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And Death Shall Have No Dominion: How to Achieve the Categorical Exemption of Mentally Retarded Defendants from Execution

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"[D]oes the system accurately and consistently determine which defendants 'deserve' to die?"

—Justice Harry Blackmun ***

I. INTRODUCTION

Shortly after the Supreme Court of the United States handed down its opinion in *Atkins v. Virginia*, exempting mentally retarded capital defendants from execution,[1] the American Bar Association ("ABA") issued two legislative options for states to adopt in order to comply with the directive of *Atkins*.[2] Alternative A rec-

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* DYLAN THOMAS, AND DEATH SHALL HAVE NO DOMINION (1937), *reprinted in* THE POEMS OF DYLAN THOMAS 49–50 (Daniel Jones ed., 1971).

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This article arises from my past and current work as a capital defender. I could never have imagined or written this piece without the guiding hand of Professor Roger Groot. I have missed him at every step in the execution of this piece. I lift up my many thanks to him. Professor Penelope Pether's thoughtful contributions, particularly in the early stage of this work, were invaluable. I thank the Southeastern Association of Law Schools for accepting this paper in its junior scholars program and Professor Arnold Loewy for his valuable comments; Dean Phil Closius and the University of Baltimore for supporting this scholarship; my colleagues, Professors Dionne Koller, Nancy Modesitt, Kimberly Brown, and Margaret Johnson for their dedicated thinking about criminal law, which is well outside of their bailiwick; and Karen Woody.

*** Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

1. 536 U.S. 304 (2002).

2. James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, MENTAL & PHYSICAL DISABILITY L. REP., Jan.–Feb. 2003, at 11, 16–17; *see Atkins*, 536 U.S. at 317 ("'[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" (alteration in original) (quoting Ford v. Wainwright, 477 U.S. 399, 416–17 (1986))).

ommended that, upon notice from defense counsel that she had a good faith belief that her capital client was mentally retarded, the trial judge should conduct a pretrial hearing to determine if the defendant is mentally retarded and, thus, not death-eligible.[3] Alternative B recommended that, upon notice from defense counsel that she had a good faith belief that her capital client was mentally retarded, the judge should empanel a jury for the sole purpose of determining if the defendant is mentally retarded and, thus, not death-eligible.[4] By adopting either option, the mental retardation assessment would be kept away[5] from the death-qualified juror,[6] who might be inclined to ignore the core values of the criminal justice system and, more narrowly, the rationale in *Atkins*.[7] With either ABA-suggested procedure, the trial court could assure due process for the mentally retarded capital defendant.

The Virginia General Assembly actively rejected these reasonable recommendations from the ABA in favor of continuing to entrust the death-qualified jury with the mental retardation determination, effectively employing the same process that resulted in Daryl Atkins's original death sentence.[8] Virginia's post-*Atkins*

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3. Ellis, *supra* note 2, at 17.

4. *Id.*

5. I use the phrase "kept away" on purpose. Years of practice as a capital defender inform my opinion about the bias of death-qualified jurors, and scholars have doubts about the citizenry's ability to delve, unbiased, into a life or death assessment *after* hearing the evidence of guilt. *See* SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 177 (2005). In the abstract, I would put the question of determining mental retardation to the person or group best able to contemplate the objective facts that might support a finding of mental retardation, but I am more inclined to rely on the ability of the death-qualified judge to set aside his personal views and render an untainted or pretainted determination on mental retardation. While this article does not purport to engage with the extensive writings of John Rawls, I will note that I am, expressly, afraid of Rawls's "public sense of justice" because it could ignore the Eighth Amendment interpretation in *Atkins*. *See generally* JOHN RAWLS, A THEORY OF JUSTICE 496–504 (1971).

6. For a discussion of "death-qualified" juries, see *Lockhart v. McCree*, 476 U.S. 162, 173 (1986); *Wainwright v. Witt*, 469 U.S. 412, 416 (1985); and *Witherspoon v. Illinois*, 391 U.S. 510, 518 (1968). In order to sit on a capital jury panel, a potential juror must demonstrate that he is willing to sentence the defendant to death. *Witherspoon*, 391 U.S. at 522 n.21. Those jury candidates who express a categorical opposition to the death penalty are ineligible to sit on a capital jury panel. *Id.* The voir dire process used in selecting jurors for a capital trial is sometimes referred to as "death-qualifying" or "*Witherspoon*-ing" the jury panel. For more on the biases of the typical death-qualified juror, see *infra* Part IV.

7. Atkins v. Virginia, 536 U.S. 304, 318–19 (2002) (offering two rationales for its decision to exempt).

8. *See* VA. CODE ANN. § 19.2-264.4(B)(iv) (Cum. Supp. 2010) ("Facts in mitigation [of the offense] may include . . . at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to

method for determining mental retardation has not been reviewed by the Supreme Court of the United States, but Atkins's own journey through the capital punishment maze offers an example of the flaws in Virginia's procedure. Three different death-qualified jury[9] panels sentenced Daryl Atkins to death.[10] The first apparently disregarded the testimony that Atkins was "mildly mentally retarded" and the instruction that such evidence should be treated as a mitigating factor in the sentencing.[11] At the first resentencing, after a reversal from the Supreme Court of Virginia,[12] a new jury panel heard more complete and detailed evidence from Dr. Evan Nelson, who concluded that Atkins's full-scale IQ was fifty-nine, making him one of only two capital defendants out of over forty that he had tested, who qualified as mentally retarded.[13] In this resentencing hearing, the Commonwealth offered expert testimony from Stanton Samenow, who, without administering an intelligence test, concluded that Atkins was of "average intelligence, at least."[14] The second jury panel reconciled the con-

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the requirements of law was significantly impaired."). The Virginia General Assembly did add a statute explaining how the capital jury should assess the evidence of mental retardation, but it did not require the capital jury to make that determination independently from the overall mitigation assessment required by Virginia Code section 19.2-264.4. *See generally id.* § 19.2-264.3:1.1(B) (Cum. Supp. 2010). When read together, the two statutes imply that a finding of mental retardation could be viewed by the jury as a mere mitigator rather than as a "categorical exemption" to a death sentence. *See Atkins*, 536 U.S. at 315–16.

9. For a discussion of death-qualified juries, see *supra* note 6.

10. *See* Atkins v. Commonwealth, 534 S.E.2d 312, 314 (Va. 2000) (discussing the first two juries to sentence Atkins to death); Bill Geroux, *Death-Row Inmate Isn't Retarded, A Jury Rules*, RICHMOND TIMES-DISPATCH, Aug. 6, 2005, at A1 (discussing the third jury to sentence Atkins to death). Atkins's predecessor as the named defendant in the mental retardation and capital punishment debate, Johnny Paul Penry, has also been sentenced to death three times, by three different death-qualified jury panels. *See* Mike Tolson, *An End to a Legal Saga*, HOUS. CHRON., Feb. 15, 2008, at B1. Each of those juries ignored mitigating evidence that Penry's IQ was below seventy and that he had the intellectual functioning of a seven-year-old. Penry v. Lynaugh, 492 U.S. 302, 302 (1989); Tolson, *supra*. Like Atkins, Penry's life has been spared; though no death-qualified jury panel has ever spared his life, prosecutors agreed to a plea that resulted in Penry's life sentence. Tolson, *supra*.

11. *See* Atkins v. Commonwealth, 510 S.E.2d 445, 451–52 (Va. 1999).

12. *Id.* at 456–57 (reversing the penalty phase because the trial court used a misleading verdict form).

13. *See Atkins*, 536 U.S. at 309 n.5. ("[Atkins'] full scale IQ is 59. Compared to the population at large, that means less than one percentile. . . . Mental retardation is a relatively rare thing. It's about one percent of the population.").

14. *Id.* at 309 & n.6. Dr. Stanton Samenow has played an interesting role in capital prosecutions in Virginia, having been responsible for evaluating Percy Walton, whose death sentenced was commuted by Governor Tim Kaine after he found him mentally incompetent to be put to death. *See* Walton v. Johnson, 269 F. Supp. 2d 692, 694 (W.D. Va. 2003); Jerry Markon, *Va. Governor Commutes Death Sentence*, WASH. POST, June 10,

flicting testimony again, apparently disregarding the compelling evidence offered by the defense, and sentenced Atkins to death.[15]

Even after Atkins's case was returned to a jury panel for a third sentencing hearing—after the Supreme Court of the United States found that execution of a mentally retarded defendant violates the Eighth Amendment[16]—the third jury also apparently disregarded both the evidence of mental retardation and the jury instruction that a mentally retarded defendant should be categorically exempt from a death sentence, and sentenced Atkins to death.[17] The Supreme Court of Virginia reversed and remanded the case for a new sentencing hearing because of procedural flaws that resulted in the death-qualified jury finding that Atkins had failed to establish "significantly subaverage intellectual functioning" and "significant limitations in adaptive behavior."[18] This decision by the Supreme Court of Virginia did not reach review by the Supreme Court of the United States due to a finding of prosecutorial misconduct that spared Atkins's life.[19]

2008, at B1.

15. *See Atkins*, 536 U.S. at 307. The Supreme Court of Virginia refused to "commute Atkins' sentence of death to life imprisonment merely because of his IQ score," thus acknowledging that the testimony from Evan Nelson—that Atkins had an IQ of fifty-nine, well within the range for a diagnosis of mental retardation—was credible. Atkins v. Commonwealth, 534 S.E.2d 312, 321 (Va. 2000). The dissent was more explicit in its wholesale rejection of the Commonwealth's evidence, rejecting Stanton "Samenow's opinion that [Atkins] possesses average intelligence [as] incredulous as a matter of law," and concluded that "the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 is excessive." *Id.* at 323–24 (noting that Samenow did not administer an intelligence test). Psychologists have recognized the difficulty in defining mental retardation to satisfy trial courts, emphasizing that using a magic number—like seventy—has problems since there is no single IQ test used in the community. *See generally* Paul B. Herbert & Kathryn A. Young, Penry *Revisited: Is Execution of a Person Who Has Mental Retardation Cruel and Unusual?*, 30 J. AM. ACAD. PSYCHIATRY L. 282, 284 (2002) (discussing the psychiatric standards for "mental retardation").

16. *Atkins*, 536 U.S. at 321 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1985)).

17. Atkins v. Commonwealth, 631 S.E.2d 93, 95 (Va. 2006).

18. *Id.* at 94, 95 & n.2 (quoting VA. CODE ANN. § 19.2-264.3:1.1(A) (Cum. Supp. 2010)); *see also* THOMAS WALKER, ELIGIBLE FOR EXECUTION: THE STORY OF THE DARYL ATKINS CASE 243, 259–60 (2009).

19. *See generally* Jon Cawley, *Prosecutorial Misconduct Case Against York-Poquoson Commonwealth's Attorney Moves Forward*, DAILY PRESS (Newport News), Mar. 6, 2010, http://articles.dailypress.com/2010-03-06/news/dp-local_addison_0306mar06_1_misconduct-arkins-and-williams-jones-cathy-krinick (noting that the State Bar's Sixth District Subcommittee certified the complaints of misconduct to the Virginia State Bar Disciplinary Board); Jon Cawley, *Prosecutor Again Charged with Misconduct*, DAILY PRESS (Newport News), Feb. 22, 2011, http://www.dailypress.com/news/york-county/dp-nws-york-addison-20110222,0,2862966.story (noting that Eileen Addison, the prosecutor in the *Atkins* trial, was exonerated of the misconduct charges that led to the commutation of Atkins's death

The Atkins saga demonstrates the overworked postconviction process in capital cases,[20] and this article argues for due process protection at the trial level for mentally retarded defendants.[21] Scholars agree that special protections given to capital defendants under the Eighth Amendment are unrealized in practice without procedures to guarantee the protections.[22] Some argue that the Court's use of "the Eighth Amendment as the primary vehicle for guaranteeing the heightened reliability of capital procedures" is conceptually weak.[23] Pursuant to the Court's decision to "leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences,"[24] the states have responded with a myriad of proce-

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sentence from death to life, but remains under investigation for misconduct in three additional murder prosecutions); Adam Liptak, *Lawyer Reveals Secret, Toppling Death Sentence*, N.Y. TIMES, Jan. 19, 2008, at A1. Atkins's life had been spared by the time that it took for the final leg in the appellate process to unfold. *See* WALKER, *supra* note 18, at 262–78. Defense counsel was able to continue investigation from the time of Atkins's conviction in 1998 through the appellate process, which seemed to be reaching a close in 2006, with the remand from the third death sentence. *See id.* at 260, 278. Atkins suffered three death warrants only to have his death sentence commuted to life because of prosecutorial misconduct that was discovered over eight years after the first death warrant. *Id.* at 262–63, 267. That the revelation of prosecutorial misconduct in *Atkins* has spared his life rather than the Court's ignored, near-directive that he be categorically exempted from a death sentence based on his obvious mental retardation, represents a travesty wrapped in irony.

20. *See* Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 368–70 (2010) (describing the postconviction process). Some maintain that the postconviction process is flawed by a lack of interest and in-depth review at the appellate level. Perhaps the most convincing criticism has come from Justice John Paul Stevens. *See* Susan Estrich et al., Op-Ed., *My Boss, Justice Stevens*, N.Y. TIMES, Apr. 11, 2010, at WK11 ("Years later, I talked about that night with Justice Stevens. He had lost faith in the fairness of the death penalty, because no one paid the kind of attention that he had, and Justice Stewart had, and Justice Marshall had, that night long ago. When I asked him why he had changed, he told me that on this, as on so many questions, he had not changed at all. The court had.").

21. Like Justice John Paul Stevens, the author has little faith in the depth of attention and review given by appellate courts in capital cases, especially in reviewing facts. *See* Estrich, *supra* note 20.

22. *See, e.g.*, Anthony G. Amsterdam, *Selling a Quick Fix for Boot Hill: The Myth of Justice Delayed in Death Cases*, *in* THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE 148, 163–64 (Austin Sarat ed., 1999) (discussing Supreme Court habeas corpus jurisprudence under the Eighth Amendment); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 357–58 (1995).

23. *See* Adam Thurschwell, *Federal Courts, the Death Penalty, and the Due Process Clause: The Original Understanding of the "Heightened Reliability" of Capital Trials*, 14 FED. SENT'G REP. 14, 15 (2001). Thurschwell gives a thorough examination of the flaws of the Eighth Amendment approach with an exegesis of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Thurschwell, *supra*, at 15–16.

24. Atkins v. Virginia, 536 U.S. 304, 317 (2002) (quoting Ford v. Wainwright, 477 U.S.

dures.[25] Some states, like Virginia, leave the task of determining mental retardation exclusively within the control of the jury,[26] while other states have given the task to the trial judge,[27] and still others allow for a determination by either the judge or the jury.[28] Some state legislatures have declined to address the procedure for implementing the *Atkins* decision at all.[29] This article contends that trial courts should employ procedures that will guarantee that mentally retarded defendants will not be wrongly sentenced to death and that any procedure that charges only the death-qualified jury with determining whether a defendant is mentally retarded is constitutionally flawed.[30] That is, such a procedure fails to comport with the requirements of due process as guaranteed by the Fifth and Fourteenth Amendments and the prohibition against cruel and unusual punishment as guaranteed by the Eighth Amendment.[31]

This article addresses how trial courts should employ procedures to accomplish "heightened reliability"[32] in the mental retar-

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399, 416–17 (1986)) (alterations in original).

25. For a full view of the states' responses to the Court's directive from *Atkins*, see Carol S. Steiker & Jordan M. Steiker, Atkins v. Virginia: *Lessons From Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721, 724–29 (2008).

26. *See, e.g.*, VA. CODE ANN. § 19.2-264.3:1.1(c) (Cum. Supp. 2010).

27. *See, e.g.*, IDAHO CODE ANN. § 19-2515A(2) (Cum. Supp. 2010); NEV. REV. STAT. ANN. § 174.098(2)(b) (LexisNexis 2006).

28. *See, e.g.*, N.C. GEN. STAT. § 15A-2005(c), (e) (2009); OKLA. STAT. ANN. tit. 21, § 701.10b(E), (F) (West Cum. Supp. 2010).

29. *See, e.g.*, Yeomans v. State, 898 So. 2d 878, 901 (Ala. Crim. App. 2004) ("The Alabama Legislature has yet to enact a statute to address the holding in *Atkins*."); State v. Lott, 779 N.E.2d 1011, 1014 (Ohio 2002) (setting forth the procedural guidelines Ohio courts should follow in determining whether a defendant facing capital punishment is mentally retarded "in the absence of a statutory framework" to make this determination); *see also* Änna M. Hagstrom, Atkins v. Virginia*: An Empty Holding Devoid of Justice for the Mentally Retarded*, 27 LAW & INEQ. 241, 242 (2009) (noting that "some state legislatures have declined to act on [the mental retardation] issue at all"). Some states, like Maryland, have remained silent in their legislation, yet have left the question of mental retardation with the jury. *See* Richardson v. State, 598 A.2d 1, 3–4 (Md. Ct. Spec. App. 1991).

30. For a broad critique of the Court's "shar[ed] constitutional decisionmaking with capital sentencing juries, state appellate courts, and state legislatures," see James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 6–7 (2007).

31. U.S. CONST. amends. V, VIII, XIV § 1. *Atkins* hinges the two requirements in a new way. *See* Thurschwell, *supra* note 23, at 14 ("Since 1972, when the Supreme Court suddenly turned to the Eighth Amendment and its 'evolving standards of decency' analysis as the primary mode for analyzing the legitimacy of death penalty procedures, historical analysis has played little role in the Court's capital jurisprudence." (citing Woodson v. North Carolina, 428 U.S. 280, 280 (1976))).

32. *See* Gilmore v. Taylor, 508 U.S. 333, 342 (1993) ("[T]he Eighth Amendment re-

dation determination to accomplish the Supreme Court's directive for categorical exclusion, and it maintains that if a mentally retarded defendant is subjected to a death sentence, then the *Atkins* directive has been ignored.[33] To satisfy the *Atkins* Court's objective of protecting mentally retarded defendants from the "special risk of wrongful execution,"[34] trial courts should employ a unified competency assessment in all capital cases where the defendant asserts mental retardation as a bar to execution. The trial court should employ the *in favorem vitae*[35] doctrine in its review of the evidence presented at the unified competency assessment. A pretrial determination of mental retardation would ensure fairness for defendants who may be at special risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty."[36]

The article proceeds in six parts. Part II will offer an overview of the Court's defendant-specific proportionality analysis, found in *Atkins* and *Roper v. Simmons*,[37] and will explore how those cases can be read together to establish a constitutional procedure for assessing mental retardation. Part III explains how the application of the traditional pretrial competency assessment, required by *Dusky v. United States*,[38] would offer an opportunity to assess a defendant's competency to face trial where a death sentence is a possibility, thus guaranteeing due process to ensure heightened reliability in the categorical exemption created by the *Atkins* Court.[39] Part IV details the historical categorical exemptions from

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quires a greater degree of accuracy and factfinding than would be true in a noncapital case." (citations omitted)); Thompson v. Oklahoma, 487 U.S. 815, 856 (1988) ("Under the Eighth Amendment, the death penalty has been treated differently from all other punishments." (citation omitted)); Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976).

33. The only way that the categorical exemption against executing the mentally retarded can have any meaning is through a procedure that will heighten the reliability of the mental retardation determination. "The fundamental Eighth Amendment question is simply whether the individual and crime merit the death penalty, and not whether the procedures by which that question is answered are adequate—which is the question asked under the Due Process Clause." Thurschwell, *supra* note 23, at 16.

34. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

35. *In favorem vitae* means "[i]n favor of life." BLACK'S LAW DICTIONARY 847 (9th ed. 2009). The doctrine demands that judges construe capital punishment statutes strictly and exercise special care with the procedural rights of capital defendants. *See* MATTHEW HALE, 2 HISTORIA PLACITORUM CORONAE [HISTORY OF THE PLEAS OF THE CROWN] 305 (1st Am. ed. 1736).

36. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

37. Roper v. Simmons, 543 U.S. 551, 560 (2005); *Atkins*, 536 U.S. at 317–21.

38. 362 U.S. 402, 402–03 (1960) (per curiam).

39. *Atkins*, 536 U.S. at 319.

a death sentence and how trial courts have applied the doctrine of *in favorem vitae* in capital cases to spare undeserving defendants from a death sentence. Part V examines the "two-edged sword" of mental retardation,[40] and how jurors and prosecutors pose a risk of disregarding the Court's directive in *Atkins*. Part VI concludes with a discussion of how, beyond guaranteeing due process, a unified theory for assessing competency in capital cases would simplify procedures, reduce costs, and put an end to some extensive postconviction litigation like that in *Atkins*.[41]

II. DEFENDANT-SPECIFIC PROPORTIONALITY ANALYSIS: READING *ATKINS* AND *ROPER* AS A BODY OF LAW

In *Atkins v. Virginia* and *Roper v. Simmons*, the Supreme Court of the United States declared that execution of a mentally retarded or juvenile defendant was unconstitutional.[42] In the canon of capital punishment jurisprudence, *Atkins* and *Roper* are proportionality cases; "it is a precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense."[43] As grounds for the new exemptions, the Court relied on the Eighth Amendment's prohibition against cruel and unusual punishment, as viewed through the modern common law constitutionalist lens of a majority of the sitting justices,[44] and found mentally retarded and juvenile defendants "categorically less culpable than the average criminal."[45]

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40. *Id.* at 321 (citing Penry v. Lynaugh, 492 U.S. 302, 324 (1989)).

41. Posttrial litigation over the defendant's competency to be executed extends beyond the mental retardation question into questions of serious mental illness. *See* Panetti v. Quarterman, 551 U.S. 930, 957–60 (2007).

42. *Roper*, 543 U.S. at 578; *Atkins*, 536 U.S. at 321.

43. *Atkins*, 536 U.S. at 311 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)). The Court's proportionality review has generally focused on specific crimes. For example, the Court has declared that a death sentence cannot be proportionate to crimes that do not involve the death of another. *See* Kennedy v. Louisiana, 554 U.S. ___, ___, 128 S. Ct. 2641, 2664 (2008) (holding that a death sentence is not proportionate to the crime of rape of a child); Coker v. Georgia, 433 U.S. 584, 599 (1977) (holding that a death sentence is not proportionate to the crime of rape of an adult woman).

44. *Atkins*, 536 U.S. at 312 ("[O]bjective evidence, though of great importance, [does] not 'wholly determine' the controversy, 'for the Constitution contemplates that in the end our own judgment will be brought to bear on . . . the acceptability of the death penalty under the Eighth Amendment.'" (quoting *Coker*, 433 U.S. at 597)).

45. *Roper*, 543 U.S. at 567 (quoting *Atkins*, 536 U.S. at 316).

Though the Court declared that mentally retarded and juvenile defendants should be "categorically excluded from execution,"[46] it declined to implement any procedure to ensure categorical exclusion for mentally retarded defendants, anticipating future difficulties "in determining which offenders are in fact retarded."[47] A comprehensive, close reading of *Atkins* and *Roper* reveals that the Court employed a unified rule and rationale to reach its conclusion that mentally retarded and juvenile defendants should be categorically excluded from execution,[48] and as such, trial courts would be justified in engaging in similar procedures to ensure compliance with the Court's rule.[49]

A. *Rationales to Support the Categorical Exemption of Mentally Retarded Defendants from Execution*

The Court identifies two reasons for exempting mentally retarded defendants from execution: the lack of penological purpose in death and the risk of an unfair trial.[50] Justice Scalia's dissenting opinion offers the best explanation for the former.[51] As support for the latter, the Court delineates anticipated pretrial problems, such as susceptibility to give false confessions; trial problems, such as an inability to assist counsel or serve as a use-

46. *Atkins*, 536 U.S. at 318; *see also Roper*, 543 U.S. at 568 ("A majority of states have rejected the imposition of the death penalty on juvenile[s] . . . and we now hold this is required by the Eighth Amendment.").

47. *Atkins*, 536 U.S. at 317.

48. Reading *Atkins* in the context of *Roper* is a novel scholarly argument.

49. Examining the strength of the right to be exempted from the imposition of death might influence the type of procedure necessary to guarantee that right. The evidence of an evolving standard of decency toward protecting the mentally retarded from execution was stronger than the evolving standard of decency toward protecting juveniles from execution. The rate of states abolishing the death penalty for mentally retarded defendants was moving at a faster clip than the pace of change for juveniles. Between *Penry* and *Atkins*, sixteen states changed their laws to exempt the mentally retarded from execution. *See Roper*, 543 U.S. at 565. In contrast, only five states moved to exempt juveniles from execution between *Stanford v. Kentucky* and *Roper*, the case that overturned *Stanford*. *See Roper*, 543 U.S. at 565; Stanford v. Kentucky, 492 U.S. 361, 380 (1989). This begs analysis of whether the mentally retarded deserve a stronger procedural protection to secure the guarantee. Arguably, under the Court's majoritarian, evolving standards of decency analysis, society is more prepared to categorically exclude mentally retarded defendants from execution than it is prepared to exclude juveniles.

50. *Atkins*, 536 U.S. at 320–21.

51. *Id.* at 337, 340–41 (Scalia, J., dissenting).

ful witness for the defense; and sentencing problems, such as a jury's disregard for mental retardation as a mitigating factor.[52]

1. Core Values

The core values of the criminal justice system demand that each punishment serve some societal goal.[53] The Supreme Court of the United States has embraced two theories of punishment as justification for execution: "retribution and deterrence of capital crimes by prospective offenders."[54] Unless execution "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment."[55] For retribution, the Court has developed its narrowing jurisprudence by examining the nature of the crime to determine whether the defendant had committed one of the most serious; for example, the Court has excluded from the sanction of the death penalty all crimes where the victim did not perish.[56] Even among murderers, the Court excludes from death those crimes that do not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder."[57] Based on the cognitive and rational deficiencies in the mentally retarded defendant, the Court has concluded that the mentally retarded defendant has lesser culpability, and thus, is less deserving of the ultimate sanction than those defendants without impairment.[58] Because this exclusion is a categorical, rather than case-by-case, assessment, the Court concluded that no person who *is* mentally retarded will ever be culpable enough to deserve death.[59]

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52. *Id.* at 320–21.

53. The classic theories of punishment are deterrence, retribution, public safety (incapacitation), and education (rehabilitation). *See* SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESS: CASES AND MATERIALS 79 (8th ed. 2007).

54. Gregg v. Georgia, 428 U.S. 153, 183 (1976) (footnotes omitted).

55. Enmund v. Florida, 458 U.S. 782, 798 (1982) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

56. Kennedy v. Louisiana, 554 U.S. ___, ___, ___, 128 S. Ct. 2641, 2650, 2665 (2008); *Coker*, 433 U.S. at 598, 621 (Burger, C.J., dissenting).

57. Godfrey v. Georgia, 446 U.S. 420, 433 (1980).

58. Atkins v. Virginia, 536 U.S. 304, 318–19 (2002).

59. *Id.* I use the vague "to be" here because the Court gives no direction on how a trial court should determine if a defendant is mentally retarded, whether the defendant or government should bear the burden of proving or disproving mental retardation, or when this determination should be made. In Part III, I begin to unravel the necessary complexities

To satisfy a deterrence theory of punishment, the Court has looked to see whether the imposition of a death sentence in one case will affect "the 'cold calculus that precedes the decision' of other potential murderers."[60] The Court has concluded that potential murderers who are mentally retarded lack the capacity to engage in the logical reasoning necessary to connect their impulsive conduct with a future punishment of death.[61] Moreover, the Court has found that potential murderers who are not mentally retarded will experience lesser deterrence from the fact that mentally retarded murderers are exempted from the imposition of death.[62]

The characteristics of mental retardation defined by the Court that affect the theory of punishment analysis are relevant to the mentally retarded defendant's capacity just before the crime, during the crime, and at the time of execution.[63] Mental retardation operates like "insanity-lite" for the *Atkins* Court.[64] The Court recognizes that some mentally retarded defendants will not be able to distinguish right from wrong, the classic element under the narrow *M'Naghten* insanity test.[65] But for those mentally retarded defendants who will not meet the *M'Naghten* standard for being found insane at the time of the offense, the symptoms of "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

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to the Court's proclamation that a mentally retarded defendant should be categorically exempted from the imposition of the death penalty.

60. *Id.* at 319 (quoting Gregg v. Georgia, 428 U.S. 153, 186 (1976)).

61. *Id.* at 320.

62. *Id.* Most critics think that the theory of deterrence is an exercise in theory with no practical effect. *See, e.g.*, Bernard E. Harcourt, *A Reader's Companion to* Against Prediction*: A Reply to Ariela Gross, Yoram Margalioth, and Yoav Sapir on Economic Modeling, Selective Incapacitation, Governmentality, and Race*, 33 LAW & SOC. INQUIRY 265, 272 (2008). That the Court engages the theory, to seemingly absurd conclusions, secures the analysis that the mentally retarded defendant is different enough, based on diagnosis alone, to warrant an exemption from the imposition of death no matter how heinous his crime.

63. ABA DEATH PENALTY MORATORIUM IMPLEMENTATION PROJECT, STATE DEATH PENALTY ASSESSMENTS KEY FINDINGS (2007), http://www.abanet.org/moratorium/assessmentproject/keyfindings.pdf.

64. Since the insanity defense is used rarely (in less than one percent of felony cases) and succeeds even less often, it follows that the Court wanted to ease the burden of proving insanity for mentally retarded defendants. Randy Borum & Solomon M. Fulero, *Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy*, 23 LAW & HUM. BEHAV. 375, 378 (1999).

65. Daniel M'Naghten's Case, (1843) 8 Eng. Rep. 718 (H.L.) 719, 723.

understand the reactions of others" operate as an exemption from the imposition of the death penalty.[66] Under theory of punishment analysis, the relationship of the symptoms, such as a diminished capacity to control impulses, to the exemption from execution, requires the symptom to have affected the mentally retarded defendant's thought process at the time of his crime.[67] If he had an irresistible impulse that was the product of mental retardation (i.e., untreatable with medication or therapy), then the defendant was not able to conform his conduct.[68] Thus, retribution for the mentally retarded defendant's act is impossible since he is unable to reflect on the quality of his act. Moreover, a mentally retarded potential capital murderer can neither engage in logical reasoning, nor control his irresistible impulse so that he could mull over the potential of a death sentence and be deterred from committing murder.

But this kind of diminished capacity issue was an available mitigating factor during capital sentencing before *Atkins* was decided[69] and remains available post-*Atkins*.[70] Taking that into account, under the theory of punishment justification, *Atkins* may serve only to guarantee an additional jury instruction explaining that mental retardation must operate as a super-mitigator and should not be balanced against other aggravating factors.[71] States have grappled with how to force death-qualified jurors to honor mental retardation as a super-mitigator; some bifurcate the mental retardation determination from the rest of the classic aggravator-mitigator sentencing determination,[72] though most merely of-

66. *Atkins*, 536 U.S. at 318.

67. *See id.* ("[T]here is abundant evidence that [the mentally retarded] often act on impulse rather than pursuant to a premeditated plan . . . .").

68. *See* Christopher Slobogin, *A Defense of the Integrationist Test As a Replacement for the Special Defense of Insanity*, 42 TEX. TECH L. REV. 523, 524 (2009).

69. See VA. CODE ANN. § 19.2-264.4(B)(vi) (Repl. Vol. 2000) ("Facts in mitigation may include . . . mental retardation of the defendant.").

70. *See id.* § 19.2-264.4(B)(iv) (Cum. Supp. 2010) ("Facts in mitigation may include . . . (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired . . . .").

71. *Cf.* Smith v. Texas, 543 U.S. 37, 38, 44 (2004) (reversing the lower court's instructions directing "the jury to give effect to mitigation evidence" and acknowledging that the defendant's low IQ score is relevant mitigation evidence that a jury "might well have considered . . . as a reason to impose a sentence more lenient than death," yet not requiring the court to exempt the defendant from the death penalty).

72. *See* Steiker & Steiker, *supra* note 25, at 727.

fer an additional instruction to jurors,[73] which arguably gets lost in the general aggravator-mitigator balancing act.

2. Trial Prejudice

Atkins has a second, often overlooked, justification for "a categorical rule making such offenders ineligible for the death penalty."[74] The *Atkins* Court found that mentally retarded defendants suffered a special risk "'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'"[75] The Court asserted that "[m]entally 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."[76] If a mentally retarded defendant is in fact "less able to give meaningful assistance to their counsel,"[77] then that defendant could be described as incompetent to stand trial where a death sentence is a possibility. That is, the defendant may be competent to stand trial for capital murder, but not competent to stand trial where the possibility of a death sentence looms.[78] In short, mental retardation may serve as a reason for a narrow finding of incompetency—the incompetency to stand trial for capital murder where death is a potential sentence.[79] Under this rationale for categori-

73. *See* Laurie T. Izutsu, Note, *Applying* Atkins v. Virginia *to Capital Defendants with Severe Mental Illness*, 70 BROOK. L. REV. 995, 1004–05 (2005).

74. Atkins v. Virginia, 536 U.S. 304, 320 (2002).

75. *Id.* (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)).

76. *Id.* at 320–21.

77. *Id.* at 320.

78. This is a distinction that would be clear to any judge, prosecutor, or defense attorney involved in a capital case, but likely deserves more explanation here. The charge of capital murder carries two potential sentences—life or death. The crime of capital murder is distinct from other murders in that it usually involves an additional element of proof from the government, like the murder of a child or of a police officer. *See, e.g.*, Omar Randi Ebeid, Comment, *Death by Association: Conspiracy Liability and Capital Punishment in Texas*, 45 HOUS. L. REV. 1831, 1859 & n.201 (2009) (noting that, in Arizona, determining whether a crime is punishable by death relies upon a showing of at least one aggravating factor, such as the murder of a police officer). Under *Atkins*, a mentally retarded defendant could proceed to trial for capital murder, but, if guilty, could only be sentenced to life in prison. *See Atkins*, 536 U.S. at 320. Criminal attorneys sometimes refer to this as "taking death off of the table." For a recent example of a trial judge removing death as a possible penalty, see Cleve R. Wootson, Jr., *No Death Penalty in Police Slayings*, CHARLOTTE OBSERVER, Aug. 25, 2010, http://www.charlotteobserver.com/2010/08/25/1641648/no-death-penalty-in-police-slayings.html.

79. *See* Joanmarie Ilaria Davoli, *Physically Present, Yet Mentally Absent*, 48 U. LOUISVILLE L. REV. 313, 317 (2009) (suggesting that if trial courts focus on the cause of

cally excluding mentally retarded capital defendants from a death sentence, leaving the job of determining mental retardation to the death-qualified jury violates due process.[80]

The second justification the Court offers for its categorical rule exempting mentally retarded defendants from the imposition of death relates to the trial itself; and in this justification, the Court has created a new concept. A mentally retarded defendant who suffers from "diminished capacities to understand and process information, to communicate, . . . to engage in logical reasoning, . . . and to understand the reactions of others" will be less able to give meaningful assistance to counsel, which will affect the defendant's ability to make a persuasive showing of mitigation, or serve as an effective witness, because he may be seen as remorseless.[81] A logical reading of the Court's concern demands that trial courts add a new determination—that of mental retardation—to the pretrial competency assessment. If a capital defendant, by virtue of his mental retardation, lacks the ability to give meaningful assistance to counsel and help prepare a useful, effective mitigation case, then he should not be subjected to a trial wherein a death sentence is a possible outcome. The Court acknowledges the mentally retarded defendant's inability to have a fair trial because of his own deficiencies[82] and creates a remedy—exemption from death.[83] Whether or not a defendant can have a fair trial is a due process question for the trial court to tackle.

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incompetency rather than the result of a finding of incompetency, the entire scheme for determining competency to stand trial might be transformed).

80. *See supra* Part II.1. (detailing the characteristics of death-qualified jurors and the likelihood that they will disregard evidence of mental retardation or ignore court instructions that might result in a life sentence).

81. *Atkins*, 536 U.S. at 318, 320–21 (footnote omitted).

82. *Id.* The *Atkins* Court seems especially cognizant of the bad *impression* that a mentally retarded defendant might give to the sentencing jury. "[They] are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id.* at 321. This concern about the *way* in which a defendant appears to the jury seems to cheapen the whole criminal justice process—particularly where death is a potential sentence—for all defendants, not just those with mental retardation. The theatrics of witnesses and lawyers has long been satirized, thus demonstrating the strategic planning between client and lawyer to manipulate the jury into empathizing with the defendant. *See* CHITA RIVERA, *When Velma Takes the Stand, on* CHICAGO: ORIGINAL SOUNDTRACK (Arista Records 1996) ("When Velma takes the stand/Look at little Vel/See her give 'em hell/When she turns it on/Ain't she doing grand/She's got 'em eating out of the palm of her hand" and "Then, I thought I'd cry. Buckets. Only I don't have a handkerchief—that's when I have to ask for yours! I really like that part. Don't you?").

83. *Atkins*, 536 U.S. at 321.

B. *No Due Process Directive from the Court*

After declaring that mentally retarded capital defendants are "categorically less culpable than the average criminal,"[84] the Court in *Atkins* recognized the difficult task of "developing appropriate ways to enforce the constitutional restriction" of excluding mentally retarded defendants from execution.[85] Rather than addressing the issue of how to make a determination of mental retardation, the Court returned the question to the states,[86] some of which, in turn, have left the question to the jury.[87] As Professors Carol and Jordan Steiker have written, "by essentially deregulating the procedural means of enforcing the substantive right, the Court has undermined the goals of the underlying ban by creating a substantial risk of false negatives."[88] Daryl Atkins himself is a testament to just how far a death-qualified jury panel will go to ignore plain evidence and a trial court's directions.[89]

Perhaps because the process of determining a juvenile's age seemed easier than determining mental retardation, the Court did not address how trial courts should determine the question of age in *Roper*, nor did the Court note that states would need to develop a process for determining the age of a capital defendant.[90] Historically, the determination of whether a defendant's fate was to be treated as a juvenile or as an adult has rested with the trial court.[91] The trial court makes the factual determination of whether a defendant was younger than eighteen years old at the time of

84. *Id.* at 316; *cf.* Roper v. Simmons, 543 U.S. 551, 567 (2005) (employing the same rationale for exempting mentally retarded capital defendants and juvenile defendants).

85. *Atkins*, 536 U.S. at 317 (quoting Ford v. Wainwright, 477 U.S. 399, 416 (1986)).

86. *Id.* (quoting *Ford*, 536 U.S. at 416–17).

87. *See* Steiker & Steiker, *supra* note 25, at 724–25. Given that the *Atkins* Court expresses concern that jurors will be less persuaded by evidence of mental retardation in light of the presentation of aggravating factors and that jurors will likely turn the mitigating factor of mental retardation into an aggravating factor showing future dangerousness, it is hard to see how any system that allows a jury to weigh mental retardation alongside other mitigating and aggravating evidence could comport with due process requirements. *See Atkins*, 536 U.S. at 320–21.

88. Steiker & Steiker, *supra* note 25, at 725 (noting, specifically, that leaving the mental retardation determination to death-qualified jurors creates a special risk).

89. The risk of prejudice is most obvious from the fact that some states have created procedures that mandate that the mental retardation determination must be made by someone who has not been charged with hearing the substantive evidence of guilt and making a guilt or innocence decision. *See id.* at 727; *supra* Part I.

90. *See* Roper v. Simmons, 543 U.S. 551, 568, 572–73, 578–79 (2005).

91. *See* CLEMENS BARTOLLAS & STUART J. MILLER, JUVENILE JUSTICE IN AMERICA 134 (6th ed. 2008).

the crime *before* the commencement of any important proceedings.[92] This factual determination of age is jurisdictional in that this decision necessitates the path and process for each case.[93]

Based on the outcome of the trial court's factual determination of age, which is likely undisputed by the parties, the defendant will find himself either in juvenile court or in adult court.[94] In the *Roper* context, the age determination could categorically exclude the defendant from death eligibility.[95] Because of this clear historical process for determining age, the Court gave no instruction in *Roper* on how the states should develop appropriate ways to enforce the constitutional restriction on excluding juveniles from a death sentence.[96]

The rationale for excluding mentally retarded defendants and juvenile defendants from the imposition of a death sentence is the same.[97] Pursuant to the Court's narrowing jurisprudence,[98] ex-

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92. *Id.*

93. *Id.*

94. *Id.* I have only seen a dispute over age arise in a collateral, postconviction proceeding, usually in the context of a deportation hearing. I have seen two cases where a defendant facing deportation, based on a criminal conviction, filed a *corum nobis* petition in the sentencing court asserting that he was actually a juvenile when he was sentenced as an adult. In both cases, the defendant was Ethiopian, and his birth date had been calculated according to the Ethiopian calendar, which differs from the Gregorian calendar, used in the United States. In U.S. years, the defendant was a juvenile at the time of his offense, though according to the Ethiopian birth date listed on his passport, the defendant appeared to be an adult at the time of the offense. For the simplest explanation of the different calendars, see Embassy of Ethiopia, *Ethiopian Time*, http://www.ethiopianembassy.org/AboutEthiopia/AboutEthiopia.php?Page=Clock.htm (last visited Mar. 2, 2011). Needless to say, in each case, a judge heard the complex facts and made a determination of the defendant's age.

95. *Roper*, 543 U.S. at 578. The under-eighteen defendant would still proceed to trial for capital murder, but if the jury found him guilty, it could only sentence him to life. *See id.* at 559–60. As such, there would be no sentencing phase of the litigation. *See supra* note 78.

96. *See Roper*, 543 U.S. at 574.

97. I believe that seriously mentally ill defendants and those with significant brain injuries could also fall within the rationale that justifies the categorical exemption. There are compelling arguments that seriously mentally ill capital defendants—whether at the time of the offense or at the time of execution—should be "categorically exempted." *See, e.g.*, Robert Batey, *Categorical Bars to Execution: Civilizing the Death Penalty*, 45 HOUS. L. REV. 1493, 1518–27 (2009) (discussing a categorical bar to executing defendants suffering from serious mental disease or defect).

98. *See* Godfrey v. Georgia, 446 U.S. 420, 433 (1980) ("There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not."). Employing special safeguards to ensure that only the most deserving are put to death originated in Justice Brennan's concurrence in *Furman v. Georgia*. 408 U.S. 238, 286 (1972) (Brennan, J., concurring) ("Death is a unique punishment in the United States."). The creation of and adherence to the "death-is-different" doctrine has

cluding mentally retarded and juvenile defendants from a death sentence is appropriate "to ensure that only the most deserving of execution are put to death."[99] The Court has concluded that mentally retarded defendants, like juvenile defendants, have a "diminished ability to understand and process information."[100] This theory of deterrence[101] in capital sentencing simply does not apply to mentally retarded or juvenile defendants because it is "less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."[102] But the Court also recognizes that the very factors which should be persuasive mitigators to the jury—diminished capacity based on mental retardation or youth—will likely be disregarded or even viewed as an aggravating factor by the sentencing jury.[103] Given the similar rationales for excluding mentally retarded and juvenile defendants from a

done little to remedy inherent problems in capital prosecutions, such as racial bias. *See* Steiker & Steiker, *supra* note 25, at 398–402 (discussing the "death-is-different" doctrine).

99. Atkins v. Virginia, 536 U.S. 304, 319 (2002).

100. *Id.* at 320.

101. The Court has long focused on deterrence and retribution as the dual justifications for capital punishment. *See* Enmund v. Florida, 458 U.S. 782, 798 (1982) (noting that "it 'is nothing more than the purposeless and needless imposition of pain and suffering'" if execution does not contribute to retribution or deterrence (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977))); Gregg v. Georgia, 428 U.S. 153, 183 (1976) (noting that "retribution and deterrence of capital crimes by prospective offenders" form the central, social purposes of the death penalty). The Court has addressed the public safety rationale, in the context of the jury's charge to assess the defendant's future dangerousness, and has concluded that the jury must know that the defendant's life sentence would be without the possibility of parole. *See* Simmons v. South Carolina, 512 U.S. 154, 163–64 (1994).

102. *Atkins*, 536 U.S. at 320. There are compelling arguments that the rationale for not executing the mentally retarded or juveniles should apply in all criminal trials, i.e., that death is not different. For a detailed critique of the "two-track system," see Rachel Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1162, 1186–97, 1205 (2009) ("A uniform approach under which all criminal defendants get the same substantive sentencing rights under the Eighth Amendment would put the Court's sentencing jurisprudence back into the constitutional mainstream.").

103. *See Atkins*, 536 U.S. at 320–21 ("The risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty,'" is enhanced . . . 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 . . . [R]eliance 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." (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978))); *Roper*, 543 U.S. at 573 ("An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant's youth may even be counted against him.").

death sentence, it follows that trial courts should, procedurally, treat the two groups the same way.[104]

C. *The Complex Task of Deciding Whether a Defendant is Mentally Retarded*

As it had in *Ford v. Wainwright*,[105] the Court in *Atkins* left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."[106] In *Ford*, the Court held that a capital defendant who alleges incompetency to be executed is entitled to a competency evaluation and an evidentiary hearing on the issue; the Court upheld the longstanding common law rule that execution of the insane violates the Eighth Amendment.[107] By 2007, the Court had to review and reaffirm its holding in *Ford*, and step into the due process breach created by the state of Texas in its attempt to create a method to comply with the Court's prohibition on the execution of those capital defendants who were insane at the time of the scheduled execution.[108] In the twenty-one years between the announcement of a new right or protection—that the insane should not be executed—and an examination of how trial courts might implement procedures to ensure the new right or protection,[109] scholars and lawyers lamented the lack of consistent constitutional criminal procedures to ensure due process.[110] As they

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104. For a complete equal protection argument, see Nita A. Farahany, *Cruel and Unequal Punishments*, 86 WASH. U. L. REV. 859, 884–903 (2009) (discussing, in particular, how mentally retarded defendants are substantially similar to defendants with traumatic brain injury, central nervous system disorders, and other pervasive developmental disorders). Expanding on Farahany's argument, the mentally retarded, juveniles, and her enumerated groups all suffer from the same type of diminished capacity, though each stems from a different source. Given the Court's reasoning in *Atkins* and *Roper*, the source of the lack of capacity is not the justification for the new narrowing jurisprudence; rather, the Court focuses on the capital defendant's capacity at the time of the crime and at the time of the trial and sentencing in "categorically exempting" a new class of people from a death sentence. *See generally* Christopher Slobogin, *What* Atkins *Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293 (2003); Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785 (2009).

105. 477 U.S. 399, 416–17 (1986).

106. *Atkins*, 536 U.S. at 317 (quoting *Ford*, 477 U.S. at 416–17).

107. *Ford*, 477 U.S. at 410–11.

108. Panetti v. Quarterman, 551 U.S. 930, 934–35, 954, 956–57 (2007).

109. *Compare Ford*, 477 U.S. at 409–10 (holding that the Eighth Amendment prohibits execution of the insane), *with Panetti*, 551 U.S. at 935 (finding that the trial court failed to provide adequate procedures).

110. *See, e.g.*, Amsterdam, *supra* note 22, at 148; Steiker & Steiker, *supra* note 22.

did with the prohibition on executing the insane, state legislatures have grappled with myriad procedures to ensure compliance with the *Atkins* prohibition on executing the mentally retarded.[111]

In *Atkins*, the Court concerned itself with justifying the outcome, exempting the mentally retarded from execution.[112] In 2002, the Court held that societal standards of decency had evolved to a place where the execution of a mentally retarded person convicted of capital murder would violate the Eighth Amendment's prohibition against cruel and unusual punishment.[113] The majority opinion offers an intense examination of the changes in the way that state legislatures dealt with the mental retardation issue in capital trials during the thirteen years between its decision in *Penry v. Lynaugh*, where the Court explicitly rejected the defendant's argument that the Eighth Amendment prohibited the execution of the mentally retarded under the Cruel and Unusual Punishments Clause,[114] and its decision in *Atkins*, which reversed *Penry*.[115] The majority justifies the outcome with "evolving standards of decency" jurisprudence and engages in an examination of state legislatures that enacted statutes to exempt the mentally retarded from execution between 1989 and 2002.[116] In particular, the majority relies on the direction of the change, exclusively in favor of protecting the mentally retarded from execution, as "powerful evidence that today our society views mentally retarded

111. *See* Steiker & Steiker, *supra* note 25, at 385 n.147 (citing cases in which the court has addressed the constitutional adequacy of states' efforts to guide sentencer discretion).

112. *See generally Atkins*, 536 U.S. at 317–20. I refer to "the mentally retarded defendant" throughout this section. While the Court did not wrestle with the facts to determine *whether* Daryl Atkins was mentally retarded or not, the fact that the Court took up the question and created a new exemption from death for mentally retarded defendants based on the facts presented about Daryl Atkins makes an inference that the Court found compelling evidence of Daryl Atkins's mental retardation seem appropriate. That the resentencing jury then sentenced Daryl Atkins to death, thereby rejecting his mental retardation, is the topic of text accompanying notes 9–19, *supra*.

113. *See id.* at 321.

114. 492 U.S. 302, 328–29, 335 (1989).

115. *Atkins*, 536 U.S. at 313–15.

116. *See id.* at 304, 313–15. In 1989, at the time of the *Penry* decision, only two states, Georgia and Maryland, had statutes that exempted the mentally retarded from execution. *See id.* at 313–14 (citing GA. CODE ANN. § 17-7-131(j) (Supp. 1988) and MD. CODE ANN., Art. 27, § 412(f)(1) (West 1989)). By 2002, Arkansas, Arizona, Colorado, Connecticut, Florida, Indiana, Kansas, Kentucky, Missouri, Nebraska, New Mexico, New York, North Carolina, South Dakota, Tennessee, and Washington had joined Georgia, Maryland, and the federal government in prohibiting execution of the mentally retarded. *Id.* at 313–15 (discussing various state statutes exempting mentally retarded defendants from capital punishment).

offenders as categorically less culpable than the average criminal."[117]

For all of the detailed attention the Court gives to the progress in the states toward exempting the mentally retarded defendant from execution, it gives scant attention to defining the *condition* of mental retardation.[118] Without adopting the definition of the American Association on Mental Retardation, the Court offers, in a footnote:

> *Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.[119]

The Court identifies by incorporation the work of scholars who study mental retardation, characteristics, or symptoms that may comprise the diagnosis of mental retardation.[120] Using the clinical definition, the Court seems to accept as a threshold that the mentally retarded defendant would have "subaverage intellectual functioning [and] significant limitations in adaptive skills such as communication, self-care, and self-direction," all of which "became manifest before the age of eighteen."[121] The Court declares that, "by definition [mentally retarded defendants] 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

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117. *Atkins*, 536 U.S. at 316. In dissent, Justice Rehnquist made the compelling argument that capital *jurors* were not as evolved as state legislators in their standards of decency since, at the time, experts estimated that ten percent of the inmates on death row were mentally retarded. *See id.* at 324 n.* (Rehnquist, C.J., dissenting).

118. The Court has a long history of shying away from detail in mental illness cases. In fact, it often conflates the fundamental principles of competency to stand trial and sanity, though this might be a remnant of Blackstone's use of "idiot" to designate both those defendants who lack the competency to stand trial and those defendants who lack the capacity to distinguish right from wrong. *See, e.g.*, Ford v. Wainwright, 477 U.S. 399, 410–11 (1986) (discussing the Eighth Amendment prohibition on executing the insane yet assessing whether the defendant is entitled to a competency evaluation); Jackson v. Indiana, 406 U.S. 715 (1972); *see also* United States v. Smith, 404 F.2d 720, 721–22, 725 (6th Cir. 1968); 4 WILLIAM BLACKSTONE, COMMENTARIES *24.

119. *Atkins*, 536 U.S. at 308 n.3 (quoting AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992)).

120. *Id.* at 318 nn.23–24.

121. *Id.* at 318.

the reactions of others."[122] Among the social and cognitive deficiencies, the Court finds "abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders."[123] Defendants who satisfy the *Atkins* definition of mental retardation are ineligible for the death penalty, whether the degree of mental retardation is defined as mild, moderate, or severe.[124] The specific characteristics of mental retardation become important upon examining the Court's two reasons for exempting the mentally retarded from the imposition of the death penalty.[125]

While the prosecution and the defense might present competing experts who employ different tests for ascertaining an opinion on the defendant's mental retardation, the gap in the kind of evidence that should be considered is quite narrow. For example, witness testimony on how the defendant acted at the time of the crime is well-accepted evidence to be considered by the jury when determining whether the defendant was insane at the time of the offense.[126] But evidence of mental retardation should not include lay testimony about how the defendant acted at the time of the crime. As Justice Scalia notes in his dissenting opinion in *Atkins*, the majority adopted a rule that excludes consideration of moral responsibility by exempting all mentally retarded defendants—from mild to severe—from a death sentence.[127] Circumstantial evidence from which a factfinder might ascertain a capital defendant's moral responsibility is, thus, irrelevant to the determination of mental retardation.

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122. *Id.* (footnote omitted).

123. *Id.* (footnote omitted).

124. *See id.* at 321; *see also* Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia*: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. RICH. L. REV. 811, 822 (2007) (discussing Justice Scalia's protest against the categorical exclusion of those with mild mental retardation from capital punishment).

125. Some argue that the factual determination of which defendants should be categorically excluded from execution should not be read narrowly. It seems reasonable that the trial court should determine which defendants, in the broader sense, satisfy the *Atkins* rationale that supports their exclusion from execution. This article, however, concerns itself only with those defendants who would meet the narrow criteria of mental retardation. *See, e.g.*, Corcoran v. State, 774 N.E.2d 495, 502 (Ind. 2002) (Rucker, J., dissenting). The author, however, agrees with the scholarship in the field that supports the categorical exclusion of other defendants whose execution could not meet the traditional goals of deterrence and retribution. *See* Slobogin, *supra* note 104, at 293; Winick, *supra* note 104, at 37.

126. *See, e.g.*, United States v. Lawson, 653 F.2d 299, 303 (7th Cir. 1981).

127. *Atkins*, 536 U.S. at 339 (Scalia, J., dissenting).

III. A UNIFIED THEORY FOR COMPETENCY ASSESSMENT

Because the *Atkins* Court expressed a specific concern that "[m]entally retarded defendants may be less able to give meaningful assistance to their counsel,"[128] trial courts should assess mental retardation during a pretrial competency hearing for the capital defendant in order to ensure that no Eighth Amendment violation makes a mockery of the criminal justice system, by undermining "the strength of the procedural protections that our capital jurisprudence steadfastly guards."[129]

William Blackstone declared that any man who became mad after committing a crime and was unable to make a proper pleading in his defense should not be arraigned.[130] Dating back as far as medieval English law, a criminal defendant must be mentally competent before standing trial.[131] Defendants with mental defects were spared from criminal prosecution.[132] No conventional theory of punishment justifies the trial and conviction of a defendant not competent to understand the charges against him, the nature of the proceedings, or the reasons for his prosecution.[133]

There is very little constitutional common law governing the assessment of competency to stand trial for criminal charges. In 1960, the Supreme Court of the United States set out an explicit test for determining a defendant's competency to stand trial in *Dusky v. United States*.[134] The per curiam opinion of less than 250 words sets out the barest of requirements that trial courts must use to determine if a defendant is competent to stand trial.[135] Per *Dusky*, the trial court must ascertain whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."[136] Merely being "oriented to time and place and

128. *Id.* at 320.

129. *Id.* at 317.

130. 4 BLACKSTONE, *supra* note 118, at *24; *see also* J. Amy Dillard, *Without Limitation: "Groundhog Day" for Incompetent Defendants*, 56 DEPAUL L. REV. 1221, 1225 (2007).

131. *See* 4 BLACKSTONE, *supra* note 118, at *24.

132. Grant H. Morris et al., *Competency to Stand Trial on Trial*, 4 HOUS. J. HEALTH L. & POL'Y 193, 201 (2004).

133. Dillard, *supra* note 130, at 1225.

134. 362 U.S. 402, 402 (1960) (per curiam).

135. *Id.*

136. *Id.*

[having] some recollection of events" is insufficient evidence of competency.[137] The Court's rational and factual understanding test, established in *Dusky*,[138] comports with Blackstone's ancient rule that the prosecution of a defendant so lacking in the present ability to understand the proceedings and charges against him cannot satisfy the core values of the criminal justice system.[139] In 1975, the Court added a fourth consideration for trial courts assessing competency—whether the defendant has the present ability to assist counsel in preparing a defense.[140]

As with many of the Court's due process declarations, the method for conducting a competency evaluation is left to the states.[141] The Court has clarified its jurisprudence minimally, requiring an assessment in every case where the evidence raises sufficient doubt as to the defendant's competency, though the Court has declined to specifically define sufficient doubt.[142] Rather, the Court has enumerated a list of factors for each trial court to consider, including the defendant's irrational behavior and demeanor in core proceedings, prior medical opinions of a defendant's competency, and concerns raised by defense counsel.[143]

Much has been written about the "rational understanding" component of the *Dusky* competency test.[144] Most of that work addresses the different levels of competency necessary to stand trial, plead guilty, or waive counsel in favor of self-representation,

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137. *Id.*

138. *Id.*

139. 4 BLACKSTONE, *supra* note 118, at *24.

140. Drope v. Missouri, 420 U.S. 162, 171 (1975).

141. *See id.* at 173 (discussing Pate v. Robinson, 383 U.S. 375, 385 (1966)).

142. Pate v. Robinson, 383 U.S. 375, 385 (1966); *see* Jackson v. Indiana, 406 U.S. 715, 738 (1972) (explaining that incompetent criminal defendants cannot be detained indefinitely when the trial court has determined that there is little hope of restoration to competency).

143. *Drope*, 420 U.S. at 180; *Pate*, 383 U.S. at 385–86.

144. *See, e.g.*, Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond* Dusky *and* Drope, 47 U. MIAMI L. REV. 539, 594 (1993) [hereinafter Bonnie, *The Competence of Criminal Defendants*]; Richard J. Bonnie et al., *Decision-Making in Criminal Defense: An Empirical Study of Insanity Pleas and the Impact of Doubted Client Competence*, 87 J. CRIM. L. & CRIMINOLOGY 48, 53 (1996); E. Lea Johnston, *Setting the Standard: A Critique of Bonnie's Competency Standard and the Potential of Problem-Solving Theory for Self-Representation at Trial*, 43 U.C. DAVIS L. REV. 1605, 1617–18 (2010) (footnote omitted); Terry A. Maroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1376 (2006); Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 618–19 (1995) (citing Dusky v. United States, 362 U.S. 402, 402 (1960)).

and the theories that support abolition of competency hearings when it is not in the best interest of the defendant to be relegated to the mental health system.[145] It is fair to say that most scholars focus on the defendant's interest in the competency hearing and finding, while paying little attention to the societal interest at stake in the competency determination.[146]

The ability to assist counsel in preparing an adequate defense operates as a lifeline in capital litigation.[147] Because of the complexity of all capital litigation, defendants rely on their attorneys for making critical decisions, and whether consciously or not, attorneys engage in surrogate decisionmaking.[148] An often-overlooked factor in the competency determination is the seriousness and complexity of the charges;[149] that is, trial courts cannot employ a fixed standard for determining competency, but must rather examine each defendant in the context of his own trial to see if he is able to assist counsel.[150] Nowhere is this demand more pressing than in a capital case.[151]

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145. *See* Bonnie, *The Competence of Criminal Defendants*, *supra* note 144, at 542, 554; Johnston, *supra* note 144, at 1610, 1614, 1624; Maroney, *supra* note 144, at 1380–84; Winick, *supra* note 144, at 622. Professor Richard J. Bonnie is responsible for establishing a cohesive theory for competency for criminal defendants, and much of the scholarship in the area operates as a response to his seminal work. *See* Bonnie, *The Competence of Criminal Defendants*, *supra* note 144.

146. Professor Bonnie elaborates on the societal interests, such as preserving the moral dignity of the process by prohibiting the prosecution and conviction of incompetent defendants who neither understand the nature of the wrongdoing nor the punishment thereof. Bonnie, *The Competence of Criminal Defendants*, *supra* note 144.

147. *See* Christopher Seeds, *The Afterlife of* Ford *and* Panetti*: Execution Competence and the Capacity to Assist Counsel*, 53 ST. LOUIS U. L.J. 309, 314, 346–47 (2009) (quoting Brief for Legal Historians as Amici Curiae Supporting Petitioner at 22, Panetti v. Quarterman, 551 U.S. 930 (2007) (No. 06-6407)).

148. *See* Bonnie, *The Competence of Criminal Defendants*, *supra* note 144, at 546–47. Surrogate decisionmaking covers only those narrow aspects of the litigation reserved for the defendant's decision—being tried by a judge or a jury and testifying or remaining silent. *Id.* This article maintains that, for a capital defendant to assist counsel in the preparation of an adequate defense, the capital defendant needs to engage in other collaborative decisionmaking—such as how to present mitigation evidence, how to characterize mental illness, and the mental retardation determination—in order to have a fair trial that satisfies the societal goals of capital punishment.

149. *See* 7 THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS 76–77 (1986).

150. *Id.* at 77.

151. The best evidence of the increased need for expertise and high-level functioning comes through the states' decisions to require that capital defenders have more experience and training than other criminal defenders. It follows that if counsel needs to have a more refined ability to handle the complexity of the capital trial, so too must the capital defendant. *See* Michael D. Moore, *Tinkering with the Machinery of Death: An Examination and*

The *Atkins* Court ultimately rested its holding on its traditional narrowing jurisprudence—"to ensure that only the most deserving of execution are put to death"—and excludes the mentally retarded from execution.[152] But the mere imposition of a death sentence upon a mentally retarded defendant also constitutes an Eighth Amendment violation under the Court's second rationale.[153] Because of the reduced capacity of the mentally retarded capital defendant, the Court establishes a "categorical rule making such offenders ineligible for the death penalty."[154] The Court worries that, all factors to the contrary, the death-qualified jury panel will sentence the mentally retarded capital defendant to death.[155] To achieve the goal of ineligible defendants avoiding a sentence of death, trial courts should assess death-eligibility at the time of the pretrial competency assessment.[156]

Even in a pretrial competency assessment, how and whether trial courts would determine a defendant's mental retardation would still be a complicated procedure that may be full of conflicting testimony and arguments about what constitutes mental re-

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Analysis of State Indigent Defense Systems and Their Application to Death-Eligible Defendants, 37 WM. & MARY L. REV. 1617, 1640 (1996); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 357–58 (1995).

152. Atkins v. Virginia, 536 U.S. 304, 319 (2002).

153. *Id.* at 321 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)). The *Atkins* Court held that mentally retarded defendants may lack the ability to assist at trial where a death sentence is a possibility. *Id.* at 320–21. Forcing a mentally retarded defendant to participate in such a trial, both through the guilt or innocence and sentencing phases, would violate the core principle of *Atkins*.

154. *Id.* at 320.

155. *Id.* at 320–21. It is hard to determine if the Court's concern is sociological or legal—i.e., will the death-qualified jury panel improperly ignore or weigh credible evidence of mental retardation, or will the death-qualified jury panel simply be unable to empathize with the mentally retarded defendant and will thus nullify the mental retardation instruction? In either case, it seems clear that the Court is concerned with the death-qualified juror's ability to listen to the evidence and make an individualized determination as required by *Eddings v. Oklahoma*, 455 U.S. 104, 105 (1982) (requiring "individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments" (quoting Lockett v. Ohio, 438 U.S. 586, 606 (1978))).

156. For an example of the risk of mentally retarded defendants being sentenced to death, one need only reexamine the years of trials and appeals for both Daryl Atkins and Johnny Paul Penry. *See supra* notes 10, 19. While the *Atkins* Court concerns itself with trial level obstacles for the mentally retarded defendant, the mentally retarded defendant is even more incapable of assisting counsel during an appellate and postconviction process, both of which are, arguably, more complex than trial level capital defense. For an excellent exposition on expanding and reconceptualizing competency determinations to include the appellate and postconviction process, see Mae C. Quinn, *Reconceptualizing Competence: An Appeal*, 66 WASH. & LEE L. REV. 259, 263, 307 (2009).

tardation.[157] But because the Court created a constitutional rule that turns on a purely clinical diagnosis of mental retardation,[158] it is easy to see the determination as a question of law—the typical province of the trial judge—rather than as a question of fact. While scholars have criticized the Court's decision to draw such a bright-line prohibition against executing any person with a mental retardation diagnosis,[159] the question is clearly not one to be mixed with demeanor facts, as the insanity determination is.[160]

IV. HEIGHTENED RELIABILITY: ACHIEVING DUE PROCESS IN THE MENTAL RETARDATION DETERMINATION

> Today's decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence. Not only does it, like all of that jurisprudence, find no support in text or history of the Eighth Amendment; it does not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate.[161]

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157. *See, e.g.*, John H. Blume et al., *Of* Atkins *and Men: Deviations From Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL'Y 689, 695–97 (2009) (discussing the difficulty courts have in adhering to standard requirements of the various definitions of mental retardation). Like determining competency to stand trial more generally, trial courts would have the task of assessing complex medical testimony. *See* Davoli, *supra* note 79, at 345–46. As there is a push among academics to persuade trial courts to use a broader, more medically appropriate method for assessing competency, see, for example, *id.* at 321, 330, so too is there a push for trial courts to employ a broader, more meaningful interpretation of "mental retardation," such as creating a categorical exemption from a death sentence. *See* Batey, *supra* note 97, at 1519; Farahany, *supra* note 104, at 903–04.

158. *See* Bonnie & Gustafson, *supra* note 124, at 813.

159. *See id.* at 814. Professor Bonnie is the dominant critic of employing a "statistical construct" as a categorical bar to execution. *See id.* This critique makes sense to any criminal law scholar, since issues of mental health are routinely examined in the context of the defendant's capacity to form mens rea. *See, e.g.*, Tison v. Arizona, 481 U.S. 137, 157 (1987). Placing the mental retardation determination with the rest of the competency assessment in the capital case should settle this discomfort with the "statistical construct." In *Atkins*, arguably, the Court purposefully chose to exempt mentally retarded defendants—and not others who suffer mental illness or impairment that make them less culpable—from death because, like being a juvenile, the clinical determination of mental retardation is fairly simple; hence, the Court adopted the clinical definition of mental retardation. *See Atkins*, 536 U.S. at 318. But in adopting a clear method, the Court escaped the "mild, moderate, and severe" argument offered by Justice Scalia, and presumably, did not want jurors to agree with Justice Scalia that mild mental retardation does not impair a defendant sufficiently to exempt him from a death sentence. *Id.* at 338–41 (Scalia, J., dissenting). Scalia's mere recitation of the facts makes his point that, in his mind, the facts should matter and no one should be categorically excluded from death. *See id.* at 338.

160. *See, e.g.*, Clark v. Arizona, 548 U.S. 735, 745, 749–53 (2005) (demonstrating the Court's acceptance of Arizona's use of demeanor facts to determine insanity).

161. *Atkins*, 536 U.S. at 337–38 (Scalia, J., dissenting).

In the opening lines of his dissenting opinion in *Atkins*, Justice Scalia condemns the "evolving standards of decency"[162] rationale supporting the majority's declaration that the execution of mentally retarded defendants would abridge the Eighth Amendment's prohibition against "cruel and unusual punishment."[163] Originalists have voiced complaints over "evolving standards of decency" as a justification for the living Constitution for decades.[164] But even as Scalia rebukes the majority's Eighth Amendment jurisprudence, he obliquely embraces centuries of criminal law jurisprudence that could likewise justify a procedure that could heighten reliability in the trial court's mental retardation determination and spare mentally retarded defendants from receiving a death sentence.[165]

The Eighth Amendment is the driving force in the capital jurisprudence developed by appellate and postconviction courts, which examine the capital defendant's claims after he has been found guilty and sentenced to death. Appellate and postconviction courts review the substantive fairness of a death sentence pursuant to the Eighth Amendment.[166] Due Process Clause review, where the court focuses on the procedure used by the trial court to protect the capital defendant's substantive rights,[167] such as the

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162. *Id.* at 341–42 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).

163. U.S. CONST. amend. VIII.

164. It is easy to categorize that originalists prefer historical due process over evolving standards of decency but the two are not mutually exclusive. When the Court applied evolving standards of decency in the death context, it did not explicitly reject historical due process, but critics could argue that the net result may well have become an over-reliance on evolving standards of decency to limit the number of defendants who receive a death sentence. *See generally* Roper v. Simmons, 543 U.S. 551, 607–08 (2004) (Scalia, J., dissenting); Woodson v. North Carolina, 428 U.S. 280, 293 (1976); Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 667–68 (2006).

165. *See Atkins*, 536 U.S. at 340–41 (Scalia, J., dissenting).

166. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 431–32 (1993) (Blackmun, J., dissenting) ("This Court has ruled that punishment is excessive and unconstitutional if it is 'nothing more than the purposeless and needless imposition of pain and suffering,' or if it is 'grossly out of proportion to the severity of the crime.' It has held that death is an excessive punishment for rape, and for mere participation in a robbery during which a killing takes place." (citing Coker v. Georgia, 433 U.S. 584, 592 (1977))); Enmund v. Florida, 458 U.S. 782, 797 (1982); Gregg v. Georgia, 428 U.S. 153, 173 (1976).

167. Whether a mentally retarded capital defendant has a *substantive* due process right to be free from receiving a death sentence is the subject of the author's work-in-progress. An exceedingly oversimplified approach to the inquiry requires a determination of whether the Eighth Amendment violation of sentencing a mentally retarded defendant to death can be remedied by appellate review. In that article, the author maintains that, when a mentally retarded defendant or a juvenile receives a death sentence, a substantive

right of mentally retarded defendants to be categorically exempted from death, is rare.[168] But due process review, in the habeas or appellate context, will always have flaws.[169] On appellate or habeas review, the defendant stands convicted and sentenced to death, and in the *Atkins* context, presumed to be free from mental retardation that would categorically exempt him from a death sentence.[170]

Justice Scalia's dissenting opinion in *Atkins* offers an overview of the treatment of mentally retarded defendants, known as "idiots" at the time of the drafting of the Eighth Amendment.[171] In 1791, "'idiots' enjoyed . . . special status under the law at that time. They, like lunatics, suffered a 'deficiency in will' rendering them unable to tell right from wrong."[172] Justice Scalia's primary objection to the majority opinion in *Atkins* is that the "idiots" of yesterday would be only the severely or profoundly mentally retarded today.[173] He objects to the "evolving standards of decency," which would give mildly mentally retarded defendants the same "special status under the law" enjoyed historically by only the most severely mentally retarded defendants.[174] But his history lesson offers a glimpse at historical due process employed by

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due process violation has occurred. Moreover, the work-in-progress asserts that, under the Court's second rationale in *Atkins*, forcing a mentally retarded defendant to participate in a capital trial where death is a potential sentence constitutes a substantive due process violation. For general overview of the debate over substantive and procedural due process claims, see, for example, Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833 (2003).

168. Thurschwell, *supra* note 23, at 16 (discussing the dominance of Eighth Amendment analysis and the Court's "flirting" with the due process jurisprudence); *see also* Gardner v. Florida, 430 U.S. 349, 360 (1977) (finding that a death sentence based on secret evidence violates due process).

169. A good example of the debate over the flaws in the process employed during appellate and habeas review appears in the statement of Justice Stevens in the denial of the petition of certiorari in *Walker v. Georgia*, 555 U.S. ___, ___, 129 S. Ct. 453, 457 (2008) ("And the likely result of such a truncated [proportionality] review . . . is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment."). If we know that appellate and habeas review will likely be "truncated," then need for trial procedures that guarantee due process becomes increasingly important.

170. *See* Thurschwell, *supra* note 23, at 17. ("[T]he Supreme Court's Eighth Amendment jurisprudence, consistent with the federal courts' exclusively *post hoc* perspective in the post-*Furman* era, looks primarily to the substantive merits of the punishment and not to its procedural regularity.").

171. Atkins v. Virginia, 536 U.S. 304, 340 (2002) (Scalia, J., dissenting).

172. *Id.* (citing 4 BLACKSTONE, *supra* note 118, at *24).

173. *Id.*

174. *Id.* at 340–41.

courts to sort the "idiots" who should be spared from death from those who were fit to be executed.[175]

This section accepts the majority view in *Atkins* that mentally retarded defendants—whether mild or severe—should be categorically exempted from execution,[176] and it looks to Justice Scalia's dissenting opinion and to legal history to see how courts have accomplished categorical exemption in the past by tracing the development, use, and evolution of *in favorem vitae*, a doctrine meaning "in favor of life."[177] The doctrine in its original form demanded rigid adherence to technical formalities and strict statutory interpretation in capital cases.[178] This section will explore how the doctrine offers a glimpse at historical due process through the heightened use of judicial discretion where death was a possible penalty.[179] In the most obvious sense, *in favorem vitae* might be seen as an argument for a presumption of life, though the Court has never accepted that argument in the capital context.[180]

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175. *Id.* at 340 ("Due to their incompetence, idiots were 'excuse[d] from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses.' Instead, they were often committed to civil confinement or made wards of the State, thereby preventing them from go[ing] loose, to the terror of the king's subjects." (quoting 4 BLACKSTONE, *supra* note 118, at *25, and citing Penry v. Lynaugh, 492 U.S. 302, 331 (1989))); SAMUEL JAN BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW 11–14 (3d ed. 1985); 1 HALE, PLEAS OF THE CROWN, *supra* note 35, at 33.

176. *Atkins*, 536 U.S. at 318–21 (majority opinion).

177. BLACK'S LAW DICTIONARY, *supra* note 35, at 847; *see also Atkins*, 536 U.S. at 339–54 (Scalia, J., dissenting); Thurschwell, *supra* note 23, at 15, 17–19.

178. Thurschwell, *supra* note 23, at 17.

179. The Court has long espoused the need for "heightened reliability" in capital trials, both at the guilt or innocence and sentencing phases. Gilmore v. Taylor, 508 U.S. 333, 342 (1993) ("[T]he Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case."); *see also* Spaziano v. Florida, 468 U.S. 447, 455 (1984) (discussing the reliability the Court demands in capital cases); Thurschwell, *supra* note 23, at 15.

180. *See* Beth S. Brinkmann, Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 YALE L.J. 351, 360–64 (1984). The Court has never confronted whether trial courts should adopt a "presumption of life" approach when making the mental retardation determination. The argument for a presumption of life in capital litigation began with the publication of Beth S. Brinkmann's note in the Yale Law Journal in 1984. While state sentencing schemes that reflect a presumption of death are unconstitutional, the Court has imposed no requirement that states employ sentencing schemes that require a presumption of life. *See* Kansas v. Marsh, 548 U.S. 163, 173–81 (2006). Courts have determined that defendants are entitled to jury determination of factors that will increase punishment, whether in terms of years or a death sentence. *See* Ring v. Arizona, 536 U.S. 584, 589 (2002); Apprendi v. New Jersey, 530 U.S. 477 (2000).

This section maintains that trial courts should ensure due process at the mental retardation determination in all capital murder prosecutions. Through an examination of how trial courts have historically protected the core values of the criminal justice system,[181] this section extends a modern application of the *in favorem vitae* doctrine[182] as it could be used by trial courts in capital cases to ensure fair application of the *Atkins* protections for mentally retarded defendants.

A. *The Origin of* In Favorem Vitae

> Death, it turns out, has always been "different," even before the Founding—not as a matter of the Eighth Amendment's *post hoc* concern with the justice of the ultimate punishment imposed, but as a matter of the due process concern with the justice of the procedures afforded to a defendant who *might* suffer the ultimate punishment at the hands of the state.[183]

Although many capital defendants were convicted in eighteenth-century England,[184] scholars estimate that in reality only approximately half of the convicts were executed.[185] This phenomenon can be credited to a combination of pardons by the crown,[186] and more pertinent here, the use of *in favorem vitae* by judges.[187] When confronted with capital statutes that expressly removed

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181. One modern expression of a core value of the criminal justice system is the Eighth Amendment's prohibition against cruel and unusual punishment. U.S. CONST. amend. VIII. Another core value, post-*Atkins*, is that mentally retarded defendants are categorically exempted from death. *See* Kennedy v. Louisiana, 554 U.S. ___, ___, 128 S. Ct. 2641, 2650–51 (2008).

182. Thurschwell, *supra* note 23, at 15 ("Death, it turns out, has always been 'different,' even before the Founding—not as a matter of the Eighth Amendment's *post hoc* concern with the justice of the ultimate punishment imposed, but as a matter of due process concern with the justice of the procedures afforded to a defendant who *might* suffer the ultimate punishment at the hands of the state."). For a discussion of *in favorem vitae*, see *supra* note 35.

183. Thurschwell, *supra* note 23, at 15.

184. *See* John H. Langbein, *Albion's Fatal Flaws*, 98 PAST & PRESENT 96, 110 (1983) (stating that 1121 people were convicted and sentenced to death between 1749–1771).

185. *See id.* at 110 (accounting that from 1749–1771, out of the 1121 convicts sentenced to death, 443 convicts were reprieved or died in prison, and of the 443 who were reprieved, 401 were pardoned for transportation); *see also* LEON RADZINOWICZ, THE MOVEMENT FOR REFORM 157–58 (1948) (estimating that from 1710–1714, only 35 percent of those capitally convicted in London were actually executed).

186. Langbein, *supra* note 184, at 110 (stating that 401 of the 443 who escaped execution were pardoned).

187. *See id.* at 110–13 (discussing the factors considered before executing a convict).

the benefit of the clergy,[188] judges applying the *in favorem vitae* doctrine would construe indictments, pleadings, statutes, and procedural rules "literally and strictly" in order to avoid imposing the statutorily required death sentence.[189]

English common law reserved capital punishment for a few crimes—treason, murder, rape, and arson.[190] From the Middle Ages to the eighteenth century, defendants facing capital punishment could invoke the *privilegii clericalis*, "the benefit of the clergy."[191] Originally, only actual members of the clergy could claim the privilege, which entitled clerics to have their cases removed from the jurisdiction of common law courts to ecclesiastical courts.[192] By the fourteenth century, literate non-clerics could also claim the privilege.[193] By the fifteenth century, the privilege had evolved so that defendants could only claim it postconviction.[194]

Beginning in the sixteenth century, Parliament attempted to curb the use of the privilege by requiring defendants who had invoked it to have their thumbs branded.[195] For capital defendants who could claim clergy, a death sentence was commuted to a seven-year term of indentured servitude in the British colonies.[196] Sir James Fitzjames Stephen, not alone in his disapproval of the clergy privilege, critically referred to it as "a promiscuous but absurd and capricious mitigation of the cruel severity of the common law."[197] Thus, by the eighteenth century, Parliament widely

188. *In privilegii clericalis* began as an ecclesiastical privilege that exempted members of the clergy from criminal trial in secular courts, but it evolved into a jurisprudence in secular court of offering leniency, first for clergymen, and later for the literate. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 513–15 (4th ed. 2002). By the sixteenth century, it had become a doctrine of leniency for first-time offenders. *See* 4 BLACKSTONE, *supra* note 118, at *358–67.

189. Thurschwell, *supra* note 23, at 17.

190. RADZINOWICZ, *supra* note 185, at 4.

191. *Id.* at 3 & n.2.

192. 4 BLACKSTONE, *supra* note 118, at *358, *361.

193. SIR JAMES FITZJAMES STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 35 (2d ed. 1890).

194. *Id.*

195. *Id.* at 36. "Under Edward VI clergy was taken from murder, burglary, housebreaking, and putting the inhabitants in fear, highway robbery, horse-stealing, and robbing churches. Under Elizabeth, stealing from the person, amounting to grand larceny, and rape and burglary in 1576, were excluded from clergy." *Id.* (citations omitted).

196. Langbein, *supra* note 184, at 117.

197. STEPHEN, *supra* note 193, at 35. For a discussion of the history and evolution of the benefit of the clergy, see *supra* note 188.

enacted statutes restricting the use of the privilege to a few limited crimes.[198]

In England, between 1688 and 1823, the number of capital crimes grew four-fold.[199] *In favorem vitae* grew increasingly popular as the clergy privilege waned in use.[200] As early as the seventeenth century, Sir Matthew Hale noted that "where any statute . . . hath ousted clergy in any of those felonies, it is only so far ousted, and only in such cases and as to such persons as are expressly comprised within such statutes, for *in favorem vitae* & *privilegii clericalis* such statutes are construed literally and strictly."[201] Strict interpretation of statutes required judges, when confronted with ambiguous statutes, to resolve the ambiguity in favor of the accused.[202]

Essentially, *in favorem vitae* demanded that capital statutes be applied with a rigid, technical conformity to pleading and proof, resulting in a disparity between the laws as written and as applied.[203] Radzinowicz noted that even though the number of capital offenses was "large and growing," the number of executions rapidly declined, and attributed this discrepancy to the "divergence between the policy of the Legislature, which was to maintain and even to increase the number of capital statutes, and the attitude of those who were called upon to put the law into operation."[204]

In favorem vitae reached its heyday in eighteenth-century England, which bore witness to the exponential growth in capital sta-

198. BAKER, *supra* note 188, at 515 & n.82; RADZINOWICZ, *supra* note 185, at 3 & n.2; Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 517 & n.40 (2002) (discussing how statutes retracting benefit of clergy were essentially death penalties).

199. *See* RADZINOWICZ, *supra* note 185, at 611–59 (offering a complete list of eighteenth century capital statutes in England).

200. *See* 2 HALE, *supra* note 35, at 335; *see also* 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 188 (8th ed. 1824) (agreeing that the "settled rule [is] that all statutes are to be construed strictly in favour of life").

201. 2 HALE, *supra* note 35, at 335.

202. *See* Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 751–52, 756–61 (1935) (discussing the history of strict interpretation of statutes and advocating its death); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 189 (1985) (proposing that the rule of strict construction is "defunct").

203. *See* RADZINOWICZ, *supra* note 185, at 158.

204. *Id.*

tutes that prohibited the clergy privilege.[205] In his *Commentaries*, published in the 1760s, Blackstone tallied the number of capital statutes at 160.[206] While some of these capital statutes punished serious crimes like murder, piracy, and arson, most imposed death for property crimes, which today would be considered minor, such as grand larceny (defined at the time as the theft of goods over twelve pence), burglary, bankruptcy, forgery, and embezzlement.[207] It was into this atmosphere of severe punishments for petty crimes that the concept of *in favorem vitae* was widely invoked.[208]

While conceding that English judges resorted to stringent requirements and strained interpretations out of necessity and from mercy, scholars nonetheless criticized the use of *in favorem vitae*.[209] Radzinowicz disapproved of the practice, commenting that "[w]hen in a case tried under a capital statute the court felt that it would be unjust to inflict the appointed penalty, it applied any technique by which it could be evaded."[210] Hale, while acknowledging "[t]he strictness required in indictments is great, because life is in question,"[211] disparaged the use of *in favorem vitae*

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205. *Id.* at 4; 4 BLACKSTONE, *supra* note 118, at *18.

206. 4 BLACKSTONE, *supra* note 118, at *18 ("It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than an hundred and sixty have been declared by act of parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death.").

207. RADZINOWICZ, *supra* note 185, at 620–59. The overwhelming majority of offenders were executed for having committed property crimes.

> Out of 678 offenders executed in London and Middlesex in the twenty-three years from 1749 to 1771, seventy-two had committed murder, fifteen attempted murder, two rape, two sodomy, one high treason, and two other felonies. Thus out of 678 capital sentences for which executions took place, only ninety-four were for very serious crimes against the person and the State; all the remaining 584 were for offences against property.

Id. at 148.

208. *See* HAWKINS, *supra* note 200, at 188.

209. *See* Thurschwell, *supra* note 23, at 17.

> The consensus view among scholars is that the hypertechnicality of the English courts' interpretations, although purporting to adhere strictly to the laws, in fact masked an instrumentalist approach that—while understandable from the perspective of the moral merits of the cases (which often involved petty theft crimes)—ill-served the greater cause of the rule of law.

Id.

210. RADZINOWICZ, *supra* note 185, at 87.

211. 2 HALE, *supra* note 35, at 168.

as "a blemish and inconvenience in the law, and the administration thereof; more offenders escape by the over easy ear given to exceptions in indictments, than by their own innocence."[212]

B. *Capital Punishment in the American Colonies and in Nineteenth Century America*

While American colonists imposed the death penalty to a lesser extent than their English contemporaries,[213] capital punishment has existed in the United States since the country's inception.[214] Initially, Northern colonists did not punish property crimes like burglary and robbery with death, but they did impose the death penalty for morality offenses, such as blasphemy, adultery, and bestiality.[215] Because of their dependence on agriculture, Southern colonists imposed death for minor property crimes, such as embezzling tobacco and stealing livestock.[216]

While the number of capital statutes in the United States increased in the eighteenth century,[217] it never came close to topping the number of English capital statutes.[218] Because not as many crimes were punishable by death, the American judiciary did not have as much occasion to employ *in favorem vitae.* Nevertheless, the concept was firmly recognized and has been applied since the country's founding.[219]

Capital cases from the early nineteenth century remained faithful to English procedural rules and judges construed rules narrowly and in favor of the defendant.[220] That capital defendants

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212. *Id.* at 193.

213. *See* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 6–7 (2002).

214. *See id.* at 5–9.

215. *See id.* at 6.

216. *See id.* at 8.

217. *See id.* at 7–8.

218. *See id.* at 7.

219. Thurschwell, *supra* note 23, at 14–15. The doctrine was first invoked in *State v. Briggs*, decided in 1794, where the Constitutional Court of Appeals of South Carolina rejected a horse thief's *in favorem vitae* argument that he was entitled to an extra day to prepare for trial. 3 S.C.L. 8, 1 Brev. *8 (S.C. Eq. 1794), *overruled by* State v. Torrence, 406 S.E.2d 315, 324, 328 n.5 (S.C. 1991). At the time, horse-stealing was punishable by death. BANNER, *supra* note 213, at 140.

220. *See* United States v. Palmer, 16 U.S. (3 Wheat.) 610, 633–34 (1818) (noting that the defendants had been indicted for the capital crime of piracy, and interpreting the anti-piracy statute to protect only crimes against U.S. citizens, resulting in a sentence other than death); United States v. Venable, 28 F. Cas. 368, 368 (C.C.D.C. 1807) (No. 16,615)

received special treatment was deeply ingrained in the minds of early American jurists. In *United States v. Wood*, where a defendant faced both capital and noncapital charges for armed robbery of the mail, the prosecutor admitted that "whether the [capital] counts were proved would depend upon the meaning [of] the word 'jeopardy,'" and noted that since "[t]he word is doubtful and the case is capital" he would not "press that part of the case which calls for the offender's life."[221]

American judges often exercised their discretion *in favorem vitae* to afford capital defendants special consideration, such as severing joint indictments[222] and granting a new trial because the original judge died right before he was about to deliver his opinion on a murder convict's motion for a new trial.[223] Of course, capital defendants did not always receive preferential treatment. For example, in *United States v. Perez*, without obtaining the capital defendant's consent, the court discharged the jury because it failed to agree on a verdict.[224] The Supreme Court of the United States held that judges have the discretion to declare mistrials; thus, discharging the jury without the defendant's consent would not bar a future trial.[225] Writing for the Court, Justice Story stated, "To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner."[226]

(instructing the jury to apply a statute narrowly, which resulted in the acquittal of a defendant who had been indicted for the capital crime of passing counterfeited coin).

221. 28 F. Cas. 755, 759 (C.C.D. Pa. 1818) (No. 16,757). Despite the prosecutor's concession, the trial judge instructed the jury to adopt the broader definition of "jeopardy" and the jury ultimately found the defendant guilty of the capital offense. *Id.* at 759–60. The appellate court, however, arrested the judgment because the indictment had not alleged that the trial court had jurisdiction, and as the case was capital, it should have been tried where the offense had been committed. *Id.* at 761.

222. *See, e.g.*, United States v. Matthews, 26 F. Cas. 1205, 1206 (C.C.S.D.N.Y. 1846) (No. 15,746).

223. *See, e.g.*, United States v. Harding, 26 F. Cas. 131, 133, 136 (C.C.E.D. Pa. 1846) (No. 15,301).

224. 22 U.S. (9 Wheat.) 579, 579 (1824).

225. *Id.* at 579–80.

226. *Id.* at 580. Justice Story may be the most prolific jurist on the *in favorem vitae* doctrine. While he criticized "its excesses," he also maintained that "capital defendants deserved special procedural considerations 'in favor of life' in appropriate cases—particularly with respect to discretionary issues and close interpretations of statutes." Thurschwell, *supra* note 23, at 18, 22 nn.43–44 (setting out a detailed history of Justice

Early on, American judges recognized that the evidence required to convict a capital defendant must be strong.[227] Trial courts often articulated the burden of proof in criminal cases—beyond a reasonable doubt—in terms of the *in favorem vitae* doctrine.[228] When confronted with the issues of peremptory challenges, motions for separate trials, and motions for new trial, while judges did not always grant capital defendants' request, they often invoked *in favorem vitae* to justify their decisions.[229]

C. In Favorem Vitae *in Twentieth Century America*

American courts in the twentieth century continued to depart from English rules of procedure. By the twentieth century, *in favorem vitae* had evolved into a catch-all phrase for exercising judicial discretion in favor of capital defendants.[230] Some courts independently searched trial records for unpreserved error,[231]

Story's *in favorem vitae* opinions). His language was often full of compassion: "In a capital cause, every motive of humanity and justice, combining with the precepts of the law, would compel me to postpone a decision until all such doubts were dissipated. I never will be instrumental in taking away life, until I am clearly persuaded that the law imposes upon me this painful and melancholy duty." United States v. Cornell, 25 F. Cas. 650, 652 (C.C.D.R.I. 1820) (No. 14,868).

227. *See, e.g.*, United States v. Vanranst, 28 F. Cas. 360, 360 (C.C.D. Pa. 1812) (No. 16,608) ("In any case, more particularly in one that is capital, the circumstances relied upon to establish the guilt of the accused, ought to be strong, so as to leave no doubt of the fact; and they should be consistent with themselves, each circumstance tending to establish the guilt of the party.").

228. *See, e.g.*, Neal v. Fesperman, 46 N.C. (1 Jones) 416, 417 (1854) ("Where the evidence is circumstantial it is admitted to be proper, '*in favorem vitae*,' for the Court to instruct the jury that if there be any hypothesis consistent with the prisoner's innocence they should find for him 'not guilty'—that is, if the circumstances proven may all be true, and still the prisoner be not guilty, they should acquit."); State v. Bartlett, 43 N.H. 224, 230 (1861), *overruled by* Novosel v. Helgemoe, 384 A.2d 124, 131 (N.H. 1978) ("A system of rules, therefore, by which the burden is shifted upon the accused of showing any of the substantial allegations in the indictment to be untrue, or, in other words, to prove a negative, is purely artificial and formal, and utterly at war with the humane principle which, *in favorem vitae*, requires the guilt of the prisoner to be established beyond reasonable doubt.").

229. *See, e.g.*, United States v. White, 28 F. Cas. 580, 580, 584 (C.C.D. Mass. 1826) (No. 16,682). Where two defendants had been indicted for murder on the high seas and one defendant moved for separate trials, the court overruled the defendant's motion, reasoning, "[i]n capital cases it is always the desire of the court to grant every reasonable favor to the prisoners; but it is, at the same time, its duty to allow the government its fair and regular claims." *Id.* at 580.

230. *See supra* notes 227–29 and accompanying text.

231. *See, e.g.*, State v. Young, 51 A. 939, 941 (N.J. 1902) ("We have deemed it proper, in favorem vitae, to assume, without deciding, that under the present legislation an exception duly taken to the admission of a confession in evidence may raise the question whether the conclusions of fact whereon the trial court acted were justified by the evidence taken

while other courts continued to recognize that capital defendants deserved special procedural accommodations.[232] In *Andres v. United States*, the trial judge issued ambiguous jury instructions regarding the mitigation of a defendant's death sentence to life imprisonment.[233] The Supreme Court of the United States reversed and remanded a lower court's death sentence, stating, "In death cases doubts such as those presented here should be resolved in favor of the accused."[234]

Modern application of *in favorem vitae* is best exemplified by the approach of the South Carolina judiciary, which afforded capital defendants heightened appellate review.[235] *In favorem vitae* thus became synonymous with an appellate court's independent review of the record in death penalty cases to search for legal errors not properly preserved.[236] In *State v. Swilling*, the court stated, "In keeping with . . . in favorem vitae, we have not only considered the exceptions on appeal and the questions briefed and orally argued . . . , but we have also independently searched the record for prejudicial error, whether or not objected to below or made a ground of exception here."[237] South Carolina abrogated its use of *in favorem vitae* in *State v. Torrence*, where it accepted the state's argument that "historical and legal developments have rendered *in favorem vitae* obsolete."[238]

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in the preliminary examination in that court.").

232. *See, e.g.*, Sanford v. Robbins, 115 F.2d 435, 439 (5th Cir. 1940) (presuming, *in favorem vitae*, that the defendant must have consented to a new trial since he had been "condemned to death and might be helped and could not possibly be hurt by a new trial . . . .").

233. 163 F.2d 468, 469 (9th Cir. 1947), *rev'd*, 333 U.S. 740 (1948).

234. Andres v. United States, 333 U.S. 740, 752 (1948).

235. *See* John H. Blume & Pamela A. Wilkins, *Death by Default: State Procedural Default Doctrine in Capital Cases*, 50 S.C. L. REV. 1, 11–16 (1998) (discussing the history of *in favorem vitae* review in South Carolina and its abolition).

236. *See* State v. Torrence, 406 S.E.2d 315, 319 (S.C. 1991).

237. 142 S.E.2d 864, 865 (S.C. 1965), *overruled by Torrence*, 406 S.E.2d at 328 & n.5.

238. 406 S.E.2d at 319. Justice Chandler argued that since other mechanisms afforded protection and postconviction relief to those capitally convicted, *in favorem vitae* review was no longer necessary to safeguard capital defendants. *Id.* at 321–23 (Chandler, J., concurring).

D. *An* In Favorem Vitae *Hearing to Determine Mental Retardation Before the Capital Trial Begins*

Since 1354, English law has recognized that individuals sentenced to death must be afforded due process of the law.[239] The framers of the Bill of Rights incorporated the same principle into the Fifth Amendment, which states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . . ."[240]

The bulk of contemporary capital punishment jurisprudence is centered on the Eighth Amendment's Cruel and Unusual Punishments Clause.[241] However, scholars have argued that the Court should use the Due Process Clause to establish "minimal procedures that should underlie all capital sentencing proceedings,"[242] reasoning that the Due Process Clause better ensures reliability in capital sentencing than the Cruel and Unusual Punishments Clause.[243] While federal courts rarely invoke the Due Process Clause when discussing capital punishment, they have done so on several occasions.[244] The Supreme Court has held that due process requires that those on trial for their lives be provided

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239. *See* John Baker, *Human Rights and the Rule of Law in Renaissance England*, 2 NW. J. INT'L HUM. RTS. 1, 11 & n.57 (2004) ("Item qe nul homme, de quel estate ou condition qil soit, ne soit oste de terre ne de tenement, ne pris, nemprisone, ne disherite, ne mis a mort, saunz estre mesne en respons par due proces de lei," which may be translated thus: "No Man, of whatever estate or condition, shall be put out from land or tenement, taken or imprisoned, disinherited, or put to death, without being brought to answer by due process of the law." (citing 28 Edward III, c.3)).

240. U.S. CONST. amend. V.

241. *See* Brinkmann, *supra* note 180, at 360–62; *see also* Thurschwell, *supra* note 23, at 16.

242. Brinkmann, *supra* note 180, at 352.

243. *See id.* at 367, 370, 373 (arguing that the Due Process Clause requires courts to presume a defendant facing capital punishment deserves a life sentence to ensure that death is not imposed in violation of the Constitution and to place the burden on the prosecution to prove beyond a reasonable doubt that death is the only appropriate penalty); Thurschwell, *supra* note 23, at 16–17; Joshua Herman, Comment, *Death Denies Due Process: Evaluating Due Process Challenges to the Federal Death Penalty Act*, 53 DEPAUL L. REV. 1777, 1777–78 (2004) (discussing *United States v. Quinones*, 196 F. Supp. 2d 416 (S.D.N.Y. 2002), *rev'd*, 313 F.3d 49 (2d Cir. 2002), and *United States v. Fell*, 217 F. Supp. 2d 469 (D. Vt. 2002), *rev'd*, 360 F.3d 135 (2d Cir. 2004), which challenged the constitutionality of the Federal Death Penalty Act using due process arguments).

244. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 158, 162, 168–73 (1975); Powell v. Alabama, 287 U.S. 45, 65 (1932).

with the aid of counsel when desired.[245] The Court has vacated a death sentence, holding that a trial judge violated due process when, in deciding whether to impose the death sentence, he relied on a confidential presentence investigation report, portions of which were not disclosed to either the defendant or his counsel, such that the defendant had no opportunity to deny or explain its contents.[246] The Court has reversed a death sentence conviction, holding that while evidence in the record indicated that aggravating circumstances existed to justify a death sentence, the jury had not reached the same conclusion, and therefore the trial court violated the defendant's due process rights by imposing a death sentence.[247] The Court reversed a capital conviction, reasoning that the trial court's exclusion of hearsay testimony during the punishment phase of the trial violated due process because that testimony was "highly relevant to a critical issue . . . and substantial reasons existed to assume its reliability."[248]

In recent cases, the Court has demonstrated willingness to look at the constitutionality of due process issues based on how English common law treated the issues.[249] Looking to common law at the time of the founding reveals that those who could not understand the fundamentals of trial were not forced to participate in trials where they might receive a death sentence.[250] Blackstone commented, "[I]f a man in his sound memory commits a capital offence, . . . [a]nd if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence?"[251] The decision of whether a man is competent to stand trial is one for the court, since the very act of putting an incompetent defendant before jurors contradicts the core values of the criminal jus-

245. *Powell*, 287 U.S. at 68, 72–73. In establishing the right to counsel in a capital case, the Court in *Powell* surveyed legal history and pointed to the right to counsel in capital cases in the colonial legislatures. *Id.* at 61–63, 65, 68. As Adam Thurschwell has argued, "the First Congress provided for appointment of counsel for capital defendants in the same act that authorized capital punishment, making no similar provision for non-capital defendants for almost another century." Thurschwell, *supra* note 23, at 14 n.3 (citing Mallard v. U.S. Dist. Court, 490 U.S. 296, 306 (1989)).

246. Gardner v. Florida, 430 U.S. 349, 351 (1977).

247. Presnell v. Georgia, 439 U.S. 14, 15–17 (1978).

248. Green v. Georgia, 442 U.S. 95, 96–97 (1979) (citations omitted).

249. Apprendi v. New Jersey, 530 U.S. 466, 479–81 (2000); Walton v. Arizona, 497 U.S. 639 (1990); *see also* Cooper v. Oklahoma, 517 U.S. 348, 356–60 (1996); Thurschwell, *supra* note 23, at 15–17.

250. *See* 4 BLACKSTONE, *supra* note 118, at *24; *see also* Thurschwell, *supra* note 23, at 17.

251. 4 BLACKSTONE, *supra* note 118, at *1440–42.

tice system. The fundamental protection of the right to due process is a determination that being made to stand trial is fair. A mentally retarded defendant who is susceptible to trial problems, such as an inability to assist counsel or serve as a useful witness for the defense, as well as to sentencing problems, such as a jury's disregard for mental retardation as a mitigating factor, is incapable of participating in a fair trial.[252]

Before the trial begins, the trial court owes each capital defendant a determination of the mental retardation issue, and employing the *in favorem vitae* doctrine would ensure that due process is not offended. Moreover, this call for a unified competency assessment, reviewed *in favorem vitae*, is consistent with the Court's trend to exempt those defendants who are incompetent to be executed from the death-eligible trial.[253]

V. THE TWO-EDGED SWORD OF MENTAL RETARDATION

The Supreme Court's decision to categorically exclude mentally retarded defendants from the imposition of a death sentence marked a shift from its earlier jurisprudence whereby mental retardation was a mitigating factor to be considered by the jury at sentencing.[254] The Court recognized that "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."[255] Because categorical exclusion is the Court's mandate in *Atkins*, the mentally retarded defendant deserves protection from "the two-edged sword."[256] By creating a new constitutional right—the Eighth Amendment right for mentally retarded defendants to be categorically excluded from the imposition of a death sentence—the Court necessitates implementation of a procedure that will guarantee due process to protect the defendant's Eighth Amendment right. An examination of

252. *See* Atkins v. Virginia, 536 U.S. 304, 318, 320–21 (2002).

253. *See* Panetti v. Quarterman, 551 U.S. 930, 954, 962 (2007); Roper v. Simmons, 543 U.S. 551, 571, 578–79 (2005); *Atkins*, 536 U.S. at 320–21.

254. *Compare Atkins*, 536 U.S. at 321 (holding mentally retarded defendants are categorically excluded from execution), *with* Penry v. Lynaugh, 492 U.S. 302, 340 (1989) ("[M]ental retardation is a factor that may well lessen a defendant's culpability for a capital offense. But we cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person . . . .").

255. *Atkins*, 536 U.S. at 321 (citing *Penry*, 492 U.S. at 324).

256. *Id.*

the role of the death-qualified juror and of the capital prosecutor reveals that neither is capable of setting aside bias and complying with the Court's directive in *Atkins*.

A. Witherspoon *Jurors*

The death-qualified jury, like any other criminal jury, is comprised of ordinary people with no special expertise. While criminal trials often involve gruesome, difficult stories, the capital jury is guaranteed to deal with challenging emotions and facts, and must further grapple with complex instructions on the law.[257] Total impartiality is impossible for any juror, and reliable studies show that jurors resort to arbitrary factors, such as race and religion, when choosing to impose a death sentence.[258] Thirty-five years after *Furman v. Georgia*, the possible reasons a jury may impose a death sentence are about as predictable as being "struck by lightning."[259] An arbitrary death sentence would constitute a due process violation.

The duty of the capital jury is two-fold, deciding the guilt-innocence phase and deciding the life-death phase, as all capital trials have a bifurcated sentencing event.[260] Prosecutors may preemptively remove potential jurors who "would *automatically* vote against the imposition of capital punishment."[261] Any other rule could result in a jury that has members who are categorically biased against death, making it impossible for a prosecutor to secure a death sentence even in a fitting case. After the prosecution preemptively strikes any potential juror who forecloses the possibility of a death sentence, the remaining potential jurors are often white, male, protestant, and less educated than the overall jury

257. José Felipé Anderson, *When the Wall Has Fallen: Decades of Failure in the Supervision of Capital Juries*, 26 OHIO N.U. L. REV. 741, 750 (2000).

258. *See* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1070–71 (1995); Theodore Eisenberg et al., *The Deadly Paradox of Capital Jurors*, 74 S. CAL. L. REV. 371, 380–87 (2001). Almost eighty percent of all executions have taken place in former slave states, and black defendants are sentenced to death at a disproportionately higher rate than their white cellmates. *See Facts About the Death Penalty*, DEATH PENALTY INFO. CENTER (Feb. 23, 2011), http://www.deathpenaltyinfo.org/documents/FactSheet.pdf. *See generally* CHARLES J. OGLETREE, JR. & AUSTIN SARAT, *Introduction* to FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

259. 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring).

260. Witherspoon v. Illinois, 391 U.S. 510, 520 n.18 (1968).

261. *Id.* at 522 n.21.

pool which included those who would not impose a death sentence.[262] Death-qualified, or *Witherspoon*, jurors are more likely to defer to and trust prosecutors, are less likely to feel sympathy for the defendant, and are generally more prone to convicting in all criminal cases.[263] When charged with determining whether a capital defendant is mentally retarded or not, death-qualified jurors are more likely to disregard or misunderstand expert psychiatric testimony.[264] Scholars have begun to focus on how prosecutors can abuse the death-qualifying voir dire process to select the jury most likely to convict the defendant.[265] Capital defenders have developed a system for selecting the jurors least likely to fit the classic *Witherspoon* profile.[266]

With no other feasible option, the Court has held that, even though it allows for bias, the death-qualifying *voir dire* practice is constitutional; the Court has never mandated that the same jury hear both phases of the capital trial.[267] Trial courts have attempted to craft proceedings that do not force the capital defendant to appear before a jury predisposed to convict, to trust the prosecution's evidence, and to doubt the defendant's evidence.[268] But in most states, the capital defendant will appear before the

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262. *See* Brooke Bulter & Adina W. Wasserman, *The Role of Death Qualification in Venirepersons' Attitudes Toward the Insanity Defense*, 36 J. APPLIED SOC. PSYCHOL. 1744, 1745–46 (2006) (describing death-qualification status frequency among different demographic and attitudinal groups); Joseph Carroll, *Gallup Poll: Who Supports the Death Penalty?*, DEATH PENALTY INFO. CENTER (Nov. 16, 2004), http://www.deathpenaltyinfo.org/gallup-poll-who-supports-death-penalty (finding that the demographic most likely to be seated as a death-qualified jury is the same demographic most inclined to impose a death sentence).

263. *See, e.g.*, Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53, 55 67–68, 73–75 (1984); James R.P. Ogloff & Sonia R. Chopra, *Stuck in the Dark Ages: Supreme Court Decision Making and Legal Developments*, 10 PSYCHOL. PUB. POL'Y & L. 379, 391 (2004).

264. *See* Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1185–86 (1997).

265. For example, in choosing to pursue its capital charge against Andrea Yates, the mother charged with drowning her children, critics opined that the prosecution merely wanted to selected a death-qualified jury, which would be less likely to accept her insanity defense. In the first trial, the prosecutors were right. *See* Lisa Teachey, *DA Will Seek to Put Yates on Death Row/Mom Pleads Insanity in Children's Drowning*, HOUS. CHRON., Aug. 9, 2001, at A1.

266. *See* Matthew Rubenstein, *Overview of the Colorado Method in Capital Voir Dire*, CHAMPION, Nov. 2010, at 18.

267. *See* Lockhart v. McCree, 476 U.S. 162, 170 n.7, 181 (1986); Wainwright v. Witt, 469 U.S. 412, 428–29 (1985).

268. *See, e.g.*, United States v. Green, 324 F. Supp. 2d 311, 331 (D. Mass. 2004).

same death-qualified jury to argue both the guilt-innocence and life-death phases of the trial.[269]

As a general matter, death-qualified jurors are hostile to mental health testimony, defenses, and mitigation; "[f]urther, death-qualified jurors more willingly accept aggravating circumstances than mitigating factors—many of which involve mental health issues."[270] Scholars have long argued that the biases of the death-qualified jury violate due process, especially given the empirical evidence that those jurors will reject credible evidence of affirmative defenses, such as insanity.[271] It is a reasonable inference that death-qualified jurors will disregard credible, empirical evidence of mental retardation.[272]

As a solution to the well-recognized problem of death-qualified juror nullification on credible mental health defenses, scholars focus on how to pick the best jurors out of the biased jury pool.[273] But the mental retardation determination, in the context of *Atkins*, could and should be made by the trial court. Unlike the insanity defense, which is inextricably intertwined with the evidence of guilt,[274] the categorical exemption from execution guaranteed by *Atkins* should *not* be considered along with facts establishing guilt or future dangerousness. If the death-qualified jury

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269. *See, e.g.*, Brook A. Thompson, *Criminal Law—The Supreme Court Expands the* Witt *Principles to Exclude a Juror Who Would Follow the Law.* Uttecht v. Brown, *127 S. Ct. 2218 (2007)*, 30 U. ARK. LITTLE ROCK L. REV. 845, 854 (2008) (detailing states that enacted a guided jury sentencing scheme in which the same jury decides both the defendant's guilt and sentence, but in two different trials); *see also* Gregg v. Georgia, 420 U.S. 153, 160, 207 (1975) (upholding a Georgia statutory system in which guilt and sentence are determined by the same jury at two different trials).

270. Andrea D. Lyon, *But He Doesn't* Look *Retarded: Capital Jury Selection for the Mentally Retarded Client Not Excluded After* Atkins v. Virginia, 57 DEPAUL L. REV. 701, 712 (2008) (citing James Luginbuhl & Kathi Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 LAW & HUM. BEHAV. 263, 279 (1988)).

271. *See, e.g.*, Phoebe C. Ellsworth et al., *The Death-Qualified Jury and the Defense of Insanity*, 8 LAW & HUM. BEHAV. 81, 89–90 (1984); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 46–48 (1984).

272. *See supra* note 15 and accompanying text.

273. *See, e.g.*, Ellsworth et al., *supra* note 271, at 91–92.

274. When determining whether a defendant was insane at the time of the offense, the jury will weigh medical testimony of the defendant's mental illness with conduct evidence, such as the defendant's "ability . . . to devise and execute a deliberate plan," the way the defendant appeared to lay observers at the time of the crime, and how the defendant appeared to and acted toward the investigating police officers. People v. Wolff, 394 P.2d 959, 965 (Cal. 1964).

is unable to resist seeing mental retardation as "a loophole allowing too many guilty people to go free,"[275] then, to preserve the due process guarantee, the trial court must step in to make the factual determination that will result in the categorical exemption from death.

The unified competency assessment serves a purpose without undermining the role of the jury in capital cases.[276] Even the best-informed capital juror would likely be confused by how he should assess the evidence of mental retardation against evidence of aggravating factors of future dangerousness. The *Atkins* Court detailed that its *Penry* rule had been a failure because it left to the death-qualified jury the task of sorting out whether mental retardation should be a mitigating factor or an aggravating factor.[277]

The Court's own justification for its categorical exemption of the mentally retarded from a death sentence is convoluted and mixes issues of culpability, diminished capacity, and ability to perform and assist at trial.[278] Given the mentally retarded defendant's unique inability to perform at trial and jurors' likelihood to view the mental retardation diagnosis as an insufficient excuse,[279] the net result will be the jury disagreeing with the Court's conclusion that diminished capacity equates to diminished culpability. And, as with Atkins himself, the jury could hear overwhelming evidence of mental retardation and simply disregard it, and sentence the defendant to death.[280] That result, post-*Atkins*, violates the Eighth Amendment.[281] And the process that allowed the jury to reach a verdict that violated the Eighth Amendment itself violates the Fourteenth Amendment guarantee of due process.[282]

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275. *See* Fitzgerald & Ellsworth, *supra* note 271, at 45.

276. *See* Ring v. Arizona, 536 U.S. 584, 604 (2002). When the Court extended its rule from *Apprendi* to capital cases, it held that the jury must determine the aggravating factors before the defendant could be sentenced to death. *Id.* at 588–89. The unified competency assessment theorized in this article does not interfere with the holding in *Ring*, since mental retardation *should* only be viewed as a mitigating factor by the sentencing jury. *Ring* does not demand that the jury must find mitigating factors.

277. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

278. *See id.* at 306–07, 320–21.

279. *Id.* at 320–21.

280. *See id.* at 310.

281. *Id.* at 321.

282. The Court deals with due process questions in the admissibility context, determining what kinds of evidence should be presented to the jury. *See* Simmons v. South Carolina, 512 U.S. 154, 156 (1994) (reversing after the trial court denied the defendant's instruction on life without parole); Skipper v. South Carolina, 476 U.S. 1, 4, 8 (1986) (reversing

B. *Prosecutors*

Prosecutors abuse their discretion when they choose to seek death in order to seat a death-disposed jury.[283] "The duty of the prosecutor is to seek justice, not merely to convict."[284] Moreover, prosecutors should "seek to reform and improve the administration of criminal justice," and "must exercise sound discretion in the performance of [their] functions."[285] One way that prosecutors could "seek to reform and improve the administration of criminal justice" would be to ask the trial court to make a pretrial determination of whether the capital defendant is mentally retarded and should be categorically excluded from a death sentence.

Prosecutors should make an independent probable cause determination before proceeding on any charges against the defendant and should not pursue prosecution in cases where the evidence is insufficient to support a conviction.[286] In making the decision to pursue a charge, the prosecutor must consider his own "reasonable doubt that the accused is in fact guilty."[287] Thus, in the *Atkins* context, the prosecutor must consider his own reasonable doubts about the capital defendant's "competency" for execution.

The ABA's commentary on the special responsibilities of a prosecutor describes the prosecutor as a "minister of justice."[288] The first Oxford English Dictionary definition of "minister" is the most relevant: "[a] servant, attendant. . . . One who waits upon, or ministers to the wants of another."[289] He is no mere advocate

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after the trial court denied the defendant the opportunity to present evidence of good behavior in prison); Gardner v. Florida, 430 U.S. 349, 351, 362 (1977) (reversing after the trial court denied defendant the opportunity to review and rebut the contents of a presentence investigation report).

283. J. Amy Dillard, *At His Discretion (N.): "To Be Disposed of as He Thinks Fit; At His Disposal, At His Mercy; Unconditionally*, 97 J. CRIM. L. & CRIMINOLOGY 1295, 1304–05 (2007) (reviewing ANGELA J. DAVIS, ARBITRARY JUSTICE (2007)) (discussing the ability of prosecutors to obtain juries inclined to adopt the death penalty, and citing the Andrea Yates prosecution as a prime example).

284. ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-1.2(c) (3d ed. 1993).

285. *Id.* at 3-1.2(d), 3-1.2(b).

286. *Id.* at 3-3.9(a).

287. *Id.* at 3-3.9(b)(i).

288. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1983) (amended 2008).

289. 9 THE OXFORD ENGLISH DICTIONARY, 817–18 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).

for his position, and the responsibility carries a specific obligation to see that each defendant "is accorded procedural justice, [and] that guilt is decided upon the basis of sufficient evidence."[290] Justice Harry Blackmun explicitly found that prosecutors could not shoulder this heavy burden in the death context: "Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed."[291]

The prosecutor bears the sole responsibility for setting the death machine in motion, and in high profile capital cases, political prosecutors are most susceptible to community pressure for revenge.[292] Federal prosecutors must work through a detailed report before seeking death, including the preparation of a "Death Penalty Evaluation," vetted by the Attorney General.[293] In making the determination of whether the decision to seek death is appropriate, the charging U.S. Attorney must weigh the mitigating factors against the aggravating factors.[294] He may not ignore the fact of mental retardation; nor does this evaluative duty disappear once the decision is made.[295] The prosecutor has a continuing responsibility to be a minister of justice.[296]

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290. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1983) (amended 2008).

291. Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

292. ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 77–78, 85–89 (2007) (detailing the controlling power of prosecutors in capital cases as well as the experience of two black prosecutors who choose not be seek death in high-profile capital prosecutions).

293. U.S. Attorney Manual, *Capital Crimes*, 9-10.040, 9-10.080, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/10mcrm.htm.

294. *Id.* at 9-10.080(A)(5).

295. *See id.*; *see also* 18 U.S.C. § 3592(a) (2006).

296. While the cost of prosecuting and defending a capital case should be irrelevant in a fair system, states may experience a "systemic breakdown in the public defender system" that may be leading to Sixth Amendment violations of the right to a speedy trial and the right to counsel. *See* Vermont v. Brillon, 556 U.S. ___, 129 S. Ct. 1283 (2009) (quoting State v. Brillon, 955 A.2d 1108, 1111 (Vt. 2008)). Categorically excluding mentally retarded defendants from capital trials where a death sentence is a possibility would dramatically reduce the cost of prosecution and defense, since neither side would need to prepare a sentencing case, nor retain the traditional expert witnesses who testify during the sentencing phase. *Determining Mental Retardation in Pennsylvania*, THE STAND DOWN TEXAS PROJECT (Aug. 30, 2010), http://standdown.typepad.com/weblog/2010/08/determing-mental-retardation-in-pennsylvania.html. In fact, many capital defendants who go to trial rather than entering a guilty plea do so to make an argument that the jury should spare their life, not to make a robust argument of innocence. Michael C. Dorf, *Why Al Qaeda Conspirator Zacarias Moussaoui's Guilty Plea Probably Won't Save His Life*, FINDLAW

Presuming that a prosecutor *charges* capital murder when the facts alleged fit the statutory crime, the prosecutor must still declare whether he seeks death as a possible penalty or whether he will proceed with life without parole as the only sentencing option for the jury.[297] It is in this continuing duty to evaluate whether death is an appropriate option that prosecutors bear the most burden. When the prosecutor learns that the capital defendant has significant mental deficiencies that may render him unsuitable for execution under *Atkins*, the prosecutor should be "[a] servant . . . who . . . ministers to the wants of another."[298] His own interests aside, he must carry out his specific obligation to see that the defendant is not subjected to a penalty for which the defendant is not suited. In the way that a prosecutor would abuse his discretion by seeking death against a juvenile post-*Roper*, so too does a prosecutor abuse his discretion when he seeks death against the mentally deficient defendant, post-*Atkins*.

VI. CONCLUSION

For the past thirty-five years the Supreme Court of the United States has fetishized procedural due process and theoretical jurisprudence in the guise of "evolving standards of decency," while wholly ignoring substantive due process in its review of capital cases. But the twenty-first century opinions, in the context of all of the Court's post-*Furman* cases, set the stage for a new method for determining adjudicative competence. Drawing on the historical approach to achieving substantive due process in criminal cases, trial courts could afford capital defendants a detailed, pretrial competency evaluation to assess their factual, rational, decisional, and emotional ability to assist counsel, along with a mental retardation determination. This honest assessment of whether a defendant is competent to be sentenced to death and executed would restore fairness to a process that is rife with bias at the hands of *Witherspoon* jurors. If the trial court determines that the defendant is incompetent and is unable to demonstrate a factual, rational, decisional, and emotional ability to assist counsel, the capital trial may not begin.[299] If the trial court determines that

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(Apr. 27, 2005), http://writ.news.findlaw.com/dorf/20050427.html.

297. *See* U.S. Attorney Manual, *supra* note 293, at 9-10.080.

298. 9 THE OXFORD ENGLISH DICTIONARY, *supra* note 289, at 817–18.

299. *See* David Freedman, *When is a Capitally Charged Defendant Incompetent to*

the defendant is mentally retarded, but is otherwise competent to stand trial, the capital trial may begin, but the court may not present the option of death to the jury. In essence, the capital trial of a mentally retarded defendant proceeds like all other trials, with a guilt or innocence decision by the jury and with the court imposing the sentence.

The unified competency assessment requires a contextual analysis to satisfy the due process requirement. Chief among the context factors is the inability of the mentally retarded defendant to escape the bias of the death-qualified jury. Moreover, if the execution of a mentally retarded (or juvenile) defendant does not comport with the core values of the criminal justice system, neither does the mockery of a trial wherein those categorically exempted defendants must struggle to fight for their lives. To truly accomplish an assessment worthy of constitutional due process, the trial court would need to view the competency assessment *in favorem vitae*—in favor of life. The marginal competency espoused by the Court in *Drope* simply has no place in capital litigation. The complexity of the bifurcated trial, the depth of the emotional issues that must be explored to adequately prepare any respectable mitigation case, the vexing issues of coping with *Witherspoon* jurors, the need for a more clinical approach to assessing mental retardation in order to satisfy the Court's desire for moral dignity, and the end of life issues that conflate with existing mental illness and death row syndrome to produce mad men taking the dead man's walk all compound to necessitate that trial courts should meet the task of making the competency determination with the fervor of a defense attorney trying to save his client's life.

Stand Trial?, 32 INT'L J.L. & PSYCHIATRY 127, 127–28 (2009). The determination of competency is a legal determination, and the Court has never delineated different levels of competency for different grades of offenses. An argument that the level of competency necessary to stand trial for capital murder is higher than the level necessary to stand trial for a misdemeanor or any other felony is the subject of a work-in-progress by the author. A key feature of support for this assertion is that state legislatures require trial counsel to be more competent to represent defendants charged with more serious crimes, and many states have special requirements for death-qualified trial, appellate, and habeas counsel. *See, e.g.*, S.C. CODE ANN. § 16-3-26(B)(1) (2003); VA. CODE ANN. § 19.2-163.7 (Repl. Vol. 2008).