NORTH CAROLINA LAW REVIEW

Volume 101 | Number 4 Article 3

5-1-2023

Left Behind, Again: Intellectual Disability and the Resentencing Movement

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LEFT BEHIND, AGAIN: INTELLECTUAL DISABILITY AND THE RESENTENCING MOVEMENT*

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This Article examines the exclusion of individuals with intellectual disability from much of the current resentencing movement. Across the country, incarcerated individuals are filing motions in federal and state courts seeking release as part of a nationwide movement toward decarceration. These motions are possible because new legislation and case law have been moving away from the "law and order" policies that permeated the criminal legal system for the last several decades. Those eligible for release include individuals sentenced to long terms of imprisonment for nonviolent drug offenses or offenses they committed as children. In addition, elderly and very sick incarcerated individuals can seek review of their sentences in many jurisdictions.

Although the current resentencing movement has its roots in Atkins v. Virginia*—in which the Supreme Court held that execution of individuals with intellectual disability violated the Eighth Amendment—individuals with intellectual disability have not been an explicit part of this movement. The Article uniquely considers the role of practical concerns that impede incorporation of individuals with intellectual disability into the resentencing movement, such as difficulties identifying individuals with intellectual disability in the criminal legal system. This Article also examines the Court's opinions both on proportionality in sentencing and individuals with intellectual disability to argue that the Court's delay in defining "intellectual disability," history of discriminatory opinions, and failure to extend* Atkins *beyond the death penalty context have contributed to individuals with intellectual disability's exclusion from resentencing.*

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Finally, this Article proposes both litigation and legislative strategies to more explicitly include individuals with intellectual disability in resentencing and early release efforts. Relatively small changes can have a substantial impact on individuals with intellectual disability who are incarcerated and on the resentencing and criminal legal system reform movements.

INTRODUCTION

By the time Tim Baker was in his mid-forties, he was on his tenth year of a fifteen-year sentence for a robbery he had committed with another man.[1] My colleague and I were representing him on his motion for compassionate release in the height of the COVID-19 pandemic. Mr. Baker had health issues that made him particularly vulnerable to COVID-19, but he was also facing substantial obstacles while incarcerated because of his intellectual disability.[2] These same obstacles were impacting our motion for release. Mr. Baker was illiterate, which had a number of consequences I never could have anticipated: he could not participate in drug treatment programs because they required participating at an eighth grade education level;[3] he did not have a GED, which courts view as a predictor of success upon release;[4] he could not put in his own requests for medical care, so he was not getting necessary treatment;[5] and he had disciplinary infractions directly related to his adaptive functioning deficits. Worst of all, because he struggled to remember instructions, he kept exacerbating a major medical issue.

These issues made prison more dangerous and less rehabilitative for Mr. Baker. The lack of opportunities for programming and rehabilitation made it

1. The story of Mr. Baker is based on a compassionate release case on which I worked as a clinical faculty member. All identifying facts have been changed to protect the client's privacy.

2. During the past 200 years, the terminology used to describe individuals with intellectual disability has changed repeatedly—terms that were once clinically appropriate, such as "feebleminded" and "idiot," were discarded as having negative and unhelpful connotations. Chris Nash, Ann Hawkins, Janet Kawchuck & Sarah E. Shea, *What's in a Name? Attitudes Surrounding the Use of the Term 'Mental Retardation*,' 17 PAEDIATRICS & CHILD HEALTH 71, 71 (2012). Most recently, the term "mental retardation" was used to describe individuals with intellectual disability, but advocates and impacted individuals began moving away from this term in the 2000s for the same reasons—the term became pejorative. *Id.* In 2007, the American Association on Mental Retardation changed its name to the American Association on Intellectual and Developmental Disabilities. Joseph Shapiro, *Label Falls Short for Those with Mental Retardation*, NPR (Jan. 22, 2007, 2:41 PM), https://www.npr.org/2007/01/22/6943699/label-falls-short-for-those-with-mental-retardation [https://perma.cc/4TVX-JLDX]. Similarly, the Supreme Court, in its 2014 opinion in *Hall v. Florida*, 572 U.S. 701 (2014), stopped using the term "mental retardation" and began using "intellectual disability" to describe the same population of individuals. *Id.* at 704. For all these reasons, I use the term "intellectual disability" throughout this Article and have changed "mental retardation" to "intellectual disability" in quoted material (I have left titles of articles and books as they are).

3. *See, e.g.*, FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., NO. 5330.11, CN-1, PSYCHOLOGY TREATMENT PROGRAMS 2-6, 2-11 (2016) [hereinafter PSYCHOLOGY TREATMENT PROGRAMS] (noting that an eighth-grade education level is required for both the BOP nonresidential and residential drug treatment programs).

4. *See, e.g.*, John Nuttall, Linda Hollmen & E. Michele Staley, *The Effect of Earning a GED on Recidivism Rates*, 54 J. CORR. EDUC. 90, 92–94 (2003) (finding that attaining a GED while in custody substantially reduced the likelihood of recidivism).

5. *See, e.g.*, PSYCHOLOGY TREATMENT PROGRAMS, *supra* note 3 (requiring that for any medical appointments, incarcerated individuals must complete an "Inmate Request for Triage Services" form).

more challenging to argue for his release.[6] Despite these barriers, Mr. Baker was fortunate to have attorneys who could hire a psychology expert to provide context for his intellectual disability and a judge who was sympathetic to the issues Mr. Baker faced. Today, he is home with his family.

This case reveals just a few of the issues facing incarcerated individuals with intellectual disability as they pursue early release. In the years after representing Mr. Baker, I went on to handle several more compassionate release cases—at least a third of my clients had documented intellectual disability. In each case, in varying ways and degrees, that intellectual disability impacted their resentencing—most often presenting challenges in a system not accustomed to addressing their unique needs.

For decades, the Supreme Court has recognized that individuals with intellectual disability are among the least culpable in criminal cases—as early as 1989 in *Penry v. Lynaugh*,[7] the Court recognized that intellectual disability is a mitigating factor in sentencing.[8] Yet, the current efforts in the United States to reform the criminal legal system and undo mass incarceration have largely ignored individuals with intellectual disability.[9]

Various strategies have been employed in trying to right the draconian policies that have dominated the United States' criminal legal system. One of the most prominent features of the push for reform has been in resentencing and early release for certain incarcerated individuals. Individuals sentenced to long terms of imprisonment for offenses they committed as children[10] or for nonviolent drug offenses,[11] as well as the elderly and very sick,[12] are able to file

6. *See* discussion *infra* Section III.A.3 on the limitations on programming available to individuals with intellectual disability in the Federal Bureau of Prisons.

7. 492 U.S. 302 (1989).

8. *Id.* at 322, 337.

9. The negative impacts of mass incarceration have been discussed at length, including the financial costs and negative impacts on incarcerated individuals and their families. *See generally* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1371 (2004) (describing how mass incarceration damages social networks, social norms, and social citizenship); Mirko Bagaric, Gabrielle Wolf & Daniel McCord, *Nothing Seemingly Works in Sentencing: Not Mandatory Penalties; Not Discretionary Penalties—But Science Has the Answer*, 53 IND. L. REV. 499, 499–500 (2020) [hereinafter Bagaric et al., *Nothing Seemingly Works in Sentencing*] (summarizing the financial and moral costs of mass incarceration); Angela Cai, *Insuring Children Against Parental Incarceration Risk*, 26 YALE J.L. & FEMINISM 91, 102–19 (2014) (describing parental incarceration as a "discrete driver of childhood disadvantage"); Monika Taliaferro, *Defund To Refund the Vote: Dismantling the Criminal Justice System's Impact on Voting*, 13 ELON L. REV. 193 (2020) (describing mass incarceration's connection with voter suppression).

10. *See, e.g.*, D.C. CODE § 24-403.03 (LEXIS through Mar. 9, 2023); Juvenile Restoration Act, ch. 61, § 1, 2021 Md. Laws 61 (codified at MD. CODE ANN., CRIM. PROC. §§ 6-235, 8-110 (2021)).

11. *See, e.g.*, First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (codified as amended at 21 U.S.C. § 21 U.S.C. 841 (2018)); Bagaric et al., *Nothing Seemingly Works in Sentencing*, *supra* note 9, at 521–22.

12. *See, e.g.*, First Step Act of 2018 § 603, 132 Stat. at 5238 (codified at 34 U.S.C. § 60541(g) (2018)).

motions seeking release or a reduced period of incarceration. Individuals with intellectual disability—often both more vulnerable and less culpable—have not been an explicit part of this resentencing movement.[13]

In 2002, the Supreme Court in *Atkins v. Virginia*[14] held that the execution of individuals with intellectual disability violates the Eighth Amendment's prohibition on cruel and unusual punishment.[15] In its opinion, the Court put substantial emphasis on the lesser culpability of individuals with intellectual disability when compared with the "average criminal."[16] Proportional sentencing, as embedded in the Eighth Amendment,[17] supported a finding that execution of individuals with intellectual disability is unconstitutional. Shortly after the *Atkins* decision, the Court decided *Roper v. Simmons*[18] and held that execution of individuals who committed offenses as children violated the Eighth Amendment.[19] The Court employed much of the same language as *Atkins* and repeatedly cited to it.[20]

The similar reasoning in these two opinions is not surprising—the criminal legal system has often treated those who committed offenses as children and individuals with intellectual disability similarly.[21] What is surprising is how the doctrinal and legislative treatment of these two groups has sharply diverged since the *Roper* decision. The Supreme Court extended the *Roper* reasoning outside the death penalty context for children—finding that mandatory juvenile life without parole and juvenile life without parole for nonhomicide offenses

13. Individuals who have intellectual disability may be eligible for resentencing because they were convicted for offenses committed as children or they fall into one of the other eligible categories, but the fact that they are individuals with intellectual disability is not a basis in and of itself for resentencing.

14. 536 U.S. 304 (2002).

15. *Id.* at 321.

16. *Id.* at 316.

17. Solem v. Helm, 463 U.S. 277, 290 (1983). The Supreme Court has repeatedly applied the proportionality principle in death penalty cases but has not consistently applied it to sentencing decisions outside the death penalty context. *Compare* Solem v. Helm, 463 U.S. 277, 303 (1983) (holding that a life sentence for writing a forged check of $100 was a disproportionate and unconstitutional sentence), *with* Ewing v. California, 538 U.S. 11, 21–23 (2003) (holding that a sentence of twenty-five years to life for stealing three golf clubs did not violate the Constitution).

18. 543 U.S. 551 (2005).

19. *Id.* at 574.

20. The *Roper* majority cited the *Atkins* decision more than twenty times.

21. *See* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 417 (1985) (noting "the accepted analogy between the presumed incapacity of children and [intellectually disabled] adults to form criminal intent"). On the same day in 1989, the Supreme Court released two opinions—one holding that execution of individuals with intellectual disability does not violate the Eighth Amendment and the other reaching the same conclusion for those who committed offenses as children. Penry v. Lynaugh, 492 U.S. 302, 338 (1989); Stanford v. Kentucky, 492 U.S. 361, 380 (1989).

violate the Eighth Amendment.[22] Some states went further, enacting statutes that permit the resentencing of those who committed offenses as children beyond the Supreme Court mandates.[23] Indeed, a national consensus has emerged that children are different and should be treated differently.[24]

Nothing similar has occurred for individuals with intellectual disability. At a time when this country is reckoning with the criminal legal system—particularly how it treats the most vulnerable among us—the resentencing of individuals with intellectual disability should be top priority. Yet, there is almost universal silence.

Ernest Gibbs, Jr., had an IQ of seventy-two and poor adaptive functioning, including "poor performance in school, lack of abstract reasoning, and inability to make appropriate independent choices."[25] He was part of a group of four men who attempted to rob an armored truck, during the course of which one of the guards was killed.[26] Mr. Gibbs's attorney sought a downward departure from the advisory sentencing guidelines due to Mr. Gibbs's intellectual disability.[27] Two of Mr. Gibbs's codefendants received sentences of twenty-five years and one received a sentence of forty years. Mr. Gibbs received a sentence of *life in prison*.[28] During sentencing, the court stated that Mr. Gibbs "did not seem 'to be [intellectually disabled] in the sense of the word that we commonly use' but 'was clearly a slow learner.'"[29] The court went

22. Graham v. Florida, 560 U.S. 48, 75 (2010); Miller v. Alabama, 567 U.S. 460, 465 (2012); Montgomery v. Louisiana, 577 U.S. 190, 200 (2016).

23. *See, e.g.*, Juvenile Restoration Act, ch. 61, § 1, 2021 Md. Laws 61 (codified at MD. CODE ANN., CRIM. PROC. §§ 6-235, 8-110 (2021)); Omnibus Public Safety and Justice Amendment Act of 2020, 68 D.C. Reg. 001034 (codified at D.C. CODE § 24-403.03 (2021)).

24. Other changes in the criminal legal system relating to children include jurisdictions raising the age at which an individual can be waived into adult court, prohibiting life without parole sentences for homicides, and making "youth" a mitigating factor at sentencing. *See, e.g.*, Act of Sept. 30, 2018, ch. 1012, 2018 Cal. Stat. 6665, 6666 (codified as amended at CAL. WELFARE & INST. CODE § 707(A)(2) (2019)) (repealing the authority of a district attorney to motion to transfer a minor from juvenile court in a case in which a minor is alleged to have committed a felony offense when he or she was fourteen or fifteen years of age, except for specified serious offenses); ARK. CODE ANN. § 5-4-108 (LEXIS through all emergency legislation effective through Mar. 7, 2023; and also includes all laws regardless of effective date through Act 160 of the 2023 Reg. Sess.) (prohibiting life without parole for those under eighteen at the time of their offense); N.J. STAT. ANN. 2C:44-1(b)(14) (Westlaw through L.2023, c. 9 and J.R. No. 1) (establishing that the mitigating factor was that "the defendant was under twenty-six years of age at the time of the commission of the offense").

25. United States v. Gibbs, 237 F. App'x 550, 558 (11th Cir. 2007).

26. *Id.* at 553.

27. *Id.* at 558.

28. *Id.* One potential explanation for this disparity is that Mr. Gibbs's codefendants pled guilty while Mr. Gibbs went to trial and lost. *Id.* at 569. Though this distinction was part of why the appellate court rejected Mr. Gibbs's argument regarding sentence disparity, the sentencing court's refusal to view his intellectual disability as mitigating and the disparity in sentences is confounding if individuals with intellectual disability are "less culpable."

29. *Id.* at 561.

on to find that Mr. Gibbs's intellectual disability made him a greater danger to the public—essentially finding his intellectual disability an aggravating factor.[30]

In some ways, the *Gibbs* decision is emblematic of how individuals with intellectual disability are treated at sentencing—the disability is often considered either irrelevant to the sentencing decision or an aggravating factor.[31] The *Gibbs* case, however, is exceptional in one respect: often, a person's intellectual disability is never known to the court or even to their own attorney. Between the masking in which many individuals with intellectual disability engage and attorneys' lack of expertise in identifying intellectual disability, the disability is rarely a feature of the underlying case. The public and courts' resistance to considering intellectual disability a mitigating factor and the invisibility of individuals with intellectual disability in the criminal legal system are likely two primary reasons they have not been part of the resentencing movement.

Though there are barriers to incorporating individuals with intellectual disability into the resentencing movement, the mechanisms for doing so either already exist or can be easily adapted to include individuals with intellectual disability. For example, resentencing laws could be amended to include "intellectual disability" as a statutory basis for eligibility. In addition, attorneys can use existing compassionate release statutes to argue in appropriate cases that intellectual disability is either an "extraordinary and compelling" reason for release or fits another basis for eligibility.[32]

Under the legal doctrine, a person is often found to have an intellectual disability where their IQ is at or below seventy, they have adaptive functioning deficits, and onset before the age of eighteen.[33] However, that definition encompasses a wide range of individuals with intellectual disability, including mild, moderate, severe, and profound.[34] This Article focuses on individuals with mild or moderate intellectual disability for two reasons. First, they encompass the majority of individuals with intellectual disability.[35] Second, those with

30. *Id.* at 565 ("If he's a fellow that's just sitting around waiting to have somebody tell him to go commit a violent act, he's always ready to erupt at any time if he's so suggestible.").

31. *See* discussion *infra* Section II.B.3 on how lower courts have viewed intellectual disability in sentencing decisions.

32. *See* explanation *infra* Section I.A of "extraordinary and compelling" circumstances.

33. *See, e.g.*, Hall v. Florida, 572 U.S. 701, 711 (2014).

34. COMM. TO EVALUATE THE SUPPLEMENTAL SEC. INCOME DISABILITY PROGRAM FOR CHILD. WITH MENTAL DISORDERS, NAT'L ACADS. OF SCIS., ENG'G & MED., MENTAL DISORDERS AND DISABILITIES AMONG LOW-INCOME CHILDREN 171 (Thomas F. Boat & Joel T. Wu eds., 2015).

35. People with a mild intellectual disability have an IQ between fifty and sixty-nine and are approximately eighty-five percent of those with intellectual disability. *Id.* Individuals with moderate intellectual disability have an IQ between thirty-six and forty-nine and are approximately ten percent of those with intellectual disability. *Id.*

severe or profound[36] intellectual disability are rarely involved in the criminal legal system, and when they are involved, they are often quickly diverted and do not serve prison sentences.[37] Thus, the vast majority of individuals with intellectual disability in the criminal legal system, serving lengthy sentences or otherwise, are those with mild or moderate intellectual disability.

Within the disability rights community, some controversy exists as to whether the *Atkins* decision has had positive or negative impacts on the rights of individuals with intellectual disability.[38] After the *Atkins* decision, a prominent disability rights advocate averred, "If we accept the concept of blanket incapacity [which *Atkins* endorses], we relegate people with [intellectual disability] to second class citizenship, potentially permitting the State to abrogate the exercise of such fundamental interests as the right to marry, to have and rear one's children, [or] to vote . . . ."[39] In contrast, another disability rights advocate argued in response:

> While people with serious disability never deserve the death penalty, it is an empirical fact, demonstrated by research examining both people with significant mental illness and [intellectual disability], that even very disabled people can be competent to make treatment decisions and engage in other decision-making tasks . . . . The inquiry in the civil setting is not whether the disabled person is "average," but whether the person meets a minimum level of competence. In other words, even a person whose capacities are "below average" can, under the law, contract, marry, vote, and so on.[40]

Furthermore, one can argue that *Atkins* demonstrates

36. A person with severe intellectual disability has an IQ of twenty to thirty-five and a person with profound intellectual disability has an IQ below twenty. *Id.*

37. If these individuals do become involved in the criminal legal system, a court is more likely to find them incompetent to stand trial; thus, they may be institutionalized but not in the prison system or serving a sentence. JOAN PETERSILIA, DOING JUSTICE? CRIMINAL OFFENDERS WITH DEVELOPMENTAL DISABILITIES 3 (2000).

38. *See* Christopher Slobogin, *Is* Atkins *the Antithesis or Apotheosis of Anti-discrimination Principles?: Sorting Out the Groupwide Effects of Exempting People with Mental Retardation from the Death Penalty*, 55 ALA. L. REV. 1101, 1101 (2004). As some describe,

> Many advocates for people with disability cheered the decision because it provides a group of disabled people with protection from the harshest punishment imposed by our society. But other disability advocates were dismayed by *Atkins*, not because they are fans of the death penalty, but because they believe that declaring disabled people ineligible for a punishment that is accorded all others denigrates disabled people as something less than human.

Id. at 1101.

39. Donald N. Bersoff, *Some Contrarian Concerns About Law, Psychology, and Public Policy*, 26 LAW & HUM. BEHAV. 565, 568 (2002). He also argued, "As important as it is to protect those who cannot protect themselves, it is equally important to promote the right of all persons to make their own choices, and, as a corollary, to be accountable for those choices." *Id.*

40. Slobogin, *supra* note 38, at 1106–07.

> sensitivity to barriers presented by the legal system for a defendant with a disability . . . . Perhaps the case may be viewed as a partial adaptation of the legal system to what would otherwise be an unthinking imposition of the same treatment on persons who are relevantly different.[41]

A similar contrarian argument could be made about the premise of this Article: by arguing that individuals with intellectual disability are different and therefore should have an opportunity for resentencing, the Article diminishes the rights and capacity of those individuals. Intellectual disability *is* relevant, however, to sentencing decisions in many cases and, yet, is rarely considered.[42] This Article is not arguing for a categorical rule exempting individuals with intellectual disability from punishment or mandating a cap to the number of years they can be incarcerated. Rather, individuals with intellectual disability should have a meaningful opportunity to argue that their disability may support a reduction in sentence.[43]

This Article explores why individuals with intellectual disability have been excluded from the resentencing movement and argues that their disability should be a more explicit factor that would allow true inclusion into this important movement. Part I provides context for the environment in which individuals with intellectual disability would seek resentencing: a description of the resentencing movement and how the Supreme Court's *Atkins* decision establishes that individuals with intellectual disability are less culpable. Part II analyzes why individuals with intellectual disability have been excluded—examining how practical barriers and Supreme Court precedent have impacted inclusion in resentencing. Part III argues that individuals with intellectual disability can be added to the resentencing movement through both litigation and legislative efforts, and addresses some of the challenges to these strategies.

I. THE RESENTENCING MOVEMENT AND ITS EXCLUSION OF INDIVIDUALS WITH INTELLECTUAL DISABILITY

Resentencing is a critical piece of the effort to end mass incarceration because it provides for both individual justice and contributes to the overall success of the decarceration movement. For individuals, the resentencing movement has targeted those who have suffered most needlessly: the less culpable, those subject to excessively harsh mandatory minimums, and the elderly and most vulnerable. For these individuals, the opportunity to seek immediate release or a shortened sentence has an unquantifiable benefit. For

41. MARK C. WEBER, UNDERSTANDING DISABILITY LAW 13 (3d ed. 2019).

42. Only six states have considered intellectual disability as a mitigating factor in noncapital cases. *See infra* Section II.B.3.

43. *See* Bersoff, *supra* note 39, at 568 ("The concept of individualized decision-making comports with the sophisticated and discriminating treatment we should accord all people with intellectual deficits.").

the greater movement, resentencing can have important implications: as more people are released early (before the expiration of their original sentence) and reintegrate into their communities with low recidivism rates, their stories can provide support for prospective changes.[44] Legislatures may be more willing to lower or get rid of mandatory minimums, judges may give lower sentences and more opportunities for probation, and prosecutors may make different charging and plea offer decisions. Despite the language in *Atkins*, though, individuals with intellectual disability are not an explicitly targeted group of the resentencing movement. This part first discusses the resentencing movement and then the doctrinal support for identifying individuals with intellectual disability as among the least culpable.

A. *The Resentencing Movement*

Across the political spectrum in the United States, the public and politicians widely acknowledge that mass incarceration is a substantial problem.[45] Mass incarceration presents problems for many reasons: it has very

44. For example, in the District of Columbia, the Incarceration Reduction Amendment Act ("IRAA") initially permitted individuals who had been convicted of offenses committed before the age of eighteen to seek resentencing. *See* Press Release, D.C. Corrs. Info. Council, DC Council Passes Second Look Amendment Act of 2019 (May 19, 2021), https://cic.dc.gov/release/dc-council-passes-second-look-amendment-act-2019 [https://perma.cc/Q9MC-WMQV]. However, after several years, the law was expanded to permit individuals who had committed offenses before the age of twenty-five to seek resentencing. *See* Omnibus Public Safety and Justice Amendment Act of 2020, ch. 568, § 601 2019 D.C. ch. 568 (codified at D.C. CODE § 24-403.03 (2021)). In discussing why D.C. expanded the reach of IRAA, D.C. Councilmember Charles Allen stated, "The men who have come home already are doing remarkably well. Some have gotten married and started a family, others are working as violence interrupters and youth mentors, and others are starting small businesses. They are a testament to the values of hope, promise, and hard work." D.C. Corrs. Info. Council, *supra*.

45. *See, e.g.*, Barack Obama, Commentary, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 822 (2017) ("What's more, unlike so many issues that divide Washington, D.C., criminal justice is an area in which there is increasing bipartisan agreement. A number of Republicans have been vocal and sincere advocates for reform efforts even as they were otherwise frequent critics of my Administration."); Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—And What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next [https://perma.cc/6AY7-97AD] ("The FIRST STEP Act's overwhelming passage demonstrates that the bipartisan movement to reduce mass incarceration remains strong."); Sarah Figgatt, *Progressive Criminal Justice Ballot Initiatives Won Big in the 2020 Election*, CTR. FOR AM. PROGRESS (Nov. 19, 2020, 9:01 AM), https://www.americanprogress.org/article/progressive-criminal-justice-ballot-initiatives-won-big-2020-election/ [https://perma.cc/4ZMK-HMDB] ("Progressive criminal justice policies won big on November 3—even in traditionally conservative states and localities."); Daniel Gotoff & Celinda Lake, *Voters Want Criminal Justice Reform. Are Politicians Listening?*, MARSHALL PROJECT (Nov. 13, 2018, 7:00 AM), https://www.themarshallproject.org/2018/11/13/voters-want-criminal-justice-reform-are-politicians-listening [https://perma.cc/4QG8-CJMT] (reporting that fifty-seven percent of voters support major reform of the criminal justice system in the United States; sixty-four percent of Democrats, fifty-eight percent of Independents, and forty-eight percent of Republicans); Alex Busansksy & Eli Lehrer, *Voters*

negative impacts on the lives of those incarcerated, their families, and their communities;[46] it costs a tremendous amount of money;[47] and, in some cases, the mandatory minimums did not reflect what the sentencing judge believed would be a just consequence.[48] Efforts to reduce the carceral state have been piecemeal and only resulted in modest reductions in incarceration.[49] Some of these efforts have included decriminalizing or not prosecuting low-level

Are Driving Justice Reform, HILL (Apr. 3, 2019, 6:00 PM), https://thehill.com/opinion/criminal-justice/437174-voters-are-driving-justice-reform [https://perma.cc/C26G-JD2S] (finding that sixty-eight percent of Republicans, seventy-eight percent of Independents, and eighty percent of Democrats support significant reform after a national Public Opinion Strategies poll in 2018).

46. *E.g.*, C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF ALABAMA'S STATE PRISONS FOR MEN 2–3 (reporting that in one week of the Alabama Department of Correction's own records, there were six incidents of prisoner-on-prisoner violence resulting in medical transports to outside facilities; four additional incidents of prisoner-on-prisoner violence, one of which resulted in death; and four instances of prisoner-on-prisoner sexual assault); Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1712 (2006) ("Today more than 1.5 million children, or 2% of the nation's minors, have a parent in prison. More than half of all children with imprisoned parents are black."); COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 270–73 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) (examining studies that show children with incarcerated fathers are more likely to have behavior problems, delinquency, and increased externalizing behaviors, especially aggression); *id.* at 264–67 (combining studies focused on male-female relationships where the male is incarcerated and finding that incarceration may diminish trust between partners, increase economic costs of maintaining a relationship, and impose considerable psychological strain, especially on those who were living with the man prior to incarceration).

47. *See, e.g.*, Annual Determination of Average Cost of Incarceration Fee (COIF), 84 Fed. Reg. 63891, 63891–92 (Nov. 19, 2019) (finding that for the fiscal year of 2018, the average cost per incarcerated individual in Bureau facilities was $37,449); Obama, *supra* note 45, at 815 ("We simply cannot afford to spend $80 billion annually on incarceration."); Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 482–83 (2010) ("It is the rapidly escalating financial cost of imprisonment that has captured the attention of policymakers. . . . The . . . financial crisis of 2008 has exacerbated concerns about the growing cost of incarceration.").

48. *See, e.g.*, United States v. Brooker, 976 F.3d 228, 230–31 (2d Cir. 2020) (acknowledging that some previous statutory mandatory minimums resulted in unjust sentencing that courts were constrained to administer).

49. *See, e.g.*, Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 86–90 (2016) (discussing the tremendous variation between states' decarceration reforms); Mirko Bagaric, Cabrielle Wolf & William Rininger, *Mitigating America's Mass Incarceration Crisis Without Compromising Community Protection: Expanding the Role of Rehabilitation in Sentencing*, 22 LEWIS & CLARK L. REV. 1, 22 (2018) ("While these advances are significant, they are piecemeal and not grounded in an overarching jurisprudential or empirical foundation. Their consequent limited impact is highlighted by the pardons that former President Obama granted in his final weeks in office, which failed to address systemic problems that produced the incarceration crisis.").

offenses,[50] reducing mandatory minimums,[51] and allowing individuals to earn more good time credit so they are released from prison earlier.[52] To decrease the percentage of the U.S. population serving carceral sentences to those of the 1970s, before the so-called law and order policies with their harsh retributive approach, the incarcerated population would have to be reduced by seventy-five percent.[53] At current rates of decarceration, that could take up to forty years.[54] Additionally, the movement towards decarceration has significant hurdles despite widespread support—legislatures rarely have sufficient political motivation to decarcerate individuals convicted of crimes.[55]

Some of the laws and policies addressing mass incarceration aim to decrease the number of people entering prisons and jails prospectively, while others provide those currently incarcerated with opportunities for early release.[56] The resentencing movement, for purposes of this Article, consists of

50. *See, e.g.*, Brian Mann, *N.Y. Gov. Cuomo Signs Marijuana Legalization*, NPR (Mar. 31, 2021, 11:45 AM), https://www.npr.org/2021/03/30/982742060/ny-lawmakers-legalize-marijuana-hoping-to-avoid-racial-pitfalls-of-decriminaliza [https://perma.cc/XM6W-QR87]; *Baltimore Ends Prosecution of Drug Possession and Other Low-Level Offenses*, EQUAL JUST. INITIATIVE (Apr. 2, 2021), https://eji.org/news/baltimore-ends-prosecution-of-drug-possession-and-other-low-level-offenses/ [https://perma.cc/BL2P-JD7P].

51. *E.g.*, RAM SUBRAMANIAN & RUTH DELANEY, VERA INST. OF JUST., PLAYBOOK FOR CHANGE? STATES RECONSIDER MANDATORY SENTENCES 8 (2014) (noting that "at least 29 states have taken steps to roll back mandatory sentences since 2000").

52. For example, under the 2018 First Step Act, individuals incarcerated in federal facilities can now earn up to fifty-four days of goodtime credit, an increase from the approximately forty-seven days previously possible. *See* First Step Act of 2018, Pub. L. No. 115-391, § 102(a), 132 Stat. 5194, 5208–09 (codified as amended at 18 U.S.C. § 3621 (2018)).

53. Pamela Oliver, *What the Numbers Say About How To Reduce Imprisonment: Offenses, Returns, and Turnover*, 103 MARQ. L. REV. 1073, 1075 (2020).

54. Bagaric et al., *Nothing Seemingly Works in Sentencing*, *supra* note 9, at 524.

55. This lack of motivation can be due to many issues, including lingering public support for "law and order" policies as well as the political and financial power of the corporations and individuals who benefit from mass incarceration. *See* Eisenberg, *supra* note 49, at 93–101 (discussing the interests that correctional officers, their unions, and private prison management have in continuing mass incarceration); Michael Cohen, *How For-Profit Prisons Have Become the Biggest Lobby No One Is Talking About*, WASH. POST (Apr. 28, 2015, 6:00 AM), https://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about/ [https://perma.cc/C4L4-ZW2S (dark archive)] (noting how private prisons donate to politicians, creating incentives for those politicians to oppose decarceration measures).

56. Klingele, *supra* note 47, at 470 (noting that state sentencing reforms have applied retroactively to reduce sentences for those incarcerated); Bagaric et al., *supra* note 9, at 518 (noting that changes made to sentencing laws in thirty-four states resulted in lowering the prison population and crime rate). Other efforts at decarceration have included making more individuals eligible for parole and eligible for parole earlier. For example, the First Step Act ("FSA") allows individuals in certain circumstances to earn more good time credit. *See* First Step Act of 2018 § 101(a), 132 Stat. at 5198–203 (codified at 18 U.S.C. § 3631–35 (2018)) (allowing individuals in certain circumstances to earn more good time credit). Good time credit is time a person can get taken off their sentence because they have engaged in certain programming or otherwise complied with the terms of their incarceration. FAMS. AGAINST

these retrospective efforts: laws that make it possible for a person to seek postconviction review of a sentence imposed years or decades earlier. Prior to the resentencing movement, in most cases, a person could only seek review of their sentence shortly after their sentencing.[57] Expanded opportunities for resentencing were established during the beginning of the twenty-first century.[58] Two of the most significant developments concerned those who committed offenses as children and the crack-powder cocaine sentencing disparity. First, following the Supreme Court's decisions in *Graham v. Florida*[59] and *Miller v. Alabama*,[60] states had to enact mechanisms for resentencing those who had been sentenced to mandatory juvenile life without parole or juvenile life without parole for a nonhomicide offense.[61] Second, after years of advocacy regarding the widely criticized crack-powder cocaine disparity in federal sentencing law, federal legislation led to the resentencing of many individuals in federal custody.[62]

MANDATORY MINIMUMS, FREQUENTLY ASKED QUESTIONS: FEDERAL GOOD TIME CREDIT, https://famm.org/wp-content/uploads/faq-federal-good-time-credit.pdf [https://perma.cc/QT8B-2MG6]. Under the First Step Act, not only is there increased good time credit for engaging in certain programing, but some individuals earn additional good time credit if they receive a certain score on the Bureau of Prison's risk assessment. First Step Act of 2018 § 101(a), 132 Stat. at 5198–203. For further reading on the Bureau's risk-assessment tool, PATTERN, see generally U.S. DEP'T OF JUST., THE FIRST STEP ACT OF 2018: RISK AND NEEDS ASSESSMENT SYSTEM—UPDATE (2020), https://www.bop.gov/inmates/fsa/docs/the-first-step-act-of-2018-risk-and-needs-assessment-system-updated.pdf [https://perma.cc/JKW7-HDRW] (highlighting changes made to PATTERN in response to concerns about its equity, effectiveness, and predictive capabilities).

57. Klingele, *supra* note 47, at 498–99. "According to a 2003 survey, five states impose a time limit of 30 to 75 days on motions for sentence modification, five others impose a 90-day limit, ten states impose a 120-day limit, and eight states permit modification for a period between 180 days and 1 year." *Id.* at 501 n.162.

58. *See id.* at 498–514 (discussing history of resentencing).

59. 560 U.S. 48 (2010). In *Graham*, the Court prohibited life without parole sentences for children who committed nonhomicide offenses. *Id.* at 82.

60. 567 U.S. 460 (2012). In *Miller*, the Court prohibited mandatory juvenile life without parole sentences. *Id.* at 465.

61. *See* Alexandra Harrington, *The Constitutionalization of Parole: Fulfilling the Promise of Meaningful Review*, 106 CORNELL L. REV. 1173, 1184–89 (2021) (providing a detailed description of all the ways in which states addressed the *Graham* and *Miller* decisions from automatic sentence reductions to parole hearings to court hearings).

62. *See* First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (codified as amended at 18 U.S.C. § 3621 (2018)) (applying the Fair Sentencing Act of 2010 retroactively). The Fair Sentencing Act of 2010 reduced the discrepancy between sentences for crack cocaine and powder cocaine. *Fair Sentencing Act*, ACLU, https://www.aclu.org/issues/criminal-law-reform/drug-law-reform/fair-sentencing-act [https://perma.cc/3XEQ-6V4P]; *see also* Sarah E. Ryan, *Judicial Authority Under the First Step Act: What Congress Conferred Through Section 404*, 52 LOY. U. CHI. L.J. 67, 72 (2020) ("The First Step Act promised relief to inmates serving disproportionately long sentences for cocaine base distribution.").

Criminal law's proportionality principle appears to be an underlying motivator behind many of these resentencing statutes.[63] It represents a desire to help individuals whom the system has wronged to provide them with a second chance.[64] Though resentencing individuals subject to lengthy sentences will have some impact on mass incarceration, the impact on actual incarceration numbers is relatively small. For example, only seventeen percent of individuals in state prison are serving sentences of more than ten years.[65] Thus, movements to resentence *some* individuals serving sentences longer than fifteen or twenty years are likely to result in the release of a fairly small percentage of the incarcerated population.

Regardless, at least eight states and the federal government have enacted statutes allowing individuals to seek resentencing in specific contexts.[66] Resentencing statutes generally require an individual to meet two prongs for relief. First, the person must demonstrate that they meet one or more statutory definitions of eligibility. For example, in federal compassionate release motions,[67] movants must demonstrate that they are (1) elderly (over seventy years old) and have served more than thirty years in prison or (2) have other "extraordinary and compelling" reasons for release.[68] States have passed laws allowing for resentencing of those convicted for offenses committed at a relatively young age[69] or for individuals who were subject to three-strikes

63. For a discussion of the doctrine of the proportionality principle in the Eighth Amendment, see *infra* Section I.B.

64. For a discussion of the proportionality of resentencing individuals who committed offenses as children, see *infra* Section II.B.3.

65. Oliver, *supra* note 53, at 1118.

66. ALA. CODE § 14-9-64 (Westlaw through Acts 2023-1 through 2023-3 of the 2023 First Spec. Sess.; through Acts 2023-43 through 2023-52 and Acts 2023-83 through 2023-86 of the 2023 Reg. Sess.); ALASKA STAT. § 12.55.125(j) (LEXIS through all 2022 legislation and Exec. Orders); CAL. PENAL CODE § 1170.126 (Westlaw through Ch. 1 of 2023–2024 1st Extra. Sess., and urgency legislation through Ch. 2 of 2023 Reg. Sess.); COLO. REV. STAT. §§ 16-13-1001, 1002 (LEXIS through Ch. 18 from the 2023 Reg. Sess. and effective as of Mar. 10, 2023); CONN. GEN. STAT. § 54-125a (2023); DEL. CODE ANN. tit. 11 § 4204A (LEXIS through 84 Del. Laws, c. 5); D.C. CODE § 24-403.03 (LEXIS through Mar. 9, 2023); 725 ILL. COMP. STAT. ANN. 5/122-9 (Westlaw through P.A. 103-1 of the 2023 Reg. Sess.).

67. 18 U.S.C. § 3582(c)(1)(A).

68. *Id.* § 3582(c)(1)(A)(i)–(ii); First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239–41 (codified at 18 U.S.C. § 3582 (2018)) (amending 18 U.S.C. § 3582, among other provisions, to authorize a defendant to motion for compassionate release).

69. *See, e.g.*, D.C. CODE § 24-403.03(a) (LEXIS) (stating that a court shall reduce a term of imprisonment for those under twenty-five at the time of their controlling offense if they have served at least fifteen years in prison and are not a danger to the safety of any person or community); 730 ILL. COMP. STAT. 5/5-4.5-115(b) (Westlaw) (making individuals who were under twenty-one at the time of their offense eligible for parole review after serving ten or more years of their sentence (or, in the case of first degree murder and certain sex offenses, eligible after serving twenty years)); FLA. STAT. § 921.1402 (2022) (making those under eighteen at the time of their offense entitled to sentence review after serving a certain number of years, that number to be determined according to the statute of conviction).

statutes that have since been repealed.[70] In many cases, establishing statutory eligibility is straightforward—it is a matter of age, time served, type of sentence, or other easily established factors.[71] In some cases, though, this prong requires substantial evidence.[72] For example, establishing that a person has "extraordinary and compelling" reasons for compassionate release can require explanation and documentation of complex medical conditions.[73]

Once a person establishes statutory eligibility, they must also demonstrate that they are no longer a danger.[74] This is an individualized determination that looks at a number of factors depending on the statutory scheme. For example, in the District of Columbia, a person convicted for an offense committed before they turned twenty-five may seek resentencing.[75] To be successful on the motion, they must show they are rehabilitated and not a danger, which the individual can do through, among other factors: (1) their history and characteristics at the time of the underlying offense; (2) psychological testing; (3) compliance with rules and engagement with programing during incarceration; (4) maturity and rehabilitation; and (5) the wishes of any victim or family of the victim.[76] Unlike statutory eligibility, demonstrating a lack of dangerousness is a very fact-specific inquiry and requires an exploration of the background of the person seeking release, the underlying offense, their rehabilitation and experience in incarceration, the support they will receive

70. *See, e.g.*, WASH. REV. CODE § 9.94A.647 (2022) (mandating resentencing for individuals whose third strike was a second-degree robbery charge, as that charge no longer triggers the three strikes statute); CAL. PENAL CODE § 1170.126 (Westlaw) (allowing petitions for resentencing for third strike offenders serving indeterminate prison terms); *see also* J. RICHARD COUZENS & TRICIA A. BIGELOW, THE AMENDMENT OF THE THREE STRIKES SENTENCING LAW 39–40 (2017), https://www.courts.ca.gov/documents/Three-Strikes-Amendment-Couzens-Bigelow.pdf [https://perma.cc/M83Q-NBGL] (explaining that, under Proposition 36, incarcerated individuals in California currently serving a three strike sentence may petition the court for a reduction of their term to a second strike sentence, if they would have been eligible for second strike sentencing under the new law).

71. For example, Maryland's Juvenile Restoration Act permits the resentencing of a person who "(1) was convicted as an adult for an offense committed when the individual was a minor; (2) was sentenced for the offense before October 1, 2021; and (3) has been imprisoned for at least 20 years for the offense." Juvenile Restoration Act, ch. 61, § 1, 2021 Md. Laws 61 (codified at MD. CODE ANN., CRIM. PROC. §§ 6-235, 8-110 (2021)).

72. For example, one of the possible ways to be eligible for compassionate release in Washington, D.C., is having a "debilitating medical condition involving an incurable illness, or a debilitating injury from which the defendant will not recover." D.C. CODE § 24-403.04(a)(3)(A) (LEXIS). Establishing that a person suffers from such a debilitating illness often requires medical records and expert opinion.

73. *See supra* note 68 and accompanying text.

74. *See, e.g.*, D.C. CODE § 24-403.03(a) (LEXIS) ("Notwithstanding any other provision of law, the court shall reduce a term of imprisonment imposed upon a defendant . . . [if it determines the defendant] is not a danger to the safety of any other person or the community . . . ."); MD CODE ANN., CRIM. PROC. § 8-110(c) (LEXIS) (establishing that the court may only grant a reduction of sentence where "the individual is not a danger to the public").

75. D.C. CODE § 24-403.03(a) (LEXIS).

76. *Id.* § 24-403.03(a)(2), (c) (LEXIS).

upon release, and other factors.[77] Thus, some resentencing cases require litigation to establish both statutory eligibility and dangerousness.

Resentencing can be time consuming and involve months or years of litigation to decarcerate a single individual. However, for the reasons discussed above—individual justice and overall support for the movement—these efforts are a necessary component of the criminal legal system reform movement. And, as this Article argues, individuals with intellectual disability should be an explicitly targeted group for resentencing.

B. *The Lesser Culpability of Individuals with Intellectual Disability in Criminal Law*

The Supreme Court has identified two groups as less culpable than the average person facing criminal charges: (1) individuals with intellectual disability[78] and (2) those who committed offenses as children.[79] The latter are a major component of the resentencing movement. The former should be as well.

In 1989, the Supreme Court held in *Penry v. Lynaugh* that the death penalty was a constitutional sentence for individuals with intellectual disability.[80] But just thirteen years later, the Court reversed course in *Atkins v. Virginia* holding that the execution of such individuals violated the Eighth Amendment.[81] In doing so, the Court found first, that a national consensus had developed that executing individuals with intellectual disability was cruel and unusual;[82] and second, that in the Court's own judgment, the death penalty for these individuals did not sufficiently serve any legitimate penological purpose.[83] But the Court's language can be applied more broadly beyond the death penalty context: the Court stated that individuals with intellectual disability are "categorically less culpable than the average criminal."[84]

The question of the constitutionality of executing individuals with intellectual disability arose after a jury convicted Daryl Renard Atkins of abduction, armed robbery, and murder.[85] During the sentencing phase of his bifurcated trial, the defense presented evidence that Mr. Atkins had mild

77. *See, e.g.*, United States v. Mercer, No. 1996 FEL 001061, 2019 WL 11541302, at *2–9 (D.C. Super. Ct. Sept. 3, 2019).

78. Atkins v. Virginia, 536 U.S. 304, 306–07, 321 (2002).

79. Roper v. Simmons, 543 U.S. 551, 571 (2005).

80. 492 U.S. 302, 340 (1989).

81. *Atkins*, 536 U.S. at 321 ("[W]e therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of [an individual with intellectual disability].").

82. *See id.* at 314–17.

83. *See id.* at 317–20.

84. *Id.* at 316; *see also* Timothy Cone, *Developing the Eighth Amendment for Those "Least Deserving" of Punishment: Statutory Mandatory Minimums for Non-capital Offenses Can Be "Cruel and Unusual" when Imposed on Mentally Retarded Offenders*, 34 N.M. L. REV. 35, 42 (2004).

85. *Atkins*, 536 U.S. at 307.

intellectual disability, a diagnosis that was based on interviews with people who knew him, school records, and an IQ of fifty-nine.[86] The jury imposed the death penalty, which was affirmed on appeal.[87] However, the Supreme Court reversed, and held that the Eighth Amendment prohibited the execution of Mr. Atkins because the unique characteristics of individuals with intellectual disability made execution unconstitutional:

> Because of their disabilities in areas of reasoning, judgment, and control of their impulses . . . they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against [intellectually disabled] defendants.[88]

Later in its opinion, the Court further explained how characteristics of individuals with intellectual disability make them less culpable[89]:

> [Intellectually disabled] persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.[90]

In addition to finding that individuals with intellectual disability are less culpable than other defendants, the Court noted trends among the state courts and legislatures prohibiting the death penalty for this population, which

86. *Id.* at 307–09.

87. *Id.* at 309–10. Mr. Atkins's initial sentencing was reversed and remanded because the judge had used a misleading sentencing form. *Id.* at 309. At his second sentencing, the same doctor testified for the defense regarding his intellectual disability, but the prosecution also presented testimony from another doctor that Mr. Atkins "was of 'average intelligence, at least.'" *Id.* This prosecution testimony was largely disregarded by the dissenters on the Virginia Supreme Court, who found this opinion "incredulous as a matter of law." *Id.* at 310 (internal quotation marks omitted) (quoting Atkins v. Commonwealth, 534 S.E.2d 312, 323 (2000) (Hassell, J., concurring in part and dissenting in part), *rev'd sub nom.* Atkins v. Virginia, 536 U.S. 304 (2002)). Mr. Atkins was sentenced the death following the second sentencing portion of the trial. *Id.* at 309.

88. *Id.* at 306–07, 321.

89. *Id.* at 318; *see also* Elizabeth Nevis-Saunders, *Not Guilty as Charged: The Myth of Mens Rea for Defendants with Mental Retardation*, 45 U.C. DAVIS L. REV. 1419, 1450 (2012) (discussing how the current legal doctrines in the criminal legal system "are insufficient responses to the lack of culpability among defendants with" intellectual disability).

90. *Atkins*, 536 U.S. at 314–17.

supported the finding that the death penalty for individuals with intellectual disability is unconstitutional.[91]

Finally, the Court found that the death penalty is not a proportional punishment when applied to individuals with intellectual disability.[92] The proportionality principle, which is embedded in Eighth Amendment jurisprudence, requires that a sentence reflect both the seriousness of the offense and the specific characteristics of the person who committed the offense.[93] In the case of the death penalty for individuals with intellectual disability, the Court found that neither deterrence nor retribution theories of punishment could be used to justify the use of the death penalty.[94] As to retribution, the Court stated: "If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the [intellectually disabled] offender surely does not merit that form of retribution."[95] Furthermore, because individuals with intellectual disability have cognitive deficits that "make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information," the death penalty also does not have significant deterrent effect.[96]

Although the decision in *Atkins* is specific to the death penalty, the Court's underlying reasoning need not be limited to that context. The *Roper* decision was specific to the death penalty for children,[97] *Graham* to nonhomicide juvenile life without parole,[98] and *Miller* to mandatory juvenile life without parole,[99] yet courts have applied the rationale that those who commit offenses as children are

91. *See id.* at 315–17.

92. *See id.* at 312–13, 321 (noting that proportionality review must be under the evolving standards of decency, which in this case indicated that execution of individuals with intellectual disability is not proportional).

93. *See* William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 75 (2011); John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71, 84 (2010); *see also* Solem v. Helm, 463 U.S. 277, 290–92 (1983). In *Solem*, one of the only pre-*Graham* cases holding that a sentence was not proportional outside the death penalty context, the Court stated that

> a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

Id. at 292, 303. Though the *Solem* Court emphasized this "objective" criteria, the subjective part (i) of the test dominates most judicial opinions regarding proportionality. *See* Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527. 529–30 (2008).

94. *Atkins*, 536 U.S. at 317–21.

95. *Id.* at 319.

96. *Id.* at 319–20.

97. Roper v. Simmons, 543 U.S. 551, 578 (2005).

98. Graham v. Florida, 560 U.S. 48, 82 (2010).

99. Miller v. Alabama, 567 U.S. 460, 489 (2012).

less culpable and have great capacity for rehabilitation to all types of sentencing decisions. Similarly, the Supreme Court's conclusions on how intellectual disability impacts individual decision-making are not limited to the most serious offenses and should be applied across the spectrum of cases.

II. PRACTICAL AND DOCTRINAL REASONS FOR THE EXCLUSION OF INDIVIDUALS WITH INTELLECTUAL DISABILITY FROM THE RESENTENCING MOVEMENT

Given the language in *Atkins*, its ties to *Roper*, and the goals of the resentencing movement, individuals with intellectual disability are a natural group for resentencing. Yet, no court or legislature has explicitly included individuals with intellectual disability in any resentencing law or doctrine. This part discusses both the practical and doctrinal reasons that individuals with intellectual disability have likely not been part of the resentencing movement. It starts with a discussion of the practical issues—individuals with intellectual disability are often unseen in the criminal legal system. This part then discusses how Supreme Court doctrine regarding individuals with intellectual disability has contributed to their absence from the resentencing movement. The doctrinal issues fall into three categories: (1) the Court's delay in clearly defining "intellectual disability"; (2) its history of implicit or explicit discrimination against this population; and (3) the failure to extend the proportionality principle beyond the death penalty context for individuals with intellectual disability.

A. *Invisibility of Individuals with Intellectual Disability in the Criminal Legal System*

Everyone in a courtroom knows when the person before the court for sentencing is still a child—sometimes this is apparent from their physical appearance, but their date of birth is also listed on almost every court record. Thus, a straightforward data analysis can reveal the number of individuals serving juvenile life-without-parole sentences.[100] However, the presence of individuals with intellectual disability in the criminal legal system is much less obvious. Unless a person has severe or profound intellectual disability, the person's attorney and the other actors in the system may never know about the

100. Organizations like The Sentencing Project and The Campaign for the Fair Sentencing of Youth collect and publish this information. As of October 2019, The Sentencing Project reported that nearly 12,000 people are serving a life sentence for an offense committed under the age of eighteen. Ashely Nellis, *Youth Sentenced to Life Imprisonment*, SENT'G PROJECT (Oct. 8, 2019), https://www.sentencingproject.org/publications/youth-sentenced-life-imprisonment/#:~:text=for%20life%20sentences-,LIFE%20WITHOUT%20PAROLE,as%20JLWOP)%20at%20yearend%202016 [https://perma.cc/2R2Y-HDMN].

disability.[101] This invisibility can impact sentencing in many ways. For example: attorneys may fail to use this factor in arguing for more favorable plea agreements or shorter sentences due to lesser culpability; judges and prosecutors may fail to consider intellectual disability as a mitigating factor; and prisons may fail to provide specialized services that would better serve the rehabilitation of the person with intellectual disability. These factors are closely intertwined, and one failure can exacerbate another. Thus, for decades, individuals with intellectual disability have received sentences that do not take into account their disability.[102] This lack of visibility exists because defense attorneys often struggle to identify that a client has intellectual disability[103] and the varied legal definitions of intellectual disability have obscured the extent to which individuals with intellectual disability are involved in the criminal legal system.[104]

During their representation of a client, a defense attorney may not learn of their client's intellectual disability because the client does not disclose it and the attorney does not have the time or expertise to independently identify it.[105] For individuals with mild or moderate intellectual disability, cursory interactions may not reveal any clear issues.[106] As one attorney stated:

> Mild [intellectual disability] has been labeled a "hidden handicap," because it is often not obvious from a person's physical appearance. . . . Ninety percent of persons with [intellectual disability] don't drool, don't

101. *See* Sheri Lynn Johnson, John H. Blume, Emily Paavola & Lindsey S. Vann, *Protecting People with Intellectual Disability from Wrongful Execution: Guidelines for Competent Representation*, 46 HOFSTRA L. REV. 1107, 1111–13 (2018) [hereinafter Johnson et al., *Protecting People with Intellectual Disability*]. One's socioeconomic background and race often influence whether an individual is diagnosed with intellectual disability. *See* Stephen Greenspan & Harvey N. Switsky, *Lessons from the* Atkins *Decision for the Next AAMR Manual*, *in* WHAT IS MENTAL RETARDATION? IDEAS FOR AN EVOLVING DISABILITY IN THE 21ST CENTURY 283, 295–96 (Harvey N. Switsky & Stephen Greenspan eds., 2006) (discussing how an African-American male raised in an impoverished rural area was labeled as "learning disabled" rather than intellectually disabled despite his IQ score below seventy because it was believed his intellectual deficits reflected his family's impoverished circumstances).

102. Some issues that lead to invisibility of intellectual disabilities at the time of the initial sentencing will also make incorporating them into the resentencing movement challenging and may present unique problems not seen with other categories of individuals seeking resentencing.

103. Johnson et al., *Protecting People with Intellectual Disability*, *supra* note 101, at 1117 ("Mild intellectual disability is challenging to identify and diagnose because a person falling in this category almost always has significant relative strengths and abilities and greater masking skills that could lead inexperienced counsel to erroneously believe their client is not a person with intellectual disability.").

104. *See generally* Judith M. Barger, *Avoiding* Atkins v. Virginia*: How States Are Circumventing Both the Letter and the Spirit of the Court's Mandate*, 13 BERKELEY J. CRIM. L. 215, 227–29 (2008) (discussing variations in how different states define intellectual disability).

105. *See* Johnson et al., *Protecting People with Intellectual Disability*, *supra* note 101, at 1125.

106. *See* Martha E. Snell, Ruth Luckasson, Sharon Borthwick-Duffy, Val Bradley, Wil H.E. Buntinx, David L. Coulter, Ellis (Pat) M. Craig, Sharon C. Gomez, Yves Lachanellle, Alya Reeve, Robert L. Schalock, Karrie A. Shogren, Scott Spreat, Marc J. Tasse, James R. Thompson, Miguel A. Verdugo, Michael L. Mehmeyer & Mark H. Yearger, *Characteristics and Needs of People with Intellectual Disability Who Have Higher IQs*, 47 INTELL. & DEVELOPMENTAL DISABILITIES 220, 220 (2009).

> stumble, aren't mute. They have significantly impaired intellectual ability, but often don't have any physical stigmata that indicate [intellectual disability]. They won't "look" a certain way.[107]

In addition, some characteristics of individuals with mild intellectual disability specific to the legal context may make it less likely that an attorney would notice the disability. For example, in "stressful situations or under pressure, an individual [with intellectual disability] may acquiesce, due at times to a desire to please, or because of inexperience, communication limitations, or fear."[108] Facing criminal charges in a complex system with a lot at stake, thus, can trigger this desire to please, leading the individual simply agreeing with whatever their attorney or the court proposes.[109] Finally, a person with mild or moderate intellectual disability may have some adaptive strengths[110] that obscure the disability, even if the person has substantial deficits unseen to the attorney.[111]

Not only do they generally conform socially, but "individuals with intellectual disability often go to great lengths to conceal their disability hiding behind a 'cloak of competence.' The cloak of competence can make it very difficult for their lawyers to identify the intellectual disability, especially if the individual is in the mild range."[112] For decades, scholars have chronicled how individuals with intellectual disability seek to mask their limitations to avoid the negative stigmatization that has only increased over time.[113] "The 'cloak of

107. PETERSILIA, *supra* note 37, at 13–14 (internal quotation marks omitted) (quoting attorney Ruth Luckasson); *see also id.* at 220 ("Most of these individuals are physically indistinguishable from the general population because no specific physical features are associated with intellectual disability at higher IQs.").

108. *Id.* at 226.

109. People with intellectual disability are even more likely to do this when the person making the suggestion is in a position of power, which is often the case during legal representation or before a court. *See id.*

110. Adaptive functioning can include a range of abilities that are generally categorized as conceptual (largely academic pursuits such as reading and language), social (including empathy, communication, and social judgment), and practical (such as personal care and money management). Mourad Ali Eissa Saad & Adel M. ElAdl, *Defining and Determining Intellectual Disability (Intellectual Developmental Disorder): Insights from DSM-5*, 8 INT'L J. PSYCHO-EDUC. SCIS. 52, 52–53 (2019). A person with intellectual disability may have strengths in some of these areas as long as they have impairment in one of the above listed domains. *Id.* at 52.

111. *See* PETERSILIA, *supra* note 37, at 227.

112. Sheri Lynn Johnson, John H. Blume & Amelia Courtney Hritz, *Convictions of Innocent People with Intellectual Disability*, 82 ALB. L. REV. 1031, 1038–39 (2018) [hereinafter Johnson et al., *Convictions with Intellectual Disability*]; *see also* Snell et al., *supra* note 106, at 222 (noting that "many individuals with intellectual disability with higher IQs attempt to hide their disability or attempt to pass as normal or try to appear intellectually capable").

113. James W. Ellis, Caroline Everington & Ann M. Delpha, *Evaluating Intellectual Disability: Clinical Assessments in* Atkins *Cases*, 46 HOFSTRA L. REV. 1305, 1367–68 (2018) ("The intense stigmatization that individuals experience when someone suggests they may be '[intellectually

competence' is a defense mechanism often deliberately employed to prevent exposure of a perceivably shameful condition, though sometimes resulting from limited awareness of the extent of the disability."[114] For example, "he may adopt a 'tough guy' persona by bragging about his physical strength and intellectual prowess" in order to disguise his difficulty understanding social situations or complex information.[115]

Furthermore, the client with intellectual disability may be unaware of their disability or its relevance to the criminal case at hand such that they simply do not disclose the information.[116] Unlike the age at which an offense was committed or the type of offense for which a person is sentenced, a person may not know whether they have an IQ at or below seventy-five.[117] A person with intellectual disability may be aware that they have some impairment. They may know that they had an Individualized Education Plan ("IEP") during school, but they may be entirely unaware of their IQ score, if such testing has taken place, or any other factors relevant to a determination of intellectual disability.[118]

This combination of social competence, masking, and lack of self-identification is then compounded by defense attorneys' limited ability to identify individuals with intellectual disability.[119] In the decades since the Supreme Court held that individuals charged with criminal offenses were

disabled]' has only increased over time."). *See generally* ROBERT B. EDGERTON, THE CLOAK OF COMPETENCE: STIGMA IN THE LIVES OF THE MENTALLY RETARDED (1st ed. 1967) (discussing a longitudinal study of individuals with intellectual disability that first identified the "cloak of competence" as a common characteristic among intellectually disabled individuals).

114. John H. Blume, Sheri Lynn Johnson & Susan E. Millor, *Convicting Lennie: Mental Retardation, Wrongful Convictions, and the Right to a Fair Trial*, 56 N.Y.L. SCH. L. REV. 943, 955 (2012).

115. *Id.* at 957.

116. *See* Jeffrey Usman, *Capital Punishment, Cultural Competency, and Litigating Intellectual Disability*, 42 U. MEM. L. REV. 855, 885–86 (2012) (discussing how cultural background can influence an individual's decision to seek medical and therapeutic services, as well as influence their tendency to conceal their disability).

117. Though a person is generally considered "intellectually disabled" when they have an IQ score below seventy, the Supreme Court held in *Hall v. Florida* that courts must take into account the "standard error of measurement" or "SEM." 572 U.S. 701, 723–24 (2014). For an IQ of seventy, the SEM is often seventy-five, thus anyone who scores a seventy-five or below on an IQ test has "significantly subaverage intellectual functioning," which is the first of three criteria for defining "intellectual disability." *See id.* at 710, 712–13.

118. *See* Johnson et al., *Protecting People with Intellectual Disability*, *supra* note 101, at 1114–15.

119. *Id.* at 1117 ("Mild intellectual disability is challenging to identify and diagnose because persons falling in this category almost always have significant relative strengths and abilities and greater masking skills that could lead inexperienced counsel to erroneously believe their client is not a person with intellectual disability.").

entitled to counsel,[120] scholars and advocates have written extensively about the failure to adequately deliver on that promise.[121]

> Public and appointed lawyers are underfunded and overworked. . . . [D]efendants can be forced to wait years before their lawyers even speak with them. Lawyers all too often engage in "meet and greet" representation, spending mere minutes on a client's case before advising that accused person to plead guilty.[122]

Because identifying an intellectual disability takes expertise—and more than a cursory look at the client file and a ten-minute conversation—many defense attorneys never know that their client is intellectually disabled.[123] Furthermore, even if a defense attorney recognizes that their client has intellectual disability, the same limited resources that make identifying the disability difficult make it unlikely the attorney will be able to sufficiently investigate the disability to present it as mitigation in the case.[124]

The extent to which individuals with intellectual disability are incarcerated or serving long sentences is not clear.[125] Estimates of the number of incarcerated individuals with intellectual disability range from four to ten percent of the jail and prison population.[126] But these numbers should be viewed with caution—intellectual disability "is not recorded on any of the major criminal justice databases."[127] Furthermore, "[t]he prevalence rates in the

120. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

121. *See, e.g.*, George C. Thomas III, *The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169, 184–85 (2005); Kim Taylor-Thompson, *Tuning Up* Gideon*'s Trumpet*, 71 FORDHAM L. REV. 1461, 1467–68 (2003); Norman Lefstein, *Will We Ever Succeed in Fulfilling* Gideon*'s Promise?*, 51 IND. L. REV. 39, 44–48 (2018).

122. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 GEO. WASH. L. REV. 1564, 1603 (2018).

123. Johnson et al., *Convictions with Intellectual Disability*, *supra* note 112, at 1039 (noting that "limited resources and expertise lead lawyers—even experienced capital defense lawyers—to miss red flags of intellectual disability and thus fail to raise the issue at trial or in state and federal post-conviction appeals"); Paul Marcus, *Does* Atkins *Make a Difference in Non-capital Cases? Should It?*, 23 WM. & MARY BILL RTS. J. 431, 438 (2014) ("We lawyers and judges are not especially skilled observers in this area, while many of the disabled persons are very adept in 'trying to prevent any discovery of their handicap.'" (quoting Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation To Participate in Their Own Defense*, 81 J. CRIM. L. & CRIMINOLOGY 419, 420–21 (1990))); PETERSILIA, *supra* note 37, at 13 ("Most justice personnel are unfamiliar with how to recognize [intellectual disability].").

124. Johnson et al., *Convictions with Intellectual Disability*, *supra* note 112, at 1039 ("It can take years for the facts of intellectual disability to be uncovered."); Backus & Marcus, *supra* note 122, at 1579 (noting that lack of funding has also resulted in a "lack of ancillary resources critical to competent representation").

125. This is for a variety of reasons, including that individuals are often not identified as having intellectual disability in the underlying case and "intellectual disability" is not consistently defined. The failure to clearly define "intellectual disability" is discussed *infra* in detail in Section II.B.1.

126. PETERSILIA, *supra* note 37, at 12.

127. *Id.* at 29.

literature vary widely."[128] For example, one study showed just three percent of individuals in prison or jail in New York have an intellectual disability compared with seventeen percent in Wisconsin and ten percent in Texas.[129] These varying numbers are believed to be "a result of different testing instruments and methods as well as underlying differences in the prevalence rates across the nation."[130]

The meager information on the number of incarcerated individuals with intellectual disability and the matter of invisibility contribute to the lack of attention this group of individuals receives in the resentencing context. In making resentencing decisions, courts have broad discretion.[131] However, if advocates are unaware of a client's intellectual disability or the prevalence of intellectual disability in the criminal legal system, they are unlikely to argue for resentencing on that basis.[132] This can have compounding effects because if this is seen as a "novel" argument, judges may be reluctant to adopt the advocates' arguments.[133] It is hard to garner support for efforts to release people convicted of crimes, particularly when those people are serving long sentences for serious offenses.[134] Even for those who committed crimes as youths, where study after study supports the idea that many will grow into law-abiding adults and for whom the public largely supports reform, some legislators and prosecutors resist resentencing efforts.[135] Although garnering support for resentencing of individuals with intellectual disability would face similar barriers, the many important reasons for this expansion justify raising and amplifying these issues.

128. *Id.* at 12.

129. *Id.*

130. *Id.*

131. Concepcion v. United States, 142 S. Ct. 2389, 2399–2401 (2022).

132. Individuals with intellectual disability can be incorporated into the resentencing movement. *See* discussion *infra* Section III.B.

133. In a previous article, I discuss how judges often need to believe that other judges are reaching similar conclusions of law with regards to certain decisions, and this has certainly been the case in the sentencing context. *See* Katie Kronick, *Forensic Science and the Judicial Conformity Problem*, 51 SETON HALL L. REV. 589, 614 (2021).

134. *See* Mirko Bagaric & Daniel McCord, *Decarcerating America: The Opportunistic Overlap Between Theory and (Mainly State) Sentencing Practice as a Pathway to Meaningful Reform*, 67 BUFF. L. REV. 227, 255–56 (2019) (noting that certain drug trafficking offenses attract high levels of condemnation); Eisenberg, *supra* note 49, at 101–19 (discussing how prison industry stakeholders are resistant to increased opportunities for early release).

135. *See generally* Keith L. Alexander, *D.C. Council Weighs Controversial Measure That Would Allow Hundreds of Inmates To Seek Release from Prison After 15 Years of Incarceration*, WASH. POST (Nov. 27, 2020, 6:36 PM), https://www.washingtonpost.com/local/public-safety/prison-reform-early-release/2020/11/27/39b75184-30bc-11eb-bae0-50bb17126614_story.html [https://perma.cc/74MJ-BZU6 (dark archive)] (discussing the concerns prosecutors and legislators have with the resentencing efforts in Washington, D.C.).

B. *The Supreme Court's Inadequate Doctrine Regarding Individuals with Intellectual Disability*

Though the Supreme Court doctrine regarding individuals who committed crimes as children applies in specific circumstances (the death penalty, mandatory life without parole, and life without parole for nonhomicide offense), many actors in the criminal legal system (and the public) have embraced the idea that children and youths who commit offenses are different and should generally be treated differently.[136] Issues relating to their culpability are considered in all types of prosecution and sentencing decisions.[137] In contrast, attorneys, legislatures, and courts have not similarly extended the application of the Supreme Court's doctrine regarding the culpability of individuals with intellectual disability.[138] This section discusses some of the case-law related challenges unique to individuals with intellectual disability that may explain this differential treatment. These include: (1) the Supreme Court's reluctance to define intellectual disability for fifteen years, and the definition's continuing vulnerability to subjectivity; (2) the Supreme Court's history with regard to providing constitutional protections for individuals with intellectual disability and its invidious underlying justifications; and (3) the Supreme Court declining to apply the proportionality principle outside the death penalty context for individuals with intellectual disability.

1. Difficulty Defining and Adjudicating "Intellectual Disability"

When the Supreme Court determines that a certain group of individuals should not be subject to the death penalty—that governments should be prohibited from taking the lives of these individuals—then the Court should have a clear definition of whom those individuals are. Yet, the Supreme Court did not define intellectual disability until fifteen years after *Atkins*, and the definition it ultimately decided upon leaves substantial room for subjectivity.[139] At the time the Court decided *Atkins*, the Court believed the states had not reached a national consensus regarding who has intellectual disability, and thus it left "to the States the task of developing appropriate ways to enforce the

136. *See* State v. Rivera, 265 A.3d 134, 137 (N.J. 2021) (holding that a person's youthfulness can only be considered as a mitigating factor—the legislature added "youth" as a statutory mitigating factor in 2020). *See generally* Dana Goldstein, *Who's a Kid? Science—And Law Enforcement—Are Rethinking Young Adults*, MARSHALL PROJECT (Oct. 27, 2016, 6:00 AM), https://www.themarshallproject.org/2016/10/27/who-s-a-kid [https://perma.cc/D62F-BWXM] (discussing how states are not only ensuring that children under eighteen are prosecuted in juvenile court but that individuals between eighteen and twenty-five are also treated differently).

137. *See* discussion *infra* Section II.B.3.

138. *See, e.g.*, D.C. CODE ANN. § 24-403.03 (LEXIS through Mar. 9, 2023); Juvenile Restoration Act, ch. 61, § 1, 2021 Md. Laws 61 (codified at MD. CODE ANN., CRIM. PROC. §§ 6-235, 8-110 (2021)).

139. *See infra* notes 169–75 and accompanying text.

constitutional restriction upon their execution of sentences."[140] Though *Atkins* implied that the clinical definition of intellectual disability should be the floor (and that states could expand but not restrict the category),[141] this was not clear and many states used this lack of clarity as an opportunity to restrict the definition of "intellectual disability."[142] Two cases that followed *Atkins*, *Hall v. Florida*[143] and *Moore v. Texas*,[144] are just two examples of state efforts to define intellectual disability narrowly and thus limit the reach of the *Atkins* decision.[145]

Hall v. Florida addressed the constitutionality of a Florida statute stating that individuals with any single IQ score above seventy could not challenge their eligibility for the death penalty.[146] The U.S. Supreme Court held that this strict cutoff was unconstitutional, clarified the standard for evaluating whether an individual is intellectually disabled, and reaffirmed that "[n]o legitimate penological purpose is served by executing a person with intellectual disability."[147] While not explicitly requiring that states adopt the clinical definition of intellectual disability, the Court held that the clinical definition should be instructive:

> The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's

140. Atkins v. Virginia, 536 U.S. 304, 317 (2002) (quoting Ford v. Wainwright, 477 U.S. 399, 405, 416–17 (1986)).

141. *See id.* at 317–18 ("This consensus unquestionably reflects widespread judgment about the relative culpability of [intellectually disabled] offenders. . . . Additionally, it suggests that some characteristics of [intellectual disability] undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards. As discussed above, clinical definitions of [intellectual disability] require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.").

142. Texas was unsuccessful in passing a bill defining intellectual disability post-*Atkins*, so Texas state and federal courts adopted their own standards and procedures for *Atkins* claims, resulting in the *Briseño* factors, which they applied for ten years before the U.S. Supreme Court found them unconstitutional. *See generally* Peggy M. Tobolowsky, *A Different Path Taken: Texas Capital Offenders' Post-*Atkins *Claims of Mental Retardation*, 39 HASTINGS CONST. L.Q. 1, 32–52 (2011) (discussing how the Texas legislature and courts dealt with defining intellectual disability post-*Atkins*). In Arizona, if the defendant's IQ score is above seventy-five there is no further inquiry into whether they are intellectually disabled. ARIZ. REV. STAT. ANN. § 13-753 (Westlaw through the Second Reg. Sess. of the Fifty-Fifth Leg. (2022), and includes Election Results from the Nov. 8, 2022 Gen. Elec.). Some states employed "ethnic adjustments," where they would increase the IQ score of African American and Latinx defendants for the purpose of an *Atkins* hearing. *See infra* Section II.B.1.

143. 572 U.S. 701 (2014).

144. 137 S. Ct. 1039, 1044 (2017), *aff'd*, 139 S. Ct. 666 (2019) (per curiam).

145. Hall v. Florida, 572 U.S. 701, 707, 724 (2014) (holding that Florida's strict IQ cutoff of seventy for establishing intellectual disability was unconstitutional because it failed to account for the standard of error and because IQ is not conclusive evidence of intellectual disability); *Moore*, 137 S. Ct. at 1046–48, 1053 (holding that Texas's requirements for establishing intellectual disability, including its reliance on an old, 1992 definition, were unconstitutional).

146. *Hall*, 572 U.S. at 704.

147. *Id.* at 708–09.

> diagnostic framework. . . . And the professional community's teachings are of particular help in this case, where no alternative definition of intellectual disability is presented and where this Court and the States have placed substantial reliance on the expertise of the medical profession.[148]

According to the American Psychiatric Association, intellectual disability is established where a person has "significantly subaverage intellectual functioning, deficits in adaptive functioning (such as the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period."[149] The first criteria is often established with an IQ test that takes into account the standard error of measurement ("SEM").[150] The Florida law failed to do this when it established a strict cutoff at an IQ of seventy.[151] Had it considered the SEM, the cutoff would have been seventy-five.[152]

The *Hall* decision established that while states have some flexibility in determining whether a person is eligible for the death penalty, their definition of intellectual disability must pass constitutional muster.

> The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.[153]

Though the Court reiterated the unconstitutionality of the death penalty for individuals with intellectual disability, it continued to avoid establishing an affirmative definition.[154]

Fifteen years after *Atkins*, the Supreme Court finally established a definition for intellectual disability in its 2017 decision, *Moore v. Texas*, holding

148. *Id.* at 721–22.
149. *Id.* at 710.
150. *Id.* at 711–12.
151. *Id.* at 712–13.
152. *Id.* at 713–14.
153. *Id.* at 724.
154. In *Atkins*, the Court noted,

> To the extent there is serious disagreement about the execution of [intellectually disabled] offenders, it is in determining which offenders are in fact [intellectually disabled]. . . . Not all people who claim to be [intellectually disabled] will be so impaired as to fall within the range of [intellectually disabled] offenders about whom there is a national consensus.

Atkins v. Virginia, 536 U.S. 304, 317 (2002).

that states could not execute an individual who met the clinical definition.[155] In *Moore*, the Court held that Texas's application of outdated definitions of intellectual disability violated the Eighth Amendment.[156] The Texas Court of Criminal Appeals had found that Mr. Moore did not have intellectual disability because some of his IQ scores were above seventy-five (others were below) and he demonstrated adaptive functioning in some areas, such as being able to survive living on the streets.[157] The state high court's opinion was irreconcilable with *Hall*.[158] The Supreme Court reversed, noting that "States have some flexibility, but not 'unfettered discretion' in enforcing *Atkins*' holding . . . . The medical community's current standards supply one constraint on States' leeway in this area."[159] Though states still have "leeway," *Moore* established that the psychological community's standard is a floor—states' definitions of intellectual disability must at least include those who meet the professional community's definition.[160]

Since the Court did not establish a clear definition until fifteen years after *Atkins*, the federal government and states with the death penalty approached intellectual disability differently.[161] As many scholars have noted, ambiguity in the definition of "intellectual disability" likely resulted in death sentences for many individuals with intellectual disability.[162] Between 2002 and 2013 (pre-*Moore*), when a person claimed they had intellectual disability such that they were ineligible for the death penalty, a court or jury only agreed 55% of the time.[163] Behind this number, however, is tremendous variation. For example, in Alabama, the rate at which people are found to be intellectually disabled is 15%, while in Florida the rate is 0% (of twenty-four claims, no one was found to have intellectual disability).[164] North Carolina has a rate of 82%, while Texas is at

155. Moore v. Texas, 137 S. Ct. 1039, 1044 (2017).

156. *Id.*

157. *Id.* at 1047.

158. *Id.* at 1049.

159. *Id.* at 1052–53 (quoting Hall v. Florida, 572 U.S. 701, 719 (2014)).

160. *Id.* at 1053.

161. *See* Alexander Updegrove, Michael S. Vaughn & Rolando V. Del Carmen, *Intellectual Disability in Capital Cases: Adjusting State Statutes After* Moore v. Texas, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 527, 528 (2018) ("In the absence of instruction, states introduced their own definitions through legislation and court cases with the resulting effect that an individual considered intellectually disabled in one state might not be considered intellectually disabled in another.").

162. *See* Änna M. Hagstrom, Atkins v. Virginia*: An Empty Holding Devoid of Justice for the Mentally Retarded*, 27 LAW & INEQ. 241, 259–60 (2009) ("[D]iffering procedural approaches could result in contradictory rulings on [intellectual disability]."); *see also* Barger, *supra* note 104, at 236–37 ("[M]any jurisdictions have enacted provisions that are too narrow to include the cognitively and adaptively impaired individuals intended to be encompassed by the Court's decision.").

163. John H. Blume, Sheri Lynn Johnson, Paul Marcus & Emily Paavola, *A Tale of Two (and Possibly Three* Atkins*): Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 WM. & MARY BILL RTS. J. 393, 397 (2014) [hereinafter Blume et al., *A Tale of Two*].

164. *Id.* at 412.

18%, and Arizona is at 45%.[165] One examination revealed that findings (whether by judges or juries) of intellectual disability "are lower in states with substantive deviations from clinical definitions."[166] In states where the definition of "intellectual disability" was *not* aligned with the definitions established by professional organizations, like the American Association on Intellectual and Developmental Disabilities ("AIDD"), which look not only to IQ but also adaptive functioning deficits, people were more likely to be found eligible for the death penalty.[167]

Even though state definitions of intellectual disability have coalesced around the clinical definition since *Moore*,[168] that definition is not applied

165. *Id.* at 412–13. Florida's resistance to finding individuals intellectually disabled is particularly strong. *See* Phillips v. State, 299 So. 3d 1013, 1020 (Fla. 2020). The Supreme Court of Florida held that the *Hall* decision, which invalidated Florida's seventy IQ score cutoff, was not "a development of fundamental significance, and therefore did not apply retroactively." *Id.* at 1020. In the Florida Supreme Court's view, *Hall* was merely procedural. Phillips v. State, 299 So. 3d 1013, 1020 (Fla. 2020), *cert denied sub nom.* Phillips v. Florida, 141 S. Ct. 2676 (2021).

166. Blume et al., *A Tale of Two*, *supra* note 163, at 414. This examination and the data are pre-*Moore*.

167. *See id.*

168. *See* ALA. CODE § 15-24-2 (Westlaw through Acts 2023-1 through 2023-3 of the 2023 First Spec. Sess.; through Acts 2023-43 through 2023-52 and Acts 2023-83 through 2023-86 of the 2023 Reg. Sess.); ARIZ. REV. STAT. ANN. § 13-753 (Westlaw through the Second Reg. Sess. of the Fifty-Fifth Leg. (2022), and includes Election Results from the Nov. 8, 2022 Gen. Elec.); ARK. CODE ANN. § 5-4-618 (LEXIS through all emergency legislation effective through Mar. 7, 2023; and also includes all laws regardless of effective date through Act 160 of the 2023 Reg. Sess.); CAL. PENAL CODE § 1376 (Westlaw through Ch. 1 of 2023–2024 1st Extra. Sess., and urgency legislation through Ch. 2 of 2023 Reg. Sess.); FLA. STAT. § 921.137 (2022); GA. CODE ANN. § 17-7-131 (LEXIS through Acts 2023, No. 23-20 of the 2023 Sess.); IDAHO CODE § 19-2515A (LEXIS through Ch. 20 from the 2023 Reg. Sess. and effective as of Mar. 8, 2023); IND. CODE § 35-36-9-2 (2022); KAN. STAT. § 21-6622 (Westlaw through laws enacted during the 2023 Reg. Sess. of the Kan. Leg. effective on Mar. 16, 2023); KY. REV. STAT. § 532.130 (Westlaw through laws effective Apr. 4, 2023 and the Nov. 8, 2022 election); LA. CODE CRIM. PROC. ANN. art. 905.5.1 (Westlaw through the 2023 First Extra. Sess.); MISS. CODE ANN. § 41-21-61 (LEXIS through 2023 Reg. Sess. legislation signed by the Governor and effective upon passage through Feb. 28, 2023); MO. REV. STAT. § 565.030 (Westlaw through WID 1 of the 2023 First Reg. Sess. of the 102nd Gen. Assemb.); NEB. REV. STAT. ANN. § 28-105.01 (2022); NEV. REV. STAT. ANN. § 174.098 (2022); N.C. GEN. STAT. ANN. § 15A-2005 (LEXIS through Sess. Laws 2023-12 of the 2023 Reg. Sess. of the Gen. Assemb.); State v. Ford, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, at ¶ 100; State v. Agee, 364 P.3d 971, 971 (Or. 2015) (en banc); Commonwealth v. Miller, 888 A.2d 624, 624 (Pa. 2005); S.C. CODE ANN. § 16-3-20 (Westlaw through 2023 Act No. 8); TENN. CODE ANN. § 39-13-203(c) (LEXIS through Ch. 114, as well as Chs. 116 through 142 and Chs. 144 through 150 of the 2023 Reg. Sess.); *Ex parte* Hearn, 310 S.W.3d 424, 428 (Tex. Crim. App. 2010); UTAH CODE ANN. § 77-15a-102 (LEXIS through 2022 Third Spec. Sess. of the 64th Leg.). These statutes all have a definition of intellectual disability that is either the same as the APA/AAIDD definitions or substantially similar. Oklahoma has a law that appears to be in violation of *Hall* and *Moore*, which states that if a person has *any* IQ test score above seventy-six, they do not have intellectual disability—even if they have other scores below seventy-six. OKLA. STAT. ANN. tit. 21, § 701.10b (Westlaw through emergency effective legislation through Ch. 1 of the First Reg. Sess. of the 59th Leg. (2023)). Finally, Wyoming and Montana, though they have a death penalty on the books, have not executed any individuals in years and this issue has not been addressed in those

consistently. For example, prosecutors have argued that even where a person's IQ score is below seventy, they are death penalty eligible because "IQ tests tend to underestimate" the intelligence of people with their perceived or assigned race.[169]

> Prosecutors and their experts have advocated for these upward, ethnic adjustments to minority IQ scores in Texas, Alabama, Tennessee, Missouri, California,[170] Pennsylvania, and Ohio state courts as well as before the Fifth Circuit.[171]

For example, in an Alabama case, *Brown v. State*,[172] the court relied on expert testimony that Mr. Brown's IQ scores were "suppressed" because "[s]ometimes individuals of African-American background don't score quite as high on formal testing."[173] These "ethnic adjustments" are not clinically validated and appear to be clearly unconstitutional under the standards established in *Atkins*, *Hall*, and *Moore*.[174]

Compounding the issues related to the lack of a clear definition of intellectual disability for fifteen years is that even the "clear" definition is ambiguous and can have disparate results. One study that examined how potential jurors might determine whether an individual has an intellectual

states. *See Wyoming*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/wyoming [https://perma.cc/3ZEC-QWM8] (stating that Wyoming's last execution was in 1992); *Montana*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/montana [https://perma.cc/W8LN-VHQR] (stating that Montana's last execution was in 2006).

169. *See* Robert M. Sanger, *IQ, Intelligence Tests, "Ethnic Adjustments" and* Atkins, 65 AM. U. L. REV. 87, 108–11 (2015); *see also* Black v. State, No. M2004-013450CCA-R3-PD, 2005 WL 2662557, at *8 (Tenn. Crim. App. Oct. 19, 2005) ("[I]f you have an African-American who tests in the seventies, the clinician must be very cautious with the interpretation, especially if [intellectual disability] is being considered, because there is a bias in the test.").

170. Though prosecutors and judges have used ethnic adjustments in the past, the California statute defining intellectual disability for death penalty purposes now prohibits adjustments "based on race, ethnicity, national origin, or socioeconomic status." *See* CAL. PENAL CODE § 1376(g) (Westlaw).

171. *See* Sanger, *supra* note 169, at 109; *see also* Michael L. Perlin, Talia Roitberg Harmon & Sarah Wetzel, "*Man Is Opposed to Fair Play": An Empirical Analysis of How the Fifth Circuit Has Failed To Take Seriously* Atkins v. Virginia, 11 WAKE FOREST J.L. & PUB. POL'Y 451, 485–88 (2021) (discussing how the Fifth Circuit has affirmed three cases in which "ethnic adjustments" were used).

172. 982 So. 2d 565 (Ala. Crim. App. 2006).

173. *Id.* at 604.

174. Sanger explains that

> [e]ven if there were an unexplained discrepancy in the test scores of cohorts based on race or ethnic origin when compared to the standardized norm, it is nevertheless unconstitutional to invoke an adjustment to make defendants, based solely on their race, eligible for execution. There is no nexus between the disparity in test scores of the group and the actual IQ of an individual before the court.

Sanger, *supra* note 169, at 128. For an extensive discussion of how these "ethnic adjustments" are not based in the science, violate the constitution, and why courts are agreeing to these upward adjustments, see *id.* at 116–29.

disability found that race played a statistically significant role.[175] When the evidence of an intellectual disability in a hypothetical death penalty case was ambiguous—which would be more likely in cases that go to trial—study participants were less likely to find that a Black or Latino defendant had intellectual disability than a white or Asian defendant.[176] In addition, study participants were less likely to find that a person had an intellectual disability in a hypothetical death penalty case than they were in a benefits case, even though the type of case should not have an impact on the finding.[177] This study suggests that even with a somewhat clear definition of intellectual disability, race and the type of case can still impact whether a person is found intellectually disabled.[178]

Another issue impacting whether an individual is found intellectually disabled, which the Supreme Court has not directly addressed, is the standard of proof required to establish an intellectual disability.[179] Though eighteen of the twenty-seven death penalty states require only a preponderance of the evidence to prove intellectually disability,[180] three require clear and convincing

175. Sheri Lynn Johnson, John H. Blume, Amelia Courtney Hritz & Caisa Elizabeth Royer, *Race, Intellectual Disability, and Death: An Empirical Inquiry into Invidious Influences on* Atkins *Determinations*, 66 UCLA L. REV. 1506, 1511 (2019).

176. *Id.* With white and Asian defendants, study participants found intellectual disability fifty-five percent of the time, but with Latino defendants they found intellectual disability only thirty-nine percent of the time and forty-two percent of the time with Black defendants. *Id.* at 1522.

177. *See id.* at 1513–14 (explaining the study results "suggest that either the presence of criminal behavior or the consequences of an intellectual disability determination (or both) influence some jurors' determination of intellectual disability, despite the fact that neither is a clinically relevant factor"). In both hypothetical scenarios, the same evidence of intellectual disability was presented, but in the death penalty case, study participants found that the person had intellectual disability fifty percent of the time, while in the benefits context there was a finding of intellectual disability in eighty-one percent of cases. *Id.*

178. *See id.* This study focused on how a juror would apply the definition, but when a defendant seeks postconviction review under *Atkins*, the matter universally goes to a judge. Blume et al., *A Tale of Two*, *supra* note 163, at 410. For the original sentencing decision, though, in ten states (Alabama, Arkansas, Georgia, Louisiana, New Mexico, North Carolina, Oklahoma, Pennsylvania, Texas, and Virginia), a jury decides after the guilty verdict whether an individual is intellectually disabled. *Id.* "From 2002 to 2014 there have been 23 jury determinations of intellectual disability, and in 22 of those cases, or 96%, the jury determined that the defendant did not have intellectual disability." *Id.* This is in contrast to the overall success rate (forty-three percent) in raising a claim of intellectual disability. *Id.*

179. Lauren Sudeall Lucas, *An Empirical Assessment of Georgia's Beyond a Reasonable Doubt Standard To Determine Intellectual Disability in Capital Cases*, 33 GA. ST. U. L. REV. 553, 554–55 (2017) ("In doing so, the Court expressly left the procedures to be used in identifying disability to the states. In the wake of *Atkins*, states developed varying standards for the definition of intellectual disability; the evidence that a sentencer may consider in making the determination whether a capital defendant is intellectually disabled; and the procedures, including the standard of proof, by which that determination must be made.").

180. Smith v. State, 213 So. 3d 239, 252 (Ala. 2007); ARK. CODE ANN. § 5-4-618(c) (LEXIS through all emergency legislation effective through Mar. 7, 2023; and also includes all laws regardless

evidence,[181] and one requires proof beyond a reasonable doubt.[182] Even if a state has adopted the clinical definition of intellectual disability, the higher the standard of proof, the less likely a person can successfully demonstrate that they are ineligible for the death penalty.[183] For example, no one has satisfied Georgia's standard of proof beyond a reasonable doubt for an *Atkins* claim.[184] Another procedural issue is whether *Hall* and *Moore* apply only prospectively or also retrospectively. Several states, including Florida, have held they are prospective only.[185] Therefore, people who would clearly meet the legal

of effective date through Act 160 of the 2023 Reg. Sess.); CAL. PENAL CODE § 1376(a)(3) (Westlaw through Ch. 1 of 2023–2024 1st Extra. Sess., and urgency legislation through Ch. 2 of 2023 Reg. Sess.); IDAHO CODE § 19-2515A(3) (LEXIS through Ch. 20 from the 2023 Reg. Sess. and effective as of Mar. 8, 2023); Wilson v. Commonwealth, 381 S.W.3d 180, 181 (Ky. 2012); LA. CODE CRIM. PROC. ANN. art. 905.5.1(C)(1) (Westlaw through the 2023 First Extra. Sess.); Chase v. State, 2013-CA-01089-SCT (¶ 8) (Miss. 2015); State v. Johnson, 244 S.W.3d 144, 151 (Mo. 2008) (en banc); NEB. REV. STAT. ANN. § 28-105.01(4) (2022); NEV. REV. STAT. § 174.098(5)(b) (2022); N.C. GEN. STAT. § 15A-2005(f) (LEXIS through Sess. Laws 2023-12 of the 2023 Reg. Sess. of the Gen. Assemb.); State v. Ford, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, at ¶ 76; State v. Agee, 364 P.3d 971, 976 (Or. 2015) (en banc); Commonwealth v. Miller, 888 A.2d 624, 626 (Pa. 2005); Franklin v. Maynard, 588 S.E.2d 604, 606 (S.C. 2003); S.D. CODIFIED LAWS § 23A-27A-26.3 (Westlaw through laws of the 2023 Reg. Sess. effective Feb. 9, 2023 and Sup. Ct. R. 23-01); TENN. CODE ANN. § 39-13-203(c) (LEXIS through Ch. 114, as well as Chs. 116 through 142 and Chs. 144 through 150 of the 2023 Reg. Sess.); State v. Maestas, 2012 UT 46, ¶ 189, 299 P.3d 892.

181. FLA. STAT. § 921.137 (2013), *invalidated by* Hall v. Florida, 572 U.S. 701 (2014); IND. CODE § 35-36-9-4(b) (2022); OKLA. STAT. ANN. tit. 21, § 701.10b(E) (Westlaw through emergency effective legislation through Ch. 1 of the First Reg. Sess. of the 59th Leg. (2023)).

182. GA. CODE ANN. § 17-7-131(c)(3) (LEXIS through the 2022 Reg. Sess. of the Gen. Assemb.). The Supreme Court of Georgia reaffirmed the standard and found the statute constitutional in 2021. Young v. State, 860 S.E.2d 746, 768, 770 (Ga. 2021). The standards of proof for Kansas, Montana, Texas, and Wyoming are unclear.

183. *See* Lucas, *supra* note 179, at 574.

184. Adam Liptak, *Language Mistake in Georgia Death Penalty Law Creates a Daunting Hurdle*, N.Y. TIMES (Jan. 3, 2022), https://www.nytimes.com/2022/01/03/us/politics/supreme-court-death-penalty-intellectual-disability.html [https://perma.cc/KDQ9-TC85 (staff-uploaded archive)] (describing how the high standard of proof in Georgia's death penalty law has likely resulted in the executions of individuals with intellectual disability). In February 2022, the U.S. Supreme Court declined to grant certiorari in the case of Rodney Young, which would have challenged Georgia's beyond-a-reasonable-doubt standard for proving intellectual disability in death penalty cases. Bill Rankin, *U.S. Supreme Court Declines To Hear Georgia Death-Penalty Appeal*, ATLANTA J. CONST. (Feb. 28, 2022), https://www.ajc.com/news/crime/us-supreme-court-declines-to-hear-georgia-death-penalty-appeal/CBW7OX53XNB5JKAJ7YP2IX5Q4Y/ [https://perma.cc/97PG-FZ22].

185. Phillips v. State, 299 So. 3d 1013, 1022 (Fla. 2020) ("Because we have concluded that *Hall* announced a new procedural rule, which does not categorically place certain criminal laws and punishments altogether beyond the State's power to impose but rather regulates only the manner of determining the defendant's culpability, we conclude that federal law does not require a retroactive application of *Hall* as a new substantive rule of federal constitutional law."); *see also* Sarah E. Warlick & Ryan V.P. Dougherty, Hall v. Florida *Reinvigorates Concept of Protection for Intellectually Disabled*, 29 CRIM. JUST. 5, 6 (2015) (describing that the Eleventh and Fourth Circuits have found that *Hall* does not apply retroactively, but the Sixth Circuit has applied *Hall* retroactively).

definition of intellectual disability are unable to seek resentencing in those jurisdictions.[186]

The Supreme Court has indicated an unwillingness to further clarify what establishes intellectual disability,[187] even where execution is imminent.[188]

186. Florida's decision in *Phillips* was actually a reversal from a position it had taken just four years before in *Walls v. State*, 213 So. 3d 340 (Fla. 2016), in which the court held that *Hall* applied retroactively. Phillips v. State, 299 So. 3d 1013, 1016, 1020–21 (Fla. 2020) (per curiam). This reversal is likely due in significant part to a reconstituting of the Florida Supreme Court: between the *Walls* and *Phillips* decisions, three justices retired, and more conservative justices were appointed the court. Noreen Marcus, *Conservatives Note That Ron DeSantis Has Turned Florida into 1 of the Most Conservative Courts in America*, U.S. NEWS (Sept. 8, 2020), https://www.usnews.com/news/best-states/articles/2020-09-08/conservatives-note-that-ron-desantis-has-turned-florida-into-the-most-conservative-court-in-america [https://perma.cc/CK99-MVRG]. The race of the defendants, however, may have also played a role. Mr. Walls, for whom the court found *Hall* applied retroactively, was a white man, while Mr. Phillips, for whom the court reversed its earlier finding of *Hall*'s retroactively, was a Black man. *See Florida Supreme Court Continues To Overturn Precedent in Death Penalty Cases*, AM. BAR ASS'N (July 24, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/summer/florida-supreme-court-overturns-precedent-in-capital-cases/ [https://perma.cc/8ES6-GLE9].

187. *See* State v. Blackwell, 801 S.E.2d 713, 732–34 (S.C. 2017), *cert. denied*, 138 S. Ct. 985 (2018) (mem.); Carr v. State, 2017-CA-01481-SCT (¶¶ 29–39) (Miss. 2019), *cert. denied*, 141 S. Ct. 138 (2020) (mem.); Reeves v. State, 226 So. 3d 711, 739–44 (Ala. Crim. App. 2016), *cert. denied*, 138 S. Ct. 22 (2017) (mem.).

188. Alfred Bourgeois was sentenced to death in 2004 by a jury who never learned of his intellectual disability. Christina Carrega, *Feds Execute 10th Death Row Inmate of 2020*, CNN (Dec. 11, 2020), https://www.cnn.com/2020/12/11/politics/alfred-bourgeois-execution/index.html [https://perma.cc/5SU4-A8E2 (staff-uploaded archive)]. Justices Sonia Sotomayor and Elena Kagan dissented from the Supreme Court's denial of certiorari, noting that Mr. Bourgeois should have had an opportunity for a hearing to prove his intellectual disability. Bourgeois v. Watson, 141 S. Ct. 507, 507–09 (2020) (Sotomayor, J., dissenting) (mem.). Alfred Bourgeois was executed one day after the Supreme Court denied certiorari in his case. Carrega, *supra*. Quintin Phillippe Jones had an IQ as low as seventy-two and suffered a traumatic childhood, which likely gave rise to subaverage intellectual functioning and deficits in adaptive functioning. Petition for Writ of Certiorari to the Texas Court of Appeals at 31, 33, Jones v. Texas, 141 S. Ct. 2666 (2021) (No. 20-8037); Suleika Jaoaud, Editorial, *Quintin Jones Is Not Innocent. But He Doesn't Deserve To Die*, N.Y. TIMES (May 10, 2021), https://www.nytimes.com/2021/05/10/opinion/quintin-jones-texas-death-row-clemency.html [https://perma.cc/7H4Z-W6WS (staff-uploaded, dark archive)]. State courts never investigated Mr. Jones's *Atkins* claim. *In re* Jones, 998 F.3d 187, 189–90 (5th Cir. 2021) (mentioning Jones's prior attempts to prove his intellectual disability claim and dismissing Jones's present claim of intellectual disability based on *Moore v. Texas*, 137 S. Ct. 1039 (2017), *aff'd* 139 S. Ct. 666 (2019) (per curiam)); *Ex parte* Jones, No. WR-57,299-02, 2021 WL 1940248 (Tex. Crim. App. 2021), *cert. denied*, 141 S. Ct. 2666 (2021). Quintin Phillippe Jones was executed the same day the Supreme Court denied certiorari regarding his intellectual disability claim. Juan A. Lozano & Michael Graczyk, *Absent Media, Texas Executes Inmate Who Killed Great Aunt*, ASSOCIATED PRESS (May 19, 2021), https://apnews.com/article/texas-executions-lifestyle-747fc8994706df9dee9e64909c464b99 [https://perma.cc/G3BV-FR3N (staff-uploaded archive)]. Warren Hill, who had an IQ of seventy, was executed on January 27, 2015, despite seven doctors diagnosing him as intellectually disabled, including three of the doctors who initially said he was not intellectually disabled at trial, and despite the victim's family opposing the execution. Hill v. Humphrey, 662 F.3d 1335, 1341 (11th Cir. 2011); *Breaking: Supreme Court Rejects Warren Hill Petition*, AMNESTY U.S.A. (Oct. 7, 2013), https://www.amnestyusa.org/breaking-supreme-court-rejects-warren-hill-petition/ [https://perma.cc/8PCX-Y8FT].

Making the argument that a person outside the death penalty context has intellectual disability such that they should be subject to lesser punishment is particularly challenging when, even in the death penalty context, "intellectual disability" is not clearly defined. This lack of a clear definition necessarily means that the group is somewhat amorphous, which hampers the ability of actors in the criminal legal system from seeing individuals with intellectual disability as a group that deserves resentencing opportunities.

2. Limiting Constitutional Protections for Individuals with Intellectual Disability

The Supreme Court's language in *Atkins* and *Penry* demonstrates an understanding that individuals with intellectual disability present unique issues worthy of special consideration.[189] Outside of the death penalty and criminal context, however, several Supreme Court opinions implicitly or explicitly reflect animus towards and misconceptions about individuals with intellectual disability.[190] Many of these cases have limited the constitutional protections for this group of individuals who are vulnerable to discrimination. Though these cases are outside the criminal legal context, they are part of the landscape of cases relating to individuals with intellectual disability—the law has not always been kind or fair. This legal treatment cannot be disentangled from treatment in the criminal legal system and is relevant to understanding why individuals with intellectual disability have not been explicitly included in the resentencing movement. As Justice Thurgood Marshall noted with regard to treatment of individuals with intellectual disability: "Prejudice, once let loose, is not easily cabined."[191]

For much of the nineteenth century, individuals with intellectual disability were largely regarded as harmless individuals for whom their communities and families provided care.[192] However, with the rise of the eugenics movement in the late nineteenth century and early twentieth century, individuals with intellectual disability became targets for discrimination.[193] Branded as prone to

189. *See* discussion *supra* Section I.B on *Penry* and *Atkins*.

190. *See, e.g.*, Buck v. Bell, 274 U.S. 200, 205–08 (1927); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442–47 (1985); Heller v. Doe, 509 U.S. 312, 321–28 (1993).

191. *Cleburne Living Ctr.*, 473 U.S. at 464 (Marshall, J., concurring in part and dissenting in part).

192. *See* PRESIDENT'S COMM. ON MENTAL RETARDATION, MR 76, MENTAL RETARDATION: PAST AND PRESENT 6–11 (1977). Around 1874, the general attitude towards individuals with intellectual disability was "essentially benign and humanitarian, the institutional objectives being to provide a better environment and opportunity for improvement to impaired persons and relief to the family and community." *Id.* at 6. Darwinism, sociological research, Mendelian genetics, and psychometry distorted the image of an individual with intellectual disability to a "depraved menace to society." *Id.* at 9.

193. *See id.* at 11–16 ("With the depravity of feeblemindedness now firmly established as a shameful blight in familial germ plasm and as the major source of society's ills, two problems were now

criminality and detrimental to communities,[194] children were taken from their parents without permission[195] and women of childbearing age were institutionalized to prevent reproduction.[196] This was followed by the movement to surgically sterilize these individuals.[197]

In 1927, the Supreme Court addressed the rights of individuals with intellectual disabilities for the first time in a truly shameful opinion: *Buck v. Bell*.[198] In a mere four pages, the Supreme Court held that the forced sterilization of some individuals with intellectual disability did not violate the Due Process or Equal Protection Clauses.[199] Justice Oliver Wendell Holmes's infamous words, "Three generations of imbeciles are enough,"[200] are among the most scurrilous to grace a Supreme Court opinion. That is not all that is shocking about this opinion. The discussion of Carrie Buck and what justified her forced sterilization is a single paragraph.[201] Justice Holmes's disdain for

paramount: how to prevent feeblemindedness from occurring and how to control those in whom it did occur.").

194. *See* James W. Ellis, *Disability Advocacy and* Atkins, 57 DEPAUL L. REV. 653, 654–55 (2008) ("With warnings about criminality as a central argument, eugenics advocates had great success in alarming the public and influencing public policy in the early decades of the twentieth century. The public policy goals pursued by this alarmist movement involved eugenic sterilization and lifelong segregation of individuals who had [intellectual disability].").

195. *See* Usman, *supra* note 116, at 865–66 ("With little protection in place to protect disabled individuals, children were even removed by force of law from their homes against the will of their parents so that they could be segregated into institutions and removed from society.").

196. *See generally* Robert J. Cynkar, Buck v. Bell*: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1429 (1981) (stating that many eugenicists concentrated on programs to segregate the sexes during their reproductive period).

197. *See* Ellis, *supra* note 194, at 655 (noting that the eugenics movement "left a morally indefensible legacy of involuntary sterilizations").

198. 274 U.S. 200 (1927). "[F]ive justices have described our nation's treatment of citizens with [intellectual disability] as 'grotesque.'" Ellis, *supra* note 194, at 654 (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 454 (1985) (Stevens, J., concurring)).

199. In finding that this was not a due process violation, the Court stated:

> There can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered, and as every step in this case was taken in scrupulous compliance with the statute and after months of observation, there is no doubt that in that respect the plaintiff in error has had due process of law.

Buck, 274 U.S. at 207. The Court went on to find that the law also was not a substantive violation (which appears to be the finding regarding the equal protection challenge), and stated:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence.

Id.

200. *Id.*

201. *Id.* at 205–06.

intellectually disabled individuals dominates the opinion—he goes so far as to equate sterilization with eradicating a disease through mandatory vaccination:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.[202]

A key feature of this opinion is the failure to see the humanity of the individuals whose lives would be impacted by this decision. In addition to Ms. Buck,[203] this decision was used to permit the forced sterilization of at least 60,000 individuals.[204] Though the eugenics movement dissipated after the 1940s and particularly after the atrocities of human testing in Nazi Germany came to

202. *Id.* at 207.

203. Carrie Buck's guardians committed her to the State Colony for Epileptics and Feebleminded in Lynchburg, Virginia, after she became pregnant, a result of her being raped. Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30, 34, 54 (1985). Ms. Buck's mother had previously been committed to the same institution. Cynkar, *supra* note 196, at 1437. The men who authored the Virginia law authorizing the sterilization of "feebleminded" individuals were searching for a test case and settled upon Ms. Buck who "with a feebleminded mother in the same institution, a record of 'immoral' behavior, and an illegitimate child, fit their needs better than they could have ever wished." *Id.* Irving Whitehead, the attorney appointed to represent Ms. Buck, was friends with the authors of the sterilization bill. Lombardo, *supra*, at 50–55. Though the lawfulness of Ms. Buck's sterilization should not turn on whether she was in fact "feebleminded," individuals who knew Ms. Buck reported that she was a woman of normal intelligence. *Id.* at 61.

204. Paul A. Lombardo, *Eugenic Sterilization Laws*, EUGENICS ARCHIVE, http://www.eugenicsarchive.org/html/eugenics/essay8text.html [https://perma.cc/6JDK-FX82] ("At one time or another, 33 states had statutes under which more than 60,000 Americans endured involuntary sterilization."); *The Supreme Court Ruling That Led to 70,000 Forced Sterilizations*, NPR (Mar. 24, 2017), https://www.npr.org/2017/03/24/521360544/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations [https://perma.cc/MF8E-NNKL].

light,[205] the Supreme Court has not strongly repudiated *Buck v. Bell*[206] or its discriminatory statements regarding individuals with intellectual disability.[207] And forced sterilizations still occur for those deemed "undesireable," though not nearly as ubiquitously as in the early twentieth century.[208]

205. Andrea DenHoed, *The Forgotten Lessons of the American Eugenics Movement*, NEW YORKER (Apr. 27, 2016), https://www.newyorker.com/books/page-turner/the-forgotten-lessons-of-the-american-eugenics-movement?utm_source=NYR_REG_GATE [https://perma.cc/XDD8-V6YK (dark archive)] ("The rhetoric of the movement toned down after the U.S. went to war with Germany; most American eugenicists abandoned their explicit praise of the Nazi project, and the field dwindled as an area of officially sanctioned research."). Harry Laughlin was one of the most prominent American eugenicists, whose Model Law influenced the enactment of eighteen U.S. state statutes and Nazi Germany's 1933 Law for the Prevention of Defective Progeny, signed by Adolf Hitler. *See* Paul A. Lombardo, Commentary, *"The American Breed": Nazi Eugenics and the Origins of the Pioneer Fund*, 65 ALB. L. REV. 743, 755–65 (2002). Laughlin was even awarded an honorary degree for his work "in the 'science of racial cleansing'" from the University of Heidelberg in 1936, which he "proudly announced" to all his colleagues. *Id.* The eugenics movement, prior to World War II, was not a clandestine movement hidden or disguised from the public, but rather was a significant part of American culture in the early 1900s—it was taught in schools; prominent Americans including Theodore Roosevelt and Alexander Graham Bell were supporters; and eugenics was celebrated at the World's Fair. Andrea DenHoed, *supra*.

206. In 2001, the Eighth Circuit cited the *Buck v. Bell*, opinion for the proposition that involuntary sterilization is not always unconstitutional if it is a narrowly tailored means to achieve a compelling government interest. Vaughn v. Ruoff, 253 F.3d 1124, 1129 (8th Cir. 2001). As of 2021, the Supreme Court has never expressly overruled *Buck v. Bell*, and in fact it was cited in *Roe v. Wade*, 410 U.S. 113 (1973), as recognizing that the Court has refused an unlimited right "to do with one's body as one pleases." *Id.* at 154; *see also* Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2059 (2021). Even in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), in which the Supreme Court held that the forced sterilization of "habitual criminals" was unconstitutional, it did so on equal protection grounds and did not overturn the reasoning or justifications of *Buck v. Bell*. *Id.* at 541–42. Though the ADA may now prohibit such forced sterilizations, the Court has yet to distance itself from the reasoning of *Buck v. Bell*. *See* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 601–03 (1999) (finding that undue institutionalization and limitations on liberty of persons with disabilities violate the ADA, though declining to make such a finding on constitutional grounds).

207. *See generally* Robyn M. Powell, *Safeguarding the Rights of Parents with Intellectual Disabilities in Child Welfare Cases*, 20 CUNY L. REV. 127, 133–34 (2016) (analyzing how present policies and practices restricting individuals with intellectual disability from forming families resemble eugenic ideologies).

208. Between 2006 and 2010, California forced the sterilization of almost 150 women incarcerated in state prisons. Hunter Schwarz, *Following Reports of Forced Sterilization of Female Prison Inmates, California Passes Ban*, WASH. POST (Sept. 26, 2014, 10:20 AM), https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/26/following-reports-of-forced-sterilization-of-female-prison-inmates-california-passes-ban/ [https://perma.cc/HH8J-TCSC (staff-uploaded, dark archive)]. California enacted a law in 2014 banning the procedure. *Id.* As recently as 2015, a Nashville, Tennessee, prosecutor, who was later fired, included sterilization as part of his plea deals. *Nashville Assistant DA Fired Amid Reports of Sterilization in Plea Deals*, CBS NEWS (Apr. 1, 2015, 5:40 PM), https://www.cbsnews.com/news/Nashville-prosecutor-fired-amid-reports-of-sterilization-in-plea-deals/ [https://perma.cc/9NK3-YJ2L]. In 2017, a Tennessee judge issued a standing order to inmates in White County, Tennessee, stating that they would receive thirty days' credit toward their sentence if they volunteered for sterilization. Derek Hawkins, *Judge to Inmates: Get Sterilized and I'll Shave Off Jail Time*, WASH. POST (July 21, 2017, 8:19 PM), https://www.washingtonpost.com/news/morning-mix/wp/2017/07/21/judge-to-inmates-get-sterilized-and-ill-shave-off-jail-time/ [https://perma.cc/42LA-EMAA (dark archive)].

More than half a century later, the Supreme Court decided that individuals with intellectual disability were not a suspect or quasi-suspect class entitled to protected status.[209] In the 1985 case, *City of Cleburne v. Cleburne Living Center*,[210] the Court held that a city ordinance requiring a special use permit for a group home for the "feebleminded" violated the Equal Protection Clause.[211] But, the Court applied the rational basis test.[212] Thus, laws targeting individuals with intellectual disability need only "be rationally related to a legitimate governmental purpose."[213] The Supreme Court reached the conclusion that individuals with intellectual disability were not a suspect or quasi-suspect class triggering elevated scrutiny in part because "lawmakers have been addressing [individuals with intellectual disability's] difficulties in a manner that belies continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."[214] In addition, the Court found that individuals with intellectual disability had political power because legislatures had passed laws favorable to them.[215]

This optimistic view of how the public views and treats individuals with intellectual disability is belied by the very existence of the case before the Court: a city sought to prohibit the building of a group home for individuals with mild intellectual disability due to "an irrational prejudice against the [intellectually

209. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 435 (1985).

210. 473 U.S. 432 (1985).

211. *Id.* at 435.

212. *Id.* at 448.

213. *Id.* at 446. In analyzing challenges under the Equal Protection Clause, the Supreme Court applies one of three standards of review: strict scrutiny, intermediate scrutiny, or rational basis—which can be based on the degree to which the class challenging the law is "suspect." Discrimination based on race or national origin is always suspect and subject to strict scrutiny, requiring the government to prove that the disparate treatment is necessary to achieve a compelling government interest and that the law is narrowly tailored to meet that government interest. *E.g.*, *id.* at 440. Intermediate scrutiny is used when the discrimination is based on gender or nonmarital children. In that situation, the court must find that the government's objective is important and that the means used have a substantial relationship to the end being sought. *E.g.*, United States v. Virginia, 518 U.S. 515, 532–33 (1996). Rational basis, which is what the Court applies for individuals with intellectual disability, is the lowest level of scrutiny and the law will be upheld as long as it is rationally related to a legitimate government interest. *E.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356, 366–67 (2001) (noting that individuals with intellectual disability are not a suspect classification). Some scholars have suggested, as Justice Thomas suggested in his opinion concurring in the judgment and dissenting in part, that the Court actually used a rational basis plus bite (or second-order rational review) analysis in *Cleburne*. *See, e.g.*, R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 243 (2002). However, in *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), the Court reaffirmed that only rational basis applies in evaluating laws related to individuals with disabilities: "If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." *Id.* at 367–68.

214. *Cleburne*, 473 U.S. at 443 (1985).

215. *Id.* at 445.

disabled]."[216] In his separate opinion concurring in the judgment in part and dissenting in part, Justice Thurgood Marshall detailed the decades of mistreatment of individuals with intellectual disability:

> The [intellectually disabled] have been subject to a "lengthy and tragic history" of segregation and discrimination that can only be called grotesque. . . . By the latter part of the [nineteenth] century and during the first decades of the new one, . . . social views of the [intellectually disabled] underwent a radical transformation. Fueled by the rising tide of Social Darwinism, the "science" of eugenics, and the extreme xenophobia of those years, leading medical authorities and others began to portray the "feeble-minded" as a "menace to society and civilization . . . responsible in a large degree for many if not all, of our social problems."[217]

This prejudice did not disappear in the ensuing decades. Rather, "lengthy and continuing isolation of the [intellectually disabled] has perpetuated the ignorance, irrational fears, and stereotyping" that people with intellectual disability continue to face.[218]

Less than ten years later, in *Heller v. Doe*,[219] individuals with intellectual disability challenged the Kentucky civil commitment process.[220] Though the state had to prove *beyond a reasonable doubt* that a person with mental illness required civil commitment, the state only had to demonstrate by *clear and convincing evidence* that a person with intellectual disability required civil commitment.[221] The Court found that this disparate treatment did not violate the Equal Protection Clause because Kentucky's reasoning—that diagnosing intellectual disability, establishing dangerousness, and providing treatment for a person with intellectual disability was easier than for a person with mental illness—satisfied the rational basis test.[222]

216. *Id.* at 450.

217. *Id.* at 461–62 (1985) (Marshall, J., concurring in part and dissenting in part) (first quoting University of California Regents v. Bakke, 438 U.S. 265, 303 (1978); and then quoting H. GODDARD, THE POSSIBILITIES OF RESEARCH AS APPLIED TO THE PREVENTION OF FEEBLEMINDEDNESS, PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION 307 (1915) (unable to independently verify second quote)).

218. *Id.* at 464 (Marshall, J., concurring in part and dissenting in part).

219. 509 U.S. 312 (1993).

220. *Id.* at 314–15.

221. *Id.* at 314–15.

222. *Id.* at 322–28 ("There is, moreover, a 'reasonably conceivable state of facts,' from which Kentucky could conclude that the second prerequisite to commitment—that '[t]he person presents a danger or a threat of danger to self, family, or others'—is established more easily, as a general rule, in the case of the [intellectually disabled]." (first quoting FCC v. Beach Commc'ns, 508 U.S. 307, 313 (1993); and then quoting KY. REV. STAT. ANN. § 202B.040 (1991)). The Supreme Court did not consider the respondents' (the class of individuals with intellectual disability) argument that a heightened standard of review should apply, noting that the respondents had not made that argument in the lower courts. *Id.* at 318–19.

These opinions reveal how the Court (and how many other courts) views individuals with intellectual disability. In *Heller*, the Court found that a lower burden of proof for the civil commitment of individuals with intellectual disability, when compared with individuals with mental illness, was rational because it is easier to establish that a person with intellectual disability "presents a danger or a threat of danger to self, family, or others."[223] The Court held that "[p]revious instances of violent behavior are an important indicator of future violent tendencies. [Intellectual disability] is a permanent, relatively static condition, so a determination of dangerousness may be made with some accuracy based on previous behavior."[224] This is tantamount to finding that if an individual with intellectual disability acted dangerously once, they will likely do so again. However, this is an empirically erroneous conclusion—studies show that individuals with intellectual disability are no more likely than the average individual to engage in criminal behavior.[225]

As Justice Souter noted in his dissent, "[B]urdens of proof are assigned and risks of error are allocated not to reflect the mere difficulty of avoiding error, but the importance of avoiding it as judged after a thorough consideration of those respective interests of the parties that will be affected by the allocation."[226] Thus, the question is whether the public's interest in taking away a person's liberty and the individual's interest in their liberty is different when the person is mentally ill versus intellectually disabled.[227] The majority of the Court ignored this concerning rhetoric and allowed Kentucky to use a lower standard of proof to take away the liberty interests of individuals with intellectual disability.[228] The majority opinion in *Heller* allows Kentucky to use

223. *Id.* at 317, 322.

224. *Id.* at 323 (citations omitted).

225. *See* Suzanne Fitzgerald, Nicola S. Gray, John Taylor & Robert J. Snowden, *Risk Factors for Recidivism in Offenders with Intellectual Disabilities*, 17 PSYCH. CRIME & L. 43, 45–46 (2011) (finding that individuals with intellectual disability do not have different risk factors associated with recidivism than non-intellectually disabled offenders). The Court also concluded that the fact that English common law distinguished between people with intellectual disability and those with mental illness (giving the government the ability to profit from the estates of the intellectually disabled but not the mentally ill) "suggests that there is a commonsense distinction." *Heller*, 509 U.S. at 326 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *302–06). Though quite clearly mentally ill individuals and intellectually disabled individuals are distinct from one another, that does not necessarily justify providing one group greater protection for their liberty interests than the other.

226. *Heller*, 509 U.S. at 339.

227. *Id.* at 340. The dissent also dispelled the conclusions in the majority opinion that the civil commitment experience of intellectually disabled individuals is less invasive than that of mentally ill individuals. *Id.* at 341–46 (Souter, J., dissenting) ("[T]here simply is no plausible basis for the Court's assumption that the institutional response to [intellectual disability] is in the main less intrusive in this way than treatment of mental illness.").

228. *Id.* at 324–28.

antiquated and discriminatory understandings of intellectual disability to offer them less protection than individuals with mental illness.[229]

The Supreme Court's checkered treatment of individuals with intellectual disability since *Buck v. Bell* has contributed to continued discrimination against and misunderstanding of these individuals. Thus, the belief that individuals with intellectual disability are more likely to engage in criminal behavior or are in need of incapacitation persists in the criminal legal system. Courts, legislatures, and the public are less likely to support resentencing of these individuals when there is a sense, as erroneous as it may be, that individuals with intellectual disability require continued incarceration to advance public safety.

3. Failure To Apply the Proportionality Principle Outside the Death Penalty Context for Individuals with Intellectual Disability

Proportional sentencing is an integral part of Eighth Amendment doctrine.[230] While the Supreme Court has always applied proportionality principles in death penalty cases, it has not consistently applied it in nondeath cases. Since *Roper*, though, the Court has consistently considered proportionality in cases involving individuals sentenced for crimes committed as children.[231] This section first discusses how the Court has applied the proportionality principle to cases involving those who committed offenses as children. It then considers how the failure to do the same for individuals with intellectual disability has had rippling effects in the criminal legal system.

The genesis of the *Roper* case was *Atkins*. Mr. Roper had exhausted his appeals when *Atkins* was decided.[232] However, he refiled and argued that the same "lesser culpability" analysis that the Court applied for individuals with intellectual disability applied to individuals who had committed offenses as children.[233] The Supreme Court agreed, prohibited the execution of individuals who committed their crimes as children, and cited *Atkins* throughout its opinion in *Roper*.[234]

229. *Id.* at 321–28.

230. Miller v. Alabama, 567 U.S. 460, 474 (2012).

231. 543 U.S. 551, 575 (2005). Following *Roper*, the Court decided *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012), both of which further expanded the application of proportional sentencing for individuals who committed offenses as children. *Graham*, 560 U.S. at 77–79; *Miller*, 567 U.S. at 474.

232. *Roper*, 543 U.S. at 575.

233. *Id.* at 559 ("After these proceedings in Simmons' case had run their course, this Court held that the Eighth and Fourteenth Amendments prohibit the execution of a[n intellectually disabled] person. Simmons filed a new petition for state postconviction relief, arguing that the reasoning of *Atkins* established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed." (internal citations omitted)).

234. *See id.* at 563–67, 571, 575 (including both analysis of *Atkins* and citations to the case for authority).

After the 2005 decision in *Roper*, the Supreme Court revisited juvenile sentencing in *Graham*, and held that juvenile life without parole for nonhomicide offenses violated the Eighth Amendment.[235] The Court reached this conclusion because "penological theory is not adequate to justify life without parole," children involved in nonhomicide offenses have limited culpability, and life without parole is a particularly severe punishment for a child.[236] The Supreme Court again expanded protections for children in *Miller* when it held that mandatory life without parole violated the Eighth Amendment as applied to them.[237] It noted that given "children's diminished culpability and heightened capacity for change . . . appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[238] The Court went on to state: "Although we do not foreclose a sentencer's ability to [impose life without parole for children], we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[239] In *Montgomery v. Louisiana*,[240] the Court made this ruling retroactive.[241] With these cases, the Court required states and the federal government to examine whether the punishments for children were proportional to the crime and to the person convicted of committing that crime.[242]

Because *Graham*, *Miller*, and *Montgomery* required jurisdictions to reexamine the sentences of some who committed offenses as children, many states passed laws to govern these resentencings.[243] Some states simply converted life-without-parole sentences to life with the possibility of parole, while others required individual resentencing hearings for those sentenced to

235. Graham v. Florida, 560 U.S. 48, 74 (2010).

236. *Id.*

237. Miller v. Alabama, 567 U.S. 460, 489 (2012).

238. *Id.* at 479.

239. *Id.* at 480.

240. 577 U.S. 190 (2016).

241. *Id.* at 200.

242. *Id.* at 206 (2016). In its most recent decision on juvenile sentencing, the Court limited the extent to which it required sentencing courts to consider youthfulness. *See* Jones v. Mississippi, 141 S. Ct. 1307, 1323 (2021). In *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), the Court held that a sentencing hearing at which a court does not make an implicit or explicit finding that the offense reflects permanent incorrigibility is sufficient to meet the requirements of *Miller* and *Montgomery*. *Id.* at 1322. This opinion seems contrary to the language in *Miller* (that only the rarest of children would be sentenced to life without parole), *Miller*, 567 U.S. at 484, and *Montgomery* (holding that states were not "free to sentence a child whose crime reflects transient immaturity to life without parole"), *Montgomery*, 577 U.S. at 211. Even with this opinion in *Jones*, the impact of this line of cases on juvenile sentencing and resentencing has been substantial. *See* discussion *infra* this section.

243. *E.g.*, S.B. 9, ch. 827, 2012 Cal. Stat. 6530 (codified as amended at CAL. PENAL CODE § 1170(d)(2)(A)(i) (2012)); Act of May 25, 2015, ch. 152, § 213, 2015 Nev. Stat. 617 (codified at NEV. REV. STAT. § 176.025 (2015)); H.B. 4210, ch. 37, 2014 W. Va. Acts 459 (codified as amended at W. VA. CODE § 61-11-23 (2014)); S.B. 635, ch. 148, 2012 N.C. Sess. Laws 713 (codified at N.C. GEN. STAT. § 15A-1340 (2012)).

life without parole as a juvenile.[244] These decisions normalized the resentencing of individuals who committed offenses as children, and several states have since passed legislation expanding opportunities for resentencing beyond the Supreme Court's mandates. For example, West Virginia,[245] the District of Columbia,[246] Maryland,[247] Nevada,[248] and Virginia[249] have all passed laws permitting individuals who committed offenses as children to seek release after having served either fifteen years (as is the case with West Virginia and the District of Columbia) or twenty years (the remaining states).[250] These laws reflect an understanding that sentences beyond fifteen or twenty years for individuals who have committed any type of offense as a child may not serve a penological purpose.[251]

In contrast, the Supreme Court has not explicitly held that *Atkins* and the proportionality principle apply outside the death penalty context for individuals with intellectual disability.[252] Much of the language in *Atkins* on proportional

244. Act of Feb. 24, 2020, ch. 2, § 53.1-165.1(B), 2020 Va. Acts 1, 9 (codified at VA. CODE ANN. § 53.1-165.1(E) (2021)) (requiring that any person sentenced to life imprisonment while a juvenile and has served at least twenty years shall be eligible for parole); Act of Oct. 1, 2015, Pub. Act No. 15-84, § 54-125a(f), 2015 Conn. Acts. 332, 334–35 (codified at CONN. GEN. STAT. ANN. § 54-125a(f) (2015)) (requiring that any person sentenced to fifty years or more when a juvenile is eligible for parole after serving thirty years); LA. STAT. ANN. § 15:574.4(G) (Westlaw through the 2023 First Extra. Sess.) (allowing those under eighteen who were sentenced to life imprisonment for first degree murder to be eligible for parole after serving twenty-five years); Act of May 25, 2015 § 213, 2015 Nev. Stat. at 618 (allowing those who were under eighteen and sentenced as an adult to be eligible for parole after serving fifteen or twenty years of incarceration, depending on the nature of the offense).

245. Act of Mar. 28, 2014, ch. 37, § 61-11-23, 2014 W. Va. Acts 459, 460–63 (codified at W. VA. CODE § 62-12-13 (2014)).

246. D.C. CODE § 24-403.03 (LEXIS through Mar. 9, 2023). The District of Columbia's law actually allows for the resentencing of individuals who committed offenses before the age of twenty-five. *Id.* § 24-403.03(a) (LEXIS).

247. Act of Apr. 10, 2021, ch. 61, § 8-110, 2021 Md. Laws 1, 2–5 (codified at MD. CODE ANN., CRIM. PROC. § 8-110 (2021)).

248. Act of May 25, 2015 § 213, 2015 Nev. Stat. at 618.

249. Act of Feb. 24, 2020, ch. 2, § 53.1-165.1(B), 2020 Va. Acts 1, 9 (codified at VA. CODE ANN. § 53.1-165.1(E) (2020)).

250. In addition, the New Jersey Supreme Court held in *Comer v. New Jersey*, 266 A.3d 374 (N.J. 2022), that any child convicted of murder (which is subject to a thirty-year mandatory minimum) is entitled to a resentencing hearing after they have served twenty years of their sentence. *Id.* at 398–99.

251. *See* Caitlin J. Taylor, *Ending the Punishment Cycle by Reducing Sentence Length and Reconsidering Evidence-Based Reentry Practices*, 89 TEMP. L. REV. 747, 751–52 (2017) (explaining that shorter sentence lengths would improve recidivism rates); Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 626–27 (2012) (describing how public officials proceed with incarceration reforms with looming public backlash).

252. The Supreme Court has not granted certiorari in any criminal case involving intellectual disability outside of the death penalty context and has denied certiorari in some cases. *E.g.*, United States v. Gibbs, No. 06-10728, 2007 WL 1827119 (11th Cir. June 26, 2007), *cert denied*, 552 U.S. 1005. In *Gibbs*, the Eleventh Circuit specifically held that *Atkins* did not apply outside of the death penalty context:

sentencing, particularly with regard to the decreased culpability of individuals with intellectual disability, is not limited to the death penalty:

> [Intellectually disabled] persons . . . have diminished capacities to understand and process information . . . . Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability . . . . [T]oday our society views [intellectually disabled] offenders as categorically less culpable than the average criminal.[253]

But because the Court has never applied this reasoning beyond the death penalty context, lower courts rarely consider intellectual disability a mitigating factor in sentencing.[254]

For example, in *People v. Brewer*,[255] Mr. Brewer challenged his sixty-three year sentence (the functional equivalent of a life sentence given that he was thirty at the time of the sentencing) arguing that his sentence was disproportionate under the Eighth Amendment because he had the mental age of a ten-year-old.[256] Mr. Brewer argued that *Atkins*, *Miller*, and *Graham* supported his contention that a functional sentence of life without parole for robbery, a nonhomicide offense, was disproportionate.[257] The state intermediate court held, however, that "*Atkins* is inapposite here where the death penalty is

> The Supreme Court's concerns in *Atkins* regarding the heightened level of culpability required for the death penalty are not present here because this is not a capital case. . . . The Supreme Court's determination that [intellectually disabled] criminals, like average murderers, lack the personal culpability to be eligible for the death penalty, which is reserved for the most heinous murder crimes, does not mean that such criminals' diminished culpability always should affect other kinds of sentencing calculations.

Id. at *15.

253. Atkins v. Virginia, 536 U.S. 304, 316, 318 (2002).

254. Only Illinois has enacted legislation specifically permitting consideration of intellectual disability as a mitigating factor outside of the death penalty context. 730 ILL. COMP. STAT. ANN. 5/5-5-3.1 (13) (Westlaw through P.A. 103-1 of the 2023 Reg. Sess.). Of the six states where case law has allowed consideration of intellectual disability as mitigation in a non-death-penalty case, five of those cases are unpublished and thus not binding precedent. State v. Black, No. 45316, 2018 WL 4940310 (Idaho Ct. App. Oct. 12, 2018); McCarty v. State, 802 N.E.2d 959 (Ind. Ct. App. 2004); State v. Jourdain, No. A16-1655, 2017 WL 3687617 (Minn. Ct. App. Aug. 28, 2017); State v. Murphy, No. A-0223-06T4, 2008 WL 631270 (N.J. Super. Ct. App. Div. Mar. 11, 2008); Commonwealth v. Watson, No. 2092 EDA 2016, 2018 WL 2226857 (Pa. Super. Ct. May 16, 2018). Many courts have found that intellectual disability is not mitigating. *See, e.g.*, State v. Little, 50,776, p. 10 (La. App. 2 Cir. 8/10/16), 200 So. 3d 400, 406; Commonwealth v. Jones, 90 N.E.3d 1238, 1252 (Mass. 2018); Commonwealth v. Hamilton, No. 179 WDA 2020, 2021 WL 2285507, at *4 (Pa. Super. Ct. June 1, 2021); State v. Ryan, 396 P.3d 867, 879–80 (Or. 2017); People v. Coty, 2020 IL 123972, ¶ 52; People v. Brewer, 279 Cal. Rptr. 3d 546, 563 (Cal. Ct. App. 2021).

255. 279 Cal. Rptr. 3d 546 (Cal. Ct. App. 2021).

256. *Id.* at 554–55.

257. *Id.* at 558–59.

not implicated,"[258] and that *Miller* and *Graham* "have no applicability to circumstances of a defendant who was twenty-eight when he committed the crimes at issue here and thirty at sentencing."[259] Crucially, the court focused on how children's capacity for rehabilitation was not as evident with individuals with intellectual disability—the court did not consider the Supreme Court's language in *Atkins* that those less culpable (individuals with intellectual disability) should receive lesser sentences than the "average criminal."[260]

In *People v. Coty*,[261] the Illinois Supreme Court not only held that a life without parole sentence for Mr. Coty, who had committed a nonhomicide offense, was proportional even when taking into account his intellectual disability, but also because of it.[262] Again, the Court focused primarily on the ability of children to rehabilitate and develop into law abiding citizens, as contrasted with individuals with intellectual disability who may not "grow-out" of their impulsive behavior.[263]

In recent years, a few courts have relied on and applied the lesser culpability language of *Atkins* outside of the death penalty context.[264] In one instance, the Oregon Supreme Court held that "a sentencing court must consider an offender's intellectual disability in comparing the gravity of the offense and the severity of a mandatory prison sentence . . . in a proportionality analysis."[265] The Court explained:

> [A] sentencing court's findings, among other factual considerations, as to an intellectually disabled offender's level of understanding of the nature and consequences of his or her conduct and ability to conform his or her behavior to the law, will be relevant to the ultimate legal conclusion as to the proportionality—as applied to the offender—of a mandatory prison sentence.[266]

The Texas Court of Appeals held that the automatic imposition of life without parole for a capital offense as applied to an individual with intellectual disability was cruel and unusual.[267] It reached this conclusion "based on the

258. *Id.* at 561.

259. *Id.* at 559.

260. *Id.* at 558–60.

261. 2020 IL 123972.

262. *Id.* ¶¶ 21–23.

263. *Id.* ¶ 24; *see also* Commonwealth v. Yasipour, 2008 PA Super 214, ¶ 25 (holding in a homicide case that the mandatory minimum applied because *Atkins* "concern[s] the constitutional limitations on the imposition of the death penalty). The *Yasipour* court explained that "[a]ppellant, unlike the defendant in *Atkins*, is not subject to sentence of execution for his crime. Thus, we fail to see how *Atkins* supports Appellant's position." *Id.* ¶ 28.

264. *See* State v. Ryan, 396 P.3d 867, 879–80 (Or. 2017); Avalos v. State, 616 S.W.3d 207, 211 (Tex. App. 2020), *rev'd*, 635 S.W.3d 660 (Tex. Crim. App. 2021).

265. *Ryan*, 396 P.3d at 877.

266. *Id.*

267. *Avalos*, 616 S.W.3d at 211.

combined reasoning of *Atkins* and the Court's individualized sentencing cases, which entitled defendants to present mitigating evidence before a trial court may impose the harshest possible penalty."[268]

In non-death-penalty cases, most courts distinguish individuals who committed offenses as children from individuals with intellectual disability by focusing on the unique rehabilitative nature of children.[269] These courts justify the outcome by relying on incorrect assumptions that individuals with intellectual disability are actually more dangerous and more in need of incapacitation than those without.[270] This belief is unfounded: individuals with intellectual disability are no more likely to recidivate than other individuals.[271] Incorporating individuals with intellectual disability into the resentencing movement and releasing some early will not only right some of the wrongs of courts failing to find intellectual disability mitigating, but it will likely also provide evidence that individuals with intellectual disability are not in greater need of incapacitation, are deserving of lesser sentences, and are capable of rehabilitation.

III. INCORPORATING INDIVIDUALS WITH INTELLECTUAL DISABILITY INTO THE RESENTENCING MOVEMENT

A significant majority of the public supports reducing the incarcerated population.[272] As the focus has been on release the most vulnerable incarcerated

268. *Id.*

269. *See, e.g.*, Commonwealth v. Jones, 90 N.E.3d 1238, 1250 (Mass. 2018) ("Furthermore, the Commonwealth argues, adults with intellectual or developmental disabilities may not have the same prospects for rehabilitation as do juveniles, whose brains have not yet fully matured.").

270. Elizabeth Nevins-Saunders, *Not Guilty as Charged: The Myth of Mens Rea for Defendants with Mental Retardation*, 45 U.C. DAVIS L. REV. 1419, 1461, 1464 (2012) ("Indeed, there may be reason to fear that jurors, or even judges, will sentence more, rather than less, harshly because of the defendant's mental retardation if they have the option to do so. Some have even argued that people with mental retardation are over-represented in the criminal justice system because key players in the system, including judges and lawyers, are unsure how to deal with this population in a professional manner.").

271. Dynamic factors are more influential on rates of recidivism than static factors, such as intellectual disability. Paul Gendreau, Tracy Little & Clair Goggin, *A Meta-analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 CRIMINOLOGY 575, 584 tbl.2 (1996); *see also* Fitzgerald et al., *supra* note 225, at 50 ("The finding that criminal history and deviant lifestyle variables are associated with general recidivism in offenders with [intellectual disability] replicates the research literature in general offenders." (citations omitted)); Billy C. Fogden, Stuart D.M. Thomas, Michael Daffern & James R.P. Ogloff, *Crime and Victimization in People with Intellectual Disability: A Case Linkage Study*, 16 BMC PSYCHIATRY 1, 9 (2016) ("In this study, the overall rate of offending did not differ between the intellectually disabled and the community groups.").

272. *See 91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, ACLU (Nov. 16, 2017), https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds [https://perma.cc/KU86-FL7N] (conducting polling through the Benson Strategy Group and finding that seventy-one percent of respondents support reducing the prison population); *Voters Want Big Changes in Federal Sentencing, Prison System: Majority Supports Broad Reforms for Drug*

individuals, individuals with intellectual disability should be among those targeted for early release. Though a number of factors explain why the resentencing movement has not included individuals with intellectual disability,[273] straightforward changes to existing law and litigation strategies can be employed to correct this omission.

The most certain pathway to including individuals with intellectual disability in the resentencing movement is to simply add "individuals with intellectual disability" to eligibility criteria in existing resentencing statutes. If such a statute does not exist, this group should be explicitly included in any new legislation. Though amending or drafting such a statute is not particularly complicated (and there are a number of existing models),[274] any legislation that might result in the release of individuals convicted of serious offenses and serving long sentences will face significant hurdles. Thus, another pathway to inclusion in resentencing for individuals with intellectual disability—at least in jurisdictions with existing compassionate release or similar statutes—is for defense attorneys to use that release mechanism to argue that a person with intellectual disability falls under the prong of the statute that allows for resentencing due to "extraordinary and compelling" or other, similarly broad, reasons.

A. *Enacting Statutes Authorizing the Release of Individuals with Intellectual Disability*

As described above,[275] several states have statutes authorizing the resentencing of individuals who committed offenses as children.[276] Some of these statutes are specifically responsive to the Supreme Court's mandates in *Graham* and *Miller*, but others expand the circumstances in which these individuals can seek resentencing.[277] For many of these statutes, lawmakers could simply add "individuals with intellectual disability" to the eligibility criteria.

Offenses, National Poll Finds, PEW CHARITABLE TRS., https://www.pewtrusts.org/en/research-and-analysis/articles/2016/02/12/voters-want-changes-in-federal-sentencing-prison-system [https://perma.cc/JNX9-4299] (last updated Mar. 8, 2016) ("By wide margins, voters also support other reforms that would reduce the federal prison population.").

273. *See supra* Part II.

274. *See* D.C. CODE § 24–403.03(a)(1)–(2) (LEXIS through Mar. 9, 2023); Juvenile Restoration Act, ch. 61, § 1, 2021 Md. Laws 61 (codified at MD. CODE ANN., CRIM. PROC. §§ 6-235, 8-110 (2021)).

275. *See supra* Section I.A.

276. *See, e.g.*, Juvenile Restoration Act § 1.

277. *See* Alexandra Harrington, *The Constitutionalization of Parole: Fulfilling the Promise of Meaningful Review*, 106 CORNELL L. REV. 1173, 1184–89 (2021) (providing a detailed description of all the ways in which states addressed the *Graham* and *Miller* decisions from automatic sentence reductions to parole hearings to court hearings).

For example, the D.C. statute authorizing the resentencing of individuals who committed offenses as youths states: "Notwithstanding any other provision of law, the court shall reduce a term of imprisonment imposed upon a defendant for an offense committed before the defendant's 25th birthday if . . . ," before listing other eligibility criteria.[278] This language could be altered to read, "Notwithstanding any other provision of law, the court shall reduce a term of imprisonment imposed upon *a defendant with intellectual disability* or a defendant for an offense committed before the defendant's 25th birthday if . . . ." The D.C. statute, like most resentencing statutes, then goes on to mandate that the individual must have served a certain number of years of their sentence and must not be a danger.[279] These are all criteria that could similarly apply to an individual with intellectual disability seeking resentencing.

Resentencing individuals with intellectual disability will pose several issues that individuals convicted for offenses committed as children do not face, but these issues will simply require different litigation approaches—they should not preclude efforts to broaden existing statutes. These differences include: (1) litigation around baseline eligibility, (2) less evidence of change over time, (3) complexities in assessing conduct while incarcerated, and (4) expectations regarding reentry.

1. Litigation Around Baseline Eligibility

For individuals convicted as children, their date of birth and the date of the underlying offense will establish their baseline eligibility for resentencing. However, for many individuals with intellectual disability, particularly with mild intellectual disability, attorneys will need to establish that the person *is* intellectually disabled. Depending on the client and circumstances, the extent of this litigation will vary. Assuming that jurisdictions use the Supreme Court's definition of intellectual disability (which mirrors the definition in the DSM-5),[280] attorneys will need to establish that the disability existed prior to the

278. D.C. CODE § 24–403.03(a)(1)–(2) (LEXIS through Mar. 9, 2023).

279. *Id.* § 24-403.03(a)(1) (LEXIS).

280. Pursuant to the DSM-5, a person has an intellectual disability if they have (a) deficits in intellectual functioning, as confirmed by IQ testing; (b) deficits in adaptive functioning; and (c) onset of the deficits during the developmental period (generally determined to be age eighteen). Saad & ElAdl, *supra* note 110, at 52. Though the DSM-5 does not include a specific IQ cutoff, it is generally understood that a person with an IQ two standard deviations below the mean, which is an IQ of seventy, has an intellectual disability. *Id.* In addition, because the measurement error for most IQ tests is around five, an IQ between sixty-five and seventy-five is generally believed indicative of intellectual deficits. *Id.*

individual's eighteenth birthday, that it impacts adaptive functioning, and that the client has an IQ below seventy plus the SEM.[281]

There are existing models and mechanisms for litigating issues such as intellectual disability. For example, since the COVID-19 pandemic, many organizations—such as law school clinics, private firms, and public defender offices—have litigated complex release eligibility criteria.[282] In compassionate release cases, attorneys pored over medical records and learned the science of virus transmission.[283] Defense organizations set up networks of doctors and other experts to support this litigation.[284] Furthermore, evaluating intellectual disability in the criminal space is not new, and tools have developed to assist advocates and decision-makers.[285] Litigation over whether a person has intellectual disability would be in the same vein, though arguably less complicated, as release cases related to COVID-19.

2. Intellectual Disability and Evidence of Change over Time

A significant perceived difference that many judges focus on between those who committed offenses as children and individuals with intellectual disability is that children have a unique capacity for change.[286] Relatively recent research has revealed that our brains continue developing until the age of twenty-five, particularly with regard to impulsive behavior.[287] Thus, a person who commits a crime when they are fifteen is likely to be a significantly

281. Moore v. Texas, 137 S. Ct. 1039, 1053 (2017); *Defining Criteria for Intellectual Disability*, AM. ASS'N ON INTELL. AND DEVELOPMENTAL DISABILITIES, https://www.aaidd.org/intellectual-disability/definition [https://perma.cc/E7P3-2PEE]; *see also* Ellis et al., *supra* note 113, at 1323–25 (giving an overview of the definition of intellectual disability).

282. *See generally* Mary Price, *The Compassionate Release Clearinghouse, COVID-19, and the Future of Criminal Justice*, 35 CRIM. JUST. 37 (2020) (describing efforts to release vulnerable incarcerated people using compassionate release during the pandemic).

283. During the first two years of the COVID-19 pandemic, I worked with my students in the Criminal Justice Clinic at American University Washington College of Law on many compassionate release motions. In addition, I reviewed dozens of pleadings and orders in these cases from D.C. and other jurisdictions. Defense attorneys learned to litigate issues, such as the risks that end-stage renal failure, obesity, asthma, diabetes, mental health issues, and more posed during the pandemic. We also learned the ins and outs of the opaque and complicated Federal Bureau of Prisons policies and Program Statements. Some of this work was done in consultation with experts while some was self-taught.

284. *See* Price, *supra* note 282, at 40–41.

285. *See* Ellis et al., *supra* note 113, at 1347.

286. "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." Roper v. Simmons, 543 U.S. 551, 570 (2005). "A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity." Graham v. Florida, 560 U.S. 48, 73 (2010).

287. K. Kersting, *Brain Research Advances Help Elucidate Teen Behavior*, 35 MONITOR ON PSYCH. 80, 80 (2004); Hannah Seigel Proff & Michael Stevens Juba, *Evolving the Standard of Decency*, 47 COLO. LAW. 39, 39 (2018).

different person when they seek resentencing at age forty or fifty.[288] Regarding individuals with intellectual disability, such *significant* growth is unlikely, but as all individuals age (and the studies show that this applies both to individuals with intellectual disability and those without), they are less and less likely to commit crimes.[289] Thus, individuals with intellectual disability, just like individuals without intellectual disability, will be less likely to engage in criminal behavior over time.[290]

In addition, the life circumstances for an individual with intellectual disability will likely change over time, making them less likely to engage in criminal behavior upon release. For example, as described *supra*,[291] individuals with intellectual disability often associate themselves with people they believe to be trustworthy. This can be problematic when a person is younger and surrounded by individuals who may be making impulsive and negative choices. As a person with intellectual disability ages, they are more likely to associate with more mature individuals who will provide positive guidance or at least be less likely to commit crimes. For example, a younger sister who was unable to support her brother with intellectual disability when they were teenagers can provide far greater support as an adult.

Furthermore, capacity for change was not the only rationale for the Supreme Court's finding that children should not be subject to the death penalty or mandatory life without parole. Degree of culpability was a substantial consideration, and some individuals with intellectual disability will have a stronger argument regarding diminished culpability than a seventeen- or eighteen-year-old. As Justice O'Connor argued in her dissent in *Roper*,

> For purposes of proportionality analysis, 17-year-olds as a class are qualitatively and materially different from the [intellectually disabled]. "[Intellectually disabled]" offenders, as we understood that category in *Atkins*, are *defined* by precisely the characteristics which render death an excessive punishment. A[n intellectually disabled] person is, "by definition," one whose cognitive and behavioral capacities have been proved to fall below a certain minimum.[292]

A sixteen- or seventeen-year-old may exhibit more impulse control, maturity, and abstract thinking skills than a twenty-seven-year-old with an IQ

288. *See* Proff & Juba, *supra* note 287, at 40; Gerard Glynn & Ilona Vila, *What States Should Do To Provide a Meaningful Opportunity for Review and Release: Recognize Human Worth and Potential*, 24 ST. THOMAS L. REV. 310, 331 (2012).

289. *See* Fitzgerald et al., *supra* note 225, at 44; Gendreau et al., *supra* note 271, at 575 (finding that age is more influential as a predictor of recidivism than intellectual functioning).

290. *See* Greenspan & Switsky, *supra* note 101, at 294–95.

291. *See supra* Section II.A.

292. Roper v. Simmons, 543 U.S. 551, 602 (2005) (O'Connor, J., dissenting) (emphasis in original).

of sixty and very poor adaptive skills.[293] This is not to say individuals convicted of crimes committed as children should not be eligible for a second chance, but limiting the justification for resentencing to children who have a unique capacity for change ignores the many other reasons that we consider certain individuals among the least culpable and most vulnerable.

3. Challenges Assessing Conduct of Individuals with Intellectual Disability While Incarcerated

During the resentencing process, courts often look to a person's behavior while incarcerated in order to evaluate whether they are a danger. By and large, prison is not a rehabilitative place for anyone,[294] but individuals with intellectual disability face challenges in incarceration that may make them appear more dangerous (or less rehabilitated) than they are. These individuals may face three barriers in this context: (1) less access to programming,[295] (2) more disciplinary infractions,[296] and (3) risk-assessment tools that do not account for unique characteristics of individuals with intellectual disability.[297]

Participation in programming during incarceration can be key to demonstrating that a person is not a danger.[298] Some programs even boast that individuals who participate in the program are less likely to recidivate upon release.[299] Individuals with intellectual disability, however, are often excluded

293. *See id.* at 600–02 (2005).

294. *See* J.J. Prescott, Benjamin Pyle & Sonia B. Starr, *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643, 1661–62 (2020); Jennifer E. Copp, *The Impact of Incarceration on the Risk of Violent Recidivism*, 103 MARQ. L. REV. 775, 787 (2020); Daniel P. Mears, Joshua C. Cochran, William D. Bales & Avinash S. Bhati, *Recidivism and Time Served in Prison*, 106 J. CRIM. L. & CRIMINOLOGY 83, 121 (2016).

295. *See, e.g.*, *UNICOR Program*, FED. BUREAU PRISONS, https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp [https://perma.cc/XM5T-7A64] (reporting that people who participate in UNICOR are twenty-four percent less likely to recidivate than those who do not).

296. *See, e.g.*, PETERSILIA, *supra* note 37, at 24 ("Inmates with [intellectual disability] are often unable to read or understand jail regulations. Such signs as 'follow the yellow line for the infirmary' are often not read or understood. What is an 'infirmary'? 'No loitering in hallways' is a cause for an in-house charge of 'insubordination.' But many people with [intellectual disability] are not likely to understand the word 'loitering.'").

297. *See, e.g.*, FED. BUREAU PRISONS, MALE PATTERN RISK SCORING, https://lisa-legalinfo.com/wp-content/uploads/2022/01/PATTERNsheet220131.jpg [https://perma.cc/P4BR-ZPYA] [hereinafter MALE PATTERN RISK SCORING] (demonstrating that a person with a GED or high school diploma gets four points of their score, if they are in enrolled to get their GED two points off their score, and if neither, they get no points of their score); *see also* discussion *infra* text accompanying notes 304–09.

298. *See* Todd Bussert, *What the First Step Act Means for Federal Prisoners*, CHAMPION, May 2019, at 28, 30 (discussing how the First Step Act encourages recidivism reduction programming).

299. *See, e.g.*, FED. BUREAU PRISONS, UNICOR PROGRAM, https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp [https://perma.cc/XM5T-7A64] (noting that people who participate in UNICOR are twenty-four percent less likely to recidivate than those who do not).

from or have limited access to these programs.[300] For example, an eighth grade education level is required for participation in certain highly regarded Federal Bureau of Prisons ("BOP") drug programs.[301] Because many individuals with intellectual disability will never attain that level of education, they are permanently excluded from some of the most highly valued programs to which judges often cite in finding that a person is no longer a danger.

Furthermore, programs specifically for individuals with intellectual disability are few and far between. For example, the BOP has only one program specifically for individuals with intellectual disability: the SKILLS program.[302] Though individuals with intellectual disability likely constitute up to ten percent of the total prison population,[303] the SKILLS program is offered in only two of the 110 BOP facilities.[304] Through no fault of their own, individuals with intellectual disability may have extremely limited access to the types of programming that courts value in resentencing litigation.

One of the other key pieces of evidence that courts consider in assessing dangerousness during resentencing litigation is disciplinary records, which can be misleading when it comes to individuals with intellectual disability. Some individuals with intellectual disability may have very few infractions on their disciplinary record—they may do comparatively well at following the strict rules of a prison setting. Others, though, may have certain deficits that can result in disciplinary infractions.[305] For example, an individual may have deficits in their working memory, which can result in difficulties following instructions.[306] A corrections officer might tell an individual to tuck in his shirt, stand in line, and keep his hands out of his pockets. Because the individual has trouble with working memory, he may only remember the last instruction—to keep his hands out of his pockets—and then fail to tuck in his shirt or stand in line. This person would then get an infraction for failing to follow a corrections officer's orders.

Individuals with intellectual disability are also more likely to be targets for physical violence in prison. Self-defense, though, is generally not available as a

300. *See id.* ("A high school diploma or General Educational Development (GED) certificate is required for all work assignments above entry level (lowest pay level).").

301. *See, e.g.*, PSYCHOLOGY TREATMENT PROGRAMS, *supra* note 3, at 2-6, 2-11 (noting that an eighth-grade education level is required for both the BOP nonresidential and residential drug treatment programs).

302. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., DIRECTORY OF NATIONAL PROGRAMS, 20 (2017) [hereinafter DIRECTORY OF NATIONAL PROGRAMS].

303. PETERSILIA, *supra* note 37, at 12.

304. DIRECTORY OF NATIONAL PROGRAMS, *supra* note 302, at 20.

305. PETERSILIA, *supra* note 37, at 24.

306. *See* Agnieszka J. Jaroslawska, Susan E. Gathercole, Richard J. Allen & Joni Holmes, *Following Instructions from Working Memory: Why Does Action at Encoding and Recall Help?*, 44 MEMORY & COGNITION 1183, 1183–84 (2016).

defense in the prison disciplinary system.[307] Thus, regardless of whether a person was the aggressor, if they are in a fight, they will receive a disciplinary infraction for assault, one of the more serious disciplinary infractions.[308]

Algorithmic risk assessment is widely used in the criminal legal system—it is often used to make pretrial release decisions and determine eligibility for programming and release in the federal prison system.[309] But these can be blunt instruments that result in discrimination in a variety of ways.[310] Specifically, with regards to intellectual disability, the tools can fail to account for the unique attributes of individuals with intellectual disability. For example, the BOP uses the PATTERN Risk Assessment tool to determine eligibility for certain programs, early release, increased good time credit, and other privileges.[311] Education is one of the evaluated categories—a person with a GED or high school diploma receives the greatest benefit (four points off their score), followed by a person enrolled in a GED program (two points off their score).[312] If a person neither has a GED nor is enrolled in a program, they receive a "0."[313] This means that if a person with an intellectual disability has been unable to attain a GED despite spending hundreds of hours in a GED program, they are negatively evaluated in the scoring. These issues are exacerbated because, as described above, individuals with intellectual disability are also excluded from some programming, which can, again, lead to a lower PATTERN score.[314]

Prisons are not designed to be places of accommodation where individuals can thrive—they are intended to be places of order where the system running

307. *See, e.g.*, Rowe v. DeBruyn, 17 F.3d 1047, 1053 (7th Cir. 1994) (holding that "prisoners do not have a fundamental right to self-defense in disciplinary proceedings" and dismissing the incarcerated individual's due process claims).

308. *See, e.g.*, FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., NO. 5270.09, INMATE DISCIPLINE PROGRAM 44 tbl.1 (2011).

309. *See* Brandon L. Garrett, *Federal Criminal Risk Assessment*, 41 CARDOZO L. REV. 101, 103–04 (2019) (describing the expansion of using algorithms in the criminal legal system); Amy B. Cyphert, *Reprogramming Recidivism: The First Step Act and Algorithmic Prediction of Risk*, 51 SETON HALL L. REV. 331, 343 (2020) (noting that a good PATTERN score results in additional good time credits, access to increased programing, and other privileges).

310. *See* SARAH PICARD, MATT WATKINS, MICHAEL REMPEL & ASHMINI KERODAL, CTR. FOR CT. INNOVATION, BEYOND THE ALGORITHM: PRETRIAL REFORM, RISK ASSESSMENT, AND RACIAL FAIRNESS 8–10 (2019), https://www.innovatingjustice.org/sites/default/files/media/document/2019/Beyond_The_Algorithm.pdf [https://perma.cc/VW9M-V5MX] (finding that New York's risk assessment also results in disparate negative outcomes for Black and Latino individuals).

311. *See* Cyphert, *supra* note 309, at 343.

312. MALE PATTERN RISK SCORING, *supra* note 297.

313. *Id.*

314. *Id.* (establishing that the more programming a person completes, the more points off their score they receive).

smoothly is a top priority.[315] Therefore, the prison system rarely considers the unique needs of individuals with intellectual disability, which can result in these individuals having more disciplinary issues and facing other discrimination.[316]

4. Expectations Regarding Reentry

Finally, though anyone returning home after a long period of incarceration will face barriers to obtaining employment and housing, individuals with intellectual disability can experience more significant obstacles and likely need additional supports to successfully transition back into the community.[317] In several lower court decisions that found intellectual disability was *not* a mitigating factor, the court placed emphasis on the need for incapacitation due to lack of support in the community.[318] The need for support should not be a barrier to release. The cost of incarcerating a person, particularly as they age, far exceeds the cost of providing services in the community that would allow them to live independently.[319] Part of the push for legislation that explicitly includes individuals with intellectual disability in resentencing schemes should include an increase in community program funding for intellectually disabled individuals.

B. *Using Existing Compassionate Release Statutes To Resentence Individuals with Intellectual Disability*

Attorneys can start advocating for the resentencing of individuals with intellectual disability in jurisdictions with existing mechanisms for compassionate release. For example, the 2018 First Step Act codified federal

315. *See* James M. Binnall, *Respecting Beasts: The Dehumanizing Quality of the Modern Prison and an Unusual Model for Penal Reform*, 17 J.L. & POL'Y 161, 170–77 (2008) (discussing the objectification of human beings in prison).

316. *See generally* Chiara Eisner, *Prison Is Even Worse When You Have a Disability Like Autism*, MARSHALL PROJECT (Dec. 18, 2020, 10:12 AM), https://www.themarshallproject.org/2020/11/02/prison-is-even-worse-when-you-have-a-disability-like-autism [https://perma.cc/Am8D-7267] (describing the challenges and exploitation individuals with disabilities face in prison).

317. *See* Snell et al., *supra* note 106, at 222–25 (discussing the social integration individuals with intellectual disability face, even without having to reenter society from prison).

318. *See, e.g.*, People v. Coty, 2020 IL 123972, ¶¶ 22–25 (arguing that defendant's intellectual disability is what makes him a continuing danger to reoffend, and therefore incapacitation is justified).

319. *See* Richard A. Van Dorn, Sarah L. Desmarais, John Petrila, Diane Haynes & Jay P. Singh, *Effects of Outpatient Treatment on Risk of Arrest of Adults with Serious Mental Illness and Associated Costs*, 64 PSYCHIATRIC SERVS. 856, 859 (2013) (finding that it cost the state almost $95,000 to incarcerate a person with severe and pervasive mental illness, but just over $68,000 to provide intensive community care); Hope Reese, *What Should We Do About Our Aging Prison Population?*, JSTOR DAILY (July 17, 2019), https://daily.jstor.org/what-should-we-do-about-our-aging-prison-population/ [https://perma.cc/C5ZK-8GUH] (noting that incarcerating individuals over age fifty-five costs $16 billion per year).

compassionate release.[320] The individual seeking release must meet four criteria. They must: (1) have completed administrative exhaustion, (2) have extraordinary and compelling reasons for release, (3) demonstrate that they are not a danger to the community, and (4) establish that reduction is consistent with statutory sentencing factors.[321] Since 2020, nine circuit courts of appeals have held that "the First Step Act freed district courts to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release."[322] In addition to these federal circuits, the District of Columbia's compassionate release statute, which is modeled after the federal statute, includes a catchall provision that allows a person to establish extraordinary and compelling reasons beyond the illustrative examples contained in the statute.[323]

Attorneys have already started seeking compassionate release based on claims of injustice in the criminal legal system. For example, the Second Circuit addressed whether a person could seek compassionate release because the mandatory minimum sentence was excessive, and it held that a court had the discretion to grant a motion for compassionate release in such a case.[324]

Furthermore, the Supreme Court recently held that in any motion for resentencing under the First Step Act, the lower court may consider any information relevant to resentencing, not merely the facts and circumstances at

320. In addition to addressing compassionate release, the First Step Act created additional pathways to early release, such as making the 2010 Fair Sentencing Act fully retroactive. *See* Concepcion v. United States, 142 S. Ct. 2389, 2399–2401 (2022).

321. *See* 18 U.S.C § 3582(c)(1)(A).

322. United States v. Brooker, 976 F.3d 228, 237 (2d Cir. 2020); *see also* United States v. McCoy, 981 F.3d 271, 286 (4th Cir. 2020); United States v. Shkambi, 993 F.3d 388, 393 (5th Cir. 2021); United States v. Jones, 980 F.3d 1098, 1111 (6th Cir. 2020); United States v. Gunn, 980 F.3d 1178, 1180 (7th Cir. 2020); United States v. Aruda, 993 F.3d 797, 802 (9th Cir. 2021); United States v. McGee, 992 F.3d 1035, 1050 (10th Cir. 2021); United States v. Long, 997 F.3d 342, 357 (D.C. Cir. 2021). Prior to the First Step Act, the Sentencing Commission was required by statute to define "extraordinary and compelling reasons," and did so in an extremely narrow manner in its Guidelines. *Brooker*, 976 F.3d at 232 ("[T]he Commission updated that Guideline to explain that extraordinary and compelling reasons for a sentence reduction exist if 'the defendant is suffering from a terminal illness,' from significant decline related to the aging process that would make him unable to care for himself within a prison, or upon 'the death or incapacitation of the defendant's only family member capable of caring for the defendant's minor child or minor children.'" (quoting U.S. SENT'G GUIDELINES MANUAL § 1B1.13 n.1(A)(i)–(iii) (U.S. SENTENCING COMM'N 2007))). A number of courts have recognized that, in passing the First Step Act, Congress intended to expand the number of people for whom compassionate release was available. Since the narrow language in the Guideline ran counter to this legislative intent, that Guideline should no longer be binding on courts. *See, e.g.*, *id.* at 235 ("Congresspersons called it 'expanding,' 'expediting,' and 'improving' compassionate release."). In contrast, the Eleventh Circuit has held that the Sentencing Commission Guidelines still apply. United States v. Bryant, 996 F.3d 1243, 1247–66 (11th Cir. 2021). The First, Third, and Eighth Circuits do not have published opinions on this issue.

323. D.C. CODE § 24-403.04(3) (LEXIS through Mar. 9, 2023).

324. *Brooker*, 976 F.3d at 237–38. The court did not opine as to whether the district court *should* grant the motion for compassionate release, merely that it could. *Id.* at 238.

the time of the original sentencing.[325] Thus, even if an individual is not seeking resentencing solely based on their intellectual disability, they may argue that their intellectual disability is a mitigating factor during the resentencing.[326]

Seeking compassionate release for individuals with intellectual disability, who have been subject to mandatory minimums or whose intellectual disability was not considered at the time of sentencing, is a natural extension of this compassionate release litigation. The often excessive mandatory minimums that have plagued the criminal legal system are particularly unjust for individuals with intellectual disability who are "less culpable" than the average criminal and no more likely to recidivate. In addition, for all the reasons stated *supra*, often intellectual disability was often not considered at the time of sentencing. Compassionate release statutes give individuals with intellectual disability an opportunity to fight for a more just outcome.

CONCLUSION

The law has treated individuals with intellectual disability poorly and the criminal legal system is no different. Resentencing individuals with intellectual disability is one avenue for alleviating some of the wrongs the system has perpetrated. It cannot give back the years that a person needlessly spent incarcerated, but it can stop those lost years from continuing to grow. In addition, stories of successful community reentry will build momentum for the resentencing movement and provide evidence that individuals with intellectual disability do not require such long-term incapacitation.

Though changes to Supreme Court doctrine could quicken the incorporation of individuals with intellectual disability into the resentencing movement, this is not a necessary condition of reform. Nationwide efforts for criminal legal system reform are not tied to the Supreme Court and its jurisprudence—actors both within and outside the criminal legal system are pushing to address injustice. Moreover, mechanisms exist to address injustices that individuals with intellectual disability have faced in the criminal legal system, such as the compassionate release statutes. Relatively small changes to legislation and litigation strategies can have a substantial impact both on individuals with intellectual disability who are incarcerated and on a movement to give them opportunities for resentencing.

325. *Concepcion*, 142 S. Ct. at 2399–2401 (describing the long history of courts having broad discretion during resentencing and the absence of anything in the First Step Act limiting the court's discretion).

326. *See id.* at 2405 ("The First Step Act does not require a district court to be persuaded by the nonfrivolous arguments raised by the parties before it, but it does require the court to consider them.").