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# Madness Alone Punishes the Madman: The Search for Moral Dignity in the Court's Competency Doctrine as Applied in Capital Cases

J. Amy Dillard

*University of Baltimore School of Law*, [adillard@ubalt.edu](mailto:adillard@ubalt.edu)

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# MADNESS ALONE PUNISHES THE MADMAN\*: THE SEARCH FOR MORAL DIGNITY IN THE COURT'S COMPETENCY DOCTRINE AS APPLIED IN CAPITAL CASES

J. AMY DILLARD\*\*

*"[Criminal] proceedings must not only be fair, they must 'appear fair to all who observe them.'"*<sup>1</sup>

The purposes of the competency doctrine are to guarantee reliability in criminal prosecutions, to ensure that only those defendants who can appreciate punishment are subject to it, and to maintain moral dignity, both actual and apparent, in criminal proceedings. No matter his crime, the "madman" should not be forced to stand trial. Historically, courts viewed questions of competency as a binary choice, finding the defendant either competent or incompetent to stand trial. However, in *Edwards v. Indiana*, the Supreme Court conceded that it views competency on a spectrum and offered a new category of competency—borderline-competent. The Court held that borderline-competent defendants may proceed to trial so long as they are represented by counsel. This Article examines borderline-competent defendants in the context of capital prosecution and argues that those defendants, like mentally retarded defendants, pose a special risk that the death penalty will be imposed in spite of factors that may call for a less severe penalty. In the death penalty context where the proceedings are complex, the risks are enormous, and the demand for moral dignity is greatest, using competent counsel as a proxy for the capital defendant's competency violates the defendant's due process rights. This Article

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\* See 4 WILLIAM BLACKSTONE, COMMENTARIES \*24 ("[F]uriosus furore solum punitur [madness alone punishes the madman]").

\*\* Assistant Professor of Law, University of Baltimore School of Law; J.D., Washington and Lee University School of Law; B.A., Wellesley College.

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1. *Indiana v. Edwards*, 554 U.S. 164, 177 (2008) (quoting *Wheat v. United States*, 486 U.S. 153, 160 (1988)).

maintains that those defendants who are incompetent to proceed to trial without counsel should be categorically exempted from death.

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## INTRODUCTION

What if Jared Lee Loughner can never be restored to competency to stand trial for the capital murder of a federal judge and other crimes, including the attempted murder of Congresswoman Gabrielle Giffords?<sup>2</sup> By all accounts of his behavior and mental state,<sup>3</sup> he would meet Blackstone's

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2. See Adam Nagourney, *A Single Terrifying Moment: Shots, a Scuffle, Some Luck*, N.Y. TIMES, Jan. 10, 2011, at A1. Loughner's case is pending before the United States District Court but is on appeal on the issue of forcible medication to restore him to competency. See United State Court of Appeals for the Ninth Circuit, D.C. No. 4:11-cr-00187-LAB-1 (order dated July, 12, 2011) (holding that Loughner should not be subjected to forcible psychotropic medication while the Ninth Circuit considers whether the district court properly ordered forcible medication to restore him to competency).

3. See, e.g., Kirk Johnson et al., *Suspect's Odd Behavior Caused Growing Alarm*, N.Y. TIMES, Jan. 9, 2011, at A12 (detailing Loughner's disturbing behavior before the crime); Marc Lacey, *Suspect in Shooting of Giffords Ruled Unfit for Trial*, N.Y. TIMES, May 25, 2011, at A2 (describing the disorganized thinking and chronic delusions of Loughner at the time of a pre-trial hearing during which he was disruptive and nonsensical).

definition of a lunatic<sup>4</sup> and, thus, would have been spared from prosecution based on the incompetency doctrine at the time of the founding of the United States.<sup>5</sup> Even if Loughner can be restored to a level of borderline competency,<sup>6</sup> would there be any moral dignity in his prosecution and execution? This Article maintains that exposing a borderline-competent capital defendant to a death sentence does not satisfy the moral dignity aspect of due process even if the defendant has competent counsel to “function as [an] instrument and defender of the client’s autonomy and dignity in all phases of the criminal process.”<sup>7</sup>

Even though our standards today are more compassionate<sup>8</sup> towards those criminal defendants who suffer from mental illness or mental defect<sup>9</sup> and have moved in the direction<sup>10</sup> of pathos for mental illness, the unrestorably incompetent capital defendant has largely become a thing of the past<sup>11</sup> since the Court handed down its decision in *Jackson v. Indiana*<sup>12</sup>

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4. A contemporary synonym for lunacy is psychosis, a condition that medical professionals identify by the presence of symptoms. Commonly, Schizophrenia, Schizoaffective Disorder, and several other permutations of spectrum are classified as psychotic diseases. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 297 (4th ed. 2000). Throughout this Article, I equate Blackstone’s lunatics with today’s seriously mentally ill defendant.

5. 4 WILLIAM BLACKSTONE, COMMENTARIES \*24 (“[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself.”).

6. See *Indiana v. Edwards*, 554 U.S. 164, 171 (2008) (using the classifications “borderline-competent” and “gray-area” competent to describe those defendants who are competent to stand trial so long as they are represented by counsel).

7. *Jones v. Barnes*, 463 U.S. 745, 763 (1983) (Brennan, J., dissenting).

8. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002); *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”). Due process requires that courts approach the marginally competent defendant with great care, notwithstanding the vigorous debate over the place of the “evolving standards of decency” doctrine in Eighth Amendment analysis. See *id.* at 341 (Scalia, J., dissenting).

9. See *id.* at 315 (majority opinion) (discerning that society was evolving in the direction of exempting mentally retarded defendants from execution).

10. The Court generally looks for social change as working in one direction and reconciles movement to two opposing directions in the light most favorable to the defendant. The best example comes from *Kennedy v. Louisiana*, 554 U.S. 407 (2008), in which the Court reconciled society’s exemption of non-homicide offenses from death-eligibility with society’s increasing interest in prosecuting child molesters. The Court chose the path that favored the defendant. *Id.* at 427–29.

11. The data on unrestorable capital defendants are not compiled by anyone, but through extensive inquiry by email with the leading capital defenders and scholars in the United States, I have uncovered only two capital defendants who have not been restored to competency. They are Gregory Murphy, my current client, who was charged with capital

in 1972. In that case, the Court found a violation of due process in the common practice of indefinitely holding unrestorably incompetent defendants, which effectively doomed such defendants to life sentences. The *Jackson* Court ordered that such defendants either be civilly committed or released from pre-trial criminal detention.<sup>13</sup> By 1972, psychotropic medication made it possible for some seriously mentally ill defendants to achieve competency. The holding in *Jackson* forced the state to undertake rigorous efforts to restore a defendant's competency or release the defendant from the criminal system into the civil mental health system.<sup>14</sup>

In response to *Jackson*, some states inserted tolling provisions into their scant legislation governing incompetent defendants. Most of the post-*Jackson* provisions provide for the civil commitment of the unrestorably incompetent defendant following a period of time during which mental health professionals might make reasonable efforts to restore the defendant to fitness for trial.<sup>15</sup> In most states, a criminal defendant who has been deemed unrestorably incompetent can be civilly committed after the dismissal of criminal charges and is subject to confinement only under the mental health standards of the state, typically, so long as the patient poses a risk of imminent danger to himself or to others.<sup>16</sup>

The *Jackson* holding created a tension between society's need for retribution<sup>17</sup> and the age-old doctrine that the prosecution of an incompetent

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murder in Alexandria, Virginia, in 2000 and remains incompetent to stand trial, and Russell Weston, the Capitol Hill shooter, who was indicted in 1998 and remains incompetent to stand trial.

12. *Jackson v. Indiana*, 406 U.S. 715, 738 (1971).

13. *Id.* at 720.

14. *See, e.g.*, MD. CODE ANN., CRIM. PROC. § 3-106 (West 2011); MD. CODE ANN., HEALTH-GEN. § 10-617 (West 2011).

15. *See, e.g.*, MD. CODE ANN., CRIM. PROC. § 3-106 (West 2011) (authorizing the release of incompetent defendants charged with non-violent crimes and the civil commitment of those charged with violent crimes); VA. CODE ANN. § 19.2-169.3 (West 2011) (setting a five year tolling period for efforts at restoration to competency for all criminal defendants except those charged with capital murder).

16. *See, e.g.*, MD. CODE ANN., HEALTH-GEN. § 10-617 (West 2011) (authorizing civil commitment for citizens who have a mental disorder and present a danger to others); VA. CODE ANN. § 37.2-817 (West 2011) (authorizing civil commitment where there is a substantial likelihood that a person in the near future will cause serious physical harm to self or others as evidenced by behavior or suffers serious harm due to lack of capacity to protect self from harm or provide for basic human needs).

17. *See* Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 113 (2007) (arguing that contemporary trends in punishment show a blood thirst for longer sentences under harsh prison conditions); R. George Wright, *The Progressive Logic of Criminal Responsibility and the Circumstances of the Most Deprived*, 43 CATH. U. L. REV. 459, 465-66 (1994) (theorizing that some defendants have less capacity to bear moral responsibility and should,

defendant serves no purpose.<sup>18</sup> In the vast majority of criminal cases, unrestorably incompetent defendants face significantly longer terms of confinement as a result of civil commitments than they might have endured if they had been found competent, gone to trial, and been sentenced.<sup>19</sup> As a result of the probable difference in terms of confinement for civil commitments and criminal convictions, scholars, defense attorneys, and the Court have crafted noble interpretations of the competency doctrine—first articulated in *Dusky v. United States*<sup>20</sup>—that allow for defendants with the barest of competency, the “marginally competent,”<sup>21</sup> to stand trial or plead guilty and to then face whatever punishment the court imposes. This interpretation of what it means to be competent to stand trial gives the defendant the choice to confront the determinate criminal system and its confinement penalty rather than to suffer the indeterminate civil system.<sup>22</sup>

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therefore, be punished differently).

18. BLACKSTONE, *supra* note 5, at \*24. Blackstone offers trial-related reasons for the doctrine, such as the incompetent defendant’s lack of caution and advice in entering a plea, his inability to present a defense, and his inability to raise claims of innocence even after his trial. *Id.*; see *Panetti v. Quarterman*, 551 U.S. 930, 960 (2007) (“Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose.”).

19. The best example might be the defendant who is charged with a non-violent misdemeanor, like trespassing, for which he might expect to serve no more than a few days in jail, if convicted. If that defendant is referred for a competency evaluation, he would likely be confined for the time necessary to complete the evaluation, and if he was found incompetent, he could expect to be detained for up to twelve months (the typical statutory maximum for a misdemeanor) while the hospital tried to restore him to competency. If the hospital found him unrestorably incompetent, he would be civilly committed, which would result in his further detention until he did not pose a risk to himself or others. Furthermore, the defendant might never have come into contact with the civil commitment system but for his arrest for trespassing.

20. 362 U.S. 402 (1960) (per curiam).

21. See Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. CRIM. L. & CRIMINOLOGY 419, 427 (1990) [hereinafter Bonnie, *The Competence of Criminal Defendants*]. I believe that Professor Bonnie coined the phrase “marginally competent” in his landmark piece on adjudicative competency and mental retardation. *Id.* at 423 (“a substantial number of these defendants are, at best, marginally competent”); see *Indiana v. Edwards*, 554 U.S. 164, 171 (2008) (using the terms “borderline-competent” and “gray-area competent” to describe a defendant who meets the standard for adjudicative competence but fails to meet the standard for representational competence). I will use the term “marginally competent” throughout this Article to refer to defendants with a serious mental illness who meet only the barest threshold of the competence standard; mentally retarded defendants, as described in detail by Professor Bonnie, easily fall in the same category.

22. See Bruce Winick, *Psychotropic Medication and Competence to Stand Trial*, AM. B. FOUND. RES. J. 769, 776 (1977) [hereinafter Winick, *Psychotropic Medication*] (explaining

This defendant-centered approach<sup>23</sup> serves most criminal defendants quite well since most achieve finality in their criminal cases and avoid indeterminate civil commitment.

The practice for *capital* defendants, however, operates in the reverse: marginally competent defendants pose a special risk “that the death penalty will be imposed in spite of factors which may call for a less severe penalty.”<sup>24</sup> In capital cases, the prosecution has a more pressing interest in having the defendant restored to competency, even if the competency is merely marginal, to achieve closure for devastatingly serious crimes; on the other hand, defense counsel often views its role as, in every ethical way possible, standing between the defendant and certain death.<sup>25</sup> While the state might be satisfied with a *Jackson* resolution— indefinite civil commitment—in a non-capital criminal case, the idea that a capital defendant might dodge prosecution and punishment for the most heinous of crimes and become eligible for release from civil commitment is intolerable.<sup>26</sup> In response to the prosecutorial interest in restoring

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that as legislatures put procedural safeguards in place for civil commitment, more mentally ill citizens found themselves shuttled to the mental health system via criminal process).

23. Defendant-centered lawyering is the paramount model for criminal defenders, and it is widely accepted as the proper approach. The best current example is the American Bar Association, 2011 National Defender Training Program, *Public Defense Plus: Client-Centered Representation and Beyond*. Criminal defense attorneys work for results that are in the best interests of their clients, but determining what “best interests” means can often be difficult when dealing with a mentally ill client. An attorney’s personal view that the client might be well served by civil commitment and in-patient mental health treatment may not be the client’s expressed wish. The attorney is ethically bound to work towards the client’s reasonable goals. Among those duties might be “limping” a client through a guilty plea with a small jail sentence to avoid a competency evaluation that might result in a finding of unrestorability and a long civil commitment. See generally DAVID BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004) (discussing the necessity of client-centered approach and encouraging active client participation).

24. *Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)) (internal quotation marks omitted).

25. Professor Bonnie asserts that the fairness of adjudication for marginally competent defendants “depends largely on the ability and inclination of the attorney to recognize and to compensate for the client’s limitations.” See Bonnie, *The Competence of Criminal Defendants*, *supra* note 21, at 423. Put another way, the defendant-centered approach in a capital case with a seriously mentally ill defendant might entail strenuous arguments that the defendant is unrestorably incompetent and should be civilly committed rather than compensating for the client’s limitations. See John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 AM. U. L. REV. 207, 258 (2008) (exploring the role of the criminal defense attorney as surrogate decision maker for the incompetent client).

26. The Court’s defendant-specific, desert-based, proportionality jurisprudence, which exempts juveniles and the mentally retarded from execution, protects those groups of defendants in ways that the death-qualified jury would not. See *Roper v. Simmons*, 543 U.S.

competence, hospitals have developed treatment regimens that answer the call of a rule of law rather than of science,<sup>27</sup> and trial courts have pushed more seriously mentally ill capital defendants to trial.<sup>28</sup>

Until recently, the Court had expressed its competence to stand trial doctrine as a binary with the defendant categorized as either competent or incompetent.<sup>29</sup> However, in *Indiana v. Edwards*,<sup>30</sup> the Court recognized a spectrum of competence that included “borderline-competent” and “gray-area” competent defendants.<sup>31</sup> The Court concluded that borderline-competent defendants could achieve adjudicative competence<sup>32</sup> and proceed to trial even when they could not achieve representational competence<sup>33</sup> to

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551 (2005); *Atkins*, 536 U.S. at 320 (holding that mentally retarded defendants are less culpable *and* are more at risk of an unjustified death sentence) (emphasis added). See generally Pamela A. Wilkins, *Competency for Execution: The Implications of a Communicative Model of Retribution*, 76 TENN. L. REV. 713, 765–66 (2009) (explaining that retributive theory has two prongs: desert theory and communicative theory).

27. See David S. Caudill & Lewis H. LaRue, *Why Judges Applying the Daubert Trilogy Need To Know about the Social, Institutional, and Rhetorical—and Not Just the Methodological—Aspects of Science*, 45 B.C. L. REV. 1 (2003); David S. Caudill, *Lacan and the Discourse of Science in Law*, 24 CARDOZO L. REV. 2331 (2003) (explaining how science is idealized in law).

28. See, e.g., *Panetti v. Quarterman*, 551 U.S. 930, 930 (2007); *Ford v. Wainwright*, 477 U.S. 399, 404 (1986).

29. See *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam).

30. 554 U.S. 164 (2008).

31. See *id.* at 176 (accepting that borderline-competent or gray-area competent defendants may suffer “disorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illness”) (quoting Brief for the American Psychiatric Association et al. as Amici Curiae in Support of Neither Party, at 26). The holding in *Edwards* is contrary to Justice Kennedy’s assertion in a concurring opinion in *Godinez v. Moran*, 509 U.S. 389 (1993), that due process does not demand that trial courts apply more than one standard of competence for different aspects and decisions in the trial. *Indiana v. Edwards*, 554 U.S. at 184.

32. Adjudicative competence is an umbrella term used to cover the defendant’s ability to understand and participate in general trial matters. General trial matters include pleading guilty or standing trial and the decisions attendant to those paths; pursuing appeals; and waiving *Miranda* rights when testifying. See THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* 3 (2d ed. 2003). Decisional, representational, and executional competence have all been devised and developed in the post-*Jackson* era, and I address those nuances in Part III.

33. Lea Johnston coined the phrase representational competence to describe the “competency standard for self-representation at trial.” See 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, 1609 (2010) [hereinafter Johnston, *Setting the Standard*]. Like Professor Johnston, I employ the term only to “capture those abilities that a court should require a defendant to possess in order to represent himself at trial.” See *id.* at 1609 n.24.



waive counsel and represent themselves at trial. Using the spectrum of competence that the Court set out in *Edwards*, this Article argues that marginally competent capital defendants should be categorically exempted from execution for many of the same reasons that mentally retarded<sup>34</sup> defendants are categorically exempted from execution.

Although the Court did not provide a specific definition<sup>35</sup> of borderline-competent or gray-area competent defendants in *Edwards*, it did offer some insight by listing conditions that might prevent a defendant from proceeding pro se.<sup>36</sup> The Court expressed concern for the defendant's overall mental condition and mental fitness, his level of decision-making powers, his expressive ability and communication skills, and his disorganized thinking.<sup>37</sup> The National Institutes of Mental Health has defined the seriously mentally ill citizen as one whose only hope for successful treatment rests on anti-psychotic medication.<sup>38</sup>

Because capital trials are markedly different from all other criminal trials due to their complexity, capital defendants need to possess a higher degree of competency to proceed.<sup>39</sup> The capital trial requires a nuanced understanding of the bifurcated sentencing proceeding; an ability to work,

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34. See *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (holding that mentally retarded defendants must be categorically exempted from execution because they are categorically less culpable and pose a special risk of suffering unacceptable trial prejudice).

35. Professor Lea Johnston has undertaken to define the scope of representational competency. See E. Lea Johnston, *Representational Competence: Defining the Limits of the Right to Self-Representation at Trial*, 86 NOTRE DAME L. REV. 523, 571 (2011) [hereinafter Johnston, *Representational Competence*] (theorizing that a defendant has adequate reasoning ability if he can justify his "selection of a defense with a single reason capable of evidentiary support in the world as we understand it"). I admire Professor Johnston's work, but having spent the past decade representing a seriously mentally ill capital defendant, my experience teaches that the complexity of representing a mentally ill defendant reaches well beyond the scope of his reasoning ability. Representing a capital client who harbors paranoia towards counsel, ignores simple advice about not communicating with the prosecution or the court about the pending charges, makes decisions based on the convoluted construct of the intricate circuitry of the individual manifestations of his mental illness, and is simply unable to concentrate, communicate, and comprehend places a burden on counsel that exceeds the bounds of moral dignity in a capital prosecution. I assert that the issue may never be resolved by using a rubric or a test but, instead, will require the trial court to ensure that moral dignity fills the capital courtroom.

36. *Edwards*, 554 U.S. at 175–76.

37. See *id.* (showing concern for "disorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illness" when determining decisional competence).

38. AMERICAN PSYCHIATRIC ASSOCIATION, *PSYCHIATRIC GLOSSARY* 14–15 (1984). These citizens suffer hallucinations, delusions, and thought and movement disorders.

39. Put another way, the marginally competent, borderline-competent, and gray-area defendants will never be competent enough for a capital trial where death is a possible sentence.

both intellectually and emotionally, with several attorneys, investigators, mitigation experts, forensic experts, and a host of mental health professionals; a keen sense of strategy; and the ability to set aside common approaches to criminal trials, such as arguing innocence, in favor of legal strategies, such as trying to convince the jury to sentence the defendant to life in prison. Because of the demands of a capital trial, a defendant who lacks the decision-making powers for self-representation at a non-capital trial will also lack the degree of competence necessary to engage in the many activities required of the capital defendant.

But more importantly, “death is different,”<sup>40</sup> and the possibility of death should imbue the competency doctrine as applied to capital cases with a conscious consideration of moral dignity.<sup>41</sup> The capital trial and death sentence of a borderline-competent defendant, even one who is represented by counsel, could result in an unfair trial for many of the same reasons that the capital trial of a mentally retarded defendant could result in an unfair trial.<sup>42</sup> The Supreme Court’s categorical exclusion of juvenile defendants and mentally retarded defendants from execution—a status that I call “incompetent for execution”<sup>43</sup>—offers insight into the moral dignity<sup>44</sup>

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40. *Ford v. Wainwright*, 477 U.S. 399, 411 (1986).

41. *Id.* American courts often view moral dignity through the societal lens and focus on ways that the appearance of dignity might assure actual dignity. *See Sell v. United States*, 539 U.S. 166, 180 (2003) (“[T]he Government has a concomitant, constitutionally essential interest in assuring that the defendant’s trial is a fair one.”); *Wheat v. United States*, 486 U.S. 153, 160 (1988) (noting that proceedings must not only be fair, but must “appear fair to all who observe them”).

42. *See Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002) (“Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.”).

43. *See Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins*, 536 U.S. at 340; J. Amy Dillard, *And Death Shall Have No Dominion: How to Achieve the Categorical Exemption of Mentally Retarded Defendants from Execution*, 45 RICH. L. REV. 961, 968–81 (2011) [hereinafter Dillard, *And Death Shall Have No Dominion*]. I use the term “incompetent” to describe juvenile and mentally retarded capital defendants because I think that is the proper understanding of the Court’s current defendant-specific proportionality doctrine.

44. For the purposes of this Article, when I use the phrase “moral dignity,” I am referring directly to one of Professor Bonnie’s three justifications—dignity, reliability, and autonomy—for excusing incompetent defendants from trial. *See Bonnie, The Competence of Criminal Defendants*, *supra* note 21, at 426; Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539, 551 (1993) [hereinafter Bonnie, *Beyond Dusky*]. I am also incorporating the Court’s constitutional conception of human dignity as expressed in *Atkins* and *Roper*; in both cases the Court draws from international and foreign law to craft its holding that executing juvenile and mentally retarded capital defendants violates the Eighth Amendment. *See Roper*, 543 U.S. at 575; *Atkins*, 536 U.S. at 317 n.21. *See generally* Steven G. Calabresi, “*A Shining City on a Hill*”: *American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law*, 86

component of the competency doctrine that is often lost in contemporary scholarship.<sup>45</sup>

This Article addresses the lost moral dignity imperative in capital prosecutions of marginally competent defendants.<sup>46</sup> Part I offers an overview of the history of the adjudicative competence doctrine. Part II reviews the prohibition on indefinite pre-trial detention within the landscape of long-term asylum care in the United States. Part III evaluates the development of policy and treatment that has resulted in an increase of seriously mentally ill defendants confronting prosecution. Part IV explores the Court's doctrine for categorically exempting mentally retarded capital defendants from execution and argues that the marginally competent capital defendant bears a striking resemblance to the mildly mentally retarded capital defendant, especially insofar as both types may have trouble obtaining a fair trial. In conclusion, Part V offers a resolution to the conflict that protects the moral dignity of our criminal process without wholly excusing the conduct of the seriously mentally ill capital defendant.

Our entire philosophy of punishment is based on the notion that criminal defendants understand both why they are being punished<sup>47</sup> and the

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B.U. L. REV. 1335, 1413–14 (2006) (asserting that the Court should consider foreign law in its interpretation of the Eighth Amendment).

45. Recent scholarship examining the competency doctrine focuses heavily on the defendant's decision-making abilities and the nuances of his capacity for rational and emotional understanding. See, e.g., Joanmarie Ilaria Davoli, *Physically Present, Yet Mentally Absent*, 48 U. LOUISVILLE L. REV. 313 (2009); Johnston, *Setting the Standard*, *supra* note 33; Terry A. Maroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1376 (2006).

46. I like to think that I might be picking up where Justice Felix Frankfurter, Justice Wiley Rutledge, and Charles Hamilton Houston left off in *Fisher v. United States*, 328 U.S. 463 (1946). See José Felipé Anderson, *The Criminal Justice Principles of Charles Hamilton Houston: Lessons in Innovation*, 35 U. BALT. L. REV. 313, 315 (2006). In *Fisher*, the Court considered, among other issues, whether to accept gradations of the classifications of sanity beyond the binary choice of sane or insane, where the defendant was beset by erratic behavior on the day of the crime and was overtaken by a deranged mental condition after his victim called him a "black nigger." *Fisher*, 328 U.S. at 477, 479 (Frankfurter, J., dissenting). Justice Frankfurter, in dissent, warned that a "shocking crime puts law to its severest test," and that no execution should be authorized by society "without the most careful observance of its own safeguards against the misuse of capital punishment." *Id.* at 477 (Frankfurter, J., dissenting). Justice Rutledge added, in a separate dissent, that "[a] revolting crime . . . requires unusual circumspection for its trial, so that dispassionate judgment may have sway over the inevitable tendency of the facts to introduce prejudice or passion into the judgment." *Id.* at 494 (Rutledge, J., dissenting). Houston made a practice of accepting the most difficult criminal cases, especially capital cases where the facts were particularly heinous and the lack of due process might be expected.

47. See, e.g., Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404–06 (1958).

process by which courts conduct their trials. Institutionalized retribution serves no purpose when the punished cannot comprehend the complexity of the process or the significance of their punishment.<sup>48</sup> While many scholars have pushed for ways to get more marginally competent defendants into the courtroom, considerations for the capital defendant must be different.<sup>49</sup> My scholarship has a narrow focus in that I examine the issues surrounding a defendant's competency only in the setting of a capital trial where a sentence of death is a possibility. In my view, most of the concerns that I raise could be avoided if the trial court declared the capital defendant to be not death-eligible;<sup>50</sup> put another way, the trial court could find that the marginally competent capital defendant is not competent to stand trial where death is a possibility<sup>51</sup> but is competent to stand trial where the most

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48. See Albert A. Ehrenzweig, *A Psychoanalysis of the Insanity Plea: Clues to the Problems of Criminal Responsibility and Insanity in the Death Cell*, 73 YALE L.J. 425, 433–41 (1964).

49. Concern for client autonomy is a fatal strategy in capital defense, and I confess that I take a maternalistic approach to capital defense of marginally competent defendants. See, e.g., Lisa Kim Anh Nguyen, Comment, *In Defense of Sell: Involuntary Medication and the Permanently Incompetent Criminal Defendant*, 2005 U. CHI. LEGAL F. 597, 598 (2005) (arguing that the implications of a lifetime of confinement while incompetent without the possibility of restoration are worse for the defendant than being tried while incompetent).

50. Accepting that a defendant may be “marginally competent” and, thus, not eligible for a death sentence would follow in the defendant-specific proportionality tradition that the Court has crafted in *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) and *Roper v. Simmons*, 543 U.S. 551, 572–75 (2005). Like sparing the mildly mentally retarded from execution, the Court could similarly exclude the “marginally competent” from a capital trial where death is a possible sentence. The costs associated with the capital punishment exist only where the death penalty is a potential sentence. Exempting some capital defendants from death-eligibility would save a great deal of tax dollars. See generally George Skelton, *Repeal the Death Penalty*, L.A. TIMES, July 14, 2011, at A2 (detailing why a pro-capital punishment citizen should seek repeal of the death penalty in California).

51. 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, 1859 n.201 (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 321. 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., *Judge Rules Out Death Penalty in Police Shooting Case*, CHARLOTTE OBSERVER, Aug. 24, 2010.

severe potential sentence is life without the possibility of parole.<sup>52</sup> I realize that this is a narrow solution, but it is one that satisfies my scholarly agenda in exploring ways to delimit the capital defendants who are death-eligible. I admire the scholars who take capital punishment scholarship and apply it more broadly to other classes of defendants;<sup>53</sup> I am, however, resolutely focused on the issues as they affect the capital trial and the capital defendant.

### I. A HISTORY OF THE ADJUDICATIVE COMPETENCY REQUIREMENT

Historically, idiots and lunatics have been spared from criminal trials. Because incompetent criminals could neither participate in, nor appreciate the consequences of, criminal proceedings, their prosecution and subsequent punishment failed to serve any purpose.<sup>54</sup> Little has been written on how courts determined lunacy<sup>55</sup> in the early days of the United States, but Justice Scalia's dissenting opinion in *Atkins v. Virginia* offers a parallel overview of the definition and treatment of mentally retarded defendants, known as "idiots," at the time of the drafting of the Eighth Amendment.<sup>56</sup> 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."<sup>57</sup> According to Justice Scalia, "idiots" were excused

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52. See *Atkins*, 536 U.S. at 320 (holding that mentally retarded defendants shall be categorically exempted from execution).

53. See, e.g., Rachel E. 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, 1205 (2008) ("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."). See generally *Graham v. Florida*, 130 S. Ct. 2011 (2010) (holding that a sentence of life without the possibility of parole for a juvenile who has committed a non-homicide offense constitutes a violation of the Eighth Amendment).

54. BLACKSTONE, *supra* note 5, at \*24 ("[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities; no, not even for treason itself.").

55. A contemporary synonym for lunacy is psychosis, a condition that is identified by the presence of symptoms. Commonly, Schizophrenia, Schizoaffective Disorder, and several other permutations of spectrum are classified as psychotic diseases. See AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 297 (4th ed. 2000). When using the term lunatic, I mean no disrespect to those who suffer from mental illness; when possible, I try to use the modern description, seriously mentally ill, rather than the historical term.

56. *Atkins*, 536 U.S. at 340 (Scalia, J., dissenting).

57. *Id.* (citing BLACKSTONE, *supra* note 5, at \*24). 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. He objects to the "evolving standards of decency," which would give mildly mentally retarded defendants the same "special status under the

from guilt and spared from punishment, either death or incarceration.<sup>58</sup> Given the wealth of literature on the deep intolerance and abject fear that that the colonists had for the pagan beliefs of Native Americans and the belief that any unusual conduct suggested witchcraft,<sup>59</sup> it is easy to imagine that any of the classic symptoms of severe mental illness—auditory and visual hallucinations, delusions, fixed false beliefs—might have resulted in a trial court declaring that a defendant was a lunatic.<sup>60</sup>

William Blackstone, a primary source for American constitutional hermeneutics, detailed the need for a competency inquiry at various stages of the trial and punishment, for if the defendant became incompetent at any stage, the trial and punishment should not proceed.<sup>61</sup> The primary goal of the incompetency doctrine was to protect criminal defendants from being tried in their absence.<sup>62</sup> Early common law prosecution occurred without

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law” enjoyed, historically, by only the most severely mentally retarded defendants. *See id.* at 340–41.

58. *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 BLACKSTONE, *supra* note 5, at \*25) (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, *HISTORY OF THE PLEAS OF THE CROWN* \*33 (1736).

59. *See generally* RICHARD FRANCIS, *JUDGE SEWALL’S APOLOGY: THE SALEM WITCH TRIALS AND THE FORMING OF AN AMERICAN CONSCIENCE* (HarperCollins 2005).

60. Defining the contours of early American prejudice towards “the other” is beyond the scope of this Article, but it is worth noting that most of the settlers had little use for reflexive sociology as a means to understanding otherness. *See generally* PIERRE BOURDIEU & LOÏC WACQUANT, *AN INVITATION TO REFLEXIVE SOCIOLOGY* (U. Chi. Press 1992); EMMANUEL LEVINAS, *OTHERWISE THAN BEING* (Duchesne U. Press 2002). The small Quaker community held different views. *See generally* THOMAS HAMM, *THE QUAKERS IN AMERICA* (Columbia Univ. Press 2003).

61. BLACKSTONE, *supra* note 5, at \*24 (citing HALE, *supra* note 58, at \*34).

62. *See Drope v. Missouri*, 420 U.S. 162, 171 (1975) (quoting Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960)); Bruce Winick, *Reforming Incompetency To Stand Trial and Plead Guilty: A Restated Proposal and Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 574 (1995) [hereinafter Winick, *Reforming Incompetency*] (explaining the common law rule against trials *in absentia*). Professors Richard Bonnie and Bruce Winick spent more than a decade in scholarly conversation about the competency doctrine and its justifications. Both agree that society’s need for reliability in the criminal process is the dominant justification for its continued use. *See Bonnie, Beyond Dusky, supra* note 44, at 543–44; Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921, 954–55 (1985) [hereinafter Winick, *Restructuring Competency*]. For the most part, when I refer to “reliability” in this article, both in the competency context and in the death penalty context, I am referring to the reliability of the jury’s finding that death is an appropriate sentence rather than focusing on the nearly-irrelevant issue of reliability in the guilt determination. *See Lockett v. Ohio*, 438

defense counsel, so at that time, trial courts had to assess the defendant's ability to participate in the adversarial criminal trial.<sup>63</sup> The defendant who could not enter a plea or adequately argue his case against counsel for the Crown was spared from trial.<sup>64</sup> The prevailing belief was that if a man committed a capital offense and then became mad before his arraignment, the court ought not arraign him because he would be lacking in caution and "advice" to enter a plea.<sup>65</sup> Likewise, if the defendant entered a plea while competent but then became incompetent before or during his trial, the court should stop the trial since the incompetent defendant would be unable to present a defense.<sup>66</sup> If the defendant entered a plea and completed his trial while competent but then became incompetent before the pronouncement of his sentence, then the court should not pronounce any judgment.<sup>67</sup> And if after judgment had been pronounced but before it had been carried out, the defendant became of "nonsane memory," his execution should be stayed.<sup>68</sup> In short, the historical due process bar to trying, sentencing, and executing an incompetent defendant was quite clear.

As a threshold matter, to comport with the guarantee of due process, trial courts must determine whether each criminal defendant is competent to stand trial.<sup>69</sup> Unlike the insanity defense,<sup>70</sup> which serves as a basis for mitigation in the punishment, incompetency to stand trial serves as a complete bar to prosecution and punishment so long as the defendant remains incompetent.<sup>71</sup> In practice, trial courts routinely refer criminal defendants who appear to suffer from mental illness for a competency

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U.S. 586, 605 (1978).

63. See *Faretta v. California*, 422 U.S. 806, 823 (1975).

64. See *id.* at 823–25; 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 341 (1883). Defendants were banned from having counsel in criminal prosecutions, though by the mid-eighteenth century trial courts began to allow counsel in felony cases. The ban on criminal defense counsel was abolished in England in 1836. See Winick, *Reforming Incompetency*, *supra* note 62, at 575 n.14.

65. BLACKSTONE, *supra* note 5, at \*24 (citing HALE, *supra* note 58, at \*34).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam).

70. See generally WAYNE LAFAVE, CRIMINAL LAW § 7.1(a) (5th ed.) (setting out the elements of the insanity defense).

71. Most states have a tolling provision in their competency statutes to allow for a civil commitment for a defendant who demonstrates no hope of being restored to competency. See, e.g., VA. CODE ANN. § 19.2-169.3(d) (West 2011). Holding an unrestorable defendant for treatment to restore him to competency violates due process. See *Jackson v. Indiana*, 406 U.S. 715, 716 (1972); J. Amy Dillard, *Without Limitation: "Groundhog Day" for Incompetent Defendants*, 56 DEPAUL L. REV. 1221, 1223–24 (2007) [hereinafter Dillard, *Without Limitation*] (asserting that Virginia Code § 19.2-169.3(d) unconstitutionally orders capital defendants to be held indefinitely in violation of *Jackson v. Indiana*).

evaluation.<sup>72</sup> Contrary to popular perceptions and scholarly attention, in terms of mental illness defenses, incompetency to stand trial is profoundly more prevalent than insanity.<sup>73</sup> The impact of the competency to stand trial doctrine on the criminal justice system has been enormous, with trial courts making tens of thousands of referrals for evaluations each year.<sup>74</sup>

There is no concrete method<sup>75</sup> for determining a defendant's adjudicative competence, just as there is no single criterion for determining competency across legal settings.<sup>76</sup> In 1960, the Court established a flexible two-part test in *Dusky v. United States*,<sup>77</sup> and this test forms the cornerstone of the present adjudicative competency standard.<sup>78</sup> Based on a forensic evaluation of greater depth than a mere mental status exam, the trial court must determine whether the defendant has a "rational as well as factual understanding of the proceedings against him,"<sup>79</sup> and the "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding."<sup>80</sup>

The Court explained the constitutional enforcement of its competency doctrine in *Pate v. Robinson*, declaring that states must have procedures in place to protect the due process right of defendants to not be forced to stand trial while incompetent.<sup>81</sup> The Court has twice since extended and clarified its competency doctrine. In *Drope v. Missouri*, the Court held that the trial court must monitor the defendant's competency throughout the proceedings

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72. See Winick, *Reforming Incompetency*, *supra* note 62, at 577 (asserting that trial courts inappropriately order virtually every mentally ill criminal defendant to undergo a competency evaluation).

73. Winick, *Restructuring Competency*, *supra* note 62, at 924 (maintaining that all criminal defendants who appear mentally ill during the trial process will be referred for a competency evaluation).

74. See generally Charles L. Scott, *Commentary: A Road Map for Research in Restoration of Competency To Stand Trial*, 31 J. AM. ACAD. PSYCHIATRY & L. 36 (2003) (outlining the proportion of patients with schizophrenia, an affective disorder, and mental retardation who are found incompetent to stand trial).

75. See RONALD ROESCH & STEPHEN GOLDING, *COMPETENCY TO STAND TRIAL* 12–13 (1980) (maintaining that the *Dusky* requirement that a defendant be able to "rationally consult, assist, and comprehend" is a theoretical device).

76. See GRISSO, *supra* note 32, at 9. The Court's holding in *Sell v. United States*, 539 U.S. 166, 166–69 (2003), offers an excellent example of the nuances of competency determinations. The Court concluded that Sell could be incompetent to stand trial but competent to refuse medical treatment. *Id.* at 183.

77. *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam); see, e.g., *Youtsey v. United States*, 97 F. 937, 942 (6th Cir. 1899); *United States v. Chisolm*, 149 F. 284, 287 (S.D. Ala. 1906).

78. GRISSO, *supra* note 32, at 70–71.

79. *Dusky*, 362 U.S. at 402.

80. *Id.*

81. *Pate v. Robinson*, 383 U.S. 375, 385 (1966).



to ensure that he does not become incompetent and that failure to do so constitutes a due process violation.<sup>82</sup> In *Medina v. California*, the Court reaffirmed its commitment to finding a due process violation in the trial of an incompetent defendant but found that placing the burden on the defendant to prove incompetency was constitutional.<sup>83</sup>

Professor Richard Bonnie has labeled “three conceptually independent rationales” for the modern adjudicative competency doctrine—dignity, reliability, and autonomy.<sup>84</sup> Dignity and reliability serve as justifications for the broadest definition of competence to stand trial. For the defendants who are incapable of grasping any “meaningful moral understanding of wrongdoing and punishment,”<sup>85</sup> conducting criminal proceedings would “offend[] the moral *dignity* of the process.”<sup>86</sup> There is no debate that sparing those who cannot master an understanding of the simplest aspects of the criminal justice process is proper.<sup>87</sup> The reliability justification is usually viewed through the anticipatory lens of the guilt determination and requires that a defendant be able to provide relevant, helpful details to counsel in furtherance of preparing a reasonable defense strategy.<sup>88</sup>

The conclusion that a defendant is competent to stand trial is based on a question of law that must be addressed by the presiding judge.<sup>89</sup> Trial courts

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82. *Drope v. Missouri*, 420 U.S. 162, 181 (1975).

83. *Medina v. California*, 505 U.S. 437, 453 (1992).

84. Bonnie, *The Competence of Criminal Defendants*, *supra* note 21, at 426.

85. *Id.* at 427.

86. *Id.* at 426.

87. I do, however, disagree with Professor Bonnie that the “moral dignity” issue is restricted to those who are the most incompetent. In my view, the moral dignity issue is at the heart of every competency determination and must be the overarching concern for the trial judge who is charged with making the determination. *See infra* Part V.

88. The Court had characterized the competency requirement as “fundamental to an adversary system of justice.” *See Drope v. Missouri*, 420 U.S. 162, 172 (1975) (expanding on the *Dusky* Court’s holding that the defendant’s ability to share relevant facts with his attorney was a requirement for a finding of competency). Of course, this is but one core value being protected in the competency doctrine, since the Court grants no such protection to defendants who are unable to relay the facts of their offense, because of intoxication, to their attorney.

89. Some states, like Texas, allow for a jury. *See TEX. CODE CRIM. PROC. ANN.*, art. 46B.051 (West 2011). However, the power of the forensic evaluator’s assessment to dictate the court’s decision on competency has long been recognized. *See* Comments, MODEL PENAL CODE § 4.04 (Tent. Draft No. 4, 1955) (“Despite the state of the prevailing law, the practice in some jurisdictions in determining fitness to proceed is for the psychiatric examiner to ask if the defendant is psychotic and, if he concludes he is, to recommend against capacity for trial. Since prospective acquiescence is the norm, the usual result of such recommendation is that the defendant is committed.”); M. C. Slough & Paul E. Wilson, *Mental Capacity To Stand Trial*, 21 U. PITT. L. REV. 593, 598 (1960) (explaining that, prior to *Dusky*, the presence of mental illness that demanded hospitalization was the essential

review competency assessments prepared by forensic examiners, which often detail the defendant's "capacities and deficits relevant to the legal issue at hand,"<sup>90</sup> but the ultimate determination rests with the court. While the Court has identified the issues that each trial court must confront in a competency determination,<sup>91</sup> the decision of competency to stand trial involves issues of justice, morality, and dignity and, therefore, rests not with the forensic evaluator but with the trial court.<sup>92</sup> The adjudicative competency determination has always been viewed as a binary—either the defendant is competent to stand trial or he is not competent to stand trial—rather than on a spectrum, but given the Court's recent acknowledgment of borderline-competent or gray-area competent defendants,<sup>93</sup> consideration must be given to whether the capital trial and execution of these defendants maintains any moral dignity.

In the end, it is the dignity of the process—both the actual dignity and the appearance of dignity—that drives the competency doctrine. Apparent fairness furthers a societal interest; if the defendant acts bizarrely or disrupts the normal courtroom proceedings, "[t]he adjudication loses its character as a reasoned interaction between an individual and his community and becomes an invective against an insensible object."<sup>94</sup> But if that same defendant sits quietly because counsel is controlling the trial, his capacity for participation remains well below the standard necessary for moral dignity in the capital trial.

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criterion that psychiatrists used to determine when a defendant was not competent to stand trial).

90. Robert A. Nicholson & Steve Norwood, *The Quality of Forensic Psychological Assessments, Reports, and Testimony: Acknowledging the Gap Between Promise and Practice*, 24 LAW & HUM. BEHAV. 9, 12 (2000).

91. *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam).

92. See Nicholson & Norwood, *supra* note 90, at 12 (detailing the debate among mental health professionals as to whether forensic assessments should reach an ultimate conclusion on the dispositive facts or only offer observations and asserting that mental health professionals agree that the legal conclusion is "the least important part of the forensic examiners role"). Criminal defendants have a due process right to not be tried while incompetent, and as such, the question of competency must rest with a court. See generally Maroney, *supra* note 45, at 1379 (arguing that the defendant's emotional competence must be a part of the overall adjudicative competency assessment).

93. *Indiana v. Edwards*, 554 U.S. 164, 171, 173–75 (2008).

94. Note, *Incompetency To Stand Trial*, 81 HARV. L. REV. 454, 458 (1967) [hereinafter Note, *Incompetency*].

## II. HOW *JACKSON V. INDIANA* CHANGED THE TREATMENT OF INCOMPETENT DEFENDANTS

Before the twentieth century, medicine and science offered little insight into mental illness and almost no useful treatment.<sup>95</sup> The shift from the ancient view that madness was supernatural to the belief that religion might bear some relevant relation took centuries.<sup>96</sup> Viewing lunacy as a natural phenomenon did not occur until the nineteenth century.<sup>97</sup> While the standards for insanity and incompetency are different, the lunacy of the defendant was the key element for both in an era without any useful treatment for the underlying condition.<sup>98</sup> A finding of incompetency was not a reprieve from a life of punishment; in Blackstone's era, when courts determined that a defendant was either an idiot or a lunatic, they might ship

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95. See generally Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271 (1944) (offering an in-depth look at the state of psychiatry and the competency to stand trial in the pre-*Dusky* and pre-*Jackson* era); David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues*, 16 MENTAL & PHYSICAL DISABILITY L. REP. 225, 225 (1992) (asserting that mental health law originated in the early 1970s on the heels of the civil rights movement and the "revolution in criminal procedure and prisoners' rights"). One explanation for the consistent conflation of the legal concept of sanity and competency might be that the defendant who was insane at the time of the offense would likely be in the throes of mental illness at the time of the trial. See, e.g., *Jackson v. Indiana*, 406 U.S. 715, 719 (1972) ("Petitioner's counsel then filed a motion for a new trial, contending that there was no evidence that Jackson was 'insane' or that he would ever attain a status which the court might regard as 'sane' in the sense of competency to stand trial."). As a legal term and an affirmative defense, insanity requires a finding that the defendant suffers from a mental defect that causes the defendant to be unable to distinguish between right and wrong. See WAYNE LAFAVE, *CRIMINAL LAW* § 7.1(a) (5th ed. 2010). Some states follow the Model Penal Code approach, which allows the defendant to show that he suffered a mental defect that caused him to lack the "substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." *Id.*

96. See LYNN GAMWELL & NANCY TOMES, *MADNESS IN AMERICA: CULTURAL AND MEDICAL PERCEPTIONS OF MENTAL ILLNESS BEFORE 1914* 15–17 (1995) (discussing Anglo-American traditions including supernatural and religious approaches).

97. In the nineteenth century, scientists began to explain strange, criminal behavior as arising from a natural rather than a supernatural cause, and this realization gave way to a broader understanding of mental illness. In the criminal context, some used mental illness as an explanation for *all* criminal behavior, while others deduced that lunatics were but a small group within the larger class of criminals. See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 119 (Harvard Univ. Press 2002) (citing NORMAN DAIN, *CONCEPTS OF INSANITY IN THE UNITED STATES, 1789–1865* (Rutgers Univ. Press 1964)).

98. See Green, *supra* note 95, at 272–73 (setting out the perceived difference, in the first half of the twentieth century, between "idiot, imbeciles, and morons"—those with a mental deficiency, and lunatics—those who suffered from paranoia, delusions, and hallucinations).

the defendant off to Bedlam<sup>99</sup> where he would be subjected to ice baths, forced vomiting, and “bleeding.”<sup>100</sup>

The idea that a defendant might be treated and restored to competency is recent and likely coincides with the discovery of effective pharmaceutical therapies.<sup>101</sup> Until 1972, when the Court decided *Jackson v. Indiana*,<sup>102</sup> most states kept incompetent criminal defendants in indefinite detention, holding them well beyond the maximum potential penalty for the crime charged.<sup>103</sup> In *Jackson*, the Court found that due process forbids a state from indefinitely holding a criminal defendant solely on the basis of incompetency to stand trial.<sup>104</sup> The Court stated that “due process requires

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99. Bedlam is the general term for any lunatic asylum or madhouse. See OXFORD ENGLISH DICTIONARY, VOLUME II 126 (2d ed. 1995). The Hospital of St. Mary of Bethlehem, also known as Bethlehem Royal Hospital, was the first known institution to attempt to care for and treat mental illness, beginning around 1400, and it is the origin of the term “bedlam,” usually meaning madness or chaos. *Id.* See generally ANNE SEXTON, TO BEDLAM AND PART WAY BACK (Houghton 1960) (where bedlam serves as a poetic metaphor for the author’s hospitalization at Westwood Lodge and Glenwood Hospital and her experience with serious mental illness).

100. See ROBERT WHITAKER, MAD IN AMERICA: BAD SCIENCE, BAD MEDICINE, AND THE ENDURING MISTREATMENT OF THE MENTALLY ILL 7–12 (Perseus Publishing 2002) (explaining the rationales for treatments that were extremely, physically harmful to patients, including draining them of “bad blood” often resulting in death).

101. During the 1930s and 1940s, U.S. asylums engaged in numerous physical therapies, with electro-shock therapy and lobotomies both being popular, to treat mental illness. See PETER SCHRAG, MIND CONTROL 5 (1978) (highlighting these and other popular therapies).

102. 406 U.S. 715, 738 (1972) (holding that defendants committed based on incompetency to stand trial “cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future”); see Dillard, *Without Limitation*, *supra* note 71, at 1223 (explaining how the Virginia General Assembly holds its incompetent capital defendants under VA. CODE ANN. § 19.2-169.3 in violation of *Jackson*).

103. For a comprehensive example of the typical treatment given and length of hospitalization for incompetent criminal defendants prior to *Jackson*, see Comment, *Commitment to Fairview: Incompetency to Stand Trial in Pennsylvania*, 117 U. PA. L. REV. 1164 (1968–1969) (detailing the practice of indefinite detention and scant efforts to restore incompetent defendants to fitness for trial) and Patricia Zapf & Ronald Roesch, *Future Directions in the Restoration of Competency to Stand Trial*, 20 Current Directions in Psychological Science 43–47 (2011) (noting the dearth of research into the efficacy of restoration to competency programs).

104. *Jackson*, 406 U.S. at 731. Jackson was an illiterate, deaf mute with low intelligence who presented no capacity for becoming competent to stand trial. See *id.* at 717–18. Because the Court could find no “substantial probability” that he would become competent in the foreseeable future, it found that due process demanded his release from the pre-trial detention that was a part of his pending criminal charges. *Id.* at 738.

that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."<sup>105</sup>

Prior to 1972, most of the scholarly commentary on the issue of competency to stand trial operated as a critique of the abuses of the doctrine.<sup>106</sup> In the United States, the end of long-term asylum care for mentally ill citizens began in 1963 when President Kennedy authorized the National Institute of Mental Health to begin developing policies and plans for treating patients after their release from state psychiatric hospitals.<sup>107</sup> During this time, hospitals appeared to treat all patients, both the civil committees and those who had been referred by courts for competency restoration, to restore their "soundness of mind."<sup>108</sup> The lack of effective restoration treatment programs left many incompetent defendants in the hospital for the equivalent of a life sentence, with the hospital operating as a shadow penal system.<sup>109</sup> The scholarship from the era points to an overwhelming concern for incompetent defendants drifting in due process limbo—neither a part of the criminal justice system nor part of the mental health system<sup>110</sup>—and a compelling narrative that incompetent defendants were simply lost in an asylum system rather than allowed into a courtroom for trial and jailed as punishment for their crimes.<sup>111</sup>

The facts from *United States v. Barnes*<sup>112</sup> offer an example of the common abuse of the adjudicative competency requirement before *Jackson*. In *Barnes*, the state indicted four defendants for a murder that occurred a decade earlier; the trial court subsequently dismissed the indictment against three of the defendants based on a Sixth Amendment speedy trial violation.<sup>113</sup> But the court found the fourth defendant, Clarence Coons,

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105. *Id.* at 738.

106. *See, e.g.*, Note, *Incompetency*, *supra* note 94, at 455 ("[I]ncompetency law, invoked in the name of fairness to the accused, has often resulted in a commitment when it is really in his interest to have trial continue.").

107. Overcrowding and understaffing plagued state mental hospitals in the early 1960s, and it was not uncommon for half of the patients to be committed as incompetent to stand trial. *See* John H. Hess et al., Comment, *Incompetency Proceedings—Common Law*, 59 MICH. L. REV. 1078, 1083 (1961).

108. *See id.* (internal quotation marks omitted) (describing the dearth of therapeutic goals within the Ionia State Hospital in Michigan).

109. *Id.* at 1088–89.

110. *Id.*; *see generally* Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943 (1927) (arguing that indefinite detention without periodic review violated due process).

111. For the best overview of indefinite confinement prior to *Jackson*, *see* Grant H. Morris & Reid Meloy, *Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants*, 27 U.C. DAVIS L. REV. 1, 3–5 (1993).

112. 175 F. Supp. 60 (S.D. Cal. 1959).

113. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. CONST. amend. VI.

incompetent to stand trial. Though his competency was not necessary for a dismissal proceeding, the court disregarded the defendant's rights and ordered him committed until he was restored to competency<sup>114</sup> for the express purpose of protecting society.<sup>115</sup>

In *Jackson*, the Court clearly sought to establish some rule that would allow an incompetent defendant to escape a lifetime of pre-trial detention in favor of a more humane approach.<sup>116</sup> Theon Jackson, the defendant, was a deaf-mute when he was charged with two counts of robbery.<sup>117</sup> Jackson had no communication skills; he could not read or write, and he was unable to sign.<sup>118</sup> The trial court ordered a competency evaluation of Jackson and committed him to the Indiana Department of Mental Health until such time as he was "sane" for trial.<sup>119</sup> Two doctors concluded that the "prognosis appear[ed] rather dim"<sup>120</sup> and that Jackson would never become competent to stand trial, even if he were not a deaf-mute, because his mental capacity was that of a preschool-aged child.<sup>121</sup> The lack of native capacity made it impossible for Jackson to overcome his deaf-mute handicap and communicate with counsel or understand the nature of the charges against

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114. *Barnes*, 175 F. Supp. at 65; see Note, *Incompetency*, *supra* note 94, at 455–56 (arguing that the incompetent defendant "is denied an opportunity to prove his innocence, or to show that the prosecution's case is defective").

115. *Id.* ("It must not be forgotten that underlying [the competency requirement], is the concept of *some protection to society*, as well as the preservation of the rights of an accused person.").

116. Prior to *Jackson*, the options for intractably incompetent defendants appeared binary—suffer a lifetime of pre-trial detention or go to trial even while incompetent. See Note, *Incompetency*, *supra* note 94, at 459 (arguing for a relaxed competency standard in cases of permanent disability to allow defendants to have closure to their criminal proceedings).

117. *Jackson v. Indiana*, 406 U.S. 715, 717 (1967). The total value of the property allegedly taken by Jackson during the robberies was less than \$10.00, a fact that seemed important to the Court when it decided that his indefinite pre-trial detention would likely result in a life sentence since Jackson was unrestorably incompetent to stand trial. See *id.* at 717.

118. *Id.* at 718–19; see Eric Eckes, Comment, *The Incompetency of Courts and Legislatures: Addressing Linguistically Deprived Deaf Defendants*, 75 U. CIN. L. REV. 1649, 1660 (2007) (setting out a method and an argument for how trial courts should assess the competency of linguistically-challenged, deaf defendants).

119. Here, as in other cases, the Court conflates the terms of sanity and competency. No doubt, the *Jackson* Court meant that the defendant needed to be competent to stand trial rather than sane to stand trial. *Jackson*, 406 U.S. at 718–19; see generally *Ford v. Wainwright*, 477 U.S. 399 (1986) (employing the terms of sanity and competency interchangeably throughout). A broad reading of *Jackson* and *Ford* might justify the conclusion that the Court intends for the term sanity to have more of a lay meaning than a legal meaning; that is, the Court uses insanity in the competency context to mean "crazy."

120. *Jackson*, 406 U.S. at 719 (internal quotation marks omitted).

121. *Id.* at 717, 720.

him and the legal proceedings.<sup>122</sup> The trial court ordered continued efforts to restore Jackson to competency even though no medical evidence of that possibility existed.

On appeal, Jackson's attorney argued that his continued pre-trial hospitalization amounted to a life sentence since Jackson lacked the capacity to accomplish the task—becoming competent to stand trial—that was the predicate for his release from the hospital and entry into the courtroom.<sup>123</sup> The Court held that the pre-trial detention of a defendant with no substantial likelihood of restoration in the foreseeable future constituted a due process violation.<sup>124</sup> The Court also held that treating Jackson differently from other “feeble-minded” citizens, simply because he had been charged with a crime, constituted an equal protection violation.<sup>125</sup>

Though the Court did not offer specifics in *Jackson* as to how long incompetent defendants could be held while the state made reasonable efforts at restoration, some states responded to the opinion by inserting a tolling provision into their incompetency statutes<sup>126</sup> and creating a civil commitment mechanism for defendants who are deemed unrestorably incompetent. In short, after *Jackson*, states had a reason to order hospitals to engage in vigorous restoration efforts<sup>127</sup> for incompetent defendants who were charged with serious crimes—to ensure that those defendants were prosecuted and punished rather than civilly committed and made eligible for release back to the community.

The *Jackson* Court was highly attuned to the obvious due process violation in Theon Jackson's case. But its solution, ordering Jackson civilly committed rather than forcing him to trial, had undesirable side effects. As asylums and long-term hospitals began to close and as mental health services lost funding, hospitals began to conclude that more and more patients, previously deemed unrestorable, were miraculously restored, and

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122. See *id.* at 718–19 (applying the *Dusky* standards).

123. *Id.*

124. *Id.* at 738.

125. *Id.* at 737–39. The Article's focus is due process rather than equal protection, but it is fair to note that the Court's equal protection analysis is incomplete, at best, as the Court nearly ignored the fact that Jackson was charged with a crime. The Court did not offer any guidance on the dispensation of the criminal charges for an unrestorably incompetent defendant, nor did it grapple with the complex question of whether probable cause that a person has committed a crime might justify detaining one “feeble-minded” person differently from another “feeble-minded” person who has not been charged with committing a crime.

126. For example, in Virginia, non-capital defendants may be detained for no more than five years on a felony charge while the Commonwealth engages in restoration efforts. See VA. CODE ANN. § 19.2-169.3(D) (2008).

127. See Stephen G. Noffsinger, *Restoration to Competency Practice Guidelines*, 45 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 356 (2001) (examining restoration to competency programs for effectiveness).

reports to the court began to reflect that these defendants were competent for trial.<sup>128</sup> The standard for competency did not change with *Jackson*, and Jackson himself would have easily landed on the profoundly incompetent end of the spectrum. But after *Jackson*, states that had previously held a wide spectrum of incompetent defendants in indefinite pre-trial detention now had a compelling reason to push marginally competent defendants into the courtroom since they could no longer be indefinitely detained.<sup>129</sup>

### III. HOW COURTS AND HOSPITALS PUSHED MORE MARGINALLY COMPETENT DEFENDANTS INTO COURT IN RESPONSE TO *JACKSON*

In *Jackson*, the Court articulated for the first time that the purpose of committing a defendant who was not competent to stand trial was to provide treatment to restore him to competency.<sup>130</sup> Hospitals responded to *Jackson* by developing a treatment regimen of medication and education,<sup>131</sup> and courts developed an expanded interpretation of the *Dusky* standard to allow more marginally competent defendants into the courtroom.<sup>132</sup> While

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128. Some assert that incompetent defendants often lack an understanding of and the resources to assert their rights under *Jackson*. See Winick, *Restructuring Competency*, *supra* note 62, at 943. But this is not the case in the death penalty context where defense counsel actively assert incompetency and are happy to live with pre-*Jackson* indeterminacy rather than taking a marginally competent defendant to trial for capital murder.

129. As evidence of the state pushing marginally competent defendants to trial, jails have become filled with inmates who are mentally ill. See generally *Brown v. Plata*, 131 S. Ct. 1910 (2011) (detailing the inhumane conditions for mentally ill prisoners in the overcrowded California penal system); Katie Connolly, *Mentally Ill Increasing Strain on U.S. Prison System*, BBC NEWS, Feb. 22, 2011, available at <http://www.bbc.co.uk/news/world-us-canada-12532538> (last visited July 29, 2011) (describing the overcrowding and lack of resources for mentally ill inmates in the Virginia penal system).

130. The facts of *Jackson* make it obvious that treatment had not been the accepted purpose of the commitment prior to the Court's decision; rather, incapacitation and separation from the community were the apparent goals. Cf. *United States v. Barnes*, 175 F. Supp. 60, 65 (S.D. Cal. 1959) ("It must not be forgotten that underlying [the competency requirement], is the concept of *some protection to society*, as well as the preservation of the rights of an accused person." (emphasis added)).

131. Competency education is beyond the scope of this Article, though I hope to tackle that troublesome problem in a future article. One scholar has suggested that a model competency restoration program should include an educational component, which should strive to educate the defendant on the following: the variety and severity of his charges; pleas, plea bargaining, and sentencing; the role of courtroom personnel; the adversarial nature of the trial process; and the evaluation of evidence. See Noffsinger, *supra* note 127, at 361. Educating the defendant to answer the questions "correctly" in the competency evaluation is not a legitimate goal of the educational component to competency restoration, though I have witnessed two highly regarded forensic psychologists offer "model" answers to standard competency assessment questions to an incompetent capital defendant.

132. See *Godinez v. Moran*, 509 U.S. 389, 401 (1993) (holding that the heightened



*Jackson* offered an acceptable resolution for many incompetent defendants—civil commitment—that resolution is less appealing in cases where the defendant has been charged with a serious crime, like capital murder. Civil commitment statutes offer some protection that an individual will not be released so long as he poses an imminent danger to himself or others,<sup>133</sup> but the decision for when and whether a patient is suitable for release from civil commitment typically rests with the treating hospital.<sup>134</sup> In serious criminal cases where the court and the public have a legitimate concern for public safety, the civil commitment of an unprosecuted, seriously mentally ill person who stands accused of committing a heinous crime is not a satisfactory result. Some states have tried to circumvent *Jackson* in capital cases,<sup>135</sup> but the sad result for a host of capital defendants is that trial courts have found them competent to stand trial when moral sensibility demonstrates that they were not.

#### A. The Example of Scott Panetti

Scott Panetti offers an example of how a trial court may have applied the nuances of the competency doctrines in a post-*Jackson* capital trial and allowed a marginally competent man to represent himself in a trial that resulted in his death sentence.<sup>136</sup> Panetti's case offers a stark example of a trial that lacked moral dignity.

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standard for pleading guilty and waiving counsel does not constitute a heightened standard for competence).

133. See generally VA. CODE ANN. § 37.2-817C (2008) (allowing involuntary commitment for a person who presents imminent threat or harm to himself or others or who cannot protect himself from harm or care for basic needs).

134. See generally VA. CODE ANN. §§ 37.2-837 to 38 (2008) (setting out the standards for release from involuntary civil commitment).

135. The best example is in Virginia, where in response to a capital defendant nearing the "tolling" date on his pre-trial detention for restoration to competency, the Virginia General Assembly passed "the Murphy bill," referring to Gregory Murphy, charged with capital murder in Alexandria, Virginia, and incompetent to stand trial since 2000. See VA. CODE ANN. §19.2-169.3(F) (2008) (allowing for the indefinite detention of pre-trial capital defendants who are not competent to stand trial); Dillard, *Without Limitation*, *supra* note 71, at 1223 (asserting that Virginia Code § 19.2-169.3(D) unconstitutionally orders capital defendants to be held indefinitely in violation of *Jackson v. Indiana*).

136. Panetti's case currently sits before the Fifth Circuit Court of Appeals on review from the United States District Court for the Western District of Texas, Austin Division, which determined, on remand from the United States Supreme Court in *Panetti v. Quarterman*, 551 U.S. 930 (2007), that Scott Panetti is competent to be executed. The issue of whether Panetti was competent to stand trial and represent himself has been joined with the executional competency issue on review, since the Court's decision in *Indiana v. Edwards*, 554 U.S. 164 (2008), has raised the new claim for Panetti. Most of the details provided in this Article on the procedural posture of Panetti's case and the factual details of

Panetti's pre-trial competency evaluation revealed that Panetti suffered from "fragmented personality, delusions, and hallucinations."<sup>137</sup> Prior to trial, he was hospitalized several times for his mental disorders and was prescribed medication so potent that a person without extreme psychosis could not have tolerated it.<sup>138</sup> Evidence revealed that even when taking his prescribed medication, Panetti believed that the devil possessed his home and that he had to engage in bizarre cleansing rituals that included burying valuables in the yard.<sup>139</sup> The trial court evaluated this and other evidence and, against the wishes of defense counsel, Panetti's family, and *the prosecution*, found Panetti competent to stand trial.<sup>140</sup>

Several months before the start of his trial, Panetti stopped taking his prescribed anti-psychotic medication.<sup>141</sup> The trial court did not re-assess Panetti's competency to stand trial during the pre-trial period or the trial, thus leaving unresolved the issue of how Panetti's discontinuation of his medication had "exacerbate[d] the underlying mental dysfunction."<sup>142</sup> At trial, with standby counsel,<sup>143</sup> Panetti represented himself against two counts of capital murder.<sup>144</sup> During the trial, Panetti acted bizarrely before

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the crime, prosecution, appeal, and habeas proceedings come directly from Greg Wiercioch, counsel of record for Panetti. See Author's Notes, dated June 23, 2011 (on file with Tennessee Law Review).

137. *Panetti*, 551 U.S. at 936. I assert that the trial court's finding that Panetti was competent to stand trial and represent himself was in error.

138. *Id.* (citing App. 233). One doctor testified, "I can't imagine anybody getting that dose waking up for two to three days. You cannot take that kind of medication if you are close to normal without absolutely being put out."

139. *Id.* at 936.

140. While the court will, necessarily, rely on testimony from witnesses with expertise in the field of mental illness and forensic psychology, the ultimate decision rests with the trial judge. For a detailed explanation, see *supra* Part I.

141. Panetti's attorneys refer to this as the "April Fools' Day Revelation," since Panetti stopped taking his medication in April 1995 before his trial began in September 1995. The court did not order forcible medication to restore Panetti to competency, and thus, he was free to refuse his medication at any time during the pre-trial period. See Author's Notes, dated June 23, 2011 (on file with Tennessee Law Review).

142. *Panetti*, 551 U.S. at 937.

143. When a trial court accepts a defendant's motion to represent himself, the court will often appoint standby or advisory counsel for the defendant, particularly if the defendant faces serious, complex charges. The list of infamous defendants who have had standby counsel includes Jack Kevoorkian, John Allen Muhammad, Zacarias Moussaoui, and Ted Kaczynski. See Anne Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U. L. REV. 676 (2000).

144. Panetti killed his mother-in-law and his father-in-law while he held his wife and daughter captive, forcing them to watch the killings. See TEX. PENAL CODE ANN. § 19.03(a)(7)(A) (West 2011) (defining capital murder as multiple murders in the same transaction).

the jury and often appeared to be in a kind of trance.<sup>145</sup> The general conclusion at the close of the trial, in which the jury found Panetti guilty and sentenced him to death, was that the trial had been a farce and a true “mockery of self-representation.”<sup>146</sup> Within two months of the close of his trial, the trial court concluded that, although he had been competent to stand trial and represent himself, Panetti was incompetent to waive his right to state habeas counsel.<sup>147</sup>

That Panetti proceeded to trial, representing himself with standby counsel on capital murder charges, severely eroded the moral dignity of the judicial process. All of Panetti’s presentations to the jury, in both the guilt and sentencing phases, were rambling and incoherent.<sup>148</sup> He dressed as a cowboy throughout the trial and attempted to subpoena President John F. Kennedy, Jesus Christ, and Pope John Paul II, among hundreds of other unavailable witnesses with no relevant knowledge. Moreover, the reliability of the adjudication<sup>149</sup> was in serious doubt. First, Panetti had a strong, valid claim that he was insane at the time of the offense but was unable to present the defense in any effective way because of his own mental illness and lack of legal training. Second, one juror claimed in an affidavit following the

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145. *Panetti*, 551 U.S. at 936. Most of the specific information about how Panetti acted at trial is omitted from the Court’s record in *Panetti v. Quarterman*. Greg Wiercioch, counsel for Mr. Panetti before the Court on his final, successful appeal, provided wonderful details from the trial record. See Author’s Notes, dated June 23, 2011 (on file with Tennessee Law Review).

146. *Panetti*, 551 U.S. at 936 (internal quotation marks omitted).

147. The Court has not addressed standards for competency during the appellate and habeas stages of a criminal trial, though it is hard to imagine that it would set a higher standard than that for adjudicative competence. See generally Mae C. Quinn, *Reconceptualizing Competence: An Appeal*, 66 WASH. & LEE L. REV. 259 (2009) (arguing for such a standard that would improve client-centered representation).

148. I am grateful to Dr. Lillian Tidler for teaching me the term “word salad,” used by forensic psychiatrists and psychologists to indicate that a patient is speaking words known in the English language while putting the words together in a wholly incoherent way. The inflection and tone may resemble common, spoken language, but on examination the words, as strung together, have no meaning.

149. The Court’s traditional reliability doctrine is embodied most plainly in the requirement that the prosecutor prove the guilt of the defendant beyond a reasonable doubt. E.g., *Holt v. United States*, 218 U.S. 245 (1910); *Davis v. United States*, 160 U.S. 469 (1895); *Miles v. United States*, 103 U.S. 304 (1880). In the capital context, reliability is usually addressed in sentencing issues. See *Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (holding 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”); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (holding that any “risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty” is “unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments”).

conviction and death sentence that the jury would not have sentenced Panetti to death if he had been represented by counsel.<sup>150</sup> Specifically, the juror claimed that the jury believed that Panetti was severely mentally ill, and that his conduct in the courtroom scared the jurors into believing that death was the only option.<sup>151</sup> Through all levels of appellate and habeas review, no court has yet addressed the overarching issue of Panetti's competency to stand trial.<sup>152</sup> Instead, Panetti's competency to be executed while he sat on death row became the paramount issue, and the Court ultimately allowed Panetti the full opportunity to litigate the issue of his competency to be executed.<sup>153</sup>

The post-*Jackson* evolution of the interpretation and application of the competency doctrine allowed for the spectacle of the Panetti trial, and Panetti's case provides an all-too-familiar example of a capital trial of a marginally competent defendant that is devoid of moral dignity. Treating the marginally competent Panetti as categorically exempt from execution would, at least, preserve some of the dignity that due process demands in the face of a potential death sentence.

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150. Affidavit of Preston Douglas.

151. This is typical conduct for death-qualified jurors. For an overview of the scholarship on the effect of death-qualified jurors on the likely success of the insanity defense or the mental retardation determination, see Dillard, *And Death Shall Have No Dominion*, *supra* note 43, at 1001–04. If the assertion of the Panetti juror is true, it demonstrates a flagrant disregard for the required consideration that the capital jury must give mitigation and aggravation factors. Texas actually requires the capital jury to view the sentencing evidence *in favorem vitae*, which gives a strong preference to capital defendants. TEX. CODE CRIM. PROC. ANN. § 932b (West 2011). It also tends to show that the Court's worry in *Atkins v. Virginia*, that some defendants may be less able "to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors," was legitimate for a class of mentally ill defendants as well as mentally retarded defendants. *Atkins*, 536 U.S. at 320 (holding that mentally retarded defendants should be categorically exempt from execution).

152. No court has ever given a substantive review to the question of Panetti's competency to stand trial. Panetti's successive appeals to the Texas courts were rejected, and the courts did not review the competency issue. The U.S. Supreme Court twice denied petitions for certiorari before granting and reversing on the narrow issue of executional competence. The United States District Court for the Western District of Texas, Austin Division, heard and denied Panetti's *Edwards* claim, and that issue is now on appeal before the Fifth Circuit. See *Panetti v. Thaler*, No. A-09-CA-774-SS, 2012 U.S. Dist. Lexis 11724 (W.D. Tex. Jan. 31, 2012).

153. The ultimate holding in *Panetti v. Quarterman* is complex and beyond the general purview of capital defenders save for the small minority that specialize in habeas litigation. In brief, the Court held that Panetti did have a right to litigate his claim of incompetence to be executed in federal district court. See *Panetti v. Quarterman*, 551 U.S. 930, 935 (2007). Panetti is currently also litigating his *Indiana v. Edwards* claim that he was not competent to represent himself at trial.

*B. Forcible Medication as the Path to Competency for Seriously Mentally Ill Defendants After Jackson*

Psychotropic medication to treat mental illness was virtually non-existent until the mid-twentieth century. In 1948, lithium carbonate<sup>154</sup> was introduced to treat the highs and lows of bipolar disorder, and in 1952, chlorpromazine<sup>155</sup> was introduced to treat the symptoms of schizophrenia. From the early 1950s to the early 1970s, a “psycho-pharmacological revolution [occurred], as a result of which drugs play an increasingly important role in the treatment of mental illness,”<sup>156</sup> though the effect of the drugs was “‘compensatory rather than curative.’”<sup>157</sup> While psychotropic drugs often have severe side effects, their overall performance has been deemed successful for helping patients.

In 1990, the Court first addressed the issue of when a state could forcibly medicate a prison inmate in *Washington v. Harper*.<sup>158</sup> *Harper* is, at its heart, a case about medicating a prison inmate to ensure his safety and the safety of those around him and, thus, looks much like a forcible medication case from a hospital setting.<sup>159</sup> The Court established a balancing test between the inmate’s “significant liberty interest in avoiding the unwanted administration of antipsychotic drugs,”<sup>160</sup> which is guaranteed under the Due Process Clause of the Fourteenth Amendment,<sup>161</sup> and the

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154. See John F.J. Cade, *Lithium Salts in the Treatment of Psychotic Excitement*, 36 MED. J. AUST. 349 (1949).

155. See Trevor Turner, *Unlocking Psychosis*, 334 BRITISH J. OF MED. § 7 (2007) (Jan. spec. ed.).

156. Winick, *Psychotropic Medication*, *supra* note 22, at 771 (citing e.g., LEO HOLLISTER, CLINICAL USE OF PSYCHOTHERAPEUTIC DRUGS 5–6 (1973)).

157. *Id.* at 781 (walking through the available psychotropic drugs and their intended use during the 1970s).

158. 494 U.S. 210 (1990).

159. The Court has grappled with the role of the judiciary in interfering with medical treatment. See *Parham v. J.R.*, 442 U.S. 584, 609 (1979) (“Although we acknowledge the fallibility of medical and psychiatric diagnosis, we do not accept the notion that the shortcomings of specialists can always be avoided by shifting the decision from a trained specialist using the traditional tools of medical science to an untrained judge or administrative hearing officer after a judicial-type hearing. Even after a hearing, the nonspecialist decision maker must make a medical-psychiatric decision. Common human experience and scholarly opinions suggest that the supposed protections of an adversary proceeding to determine the appropriateness of medical decisions for the commitment and treatment of mental and emotional illness may well be more illusory than real.” (citations omitted)).

160. *Harper*, 494 U.S. at 221.

161. See U.S. CONST. amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”).

state's interest in keeping the prison environment safe.<sup>162</sup> The Court found that the due process rights of prison inmates are reduced because of their confinement and that the state may have a legitimate penological interest in medicating an inmate with a serious mental illness who poses a danger to himself or others.<sup>163</sup> As part of the balancing test, the Court required the state to show that the medication was consistent with the inmate's medical interests.<sup>164</sup>

The Court first considered whether the state could forcibly medicate a pre-trial detainee for the purpose of restoring him to competency in *Riggins v. Nevada*.<sup>165</sup> On appeal from a capital conviction, Paul Riggins argued that forcible psychotropic medication before and during his capital trial had constituted due process and fair trial violations.<sup>166</sup> The Court adopted a more rigorous standard in *Riggins* than it had in *Harper*, acknowledging that the pre-trial detainee retained due process rights that were lost to the inmate.<sup>167</sup> To medicate a pre-trial detainee, the state must show an "overriding justification."<sup>168</sup> One such justification mimics the standard for forcibly medicating civil committees: "medically appropriate and, considering less intrusive alternatives, essential for the sake of [the defendant's] own safety or the safety of others."<sup>169</sup> The other "overriding justification" creates a path towards restoring a defendant to competency: the state might be able to justify forcible medication if the medication is medically appropriate and if the state "could not obtain an adjudication of [the defendant's] guilt or innocence by using less intrusive means."<sup>170</sup> As is typical, the Court specifically declined to specify *how* trial courts should

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162. *Harper*, 494 U.S. at 223.

163. *Id.* at 227.

164. *Id.*

165. 504 U.S. 127 (1992).

166. *Id.* at 130. This Article has a collateral concern for fair trial rights, as the Court in *Atkins* also focuses on fair trial rights as a rationale for categorically exempting the mentally retarded from death. See *infra* note 218. Fair trial rights are wide-ranging, but for the marginally incompetent defendant they would likely include: the right to be free from trial unless the defendant is capable of consulting with and effectively assisting his attorney, *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975); the right to be an effective witness on his own behalf, *Rock v. Arkansas*, 483 U.S. 44, 52 (1987); the right to be present during the trial without undermining his presumption of innocence, *Estelle v. Williams*, 425 U.S. 501, 503 (1976); and the right to present an effective insanity defense, *United States v. Weston*, 206 F.3d 9, 20 (D.C. Cir. 2000) (Tatel, J., concurring).

167. See *Weston*, 206 F.3d at 17 (Rogers, J., concurring) ("[I]t nonetheless was clear that the Supreme Court did not simply apply the *Harper* standard.")

168. *Riggins v. Nevada*, 504 U.S. 127, 135 (1992).

169. *Id.*

170. *Id.* This is the current posture of the prosecution against Jared Lee Loughner. See *supra* note 2.

review and balance these competing interests.<sup>171</sup> Scholars often note that when the Court extends a new right, such as the right of mentally retarded people to be categorically exempted from death, it fails to give any guidance as to *how* trial courts should implement procedures to ensure the new right. 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.”<sup>172</sup>

Frankly, *Riggins* abandoned the question of forcible medication for pre-trial defendants without determining whether restoration to competency alone was a compelling state interest: “[w]hether a competent criminal defendant may refuse antipsychotic medication if cessation of medication would render him incompetent at trial is not before us.”<sup>173</sup> However, in 2003, the Court again addressed the question in *Sell v. United States*.<sup>174</sup> There, the Court set out a preference for states to look first to reasons other than restoration to competency to justify forcible medication of pre-trial detainees.<sup>175</sup> The Court designed a four-step balancing test to clarify its doctrine when the state’s *sole* justification for forcible medication doctrine is restoration to competency.<sup>176</sup> First, the state must demonstrate an important governmental interest in bringing the defendant to trial.<sup>177</sup> As

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171. The Court explicitly rejected strict scrutiny as the standard of review and declared that it did not need to reach that decision, though it did employ the traditional language of strict scrutiny review by balancing an “essential state interest” and “less intrusive alternatives.” See *Riggins*, 504 U.S. at 136; cf. *Roe v. Wade*, 410 U.S. 113, 154 (1973) (holding that limitations on fundamental rights may be justified only with narrowly drawn legislation that protects a compelling state interest).

172. 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, 725 (2008) (noting, specifically, that leaving the mental retardation determination to death-qualified jurors creates a special risk).

173. *Riggins*, 504 U.S. at 136.

174. 539 U.S. 166 (2003). *Sell*, a licensed dentist, was charged with the non-violent crime of insurance fraud. *Id.* at 169. He refused antipsychotic medication, and at the time of his appeal to the U.S. Supreme Court, he had been held in pre-trial custody for six years in an effort to restore him to competency. *Id.* at 169–70.

175. *Id.* at 181–82. I submit that there is simply no moral dignity in medicating a defendant for the sole purpose of sending him to trial for capital murder with the goal of execution. After the Court handed down *Sell*, a flurry of law reviews published student notes and comments criticizing the opinion. See, e.g., Cameron J. Jones, *Fit To Be Tried: Bypassing Procedural Safeguards to Involuntarily Medicate Incompetent Defendants to Death*, 10 ROGER WILLIAMS U. L. REV. 165 (2004); Elizabeth G. Schultz, Note, *Sell-ing Your Soul to the Courts: Forced Medication To Achieve Trial Competency in the Wake of Sell v. United States*, 38 AKRON L. REV. 503 (2005).

176. *Sell*, 539 U.S. at 180–81.

177. *Id.* at 180.

applied in *Sell*, the important governmental interest may be measured against the severity of the crime,<sup>178</sup> in which case the state might always satisfy the first step in a prosecution for capital murder. Second, the state must establish that forcible medication will significantly further those important governmental interests.<sup>179</sup> This step tracks the *Jackson* standard for treatment to restore to competency so long as the doctors have a reasonable expectation of success within the foreseeable future.<sup>180</sup> Third, the state must establish that it likely cannot achieve its important governmental interests through less intrusive alternatives.<sup>181</sup> Finally, the medication must be medically appropriate.<sup>182</sup>

There is a legitimate argument that the holding of *Sell* violates the equal protection concerns raised by the *Jackson* Court,<sup>183</sup> though the presence of the criminal charge could be sufficient to distinguish civil committees and pre-trial criminal detainees. For the defendant, the real concern of forcible medication is the inability to have a fair trial. Arguably, the defendant's best evidence of his insanity at the time of the offense would be a presentation of that mental state during the trial. Scholars have long criticized "synthetic sanity,"<sup>184</sup> and chemical competency to execute.<sup>185</sup> Capital trials are especially complex in their dependency on the emotions and intangible impressions of the jurors in the sentencing process. *Showing* a mentally ill capital defendant's condition rather than calling experts to *tell*

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178. *Id.* at 186 (holding that the government failed to prove the important governmental interest at stake in prosecuting a non-violent felony).

179. *Id.*

180. *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (requiring a "substantial probability that he will attain that capacity in the foreseeable future").

181. *See Sell*, 539 U.S. at 181. Talk therapy and competency education programs are the most prevalent less intrusive alternatives, and they are typically used in conjunction with medication.

182. *Id.* This position is consistent with the Court's doctrine whenever medicine interacts with the law. *See Schmerber v. California*, 384 U.S. 757, 771 (1966) (holding that a blood test was a reasonable search under the Fourth Amendment so long as it was administered in an appropriate medical manner).

183. *See Grant H. Morris, Mental Disorder and the Civil/Criminal Distinction*, 41 SAN DIEGO L. REV. 1177, 1197-1208 (2004) (explaining that imposing more risk of forcible medication for criminal defendants than for civil committees results in the two, similarly situated classes, being treated differently).

184. *See Linda C. Fentiman, Whose Right Is It Anyway?: Rethinking Competency To Stand Trial in Light of the Synthetically Sane Insanity Defendant*, 40 U. MIAMI L. REV. 1109 (1986) (arguing that the synthetic appearance of sanity may inhibit the mentally ill defendant from presenting an effective insanity defense).

185. For many years, courts routinely prohibited the trial of defendants while under the influence of psychotropic medication, resulting in a merry-go-round of medication, restoration, removal from medication for trial, decompensation, hospitalization, and medication. *See Winick, Psychotropic Medication, supra* note 22, at 772-73.



the jury about it is an effective strategy for defense attorneys. Furthermore, while the side effects of psychotropic medication manifest in how the defendant feels,<sup>186</sup> and thus invoke a liberty interest, they also produce outwardly apparent conditions that may affect the jury's perception of the defendant.<sup>187</sup> Nevertheless, the mentally ill defendant is left with few options. If he refuses the medication and somehow the court deems him competent, he will likely engage in behavior and present himself in ways that will frighten the jury, but if he appears before the jury fully medicated, he will likely appear as a disengaged zombie.<sup>188</sup>

The real issue, then, mandates a simpler strategic approach. For the capital defender, avoiding trial altogether is the best way to "win," where "winning" is defined as avoiding death for the client. Proving insanity is very difficult, even in cases with overwhelming evidence of long-term, untreated mental illness.<sup>189</sup> Most capital defenders have a clear opinion of their ethical obligation to the client—save his life<sup>190</sup>—notwithstanding criticism from others who do not engage in capital defense representation. When speaking of Russell Weston,<sup>191</sup> the famous case of an unrestorably incompetent capital defendant, Professor Arthur Caplan, who held a chair in Medical Ethics at the University of Pennsylvania (and was not a capital

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186. Common physical side effects include ataraxia or a zombie-like feeling, sedation, restlessness, dry mouth, and constipation. See EDWARD DRUMMOND, *THE COMPLETE GUIDE TO PSYCHIATRIC DRUGS* 170–199 (2000).

187. Synthetically sane patients often appear bored and indifferent during court proceedings, and they are often confused and unable to think clearly because of the extreme sedation side effect. See Lawrence D. Gaughan & Lewis H. LaRue, *The Right of a Mental Patient To Refuse Antipsychotic Drugs in an Institution*, 4 *LAW & PSYCHOL. REV.* 43, 47 (1978).

188. See *Riggins v. Nevada*, 504 U.S. 127, 134–38 (1992).

189. See Paul Butler, *A Basic Question of Right and Wrong: Suspect in Capitol Killings Faces Tough Insanity Test to Stay Alive*, *FULTON COUNTY DAILY REP.*, Aug. 25, 1998, at 6 (concluding that even though Russell Weston had suffered from schizophrenia for twenty years, he would likely have a difficult time proving that he was insane at the time of his offense of killing two Capitol Hill police officers).

190. In his representation of Russell Weston, A.J. Kramer, then the Federal Defender for Washington, D.C., asserted that avoiding forcible medication was part of his trial strategy and sustained significant criticism in the press. See Anne Hull, *A Living Hell or a Life Saved? Capitol Shooter's Untreated Madness Fuels Legal and Ethical Debate*, *WASH. POST*, Jan. 23, 2001, at A1; Marianne Szegedy-Maszak, *Psychosis and Punishment: Should the Mentally Ill Be Drugged So They Can Face Execution?*, *U.S. NEWS & WORLD REP.*, Mar. 26, 2001, at 50.

191. Weston was forcibly medicated for 120 days, but he showed no signs of restoration. He remains a pre-trial detainee at the Federal Correctional Institute in Butner, North Carolina.

defender) compared denying antipsychotic medication to denying medication for a painful physical condition.<sup>192</sup>

Forcible medication to restore a condemned prisoner to competency before his execution presents an even more complex thicket of moral and ethical issues, especially for doctors.<sup>193</sup> The Eighth Circuit has applied the doctrines established in *Sell* to the question of whether the state may forcibly medicate a condemned prisoner to render him competent to satisfy the *Ford* standard for executional competence.<sup>194</sup> In *Singleton v. Norris*, the Eighth Circuit concluded that the state's interests in executing Singleton were greater than Singleton's liberty interests in being free from psychotropic medication and that the medication was the least intrusive, medically appropriate means for restoring him to competency for execution.<sup>195</sup> The dissent raised the common existential issue of whether "synthetic sanity" is the true competency that the *Ford* Court required for execution,<sup>196</sup> as well as the more provocative issue of whether doctors treating mentally ill patients awaiting execution were in fact violating their own medical ethical standards.<sup>197</sup> This dilemma—having to choose between treating the patient and thus, condemning him to death, or leaving him untreated and condemning him to "a world such as [the defendant's], filled with disturbing delusions and hallucinations"<sup>198</sup>—has garnered the attention of physicians.<sup>199</sup>

Some states have resolved the forcible medication issue in favor of the capital defendant. In Maryland, for example, if the reviewing court finds that the defendant is incompetent to be executed, his sentence must be

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192. *ABC News Nightline: Insanity in the Courtroom: Russell Weston Denied Medication So He Won't Be Competent to Stand Trial* (ABC television broadcast Jan. 23, 2001); see Aimee Feinberg, Note, *Forcible Medication of Mentally Ill Criminal Defendants: The Case of Russell Eugene Weston, Jr.*, 54 STAN. L. REV. 769, 780 (2002).

193. See Kursten B. Hensl, *Restoring Competency for Execution: The Paradoxical Debate Continues with the Case of Singleton v. Norris*, 5 J. FORENSIC PSYCHOL. & PRAC. 55, 57 (2005) ("Is treatment that may benefit the person's short-term medical interests, but ultimately facilitate his or her scheduled death truly in the individual's best medical interests?") (internal citations omitted).

194. *Singleton v. Norris*, 319 F.3d 1018, 1023 (8th Cir. 2003), *cert. denied*, 540 U.S. 832 (2003).

195. *Id.* at 1023–27.

196. *Id.* at 1033–34 (Heaney, J., dissenting) (arguing that only a cure to mental illness, rather than a temporary reprieve from its symptoms, can satisfy the *Ford* requirement for executional competence).

197. *Id.* at 1036.

198. *Id.* at 1037.

199. See Richard E. Redding & Kursten Hensl, *Do No Harm: Should We Medicate To Execute?*, 130 COMMONWEAL 9–10 (2003) (examining the conflict between the legal obligation of treating psychiatrists to order forcible medication to condemned prisoners and the overarching obligation of the doctor to "do no harm").

commuted to life without parole.<sup>200</sup> South Carolina and Louisiana have both held that forcible medication for execution is unconstitutional.<sup>201</sup> However, the question of whether due process protects a severely mentally ill capital defendant from forcible medication to restore him to competency for trial or for execution remains unanswered by the Court.

### C. Parsing the Dusky Standard in the Post-Jackson Era

Professor Bonnie's theory of competency in criminal defense has been widely accepted by scholars and courts<sup>202</sup> as representing the best understanding and explanation of the terse, two-part *Dusky* test. In the post-*Jackson* era, most scholars focus on the "rational understanding" to assist counsel<sup>203</sup> component of the *Dusky* competency test,<sup>204</sup> which requires that the defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding."<sup>205</sup> Most of that work addresses the different levels of competency necessary to stand trial, plead guilty, or waive counsel in favor of self-representation 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.<sup>206</sup> Scholars

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200. See MD. CODE ANN., CORR. SERVS. §§ 3-904(c), (h)(2) (West 2009).

201. See *State v. Perry*, 610 So. 2d 746, 766 (La. 1992) ("The punishment intended for Perry is severely degrading to human dignity. . . . [H]e will be forced to linger for a protracted period, stripped of the vestiges of humanity and dignity usually reserved to death row inmates, with the growing awareness that the state is converting his own mind and body into a vehicle for his execution. In short, Perry will be treated as a thing, rather than a human being, and deliberately subjected to 'something inhuman, barbarous' and analogous to torture."); *Singleton v. State*, 437 S.E.2d 53, 61 (S.C. 1993).

202. See *Indiana v. Edwards*, 554 U.S. 164, 175–76 (2008) (citing N. POLYTHRESS ET AL., ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES 103 (2002)).

203. This aspect of the competency requirement is, perhaps, more difficult for seriously mentally ill defendants to master because it is much harder to "teach" than the facts necessary to show a rationale and factual understanding of the proceedings. Competency education programs focus on the defendant's rationale and factual understanding of the proceedings. Course material often covers the number of jurors in a trial and the requirement of unanimity, the options for pleading guilty, not guilty, and no contest, and the role of the judge and the lawyers.

204. See, e.g., Bonnie, *Beyond Dusky*, *supra* note 44, at 552–60; Richard J. Bonnie et al., *Decision-Making in Criminal Defense: An Empirical Study of Insanity Pleas and the Impact of Doubtful Client Competence*, 87 J. CRIM. L. & CRIMINOLOGY 48, 53 (1996); Johnston, *Setting the Standard*, *supra* note 33, at 1617–18 (footnote omitted); Maroney, *supra* note 45, at 1376; Winick, *Reforming Incompetency*, *supra* note 62, at 618–19 (citing *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam)).

205. *Dusky*, 362 U.S. at 402 (internal quotation marks omitted).

206. See Bonnie, *Beyond Dusky*, *supra* note 44, at 542, 554; Johnston, *Setting the Standard*, *supra* note 33, at 1610, 1614, 1624; Maroney, *supra* note 45, at 1380–84; Winick,

often 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<sup>207</sup> because in the vast majority of criminal cases, the defendant's interests may be best served by a finding of competency and a trial.<sup>208</sup>

Professor Bonnie's complex theory of the requirements for the competence to assist counsel prong of the adjudicative competency standard focuses on the defendant's ability to appreciate the seriousness of the circumstances and to communicate necessary, relevant information to help in the preparation of a defense.<sup>209</sup> Bonnie focuses on criminal defendants who are represented by counsel and notes that, even with counsel, criminal defendants are responsible for making some choices on their own; as such, defendants must also have a suitable degree of decisional competence.<sup>210</sup> Criminal defendants are uniquely responsible for making three decisions in every criminal trial: whether to plead guilty or not guilty, whether to have a jury or a bench trial, and whether to testify.<sup>211</sup> These specific decisions present the threshold requirement that the defendant possess the ability to make reasoned decisions, but decisional competence extends beyond these three fundamental choices for each defendant. The ABA Model Rules authorize the attorney to make "decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions . . . *after consultation with the client.*"<sup>212</sup> Thus, decisional competence is an inherent, fundamental part of the overall determination of whether a defendant is competent to stand trial.<sup>213</sup>

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*Reforming Incompetency, supra* note 62, at 622.

207. 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 21, at 426–27.

208. The reverse is true for the capital defendant with a serious mental illness.

209. See Bonnie, *Beyond Dusky, supra* note 44, at 562–63.

210. *Id.* at 552–54 (referring to the defendant's ability to engage in legally valid decision-making which is part of the autonomy justification for the incompetency doctrine). Bonnie offers a hypothetical criminal justice system where the defendant would not be allowed to represent himself or plead guilty and where all decisions regarding the defense would be left to the attorney. *Id.* In this hypothetical system, the defendant would have no autonomy and thus, would not need to demonstrate any degree of decisional competence. *Id.*

211. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (explaining that the criminal defense lawyer "shall abide" by the defendant's decisions regarding his plea, his choice of jury or bench trial, and his choice to testify).

212. ABA STANDARDS OF PROFESSIONAL CONDUCT § 4-5.2(b) (1986) (emphasis added).

213. Bonnie, *The Competence of Criminal Defendants, supra* note 21, at 428 (noting that "competence to stand trial" is a misnomer since 90% of criminal cases do not proceed to

In order to provide meaningful assistance to counsel, “[a] robust conception of adjudicative competence that gives meaning to the *Dusky* standard must ask whether a criminal defendant has the capacity to participate meaningfully in the host of decisions potentially required of her, and a sound assessment of such capacity requires careful attention to both the cognitive and emotional influences on rational decision-making.”<sup>214</sup> The inquiry must be whether the defendant can make reasoned choices in light of the potential risks.<sup>215</sup>

Dignity and autonomy are likely in tension when any criminal defendant waives counsel and elects to represent himself,<sup>216</sup> and in *Indiana v. Edwards*,<sup>217</sup> the Court held that a defendant must demonstrate a higher degree of competency to waive counsel and represent himself at trial.<sup>218</sup> The Court characterized Edwards and other hypothetically similar defendants as “insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court.”<sup>219</sup> Given this characterization, it is fair to conclude that an *Edwards* defendant—one who has been found competent to stand trial but incompetent to represent himself, a borderline-competent or gray-area competent defendant—must present at the lowest end of the acceptable spectrum for competent defendants.<sup>220</sup>

trial).

214. Maroney, *supra* note 45, at 1376.

215. Bonnie uses the phrase “ability to make reasoned choices” when describing the necessary capacity for a pro se defendant to proceed to trial without counsel. But even those defendants who are represented by counsel must be able to make the three choices that are required of criminal defendants. See Bonnie, *Beyond Dusky*, *supra* note 44, at 579 (noting that pro se defendants might need some additional abilities for self-representation to avoid making a mockery of the proceedings).

216. This is a common practice for mentally ill capital defendants, who often, in the face of possible execution, develop a serious distrust of their attorneys. The symptom of delusional beliefs for the mentally ill defendant often overtakes all other reason and leads the defendant to believe that he alone is the only person capable of preparing a defense, a defense which is usually irrational. See Paula Shapiro, Comment, *Are We Executing Mentally Incompetent Defendants Because They Volunteer To Die?: A Look at Various States’ Implementation of Standards of Competency To Waive Post-Conviction Review*, 57 CATH. U. L. REV. 567 (2008).

217. 554 U.S. 164 (2008).

218. *Id.* at 174–76 (holding that “the spectacle” of a trial without counsel could be humiliating to the defendant, and as such, the standard for competency to proceed to trial without counsel was higher than the standard for competency to proceed to trial with counsel). A concern for courtroom decorum, orderly presentation of evidence and witnesses, and the advancement of relevant legal arguments drove the Court’s decision. *Id.*

219. *Id.* at 177 (quoting *Massey v. Moore*, 348 U.S. 105, 108 (1954)). This is one of several instances where the Court uses the term “insane” to mean mentally ill or, in the common vernacular, crazy, rather than for its legal meaning. See *infra* note 291.

220. Professor Bonnie uses the phrase “marginally competent” to describe the standard

The Court declined to define a specific standard for decisional competence, and as a result, it did not define marginal competency. But in identifying the conditions that will impede a defendant from representing himself, the court included these examples: “disorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illness.”<sup>221</sup> Professor Lea Johnston has added a great deal to the discourse in her effort to define the parameters of the borderline-competent defendant described in *Edwards*.<sup>222</sup> She argues that defendants should not be allowed to represent themselves if so doing “poses a grave threat to the reliability or fairness of the proceeding.”<sup>223</sup> I maintain that when there is a grave threat to reliability and fairness of capital proceedings, based on a defendant’s marginal competence to proceed, that defendant should be categorically exempted from receiving a death sentence.<sup>224</sup>

In some instances, defendants who were competent to stand trial may become incompetent while on death row,<sup>225</sup> but for those who are deemed marginally competent during the competency assessment, moral dignity should demand that the court determine executional competence before the trial begins. Trying a madman who does not understand the nature or connection of the proposed punishment is no less morally offensive than executing that same madman. Executional competence has been criticized as “the new insanity defense,”<sup>226</sup> available to those capital defendants who failed to convince the jury of their insanity or of the mitigating nature of their mental illness, but who may still receive a reprieve from execution if they are found not competent to be executed.<sup>227</sup> Though there have been several instances of gubernatorial commutations of death sentences for

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that trial courts employ when finding mentally retarded defendants competent to stand trial. Bonnie, *The Competence of Criminal Defendants*, *supra* note 21, at 422–23; *cf.* *Atkins v. Virginia*, 536 U.S. 304, 340–41 (2002) (Scalia, J., dissenting) (objecting to the majority’s extension of the early common law prohibition on exempting mentally retarded defendants to those who were “mildly mentally retarded.”)

221. *Edwards*, 554 U.S. at 176 (quoting Brief for the American Psychiatric Association et al. as Amici Curiae in Support of Neither Party, at 26) (internal quotation marks omitted).

222. See Johnston, *Representational Competence*, *supra* note 35, at 579 (establishing a normative theory for representational competence that focuses on the defendant’s rational decision-making ability).

223. *Id.* at 526.

224. See *infra* Part IV.

225. See generally Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450 (1986) (studying the severe psychiatric reactions that death row inmates had to austere, isolated living conditions).

226. Alan A. Stone, *Psychiatry and the Death Penalty*, PSYCHIATRIC TIMES, SEPT. 1986, at 1.

227. See *Panetti v. Quarterman*, 551 U.S. 930, 934–35 (2007); *Ford v. Wainwright*, 477 U.S. 399, 417–18 (1986).

extremely mentally ill defendants,<sup>228</sup> the courts are much less likely to reverse a death sentence for a seriously mentally ill defendant.<sup>229</sup>

The Eighth Amendment prohibits the execution of a prisoner who has been sentenced to death if that prisoner is “insane.”<sup>230</sup> While the core focus of the Court in *Ford v. Wainwright* is retributive in nature,<sup>231</sup> the original common law prohibition stemmed from the right of the condemned to continue to argue his innocence and seek a pardon from his death sentence.<sup>232</sup> While the *Ford* plurality disregarded the need for an assessment of the condemned prisoner’s ability to assist counsel, the larger concern in the capital context is whether the defendant was competent to be executed *before the trial began*.

*D. How the Dusky Standards Should Apply to a Marginally Competent Defendant in a Capital Trial*

The Court has accepted that proceedings in which marginally competent defendants who lack the capacity to make the kinds of decisions necessary to represent themselves are allowed to represent themselves cannot maintain any shred of moral dignity.<sup>233</sup> Defining the marginally

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228. See, e.g., Official Site of the Governor of Virginia, *Statement of Governor Kaine on the Scheduled Execution of Percy Levar Walton*, June 9, 2008.

229. The case of Pernell Ford garnered a good deal of public support for commutation. Ford was clearly, actively in the throes of mental illness when he acted as his own attorney; he asked the trial court to bring the victims into the courtroom so God could resurrect them. He was executed, nonetheless, in 2000. See Spencer Hunt, *Standard of Insanity at Issue*, CINCINNATI ENQUIRER, Apr. 22, 2001.

230. See *Ford*, 477 U.S. at 409–10. The Court found that the condemned prisoner must possess the present ability to experience retribution—understand the scheduled execution and the relationship between the prisoner’s capital offense and his execution. *Id.* at 417–18.

231. See *id.* at 407. The Court examined three core rationales for the prohibition against executing the incompetent: it offends humanity and serves as no example to others, madness is its own punishment, and it is “uncharitable to dispatch . . . [the unfit] into another world.” *Id.* (citing EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES* 6 (6th ed., London, W. Rawlins 1680); SIR JOHN HAWLES, *REMARKS ON THE TRYAL OF CHARLES BATEMAN*, in *3 A COMPLETE COLLECTION OF STATE-TRYALS AND PROCEEDINGS UPON IMPEACHMENTS FOR HIGH TREASON AND OTHER MISDEMEANORS* 651, 653 (Thomas Salmon ed., London, Timothy Goodwin 1719)).

232. See BLACKSTONE, *supra* note 5, at \*24–25 (“[A]nd if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of execution.”).

233. Beyond actual moral dignity or the appearance thereof, the accuracy of any conviction would call into question the entire criminal justice system. See Johnston, *Setting the Standard*, *supra* note 33, at 1609 (describing the trial of Zacarias Moussaoui, a pro se

competent may be a slightly easier task for a trial court in light of the Court's holding in *Indiana v. Edwards*. However, the need for moral dignity is increased in the capital trial because "death is different."<sup>234</sup> By setting a spectrum between the generalized standard of adjudicative competency (with counsel) and representational competency (proceeding pro se), the Court has acknowledged that some defendants are less competent than others. Those who are less competent will always be forced to accept counsel, but counsel in a capital case is an insufficient proxy to protect the marginally competent defendant, and indeed all of society, from the moral indignity of his capital trial.

The *Edwards* Court is peculiarly concerned with the appearance of moral dignity in the trial proceedings, and in most cases, a lawyer can quiet the disruptive behavior of a defendant. Indeed, one fair reading of *Edwards* would be that no capital defendant would likely ever be competent to represent himself.<sup>235</sup> It is hard to imagine a post-*Edwards* capital case involving a defendant suffering from some mental health issues that interfered with his competence to stand trial, at least insofar as determined by the court-ordered assessment, where the trial court would find the defendant competent to waive counsel and represent himself.<sup>236</sup> *Edwards* has closed the door on the autonomy issue for a capital defendant who, while competent to stand trial, nonetheless "stands helpless and alone before the court."<sup>237</sup> On balance, the need to destigmatize people with mental illness by allowing their autonomy for self-representation at trial will not "'affirm' the dignity of a defendant who lacks the mental capacity to conduct [a] defense without the assistance of counsel"<sup>238</sup> in a capital prosecution. In capital cases, the need for dignity in the courtroom must trump the dignity of autonomous self-representation by a defendant who is no more than marginally competent.<sup>239</sup>

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defendant "of borderline mental capacity").

234. *Ford*, 477 U.S. at 411.

235. Scott Panetti, who waived counsel and represented himself, is now in litigation over his *Edwards* claim. Author's Notes, Interview with Greg Wiercioch, Counsel for Scott Panetti, June 23, 2011 (on file with Tennessee Law Review).

236. But the United States District Court for the Western District of Texas, Austin Division recently concluded that Scott Panetti was not marginally or borderline competent and denied his *Edwards* claim. See *Panetti v. Thaler*, Case No. A-09-CA-774-SS (Jan. 31, 2012). This issue is presently on appeal to the Fifth Circuit.

237. *Indiana v. Edwards*, 554 U.S. 164, 177 (2008) (quoting *Massey v. Moore*, 348 U.S. 105, 108 (1954)).

238. *Id.* at 176 (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 176-77 (1984)).

239. I appreciate the motives of Professors Christopher Slobogin, Bruce Winick, and others in their extended efforts to theorize ways that trial courts should scrutinize competency decisions to allow for autonomy *even for those who are only marginally competent*, but I find no place for those theories in a capital prosecution. See, e.g., CHRISTOPHER SLOBOGIN, MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL



The ability to assist counsel in preparing an adequate defense operates as a literal lifeline in capital litigation.<sup>240</sup> 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 decision-making.<sup>241</sup> An often-overlooked factor in the competency determination is the seriousness and complexity of the charges;<sup>242</sup> 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.<sup>243</sup> Nowhere is this demand more pressing than in a capital case.<sup>244</sup>

However, using counsel to hide the marginal competence of the defendant is not a suitable solution in the capital trial.<sup>245</sup> Capital defendants need a higher degree of competency—intellectual and emotional—to participate with counsel in a more complex trial. For a capital defendant to assist counsel in the preparation of an adequate defense, the capital defendant needs to engage in other collaborative decision-making—such as how to present mitigation evidence, how to characterize mental illness, and

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DISABILITY OF LIFE AND LIBERTY 20 (2006); Erica Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right To Control the Case*, 90 B.U. L. REV. 1147, 1178–79 (2010) (arguing that only the defendant can prioritize the competing risks of going to trial and sentencing exposure and that he should be allowed to make decisions based on the information he receives from counsel, regardless of his ability to process and make rationale choices); Winick, *Reforming Incompetency*, *supra* note 62, at 618–22.

240. 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)).

241. See Bonnie, *Beyond Dusky*, *supra* note 44, at 546–47. Surrogate decision-making 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.*

242. See GRISSO, *supra* note 32, at 87.

243. *Id.*

244. 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 Analysis of State Indigent Defenses 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).

245. The specific role of counsel in capital defense is beyond this scope of this Article and is the subject of a work-in-progress. In that work, I argue that using capital counsel to quiet the marginally competent defendant merely makes the adjudicative process *seem* to have moral dignity, which is insufficient for a capital prosecution where death is a possible sentence.

how to determine mental retardation—in order to have a fair trial that satisfies the societal goals of capital punishment.

The complexity of the bifurcated trial offers the first challenge for the marginally competent defendant. Appreciating the strategy of engaging in a “slow plea” during the guilt/innocence phase rather than raising marginal or even strong defenses is very difficult for all capital defendants; staying focused on the goal—a life sentence—requires an understanding of the death-qualified jury and its tendency to disregard innocence claims once death-qualified. Experience and training prepares the capital defender for this complex strategy, but the capital defendant does not have the benefit of training and experience. Moreover, the marginally competent capital defendant likely suffers a mental illness that will render him paranoid, especially as regards his counsel, so “relying” on the advice of counsel to understand traditional capital defense strategy may be impossible for the marginally competent defendant.

In most capital trials, the majority of the preparation is directed towards the sentencing phase, where the jury will be given evidence to prove aggravating factors from the prosecution and mitigation evidence from the defense. In preparation for the mitigation case, the capital defendant must work closely with defense investigators and mitigation experts to reveal information about himself and his family that could persuade a jury to opt for a life sentence. Clarity of thought and sheer recollection could be problematic for the highly medicated, marginally competent capital defendant. But the need to access a deep well of emotional strength to reveal family secrets and confront personal flaws will likely flummox the marginally competent capital defendant to a degree that he is worthless in his contributions to the defense team.<sup>246</sup> Intense questioning from mental health experts often exhausts capital defendants who are *competent*, but for those who are only *marginally competent*, stretching their native intellect, quieting the delusions of their severe mental illness, and overcoming the debilitating side effects of psychotropic medication is nearly impossible.

The *Edwards* Court seems to regard the lawyer as moderator—someone who can keep the defendant quiet and attentive, help maintain decorum, and

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246. One of the better examples of a defendant reaching the emotional level necessary to help his attorneys comes from the film *DEAD MAN WALKING*, which chronicles the final days of a convicted murderer awaiting death. During a counseling session with his spiritual advisor, the condemned man achieves a breakthrough in his ability to confront his crime, contemplate his intoxication during the crime, and consider how his life led him to commit the capital crime. See *DEAD MAN WALKING* (Havoc 1995). Had this breakthrough happened *during* the preparation for trial, it would have offered a wealth of relevant material for the sentencing phase. See *SISTER HELEN PREJEAN, DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* (1994) (detailing the mental and emotional preparation of two condemned men as they prepare for execution).

keep the proceedings moving along smoothly.<sup>247</sup> But accepting this as part of the role of the capital defender may not benefit the capital defendant. Telling a capital defendant to be quiet in order to hide his chronic delusions and chaotic thinking during pre-trial proceedings may stifle the best evidence that the defendant is not competent to stand trial. Furthermore, if the lawyer works to stifle the outward manifestation of severe mental illness, the jury may not find persuasive any assertion that the defendant's severe mental illness should serve as a compelling mitigating factor that demands a life sentence.

More troubling, though, is the work-around that the defense team often creates to prepare for a capital trial with a marginally competent defendant. The fact of severe mental illness in the defendant often crafts the outline of the narrative that lawyers are likely to complete with evidence from mitigation and mental health experts. Whether arguing insanity in the guilt-innocence phase or the diminished capacity caused by severe mental illness in the sentencing phase, attorneys often piece the theory together from experience rather than from direct information and assistance from the defendant. In fact, marginally competent defendants might be so unhelpful as to become an afterthought in preparation and actually become a burden by forcing counsel to spend precious time repetitively *explaining* strategy and evidence to the defendant rather than *consulting* with the defendant in making those decisions.

#### IV. A CATEGORICAL EXEMPTION OF THE MARGINALLY COMPETENT FROM EXECUTION

The competency doctrine must be flexible and applied in degrees according to each individual defendant. As one commentator has stated, "the purpose of the law is not to attempt to compensate all the inevitable disparities in innate abilities among defendants, but to identify those instances where the purposes of incompetency law are most directly relevant."<sup>248</sup> In this section, I will look closely at the Court's rationales for declaring that mentally retarded defendants—even those with mild mental retardation—must be categorically exempted from execution. Marginally competent capital defendants share profound similarities with mentally retarded defendants in terms of how desert-based theories of punishment and trial-related inadequacies make them unsuited for a capital trial and a death sentence. But, the mentally retarded are less likely to be restored to competency than marginally competent defendants,<sup>249</sup> leaving marginally

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247. See *Indiana v. Edwards*, 554 U.S. 164 (2008).

248. Note, *Incompetency*, *supra* note 94, at 459.

249. I use the term "restore" for consistency, but properly, mentally retarded defendants are treated to "gain" competency, and mentally retarded defendants, once found incompetent, are unlikely to gain competency through traditional restoration efforts. See

competent defendants at risk for execution when a lesser sentence would have been more appropriate. Because the two groups share relevant qualities, marginally competent defendants should, if competent to stand trial, be categorically exempted from execution.<sup>250</sup>

The defendant-specific proportionality<sup>251</sup> jurisprudence that the Court has established for mentally retarded and juvenile capital defendants offers an excellent playbook on why the prosecution and execution of marginally competent capital defendants is devoid of moral dignity and violates due process. In *Atkins v. Virginia*<sup>252</sup> and *Roper v. Simmons*,<sup>253</sup> the Court declared that the execution of a mentally retarded or juvenile defendant was unconstitutional.<sup>254</sup> In the canon of capital punishment jurisprudence, *Atkins* and *Roper* are proportionality cases: “it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.”<sup>255</sup> 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,<sup>256</sup> to conclude that mentally retarded and juvenile defendants are “categorically less culpable than the average criminal.”<sup>257</sup>

Scott, *supra* note 74, at 39.

250. Arguments have been made that the Court’s categorical exclusion of juveniles and the mentally retarded from execution should be extended to include seriously mentally ill and brain-injured defendants. 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); 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).

251. I use this term to describe the rule from *Atkins* and *Roper* that certain defendants must be categorically exempted from execution; due to their condition, execution can never be a proportionate punishment for juveniles and mentally retarded defendants. See *Roper v. Simmons*, 543 U.S. 551, 567 (2005); *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

252. 536 U.S. 304 (2002).

253. 543 U.S. 551 (2005).

254. *Id.* at 578; *Atkins*, 536 U.S. at 321.

255. *Atkins*, 536 U.S. at 311 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)) (internal quotation marks omitted). 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. 407, 446 (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).

256. *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)).

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

Though the Court declared that mentally retarded and juvenile defendants must be “categorically excluded from execution,”<sup>258</sup> it declined to implement any procedure to ensure such categorical exclusion for mentally retarded defendants, anticipating some difficulty in the future “in determining which offenders are in fact retarded.”<sup>259</sup> But a comprehensive, close reading of *Atkins* and *Roper* reveals that the Court employed a similar rule and rationale to reach its conclusion that mentally retarded and juvenile defendants should be categorically excluded from execution,<sup>260</sup> and, as such, trial courts would be justified in engaging in similar procedures<sup>261</sup> to ensure compliance with the Court’s rule.<sup>262</sup> Here, the focus is why mentally retarded defendants, and by extension marginally competent capital defendants, should be categorically exempted from death-eligibility rather than how to accomplish the task.

*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.<sup>263</sup> Justice Scalia’s dissenting opinion offers the best

258. *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.”).

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

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

261. I have previously argued that trial courts must make a pre-trial mental retardation determination to achieve due process in the Court’s directive for a categorical exclusion. See Dillard, *And Death Shall Have No Dominion*, *supra* note 43, at 974 (asserting that trial courts must view the evidence of mental retardation *in favorem vitae*, which requires a pre-trial determination).

262. Examining the strength of the right to be exempted from the imposition of the death penalty might influence the type of procedure necessary to guarantee that right. The evidence of an evolving standard of decency towards protecting the mentally retarded from execution was stronger than the evolving standard of decency towards 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 *Perry* 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*, 492 U.S. 361 (1989), 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.

263. *Atkins*, 536 U.S. at 318–21.

explanation for the former.<sup>264</sup> As support for the latter, the Court delineates anticipated pre-trial problems, such as susceptibility to giving false confessions; trial problems, such as an inability to assist counsel or serve as a useful witness for the defense; and sentencing problems, such as a jury's disregard for mental retardation as a mitigating factor.<sup>265</sup>

The core values of the criminal justice system demand that each punishment serve some societal goal.<sup>266</sup> The Court has embraced two theories of punishment as justification for execution: "retribution and deterrence of capital crimes by prospective offenders."<sup>267</sup> 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."<sup>268</sup> 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.<sup>269</sup> 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."<sup>270</sup> Based on the cognitive and rational deficiencies in the mentally retarded defendant, the Court has concluded that the mentally retarded defendant has decreased culpability and, thus, is less deserving of the ultimate sanction than those defendants without impairment.<sup>271</sup> Because this exclusion is a categorical, rather than a case-by-case, assessment, the Court concluded that no person who *is* mentally retarded would ever be culpable enough to deserve death.<sup>272</sup>

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."<sup>273</sup>

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264. *Id.* at 337, 350–51 (Scalia, J., dissenting).

265. *Id.* at 320–21 (majority opinion).

266. The classic theories of punishment are deterrence, retribution, public safety (incapacitation), and education (rehabilitation). See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESS: CASES AND MATERIALS* 101 (7th ed. 2001).

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

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

269. *Kennedy v. Louisiana*, 554 U.S. 407, 447 (2008); *Coker*, 433 U.S. at 598; *Coker*, 433 U.S. at 621 (Burger, C.J., dissenting).

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

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

272. *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 defendant or government should bear the burden of proving or disproving mental retardation, or when this determination should be made.

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

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.<sup>274</sup> Moreover, the Court has concluded that potential murderers who are not mentally retarded will not experience less deterrence if mentally retarded murderers are exempted from the imposition of death.<sup>275</sup>

The characteristics of mental retardation defined by the Court that affect retributive theory analysis are relevant to the mentally retarded defendant's capacity before the crime, during the crime, and at the time of execution.<sup>276</sup> Mental retardation operates like "insanity-lite" for the *Atkins* Court.<sup>277</sup> 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.<sup>278</sup> But for those mentally retarded defendants who will not meet the *M'Naghten* standard for being found insane at the time of the offense,<sup>279</sup> 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 understand the reactions of others" justify an exemption from the imposition of the death penalty.<sup>280</sup> Under a desert-based theory of punishment, for a symptom, such as a diminished capacity to control impulses, to cause the defendant to be exempted from execution

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274. *Id.* at 320.

275. *Id.* Most critics think that the theory of deterrence is an exercise in theory with no practical effect. 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.

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

277. Since the insanity defense is used rarely (1%) 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).

278. *Daniel M'Naghten's Case*, (1843) 8 Eng. Rep. 718 (H.L.) 719, 722–23.

279. Juries are extremely skeptical of an insanity defense, and death-qualified juries even more so. Even in cases with a very strong insanity claim supported by expert testimony, juries can rely on lay evidence of how the defendant acted before, during, and after the crime to disregard the expert testimony. 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 (1997). I find arguments for a wholesale re-working of the insanity defense quite persuasive. See, e.g., Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199 (2000).

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

requires the symptom to have affected the mentally retarded defendant's thought process at the time of his crime.<sup>281</sup> For example, if a defendant had an irresistible impulse that was the product of mental retardation (i.e., untreatable with medication or therapy), then the defendant's thought process was affected causing the defendant to be unable to conform his conduct.<sup>282</sup> Thus, retribution for the mentally retarded defendant's act is impossible because 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 contemplate the potential of a death sentence and be deterred from committing murder.

The *Atkins* Court offered a second justification for the categorical exemption of mentally retarded defendants from execution.<sup>283</sup> The 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."<sup>284</sup> 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."<sup>285</sup> If mentally retarded defendants are, in fact, "less able to give meaningful assistance to their counsel,"<sup>286</sup> then those defendants could be described as incompetent to stand trial where a death sentence is a possibility.<sup>287</sup> 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.<sup>288</sup> In short, based

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

282. *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).

283. *Atkins*, 536 U.S. at 320.

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

285. *Id.* at 320–21.

286. *Id.* at 320.

287. *See Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam) ("[T]he 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rationale understanding . . .").

288. 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, 1859 n.201 (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



on the Court's rationale, mental retardation should serve as a reason for a narrow finding of incompetency—the incompetency to stand trial for capital murder where death is a potential sentence.<sup>289</sup>

The Court's second justification for its categorical rule, exempting mentally retarded defendants from the imposition of death, relates to the trial itself; 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.<sup>290</sup> A critical reading of the Court's concern demands that trial courts add a new determination—for mental retardation—to the *pre-trial* 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<sup>291</sup> and creates a remedy—exemption from death.<sup>292</sup>

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prison. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). 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., *Judge Rules Out Death Penalty in Police Shooting Case*, CHARLOTTE OBSERVER, Aug. 24, 2010.

289. See Davoli, *supra* note 45, at 317 (suggesting that if trial courts focus on the cause of incompetency rather than the result of a finding of incompetency, the entire scheme for determining competency to stand trial might be transformed).

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

291. *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), available at <http://www.songlyrics.com/chicago-soundtrack/when-velma-takes-the-stand-lyrics/> (“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?”).

292. *Atkins*, 536 U.S. at 321. How the trial court accomplishes the categorical exemption requires due process analysis. *Id.*

Because the *Atkins* Court expressed a specific concern that “[m]entally retarded defendants may be less able to give meaningful assistance to their counsel,”<sup>293</sup> trial courts should assess mental retardation during a pre-trial competency hearing for the capital defendant in order to ensure that no subsequent Eighth Amendment violation occurs and makes a mockery of the criminal justice system by undermining “the strength of the procedural protections that our capital jurisprudence steadfastly guards.”<sup>294</sup> As I have argued before,<sup>295</sup> the inability to give meaningful assistance to counsel must be a consideration in the competency assessment, and if the mentally retarded defendant is not able to assist *sufficiently* to prepare for a capital trial where death is a possibility, then forcing him to proceed as such constitutes a due process violation.

*B. How the Rationales Underlying Atkins and Roper Should Apply to Marginally Competent Defendants*

In *Atkins*, the Court acknowledges the difficulty of defining which defendants may be mentally retarded, but it nonetheless declares that the Eighth Amendment requires the categorical exemption of the mentally retarded from execution.<sup>296</sup> In fact, the Court gives scant attention to defining the *condition* of mental retardation.<sup>297</sup> Without adopting the definition of the American Association on Mental Retardation, the Court offers the following definition 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.<sup>298</sup>

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293. *Id.* at 320.

294. *Id.* at 317, 321.

295. See Dillard, *And Death Shall Have No Dominion*, *supra* note 43, at 968–81.

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

297. 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 (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); *United States v. Smith*, 404 F.2d 720, 721–22, 725 (6th Cir. 1968); BLACKSTONE, *supra* note 5, at \*24.

298. *Atkins*, 536 U.S. at 308 n.3 (quoting AM. ASSOC. ON MENTAL RETARDATION,

The Court identifies by incorporation the work of scholars who study mental retardation, characteristics, or symptoms that may comprise the diagnosis of mental retardation.<sup>299</sup> 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 age 18.”<sup>300</sup> 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 the reactions of others.”<sup>301</sup> 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.”<sup>302</sup> Defendants who satisfy the *Atkins* definition of mental retardation are ineligible for the death penalty, regardless of whether the degree of mental retardation is defined as mild, moderate, or severe.<sup>303</sup> 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.<sup>304</sup>

Strong arguments have been made that severely mentally ill capital defendants and mentally retarded defendants are so similar that they should be treated the same way insofar as both should be categorically exempted from execution.<sup>305</sup> Regardless of the nature or the quality of the mental

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MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992)).

299. *Id.* at 318 nn.23–24.

300. *Id.* at 318.

301. *Id.* (footnote omitted).

302. *Id.* (footnote omitted).

303. *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).

304. 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, e.g., Slobogin, supra* note 250, at 293.

305. *See, e.g., Batey, supra* note 250, at 1518–27 (discussing a categorical bar to

illness, the Court in *Atkins* has enumerated that the execution of those who are less able to give meaningful assistance to their counsel constitutes an Eighth Amendment violation.<sup>306</sup> In the competency context, forcing a trial on a defendant who is only marginally able to give meaningful assistance to counsel constitutes a due process violation. Hiding that same defendant—whether mentally retarded or marginally competent—behind competent counsel does not prevent the violation. At the heart of the matter is the moral dignity of the process, and a process that looks acceptable because a lawyer has tamped down the unruliness of his client is nonetheless devoid of moral dignity.

#### V. CONCLUSION—RESOLVING THE CONFLICT

Some have declared that the whole of capital punishment is “a moral and practical failure.”<sup>307</sup> Indeed the American Law Institute (ALI), which was largely responsible for the modern procedural framework for capital punishment, has, after almost 50 years of “tinkering with death,”<sup>308</sup> voted to discontinue its efforts.<sup>309</sup> Among the moral failures of capital punishment are the trial and execution of seriously mentally ill defendants.

If we accept the premise of *Atkins*—that idiots and lunatics were spared from the death penalty at the time of the drafting of the Eighth Amendment and that evolving standards of decency have led society to include the mildly mentally retarded in today’s definition of idiots and lunatics—then it follows that those same idiots and lunatics, who would have been incompetent to stand trial in 1789, should be spared from trial today under an evolving standard of decency interpretation of due process.<sup>310</sup> In the simplest of terms, the mildly mentally retarded defendant who must be categorically exempted from execution would, by historical definitions, also be incompetent to stand trial. The nuances of the competency doctrine in the past 40 years create friction in this analogy, but the underpinnings of why idiots and lunatics were spared from trial and execution remain the same.

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executing defendants suffering from serious mental disease or defect).

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

307. See Adam Liptak, *Group Gives Up Death Penalty Work*, N.Y. TIMES, January 5, 2010, at A11 (quoting Professor Samuel Gross).

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

309. See Report of the Council to the Membership of the American Law Institute on the Matter of the Death Penalty, Apr. 15, 2009 (deciding to discontinue its efforts “in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment”).

310. See *Atkins*, 536 U.S. at 321.

The dual goals of retribution and deterrence bear an illusory connection to the prosecution and execution of seriously mentally ill defendants; the connection is merely theory that falls apart in application. But the need of the community to grasp retribution for heinous crimes is tangible. The objectives underlying the belief that incompetent defendants should be spared prosecution—moral dignity and reliability—are, likewise, theoretical. I have great admiration for those scholars who work in the field of forgiveness and desert-based theory, but I believe that an answer to the conflict between society's need for retribution and the incompetent capital defendant's right to due process may rise from a practical place.

The Court has declared that standards of decency in American society have evolved to a place where society demands (or at least accepts) that a capital defendant should be spared execution if the defendant is a juvenile or mentally retarded.<sup>311</sup> Beyond the theoretical justifications that the defendant is less culpable and retribution less effective, fair trial concerns support the conclusion that the only way to ensure that a mentally retarded defendant might avoid the special risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty"<sup>312</sup> is to categorically exempt him from execution. The seriously mentally ill defendant, who fits within the parameters of the marginally competent, should be spared from execution for the same reasons.

Actual due process represents the traditional fair play and substantive justice rights deeply rooted in our country's history and tradition; it is the United States' explicit expression of our collective decency, fairness, and conscience. If we are to believe in the promise of actual due process, then the marginally competent defendant may not proceed to trial where the result might be his execution.

I propose four ways to approach the problem set out in this Article. First, although challenging, society could reform its lust for retribution and accept the adage that madness is punishment for the madman. Though scholars work diligently in this area, it is hard to imagine society quickly abandoning its desire for retribution and punishment. Despite good arguments to the contrary,<sup>313</sup> the Court has never seriously entertained any adjustment to the settled incompetency doctrine. And while some juries

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311. *Id.*

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

313. See Robert A. Burt & Norval Morris, *A Proposal for the Abolition of the Incompetency Plea*, 40 U. CHI. L. REV. 66 (1972) (suggesting abolition of the incompetency doctrine after *Jackson*); Bruce J. Winick, *Incompetency to Stand Trial: An Assessment of Costs and Benefits, and a Proposal for Reform*, 39 RUTGERS L. REV. 243, 245-58 (1987) (arguing that marginally competent defendants should be allowed to waive their right to be found incompetent if proceeding to trial is in their greater interest).

perform ably in very challenging cases,<sup>314</sup> such is not often the case for the death-qualified jury.

Second, the *Jackson* response for capital defendants could be different. States could either ignore the *Jackson* directive for capital defendants<sup>315</sup> and wait for the court challenge to see if the approach meets constitutional muster, or states could modify their standards for release from civil commitment for unrestorable capital defendants.<sup>316</sup>

Third, the trial court could conduct a trial while the defendant is incompetent to determine if the government's case has merit. Defenses, such as a speedy trial violation or the government's failure to offer proof on a required element, do not require participation from the defendant, and some affirmative defenses can be raised without the defendant's participation.<sup>317</sup> There was a trend towards scholars proposing a trial on the merits while the defendant was incompetent after two English cases<sup>318</sup> grappled with the idea in the mid-1950s. This proposal is, of course, squarely at odds with our long tradition of not trying incompetent defendants.

Finally, the most straightforward way to achieve the categorical exemption is by determining that the marginally competent capital defendant is not competent to stand trial where death is a possible sentence. This approach offers an immediate simplification of the overall procedure of the capital trial by eliminating the emotionally, intellectually, and strategically complex sentencing phase, during which the marginally competent, seriously mentally ill defendant runs the risk of receiving a death sentence even though the existence of his mental illness should persuade the jury toward the less severe penalty of life without parole.

I recognize that my solutions focus mostly on public safety and avoiding the detrimental effect on society of a competency doctrine, which, in practice in the capital punishment arena, lacks moral dignity. I recognize

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314. See Dahlia Lithwick, *Trial by Fury*, SLATE, July 12, 2011 (detailing how the jurors in the Casey Anthony trial were able to push aside the public's fury at the defendant and view the evidence to reach a not guilty verdict).

315. See, e.g., VA. CODE ANN. § 19.2-169.3 (West 2011).

316. See Dillard, *Without Limitation*, *supra* note 71 (offering model legislation for the civil commitment of unrestorably incompetent capital defendants).

317. See Caleb Foote, *A Comment on Pre-trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 845-46 (1960) (setting out a three-part plan for conducting a trial for an incompetent defendant, with all results from the trial sending the defendant to a hospital for treatment rather than punishment).

318. See *Regina v. Beynon*, 2 Q.B. 111 (1957) (holding that the defendant had to be proven "fit" for trial before he could even enter a plea); *Regina v. Roberts*, 2 Q.B. 329 (1954) (holding that defense counsel could proceed to trial on the general issues before raising the incompetency issue, thus leaving the court to send the criminally responsible but also incompetent defendant to a hospital for the criminally insane).

that there are legitimate therapeutic concerns<sup>319</sup> for the defendant, and I confess that I am merely prioritizing some concerns over others.<sup>320</sup>

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319. See generally Wexler & Winick, *supra* note 95, at 225.

320. The comparison is more metaphoric than actual, physiological needs, such as the need for life, are more basic than the need for self-esteem and self-actualization. See Abraham H. Maslow, *A Theory of Human Motivation*, 50 PSYCHOLOGICAL REV. 370 (1943) (establishing a theory to rank the hierarchy of human needs).