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Balancing the Burden: The Constitutional Justification for Requiring the Government to Prove the Absence of Mental Retardation Before Imposing the Death Penalty

Stephen B. Brauerman

American University Washington College of Law

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Balancing the Burden: The Constitutional Justification for Requiring the Government to Prove the Absence of Mental Retardation Before Imposing the Death Penalty

COMMENTS

BALANCING THE BURDEN: THE CONSTITUTIONAL JUSTIFICATION FOR REQUIRING THE GOVERNMENT TO PROVE THE ABSENCE OF MENTAL RETARDATION BEFORE IMPOSING THE DEATH PENALTY

STEPHEN B. BRAUERMAN*

TABLE OF CONTENTS

Introduction	402
I. Background.....	404
A. Establishing the Minimum Requirements for a Constitutional Death Penalty	404
B. Mental Retardation and the “Evolving Standards of Decency”	406
C. A Return to Jury Sentencing in Capital Cases.....	407
II. Three Constitutional Rights Justify Jury Determination of Mental Retardation	409
A. Sixth Amendment Right.....	409
1. The absence of mental retardation is an element of capital murder	410
2. The prosecution must prove the absence of mental retardation to a jury beyond a reasonable doubt	416
B. Eighth Amendment Right.....	419

* Editor-in-Chief, *American University Law Review*, Volume 55; J.D. Candidate, May 2006, *American University, Washington College of Law*; B.A. with honors, 2003, *The Johns Hopkins University*. I would like to thank Professor Amy Dillard for her expertise and guidance throughout this Comment. Additional thanks to my editor Kelly Barrett, the members of the *American University Law Review*, Katy O’Donnell and her staff at the Capital Crimes Division of the Maryland Public Defender’s Office, and Christine Bradshaw for their edits and suggestions. Finally I would like to thank Liz, Amy, and my parents for all their love and support.

1. Only a jury can objectively evaluate the “evolving standards of decency” on a case-by-case basis.....	420
2. Only a jury can determine whether a punishment responds proportionally to individual culpability	421
C. Due Process Right	425
1. Due process requires the state to provide a capital defendant with a mental retardation hearing.....	426
2. <i>Patterson’s</i> historical basis test does not apply to newly recognized substantive rights.....	427
3. The Supreme Court should use the <i>Mathews</i> balancing test to assign the burden of proof.....	429
4. At a minimum, due process requires the state to show that an offender is not mentally retarded by a probable cause standard.....	433
III. Recommendations.....	433
A. States Should Adopt a Rational and Uniform Definition of Mental Retardation	434
B. States Should Consider Pretrial Adjudication of the Mental Retardation Issue to Comprehensively Protect All of a Mentally Retarded Offender’s Constitutional Rights	436
Conclusion.....	439

INTRODUCTION

Ten years ago, Justice Blackmun threw in the towel and concluded that states could not impose the death penalty in accordance with the Constitution.¹ The Supreme Court has, however, refused to follow his lead and has issued numerous decisions in an effort to make the ultimate punishment conform to the constitutional requirements² enumerated in

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

2. *See, e.g.*, *Schiro v. Summerlin*, 124 S. Ct. 2519, 2523 (2004) (declining to apply retroactively *Ring v. Arizona’s* requirement that a jury find aggravating factors before the state imposes the death penalty); *Wiggins v. Smith*, 539 U.S. 510, 535-38 (2003) (discussing ineffectiveness of counsel in the investigation and presentation of mitigating factors); *Miller-El v. Cockrell*, 537 U.S. 322, 342-46 (2003) (disavowing racial discrimination in peremptory challenges during jury voir dire); *Shafer v. South Carolina*, 532 U.S. 36, 51 (2001) (requiring trial courts to inform juries that life in prison without the possibility of parole is an alternative to consider when evaluating an offender’s future dangerousness); *Hopkins v. Reeves*, 524 U.S. 88, 90-91 (1998) (refusing to require trial courts to inform juries of lesser offenses during capital cases where those offenses “are not lesser included offenses of the charged crime”); *Buchanan v. Angelone*, 522 U.S. 269, 279 (1998) (failing to identify any constitutional basis for a jury instruction on the meaning of mitigation and its role in the capital sentencing process); *Harris v. Alabama*, 513 U.S. 504, 515 (1995)

*Furman v. Georgia*³ and *Lockett v. Ohio*.⁴ With its 2002 decision in *Atkins v. Virginia*,⁵ the Supreme Court added mentally retarded offenders to the growing list of persons categorically excluded from receiving the death penalty.⁶ The *Atkins* Court provided limited guidance for implementing its decision and left the states with the onerous burden of determining which offenders they can execute.⁷

This Comment argues that the Constitution requires the government to prove the absence⁸ of mental retardation to a jury beyond a reasonable doubt before imposing a death sentence. Part I briefly discusses the Supreme Court's capital punishment jurisprudence with a focus on the constitutional requirements and the development of the mental retardation exclusion. Part II argues that the Supreme Court's decisions in *Ring v. Arizona*⁹ and *Apprendi v. New Jersey*¹⁰ provide a Sixth Amendment basis for jury determination of mental retardation. Part II also examines an independent Eighth Amendment justification for requiring the state to prove the absence of mental retardation beyond a reasonable doubt. Finally, Part II explores an offender's due process right to a jury determination of mental retardation and concludes that the Fourteenth Amendment requires the prosecution to bear the burden of proof by at least a probable cause standard. Part III discusses how states can comply with the Constitution by implementing procedures to prevent the execution of mentally retarded offenders. It also suggests that a pretrial determination of mental retardation is the most efficient way to implement *Atkins* while simultaneously preserving an offender's due process rights.

(allowing a judge to override a jury's advisory sentencing verdict and impose the death penalty).

3. 408 U.S. 238 (1972) (plurality opinion) (requiring states to impose the death penalty fairly or not at all).

4. 438 U.S. 586, 605-06 (1978) (mandating the consideration of all aspects of an offender's character, record, and the circumstances of the offense during capital sentencing).

5. 536 U.S. 304, 321 (2002) (noting that the Constitution places a substantive restriction on a state's power to take the life of a mentally retarded offender).

6. See *Roper v. Simmons*, No. 03-633, slip op. at 14 (U.S. Mar. 1, 2005) (excluding juveniles under eighteen from capital punishment); *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (excluding juveniles under sixteen from capital punishment); *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986) (excluding the insane from the death penalty).

7. *Atkins*, 536 U.S. at 317; see also *Ford*, 477 U.S. at 416-17 ("[W]e leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.").

8. Requiring the prosecution to prove a negative, such as proving the absence of self-defense or heat of passion/provocation beyond a reasonable doubt, poses no constitutional infirmity and is not unique in the American system of criminal justice. See *Mullaney v. Wilbur*, 421 U.S. 684, 701-02 (1975).

9. 536 U.S. 584 (2002) (overruling prior case law and holding that a defendant has the right to have a jury decide the existence of aggravating factors necessary to impose the death penalty).

10. 530 U.S. 466 (2000) (requiring that the government prove any fact that would increase a defendant's sentence to a jury beyond a reasonable doubt).

I. BACKGROUND

A. *Establishing the Minimum Requirements for a Constitutional Death Penalty*

In 1972, the Supreme Court took the first step in its torturous journey to conform the procedural and substantive elements of the death penalty to the requirements of the Constitution.¹¹ In *Furman*, the Court held that the death penalty violated the Eighth Amendment's ban on cruel and unusual punishment as applied to the states through the Fourteenth Amendment.¹² Citing the infrequent, random, discriminatory, excessive, and arbitrary manner in which states imposed the death penalty, a five Justice plurality suspended executions in the United States.¹³

In their concurring opinions, Justices White, Brennan, and Marshall analyzed the cruel and unusual nature of the death penalty by "the evolving standards of decency that mark the progress of a maturing society."¹⁴ Although only three Justices specifically relied on it, the "evolving standards of decency" became the primary analytical tool¹⁵ for defining "cruel and unusual" punishment and for identifying penalties that violate the Eighth Amendment.¹⁶

11. *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (plurality opinion) (identifying the constitutional infirmities in the application of the death penalty).

12. *Id.* at 241-45 (arguing that the history of the Eighth Amendment demonstrates that cruel and unusual punishment includes the death penalty, especially where the penalty is applied selectively to a specified group of people, such as a racial minority).

13. *See id.* at 257 (Douglas, J., concurring) (denouncing the discriminatory imposition of the death penalty); *id.* at 286 (Brennan, J., concurring) ("It is a denial of human dignity for the State arbitrarily to subject a person to an unusually severe punishment that society has indicated it does not regard as acceptable, and that cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment."); *id.* at 310 (Stewart, J., concurring) ("[The Constitution] cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."); *id.* at 311-12 (White, J., concurring) (observing that the infrequent imposition of the death penalty makes it impossible for the death penalty to serve any legitimate penological purpose); *id.* at 332-33 (Marshall, J., concurring) (condemning capital punishment as excessive, unnecessary, and abhorrent to currently existing moral values). *But see* *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (cautioning that courts should not interpret *Furman* as holding the death penalty unconstitutional per se).

14. *See Furman*, 408 U.S. at 242 (Douglas, J., concurring), *id.* at 269-70 (Brennan, J., concurring), *id.* at 327, 329 (Marshall, J., concurring) (all quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

15. *See Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (assessing evolving standards to determine whether a punishment is cruel and unusual); *see also* *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (relying on evolving societal standards when determining whether a particular punishment violates the Eighth Amendment); *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989) (placing the burden of proof on defendants to establish that their punishment violates society's evolving moral standards); *Penry v. Lynaugh*, 492 U.S. 302, 330-31 (1989) (applying evolving standards analysis to determine the meaning of the Eighth Amendment).

16. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

The *Furman* moratorium lasted four years until the Court decided *Gregg v. Georgia*¹⁷ and held that states can impose the death penalty provided they properly guide sentencing discretion to prevent the arbitrary and discriminatory imposition of the penalty that the Court found problematic in *Furman*.¹⁸ In *Furman*, *Gregg*, and the cases that followed, the Supreme Court established the minimum requirements for a constitutional death penalty.¹⁹ While the Constitution does not require states to adopt a capital punishment system, those that do must impose the death penalty in accordance with the Constitution's requirements.²⁰

B. Mental Retardation and the "Evolving Standards of Decency"

The Supreme Court first addressed the constitutionality of executing mentally retarded offenders in *Penry v. Lynaugh*.²¹ After a trial²² during which the defense challenged Penry's competence and sanity,²³ the jury convicted him and sentenced him to death.²⁴ In her majority opinion, Justice O'Connor wrote:

I cannot conclude that all mentally retarded people of Penry's ability—by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility—inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty.²⁵

The Court would not find evidence of a national consensus prohibiting the

17. 428 U.S. 153 (1976).

18. *Id.* at 187 (requiring that states guide a sentencing body's discretion in imposing the death penalty in order to stay within the boundaries of the Constitution).

19. *See* *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (commanding that a jury find the aggravating factors necessary for the state to impose a death sentence); *McCleskey v. Kemp*, 481 U.S. 279, 293-95 (1987) (rejecting the use of general statistics as proof of racial discrimination when challenging a death sentence); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (insisting on individualized consideration of mitigating factors in capital sentencing); *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (requiring proportionality between a death sentence and the crime it punishes); *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (enjoining racial, sexual, or social discrimination in the imposition of the death penalty); *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976) (rejecting mandatory death sentences); *Furman v. Georgia*, 408 U.S. 238 (1972) (plurality opinion) (prohibiting the arbitrary and capricious application of the death penalty).

20. *Gregg*, 428 U.S. at 169.

21. 492 U.S. 302, 340 (1989) (declining to adopt a rule banning the execution of mentally retarded offenders).

22. *Id.* at 307 (describing how Penry killed Pamela Carpenter by stabbing her with scissors after raping and beating her).

23. *Id.* at 308-10 (characterizing Penry as having an intelligence quotient ("IQ") between fifty and sixty-three, which indicated mild to moderate mental retardation, the mental age of a six-and-a-half-year-old, and the social maturity of a nine to ten-year-old, all caused by beatings and neurological injuries suffered as a child).

24. *Id.* at 311.

25. *Id.* at 338.

execution of mentally retarded offenders for another thirteen years.²⁶

In 2002, the Supreme Court reexamined the evidence of a national consensus and concluded that the execution of mentally retarded offenders did constitute cruel and unusual punishment.²⁷ Following his conviction and death sentence²⁸ based largely on the testimony of his accomplice,²⁹ Atkins appealed to the Supreme Court.³⁰ Writing for the majority, Justice Stevens identified a national consensus and concluded that the execution of mentally retarded offenders violates the Eighth Amendment.³¹

Since *Penry*, sixteen states had changed their death penalty statutes to exempt mentally retarded offenders from capital punishment,³² and two others had begun that process.³³ As Justice Stevens explained: "It is not so much the number of these States that is significant, but the consistency of the direction of change."³⁴ In making its decision, the Court also considered subjective indicators of a national consensus, including public opinion polls and international opposition, in addition to the objective measures of jury behavior and legislative enactments the Court relied upon in *Penry*.³⁵

26. Compare *id.* at 334-35 (refusing to recognize a national consensus where only two state statutes prohibited the execution of mentally retarded offenders, even when added to the fourteen states that did not impose the death penalty at all), with *Atkins v. Virginia*, 536 U.S. 304, 315 (2002) (recognizing a national consensus where thirty states either explicitly prohibited the execution of mentally retarded offenders or the death penalty entirely).

27. *Atkins*, 536 U.S. at 304-05.

28. *Id.* at 308 (imposing the death sentence because of the manner in which Atkins kidnapped, robbed, and murdered Eric Nesbit).

29. *Id.* at 307-08 (observing that Atkins' cohort, William Jones, did not suffer from mental retardation and the jury found his testimony more credible and coherent than Atkins').

30. *Atkins v. Virginia*, 533 U.S. 976 (2001) (granting certiorari); see *Atkins*, 536 U.S. at 308-09 (restating the opinion of a forensic psychologist who concluded that Atkins was mildly mentally retarded with an IQ of fifty-nine and a mental age between nine and twelve).

31. *Id.* at 321.

32. *Id.* at 314-15 (citing the statutes of Kentucky, Tennessee, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina, all of which amended their laws between 1990 and 2001 to exempt mentally retarded offenders from capital punishment); see ARIZ. REV. STAT. ANN. § 13-703.02 (West 2004); ARK. CODE ANN. § 5-4-618 (Michie 2004); COLO. REV. STAT. § 16-9-401 (2004); CONN. GEN. STAT. § 53a-46a (2004); FLA. STAT. ANN. § 921.137 (West 2004); IND. CODE §§ 35-36-9-2 to 35-36-9-6 (2004); KAN. STAT. ANN. § 21-4623 (2003); KY. REV. STAT. ANN. §§ 532.130, 532.135, 532.140 (Banks-Baldwin 2004); MO. REV. STAT. § 565.030 (2004); NEB. REV. STAT. § 28-105.01 (2004); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2004); N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2004); S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie 2004); TENN. CODE ANN. § 39-13-203 (2004); WASH. REV. CODE § 10.95.030 (2004); see also GA. CODE ANN. § 17-7-131(j) (2004).

33. *Atkins*, 536 U.S. at 315 (citing measures introduced in the legislatures of Virginia and Nevada); see S.B. 497, 2002 Gen. Assem., Reg. Sess. (Va. 2002); H.B. 957, 2002 Gen. Assem., Reg. Sess. (Va. 2002); A.B. 353, 71st Leg., Reg. Sess. (Nev. 2001).

34. *Atkins*, 526 U.S. at 315.

35. *Id.* at 312 (emphasizing that the Constitution allows the Justices to express their own views in determining the meaning of the Eighth Amendment). But see *id.* at 327

C. A Return to Jury Sentencing in Capital Cases

In 2000, the Supreme Court decided *Apprendi v. New Jersey*, a non-capital case involving a challenge to a state sentencing law under which the defendant received an enhanced sentence after the judge found that racial bias motivated the defendant to act.³⁶ Apprendi appealed and the Supreme Court reversed, holding that “any fact . . . that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”³⁷ After undertaking a thorough historical analysis,³⁸ the Court explained that the jury served to protect against oppression and tyranny by the ruling class.³⁹ Oddly limiting the scope of its decision, the Court concluded that *Apprendi* should have no effect on capital sentencing schemes that allow judges to find the specific aggravating factors necessary to sentence a defendant to death.⁴⁰

Recognizing the tension between *Apprendi* and *Walton v. Arizona*, which upheld judges’ freedom to find aggravating factors that would justify imposing the death penalty,⁴¹ the Supreme Court decided in *Ring v. Arizona* that juries, not judges, were required to find the aggravating factors necessary to sentence a defendant to death.⁴² The Court reasoned that aggravating factors operate as statutory elements of capital murder because an offender cannot receive a death sentence in their absence.⁴³ In response to states’ efforts to circumvent the Sixth Amendment’s protections by characterizing facts, like aggravating factors, that increase the penalty beyond the statutory maximum as sentencing factors,⁴⁴ the Court explicitly

(Rehnquist, C.J., dissenting) (complaining that public opinion polls do not ask whether the public feels that all mentally retarded people by definition can never act with the level of culpability associated with the death penalty); *id.* at 338 (Scalia, J., dissenting) (“Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members.”).

36. *Apprendi v. New Jersey*, 530 U.S. 466, 470 (2000). Charles Apprendi pled guilty to second-degree possession of a firearm for an unlawful purpose. *Id.* at 469-70. Under New Jersey’s existing hate crime statute, however, he received the equivalent of a first-degree sentence because he acted with a racially biased purpose. *Id.* at 470-71.

37. *Id.* at 476 (quoting *Jones v. United States*, 526 U.S. 227, 243 (1999)).

38. *See id.* at 501-10 (Thomas, J., concurring) (tracing the history of the right to a jury determination of every fact that creates an independent basis for increasing punishment).

39. *Id.* at 477.

40. *Id.* at 496 (distinguishing the facts of *Apprendi* from capital sentencing schemes that require a judge to find specific aggravating factors before imposing a death sentence); *see also* *Walton v. Arizona*, 497 U.S. 639, 647-49 (1990) (noting that aggravating factors do not create a new element of capital murder).

41. 497 U.S. 639, 648 (1990).

42. 536 U.S. 584, 589 (2002) (noting the importance of jury determinations regarding any factor that increases a defendant’s punishment).

43. *See id.* at 599 (explaining that the maximum penalty after a guilty verdict for a capital crime is life without the possibility of parole). Under Arizona law at the time, for a death sentence to result, the sentencing court had to find that at least one aggravating factor outweighed any mitigating factors the defendant presented. *See* ARIZ. REV. STAT. ANN. § 13-703(E) (West 2001).

44. *See, e.g., Apprendi*, 530 U.S. at 476 (observing that a legislature’s classification of a

abolished this semantical distinction in *Ring*.⁴⁵ Although the Court declined to apply *Ring* retroactively,⁴⁶ the decision nevertheless has broad implications and will require a number of states to restructure their capital sentencing procedures.⁴⁷

Neither *Apprendi* nor *Ring* suggests how states should handle the procedural determination of mental retardation after *Atkins*.⁴⁸ The confusion over whether a fact constitutes an element of the crime or an element of the sentence highlights this problem.⁴⁹ With its recent decision in *Blakely v. Washington*,⁵⁰ the Supreme Court appears unlikely to retreat from the Sixth Amendment position it adopted in *Apprendi* and affirmed in *Ring*.⁵¹ In reiterating the *Apprendi* rule, Justice Scalia defined the statutory maximum penalty as the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury's verdict or admitted by the defendant.⁵² Despite criticism,⁵³ a majority of the Court appears committed to restoring the Sixth Amendment's jury trial guarantee.⁵⁴

II. THREE CONSTITUTIONAL RIGHTS JUSTIFY JURY DETERMINATION OF MENTAL RETARDATION

A. Sixth Amendment Right

The Sixth Amendment guarantees that an accused will have "the right to

fact as an element of the crime or a sentencing factor does not provide a principled basis for treating the facts differently and attaching different constitutional protections to them); *McMillan v. Pennsylvania*, 477 U.S. 79, 89-90 (1986) (protecting the legislature's ability to determine the weight and effect given by sentencing courts to the specific circumstances of a given crime).

45. 536 U.S. at 604.

46. See *Schiro v. Summerlin*, 124 S. Ct. 2519, 2523 (2004).

47. See Adam Liptak, *A Supreme Court Ruling Roils Death Penalty Cases*, N.Y. TIMES, Sept. 16, 2002, at A14 (explaining that the capital sentencing statutes of Idaho, Montana, Nebraska, Alabama, Delaware, Florida, and Indiana are in jeopardy after *Ring*).

48. Cf. *Enmund v. Florida*, 458 U.S. 782, 800-01 (1982) (forbidding the execution of a felony murderer who neither killed nor intended to kill without suggesting how states should assess these facts); *Tison v. Arizona*, 481 U.S. 137, 138 (1987) (permitting the execution of a felony murderer who played a major role in the homicide and acted with reckless disregard for human life without establishing a procedure for assessing participation and mental state).

49. See John Kenneth Zwerling, *Comprenez Apprendi?*, 38 AM. CRIM. L. REV. 309, 310-11 (2001) (defining elements of an offense and discussing the differences between sentencing factors and sentence enhancements).

50. 124 S. Ct. 2531 (2004).

51. *Id.* at 2538 (overturning a sentence that a judge increased more than three years above the statutory maximum sentence because he found that the defendant had acted with deliberate cruelty).

52. *Id.* at 2537.

53. See *Ring v. Arizona*, 536 U.S. 584, 619 (2002) (O'Connor, J., dissenting) ("Not only was the decision in *Apprendi* unjustified in my view, but it also had a severely destabilizing effect on our criminal justice system.").

54. See *id.* at 610 (Scalia, J., concurring) (observing that *Ring* represents a return to the fundamental meaning of the jury trial guarantee).

a speedy and public trial, by an impartial jury . . . and [the right] to be informed of the nature and cause of the accusation . . . against him.”⁵⁵ The Supreme Court has interpreted this protection to require that the state prove to a jury beyond a reasonable doubt any fact that increases the maximum penalty for a crime beyond the prescribed statutory maximum.⁵⁶ The Court defined “statutory maximum penalty” as any increase in punishment beyond that which a defendant could have received on the basis of the jury verdict alone.⁵⁷ The Constitution also “places a substantive restriction on the State’s power to take the life of a mentally retarded offender.”⁵⁸ The absence of mental retardation, like aggravating factors⁵⁹ in capital sentencing proceedings,⁶⁰ operates as an element of capital murder because it increases the maximum penalty the offender faces.⁶¹ A state cannot, therefore, impose the death penalty without implementing the proper procedures for identifying and excluding mentally retarded offenders.⁶²

1. *The absence of mental retardation is an element of capital murder*

State legislatures typically have broad discretion in differentiating elements of a crime from sentencing factors.⁶³ The Supreme Court has

55. U.S. CONST. amend. VI.

56. *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (asserting that the Sixth Amendment “entitle[s] a criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt’”) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)).

57. See *Ring*, 536 U.S. at 602; see also *Blakely*, 124 S. Ct. at 2537 (“[T]he statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”) (emphasis and internal quotations omitted); *Apprendi*, 530 U.S. at 483 (defining statutory maximum as the punishment supported only by facts found by the jury).

58. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (internal quotations omitted).

59. See, e.g., OKLA. STAT. ANN. tit. 21, § 701.12 (West 2004) (enumerating aggravating factors). The enumerated aggravating factors include: (1) knowingly creating a great risk of death to more than one person; (2) committing murder for hire; (3) committing an especially heinous, atrocious, or cruel murder; (4) killing to avoid or prevent arrest; (5) killing while serving a sentence of imprisonment; (6) killing a peace officer performing an official duty; (7) having a previous conviction for a violent felony; and, (8) constituting a continuing threat to society. *Id.*

60. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (upholding Georgia’s bifurcated sentencing procedure in which the prosecution must prove aggravating factors to a sentencing authority that weighs them against any mitigating factors); see also *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (deriding North Carolina’s use of mandatory death sentences as insensitive to the constitutional infirmities identified in *Furman*); *Furman v. Georgia*, 408 U.S. 238 (1972) (plurality opinion) (prohibiting the arbitrary, capricious, wanton, and freakish imposition of the death penalty). But see *Walton v. Arizona*, 497 U.S. 639, 673 (1990) (Scalia, J., concurring) (abandoning the *Woodson* individuality principle as inherently inconsistent with *Furman*’s prohibition against arbitrary and capricious imposition of the death penalty).

61. Cf. *Ring*, 536 U.S. at 599 (observing that a death sentence is not available without proof of an aggravating factor).

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

63. See *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986) (observing that the applicability of the Due Process Clause, and the jury trial protections that accompany it, has always hinged on how a state defines the crime); accord *Patterson v. New York*, 432 U.S.

emphasized, however, that in evaluating a state's classification of a fact as an element or a sentencing factor, "the relevant inquiry is not one of form, but of effect."⁶⁴ According to the Supreme Court, the Sixth Amendment jury trial right hinges on whether "the required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict [alone]."⁶⁵

Each state that imposes the death penalty⁶⁶ does so through the use of a bifurcated trial, where the guilt/innocence determination is conducted separately from the sentencing phase.⁶⁷ After a guilty verdict in the first phase of the trial, the maximum punishment a defendant can receive,

197, 206 (1977) (holding that due process does not prohibit a state from assigning the defendant the burden of proving an affirmative defense). *But see* Mullaney v. Wilbur, 421 U.S. 684, 698 (1975) (recognizing constitutional limits to a state's ability to define a crime); Leslie Yalof Garfield, *Back to the Future: Does Apprendi Bar a Legislature's Power to Shift the Burden of Proof Away from the Prosecution by Labeling an Element of a Crime an Affirmative Defense?*, 35 CONN. L. REV. 1351, 1355 (2003) (concluding that a legislature cannot circumvent the protections of the Due Process Clause by simply redefining elements of a crime as sentencing enhancements or as affirmative defenses).

64. *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2002). *But see* *Winston v. Commonwealth*, 604 S.E.2d 21, 46, 50 (Va. 2004) (classifying age and mental retardation as mitigating factors rather than aggravating factors or elements of the crime because they do not bar capital convictions); *State v. Williams*, 831 So. 2d 835, 860 n.35 (La. 2002) ("*Atkins* explicitly addressed mental retardation as an exemption from capital punishment, not as a fact the *absence* of which operates 'as the functional equivalent of an element of a greater offense.'") (internal citations omitted). Contrary to the *Williams* Court's observations, the absence of mental retardation becomes an element of capital murder, not through *Atkins* alone, but through the combination of *Atkins* and the Supreme Court's decisions in *Apprendi* and *Ring*. Derek S. Benston, Note, *Beyond Statutory Elements: The Substantive Effects of the Right to a Jury Trial on Constitutionally Significant Facts*, 90 VA. L. REV. 645, 676-77 (2004) (explaining how *Atkins*, *Ring*, and *Apprendi* make the absence of mental retardation an element of capital murder). Similarly, by correctly concluding that age and mental retardation do not prevent capital convictions, and ending its analysis at that point, the *Winston* Court erred by failing to consider that age and mental retardation bar the imposition of capital punishment. *Id.* at 46, 50 (emphasis added). Because Sixth Amendment protections attach to those facts that increase the available punishment, a decision like *Winston*, that focuses on a fact's effect on conviction misses the distinction the Supreme Court has made between elements of a crime and sentencing factors. *Apprendi*, 530 U.S. at 483 (emphasis added).

65. *Apprendi*, 530 U.S. at 494.

66. See DEATH PENALTY INFORMATION CENTER, STATE BY STATE DEATH PENALTY INFORMATION: STATES WITH THE DEATH PENALTY (2005) (noting that Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin, the District of Columbia, and Puerto Rico have repealed their death penalty statutes), at www.deathpenaltyinfo.org/article.php?did=121&scid=11 (on file with the American University Law Review). Connecticut, Kansas, New Hampshire, New Jersey, New York, South Dakota and the U.S. military have not carried out an execution since the Supreme Court upheld the constitutionality of capital punishment in 1976. *Id.*; see also *People v. LaValle*, 817 N.E.2d 341, 367 (N.Y. 2004) (invalidating New York's death penalty statute); *State v. Marsh*, 102 P.3d 445, 466 (Kan. 2004) (invalidating Kansas' death penalty statute).

67. See *supra* note 60 (discussing the constitutionality of bifurcated proceedings); see also Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1215 (2000) (pointing out that bifurcation is not constitutionally required, but states have used it as a procedure for ensuring a fair trial).

without further findings, is life in prison.⁶⁸ If a state still wants to impose the death penalty, it must prove at least one aggravating factor to a jury beyond a reasonable doubt⁶⁹ and show that the aggravating factors outweigh any mitigating factors⁷⁰ the defendant presented.⁷¹ Because a defendant cannot receive a death sentence without proof of at least one aggravating factor, aggravating factors constitute an element of the crime of capital murder.⁷²

Like aggravating factors, the absence of mental retardation is an element of capital murder because it increases the maximum penalty a defendant can receive. The Eighth Amendment prohibits the execution of a mentally retarded offender.⁷³ As a result, the maximum penalty that a properly identified⁷⁴ mentally retarded offender faces is life without parole, while an offender who does not suffer from mental retardation can receive the death penalty.⁷⁵ Because a state may not impose the death penalty without first excluding mentally retarded offenders, the absence of mental retardation is

68. *Ring v. Arizona*, 536 U.S. 584, 597 (2002) (“Based solely on the jury’s verdict finding [the defendant] guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment.”).

69. *Id.* at 609.

70. *See, e.g.*, VA. CODE ANN. § 19.2-264.4(B) (Michie 2004) (enumerating mitigating factors). The statutory mitigating factors include: (1) the defendant lacked a significant criminal history; (2) the defendant suffered from extreme mental or emotional disturbance; (3) the victim participated in the defendant’s conduct or consented to the act; (4) the defendant lacked the capacity to appreciate the criminality of his conduct or conform his behavior to the requirements of the law; (5) the defendant’s age; or, (6) “even if [*Atkins* does not apply,] the subaverage intellectual functioning of the defendant.” *Id.*

71. *See, e.g.*, MD. CODE ANN. CRIM. LAW § 2-303(i)(1) (2004) (“If the court or jury finds that one or more of the mitigating circumstances . . . exists, it shall determine by a preponderance of the evidence whether the aggravating circumstances . . . outweigh the mitigating circumstances.”); *see also* *Mills v. Maryland*, 486 U.S. 367, 372 (1988) (vacating a death sentence imposed under a sentencing statute that only allowed the jury to weigh unanimously-found mitigating factors against aggravating factors, thereby requiring that the death penalty be imposed even if all jurors believed that *some* mitigating factors existed but the jury as a whole failed to unanimously find *any particular* mitigating factor); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (reaching the same conclusion).

72. *Ring*, 536 U.S. at 597; *see also* *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (requiring jury determination of any fact that increases the maximum penalty an offender faces).

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

74. *See* Cynthia A. Orpen, Note and Comment, *Following in the Footsteps of Ford: Mental Retardation and Capital Punishment Post-Atkins*, 65 U. PITT. L. REV. 83, 88 (2003) (analogizing the effectiveness of protections for insane offenders post-*Ford* to the protections for mentally retarded offenders post-*Atkins* and concluding that the Supreme Court’s lack of guidance leaves these protections devoid of meaning because of the difficulty of excluding protected offenders); Roberta M. Harding, “*Endgame*”: *Competency and the Execution of Condemned Inmates—A Proposal to Satisfy the Eighth Amendment’s Prohibition Against the Infliction of Cruel and Unusual Punishment*, 14 ST. LOUIS U. PUB. L. REV. 105, 117 (1994) (asserting that the variety of approaches taken by the states post-*Ford* to prevent the execution of the mentally ill has resulted in a “lack of uniformity [that] possesses the potential to violate not only *Ford*, but also the Eighth Amendment principals embodied in *Furman*”).

75. *See supra* notes 2-6 and accompanying text (discussing those classes of individuals that the Constitution categorically excludes from execution).

an element of capital murder because its presence precludes the state from imposing a death sentence.⁷⁶

The absence of mental retardation is an element of capital murder in the same way that racially biased motivation and deliberate cruelty act as elements of their respective statutes in New Jersey and Washington. In *Apprendi*, the Court viewed the defendant's motivation as an element⁷⁷ because it could potentially increase the defendant's sentence by ten years.⁷⁸ Similarly in *Blakely*, the Court recognized the elemental nature of "deliberate cruelty"⁷⁹ because it had the effect of increasing the defendant's penalty by more than three years.⁸⁰

Like racial bias and deliberate cruelty, the absence of mental retardation is a fact that increases a penalty beyond that permitted by the jury's finding or the defendant's guilty plea.⁸¹ If sentence increases of two, three, or ten years have constitutional significance, then the difference between life imprisonment and death must have constitutional significance as well.⁸² Since the relevant inquiry is one of effect and not form,⁸³ the absence of

76. See *supra* notes 2-6 and accompanying text; *infra* notes 81-84 and accompanying text (arguing that the state must prove the absence of mental retardation as an element of capital murder).

77. See 530 U.S. at 494-95 (observing the "elemental nature" of "motive" because it had the effect of turning a second-degree offense into a first-degree offense). Under New Jersey law, *Apprendi* pled guilty to second-degree possession of a firearm, punishable by up to ten years in prison. *Id.* at 470-71; N.J. STAT. ANN. § 2C:39-4a (West 1995). By sentencing him to twelve years in prison because of his racially biased motive, New Jersey effectively used a first-degree penalty to punish a second-degree offense. See *Apprendi*, 530 U.S. at 494.

78. See *Apprendi*, 530 U.S. at 470 (observing that despite the fact that the state charged *Apprendi* with a second-degree offense, it reserved the right to request a higher sentence on the ground that *Apprendi* acted with a biased purpose); N.J. STAT. ANN. § 2C:44-3(e) (West 2004).

79. *Blakely v. Washington*, 124 S. Ct. 2431, 2535 (2004) (invalidating an interpretation of Washington law that allowed the trial court to impose a sentence of thirty-seven months beyond the maximum authorized by statute based on its finding that *Blakely* acted with deliberate cruelty).

80. *Id.* at 2543.

81. See *Ring v. Arizona*, 536 U.S. 584, 604 (2002); see also Bill Lockyer & Taylor S. Carey, *Capital Punishment and the Mentally Retarded: Implementing Atkins*, 15 STAN. L. & POL'Y REV. 329, 338 (2004) (clarifying that *Ring* entitles capital defendants to a jury determination of any fact upon which the legislature conditions an increased punishment). The Supreme Court's decision in *Atkins* conditions an execution on the absence of mental retardation, consequently placing a constitutional restriction on a legislature's ability to increase a maximum penalty and implicating the same Sixth Amendment protections that would attach if the legislature had set the condition itself. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

82. See *Apprendi*, 530 U.S. at 494 (finding constitutional significance in a two year sentence enhancement); *Blakely*, 124 S. Ct. at 2535 (giving a three year sentence increase constitutional significance). Justice Stewart's "death is different" rationale has traditionally stood for greater, not lesser, protections for capital defendants. See *Furman v. Georgia*, 408 U.S. 238, 306 (1972).

83. See *Apprendi*, 530 U.S. at 494 (asserting that exposing the defendant to a greater punishment than that authorized by the jury's guilty verdict alone is more compelling than whether a particular characteristic of the defendant or the crime is characterized as an

mental retardation becomes an element of capital murder because it has the effect of increasing the range of punishment an offender can receive.⁸⁴

An examination of the effect of the fact in question does not, however, end the constitutional inquiry, and courts should also look at historical practice to define the scope of the Sixth Amendment.⁸⁵ Historically, the criminal jury constituted one of the Framers' principal protections against governmental tyranny.⁸⁶ Although there is no direct historical basis for requiring jury determination of mental retardation, history cannot dispose of issues concerning newly recognized constitutional rights.⁸⁷ Nevertheless, indirect history amply supports the proposition that the Sixth Amendment requires jury determination of mental retardation.⁸⁸

In both *Apprendi* and *Blakely*, the Supreme Court justified its holdings with historical principles even though jury findings of racial bias and deliberate cruelty have no explicit historical support.⁸⁹ If historical bases are sufficient to classify racial bias and deliberate cruelty as elements of crimes for Sixth Amendment purposes, then they are sufficient to classify the absence of mental retardation as an element of capital murder.

Finally, courts must examine the possibility that the legislature may abuse its power in classifying a fact as an element of a crime or as a sentencing factor.⁹⁰ The risk of abuse of legislative power in the context of

“element” or a “sentencing factor”).

84. Cf. *id.* at 495 (making racially biased purpose an element of unlawful possession of a weapon); *Blakely*, 124 S. Ct. at 2543 (making deliberate cruelty an element of kidnapping).

85. See Garfield, *supra* note 63, at 1383 (explaining that a complete analysis under *Apprendi* requires the consideration of the historical principles of punishment with respect to the appropriate placement of the burden of proof and the risk that the legislature may overstep its authority in creating sentencing factors).

86. See *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (“The founders of the American Republic were not prepared to leave [sentencing] to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.”).

87. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (“The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”). Given that the Eighth Amendment evolves to reflect modern values, historical analysis cannot account for rights, like the prohibition on executing mentally retarded offenders, that lack historical support. See *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

88. See *Apprendi*, 530 U.S. at 518 (Thomas, J., concurring) (providing a detailed historical analysis for the link between jury determination of the elements of a crime and the specific punishments that follow). See generally Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N.C. L. REV. 621, 629-53 (2004) (tracing the historical development of jury sentencing and concluding that the jury has always played a role in evaluating the characteristics of offenders and crimes that demand the death penalty).

89. See *Apprendi*, 530 U.S. at 476-83 (relying upon the historical connection between jury fact-finding and sentencing); *Blakely*, 124 S. Ct. at 2538-40 (making explicit the Court's commitment to *Apprendi* and the historical principles essential to its reasoning).

90. See *Jones v. United States*, 526 U.S. 227, 244 (1999) (“It is therefore no trivial question to ask whether recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn.”); see also Benjamin J. Preister, *Constitutional Formalism and the Meaning of Apprendi v. New*

mental retardation is particularly significant because of the Supreme Court's minimal guidance on how to identify mentally retarded offenders.⁹¹ Like the legislatures of New Jersey and Washington, which mischaracterized elements as sentencing factors, several states already have classified improperly mental retardation as a sentencing factor.⁹² The confusion that followed *Apprendi*⁹³ and the lack of consistency among Court precedent⁹⁴ only exacerbates this problem.⁹⁵ Considering the effect, history, and potential for error, mental retardation is an element of capital murder, where that distinction is necessary,⁹⁶ and must receive the accompanying procedural protections of proof to a jury beyond a reasonable doubt.

Jersey, 38 AM. CRIM. L. REV. 281, 307 (2001) (arguing that the *Apprendi* Court reasserted the constitutional importance of distinguishing between the legislature's powers to define offenses and regulate sentencing, which had eroded over the years).

91. See *Atkins*, 536 U.S. at 317 (leaving the states to define, identify, and exclude mentally retarded offenders from the death penalty); cf. *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986) (placing the burden on the states to develop appropriate procedures for excluding insane offenders from capital punishment).

92. See, e.g., VA. CODE ANN. § 19.2-264.3:1.1(C) (Michie 2004) (placing the determination of mental retardation in the sentencing phase).

93. See *Apprendi*, 530 U.S. at 540 (O'Connor, J., dissenting) (criticizing "the Court's failure to clarify the contours of the constitutional principle underlying its decision"). According to Justice O'Connor, *Apprendi* has two possible interpretations: first, a fact must be submitted to a jury if, as a formal matter, it increases the punishment beyond a statutory maximum. *Id.* at 541. Second, a fact must be submitted to a jury if, as a formal matter, it increases the range of punishment that an offender could face. *Id.* at 542. If Justice O'Connor's second interpretation is accurate, then *Apprendi* makes the continued viability of *McMillan v. Pennsylvania* questionable. See *McMillan v. Pennsylvania*, 477 U.S. 79, 89 (1986) (allowing a Pennsylvania statute to raise the statutory minimum penalty, thereby increasing the range of punishment, without proof of fact to a jury beyond a reasonable doubt); see also Preister, *supra* note 90, at 295-96 (responding to criticisms that state legislatures can easily avoid *Apprendi* by drafting statutes with high statutory maximums); Zwerling, *supra* note 49, at 312 (identifying three different interpretations of the *Apprendi* principle).

94. See *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998) (excepting prior convictions from Sixth Amendment protection); *McMillan*, 477 U.S. at 89 (excluding facts that increase the statutory minimum penalty from Sixth Amendment protection); *Ring v. Arizona*, 536 U.S. 584, 619 (2002) (O'Connor, J., dissenting) (arguing that the Court should overrule *Apprendi* rather than *Walton v. Arizona*); accord *Apprendi*, 530 U.S. at 523 (O'Connor, J., dissenting); *id.* at 555 (Breyer, J., dissenting).

95. See Preister, *supra* note 90, at 302 (supporting the *Apprendi* principle as a protective barrier between the legislature's separate powers to define offenses and regulate sentences). Preister notes that each of these legislative powers is subject to distinct constitutional protections, the differences between which are themselves formalistic. *Id.* at 307.

96. See *Apprendi*, 530 U.S. at 475-76 (explaining that labeling a fact as a "sentence enhancement" or an "element of a crime" does not present a principled basis for treating facts with similar effects differently).

2. *The prosecution must prove the absence of mental retardation to a jury beyond a reasonable doubt*

The standard of proof beyond a reasonable doubt⁹⁷ in a criminal case is a constitutional requirement⁹⁸ because of the high stakes⁹⁹ of such proceedings. The *Apprendi* Court remanded for proof beyond a reasonable doubt because of the seriousness of losing an additional two years of liberty.¹⁰⁰ Similarly in *Blakely*, the Court focused on the defendant's potential loss of three additional years of freedom.¹⁰¹ If the stakes are high enough to require the government to prove facts that increase the length of term sentences to a jury beyond a reasonable doubt,¹⁰² then similar protections must apply to facts that increase the punishment from a term of years to death.¹⁰³ Considering that an offender's interest in life outweighs his interest in liberty, the stakes are highest at a capital trial where the state attempts to take an offender's life.¹⁰⁴ Given the enormity of what is at stake in a capital trial, the prosecution must prove the absence of mental retardation to a jury beyond a reasonable doubt.¹⁰⁵

97. See Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 458 (1989) (defining the reasonable doubt rule as requiring acquittal if the jury harbors a reasonable doubt about the veracity or existence of the fact in question).

98. See *In re Winship*, 397 U.S. 358, 362 (1970) ("This notion—basic in our law and rightly one of the boasts of a free society—is a constitutional requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'").

99. See *id.* at 363 (focusing on the potential for defendants in criminal trials to lose their liberty and the certainty that they would be stigmatized upon conviction); see also *Apprendi*, 530 U.S. at 484; *McMillan*, 477 U.S. at 97 (Marshall, J., dissenting); *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975).

100. 530 U.S. at 497.

101. 124 S. Ct. 2531, 2537 (2004).

102. See *id.*; *Apprendi*, 430 U.S. at 475-77.

103. See *supra* notes 63-96 and accompanying text (arguing that the absence of mental retardation is a fact that increases the maximum penalty that an offender can face); see also Benston, *supra* note 64, at 680-81 (noting that *Atkins* made the absence of mental retardation a "de facto" element of capital murder). While Benston accurately identifies mental retardation as an element of capital murder, he incorrectly suggests that the defendant must bear the burden of proof on the issue. *Id.* at 685. The Sixth Amendment places an affirmative burden on the prosecution to prove elements of the crime; it leaves the defendant without any responsibility to produce any evidence whatsoever. See *Apprendi*, 530 U.S. at 475-76. Placing this burden on the defendant could violate the Fifth Amendment's protection against self incrimination. See U.S. CONST. amend. V.

104. See *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

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

Id.; see also Sarah Cohen & Deborah Hastings, *For 110 Inmates Freed by DNA Tests, True Freedom Remains Elusive*, ASSOCIATED PRESS, May 28, 2002 (detailing the devastating effects of capital convictions upon individuals subsequently exonerated), available at <http://www.deathpenaltyinfo.org/article.php?scid=17&did=293>.

105. Cf. *Cooper v. Oklahoma*, 517 U.S. 348, 368 (1996) (holding that assigning the burden of proving competence to stand trial to the defendant by a clear and convincing standard violates the defendant's right not to be tried while incompetent).

The allocation of the burden of proof also serves to balance the risk of error between the parties in any adjudication.¹⁰⁶ In the context of mental retardation, error can manifest itself through the procedures used to identify the members of the protected class.¹⁰⁷ Although the Supreme Court declined to define its scope, *Atkins*' protections apply to a specific and identifiable class of defendants.¹⁰⁸ To the extent that states have the freedom to give meaning to *Atkins*, some statutes may suffer from over-inclusiveness and others from under-inclusiveness.¹⁰⁹ While over-inclusive statutes do not present constitutional problems,¹¹⁰ under-inclusive statutes do.

To illustrate this point, assume that the national consensus identified in *Atkins* protects offenders whose intelligence quotient ("IQ") is seventy or below.¹¹¹ Arkansas' statute, which defines mental retardation as an IQ of sixty-five or below,¹¹² would fail as constitutionally inadequate because it would not protect the full class of offenders that *Atkins* protects. The Supreme Court did not, however, define the class of offenders who fall within the protections of the national consensus by announcing an IQ threshold¹¹³ or any other standard.¹¹⁴ Because the meaning of the national

106. See *In re Winship*, 397 U.S. 358, 364 (1970).

107. See Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding them From Execution*, 30 J. LEGIS. 77, 86 (2003) (emphasizing that states disagree about how to determine which offenders are actually mentally retarded); see also *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) ("To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded.").

108. See *Atkins*, 536 U.S. at 317 (observing that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus").

109. Compare ARK. CODE ANN. § 5-4-618 (Michie 2003) (excluding those offenders with an IQ below sixty-five), with 725 ILL. COMP. STAT. ANN. 5/114-15 (West 2004) (providing that an IQ below seventy-five is presumptive evidence of mental retardation). Based solely on definition, the Illinois statute protects a greater class of offenders than does its Arkansas counterpart. See ARK. CODE ANN. § 5-4-618 (Michie 2003); 725 ILL. COMP. STAT. ANN. 5/114-15 (West 2004). Yet neither may comply with *Atkins*, since states have no way to know the true meaning of the national consensus until the Supreme Court provides more guidance. See *Atkins*, 536 U.S. at 317. As a categorical exemption, *Atkins* may suffer from over or under-inclusiveness, especially where mental retardation is determined by IQ testing. See Douglas Mossman, *Atkins v. Virginia: A Psychiatric Can of Worms*, 33 N.M. L. REV. 255, 268-70 (2003) (denouncing the practice of defining mental retardation by reference to an IQ of seventy as a statistical, rather than a medical distinction, and one that can be inaccurate given the five point margin of error in such testing).

110. See *State v. Jackson*, 76 P.3d 217, 222 (Wash. 2003) (acknowledging that state constitutions may provide greater protections for their citizens than the U.S. Constitution requires).

111. *Atkins* does not attempt to quantify the national consensus and explicitly leaves states with the task of identifying those mentally retarded offenders who fall within the national consensus. See 536 U.S. at 317.

112. ARK. CODE ANN. § 5-4-618.

113. See Mossman, *supra* note 109, at 268-70 (cautioning that definitions of mental retardation based solely on IQ are inherently imprecise).

114. See *Atkins*, 536 U.S. at 308.

consensus is unclear, less-inclusive statutes like Arkansas' may fall short of *Atkins*' constitutional protections.¹¹⁵ Given the enormous potential for under-inclusion, erroneous determinations of mental retardation,¹¹⁶ and the availability of alternatives,¹¹⁷ society should not—and the Constitution does not—allow an offender to bear this risk.

Like the assignment of the burden of proof, the jury trial right provides important procedural protections. As the Court explained in *Apprendi*, the jury serves to check the power of the state.¹¹⁸ In an adversarial proceeding where the state seeks the death penalty, abuse of power becomes a grave concern.¹¹⁹ Requiring a jury to determine whether an offender suffers from mental retardation also protects the integrity of the system.¹²⁰ Jury sentencing ensures that only those offenders whom society finds deserving of the ultimate penalty receive it.¹²¹ Considering the effect mental retardation has on the availability of a death sentence, the risks of under-inclusion and erroneous identification, and the jury's role as a guarantor of liberty, Sixth Amendment protections must attach to the determination of mental retardation required to identify which offenders are eligible for the death penalty.

B. Eighth Amendment Right

The Eighth Amendment prohibits cruel and unusual punishment.¹²² The Supreme Court has explained that it will evaluate a punishment by the standards that prevailed in 1791 when the states ratified the Eighth Amendment¹²³ and by “the evolving standards of decency that mark the

115. *See id.* at 316 (finding a national consensus against “the practice” of executing mentally retarded offenders without attempting to define the protected class).

116. *Cf. id.* at 320-21 (observing that the possibility of false confessions, inability to give meaningful assistance to counsel, and poor performance as witnesses make mentally retarded offenders less able to present a powerful argument for mitigation than an offender not so afflicted).

117. *See id.* (emphasizing that *Atkins* merely prohibits states from imposing the most severe form of punishment on mentally retarded offenders, and does not prohibit the imposition of lesser punishments).

118. *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2002) (“To guard against a spirit of oppression and tyranny on the part of our rulers and as the great bulwark of our civil and political liberties, trial by jury has been understood to require that the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of the defendant's equals and neighbors.”) (emphasis and internal citations omitted).

119. *Cf. Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971) (interpreting the Fourth Amendment to require a neutral and detached magistrate to prevent abuse of power by the state engaged in the competitive enterprise of ferreting out crime).

120. *See Apprendi*, 530 U.S. at 478 (articulating that a jury determination of elements of a crime historically left no doubt as to the punishment that would follow the conviction); *see also Blakely v. Washington*, 124 S. Ct. 2531, 2543 (2004) (observing that the Framers' paradigm for criminal justice involved a strict division of authority between judge and jury).

121. *See Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968) (articulating that the jury will express the conscience of the community on the question of life or death).

122. U.S. CONST. amend. VIII.

123. *See Gregg v. Georgia*, 428 U.S. 153, 171 (1976).

progress of a maturing society.”¹²⁴ Since 1972, the Court has invalidated death penalty statutes for providing too little guidance,¹²⁵ too much guidance,¹²⁶ failing to consider the offender as an individual,¹²⁷ inadequately considering mitigating factors,¹²⁸ and for findings of disproportionality¹²⁹ and excessiveness.¹³⁰ Although the Supreme Court already has held that the Eighth Amendment prohibits the execution of mentally retarded offenders, proof of the absence of mental retardation to a jury beyond a reasonable doubt is necessary to protect the substantive right *Atkins* guarantees.¹³¹

1. Only a jury can objectively evaluate the “evolving standards of decency” on a case-by-case basis

In evaluating a national consensus,¹³² the Supreme Court has consistently looked to jury verdicts to measure social values.¹³³ Although legislative enactments may help the Court identify a national consensus in favor of a

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

125. See *Furman v. Georgia*, 408 U.S. 238 (1972) (plurality opinion) (striking down the death penalty because of the excessive, arbitrary, freakish, and wanton manner in which states imposed it).

126. See *Roberts v. Louisiana*, 428 U.S. 325, 333-34 (1976) (invalidating the state’s death penalty statute for failing to allow the sentencing authority enough discretion during the sentencing proceedings).

127. See *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (explaining that failing to allow the consideration of the character and record of the individual offender during sentencing proceedings violates the Constitution).

128. See *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (finding that the Eighth Amendment prohibits any limitation on the mitigating factors a sentencing authority can hear); *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (holding that the Ohio death penalty statute did not meet the requirements of the Eighth and Fourteenth Amendments because it failed to allow the sentencing authority to consider any and all factors that would argue in favor of mitigation).

129. See *Thompson v. Oklahoma*, 487 U.S. 815, 836 (1988) (considering the death penalty disproportionate for offenders who are less than sixteen-years-old when they committed the crime); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (declaring the death penalty disproportionate for a felony murderer who neither killed nor intended to kill); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (ruling the death penalty disproportionate to the crime of rape).

130. See *supra* note 129 (discussing disproportionate penalties). The Court applies the same Eighth Amendment calculus to determine excessiveness as it does to determine proportionality. See *Coker*, 433 U.S. at 592.

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

132. See *id.* at 312 (examining legislative enactments and jury behavior as the most reliable and objective evidence of contemporary standards).

133. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (assessing contemporary values by looking to data concerning the actions of sentencing juries); *Enmund*, 458 U.S. at 794 (recognizing that the jury is a reliable objective index of contemporary values because of its close link with the community); see also *Spaziano v. Florida*, 468 U.S. 447, 462 (1984) (noting the significance of the jury’s role as a link between the community and the penal system); *Atkins*, 536 U.S. at 324 (Rehnquist, C.J., dissenting) (criticizing the majority for inserting its subjective opinion into the Eighth Amendment calculus where individual sentencing juries can give effect to the complex societal and moral considerations that inform the selection of the appropriate criminal penalty better than courts).

substantive right,¹³⁴ they cannot adequately determine those individuals who should benefit from that right.¹³⁵ The *Atkins* Court made clear that the national consensus against executing mentally retarded offenders does not apply to all people who claim its protections,¹³⁶ and it may not even apply to *Atkins* himself.¹³⁷

By their very nature, legislatures cannot undertake a case-by-case analysis; and judges, who could undertake such an analysis, do not reliably measure community values.¹³⁸ Only juries can evaluate the unique circumstances of each individual case, as *Atkins* impliedly requires.¹³⁹ Considering the varying abilities and degrees of impairment of mentally retarded offenders,¹⁴⁰ the Constitution requires jury identification of those mentally retarded offenders who fall within *Atkins*' national consensus.

134. See *Penry*, 492 U.S. at 334 (doubting that two state statutes prohibiting the execution of mentally retarded offenders coupled with the fourteen states that have rejected capital punishment altogether adequately support a national consensus); *Coker*, 433 U.S. at 594-95 (relying on the only state statute authorizing the death penalty for the rape of an adult woman as evidence of a national consensus against such a disproportionate penalty).

135. The disagreement about which offenders suffer from mental retardation inherently requires a case by case determination of their mental condition. *Atkins*, 536 U.S. at 317.

136. See *Atkins*, 536 U.S. at 317 (noting that not all defendants who argue for the mental retardation exclusion will have such impairment as to place them within the range of mentally retarded offenders covered by *Atkins*); accord *Penry*, 492 U.S. at 338 (holding that individualized consideration of mental retardation is necessary for any sentencing determination).

137. See *Atkins*, 536 U.S. at 317 (accepting Virginia's argument that *Atkins* may not qualify as mentally retarded and remanding for a factual determination of *Atkins*' mental retardation); see also *Atkins v. Commonwealth*, 581 S.E.2d 514 (Va. 2003) (remanding to the circuit court for a determination of *Atkins*' mental retardation); Adam Liptak, *Inmate's Rising I.Q. Score Could Mean His Death*, N.Y. TIMES, Feb. 6, 2005, at 114 (explaining that *Atkins*' IQ score has improved as a result of his participation in his defense); Maria Glod, *Jury to Be Killer's Arbiter Court Says; Under Va. Ruling, Panel Must Decide if Man is Mentally Retarded*, WASH. POST, June 7, 2003, at B1 (reporting on the Virginia Supreme Court's decision to remand *Atkins* for a jury determination of mental retardation).

138. See *Harris v. Alabama*, 513 U.S. 504, 519 (1995) (Stevens, J., dissenting) (asserting that judges may be too responsive to a political climate in which those who covet higher office must demonstrate their commitment to the death penalty to prove their toughness on crime, a problem that juries do not face); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (discussing the Framers' fear that judges may be biased or overzealous in their decisions).

139. See *Atkins*, 536 U.S. at 317 (declining to impose universal standards for determining mental retardation).

140. See *Penry*, 492 U.S. at 338 (recognizing that mentally retarded persons are individuals whose abilities and experiences can vary greatly); see also AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 49 (4th ed., Text Revision 2000) (classifying mental retardation as mild, moderate, profound, or severe); AMERICAN ASSOCIATION ON MENTAL RETARDATION, FACT SHEET: THE DEATH PENALTY (Mar. 6, 2001), at http://www.aamr.org/Policies/faq_death_penalty.shtml (on file with the American University Law Review) [hereinafter FACT SHEET] (emphasizing the individualized nature of mental retardation and the importance of personalized treatment programs); Mossman, *supra* note 109, at 273 (condemning *Atkins* for discriminatorily treating all mentally retarded offenders as categorically similar). As Dr. Mossman observes, "individuals with the same diagnosis may manifest different kinds of symptoms; even when the symptoms are the same, they may vary widely in their severity. Nor is there a direct or simple connection between severity of symptoms and impairments that may be relevant to a particular decision." *Id.* (internal citation omitted).

2. *Only a jury can determine whether a punishment responds proportionally to individual culpability*

In addition to the evolving standards of decency, the Supreme Court also looks to proportionality in evaluating cruel and unusual punishments.¹⁴¹ The proportionality of a given punishment is directly related to the circumstances of the crime and the characteristics of the offender,¹⁴² and it reflects a particular judgment about community values.¹⁴³ In *Coker v. Georgia*, the Court explained the relationship between proportionality and culpability with an emphasis on community values.¹⁴⁴ According to the Supreme Court's assessment of community values, mental retardation limits culpability

in the same way that youthfulness,¹⁴⁵ insanity,¹⁴⁶ mens rea,¹⁴⁷ and nature of the crime¹⁴⁸ do. The Court has repeatedly explained that juries are uniquely capable of determining the proportionality of capital punishment in any given case, considering their close ties to the community.¹⁴⁹

141. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (asserting that the Eighth Amendment prohibits "barbaric" punishments, as judged by the evolving standards of decency, and those punishments that are "excessive" in relation to the severity of the crime); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (holding that a punishment is excessive if it is disproportionate to the severity of the crime).

142. See *Penry*, 492 U.S. at 319.

143. See *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (discussing the sociological justification for individual consideration and asserting that culpability depends on an individual's background).

144. See 433 U.S. at 592 (stating that a punishment should not inflict needless pain and suffering and that it must be proportional to the severity of the crime).

145. See *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988) (noting that juvenile offenders are not as culpable as their adult counterparts).

146. See *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986) (initiating extra protections for insane offenders because of their diminished culpability).

147. See *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (finding felony murderers who neither killed nor intended to kill less culpable than intentional murderers). *But see* *Tison v. Arizona*, 481 U.S. 137, 150-54 (1985) (diminishing *Enmund*'s protections because felony murderers who are major participants in a crime and act with reckless disregard for human life have the same culpability as intentional murderers and should receive the same punishment).

148. See *Coker*, 433 U.S. at 592 (considering rapists less culpable than murderers and excluding them from death penalty eligibility).

149. See, e.g., *Ring v. Arizona*, 536 U.S. 584, 615-16 (2002) (Breyer, J., concurring) (marshaling support for the argument that juries possess comparative advantages over judges in determining the propriety of capital punishment in each case); *Spaziano v. Florida*, 468 U.S. 447, 486 (1984) (Stevens, J., concurring in part and dissenting in part) (explaining that a jury "reflect[s] more accurately the composition and experiences of the community as a whole"); *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968) (observing that a jury is more likely to "express the conscience of the community on the ultimate question of life or death"); see also *Huigens*, *supra* note 67, at 1202-04 (insisting that the Eighth Amendment's concern with culpability is really an effort to punish offenders with respect to what they "deserve" based on community values).

The fact that the *Atkins* Court confused its analysis¹⁵⁰ and failed to consider fully the excessiveness of executing mentally retarded offenders does not leave proportionality assessments devoid of constitutional significance.¹⁵¹ Had the *Atkins* Court considered this element, it would have concluded that executing mentally retarded offenders leads to the unnecessary imposition of pain and suffering.¹⁵² Because individual culpability depends on the values of the community, the Eighth Amendment requires a jury determination of an offender's mental retardation.¹⁵³

Excessiveness also depends on whether a particular punishment serves the acceptable goals of punishment.¹⁵⁴ According to the Court, a punishment can serve as a deterrent only when the crime results from premeditation and deliberation.¹⁵⁵ A punishment's specific deterrent effect¹⁵⁶ depends on an individual's ability to anticipate consequences and

150. See generally *Atkins v. Virginia*, 536 U.S. 304 (2002) (omitting any discussion of whether the execution of a mentally retarded offender is an unnecessary infliction of pain and suffering).

151. See *id.* at 311-12 (judging excessiveness by the evolving standards of decency). The *Atkins* Court confuses the two separate prongs of Eighth Amendment analysis: (1) whether the punishment is "cruel and unusual" and (2) whether it is excessive. *Gregg v. Georgia*, 428 U.S. 153, 173-74 (1976). In *Trop v. Dulles*, the case that sets the context and rules for the Court's Eighth Amendment analysis, the Court uses the evolving standards of decency to determine the meaning of "cruel and unusual." 356 U.S. 86, 100-01 (1958). In *Atkins*, the Court relies on evolving standards to determine whether the execution of mentally retarded offenders is "cruel and unusual," and fails to undertake a separate excessiveness analysis as required by the Eighth Amendment. 536 U.S. at 321. This problem does not, however, threaten the legitimacy of the Court's ruling because the Court must at a minimum find that the practice violates one prong of the analysis to hold that it violates the Eighth Amendment. See *Gregg*, 428 U.S. at 173.

152. See *Rex Bowman, Judge: Inmate Should Remain on Death Row*, RICH. TIMES-DISPATCH, Mar. 5, 2004, at B1, available at 2004 WL 61898880. "Walton is incapable of coherent, prolonged conversation, does not bathe and believes he can get a motorcycle, telephone and a job at Burger King after his execution." *Id.* Like *Atkins* who has an IQ of fifty-nine, Walton has an IQ of sixty-six and suffers from similar, if not worse, impairments. *Atkins*, 536 U.S. at 309; cf. *Ford v. Wainwright*, 477 U.S. 399, 422 (1986) (Powell, J., concurring) (explaining that "those who are unaware of the punishment they are about to suffer and why they are to suffer it" cannot constitutionally be executed).

153. *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("[T]he sentence imposed . . . should reflect a reasoned moral response to the defendant's background, character, and crime . . .") (emphasis in original).

154. See *Gregg*, 428 U.S. at 183 (identifying retribution and deterrence as the acceptable penological goals of capital punishment).

155. *Enmund v. Florida*, 458 U.S. 782, 799 (1982). Like heat of passion or provocation, premeditation and deliberation are elements of the crime of murder. See, e.g., *Mullaney v. Wilbur*, 421 U.S. 684, 696 (1975). As components of a defendant's mens rea, the Sixth Amendment requires the prosecution to independently prove these facts to a jury beyond a reasonable doubt. *Id.*; see also *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *supra* text accompanying notes 56-57.

156. See William C. Bailey & Ruth D. Peterson, *Murder, Capital Punishment and Deterrence: A Review of the Literature*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 135, 136 (Hugo Adam Bedau ed., 1997) (defining specific deterrence as the punishment necessary to prevent the individual offender from killing again). The Eighth Amendment analysis must focus on specific rather than general deterrence because

control his behavior to avoid them.¹⁵⁷ The assessment of this ability necessarily depends on community values.¹⁵⁸

Mentally retarded offenders do not act with the “cold calculus that precedes the decision”¹⁵⁹ of other murderers, and consequently their punishments will not serve a deterrent purpose.¹⁶⁰ As a result, the exclusion of mentally retarded offenders from capital eligibility will not diminish whatever general deterrent effect the death penalty may have.¹⁶¹ Not all mentally retarded offenders have the same level of impairment,¹⁶² and some may have the capacity to act deliberately.¹⁶³ To the extent that the effectiveness of deterrence depends on the capacity of an individual offender, only the jury can undertake the individual assessment necessary to distinguish those offenders who act with premeditation and deliberation from those who do not.¹⁶⁴

Retribution presents the strongest justification for an Eighth Amendment right to a jury determination of mental retardation.¹⁶⁵ Retribution is the

culpability depends on the characteristics of the individual offender. *See Gregg*, 428 U.S. at 183.

157. *See, e.g., Atkins*, 536 U.S. at 320-21 (“The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct.”).

158. *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring).

159. *Gregg*, 428 U.S. at 186 (noting that there are some murders, such as murder for hire, where murderers likely consider that they may be subject to the death penalty before they act).

160. *See Atkins*, 536 U.S. at 319-20 (concluding that the cognitive and behavioral impairments that make mentally retarded offenders less culpable make it less likely that they can process the possibility of execution and control their behavior as a result). *See generally Ring v. Arizona*, 536 U.S. 584, 614-15 (2002) (Breyer, J., concurring) (questioning the deterrent effect of the death penalty in general and citing academic studies supporting his conclusions); Ernest van den Haag, *On Deterrence and the Death Penalty*, in PUNISHMENT AND THE DEATH PENALTY: THE CURRENT DEBATE 125, 125-35 (Robert M. Baird & Stuart E. Rosenbaum eds., 1995) (questioning the deterrent effect of the death penalty); Daniel M. Farrell, *The Justification of General Deterrence*, in PUNISHMENT AND REHABILITATION 38, 39-60 (Jeffrie G. Murphy ed., 3d ed. 1995) (arguing that “wrongdoers may be punished beyond what is necessary to keep them from doing wrong again—if so punishing them can plausibly be said to be likely to deter others from doing wrong themselves”) (emphasis in original).

161. *See Atkins*, 536 U.S. at 320 (noting that the exclusion of mentally retarded offenders will not minimize the general deterrent effect of the death penalty because non-mentally retarded offenders can still receive a death sentence).

162. *See supra* note 140 (emphasizing that mentally retarded offenders suffer differing degrees of impairment and that they can act with varying degrees of culpability, consequently requiring individualized consideration to determine whether a particular punishment, for a particular individual, serves an acceptable goal of punishment).

163. *See Atkins*, 536 U.S. at 317 (leaving to the states to determine whether a specific individual is mentally retarded and whether that individual has the capacity to act deliberately).

164. *See Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968) (highlighting the jury’s unique ability to express the conscience of the community on the propriety of a given punishment).

165. *See Ring*, 536 U.S. at 614 (Breyer, J., concurring in judgment) (noting that the jury, as a representative of the community, is more competent than a judge to determine whether capital punishment will serve its necessary retributive purpose).

community's moral response to a particular crime.¹⁶⁶ Comprised of members of the community, a jury "remains uniquely capable of determining whether, given the community's views, capital punishment is appropriate."¹⁶⁷ The characteristics of mentally retarded offenders that make the death penalty disproportionate and ineffective as a deterrent involve the individual culpability determinations that retributive analysis requires.

Mentally retarded offenders tend to act on impulse rather than pursuant to a plan, tend to follow rather than lead, make poor witnesses, and have difficulty controlling their behavior and appreciating the wrongfulness of their conduct.¹⁶⁸ No one suggests that these offenders should escape criminal liability altogether,¹⁶⁹ only that the Court's Eighth Amendment narrowing jurisprudence¹⁷⁰ requires states to limit capital eligibility to the worst offenders.¹⁷¹ Because impairment varies depending on the severity and extent of mental retardation,¹⁷² retributive analysis necessarily involves an assessment of social values.¹⁷³ Consequently, juries must consider the extent of offenders' mental retardation in determining the retributive purpose their execution would serve.¹⁷⁴

166. See *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) ("[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct."). See generally Michael S. Moore, *The Moral Worth of Retribution*, in PUNISHMENT AND REHABILITATION 94 (Jeffrie G. Murphy ed., 1995) (defining retribution and justifying it as a theory of punishment).

167. *Ring*, 536 U.S. at 616 (Breyer, J., concurring in judgment).

168. See Lockyer & Carey, *supra* note 81, at 333 (identifying characteristics of mentally retarded offenders that make them less culpable); Mossman, *supra* note 109, at 267 (highlighting the behavior of mentally retarded offenders that distinguishes them from the general community); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 429 (1985) (detailing the impulse control problems that typify mentally retarded offenders).

169. See *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (insisting that mentally retarded offenders' deficiencies do not warrant exemption from criminal sanctions); see also Lockyer & Carey, *supra* note 81, at 333-34 (noting that society views mentally retarded offenders as less culpable, though not completely blameless, for criminal acts).

170. See, e.g., *Gregg*, 428 U.S. at 186. The Court's narrowing jurisprudence seeks to ensure that only those most deserving of death sentences receive them. See *Atkins*, 536 U.S. at 319; see also *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988) (preventing the execution of juvenile offenders younger than sixteen); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (exempting insane offenders from capital punishment); *Enmund v. Florida*, 458 U.S. 782, 799 (1982) (excluding felony murderers who neither killed nor attempted to kill from death penalty eligibility).

171. See *Gregg*, 428 U.S. at 184 (observing that capital punishment may be appropriate in extreme cases as a response to certain crimes that are so "grievous an affront to humanity" that the only adequate response is the death penalty).

172. See *Atkins*, 536 U.S. at 318 (noting that while some mentally retarded persons know the difference between right and wrong and can conform their behavior to the requirements of the law, others may not have the same ability).

173. See *id.* (recognizing that identifying the worst offenders is a social judgment that can only be accomplished by members of the community, whose values form that judgment).

174. See *Ford*, 477 U.S. at 410 (noting that once the Constitution recognizes a

C. Due Process Right

Both the Sixth and Eighth Amendment protections discussed in the preceding two sections apply to the states through the Due Process Clause of the Fourteenth Amendment.¹⁷⁵ The Supreme Court has not addressed whether the Due Process Clause provides an independent basis for an offender's right to a jury determination of whether the offender is mentally retarded.¹⁷⁶ Once the Court recognizes a due process right, it applies either the *Patterson v. New York* "historical basis"¹⁷⁷ test or the *Mathews v. Eldridge* "balancing test"¹⁷⁸ to determine the appropriate placement of the burden of proof.¹⁷⁹

1. Due process requires the state to provide a capital defendant with a mental retardation hearing

The Due Process Clause requires the prosecution to prove all of the elements included in the offense charged beyond a reasonable doubt.¹⁸⁰ The absence of mental retardation constitutes an element of capital murder¹⁸¹ and therefore requires proof to a jury beyond a reasonable doubt.¹⁸² The Due Process Clause also affords individuals the right to a fair

substantive right, states must enforce it using any procedures necessary to ensure its protections). In the context of the mental retardation exclusion, this rule requires a consideration of the retributive purposes served by the penalty. *Id.*

175. U.S. CONST. amend. XIV; see *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (explaining the doctrine of incorporation). Incorporation is the process through which "many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment." *Id.*

176. The Court has, however, expanded the Due Process Clause to find other procedural protections. See, e.g., *Ake v. Oklahoma*, 470 U.S. 68, 86-87 (1985) (finding a due process right to a psychological expert); *Douglas v. California*, 372 U.S. 353, 357 (1963) (guaranteeing criminal defendants the right to counsel on their first appeal of right); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (recognizing a criminal defendant's due process right to a free transcript on appeal). But see *Ross v. Moffitt*, 417 U.S. 600, 610 (1974) (refusing to recognize a due process right to counsel for indigent criminal defendants on discretionary appeals).

177. 432 U.S. 197, 201-02 (1977) (finding that state laws assigning burdens of proof in criminal cases comport with due process unless they violate traditionally-held fundamental principles of justice).

178. 424 U.S. 319, 335 (1976) (analyzing due process claims by balancing the private interest at stake; the risk of error inherent in the procedures used to deprive the private individual of that interest, and the potential value "of additional or substitute procedural safeguards;" and the government's interest in the matter).

179. Compare *Patterson*, 432 U.S. at 201-02 (evaluating the assignment of a burden of proof on the basis of fundamental principles of justice), with *Mathews*, 424 U.S. at 335 (articulating a three-pronged interest-balancing test for determining the appropriate placement of the burden of proof).

180. See *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986) (noting that a state legislature's definition of the elements of a crime and the facts that must be demonstrated to prove guilt beyond a reasonable doubt are generally presumed to comport with due process).

181. See *supra* notes 63-96 and accompanying text (justifying the treatment of mental retardation as an element of capital murder).

182. See *McMillan*, 477 U.S. at 85.

hearing.¹⁸³ In the wake of *Atkins*, the due process right to be heard requires, at a minimum, that states provide capital defendants with a mechanism for identifying mental retardation.¹⁸⁴ Since *Atkins* established new due process rights for capital offenders, states must determine how best to protect these rights.

2. *Patterson's historical basis test does not apply to newly recognized substantive rights*

The Supreme Court has embraced *Patterson's* historical test for determining the appropriate placement of the burden of proof.¹⁸⁵ Under *Patterson*, a state regulation violates the Due Process Clause only if it offends a fundamental principle of justice.¹⁸⁶ According to the Court, *Patterson* shows the proper respect for state power¹⁸⁷ while still protecting constitutional rights.¹⁸⁸

Under *Patterson's* deferential approach, a state could require defendants to prove mental retardation and force them to bear the burden of proof by a preponderance of the evidence,¹⁸⁹ clear and convincing evidence,¹⁹⁰ or

183. See *Mathews*, 424 U.S. at 333 (“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”) (internal quotations omitted); see also *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974) (requiring some form of a hearing before the state can deprive an individual of a property interest); *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) (“[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.”).

184. See *Mathews*, 424 U.S. at 333 (recognizing that the government must provide private individuals some form of hearing when depriving them of constitutionally-protected rights).

185. See, e.g., *Medina v. California*, 505 U.S. 437, 445 (1992) (applying *Patterson's* historical basis test and discarding the *Mathews* balancing test to evaluate the placement of the burden of proof on the defendant in a competency proceeding by a preponderance of the evidence).

186. *Patterson v. New York*, 432 U.S. 197, 201-02 (1968).

187. See *id.* at 201 (concluding that the onus of preventing and dealing with crime belongs to the states rather than the federal government).

188. See *id.* at 202 (indicating that the Court will strike down state procedures that offend “some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental”) (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958)).

189. See *Tobolowsky*, *supra* note 107, at 119 (recommending that states assign the defendant “the burden of proof to establish mental retardation by a preponderance of the evidence”). Several states have adopted this view and placed the burden of proof on the defendant to establish mental retardation by a preponderance of the evidence. See ARK. CODE ANN. § 5-4-618(c) (Michie 2003); CAL. PENAL CODE § 1376(b)(3) (West 2004); IDAHO CODE § 19-2515A(3) (Michie 2004); 725 ILL. COMP. STAT. 5/114-15(b) (2004); LA. REV. STAT. ANN. § 905.5.1(C)(1) (West 2004); MD. CODE ANN., CRIM. LAW § 2-202(b)(2)(ii) (2004); MO. ANN. STAT. § 565.030(4)(1) (West 2004); NEB. REV. STAT. ANN. § 28-105.01(4)(b)(ii) (Michie 2004); NEV. REV. STAT. 174.098(5)(b) (2004); N.M. STAT. ANN. § 31-20A-2.1(C) (Michie 2004); N.Y. CRIM. PROC. LAW § 400.27(12)(e) (McKinney 2004); S.D. CODIFIED LAWS § 23A-27A-26.3 (Michie 2004); TENN. CODE ANN. § 39-13-203(c) (2003); UTAH CODE ANN. § 77-15a-104(12)(a) (2004); VA. CODE ANN. § 19.2-264.3:1.1(C) (Michie 2004); WASH. REV. CODE ANN. § 10.95.030(2) (West 2004).

190. Some states require the defendant to prove mental retardation by clear and

possibly even beyond a reasonable doubt.¹⁹¹ With the recent development of a national consensus,¹⁹² our society has no fundamental notions of justice about *how* to prevent the execution of mentally retarded offenders.¹⁹³ As long as a state provides defendants the opportunity to present evidence of their mental retardation, the state procedure will survive constitutional scrutiny under *Patterson's* historical basis test.

Under a broader interpretation of "fundamental notions of justice," state procedures for identifying and excluding mentally retarded offenders from capital punishment could fail *Patterson's* historical basis test.¹⁹⁴ If the Court accepts that the Eighth Amendment ranks in society as a fundamental notion of justice,¹⁹⁵ then the Court should view all of its protections as fundamental.¹⁹⁶ This would include newly recognized rights like the exclusion of mentally retarded offenders from the death penalty.¹⁹⁷ Admittedly, classifying a newly recognized right as historically fundamental seems counterintuitive, and the Court will probably not find such an argument persuasive.

More likely, a *Patterson* analysis would justify any state procedure that allows a defendant the opportunity to be heard.¹⁹⁸ Consequently, any state

convincing evidence. See ARIZ. REV. STAT. ANN. § 13-703.02(G) (West 2004); COLO. REV. STAT. ANN. § 18-1.3-1102(2) (West 2004); DEL. CODE ANN. tit. 11, § 11-4209(D)(3)(b) (2003); FLA. STAT. ANN. § 921.137(4) (West 2004); IND. CODE ANN. § 35-36-9-4(b) (West 2004); N.C. GEN. STAT. § 15A-2005(c) (2004).

191. See GA. CODE ANN. § 17-7-131(c)(3) (Harrison 2004) (placing the burden of proof on the defendant beyond a reasonable doubt). Other states fail to specify the applicable burden of proof. See CONN. GEN. STAT. ANN. § 53a-46a(h)(2) (West 2004); KAN. STAT. ANN. § 21-4623 (2003); KY. REV. STAT. ANN. § 532.135 (Michie 2004); OKLA. STAT. ANN. tit. 22, § 1175.5(3) (West 2004); S.C. CODE ANN. § 16-3-20(C)(b)(10) (Law. Co-op. 2003).

192. Compare *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) (finding the evidence insufficient to recognize a national consensus against the execution of mentally retarded offenders in 1989), with *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (recognizing such a consensus in 2002).

193. Cf. *Medina v. California*, 505 U.S. 437, 446 (1992) (observing that there is no settled tradition on the proper allocation of the burden of proof in a competency proceeding and upholding California's procedure of placing the burden of proof on the defendant by a preponderance of the evidence).

194. See *Patterson v. New York*, 432 U.S. 197, 202 (1977); see also *supra* notes 185-88 and accompanying text (discussing the *Patterson* historical basis test).

195. The Eighth Amendment constitutes a "principle of justice so rooted in the traditions and conscience of [the American] people as to be ranked as fundamental." *Patterson*, 432 U.S. at 202. The Eighth Amendment prohibits the execution of mentally retarded offenders. *Atkins*, 536 U.S. at 321. Although the state does not have to adopt a procedure that is more favorable to the defendant, it must observe procedures adequate to protect a mentally retarded offender's right not to be executed. See *Medina*, 505 U.S. at 449.

196. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment draws its meaning from the evolving standards of decency that mark the progress of a maturing society.").

197. See *Atkins*, 536 U.S. at 321 (finding that imposing the death penalty on mentally retarded individuals violates the Eighth Amendment).

198. See *Medina*, 505 U.S. at 449 ("Once a state provides a defendant access to procedures . . . we perceive no basis for holding that due process further requires the state to assume the burden of vindicating the defendant's constitutional right by persuading the trier

procedure that allowed for the consideration of an offender's mental retardation would pass constitutional muster.¹⁹⁹ As a newly recognized right, the mental retardation exclusion could not meet *Patterson's* deferential standard.²⁰⁰ Considering the Supreme Court's questionable application of *Patterson*,²⁰¹ and confusion about its applicability to newly recognized rights,²⁰² the Court should not rely on the historical basis test to evaluate the procedures states use to exclude mentally retarded offenders from the death penalty.

3. *The Supreme Court should use the Mathews balancing test to assign the burden of proof*

Although the Supreme Court has suggested that the *Mathews* test does not apply to criminal procedure issues,²⁰³ this position is irreconcilable with other Court decisions.²⁰⁴ Considering that the Court actually applies the *Mathews* test despite its claims to the contrary,²⁰⁵ coupled with the fact that *Mathews* allows for a more accurate assessment of the interests involved in assigning the burden of proof,²⁰⁶ due process analysis requires some comparison of the state's interests with those of the defendant.²⁰⁷

of fact.”).

199. *See id.*; *see also Patterson*, 432 U.S. at 201-02 (noting that state procedural rules do not violate the Due Process Clause unless they offend a fundamental principle of justice).

200. *See* 432 U.S. at 197.

201. *Patterson's* continued utility as a tool for due process analysis is uncertain after the Court's decision in *Medina*, which while affirming the historical test as correct, effectively applied the *Mathews'* balancing test. *See Medina*, 505 U.S. at 454 (O'Connor, J., concurring in judgment) (suggesting that the majority's rejection of *Mathews* is inappropriate considering it could have reached the same result by applying the *Mathews* balancing test); *see also* Bruce J. Winick, *Presumptions and Burdens of Proof in Determining Competency to Stand Trial: An Analysis of Medina v. California and the Supreme Court's New Due Process Methodology in Criminal Cases*, 47 U. MIAMI L. REV. 817, 827 (1993) (criticizing the majority opinion in *Medina* for applying a balancing inquiry that cannot be meaningfully distinguished from the three-factor test it claims to disavow).

202. *See* Winick, *supra* note 201, at 864 (1993) (suggesting that the *Medina* test does not allow the Court to recognize new forms of injustice or to prohibit historically acceptable practices that seem increasingly unjust).

203. *See Medina*, 505 U.S. at 444 (noting that the *Mathews* test was designed to address due process issues related to administrative proceedings); *see also Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (evaluating the requirements of due process in an administrative law hearing).

204. *See, e.g., Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (applying the *Mathews* balancing test to determine the due process requirements of providing psychological experts to indigent offenders in criminal cases); *United States v. Raddatz*, 447 U.S. 667, 680 (1980) (finding no due process violation where an appellate court relies on a trial court's finding of facts in a criminal case under de novo review after applying the *Mathews* test); *see also Medina*, 505 U.S. at 453 (O'Connor, J., concurring in judgment) (observing that the majority cannot distinguish *Ake* without disavowing the analysis that supports the decision). *But see Medina*, 505 U.S. at 444 (claiming that the *Mathews* analysis was not essential to results reached in *Ake* or *Raddatz*).

205. *See Cooper v. Oklahoma*, 517 U.S. 348, 365 (1996) (applying *Mathews* implicitly by weighing the state's interests against those of the defendant).

206. *See* Winick, *supra* note 201, at 866 (proposing that the Court discard the *Patterson* test as unduly rigid and unable to adequately protect fundamental fairness and due process

The first prong of the *Mathews* balancing test involves the consideration of the private interest at stake.²⁰⁸ Facing the death penalty, the defendant's interest, is quite simply, his life.²⁰⁹ This interest in life is greater than his interest in liberty,²¹⁰ in being tried while competent,²¹¹ in having effective assistance of counsel,²¹² in accessing mental health experts,²¹³ and certainly greater than retaining an interest in property.²¹⁴ Given the enormity of this interest,²¹⁵ proper respect for life²¹⁶ would require the most stringent protections to ensure that only the most deserving of offenders receive the ultimate punishment.²¹⁷

Second, a *Mathews* analysis requires a consideration of "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."²¹⁸ Placing the burden of proving mental retardation on a defendant, even by a

of law).

207. See *Mathews*, 424 U.S. at 335.

208. *Id.*

209. Cf. *Washington v. Glucksberg*, 521 U.S. 702, 741 (1997) (Stevens, J., concurring) ("The value to others of a person's life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life."). Ted Barrett et al., *Federal Court Set to Hear Schiavo's Case*, CNN.com, Mar. 21, 2005, at <http://www.cnn.com/2005/LAW/03/21/schiavo/index.html> (on file with American University Law Review) (quoting President George W. Bush: "In cases like this one, where there are serious questions and substantial doubts, our society, our laws and our courts should have a presumption in favor of life."). *But see* *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (allowing a state to differentiate among the value of human life in certain circumstances).

210. Cf. *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (observing that individual's interest in liberty prevents involuntary civil commitment absent proof that he poses a threat to himself or society).

211. See *Pate v. Robinson*, 383 U.S. 375, 378 (1966) (asserting that the conviction of a legally incompetent accused violates due process).

212. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (requiring proof that the attorney's conduct violated professional standards and that these errors prejudiced the defendant in order to state a claim for ineffective representation).

213. See *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (requiring states to provide mental health experts at trial because the lack of such expert testimony could be devastating to a successful defense).

214. See *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (holding that only minimal due process protections are required for the state to deprive an individual of a property interest).

215. See *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (focusing on the risks at stake in a capital trial and arguing that the imposition of the death penalty involves extraordinary consideration).

216. See Damien P. DeLaney, *Better to Let Ten Guilty Men Live: The Presumption of Life—A Principle to Govern Capital Sentencing*, 14 CAP. DEF. J. 283, 285 (2002) (arguing "that an individual's liberty interest outweighs the government's interest in punishing criminals").

217. See *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (noting that previous case law required any capital sentencing scheme to significantly distinguish the few cases to which the death penalty applied from the many to which it did not); see also Robert Blecker, *Among Killers, Searching for the Worst of the Worst*, WASH. POST, Dec. 3, 2000, at B1 (grappling with the problem of identifying the worst offenders who deserve the death penalty).

218. 424 U.S. at 335.

preponderance of the evidence, risks excluding some offenders covered by the national consensus.²¹⁹ Mentally retarded offenders will have the same difficulty proving mental retardation as they have showing mitigation.²²⁰ Placing the burden of proof on the state, however, would reallocate this risk and cautiously err on the side of life, rather than death.²²¹ Considering the defendant's immense interest in life and the possible error inherent in mental retardation determinations, the Due Process Clause requires the prosecution to bear the burden of proving the absence of mental retardation before imposing the death penalty.

Finally, one must look to the government's interest and balance it against the factors discussed in the preceding two paragraphs.²²² Admittedly a state has a strong interest in punishing an offender it has already convicted.²²³ Unlike competence²²⁴ or sanity²²⁵ determinations, an offender adjudicated mentally retarded does not avoid punishment altogether,²²⁶ but rather the defendant only escapes the imposition of the death penalty. Placing the burden of proof on the prosecution would not interfere with a state's ability to punish dangerous offenders or protect society;²²⁷ it simply requires the state to prove one additional fact, which it would have to prove anyway, before imposing the ultimate penalty.²²⁸

219. See *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (noting that the procedure at issue in *Medina* created problems when the evidence is equal). In other words, *Medina* allowed a state to try an offender whom the evidence showed was just as likely competent as not. 505 U.S. 437, 449 (1992). Under this analysis, a state could execute an offender who is just as likely mentally retarded as not, even though the offender would have diminished culpability and could fall within *Atkins*' national consensus. See *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

220. See *Atkins*, 536 U.S. at 320-21 (justifying a prohibition on the execution of mentally retarded offenders by suggesting that such individuals are less capable of persuasively establishing mitigating factors because of their handicap).

221. See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 283 (1990) (declaring that the purpose of a standard of proof is to place the risk of error on the party that would suffer least from any potential error).

222. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (indicating that the examination of the state's interest should focus on, among other considerations, the fiscal and administrative burdens that the additional or substitute procedure would require).

223. See *Ford v. Wainwright*, 477 U.S. 399, 425 (1986) (Powell, J., concurring).

224. See *Pate v. Robinson*, 383 U.S. 375, 384 (1966) (preventing the state from trying an incompetent offender, even when the offender waives the right to a hearing).

225. See *Leland v. Oregon*, 343 U.S. 790, 795 (1952) (recognizing insanity as an affirmative defense that allowed the defendant to escape all criminal liability and receive mental health treatment rather than punishment).

226. See *Atkins v. Virginia*, 536 U.S. 304, 306 (2002) (embracing the notion that mentally retarded persons should be tried and punished when they commit crimes). The *Atkins* holding only excludes mentally retarded offenders from capital eligibility, not punishment altogether. *Id.* at 318-21.

227. See *id.* at 318 (emphasizing the national consensus supporting some form of criminal sanctions for mentally retarded offenders because such individuals can often distinguish between right and wrong and can competently stand trial, although their mental deficiencies somewhat diminish their culpability for the crimes they may commit).

228. Cf. *Ring v. Arizona*, 536 U.S. 584, 599 (2002) (requiring the state to prove additional aggravating facts before sentencing an offender to death).

A state also has an interest in minimizing the expense of the death penalty and ensuring the integrity of its criminal justice system.²²⁹ Requiring the state to prove mental retardation does not, however, significantly increase costs²³⁰ since the death penalty already requires jury sentencing.²³¹ Fears about the defendant feigning mental retardation could support the placement of the burden on the defendant.²³² Unlike questions of competence,²³³ malingering in mental retardation determinations does not pose a significant threat²³⁴ and certainly does not outweigh the defendant's interest in life. Applying the *Mathews* test by balancing an individual's interest in life against the state's interest in punishment, coupled with the minimal burden placed on the state,²³⁵ due process requires the state to bear the burden of proving mental retardation before imposing the death penalty.²³⁶

229. See *Ake v. Oklahoma*, 470 U.S. 68, 78-80 (1985) (assessing the economic impact of providing psychiatric assistance to defendants presenting an insanity defense and the risk of error that might arise if such services are not made available).

230. See *id.* at 79 (recognizing that providing a mental health expert in a criminal case is well worth the cost to the state when considering the threat to an offender's liberty); Richard C. Dieter, *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty* (Fall 1994), at <http://www.deathpenaltyinfo.org/article.php?scid=45&did=385#sxn> (on file with the American University Law Review) (criticizing politicians for allowing the death penalty to escape the type of cost-benefit analysis that all other criminal justice programs receive). Even where cost is inapposite, permitting or denying an exclusionary procedure on the basis of cost alone seems incompatible with common notions of fair play and justice considering the value society places on human life. *Id.*

231. See *Ring*, 536 U.S. at 599 (requiring that the jury, not the judge, determine the existence of aggravating factors); *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (approving Georgia's bifurcated capital sentencing procedure where a jury determines the guilt and punishment of a defendant in two separate stages).

232. Cf. *Cooper v. Oklahoma*, 517 U.S. 348, 365 (1996) (acknowledging that the possibility of defendants lying about their mental incompetence may add additional costs to a trial and frustrate a state in the "prompt disposition of criminal charges").

233. See Winick, *supra* note 201, at 840-41 (discussing Justice O'Connor's concurring opinion in *Medina v. California*, which argued that placing the burden of proof on defendants to prove their incompetence gives them more incentive to cooperate with psychiatric evaluators and reduces the risk of feigning; Justice O'Connor also noted that competence is a condition that can fluctuate over time).

234. See James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 13-14 (2003) (reviewing literature on malingering and arguing that feigning has not proven to be a practical problem in assessing mental retardation); Lockyer & Carey, *supra* note 81, at 336 (noting that the "age of onset" requirement in professional definitions of mental retardation ensures that defendants may not feign mental retardation once charged with a capital offense) (quoting Ellis, *supra*).

235. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

236. See *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) ("[I]f the constitution renders the fact or timing of [an] execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being."); see also *Cooper v. Oklahoma*, 517 U.S. 348, 365 (1996) (placing the burden of proof on the government to establish the defendant's mental state because the government can hold an incompetent defendant in custody to determine whether he will attain competence in the future).

4. *At a minimum, due process requires the state to show that an offender is not mentally retarded by a probable cause standard*

When the state bears the burden of proof in criminal procedure, it must satisfy either a probable cause²³⁷ or a beyond a reasonable doubt²³⁸ standard.²³⁹ The probable cause standard applies when state action infringes on a constitutional right.²⁴⁰ The reasonable doubt standard applies when the state attempts to deprive an individual of life, liberty, or property.²⁴¹ The execution of mentally retarded offenders would violate a constitutional right²⁴² and deprive individuals of their interest in life, potentially implicating either standard. Given the Supreme Court's preference for deferential review, the Due Process Clause at least requires the prosecution to bear the burden of proof by a probable cause standard and could even justify placing a higher burden on the state.

III. RECOMMENDATIONS

After recognizing that the government must prove the absence of mental retardation to a jury, states may implement a variety of procedures to protect this right. Each of these procedures requires an explicit definition of mental retardation, and states should consider using the definitions the Supreme Court relied upon in *Atkins* to achieve cross-jurisdictional uniformity.²⁴³ As long as state legislatures place the burden of proving the absence of mental retardation on the prosecution, they have the freedom to place this determination in a pretrial hearing, in the guilt/innocence phase

237. See *Illinois v. Gates*, 462 U.S. 213, 232 (1983) (“[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.”).

238. See *Sundby*, *supra* note 97, at 458 (observing that the reasonable doubt standard gives practical effect to the constitutional requirement that criminal defendants be presumed innocent until proven guilty).

239. See Ronald J. Allen, *Rationality and Accuracy in the Criminal Process: A Discordant Note on the Harmonizing of the Justices' Views on Burdens of Persuasion in Criminal Cases*, 74 J. CRIM. L. & CRIMINOLOGY 1147, 1148 (1983) (explaining that proof beyond a reasonable doubt is the standard burden of proof in criminal cases).

240. See, e.g., *Ybarra v. Illinois*, 444 U.S. 85, 86 (1979) (requiring the state to show probable cause before searching an individual without a warrant); *United States v. Watson*, 423 U.S. 411, 424 (1976) (requiring the state to show probable cause for a warrantless public arrest); *Jones v. United States*, 357 U.S. 493, 497-98 (1958) (requiring the state to show probable cause before seizing private property).

241. See, e.g., *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986) (reiterating the rule that the prosecution must prove elements of a crime to a jury beyond a reasonable doubt).

242. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (identifying an Eighth Amendment protection that prohibits the execution of mentally retarded offenders).

243. See Ellis, *supra* note 234, at 14 (recommending that the states adopt the American Association of Mental Retardation's (“AAMR”) definition of mental retardation in their mental retardation exclusion statutes); Tobolowsky, *supra* note 107, at 89 (cautioning states to ensure that their definitions of mental retardation are at least as comprehensive as the clinical definitions referenced by the Court in *Atkins*); see also *infra* note 248 (presenting the AAMR's and American Psychiatric Association's (“APA”) definitions of mental retardation).

of trial or in the sentencing phase.

A. *States Should Adopt a Rational and Uniform Definition of Mental Retardation*

The *Atkins* Court admitted that identifying and excluding mentally retarded offenders from the death penalty would constitute the most difficult part of implementing its decision.²⁴⁴ Studies estimate that approximately one to three percent of the population suffers from mental retardation²⁴⁵ and four to twenty percent of offenders on death row are mentally retarded.²⁴⁶ The identification of mentally retarded offenders depends on the definition a state legislature adopts.²⁴⁷ State legislatures should consider adopting the definitions relied upon by the Supreme Court in *Atkins*.

Both of the clinical definitions the Supreme Court referenced in *Atkins* contain three main components: intellectual functioning, adaptive behavior, and age of onset.²⁴⁸ Experts measure intellectual functioning primarily through IQ testing.²⁴⁹ Although informative, IQ testing should not dispose of the mental retardation question, and states should rely on it cautiously.²⁵⁰ The adaptive behavior component evaluates the practical

244. See *Atkins*, 536 U.S. at 317 (noting that Virginia disputes *Atkins*' mental retardation and that not all mentally retarded offenders fall within the Eighth Amendment's protection because not all offenders are so mentally retarded that their execution would offend the contemporary standards of decency).

245. See FACT SHEET, *supra* note 140 (stating that between 4% and 10% of the individuals in the criminal justice system are mentally retarded, compared to 1.5% to 2.5% of the general public).

246. See Tobolowsky, *supra* note 107, at 86 (indicating that approximately 140 to 170 death row inmates in the United States are deemed mentally retarded out of a total death row population of 3,500).

247. Compare KAN. STAT. ANN. § 76-12b01(d) (2003) (defining mental retardation as "significantly subaverage general intellectual functioning . . . manifested during the period of birth to age 18"), with MD. CODE ANN., CRIM. LAW § 2-202(b)(1)(ii) (2004) (establishing the age of onset of mental retardation at twenty-two).

248. *Atkins*, 536 U.S. at 308 n.3 (citing favorably the definitions of mental retardation provided by the AAMR and the APA); see AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (Ruth Luckasson ed., 10th ed. 2002) ("Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills . . . originat[ing] before age 18."); AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 140, at 41 (defining mental retardation as "significantly subaverage intellectual functioning . . . accompanied by significant limitations in adaptive functioning . . . occur[ring] before age 18 years").

249. See Mossman, *supra* note 109, at 267-68 (noting that mental health professionals use IQ tests to measure intellectual capabilities and identify mentally retarded individuals).

250. See *id.* at 268-70 (explaining that an IQ score refers to a placement along a "bell curve" where the average is 100 and the standard deviation is 15). Approximately 95% of the population falls within two standard deviations of the mean, ranging between 70-130. *Id.* Consequently, an IQ score of 70 represents a statistical convention rather than a psychological determination and individuals on either side of that line may suffer similar deficiencies. *Id.* But see ARK. CODE ANN. § 5-4-618 (Michie 2003) (establishing "a rebuttable presumption of mental retardation when a defendant has an intelligence quotient

effects of an offender's intellectual disability.²⁵¹ Age of onset is crucial to a definition of mental retardation,²⁵² because it virtually eliminates the risk of malingering²⁵³ and provides an objective basis for assessment.²⁵⁴

Despite criticism from academics, these definitions provide some, albeit minimal, guidance for judges and juries to use in identifying mentally retarded offenders.²⁵⁵ Although state legislatures have the freedom to implement *Atkins* how they see fit, they should take care to include each of these components in their definitions of mental retardation.

While the Supreme Court left the states with the onerous burden of identifying mentally retarded offenders, the Court's *Furman* decision requires a degree of uniformity among their definitions.²⁵⁶ Adopting the definitions of mental retardation advocated by the American Association of Mental Retardation and the American Psychiatric Association would minimize the risks of arbitrary imposition of the death penalty and give proper deference to the experts familiar with determining, treating, and defining mental health problems. Without cooperation among the states, or

of 65 or below"); 725 ILL. COMP. STAT. ANN. § 5/114-15(d) (West 2004) (indicating that an IQ score of 75 or below is presumptive evidence of mental retardation); KY. REV. STAT. ANN. § 532.130(2) (Michie 2003) (defining mental retardation partially by reference to IQ score); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2004) (establishing a presumption of mental retardation in defendants with IQ scores of 70 or below).

251. See Ellis, *supra* note 234, at 13 (explaining that the adaptive functioning requirement ensures that an individual is really impaired as opposed to simply a poor test-taker).

252. See Tobolowsky, *supra* note 107, at 99 (highlighting that age of onset requires manifestation of the disability prior to eighteen years of age but does not require a previous diagnosis).

253. See Ellis, *supra* note 234, at 13-14 (concluding that malingering is not a practical problem in the assessment of individuals who have mental retardation); Mossman, *supra* note 109, at 276 ("[M]ental retardation is hard to fake successfully, because the criteria require evidence that retardation began during childhood—evidence . . . that the condition existed years before the defendant committed a capital crime."). But see *Atkins*, 536 U.S. at 353 (Scalia, J., dissenting) (believing that an individual could successfully feign mental retardation).

254. See *Atkins*, 536 U.S. at 308-09 (explaining that psychologists can evaluate mental retardation by interviewing people familiar with the defendant, reviewing school and court records, reading statements the defendant made, interviewing the defendant, and administering a standard intelligence test).

255. See Ellis, *supra* note 234, at 13 (criticizing the use of IQ scores as the dispositive factor in legislative definitions of mental retardation); Mossman, *supra* note 109, at 272 (outlining the differences between legal determinations and medical diagnoses to conclude that legal distinctions require more information than medical ones); Thomas L. Hafemeister & John Petrila, *Treating the Mentally Disordered Offender: Society's Uncertain, Conflicted and Changing Views*, 21 FLA. ST. U. L. REV. 729, 739-40 (1994) (explaining that the threat to liberty and the sociological nature of the decision to restrict the rights of mentally disordered offenders traditionally precluded courts from relying on the determinations of physicians). But see *id.* at 749 (observing that courts began restoring the locus of decision-making to mental health professionals in the 1980s and 90s); Lockyer & Carey, *supra* note 81, at 335 (arguing that states should adopt definitions that accurately reflect the judgment of experts).

256. See 408 U.S. 238, 310 (1972) (plurality opinion) (prohibiting the arbitrary imposition of the death penalty and requiring cross-jurisdictional uniformity).

at least communication, the states could adopt varying definitions of mental retardation that inadequately implement *Atkins*' protections and violate *Furman*'s mandate.

B. States Should Consider Pretrial Adjudication of the Mental Retardation Issue to Comprehensively Protect All of a Mentally Retarded Offender's Constitutional Rights

On its face, *Atkins* permits any state procedure that identifies and excludes mentally retarded offenders from capital punishment.²⁵⁷ The Sixth, Eighth, and Fourteenth Amendments require the state to bear the burden of proof in this regard by a probable cause or reasonable doubt standard.²⁵⁸ Including a mental retardation determination in the guilt/innocence phase of trial as part of the mens rea element of the crime will allow the jury to consider all mental health evidence at once and may ease the prosecution's burden if the defendant raises an insanity defense.²⁵⁹

Alternatively, states could require the prosecution to prove the absence of mental retardation during the sentencing phase by treating mental retardation as a capital punishment gateway factor.²⁶⁰ In this context, mental retardation could simultaneously serve as both an aggravating and a mitigating factor.²⁶¹ The defendant's presentation of mental health

257. 536 U.S. 304, 317 (2002).

258. See *supra* Part II (arguing that the Sixth Amendment requires the jury to determine the imposition of death penalty, the Eighth Amendment requires the state to prove the absence of mental retardation beyond a reasonable doubt, and the Fourteenth Amendment requires the prosecution to bear the burden of proof by at least a probable cause standard).

259. See AM. LAW INST., MODEL PENAL CODE AND COMMENTARIES § 4.01 (1985) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law."). The other common test for insanity, "the M'Naghten test[,] turns on whether the actor by reason of mental disease or defect did not know the nature or quality of his act or know that it was wrong . . ." *Id.* cmt. 2. Given the American Law Institute's deferential approach to "medical understanding," a finding of mental retardation would satisfy the "mental disease or defect" prongs of both the American Law Institute and M'Naghten tests. *Id.* cmt. 4; see also *Patterson v. New York*, 432 U.S. 197, 206 (1977) (allowing the state to place the burden of proving insanity as an affirmative defense on the defendant).

260. See Kristen F. Grunewald, Case Note, *United States Supreme Court: Atkins v. Virginia*, 122 S. Ct. 2242 (2002), 15 CAP. DEF. J. 117, 123 (2002) (suggesting that a state could require the prosecution to prove the absence of mental retardation beyond a reasonable doubt as a threshold issue before proceeding to the sentencing hearing); cf. *Ring v. Arizona*, 536 U.S. 584, 603 (2002) (noting that under Arizona's statutory scheme, the death penalty would only be imposed after proving the existence of an aggravating factor); *Tison v. Arizona*, 481 U.S. 137, 138 (1987) (allowing the death penalty of a felony murderer only after proof that the offender played a major role in the offense and exhibited extreme indifference to human life); *Enmund v. Florida*, 458 U.S. 782, 800-01 (1982) (permitting courts to impose the death penalty for felony murder only after finding that the defendant killed or intended to kill).

261. See Huigens, *supra* note 67, at 1268-69 (emphasizing that mitigating factors are just the converse of aggravating factors and any distinction between the two is formalistic and serves no constitutional purpose; both types of factors serve the same purpose of

evidence would ease the prosecution's burden of gathering such information.²⁶² Although proving the absence of mental retardation during trial or at sentencing would adequately protect a mentally retarded offender from capital punishment, a pretrial determination of mental retardation may prove more efficient and avoid the adverse risks of "death qualifying" a jury.²⁶³

A pretrial determination of mental retardation would minimize the cost of a capital trial for a defendant who is prohibited from receiving the death penalty.²⁶⁴ More importantly, a pretrial determination would eradicate the need to "death qualify" a jury, thereby eliminating a time consuming, costly, and potentially prejudicial

determining the offender's culpability for sentencing purposes). Even if the prosecution proved that the offender did not suffer from mental retardation to the extent required by *Atkins*, the defense could still argue that the offender's mental deficiency, albeit minimal, diminishes culpability enough to warrant life rather than death. See *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (requiring courts to consider any mitigating evidence that the defendant presents).

262. See *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (White, J., concurring) (emphasizing that the U.S. Constitution permits the states to shift the burden of presenting mitigating evidence during capital sentencing to the defendant).

263. See Ellis, *supra* note 234, at 13 (addressing the advantages of determining mental retardation during pretrial proceedings, such as saving the state the cost of an unnecessary capital trial).

264. See *id.*; see also STATE OF KANSAS, LEGISLATIVE DIVISION OF POST AUDIT, COSTS INCURRED FOR DEATH PENALTY CASES: A K-GOAL AUDIT OF THE DEPARTMENT OF CORRECTIONS 11 (Dec. 2003) (finding that death penalty cases cost the state about seventy percent more than non-death penalty cases), available at http://www.kslegislature.org/postaudit/audits_perform/04pa03a.pdf; PHILIP J. COOK ET AL., THE COST OF PROCESSING MURDER CASES IN NORTH CAROLINA 7 (May 1993) (estimating that capital cases cost North Carolina \$163,000 more than non-capital cases), available at <http://www.pps.aas.duke.edu/people/faculty/cook/comnc.pdf>.

procedure.²⁶⁵ Following a credible showing of mental retardation,²⁶⁶ a judge would determine whether the prosecution has probable cause to believe an offender does not suffer from mental retardation.²⁶⁷ If the state cannot even meet this burden, then no rational jury could find the absence of mental retardation beyond a reasonable doubt.²⁶⁸ Should the prosecution prevail at the pretrial hearing, it would still have to prove the absence of mental retardation to a jury during sentencing.²⁶⁹ This added layer of protection will help guarantee *Atkins*' protections and ensure that no mentally retarded offender would receive the death penalty.²⁷⁰ Despite its

265. See *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (forbidding jurors whose views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" from serving on death penalty juries) (internal citation omitted). This process, known as death-qualification, developed out of the Supreme Court's decision in *Witherspoon v. Illinois*, where the Court struck down a state procedure that prohibited all potential jurors who had "conscientious or religious scruples against capital punishment[.]" or who opposed the death penalty altogether, from capital jury service. 391 U.S. 510, 520 (1968). In striking down the Illinois law, the *Witherspoon* Court emphasized "that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal organized to convict . . . [or] the determination of whether a man should live or die to a tribunal organized to return a verdict of death." *Id.* at 521 (internal quotations omitted); see also Craig M. Cooley, *Forensic Individualization Sciences and the Capital Jury: Are Witherspoon Jurors More Deferential to Suspect Science than Non-Witherspoon Jurors?*, 28 S. ILL. U. L.J. 273, 280 (2004) (concluding that death-qualified jurors are more likely to convict and sentence an offender to death than excludable jurors).

[D]eath-qualified jurors are more concerned with crime control, more likely to assume the defendant's guilt before hearing any evidence, less remorseful over wrongful convictions, more regretful with respect to erroneous acquittals, more impressed with prosecution witnesses, and more prone to endorse aggravating factors. On the other hand, excludables are typically due process oriented, more critical of the prosecution, more judgmental toward their fellow jurors, more receptive to mitigating evidence, and more likely to endorse non-statutory mitigators.

Id. at 281-82 (internal citations omitted); see also *United States v. Green*, 343 F. Supp. 2d 23, 35 (D. Mass. 2004) (refusing to impanel a death-qualified jury to determine guilt or innocence because of the discriminatory effects of conviction-prone death-qualified juries, and instead agreeing to impanel a second death-qualified jury to determine the appropriate penalty if the first jury issued a guilty verdict); Jonathan Saltzman, *New Juries Must Weigh Sentence in Capital Case*, BOSTON GLOBE, Nov. 5, 2004, at A1 (reporting on Judge Gertner's decision in *Green*).

266. *Cf. Medina v. California*, 505 U.S. 437, 452 (1992) (requiring a competence hearing after the defendant shows credible evidence of incompetence).

267. See *id.* (noting that once the trial court has expressed a doubt as to the defendant's competence, it will hold a hearing); *cf. Ornelas v. United States*, 517 U.S. 690, 694 (1994) (conducting an evidentiary hearing to determine whether police officers had probable cause to search a suspect).

268. See *Freeman v. Zahradnick*, 429 U.S. 1111, 1112 (1977) (forbidding a conviction where, as a matter of law, no rational jury could find an element of a crime to exist beyond a reasonable doubt).

269. See *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (requiring that any fact that increases the maximum penalty, such as an aggravating factor, be proven to a jury beyond a reasonable doubt). Although a pretrial hearing to determine whether an offender was mentally retarded would satisfy due process, the Sixth Amendment still requires the state to prove any fact upon which it conditions punishment. See *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

270. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (ruling that executing mentally

comparative advantages, states are not required to implement a pretrial determination of mental retardation. As long as the prosecution has the burden of proving the absence of mental retardation to a jury beyond a reasonable doubt, a state may include this assessment in any phase of a capital trial.

CONCLUSION

After the Supreme Court left the states with the task of identifying and excluding mentally retarded offenders from capital punishment,²⁷¹ every state that accepted the Court's challenge required the defendant to bear the burden of proof by at least a preponderance of the evidence.²⁷² In so doing, these states failed to consider the Sixth, Eighth, and Fourteenth Amendment rights with which these procedures interfere.

By increasing the maximum penalty an offender can face, the absence of mental retardation implicates the Sixth Amendment as an element of capital murder. Only a jury can gauge the community values necessary to impose the death penalty on a case-by-case basis under the evolving standards and proportionality prongs of the Eighth Amendment's cruel and unusual punishment analysis. Due process guarantees that a defendant has an opportunity to be heard and requires the prosecution to prove the absence of mental retardation by at least a probable cause standard.

The Founders of this country trusted only a jury to stand between life and death at the hands of the state. That principle, reflected in the Sixth, Eighth, and Fourteenth Amendments to the Constitution, as vibrant now as then, requires the state to prove the absence of mental retardation to a jury beyond a reasonable doubt before imposing the death penalty. Until a majority of the Court accepts Justice Blackmun's conclusion that "no combination of procedural rules or substantive regulations can ever save the death penalty from its inherent constitutional deficiencies[,],"²⁷³ states must endeavor to impose the death penalty in accordance with the

retarded criminals is a form of excessive punishment prohibited by the Constitution).

271. *Id.* at 317.

272. *See, e.g.*, CAL. PENAL CODE § 1376(b)(3) (West 2004) (placing the burden of proof by a preponderance of the evidence on the defendant to establish mental retardation); DEL. CODE ANN. tit. 11, § 11-4209(D)(3)(b) (2003) (placing the burden on the defendant by clear and convincing evidence); IDAHO CODE § 19-2515A(3) (Michie 2004) (allowing the court to impose the death penalty only when it finds by a preponderance of the evidence that the defendant is not mentally retarded); 725 ILL. COMP. STAT. 5/114-15(b) (2004) (placing the burden of proving the existence of mental retardation on the "moving party"); LA. CODE CRIM. PROC. ANN. art. 905.5.1(C)(1) (West 2004) (placing the burden of proving mental retardation by a preponderance of the evidence on the defendant); NEV. REV. STAT. 174.098(5)(b) (2004) (declaring that the defendant has the burden of proof of proving mental retardation); VA. CODE ANN. § 19.2-264.3:1.1(C) (Michie 2004) (placing the burden of proof on the defendant by a preponderance of the evidence).

273. *Collins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

438

AMERICAN UNIVERSITY LAW REVIEW

[Vol. 54:401

Constitution.