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ATKINS V. VIRGINIA: LESSONS FROM SUBSTANCE AND PROCEDURE IN THE CONSTITUTIONAL REGULATION OF CAPITAL PUNISHMENT

Carol S. Steiker* and Jordan M. Steiker**

In its first two decades regulating capital punishment in the modern era, the U.S. Supreme Court focused primarily on procedure rather than substance.¹ The broad attack on the death penalty in the 1960s and early 1970s had both substantive and procedural dimensions.² Death penalty opponents claimed that the punishment itself was excessively cruel and inconsistent with evolving standards of decency. They also argued that state death penalty systems lacked basic procedural safeguards to ensure that the punishment, if retained, would be applied in a consistent, nondiscriminatory manner. In response to these claims, the Court insisted that states rewrite their statutes to guide sentencer discretion³ while also preserving some meaningful consideration of mitigating evidence.⁴ Additionally, the Court adopted rules intended to limit unfair or discriminatory selection of

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1. See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV L. REV. 355, 402–03 (1995).

2. MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 60–72 (1973) (describing death penalty opponents' strategy leading up to *Furman v. Georgia*, 408 U.S. 238 (1972), as a plan to attack the death penalty on procedural grounds with hopes of gaining ground on a substantive assault against the death penalty).

3. See *Proffitt v. Florida*, 428 U.S. 242, 253 (1976) (“Under Florida’s capital-sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life.”). In *Gregg v. Georgia*, the Court stated the following:

[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance . . . [I]t is possible to construct capital-sentencing systems capable of meeting *Furman*’s constitutional concerns.

428 U.S. 153, 195 (1976) (citing *Furman*, 408 U.S. 238).

4. See *Woodson v. North Carolina*, 428 U.S. 280 (1976) (invalidating a mandatory death penalty statute on grounds that it foreclosed individualized consideration of the offender and offense).

capital jurors⁵ and required some heightened standards in capital cases to enhance the reliability of capital sentencing.⁶ At the same time, the Court generally rejected efforts to impose significant substantive limits on the imposition of the death penalty, either through total abolition or enforceable proportionality limits⁷ or through judicial policing of the outcomes of the death penalty system.⁸

The proceduralization of American death penalty law might be regarded as appropriately reflecting the Court's institutional strengths and limitations. The Court's expertise and authority are at their height when the Court focuses on the design and implementation of procedures within the framework of the criminal justice system.⁹ In contrast, substantive assessments by the Court—such as whether a form of punishment is excessive in itself or disproportionate in light of the characteristics of an offense and offender—draw the Court into more difficult and controversial terrain. Indeed, given the Court's focus on the evolving standards of contemporary society in crafting proportionality limits on the death penalty, regulating the substantive reach of the American death penalty moves the Court toward political and social anthropology and away from the more familiar territory of criminal procedure.

Nonetheless, looking at the two decades of constitutional regulation of the death penalty post-*Furman*, we previously argued that the excessively procedural focus on American death penalty law had wrought the worst of all possible worlds.¹⁰ The Court's intricate procedural doctrines did little to enhance the reliability or fairness of the American death penalty, yet the expensive, time-consuming litigation

5. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (regulating the practice of death-qualifying juries by insisting that states could not strike for cause all jurors who harbored some conscientious reservations about the death penalty).

6. See *Simmons v. South Carolina*, 512 U.S. 154 (1994) (invalidating limits on defense-sponsored testimony regarding the unavailability of parole in cases where the prosecution emphasized the prospective dangerousness of the defendant); *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (limiting prosecutorial efforts to diminish jurors' sense of responsibility for their verdict based on an inaccurate characterization of the scope of appellate review); *Gardner v. Florida*, 430 U.S. 349 (1977) (requiring heightened procedural protections at the sentencing phase to ensure accuracy of information offered in support of imposing a death sentence).

7. See *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (rejecting the argument that the death penalty is disproportionate as applied to offenders with mental retardation); *Tison v. Arizona*, 481 U.S. 137 (1987) (limiting proportionality protections for non-triggerpersons sentenced to death).

8. See *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting the claim that the demonstrable role of race—particularly the race of the victim—in capital sentencing renders the death penalty impermissibly arbitrary in violation of the Eighth Amendment).

9. Steiker & Steiker, *supra* note 1, at 407.

10. *Id.* at 438.

wrought by such procedures gave the appearance of intensive, meaningful regulation.¹¹ We worried that the complicated web of legal rules gave unjustified legitimacy to a death penalty system that still operated in an arbitrary, discriminatory, and disproportionate manner.¹² We also argued that the Court had missed several opportunities to address the underlying concerns about the arbitrary, discriminatory, and disproportionate use of the death penalty by imposing significant substantive limitations on its reach.¹³ In our view, forbidding the imposition of the death penalty against certain offenders would provide a meaningful limitation on the death penalty and would not risk exacerbating the “legitimation” problem created by highly visible, yet highly ineffectual, procedural safeguards.

Over the past five years, the Court has reversed earlier decisions and embraced the sort of substantive constraints on capital punishment that we had endorsed—banning the imposition of the death penalty against juveniles offenders¹⁴ and offenders with mental retardation.¹⁵ Although these decisions pointed to some objectively discernible measures of growing public concerns about executing such offenders, they also reflected the movement toward a methodological approach more hospitable to substantive regulation of the death penalty. In both cases, a minority of death penalty states forbade the challenged practice,¹⁶ yet the Court relied upon the direction and speed of change toward prohibition and other, nonlegislative indicia of contemporary values (expert and international opinion, among other things) in discerning an emerging consensus that such executions were excessive.¹⁷

The implementation of the juvenile ban involves no difficult cases, and there has been virtually no litigation surrounding it: offenders who committed the crime before turning eighteen have had their sentences commuted via judicial or clemency proceedings. At least one state expressed deep dissatisfaction with the Court’s decision, but such disappointment was not accompanied by defiance of the man-

11. *Id.* at 426–38.

12. *Id.*

13. *Id.* at 415–21 (outlining possible substantive regulation).

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

15. See *Atkins v. Virginia*, 536 U.S. 304 (2003).

16. At the time of *Atkins*, eighteen death penalty states prohibited the execution of offenders with mental retardation. *Id.* at 313–15. At the time of *Simmons*, eighteen death penalty states prohibited execution of persons under eighteen at the time of the crime. 543 U.S. at 564.

17. *Simmons*, 543 U.S. at 565–78 (referencing professional evaluations of juveniles’ culpabilities and discussing international opinion of the juvenile death penalty); see also *Atkins*, 536 U.S. at 316–18 & n.21 (discussing expert opinions of mental retardation and culpability and referring to disapproval of the “world community”).

date.¹⁸ The ban on executing persons with mental retardation, on the other hand, has spawned extensive, intricate, and bitterly contested litigation. Although states have differed marginally in their definitions of mental retardation—some have embraced evidentiary presumptions for IQ scores at or below 65,¹⁹ 70,²⁰ or 75,²¹ and others have adopted no numeric standard²²—there appears to be remarkable agreement about a “core” definition of mental retardation. But this “core” is more of a standard than a rule; thus, there is frequent disagreement about whether the exemption applies in particular cases.

I. PROCEDURES FOR DETERMINING MENTAL RETARDATION: IMPLEMENTATION OR EVASION?

The greatest variation among states exists in the procedures used to determine whether a defendant is mentally retarded, including whether the ultimate decisionmaker should be judge or jury,²³ whether the state or the defendant should bear the burden of proof,²⁴

18. See Petition for Writ of Certiorari at i, *Alabama v. Adams*, 2006 WL 979273 (U.S. Mar. 22, 2006) (No. 05-1309) (presenting the question of “[w]hether this Court should reconsider its decision in *Roper v. Simmons*”).

19. See, e.g., ARK. CODE ANN. § 5-4-618(a)(2) (2007) (establishing a rebuttable presumption of mental retardation when the defendant’s IQ is 65 or below).

20. See, e.g., KY. REV. STAT. ANN. § 532.130(2) (LexisNexis 2006); MD. CODE ANN. CRIM. LAW § 2-202(b)(1) (LexisNexis 2007); NEB. REV. STAT. ANN. § 28-105.01(3) (LexisNexis 2007); N.M. STAT. ANN. § 31-20A-2.1(A) (LexisNexis 2007); N.C. GEN. STAT. § 15A-2005(a)(1)(c) (2007).

21. See, e.g., 725 ILL. COMP. STAT. ANN. 5/114-15 (LexisNexis 2007) (in Illinois, an IQ of 75 or below is presumptive evidence of mental retardation).

22. See, e.g., COLO. REV. STAT. § 18-1.3-1101(2) (2007); GA. CODE ANN. § 17-7-131(a)(3) (2007); KAN. STAT. ANN. § 21-4623(e) (2007); MO. REV. STAT. § 565.030(6) (2007).

23. For example, Delaware and Virginia require a jury determination of mental retardation. DEL. CODE ANN. tit. 11, § 4209(d)(3) (2007); VA. CODE ANN. § 19.2-264.3:1.1 (2007). In contrast, Idaho and Nevada require the judge to determine mental retardation. IDAHO CODE ANN. § 19-2515A (2007); NEV. REV. STAT. ANN. § 174.098 (LexisNexis 2007). North Carolina and Oklahoma allow for determination by either a judge or a jury, but specify different burdens of proof for each. N.C. GEN. STAT. § 15A-2005; OKLA. STAT. ANN. tit. 21, § 701.10b (2007).

24. States vary regarding the standard of proof as well. For example, Mississippi, South Carolina, and Washington place the burden on the defendant by preponderance of evidence. *Chase v. State*, 873 So. 2d 1013, 1029 (Miss. 2004); *Franklin v. Maynard*, 588 S.E.2d 604, 606 (S.C. 2003); WASH. REV. CODE § 10.95.030 (LexisNexis 2007). In contrast, Arizona and Delaware place the burden on the defendant by clear and convincing evidence. ARIZ. REV. STAT. ANN. § 13-703.02 (2007); DEL. CODE ANN. tit. 11, § 4209(d)(3). Georgia places the burden on the defendant to establish mental retardation beyond a reasonable doubt. GA. CODE ANN. § 17-7-131(a)(3). In California cases predating the state legislation, it appears that the burden is on the state. See, e.g., *In re Young*, No. S115318, 2006 Cal. LEXIS 12452, at *1 (Cal. Oct. 11, 2006) (“The Director of the Department of Corrections . . . is ordered to show cause . . . why petitioner’s death sentence should not be vacated . . . on the ground that he is mentally retarded within the meaning of *Atkins* . . .”).

and whether the determination should be made pretrial or post-trial.²⁵ For those already sentenced to death, states differ in what triggers either a right to resources for further developing a mental retardation claim or a right to an evidentiary hearing. Further, they differ regarding whether claims of ineligibility based on mental retardation are defaultable.²⁶

In *Atkins*, the Court explicitly left to the states the means of implementing the ban: “As was our approach in *Ford v. Wainwright* with regard to insanity, ‘we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences.’”²⁷ But, by essentially deregulating the procedural means of enforcing the substantive right, the Court has undermined the goals of the underlying ban by creating a substantial risk of false negatives. This risk is especially great in jurisdictions where the determination of mental retardation is made by the same jurors who have already determined that the defendant should be sentenced to death (or by a judge after an advisory sentence of death)²⁸ and in jurisdictions that impose other significant obstacles to a finding of mental retardation, such as a “beyond a reasonable doubt” or “clear and convincing” standard of proof borne by the defendant,²⁹ excessively stringent provisions for litigating mental retardation claims in postconviction fora (including threshold rules for funding and evidentiary hearings), or evidentiary rules that permit prejudicial considerations (for instance, the manner in which the crime was committed) to play a significant role in the assessment of mental retardation.³⁰

25. See, e.g., KAN. STAT. ANN. § 21-4623 (providing for pre-sentencing determination); NEV. REV. STAT. §§ 174.098, 175.554 (detailing separate procedures for claims brought pretrial, during trial, or post-trial); N.C. GEN. STAT. § 15A-2005 (specifying that the determination take place pretrial if made by a judge, but during sentencing if by jury); S.D. CODIFIED LAWS § 23A-27A-26.2 (2007) (requiring pretrial determination).

26. Georgia defendants who do not raise mental retardation at trial may raise the claim in a habeas petition under the miscarriage of justice exception to procedural default. See, e.g., *Head v. Ferrell*, 554 S.E.2d 155 (Ga. 2001). However, the habeas court may not “revisit jury verdicts on mental retardation and order different results.” *Head v. Stripling*, 590 S.E.2d 122, 128 (Ga. 2003); see also *Rivera v. Quarterman*, 505 F.3d 349 (5th Cir. 2007); *Schofield v. Palmer*, 621 S.E.2d 726, 731 (Ga. 2005).

27. *Atkins v. Virginia*, 536 U.S. 304, 317 (2003) (citation omitted) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986)).

28. See, e.g., FLA. STAT. ANN. § 921.137(4) (LexisNexis 2007) (leaving the determination to the judge after a jury’s advisory death verdict); VA. CODE ANN. § 19.2-264.3:1.1 (2007) (leaving the mental retardation determination to the jury).

29. Arizona and Delaware place the burden on the defendant by clear and convincing evidence. ARIZ. REV. STAT. § 13-703.02; DEL. CODE ANN. tit. 11, § 4209(d)(3). Georgia places the burden on the defendant beyond a reasonable doubt. GA. CODE ANN. § 17-7-131(a)(3).

30. See, e.g., *Ex parte Briseno*, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004) (utilizing a judicially created test for mental retardation that explicitly requires focus on the defendant’s behavior

Both pre- and post-*Atkins* litigation has demonstrated the ways in which statutory or court-imposed procedural obstacles can impair the underlying prohibition against executing persons with mental retardation. In Georgia, for example, placing the burden of establishing mental retardation beyond a reasonable doubt on defendants certainly limits the effectiveness of the prohibition. Georgia adopted its ban after the notorious execution of Jerome Bowden, an inmate with mental retardation, who was denied clemency notwithstanding his significant impairment (Bowden reportedly could not count to ten).³¹ The net effect of the high burden Georgia imposes on defendants is that disagreement among experts will invariably support a finding against the defendant.³² There is some irony in Georgia's simultaneous status as the first state to ban the practice and the state that imposes the highest burden to establish mental retardation. Other states, via statute or judicial decision, have rejected the Georgia standard, some doing so explicitly on constitutional grounds. In Kentucky, for example, the state supreme court concluded that it could not impose a burden above the preponderance standard in its implementation of the state's prohibition against executing "seriously mentally retarded" offenders.³³ The Kentucky court, analogizing to the issue of incompetency, held that the beyond a reasonable doubt standard was inconsistent with the U.S. Supreme Court's rejection of Oklahoma's requirement that defendants establish their incompetency by clear and convincing evidence.³⁴

Some jurisdictions have sought to ensure that the mental retardation determination is not divorced from the underlying facts of the offense notwithstanding the possible prejudice of tying that determination to the death penalty decision. The effort to connect the crime to the assessment of mental retardation occurs on two levels: the timing of the decision and the permissible evidentiary bases for establishing or, more commonly, rebutting deficits in adaptive behavior.

during the crime). A related hurdle exists in many states that require the presence of mental retardation "at the time of the offense." *See, e.g., Anderson v. State*, 163 S.W.3d 333, 356 (Ark. 2004) ("Here, instead of submitting evidence demonstrating mental retardation at the time of the offense, which took place on October 12, 2000, Anderson submitted evidence of his IQ from 1996.").

31. Tiffany A. Mann, Note, *The Supreme Court Exempts Another Class from the Death Penalty: Mentally Retarded Offenders—Atkins v. Virginia*, 4 *LOY. J. PUB. INT. L.* 77, 88 (2003).

32. *See, e.g., Schofield v. Holsey*, 642 S.E.2d 56, 63 (Ga. 2007) (citing disagreement between the defendant's and state's experts to support the conclusion that the defendant did not establish mental retardation beyond a reasonable doubt).

33. *Bowling v. Commonwealth*, 163 S.W.3d 361, 382 (Ky. 2005).

34. *Id.* (citing *Cooper v. Oklahoma*, 517 U.S. 348 (1996)).

With respect to timing, in some states, the decision about mental retardation is made at the punishment phase by the same jury that has already determined that death is the appropriate punishment.³⁵ The risk of prejudice is obvious, and several states have taken deliberate steps in the opposite direction—mandating that the determination of mental retardation be made by a decisionmaker who has not been unnecessarily exposed to the circumstances of the offense or the consequences of the factual determination regarding mental retardation.³⁶ The contrary decision to locate the mental retardation determination at the punishment phase, apart from its likely prejudicial impact on the assessment, seems patently inefficient. If the determination of mental retardation is made pretrial, substantial costs associated with capital litigation can be avoided. The only plausible account for avoiding a pretrial determination is the state's desire to confront the decisionmaker with the "cost" of exempting a defendant from the death penalty in circumstances where they have already found his criminal behavior to warrant death.

Some jurisdictions have sought to weave the facts of the crime into the determination itself by treating such facts as relevant to the issue of adaptive deficits.³⁷ For example, the Texas Court of Criminal Appeals (CCA) has developed a seven-part inquiry for mental retardation that explicitly directs the decisionmaker to consider the facts of the crime.³⁸ The seventh factor asks, "Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?"³⁹ The Texas test also asks whether the defendant is able to "hide facts or lie effectively in his own or others' interests."⁴⁰ This test significantly departs from those employed by professionals in the field, which use standardized criteria to detect significantly subaverage adaptive functioning.⁴¹ Although Texas embraces the standard test

35. See, e.g., CONN. GEN. STAT. ANN. § 53a-46a (West 2007); VA. CODE ANN. § 19.2-264.3:1.1(C) (2007).

36. See ARIZ. REV. STAT. ANN. § 13-703.02(B)–(D) (2007); IDAHO CODE ANN. § 19-2515A (2007); IND. CODE ANN. § 35-36-9-5 (LexisNexis 2007); KY. REV. STAT. ANN. § 532.135 (LexisNexis 2007); OKLA. STAT. ANN. § 701.10(b) (West 2007); S.D. CODIFIED LAWS § 23A-27A-26.3 (2007); UTAH CODE ANN. § 77-15a-104 (2007).

37. See, e.g., *Morrow v. State*, 928 So. 2d 315, 320 (Ala. Crim. App. 2004).

38. *Ex parte Briseno*, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004).

39. *Id.*

40. *Id.* at 8.

41. See AM. ASS'N ON MENTAL RETARDATION, *MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT* 23, 42, 74, 78 (10th ed. 2002) (dividing adaptive functioning into three major domains, listing skills within those domains, and defining significantly subaverage adaptive functioning); AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 49 (4th ed. text rev. 2000).

for mental retardation in its health and safety statute,⁴² the court-crafted overlay for assessing deficits in adaptive behavior in capital cases is not grounded in professional practice or guidelines.

Moreover, the apparent effort of the CCA to mitigate the potential prejudice by asking the decisionmaker to “put aside” the heinousness or gruesomeness of the offense is more likely to highlight those facts than to divert attention from them. The obvious purpose of crafting such a test is to narrow the class of individuals who can avail themselves of the exemption, and the CCA was forthright in explaining why the familiar test for mental retardation set forth in Texas’s health code should not automatically control capital litigation. According to the CCA, the definition in the health code might sweep too broadly, and the court instead sought to “define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty.”⁴³ Unsurprisingly, Texas courts have rejected virtually every contested claim of mental retardation in applying this test to persons already sentenced to death.⁴⁴

In addition to systemic procedural obstacles, litigation surrounding the *Atkins* exemption has been compromised by idiosyncratic procedural irregularities. In one unusual post-*Atkins* case, an Alabama court refused to accept the parties’ stipulation that the defendant had mental retardation despite extensive evidence establishing his low IQ and significant deficits in adaptive behavior.⁴⁵ The Alabama Court of Criminal Appeals ultimately reversed that decision, holding that the “evidence overwhelmingly supports a finding that [the defendant] is mentally retarded and that he is therefore not eligible for the death penalty.”⁴⁶ In another decision, issued just after *Atkins*, the Alabama Supreme Court rejected a defendant’s claim of mental retardation, emphasizing the defendant’s “articulate statement made to the police after he was arrested,” the fact that the defendant had had a long-time girlfriend, and the fact that, before shooting the victim, the defendant had instructed his girlfriend to move out of harm’s way.⁴⁷ The Alabama Supreme Court reversed his death sentence on other grounds, paving the way for a new sentencing hearing that resulted in another

42. TEX. HEALTH & SAFETY CODE ANN. § 591.003(13) (Vernon 2007).

43. *Briseno*, 135 S.W.3d at 6.

44. Petition for Writ of Certiorari at 18–19, *Chester v. Texas*, 128 S. Ct. 373 (2007) (No. 06-1616) (stating that the application of *Briseno* in Texas cases has allowed for relief in only one contested Texas case).

45. *Jackson v. State*, 963 So. 2d 150, 152 (Ala. Crim. App. 2006).

46. *Id.* at 157.

47. *Ex parte Smith*, No. 1010267, 2003 Ala. LEXIS 79, at *26–28 (Ala. Mar. 14, 2003).

sentence of death.⁴⁸ On appeal of the subsequent sentence, the Alabama Court of Criminal Appeals found that the defendant was ineligible for the death penalty because of his mental retardation.⁴⁹

A Mississippi court denied a post-*Atkins* motion for a hearing on mental retardation on the ground that the defendant failed to produce evidence of nonmalingering via the Minnesota Multiphasic Personality Inventory-II (MMPI-II).⁵⁰ Despite the defendant's proffered evidence of an IQ of 68 and deficits in adaptive behavior, the Mississippi Supreme Court ruled that no further proceedings were necessary, because the defendant had, at best, shown "borderline mental retardation" and had not offered evidence to demonstrate nonmalingering.⁵¹ Mississippi's requirement that a defendant establish, as a threshold matter, nonmalingering via a particular test creates an unnecessary obstacle to merit review of claims of mental retardation, especially where a defendant has independently established a basis for supposing that he has mental retardation.

The most troubling procedural barrier to relief under *Atkins* is the imposition of default doctrines, such as statutes of limitations or successive petition bars, with the undeniable consequence of permitting the execution of persons with mental retardation. In *Rivera v. Quarterman*, a panel of the Fifth Circuit Court of Appeals affirmed the district court's finding that the defendant had mental retardation but did not grant relief on his claim, because the defendant filed his habeas petition five days late.⁵² Instead, the panel remanded the case to the district court to determine whether equitable considerations justified excusing the defendant's failure to comply with the one-year statute of limitations under the federal habeas statute.⁵³ In the state court proceedings, the defendant had been denied relief on the ground that he had not established a prima facie case of mental retar-

48. *Id.* at *30.

49. *Smith v. State*, No. CR-97-1258, 2006 Ala. Crim. App. LEXIS 203, at *22-25 (Ala. Crim. App. Sept. 26, 2006). The Court of Criminal Appeals held that the Alabama Supreme Court's analysis of the claim of mental retardation did not bar further review of the issue, especially in light of additional evidence introduced at the subsequent trial. *Id.* at *24. Based on the defendant's IQ of 61 and documented deficits in adaptive behavior, the Court of Criminal Appeals found the defendant ineligible for the death penalty. *Id.* at *23-24. Although the subsequent review by the Court of Criminal Appeals protected Smith from execution, the Alabama Supreme Court opinion illustrates the hazards of non-expert analysis of evidence of mental retardation.

50. *Wiley v. State*, 890 So. 2d 892, 897 (Miss. 2004).

51. *Id.* at 896, 898.

52. 505 F.3d 349, 351, 353-54 (5th Cir. 2007). Applicant's motion for authorization did not alter due date for filing of petition, so the August 11, 2003 filing of the petition was five days late given that the statute of limitations expired on August 6, 2003.

53. *Id.* at 363; see generally 28 U.S.C. § 2244(d)(1) (2000).

dation, notwithstanding evidence of his long-standing academic difficulties and expert testimony that, “as an adult, [he] was performing academically at the level of a 10 year old.”⁵⁴ The Fifth Circuit found no clear error in the federal district court’s conclusion that the defendant’s IQ of 68 and evidence of deficits in adaptive behavior (reflected in his sleeping outside under his house) established his mental retardation.⁵⁵ But the appellate court held that the state was entitled to a determination whether the *Atkins* claim was barred by the statute of limitations.⁵⁶ Among the considerations the Fifth Circuit thought should be addressed on remand were whether the defendant was represented at all times prior to his filing and whether strict application of limitations periods is justified when a defendant with mental retardation represents himself.⁵⁷

The most surprising aspect of the *Rivera* decision was the Fifth Circuit’s refusal to embrace the defendant’s claim that the Eighth Amendment ban on executing persons with mental retardation trumps procedural restrictions like the limitations period. Several courts have wrestled with whether the federal habeas limitations period should be read to embrace an “actual innocence” exception.⁵⁸ A logical corollary is whether a defendant who is exempt from the death penalty as a matter of Eighth Amendment law would likewise overcome this procedural barrier. It seems clear that no defendant, post-*Simmons*, who was under the age of eighteen at the time of the offense, would be deemed to have “forfeited” his Eighth Amendment claim by failing to raise it in a timely manner. The Fifth Circuit, though, appears to have endorsed the possibility that a defendant whose mental retardation is established and judicially acknowledged might have no judicial protection from execution.⁵⁹ If, on remand, the district court were to find that the limitations period should not have been equitably tolled, the appellate court will have to address directly

54. *Rivera*, 505 F.3d at 356 (internal quotation marks omitted).

55. *Id.* at 362.

56. *Id.* at 354.

57. *Id.*

58. Compare *Souter v. Jones*, 395 F.3d 577, 599 (6th Cir. 2005) (embracing equitable tolling of AEDPA’s statute of limitations based on actual innocence), and *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) (stating in dicta that actual innocence would justify equitable tolling), with *Escamilla v. Jungwirth*, 426 F.3d 868, 872 (7th Cir. 2005) (stating that actual innocence would not overcome the limitations bar except for newly discovered claims).

59. *Rivera*, 505 F.3d at 353–54.

whether the defendant can be executed notwithstanding the court's conclusion that he is constitutionally ineligible under *Atkins*.⁶⁰

II. REFLECTIONS ON PROCEDURAL EVASION OF NEW SUBSTANTIVE RIGHTS

Despite our earlier concerns about procedural safeguards without substantive limits,⁶¹ these recent developments have caused us to reflect on the risks posed by the declaration of substantive limits without the enforcement of procedural safeguards. Just like the excessive proceduralism of the earlier era, the Court's ban on the execution of persons with mental retardation—unaccompanied by any meaningful review of the state procedures for implementing the ban—carries with it the risk of legitimation. The Court's message, to both domestic and international audiences, was that this country will no longer tolerate executing persons with mental retardation. Unfortunately, the absence of procedural safeguards and the very troublesome procedures adopted in many jurisdictions undercut the plausibility of any such claim.

Ultimately, the prevalence of state procedures that, whether by design or implementation, make it difficult to establish mental retardation limits the scope of the substantive right. Procedures dictate the scope of substantive rights, and, in this context, the procedures adopted within various jurisdictions have the effect of redefining the "consensus" the Court identified. If heavy burdens of proof, stringent threshold requirements for experts and hearings, and the timing of the determination of mental retardation systematically screen out close cases because of the fear of "false positives," the substantive right in effect becomes a prohibition against executing offenders whose mental retardation is *obvious* or *indisputable*, and offenders without severe retardation have little meaningful protection. Perhaps the Court's willingness to cede to the states the authority to craft procedures reflects its view that the substantive right extends only so far—that there is no clear consensus beyond a prohibition against executing individuals with severe and demonstrable manifestations of mental retardation. Indeed, the Court's pronouncement in *Atkins* that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there

60. In other cases, the Fifth Circuit has rejected the argument that the limitations period should yield to claims of actual innocence based on evidence of mental retardation. *See, e.g., In re Lewis*, 484 F.3d 793, 798 n.20 (5th Cir. 2007).

61. *See supra* notes 10–13 and accompanying text.

is a national consensus"⁶² could be read precisely in this way. More likely, though, is that the Court's embrace of the proportionality limitation was rooted in its understanding that the core clinical definition of mental retardation was widely shared and that state procedures, therefore, were unlikely to diverge sharply in their results. On this latter point, the Court seriously underestimated the extent to which procedures matter in this context.

It would be ironic if the Court's reliance on *Ford v. Wainwright* for charging the states with "the task of developing appropriate ways to enforce" the federal right were transformed into an unfettered license to defeat or marginalize the Eighth Amendment prohibition.⁶³ *Ford* itself was a death penalty case that was centrally concerned with the importance of *procedure* in protecting an underlying substantive prohibition against certain types of executions.⁶⁴ In *Ford*, the Court announced the Eighth Amendment ban on the execution of offenders who are insane at the time of their executions.⁶⁵ Unlike *Atkins*, *Ford* was not concerned with the culpability of offenders at the time of their offenses, but rather with the mental state of death row inmates at the time of their scheduled executions.⁶⁶ A fractured majority of the Court discerned a consensus among the states—indeed, a unanimous one—against executing the insane.⁶⁷ Justice Powell explained, in a widely followed concurring opinion, that insanity for these purposes includes those whose mental state prevents them from being aware of either their impending execution or the reason for it.⁶⁸ Florida, the state in which *Ford* was sentenced to death, recognized this substantive limitation by statute.⁶⁹ But the procedure that Florida provided for assessing a death row inmate's competency to be executed was wholly nonadversarial, allowing the inmate neither an opportunity to present relevant evidence nor an opportunity to challenge the state's evidence.⁷⁰ Moreover, the ultimate decision about an inmate's competency to be executed was vested by Florida law not in a neutral fact finder, but rather in the governor, the head of the very executive branch that had brought the prosecution in the first place.⁷¹ The *Ford*

62. *Atkins v. Virginia*, 536 U.S. 304, 317 (2003).

63. *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 416 (1986)).

64. 477 U.S. 399.

65. *Id.* at 409–10.

66. *Id.*

67. *Id.* at 409 n.2.

68. *Id.* at 421 (Powell, J., concurring in part and concurring in the judgment).

69. *Id.* at 412 (majority opinion) (citing FLA. STAT. § 922.07 (1985 and Supp. 1986)).

70. *Ford*, 477 U.S. at 412 (majority opinion).

71. *Id.*

Court concluded that this procedural regime failed to meet the requirements of due process and therefore was not “adequate to afford a full and fair hearing” on the underlying substantive claim of insanity.⁷² Thus, when the *Atkins* Court cited *Ford* for the proposition that states should develop procedures for the adjudication of claims of mental retardation, there is no reason to think that the Court intended to invite or allow the kind of procedural undermining of the substantive right that we have described above.

Intended or not, however, the current procedural landscape five years after *Atkins* threatens vindication of the underlying substantive right in a way that the Court found intolerable in the analogous *Ford* context. What are the implications for our death penalty practices of this new turn in constitutional regulation—the ringing announcement of a new substantive limitation on executions coupled with substantial state limitations on the effective enforcement of that restriction? In what follows, we consider both the potential consequences and the way forward from this odd moment of constitutional cognitive dissonance.

First, the current state of affairs is a humbling lesson in the vein of “be careful what you wish for” In our review, two decades after *Furman*, of the Court’s constitutional regulation of capital punishment, we lambasted the Court for its excessively procedural focus in crafting its Eighth Amendment doctrine.⁷³ We argued that the Court’s complicated, but relatively ineffective, procedural requirements created the appearance but not the reality of meaningful regulation, and we worried about the “legitimation” effect of such false assurances.⁷⁴ We advocated for more thoroughgoing substantive regulation of capital punishment, and, in particular, we urged the Court to reconsider its unwillingness to categorically ban the execution of juvenile offenders and offenders with mental retardation—as the Court has now done in *Simmons* and *Atkins*.⁷⁵ However, a survey of the post-*Atkins* landscape makes clear that the problem of “legitimation” is not the exclusive province of excessive proceduralism. Indeed, the announcement of substantive rights that are undermined by ineffective procedures for implementing or enforcing those rights can be a particularly pernicious mode of constitutional regulation, because

72. *Id.* at 418 (citing 28 U.S.C. § 2254(d)(2)). The “full and fair hearing” language is from the then-prevailing federal habeas statute, which entitled petitioners to an evidentiary hearing de novo in federal district court, without deference to state fact finding, if the state proceedings were found—as Florida’s were in this case—to be procedurally inadequate.

73. Steiker & Steiker, *supra* note 1, at 426–38.

74. *Id.*

75. *Id.* at 417–18.

it allows the Court to speak in two voices to two different audiences.⁷⁶ Those “in the know” realize that the substantive right runs only as far as its effective enforcement; thus, state court prosecutors can continue to seek the death penalty for offenders with probable mental retardation in cases in which they predict that the defendants will be unable to marshal the resources or bear the procedural burdens of proving their mental condition. For the sophisticated, the procedural regime redefines the very nature of the right at issue; close cases of mental retardation or cases in which the procedural burdens cannot be met by the defendant become simply cases of “no” mental retardation, whatever the fact of the matter might be. The less sophisticated general public, however, is likely to accept at face value that the United States no longer executes persons with mental retardation and may believe or be persuaded that this country’s death penalty practices are less problematic than they really are.

The divergence of perception from reality is particularly intractable in the context of mental retardation because of the difficulty of proving conclusively that “real” cases of mental retardation are being systematically excluded by procedural hurdles. The essential faith that our criminal justice system would not permit the execution of an innocent person, for example, is susceptible to post-trial (and even posthumous) scientific disproof. The power of disproving such a comforting illusion can be seen most clearly, perhaps, in Illinois, where the exoneration of more than a dozen death row inmates led Governor George Ryan to grant mass clemency to the state’s death row in 2003.⁷⁷ Similarly, the current controversy over lethal injection protocols illustrates the way in which science can quickly undermine a too-facile consensus—in this case, that the dominant lethal injection protocol is both painless and humane.⁷⁸ Proof of mental retardation is another matter. Persons with mental retardation often become skilled at hiding their

76. See generally Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996) (raising legitimization concerns about the way that the Burger and Rehnquist Courts cut back on the Warren Court’s criminal procedure revolution by undermining remedies for Fourth, Fifth, and Sixth Amendment violations while leaving relatively intact that scope of the underlying substantive rights).

77. See generally Rob Warden, *Illinois Death Penalty Reform: How It Happened, What It Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381 (2005) (describing the events leading up to Governor Ryan’s actions and the death penalty reform efforts that followed).

78. See Note, *A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections*, 120 HARV. L. REV. 1301, 1304 (2007) (describing the galvanizing role of a study published in the medical journal, *The Lancet*, which found that anesthesia administered during lethal injections was inadequate). The Court has granted certiorari to consider a constitutional challenge to the dominant lethal injection protocol. *Baze v. Rees*, 128 S. Ct. 372 (2007).

disability,⁷⁹ and experts frequently disagree about whether a defendant meets the criteria for a formal diagnosis of mental retardation.⁸⁰ The highly contested and repeated litigation of the proper diagnoses of Johnny Paul Penry and Daryl Atkins, the two capital defendants whose cases led to the new constitutional ban, reveals just how difficult it is to reach a conclusive determination of mental retardation, even in cases in which there is strong and long-standing evidence of serious cognitive impairment. Thus, the substance-procedure divide may pose a particularly potent danger of legitimation in this context.

Despite real reasons to worry that the Court's decision in *Atkins* might legitimate and thus stabilize our death penalty practices, there are also reasons to see in *Atkins* the seeds of much more fundamental change—perhaps even abolition. The Court's new method for assessing evolving standards of decency—laid out first in *Atkins* and elaborated in *Simmons*—now references expert, religious, and world opinion in addition to state legislative practices.⁸¹ Such a privileging of elite opinion—which is always far more skeptical of capital punishment than general public opinion—will inevitably be far more solicitous of substantive regulation and limitation of death penalty practices than the Court's prior focus on wholly “objective” evidence of state legislation and actual jury verdicts. Indeed, the Court's decision in *Atkins* appears to be its first to find an American criminal practice excessive in the absence of an overwhelming legislative consensus against the practice. Thus, *Atkins* has opened the path not only to other proportionality limitations on the reach of the death penalty, but also to the prospect of judicial abolition of the death penalty itself.

After *Atkins*, the fact that numerous jurisdictions have the death penalty on the books appears to be less dispositive of the death penalty's consistency with prevailing societal norms. Hence, in the post-*Atkins* era, incremental movement away from capital punishment might serve as evidence of community standards evolving toward greater decency, even in the absence of overwhelming legislative rejection of the practice. The wide range of potentially relevant evidence might include some or all of the following: declining death sentencing and execution rates; declining capital charging rates; state

79. See James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 430 (1985).

80. See Jeffrey Fagan, *Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment*, 33 N.M. L. REV. 207, 220 (2003) (citing “the dueling experts” on the question of mental retardation in *Penry* as illustrative of the “considerable disagreement among mental health professionals” in diagnosing mental retardation).

81. *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2003); *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

and local moratoria to reform or study death penalty practices; new legislative limitations on the scope of the penalty (even in the absence of wholesale abolition); partial moves toward abolition (such as the vote of a single house of a bicameral legislature);⁸² increased use of executive clemency; or further consolidation of public, expert, or world opinion. In a country in which the distribution of executions is already “lumpy”—two-thirds of the executions since *Furman* have occurred in only five states⁸³—it is increasingly plausible to view executions as a marginalized practice, which may be enough under *Atkins* to outlaw it entirely.⁸⁴

If *Atkins* is continually procedurally undermined, how are we to weigh its potential legitimating effect against its radical potential as the key to nationwide abolition? One answer, of course, is that the proof will be in the pudding—only time will tell whether the fruit that *Atkins* bears will be lotus-like (engendering apathy) or galvanizing. Alternatively, we might observe that any weighing should consider the fact that the Court’s failure to address the varied state procedural approaches toward implementing (or defeating) the substantive limitation announced in *Atkins* probably facilitated its effort to discern a national consensus in the first instance. Had the *Atkins* Court examined more closely some of the underlying statutory and judicial obstacles to relief in the states it counted as “prohibiting” the execution of offenders with mental retardation, the Court would have been less able to support its claim of a firm emerging norm against the practice. Georgia, the first state to reject the practice of executing persons with mental retardation, imposes the highest burden in the country—requiring defendants to prove their mental retardation beyond a reasonable doubt. This imposition of an extraordinary burden on defendants represents an important qualification to Georgia’s rejection of the practice, and by not engaging the burden-of-proof issue in the *Atkins*

82. Other evidence of partial or tentative abolition might be the New York legislature’s failure to *reinstate* the death penalty after the state’s highest court struck it down because of a remediable technical defect on state constitutional grounds in 2004. See Patrick D. Healy, *Death Penalty Is Blocked by Democrats*, N.Y. TIMES, Apr. 13, 2005, at B1. Similarly, the New Hampshire legislature’s abolition of the death penalty that was vetoed by Democratic Governor Jeanne Shaheen could be considered evidence of partial or tentative abolition. See John Kifner, *A State Votes to End Its Death Penalty*, N.Y. TIMES, May 19, 2000, at A16.

83. Texas, Virginia, Oklahoma, Missouri, and Florida have carried out 719 of the 1,099 executions in the United States since 1976, when the death penalty was reinstated after *Furman*. Texas alone has carried out 405 of the executions. See Death Penalty Info. Ctr., Number of Executions by State and Region Since 1976, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=186> (last visited Feb. 11, 2008).

84. We explore how an argument for abolition using the new Eighth Amendment methodology developed in *Atkins* might succeed in Carol S. Steiker & Jordan M. Steiker, *The Beginning of the End?*, in *THE ROAD TO ABOLITION* (Charles Ogletree & Austin Sarat eds., 2008).

opinion, the Court was able to offer a somewhat more persuasive account of the national consensus against the practice. Thus, it is possible that the Court's recognition of the existence of the underlying consensus actually required turning a blind eye toward state procedural practices, at least at the moment of announcing the consensus.

In the same vein, the Court's decision to regulate substance but not procedure might facilitate future substantive regulation by lessening the costs of the Court's interventions. The Court's efforts to regulate state death penalty practices are highly contested, and the Court's willingness to cede implementation of its substantive regulation might lessen the opposition to its interventions. Unlike its prohibition against the execution of juveniles, the existence of procedural barriers allows for a gradualist approach to the ban on executing persons with mental retardation. Indeed, some of the more significant barriers to enforcement involve the retroactive application of the ban, and the Court's deregulation of procedures alleviates some of the costs—as perceived by the states—of a fully retroactive prohibition. In this way, the Court's deregulation of state procedural regimes and simultaneous announcement of new, sweeping substantive prohibitions under the Eighth Amendment is analogous to the Warren Court's embrace of nonretroactivity principles during its broader criminal procedure revolution: both techniques have allowed the Court to move faster and reach farther in promoting institutional change than it might otherwise have been able to do.⁸⁵

The foregoing is not meant to suggest that we should accept procedural deregulation as either benign or inevitable. Rather, as time progresses and we move further from the announcement of consensus into an extended period of implementation of the new ban, the helpfulness of procedural deregulation (in discerning consensus and allowing gradual acclimation to the new substantive regime) fades, while the danger of legitimation grows. What should be the strategy of capital litigants in this extended implementation period? Is it possible or likely that the Court will revisit the procedural issues and begin a process of procedural regulation?

The Court's recent decision in *Panetti v. Quarterman* suggests an answer in a closely analogous context.⁸⁶ *Panetti* involved a refinement of the substantive ban on the execution of the insane announced in

85. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1734 (1991) ("Even the Warren Court might have hesitated to move as far and as fast as it did if each decision recognizing a 'new' right required opening the prison gates for all victims of past violations.").

86. 127 S. Ct. 2842 (2007).

Ford. Panetti, a Texas capital defendant who had long suffered from serious mental illness, refused to continue taking his antipsychotic medication and began to suffer from serious psychotic delusions.⁸⁷ Examined by mental health experts as his execution date approached, Panetti stated that he knew that he had been convicted of killing two people and that the state of Texas claimed that this was the reason that it was seeking to execute him.⁸⁸ But, according to expert testimony offered on Panetti's behalf, Panetti was convinced that this stated reason was a sham and that the real reason Texas sought to execute him was "to stop him from preaching"—part of his psychotic delusions about religious persecution.⁸⁹ The Court held that the Fifth Circuit's test for competence to be executed—which required only that the inmate be able to state that he understood the fact of his impending execution and the reason for it—was too restrictive, because it failed to consider whether the inmate's understanding was rational.⁹⁰ The *Panetti* Court thus expanded the *Ford* prohibition beyond its narrowest literal terms.

The *Panetti* decision, however, contained a significant procedural dimension as well. The Court held that Panetti was denied "an adequate opportunity to submit expert evidence in response to the report filed by the court-appointed experts."⁹¹ The Court did not clarify the kind of opportunity the Texas courts should have offered Panetti; it held simply that what had occurred in the case was inadequate.⁹² The Court made clear that it was reserving for another day "whether other procedures, such as the opportunity for discovery or for the cross-examination of witnesses, would in some cases be required under the Due Process Clause."⁹³ While this decision can be criticized for being excessively noncommittal,⁹⁴ that very minimalism might actually serve as a model for how to take the first steps from procedural deregulation to regulation. Justice Kennedy's opinion for the five-to-four Court was modest and incremental: it identified a set of procedural inadequacies with great particularity (focusing with minute precision on what the Texas trial court said and did in each interaction with

87. *Id.* at 2849.

88. *Id.* at 2851.

89. *Id.* at 2859.

90. *Id.* at 2862.

91. *Id.* at 2857.

92. *See Panetti*, 127 S. Ct. at 2857.

93. *Id.* at 2858.

94. *See* Carol S. Steiker, *Panetti v. Quarterman: Is There a "Rational Understanding" of the Supreme Court's Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285, 288 (2007) (criticizing the *Panetti* opinion for "how little it manages to say" in addressing the questions before it).

defense counsel), and it declared this narrow and extreme set of facts beyond the constitutional pale, without attempting to define the general contours of constitutionally appropriate procedures.⁹⁵ Such an approach allows for state variation in procedural regimes, while providing a mechanism both for policing outliers and, more generally, for signaling that the Court is scrutinizing procedure as well as substance.

Panetti can serve as a template for challenges to some of the more extreme procedural impediments to vindicating *Atkins*'s substantive ban—such as Georgia's placement of the burden on a capital defendant to prove mental retardation beyond a reasonable doubt or Texas courts' consideration of the facts of the underlying crime as highly probative of a defendant's lack of mental retardation. If some of the more extreme procedural burdens to vindicating *Atkins* claims are winnowed out, the gap between *Atkins*'s substantive promise and the reality of our death penalty practices will begin to narrow, and there will be greater reason to accept with less irony the Court's claim that our country's capital practices are indeed "evolving" toward greater "decency."

95. 127 S. Ct. at 2856–57.

