

## TAKING ACCOUNT OF THE “DIMINISHED CAPACITIES OF THE RETARDED”: ARE CAPITAL JURORS UP TO THE TASK?

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### INTRODUCTION

In 2002, the U.S. Supreme Court extended its Eighth Amendment jurisprudence to preclude individuals who are mentally retarded from being sentenced to death.<sup>1</sup> Relying on an “evolving standards of decency” analysis, the Court concluded, in *Atkins v. Virginia*, that there was “no reason to disagree with the judgment of the legislatures that have recently addressed the matter and concluded that death is not a suitable punishment for a mentally retarded criminal.”<sup>2</sup> Unlike previous analyses based on evolving standards of decency, the majority devoted little attention to the outcomes of actual sentencing juries. As then Chief Justice Rehnquist remarked in his dissent, “[i]n reaching its conclusion today, the Court does not take notice of the fact that neither petitioner nor his *amici* have adduced any comprehensive statistics that would conclusively prove (or disprove) whether juries routinely consider death a disproportionate punishment for mentally retarded offenders like petitioner.”<sup>3</sup> Similarly, Justice Scalia’s dissent echoed the lack of information regarding actual sentencing juries:

The Court’s analysis rests on two fundamental assumptions: (1) that the Eighth Amendment prohibits excessive punishments, and (2) that sentencing juries or judges are unable to account properly for the “diminished capacities” of the retarded. . . . The second assumption—inability of judges or juries to take proper account of mental retardation—is not only unsubstantiated, but contradicts the immemorial belief, here and in England, that they play an *indispensable* role in such matters . . . .<sup>4</sup>

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

2. *Id.* (internal quotation marks omitted).

3. *Id.* at 324 (Rehnquist, C.J., dissenting).

4. *Id.* at 349 (Scalia, J., dissenting) (emphasis in original).

Drawing on data collected by the Capital Jury Project (CJP),<sup>5</sup> this Article examines how actual capital jurors respond to evidence of mental retardation. In so doing, it not only addresses the concerns of Justices Rehnquist and Scalia, but also speaks to the ways in which attorneys representing defendants with mental retardation post-*Atkins* can expect triers of fact to respond.

Part II of this Article examines Indiana's handling of seven capital cases in which the defendant alleged mental retardation.<sup>6</sup> Next, Part III compares public opinion data regarding death penalty support with data collected from Florida venirepersons.<sup>7</sup> Part IV details the CJP and its results.<sup>8</sup> Finally, Part V concludes that jurors are often ill-equipped to properly account for the "diminished capacities" of defendants with mental retardation.<sup>9</sup>

## II. IMPACT ON THE SYSTEM

The World Health Organization estimates the worldwide prevalence of mental retardation at 1% to 3%.<sup>10</sup> Although the number of capital defendants with mental retardation is unknown, some research suggests that persons who are mentally retarded are overrepresented in the criminal justice system.<sup>11</sup> In turn, this suggests that they are overrepresented among capital defendants. Current estimates of the number of persons with mental retardation on death row range from 12% to 20% of the population.<sup>12</sup>

Indiana provides some insight into how triers of fact handle evidence of mental retardation in capital trials. In 1994, Indiana passed a law that exempts persons with mental retardation from being sentenced to death or life in prison without the possibility of parole.<sup>13</sup>

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5. See *infra* note 46.

6. See *infra* notes 10–22 and accompanying text.

7. See *infra* notes 23–45 and accompanying text.

8. See *infra* notes 46–67 and accompanying text.

9. See *infra* notes 68–74 and accompanying text.

10. WORLD HEALTH ORG., THE WORLD HEALTH REPORT 2001: MENTAL HEALTH: NEW UNDERSTANDING, NEW HOPE 35 (2001), available at [http://www.who.int/whr/2001/en/whr01\\_en.pdf](http://www.who.int/whr/2001/en/whr01_en.pdf).

11. John J. McGee & Frank J. Menolascino, *The Evaluation of Defendants with Mental Retardation in the Criminal Justice System*, in THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION: DEFENDANTS AND VICTIMS 55, 62 (Ronald W. Conley et al. eds., 1992).

12. Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 40 (1996); Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911, 911 (2001).

13. IND. CODE ANN. § 35-36-9-6 (LexisNexis 1998).

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Under that law, judges determine defendants' mental status in pretrial hearings.<sup>14</sup> Since the passage of the new law, seven capital charged defendants have alleged mental retardation pursuant to the statute.<sup>15</sup> Trial courts found three of these seven defendants to be mentally retarded and, thus, dismissed the state's death penalty requests.<sup>16</sup> In two of the seven cases, prosecutors negotiated plea agreements prior to the trial courts' determinations.<sup>17</sup> The two remaining cases proceeded to trial, and the juries decided that death was the appropriate punishment for each defendant.<sup>18</sup> In one of those two cases, the trial court overrode the jury's recommendation and imposed a sentence of life without parole. The other defendant was sentenced to death, and his case is currently being appealed.<sup>19</sup>

While the findings from a single state cannot be generalized to the nation, Indiana's experience sheds light on the ways in which other jurisdictions may receive evidence of mental retardation post-*Atkins*. First, in contrast to Justice Scalia's expectations,<sup>20</sup> the overwhelming percentage of capital defendants did not allege mental retardation in response to the Indiana law. Second, most cases with an allegation of mental retardation resulted in sentences other than death. In three of seven cases where mental retardation was alleged, judges in Indiana found that defendants met the legal standard for mental retardation and, thus, could not be sentenced to death.<sup>21</sup> In two additional cases, the prosecutors were willing to negotiate plea agreements before the judges had decided on the defendants' mental status.<sup>22</sup> Only in two of the seven was a sentence of death found to be appropriate. Thus, the fact that juries in both of these cases voted for death suggests that there are no guarantees that jurors who are presented with evidence of mental retardation will necessarily spare the defendant's life.

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14. § 35-36-9-4.

15. From 1995 through 2006, there were ninety-five death penalty requests filed across Indiana. The Clark County Prosecuting Attorney, <http://www.clarkprosecutor.org/html/death/rowstats.htm> (last visited Feb. 23, 2008).

16. Interview with Paula Sites, Assistant Executive Dir., Ind. Pub. Defender Council (Jan. 21, 2008).

17. *Id.*

18. *Id.*

19. *Id.*

20. See *Atkins v. Virginia*, 536 U.S. 304, 353–54 (2002) (Scalia, J., dissenting) (“The mere pendency of the present case has brought us petitions by death row inmates claiming for the first time, after multiple habeas petitions, that they are retarded.”).

21. See Interview with Paula Sites, *supra* note 16.

22. See *id.*

## III. PUBLIC OPINION

As noted in *Atkins*, state and national polls consistently find that a majority of the public is opposed to capital punishment for offenders with mental retardation.<sup>23</sup> While polls show that 28% of the public was generally opposed to capital punishment,<sup>24</sup> polls cited in *Atkins* found that at least 50%, and frequently more than 70%, of respondents were opposed to the death penalty for offenders with mental retardation.<sup>25</sup> A 2002 Gallup Poll looking at attitudes toward the death penalty for selected groups found the least support for defendants with mental retardation.<sup>26</sup> In particular, while general support for the death penalty was 72%, only 13.5%<sup>27</sup> indicated that they were in favor of the death penalty for persons with mental retardation.<sup>28</sup> In comparison, 19% favored the death penalty for offenders who are mentally ill, 26% were in favor of the death penalty for juvenile offenders, and 67.6% favored the death penalty for female offenders.<sup>29</sup> Thus, while there is little difference between general support for the death penalty and support for the death penalty for female offenders, there is substantially less support for the other groups of offenders. This is especially true for those who are mentally retarded, where there is almost a sixty percentage point drop in support for the death penalty.<sup>30</sup>

Because jurors' opinions may differ from those of the general public, researchers have also studied prospective jurors. For instance, Boots and her coauthors administered a questionnaire to all persons called for jury duty over the course of three days in Tampa, Florida.<sup>31</sup> While the general pattern of findings was mostly consistent with the results of the Gallup Poll discussed above, there were notable differences. For instance, 83.4% of respondents were in favor of capital

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23. See *Atkins*, 536 U.S. at 317 (majority opinion).

24. According to the Death Penalty Information Center, a 2006 Gallup poll found 67% in favor of the death penalty for persons convicted of murder, 28% opposed, and 5% no opinion. Death Penalty Info. Ctr., National Polls and Studies, <http://www.deathpenaltyinfo.org/article.php?did=2163#gdp> (last visited Jan. 3, 2008).

25. See *Atkins*, 536 U.S. app. at 336–37 (Rehnquist, C.J., dissenting).

26. Jeffrey M. Jones, *Slim Majority of Americans Say Death Penalty Applied Fairly*, THE GALLUP POLL TUESDAY BRIEFING, May 20, 2002, at 55.

27. This is from a sample of 1,012 individuals surveyed. *Id.*

28. *Id.* at 54–55.

29. *Id.* at 55.

30. *Id.*

31. Denise Paquette Boots et al., *Death Penalty Support for Special Offender Populations of Legally Convicted Murderers: Juveniles, the Mentally Retarded, and the Mentally Incompetent*, 22 BEHAV. SCI. & L. 223, 229–30 (2004) (reporting results of a survey of 697 prospective jurors during the Winter of 2000).

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punishment.<sup>32</sup> That greater favorability among prospective jurors in Florida was also apparent for each of the groups of special offenders. For example, Boots found that 29.1% of respondents supported capital punishment for “adults who are mentally retarded and are legally convicted of murder.”<sup>33</sup> While 29% support represents a sizeable difference from the national findings, it also reflects almost a fifty-five percentage point drop in support of the death penalty generally among Floridians.<sup>34</sup> Thus, while the actual level of support clearly differs from the Gallup Poll, the pattern of findings is similar.<sup>35</sup>

Although these surveys reveal general opposition to the idea of subjecting persons who are mentally retarded to the death penalty, the findings do not reveal how jurors actually respond to evidence that a defendant is mentally retarded. Understandably, the items employed in these public opinion polls rely upon general conceptions of mental retardation and assume that respondents know what the diagnosis means. Most respondents rely upon their own stereotypes regarding mental retardation when answering general opinion items. Research suggests that, although such stereotypes are consistent with representations and images of retardation perpetuated by the media, they are wrought with misconceptions. For example, people often falsely believe that all persons with mental retardation “look retarded,” exhibit childlike behavior, and are easy to detect.<sup>36</sup> Although some persons with mental retardation fit this profile, most do not. This profile more accurately describes those with severe mental retardation than those who fall in the “mild” range. The expectation that persons who are mentally retarded will exhibit characteristics of persons who are severely mentally retarded is problematic, because most defendants who have mental retardation likely fall in the “mild” range.

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32. *Id.* at 229.

33. *Id.* at 228.

34. *See id.* at 229–30.

35. *Id.* at 228. The study also asked about juveniles (fifteen years old and younger) and “adults who were legally convicted of murder but who later become mentally incompetent (in other words, those who do not understand the nature of their punishment any longer and/or are unable to assist in their own defense).” *Id.* Regarding juveniles, some 34.9% supported the death penalty, which is somewhat higher than the 26% found by Gallup. *Id.* As to adults who become mentally incompetent, a full 57% of respondents in the Florida study supported capital punishment for such offenders. *Id.* Given how different this question was from Gallup’s question about defendants who are mentally ill, no comparison can be made.

36. James R. Patton & Denis W. Keyes, *Death Penalty Issues Following Atkins*, 14 *EXCEPTIONALITY* 237, 239–40 (2006). Stereotypes of persons who are mentally retarded often contain a physical profile similar to someone with Down syndrome. *Id.*; *see also* Denis W. Keyes et al., *Mitigating Mental Retardation in Capital Cases: Finding the “Invisible” Client*, 22 *MENTAL & PHYSICAL DISABILITY L. REP.* 529, 531 (1998).

The characteristics of mild mental retardation are quite different from the stereotypes. Persons with mild mental retardation generally have specific areas of weakness and others of relative strength.<sup>37</sup> Patton and Keyes list several characteristic features of mild mental retardation that, coupled with the stereotypes that jurors are likely to bring with them to trial, may result in the mistaken judgment that the defendant is not mentally retarded.<sup>38</sup> For example, people with mild mental retardation tend to be exceedingly gullible, often acquiesce or “give in” under stressful situations, are highly suggestible, and frequently exhibit a desire to please.<sup>39</sup> These features often lead suspects with mental retardation to falsely confess, which may create the impression among jurors that they understood their actions and made reasoned decisions.<sup>40</sup> Further, persons with mild mental retardation tend to have poor memory, language problems, and difficulty understanding abstract legal concepts and ideas.<sup>41</sup> Arguably, the most counterproductive characteristic features of mild mental retardation are certain affectations and the “cloak of competence.”<sup>42</sup> The former refers to the tendency of persons with mild mental retardation to display inappropriate or unfounded emotional reactions.<sup>43</sup> They may smile, laugh, or applaud during trial, because they frequently do not understand what is happening.<sup>44</sup> Persons with mild mental retardation often go to great lengths to conceal their condition and may deny their limitations altogether, thereby resulting in a “cloak of competence.”<sup>45</sup>

The general public’s limited exposure to and experience with mental retardation often result in the formation of unfounded stereotypes and misconceptions. When these misconceptions are brought into the jury box, defendants with mental retardation stand to suffer. If defendants present evidence that is inconsistent with jurors’ preconceived notions about mental retardation, the evidence may be dismissed, ignored, or at least misunderstood. The remainder of this Article explores the ways in which capital jurors respond to evidence of mental retardation.

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37. Patton & Keyes, *supra* note 36, at 250 (“All professional definitions of mental retardation stress that relative strengths can coexist with deficits in adaptive behavior, as indicated by the fact that deficits do not have to be found in all adaptive skill areas.”).

38. *Id.* at 240–41.

39. *Id.* at 241.

40. *Id.*

41. *Id.*

42. *Id.*

43. Patton & Keyes, *supra* note 36, at 241.

44. *Id.*

45. *Id.*

## IV. THE CAPITAL JURY PROJECT

The data for this Article come from the CJP, organized as a consortium of law and social science professors and designed to explore capital jurors' decision making.<sup>46</sup> The CJP utilizes extensive face-to-face interviews with former capital jurors. The interviews address all aspects of the jurors' experiences, from the initial reporting of the crime in the media to jury selection, the guilt and penalty phases, and, ultimately, post-trial. To date, 1,198 jurors from 353 capital trials in fourteen states have been interviewed. Within each state, researchers select approximately equal numbers of cases that result in life and death sentences. The total number of cases selected for inclusion in the study within a state has ranged from twenty to thirty. For each capital case, researchers use a systematic selection procedure to target four jurors to interview.<sup>47</sup>

A. *Incidence of Mental Retardation*

As noted in *Atkins*, the execution of persons who are mentally retarded "has become truly unusual."<sup>48</sup> However, according to Keyes, Edwards, and Perske, at least twenty-nine individuals with mental retardation have been executed in the United States from 1984 through 1997.<sup>49</sup> These twenty-nine represent 8.7% of the total number of persons executed during the same period of time.<sup>50</sup> The actual number of cases in which mental retardation was alleged at trial in the post-*Gregg* era is unknown.<sup>51</sup> Although the CJP was not designed to answer this question, its findings indicate the extent to which jurors perceive defendants as mentally retarded. In particular, early on in the

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46. For further information on the sampling design and data collection procedures, see William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995). The grant was funded by the Law and Social Science Program of the National Science Foundation.

47. *See id.*

48. *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

49. Denis Keyes et al., *People With Mental Retardation Are Dying, Legally*, 35 MENTAL RETARDATION 59 (1997).

50. Death Penalty Info. Ctr., Executions by Year, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=146> (last visited Feb. 23, 2008); Death Penalty Info. Ctr., List of Defendants with Mental Retardation Executed in the United States, <http://www.deathpenaltyinfo.org/article.php?did=1858> (last visited Feb. 23, 2008). This figure is based on reports of executions, by year, on the Death Penalty Information Center's website, which also includes an updated list of persons with mental retardation who have been executed. *Id.* According to the Death Penalty Information Center, that number is now forty-four (through 2001), which represents 6.3% of all persons executed during that same time period. *Id.*

51. *See Gregg v. Georgia*, 428 U.S. 153 (1976) (finding Georgia's newly written death penalty statute constitutional and thereby reinstating the death penalty in the United States after an unspoken four-year moratorium).

interviews, participants are presented with a battery of items and asked to indicate the extent to which each one describes the defendant. A total of 1,180 former jurors responded to the item about mental retardation. Of these jurors, 4.8% said that the term “mentally retarded” described the defendant “very well,” an additional 11.9% said that it described the defendant “fairly well,” 19.9% said that it described the defendant “not so well,” and 63.3% said the term described the defendant “not at all.” Thus, a relatively small percentage of jurors believed that the defendant in their case was mentally retarded. Their perceptions comport with the estimated number of persons with mental retardation executed.<sup>52</sup>

Jurors interviewed for the CJP are also asked, “How much did the discussion among the jurors (at the penalty phase) focus on the following topics: defendant’s IQ or intelligence?”<sup>53</sup> Because IQ is the best-known indicator of mental retardation, this question taps into how often jurors considered mental retardation an issue in their case. Responses to this question show that jurors discuss defendants’ intelligence on a relatively routine basis. In particular, 14.2% of the 1,163 jurors who responded said that their penalty phase deliberations focused on the defendant’s IQ or intelligence a “great deal.” All told, almost half of the jurors (46.3%) stated that the discussion at the penalty phase of their trial focused on the defendant’s IQ or intelligence at least “a fair amount.” Roughly one-quarter (25.5%) of jurors said that their penalty phase deliberations focused on the defendant’s IQ or intelligence “not at all.” Thus, it appears that jurors are more inclined to discuss the defendant’s IQ or intelligence than they are to describe the defendant as mentally retarded. Such a finding is consistent with the diagnostic criteria for mental retardation. In addition to subaverage intellectual functioning, the diagnosis requires concomitant deficits in adaptive behavior and onset before eighteen years of age.<sup>54</sup>

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52. Keyes et al., *supra* note 49.

53. Capital cases must be tried as bifurcated proceedings. *Gregg*, 428 U.S. at 153-54. In the first phase, jurors are charged with determining whether the defendant is guilty or not guilty. *Id.* If the defendant is found guilty of the capital offense, there is at least one other phase at which jurors must decide the appropriate penalty; this is known as the penalty phase. *See id.* It is during this phase that jurors are presented with aggravating factors—those that suggest that death is a more appropriate penalty—and mitigating factors—those that suggest that a sentence of life is a more appropriate penalty. *Id.* at 154.

54. The Am. Ass’n on Intellectual & Developmental Disabilities, Definition of Mental Retardation, [http://www.aamr.org/Policies/faq\\_mental\\_retardation.shtml](http://www.aamr.org/Policies/faq_mental_retardation.shtml) (last visited Feb. 23, 2008).

*B. Mental Retardation and Case Outcomes*

Interestingly, of the fifty-seven jurors who said the term “mentally retarded” described the defendant “very well,” 61.4% served on juries that sentenced the defendant to life in prison.<sup>55</sup> Given that, 41.2% of the sample as a whole served on life cases, it appears that the defendant’s mental retardation exerts a powerful mitigating influence on a small group of capital jurors. It is tempting to ask whether there is something unique about those trials where jurors viewed the defendant as mentally retarded that could account for the disparity in case outcomes. That question, however, assumes that classifying cases by whether the defendant is mentally retarded is as easy as classifying cases by whether the defendant is a juvenile.<sup>56</sup> To determine whether a defendant is ineligible for the death penalty based on age, one merely subtracts the year of birth from the year of the crime. While there are certainly situations where birth certificates cannot be located, there can be little argument concerning eligibility based on age when the year of birth is known.

No comparable formula exists for determining whether a defendant is mentally retarded. It is not surprising that jurors who serve on the same jury do not necessarily agree on the defendant’s mental status. The extent to which there is lack of consensus is demonstrated by the CJP’s finding that the fifty-seven jurors who viewed the defendant as mentally retarded served on forty-seven different juries. Given that an average of three to four jurors were interviewed from each trial included in the CJP,<sup>57</sup> the difficulty in convincing an entire jury that a defendant is mentally retarded becomes abundantly clear. To the extent that the defendant’s mental retardation was the reason to vote for life, these data suggest that this was a decision made—initially at least—by individual jurors. Furthermore, these data make it clear that classifying cases by whether the defendant was mentally retarded is inappropriate. The more appropriate analysis focuses on individual jurors.

In an attempt to understand how a variety of factors affect decision making, jurors were asked a series of questions about each factor, in-

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55. In contrast, of the 749 jurors who said the term “mentally retarded” described the defendant “not at all,” 41% served on juries that sentenced the defendant to life in prison.

56. See William J. Bowers et al., *Too Young for the Death Penalty: An Empirical Examination of Community Conscience and the Juvenile Death Penalty from the Perspective of Capital Jurors*, 84 B.U. L. REV. 609, 687 (2004) (comparing cases where the defendant was a juvenile at the time of the crime to cases where the defendant was an adult and finding that “[j]uvenile status is far more likely than mental retardation to keep capital jurors from sentencing a defendant to death”). See generally *Roper v. Simmons*, 543 U.S. 551 (2005).

57. See *supra* note 46 and accompanying text.

cluding whether the defendant was mentally retarded. First, the jurors were asked whether a situation or circumstance—for instance, that the defendant was mentally retarded—was a factor in their case. Next, if the person indicated that the situation or circumstance was a factor in their case, they were asked to indicate the importance of that factor in their sentencing decision. Finally, the juror was asked if that situation or circumstance made them much more likely, slightly more likely, slightly less likely, much less likely, or just as likely to vote for a death sentence. Conversely, if the juror stated that the situation or circumstance was not a factor in their case, they were asked, “In another case, if that situation or circumstance was present, would that factor make you much more likely, slightly more likely, slightly less likely, much less likely, or just as likely to vote for death?” Thus, researchers collected two different types of information about the influence of mental retardation on sentencing outcomes: its actual impact on jurors who believed that the defendant was mentally retarded and its predicted or hypothetical influence on capital jurors who did not believe that the defendant was mentally retarded. Hence, all jurors were explicitly asked either to describe how they evaluated the evidence of the defendant’s mental retardation in their case or to predict how they *would* have treated evidence of mental retardation. The information from this later group is akin to general public opinion polls with the important distinction that all of the respondents in the CJP have served as capital jurors.

All told, fifty-five jurors indicated that the defendant’s mental retardation was a factor in their case. These jurors were asked, “How important was this factor in your punishment decision?” Among the jurors, 41.5% claimed that the defendant’s mental retardation was “very important” to their punishment decision. An additional 26.4% said that the defendant’s mental retardation was “fairly important” in their punishment decision, and almost one in three (32.1%) said that the defendant’s mental retardation was “not important” in their punishment decision. The responses of both groups of jurors—those for whom the defendant’s mental retardation was a factor and those who answered only hypothetically—to the respective follow-up questions are presented below.

Table 1 illustrates that people believe they would be much more sympathetic and receptive to evidence of mental retardation than they actually are when presented with such evidence. For example, 80.7% of jurors answering the hypothetical question believed that evidence that the defendant was mentally retarded would make them at least slightly less likely (31.4%), if not much less likely (49.3%), to vote for

*Table 1: Influence of Mental Retardation on Voting in the Case*

Was the defendant's mental retardation a factor in your decision?				
	Yes, it was a factor, and it made me . . .		No, it was not a factor, but it would have made me . . .	
	%	(#)	%	(#)
Much more likely to vote for death	2.3%	(1)	0.7%	(7)
Slightly more likely to vote for death	4.7%	(2)	1.5%	(15)
No more or no less likely to vote for death	41.9%	(18)	17.0%	(170)
Slightly less likely to vote for death	20.9%	(9)	31.4%	(314)
Much less likely to vote for death	30.2%	(13)	49.3%	(493)
Total:	100%	(43)	99.9%	(999)

a death sentence. In reality, just over half (51.1%) of the jurors who believed that the defendant was mentally retarded stated that this factor made them less likely to vote for death. Many of the jurors for whom the defendant's mental retardation was a factor in their case (41.9%) stated that this information made them no more or less likely to vote for death. Why is it that so many jurors who acknowledge that the defendant in their case was mentally retarded nevertheless say that this information made them no more or less likely to vote for death? Stated differently, why is it that so many jurors, when actually faced with evidence of mental retardation in their cases, fail to treat that information as a mitigating factor justifying a sentence less than death?

*C. Mental Retardation as Related to Perceptions of Dangerousness*

One reason that jurors frequently fail to treat evidence of mental retardation as mitigation may be its relationship to perceptions of dangerousness. To the extent that jurors believe that the defendant's mental retardation reflects an inability to control one's behavior or a tendency toward random violence, it is plausible that what should be exceptionally strong mitigating evidence<sup>58</sup> quickly becomes aggravating evidence.<sup>59</sup>

58. See *Penry v. Lynaugh*, 492 U.S. 302 (1989):

In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision . . .

*Id.* at 303-04.

59. See *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

Table 2 below shows that jurors who believed that the defendant was mentally retarded were substantially more likely than those who did not believe that the defendant was mentally retarded to say that “dangerous to other people” described the defendant “very well.” Almost three-fourths (70.9%) of the fifty-five jurors who claimed that the defendant’s mental retardation was a factor in their case said that “dangerous to other people” described the defendant “very well.” All told, nine out of ten of the jurors who said that the defendant’s mental retardation in their case was a factor also stated that “dangerous to other people” described the defendant at least “fairly well.” While jurors who did not believe that the defendant’s mental retardation was a factor in their case also believed that the defendant was dangerous to others, they did so less extremely. For instance, there is a seventeen percentage point difference (from 70.9% to 53.7%) in terms of “dangerousness to others” describing the defendant “very well” between jurors for whom the defendant’s mental retardation was a factor and those for whom mental retardation was not a factor in their case.

In brief, the data suggest that capital jurors are more likely to perceive a mentally retarded defendant as dangerous to others than a person who is not mentally retarded. Given the documented relationship between perceptions of future dangerousness and case outcomes,<sup>60</sup> the disparity between the anticipated and the actual mitigating influence of mental retardation becomes more understandable. To the extent that jurors can come to understand the complex characteristics of mental retardation—and particularly that dangerousness is not a characteristic feature of those so diagnosed<sup>61</sup>—the gap between the impact of mental retardation on sentencing outcomes in the abstract and in practice should narrow. In an attempt to understand more fully how jurors perceive defendants who are mentally retarded, this Article turns to jurors’ narrative accounts of their experiences on these cases.

#### *D. Jurors’ Perceptions of Defendants with Mental Retardation*

The CJP interviews utilized a variety of open-ended questions designed to encourage respondents to describe in depth their capital trial experiences, their reactions to the evidence, and the manner in which they arrived at their punishment decisions. This Section focuses solely on those interviews in which jurors indicated that the defendant’s

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60. See John H. Blume et al., *Future Dangerousness in Capital Cases: Always “At Issue,”* 86 CORNELL L. REV. 397 (2001).

61. See Patton & Keyes, *supra* note 36, at 241 tbl.2.

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*Table 2: Percentage of Jurors Who See Defendants as Dangerous by Whether Mental Retardation Was a Factor in their Case*

	<i>Mental Retardation Was a Factor</i>			
	Yes	(#)	No	(#)
How well do the following describe the defendant?				
Dangerous to other people:				
Very Well	70.9%	(39)	53.7%	(571)
Fairly Well	20.0%	(11)	25.3%	(269)
Not so Well	3.6%	(2)	12.3%	(131)
Not at All	5.5%	(3)	8.7%	(92)
Total:	100%	(55)	100%	(1,063)

mental retardation was a factor in their case. In reviewing the transcripts of these interviews, several patterns become apparent. First, jurors are confused by the terminology used to diagnose persons as mentally retarded. Second, there is a disconnect between jurors' perceptions of defendants' mental retardation and their actual capabilities. Third, jurors' personal experiences inform their evaluations of evidence of mental retardation. Fourth, jurors' perceptions of experts who testify about defendants' mental capabilities vary. Finally, when defendants with mental retardation were spared the death penalty, their mental retardation was often part of a larger constellation of mitigating factors. This Section provides a more elaborate exploration of each of these themes.

### *1. Confusion Regarding the Meaning of the Diagnosis*

Even though mental retardation should be considered a mitigating factor, it is not uncommon for jurors to express confusion about what the diagnosis means or what they should do with the information. This confusion is perhaps best illustrated by the response of a South Carolina juror to the question, "Among the topics you did discuss [during the guilt-innocence phase] what were the main areas or points on which jurors disagreed?" The juror answered, "The line between sane and mentally retarded or insane, or not sane because, the line between, you know, being here and not being here, the line between not being, how much competency you have, even if you are mentally retarded." This juror was then asked if there was any information that would have helped in making the punishment decision, and he responded that "no one knew what mental competence meant." According to this juror, there was a lack of understanding about how to evaluate the evidence of mental retardation. That theme was echoed

by a Kentucky juror, who said, "The defense tried to portray him as semi-retarded . . . [but the psychiatrists] also concluded that he knew right from wrong, so, if he was retarded in any way, that wasn't a factor as far as we were concerned." This juror basically dismissed the potential mitigating influence of the defendant's "semi-retard[ation]" and concluded that it was irrelevant after hearing testimony that the defendant knew right from wrong.

Some jurors appear not to comprehend mental retardation diagnoses. For example, when describing the impression that the defendant made, a Missouri juror said, "it wasn't for lack of education. It was also because he was perhaps slow, suffering from some, some form of retardation, or, ya know, hyperactive or something." Thus, for this juror, the defendant could have been mentally retarded or perhaps hyperactive. Similarly, when asked how well "mentally retarded" described the defendant, another South Carolina juror responded, "Well they tried to bring that out in court but I don't think he was retarded enough to do something like that. He might not have had good sense, but I couldn't place him as just mental." It thus appears that, for this juror, the defendant was not "retarded enough" for it to have contributed to his behavior. This juror's response suggests a failure to distinguish between what was likely mild mental retardation and lack of "good sense."

Another way in which juror misunderstanding about the mental retardation diagnosis was revealed in the interviews is through jurors' references to the defendants' inappropriate behaviors during the trial. As previously discussed, mild retardation is often characterized by a "cloak of competence" and may be revealed through "a behavior (e.g., smiling or laughing) that suggests a lack of remorse (e.g., happiness) at an inappropriate time (e.g., during trial)."<sup>62</sup> That description could have been written about one defendant in a North Carolina case. When asked if there "is anything about the case that continues to stick in mind or that you keep thinking about," the juror responded, "[The defendant] was laughing when [the jury] handed down [the] sentence. When that happened, hair stood up on the back of my neck, and I knew the man just wasn't right."

The above quotations illustrate a pattern of misunderstanding regarding the meaning of mental retardation. Echoing the findings of past research,<sup>63</sup> these data suggest that capital jurors are unable to distinguish among various levels of mental retardation and that they

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62. See Patton & Keyes, *supra* note 36.

63. See *id.*

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confuse the task of evaluating evidence of mild mental retardation as a mitigator (a penalty phase consideration) with the standard necessary to determine sanity (a guilt-phase defense). Furthermore, CJP data suggest that jurors reconcile their confusion by erring on the side of skepticism, with the result being disbelief that the defendant is mentally retarded.

## 2. *The Disconnect between Diagnosis and Perceived Abilities*

For several jurors, there was an apparent disconnect between a diagnosis of mental retardation and their perceptions of the defendant's abilities. For some jurors, that disconnect was tied directly to the defendant's actions during the crime. For example, one juror explained, "If [the defendant is] retarded and didn't know what he's doing then why did he drag her around behind the church before he did anything? . . . [H]e was mentally competent enough to hide his acts." Likewise, an Indiana juror said that, "the fact he tried to cover it up—it showed some rationale" was an important factor in making the punishment decision. Similarly, a Kentucky juror stated the following:

[T]he evidence started pointing to me that this was a pretty cold-blooded crime that could have been avoided on more than one occasion. He had plenty of time to think about walking down that road, to turn around and come back. And he didn't. He chose. He made a conscious decision not to avoid the confrontation.

For other jurors, it was not anything about the crime per se, but rather the defendant's actions either in jail or during trial. A juror from South Carolina explained as follows:

The only thing that I really focused on—the idea of him writing all those letters to his girlfriend when he was in jail. You know, using those words, that I'm a teacher, and I couldn't write anything like that. That man was smart. He knew what he was doing.

Similarly, a juror from Alabama recalled that the "[d]efense said defendant was mentally defective but defendant spoke well trying to save his skin."

Perhaps more than any other reaction, the jurors reported disbelief about the actual diagnosis. This characterization is different than confusion about the diagnosis in that jurors thought the defendant was attempting to fool everyone. In such cases, the jurors appeared to rely upon their beliefs that the defendants knew right from wrong and, thus, whatever disabilities existed, they were not severe enough to justify reducing defendants' punishment:

- "He acted crazy for the test."
- "We were also shown a videotape of him when he was arrested, things that he said on there. I don't know if it's incompetence, it's

a slickness—whatever you want to call it—just outsmart you, the lying.”

- “If you followed the whole trial, you found [defendant] to be a good actor.”
- “He tried to come off as a guy with so many problems; a show.”
- “I think that during his testimony, there were times when he appeared to be kind of a cunning individual, and not one that is an individual that can’t understand right and wrong. He knew perfectly well what he was doing.”

Therefore, for these jurors, allegations of mental retardation were just another way that defendants try to avoid responsibility for their actions. Moreover, defendants were seen as malingering, putting on “a show,” and, by implication, attempting to mislead the jury. If the defendants were truly mentally retarded, the reasoning goes, they would not have engaged in a particular behavior or have been capable of communicating as effectively. Unlike jurors who failed to understand what mental retardation is and how it differs from an insanity defense, these jurors did not believe that the defendant’s intellectual disabilities were severe enough to warrant consideration as mitigation.

### 3. *Jurors’ Personal Experiences*

Another common theme that emerged from the interviews is the extent to which jurors rely upon their own and other jurors’ experiences to interpret defendants’ behaviors. For example, an Alabama juror who served on a life case noted the importance of teachers on the jury: “We had teacher[s] in there that were familiar with teaching the mentally deficient. We had teacher[s] in there who would teach the children from that environmental and family background. They presented their views. Everybody presented their views, and the result was life in prison.” A juror from South Carolina, herself a teacher, was nonplussed by the defendant’s low IQ score:

Some of the tests he had taken and he had scored low, and then as a teacher I know that IQs can be raise[d]. For an example, there was a question on one of the tests. One of the brightest students missed it, because they asked her if she was going to her grandma’s, what would her mom pack her things in? And they have a cardboard box and a suitcase. Well, she was supposed to say the suitcase, but her mom always put her things in a cardboard box . . . . If he could have done all those things that he did . . . he was not mentally unbalanced. His IQ was so low, but IQs can be raised.

For another South Carolina juror, the case reminded her of her work with mentally retarded children during the summers of her college years: “Connecting the two together, mental retardation and the chil-

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dren, I couldn't separate the two, and I figured that it wasn't his fault, that's why I decided on the life sentence. I was trying to get everybody else to see that."

For a Kentucky juror, personal experience was irrelevant to the sentencing determination. Rather, this juror reported comparing the defendant's situation to unknown others that could have been in the same situation:

I didn't imagine myself being in his situation, but I often thought about people that have experienced different homes, different people to care for them. In point of fact, there are a lot of people who wind up in those categories, and not all of them wind up killing people.

Jurors appear to be looking for ways in which to interpret the defendant's mental status by comparing him to others. By relying upon one's own personal experience or that of other jurors, the defendant's sentence may be a function of how well the defendant compares to those (un)known others. For some, the defendant's limitations are less profound and, thus, are dismissed as a potential mitigator. In contrast, some defendants may remind jurors of others who are intellectually or developmentally disabled in a way that elicits more sympathy.

#### 4. *Perceptions of Experts*

Evidence of intellectual disability is often introduced through expert testimony, so it is not surprising that the jurors' perceptions of experts affect whether they believe the defendant is mentally retarded.<sup>64</sup> For example, several jurors noted that dueling experts canceled each other out: "One doctor said [the defendant] was insane<sup>65</sup> and the other said he was not. Basically the decision came from us." A Missouri juror was not persuaded by the mental health expert's testimony, claiming that the jury "tuned [her] out." In describing the testimony, this juror said that the "psychologist—or psy, I don't remember what she was—she got too technical and too long, and toward the end, none of us, we didn't even wait to hear her." A similar inability to relate to an expert witness was reflected in the statements of a North Carolina juror when asked if any of the "testimony by defense witnesses at the punishment stage of the trial backfired or actu-

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64. See Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997) (finding that defense strategies that rely on primarily expert testimony are likely to fail while those that orchestrate the consistent presentation of evidence by experts, lay witnesses, and even family members are more likely to succeed).

65. Even though this juror referred to the issue in terms of sanity, other jurors on this case talk about the defendant's IQ being in the high 70s.

ally hurt their case?” The juror replied, “Psychologist. He was, for a professional witness, unprepared, did not do his job very well . . . made a lot of quotes out of a book that I personally had nothing to relate them to.” Another juror from this case felt similarly about the psychologist: “A lot of our decision rested on that person; did not prove that [the defendant] had mental disease and was on drugs.” Thus, some jurors disregarded the testimony of dueling experts. For other jurors, the perceived poor performance on the part of the expert may allow them to dismiss other evidence of the defendant’s intellectual dysfunction.

### 5. *Constellation of Factors*

Thus far, jurors’ comments have spoken to specific aspects of the evidence or testimony concerning the defendants’ intellectual disabilities. It appears that jurors who served on cases where mental retardation was a factor were confused about what the diagnosis meant and how they should evaluate the related evidence. In many situations, jurors’ expectations about mental retardation were inconsistent with—and usually more extreme than—the perceived functioning of the defendant. In other cases, jurors were skeptical of evidence of mental retardation and believed defendants were malingering. In general, the jurors appeared to trust their own experience and that of their fellow jurors more than the experts. Given these difficulties, in which cases do jurors point to the defendant’s mental retardation as the reason for voting for life?

A review of the CJP’s interviews lends credence to Scott Sundby’s finding that the cases most likely to result in a life sentence are those that are well orchestrated and use testimony from multiple witnesses about the defendant’s condition.<sup>66</sup> While jurors often mentioned defendants’ intellectual disabilities, the most compelling stories for life sentences usually went beyond that aspect to talk about a constellation of mitigating circumstances. A case from Florida provides an example of the way in which stories of mitigation can become stories for life. When asked what the defense attorney stressed most as the reason the defendant should not get the death penalty, one of the jurors said, “he had an IQ of 57. That’s what stands out in my mind.” This juror then went on to describe the evidence for the defense at the penalty phase. When asked whether the defense’s mitigation witnesses included a variety of people, this juror stated the following:

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66. See Sundby, *supra* note 64.

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A preacher, several (co-workers), his mother, and aunt. His aunt testified he had been hit in the head several times when he was young. One time he was hit with a pipe when the kids were playing, another time with a brick. The kid had a rough life. I'm not denying that, but, my gosh, this whole situation. If you've never been there, you can't imagine what it was like. It got to the point when the family was going up—the friends and the clergy pleading for this young man's life—it was almost like a carnival. Who can tell a story that's more incredible? And then comes the next witness, it was unbelievable.

This was also a case in which the expert witness, a psychologist, made a positive impression on the jurors:

The psychological expert had formulated a test for measuring IQ and criminal, a capacity-type test for committing crimes. He had put all of this on a graph. He had done hundreds of interviews with criminals and had a baseline for comparison. [The defendant] was either at or below all of the scales. It was so incredible to have an expert witness up there who had hundreds of interviews with criminals and has been able to develop this type of test . . . that really clinched it for me.

The jurors on this particular case were so persuaded by the mitigating evidence that they were angry at the defense attorneys for not bringing it forward in the guilt phase. When asked if there was anything about the case that stuck in their minds, another juror on this case said, "Yes. After we brought the verdict in they bring witnesses to make you feel that you did something wrong. I felt that should have been done before the jury went in for the verdict because really, basically, I think the sentence would have been different."

Another juror's response to that question echoed the same theme:

Yes, we were led down the road that [the defendant] was an individual who was a bad person who got in a lot of trouble and basically was not to be put back out on the street in the public. Yet there was information that was withheld from us, that was held until sentencing, info about severe injuries he received as a child, info pertaining to his IQ, extremely low IQ. These are factors I feel should have been brought out in the defense portion of the case which probably would have steered us to a different verdict. Had we known all these facts from the beginning, as opposed to trying to punish him, we would have sent him to a hospital for treatment.

That juror went on to blame the defense attorneys for not bringing forward mitigation in the guilt phase of the trial:

The first thing we discussed [during the penalty phase deliberations] was how in the world can these two men call themselves defense attorneys for not bringing out this information earlier. We discussed how in the world could the judge, upon all of this informa-

tion coming out, not penalize them in some way for not representing him properly.

The defendant in this case was sentenced to life in prison, but the juror's remarks show a misunderstanding of the structural constraints on the defense during the guilt phase of the trial.<sup>67</sup>

## V. SUMMARY AND CONCLUSION

The *Atkins* dissents, written by then Chief Justice Rehnquist and Justice Scalia, take issue with the lack of information available on how actual sentencing juries treat evidence of mental retardation.<sup>68</sup> Justice Scalia in particular chided the majority for assuming that juries cannot "account properly for the 'diminished capacities' of the retarded."<sup>69</sup> Using data collected by the CJP, this Article directly addresses these concerns by examining actual jurors' perceptions of mental retardation and the role these perceptions played in their sentencing decisions.

There is reason to suspect that evidence of mental retardation exerts a powerful mitigating influence on some capital jurors. Empirical studies reveal strong public opposition to the execution of capital offenders with mental retardation,<sup>70</sup> and jurors in our study who believed that the defendant in their case was not mentally retarded indicated that evidence of mental retardation would make them less likely to vote for death. However, there was a lack of consensus among jurors about which defendants were in fact was mentally retarded. As discussed, the fifty-seven jurors who indicated that mentally retarded described the defendant in their case "very well" served on forty-seven different juries. If jurors agreed on the qualities indicative of mental retardation, more jurors from each case would have stated that the defendant was mentally retarded. Hence, although general opposition to a death sentence for capital offenders who are mentally retarded is firmly established, this opposition appears to be based on stereotypes that conflict with the realities of mild retarda-

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67. See Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447 (1997). See also CRAIG HANEY, *DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM* (2005) (finding that the process of death sentencing includes psychological factors that serve to make death verdicts more likely).

68. *Atkins v. Virginia*, 536 U.S. 304, 324 (2002) (Rehnquist, C.J., dissenting) ("In reaching its conclusion today, the Court does not take notice of the fact that neither petitioner nor his *amici* have adduced any comprehensive statistics that would conclusively prove (or disprove) whether juries routinely consider death a disproportionate punishment for mentally retarded offenders like petitioner.")

69. *Id.* at 349 (Scalia, J., dissenting).

70. See *supra* notes 24–35 and accompanying text.

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tion, the type of mental retardation jurors are most likely to be presented with at trial. How, then, do jurors reconcile this inconsistency? One way that jurors can maintain a sense of consistency is to refuse to believe that the defendant is mentally retarded. By so doing, jurors can vote for death while maintaining that they are opposed to the death penalty for persons who are mentally retarded—it is just that the defendant in *their case* was not mentally retarded.

Further, there is a tendency for jurors who see the defendant as mentally retarded to vote for a life sentence, but this is not always the case. Cases that resulted in life sentences usually involved a compelling constellation of mitigating evidence. Thus, a mere diagnosis of mental retardation is insufficient to result in a sentence of life.<sup>71</sup> Rather, jurors look to understand how the defendant's mental retardation manifested itself in other aspects of the person's life and how the overall story of the defendant's life suggests that life in prison, not death, is the more appropriate sentence.

Our findings demonstrate that jurors often confuse mental retardation with other conditions, including mental illness, and that much of the related evidence is interpreted in terms of sanity, not mitigation. If jurors do not understand the important distinctions between the meanings of these terms, they cannot properly evaluate and interpret the evidence in accordance with the law. While some jurors acknowledge their confusion, the greater tendency is to rely upon experience as the basis for interpretation. This means that not all jurors will consider mental retardation mitigating.

When asking whether jurors are equipped to take account of the “diminished capacities of the retarded,”<sup>72</sup> the answer is that, given the current structure of capital sentencing procedures, it depends on the individual juror. While the law is clear that mental retardation is a mitigating factor, CJP data suggest that many jurors' beliefs regarding mental retardation conflict with the legal standard.<sup>73</sup> Thus, before we can assume that jurors are equipped to account properly for the diminished capacities of persons with mental retardation, more needs to be done to both understand jurors' beliefs and to educate them about the law. As to the former, attorneys should be given broad latitude during voir dire to question jurors about both their understanding of and experience with individuals with mental retardation. If a prospec-

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71. Jurors appear not to understand or believe a diagnosis of mental retardation without compelling testimony on the ways in which the defendant's intellectual disabilities were manifested beyond the specific crime.

72. *Atkins*, 536 U.S. at 349 (Scalia, J., dissenting).

73. *See id.* at 304 (majority opinion).

tive juror's beliefs regarding mental retardation are limited to severe cases, that person may be mitigation-impaired and thus ineligible to serve as a juror.<sup>74</sup> Likewise, determining only whether a prospective juror has experience with individuals with mental retardation is insufficient. Attorneys must attempt to understand the nature of jurors' experiences with individuals with mental retardation to ensure that they will be able to properly consider the evidence as mitigation. Doubtless, some jurors are capable of taking proper account of a defendant's diminished capacities, but determining who they are requires expansive voir dire on related issues.

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74. See *Morgan v. Illinois*, 504 U.S. 719 (1992).