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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

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

TIMOTHY CONE*

The development of the Supreme Court of the United States' jurisprudence interpreting the Eighth Amendment's prohibition on "cruel and unusual punishment" has been surprisingly uneven: a good number of cases have been decided regarding the imposition of the death penalty;[1] by contrast, the caselaw respecting punishments less severe than death is much less developed.[2] The Supreme Court's recent application of the proportionality principle—the principle that "grossly disproportionate punishments are unconstitutional"[3]—in *Atkins v. Virginia*[4] holds promise for the development of Eighth Amendment caselaw in non-capital cases. Invoking the proportionality principle, *Atkins* held that the execution of the mentally retarded is unconstitutional.[5] The Court reasoned that, categorically, mentally retarded offenders should not be subject to punishments intended for more deserving offenders.[6] This reasoning can be extended to strike down non-capital punishments on proportionality grounds. This article argues that, in light of *Atkins*, the imposition of statutory mandatory minimums on mentally retarded offenders violates the Eighth Amendment when the result is a disproportionate sentence.

I. BACKGROUND: THE PROPORTIONALITY PRINCIPLE APPLIED TO CAPITAL CASES VERSUS NON-CAPITAL CASES

In capital punishment cases, the Supreme Court of the United States has limited the types of crimes punishable by death.[7] In addition, having ruled in the 1970s that the death penalty cannot be left to the open-ended discretion of the sentencer,[8] the Court went on in decisions in ensuing decades to lay down fairly particularized

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* Assistant Federal Public Defender, Southern District of Florida. J.D. Yale Law School (1984); B.A. Haverford College (1979). This article is not meant to express the views of the Federal Public Defender's Office. I gratefully acknowledge help from Dean John C. Jeffries, Jr., and from Professors Douglas A. Berman and James W. Ellis. This article is dedicated to the memory of Jérôme Baverez, Avocat à la Cour, my friend—Deo gracias!

1. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 360 (1995) (reviewing the host of modern Supreme Court cases governing capital punishment and noting that they give the impression of "enormous regulatory effort").

2. *See* Note, *Legislative Deference in Eighth Amendment Capital Sentencing Challenges: The Constitutional Inadequacy of the Current Judicial Approach*, 50 CASE W. RES. L. REV. 467, 468 (1999) ("challenges to the imposition of the death penalty dominate the judicial landscape in the Eighth Amendment context").

3. Hutto v. Davis, 454 U.S. 370, 377 (1982) (Powell, J., concurring) (quoting Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980)). An example of how the proportionality principle works can be seen in *Solem v. Helm*, 463 U.S. 277 (1983), where the Supreme Court struck down a sentence of life imprisonment as excessive punishment for a recidivist's offense of uttering a no account check.

4. 536 U.S. 304 (2002) (holding that the death penalty is unconstitutional when applied to mentally retarded offenders because, categorically, mentally retarded offenders are less deserving of punishment).

5. *Id.* at 321.

6. *Id.* at 318–21.

7. *E.g.*, Coker v. Georgia, 433 U.S. 584 (1977) (death penalty is excessive punishment for rape); Enmund v. Florida, 458 U.S. 782 (1982) (death penalty is excessive punishment for unintentional taking of life).

8. Furman v. Georgia, 408 U.S. 238 (1972).

guidelines governing the proper consideration of aggravating and mitigating circumstances.[9]

By contrast, Eighth Amendment caselaw addressing non-capital sentences is much less developed. Since 1983, when it struck down a life sentence for a recidivist convicted of check fraud,[10] the Supreme Court has never held a prison term unconstitutional under the Eighth Amendment.[11] "Successful challenges to the proportionality of particular sentences have been exceedingly rare."[12] Indeed, a majority of Justices have yet to agree on a test by which to measure "proportionality"; each new case seems to produce a new approach to this question.[13] These inconsistent analyses leave "unclear" the "precise contours" of the Eighth Amendment in non-capital cases.[14]

"Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."[15] This "qualitative difference between death and all other penalties" became the Supreme Court's justification in *Harmelin v. Michigan* for not requiring any consideration of aggravating and mitigating

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9. *See* Steiker & Steiker, *supra* note 1, at 355 (assessing the impact of the Supreme Court's capital punishment jurisprudence).

10. Solem v. Helm, 463 U.S. 277 (1983).

11. Since deciding *Solem* in 1983, the Supreme Court has decided only three non-capital Eighth Amendment challenges: *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Ewing v. California*, 538 U.S. 11 (2003) (plurality opinion); and *Lockyer v. Andrade*, 538 U.S. 63 (2003).

12. *Ewing*, 538 U.S. at 21 (plurality opinion) (quoting Rummel v. Estelle, 445 U.S. 263, 272 (1980)).

13. In 1983, the Supreme Court stated that the proportionality test involved the consideration of three factors: the inherent gravity of the offense, the sentences imposed for similarly grave offenses in the same jurisdiction, and sentences imposed for the same crime in other jurisdictions. *Solem*, 463 U.S. at 292. Since *Solem*, however, a majority of Justices have not endorsed this test or agreed on a new approach to proportionality issues.

In *Harmelin*, Justices Kennedy, O'Connor, and Souter agreed that the Eighth Amendment embodies only a "narrow" proportionality principle. 501 U.S. at 996 (Kennedy, J., concurring). But Justices White, Blackmun, and Stevens, joined by Justice Marshall, did not agree that the principle was as narrow. *Id.* at 1009 (Marshall, J., dissenting); *id.* at 1027 (White, J., dissenting). Justice Kennedy, rejecting the dissent's criticism that he was effectively "eviscerat[ing]" and "abandon[ing]" *Solem*, wrote that an analysis of the second and third *Solem* factors was unnecessary if the defendant did not make a threshold showing of gross disproportionality. *Id.* at 1005 (citing *id.* at 1018, 1020 (White, J., dissenting)).

Justice Kennedy identified the following relevant principles for a proportionality analysis: "the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system,...the requirement that proportionality review be guided by objective factors [and the fact that the] Eighth Amendment does not require strict proportionality between crime and sentence." *Harmelin*, 501 U.S. at 1001 (Kennedy, J., dissenting). This analysis "guide[d]" the plurality in *Ewing*, but neither the plurality in *Ewing* nor Justice Kennedy's *Harmelin* concurrence had the support of a majority of Justices, and therefore neither constitutes binding precedent in the Supreme Court or in the lower courts. *See* Texas v. Brown, 460 U.S. 730, 737 (1983); *see, e.g.*, DeStefano v. Emergency Housing Group, Inc., 247 F.3d 397, 418–19 (2d Cir. 2001). *But cf.* United States v. Brant, 62 F.3d 367, 368 (11th Cir. 1995) (adopting the *Harmelin* "threshold" test).

Disagreement about the proper proportionality test is also evident in the dissents in *Ewing*: Justice Stevens' dissent joined Justice Breyer's dissenting opinion, though noting that the *Solem* analysis, not Justice Kennedy's *Harmelin* approach (which Justice Breyer followed in *Ewing*) "seem[ed] more directly on point." 538 U.S. at 33 n.1 (Stevens, J., dissenting). Justice Breyer's dissent noted this point and stated that he was only following Justice Kennedy's *Harmelin* approach "for present purposes." *Id.* at 36 (Breyer, J., dissenting).

This article suggests that a proportionality test should focus on whether a punishment measurably advances legitimate penological goals. *See infra* notes 76 and 114 and accompanying text. *See also* Atkins v. Virginia, 536 U.S. 304, 317-21 (2002) (evaluating whether the execution of mentally retarded offenders advances penological goals).

14. *Lockyer*, 538 U.S. at 70–72 ("our proportionality decisions have not been clear or consistent in all respects") (quoting *Harmelin*, 501 U.S. at 996 (Kennedy, J., concurring)).

15. Woodson v. North Carolina, 428 U.S. 280, 304 (1976); *see Harmelin*, 501 U.S. at 995 (death penalty is "unique") (citing *Furman*, 408 U.S. at 306 (Stewart, J., concurring)).

factors in non-capital sentencings, even though this inquiry is required before the death penalty can be imposed.[16] However, looking at the criminal justice system

16. *Harmelin*, 501 U.S. at 995. *Harmelin* left standing a life-sentence without parole for a defendant convicted of possession of 672 grams of cocaine. *Id.* at 961. However, only a three-Justice concurrence, authored by Justice Kennedy, agreed that this was where the Eighth Amendment drew the proportionality line. *Id.* at 996 (Kennedy, J., concurring). Two Justices declined to accept the premise that the Eighth Amendment contains a proportionality guarantee. *Id.* at 961. Four Justices—one more than joined the *Kennedy* concurrence—agreed that the sentence was disproportionate. *Id.* at 1008, 1027. Five Justices, however, did agree that the *mandatory* nature of the sentence did not make it unconstitutional, declining to extend to non-capital cases the "individualized" inquiry into aggravating and mitigating factors required in capital cases. *Id.* at 994–95. This became the sole holding of *Harmelin*. *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (citation omitted); *cf.* Henderson v. Norris, 258 F.3d 706, 708 (8th Cir. 2001) ("Five Justices agreed that a mandatory sentence of life imprisonment without parole for possession of 672 grams, which was the defendant's first offense, was not cruel and unusual.").

One can question whether *Harmelin*'s reliance on this "qualitative difference" was merely a rationalization; as Professor Frank Bowman recently observed, the Supreme Court's "real reason for refusing to extend capital punishment-like proportionality analysis to non-capital penalty schemes probably has as much to do with the practical difficulties of creating useful standards as it does with the 'qualitative' difference between death and long imprisonment." Frank O. Bowman III, Ewing v. California: *The Supreme Court Takes a Walk on "Three Strikes" Laws...and That's Fine*, JURIST (Mar. 24, 2004), *available at* http://jurist.law.pitt.edu/forum/forumnew103.php. Bowman noted that recidivist sentencing schemes have many variations of punishment, depending on the severity of both past and present offenses. Bowman states,

> Across the country, the length of the mandatory sentence called for by various recidivist statutes ranges from as little as five years to as much as life imprisonment. The California regime alone provides five different ways of calculating the applicable minimum sentence depending on the defendant's prior record and the nature of the triggering offense.

Id. He argues that it is therefore "prohibitively difficult" to pin down the point at which a recidivist sentence becomes excessive, and even more difficult for courts to avoid creating an unintelligible "patchwork" of decisions. Bowman views *Ewing* as a "blessing in disguise" because it focuses attention back on state legislatures, which can do more than courts to fix the problem of excessive sentences. *Id.* However, after the unsuccessful challenge in 1991 in *Harmelin* of a statute mandating a life sentence for simple possession of cocaine, it took the Michigan legislature more than ten years before it repealed this law. *See* News Release, Families Against Mandatory Minimums, Michigan Legislature Repeals Draconian Mandatory Minimum Drug Sentences (Dec. 12, 2003), *available at* http://www.famm.org/nr_sentencing_news_mi_release_12_12_02.htm (praising repeal of Michigan sentencing law that had caused "injustices") (last visited Feb. 23, 2004). Moreover, there is no cause for satisfaction when, as Bowman puts it, the Supreme Court "takes a walk" in the face of a twenty-five-year sentence for stealing three golf clubs, which, even for a recidivist, seems patently excessive. *See Ewing*, 538 U.S. 11, 47 (Breyer, J., dissenting) ("Ewing's recidivist sentence is virtually unique in its harshness for his offense of conviction, and by a considerable degree.").

In the same vein, Justice Scalia broadly questions the judiciary's ability to "speak intelligently" about the proportionality of sentences in light of the variety of penological justifications that can underlie a sentence. *Id.* at 31 (Scalia, J., concurring). He also questions the legitimacy of judges substituting their own subjective values for the judgment of state legislatures about proportional punishment. *Harmelin*, 501 U.S. at 986 (opinion of Scalia, J.); *see also Atkins*, 536 U.S. at 341 (2002) (Scalia, J., dissenting) (Eighth Amendment judgments "should not appear to be, merely the subjective views of individual Justices"); Thompson v. Oklahoma, 487 U.S. 815, 854 (1988) (O'Connor, J., concurring) ("I would not substitute our inevitably subjective judgment about the best age at which to draw a line in the capital punishment context for the judgments of the Nation's legislatures.").

Justice Scalia, therefore, views death penalty jurisprudence as entirely distinct from Eighth Amendment law. *Harmelin*, 501 U.S. at 994 (opinion of Scalia, J.) (the proportionality principle is "an aspect of our death penalty jurisprudence, rather than a generalizable aspect of Eighth Amendment law"). In *Ewing*, Justice Scalia maintained that the Eighth Amendment is not a guarantee against disproportionate sentences. 538 U.S. at 31–32 (Scalia, J., concurring, joined by Thomas, J.). But this position cannot be squared with the plain language of the text. The Amendment also bars "excessive" bails and fines. U.S. CONST. amend. VIII. This language inherently implicates proportionality concerns. Since the drafters of the Eighth Amendment clearly foresaw the evil of disproportionate bails and fines, it seems most unlikely that they did not at the same time envisage that terms of incarceration might also be excessive. *See Ewing*, 538 U.S. at 33 (Stevens, J., dissenting) ("It 'would be anomalous indeed' to suggest that the Eighth Amendment makes proportionality review applicable in the context of bail and fines but not in the

as a whole, it does not make sense for the prohibition against cruel and unusual punishments to dissipate when the punishment is less severe than death.[17] Of course, it is appropriate to give death penalty cases priority, because punishment by death is the harshest punishment our justice system imposes on an offender.[18] Since selecting the most extreme option presents a greater risk for extreme results, capital cases inherently raise questions about whether the punishment fits the crime.[19] To avoid extreme, and therefore unacceptable, results,[20] it was natural for a "narrowing jurisprudence" to have developed in the specific context of the death penalty to "ensure that only the most deserving of execution are put to death."[21]

However, as a majority of Justices now recognize, there is no legal impediment to applying the "proportionality principle" in both capital[22] and non-capital[23] Eighth

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context of other forms of punishment, such as imprisonment.") (quoting Solem v. Helm, 463 U.S. 277, 289 (1983)); John C. Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 147 (1986) ("The eighth amendment to the Constitution of the United States forbids excessive bail, excessive fines, and cruel and unusual punishment. The three are obviously related.").

17. *Cf.* Harris v. United States, 536 U.S. 545, 579 (2002) (Thomas, J., dissenting) ("fundamental constitutional principles cannot alter depending on degrees of sentencing severity") (Sixth Amendment case).

18. *See* Gregg v. Georgia, 428 U.S. 153, 187 (1976) (because death is "unique in its severity and irrevocability," the Court has been "particularly sensitive to insure that every safeguard is observed"); Sinclair v. State, 657 So. 2d 1138, 1142 (Fla. 1995) ("Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review *to consider the totality of the circumstances in a case, and to compare it with other capital cases.*") (emphasis added) (applying Florida law); Bridgette M. Palmer, Note, *Death as a Proportionate Penalty for the Rape of a Child: Considering One State's Current Law*, 15 GA. ST. U. L. REV. 843, 851 (1999) (noting that in *Coker v. Georgia*, the Supreme Court "extended the Eighth Amendment proportionality review to death penalty cases because punishment of death is 'unique in its severity and irrevocability'"); *cf.* Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 147 (2002) (noting that some consider the death penalty inherently disproportionate because the purposes of punishment can be achieved through less extreme action).

19. *See Gregg*, 428 U.S. at 187 (because death is "unique in its severity and irrevocability," the Court has been "particularly sensitive to insure that every safeguard is observed"); *Sinclair*, 657 So. 2d at 1142 ("Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review *to consider the totality of the circumstances in a case, and to compare it with other capital cases.*") (emphasis added) (applying Florida law); Note, *Death as a Proportionate Penalty for the Rape of a Child: Considering One State's Current Law*, *supra* note 18, at 851 (noting that, in *Coker v. Georgia*, the Supreme Court extended the proportionality review of death penalty cases because death is unique in severity and irrevocability); *cf.* Barak, *supra* note 18, at 147 (noting that some consider the death penalty inherently disproportionate because the purposes of punishment can be achieved through less extreme action).

20. The five Justices who ruled against the defendant in the fractured *Harmelin* decision nonetheless explicitly agreed that the Eighth Amendment would apply in "extreme" cases. *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring, joined by O'Connor & Souter, JJ.); *id.* at 962 (opinion of Scalia, J., & Rehnquist, C.J.) (conceding that the disproportionality principle would come into play in "extreme" cases).

21. *Atkins*, 536 U.S. at 319. The Supreme Court's "narrowing jurisprudence" has narrowed the application of the death penalty, but a "narrowing jurisprudence" need not be limited to the death penalty and can, outside the death penalty context, narrow the range of sentences that are constitutional rather than cruel and unusual.

22. The proportionality precept explains how the Supreme Court, while never banning the death penalty, has been able to rationalize its limited application. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 308 (1987) (because state procedures properly focused sentencing discretion, the death penalty was not imposed "wantonly and freakishly" and, therefore, was not "disproportionate" under the Eighth Amendment); *Harmelin*, 501 U.S. at 1018 (White, J., dissenting) ("our capital punishment cases...do not outlaw death as a mode or method of punishment, but instead put limits on its application. If the concept of proportionality is downgraded in the Eighth Amendment calculus, much of this Court's capital penalty jurisprudence will rest on quicksand."); Carol S. Steicker & Jordan M. Steicker, *Let God Sort Them Out: Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 854 (1992) ("most aggravating circumstances serve a proportionality function rather than an individualizing function [because] they connect punishment to harm and social cost").

23. *Ewing*, 538 U.S. at 24 (applying the "proportionality principle" to assess the validity of a lengthy sentence of incarceration under California's Three Strikes Law).

Amendment cases.[24] Legal principles that are first developed in capital cases can have equal force in non-capital cases; for example, the Supreme Court initially was willing to admit of a constitutional right to the assistance of counsel only in capital cases[25] but later found that this right exists in all criminal cases.[26]

Moreover, although Supreme Court Justices have repeatedly stated that death is a unique punishment in *both* its "severity and irrevocability,"[27] in reality, for Eighth Amendment purposes, the *severity* of the death penalty matters much more than its irrevocability. The irrevocability of the death penalty becomes most relevant when one assumes that an *innocent* person has been executed, since the unjust result can never be altered.[28] But, Eighth Amendment analysis assumes that the defendant is *guilty*—indeed, in appeals of death sentences, guilty of a heinous crime.[29] Eighth Amendment proportionality analysis weighs severity similarly in capital and non-capital cases.[30] And, from the standpoint of severity, non-capital penalties can be more severe and disproportional than capital punishment, because, under certain circumstances, life can be more painful than death.[31] "Grossly disproportionate" sentences (*i.e.*, sentences prohibited under the proportionality principle as excessive) can occur for a variety of reasons, not all of them having to do with death.

A punishment can be excessive not because the penalty in and of itself is unacceptably cruel, but primarily because the penalty is harsh *in relation to* the conduct at issue. For example, the Supreme Court has recognized that the proportionality principle would come into play "if a legislature made overtime parking a felony punishable by life imprisonment."[32] Life imprisonment, of course, is a harsh penalty, but its imposition for the relatively innocuous misconduct of overtime parking would make it not just harsh, but "cruel and unusual."[33]

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24. Tallying the opinions of the plurality and the dissent in *Ewing v. California*, a total of seven Justices now agree that a "proportionality principle" governs non-capital Eighth Amendment cases. *Ewing*, 538 U.S. at 23–24 (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., & Kennedy, J.); *id.* at 36-37 (dissent of Breyer, J., joined by Stevens, Souter, & Ginsburg, JJ.).

25. Bute v. Illinois, 333 U.S. 640, 674 (1948) (finding that the circumstances did not warrant the appointment of counsel but recognizing that if the case had involved capital charges the State would have been required to assign competent counsel to represent the defendant); Betts v. Brady, 316 U.S. 455 (1942) (holding that there is a right to appointed counsel in state capital cases but not in non-capital cases).

26. Gideon v. Wainwright, 372 U.S. 335, 347 (1963) (Clark, J., concurring) (noting the evolution of the right to counsel from capital to non-capital cases).

27. *See, e.g.*, *Gregg*, 428 U.S. at 187 ("There is no question that death is unique in its severity and irrevocability.").

28. *See, e.g.*, Crane McClennen, *Capital Punishment in Arizona*, ARIZ. ATT'Y, Oct. 1992, at 21 ("because of the irrevocable nature of the death penalty, we need a system that has sufficient safeguards to see that an innocent person is not executed").

29. *See Furman*, 408 U.S. at 286 (Brennan, J., concurring) (noting that "those States that still inflict death reserve it for the most heinous crimes").

30. *Compare, e.g.*, *Atkins*, 536 U.S. at 319 ("the severity of the appropriate punishment necessarily depends on the culpability of the offender") (capital case), *with Solem*, 463 U.S. at 299 (striking down sentence because the defendant was "treated in the same manner as, or more severely than, criminals who have committed far more serious crimes") (non-capital case).

31. *See* Michel de Montaigne, *That the Taste of Good and Evil Depends in Large Part on the Opinion We Have of Them in* ESSAYS I, 14, 34 (Donald Frame trans., 1965) (~1577) ("And even as some await [death] trembling and afraid, others endure it more easily than life.").

32. *Rummel*, 445 U.S. 263, 274 n.11 (1980).

33. *Ewing*, 538 U.S at 21 (reaffirming that the Eighth Amendment would "come into play" if the legislature made overtime parking punishable by life imprisonment).

Moreover, even if a serious offense were at issue, a diminished *mental* culpability can cause an otherwise permissible penalty to become disproportionate.[34] Indeed, this is the crucial holding of the Supreme Court's decision in *Atkins*—a decision that promises to reconnect the heretofore disparate tracks of capital and non-capital Eighth Amendment caselaw.[35] *Atkins* recognizes that the Eighth Amendment circumscribes the range of punishments that can be imposed on offenders who have diminished mental culpability. This principle has force outside of capital cases, for example,[36] in cases where the prosecution seeks to impose a mandatory minimum term of imprisonment on mentally retarded offenders in non-capital cases.

II. *ATKINS* CIRCUMSCRIBES THE RANGE OF PERMISSIBLE PUNISHMENT FOR THE LEAST DESERVING OFFENDERS

Atkins v. Virginia[37] held that the Eighth Amendment bars the execution of mentally retarded persons, thereby overruling the 1989 case of *Penry v. Lynaugh*.[38] In *Penry*,[39] the Supreme Court of the United States recognized that mental retardation was a mitigating factor of constitutional significance,[40] which had to be considered by the sentencer in capital cases;[41] but the Court held that the execution of mentally retarded offenders does not violate the Eighth Amendment's prohibition on "cruel and unusual punishment."[42] In overruling *Penry*, *Atkins* effectively held that the mental retardation mitigator was so significant that it made the mentally retarded categorically ineligible for the death penalty.[43]

Atkins began by noting the line of caselaw holding that the Eighth Amendment's prohibition on "cruel and unusual punishment" invalidates sentences that are

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34. The notion that defendants with a lesser mens rea are less deserving of punishment is, of course, a basic feature of our criminal justice system. *See, e.g.*, Boyde v. California, 494 U.S. 370, 400 (1990) (Marshall, J., dissenting) ("a criminal defendant may be considered *less culpable* and thus *less deserving* of severe punishment if he encountered unusual difficulties in his background, suffers from limited intellectual or emotional resources, or possesses redeeming qualities") (second emphasis added).

35. The interconnection of capital and non-capital Eighth Amendment jurisprudence is manifest in *Atkins*, which, though it involved the death penalty, relied on non-capital cases for the proposition that the Eighth Amendment embodies a "proportionality precept." 536 U.S. at 311 (citing Weems v. United States, 217 U.S. 349 (1910); *Harmelin*, 501 U.S. 957; Robinson v. California, 370 U.S. 360 (1962)). The interconnection between capital and non-capital caselaw is also evident outside the Eighth Amendment context. For example, *Ring v. Arizona*, 536 U.S. 584 (2002), a capital case, drew upon *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a non-capital case, in holding a sentencing scheme unconstitutional under the Sixth Amendment. *See also* Mitchell v. Esparza, 540 U.S. ___, 124 S. Ct. 7, 10 (2003) (per curiam) ("We cannot say that because the violation occurred in the context of a capital sentencing proceeding that our precedent requires the opposite result [from the one reached in non-capital cases].").

36. *See infra* notes 112–115 and accompanying text. The implications of *Atkins* outside the death penalty context are not limited to mentally retarded offenders. This article focuses on mentally retarded offenders because they were the offenders at issue in *Atkins*.

37. 536 U.S. 304 (2002).

38. Penry v. Lynaugh, 492 U.S. 302 (1989); *Atkins*, 536 U.S. at 321.

39. 492 U.S. 302 (1989).

40. *Id.* at 328.

41. *Id.*

42. *Id.* at 335.

43. *See* Mark Alan Ozimek, Note, *The Case for a More Workable Standard in Death Penalty Jurisprudence:* Atkins v. Virginia *and Categorical Exemptions under the Imprudent "Evolving Standards of Decency" Doctrine*, 34 U. TOL. L. REV. 651, 684 (2003) (*Atkins* changed mental retardation from a "sentence-mitigator" to a basis for "categorical exemption.").

"grossly disproportionate."[44] Applying this "proportionality precept," the Court then analyzed the proportionality of executing mentally retarded criminals, focusing on whether the two "penological purposes" of capital punishment, retribution[45] and deterrence,[46] are advanced by the execution of the mentally retarded.[47] Retribution and deterrence are the two principal justifications for punishment, especially when that punishment is the death penalty.[48]

For retribution purposes, the Court noted, "the severity of the appropriate punishment necessarily depends on the culpability of the offender."[49] The recent trend in many states' legislation to eliminate capital punishment for the mentally retarded, as well as other indicators of public opinion, showed that society now viewed mentally retarded offenders "as categorically less culpable than the average criminal."[50] The Justices noted that their own views had also evolved, finding that the "deficiencies" of the mentally retarded "diminish their personal culpability";[51] and since capital punishment is reserved for "the most deserving of execution," the Court concluded that it is "excessive" to execute mentally retarded persons.[52]

As for deterrence, the Court wrote, "the increased severity of the punishment...inhibits criminal actors from carrying out their murderous conduct."[53] But, mentally retarded persons are "less likely" than average offenders to "control their conduct," even when the severity of punishment is increased.[54] Hence, executing the mentally retarded does not measurably further the goal of deterrence.[55]

Atkins' significance should not be confined to capital punishment. The Court's willingness to reverse *Penry*[56] plainly did not arise from the nature of the punishment; the severity of death had remained unchanged in the thirteen years since *Penry*. Moreover, *Atkins* involved a murder heinous enough to qualify the defendant for execution.[57] But, the Court did not decide that death was excessive punishment based on a judgment regarding the relative egregiousness of the defendant's

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44. 536 U.S. at 311–13.

45. "Retribution" refers to society's "need to offset a criminal act by a punishment of equivalent 'moral quality.'" Ford v. Wainwright, 477 U.S. 399, 408 (1986).

46. "Deterrence refers to the use of punishment to discourage future criminal conduct." Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1155 (2003) (citation omitted).

47. *Atkins*, 536 U.S. at 313–21.

48. *Id.* at 318–19.

49. *Id.* at 319.

50. *Id.* at 316.

51. *Id.* at 318.

52. *Id.* at 319.

53. *Id.* at 320.

54. *Id.*

55. *Id.* It bears noting that the reasoning in *Atkins* places a limitation on the deference that the judiciary ordinarily shows toward legislative choices on how to achieve penological goals through sentencing. Ordinarily, the determination of the maximum possible sentence for a given offense is "purely a matter of legislative prerogative." *Rummel*, 445 U.S. at 274. Accordingly, the judiciary gives "substantial deference" to such legislative determinations. *Solem*, 463 U.S. at 290; *see also Gregg*, 428 U.S. at 174 ("Of course, the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts. This does not mean that judges have no role to play, for the Eighth Amendment is a restraint upon the exercise of legislative power.").

56. *Penry*, 492 U.S. 302.

57. *Atkins*, 536 U.S. at 338 (Scalia, J., dissenting) (Atkins shot the victim "one, two, three, four, five, six, seven, eight times in the thorax, chest, abdomen, arms, and legs.").

conduct;[58] *i.e.*, the severity of Atkins' crime did not figure into the Court's Eighth Amendment analysis.[59]

In short, the Court grounded its ruling on the offender's lessened mental culpability—not on the lack of egregiousness of the offensive conduct or the nature of the death penalty itself.[60] The lessened mental culpability of the offender drove the Court's proportionality analysis. By finding the mentally retarded "categorically less culpable than the *average* criminal,"[61] the Court differentiated that group, not just from the most deserving offenders for whom death is a permitted punishment,[62] but even from "average" offenders, for whom death is impermissible punishment.[63] *Atkins* recognized that an ordinarily permissible punishment can be unconstitutional, nonetheless, as to certain categories of less deserving offenders.[64] In effect, the Court recognized a category of offenders "least deserving" of punishment. The "narrowing" effect of Eighth Amendment jurisprudence drew upon a recognition that the diminished mental culpability of an offender circumscribes the range of constitutionally permissible punishment.[65] This principle has significant implications outside the death penalty context,[66] particularly in non-capital cases where the applicable sentence is a minimum term of incarceration mandated by statute.[67]

III. THE *ATKINS* PROPORTIONALITY TEST APPLIED TO NONCAPITAL, MANDATORY MINIMUM SENTENCES

In *Harmelin*, the Supreme Court of the United States rejected the contention "that a sentence which is not otherwise cruel and unusual becomes so simply because it is mandatory."[68] In effect, the Court held that the "mandatory" nature of a sentence does not make it unconstitutional. However sound this holding may be,[69] it does not

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58. As noted *supra* and *infra*, notes 57–63 and accompanying text, the *Atkins* opinion focused on the diminished culpability of the mentally retarded generally and did not address the circumstances of the defendant's crime.

59. *See Atkins*, 536 U.S. at 338 (Scalia, J., dissenting) (criticizing the majority for presenting an "abridged" version of the murder).

60. *Id.* at 319.

61. *Id.* at 316 (emphasis added).

62. *Id.* at 319–20 (noting that the cold calculus of premeditated murderers places these offenders "at the opposite end of the spectrum" from the mentally retarded).

63. *Id.* at 319 ("If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.").

64. *See* Note, *Implementing* Atkins, 116 HARV. L. REV. 2565, 2583 n.120 (2003) (*Atkins* "removed" mental retardation from the typical balancing of factors at sentencing and made this factor a "mandatory" basis for not imposing the death penalty.).

65. Notably, the majority did not adopt Justice Scalia's view that retribution is based on the "depravity of the crime" rather than on the mental capacity of the offender. *Atkins*, 536 U.S. at 350 (Scalia, J., dissenting).

66. *But cf.* Harris v. McAdory, 334 F.3d 665, 668 n.1 (7th Cir. 2003) ("A cursory glance at *Atkins* reveals that the Court was addressing the issue of mental retardation solely in the context of capital punishment.").

67. *See infra* notes 70–113 and accompanying text.

68. *Harmelin*, 501 U.S. at 995 (internal quotation marks omitted).

69. More recent opinions of the Justices are less approving of mandatory sentences. *Cf.* Harris v. United States, 536 U.S. 545, 568 (2002) (acknowledging that criticisms of mandatory minimums for failing to account for the unique circumstances of offenders who warrant a lesser penalty "may be sound"); *id.* at 570 (Breyer, J., concurring) ("Mandatory minimum statutes are fundamentally inconsistent with...a fair, honest, and rational sentencing system."). *See also* Almendarez-Torres v. United States, 523 U.S. 224, 245 (1998) (noting "risk of unfairness" of mandatory minimums); *cf. High Court Justice Crusades for Mercy*, S.F. CHRON., Aug. 10, 2003, at

shield mandatory sentences from constitutional scrutiny for their *disproportionality*.[70] As noted above, *Atkins* held that, for proportionality purposes, mental retardation is a mitigator of conclusive significance with respect to capital punishment;[71] thus, under the Eighth Amendment, the fact of mental retardation forecloses an inquiry into whether to apply the death penalty. For non-capital cases, this suggests that, although the mental retardation mitigator does not foreclose imposition of any particular term of incarceration, it is *still relevant* to the proportionality, and hence the constitutionality, of the sentence.[72]

The relevance of the mental retardation mitigator to the proportionality of a non-capital case sentence cannot be ignored simply by labeling the sentence as "mandatory." Because the relevance of this mitigator arises as a matter of *constitutional law*, a mandatory minimum *statute* cannot make it any less relevant by cutting off its consideration.[73] To the contrary, under the rationale of *Atkins*, when a sentencing judge determines that, as applied to a mentally retarded offender, a statutory mandatory minimum term, be it a five, twenty, or fifty-year term of imprisonment, might be "grossly disproportionate," that judge has a *constitutional duty* to consider whether the sentence might violate the Eighth Amendment.[74] If a judge concludes

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A2 (At a speech at the ABA Convention in San Francisco, Justice Kennedy called for the repeal of mandatory minimum sentences.).

Harmelin involved an average, first-time offender, not a mentally retarded defendant. 501 U.S. at 994. The case therefore is not on point with respect to the validity of mandating punishments for offenders who are "categorically less culpable than the average criminal." *Atkins*, 536 U.S. at 316.

In addition, Justice Scalia's refusal to require consideration of mitigating factors in non-capital cases largely relied on his separate opinion in that case, which found *no* support for a "gross disproportionality" precept in the Eighth Amendment. *Harmelin*, 501 U.S. at 994 (opinion of Scalia, J., & Rehnquist, C.J.) ("*As our earlier discussion should make clear*, th[e] claim [that mitigating factors must be considered in non-capital cases] has no support in the text and history of the Eighth Amendment.") (emphasis added). But Justice Scalia's "earlier discussion" was not the law then and has not gotten any closer to becoming law. Chief Justice Rehnquist, who had joined Justice Scalia's separate opinion in *Harmelin*, 501 U.S. at 961, recently agreed that the Eighth Amendment contains a proportionality guarantee. *Ewing*, 538 U.S. at 13. Justice Souter, who joined Justice Scalia's *Harmelin* opinion upholding a mandatory life sentence for a first-time drug offender, now questions whether a mandatory sentence of twenty-five years for a recidivist who commits another felony is "constitutionally sound." *Lockyer*, 538 U.S. at 81 (Souter, J., dissenting). Plainly, some wind has gone out of the sails of Justice Scalia's *Harmelin* opinion, and the current horizon does not promise him much of a fresh breeze. Indeed, Michigan recently repealed the very statute upheld in *Harmelin*. *See* News Release, Families Against Mandatory Minimums, *supra* note 16; Fox Butterfield, *With Cash Tight, States Reassess Long Jail Terms*, N.Y. TIMES, Nov. 10, 2003, at A1 (reporting that many states are abandoning the "mandatory minimum" approach to crime).

70. *Harmelin* left open the extent to which future sentences might be successfully challenged on disproportionality grounds. The splintered votes of the Justices in *Harmelin* failed to deliver even a plurality opinion on whether the challenged sentence was "grossly disproportional." *See Ewing*, 538 U.S. at 23 ("A majority of the Court rejected Harmelin's claim that his sentence was so grossly disproportionate that it violated the Eighth Amendment. The Court, however, could not agree on why his proportionality argument failed."); *see also Lockyer*, 538 U.S. at 70–77 (The lower court could not be faulted for unreasonably interpreting the Court's Eighth Amendment precedents because the current jurisprudence is a "thicket," the "precise contours" of which remain "unclear.").

71. *Atkins*, 536 U.S. at 321 ("'the Constitution places a substantive restriction on the State's power to take the life' of a mentally retarded offender") (citation omitted).

72. *Cf.* Francis v. Franklin, 471 U.S. 307, 333 (1985) (Rehnquist, J., dissenting) (facts that might not create a "conclusive presumption" can nonetheless give rise to a "rebuttable presumption" because they are "still relevant" to the analysis).

73. *See* Marbury v. Madison, 5 U.S. 137, 178 (1803) (Constitution supersedes conflicting statutes).

74. *See Harmelin*, 501 U.S. at 1017 (White, J., dissenting) (The Supreme Court has a "duty [under the Eighth Amendment] to assess the constitutionality of punishments enacted by state legislative bodies.") (citing *Marbury*, 5 U.S. at 177); *see also* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 868 (1992) ("this Court

that the mandatory sentence in fact would be "grossly disproportionate" for that offender, the judge must disregard the statute and reduce the sentence to avoid imposing an unconstitutional sentence.[75]

The present sentencing landscape confirms that mandatory sentences can be problematic if applied to the mentally retarded.[76] At the state level, many states recognize the need to sentence mentally retarded offenders less severely than average defendants.[77] At least two states have legislation that allows departures from mandatory minimums.[78] All of these state laws, in effect, recognize a *categorical*

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cannot and should not assume any exemption when duty requires it to decide a case in conformance with the Constitution"); Wright v. West, 505 U.S. 277, 300 (1992) (O'Connor, J., concurring) (in federal habeas cases, the duty of adjudicating constitutional principles is left to the federal judge) (citation omitted); Dickerson v. United States, 530 U.S. 428, 446 (2000) (Scalia, J., dissenting) (the power of judges "will permit, indeed require [them] to 'disregard' a duly enacted statute if it is 'in opposition to the constitution'") (citing *Marbury*, 5 U.S. at 178).

75. *Cf. Henderson*, 258 F.3d at 714 (striking down a state drug-trafficking sentence as excessive under Eighth Amendment grounds).

76. It is unclear whether, as part of "gross disproportionality" analysis, the case law requires comparisons of the petitioner's punishment with sentences imposed for the same offense in other jurisdictions, which in the capital punishment context is viewed as the "clearest and most reliable" evidence on the question of proportionality. *Atkins*, 536 U.S. at 312. It can be argued that these comparisons should play no role in proportionality analysis. *See* Michael J. O'Conner, Note, *What Would Darwin Say? The Mis-Evolution of the Eighth Amendment*, 78 NOTRE DAME L. REV. 1389, 1390 (2003) (arguing that "state legislation should be abandoned as the judicial measuring stick" in Eighth Amendment cases).

In *Ewing*, the plurality opinion did not rest on state-by-state comparison of sentences to gauge the California Three Strike Law's proportionality. To the contrary, the opinion cited approvingly Justice Kennedy's statement that the Eighth Amendment "'did not mandate' comparative analysis 'within and between jurisdictions.'" 538 U.S. at 23 (citing *Harmelin*, 501 U.S. at 1004–05 (Kennedy, J., concurring)). Further, the opinion ignored the dissent's Appendix listing States that punished the offense less severely than California.

In *Rummel*, a non-capital case, the Court rejected the defendant's reliance on a "comparison" of his term of incarceration in Texas with the penalties for the same offense in the other forty-nine states and noted that the Court's reliance on such comparative data in capital cases was inapposite: "It is one thing for a court to compare those States that impose capital punishment for a specific offense with those States that do not. It is quite another thing for a court to attempt to evaluate the position of any particular recidivist scheme within Rummel's complex [interstate] matrix." *Rummel*, 445 U.S. at 279 (citation omitted).

For my part, I am skeptical whether the legislative sentencing landscape should ground Eighth Amendment law: as laws change, the landscape is constantly shifting, and the laws can be good, bad, and even ugly. *See* O'Conner, *supra* at 1416–17 (relying on legislation as an indicator of morality fails to recognize that laws can be both moral and immoral); *see also Atkins*, 536 U.S. at 315 (noting that "anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime"). As discussed *infra*, note 114, a better approach is to ground Eighth Amendment determinations in an inquiry into whether a given sentence *measurably advances legitimate penological goals*. Once this determination has been made, the legislative landscape can then serve as a useful metric to determine how much a sentence should be reduced to avoid gross disproportionality. *See infra* note 114 and accompanying text.

77. *See* State v. Hoffman, 745 So. 2d 985 (Fla. Dist. Ct. App. 1999) (affirming FLA. STAT. § 921.0016(4)(c) downward guideline departure based on defendant's "inferior intelligence"); State v. Barsness, 473 N.W.2d 325, 329 (Minn. Ct. App. 1991) (affirming thirty-six-month downward departure based in part on defendant's "borderline" mental retardation); State v. Jarbath, 555 A.2d 559 (N.J. 1989) ("serious injustice" to impose any prison time on mentally retarded offender, when the goals of deterrence would not be served); Commonwealth v. Sheridan, 502 A.2d 694, 697 (Pa. Super Ct. 1985) (affirming downward departure to probation based in part on defendant's "restricted intelligence"); *see also* S.A. Garcia & H.V. Steele, *Mentally Retarded Offenders in the Criminal Justice and Mental Retardation Services System in Florida: Philosophical, Placement and Treatment Issues*, 41 ARK. L. REV. 809, 832 (1988) (in clinical studies, "students gave mentally retarded offenders lighter sentences than 'normal' offenders, regardless of the crime committed").

78. *See* State v. Keith, 955 P.2d 966, 969 (Mont. 2000) ("[section] 46-18-222(2), MCA, does permit the sentencing court to reject the mandatory minimum sentence if it determines that the defendant's mental capacity was significantly impaired during the commission of the offense"); People v. Waters, 595 N.E.2d 1369, 1375 (Ill. App. Ct. 1992) (construing Illinois law to permit a court to sentence below the mandatory minimum for a mentally retarded offender. "While the criminal acts of a mentally disabled person are not per se excused, our society has

difference. This certainly validates an initial judgment that the application of a sentence prescribed for typical cases could be "grossly disproportional" when applied to the mentally retarded.[79]

Similarly, at the federal level, the United States Sentencing Guidelines[80] provide that, if the defendant committed the offense "while suffering from a significantly reduced mental capacity," a sentence below the guideline range may be warranted where the offense did not involve violence.[81] This makes mental deficiency one of the Guidelines' "encouraged" grounds for downward departure.[82] Thus, the Guidelines expressly recognize that mentally retarded defendants are categorically outside the "heartland" of typical cases.[83]

In fact, for a federal judge, analyzing whether and to what extent a mandatory term of incarceration is disproportionate for a mentally retarded offender is akin to evaluating whether a case is so "outside the heartland" of the Sentencing Guidelines that a defendant is entitled to a downward departure below the range mandated by the applicable Sentencing Guideline.[84] The Guidelines provide that a departure is appropriate "where conduct significantly differs from the norm."[85] Analytically, determining whether conduct "significantly differs from the norm" is similar to finding, as the Supreme Court did in *Atkins*, that a defendant is "categorically" less culpable than the "average" offender.[86]

For federal appellate courts, review of the magnitude of a departure from the mandatory minimum would be similar to review of district court departures from the Sentencing Guidelines. The Sentencing Guideline statute requires reviewing courts to examine whether a departure by the district court "departs to an unreasonable

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evolved to an understanding that because of a disability a sentence of imprisonment may not serve the ends of justice and the interests of society and the offender.") (citation omitted); *cf.* State v. Silverman, 977 P. 2d 1186, 1190 (Or. Ct. App. 1999) (reversing departure below the mandatory minimum where "nothing about defendant's circumstances or mental health" made the sentence more shocking than when applied in average cases).

79. *See generally* HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS (2003) (describing how state prisons in the United States are ill-equipped to incarcerate mentally ill inmates).

80. UNITED STATES SENTENCING GUIDELINES MANUAL (2003).

81. *Id.* § 5K2.13.

82. *Cf.* Koon v. United States, 518 U.S. 81, 94 (1996).

83. *See* UNITED STATES SENTENCING GUIDELINES MANUAL ch.1, pt. A, cmt. (b) (2003).

84. *See id.* § 5K2.0 *et seq.*

85. *See id.* ch.1, pt. A, § 4(b); *Koon*, 518 U.S. at 96, 109. If a factor is a "discouraged" basis for departure under the Guidelines, a departure is still appropriate if the factor "is present to an exceptional degree." *Koon*, 518 U.S. at 96. *See, e.g.*, United States v. Allen, 250 F. Supp. 2d 317, 322 (S.D.N.Y. 2003) (granting downward departure to defendant whose mind was "somewhat slow"; "a limited period of incarceration will sufficiently serve the twin aims of punishment and deterrence"); United States v. Adonis, 744 F. Supp. 336 (D.D.C. 1990) (granting mentally retarded defendant a downward departure).

86. A decision to depart downward from the prescribed Guidelines range is often based on a mitigating circumstance that "somehow reduces a defendant's guilt or culpability." United States v. Newby, 11 F.3d 1143, 1148 (3rd Cir. 1993) (listing various grounds for downward departure under the Sentencing Guidelines). Likewise, a finding that a punishment is "excessive" under the Eighth Amendment involves a determination that the punishment is not warranted in relation to the defendant's culpability. *See Atkins*, 536 U.S. at 318 (for capital punishment purposes, deficiencies of the mentally retarded diminish their "personal culpability"); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 434–35 (2001) (in evaluating the proportionality of punitive damages or fines under the Eighth Amendment, the Court has focused in part on "the degree of the defendant's reprehensibility or culpability") (citing United States v. Bajakajian, 524 U.S. 321, 337, 339, 340–43 (1998) (striking down fine as excessive under Eighth Amendment on account of defendant's "minimal level of culpability")).

degree from the applicable guidelines range."[87] Applying this standard, appellate courts have turned to the Guidelines as a reference for what constitutes a "reasonable" departure, sometimes even requiring district courts to make an analogy to other Guidelines sections to justify their departures.[88]

This metric could be applied to determine whether, for Eighth Amendment purposes, a district court correctly sentenced a mentally retarded offender below a mandatory minimum.[89] The Guidelines provide a two-level to four-level downward sentence adjustment for defendants who play a "minor" or "minimal" role in the offense.[90] This is an objective measure of how a defendant's diminished culpability for an offense should weigh in relation to his overall sentence. Both the Eighth Amendment concern here and the Guidelines role adjustment provision relate to the "level of culpability" of an offender.[91] One way of measuring the reduced level of culpability of a mentally retarded offender in non-capital cases is by looking to the way the Guidelines reduce punishment based on an offender's limited responsibility for an offense, since criminal responsibility and culpability are related concepts.[92] Thus, a mentally retarded offender typically ought to be eligible for a two-to-four level downward adjustment from the mandatory minimum.

For example, a mentally retarded offender convicted of importing more than 500 grams of cocaine, after pleading guilty and receiving a three-level "acceptance of responsibility" sentence reduction, typically would have an offense level of twenty-three, *i.e.*, for a first-time offender, a sentence of forty-six to fifty-seven months.[93] Statutorily, however, he would be subject to a mandatory five-year sentence.[94] Under the rule proposed here, if the offender were mentally retarded, a federal sentencing judge could borrow from the Guidelines and reduce the sentence (to avoid a conflict with the Eighth Amendment's prohibition of "cruel and unusual punishment") by the equivalent of three Guidelines levels (between the two and four-level reductions provided by the Guidelines for offenders with diminished

87. *See* 18 U.S.C. § 3742(e)(3) (2003).

88. *See* Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 57 nn.134, 135 (2000) (collecting cases); *see also Bajakajian*, 524 U.S. at 338–39 (noting that the applicable penalties under Sentencing Guidelines "confirm [defendant's] minimal level of culpability" and the excessiveness of his fine under the Eighth Amendment). Analogous statutes can also provide a useful metric to determine the magnitude of a sentence reduction. *Cf., e.g.*, United States v. Fan, 36 F.3d 240, 245 (2d Cir. 1994) ("Reference to an analogous statute is a well-established method to determine the magnitude of an upward departure.").

89. *See Henderson*, 258 F.3d at 714 (relying on the lesser punishment under the Federal Sentencing Guidelines for an equivalent offense as support for a decision to strike down a State drug-trafficking sentence on Eighth Amendment grounds); *id.* at 713 (relying on the lesser sentence under the State's advisory sentencing guidelines as a basis for striking down the mandatory sentence on Eighth Amendment grounds).

90. UNITED STATES SENTENCING GUIDELINES MANUAL § 3B1.2 (2003).

91. *See id.* § 3B1.2, cmt. 4 (minimal role adjustment is meant to apply to defendants who are "among the least culpable" of those involved in the offense).

92. *See* Smith v. Francis, 474 U.S. 925, 929 (Marshall, J., dissenting from the denial of certiorari) (for mentally retarded offenders the "level of personal responsibility and moral guilt" is lower than for average offenders) (citation omitted).

93. UNITED STATES SENTENCING GUIDELINES MANUAL § 2D1.1(7) (2003); *id.* § 3E1.1; *id.* ch. 5, pt. A, table.

94. 21 U.S.C. § 960(b)(2)(B) (2003).

culpability).[95] Thus, the mentally retarded offender's offense level would now be twenty. For a first-time offender, the sentence has dropped from the mandatory five years to thirty-three to forty-one months,[96] a reduction of roughly two years.[97]

Admittedly, the analogy to Guidelines departures is not perfect because the size of district court departures has been treated as a case-specific determination, for which appellate review has been "quite deferential";[98] whereas a determination that a sentence is "grossly disproportional," like any ruling anchored in the Constitution, is binding for a generality of cases.[99] Thus, whereas departure caselaw left flexibility for future courts to reach different results—even under analogous facts—a constitutional determination is binding on future cases, and, in that respect, rigid. This difference, however, largely reflects how courts to date have interpreted the review provisions of the Sentencing Reform Act; an approach that is arguably incorrect[100] and, in any event, is bound to change under the requirement of the 2003 "Feeney Amendment" to the Sentencing Reform Act that appellate courts review lower court departures "de novo."[101] Just as, post-Feeney Amendment, appellate review of a departure will provide guidance to district courts regarding the correct magnitude of a departure,[102] appellate decisions concerning mandatory minimums that are "grossly disproportional" will provide useful benchmarks on the constitutional boundaries for these cases.[103]

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95. *See* United States v. Cordova, 337 F.3d 1246, 1250 (10th Cir. 2003) (reversing fifteen-level departure based on the defendant's reduced mental capacity and holding that on remand a two to four level departure would be appropriate).

96. UNITED STATES SENTENCING GUIDELINES MANUAL ch. 5, pt. A, table (2003).

97. One could argue that *Harmelin* precludes interpreting the Eighth Amendment to require a three-year sentence for a drug trafficking offense involving more than 500 grams of cocaine, even for a mentally retarded offender, since *Harmelin* left standing a life sentence without parole for a defendant convicted of possession of 672 grams of cocaine. 501 U.S. 957. However, as explained in *supra* note 16, the holding of *Harmelin* was limited to the only ground for decision on which five Justices agreed. This narrow ground did not address the proportionality of a life sentence for possession of 672 grams of cocaine. Consequently, *Harmelin* is not binding precedent on the question of whether a life sentence for possession of 672 grams of cocaine is "grossly disproportional." In *Lockyer*, the Court analyzed the "contours" of its Eighth Amendment jurisprudence, and, while recognizing that the defendant's sentence and the facts in that case fell "in between" *Solem* and *Rummel*, the opinion did not even mention the sentence and facts of *Harmelin*. *Lockyer*, 538 U.S. at 74. This omission confirms that the *Harmelin* sentence is not a benchmark for Eighth Amendment gross disproportionality law.

98. *See* Berman, *supra* note 88, at 57, n.133.

99. *See, e.g.*, Braun v. Powell, 77 F. Supp. 2d 973, 996 (E.D. Wis. 1999) (decision of a court of appeals interpreting the Constitution as binding on any federal district court within that circuit), *rev'd on other grounds*, 227 F.3d 908 (7th Cir. 2000).

100. *See* Berman, *supra* note 88, at 99 ("[T]here would be considerable benefits from refocusing departure jurisprudence to be highly discretionary and deferential concerning the threshold decision to depart, but rigorous in its examination and review of the extent of departures.").

101. 18 U.S.C. § 3742(e) (2003).

102. *See* Mark H. Allenbaugh, *Who's Afraid of the Federal Judiciary? Why Congress' Fear of Judicial Sentencing Discretion May Undermine a Generation of Reform*, CHAMPION, June 2003, at 11 (Feeney Amendment will force appellate courts to provide district courts with "more certain guidance on when and to what degree departures are warranted").

103. This body of law would resemble the "common law of sentencing" that some commentators believe should evolve alongside the caselaw interpreting the Sentencing Guidelines. *See* Berman, *supra* note 88, at 35 n.46 (citing Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 283–85 (1977)); Douglas A. Berman, *A Common Law for This Federal Age of Sentencing: The Need and Opportunity for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 98 (1999).

It bears noting that not all disproportionate sentences raise constitutional concerns; only "grossly" disproportionate ones.[104] "Plain error" analysis can inform courts concerning the threshold at which a mandatory sentence becomes so "grossly disproportional" that it violates the proportionality principle. "Plain error" requires reversal of a sentence on appeal, even when the defendant failed to object to the error in the lower court, because the error is not only "plain" under applicable law, but also because the error impacts the defendant's "substantial rights" and "seriously affects the fairness, integrity, and public reputation of judicial proceedings."[105] A "grossly disproportional" sentence is like a sentence infected by "plain error" because it substantially prejudices the individual defendant and does so in a manner that undermines the legitimacy of the proceedings.[106]

The case law indicates that "plain error" can occur when the defendant was sentenced under the wrong guideline range and the resulting error affected the defendant's sentence by no less than ten percent.[107] This ten percent margin of error can be applied in the "grossly disproportional" context. Thus, if a judge determines that the diminished culpability of a mentally retarded offender warrants a downward departure but the departure would be less than ten percent of the sentence, the Eighth Amendment would not require the judge to adjust the sentence. However, if the judge determines that the diminished culpability of the offender requires a departure of ten percent or more from the otherwise applicable sentence, the Eighth Amendment would require the judge to grant a departure because the sentence

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104. *See Ewing*, 538 U.S. at 23 ("the Eighth Amendment does not require strict proportionality between crime and sentence [but] forbids only extreme sentences that are 'grossly disproportionate' to the crime") (quoting *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring)).

One could, of course, interpret the Eighth Amendment to require stricter proportionality than just avoidance of "grossly" unfair sentences, since "proportionality in sentencing" is now widely recognized as a fundamental principle of sentencing laws. See UNITED STATES SENTENCING GUIDELINES MANUAL ch. 1, pt. A, intro., n. 3. (2003).

105. United States v. Olano, 507 U.S. 725, 735 (1993) (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

106. *See* United States v. Castillo-Casiano, 198 F.3d 787, 792 (9th Cir. 1999) (plain error where district court erroneously believed it lacked authority to depart; "sentencing errors that might have affected the defendant's sentence undermine the fairness of sentencing proceedings"); *cf.* United States v. Cotton, 535 U.S. 625, 634 (2002) ("the fairness and integrity of the criminal justice system depends on meting out to those inflicting the greatest harm on society the most severe punishments").

107. *See* United States v. Knight, 266 F.3d 203, 205, 207 (3rd Cir. 2001) (plain error where defendant erroneously sentenced to 162 months but correct guideline range was 140 to 175 months); United States v. Ford, 88 F.3d 1350, 1356 (4th Cir. 1996) (plain error where defendant sentenced to 360 months under wrong guideline would have received a 324-month sentence if correctly sentenced); United States v. Osuna, 189 F.3d 1289, 1295 (10th Cir. 1999) (plain error where defendant sentenced to fifty-one months and guideline range was forty-six to fifty-seven months, not fifty-one to sixty-three months); United States v. Wallace, 32 F.3d 1171, 1174 (7th Cir. 1994) (plain error where defendant sentenced to 168 months should have been eligible for 151-month low-end sentence). Plain error generally occurs when a defendant is sentenced under the wrong Guideline range. *Knight*, 266 F.3d at 207. Generally, application of the wrong Guidelines range results in a ten-percent error. For example, for an offender with Criminal History Category I, the low-end of the Guideline range is seventy months for an offense level of twenty-seven and sixty-three months for a level twenty-six. UNITED STATES SENTENCING GUIDELINES MANUAL ch. 5, pt. A, table (2003). If a defendant is originally sentenced at the low-end under level twenty-seven and then (after reversal on appeal for "plain error") is resentenced at the low end of the guideline range for level twenty-six, the difference between the two low-end sentences is seven months. Seven months represents ten percent of the original seventy-month sentence. This percentage difference between low-ends from offense level to offense level is greater for offense levels eighteen and below, but the ten percent differential holds for most offense levels in the table. It therefore seems like a fair measure of "plain error." *But see* United States v. Guerrero, 5 F.3d 868 (5th Cir. 1993) (a discrepancy of only one offense level militates against a finding of plain error).

would be grossly disproportionate for the offender's degree of culpability, even if the applicable sentence is a minimum mandated by statute.[108]

To be sure, this ten percent line, and the Guidelines-guided metric for departure discussed above, may at first appear to be somewhat arbitrary. But, as Justice Stevens noted in his dissent in *Ewing v. California*,[109] courts are "constantly" called upon to draw lines in a variety of constitutional contexts (*e.g.*, punitive damages under due process, speedy trial delays under the Sixth Amendment);[110] once the lines are drawn, they have a way of no longer seeming arbitrary, but of laying down "constitutional boundaries."[111]

CONCLUSION

Atkins recognized that the Eighth Amendment circumscribes the range of punishments that can be imposed on offenders who have diminished mental culpability, and this principle has force in cases where the prosecution seeks to impose a mandatory minimum term of imprisonment on mentally retarded offenders in non-capital cases. In the future, it is conceivable that mitigators other than mental retardation could systematically call into question the proportionality of a mandatory sentence.[112] A sentencing court could conclude that another category of ameliorating

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108. Although ten percent might not seem "excessive" in the absolute, in the Eighth Amendment context it is a fair benchmark of "gross disproportionality." Under the Sixth Amendment, "any" amount of jail time is constitutionally significant. Glover v. United States, 531 U.S. 198, 203 (2001). Moreover, even a "minimal amount" of unwarranted additional jail time is sufficiently prejudicial to support a finding that defense counsel's assistance was constitutionally deficient. *Id.*

109. *Ewing*, 538 U.S. at 32 (Stevens, J., dissenting).

110. *Id.* at 33–34.

111. *See, e.g.*, *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring). "The severity of petitioner's crime brings his sentence *within the constitutional boundaries established by our prior decisions.*" *Id.* at 1004 (emphasis added).

The current "constitutional boundaries" leave plenty of room for a determination that a mandatory minimum is unconstitutional as applied to mentally retarded offenders (or other offenders who can show that they are categorically less culpable than average offenders). *Atkins*' holding that the most extreme sanction is excessive when applied to less culpable offenders can be read in conjunction with *Solem*, which held that a life sentence without parole was disproportional for a recidivist. *Solem*, 463 U.S. 277. Recidivists constitute the most culpable category of offenders. *See Ewing*, 538 U.S. at 24 (career criminals are "the class of offenders who pose the greatest threat to public safety"). If the life sentence in *Solem* was grossly disproportional for recidivists, it surely can also be grossly disproportional for mentally retarded offenders. Putting *Atkins* and *Solem* together, it is fair to infer that punishments short of death, such as mandatory terms of imprisonment, can be grossly disproportional, especially when applied to the mentally retarded.

Some might object that so many defendants will be able to claim that they are categorically less culpable than average offenders that the rule proposed here would undermine statutory mandatory minimums. However, judges should be able to discern whether a defendant has established that legitimate penological goals are not advanced by the imposition of the mandated minimum punishment. The defendant would have to show that his circumstances truly are categorically different from the average offender's. In any event, the demise of mandatory minimums may not be something to be regretted. *See ABA to Study Federal Sentencing*, ABA J. & REP., Aug. 15, 2003 (ABA President announces that a committee will study whether mandatory minimum sentences "should be discarded"); *supra* note 70 (discussing Supreme Court Justices' doubts about the fairness of mandatory sentences); Butterfield, *supra* note 69.

112. *See* Roper v. Simmons, 112 S.W.3d 397 (Mo. 2003), *cert. granted*, 124 S. Ct. 1171 (U.S. Jan. 26, 2004) (No. 03-633) (granting certiorari to review whether the execution of persons under the age of seventeen is cruel and unusual); Robin M.A. Weeks, Note, *Comparing Children to the Mentally Retarded: How the Decision in* Atkins v. Virginia *Will Affect the Execution of Juvenile Offenders*, 17 BYU J. PUB. L. 451, 475-82 (2003) (discussing the possible extension of *Atkins* to prohibit the execution of juveniles); Edmund P. Power, *Too Young to Die: The Juvenile Death Penalty after* Atkins v. Virginia, 15 CAP. DEF. J. 93 (2002) (advocating the prohibition of the

circumstances rises to constitutional stature by finding, as the Supreme Court did in *Atkins*, that the punishment does not measurably advance legitimate penological goals.[113] Contrary to Justice Scalia's view, these are matters about which courts are able to "speak intelligently."[114]

There will be room for disagreement about whether punishments fail to measurably advance legitimate penological goals.[115] As this debate unfolds, the

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execution of juveniles based on *Atkins*); Margaret Talbot, *The Executioner's I.Q. Test*, N.Y. TIMES, June 29, 2003, § 6 (Magazine), at 30 (arguing that individuals other than the mentally retarded may be entitled to more lenient treatment under the criminal law).

113. *See Atkins*, 536 U.S. at 321 (execution of the mentally retarded does not "measurably advance" the goals of the death penalty).

114. *Ewing*, 538 U.S. at 31 (Scalia, J., concurring). As explained below, a court, in fact, can judge whether a penological goal is legitimate and whether a punishment measurably advances that goal. For instance, in *Ewing* the plurality upheld California's Three Strikes Law based on data that showed (1) the crime rate of recidivists justified imposing sentences designed to incapacitate and (2) a drop in the crime rate after repeat felons were incapacitated. *Ewing*, 538 U.S. at 26-28.

Justice Scalia himself, when pressed, has been able to explain why, contrary to the majority, he believes a particular punishment does further a penological goal. *See Atkins*, 536 U.S. at 351 (Scalia, J., dissenting) ("[if] mental retardation does not render the offender morally *blameless*, there is no basis for saying that the death penalty is *never* appropriate retribution....But surely the deterrent effect of a penalty is adequately vindicated if it successfully deters many, but not all, of the target class.") (citations omitted). Justice Scalia is not alone in grounding his Eighth Amendment positions in a judgment concerning whether a punishment advances rational penological goals. In *Overton v. Bazzetta*, 539 U.S. 126, ____, 123 S. Ct. 2162, 2170 (2003), the Court linked its decision concerning the validity of prison restrictions on visitation of inmates under the Eighth Amendment to its earlier discussion of their validity under the First Amendment. This earlier discussion considered whether the regulations bore "a rational relation *to legitimate penological interests*." *Id.* at ____, 123 S. Ct. at 2167 (emphasis added). This inquiry into whether legitimate penological interests are being furthered is, in fact, a theme in Eighth Amendment cases. *See Ewing*, 538 U.S. at 25 (plurality opinion) ("[a] sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation"); *id.* (the valid goal of the Three Strikes Law is to incapacitate repeat felons); *id.* at 1190 ("Ewing's incapacitation is justified by the State's public-safety interest in incapacitating and deterring recidivist felons"); *Atkins*, 536 U.S. at 317 (examining "the relationship between mental retardation and the penological purposes served by the death penalty"); *Harmelin*, 501 U.S. at 1003 ("the Michigan legislature could with reason conclude that the threat posed to the individual and society by possession of [a] large amount of cocaine [warrants] a life sentence without parole"); *id.* at 1028 (Stevens, J., dissenting) (failure of a sentence to "even purport to serve a rehabilitative function" as to this offense was "irrational").

In the future, the Eighth Amendment should be expressly grounded in considerations regarding whether the punishment at issue is measurably advancing legitimate penological goals. This approach, it bears noting, is consistent with the factors federal judges should consider generally when sentencing. *See* Berman, *supra* note 88, at 8 n.64 (citing 18 U.S.C. § 3553(a) (1994)); United States v. Pullen, 89 F.3d 368, 370 (7th Cir. 1996) (consistency with the goals of deterrence, incapacitation, and retribution is "a reason in favor of a departure"); United States v. Godfrey, 22 F.3d 1048, 1058 (11th Cir. 1994) (departure not justified because sentence was not excessive in relation to penological goals). It is also consonant with the approach some commentators are urging in the administration of departures under the Sentencing Guidelines. *See* Berman, *supra* note 88, at 96, 107 (arguing that decisions regarding departures from the Sentencing Guidelines should "focus primarily" on the "purposes of punishment" and the "traditional goals of sentencing"); *accord* Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home*, 24 S.C. L. REV. 649, 651 (2003) (arguing that judges making departures have merely been going "by the book" and should instead consider "traditional sentencing goals").

115. *See Ewing*, 538 U.S. at 31 (Scalia, J., concurring) (acknowledging "in all fairness" that the plurality failed to demonstrate that a sentence of twenty-five years to life was proportionate for the theft of three golf clubs); *Lockyer*, 538 U.S. at 82 (Souter, J., dissenting) (consecutive twenty-five-year to life sentences not proportionate for two thefts of a handful of videotapes); *Harmelin*, 501 U.S. at 1028 (Stevens, J., dissenting) (failure of sentence to "even purport to serve a rehabilitative function" was "irrational"); *cf.* United States v. Uphoff, 232 F.3d 624 (8th Cir. 2000) (imposition of five-year mandatory sentence on defendant with mental illness did not violate Eighth Amendment); United States v. Yirkovsky, 276 F.3d 384 (8th Cir. 2001) (en banc) (Arnold, J., dissenting from denial of en banc review) (noting that on its face the mandatory sentence imposed was "grossly disproportional"); Daniel Bergner, *When Forever Is Far Too Long*, N.Y. TIMES, June 17, 2003, at A27 (suggesting that lifetime prisoners should be given a second chance at freedom).

Eighth Amendment will "draw[] its meaning from the evolving standards of decency that mark the progress of a maturing society."[116] These evolving standards ought to create a jurisprudence that strives to keep the "least deserving" offenders free of "cruel and unusual" punishments.

116. *Atkins*, 536 U.S. at 312 (citation omitted).