalism, the concept of "saying no more than necessary to justify an outcome, and leaving as much as possible undecided." See Cass R. Sunstein, Foreword, *The Supreme Court, 1995 Term: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6 (1996). For more information on Justice Stevens' jurisprudential tendencies, see Ghoshray, *supra* note 68, at 735. For a more general discussion of judicial minimalism, see CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

¹⁴² A reading of *Roper* illuminates Kennedy's jurisprudence, where he believes that the judges are bound to expand the frontiers of liberty and privacy by enforcing the larger values and principles in the Constitution. In his earlier decision in *Lee v. Weisman*, 505 U.S. 577, 593-94 (1992), Kennedy cited psychological studies to argue that the death penalty for juvenile offenders is disproportionate because, as a class, juveniles are less developed emotionally and intellectually, and, hence, more susceptible to peer pressure. *Roper's* promise to broaden individual freedom and solidify human dignity is enshrined in Kennedy's understanding of constitutional commitment, which he believes is in consonance with the evolution of humanistic and just jurisprudence in other parts of the world. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) ("[T]he express affirmation of certain fundamental rights by other nations and peoples . . . underscores the centrality of those . . . rights within our own heritage."). Of all the current Supreme Court Justices, Justice Kennedy endorses perhaps the most expansive view of personal liberty. Therefore, he seeks to investigate the broader provisions of the Constitution on issues of moral rights, governmental power, and the Cruel and Unusual Punishment Clause. This quest

culminated in the path-breaking decisions of *Roper* and *Atkins*.

III. SUPREME COURT JURISPRUDENCE
MEETS PAPAL PHILOSOPHY: NORMATIVE ALIGNMENT
OR ACCIDENTAL COINCIDENCE?

As we ponder the consequences of the Court's decisions in *Atkins* and *Roper*, we cannot extricate ourselves from the moral relevancy of the term "cruel" within the Eighth Amendment jurisprudence. The issue is whether the moral content alone can invalidate the consistency of penal practices based on socio-political and historical traditions. This will require us to identify the full scope and dimensions of the moral discourse within the Court's judicial decision making in *Atkins* and *Roper* so that the death penalty debate can stand alone. My contention is that any analysis of morality in constitutional adjudication is incomplete without a discussion of the inherent dignity of the human person. In this analysis, therefore, I seek confirmation within Pope John Paul II's writings on dignity of human persons as I juxtapose the

has led Kennedy to look to comparative constitutional interpretation even before he came to the Supreme Court. As a result, Justice Kennedy has become extremely comfortable in turning to, and seeking guidance from, the law and practices of other nations. In *Roper*, Justice Kennedy opens the door for a thorough examination of the developmental differences between adolescents and adults, and sets the stage for a collision course between our punitive sense of justice and the scholars' view of juvenile crime. By introducing scientific confirmation on developmental differences between adolescents and adults, the Court essentially supports the assertion that juveniles are less culpable for their criminal actions, and, hence, challenges us to embrace the rehabilitative ideal in adolescent criminal jurisprudence by taking the punitive focus off our juvenile criminal law. Could this opinion in *Roper* be the groundwork to alter harsh punishments against juvenile criminal dependents in non-death penalty cases? See Ghoshray, *supra* note 68, at 729.

¹⁴³ Justice Breyer's jurisprudence sits at the confluence of contrasting intellectual and philosophical developments. His consequentialism guides the process by finding its trajectory from the Constitution, where the text is viewed as a contract with the citizens. Within a broader formalism of this contractual paradigm lies the smaller subset of Breyer's jurisprudence, an active liberty for the people, a reasonable sovereignty for the larger collective organism (the State), and a restraint in judicial activism. The contract with the people requires the fulfillment of the best interest of the individual, although, at times it may come at odds with the expansive concept of liberty, and at times as an antithesis to the judiciary's concept of federalism. In the end, however, it is firmly anchored in pragmatic consequentialism, which will continue to be the hallmark of his jurisprudence. Its pursuit will continue to reverberate across the constitutional courts, from Zimbabwe to Australia, and will find its way into the opinions of our Supreme Court through Justice Breyer's analyses. For more information, see Dr. Saby Ghoshray, *supra* note 68, at 735.

Supreme Court's morality-based capital jurisprudence along the moral contours of the late Pontiff's philosophy of human dignity.

Embedded at the heart of the Eighth Amendment's characterization of "cruel" and "inhuman" punishment is the value-centric, dignity-laden conception of humankind, whose inherent dignity cannot be stripped away by the mere invocation of man's law. This individual human, therefore, endowed with full dignity, exists in an environment where his existence is marked by an expansive conception of "liberty." This is reflected in John Paul II's writings, as he lends credence to a broader frontier of our Eighth Amendment jurisprudence:

Man has acquired full awareness of his dignity, of the heights to which he is raised, of the surpassing worth of his own humanity, and of the meaning of his existence . . . what is in question here is man in all his truth, in his full magnitude. We are not dealing with the "abstract" man, but the real, "concrete," "historical" man. Each man in all the unrepeatable reality of what he is and what he does, of his intellect and will, of his conscience and heart in his unique unrepeatable human reality.¹⁴⁴

In this context, John Paul II considers a "heightened sense of the dignity of the human person and of his or her uniqueness, and of the respect due to the journey of conscience . . . one of the positive achievements of modern culture."¹⁴⁵ Legal philosophies are borne out of historic and cultural traditions that help shape legal governance. Therefore, it is expected that evolution of law should be in stride with positive achievements of our modern culture, marked by a decent respect for the dignity of the human person. John Paul II contends that giving primacy to the dignity of human life inculcates in us a greater respect for the value of human life—one worth preserving via developing a "culture of life"¹⁴⁶ in the face of a "culture of death."¹⁴⁷ Therefore, the

¹⁴⁴ JOHN PAUL II, ENCYCLICAL LETTER *REDEMPTOR HOMINIS* ¶ 11 (1979), available at <http://www.ourladywarriors.org/teach/redehomi.htm#-2K>.

¹⁴⁵ JOHN PAUL II, ENCYCLICAL LETTER *VERITATIS SPLENDOR* ¶ 31.3 (1993).

¹⁴⁶ *EVANGELIUM VITAE*, *supra* note 11, ¶ 21.1.

¹⁴⁷ POPE JOHN PAUL II, POST-SYNODAL APOSTOLIC EXHORTATION *ECCLESIA IN AMERICA ON THE ENCOUNTER WITH THE LIVING JESUS CHRIST* ¶ 63 (1999) [hereinafter *ECCLESIA IN AMERICA*], available at http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_22011999_ecclesia-in-america_en.html.

Supreme Court's explicit ban on certain classes of capital punishment is not a judicial arrogation, nor is it arbitrary decision-making; rather, it contains a sacred, moral fiber, laden with hope for a future where such a "culture of life" will completely overcome the "culture of death."

The foundation of John Paul II's principled opposition to the death penalty is shaped by his philosophy of the inherent dignity of human life. This philosophy centers on his sacred belief that humankind is created in the image of God, which automatically bestows in humans an inherent dignity that is irrelevant and irrespective of personal traits. He says: "[T]he dignity of human life must never be taken away, even in the case of someone who has done great evil."¹⁴⁸ While acknowledging the traditional penological objectives as enshrined in the trifecta of retribution, rehabilitation, and societal protection, John Paul II echoed the cautious approach the Supreme Court has undertaken since *Furman* when he commented that "*the nature and extent of the punishment must be carefully evaluated*"¹⁴⁹—echoing in unmistakable terms the heightened due process needs of our death is different jurisprudence. From a doctrinal point of view, John Paul II does not reject the death penalty outright, as he believes in the justification of death penalty in cases "of absolute necessity . . . when it would not be possible otherwise to defend society."¹⁵⁰ He put forth arguments, however, that eradicated the utility of the death penalty as a procedure. Because John Paul II contended that "redress[ing] the violation of personal and social rights" is the "primary purpose" of punishment, it seems that the value of human life and the need to offer the offender the possibility of rehabilitation eradicates any need for capital punishment.¹⁵¹ However, in his opinion, "[t]oday, given the means at the State's [sic] disposal to deal with crime and control those who commit it, without abandoning all hope of their redemption, the cases where it is absolutely necessary to do away with an offender 'are now very rare, even non-existent.'"¹⁵² This

¹⁴⁸ Pope John Paul II, Homily Delivered at the Papal Mass, St. Louis, Mo. (Jan. 27, 1999), available at http://www.vatican.va/holy-father/john-paul-ii/travels/documents/hf_jp-ii_hom_27011999_stlois_en.html.

¹⁴⁹ *EVANGELIUM VITAE*, *supra* note 11, ¶ 56.2.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* ¶ 56.1.

¹⁵² *ECCLESIA IN AMERICA*, *supra* note 147, at ¶ 63.

is where John Paul II sows the seed for total abolition of the death penalty as a penological procedure.

What is, then, the “absolute necessity” of the death penalty from society’s survival point of view? It is clear that if the society cannot establish “absolute necessity” for the imposition of the death penalty, we must end the practice. Therefore, the uniqueness of the death penalty and the history of its capricious application in the criminal justice system make it imperative on us to delve deeper into the legal discourse of this punishment. Our earlier exploration of the jurisprudential philosophies of Justice Brennan went to great lengths to systematically analyze all available social objectives sought in this discourse, and Brennan concluded that the death penalty does not serve any rational purpose.¹⁵³ This is precisely the context in which John Paul II challenges us to consider the death penalty debate, as he asserts: “This is the context in which to place the problem of the *death penalty*. On this matter there is a growing tendency, both in the Church and in civil society, to demand that it be applied in a very limited way or even that it be abolished completely.”¹⁵⁴ This I see as the beginning of the Catholic Church’s shift towards a more robust abolitionist philosophy, even though there is confusion over the explicit position to that effect.¹⁵⁵ Why now is

¹⁵³ See *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (per curiam) (Brennan, J., concurring).

¹⁵⁴ *EVANGELIUM VITAE*, *supra* note 11, ¶ 56.1.

¹⁵⁵ Although there has been internal debate within the Catholic Church on its official position on the death penalty, it is clear that the overriding theme within the Church is directed towards life. The leaders within the Church, from the Bishops to the Pope and even the Lay, have expressed this life attitude. The Vatican’s position was made abundantly clear in 2001, when it said: “The Holy See has engaged itself in the pursuit of the abolition of capital punishment as an integral part of the defense of human life at every stage of its development, and does so in defiance of any assertion of a culture of death.” *Cacp.org*, *Catholics Against Capital Punishment: What the Vatican Has Said*, <http://cacp.org/vaticandocuments.html> (click on left hand tab “Q & As”) (last visited Aug. 25, 2006) (quoting UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Declaration to the World Congress on the Death Penalty*, France (June 2001)). Additionally, Amnesty International conducted an interview with Bishop Gabino Zavala of the Los Angeles Archdiocese discussing the death penalty. The interview shed light on the tradition within the Church to pursue life over death. The interview also shed light on the Pope’s attitude about the death penalty. Here, I am providing only a select portion of the interview, but the complete interview is available at <http://www.amnestyusa.org/abolish/event2/zavala.html>. The interview is between “S,” the interviewer, and “Bishop,” Bishop Gabino Zavala. The interview begins as follows:

the Church developing a principled opposition to death penalty? The Pope argued for a penological practice that comports with human dignity,¹⁵⁶ echoing Justice Brennan's view, examined earlier,¹⁵⁷ that "[t]he problem must be viewed in the context of a system of penal justice ever more in line with human dignity and

S: I would like to start with you providing us with a general overview of the perspective of Catholicism on the death penalty.

Bishop: As with many of our traditions and our teachings, over the years, as we understand more, it has developed. At one time we as a Church gave the right to the state to decide on the death penalty, the question of the death penalty and so it was the state that had the right to put someone into death if they so deemed it. But I think the position of the Church now is that the guiding principle would be that every life is sacred and it doesn't matter if it's the life of an elderly person, of a child, or of a criminal, every life is sacred. And so no one has a right to take the life of another, even on behalf of the state. And so that that's what we try to promote now, that the sacredness of life is something that we have to promote.

S: Have any Catholic groups or organizations adopted an official position on the death penalty?

Bishop: There are. There are a number of groups that really work to abolish here in the United States the death penalty and are opposed to the death penalty. One, which I am a member of, is the United States Conference of Catholic Bishops. A few years ago they came out on Good Friday with a pastoral letter where they declared, where we declared our opposition against the death penalty for the reasons that I have mentioned. There are other groups like Death Penalty Focus and religious communities as well of men and women who have consistently spoken out against the death penalty and whose efforts are at working to abolish the death penalty.

S: What is the Pope's position on the death penalty?

Bishop: The Pope has been very articulate, in fact more articulate than some people would like him to be, against the death penalty. He has come out recently in his visit . . . when he came to St. Louis he was very clear on speaking against the death penalty and promoting life, and saying that as a community, the death penalty diminishes us and so that we need to abolish that. He also, in his letter *Evangelium Vitae*, where he talks about the gospel of life and within the context of life he spoke against the death penalty. So he has been very articulate and very clear in his opposition to the death penalty.

S: What do you see as the role of the Catholic faith community, particularly Catholic faith leaders, in the movement to abolish the death penalty?

Bishop: Well I think one of the things the Catholic community needs to do, and the Catholic leaders need to do, is that we as the Church need to express wherever appropriate and wherever possible our stance against the death penalty.

Interview by "S" with Bishop Gabino Zavala, Auxiliary Bishop, Archdiocese of Los Angeles, available at <http://www.amnestyusa.org/abolish/event2/zavala.html>.

¹⁵⁶ See *EVANGELIUM VITAE*, *supra* note 11, ¶ 56.1.

¹⁵⁷ See *Furman*, 408 U.S. at 305 (Brennan, J., concurring) (arguing that the death penalty is inconsistent with human dignity).

thus, in the end, with God's plan for a man and society."¹⁵⁸ As to human dignity-centric punishment procedures, he offers two social objectives. In the first, he felt that by applying punishment that did not strip the offender of his or her inherent dignity, society could reduce disorder.¹⁵⁹ Second, he suggests that by incorporating such punishment, society can embark upon establishing a much greater goal—that of fulfilling its rehabilitative ideals.¹⁶⁰

In the preceding section, we spoke at length about *Furman* and its holdings against the imposition of arbitrary and random death sentences, while recognizing the required threshold of individualizing the punishment procedure.¹⁶¹ More than two decades later, Pope John Paul II echoed similar restraints and overtly promoted a cautious approach towards the imposition of death penalty, as he observed: "It is clear that, for these purposes to be achieved, the nature and extent of the punishment must be carefully evaluated and decided upon . . ."¹⁶²

As we illuminate ourselves in a humanistic jurisprudence that reiterates the opinions of Justices Brennan and Marshall,¹⁶³ or the majority opinions of Justices Kennedy and Stevens,¹⁶⁴ or the teachings of the former Cardinal Karol Wojtyla of Krakow, we can't help but become jolted by their odd coincidences. I do not suggest there exists a causal relationship between the religious teachings and the legal discourse of the Highest Court, nor do I believe either entity influenced the other. What I do assert, however, is that the principled opposition against the

¹⁵⁸ See *EVANGELIUM VITAE*, *supra* note 11, ¶ 56.1.

¹⁵⁹ See *CATECHISM OF THE CATHOLIC CHURCH*, ¶ 2266 (2d ed. 1997) (explaining that when punishment conforms to human dignity, and is accepted by the guilty party, the punishment assumes the value of expiation).

¹⁶⁰ See *CATECHISM OF THE CATHOLIC CHURCH*, ¶ 2266 (2d ed. 1997) (noting that punishment must "contribute to the correction of the guilty party").

¹⁶¹ See *Furman*, 408 U.S. at 286 (Brennan, J., concurring) (finding it a denial of human dignity for a state to arbitrarily impose an unusually severe punishment).

¹⁶² *EVANGELIUM VITAE*, *supra* note 11, ¶ 56.

¹⁶³ See *Furman*, 408 U.S. at 286 (Brennan, J., concurring) (reiterating that it is "cruel and unusual" to arbitrarily impose the death sentence); *id.* at 315 (Marshall, J., concurring) (questioning whether capital punishment is consistent with "our own self-respect").

¹⁶⁴ See *Roper v. Simmons*, 543 U.S. 551, 560–61, 564–68 (2005) (finding the death penalty for children under eighteen unconstitutional because inconsistent with "evolving standards of decency"); *id.* at 587 (Stevens, J., concurring) (reiterating the importance of "evolving standards of decency" in determining the constitutionality of capital punishment).

death penalty evidenced here weaves a continuous tapestry of moral contour development that has been nurtured over the decades. That tapestry sometimes focused on the inviolability of human persons,¹⁶⁵ and at other times relied upon either the immorality of vengeance,¹⁶⁶ or the moral vulnerability of society.¹⁶⁷ In this journey, what the venerable Justices have called the “evolving standards of decency,”¹⁶⁸ the Pope has termed the “concrete conditions of the common good,”¹⁶⁹—an idea all the while forging us closer to a society free from the practice of “tinker[ing] with the machinery of death.”¹⁷⁰

IV. WHAT DOES *ROPER* AND *ATKINS* HOLD FOR THE FUTURE OF THE DEATH PENALTY?

Three decades after its reintroduction in *Gregg*, the Supreme Court continued to struggle in its attempt to overcome the *Furman* threshold of arbitrariness and capriciousness. Along the way, the Court grappled with the death penalty’s qualitatively different challenges. These challenges came from the tension between universalizing procedure, and individualizing the defendant. Challenges also arose from capricious interpretations of the threshold of culpability for capital murder.¹⁷¹ The inherent

¹⁶⁵ See discussion *supra* note 238 (describing the inviolability of the human person).

¹⁶⁶ See discussion *supra* note 15 (noting the historic relevance of vengeance).

¹⁶⁷ As I have traced the moral contour of the Supreme Court’s capital jurisprudence, I used moral vulnerability synonymously with penchant for morality or morality-centered philosophy.

¹⁶⁸ See, e.g., *Roper*, 543 U.S. at 563 (inquiring into society’s “evolving standards of decency”).

¹⁶⁹ CATECHISM OF THE CATHOLIC CHURCH ¶ 2267 (2d ed. 1997).

¹⁷⁰ This phrase holds special significance in the dramatic conclusion of Justice Blackmun’s *Callins* dissent. See *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

¹⁷¹ Post-*Furman* death penalty statutes attempted to balance individualized sentencing procedures with guided discretion. Stephen R. McAllister succinctly captured the debate:

[T]he Supreme Court identified and applied two primary principles that now form the core of the Court’s Eighth Amendment capital jurisprudence. These principles are that (1) the sentencer must be given specific guidance regarding how to determine when death is an appropriate sentence (the “guided discretion” principle) and (2) in making the determination, the sentencer must be permitted to consider each defendant’s situation on an individual basis (the “individualized sentencing” principle).

Stephen R. McAllister, *The Problem of Implementing a Constitutional System of Capital Punishment*, 43 U. KAN. L. REV. 1039, 1040 (1995).

human fallibility failed to explicate race and class bias,¹⁷² and, thus, legislative divergence in jury instruction became even more pronounced.¹⁷³ Within this vast array of Supreme Court death penalty decisions, however, we may take comfort in the illuminating opinions of Justices Brennan, Marshall, Blackmun, Douglas, Stevens, Kennedy, and Breyer. In those opinions, we see a sustained effort to develop a moral contour encapsulating an authentic view of the human person.¹⁷⁴ Despite relentless tinkering with the law to develop a consistent practice for determining who dies and who lives, death penalty jurisprudence remains hopelessly fraught with *Furman*-era arbitrariness. The decisions in *Atkins* and *Roper*, therefore, signal a willingness to change the subjective dimension of the Eighth Amendment's requirement that the decision to impose the death penalty be based upon the character and background of the offender in a more objective framework.¹⁷⁵ This concept prompted the Court to develop an additional framework so that its decisions could be justified on legal grounds. While in *Atkins* the Court cited a

Noting the logical incompatibility of these two principles, McAllister further noted: "Neither principle can be extended except at the expense of the other. The Supreme Court largely has ignored the conflict...[U]ntil the full Court acknowledges the dilemma, no solution will be forthcoming." *Id.* at 1100.

¹⁷² In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Court confronted the issue of race and class bias. The petitioner, McCleskey, relied on statistical studies to argue that he was denied the Fourteenth Amendment's equal protection on the basis of the established discriminatory differences in sentencing blacks and whites to diverging punishments for similar crimes. In rejecting his claim, Justice Powell argued that the burden of proving an equal protection violation involves proving the "existence of purposeful discrimination." *McCleskey*, 481 U.S. at 292 (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)). Justice Brennan argued passionately throughout his dissent and noted that "evidence shows that there is a better than even chance in Georgia that race will influence the decision to impose the death penalty: a majority of defendants in white-victim crimes would not have been sentenced to die if their victims had been black." *Id.* at 328 (Brennan, J., dissenting).

¹⁷³ See MELLO, *supra* note 105, at 180–195 (noting the divergence in judicial opinion regarding the permissibility of prosecutorial conduct that minimizes a juror's sense of responsibility in imposing the death penalty).

¹⁷⁴ An authentic view of the human person is, in my mind, an evolving concept centering on the uniqueness of the human being, immutability of death, and sacred nature of inherent human dignity. I elaborate on the authentic-human-person-driven moral underpinnings of the judiciary in the next section.

¹⁷⁵ See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (construing the Eighth Amendment in light of "evolving standards of decency"); *Roper v. Simmons*, 543 U.S. 551, 572–75 (2005) (discussing and purporting to apply an individualized analysis of the defendant).

shift¹⁷⁶ in public opinion during the preceding decade and half since *Penry*,¹⁷⁷ the Court in *Roper* developed a standard of measurement for *Atkins*' reliance on public consensus¹⁷⁸ and advanced the doctrine of diminished culpability.¹⁷⁹ Is this the long-awaited abolitionist future? Though laudable, the process through which the Supreme Court arrived at the two decisions opens up a Pandora's Box on several grounds. On the flip side, I want to show that the Court's decision was in line with moral contour formation, an area more misunderstood than explored.¹⁸⁰ The advocates for persons with mental disabilities exult in the impressive victory earned in *Atkins*,¹⁸¹ while the campaigners against the death penalty bask in the glorious possibilities of an abolitionist future.¹⁸² While the majority's opinion in *Atkins* may be another stepping stone to make the administration of capital punishment more equitable, I see the juxtaposition of legal proceedings and clinical diagnoses bringing in additional layers of ambiguities that may never escape *Furman* arbitrariness. I do not fail to see, however, the ethical vision of the human person that Pope John Paul II tried to imbibe in our civilization's quest to achieve greater heights. Neither do I miss the continued endeavor by the judiciary's moral contour building; yet, I am concerned about the possibility that *Atkins* may lose its way in

¹⁷⁶ See *Atkins*, 536 U.S. at 313–16 (pointing to the large number of states restricting use of capital punishment since the Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

¹⁷⁷ See *Penry*, 492 U.S. at 302.

¹⁷⁸ See *Roper*, 543 U.S. at 566–67 (relying on “objective indicia of [public] consensus” as sufficient evidence that society views juveniles as less culpable than the average criminal and, thus, that capital punishment is inappropriate for such offenders).

¹⁷⁹ See *id.* at 569–71 (recognizing and explaining the reduced culpability of juveniles).

¹⁸⁰ Throughout this paper, I explain this concept. See Parts I, IV, and V (explaining that throughout the history of Supreme Court jurisprudence on the constitutionality of the death penalty, there has been a sustained effort by some justices to develop a moral contour encapsulating an authentic view of the human person).

¹⁸¹ See *Atkins*, 536 U.S. at 304 (holding that executions of mentally retarded criminals are “cruel and unusual punishments” prohibited by the Eighth Amendment).

¹⁸² Justices Marshall, Brennan, and Blackmun have favored abolitionist positions throughout their dissents in various Supreme Court opinions. See *supra* notes 60, 65–105 and accompanying text (discussing the abolitionist positions of the three Justices as exemplified by their opinions in various death penalty cases). I discuss the challenges for the abolitionist future in the next section.

the complex labyrinth of legal, social, and behavioral issues that yield capricious outcomes in death penalty cases.

The *Atkins* decision to ban further use of the death penalty for mentally retarded offenders on the grounds of higher threshold requirements for executions and preventing “special risk of wrongful execution”¹⁸³ raised a host of issues. Jury determinations of mental retardation call for a subjective evaluation of a capital murder defendant’s mental condition, as well as the diagnostic process—a cascaded procedure fraught with the possibility of distortion due to both interference from Courts and legislatures, as well as the competency level used in the actual diagnostic process. In reviewing competency levels used in the actual diagnostic process, Professor Michael Perlin wrote:

Anyone who has spent any time in the criminal justice system—as a defense lawyer, as a district attorney, or as a judge—knows that our treatment of criminal defendants with mental disabilities has been, forever, a scandal. Such defendants receive substandard counsel, are treated poorly in prison, receive disparately longer sentences, and are regularly coerced into confessing to crimes (many of which they did not commit).¹⁸⁴

While commenting on the coupling between criminal culpability and mental capacity, he noted that “the scope and role of the insanity defense . . . is virtually irrelevant to this entire conversation.”¹⁸⁵ *Atkins*, therefore, invites us to consider how testimony by mental health experts may affect the death sentencing determinations.

If we are prohibited from executing mentally retarded people, how does the *Atkins* decision affect capital defendants with mental illness as debilitating as, or more incapacitating than, mental retardation? Potential implications are boundless, and, therefore, could lead to capricious outcomes in death sentencing. For example, if people with borderline mental illness

¹⁸³ See *Atkins*, 536 U.S. at 304–05 (showing that the Court’s rationale for banning the execution of mentally retarded criminals was based on the fact that these criminals face “special risk[s] of wrongful execution,” and that executing the mentally retarded does not meet the threshold requirement of providing retribution and deterrence for capital crimes).

¹⁸⁴ Michael L. Perlin, Symposium, “*Life Is in Mirrors, Death Disappears*”: *Giving Life to Atkins*, 33 N.M. L. REV. 315, 315 (2003) (citations omitted).

¹⁸⁵ *Id.*

are placed in a prison system upon conviction, and are not provided with adequate mental health resources, a condition is created whereby the constellations of crowding, regimentation, and a lack of mental health resources could contribute to full-blown mental incapacitation. If now, by virtue of this impairment of the thought process, this mentally ill person commits death penalty-eligible violence, can we execute him? Are we, then, not acting against normative standards of fairness?

The *Atkins* decision confronts us with a poignant question: where do we draw the line between mentally retarded and mentally ill? The Court in *Atkins* held that the death penalty for the mentally retarded does not serve any retributive or deterrent interest.¹⁸⁶ Should not the same, then, apply for mentally ill murder defendants? If the answer is yes, the profound determination of who lives and who dies comes down to subjective diagnoses by experts, and the jury instructions given in a particular jurisdiction. Therefore, should we arrive at that evolutionary moment in constitutional history where the execution of the mentally ill becomes prohibited, we would still be left with the confusing quagmire of separating those defendants eligible for death from those who are ineligible. No doubt, constitutional prohibition of executing mentally ill murderers will allow us to sit on a moral high ground, but we would still be left grappling with the capricious adjudication of the death penalty. Therefore, I believe this issue will remain despite the fact that the Court might provide us with the psychiatric prescription and jury instructions relevant to a determination of culpability.

As we ponder the potential ramifications of *Atkins*, we cannot escape the reflective dimension of the encouraging footnote attached to the *Atkins* opinion stating that, “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”¹⁸⁷ Justice Stevens, writing for the majority in *Atkins*, further concluded: “Mentally retarded persons . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning. . . . Their deficiencies

¹⁸⁶ *Atkins*, 536 U.S. at 319–20.

¹⁸⁷ *Id.* at 316–17 n.21.

do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.”¹⁸⁸ If the diminished culpability associated with mental retardation renders the death penalty an excessive punishment, should not the people suffering from serious mental illness also be exempt from execution?¹⁸⁹

¹⁸⁸ *Id.* at 318.

¹⁸⁹ While a clinical distinction exists between mental retardation and mental illness, my conviction is that the *Atkins* ruling applies to the murderers suffering from mental illness regardless of the scope of the insanity defense. For example, a mentally ill person’s delusional beliefs may cause them to engage in illogical reasoning, and to act on impulse, which should reduce their threshold of culpability for capital sentencing. Following the *Atkins* decision, a former President of the American Psychiatric Association noted: “From a biopsychosocial perspective, primary mental retardation and significant Axis I disorders have similar etiological characteristics. And the mentally ill suffer from many of the same limitations that, in Justice Stevens’ words, ‘do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.’” Alan A. Stone, M.D., *Supreme Court Decision Raises New Ethical Questions for Psychiatry*, PSYCHIATRIC TIMES, Vol. XIX, Issue 9, September 2002, at 1 (quoting *Atkins*, 536 U.S. at 318). The DSM-IV (Diagnostic and Statistical Manual of Mental Disorders Fourth Edition), published by the American Psychiatric Association, operates a five-axis classification system. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 27 (4th ed. 2000). Clinical disorders are listed under Axis I. *Id.* The U.S. Supreme Court majority in *Atkins* held that a part of the reason for prohibiting the execution of offenders with mental retardation was that “in the aggregate [they] face a special risk of wrongful execution.” *Atkins*, 536 U.S. at 321. Here, the Court meant not only that the particular vulnerabilities of such individuals placed them at particular risk of wrongful conviction, but also of being sentenced to death when a non-impaired individual might receive a life prison term. *Id.* at 320–21. The Court felt:

The risk ‘that the death penalty will be imposed in spite of factors which may call for a less severe penalty,’ is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. . . . [M]oreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.

Id. (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). I am confident that most people suffering from mental illness will never commit a violent crime while being incarcerated with proper medical care. As a result, the constitutional ban on execution, as in the case of individuals with mental retardation, must be extended for people suffering from mental illness. I am also certain that a mentally ill defendant who has committed a capital offense may be at a heightened and unfair risk, as compared to defendants with no or lesser impairments, of receiving a death sentence or in some cases being wrongfully convicted. Therefore, the *Atkins* and *Roper* decisions again open up the issue of arbitrariness on the part of the death

Could the same benchmark be applicable to persons who lose their sanity while laying in wait, entangled in the dehumanizing environment of hopelessness, and ultimately lose their sanity to the debilitating impairment called “Death Row Syndrome?”¹⁹⁰

penalty’s diminished culpability doctrine. If the diminished culpability associated with youth and mental retardation renders the death penalty an excessive punishment when used against offenders from those categories, what about people suffering from serious mental illness or impairment other than retardation, such as serious brain damage at the time of the crime? Should they not also be ineligible for execution? Justice Stevens, writing for the Supreme Court majority in *Atkins*, concluded that:

Mentally retarded persons . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan . . . Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Id. at 318. In a January 2006 report, Amnesty International observed that “[s]ome judges in the USA have already recognized this fundamental inconsistency.” AMNESTY INT’L, UNITED STATES OF AMERICA: THE EXECUTION OF MENTALLY ILL OFFENDERS 11 (Jan. 2006), [http://web.amnesty.org/library/pdf/AMR510032006ENGLISH/\\$File?AMR5100306.pdf](http://web.amnesty.org/library/pdf/AMR510032006ENGLISH/$File?AMR5100306.pdf). For example, the report chronicled how, in July 2003, Judge Robert Henry of the Tenth Circuit Court of Appeals noted the *Atkins* ruling, and concluded that the execution of a mentally ill Oklahoma death row inmate would contribute nothing to the goals of retribution and deterrence. *Id.* On a similar note, the report discussed the 2002 dissent of Justice Robert Rucker of the Indiana Supreme Court in the case of Joseph Corcoran, an inmate suffering from mental illness. *Id.* Justice Rucker drew attention to the *Atkins* decision:

I respectfully dissent because I do not believe a sentence of death is appropriate for a person suffering a severe mental illness. Recently the Supreme Court held that the executions of mentally retarded criminals are “cruel and unusual punishments” prohibited by the Eighth Amendment of the United States Constitution. There has been no argument in this case that Corcoran is mentally retarded. However, the underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill, namely evolving standards of decency.

Id. (quoting *Corcoran v. State*, 774 N.E.2d 495, 502 (Ind. 2002) (Rucker, J., dissenting)).

¹⁹⁰ According to Wikipedia, “[t]he death row phenomenon, also known as the death row syndrome, is a term used to refer to the emotional distress felt by prisoners on death row, as a social phenomenon.” Wikipedia.org, Death Row Phenomenon, http://en.wikipedia.org/wiki/Death_row_phenomenon (last visited Aug. 25, 2006). The phenomenon has been described as the result of living on death row for an extended time. *Id.* It is documented in the U.S. that the typical death row inmate spends about a decade awaiting execution, with some inmates having spent over twenty years on death row. See DEATH PENALTY INFORMATION CENTER, TIME ON DEATH ROW, <http://www.deathpenaltyinfo.org/article.php?&did=1397> (last visited Aug. 25, 2006). The effects of this long time and arduous confinement create a

Often times, death row inmates drop their appeals and consent to their own execution, as they succumb to the horrifying specter of their impending lethal conclusion.¹⁹¹ Sometimes these condemned persons find themselves on death row for a long time while the appellate processes labor on knowing fully well the sole object for preserving life is to terminate it, at the time of the State's choosing. While they live under the Sword of Damocles,¹⁹² each becomes a "Dead Man Walking"¹⁹³ as their

breeding ground for "delusions and suicidal tendencies in an individual and can cause insanity in a form that is dangerous." Wikipedia.org, *supra*. As death row prisoners are generally isolated from other prisoners, death row prisoners do not participate in educational and employment programs, have severe restrictions on their visitation and exercise privileges, and typically spend twenty-three hours a day alone in their cells. See DEATH PENALTY INFORMATION CENTER, *supra*. In 2005, The United Nations Commission on Human Rights considered the conditions on death row, and the phenomenon of being a death row inmate:

The notion of "death row phenomenon" indicates the conditions of detention of a person condemned to capital punishment while awaiting the execution of the sentence. Those conditions of detention—which can include such factors as the very long duration of detention, total or near-total isolation in individual cells, the uncertainty of the moment of the execution, and deprivation of contacts with the outside world, including family members and legal counsel—often amount to cruel, inhuman or degrading treatment.

Question of the Death Penalty, Item 17 of Draft Agenda, Promotion and Protection of Human Rights, (United Nations Comm'n On Human Rights, 61st Session), July 4, 2005, available at http://www.fidh.org/article.php3?id_article=2373. Further, the United States Supreme Court considered Death Row Syndrome in *Solesbee v. Balkcom*, 339 U.S. 9 (1950), when, in a dissenting opinion, Justice Frankfurter stated that the "onset of insanity while awaiting execution of a death sentence is not a rare phenomenon." *Id.* at 14 (Frankfurter, J., dissenting). Moreover, since 1995, both Justices Stephen Breyer and John Paul Stevens have questioned the length of time spent on death row. DEATH PENALTY INFORMATION CENTER, *supra*. Justice Stevens addressed the issue in 1995 by writing on a Texas case involving a man who spent seventeen years on death row. See *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995). Justice Stevens wrote that the Courts should act as "laboratories" for examining whether executing inmates after extended time on death row could violate the Eighth Amendment. See *id.* at 1047. In 1999, Justice Breyer stated, "It is difficult to deny the suffering inherent in a prolonged wait for execution" *Knight v. Florida*, 528 U.S. 990, 994 (1999) (Breyer, J., dissenting); *Moore v. Nebraska*, 528 U.S. 990, 994 (1999) (Breyer, J., dissenting). He was the dissenting voice for the Court's decision not to hear the appeals of two inmates. The first spent nearly twenty-five years on Florida's death row, *Knight*, 528 U.S. at 994, and the latter, a Nebraska prisoner, spent nearly twenty years on death row. *Id.*

¹⁹¹ See, e.g., DEATH PENALTY INFORMATION CENTER, *supra* note 190 (noting that Michael Ross, a death row inmate in New England, waived his appeals, and accepted his execution).

¹⁹² A popular Greek tale, the Sword of Damocles, is often described as a philosophical tale with a hidden meaning similar to that of the common English quote "walk a mile in my shoes." See, e.g., Ancienthistory.about.com, Sword of

lives continue to sway under the pendulum of glimmering hope and impending death. Would not this tortuous existence fall under the Cruel and Unusual Punishment Clause? Where are the “evolving standards of decency”¹⁹⁴ in executing people who have gone insane under the traumatic and dehumanizing experience of death row? The history of U.S. capital

Damocles, <http://ancienthistory.about.com/od/ciceroworkslatin/f/DamoclesSword.htm> (last visited Aug. 25, 2006) (describing the Sword of Damocles as a philosophical writing which almost translates into the idiom of “walk a mile in my shoes”). However, the English saying lacks the intense bite found in the story of the Sword of Damocles. A simple scan of the local library shelves or a cursory internet search will turn up numerous results for this popular story. However, for the ease of the reader, I provide the following translation of the Sword of Damocles:

Dionysius was a fourth century B.C. tyrant of Syracuse. To all appearances he was very rich and comfortable, with all the luxuries money could buy, tasteful clothing and jewelry, and delectable food. He even had court flatterers (*adsentatores*) to inflate his ego. One of these ingratiators was the court sycophant Damocles. Damocles used to make comments to the king about his wealth and luxurious life. One day when Damocles complimented the tyrant on his abundance and power, Dionysius turned to Damocles and said, “If you think I’m so lucky, how would you like to try out my life?” Damocles readily agreed, and so Dionysius ordered everything to be prepared for Damocles . . . Damocles was enjoying himself immensely until he noticed a sharp *sword hovering over his head*, which was suspended from the ceiling by a horse hair. This, the tyrant explained to Damocles, was what life as ruler was really like. Damocles alarmed and quickly revising his idea of what made up a good life, asked to be excused. He then eagerly returned to his poorer, but safer life.

Id. (emphasis added). This story is a metaphoric glance at the life of the death row inmate. He is constantly aware of the sword dangling above his head—the impending execution.

¹⁹³ Consider a “Dead Man Walking”:

The clank announces the opening of the iron cell door. The man steps out. For 13-years he has remained isolated on death row. The air is dry. He is emotionally dead. He is only a body, a space. He walks. Step-by-step. His appointment date has arrived. Numbed, he surrenders his body to the crucifix-shaped bed. His arms outstretched. Blankly he stares. Watching the death routine unfold. Fellow humans beings, his executioners insert needles into his veins. The death drugs will follow. He may eek out some last words, or he may remain silent. After all, he is a dead man walking.

This is an interpretive depiction of the final moments of a dead man walking. This is the experience of many death row inmates on their final walk towards execution. The phrase “Dead Man Walking” has also become popularized because these are words that that guards at San Quentin Prison are said to have yelled when death-row inmates were let out of their cells. Additionally, the phrase “Dead Man Walking” has become famous because of the book and movie based on the real life of Sister Helen Prejean, a Catholic Sister of St. Joseph of Medaille Order.

¹⁹⁴ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

jurisprudence in determining competency for execution is scandalous at worst, minimally instructive at best.

Though the Supreme Court has provided some constitutional protections against the death penalty on account of mental impairment, these protections have limited or no effect for people who were sane at the time of the crime, trial, conviction, and sentence, but have developed severe mental illness during incarceration. In 1986, the petitioner, Alvin Ford, in *Ford v. Wainwright*,¹⁹⁵ challenged the Supreme Court to determine whether a maturing civilized society can carry out the execution knowing that the person being executed no longer comprehends what is going to happen, or why it is going to happen.¹⁹⁶ The *Ford* majority, while taking into account “objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects,”¹⁹⁷ failed to provide us with any objective guidance regarding competency for execution. While Justice Marshall recognized the severe limitations in the State’s procedure to provide an objective review of the death row inmates’ mental state,¹⁹⁸ Justice Powell attempted to provide the competency criteria by suggesting that the test should be whether the prisoner is aware of both his or her impending execution and the reason for it.¹⁹⁹ To him, therefore, the issue of *Ford’s* claim warrants an answer “not *whether*, but *when*, his execution may take place,”²⁰⁰ as he asserted that, “if petitioner is cured of his disease, the State is free to execute him.”²⁰¹

Two decades later, the State of California took Justice Powell’s guidance in *Ford* and ran with it, as it executed seventy-six year old Clarence Ray Allen, California’s oldest inmate on

¹⁹⁵ 477 U.S. 399 (1986)

¹⁹⁶ *See id.* at 401–05 (showing that the case involved the need to resolve the issue of whether the Eighth Amendment prohibits execution of the insane, even if the person became insane after his or her incarceration).

¹⁹⁷ *Id.* at 406.

¹⁹⁸ *See id.* at 415 (recognizing that there could be no objective review of a death row inmates’ mental state because of Florida’s procedure of denying any opportunity to challenge the state-appointed psychiatrists’ opinions).

¹⁹⁹ *See id.* at 421 (arguing that one of the death penalty’s critical justifications—its retributive force—depends on the defendant’s awareness of the penalty’s existence and purpose).

²⁰⁰ *Id.* at 425.

²⁰¹ *Id.* at 425 n.5.

death row.²⁰² Allen was blind, confined to a wheelchair, suffered from diabetes, and had a nearly fatal heart attack four months before his execution date in January of 2006.²⁰³ His case was fraught with the hallmark capriciousness that often surrounds the death penalty, such as the testimony of unreliable informant witnesses, perceived racial bias, and critical errors by the “trial court, prosecutor, and defense counsel.”²⁰⁴ The Ninth Circuit Court of Appeals, in an opinion denying relief, shed light this way: “Trial counsel admits he did nothing to prepare for the penalty phase until after the guilty verdicts were rendered, and even then, in what little time was available, he failed sufficiently to investigate and adequately present available mitigating evidence.”²⁰⁵ By medically reviving Allen after his earlier heart attack and then introducing a lethal injection into his veins four months later,²⁰⁶ the State of California raised the issue of morality of vengeance that penetrates deep into the ethical fibers of the U.S. Constitution. If a civilized nation permits planned and calculated termination of life, does it have any “standards of decency”²⁰⁷ left to continue to stake claim as a “maturing society?”²⁰⁸ Are these flagrant transgressions of humanitarian principles simply the last vestige of frontier mentalities of a bygone generation? Or, do these barbaric executions echo the historical background and ethos of a constitution grappling to come to terms with the “evolving standards of decency?”²⁰⁹ Despite the disastrous outcome, the moral contour of the Supreme Court remained intact, albeit barely, by the dissent of Justice Breyer in the Court’s denial of the petition for the writ of certiorari, when he stated that, “I believe that in the circumstances he raises a significant question as to whether his

²⁰² See *Senior Prisoner on California’s Death Row Is Executed at Age 76*, WASH. POST, Jan. 18, 2006, at A02.

²⁰³ See National Coalition To Abolish the Death Penalty, Do Not Execute Clarence Ray Allen!, http://www.democracyinaction.org/dia/organizations/ncadp/campaign.jsp?campaign_KEY=1735 (last visited Aug. 25, 2006).

²⁰⁴ Death Penalty Focus, Clarence Ray Allen, http://www.deathpenalty.org/pdf_files/ClarenceRayAllen.pdf (last visited Aug. 18, 2006).

²⁰⁵ *Id.*

²⁰⁶ See *76-Year-Old Man Executed*, ADVERTISER, Jan. 18, 2006, at 32.

²⁰⁷ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

execution would constitute ‘cruel and unusual punishment’ [in violation of the Eighth Amendment].”²¹⁰

Between Alvin Ford and Clarence Ray Allen, there was a twenty-year journey to decide the level of competence required before one is executed. *Ford’s* challenge to ensure greater protection for the seriously mentally ill in capital jurisprudence remained unanswered in *Allen*. As the deadly cocktail of racial disparity, inadequate counsel, and prosecutorial misconduct continues to interject lethal consequences for mentally incapacitated prisoners, such deaths have never been so uniquely degrading to human dignity as they are in the case of mentally ill foreign nationals.²¹¹ Mr. Syed Rabbani was a twenty-one year old student from Bangladesh when he was charged in Texas for killing a fellow foreign national in 1986.²¹² Besides the serious reservations regarding the quality of his representation, whether or not the arresting authorities properly notified him of his right to communicate with his consular representative is hazy at best.²¹³ Moving beyond the procedural issues heavily skewed

²¹⁰ *Allen v. Ornoski*, No. 05-8639 (U.S. Jan. 16, 2006) (Breyer, J., dissenting), <http://www.supremecourt.us/orders/courtorders/011606pzz.pdf> (last visited Aug. 30, 2006).

²¹¹ The execution of foreign nationals has not received much attention because of the unfavorable light in which they are perceived as non-citizens. Additionally, the literature is rather limited on this issue despite the fact that foreign nationals face more hurdles due to their different backgrounds and the language and culture barriers that exist. See Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT’L L. 565, 606 (1997) (“[B]ecause of culture, language barriers, and the inability to obtain evidence, a foreign national is inherently prejudiced . . . in a foreign criminal justice system.”). See generally John Quigley, *Execution of Foreign Nationals in the United States: Pressure from Foreign Governments Against the Death Penalty*, 4 ILSA J. INT’L & COMP. L. 589 (1998) (discussing the execution of foreign nationals in the United States).

²¹² See Kathy Fair, *Death Row Inmate Threatens Suicide*, HOUS. CHRON., July 28, 1988, at 123. According to staff writer Kathy Fair, “Rabbani, 23, [] came to the United States in 1984 on a student visa.” *Id.*; see also Texas Department of Criminal Justice, Syed Mohmed Rabbani (describing Rabbani’s crime), <http://www.tdcj.state.tx.us/statistics/deathrow/drowlist/rabbani.jpg> (last visited Aug. 30, 2006). The Texas Department of Criminal Justice maintains a list of all death row inmates. Texas Department of Criminal Justice, 391 Offenders are Currently on Death Row, <http://www.tdcj.state.tx.us/stat/offendersondrow.htm> (last visited Aug. 30, 2006).

²¹³ See U.S. Department of State, Bureau of Consular Affairs, Consular Notification and Access, Part 2: Detailed Instructions (explaining the rights of a foreign national when detained in the United States), http://travel.state.gov/law/consular/consular_747.html (last visited Aug. 30, 2006). “Whenever a foreign national is arrested or detained in the United States, there are legal requirements to

against the poor, immature, and non-native English-speaking foreign national, Rabbani's mental health needs to be considered as he is now in the psychiatric unit of the Texas Department of Criminal Justice's death row.²¹⁴ The legitimacy of his mental illness is beyond doubt, as even a federal judge noted that "Rabbani's apparent deranged mental state '[is] evidenced by his prior litigation history, along with his status as a death row inmate.'"²¹⁵ Rabbani's case invites us to take a deep, introspective, look at the complex tapestry of constitutional protection against Due Process violations and cruel and unusual punishment, deficient judicial construction to guarantee greater protection against the "special risk of wrongful execution,"²¹⁶ and the Eighth Amendment's insurance of greater scrutiny of the offender's background. Rabbani developed a serious mental impairment during the excruciating interval between his sentencing and execution. The impairment was exacerbated by

ensure that the foreign national's government can offer him/her appropriate consular assistance." *Id.* The mandatory nature of such notice depends upon one's country of origin, and a Bangladeshi citizen may receive the following notification:

As a non-U.S. citizen who is being arrested or detained, you are entitled to have us notify your country's consular officers here in the United States of your situation. You are also entitled to communicate with your consular officers. A consular officer may be able to help you obtain legal representation, and may contact your family and visit you in detention, among other things. If you want us to notify your consular officers, you can request this notification now, or at any time in the future. Do you want us to notify your consular officers at this time. [sic]

U.S. Department of State, Bureau of Consular Affairs, Consular Notification and Access, Part 4: Translations, http://travel.state.gov/law/consular/consular_749.html (last visited Aug. 30, 2006). Questions arise as to whether or not Rabbani received proper notification of his right to speak with a consular representative.

²¹⁴ Syed Rabbani is currently housed at the Jester IV Psychiatric Facility in Fort Bend County. Inmate status, including current physical location, can be confirmed by contacting Jester IV, Richmond, Texas 77469-8549 at (281) 277-3700. The Jester IV (J4) Psychiatric Facility is described as, "Custody Levels Housed: All levels requiring psychiatric treatment." Texas Department of Criminal Justice, Unit Directory, Jester IV Psychiatric Facility, <http://www.tdcj.state.tx.us/stat/unitdirectory/j4.htm> (last visited Aug. 22, 2006).

²¹⁵ Rosanna Ruiz, *Lawsuits Out of This World*, HOUS. CHRON., Feb. 24, 2003, at A15.

²¹⁶ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). The Courts have noted in cases like *Atkins* and *Roper* that heightened protection is needed for mentally ill and juvenile offenders because they are less able to comprehend their crimes, and, therefore, face an increased risk of wrongful convictions and unjustified death sentences. I have noted that foreign nationals like Rabbani, because of their reduced comprehension of the U.S. language, culture, and particularly, the legal system, also face a heightened risk of wrongful convictions and unjustified death sentences.

the encompassing environment of an alien culture, his constant brooding over his fate, and his inability to comprehend the appellate procedure because of a debilitating language barrier.²¹⁷ In light of the murky history, including Alvin Ford and Clarence Ray Allen, what fate do we impose on Syed Rabbani? Do we apply Justice Powell's prescription of waiting to cure Rabbani to then execute him,²¹⁸ or do we take guidance from Justice Breyer's ruling in an unrelated case in which he believed that such a situation warranted a commutation of the death sentence because anything else would be a flagrant violation of the Eighth Amendment's prohibition of cruel and unusual punishment? In the absence of credible objective standards to guide us, and in light of voluminous evidence corroborating the existence of an inconsistency of death sentences, I would argue the Supreme Court must now step forward to lay another layer of prohibitions against death penalty sentences for the mentally ill, including those diagnosed with mental illness anytime during the process between the commission of a crime and execution.

V. CHALLENGES TO MORAL CONSISTENCY: THE OBSTACLE COURSE FOR THE COURT

Three decades ago, when the U.S. Supreme Court reinstated the death penalty in *Gregg*, it did so with the premise that "contemporary standards of decency"²¹⁹ in the U.S. had not matured enough to warrant the death penalty, per se, unconstitutional.²²⁰ By removing mentally retarded individuals and juveniles from the overarching tentacles of capital punishment, the Court signaled various themes. First, implicit

²¹⁷ Telephone Interview with Prison Secretary, Chester IV, in Richmond, Tex. (Feb. 1, 2006) (on file with author). His English comprehension is quite fuzzy, as noted by a Jester IV secretary in a personal telephone conversation regarding Rabbani's telephone and letter writing privileges. One conversation resulted in the secretary stating, "I don't know think [sic] he can read English very well, someone could just read his letters to him." *Id.* His English comprehension is quite fuzzy. Syed Rabbani's native language is Bengali. He was raised in Dhaka, Bangladesh and studied until the 12th grade. Texas Department of Criminal Justice, Syed Mohmed Rabbani, <http://www.tdcj.state.tx.us/statistics/deathrow/drowlist/rabbani.jpg> (last visited Aug. 30, 2006).

²¹⁸ See *Ford v. Wainwright*, 477 U.S. 399, 418–27 (1986) (Powell, J., concurring) (implying that a mentally incompetent criminal cannot be executed until cured of his mental infirmity).

²¹⁹ *Gregg v. Georgia*, 428 U.S. 153, 155 (1976).

²²⁰ See *id.* at 179.

in the Court's conclusion is the recognition that "contemporary standards of decency"²²¹ have evolved in the thirty years since it decided *Gregg*.²²² Second, by its own admission in *Roper*, the Court is willing to impose the moral judgment of the judiciary on the people of the land.²²³ Third, the Court emphasized its willingness to impose a more heightened measure of culpability for determining death eligibility.²²⁴ These all are reasons for an abolitionist outcome at the end of the Supreme Court death penalty jurisprudence's evolutionary process. The reality, however, is different as the Supreme Court faces significant challenges on a number of fronts.

First, the benchmark the Court established in *Roper* for a national consensus test called for the determination of a "consistency of . . . change,"²²⁵ a rather vague criterion that can either be easily manipulated or strictly interpreted to fit the retentionist outcome in any specific class of death penalty. Though the Court advocated a national consensus test, it is no substitute for the awesome duty vested in the Court to interpret the Constitution and to uphold its provisions. When it comes to the issue of death, the most extreme and irrevocable form of punishment, the Court in no way must waver from its duty to act as an independent arbiter, nor should it adjudicate constitutional issues with fear or on the basis of finding favor with the public. Almost a century back, in *Weems v. United States*,²²⁶ the Court held that the provision of the Constitution was "not fastened to the obsolete," but might "acquire meaning as public opinion becomes enlightened by a humane justice."²²⁷ Justice Jackson, in *West Virginia Board of Education v. Barnette*,²²⁸ echoed similar sentiments:

²²¹ *Id.* at 155.

²²² *See Roper v. Simmons*, 543 U.S. 551, 551 (2005) (illustrating the evolving standards of decency by recapping state legislative activity pertaining to capital punishment).

²²³ *See id.* at 563–64 ("[I]n the end our own judgment will be brought to bear on the question of the acceptability of the death penalty . . .").

²²⁴ *See id.* at 568 (limiting capital punishment to those offenders whose extreme culpability makes them "the most deserving of execution") (citation omitted).

²²⁵ *Id.* at 566.

²²⁶ 217 U.S. 349 (1910).

²²⁷ *Id.* at 378.

²²⁸ 319 U.S. 624 (1943).

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.²²⁹

Therefore, I argue the right to human life is so sacred, and the inherent dignity of human beings so inviolable, that the issue of the constitutionality of capital punishment cannot be referred to an opinion poll in which a majority would surely prevail over the wishes of the minority—the condemned murderers. Justice Powell was correct in his *Furman* dissent when he expressed his belief that the “amorphous ebb and flow of public opinion”²³⁰ on the significantly volatile issue of death “lies at the periphery—not the core—of the judicial process in constitutional cases.”²³¹ Chief Justice Wright, speaking for the Supreme Court of California, succinctly summarized this notion:

Public acceptance of capital punishment is a relevant but not controlling factor in assessing whether it is consonant with contemporary standards of decency. But public acceptance cannot be measured by the existence of death penalty statutes or by the fact that some juries impose death on criminal defendants. Nor are public opinion polls about a process which is far removed from the experience of those responding helpful in determining whether capital punishment would be acceptable to an informed public were it even-handedly applied to a substantial proportion of the persons potentially subject to execution.²³²

The second issue the Court must overcome is the rejection, by scholars, of the Justices' practice of taking the lead in establishing the moral norms governing society.²³³ The Court's leadership in melding society's morality with domestic

²²⁹ *Id.* at 638.

²³⁰ *Furman v. Georgia*, 408 U.S. 238, 443 (per curiam) (Powell, J., dissenting).

²³¹ *Id.*

²³² *People v. Anderson*, 493 P.2d 880, 893–94 (Cal. 1972).

²³³ A growing number of scholars have rejected the idea of Supreme Court Justices becoming the moral arbiters of society's values. In this context, I refer to the excellent commentary provided to me by Professor Rob Vischer during the St. John's Law School Symposium: The Jurisprudential Legacy of Pope John Paul II, March 24–25, 2006, New York City.

jurisprudence, as shown in *Roper* and *Atkins*, should not be misconstrued as the Courts' overarching reach in controlling all aspects of moral discourse within the society. We must recognize both that the death penalty is unique, and that implicitly embedded within the confines of the Constitution are values of a more mature society, which can evolve via moral contour formation in our jurisprudential discourse. In this context, Justice Stewart's comment in *Furman* warrants repetition:

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.²³⁴

Judicial process cannot operate in an ethical vacuum, nor can the legal methods be devoid of morality-laden value judgments. We cannot deny that the Supreme Court is the Court of final adjudication over all matters pertaining to the interpretation of constitutional text, protection of minorities, and enforcement of constitutional safeguards. Therefore, inherent in this adjudication process is the promise of extra-legal considerations, albeit within a legal framework that starts with law and ends with law. This discourse also entails giving broader discretion to the Supreme Court Justices in settling the most significant of all disputes; namely, the question of under what circumstances a fellow human in society forfeits his or her right to life. In a climate where the value of life and human dignity have been demeaned, I do not hesitate in having an ethically enlightened and morally empowered Supreme Court to take us to an abolitionist future, even at the expense of the remote possibility of letting them encroach into other areas of moral discourse. Almost a century back, Prime Minister Winston Churchill captured it best, while speaking in the House of Commons:

The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation [sic] of any country. A calm and dispassionate recognition of the rights of the accused against the State, and even of convicted criminals against the State, a constant heart-

²³⁴ *Furman*, 408 U.S. at 306 (Stewart, J., concurring).

searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes, and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man—these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it.²³⁵

As the public perceptions of morality of execution and the evolving Supreme Court capital jurisprudence accelerate towards a collision course, we are confronted with the challenge to seek a robust framework to position the issue of the death penalty. What would that framework be? Is it even possible to develop such framework? Could the debate on the death penalty be sustained through this framework?²³⁶ I believe this framework revolves around a concerted effort to trace a moral contour around what it means to be human.²³⁷ As we fully comprehend the most authentic version of what it means to be human, we will be able to encapsulate the inherent dignity of such human persons. Therefore, the measure of human dignity manifests itself in a comprehensive understanding of its inviolability,²³⁸

²³⁵ WINSTON S. CHURCHILL, ADDRESS TO THE HOUSE OF COMMONS, ON THE SUBJECT OF DOMESTIC AFFAIRS (July 20, 1910), reprinted in WINSTON CHURCHILL: HIS COMPLETE SPEECHES, 1897–1963, 1598 (Robert Rhodes James ed., 1974). A former Prime Minister of England, Winston Churchill (1874–1965), in this famous speech in the House of Commons on July 20, 1910, detailed his personal beliefs relating to crime and the treatment of criminals in society. This philosophy was witnessed many years later in his important role in the development of the European Convention on Human Rights.

²³⁶ Professor Richard Garnett posed this challenge in his work, *Christian Witness, Moral Anthropology, and the Death Penalty*. See Richard Garnett, *Christian Witness, Moral Anthropology, and the Death Penalty*, in RELIGION AND THE DEATH PENALTY: A CALL FOR RECKONING (Owens et al. eds., 2004) (attempting to set a framework in which to analyze capital punishment), available at http://www.law.nd.edu/faculty/facultypages/garnetttr/Garnett_Call_for_Reckoning_Chap.%208.pdf.

²³⁷ See generally Rev. John J. Coughlin, *Law and Theology: Reflections on What It Means To Be Human from a Franciscan Perspective*, 74 ST. JOHN'S L. REV. 609 (2000) (exploring the anthropological question of what it means to be a human being).

²³⁸ The central theme on which the right to life for all humans stands, I will argue, is the inviolability of a human person. The concept that every person has the right to life can evolve in various forms. For example, what does it mean that every person shall have the right to life? What is a “person”? When does “personhood” and life initiate? Can a human person ever forfeit the right to life? The answers to all such queries can be encapsulated by extracting the inviolability of the human person

which in turn allows us to make a value judgment on the issues of forfeiture. When does the human forfeit inherent dignity? Or, does the human ever forfeit human dignity? If ever, it depends in part on an understanding of the human person, and in part through an estimation of inherent dignity.²³⁹

within the intersection of moral and jurisprudential discourse. I will argue that every person has the right to life and, therefore, that right is inviolable. Judicial extrapolation of this issue, then, invalidates all capital punishment, an outcome with which both the judiciary and legislators have yet to come to grip. In this context, Michael Perry notes, "Indeed, the proposition that every human being is inviolable (or some functionally equivalent proposition) is axiomatic for so many secular moralities that many secular moral philosophers have come to speak of 'the moral point of view' as that view according to which 'every person [has] some sort of equal status.'" Perry, *supra* note 38, at 45–46 (quoting JAMES GRIFFIN, *WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE* 239 (1986)). According to the Gospel Vision, the answer to the above query is: "Each and every other human being, because each and every other human being is a child of God and a sister/brother to oneself." *Id.* at 44 n.76. This then results in the outcome according to Perry, "[n]o life better befits us as God's children, no life better fulfills us as beings created as God has created us, than to 'love one another.'" *Id.* at 44–45 n.76. John Paul II writes, "there arise at the same time the fundamental questions which pervade human life: Who am I? Where have I come from and where am I going? . . . [W]e find them in the writings of Confucius and Lao-Tze, and in the preaching of Tirthankara and Buddha . . . They are questions which have their common source in the quest for meaning which has always compelled the human heart." *Id.* at 50 n.88 (quoting JOHN PAUL II, *ENCYCLICAL LETTER FIDES ET RATIO* ¶ 1 (1998) (emphasis omitted)).

²³⁹ Inherent dignity is, in my mind, the life force of making the human person inviolable. Throughout the text, I refer to the scope and meaning of inherent human dignity. There is an established belief within the Catholic Church on the inherent dignity of humanity. This very belief was reaffirmed by a group of U.S. Catholic Bishops from the south when they stated:

As pastoral leaders of the Roman Catholic community, we continue to reflect with you on the themes of responsibility, rehabilitation and restoration in light of the reality of crime and criminal justice in our area of the country

. . . .
 . . . [P]risoners have failed to respect the fundamental human dignity of every prisoner

We recognize the fundamental human dignity of prisoners and are troubled by the documented level of violence against prisoners . . . Prisoners are persons, with inherent God-given human dignity. When prisoners become units from which profit is derived, there is a tendency to see them as commodities rather than as children of God. Our troubled times have taught us that, once people are dehumanized, they are more liable to be exploited, abused and violated and to becoming more violent themselves.

. . . .
 . . . To deprive other persons of their freedom, to restrict them from contact with other human beings, to use force against them up to and

The history of U.S. Supreme Court jurisprudence traced the development of a hierarchical threshold level of criminal culpability, based on which punishment of life and where death falls. This difference is in quantum, and gives rise to a very narrow meaning of human dignity, and it invites a plethora of question that requires delving into our contemporary moral discourse. Does that mean those human beings that are immunized from death in both *Roper* and *Atkins* have more human dignity, and therefore greater value as humans, than those who fall outside the *Roper* and *Atkins* framework? Could this also mean a human person in the *Roper* or *Atkins* sense is more inviolable, and thus may never forfeit his or her life, while those who fall outside the spectrum do forfeit their life? Does that also mean that human dignity has a hierarchical value structure that can be assigned in accordance to the threshold of criminal culpability adjudicated by a jury or judge? These questions clearly indicate that contemporary society's current understanding of the human person and his inherent dignity fall flat against a robust value-centric argument. By this same line of reasoning, we cannot associate a human person with the punishment of execution because, if we do so, we will undoubtedly apply the penalty inconsistently regardless of the jurisprudential safeguards. This, then, leads me to conclude that these are the objective issues we must incorporate in developing

including deadly force, are the most serious of acts

. . . [There is] the need for our prisons to respect the human dignity of each and every person

. . . Independent monitors should be allowed to make sure that private prisons are operating in ways that treat all concerned, including prisoners, with the dignity that is inherent in all human beings.

CATHOLIC BISHOPS OF THE SOUTH, PASTORAL STATEMENT, *WARDENS FROM WALL STREET: PRISON PRIVATIZATION*, http://www.restorejustice.com/files/whtis_sobishopsrJ2.pdf (last visited Oct. 8, 2006). Proceeding further on the topic of inherent dignity, the University of San Diego Department of Ethnic Studies has within its program the Catholic Social Teachings. The Catholic Social Teachings overview on the area of Dignity of the Human Person states:

I. There is inherent dignity in the human person because all people are created in the image of God.

II. Human dignity exists as a result of our existence. It is not dependent upon social conditions, race, class, gender, sexuality—it is not earned or achieved—it provides a unique social worth that exist [sic] in each person simply because they exist. Therefore, all human life is sacred.

III. The human person is the starting point for a moral vision of society.

Univ. San Diego, Dep't Ethnic Studies, Catholic Social Teaching, <http://www.sandiego.edu/es/socialteaching.php> (last visited August 30, 2006).

a framework to define the authenticated human person, who is inviolable by death, infinitely estimable with inherent dignity, and for whom the forfeiture of life is not an option.

The vision of the human person enumerated here does not comport with a justice mechanism fraught with the randomness and arbitrariness of the death penalty. Justice Brennan, in *Furman*, echoed this sentiment:

The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.²⁴⁰

Finally, as we seek a full conceptualization of an authentic human person amidst a multitude of complexities, we are reminded of what John Paul II has called the “moral truth about the human person.”²⁴¹ As we ponder over the interaction of dignity, destiny, and the destructive possibility of the human person, we seek to correct our moral compass by trying to comprehend the “inviolable mystery of the [human] person.”²⁴² Why is this important in our discourse? Because, the debate over the death penalty must fully comprehend the dignity and destiny of the human person, which remains incomplete without appreciating that every human being, from the mentally retarded to mentally incapacitated, from a convicted murderer to a child rapist, every single one of them is “‘the noblest work of G[od]’—infinitely valuable, relentlessly unique, endlessly interesting.”²⁴³ How is it possible, a child rapist? Convicted murderer? The answer to these questions, I do not know. But, this much I do know. Somewhere in the infinite, inestimable process of creation, something snapped, and something went haywire. As a result, we see the transformation of the noblest creation of God

²⁴⁰ *Furman v. Georgia*, 408 U.S. 238, 272–73 (1972) (per curiam) (Brennan, J., concurring).

²⁴¹ JOHN PAUL II, AD LIMINA ADDRESS TO THE BISHOPS OF TEXAS, OKLAHOMA, AND ARKANSAS *TEACHERS OF MORAL TRUTH* ¶ 3, reprinted in *ORIGINS*, Oct. 1, 1998, at 282, 283.

²⁴² Letter from Cardinal Wojtyla to Henri de Lubac, quoted in George Weigel, *John Paul II and the Crisis of Humanism*, *FIRST THINGS*, Dec. 1999, at 31–36, in *THE SECOND ONE THOUSAND YEARS: TEN PEOPLE WHO DEFINED A MILLENNIUM* 116 (Richard John Neuhaus ed., 2001).

²⁴³ Thomas L. Shaffer, *Human Nature and Moral Responsibility in Lawyer-Client Relationships*, 40 *AM. J. JURIS.* 1, 2 (1995) (quoting *Chisholm v. Georgia*, 2 U.S. 419, 463 (1793)).

who becomes a child rapist or a murderer. Should we then exterminate his life? Will state-sanctioned killing fulfill the societal objectives? The answer in the affirmative will require us to accept our existence as humans within a narrow quantum of time. It will require us to estimate the worthiness of a human life with a restricted vision of the universe. That, surely, is not the answer we are seeking as humans, nor is it the destination our civilization wants to proceed towards. As stated by Nobel Laureate Tagore:

Life is perpetually creative because it contains in itself that surplus which ever overflows the boundaries of the immediate time and space, restlessly pursuing its adventure of expression in the varied forms of self-realization.

...
... Born in this great world, full of the mystery of the infinite, we cannot accept our existence as a momentary outburst of chance drifting on the current of matter toward an eternal nowhere.²⁴⁴

Therefore, I would argue that the ethical vision that guided the Supreme Court in its journey from *Furman* to *Roper* is seeking this same philosophical vision of the human person that is at the core of the Papal philosophy of the late Cardinal Karol Wojtyla.

I began this monograph with an inquiry as to whether the overlap between the Papal jurisprudence and the general abolitionist position had a deeply rooted alignment. After carefully parsing through a series of Supreme Court decisions, a plethora of illuminated judicial opinions, and a litany of scholar's views, I am convinced that any apparent overlap is purely coincidental. On the other hand, the nature of this alignment gives currency to the general conclusion that a civilized society must do away with the machinery of death under all circumstances.

²⁴⁴ Selected Quotations of Rabindranath Tagore, <http://www.schoolofwisdom.com/tagorequotes.html> (last visited August 20, 2006). Rabindranath Tagore was born in Calcutta, India on May 7, 1861. A Nobel Laureate in poetry, Rabindranath Tagore was a proud Ambassador of Indian culture. He is well known for his poetry, but also flourished in philosophy, novels, and painting. He was a social activist, humanitarian, and Indian patriot. The national anthems for both India and Bangladesh are his creations.

CONCLUSION

This article expresses my conviction that capital punishment is qualitatively different from other punishments and is not consistent with the present maturity of our civilization. Further, the deliberate termination of the life of a person, systematically planned by the governmental machinery, is a punishment unjustifiable under any circumstances within the current modalities of our contemporary society. I arrive at this conclusion after carefully evaluating all possible social objectives for the imposition of such a mode of punishment and, therefore, hold the view that the U.S. Supreme Court should extend its categorical ban on capital punishment beyond the class of murderers it characterized in its decision in *Atkins* and *Roper*.

My current inquiry seeking a trajectory of consistent jurisprudence and moral vision in the Court's legal discourse is prompted by two significant philosophical shifts—our judiciary's recognition of an increased threshold for capital punishment, and the Catholic teaching embedded in the moral vision of an enhanced value for the human person. While both advocate a greater emphasis on the dignity of man, I do not see any causal relationship between the two viewpoints, albeit each one's stance lends credence to the others. On the issue of the consistency of Supreme Court capital jurisprudence, my conclusion is two-fold.

A review of the history of significant cases, and the opinions of the Justices therein, shows that each time the Court recognized and embarked on a corrective course of action, the outcome either opened up to more complexities or it was never able to overcome the capricious application identified by the *Furman* Court. It is my opinion that, despite its best efforts, it is extremely difficult to prevent random application of the death penalty and my analysis above supports it. Therefore, a rational and judicial analysis supports the conjecture that the innocent and less culpable have been executed, and will continue to be executed, and does not require the explicit proof via statistical measures. On this argument alone, the death penalty remains an impermissibly cruel invasion of the right to life, the protection of which is fundamental to the maturing process of our society.

My examination of several Supreme Court opinions during the Court's storied journey from *Furman* to *Roper* reveals the judiciary's recognition of a moral contour that the legal discourse must follow. Driven by an implicit fidelity to the indeterminate

texts of the Constitution and an awareness of the citizenry's belief in 18th century frontier jurisprudence, perhaps the Court lost its moral compass. In the long run, however, the Court has shown its commitment to steadying the moral compass, which signals a siren call for hope, for the better understanding of the human person.

Implicit within the Court's moral contour formation, I see a promise to seek a fuller understanding of personhood. However, the Court must extricate itself from the frozen inequalities of the two hundred year old Constitution and imbibe within its ethos a renewed understanding of the human being. This understanding is enshrined in the inviolability of life, a life that can never be taken away under any pretext of constitutionality. This, then, forms the backbone of the framework on which the death penalty debate must rise or fall, and along the way allows the Court to overcome the societal and citizenry challenges I have previously discussed.

I close with hope. Hope from what I see in the Supreme Court's bold step in *Roper*, hope from what I see in the Vatican's vision of the human person. And, it is with the same hope that I am waiting for an abolitionist future that sits lurking in a tunnel of despair, the tunnel that subsumes the languishing moans of countless men and women waiting on death row. Some innocent, some not innocent, but all born with the inviolable human dignity, human dignity that the 20th century legal scholar, Clarence Darrow, invoked in his plea for life: "I am pleading for the future; I am pleading for a time when hatred and cruelty will not control the hearts of men, when we can learn by reason and judgment and understanding and faith that all life is worth saving, and that mercy is the highest attribute of man."²⁴⁵ In the end, I believe justice must be melded with mercy as our civilization marches to define our evolving standards of decency.

²⁴⁵ CLARENCE DARROW, ATTORNEY FOR THE DAMNED: CLARENCE DARROW IN THE COURTROOM 86–87 (Arthur Weinberg ed., 1957). For more information on the life of Clarence Darrow, see KEVIN TIERNEY, DARROW: A BIOGRAPHY (1979).