NOTE

UNEQUAL PROTECTION: CHALLENGES TO SERIOUS MENTAL ILLNESS EXEMPTIONS FROM THE DEATH PENALTY

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INTRODUCTION

On January 9, 2021, Ohio became the first state to categorically exempt individuals with specific serious mental illnesses from receiving the death penalty with the passage of House Bill 136.[1] The bill prohibits imposition of the death

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1 H.B. 136, 133d Gen. Assemb. (Ohio 2021); *Ohio Bars Death Penalty for People with Severe Mental Illness*, DEATH PENALTY INFO. CTR. (Jan. 11, 2021), https://deathpenaltyinfo.org/news/ohio-passes-bill-to-bar-death-penalty-for-people-with-severe-mental-illness [https://perma.cc/TJH6-8TFQ]. Note that Connecticut previously adopted CONN. GEN. STAT. § 53a-46a(h) (2006), which also exempts individuals from the death penalty whose "mental capacity was significantly impaired or the [accused]'s ability to conform [their] conduct to the requirements of law was significantly impaired," but that this law did not create categorical exemptions for specific mental disorders. Furthermore, Connecticut

penalty upon individuals whose serious mental illness "significantly impaired [their] capacity to exercise rational judgment in relation to [their] conduct" in reference to either "'conforming [their] conduct to the requirements of law' or in 'appreciating the nature, consequences, or wrongfulness of [their] conduct.'"[2] Mental disorders that qualify under House Bill 136 are schizophrenia, schizoaffective disorder, bipolar disorder, and delusional disorder.[3] While individuals who meet these criteria are ineligible for the death penalty, they must consent to an automatic sentence of life without parole, thereby forfeiting any possibility of lesser punishment.[4] Additionally, House Bill 136 includes a non-severability clause which states that any successful constitutional challenge against the bill would render it entirely void for future litigants.[5] Although a bill of this nature has only been enacted in Ohio thus far, several other states, including Idaho, Indiana, North Carolina, South Dakota, and Tennessee[6] have introduced similar legislation or have expressed a desire to do so. Proposed bills in these states closely parallel House Bill 136. For example, Tennessee's House Bill 1455/Senate Bill 1124 would likewise exempt individuals with schizophrenia, schizoaffective disorder, bipolar disorder with psychosis, and delusional disorder from receiving the death penalty.[7] Additionally, it would exempt those who have major depressive disorder with psychosis.[8]

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abolished the death penalty in 2015. CONN. GEN. STAT. § 53a-46a(h) (2006); Mark Berman, *Connecticut Supreme Court Says the Death Penalty is Unconstitutional and Bans Executions for Inmates on Death Row*, WASH. POST (Aug. 13, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/08/13/connecticut-supreme-court-says-the-death-penalty-is-unconstitutional-banning-it-for-remaining-inmates-on-death-row/ [https://perma.cc/6ATZ-THY6].

2 *Ohio Bars Death Penalty for People with Severe Mental Illness*, *supra* note 1.

3 *Id.*

4 Lynanne Norwalk, *No More Death Penalty for Those with Severe Mental Illness in Ohio*, LIMAOHIO.COM (Jan. 30, 2021), https://www.limaohio.com/uncategorized/2021/01/30/no-more-death-penalty-for-those-with-severe-mental-illness-in-ohio/ [https://perma.cc/X7MB-PMBF].

5 H.B. 136, 133d Gen. Assemb. (Ohio 2021).

6 *At Least Seven States Introduce Legislation Banning Death Penalty for People with Severe Mental Illness*, DEATH PENALTY INFO. CTR. (Feb. 3, 2017), https://deathpenaltyinfo.org/news/at-least-seven-states-introduce-legislation-banning-death-penalty-for-people-with-severe-mental-illness [https://perma.cc/262C-662C]. Virginia is also listed as a state considering adoption of this legislation, but it subsequently abolished the death penalty altogether in March 2021. *See* Samantha O'Connell, *Virginia Becomes First Southern State to Abolish the Death Penalty*, AM. BAR ASS'N (Mar. 24, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/virginia-death-penalty-repeal/ [https://perma.cc/J35A-9T9G].

7 S.B. 1124, 111th Gen. Assemb. § 1 (Tenn. 2019).

8 *Id.*

Although these proposed bills are a small step in the right direction for people with serious mental illness facing prosecution for death-eligible offenses, state legislatures that end up passing bills with language mirroring that of House Bill 136 could face constitutional challenges under the Equal Protection Clause of the Fourteenth Amendment as well as other feasibility concerns. To avoid such challenges, state legislatures should modify the language within their proposed bills to encompass a wider scope of serious mental illnesses and symptomologies (as opposed to only four or five specified disorders). Instead of adopting a categorical approach to serious mental illness exemptions from the death penalty, states should establish modified bifurcated proceedings during which the accused can raise the issue of death eligibility and present evidence of serious mental illness prior to any determination of guilt or innocence.

This Note explores the contention that Ohio House Bill 136 and similar proposed bills with a diagnosis-based categorical approach to death penalty exemptions violate seriously mentally ill individuals' rights under the Equal Protection Clause of the Fourteenth Amendment by limiting the scope of eligible mental illnesses to a narrow subset of specified disorders. This Note also addresses additional feasibility issues regarding implementation of such bills. Since the Equal Protection Clause requires that state legislation treat all similarly situated individuals equally, capital defendants could successfully argue that there are a plethora of other symptomologies that would sufficiently inhibit one's capacity to conform their actions to requirements of law or to appreciate the nature or wrongfulness of their conduct that are not included within the statutory text.[9] This Note then examines potential solutions to these equal protection concerns and adopts a recommendation for states contemplating such legislation.

I
BACKGROUND

A. Judicial Intent: Atkins, Roper, and Beyond

The United States Supreme Court has historically exempted categories of individuals from the death penalty based

9 *See infra* subpart II.A.

upon certain inalienable characteristics.[10] In *Atkins v. Virginia*, the Court held that individuals with intellectual disabilities[11] may not be subjected to the death penalty because this practice violates the Eighth Amendment's prohibition against cruel and unusual punishment.[12] However, the Court left the responsibility to state legislatures to determine which individuals are considered intellectually disabled.[13] Similarly, the Court held in *Roper v. Simmons* that adolescents under the age of eighteen at the time of the offense committed cannot be sentenced to death.[14] The sentiment underlying the Court's decisions in *Atkins* and *Roper* reflects the idea that certain categories of individuals are less "morally culpable" than others and, consequently, do not deserve to be subjected to the most serious of all punishments.[15] In *Atkins*, the Court reasoned that due to "their disabilities in areas of reasoning, judgment, and control of their impulses . . . [individuals with intellectual disabilities] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct."[16] Furthermore, the *Atkins* court opined that the practice of executing people with intellectual disabilities had become "truly unusual," and that "a national consensus [had] developed against it."[17] Likewise, the *Roper* court cited three factors that lessen a juvenile's criminal culpability: (1) "lack of maturity and an underdeveloped sense of responsibility," (2) "vulner[ability] or suscept[ability] to negative influences and outside pressures, including peer pressure," and (3) limited character development and formation compared to that of adults.[18] The *Roper* court found that a national consensus against the death penalty existed not only for intellectually disabled individuals in

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10 David DeMatteo & Claire Lankford, *Limiting the Reach of the Death Penalty*, AM. PSYCH. ASS'N (Sept. 2017), https://www.apa.org/monitor/2017/09/jn [https://perma.cc/W5JC-7ATZ].

11 Note that the term used in the Supreme Court's *Atkins* decision is "mental retardation" rather than "intellectual disability." However, due to the pejorative nature of this term, I have chosen to refrain from using it and instead adopt the language "intellectual disability" in its place throughout this Note.

12 536 U.S. 304 (2002).

13 *See id.* at 317 ("[W]e leave it to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." (second and third alterations in original) (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986))).

14 543 U.S. 551 (2005).

15 DeMatteo & Lankford, *supra* note 10.

16 536 U.S. at 306.

17 *Id.* at 316.

18 543 U.S. at 569–70.

Atkins, but also for juveniles.[19] Accordingly, the Court held that imposition of the death penalty upon those under the age of eighteen at the time of the offense committed violates the Eighth and Fourteenth Amendments to the U.S. Constitution.[20]

B. Atkins, Roper, and Equal Protection Jurisprudence

Although the *Atkins* court did not specifically conduct an equal protection analysis in its majority opinion, it declared that the execution of individuals with intellectual disabilities violates the Eighth Amendment's prohibition against cruel and unusual punishment.[21] The *Roper* court identified that the Eighth Amendment applies to the states through the Fourteenth Amendment.[22] Thus, the Supreme Court's decisions in *Atkins* and *Roper* implicate equal protection concerns despite their lack of detailed equal protection analyses. The Equal Protection Clause of the Fourteenth Amendment provides, in relevant part, that no state may "deny to any person within its jurisdiction the equal protection of the laws."[23] The Supreme Court has interpreted this clause as prohibiting disparate treatment among "similarly situated" individuals.[24] However, the Court has not forbidden all types of disparate treatment.[25] States may treat various classes of individuals differently, but only so long as such treatment is "reasonably related" to the objective of the statute.[26] Such discrepancy in treatment

19 *Id.* at 564.
20 *Id.* at 578.
21 536 U.S. at 321.
22 543 U.S. at 560.
23 U.S. CONST. amend. XIV, § 1.
24 *See* Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding that a state statute banning contraception for unmarried persons but not married persons violated the Equal Protection Clause of the Fourteenth Amendment because it provided different treatment among individuals who were similarly situated).
25 *Id.* at 446–47.
26 *Id.* at 447. This language refers to "rational basis scrutiny." Although the Supreme Court uses heightened levels of scrutiny to assess equal protection claims in cases where individuals are members of a "protected class," individuals with serious mental illness do not explicitly fall into this category. For a particular social group to qualify as a "suspect" or "quasi-suspect" class that receives heightened protection, the group must generally "(1) constitute[ ] a discrete and insular minority; (2) [ ] suffer[ ] a history of discrimination; (3) [be] politically powerless; (4) [be] defined by an immutable trait; and (5) [be] defined by a trait that is generally irrelevant to one's ability to function in society." Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 742 (2014). Forms of heightened scrutiny for members of suspect or quasi-suspect classes include "intermediate scrutiny" and "strict scrutiny." *See* United States v. Virginia, 518 U.S. 515, 515–16, 533, 567 (1996) (explaining that states who treat individuals differently upon the basis of sex must satisfy the standard for intermediate scrutiny, which

based upon an individual's characteristic must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[27] In *Heller v. Doe*, the Court found that the standard of proof and procedures for commitment of individuals with intellectual disabilities may differ from those for individuals with mental illness if the state has a "rational basis" for such distinctions, which typically permits any plausible reason to justify differential treatment.[28] However, in *City of Cleburne v. Cleburne Living Center, Inc.*,[29] the Court insinuated that "something more than [ ] rational basis" is required for states to maintain legislation that discriminates against individuals with mental disabilities.[30] The *Cleburne* court did not classify individuals with intellectual disabilities as a suspect or quasi-suspect class for equal protection purposes (which would, consequently, entitle these individuals to a heightened level of protection).[31] The Court disagreed with the application of a heightened level of scrutiny, finding that the factors that had led it to apply strict scrutiny to other classifications were not prevalent in the case of intellectual disability.[32] Furthermore, the Court expressed apprehension that if it were to grant quasi-suspect status to laws that discriminated against intellectually disabled individuals, it would be difficult to articulate a sound reasoning for refusing to extend the same status (along with the heightened scrutiny it necessitates) to broader ranges of classifications.[33] Nonetheless, the Court did grant relief to the plaintiffs, finding that an ordinance prohibiting group homes for intellectually disabled individuals in specific residential ar-

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requires an "exceedingly persuasive" justification for the classification that serves an "important governmental objective[ ]" that is "substantially related to the achievement of [that] objective[ ]"); Griswold v. Connecticut, 381 U.S. 479, 503–04 (1965) (White, J., concurring) (finding that the state failed to satisfy the "strict scrutiny" standard which requires a "compelling" government interest that "must be viewed in the light of less drastic means for achieving the same basic purpose," thereby striking down a statute banning married couples from purchasing contraceptives).

27 405 U.S. at 447 (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

28 509 U.S. 312, 320 (1993) (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993)); Christopher Slobogin, *Mental Illness and the Death Penalty*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 667, 668 (2000).

29 473 U.S. 432 (1985).

30 Slobogin, *supra* note 28, at 668.

31 *Id.*

32 Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 KY. L.J. 591, 610 (2000).

33 *Id.*; *see* 473 U.S. at 446.

eas but permitting comparable group home settings—such as boarding houses, fraternities and sororities, apartment hotels, and nursing homes—for able-bodied individuals in the same residential areas violated the Equal Protection Clause of the Fourteenth Amendment.[34] This is an outcome that does not generally occur in equal protection jurisprudence that strictly applies the rational basis standard.[35] This result has led several legal commentators to the conclusion that *Cleburne* demonstrates that state legislators must satisfy a standard akin to "rational basis with a bite" to prevail in equal protection litigation discriminating against individuals with a mental disability.[36] In "rational basis with a bite" cases, courts need not create nor offer justifications for a law, but "should ensure that the law is not a pretextual exercise of the government's power."[37] Application of the "rational basis with a bite" standard is triggered when a statute discriminates against a particular group or classification that approaches, but does not fully reach, quasi-suspect status and implicates substantial fundamental rights.[38] The *Cleburne* court described this version of rational basis review as one that "affords [the] government the latitude necessary both to pursue policies designed to assist the [intellectually disabled] in realizing their full potential, and to freely and efficiently engage in activities that burden the [intellectually disabled] in what is essentially an incidental manner."[39] Utilizing this "heightened" form of rational basis review, courts examine the purported rationales behind a statute and declare it unconstitutional if it fails to serve a "legitimate [] interest," thus preventing governments from discriminating against certain groups merely because they are

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34 473 U.S. at 449–50; Slobogin, *supra* note 28, at 668.

35 Slobogin, *supra* note 28, at 668.

36 *Id.* (internal quotation marks omitted); *see also* Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 795–96 (1987) (arguing that despite the Court's refusal to apply intermediate scrutiny, it suggested that states must satisfy something stronger than a rational basis test to justify discrimination in cases involving individuals with mental disabilities). As support for her assertion, Pettinga cites the *Cleburne* court's argument that it would "take a closer look at the proffered justifications" as well as its citation to *Zobel v. Williams*, a case that involved stricter scrutiny than traditional rational basis review. *Id.*

37 Munir Saadi, *Neighbor Opposition to Zoning Change*, 49 URB. LAW. 393, 402 (2017) (quoting Timothy Sandefur, *Equality of Opportunity in the Regulatory Age: Why Yesterday's Rationality Review Isn't Enough*, 24 N. ILL. U.L. REV. 457, 477 (2004)).

38 *Id.* at 402–03.

39 *Id.* at 404 (quoting 473 U.S. at 446) (first alteration in original).

politically unpopular.[40] Accordingly, state legislators must offer *good* reasons, not merely *plausible* ones, for a legal framework that discriminates against some individuals with a particular characteristic, but not others.[41]

C. Challenges with Categorical Exemptions: Atkins as an Illustration

When the Supreme Court established a categorical exemption from the death penalty for individuals with intellectual disability in *Atkins*, the Court's decision to refrain from defining this term and leave its interpretation to the states resulted in a "perverse incentive for states to define the class too narrowly," thereby implicating equal protection issues.[42] Since state courts and legislatures wish to evade being overturned upon appellate review, many states define "intellectual disability" by utilizing very specific standards that are easily satisfied and readily in line with *Atkins*.[43] Nita A. Farahany asserts that the Court's approach of adopting a medical term as a dispositive basis for a legal classification is erroneous because "intellectual disability" operates merely as a "linguistic quirk."[44] Adults who have experienced losses in adaptive functioning as a result of an accident, illness, infection, or disease have not been "intellectually disabled" since their births, but they, nonetheless, possess diminished cognitive, behavioral, or adaptive capabilities.[45] This loss in function is an example of *diminution* or *regression*, rather than inherent disability.[46] Thus, Court's linguistic labels for these individuals differentiates them from intellectually disabled individuals based upon "language, diagnosis, and treatment, rather than legal criteria about their relative culpability."[47] The American Psychological Association has expressed apprehension regarding this practice:

> [w]hen the DSM-IV categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law

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40 *Id.* at 402; Sandefur, *supra* note 37, at 475–76.
41 Slobogin, *supra* note 28, at 668.
42 Nita A. Farahany, *Cruel and Unequal Punishments*, 86 WASH. U.L. REV. 859, 880 (2009).
43 *Id.* at 885.
44 *Id.*
45 *Id.*
46 *Id.*
47 *Id.*

> and the information contained in a clinical diagnosis. . . . In determining whether an individual meets a specified legal standard (e.g., for competence, criminal responsibility, or disability), additional information is usually required beyond that contained in the DSM-IV diagnosis.[48]

Consequently, the Association contends, courts' adherence to rigid legal standards based upon medical terminology results in unequal treatment among similarly situated individuals.[49]

Despite the American Psychological Association's admonitions, courts have continued to utilize medical frameworks to formulate criteria for legal culpability. As the Association predicted, this practice has resulted in arbitrary treatment among individuals with similar cognitive and behavioral impairments.[50] For instance, the Louisiana Supreme Court found that Gregory Brown, an individual who suffered a traumatic brain injury at the age of twenty-two, was eligible for the death penalty after committing a double homicide even though Brown's injury had caused significant damage to his right frontal lobe and temporal regions of his brain.[51] At trial, Brown offered persuasive expert testimony that his cognitive, behavioral, and adaptive functioning levels met the Court's criteria for exemption from the death penalty.[52] However, the Court rejected Brown's claim, finding that although Brown had decreased cognitive, behavioral, and adaptive functioning, the onset of intellectual disability must occur before the age of eighteen years.[53] In contrast, a twenty-two-year-old with an intellectual disability since birth accused of the same crime would be exempt from the death penalty under the standards articulated in *Atkins* and its progeny.[54] The case of Gregory Brown brings the American Psychological Association's concerns to fruition by illustrating the problems with reliance on strict medical criteria to define categorical exemptions. Through this practice, courts invite unequal treatment among similarly situated individuals that creates tension between the Eighth and Fourteenth Amendments.[55]

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48 *Id.* at 885–86.

49 *Id.* at 885.

50 *Id.*

51 State v. Brown, 907 So. 2d 1 (La. 2005); Farahany, *supra* note 42, at 860–61.

52 Farahany, *supra* note 42, at 861.

53 *Id.* (quoting *Brown*, 907 So. 2d at 31).

54 *Id.* at 863.

55 *Id.* at 861.

D. Defining "Serious Mental Illness" in Proposed State Legislation

The Supreme Court's viewpoint articulated in *Atkins* and *Roper* that specific categories of individuals are less morally culpable than others has influenced legislators in several states to introduce bills that would exempt individuals with certain serious mental illnesses from receiving the death penalty.[56] A handful of states contemplating this legislation continue to utilize a "diagnosis-focused approach" despite evidence that such a practice can result in disparate treatment between similarly situated individuals.[57] Developing criteria to determine which diagnoses qualify as "serious mental illnesses," some state bills have adopted language closely mirroring that of the Model Penal Code's "Insanity Defense."[58] State legislatures have also consulted the expertise of psychologists and definitions of serious mental illness as expressed by the Diagnostic and Statistical Manual of Mental Disorders ("DSM").[59] Legislation proposed in Indiana includes serious mental illnesses such as schizophrenia and other psychotic disorders, bipolar disorder, major depressive disorder, delusional disorder, post-traumatic stress disorder, and traumatic brain injury.[60] The bill explicitly excludes disorders that are "manifested primarily by repeated criminal conduct (such as antisocial personality disorder)" or by the voluntary consumption of alcohol or drugs because the legislature still deems these individuals morally culpable.[61] Other states, such as Ohio, have taken a narrower approach, only permitting individuals with four mental disorders (schizophrenia, schizoaffective

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56 *At Least Seven States Introduce Legislation Banning Death Penalty for People with Severe Mental Illness*, *supra* note 6.

57 Erin Hanson, *Cruel and Unusual: The Constitutional Requirement for Heightened Protections for Defendants with Severe Mental Illness in Capital Cases*, 57 IDAHO L. REV. 299, 313 (2021).

58 *Compare* Paul H. Robinson & Tyler Scot Williams, *Mapping American Criminal Law: Variations Across the 50 States: Ch. 14 Insanity Defense*, FAC. SCHOLARSHIP. PENN L. 1, 3 (2017) (stating that an individual is not criminally liable if at such time of the offense they "*lack[ed] substantial capacity* either to appreciate the criminality [wrongfulness] of his conduct or to conform [their] conduct to the requirements of law") *with* H.B. 136, 133d Gen. Assemb. (Ohio 2021) (explaining that individuals with a serious mental illness as defined by this bill are not eligible for the death penalty if they were not capable of "conforming [their] conduct to the requirements of the law [or] [a]ppreciating the nature, consequences, or wrongfulness of [their] conduct").

59 DeMatteo & Lankford, *supra* note 10.

60 *Id.* Note that this bill did not advance through the Indiana Senate Judiciary Committee, but it could still be reintroduced.

61 *Id.*

disorder, bipolar disorder, and delusional disorder) to obtain relief from the death penalty.[62]

The American Bar Association (ABA) likewise adopts a categorical approach to death penalty exemptions and has also relied on the DSM to define "severe mental illness" as "disorders that mental health professionals would consider the most serious."[63] However, the ABA's approach encompasses a wider variety of diagnoses than some proposed pieces of state legislation, as it includes schizophrenia, psychotic disorders, mania, major depressive disorder, and dissociative disorder.[64] The ABA places an emphasis upon these disorders, in particular, because of their ability to cause substantial disturbances in consciousness, memory, or perception.[65] The ABA's categorical approach to exemptions focuses less on concrete diagnoses, but rather upon the presence of active symptoms at the time of the offense committed.[66] Their recommendation provides that a qualifying disorder should "significantly impair cognitive or volitional functioning at the time of the offense" to guarantee that the exemption only applies to individuals who are "less culpable" than most individuals who commit capital offenses.[67] Some states, such as Virginia,[68] have followed the ABA's approach and proposed defining serious mental illness as exhibition of active psychotic symptoms that substantially impair a person's capacity to: "(a) [ ] appreciate the nature, consequences[,] or wrongfulness of [the person's] conduct[;] (b) [ ] exercise rational judgment in relation to [the person's] conduct[;] or (c) [ ] conform [the person's] conduct to the requirements of the law."[69] This emphasis upon symptoms, as opposed to diagnoses, extends protection to a larger number of individuals with a greater array of mental illnesses.[70] For instance, this standard would protect those living with personality disorders, even though legislators typically do not perceive personality disorders to be as serious as other diagnoses, such

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62 H.B. 136, 133d Gen. Assemb. (Ohio 2021).

63 *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668, 670 (2006) [hereinafter "ABA Report"].

64 *Id.*

65 Hanson, *supra* note 57, at 313–14.

66 *Id.* at 314.

67 *Id.* (quoting ABA Report, *supra* note 63, at 671).

68 Note that Virginia subsequently abolished the death penalty altogether in March 2021 with the passage of House Bill 2263. *See* O'Connell, *supra* note 6.

69 ABA Report, *supra* note 63, at 668.

70 *Id.* at 671.

as schizophrenia.[71] Individuals with personality disorders can still exhibit symptoms of delusion or psychosis during periods of stress and should, accordingly, receive the same protections as people with schizophrenia and other psychotic disorders.[72]

II
ANALYSIS

A. The Categorical Approach to Serious Mental Illness Exemptions: Equal Protection and Feasibility Concerns

Although a diagnosis-based categorical approach to exemption for seriously mentally ill individuals would be beneficial in terms of predicting who will likely be exempt from the death penalty, it could also give rise to equal protection challenges. The Supreme Court has recognized that a categorical approach to exemptions that impact equal protection jurisprudence can be flawed because the targeted demographic that a statute or judicial ruling intends to protect may be either underrepresented or overrepresented by the categorical distinction.[73] The *Roper* court acknowledged the validity of criticism regarding its decision to draw the line of exemption from the death penalty at adolescents who were under eighteen years of age at the time of their offense.[74]

Nevertheless, the *Roper* court determined that "a line must be drawn" and that "[t]he age of [eighteen] is the point where society draws the line for many purposes between childhood and adulthood . . . [and is] the age at which the line for death eligibility ought to rest."[75]

Although the Supreme Court opined that a categorical exemption for intellectually disabled individuals was appropriate in *Atkins*[76] (with states determining for themselves what constitutes an "intellectual disability") such a framework may not as easily apply to death penalty exemptions based upon seri-

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71 *Id.*

72 *Id.*

73 *See* Roper v. Simmons, 543 U.S. 551, 574 (2005).

74 *See id.* ("Drawing the line at [eighteen] years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns [eighteen]. By the same token, some under eighteen have already attained a level of maturity some adults will never reach.").

75 *Id.*

76 Atkins v. Virginia, 536 U.S. 304, 316 (2002) (opining that individuals with intellectual disabilities are "categorically less culpable than the average criminal").

ous mental illness. A diagnosis-based categorical exemption would not safeguard all seriously mentally ill individuals from the death penalty, as its under-inclusivity would ultimately fail to protect some individuals who experience symptoms of delusion and psychosis but lack an appropriate diagnosis.[77] Furthermore, such an approach could open itself up to equal protection challenges. For example, Ohio's House Bill 136 permits exemptions only for individuals with diagnoses of schizophrenia, schizoaffective disorder, bipolar disorder, and delusional disorder.[78] The ABA identifies, however, that some conditions that are not classified as psychotic or dissociative disorders can be equally as "severe" on rare occasions.[79] Individuals with personality disorders may, at times, experience more drastic dysfunction, and those with borderline personality disorder can experience "psychotic-like symptoms during times of stress."[80] Thus, individuals with serious mental illnesses that fall outside the scope of Ohio House Bill 136's four permissible categories but who suffer from analogous symptoms could be deemed "similarly situated" to those who do fall within these exempted categories. If an individual with a mental disorder falling outside of House Bill 136's four categories were to bring an equal protection claim, Ohio's state legislature would need to satisfy the "rational basis with a bite" standard in *Cleburne* to justify disparate treatment between those diagnosed with these four specified disorders and those who experience comparable symptomology but have not been diagnosed with one of the four specified disorders.[81] This would require the state legislature to provide not merely a *plausible* reason for the discrimination, but a *good* reason.[82] It is unlikely that the state could proffer such a reason because the legislative intent behind the bill aims to absolve individuals who are less morally culpable from the most severe of punishments, and an individual who does not have a diagnosis but has a "significantly impaired . . . capacity to exercise rational judgment in relation to [their] conduct" in reference to either "[c]onforming [their] conduct to the requirements of law" or in "[a]ppreciating the nature, consequences, or wrongfulness of [their] conduct" is just as blameless as someone who has a

77 Hanson, *supra* note 57, at 314.

78 H.B. 136, 133d Gen. Assemb. (Ohio 2021).

79 ABA Report, *supra* note 63, at 671.

80 *Id.*

81 Slobogin, *supra* note 28, at 668; Pettinga, *supra* note 36, at 795–96.

82 Pettinga, *supra* note 36, at 795–796.

diagnosis.[83] Consequently, it is likely that capital defendants who suffer from symptoms of delusion or psychosis but have not had a definitive diagnosis of schizophrenia, schizoaffective disorder, bipolar disorder, or delusional disorder could bring a successful equal protection claim. However, due to House Bill 136's non-severability clause that would render the entire bill void in the face of a successful constitutional challenge, it is unlikely that many attorneys would be willing to bring an equal protection claim out of a desire to keep the bill available to individuals who do have these diagnoses.[84] Thus, states hoping to adopt bills resembling House Bill 136 should consider expanding their definition of "serious mental illness" beyond the scope of four pre-determined classifications.

States still favoring a categorical approach could adopt the ABA's "symptom-based" approach (as opposed to Ohio's "diagnosis-based" approach) without opening themselves up to potential equal protection violations.[85] This approach would not apply different treatment to individuals based upon diagnosis, is better suited at maintaining the legislative intent of protecting those with diminished moral culpability, and would protect a greater scope of people.[86] Nevertheless, aside from equal protection issues, even a symptom-based categorical approach to serious mental illness exemptions presents feasibility concerns. Professors John H. Blume and Sheri Lynn Johnson specifically reject a categorical approach for individuals with "psychotic disorders" for two reasons.[87] First, there is no means of creating an "evolving standard of decency" banning the execution of persons with such disorders (as there was in *Atkins* and *Roper*) because no judicial opinions or state statutes address the issue in these terms, and there is no simple manner by which to approximate the number of individuals with these conditions who have been sentenced to death or executed.[88] The known number of individuals in the criminal system who suffer from these disorders may also be underrepresented or otherwise inaccurate because disorders like schizophrenia are often not diagnosable at the time of the offense committed.[89] Since the onset of schizophrenia's symp-

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83 H.B. 136, 133d Gen. Assemb. (Ohio 2021).

84 *See id.*

85 *See* Hanson, *supra* note 57, at 314.

86 *Id.*

87 John H. Blume & Sheri Lynn Johnson, *Killing the Non-Willing:* Atkins, *the Volitionally Incapacitated, and the Death Penalty*, 55 S.C. L. REV. 93, 133 (2003).

88 *Id.*

89 *Id.*

toms parallel symptoms of other personality disorders, individuals are frequently misdiagnosed.[90] Additionally, schizophrenia's diagnostic criteria require that the individual experience active phase symptoms for at least one month and have the illness for at least six months.[91] Thus, schizophrenia diagnoses are often missed during the period of time after the onset of symptoms preceding the six-month mark due to insufficient medical information about the individual.[92] This inadequacy in information is usually attributable to the fact that many people do not have the resources or appropriate living situations prone to generating accurate reports regarding their mental states.[93] All of these factors hinder the development of an evolving standard against executing people with serious mental illnesses. Furthermore, Professors Johnson and Blume identify a second issue with the categorial approach: there may be difficulty in proving that the individual's mental illness had a "necessary nexus" to the offense committed.[94] While intellectually disabled individuals are always disabled, those with mental illness may conform their behavior to "socially acceptable" societal standards in some situations but may experience delusions or hallucinations in others.[95] Accordingly, defense counsel cannot merely assert that the individual's mental disorder was the cause of the offense. Rather, defense counsel must offer evidence of an actual nexus between the mental disorder and the crime committed, which can be challenging.[96] Professors Blume and Johnson explain that this predicament is reminiscent of issues underlying the District of Columbia Circuit's *Durham* rule.[97] This standard found that "an accused is not criminally responsible if his unlawful act was the product of mental disease or defect."[98] The D.C. Circuit favored this rule because it allowed psychiatrists to testify in an open and honest manner regarding the accused's mental illness.[99] However, one shortcoming of this standard was that the expert

90 *Id.*
91 *Id.*
92 *Id.*
93 *Id.*
94 *Id.* at 133–34.
95 *Id.* at 134.
96 *Id.*
97 *Id.*; *see* Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), *overruled by* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (en banc). The D.C. Circuit followed the *Durham* rule for nearly twenty years.
98 Blume & Johnson, *supra* note 87, at 134 (quoting *Durham*, 214 F.2d at 874–75).
99 *Id.*

testimony of the psychiatrist frequently became determinative of the trial's outcome, thereby frustrating the jury's purpose.[100] This also created unpredictable verdicts based upon ever-changing medical standards.[101] For instance, one psychiatrist testified on a Friday afternoon that the accused was not mentally ill but altered his testimony on Monday morning exclaiming that the accused was, in fact, mentally ill because the hospital where the psychiatrist practiced had decided over the weekend to classify "psychopathic personality" as a mental disease.[102] Such changes that may be appropriate in the discipline of psychiatry are not necessarily appropriate in the field of law.[103] State legislators considering serious mental illness exemptions from the death penalty should, therefore, contemplate standards that reach beyond categorical approaches that are heavily reliant upon psychiatric diagnoses and classifications.

B. Legislative Solutions

Since diagnosis-based categorical serious mental illness exemptions present several well-founded concerns and could give rise to equal protection challenges, states contemplating this type of legislation should consider alternate approaches. The Supreme Court does not specify a favored procedural method in regard to proportionality jurisprudence.[104] However, the procedures for determining death eligibility as it pertains to serious mental illness should honor the Eighth Amendment's underlying values of "accuracy and proportionality."[105] The process should also consider practical matters such as "efficiency, cost, and therapeutic jurisprudence."[106] One justice has offered a categorical approach to serious mental illness that avoids overreliance upon psychiatric diagnoses.[107] In *State v. Nelson*,[108] Justice Zazzali adopted an *I know it when I see it* approach to defining exemptions for seri-

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100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.*

104 Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 848 (2009).

105 *Id.*

106 *Id.* at 848–49 & n.439 ("Therapeutic jurisprudence is an interdisciplinary field of legal research and law reform that focuses attention on the psychological well-being of those affected by law, legal processes, and how the law is applied.").

107 Blume & Johnson, *supra* note 87, at 134–35.

108 803 A.2d 1 (N.J. 2002) (Zazzali, J., concurring).

ous mental illness.[109] The accused in that case, Leslie Ann Nelson, was a transgender woman who suffered from "a long standing depression" and had "problems of social withdrawal, delusions, paranoia, and schizoid and borderline personality disorders."[110] When police came to arrest her, Nelson shot and killed one police officer and wounded another because she did not want to go to jail where she would lose possession of her guns (which she perceived as her surrogate children) and would be unable to maintain certain gender-affirming aspects of her appearance.[111] Justice Zazzali, declining to exempt a specific class, supported reversal of the death penalty in Nelson's case, exclaiming "[m]y approach is specific to Nelson and based on her specific set of psychological problems and her conditions during the circumstances of her crimes."[112] Justice Zazzali's *I know it when I see it* approach does alleviate overdependence upon psychiatric diagnoses and testimony, but it also presents issues of predictability regarding who will likely receive exemptions from the death penalty. Professors Blume and Johnson assert that state constitutional law could handle such a cumbersome test, but that this approach would, nonetheless, be incompatible with existing Eighth Amendment jurisprudence.[113] Accordingly, Professors Johnson and Blume assert that legislators should look toward a definition that is consistent with Eighth Amendment values of "accuracy and proportionality" while also avoiding overreliance on medical diagnoses.[114]

Another potential solution has been offered by Professor James W. Ellis, who recommends two alternatives for statutory language regarding exemptions for individuals with intellectual disability that could also apply to individuals with serious mental illness. Ellis's "Alternative A" would examine the issue of death eligibility through a modified bifurcated process.[115]

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109 Blume & Johnson, *supra* note 87, at 134–35.

110 *Id.* at 135 (quoting 803 A.2d at 45–46).

111 *Id.*; 803 A.2d at 9, 50.

112 803 A.2d at 49 (Zazzali, J., concurring).

113 Blume & Johnson, *supra* note 87, at 135.

114 *Id.*; Winick, *supra* note 104, at 848.

115 James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 16 (2003). All capital cases consist of bifurcated proceedings in which the court first conducts a trial to determine the accused's guilt or innocence. If the accused is convicted, the litigation proceeds to a separate penalty phase. During the penalty phase, prosecution and defense counsel present evidence to the jury regarding aggravating and mitigating circumstances and the jury must recommend a sentence of either life or death. *See* Winick, *supra* note , at 848.

Ellis's approach, unlike current bifurcated proceedings, would permit the accused to raise the issue of death eligibility prior to any determination of guilt or innocence. Under Alternative A, the court would first hold a pretrial hearing before the trial judge permitting defense counsel to raise the issue of death eligibility on account of serious mental illness.[116] At this stage, the accused would bear the burden of persuasion by a preponderance of the evidence, and it is likely that most cases would be settled.[117] Second, in the event that the trial judge's finding is adverse to the accused, defense counsel could likewise present the issue before the trial jury.[118] A similar model has been endorsed by the Supreme Court in *Jackson v. Denno*, a case examining the admissibility of confessions, and could just as readily apply to death penalty exemptions.[119] Although some state legislators may perceive such a process as unfair because it gives the accused "two bites at the apple," Ellis asserts that this framework is appropriate because it is designed to address two distinct questions.[120] First, the judge addresses the *legal* issue pertaining to the individual's death eligibility.[121] Second, the jury assesses whether the prosecution has *factually* established that the accused is a person upon whom the death penalty may be imposed.[122] Ellis recommends that states adopting Alternative A utilize the following statutory language:

> If defense counsel has a good faith belief that the defendant in a capital case has [symptoms of a serious mental illness], counsel shall file a motion with the court, requesting a finding that the defendant is not death-eligible because of [symptoms of serious mental illness] . . . . Upon receipt of such motion, the trial court shall conduct a hearing for the presentation of evidence regarding the defendant's possible [symptoms of serious mental illness]. Both the defense and the prosecution shall have the opportunity to present evidence, including expert testimony. After considering the evidence, the court shall find the defendant is not death-eligible if it finds, by a preponderance of the evidence, that the defendant has [symptoms of a serious mental illness] . . . . If the court finds that [the] defendant is death-eligible, the case may pro-

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116 Ellis, *supra* note 115, at 16.

117 *Id.*

118 *Id.*

119 *Id.*; *see also* 378 U.S. 368 (1964) (finding that Jackson was entitled to a state court hearing regarding the voluntariness of his confession conducted by a different entity than the one determining his guilt or innocence).

120 Ellis, *supra* note 115, at 16.

121 *Id.*

122 *Id.*

> ceed as a capital trial. The jury shall not be informed of the prior proceedings or the judge's findings concerning the defendant's claim of [symptoms of a serious mental illness].[123]

Ellis's "Alternative B" also adopts a bifurcated model, but the pretrial determination of the accused's death eligibility in the first stage would be conducted before a jury specially empaneled to address the issue instead of the trial judge.[124] Unlike the proceedings in Alternative A, the prosecution would bear the burden of persuasion beyond a reasonable doubt that the accused is death-eligible.[125] Ellis recommends that states adopting Alternative B utilize the following statutory language:

> If defense counsel has a good faith belief that the defendant in a capital case has [symptoms of a serious mental illness], counsel shall file a motion with the court, requesting a finding that the defendant is not death-eligible because of [symptoms of serious mental illness] . . . . Upon receipt of such a motion, the trial court shall conduct a hearing for the presentation of evidence regarding the defendant's possible [symptoms of serious mental illness]. *The hearing shall be conducted before a jury, which shall be specially empanelled* [sic] *for this issue only.* Both the defense and the prosecution shall have the opportunity to present evidence, including expert testimony. After considering the evidence, the jury shall be asked, by special verdict, "Do you unanimously find, beyond a reasonable doubt, that the defendant does not have [symptoms of a serious mental illness]?" If the jury finds, beyond a reasonable doubt, that the defendant does not have [symptoms of a serious mental illness], the case may be certified for a capital trial. *Such a trial shall be conducted before a separate jury.* The trial jury shall not be informed of the prior proceedings or the findings concerning the defendant's claim [regarding symptoms of severe mental illness].[126]

Under Alternative B, an individual who is deemed death-eligible by the pretrial jury would not have the chance to relitigate the issue of death eligibility in the second stage of proceedings.[127] However, the accused would still be permitted to raise the issue of serious mental illness at trial as it pertains to any issue that may be relevant and would also be permitted to offer evidence of serious mental illness as mitigation in the event of conviction.[128]

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123 *Id.* at 17.
124 *Id.* at 16.
125 *Id.*
126 *Id.* at 17 (emphases added).
127 *Id.* at 16.
128 *Id.*

Evaluating the differences between these two approaches, I recommend that state legislatures consider adopting Ellis's Alternative A over Alternative B for two reasons. First, Alternative A is more favorable to accused individuals because it allows two opportunities to address the issue of death eligibility. Second, Ellis identifies Alternative A as the "more economical approach" because it incorporates the costs of only one jury proceeding rather than two.[129] This characteristic makes the adoption of such a standard more appealing to state legislatures, as it would ultimately be more feasible to implement. Although Alternative A could be more time-consuming for courts than a diagnosis-based categorical approach to serious mental illness exemptions, it could ensure a fairer fact-finding procedure for individuals with serious mental illness potentially facing execution and provide opportunities for those with diagnoses that extend beyond psychotic disorders to receive relief from death eligibility.[130]

Professor Bruce J. Winick likewise contends that a pretrial determination regarding death eligibility made by the trial judge (rather than by a specially empaneled jury) is the optimal approach to serious mental illness exemptions for several reasons.[131] First, the process of capital jury selection contains procedural biases that result in juries composed of individuals who favor capital punishment.[132] Second, capital juries who reach the penalty phase of bifurcated proceedings are biased because they have already heard the facts of the case at the

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129 *Id.*.

130 While Alternative A may seemingly resemble the *Durham* rule and Justice Zazzali's "I know it when I see it" approach, I contend that Alternative A could be implemented in a manner that differs from these two standards. First, Alternative A can be distinguished from the *Durham* rule because the accused need not be definitively diagnosed with a disorder that is classified as a "serious mental illness." Rather, it is sufficient that the trial judge finds by a preponderance of the evidence that the accused exhibits *symptoms* of a serious mental illness. Second, Alternative A can be distinguished from the "I know it when I see it" approach because the modified bifurcated proceeding offers the accused the opportunity to present evidence of death ineligibility *prior* to a determination of guilt or innocence. The accused also has two opportunities to present this evidence: first, before the trial judge, and second, if an adverse determination is made, before the jury. Note, however, that Alternative A could still implicate some of the predictability concerns voiced by Professors Blume and Johnson in response to the "I know it when I see it" approach. *See* Blume & Johnson, *supra* note 87, at 135.

131 Winick, *supra* note 104, at 849.

132 *Id.*; *see generally* Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L. J. 769, 775–78 (2006) (describing the process of "death qualification," during which individuals who vehemently oppose the death penalty are stricken from the jury and identifying death qualification's ability to skew juries in favor of the prosecution and application of the death penalty).

guilt/innocence stage and have made an adverse determination against the accused.[133] These juries have a tendency to misinterpret or neglect their role in contemplating mitigating evidence.[134] Furthermore, jurors may misunderstand evidence regarding the accused's mental illness and its impact upon their functioning, may inaccurately liken mental illness with future dangerousness, and may erroneously perceive the death penalty as the only means by which to protect the community from the accused's possible future violence.[135] Winick opines that a trial judge is less susceptible to these types of biases and misunderstandings, is better able to comprehend clinical testimony, and is better equipped to decide the legal issue in question.[136] Consequently, Winick asserts that Eighth Amendment values would be advanced by having the issue of death eligibility determined at a pretrial judicial hearing, but would be frustrated by permitting the question to be decided by a capital jury.[137]

CONCLUSION

Supporting the contention expressed by the Supreme Court in *Atkins* and *Roper* that particular categories of individuals are less "morally culpable" than others, legislators in several states have proposed bills that would exempt individuals with certain serious mental illnesses from receiving the death penalty.[138] Ohio's recently implemented House Bill 136 became the first such piece of legislation to categorically exempt individuals with specific serious mental illnesses from death eligibility, and several other states have introduced similar bills.[139] Legislation premised solely upon a diagnostic-based categorical approach to exemption, though predictable in

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133 Winick, *supra* note 104, at 850; *see* 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, 1019 (2001) ("[M]any [jurors] are firmly convinced of their decision about punishment, particularly that the sentence should be death, before the penalty phase of the trial has even begun. . . . [T]he same inability, or unwillingness, to keep the decisions separate appears to allow jurors to justify a death sentence simply by pointing to evidence of the defendant's guilt.").

134 Winick, *supra* note 104, at 850.

135 *Id.*

136 *Id.*

137 *Id.*

138 *At Least Seven States Introduce Legislation Banning Death Penalty for People with Severe Mental Illness*, *supra* note 6.

139 H.B. 136, 133d Gen. Assemb. (Ohio 2021); *At Least Seven States Introduce Legislation Banning Death Penalty for People with Severe Mental Illness*, *supra* note 6.

terms of determining who will be ineligible for death, presents equal protection and feasibility concerns.[140] Diagnosis-based categorical exemptions ultimately do not shield all seriously mentally ill individuals from the death penalty because they are underinclusive, thereby failing to protect some individuals who experience symptoms of delusion and psychosis but lack an appropriate diagnosis.[141] This implicates equal protection issues, as people with serious mental illnesses or symptoms that fall outside the scope of a state legislature's definition of "serious mental illness" could be deemed "similarly situated" to those who do fall within these categories. State legislatures that wish to maintain this distinction without violating the Equal Protection Clause of the Fourteenth Amendment must satisfy the "rational basis with a bite" standard articulated in *Cleburne* to justify disparate treatment between individuals diagnosed with specific disorders and those who experience comparable symptomology but lack diagnoses.[142] This would require state legislatures to present a *good* reason, and not merely a *plausible* one, for discriminatory treatment.[143] Since the legislative intent behind these bills seeks to absolve individuals who are less morally culpable from the death penalty and a person who does not have a diagnosis but experiences similar symptoms is arguably just as blameless, it is unlikely that states can justify different treatment between these classes of individuals. States may also consider adopting "symptom-based" (as opposed to diagnosis-based) categorical exemptions from the death penalty that could safeguard them from equal protection litigation, but this approach presents feasibility concerns. Such issues include that there is no "evolving standard of decency" banning the execution of persons with psychiatric disorders (as there was in *Atkins* and *Roper*) and that there may be difficulty in proving that the individual's mental illness had a "necessary nexus" to the offense committed.[144] Accordingly, state legislatures should look toward other non-categorical solutions to implementing exemption bills.

I recommend that states contemplating this legislation adopt Professor Ellis's "Alternative A," which would create modified bifurcated proceedings to establish death ineligibility prior to any determination of guilt or innocence.[145] This ap-

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140 *See supra* subpart II.A.
141 Hanson, *supra* note 57, at 314.
142 Slobogin, *supra* note 28, at 668; Pettinga, *supra* note 36, at 795–96.
143 Pettinga, *supra* note 36, at 795–96.
144 Blume & Johnson, *supra* note 87, at 133–34.
145 Ellis, *supra* note 115, at 16.

proach would permit the trial judge to determine whether the accused has demonstrated evidence of symptoms of serious mental illness sufficient to establish death ineligibility by a preponderance of the evidence.[146] In the event of an adverse finding, the accused could also present evidence of these symptoms to the jury.[147] I believe that Alternative A is a preferable approach to the other options presented because it gives the accused two opportunities to address the issue of death eligibility and incorporates the costs of only one jury proceeding rather than two.[148] Although Alternative A may be more time-consuming than a diagnosis-based categorical approach to serious mental illness exemptions and could still implicate concerns about predictability, it would, nonetheless, ensure a fairer procedure for seriously mentally ill individuals facing capital punishment and provide opportunities for individuals with diagnoses and symptomologies that extend beyond psychotic disorders to obtain relief from death eligibility.

146 *Id.*
147 *Id.*
148 *Id.*