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Life is in Mirrors, Death Disappears: Giving Life to Atkins

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"LIFE IS IN MIRRORS, DEATH DISAPPEARS": GIVING LIFE TO ATKINS

MICHAEL L. PERLIN

INTRODUCTION

Anyone who has spent any time in the criminal justice system—as a defense lawyer, as a district attorney, or as a judge—knows that our treatment of criminal defendants with mental disabilities has been, forever, a scandal. Such defendants receive substandard counsel, are treated poorly in prison, receive disparately longer sentences, and are regularly coerced into confessing to crimes (many of which they did not commit). And those of us who know about this system know that it is a scandal of little interest to most lawyers, most citizens, and most judges. We further know that the one question on which we obsessively focus—the scope and role of the insanity defense—is virtually irrelevant to this entire conversation.

This is not news and has not been so for decades. We are content to “bury our heads in the sand” and ignore the ramifications of the morally corrupt system that we have created. But every once in a while, a case is decided that makes us reconsider this question and forces us to see what we do on a regular basis in that system. Atkins v. Virginia is such a case.

My thesis is simple: In spite of the impressive victory earned in Atkins by advocates for persons with mental disabilities, that victory may be illusory unless we look carefully at a constellation of legal, social, and behavioral issues that have combined to poison this area of the law for decades. Atkins gives us a blueprint with which to work, but we must remain vigilant to make sure that it does not become merely a “paper victory.” This article will raise seventeen issues that must be

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* Professor of Law, New York Law School. A.B., Rutgers University, 1966; J.D., Columbia University School of Law, 1969. The author wishes to thank the participants—both faculty and students—in the New York Law School Faculty Scholarship Lunch Seminar series for their extraordinarily helpful comments, and to single out Steve Ellmann for his encouragement, suggestions, support and assistance. He also wishes to thank Jeanie Bliss for her superlative research help.

1. See, e.g., David L. Bazelon, The Defective Assistance of Counsel, 42 U. CIN. L. REV. 1, 2 (1973) (referring to such lawyers as “walking violations of the Sixth Amendment”).
6. See generally 4 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, chs. 8-12 (2d ed. 2002) [hereinafter PERLIN, MENTAL DISABILITY LAW]; PERLIN, supra note 5, at 37-49 (discussing obsessive focus on role of insanity defense).
considered rigorously and carefully if *Atkins* is to make any sense and if it is to have any true meaning for the population that is its focal point.

The article will proceed in this manner. First, it will briefly look at some earlier signposts on this road—the *Ford v. Wainwright* decision, then *Penry v. Lynaugh* (with a brief nod at *Penry v. Johnson*)—and will try to uncover which meta-issues were really animating the majority and dissenting Justices in those opinions. Next, the article will briefly summarize the key points of *Atkins* (from the perspective of this article) and then will consider what will be characterized as the seventeen "pressure points" in *Atkins*, pressure points that must be taken extraordinarily seriously if the *Atkins* decision is, in fact, to be given life (pun clearly intended). Finally, the article will offer some brief conclusions—both prescriptions and proscriptions—focusing primarily on what the likely meaning of the *Atkins* decision will be for the advocacy community.

I am a Bob Dylan fan, and have been drawing on Dylan lyrics in my article titles for the past seven years. When I last wrote about the death penalty—in a piece that looked both at the way jurors “convert” evidence offered in support of mitigation into evidence in support of aggravation, and at the abysmal job that defense counsel often does in death penalty cases—I drew on a line from Dylan’s well-known masterpiece, *A Hard Rain’s A-Gonna Fall*: “the executioner’s face is always well hidden.” For the title of this article, I draw on a somewhat-more obscure song, one that I have unfortunately never seen in person, *Political World*, from Dylan’s painfully-underrated 1989 album, *Oh Mercy*. The song has been called by a critic “Bob’s commentary on the state of the fallen world we live in,” and I think that is about right. The lyric that I have chosen, “Life is in mirrors; death disappears,” is, I think, about as on point for this article as I could find anywhere. This is the couplet from which it comes:

We live in a political world
Where mercy walks the plank,

13. See infra part I.
14. See infra part II.
15. See infra part III.
16. See infra part IV.
20. He hasn’t played it in ten years, but, knowing Bob, it may reappear miraculously one of these days. See *How Long Has It Been Since Dylan Played…*, at http://www.geocities.com/adam1117/boblast.html#OH (last visited May 5, 2003).
Life is in mirrors, death disappears
Up the steps into the nearest bank.23

Interestingly, the following lyrics surround this couplet:

We live in a political world,
Wisdom is thrown into jail,
It rots in a cell, is misguided as hell
Leaving no one to pick up a trail.

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We live in a political world
Where courage is a thing of the past
Houses are haunted, children are unwanted
The next day could be your last.24

“Rots in a cell”; “the next day could be your last”; I could not get much closer
than this. And, of course, the “nearest bank” line pays homage to the issue focused
on in the Executioner’s Face article: the criminally-inadequate fee schedules in capi-
tal cases are often a contributing reason—perhaps the most important factor—in-
volved in the calculus of who will live and who will die.25 Yet my daughter Julie (a
twenty-three-year-old recent college graduate and a serious Dylan fan in her own
right) came up with an additional/alternative connection to the “mirrors” line. People
see themselves in mirrors, she said, and are blinded to others. People with mental
retardation remain invisible to us in many ways, especially after they are imprison-
ed.26 I think Julie is on to something, and her insight needs to be added to any inter-
pretation of the lyric in question. I note, also, that my most recent book is titled The
HIDDEN Prejudice: Mental Disability on Trial27 and deals with the invisibility of the
prejudice against persons with mental disability, an invisibility that is a manifesta-
tion of what I call sanism.28 One cannot read Atkins without thinking about sanism.

24. Id.
25. See Perlin, supra note 19, at 205:
And one often gets what one pays for. Professor Robert Weisberg, an appellate defense counsel
in death cases, has mordantly noted: “The fees [at trial] were infamously low. The second capital
appeal I worked on was a case where the defense lawyer was paid $150 for the entire case, and,
believe me, he earned every penny of it.” (Footnote omitted).
26. See Michael L. Perlin et al., Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally
are the people society renders the most visible within the community, and they are virtually invisible when expelled
from the community.”).
27. PERLIN, supra note 7 (emphasis added).
28. See, e.g., Perlin, Idiot Wind, supra note 17, at 236:
“Sanism” is defined as an irrational prejudice towards mentally ill persons, which is of the same
quality and character as other irrational prejudices. Such other prejudices are reflected in
prevailing social attitudes of racism, sexism, homophobia, and ethnicity. As I recently wrote:
Sanism is as insidious as other “isms” and is, in some ways, more troubling, because it is (a)
largely invisible, (b) largely socially acceptable, and (c) frequently practiced (consciously and
unconsciously) by individuals who regularly take “liberal” or “progressive” positions decrying
similar biases and prejudices that involve sex, race, ethnicity, or sexual orientation. It is a form
of bigotry that “responsible people can express in public.” Like other “isms,” sanism is based
largely upon stereotype, myth, superstition and deindividualization....
I. THE ROAD FROM FORD TO PENRY TO ATKINS

A. The Ford Decision

The Supreme Court's jurisprudence in this area of the law is tortured, and there is no easy way to reduce it to a coherent example of doctrinal growth and development. The modern era begins with its decision in Ford v. Wainwright, in which a fractured Court concluded that the Eighth Amendment did prohibit the imposition of the death penalty on an insane prisoner.

Justice Marshall—writing in the only portion of any of the four opinions that captured a majority of the court—pointed out that since the Court decided Solesbee v. Balkcom in 1950, its Eighth Amendment jurisprudence had “evolved substantially.” Its ban on “cruel and unusual punishment embraced, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted” and also recognized the “evolving standards of decency that mark the progress of a maturing society.” In coming to its determination, the Court took into account “objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects.”

The opinion traced the common law development of the doctrine barring execution of the insane, noting that, while the reasons for the rule were not precisely clear, “it is plain the law is so.” It concluded that there was “virtually no authority condoning the execution of the insane at English common law,” and that “this solid proscription was carried to America.”

The practicing bar, courts, legislatures, professional psychiatric and psychological associations, and the scholarly academy are all largely silent about sanism. A handful of practitioners, lawmakers, scholars and judges have raised lonely voices, but the topic is simply "off the agenda" for most of these groups.

See also Michael L. Perlin, On "Sanism", 46 SMU L. REV. 373, 374-76 (1992); PERLIN, supra note 7, at 22-23.

29. This section is generally adapted from 4 PERLIN, MENTAL DISABILITY LAW, supra note 6 § 12-4.1c, at 527-38.


32. Id. at 405-10.
34. Ford, 477 U.S. at 405.
35. Id. at 405-06 (citing, inter alia, Solem v. Helm, 463 U.S. 277, 285-86 (1983) (Burger, C.J., dissenting)).
36. Id. at 406 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).
37. Id. (citing Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion)).
38. Id. at 406-07.
39. Id. See also 4 PERLIN, MENTAL DISABILITY LAW, supra note 6 § 12-4.1a, at 520-22.
40. Ford, 477 U.S. at 408 (quoting Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 HOW. ST. TR. 474, 477 (1685)).
41. Id.
42. Id. "[I]t was early observed that 'the judge is bound' to stay the execution upon insanity of the prisoner." (citing 1 CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW *761 (5th Am. ed. 1847), and 1 WHARTON, A TREATISE ON CRIMINAL LAW § 59 (8th ed. 1880)).
This "ancestral legacy" has not "outlived its time," the Court added.\(^4\) No state currently permits execution of the insane,\(^3\) and it is "clear that the ancient and humane limitation upon the State's ability to execute its sentences has as firm a hold upon the jurisprudence of today as it had centuries ago in England":\(^5\)

The various reasons put forth in support of the common-law restriction have no less logical, moral, and practical force than they did when first voiced. For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. See Note, The Eighth Amendment and the Execution of the Presently Incompetent, 32 Stan. L. Rev. 765, 777 n.58 (1980). Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across the Nation. Faced with such wide-spread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort or understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.\(^6\)

Justice Powell concurred, joining fully in the majority's opinion on the substantive Eighth Amendment issue\(^7\) but writing separately, at least in part, to consider an issue not addressed by the Court: the meaning of "insanity" in the context of the case before it.\(^8\) After considering the common law justifications for barring execution of the insane, Justice Powell concluded that the Eighth Amendment should only bar the execution of those "who are unaware of the punishment they are about to suffer and why they are to suffer it,"\(^9\) a category into which Ford "plainly fit."\(^10\) Also, Powell argued, because the defendant "has been validly convicted of a capital crime and sentenced to death," the question is not "whether, but when, his execution may take place."\(^11\) Thus making inapplicable earlier Court decisions imposing heightened procedural requirements on capital trials and sentencing proceedings.\(^12\)

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\(^{43}\) Id. at 408.
\(^{44}\) Id. at 408-09 n.2 (listing statutes).
\(^{45}\) Id. at 409.
\(^{46}\) Id. at 409-10.
\(^{47}\) Id. at 418 (Powell, J., concurring).
\(^{49}\) Id. at 422.
\(^{50}\) Id. Compare Rector v. Bryant, 501 U.S. 1239, 1239 (1991) (Marshall, J., dissenting from denial of certiorari) (criticizing court's decision to deny certiorari in case presenting question of whether a prisoner whose mental incapacity renders him unable to recognize or communicate facts that would make his sentence unlawful or unjust is nonetheless competent to be executed). For further proceedings, see Rector v. Clinton, 308 Ark. 104, 823 S.W.2d 829 (1992).
\(^{51}\) Id. at n.5 (noting that "some defendants may lose their mental facilities and never regain them, and thus avoid execution altogether").
Writing for herself and Justice White, Justice O'Connor concurred in part and dissented in part. Due process demands in this sort of case are "minimal," she concluded, noting "substantial caution" was warranted "before reading the Due Process Clause to mandate anything like the full panoply of trial-type procedures." This was so for several reasons: (1) after a valid conviction, the demands of due process are "reduced accordingly"; (2) the potential for false claims and deliberate delay in this context is "obviously enormous"; and (3) by definition, the defendant's protected interest can "never be conclusively and finally determined... until the very moment of execution."

Finally, Justice Rehnquist dissented on behalf of himself and the Chief Justice. He saw no reason to abandon Solesbee, which had sanctioned procedures vesting decision making in "the solemn responsibility of a state's highest executive with authority to invoke the aid of the most skillful class of experts on the crucial questions involved." He concluded that state law did not grant the defendant the sort of entitlement "that gives rise to the procedural protections for which he contends." To create a constitutional right to a judicial determination of sanity prior to execution "needlessly complicates and postpones still further any finality in this area of the law," in an area where yet another adjudication "offers an invitation to those who have nothing to lose by accepting it to advance entirely spurious claims of insanity."

B. The Meaning of Ford

Ford was both a curious and difficult opinion, and one that reflected much of the ambiguity and ambivalence that continues to permeate this subject matter. To some extent, Ford serves as a paradigm for the Supreme Court's confusion and, to some extent, its use of rationalization as a means of dealing with many of the cases it has decided in the past several decades dealing with mentally disabled criminal defendants.

53. Id. at 427 (O'Connor, J., concurring in part and dissenting in part). On those aspects of the majority opinion in Ford dealing with procedural issues, see 4 PERLIN, MENTAL DISABILITY LAW, supra note 6 § 12-4.1c, at 531-34.
54. Ford, 477 U.S. at 429.
55. Id. (citing Meachum v. Fano, 427 U.S. 215, 224 (1976)).
56. Id. at 429 (citing Nobles v. Georgia, 168 U.S. 398, 405-06 (1897)). Cf. Joseph Rodriguez et al., The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders, 14 Rutgers L.J. 397, 404 (1983) (no question as to presence of serious mental illness in 138 of 141 successful insanity defense cases studied).
57. Ford, 477 U.S. at 429.
58. Id. at 431 (Rehnquist, J., dissenting).
59. Id. at 432.
60. Id. at 433.
61. Id. at 434.
62. Id. at 435:
A claim of insanity may be made at any time before sentence, and, once rejected, may be used again; a prisoner found sane two days before execution might claim to have lost his sanity the next day thus necessitating another judicial determination of his sanity and presumably another stay of execution.
63. See 4 PERLIN, MENTAL DISABILITY LAW, supra note 6 § 12-4.1d, at 539-42.
64. See generally PERLIN, supra note 7, at 78-98.
There are significant inconsistencies between the positions articulated in the various Ford opinions and positions with which the Court had appeared to be entirely comfortable in the past. Justice Powell's position that the only question is not "whether but when"\textsuperscript{65} ignored the possibility that organic brain damage, for instance, could make a once competent-to-be-executed defendant become irreversibly incompetent, or that, in a state that has abolished the insanity defense, it is not beyond the realm of possibility that a defendant like the petitioner in Jackson v. Indiana\textsuperscript{66} might face execution.\textsuperscript{67} And both Justice Rehnquist's and Justice O'Connor's opinions remained obsessed with the fear that defendants will raise "false"\textsuperscript{68} or "spurious claims"\textsuperscript{69} in desperate attempts to stave off execution. This fear—a doppelganger of the public's "swift and vociferous...outrage"\textsuperscript{70} over what it perceives as "abusive"\textsuperscript{71} insanity acquittals, thus allowing "guilty" defendants to "beat the rap"\textsuperscript{72}—was responded to more than adequately almost 150 years ago by Dr. Isaac Ray, the father of American forensic psychiatry:

The supposed insurmountable difficulty of distinguishing between feigned and real insanity has conduced, probably more than all other causes together, to bind the legal profession to the most rigid construction and application of the common law relative to this disease, and is always put forward in objection to the more humane doctrines.\textsuperscript{73}

C. Following Ford

Subsequent to Ford, courts have split in their assessment of whether individual defendants were competent to be executed under the standards set out in that case.\textsuperscript{74} As with other important areas of criminal procedure, the question of whether a defendant was "malingering" remains an important question in this context.\textsuperscript{75} Other

\textsuperscript{65} Ford, 477 U.S. at 425 (Powell, J., concurring). See 4 Perlin, MENTAL DISABILITY LAW, supra note 6 § 12-4.1.c.
\textsuperscript{66} 406 U.S. 715, 726 (1972) ("There is nothing in the record that even points to any possibility that Jackson's present condition can be remedied at any future time."). See generally 4 Perlin, MENTAL DISABILITY LAW, supra note 6 § 8A-5.2.
\textsuperscript{68} Ford, 477 U.S. at 429 (O'Connor, J., concurring in part and dissenting in part).
\textsuperscript{69} Id. at 435 (Rehnquist, J., dissenting).
\textsuperscript{72} Id. at 860. See also DAVID M. NISSMAN ET AL., BEATING THE INSANITY DEFENSE: DENYING THE LICENSE TO KILL (1980).
\textsuperscript{73} ISAAC RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY § 247, at 243 (Winfred Overholser ed., 1962 ed.).
\textsuperscript{74} See 4 Perlin, MENTAL DISABILITY LAW, supra note 6 § 12-4.1.c, at 542-43 n.457 (citing cases).
\textsuperscript{75} See Boggs v. State, 667 So. 2d 765, 766 n.3 (Fla. 1996) (discussing press report of trial judge's beliefs that defendant was "faking mental illness to avoid execution"). On the significance of this position to Justice Scalia's opinion in Atkins, see infra notes 150-151. See generally, on this question, Michael L. Perlin, "The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment, 82 IOWA L. REV. 1375 (1997).
cases decided on related questions reveal a continued failure on the part of many courts to authentically implement the *Ford* decision.76

**D. The Penry I Decision**

While *Ford v. Wainwright*77 clarified the question of the constitutionality of executing persons with mental illness,78 it did not answer the collateral and equally important issue of the constitutionality of executing individuals who have mental retardation. In *Penry v. Lynaugh*,79 the Supreme Court approached the question from a significantly different perspective and reached a strikingly different conclusion.80 Penry was moderately mentally retarded (with an I.Q. of 50 to 63, the mental age of a six-and-a-half-year-old, and the social maturity of a nine-to-ten-year-old).81 In addressing the question of whether the Constitution banned the execution of persons with mental retardation, the Supreme Court turned to the Eighth Amendment issue. While the Court conceded that it might be cruel and unusual punishment to execute those who are “profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions,”82 it suggested that, because of “the protections afforded by the insanity defense today,” such persons were not likely either to be convicted or to face punishment.83 Further, it distinguished the case before it on factual grounds: Penry had been found competent to stand trial, and the jury had rejected his insanity defense, reflecting their conclusion that he did know right from wrong at the time of the offense.84 It further dismissed Penry’s argument that there was an “emerging national consensus” against execution of persons with

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76. See 4 PERLIN, MENTAL DISABILITY LAW, supra note 6 § 12.4.1e, at 544; *Ford*...reflects the depth of the split on the question of the standards to be employed in determining one’s competency to be executed. Further, the perplexing inconsistencies between the positions taken by several of the Justices and their opinions in other mental disability cases probably result from the grave difficulties the Justices face in resolving these questions. Unfortunately, the fact that the procedural aspect of *Ford* is “controlled” by a plurality opinion will make it far more difficult for legislators in those states with statutes similar to Florida’s to draft new laws that are constitutionally sound.

See, e.g., Cuevas v. Collins, 932 F.2d 1078, 1084 (5th Cir. 1991) (hearing not required unless defendant is “so deranged that he is unaware that he is about to be put to death”); Garrett v. Collins, 951 F.2d 57 (5th Cir. 1992) (holding that defendant’s belief that his dead aunt would protect him from effects of toxic agents used during execution did not preclude imposition of death penalty on grounds of incompetency); Shaw v. Delo, 762 F. Supp. 853 (E.D. Mo. 1991) (holding that funds for investigative and expert services to support incompetency claim were not necessary). On the question of whether a trial court can exclude the death penalty as a possible punishment because of a defendant’s mental illness, see *Commonwealth v. Ryan*, 5 S.W.3d 113 (Ky. 1999) (finding that court lacked authority to do so).

77. 477 U.S. 399 (1986).
78. See 4 PERLIN, MENTAL DISABILITY LAW, supra note 6 §§ 12-4.1c–12-4.1d, at 527-42.
79. 492 U.S. 302 (1989). For the Supreme Court’s subsequent decision in *Penry*, see *Penry v. Johnson*, 532 U.S. 782 (2001), discussed in 4 PERLIN, MENTAL DISABILITY LAW, supra note 6 §§ 10-2.3e, 12-3.3. In the latter decision, the Supreme Court again remanded because of errors in the trial court’s charge on the issue of mitigation. See *Penry*, 532 U.S. at 797-801.
82. Id. at 333.
83. Id.
84. Id.
retardation, noting that only one state had legislatively banned such executions and rejecting Penry’s evidence on this point of public opinion surveys as an “insufficient basis” upon which to ground an Eighth Amendment prohibition. 85

On the question of whether such punishment was disproportionate, Justice O’Connor 86 rejected Penry’s argument that individuals with mental retardation do not have the same degree of culpability, as they do not have the same “judgment, perspective and control as persons of normal intelligence.” 87 On the record before the Court, she could not conclude that all mentally retarded persons—“by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility—invariably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty.” 88 Further, she rejected the concept that there was a baseline “mental age” beneath which one could not be executed, arguing that this sort of a bright line test might have a “disempowering effect” on the mentally retarded if applied in other areas of the law (such as contracts or domestic relations). 89 Thus, she concluded that, while mental retardation might “lessen” a defendant’s culpability, the Eighth Amendment did not preclude the execution of any mentally retarded person. 90

In partial dissent, 91 Justice Brennan (for himself and for Justice Marshall) 92 stated that he would ban capital punishment in the case of any mentally retarded offender who “thus lack[ed] the full degree of responsibility for [his] crimes that is a predicate for the constitutional imposition of the death penalty.” 93 First, on the question of proportionality, while Justice Brennan agreed that the treatment of persons with mental retardation as a homogeneous group is inappropriate for many reasons, he argued that the dangers associated with that sort of overgeneralization disappear in the context of the controlling clinical definition for the purposes of punishment. Quoting from documents prepared by the American Association of Mental Retardation, he reasoned that all mentally retarded individuals share the common attributes of “low intelligence and inadequacies of adaptive behavior” as well as “reduced ability” in such areas of functioning as “ability to control impulsivity [and] moral development.” 94 Such impairment so limits the individual’s culpability so as to make capital punishment “always and necessarily disproportionate to...blameworthiness and hence...unconstitutional.” 95

86. No other member of the court joined in this aspect of Justice O’Connor’s opinion. The remainder of the opinion reflected a majority.
88. Id. at 338-39.
89. Id. at 338-40. This assertion of Justice O’Connor has been used to buttress a decision upholding the admissibility of a confession of a person with mental retardation (see generally 4 PERLIN, MENTAL DISABILITY LAW, supra note 6 §§ 10-3-10-3.3d). See United States v. Macklin, 900 F.2d 948, 952-53 (6th Cir. 1990).
91. Id. at 341. Justices Brennan and Marshall joined in those aspects of the majority’s opinion that dealt with the question of mitigation.
92. Id. at 349. Justice Stevens also partially dissented (for himself and Justice Blackmun), concluding that executions of the mentally retarded are unconstitutional.
93. Id. at 341 (Brennan, J., concurring in part and dissenting in part).
94. Id. at 346.
95. Id. at 346-48. Even if mental retardation were not always associated with the requisite lack of culpability,
Second, Justice Brennan found that the execution of an individual with mental retardation neither furthers the punishment aims of deterrence nor of retribution. Because such individuals lack the requisite culpability, execution can never be a “just desert” for a retarded offender. Similarly, the factors that make capital punishment disproportionate when applied to persons with mental retardation give the penalty “the most minimal deterrent effect” as far as retarded potential offenders are concerned; the potential death penalty will not, for such individuals, “figure in some careful assessment of different courses of action.”

In a separate opinion, Justice Scalia (writing for himself, Justice White, Justice Kennedy, and the Chief Justice) parted company with those aspects of Justice O’Connor’s opinions that dealt with proportionality, arguing that the concerns she expressed “ha[ve] no place in our Eighth Amendment jurisprudence.”

In an early analysis of this aspect of Penry, a student commentator characterized it as a “troubling decline in the Court’s death penalty jurisprudence,” concluding that its Eighth Amendment analyses relied upon “overly narrow considerations… [while] ignor[ing] the broader social and political context in which public sentiment and defendant culpability must be evaluated.” The author focused on those aspects of the opinion that relied on legislative silence as indicia that public opinion did not oppose such executions:

Even if one assumes that legislation reflects the collective will, the absence of legislation may only reflect a failure to secure a place on the legislative agenda. A strong consensus may never be articulated through legislation if the issue never comes to a vote. Therefore, in construing legislative silence, the Court should pay special heed to the political enactment and hesitate to draw substantive conclusions from the products of process failure. Because mentally retarded citizens have difficulty participating in the political process, the Court’s assumption that legislative silence signified more than public misunderstanding and political inattention was unreasonable.

Beyond this, two other curious aspects of Penry deserve mention. First, Justice O’Connor’s bald assertion that the insanity defense serves as a bulwark to protect against the conviction and punishment of persons with severe mental disabilities stands in stark opposition to the track record of counsel in the representation of such individuals. Justice Brennan argued that he would still find capital punishment unconstitutional for such individuals, since there is no assurance that an adequate individualized assessment of whether the death penalty is a proportionate punishment will be made at the conclusion of each death penalty trial as the relationship between degree of culpability and status of mental retardation is not “isolated” as a factor that “determinatively bars a death sentence.”

Id. at 348 (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).


98. Id. at 350-51 (Scalia, J., concurring in part and dissenting in part). If a punishment is not “unusual,” he explained, then it is not unconstitutional “even if out of accord with the theories of penology favored by the Justices of this Court.”


100. Id. at 153-54.

101. Id. at 154. See also id. at 154-55 (noting that, in other death penalty rulings, the court has considered public opinion polls in weighing consensus questions). Compare Michael L. Perlin, Psychodynamics and the Insanity Defense: “Ordinary Common Sense” and Heuristic Reasoning, 69 Neb. L. Rev. 3, 32-35 (1990) (discussing role of “imperfect public opinion” in death penalty and insanity defense jurisprudence).
individuals in this area\textsuperscript{102} and ignores the post-Hinckley political reality\textsuperscript{103} that the insanity defense has been severely truncated in many jurisdictions and has been "abolished" in others.\textsuperscript{104} Second, her discussion of disempowerment appears somewhat disingenuous; it is a strenuous leap in logic to suggest that a decision outlawing capital punishment of individuals with mental retardation as a violation of the Eighth Amendment will lead to a change in civil law standards as to whether an individual is, by way of example, competent to enter into a contract or a marriage agreement.\textsuperscript{105}

On the other hand, Justice Brennan's focus on issues of moral development engrafted an important subject of philosophical and psychological speculation into one of the most contentious areas of the law. Although consideration of this issue came slowly,\textsuperscript{106} the question as to its implications for subsequent developments still remains open.\textsuperscript{107}

Some seven years ago, I had this to say about the two lead cases:

To some extent, \textit{Ford} and \textit{Penry} serve as paradigms for the Court's confusion about cases involving mentally disabled criminal defendants. Justice Rehnquist's and Justice O'Connor's opinions in \textit{Ford} and Justice O'Connor's opinion in \textit{Penry} remain infused with the obsessive fear that defendants will raise "false" or "spurious claims" in desperate attempts to stave off execution. This fear—a doppelganger of the public's "swift and vociferous...outrage" over what it perceives as "abusive" insanity acquittals, thus allowing "guilty" defendants to "beat the rap"—remains the source of much of the friction in this area.\textsuperscript{108}

\textsuperscript{102}See 4 PERLIN, MENTAL DISABILITY LAW, supra note 6 § 9C-7. For a case example, see \textit{Alvord v. Wainwright}, 469 U.S. 956, 957 (1984) (Marshall, J., dissenting from denial of certiorari).

\textsuperscript{103}See 4 PERLIN, MENTAL DISABILITY LAW, supra note 6 §§ 9C-1–9C-8; see generally PERLIN, supra note 5, at 333-48.


\textsuperscript{105}On the multiple meanings of competency, and the courts' confusion in attempting to clarify them, see Michael L. Perlin, \textit{Are Courts Competent to Decide Questions of Competency? Stripping the Facade from United States v. Charters, 38 U. KAN. L. REV. 957, 967-68 (1990).


\textsuperscript{107}Compare Fleming v. Zant, 259 Ga. 687, 386 S.E.2d 339 (1989) (executing mentally retarded persons constitutes cruel and unusual punishment under the Georgia constitution; defendant must present evidence at habeas hearing so that the court can determine whether there is a genuine issue of fact as to his retardation), to Buttrum v. Black, 721 F. Supp. 1268, 1307 (N.D. Ga. 1989), aff'd, 908 F.2d 695 (11th Cir. 1990) (noting that \textit{Penry} "forecloses" defendant's argument that death penalty was unconstitutionally applied to her because she was "emotionally 12 or 13 at the time of the crime"). See also Richardson v. State, 89 Md. App. 259, 598 A.2d 1 (Spec. App. 1991), aff'd, 332 Md. 94, 630 A.2d 238 (1993) (finding the issue of defendant's mental retardation as bar to capital punishment should be determined by trier of fact at sentencing stage, not at pretrial proceeding); \textit{Ex parte Williams}, 833 S.W.2d 150 (Tex. Crim. App. 1992) (noting the defendant was entitled to a charge that the jury could consider and give mitigating effect to evidence of his mental retardation in the sentencing phase. A writ of habeas corpus was granted and the sentence vacated); State v. Patillo, 262 Ga. 259, 417 S.E.2d 139 (1992) (barring execution of mentally retarded persons under Georgia statute, the jury should not be informed of the effect of a finding of mental retardation in a death penalty case).

\textsuperscript{108} Perlin, supra note 19, at 216.
II. THE ATKINS DECISION

The opening paragraph of Atkins gives us important signposts as to the development of the case. This is how Justice Stevens begins the majority opinion:

Those mentally retarded persons who meet the law’s requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants. Presumably for these reasons, in the 13 years since we decided Penry, the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case: whether such executions are “cruel and unusual punishments” prohibited by the Eighth Amendment to the Federal Constitution.

Atkins had been convicted of capital murder stemming from an ATM robbery. In the penalty phase, the defense called a forensic psychologist, who testified that Atkins was “mildly mentally retarded” (with an IQ of 59). The jury convicted Atkins and sentenced him to death; after that sentence was set aside (for unrelated reasons), the same witness testified at the rehearing. At this time, the state called its own witness (Dr. Stanton Samenow) in rebuttal. Dr. Samenow testified that the defendant was not retarded, that he was “of average intelligence, at least,” and that the appropriate diagnosis was antisocial personality disorder. The jury again sentenced Atkins to death, and this sentence was affirmed by the Virginia Supreme Court (over a dissent that characterized the state’s expert’s testimony “incredulous as a matter of law” and argued that the imposition of the death sentence on one “with the mental age of a child between the ages of 9 and 12 [was] excessive”).

In weighing the case, the Supreme Court first looked at the meaning of “excessive” in Eighth Amendment jurisprudence, stressing:

A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the “Bloody Assizes” or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in Trop v. Dulles, “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man…. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”

110. Id. at 308.
111. Id.
112. Id. at 309.
113. Id.
114. Id.
115. Id. at 310 (quoting State v. Atkins, 534 S.E. 2d 312, 323-24 (2000)).
In engaging in proportionality review, the Court pointed out that its inquiry should be guided by "objective factors," and that, in assessing these factors, the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." As part of this inquiry, it noted the significant changes since it decided Penry in 1989 when only two states banned the execution of persons with mental retardation; in the intervening thirteen years, at least another sixteen (and the federal government) enacted similar laws, leading the Court to this conclusion:

It is not so much the number of these States that is significant, but the consistency of the direction of change. Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition.... The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.

Further, the Court perceived that this consensus "unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders and the relationship between mental retardation and the penological purposes served by the death penalty." The Court added that "it suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards."

Mental retardation, the Court found, involves "not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." It continued in the same vein:

Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not

117. Id. at 312 (quoting Penry, 492 U.S. at 331).
118. Id. at 314-15.
119. Id. at 315-16.
120. Id. at 317.
121. Id.
122. Id. at 318.
warrant an exemption from criminal sanctions, but they do diminish their personal culpability.\textsuperscript{123}

In light of these deficiencies, the Court found that its death penalty jurisprudence provided two reasons "consistent with the legislative consensus that the mentally retarded should be categorically excluded from execution."\textsuperscript{124}

First, there is a serious question as to whether either justification that we have recognized as a basis for the death penalty applies to mentally retarded offenders. \textit{Gregg v. Georgia}\textsuperscript{125} identified "retribution and deterrence of capital crimes by prospective offenders" as the social purposes served by the death penalty.\textsuperscript{126} Unless the imposition of the death penalty on a mentally retarded person "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment."\textsuperscript{127}

On the question of retribution, the Court reasoned that, in light of its precedents in this area,\textsuperscript{128}

\begin{quote}
[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.\textsuperscript{129}
\end{quote}

On the question of deterrence, the Court again looked at earlier cases for a restatement of the proposition that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation"\textsuperscript{130} and added,

\begin{quote}
Exempting the mentally retarded from that punishment will not affect the "cold calculus that precedes the decision" of other potential murderers.... Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders. 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. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with
\end{quote}

\begin{flushright}
\textsuperscript{123}\textit{Id.} (emphasis added).
\textsuperscript{124}\textit{Id.}
\textsuperscript{125}428 U.S. 153, 183 (1976).
\textsuperscript{126}\textit{Id.}
\textsuperscript{127}\textit{Atkins}, 536 U.S. at 319 (quoting, in part, \textit{Enmund}, 458 U.S. at 798).
\textsuperscript{128}\textit{See}, e.g., \textit{Godfrey v. Georgia}, 446 U.S. 420, 433 (1980) (vacating death sentence because petitioner's crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder").
\textsuperscript{129}\textit{Atkins}, 536 U.S. at 319.
\textsuperscript{130}\textit{Enmund}, 458 U.S. at 799.
\end{flushright}
respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence. 131

The reduced capacity of mentally retarded offenders provided an additional justification for a categorical rule making such offenders ineligible for the death penalty. 132 The Court went on to note that there was an “enhanced” risk of improperly-imposed death penalty in cases involving defendants with mental retardation because of the possibility of false confessions, as well as “the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors.” 133 The Court also stressed several additional interrelated issues: the difficulties that persons with mental retardation may have in being able to give meaningful assistance to their counsel, their status as “typically poor witnesses,” and the ways in which their demeanor “may create an unwarranted impression of lack of remorse for their crimes.” 134

Here the Court acknowledged an important difficulty: “reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury,” 135 raising the specter that “mentally retarded defendants in the aggregate face a special risk of wrongful execution.” 136 Thus, the Court concluded, “Construing and applying the Eighth Amendment in the light of our ‘evolving standards of decency,’ we therefore conclude that such punishment is excessive and that the Constitution ‘places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender.” 137

There were two dissents. Chief Justice Rehnquist, dissenting for himself and Justices Thomas and Scalia, criticized that part of the majority’s methodology that had relied upon public opinion polls, the views of professional and religious organizations, and the status of the death penalty in other nations as part of the basis for its decision. 138 According to the Chief Justice, only “two sources—the work product of legislatures and sentencing jury determinations—ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment.” 139

Justice Scalia also dissented (for himself, the Chief Justice, and Justice Thomas), noting immediately, “Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members.” 140 Justice Scalia’s dissent flatly rejected the notion that there was a “consensus” against the execution of persons

131. Atkins, 536 U.S. at 320.
132. Id.
133. Id.
134. Id. at 321.
135. Id.
136. Id.
137. Id. (quoting, in part, Ford, 477 U.S. at 405).
138. Id. at 316 n.21.
139. Id. at 324 (Rehnquist, C.J., dissenting).
140. Id. at 338 (Scalia, J., dissenting).
with mild mental retardation (relying both on historical sources that had exempted only persons with severe or profound mental retardation from that punishment\textsuperscript{141} and on his alternative reading of the data cited by the majority that led him to conclude that, at best, a “fudged” forty-seven percent of death penalty jurisdictions had barred such executions).

Rather than being based on a consensus, Justice Scalia continued, “what really underlies today’s decision [is] pretension to a power confined neither by the moral sentiments originally enshrined in the Eighth Amendment (its original meaning) nor even by the current moral sentiments of the American people.”\textsuperscript{143} In his view, it was nothing more than “the feelings and intuition of a majority of the Justices that count—‘the perceptions of decency, or of penology, or of mercy, entertained...by a majority of the small and unrepresentative segment of our society that sits on this Court.’”\textsuperscript{144} Here he specifically rejected the majority’s assumption that judges and jurors were unable to “take proper account of mental retardation.”\textsuperscript{145}

Justice Scalia assessed the majority’s retribution and deterrence analyses and found them both wanting. On the question of retribution, he noted rhetorically, “The fact that juries continue to sentence mentally retarded offenders to death for extreme crimes shows that society’s moral outrage sometimes demands execution of retarded offenders. By what principle of law, science, or logic can the Court pronounce that this is wrong? There is none.”\textsuperscript{146} He continued in the same vein: “As long as a mentally retarded offender knows ‘the difference between right and wrong,’ only the sentencer can assess whether his retardation reduces his culpability enough to exempt him from the death penalty for the particular murder in question.”\textsuperscript{147}

On the deterrence issue, Justice Scalia concluded that “the deterrent effect of a penalty is adequately vindicated if it successfully deters many, but not all, of the target class,”\textsuperscript{148} and, again, flatly rejected the majority’s “flabby” argument that persons with mental retardation faced a “special risk” for wrongful execution (suggesting that “just plain stupid..., inarticulate...or even ugly people” might face a similar risk, but that, if this were in fact so, it was not an issue that came within the ambit of the Eighth Amendment).\textsuperscript{149}

Finally, he expressed his “fear of faking”:

One need only read the definitions of mental retardation adopted by the American Association of Mental Retardation and the American Psychiatric Association to realize that the symptoms of this condition can readily be feigned. And...the capital defendant who feigns mental retardation risks nothing at all.\textsuperscript{150}

\textsuperscript{141.} Id. at 338-39.
\textsuperscript{142.} Id. at 342.
\textsuperscript{143.} Id. at 348.
\textsuperscript{144.} Id. at 348-49 (quoting, in part, Thompson v. Oklahoma, 487 U.S. 815, 873 (1988) (Scalia, J., dissenting)).
\textsuperscript{145.} Id. at 349.
\textsuperscript{146.} Id. at 351.
\textsuperscript{147.} Id.
\textsuperscript{148.} Id. at 352.
\textsuperscript{149.} Id.
\textsuperscript{150.} Id. at 353. Justice Scalia contrasted this, curiously, with a reference to the feigning insanity defense pleader who then “risks commitment to a mental institution until he can be cured (and then tried and executed).” Id. How a defendant who feigns insanity can be cured is, to be honest, beyond me. See generally Perlin, supra note
“Nothing has changed,” he concluded, in the nearly 300 years since Hale wrote his Pleas of the Crown:

[Determination of a person’s incapacity] “is a matter of great difficulty, partly from the easiness of counterfeiting this disability... and partly from the variety of the degrees of this infirmity, whereof some are sufficient, and some are insufficient to excuse persons in capital offenses.”

III. ATKINS’ PRESSURE POINTS

Atkins leaves open many unanswered questions—the extent to which states will adopt new prophylactic implementation procedures, the dangers in using a numerical IQ score as the primary retardation determination “cut off factor,” the difficulties in assessing mental retardation in persons who are not English-speaking, the allocation of the burden of proof in making that assessment, the application of Atkins in cases of “borderline” mental retardation, the interplay between judge and jury in the determination of who is “mentally retarded” (no matter how that term is ultimately defined), the question of retroactivity of application, among others—that are not otherwise addressed in this article. Also consciously avoided is any discussion of the costs of implementation, which may be significant if the reforms urged in this article are, in fact, to be implemented.

As will be discussed in the next section, I believe that it is impossible for Atkins to have any authenticity unless we restructure the ways in which counsel represent persons with mental retardation and we insure that such individuals have competent representation.

75. Atkins, 536 U.S. at 354 (quoting 1 HALE, PLEAS OF THE CROWN 32-33 (1736)).

151. Atkins, 536 U.S. at 354 (quoting 1 HALE, PLEAS OF THE CROWN 32-33 (1736)).

152. The states’ track record in the wake of the parallel case of Ford v. Wainwright has been spotty, to say the least. See 4 PERLIN, MENTAL DISABILITY LAW, supra note 6 § 12-4.1e, at 543 (noting that post-Ford case law reveals “a continued failure on the part of many courts to authentically implement the Ford decision”).


154. Compare, e.g., Larry P. v. Riles, 793 F.2d 969 (9th Cir.1984) (discussing discriminatory impact of IQ tests in school placements).


159. I hope to do so in another paper relatively soon.


On the other hand, if the Court remains committed to addressing in some significant sense the concerns that originally animated it in Furman and Gregg, it is hard to see why the Court has not attempted to flesh out the ideas for alternative regulatory regimes that we have sketched. It is difficult to imagine a body of doctrine that is much worse—either in its costs of implementation or in its negligible returns—than the one we have now.

161. See Judith Resnik, Managerial Judges, 96 HARV. L. REV. 374, 433 (1982) (“The mere existence of rules does not automatically result in their enforcement, and the costs of implementation can be high.”).
experts assisting them. Here, however, the discussion will be limited to the seventeen “pressure point” issues identified in Atkins on questions of implementation—issues that must be taken seriously if we are to understand the greater significance of the Atkins case.

1. The capacity of lawyers to “get” mental retardation;
2. The extent to which defense lawyers can “explain away” what may appear to jurors as a lack of remorse on the part of defendants;
3. The ways that failures to develop retardation evidence are treated in Strickland v. Washington cases;
4. The underlying sanism of jurors in assessing mental retardation;
5. The ability of fact-finders to “unpack” the difference between cases involving the types of violent crimes more likely to be committed by persons with mental retardation (non-deliberate) and the types more likely to be committed by some persons with severe mental illness (very deliberate and planful, but equally immune from deterrence);
6. The extent to which jurors will use retardation evidence as an aggravator rather than as a mitigator;
7. The capacity of jurors to empathize with persons with mental retardation;
8. The willingness of states to read Ake v. Oklahoma expansively to insure access to appropriate experts;
9. The role of experts in explaining the meanings of IQs, functional abilities, capacity for moral development, etc., of persons with mental retardation;
10. The reluctance of criminal defendants, even those facing the death penalty, to identify themselves as “mentally retarded;”
11. The ability of post-Atkins defendants to provide meaningful assistance to counsel (assuming a finding of competence to stand trial);
12. The impact of the Godinez v. Moran morass;
13. The willingness of judges to enforce Atkins;
14. The extent to which Justice Scalia’s fear-of-faking concerns will dominate post-Atkins jurisprudence;
15. The ability of all participants to understand the relationship between such cases and the insanity defense;
16. The attitude of prosecutors toward such cases; and
17. The ability of society to accept the reality of the number of death-eligible defendants with mental retardation.

These seventeen issues can be “sorted” as to the interest group whose attitudes and/or behaviors are most at issue (although there are certainly many overlaps): defense counsel, jurors, experts, defendants, trial court judges, appellate court judges, prosecutors, and, for lack of a better phrase, society as a whole. I will address them in order.

162. On the use of this phrase in analyzing the Supreme Court’s jurisprudence in the First Amendment context, see, e.g., Rodney Smolla, Rethinking First Amendment Assumptions about Racist and Sexist Speech, 47 WASH. & LEE L. REV. 171, 194 (1990).
A. Defense Counsel

Issue 1. The capacity of lawyers to “get” mental retardation

Lawyers have traditionally done a terrible job of being able to identify mental disability, being able to differentiate mental illness from mental retardation, and “seeing” mental disability if the defendant does not “look crazy.” Writing about this issue seven years ago, I noted,

Nearly twenty years ago, when surveying the availability of counsel to mentally disabled litigants, President Carter’s Commission on Mental Health noted the frequently substandard level of representation made available to mentally disabled criminal defendants. Nothing that has happened in the past two decades has been a palliative for this problem; if anything, it is confounded by the myth that adequate counsel is available to represent both criminal defendants in general, and mentally disabled litigants in particular. And, as the importance of the construction of “mitigating” and “aggravating” evidence grows, so does the need for counsel to be able to understand and utilize mental disability evidence.

The dangers here should be self-evident. If a lawyer does not “get” the fact that his client is mentally retarded, then the issues raised in Atkins may never be brought to the court’s attention. As will be explored below, there are countless cases of lawyers’ failures to identify a client’s mental disability, often resulting in an “effectiveness of counsel” challenge. This issue is the first one that must be confronted; if counsel fails here, it is impossible for Atkins to be given any kind of meaningful life.

Issue 2. The extent to which defense lawyers can “explain away” what may appear to jurors as a lack of remorse on the part of defendants

Jurors frequently look for visual cues and clues in determining whether a defendant should be sentenced to death. In this process, they determine—based on their own flawed, pre-reflective “ordinary common sense”—whether a defendant

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166. On the public’s demand that mentally disabled defendants “look crazy,” see generally Perlin, supra note 104, at 724-27; Michael L. Perlin, The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of “Mitigating” Mental Disability Evidence, 8 NOTRE DAME J.L., ETHICS & PUB. POL’Y 239, 265 (1994) (“[T]he public has always demanded that mentally ill defendants comport with its visual images of ‘craziness.’”). See also, e.g., JOHN PARRY & ERIC DROGIN, CIVIL LAW HANDBOOK ON PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE AND TESTIMONY § 1.01, at 1-2 (2001).

167. Perlin, supra note 19, at 207-08.

168. The vast majority of criminal defense lawyers have had no training in identifying or understanding mental retardation. See, e.g., Ruth Luckasson, The Death Penalty and Those with Mental Retardation, in AMNESTY INTERNATIONAL USA, THE MACHINERY OF DEATH: A SHOCKING INDICTMENT OF CAPITAL PUNISHMENT IN THE UNITED STATES 93 (1994); Sandra A. Garcia & Holly V. Steele, Mentally Retarded Offenders in the Criminal Justice and Mental Retardation Services Systems in Florida: Philosophical, Placement, and Treatment Issues, 41 ARK. L. REV. 809, 820 (1988).

169. See 4 PERLIN, MENTAL DISABILITY LAW, supra note 6 §12-3.6, at 506-10 nn.179-194 (representative cases in the death penalty context). See also infra text accompanying notes 184-189.

170. See generally Perlin, supra note 101; PERLIN, supra note 7, at 16-20.
looks sufficiently "remorseful." This behavior was noted accurately by Justice Kennedy in his concurrence in *Riggins v. Nevada*,

relying on research by William Geimer and Jonathan Amsterdam, demonstrating that an assessment of the defendant's level of remorse may be the most determinative factor in the decision as to who will live and who will die.\footnote{172}

Nonetheless, this remains a significant obstacle for lawyers representing persons with mental retardation, some of whom may gesture inappropriately, grimace, giggle, or manifest other behaviors that jurors may translate into meaning "I don't care."\footnote{173} A person with mental retardation may not understand the consequences of the proceedings; consequently, he may alienate the jury by "sleeping, smiling, or staring at nothing while in court."\footnote{174} This "unavoidable and inappropriate conduct" may also convey a "false impression of a lack of remorse or compassion for the victim."\footnote{175} A juror, by way of example, may perceive a defendant's sitting slumped down in his chair as acting "cool," and not showing "proper respect for the proceedings."\footnote{176} The lawyer must be able to neutralize these interpretations.

Beyond this, a defendant with mental retardation may not truly understand what is transpiring in court. Even if he meets the minimalist competency-to-stand-trial test set out in *Dusky v. United States*,\footnote{177} the defendant may not be able to adequately participate meaningfully in his or her own defense. Also, persons with mental retardation quite often suffer from very poor memory, an impediment that, when coupled with the tendency to fall prey to others' suggestions, may render communication of the facts to the defense lawyer, especially the most mitigating facts, "next to impossible."\footnote{178}

There is an ominous "flip side" to this coin, and it is one that cannot be understood without a nuanced appreciation of the extent to which the phenomenon that I call "sanism" dominates attitudes in such cases.\footnote{179} Jurors often expect people with mental retardation to be extremely low functioning and may not be expecting...
a quiet, mild-mannered individual. When the defendant fails to exhibit any stereotypical behaviors (such as drooling, giggling, smiling with a vacant appearance, rocking), jury members may think that the mental retardation defense is untrue or unwarranted.\footnote{ Courts see facial expressions—purportedly “decodable” by any layperson—as evidence of mental retardation.}{180} The burdens here on defense counsel are self-evidently immense. A leading article summarizes: “Counsel must explain mental retardation and its diagnostic process thoroughly and carefully so jurors will have a clear understanding of this often misunderstood disability. The defense lawyer must educate the jury about mental retardation, its various presentations, and the distinct difference between mental retardation and mental illness.”\footnote{ The quality of counsel in providing legal representation to mentally disabled criminal defendants is a disgrace. Judge Bazelon’s reference to many of the lawyers in this cohort as “walking violations of the Sixth Amendment” has, if anything, proven to be an understatement. And when this shameful state of affairs is combined with what we know about the performance of sporadically-assigned counsel in death penalty cases, then we should have a fairly decent sense of the enormity of this problem.}{182}

The majority in Atkins clearly understood this (as evidenced by its focus on the ways that the demeanor of persons with mental retardation “may create an unwarranted impression of lack of remorse for their crimes”).\footnote{ It is an open question whether defense lawyers will pay heed to this warning.}{183} It is an open question whether defense lawyers will pay heed to this warning.

**Issue 3. The ways that failures to develop retardation evidence are treated in Strickland v. Washington cases**

The quality of counsel in providing legal representation to mentally disabled criminal defendants is a disgrace. Judge Bazelon’s reference to many of the lawyers in this cohort as “walking violations of the Sixth Amendment” has, if anything, proven to be an understatement. And when this shameful state of affairs is combined with what we know about the performance of sporadically-assigned counsel in death penalty cases, then we should have a fairly decent sense of the enormity of this problem.

The case law is startling and abounds with examples of lawyers failing miserably in this area. And often, such shoddy representation does not even result in a new

\footnote{ See Winiviere Sy, The Right of Institutionalized Disabled Patients to Engage in Consensual Sexual Activity, 23 WHITTIER L. REV. 545, 563-64 (2001) (discussing State v. Soura, 796 P.2d 109, 115 (Idaho 1990), where the court noted that the victim’s “facial expressions consisting of a ‘sagging jaw, mouth open’ and tendency to ‘stare off into space’” were evidence of her mental retardation).}{181}

\footnote{ For an astonishing report, see Keyes et al., supra note 173, at 530 n.17: “In one recent case, one of the authors learned that the prosecutor’s expert, a psychologist, suggested that because the defendant could wash his own laundry, ride the bus and watch TV on his own, he did not have mental retardation.”}{182}

\footnote{ For an astonishing report, see Keyes et al., supra note 173, at 536.}{184}

\footnote{ See, e.g., Louis Bilionis & Richard Rosen, Lawyers, Arbitrariness, and the Eighth Amendment, 75 TEX. L. REV. 1301, 1321-22 n.65 (1997) (citing examples).}{186}

\footnote{ See, e.g., Perlin, supra note 19, at 203-05 (citing examples).}{187}

\footnote{ See, e.g., Smith v. Stewart, 189 F.3d 1004 (9th Cir. 1999), 121 Sup. Ct. 358 (2000) (finding that trial counsel did not even investigate evidence of mental disabilities and mental impairment at the time of the crimes, let alone present such evidence at trial); Rompilla v. Horn, 2000 WL 964750, *14 (E.D. Pa. July 11, 2000) (noting that trial counsel failed to inquire into and present evidence about defendant’s mental retardation, cognitive impairments, and organic brain damage); Valdez v. Johnson, 93 F. Supp. 2d 769, 787 (S.D. Tex. 1999) (finding that trial counsel failed to present evidence of Valdez’s childhood history of borderline intelligence, impaired judgment,}
Although this is not a topic that is news to commentators, the rich body of descriptive, analytical, anecdotal, and prescriptive literature has had little impact on the realities of practice in this area of the law.

B. Jurors

Issue 4. The sanism of jurors

In an earlier paper, I challenged the Supreme Court's assumption that jurors can be relied upon to apply the law in this area conscientiously and fairly. In that paper, I concluded,

A review of case law, controlled behavioral research and "real life" research not only casts grave doubt on its validity, but tends to reveal the opposite: that jurors generally distrust mental disability evidence, that they see it as a mitigating factor only in a handful of circumscribed situations (most of which are far removed from the typical scenario in a death penalty case), that lawyers representing capital defendants are intensely skeptical of jurors' ability to correctly construe such evidence, and that jurors actually impose certain preconceived schemas in such cases that, paradoxically, result in outcomes where the most mentally disabled persons (those regularly receiving doses of powerful antipsychotic medications) are treated the most harshly, and that jurors tend to over-impose the death penalty on severely mentally disabled defendants.

189. See, e.g., Boyd v. Johnson, 167 F.3d 907 (5th Cir. Feb. 1999), cert. denied, 527 U.S. 1055 (1999) (trial counsel's failure to investigate and present possible evidence of the defendant's mental retardation did not amount to ineffective assistance of counsel); Andrews v. Collins, 21 F.3d 612, 623 (5th Cir. 1994) (rejecting ineffective assistance claim of defendant whose experts estimated his IQ to be 68, because he was claiming complete innocence rather than using his mental deficiency as his defense), cert. denied, 513 U.S. 1114 (1995); Motley v. Collins, 18 F.3d 1223, 1227-28 (5th Cir.) (counsel's failure to present evidence of defendant's organic brain disorder was not ineffective), cert. denied, 513 U.S. 960 (5th Cir. 1995) (failure to offer mitigating evidence of diminished mental capacity not ineffective assistance); Smith v. Black, 904 F.2d 950, 977 (5th Cir. 1990) (counsel not ineffective, even though he did not introduce fact that defendant's IQ was 70); Kevin Cullen, The New Freedom Riders, BOSTON GLOBE, June 25, 1995, at 16 (discussing case where Georgia appeals court held that defendant's trial counsel was not ineffective, though his attorney did not raise the fact that his client's IQ was 63 nor cite the Georgia law that bans the execution of persons with mental retardation). See generally Middleton v. Evatt, 855 F. Supp. 837, 842 (D.S.C. 1994) (counsel's reference to the mentally retarded defendant as "dumb" during closing argument did not constitute ineffective assistance of counsel), as discussed in Doug Gardner, Criminal Procedure, 31 TEX. TECH L. REV. 517, 545 (2000); Jonathan Bing, Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Penry and Recommendations for the Future, 22 N.Y.U. REV. L. & SOC. CHANGE 59, 84-85 nn.157-158 (1996). See also Holladay v. Haley, 209 F.3d 1243 (11th Cir. 2000) (affirming the denial of a convicted capital murder defendant's petition for a writ of habeas corpus, finding that his attorneys did not provide ineffective assistance of counsel in failing to properly pursue mitigation based on his mental retardation); Diminished Capacity; Effective Representation; MR; Miranda Rights, 21 MENTAL & PHYS. DISABILITY L. REP. 26 (1997) (discussing United States ex rel. Davenport v. Peters, No. 96 C 2284 (N.D. III. Nov. 14, 1996), finding that defense counsel did not provide ineffective assistance to a murder defendant who claimed that his attorney did not present evidence of his mental retardation).

190. See, e.g., Perlin, supra note 19; Bilionis & Rosen, supra note 186; Desai, supra note 188; Bing, supra note 189; John Blume & David Bruck, Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis, 41 ARK. L. REV. 725 (1988); James Ellis & Ruth A. Luckasson, Mentally Retarded Criminal Defendants, 53 GEO. WASH. L. REV. 414 (1985).
Why is this? I argue that it results from a combination of important factors: jurors’ use of cognitive simplifying devices (heuristics) in which vivid, negative experiences overwhelm rational data (and a death penalty case is a fertile environment for such cognitive distortions) and which reify their sanist attitudes, courts’ pretextuality in deciding cases involving mentally disabled criminal defendants, and courts’ teleological decision-making in reviewing such cases.191

Nothing that has taken place in the nine years since that paper was written has led me to change my mind. These issues must be addressed if Atkins is to be implemented in a meaningful and coherent manner.

Issue 5. The ability of fact-finders to “unpack” the difference between cases involving the types of violent crimes more likely to be committed by persons with mental retardation (non-deliberate) and the types more likely to be committed by some persons with severe mental illness (often very deliberate and planful, but equally immune from deterrence)

Fact-finders confuse and conflate mental retardation and mental illness.192 This confusion may be fatal to the chances of a reasoned judgment in a death penalty case involving a defendant with mental retardation. First, the defendant may not appear to be “mad to the man on the street.”193 Second, the criminal conduct of a person with mental retardation often “stem[s] from an impulsive reaction against the painful awareness, hammered home by frustration, failure, and humiliation, of the cruel trick that biology has played on him.”194 Because persons with mental retardation often lack the ability to control impulsive behavior, they are far less likely to have planned out the commission of capital crimes195 in the bizarre ways that some persons with profound mental illness do.196 Thus, in many instances, given limitations in intellectual reasoning, control of impulsive behavior, and moral development, “it is not possible for a mentally retarded defendant to freely choose to commit a crime.”197 Again, I am not particularly optimistic about jurors’ ability to make these discriminating judgments.

191. Perlin, supra note 166, at 241-42 (footnotes omitted).
192. Research demonstrates that mental health professionals frequently commit this important error. See, e.g., Diane Courson et al., Suspects, Defendants, and Offenders with Mental Retardation in Wyoming, 1 WYO. L. REV. 1, 5 (2001) (relying upon President’s Committee on Mental Retardation, Report to the President: Citizens with Mental Retardation and the Criminal Justice System 3-22 (1991)); Keyes et al., supra note 173, at 530. It defies credulity to suggest that lay jurors are more sophisticated in their determinations.
193. ALAN STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 219 (1976). See also Caton F. Roberts et al., Implicit Theories of Criminal Responsibility: Decision Making and the Insanity Defense, 11 LAW & HUM. BEHAV. 207, 226 (1987) (the only defendant who will likely be found universally insane is the “totally mad individual who acts impulsively in response to a glaring psychotic process that is itself tied thematically to a criminal action”).
196. See, e.g., Murtishaw v. Woodford, 255 F.3d 926 (9th Cir. 2001).
Issue 6. The extent to which jurors will use retardation evidence as an aggravator rather than as a mitigator

Although the Supreme Court has made it clear that mental illness is a mitigating factor in death penalty jurisprudence, in reality, such evidence is often seen as an aggravating factor. If competent counsel is present, the dilemma may paradoxically be even further confounded: if she should rely on certain kinds of "empathy"—evidence of abuse, stress, retardation, institutional failure, and substance abuse—she runs the risk of putting before the jury the evidence that "has the greatest potential for turning into evidence in aggravation...." In the hands of sanist fact-finders, the presentation of such evidence can be deadly to the defendant. My colleague Richard Sherwin has appropriately called this "the disempathetic effect." Thus, the decision whether to call experts to testify at the penalty phase of a capital trial has "far-reaching consequences for defendants." Nonetheless, defense counsel may be inclined to withhold expert testimony as to defendants' mental health from capital sentencers. The Atkins Court took this issue seriously, cautioning that "reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury," and warning of "the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors." Again, I am concerned about how this will "play out" in subsequent cases.

199. Perlin, supra note 19, at 233.
205. Id. (One attorney, for example, "had a psychologist examine his client...before his 1982 trial—but wouldn't allow the doctor to testify....Like many other defense attorneys, he assumed talk of brain disorders, mental retardation or childhood abuse could evoke fear instead of empathy...."). See Scott W. Howe, Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation, 26 GA. L. REV. 323, 359 n.136 (1992) (citing Marcia Coyle et al., Trial and Error in the Nation's Death Belt: Fatal Defense, NAT'L L.J., June 11, 1990, at 30, 34); see also Ellen F. Berkman, Note, Mental Illness as an Aggravating Circumstance in Capital Sentencing, 89 COLUM. L. REV. 291, 304 (1989) (discussing defense counsels' dilemma concerning use of evidence of defendants' mental illness).
207. Id. at 320.
Issue 7. The capacity of jurors to empathize with persons with mental retardation

Little has been written about this important question, but it is one we must consider seriously. The persistence of the mental retardation stereotype also frequently precludes the development of juror empathy. In cases in which the crime is especially violent and inexplicable, we may "simply shut our eyes to the reality of his madness in order to reap the rewards of our revenge." In the context of a capital trial, "empathy evidence," such as mental problems, substance abuse, or family background difficulties, "can facilitate the jury's image of the defendant as an 'irreparable monster' who was so retarded, scarred, or disturbed by child abuse that he just could not contain his rage." As one scholar has noted in the context of the substantively unrelated question of school financing,

Adding in the mentally retarded is a complicated matter: do we fear and detest them and find it wasteful to educate them (as was the conventional outlook) or do we now empathize with them and their parents and respond with a generous willingness to try to do something helpful for them even at higher than average cost? Can Atkins have any impact on this issue? Early on in my writings about sanism, I cited Chief Justice Warren's well-known phrase from Brown v. Board of Education—"their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone"—and noted, in the civil mental disability law context,

There have been no attempts, so far, to answer the question that has bedeviled civil rights activists since the 1950s: how to capture "the hearts and minds" of the American public so as to best insure that statutorily and judicially articulated...
rights are incorporated—freely and willingly—into the day-to-day fabric and psyche of society.\textsuperscript{214}

The same question must be repeated here.\textsuperscript{215}

\textbf{C. Experts}

\textbf{Issue 8. The role of experts in explaining the meanings of IQs, functional abilities, capacity for moral development, etc., of persons with mental retardation}

There are multiple roles for experts in death penalty cases involving defendants with mental retardation. A mental retardation expert may be utilized to explain the relevance of mental retardation in either the guilt or penalty phases of trial, or both (including relevant aspects of confessions, waiver of \textit{Miranda} rights, culpability, and potential future dangerousness).\textsuperscript{216} Often, a multi-disciplinary team of experts is critical to the defense of capital defendants with mental retardation. One of the leading practice articles instructs that defense counsel should “always contact a mitigation or mental health expert to determine the existence of mental retardation and complete a social-medical history before requesting the assistance of a psychologist or psychiatrist.”\textsuperscript{217} The article also cautions that “ordinary psychiatrists and most psychologists are not trained in areas involving mental retardation and courts frequently fail to make the distinction between these experts.”\textsuperscript{218}

What are some of the factors that the expert must consider? “Speech, language and memory impairments, physical and motor disabilities, IQ examinations and other tests require a professional evaluation and assessment by various mental health experts.”\textsuperscript{219} Such experts should also be able to convey to the jury “the effects that mental retardation has on behavior and decision making, explain the vulnerable and suggestible nature of a mentally retarded individual, and educate juries about the full spectrum of mental retardation, irrespective of the defendant’s appearance or demeanor,” and must be able to “state their findings in plain, comprehensible language and common sense terms used by the average person.”\textsuperscript{220}

Finally, the expert must be able to rebut sanist myths (recall my earlier discussion about the defendant who failed to exhibit any stereotypical behaviors, such as

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\textsuperscript{214} See Perlin, supra note 213, at 22.
\textsuperscript{215} On the impact of the fear-of-faking myth on this question, see infra text accompanying notes 248-262.
\textsuperscript{216} Keyes et al., supra note 173, at 536.
\textsuperscript{217} Desai, supra note 188, at 268.
\textsuperscript{218} Id.
\textsuperscript{219} Id.
\textsuperscript{220} Id. quoting, in part, John H. Blume & Pamela Blume Leonard, \textit{Principles of Developing and Presenting Mental Health Evidence in Criminal Cases}, \textit{THE CHAMPION}, Nov. 2000, at 70:

Thus the testimony of lay witnesses, such as defendant’s family, friends, teachers or neighbors, should always be presented to augment the testimony of experts. When testimony regarding the defendant’s mental retardation is presented from various sources, defense counsel must interlock the testimonies and other relevant evidence to achieve a comprehensible presentation of the mental retardation issue.
\end{flushleft}
drooling, giggling, smiling with a vacant appearance, rocking).

In short, Atkins will be an empty shell without the aggressive participation of such experts.

**Issue 9. The willingness of states to read Ake expansively to insure access to appropriate experts**

In *Ake v. Oklahoma*, the Supreme Court held that an indigent defendant is constitutionally entitled to psychiatric assistance when he makes a preliminary showing that his sanity "is [likely] to be a significant factor at trial." Courts have split on the requisite professional background to satisfy Ake's command, for instance, on the question of whether a defendant is entitled to the appointment of an expert psychologist (certainly the appropriate professional in many cases involving defendants with mental retardation). A leading criminal procedure treatise concludes that, "[g]enerally speaking, the courts have read Ake narrowly, and have refused to require appointment of an expert unless it is absolutely essential to the defense." The problems here are heightened by some experts' lack of expertise. Commentators have noted that even mental disability professionals often inappropriately confuse mental retardation with mental illness, an error that could be, literally, fatal, in a post-Atkins case.

Will narrow readings of Ake (coupled in some cases with inexpert experts) rob fact-finders of the full and rich explanation of mental retardation and its relationship to the commission of the charged criminal act? I cannot answer that question, but I believe this is an issue that cannot be ignored.

**D. Defendants**

**Issue 10. The reluctance of criminal defendants, even those facing the death penalty, to identify themselves as "mentally retarded"**

One of the basic sanist myths is that defendants regularly feign mental disability, and that they similarly succeed regularly in befuddling experts when they do that. I have written extensively in an attempt to demonstrate that this is not so (and why it is not so). What I am concerned about here is the inverse: criminal defendants will mask their retardation from their counsel (and often from themselves).

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221. See supra text accompanying note 181, discussing Keyes et al., supra note 173, at 536.
223. Id. at 83.
225. See, e.g., PARRY & DROGIN, supra note 166 § 1.09(e), at 35-37.
226. STEPHEN A. SALTBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 802 (6th ed. 2000). See also David A. Harris, Ake Revisited: Expert Psychiatric Witnesses Remain Beyond Reach for the Indigent, 68 N.C. L. REV. 763, 783 (1990) ("Lower courts often have interpreted Ake less than generously, unduly constricting the availability of the right.").
227. Keyes et al., supra note 173, at 530.
228. See, e.g., Perlin, supra note 19, at 231.
Dr. Dorothy Lewis documented that juveniles imprisoned on death row were quick to tell her and her associates, "I'm not crazy," or "I'm not a retard."²²⁹ Moreover, a person with mental retardation will often attempt to conceal his condition from lawyers, not realizing that his condition could constitute a major part of his defense.²³⁰ Especially in a case in which counsel is substandard, this could—again—be fatal to a defendant who ought otherwise come under the Atkins umbrella.²³¹

Issue 11. The ability of post-Atkins defendants to provide meaningful assistance to counsel (assuming a finding of competence to stand trial)

Many defendants of ordinary intelligence do not contribute much help to their attorneys in extracting pertinent mitigating information.²³² This is certainly "exacerbated in the situation of a retarded defendant, who may not even understand what type of information her attorney needs, let alone begin to know how to provide it."²³³ The Atkins Court stressed the difficulties that persons with mental retardation may have in being able to give meaningful assistance to their counsel, their status as "typically poor witnesses," and the ways that their demeanor "may create an unwarranted impression of lack of remorse for their crimes."²³⁴ This is an extremely important issue to which scant attention has been paid, and it is one that is intensified by the reality that state criminal justice systems are ill equipped to deal with mentally ill or retarded defendants unable to aid their defense attorneys.²³⁵

Surveys of case law underscore the inability of mentally disabled criminal defendants to aid their counsel, even in cases in which no Dusky violation has been found.²³⁶ This issue must be reexamined carefully in the post-Atkins generation of death penalty cases.

²²⁹. Perlin, supra note 75, at 1412, relying on findings reported in Dorothy Lewis et al., Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States, 145 AM. J. PSYCHIATRY 584, 588 (1988) (stating that death row juveniles “almost uniformly tried to hide evidence of cognitive deficits and psychotic symptoms”), and in Dorothy Otnow Lewis et al., Psychiatric and Psychoeducational Characteristics of 15 Death Row Inmates in the United States, 143 AM. J. PSYCHIATRY 838, 841 (1986) (stating that all but one of a sample of death row inmates studied attempted to minimize rather than exaggerate their degree of psychiatric disorders).


²³¹. See, e.g., People v. McCleary, 567 N.E. 2d 434, 437 (Ill. App. Ct. 1990) (testimony from doctor finding that, in his opinion, defendant was insane and that "defendant did not want to be known as a crazy person and, in fact, was 'malingering sanity'").


²³⁴. Atkins, 536 U.S. at 321.


²³⁶. See, e.g., Jeffrey Wertzkin, Competency to Stand Trial, 90 GEO. L.J. 1514, 1515-16 n.1308 (2002), discussing, inter alia, United States v. Santos, 131 F.3d 16, 20-21 (1st Cir. 1997); United States v. Morrison, 153 F.3d 34, 39-40, 46-47 (2d Cir. 1998); Noland v. French, 134 F.3d 208, 211, 219 (4th Cir. 1998); Moody v. Johnson, 139 F.3d 477, 482 (5th Cir. 1998); United States v. Collins, 949 F.2d 921, 926-27 (7th Cir. 1991); Wise v. Bowersox, 136 F.3d 1197, 1202-05 (8th Cir. 1998); United States v. Frank, 956 F.2d 872, 874-75 (9th Cir. 1991); Foster v. Ward, 182 F.3d 1177, 1189-91 (10th Cir. 1999).
Issue 12. The impact of the Godinez v. Moran morass

The Supreme Court held in Godinez v. Moran\(^ {237} \) that the standard for pleading guilty and for waiving counsel was no higher than for standing trial, rejecting the notion that competence to plead guilty must be measured by a higher (or even different) standard from that used in incompetence to stand trial cases.\(^ {238} \) It reasoned that a defendant who was found competent to stand trial would have to make a variety of decisions requiring choices: whether to testify, whether to seek a jury trial, whether to cross-examine his accusers, and, in some cases, whether to raise an affirmative defense.\(^ {239} \) While the decision to plead guilty is a “profound one,” “it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial.”\(^ {240} \) Finally, the Court reaffirmed that any waiver of constitutional rights must be “knowing and voluntary.”\(^ {241} \) It concluded on this point:

Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel. While psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence, and while States are free to adopt competency standards that are more elaborate than the Dusky formulation, the Due Process Clause does not impose these additional requirements.\(^ {242} \)

The Godinez holding may lead to a potentially absurd scenario where a defendant with a history of mental illness or who is mentally retarded may be found competent to stand trial if he is found to have some ability to assist counsel in some way, and later may be allowed to remove counsel and represent himself.\(^ {243} \) The trial of Colin Ferguson “graphically symbolizes the dangerous implications of courts using Godinez’s low standard of competency.”\(^ {244} \)

Atkins, of course, is silent on this issue, as counsel represented the defendant. But it is an issue—how the Atkins standards can possibly be met in the case of a pro se defendant with mental retardation—that must be taken seriously.

E. Trial Judges

Issue 13. The willingness of judges to enforce Atkins

I have written extensively about the corrosive impact of pretextuality in mental disability law jurisprudence. “Pretextuality” means that courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest

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238. Id. at 390.
239. Id. at 398.
240. Id.
241. Id. at 400 (quoting Parke v. Raley, 506 U.S. 20, 29 (1992)).
244. Corinis, supra note 243, at 280; see generally Perlin, Dignity, supra note 17.
(frequently meretricious) decision making, specifically where witnesses, especially expert witnesses, show a “high propensity to purposely distort their testimony in order to achieve desired ends.”245 This pretextuality is poisonous; it infects all participants in the judicial system, breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and, at times, perjurous and/or corrupt testifying.246

A careful examination of mental disability law reveals that judges are often pretextual because of their own “instrumental, functional, normative and philosophical” dissatisfaction with non-sanist constitutional decisions that grant a measure of dignity to persons with mental disabilities.247 Trial judges who are similarly dissatisfied with Atkins—and it does not require research or citations to assert that there will be many—can easily sabotage it in hidden ways. This is an area that demands extraordinary vigilance.

F. Appellate Courts

Issue 14. The extent to which Justice Scalia's fear-of-faking concerns will dominate post-Atkins jurisprudence

Again, the sanist “fear of faking” myth dominates mental disability law.248 I have discussed this extensively in the context of competency-to-stand-trial law,249 the insanity defense,250 and death penalty law,251 and, in the insanity defense context, I have written that it is the fear that continues to “dominate” that jurisprudence.252 Justice Scalia’s dissent in Atkins is a pathetic recapitulation of this dreary myth and may prove to be the most significant roadblock to the implementation of Atkins.

His fears—similar to ones that the Chief Justice and Justice O’Connor expressed in Ford and in Penry253—reflect “society’s suspicion that the defendant is faking the illness and, together with her defense lawyers, will hoodwink an unsuspecting jury into accepting fallacious medical testimony.”254 Despite the lack of empirical support, judges deciding legal questions related to sanity frequently appeal to what they perceive as the “significant dangers presented by feigned or spurious claims of

245. Perlin, supra note 177, at 227.
246. See, e.g., id. at 227; see generally PERLIN, supra note 7, at 59-77.
248. See generally Perlin, supra note 75.
250. See Perlin, supra note 75.
251. See Perlin, supra note 19.
252. See PERLIN, supra note 5, at 247.
253. See Perlin, supra note 19, at 216.
insanity." Historically, society believed that insanity was too easily feigned, that such simulation easily deceived psychiatrists, and that the use of the defense was "an easy way to escape punishment." The fear is one that has held some of this century's most respected jurists in its thrall, regardless of the fact that it is not an axiom of criminal procedure that rights be "denied to all because of the fear that a few might abuse them."  

This helps to explain why there is increasing support for relaxing the legal protections available to persons with mental illness, by making those persons equally subject to the same draconian penalties now generally in favor. Thus, in analyzing the decision of the legislature in Idaho to reduce the insanity defense to solely a consideration of mens rea, Geis and Meier found that Idaho residents concluded that mentally disabled criminal defendants should not be able to avoid punitive consequences of criminal acts by reliance on either a "real or faked plea of insanity." A member of the Louisiana Supreme Court subsequently endorsed this sentiment. Again, reconsider Justice Scalia's curious reference to the feigning insanity defense pleader who then "risks commitment to a mental institution until he can be cured (and then tried and executed)."

The empirical realities are very different:  

Malingering by mentally disabled criminal defendants is statistically rare. Research reveals that defendants attempt feigning in less than eight percent of all competency to stand trial inquiries. Yet, in deciding incompetency to stand trial cases, courts continue to focus, in some cases almost obsessively, on testimony that raises the specter of malingering. The fear of such deception has "permeated the American legal system for over a century," despite the complete lack of evidence that such feigning "has ever been a remotely significant problem of criminal procedure." This fear is a further manifestation of judicial sanism.

256. Perlin, supra note 75, at 1408.
257. Perlin, supra note 105, at 714 (quoting, in part, Bolton v. Harris, 395 F.2d 642, 649 n.35 (D.C. Cir. 1968)).
258. Gilbert Geis & Robert F. Meier, *Abolition of the Insanity Plea in Idaho: A Case Study*, 477 ANNALS 72, 73 (1985) (explaining that Idaho residents hold the view that persons should not be able to avoid punitive consequences of criminal acts by reliance on "either a real or a faked plea of insanity").
259. See *State v. Perry*, 610 So. 2d 746, 781 (La. 1992) (Cole, J., dissenting) ("Society has the right to protect itself from those who would commit murder and seek to avoid their legitimate punishment by a subsequently contracted, or feigned, insanity.").
261. Perlin, supra note 249, at 678-79 (footnotes omitted). See also Perlin, supra note 75, at 1405: Perhaps the oldest of the insanity defense myths is that criminal defendants who plead insanity are usually faking, a myth that has bedeviled American jurisprudence since the mid-nineteenth century. Of the 141 individuals found NGRI [not guilty by reason of insanity] in one jurisdiction over an eight year period, there was no dispute that 115 were schizophrenic...and in only three cases was the diagnostician unwilling or unable to specify the nature of the patient's mental illness.

Again, this most compelling of all mental disability law myths can be attributed to the ravaging existence of sanism. It is a myth that must be taken seriously in the aftermath of Atkins.

**Issue 15. The ability of all participants to understand the relationship between such cases and the insanity defense**

Sanism similarly infects competency-to-stand-trial jurisprudence in critical ways. Courts stubbornly refuse to understand the distinction between competency to stand trial and insanity, even though the two statuses involve different concepts, different standards, and different points on the “time line,” and courts frequently misunderstand the relationship between incompetency and subsequent commitment. Justice Scalia’s curious reference to feigned insanity defenses suggests that this confusion persists. It is an issue that must be taken seriously in the world after Atkins, especially when we consider the extent to which the act of pleading the insanity defense may significantly increase the likelihood of a jury returning a death penalty verdict.

**G. Prosecutors**

**Issue 16. The attitude of prosecutors toward such cases**

There has been little written about the ways that prosecutors construct cases involving defendants with mental retardation. Jamie Fellner, an attorney with Human Rights Watch, had this to say:

Even when a defense lawyer presents evidence of the client’s retardation, prosecutors are all too often more concerned with the professional or political ramifications of obtaining a “victory”—a death sentence—than with giving serious consideration to the ways mental retardation has affected the defendant’s comprehension and conduct. Faced with pressure from the community and the victim’s family, they do not want to “excuse” the crime or let an offender “off too easy.” During trials they vigorously challenge the existence of mental retardation, minimize its significance, and suggest that although a capital defendant may “technically” be considered retarded, he nonetheless has “street smarts”—and hence should receive the highest penalty.

Nothing in the body of Atkins touches on this issue, but, operationally, its importance cannot be overstated. Again, those of us who watch post-Atkins developments must scrutinize this carefully.

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262. See Perlin, supra note 75, at 1380.
263. Perlin, supra note 177, at 235-36; Perlin, supra note 249, at 680.
H. Society

Issue 17. The ability of society to accept the reality of the number of death-eligible defendants who are mentally retarded

It has been estimated that up to thirty percent of all persons on death row are mentally retarded.\textsuperscript{266} Other surveys range from four percent to twenty percent.\textsuperscript{267} Jonathan Bing's research reveals that

\[ \text{[o]f the first 157 convicted murderers executed since capital punishment was re instituted in 1976, at least eleven of them (seven percent) were known to be mentally retarded, although the incidence of mental retardation among the population at large is estimated at only three percent.} \]

\[ \text{...Of the...2,500 people on death row [in 1995], it is estimated that twelve to twenty percent of them are mentally retarded.} \]

These are numbers that many find jarring and all should find troubling. My point here is that there is little that is exceptional or idiosyncratic about the facts of the Atkins case. Any post-Atkins analyses must confront these statistics soberly and carefully.

IV. CONCLUSION

I know that I have painted a gloomy picture. The questions then are these: Is it too gloomy? If it is not, what is there, if anything, that we can do to ameliorate this situation (and "we" here refers to those of us who take this issue seriously)?

I am convinced that the picture is not inappropriately gloomy. I began to represent mentally disabled criminal defendants in 1971, and I have provided representation to members of this universe at every stage of the litigation process. I have taught about, written about, and spoken about this population since 1984. I am convinced that the issues that I have raised here are not new ones and that they continue to dominate this part of the legal landscape.

So this leads to my second question: What can be done? My prescriptions here are modest but are necessary if we are to break the cycles that I have described in this article, and if Atkins is to be, truly, given life.

First, it is essential that the organized criminal defense bar "step up to the plate" and take stock of the status quo. It is never easy to do public self-evaluation, and less so when the conclusions to be reached are inevitably so negative. But, if Atkins is to have authentic meaning, groups such as the National Legal Aid and Defenders


Association, the National Association of Criminal Defense Lawyers, and others must confront the issues raised in this article and “take the lead” in educating their members and in developing strategies to assure that counsel is authentically “effective” (which does not mean that it simply passes the pallid Strickland v. Washington standard). 269

Second, the judiciary must—for the first time—take these issues seriously. Judges, like jurors and other lay people, still continue to take ordinary-common-sense-like refuge in stereotyping persons with mental retardation, especially in the cases of such persons charged with serious crimes. Legal resources are now available to all judges that help dispel these myths, 270 but it is not at all clear whether judges have availed themselves of these resources. It is time they do.

Third, it is time for prosecutors to stop posturing. It is black letter law that the role of the prosecutor is not simply to win convictions, but to seek justice. 271 It is time that this happens in these cases.

Fourth, we must again confront the corrosive and malignant impact of sanism and pretextuality, 272 an impact that is at its most insidious in this sort of case. If we fail to do that, then Atkins can be no more than a “paper victory.” 273

I end as I began, with Bob Dylan. Think again about the line that I used for my title: “Life is in mirrors, death disappears.” Then think about the words of Atkins and these hidden issues that I have sought to raise here. My hope is that the heart and soul of the Atkins decision do not disappear.

269. See Perlin, supra note 19, at 205-06.
270. JOHN PARRY & ERIC DROGIN, CRIMINAL LAW HANDBOOK ON PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE AND TESTIMONY (2000).
271. E.g., People v. Kelley, 142 Cal. Rptr. 457, 467 (Cal. Ct. App. 1977) (stating that a prosecutor is held to a higher standard because of his or her unique role in exercising sovereign state power); State v. Ferrone, 113 A. 452, 455 (Conn. 1921) (stating that a prosecutor is a high public officer charged to seek impartial justice).
273. See supra note 9.