The Unkindness of Fate*: Why *Atkins v. Virginia* Warrants an Extension to Capital Defendants with a Cluster B Personality Disorder

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I. INTRODUCTION.

Daryl Renard Atkins never finished high school.[1] His trouble with academics began when he was held back in the second grade and continued throughout elementary and middle school, where he maintained a "D" grade average.[2] His middle school transcripts noted "he did not meet the requirements for promotion to high school."[3] Socially, Atkins was described as a "follower" whose "limited intellect would result in 'reduced judgments and reduced understanding of the world in general around him compared to others.'"[4] He accrued twenty-one felony convictions between the ages of thirteen and eighteen.[5] Atkins's former teachers described him as having "a constant problem with authority, tardiness, loitering, [and] disciplinary problems."[6] After repeating the tenth grade, Atkins was placed in a classroom meant for "slow learners," with a smaller student-to-teacher ratio.[7] For the first time in his academic career, Atkins earned an "A" grade in this classroom.[8]

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* HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 384 (Samuel E. Thorne trans., 1968).

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1. Brief for Petitioner at 11, Atkins v. Virginia, 536 U.S. 304 (2002) (No. 00-8452).
2. *Id.* at 10–11.
3. *Id.* at 11. Atkins was nonetheless promoted to high school pursuant to the school district's policy of promoting failing students. *Id.* at 11 n.17.
4. *Id.* at 12, 14.
5. *Id.* at 13 n.20.
6. *Id.* at 20.
7. *Id.* at 11.
8. *See id.* at 10–11.

Now consider Christopher J. Newton. After a childhood fraught with physical and verbal abuse, Newton fell behind in school, and at the age of thirteen, began attending an alternative school for children with severe behavioral problems.[9] He was described by family members and teachers as impulsive, bizarre, and suffering from "social[ ], emotional[ ], and physical[ ] immatur[ity]."[10] Recognizing that Newton had a penchant for following others, one of his teachers noted that "Newton began to 'pattern himself after another student who claimed to believe in Satan worship.'"[11] He developed a formal criminal record at age nineteen, but his delinquency could be traced back to around age five or six, when he allegedly set fire to his family's home.[12] Newton's problems in school briefly subsided after he spent six months in a children's home and showed "marked improvement [in] [h]is grades, classroom behavior, anger, and interaction with peers."[13] Upon his release from the children's home, and equipped with an aftercare plan, Newton was allowed to attend regular high school.[14]

Christopher Newton was executed on May 24, 2007, at the Southern Ohio Correctional Facility.[15] He was in prison for burglary and violating parole when he strangled his cellmate in 2001, for which he was sentenced to death.[16] Atkins, who was also sentenced to death for a murder he committed in 1996, remains in a Virginia prison today.[17] The critical difference between Newton's and Atkins's fates? An IQ score. After an examiner determined Atkins's IQ fell within a range making him intellectually disabled, his death sentence was commuted to life in prison.[18] Despite the similarities between Atkins's and Newton's psychological problems, Newton's diagnosis of borderline personality disorder, and findings of his several other "severe

9. State v. Newton, 108 Ohio St. 3d 13, 2006-Ohio-81, 840 N.E.2d 593, ¶ 23.

10. *Id.* at 16–17, 840 N.E.2d at 602.

11. *Id.* at 17, 840 N.E.2d at 602.

12. *Id.* at 16–17, 840 N.E.2d at 601–02. The record does not establish whether the fire was intentionally set but does note that Newton's family called him "Pyro" after the fire. *Id.* at 16, 840 N.E.2d at 601.

13. *Id.* at 17, 840 N.E.2d at 602.

14. *Id.*, 840 N.E.2d at 602.

15. Jim Leckrone, *Ohio Executes Man Who Killed Prison Cellmate*, REUTERS (May 24, 2007, 11:06 AM), https://www.reuters.com/article/us-execution-ohio/ohio-executes-man-who-killed-prison-cellmate-idUSN2437135120070524 [https://perma.cc/79UU-KEWJ].

16. *Id.*

17. Danielle Zielinski, *Archive: Atkins' Death Sentence Commuted*, DAILY PRESS (Jan. 18, 2008, 3:00 AM), https://www.dailypress.com/news/dp-atkins-sentence-communte-archive-story.html [https://perma.cc/QFM5-UX8H].

18. Atkins v. Virginia, 536 U.S. 304, 308–09 (2002).

mental disorder[s],"[19] Newton's IQ of 106 barred him from invoking the protection given to Atkins, and he was put to death.[20]

Newton—and many other defendants—could have avoided a death sentence if the U.S. Supreme Court recognized the striking similarities between intellectually disabled defendants and defendants with a cluster B personality disorder (hereinafter "cluster B defendants"). This paper will argue that a culpability-based approach, rather than a competence-based approach, best supports the argument for a death penalty exemption for cluster B defendants. This paper focuses mainly on the two-part rationale found in *Atkins* and occasionally borrows from *Roper v. Simmons*, a 2005 Supreme Court case that used a culpability-based approach to carve out a death penalty exemption for juveniles.[21] Together, these cases demonstrate the Court's tendency to focus on a defendant's psychological state and mental development in weighing the rationales behind the death penalty with the belief that the death penalty should be reserved for murderers who act with "cold calculus" and "reflect 'a consciousness materially more "depraved" than that of any person guilty of murder.'"[22] Based on the Court's decision in both *Atkins* and *Roper*, this paper will argue why a culpability-based approach is the best path forward to carving out a new exemption for mentally ill defendants.

II. *ATKINS*: THE DEFENDANT, THE STANDARD, AND THE LEGACY.

A. The Atkins *Standard.*

On August 16, 1996, Atkins and an accomplice kidnapped, robbed, and murdered a man.[23] During the penalty phase of his capital trial, the defense presented an forensic psychologist who testified Atkins was "mildly mentally

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19. The record indicates Newton's other diagnoses included polysubstance abuse disorder, posttraumatic stress disorder, and a personality disorder with borderline, antisocial, and narcissistic features. In 2001, a prison psychiatrist diagnosed him with antisocial personality disorder and a substance abuse disorder. Newton also had a history of self-mutilation and suicide attempts. *Newton*, 108 Ohio St. 3d at 18, 840 N.E.2d at 603.

20. *See id.* at 18, 36, 840 N.E.2d at 602, 617–18.

21. Roper v. Simmons, 543 U.S. 551 (2005). In *Roper*, the Court imposed a categorical ban on the death penalty for juvenile offenders for three main reasons: first, juveniles are more immature and have an underdeveloped sense of responsibility as compared to adults, "result[ing] in impetuous and ill-considered actions and decisions"; second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and third, "the character of a juvenile is not as well formed as that of an adult." *Id.* at 569–70.

22. *Atkins*, 536 U.S. at 319 (quoting Godfrey v. Georgia, 446 U.S. 420, 433 (1980)).

23. *Id.* at 307.

retarded" and had an IQ of 59.[24] Atkins was sentenced to death, but the Virginia Supreme Court remanded for a new sentencing hearing based on the trial court's use of an improper verdict form.[25] At the resentencing, an expert for the prosecution testified that "Atkins was not mentally retarded, but rather was of 'average intelligence, at least,' and diagnosable as having antisocial personality disorder."[26] The jury resentenced Atkins to death.[27]

On appeal, the United States Supreme Court vacated Atkins's death sentence, holding that his intellectual disability rendered the death penalty a cruel and unusual punishment in violation of the Eighth Amendment.[28] The Court gave two reasons for its decision: first, executing intellectually disabled defendants does not "measurably contribute" to the retributive or deterrent goals of imposing the death penalty.[29] The Court noted that intellectually disabled defendants "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[30] Even if an intellectually disabled defendant knew some crimes were punishable by death, it would not serve as a deterrent to committing a crime because there is "abundant evidence" to suggest that these defendants "act on impulse rather than pursuant to a premeditated plan."[31] Moreover, retribution is only a valid interest where a defendant is culpable for his crimes. "If 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."[32]

Second, the limited intellectual capacity of these defendants creates too high of a risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty."[33] Since intellectually disabled defendants may be unable to "make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors . . . [or] give meaningful assistance to their counsel,"[34] they may be more prone to receiving a death sentence where such a penalty would be unwarranted. In

24. *Id.* at 308–09.
25. *Id.* at 309.
26. *Id.*
27. *Id.*
28. *Id.* at 321.
29. *Id.* at 319.
30. *Id.* at 318.
31. *Id.*
32. *Id.* at 319.
33. *Id.* at 320 (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)).
34. *Id.*

light of these reasons, the Court established a categorial rule barring intellectually disabled defendants from receiving a death sentence.[35]

B. The Atkins *Legacy.*

Since *Atkins* was decided in 2002, the Court has taken several opportunities to build upon its capital punishment jurisprudence. In *Hall v. Florida*, the Court held that rigid adherence to a strict IQ cutoff in determining intellectual disability in capital cases violated the Eighth Amendment.[36] In the Court's view, Florida had erred by both taking "an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence" and by relying on "a purportedly scientific measurement of the defendant's abilities . . . while refusing to recognize that the score is, on its own terms, imprecise."[37] Instead, when a defendant's IQ falls within a range typically associated with intellectual disability, courts must allow defendants to present other evidence of intellectual disability.[38] Courts may not adhere to strict cutoffs when considering IQ scores; rather, when an IQ score borders on intellectual disability, the standard error of measurement in the IQ test must be taken into account.[39]

When considering additional evidence in conjunction with a defendant's IQ score, courts should rely primarily on prevailing medical standards and consensus in the medical community.[40] Courts should also give equal weight to adaptive strengths and deficits, particularly the "adaptive-functioning inquiry on adaptive deficits" that medical communities place substantial weight on.[41] The Supreme Court advocated for a holistic approach in evaluating intellectual disability and related mitigating factors, noting that consensus in the medical community on what constitutes "risk factors" should be given deference.[42]

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35. *Id.* at 321.
36. Hall v. Florida, 572 U.S. 701, 704 (2014).
37. *Id.* at 712.
38. *Id.* at 723.
39. *Id.* at 724.
40. Moore v. Texas, 137 S. Ct. 1039, 1053 (2017).
41. *Id.* at 1050.
42. *Id.* at 1051.

C. Subsequent Atkins *Scholarship.*

After *Atkins* was decided, many scholars saw it as the beginning of the end of the death penalty for mentally ill defendants. In 2003, the American Bar Association ("ABA") formed a task force to grapple with what *Atkins* could mean for people with mental illness.[43] The task force proposed that "serious consideration should be given to whether some people with mental illness should be exempt from execution and how to deal with several issues concerning mental illness of death row inmates."[44] It advocated in part for an exemption that would protect defendants who experience "delusions, hallucinations, significant thought disorders, and highly disorganized thinking . . . [and who have] such disorders as schizophrenia and psychosis, *but not anti-social personality disorder*."[45] Scholars jumped on board with this classification, citing the similarities between intellectually disabled defendants and defendants with schizophrenia: "[P]eople who suffer from psychosis also have great difficulty in communicating with and understanding others, engaging in logical cost-benefit analysis, and evaluating the consequences of and controlling their behavior."[46]

Others take a competency-based approach and advocate the use of an exemption similar to the insanity defense. This is because the symptoms of psychosis and schizophrenia disorders can be associated with a break from reality that is similar to the basis for an insanity defense: "[H]ow can the death penalty be imposed on someone who, at the time of the commission of his capital offense, suffered from delusions, hallucinations, disorganized speech, grossly or greatly disorganized behavior, and/or incoherence?"[47] Proponents of the insanity-based exemption argue defendants should be exempt from the death penalty if "their mental illness 'significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct,

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43. Ronald J. Tabak, *Overview of Task Force Proposal on Mental Disability and the Death Penalty*, 54 CATH. U. L. REV. 1123, 1123 (2005).

44. *Id.*

45. *Id.* at 1128 (emphasis added).

46. Christopher Slobogin, *What* Atkins *Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293, 304 (2003); *see also* Lyn Entzeroth, *The Challenge and Dilemma of Charting a Course To Constitutionally Protect the Severely Mentally Ill Capital Defendant from the Death Penalty*, 44 AKRON L. REV. 529, 558 (2011) ("Often individuals with schizophrenia display a lack of understanding of the consequence of their actions, particularly when the individual suffers from delusions or hallucinations, and a lack or limited control of impulses . . . ." (footnote omitted)).

47. Entzeroth, *supra* note 46, at 534. The evidence required for an insanity defense varies from state to state but typically requires a defendant to show that he was unable to appreciate the wrongfulness of his actions at the time of the crime due to mental illness or defect. *See Insanity Defense*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/insanity_defense [https://perma.cc/N76L-RFYQ].

(b) to exercise rational judgment in relation to [the] conduct, or (c) to conform their conduct to the requirements of the law.'"[48]

Rather than follow one of the above approaches, this paper will argue a culpability-based approach is more in line with the Court's decisions in *Atkins* and *Roper*. Moreover, instead of navigating an exemption for a broad swathe of mental illnesses, this paper will focus specifically on cluster B personality disorders. Cluster B personality disorders are rarely included in the death penalty exemption debate, even though research shows these disorders are frequently associated with violence and strongly linked with emotional dysregulation.[49]

III. CLUSTER B PERSONALITY DISORDER DEFINED.

According to the Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition ("DSM-5"), the term "personality disorder" encompasses ten specific clinical disorders marked by "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment."[50] To meet the criteria for a personality disorder, that "pattern of inner experience and behavior . . . is manifested in two (or more) of the following areas: (1) cognition (i.e., ways of perceiving and interpreting self, other people, and events); (2) affectivity (i.e., the range, intensity, lability, and appropriateness of emotional response); (3) interpersonal functioning; (4) impulse control."[51]

The ten personality disorders diagnosable by these criteria are organized into three groups, called "clusters," based on similarity.[52] This paper will address only "cluster B" personality disorders, which include antisocial, borderline, narcissistic, and histrionic personality disorders.[53]

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48. Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 818 (2009) (alteration in original) (quoting ABA Task Force on Mental Disability and the Death Penalty, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668 (2006)).

49. Richard Howard, *Personality Disorders and Violence: What Is the Link?*, BORDERLINE PERSONALITY DISORDER & EMOTION DYSREGULATION, Sept. 17, 2015, at 2, 6 (2015).

50. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 645 (5th ed. 2013) [hereinafter DSM-5].

51. *Id.* at 646.

52. *Id.*

53. *Id.*

Cluster B personality disorders cause afflicted individuals to "appear dramatic, emotional, or erratic."[54] Each cluster B personality disorder manifests in a slightly different way.

> Antisocial personality disorder is a pattern of disregard for, and violation of, the rights of others. Borderline personality disorder is a pattern of instability in interpersonal relationships, self-image, and affects, and marked impulsivity. Histrionic personality disorder is a pattern of excessive emotionality and attention seeking. Narcissistic personality disorder is a pattern of grandiosity, need for admiration, and lack of empathy.[55]

For antisocial and borderline personality disorders specifically, impulsiveness is a key symptom.[56] "Impulsiveness can broadly be defined as a predisposition to react rapidly and without planning to internal and external stimuli with lack of regard for short-term and long-term consequences for oneself and others."[57] Moreover, antisocial and borderline personality disorders are both correlated with exhibiting urgency and lack of premeditation.[58]

IV. RATIONALE I: REDUCED CULPABILITY.

In American jurisprudence, the appropriate punishment for a crime rests heavily on the culpability of the offender. In the first of the Court's two-part rationale for a categorical ban on the execution of intellectually disabled defendants, the Court recognized that these defendants suffer from cognitive deficiencies that "do not warrant an exemption from criminal sanctions, but . . . do diminish their personal culpability."[59] The deficiencies considered by the Court included the "diminished capacities to understand and process information . . . to engage in logical reasoning, to control impulses, and to understand the reactions of others."[60] The "abundant evidence that [intellectually disabled defendants] often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders"[61] warranted an exception from the death penalty, because their

54. *Id.*
55. *Id.* at 645.
56. Howard, *supra* note 49, at 5.
57. *Id.*
58. *Id.* at 6.
59. Atkins v. Virginia, 536 U.S. 304, 318 (2002).
60. *Id.*
61. *Id.*

crimes "[do] not reflect 'a consciousness materially more "depraved" than that of any person guilty of murder.'"[62]

On their face, the cluster B disorders may not lend themselves to finding lesser culpability. Cluster B defendants are not significantly impaired from understanding their actions, nor do they suffer from delusions or hallucinations that unmoor them from reality. Rather, the lesser culpability is rooted in neurological impairments: cluster B disorders can be caused by brain damage, "abnormal neurotransmitter systems, stress hormones, and other gene products."[63] The brain dysfunction typically correlated with antisocial and borderline personality disorders can lead to a person being "much less capable of inhibiting aggression, violence[,] and addictions. If these behaviors impact others to some arbitrarily defined degree, then the behavior is variably termed immoral, unethical, antisocial, and/or criminal."[64] For defendants with these disorders, which stem from problems within neurological structures, their impulsive, aggressive, and violent behavior are a matter of brain function. The ABA's task force advocated an exemption from the death penalty for defendants who have a "significant incapacity 'to conform [their] conduct to the requirements of the law.' . . . For instance, people . . . might understand the wrongfulness and consequences of their acts, but nonetheless feel impervious to punishment."[65] Thus, although a defendant's disorder may manifest itself in violent and destructive ways, the inherently biological nature of the disorder still renders a defendant less culpable than his non-mentally ill counterpart.

The diminished culpability of intellectually disabled defendants was at the heart of the Court's opinion in *Atkins*, and the same rationale rings true for cluster B defendants for two reasons: first, cluster B defendants have limited ability to control impulses; and second, cluster B defendants have limited capacity to process information and engage in logical reasoning.

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62. *Id.* at 319 (quoting Godfrey v. Georgia, 446 U.S. 420, 433 (1980)).

63. James H. Fallon, *Neuroanatomical Background to Understanding the Brain of the Young Psychopath*, 3 OHIO ST. J. CRIM. L. 341, 347 (2006).

64. *Id.* Research indicates damage to or dysfunction in the orbital cortex is most frequently associated with antisocial and borderline personality disorders. Damage to the orbital cortex—which "is involved in social interactions, inhibition of impulsive behavior, [and] projection of future outcomes"—can be caused by external injury or damage or internal damage, such as brain lesions or dysfunctional neurotransmitters. *Id.* at 345, 347.

65. Christopher Slobogin, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 CATH. U. L. REV. 1133, 1144 (2005).

A. Impulse Control and Premeditation.

One hallmark of a personality disorder generally is impulse control that markedly differs from cultural expectations.[66] That is, an individual with a personality disorder will have noticeable differences in their impulse control compared to a non-personality-disordered individual. In cluster B personality disorders, lack of impulse control is even more prominent. According to the DSM-5, antisocial, borderline, and histrionic personality disorders are all marked by impulsivity—most prominently antisocial and borderline.[67] In antisocial personality disorder, the individual's impulsive tendencies "may be manifested by a failure to plan ahead."[68] Narcissistic personality disorder is also associated with a form of impulsivity, specifically related to aggression: "Narcissism or threatened egotism and paranoid cognitive personality style . . . may be particularly important as additional critical features in explaining acts of aggression in individuals with cluster B personality disorders."[69] Thus, research across the cluster B personality disorders indicates each one is associated in some way with lack of impulse control, most prominently in antisocial and borderline personality disorders.

When a person suffers from a lack of impulse control, he "responds to a stimulus or event on the basis of an immediate emotional reaction such as desire or anger, with little if any checking of long-term consequences."[70] This corresponds directly with the Supreme Court's reasoning in *Atkins* that intellectually disabled defendants are not deserving of the death penalty in part due to their inability to form premeditation: "[C]apital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation."[71] According to research, antisocial and personality disorders are both correlated with lack of premeditation and heightened sense of urgency.[72] The Court has stressed numerous times that the death penalty should be reserved for those offenders who commit the most heinous crimes[73] and exhibit the "cold calculus" associated with the worst murders.[74] In exempting juvenile offenders from the death penalty in *Roper v. Simmons*,

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66. DSM-5, *supra* note 50, at 645–46.

67. *See id.* at 659, 663, 667.

68. *Id.* at 660.

69. Paul G. Nestor, *Mental Disorder and Violence: Personality Dimensions and Clinical Features*, 159 AM. J. PSYCHIATRY 1973, 1973 (2002).

70. Howard, *supra* note 49, at 5.

71. Atkins v. Virginia, 536 U.S. 304, 319 (2002) (quoting Enmund v. Florida, 458 U.S. 782, 799 (1982)).

72. Howard, *supra* note 49, at 6.

73. *See* Godfrey v. Georgia, 446 U.S. 420, 433 (1980); Gregg v. Georgia, 428 U.S. 153, 186 (1976).

74. *Gregg*, 428 U.S. at 186.

the Court reasoned that "juvenile offenders cannot with reliability be classified among the worst offenders," because their "lack of maturity and . . . underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions."[75] With respect to the deterrence rationale behind the death penalty, "it is worth noting that . . . life imprisonment without the possibility of parole is itself a severe sanction."[76]

Based in large part on the inability of intellectually disabled defendants to control their impulses and form the premeditation necessary for a particularly heinous crime, the Supreme Court exempted them from execution.[77] The same reasons apply to exempt cluster B defendants from execution based on their lack of impulse control and inability to form premeditation.[78]

B. Information Processing and Logical Reasoning.

The *Atkins* Court pointed out that an intellectually disabled defendant's "diminished ability to understand and process information, to learn from experience, [and] to engage in logical reasoning" contributes to diminished culpability.[79] A hallmark of personality disorders generally is cognition—i.e., the way one perceives himself, others, and events around him—that is markedly different from societal expectations.[80] In antisocial personality disorder specifically, symptoms include "failure to conform to social norms with respect to lawful behaviors" and persistent, extreme irresponsibility.[81] Individuals with borderline personality disorder have difficulty separating imagined scenarios from reality and experience emotional instability that leads to intense emotional reactions to information or events.[82] Research has shown individuals with borderline personality disorders "have demonstrated significant levels of cognitive impairment . . . particularly in tests of planning/sequencing cognitive functions."[83]

An inability to engage in logical reasoning and process potential consequences of one's actions served as another basis for the Court's decision in *Atkins*.[84] Since intellectually disabled defendants have a diminished

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75. Roper v. Simmons, 543 U.S. 551, 569 (2005).
76. *Id.* at 572.
77. Atkins v. Virginia, 536 U.S. 304, 319–21 (2002).
78. Howard, *supra* note 49, at 6.
79. *Atkins*, 536 U.S. at 320.
80. DSM-5, *supra* note 50, at 645–46.
81. *Id.* at 659.
82. *See id.* at 663.
83. J. Wesley Burgess, *Neurocognitive Impairment in Dramatic Personalities: Histrionic, Narcissistic, Borderline, and Antisocial Disorders*, 42 PSYCHIATRY RSCH. 283, 286 (1992).
84. *Atkins*, 536 U.S. at 320.

capacity for information processing and logical reasoning, the risk of execution as a consequence for their unlawful actions does not serve as a deterrent.[85]

> 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[, but for intellectually disabled defendants,] it [is] less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.[86]

With respect to deterrence in juveniles, the Court noted "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent."[87] A cluster B personality disorder similarly limits a person's ability to engage in logical reasoning, separate imagination from reality, and make an informed, non-impulsive decision.[88] The death penalty as a potential consequence for one's actions would not deter a cluster B defendant, who has an inhibited capacity to make rational and logical decisions.[89] His impulsiveness and limited cognitive ability to conform his behavior to social norms make the deterrent effect of the death penalty inapplicable.[90]

The same rationales the Court applied in *Atkins* as to why intellectually disabled defendants have diminished culpability apply with equal force to cluster B defendants. "Even though a person suffering from severe mental illness may be held criminally liable for his wrongful conduct, severe mental illness can often strip the individual of the degree of culpability and blameworthiness that the Constitution demands before a state can inflict the punishment of death."[91] A cluster B defendant's inability to control impulses, engage in logical reasoning, or make informed decisions due to his mental illness makes him less culpable and therefore deserving of exemption from the death penalty.

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85. *Id.*
86. *Id.*
87. Thompson v. Oklahoma, 487 U.S. 815, 837 (1988).
88. *See* DSM-5, *supra* note 50, at 659–72.
89. *See id.*
90. *See id.*
91. Entzeroth, *supra* note 46, at 534.

V. RATIONALE II: RISK OF RECEIVING AN UNWARRANTED DEATH SENTENCE.

In its second rationale for exempting intellectually disabled defendants from the death penalty, the Court emphasized the heightened risk that a jury will impose the death penalty where it is wholly unwarranted.[92] The Court noted several factors contributing to this risk, including "the lesser ability of . . . defendants to make a persuasive showing of mitigation . . . [and] to give meaningful assistance to their counsel . . . and their demeanor[, which] may create an unwarranted impression of lack of remorse for their crimes."[93]

A. Jury Perceptions of Defendants and Mental Illness.

Problems with emotional regulation and affect cause cluster B defendants to have a diminished ability to display emotions and remorse.[94] Individuals with antisocial personality disorder may feel little to no remorse at all as a symptom of the disorder.[95] They may display indifference and "generally fail to compensate or make amends for their behavior."[96] Borderline personality disorder is marked by "[e]motion dysregulation, also known as affective instability or emotional lability," which causes individuals to have difficulty controlling their emotions and can lead to emotional outbursts at inappropriate times.[97] Individuals with histrionic personality disorder "display[ ] rapidly shifting and shallow expression[s] of emotions,"[98] and narcissistic personality disorder is characterized by a lack of empathy and inability to "recognize or identify with the feelings and needs of others."[99] Although each in different ways, all four cluster B personality disorders involve some dimension of emotional dysregulation, which could cause cluster B defendants to present an unemotional front to a jury.

Defendants who are unable to demonstrate remorse to a jury are at a significantly higher risk of receiving the death penalty than their remorseful counterparts.[100] Various studies have concluded "jurors frequently cited a defendant's lack of remorse as a [significant] factor in precipitating their

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92. Atkins v. Virginia, 536 U.S. 304, 320–21 (2002).
93. *Id.*
94. *See* DSM-5, *supra* note 50, at 659–72.
95. *Id.* at 659–60.
96. *Id.* at 660.
97. *See* Howard, *supra* note 49, at 5–6; DSM-5, *supra* note 50, at 663–64.
98. DSM-5, *supra* note 50, at 667.
99. *Id.* at 670.
100. *See* Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1558 (1998).

decision to impose the death penalty."[101] In a study conducted with former capital trial jurors, researchers found that "[a]bove all else . . . the defendant's demeanor and behavior during the actual trial shaped the jurors' perceptions of the defendant's remorse. Jurors scrutinized the defendant throughout the course of the trial, and they were quick to recall details about demeanor, ranging from his attire to his facial expressions."[102]

Since cluster B defendants have limited ability to regulate their emotions or display remorse, they are at a heightened risk of being viewed negatively by the jury, who weigh remorse heavily in their decision to impose the death penalty.[103] This is precisely the fear the *Atkins* Court had in holding intellectually disabled defendants exempt from the death penalty: if they are unable to show remorse for their actions through no fault of their own, the risk that the jury will interpret that negatively and impose the death penalty is too high.[104] Since cluster B defendants face the same risk, they are entitled to *Atkins* protections to guard against the risk of an unwarranted death sentence.

With respect to personality disorders specifically, "some jurors assume that personality disorders are neither real, compared to organic disorders like epilepsy, nor permanent, compared to diseases like schizophrenia."[105] Research indicates jurors tend to minimize personality disorders, even if expert testimony was presented at trial. After hearing expert testimony diagnosing the defendant with borderline and antisocial personality disorders, one juror in the study minimized the mental illness symptoms as "just mean. [The defendant] was just being selfish."[106]

B. Importance of a Defendant's Ability To Communicate with and Assist Counsel.

The *Atkins* opinion noted the importance of a defendant's ability to give meaningful assistance to his counsel and named it as one of the main risks of allowing an intellectually disabled defendant's trial to go forward.[107] The Court did not elaborate on exactly why this is such a high risk, but subsequent scholarship exploring the topic offers several explanations. First, counsel can

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101. *Id.*
102. *Id.* at 1561–62.
103. *Id.* at 1560.
104. Atkins v. Virginia, 536 U.S. 304, 320–21 (2002).
105. Leona D. Jochnowitz, *Does Mental-Health Mitigating Evidence of Personality Disorders Make a Difference to Jurors in Capital-Sentencing Decisions?*, 50 CRIM. L. BULL. 344, 346–47 (2014).
106. *Id.* at 365.
107. *Atkins*, 536 U.S. at 320–21.

be thrown into a case with an intellectually disabled defendant having no experience or training on how to work with such defendants.[108] "An attorney may recognize that there is something wrong with the client but feel that the attorney can simply compensate for this by providing additional guidance or by substituting his or her judgment for the client's."[109] Second, intellectually disabled defendants tend to mask their disability or pretend they understand in order to avoid embarrassment.[110] Third, since an intellectually disabled defendant is "in no position to monitor their attorney's performance," it is up to the attorney to recognize and properly evaluate her client's intellectual disability, which often never happens for attorneys inexperienced with intellectual disability.[111]

A cluster B defendant faces a similar, serious risk of an unfair outcome resulting from difficulties with his counsel. An attorney may never discover the defendant's mental illness if the defendant tries to mask it to avoid the stigma associated with mental illness.[112] If a defendant does not inform his counsel of an existing mental illness, if the attorney does not order a mental health evaluation, or if the mental illness is not readily apparent and obvious, the attorney may never know it exists.[113] Being unaware of a mental illness that could potentially raise a viable defense or act as persuasive mitigating evidence could become a serious detriment to a cluster B defendant's case, creating a heightened risk similar to that in *Atkins*, which convinced the Court those defendants are deserving of exemption from the death penalty.

A defendant can be competent to stand trial but still unable or unwilling to effectively assist counsel, thereby creating a risk that his attorney will not be able to zealously advocate for him.[114] Sometimes, a mentally ill defendant purposely refuses to aid his counsel in an effort to subvert her[115] or because the defendant is trying to avoid counsel presenting some evidence about

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108. Diane Courselle, Mark Watt & Donna Sheen, *Suspects, Defendants, and Offenders with Mental Retardation in Wyoming*, 1 WYO. L. REV. 1, 5 (2001).

109. *Id.* at 7.

110. *Id.*

111. *Id.*

112. Rebecca J. Covarrubias, Comment, *Lives in Defense Counsel's Hands: The Problems and Responsibilities of Defense Counsel Representing Mentally Ill or Mentally Retarded Capital Defendants*, 11 SCHOLAR 413, 442–43 (2009).

113. *Id.* at 442.

114. Richard J. Bonnie, *Mental Illness, Severe Emotional Distress, and the Death Penalty: Reflections on the Tragic Case of Joe Giarratano*, 73 WASH. & LEE L. REV. 1445, 1454–55 (2016).

115. *Id.* at 1454.

him.[116] That was the case, for example, in *Godinez v. Moran*: the defendant, on trial for murder and facing the possibility of a death sentence, fired his attorneys and requested to represent himself in order to prevent his attorneys from presenting mitigating evidence.[117] In another case, *Giarratano v. Procunier*,[118] the defendant, on trial for capital murder, turned down a plea agreement, requested a bench trial, asked the judge to sentence him to death, and directed his lawyers not to appeal his conviction and death sentence.[119]

With defendants who are deemed competent to stand trial but remain unable to effectively assist their lawyers, "[t]he key issue is functional impairment of decisional capacity. The question should be whether the defendant's emotional condition is symptomatic of a clinically diagnosable disorder and is interfering materially with his ability to make a rational, self-interested decision about the defense or disposition of the case."[120] *Giarratano* and *Godinez* both stand for the difficulty attorneys have representing defendants who are able to understand proceedings and therefore competent to stand trial, but at the same time have a limited capacity for rational decision making.[121] With cluster B defendants, their impaired capacity for decision making[122] creates a heightened risk that they will be unable to effectively assist counsel and end up receiving a death sentence where such a punishment is unwarranted.

116. Godinez v. Moran, 509 U.S. 389, 392 (1993). This case presented the issue of whether the standard of competency to waive one's right to counsel is higher than the standard of competency to stand trial; the Court found it is not. *Id.* at 398–400.

117. *Id.* at 391–92.

118. Giarratano v. Procunier, 891 F.2d 483 (4th Cir. 1989). The defendant was not diagnosed with a cluster B personality disorder, but his case still exemplifies the issues mentally ill defendants have with counsel generally and the problem with defendants who are competent to stand trial but unable to effectively assist counsel.

119. Bonnie, *supra* note 114, at 1454–55.

120. *Id.* at 1456–57.

121. *See id.* at 1457.

122. *See supra* Part IV.A.

VI. CRITIQUES.

A. Critique I: Cluster B Defendants Are Not Similar Enough to Atkins *Defendants.*

As of this writing, the Supreme Court has not taken a stance on whether severely mentally ill offenders should be exempt from the death penalty.[123] Scholars observe this is likely because of the Court's competency-based approach rather than culpability-based approach.[124] Critics of this thesis, then, would argue that since "the law of competency deals with whether or not a person understands the reason for his execution, *not* whether a person's psychiatric illness caused him to be less culpable for the underlying crime itself," cluster B defendants are too dissimilar from *Atkins* defendants to warrant extension of constitutional protections.[125] Specifically, *Atkins* had to do with developmental impairments that hinder a person's ability to understand societal rules and norms, whereas mental illness does not impair a person in such a way.[126]

The Court's decision in *Roper v. Simmons* indicates its willingness to consider overall policy concerns in an Eighth Amendment case, rather than identical similarities in defendants, in order to extend exemption from the death penalty.[127] In *Roper*, the Court accepted three rationales in favor of creating a categorical ban on execution of minors: (1) juveniles lack maturity and a developed sense of responsibility; (2) they are more susceptible to negative influences by peers; and (3) their personalities are not well-developed and still subject to transformation and growth.[128] Note that none of these rationales were recognized by the Court in *Atkins*, yet the Court in *Roper* acknowledged that this new rule banning execution of minors was an appropriate successor of *Atkins*.[129] Scholars suggest the Supreme Court's willingness to extend *Atkins* to the juvenile context will eventually lead the Court to grant the same protections to the mentally ill: "Like juvenile

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123. *See* Lise E. Rahdert, Essay, Hall v. Florida *and Ending the Death Penalty for Severely Mentally Ill Defendants*, 124 YALE L.J.F. 34, 35 (2014). The Court has, however, denied certiorari in cases where this question was presented. *E.g.*, Commonwealth v. Baumhammers, 960 A.2d 59 (Pa. 2008), *cert. denied*, 558 U.S. 821 (2009).

124. Rahdert, *supra* note 123, at 36.

125. *Id.*

126. *See* Slobogin, *supra* note 46, at 309.

127. Roper v. Simmons, 543 U.S. 551 (2005).

128. *Id.* at 569–70. Note the Court's categorical ban resulting from this case was on defendants who were minors at the time of the capital offense, not at the time of execution.

129. *Id.* at 571 ("The same conclusions [from *Atkins*] follow from the lesser culpability of the juvenile offender.").

offenders and [intellectually disabled] offenders, the severely mentally ill often lack or have diminished impulse control and have difficulty comprehending the consequences of their actions."[130]

Cluster B defendants also share many common characteristics with intellectually disabled defendants, which demonstrates the practicability of extending *Atkins* protections. First, both conditions can be traced to organic, genetic causes. Research indicates "borderline [personality disorder] and antisocial [personality disorder] appeared to share genetic risk factors above and beyond those shared in common with the other cluster B disorders."[131] Cluster B disorders are suspected to result from "dysfunction in the serotonin (5-HT) system [that] is associated with impulsivity, aggression, affective lability, and suicide. Genes linked to the function of [serotonin] can therefore be considered possible candidate genes for borderline and antisocial [personality disorders]."[132] The DSM-5 notes "antisocial personality disorder is more common among the first-degree biological relatives of those with the disorder than in the general population. . . . Adoption studies indicate that both genetic and environmental factors contribute to the risk of developing antisocial personality disorder."[133] Similarly, "borderline personality disorder is about five times more common among first-degree biological relatives of those with the disorder than in the general population."[134]

Similarly, many intellectual disability disorders stem from organic or genetic sources. Genetic syndromes causing sequence variations or chromosomal disorders are a frequent cause of intellectual disability as well as brain malformations and maternal disease.[135] Disability can also result from brain injuries sustained during birth or post-birth due to "encephalopathy . . . traumatic brain injury, infections . . . seizure disorders . . . severe and chronic social deprivation, and toxic metabolic syndromes and intoxications."[136]

Finally, while some would argue the *Atkins* decision was based on a competency standard, the opinion itself indicates "the most important factors in determining which murderers may be put to death are relative culpability and deterrability."[137] The Court's analysis does not rest on the rigid IQ score of the offender nor the defendant's ability to answer basic questions on a test.

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130. Entzeroth, *supra* note 46, at 559.

131. Ted Reichborn-Kjennerud, *The Genetic Epidemiology of Personality Disorders*, 12 DIALOGUES CLINICAL NEUROSCIENCE 103, 107 (2010).

132. *Id.* at 109.

133. DSM-5, *supra* note 50, at 661.

134. *Id.* at 665.

135. *Id.* at 39.

136. *Id.*

137. Slobogin, *supra* note 46, at 293.

It rests on the reasoning that executing intellectually disabled defendants does not serve any penological purpose because the disability manifests itself in a way that lessens the defendant's culpability.[138] So too does this rationale apply to cluster B defendants, despite the dissimilarities in IQ scores.

B. Critique II: Current Mitigation Practices in Capital Trials Are Effective Enough To Prevent Unjust Application of the Death Penalty.

Capital trials in the United States are bifurcated into two parts: a guilt phase and a penalty phase.[139] In the guilt phase, the jury determines whether the defendant is guilty of the crime charged; in the penalty phase, the same jury determines whether the defendant should receive a death sentence or life in prison. During the penalty phase, the defendant presents mitigating evidence to weigh against the imposition of the death penalty, and the prosecution presents aggravating factors to weigh against the mitigation.[140] Mitigating factors most often include mental illness or impairment, a history of trauma, and absence of a criminal record.[141]

While the penalty phase is an opportunity for a defendant to present evidence of mental illness, mitigation practices frequently work against mentally ill defendants. Instead of seeing mental illness as a mitigating factor, "many juries view mental illness as an *aggravating* circumstance favoring execution."[142] In a case specifically involving a defendant with antisocial personality disorder, the Eleventh Circuit declined to find ineffective assistance of counsel where the defense attorney chose not to present evidence of the defendant's mental illness.[143] Defense counsel viewed the antisocial personality disorder as potentially damaging to the case, and the Eleventh Circuit agreed.[144]

The risk of presenting evidence of mental illness is sometimes too high in capital cases. "Stigma against mental illness is a crucial phenomenon, because it has persisted even as tolerance for other stigmatised groups has

138. Atkins v. Virginia, 536 U.S. 304, 318 (2002).
139. Gregg v. Georgia, 428 U.S. 153, 191 (1976).
140. *Id.* at 193.
141. *See, e.g.*, 18 U.S.C. § 3592(a).
142. Rahdert, *supra* note 123, at 39.
143. *Id.*
144. *Id.*

gradually grown."[145] It is widely accepted—even by the Supreme Court[146]—that jurors view evidence of mental illness or intellectual disability as "qualities . . . making the defendant more dangerous and deserving of death."[147] This perception turns mitigating evidence into aggravating evidence in the jury's eyes and makes mitigation practices almost completely futile.

C. Critique III: Defendants Will Malinger and Feign a Cluster B Personality Disorder To Avoid the Death Penalty.

A serious concern in any mental illness diagnosis is malingering, which is defined as faking or exaggerating a mental or physical illness.[148] Malingering is frequently associated with gaining an external benefit, such as being found incompetent to stand trial.[149] Researchers and psychologists are acutely aware of the effects of malingering and have developed several tests designed to detect malingering in patients, including the Minnesota Multiphasic Personality Inventory, the F-scale personality test, test of memory malingering, the negative impression management scale, the Rey 15-item test, the temporal memory sequence test, and a Symptom and Disposition Interview.[150] These tests can also be used to detect malingering in capital defendants who allege symptoms of a cluster B personality disorder.

Additionally, the DSM-5 provides guidelines for diagnosing personality disorders, which include evaluating a patient's mental and social history.[151] It suggests clinicians "take into account the individual's ethnic, cultural, and social background" and states "[a] personality disorder should be diagnosed only when the defining characteristics appeared before early adulthood, are typical of the individual's long-term functioning, and do not occur exclusively during an episode of another mental disorder."[152] Finally, the DSM-5 cautions clinicians about distinguishing personality traits from personality disorders and instructs clinicians to diagnose personality

145. Andrea Stier & Stephen P. Hinshaw, *Explicit and Implicit Stigma Against Individuals with Mental Illness*, 42 AUSTRALIAN PSYCH. 106, 107 (2007).

146. Tennard v. Dretke, 542 U.S. 274, 288–89 (2004) ("A reasonable jurist could conclude that the jury might have given the low IQ evidence aggravating effect in considering Tennard's future dangerousness . . . .").

147. Entzeroth, *supra* note 46, at 546.

148. UBAID ULLAH ALOZAI & PAMELA K. MCPHERSON, MALINGERING (2018), https://www.ncbi.nlm.nih.gov/books/NBK507837/ [https://perma.cc/3GKW-REVE].

149. *Id.*

150. *Id.*

151. DSM-5, *supra* note 50, at 646–48.

152. *Id.* at 648.

disorders "only when [the personality traits] are inflexible, maladaptive, and persisting and cause significant functional impairment or subjective distress."[153] Clinicians and psychologists licensed to diagnose and treat mental illnesses have numerous resources at their disposal to ensure they are giving accurate diagnoses and detecting malingering, even in the context of capital defendants.

Moreover, the unlikelihood of defendants filing frivolous mental illness claims was emphasized in post-*Atkins* scholarship. A 2009 study reviewing cases of the 3,000 death row inmates in the United States "found 234 cases adjudicating the substance of *Atkins* claims, which implies that about seven percent of all death row inmates have filed *Atkins* claims."[154] Out of all the defendants who filed *Atkins* claims, almost 40% proved they qualified.[155] That is "substantially higher than the frequency with which defendants succeed on allegations of incompetence to stand trial, allegations of ineffective assistance of counsel, or any other claim of which [the authors] are aware."[156] Justice Scalia had the same concern about *Atkins* that some now have about an exemption for the mentally ill—that it would invite frivolous claims of these afflictions[157]—and such a concern turned out to be unfounded. There is no reason to believe an exemption for cluster B defendants would be any different.

VII. CONCLUSION: EVOLVING STANDARDS OF DECENCY & THE CLIMATE OF THE ERA.

Throughout the *Atkins* opinion, the Court heavily emphasized its deference to the changing tides of the states, citing over twenty states that adopted legislation barring execution of intellectually disabled defendants within the previous fourteen years.[158] The Court noted, "It is not so much the number of these States that is significant, but the consistency of the direction of change."[159] Likewise, state legislatures are starting to trend towards a prohibition on executing the mentally ill. Most recently, in March of 2019, California Governor Gavin Newsom announced a statewide moratorium on

153. *Id.*

154. John H. Blume, Sheri Lynn Johnson & Christopher Seeds, *An Empirical Look at* Atkins v. Virginia *and Its Application in Capital Cases*, 76 TENN. L. REV. 625, 628 (2009).

155. *Id.*

156. *Id.*

157. Atkins v. Virginia, 536 U.S. 304, 353 (2002) (Scalia, J., dissenting) ("This newest invention promises to be more effective than any of the others in turning the process of capital trial into a game.").

158. *Id.* at 314–15 (majority opinion).

159. *Id.* at 315.

the death penalty.[160] His decision to halt executions rested partly upon reports that "[a]t least 18 of the 25 people executed in the U.S. in 2018 had one or more of the following impairments: significant evidence of mental illness; evidence of brain injury, developmental brain damage, or an IQ in the intellectually disabled range; chronic serious childhood trauma, neglect, and/or abuse."[161] In 2017, of the twenty-seven states in which the death penalty was still imposed,[162] seven were considering legislation barring the execution of defendants with severe mental illness.[163] In January of 2020, the Virginia Senate passed a bill to exempt severely mentally ill offenders from the death penalty.[164] In 2014, a nationwide poll found 58% of respondents opposed the death penalty for mentally ill defendants.[165] A 2015 poll produced similar results: 66% of voters supported a severe mental illness exemption from the death penalty; that number rose to 72% after the subjects were given more details about such an exemption.[166] "While Americans remain[ ] divided on the issue of the death penalty as a whole, they agree by

160. Press Release, California Off. of the Governor, Governor Gavin Newsom Orders a Halt to the Death Penalty in California (Mar. 13, 2019), https://www.gov.ca.gov/2019/03/13/governor-gavin-newsom-orders-a-halt-to-the-death-penalty-in-california/ [https://perma.cc/TW3N-7NL9].

161. *Id.*

162. This number excludes the four states with a governor-imposed moratorium. *States with and Without the Death Penalty–2017*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state [https://perma.cc/T8TU-XE5A].

163. Jason Lee & Ryan Hall, *The Death Penalty and Mental Illness: An Evolving Standard?*, PSYCHIATRIC TIMES, June 2017, https://www.psychiatrictimes.com/view/death-penalty-and-mental-illness-evolving-standard [https://perma.cc/Z3W3-TJK2].

164. Whittney Evans, *Bill To End Death Penalty for Mentally Ill Advances*, VA. PUB. MEDIA (Jan. 27, 2020), https://vpm.org/news/articles/10104/bill-to-end-death-penalty-for-mentally-ill-advances [https://perma.cc/J23Y-6MAL]. The bill failed in the House at the end of the 2020 legislative session; however, in January 2021, Virginia Governor Ralph Northam announced he will introduce a bill to abolish the death penalty in the state altogether. *2020 Session: SB 116 Death Penalty; Severe Mental Illness.*, VA.'S LEGIS. INFO. SYS., https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+SB116&201+sum+SB116 [https://perma.cc/VT5D-NQS7]; Frank Green, *Gov. Northam Will Introduce Bill To End Death Penalty in Virginia*, RICHMOND TIMES-DISPATCH (Jan. 13, 2021), https://richmond.com/news/state-and-regional/gov-northam-will-introduce-bill-to-end-death-penalty-in-virginia/article_920c1b1c-390b-593d-91a2-711ff6571632.html [https://perma.cc/8XT3-UXTL].

165. Press Release, Texas Coal. To Abolish the Death Penalty, New Poll: Americans Opposed to Death Penalty for People with Mental Illness (Dec. 1, 2014), https://tcadp.org/2014/12/01/new-poll-americans-opposed-death-penalty-people-mental-illness/ [https://perma.cc/DD6Y-UJHK].

166. AM. BAR ASS'N, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY 4 (2016), http://www.amnestyhouston.org/uploads/1/5/9/9/15993000/american_bar_associaton_-_severe_mental_illness___deathpenalty__2016_.pdf [https://perma.cc/4WYT-T8WZ].

a wide margin that our society should not execute those with severe mental illness."[167]

Dozens of domestic and international organizations have voiced opposition for imposing the death penalty on the mentally ill. In 2006—four years after *Atkins* was decided—the ABA adopted a resolution urging states to prohibit execution of mentally ill offenders.[168] Notably, the ABA's resolution advocated for "an exemption from the death penalty . . . [for] those persons whose mental disorders are 'functionally the same as mental retardation.'"[169] In the following years, several more organizations adopted similar resolutions: the American Psychiatric Association, the American Psychological Association, the National Alliance on Mental Illness, and Mental Health America were at the forefront.[170] The practice of executing the mentally ill has drawn international protest as well: the United Nations Commission on Human Rights and the United Nations General Assembly both urge countries to exempt the mentally ill from execution.[171] The European Union, the Council of Europe, the World Coalition Against the Death Penalty, and the Inter-American Commission on Human Rights have recommended halting practices of executing the mentally ill.[172] The national consensus—indeed, even the international consensus—on execution of the mentally ill is changing, and it is time for the United States Supreme Court to catch up.

An IQ score alone was never the driving force behind the Court's decision in *Atkins*, and it became even less imperative in *Hall*. The Court's ban on execution for intellectually disabled defendants rested on reduced culpability, due in part to limited capacity for impulse control and information processing, and the heightened risk for an unwarranted death sentence due to difficulties communicating with defense counsel and problems with jury perception.[173] These same considerations apply to cluster B defendants. In the same way "intellectual disability is a condition, not a number," so too is mental illness.[174] Without the same protection afforded to *Atkins* defendants,

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167. *Id.* at 36.

168. *Id.* at 7.

169. Richard J. Wilson, *The Death Penalty and Mental Illness in International Human Rights Law: Toward Abolition*, 73 WASH. & LEE L. REV. 1469, 1476–77 (2016).

170. David DeMatteo & Claire Lankford, *Limiting the Reach of the Death Penalty*, MONITOR ON PSYCH., Sept. 2017, at 33.

171. Wilson, *supra* note 169, at 1478, 1489.

172. *Id.* at 1479, 1489–90; *12th World Day Against the Death Penalty: Mental Health*, WORLD COAL. AGAINST THE DEATH PENALTY (Oct. 10, 2014), http://www.worldcoalition.org/worldday2014.html [https://perma.cc/F6XT-R6LW].

173. Hall v. Florida, 572 U.S. 701, 724 (2014).

174. *Id.* at 723.

individuals with severe mental illness who suffer the same afflictions as the intellectually disabled will be executed merely because they score higher on IQ tests. The United States Supreme Court has already recognized the importance of individualized considerations in capital proceedings:

> Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due [to] the uniqueness of the individual is far more important than in noncapital cases. . . . The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.[175]

There is no remedy to a wrongful execution. The death penalty is the most permanent form of punishment available, and the risk of imposing it on undeserving defendants is too high. Just as these unique considerations demanded a ban on execution of intellectually disabled defendants, they now require the same for defendants with a cluster B personality disorder.

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