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For Mice or Men or Children - Will the Expansion of the Eighth Amendment in *Atkins v. Virginia* Force the Supreme Court to Re-Examine the Minimum Age for the Death Penalty

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FOR MICE OR MEN OR CHILDREN? WILL THE EXPANSION OF THE EIGHTH AMENDMENT IN *ATKINS V. VIRGINIA* FORCE THE SUPREME COURT TO RE- EXAMINE THE MINIMUM AGE FOR THE DEATH PENALTY?

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

I. INTRODUCTION

In May 2003, the United States Supreme Court removed mentally retarded criminals from eligibility for the death penalty during sentencing proceedings. Basing its decision upon the recent trend of legislation in various states removing retarded offenders from their sentencing schemes, the Court in *Atkins v. Virginia* expanded the Court's Eighth Amendment "cruel and unusual punishment" jurisprudence. The phrase "cruel and unusual" evolves along with society's values and the Court looks to objective indicia such as legislation and jury verdicts to determine when a "national consensus" has developed against a practice. When the Court finds that such a "consensus" exists, the practice is determined to be "cruel and unusual punishment" and thus unconstitutional. In *Atkins*, the Court continued their policy of looking outside of its walls and into society to find that the combination of recently enacted legislation, jury verdicts, the statements of international, religious and professional organizations, and polling data indicated a "national consensus" against executing mentally retarded offenders. While the Court's method follows precedent, the result does not. The "national consensus" in *Atkins* is far weaker than any that has been previously relied upon to strike down a sentencing scheme under the Eighth Amendment. The Court has lowered its standards for defining a "national consensus," and this decision will have substantial future implications. With this new lower standard, the Court should accept certiorari for an age-related appeal and re-examine the minimum age of eligibility for the death penalty.

II. BACKGROUND: THE EVOLVING STANDARD OF THE EIGHTH AMENDMENT'S PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENT

A. THE BEGINNING OF THE COURT'S MODERN ANALYSIS OF THE EIGHTH AMENDMENT

1. Weems v. United States

In *Weems v. United States*,¹ the Court found that it was “cruel and unusual punishment” under the Eighth Amendment² to sentence a man convicted of falsifying two public documents to “twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council.”³ The Court wrote that such a punishment offended Americans’ belief that “it is a precept of justice that punishment for crime should be graduated and proportioned to offense.”⁴ The Court acknowledged that the Framers of the Bill of Rights and the members of Congress who passed the Bill explicitly left the term “cruel and unusual punishment” without a strict definition.⁵ The lack of a confined definition has allowed the Court to look beyond the original intent of the drafters and has forced the Constitution to evolve. “Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth.”⁶ Constitutions are “‘designed to approach immortality as nearly as human institutions can approach it.’ . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.”⁷ By allowing the Constitution to evolve along with society and demonstrating the battle between the legislative and judicial branches, this decision set the tone for the development of Eighth Amendment “cruel and unusual” jurisprudence.

¹ 217 U.S. 349 (1910).

² “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

³ *Weems*, 217 U.S. at 366.

⁴ *Id.* at 366-67.

⁵ *See id.* at 368-69.

⁶ *Id.* at 373.

⁷ *Id.*

2. *Trop v. Dulles*

In *Trop v. Dulles*,⁸ the Court decided that Section 401(g) of the Nationality Act of 1940 violated the Eighth Amendment as “cruel and unusual punishment.”⁹ The Act allowed for the citizenship rights to be revoked from a deserter of the armed forces who was court-martialed and dishonorably discharged.¹⁰ Chief Justice Warren recognized the inherent vagueness of the terms “cruel and unusual,” but instead of inserting a rigid definition, the Court stated that the meaning must be found in the “evolving standards of decency that mark the progress of a maturing society.”¹¹ In deciding what constituted “evolving standards of decency,” the Court looked to international law.¹² The reality of a punishment such as loss of citizenship was not physical, but instead, stripped the offender of all political rights and left him stateless.¹³ At the time of this decision, denationalization was the punishment for desertion in only two other countries, the Philippines and Turkey.¹⁴ These statistics led the Court to declare denationalization “a fate universally decried by civilized people,” thereby establishing that it did not fall within the “standard of decency.”¹⁵

⁸ 356 U.S. 86 (1957).

⁹ *Id.* at 101. The text of section 401(g) read:

A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by . . . (g) Deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces: *Provided*, That notwithstanding loss of nationality or citizenship or civil or political rights under the terms of this or previous Acts by reason of desertion committed in time of war, restoration to active duty with such military or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military or naval authority, prior or subsequent to the effective date of this Act, shall be deemed to have the immediate effect of restoring such nationality or citizenship and all civil and political rights heretofore or hereafter so lost and of removing all civil and political disabilities resulting therefrom

Id. at 88 n.1 (citing Nationality Act of 1940 § 401(g), 8 U.S.C. § 1481(a)(8) (2002)).

¹⁰ *Id.* at 88.

¹¹ *Id.* at 101.

¹² *See id.* at 102.

¹³ *Id.* at 101.

¹⁴ *Id.* at 103.

¹⁵ *Id.* at 102.

B. DEATH PENALTY AND THE EIGHTH AMENDMENT—THE
CONSENSUS ANALYSIS

1. Coker v. Georgia—Death Penalty for a Crime less than Murder

In *Coker v. Georgia*,¹⁶ the Court struck down a Georgia statute that allowed persons convicted of rape to be sentenced to death.¹⁷ The Court found that there was a consensus against the proportionality of this punishment within the United States and around the world.¹⁸ Following *Furman v. Georgia*,¹⁹ only three out of sixteen states that had revised their death penalty sentencing schemes to ensure constitutionality included death as an available sentence for a rape conviction.²⁰ No state that had previously excluded death for a rape conviction imposed the penalty in their new statute.²¹ Nineteen states had recently enacted death penalty statutes and none of them had included rape as a capital offense.²² Overall, at the time of this decision, Georgia was the only jurisdiction that allowed a death sentence to be imposed upon an individual convicted of the rape of an adult woman.²³

Beyond the legislation relating to rape and the death penalty, the Court considered jury verdicts persuasive in finding a national consensus against imposing a death sentence for rape.²⁴ In Georgia, nine out of ten juries had not imposed death on a convicted rapist.²⁵ These two considerations led the Court to find that death was a “grossly disproportionate and excessive punishment for the crime of rape and . . . therefore forbidden by the Eighth Amendment as cruel and unusual punishment.”²⁶

¹⁶ 433 U.S. 584 (1977).

¹⁷ *Id.* at 592.

¹⁸ *Id.* at 593-95.

¹⁹ 408 U.S. 238 (1972) (per curiam). In *Furman*, the Court decided that the death penalty was unconstitutional due to the arbitrary nature in which it was being applied. *Id.* at 295 (Brennan, J., concurring).

²⁰ *Coker*, 433 U.S. at 594. North Carolina and Louisiana had statutes that made death the mandatory sentence for the crime of rape. Both of these statutes were invalidated by *Woodson v. North Carolina*, which required individualized consideration for death to be imposed. *Id.*; see *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976). When both of these states revamped their death penalty statutes again, rape was not included as a capital offense. *Coker*, 433 U.S. at 594.

²¹ *Coker*, 433 U.S. at 594.

²² *Id.* at 595.

²³ *Id.* at 595-96.

²⁴ *Id.* at 596.

²⁵ *Id.* at 597.

²⁶ *Id.* at 592.

2. *Enmund v. Florida—Culpability and the Death Penalty*

In *Enmund v. Florida*,²⁷ the Court declared unconstitutional a Florida statute that allowed persons who had been convicted of felony murder but had “neither [taken] life, attempted to take life, nor intended to take life” to be sentenced to death.²⁸ The Court followed the pattern of reasoning established in *Coker*.²⁹ The Court first analyzed various state laws with respect to punishment of an offender such as *Enmund*.³⁰ It found that only eight states expressly permitted such an offender to be given a sentence of death.³¹ The Court recognized that the legislation did not reflect a unanimous condemnation of such punishment and as such was not dispositive; instead it found the state laws to be a factor of substantial weight.³² The Court then looked to the sentencing patterns of juries to shed light on society’s reaction to the death penalty in the case of felony murder.³³ It found that only six people (all executed prior to 1955) out of the 362 executed since 1954 had been convicted as a non-triggerman felony murderer.³⁴ These two factors combined to establish a consensus against the death penalty for an offender who did not kill nor contemplate death during the offense.³⁵

3. *Thompson v. Oklahoma—Age and the Death Penalty*

In *Thompson v. Oklahoma*,³⁶ the Court held that a national consensus existed against the execution of an offender who was under the age of sixteen at the time of the offense.³⁷ In 1988, fourteen states did not allow any kinds of executions and nineteen states did not specify a minimum age

²⁷ 458 U.S. 782 (1982).

²⁸ *Id.* at 787.

²⁹ *Id.* at 788-89.

³⁰ *Id.* at 789-93.

³¹ *Id.* at 792. This statistic was disputed by the dissent. The dissent interpreted the language of the statutes in thirty-one states as allowing “a sentencer to impose a death sentence for a death that occurs during the course of a robbery.” *Id.* at 819 (O’Connor, J., dissenting).

³² *Id.* at 792-93. The Court juxtaposed this situation to *Coker* and decided that the various state legislation were less persuasive in this case. *Id.*

³³ *Id.* at 794.

³⁴ *Id.* at 794-95. Again the Court compared these results to those in *Coker*; however, the evidence of jury verdicts for non-triggerman felony murder was far more persuasive than the verdicts involving those executed for rape. *Id.*

³⁵ *See id.* at 789-96.

³⁶ 487 U.S. 815 (1988).

³⁷ *Id.* at 824-25.

in their death penalty statutes.³⁸ The remaining eighteen states had established a minimum age and “all of them require[d] that the defendant have attained at least the age of 16 at the time of the capital offense.”³⁹ The Court also stated that professional organizations and the international community decried such punishment.⁴⁰

In this case, the Court did not hold that a national consensus against the punishment was enough to be “cruel and unusual punishment”; instead they looked beyond the objective indicia to the culpability of juvenile offenders.⁴¹ Prior court precedent stated that, based on juveniles’ “[i]nexperience, less education, and less intelligence,” they were inherently less culpable than adults for crimes of similar magnitude.⁴² This diminished culpability led the Court to conclude that the principle of retribution was not served by sentencing an offender under the age of sixteen to death.⁴³

4. *Stanford v. Kentucky—Age and the Death Penalty Revisited*

In *Stanford v. Kentucky*,⁴⁴ the Court again confronted the issue of a minimum age of eligibility for the death penalty.⁴⁵ The plurality opinion, written by Justice Scalia, determined that there was not a national consensus against the execution of sixteen or seventeen-year-old offenders.⁴⁶ The fact that fifteen states did not impose death upon anyone under the age of seventeen and twelve states set the bar at eighteen did not meet the Court’s requirement for a national consensus.⁴⁷ The individualized consideration given to age as a mitigating circumstance was enough to ensure that an offender was properly culpable for the death penalty.⁴⁸ The lack of a national consensus was enough to preclude the Court from looking at outside sources such as public interest polls and the views of professional

³⁸ *Id.* at 826-27.

³⁹ *Id.* at 829.

⁴⁰ *Id.* at 830-31.

⁴¹ *Id.* at 833.

⁴² *Id.* at 835.

⁴³ *Id.* at 836-37.

⁴⁴ 492 U.S. 361 (1989).

⁴⁵ *Id.* at 380.

⁴⁶ *Id.* at 377.

⁴⁷ *Id.* at 370-71. The dissent (written by Justice Brennan and joined by Justices Blackmun, Marshall and Stevens) viewed these statistics differently and found a national consensus against sentencing offenders under eighteen to death. *Id.* at 384-85 (Brennan, J., dissenting).

⁴⁸ *Id.* at 374-75.

organizations.⁴⁹ “[O]ur job is to *identify* the ‘evolving standards of decency’; to determine, not what they *should* be, but what they *are*.”⁵⁰

5. *Penry v. Lynaugh—Mental Retardation and the Death Penalty*

Prior to the Court’s decision in *Atkins*, *Penry v. Lynaugh*⁵¹ set the standard for the treatment of mentally retarded people under death penalty sentencing statutes. In *Penry*, the Court⁵² decided that it was not “cruel and unusual punishment under the Eighth Amendment to execute a mentally retarded person with Penry’s reasoning ability.”⁵³ Looking back to common law, the Court stated that it would be “cruel and unusual” to allow the execution of those who are “profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions.”⁵⁴ At the time of the *Penry* decision, only the federal government and the state of Georgia had statutes that specifically excluded mentally retarded individuals from eligibility for the death penalty.⁵⁵ The Court did not consider this to be a national consensus, even when combining these two jurisdictions with the fourteen that outlawed the death penalty altogether.⁵⁶

Beyond legislation, the Court looked at whether the application of the death penalty to mentally retarded offenders accomplished the goals of retribution and deterrence.⁵⁷ The Court held that, because almost every state sentencing statute allowed the jury to consider the capacity of the

⁴⁹ *Id.* at 377. Justice O’Connor in a concurrence and the dissent disagreed with this contention and would have used these outside sources as indicative of society’s values. *Id.* at 380-81 (O’Connor, J., concurring); *id.* at 388 (Brennan, J., dissenting).

⁵⁰ *Id.* at 378 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

⁵¹ 492 U.S. 302 (1989).

⁵² The majority opinion was written by Justice O’Connor and the sections relevant to mental retardation were joined by Chief Justice Rehnquist and Justices Scalia, White, and Kennedy.

⁵³ *Penry*, 492 U.S. at 313. Penry was determined to have the mental age of a 6½ year old with the social ability of a nine or ten year old. He had never completed the first grade, and his aunt struggled for over a year to teach him to print his own name. *Id.* at 307-09.

⁵⁴ *Id.* at 333. The Court bases this on the common law rule that “idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities.” *Id.* at 331 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 24-25). The Court states that severely or profoundly mentally retarded people are the modern equivalent of a common law idiot. *Id.* at 332-33.

⁵⁵ *Id.* at 334. The Court noted that Maryland had passed a similar statute that had not yet taken effect. *Id.*

⁵⁶ *Id.* at 334.

⁵⁷ *Id.* at 335-36.

defendant to appreciate the criminality of the offense as a mitigating factor, the offender's culpability was considered.⁵⁸

The majority was troubled by the heterogeneity of the class of individuals characterized as "mentally retarded."⁵⁹ The Court expressed concern about when mental retardation was serious enough to warrant exclusion from the death penalty, noting that education and habilitation could lessen some of the symptomatic effects of retardation.⁶⁰ Justice Brennan disagreed,⁶¹ stating that "there are characteristics as to which there is no danger of spurious generalization because they are a part of the clinical definition of mental retardation."⁶² Brennan also questioned the effectiveness of the death penalty as a retributive device against the mentally retarded.⁶³ He characterized the impairment of a mentally retarded offender as so limiting on their culpability that "the ultimate penalty of death is always and necessarily disproportionate to his or her blameworthiness and hence unconstitutional."⁶⁴ Brennan argued that because mentally retarded individuals have difficulty anticipating the consequences of their actions and have a diminished ability to control their impulses, the death penalty as a punishment serves no deterrent purpose and becomes "nothing more than the purposeless and needless imposition of pain and suffering."⁶⁵

After recognizing that mental retardation may in fact reduce culpability, the majority declined to exclude *all* mentally retarded offenders from eligibility for the death penalty.⁶⁶ However, the majority left the door open for future reconsideration by stating, "[w]hile a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing

⁵⁸ *Id.* at 337.

⁵⁹ *See id.* at 338-39.

⁶⁰ *Id.* at 338.

⁶¹ Three separate dissents were written in this case. However, only two of the dissenting opinions disagreed with the majority on issues relevant to this case note. The dissent cited here was written by Justice Brennan and joined by Justice Marshall. The other was written by Justice Stevens and joined by Justice Blackmun.

⁶² *Penry*, 492 U.S. at 344 (Brennan, J., dissenting). The dissent would have adopted the definition of mental retardation proffered by the American Association on Mental Retardation in an amicus brief. *Id.* at 344-45 (Brennan, J., dissenting).

⁶³ *Id.* at 348 (Brennan, J., dissenting).

⁶⁴ *Id.* at 346 (Brennan, J., dissenting).

⁶⁵ *Id.* at 349 (Brennan, J., dissenting) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

⁶⁶ *Id.* at 340.

society,' there is insufficient evidence of such a consensus today."⁶⁷ Eleven years later, however, the Court re-examined this exact issue.

III. ATKINS V. VIRGINIA

A. FACTUAL BACKGROUND

On August 18, 1996, Daryl Renard Atkins and William Jones abducted Eric Nesbitt, robbed him of the money on his body, and then drove him to an ATM machine and forced him to withdraw more cash.⁶⁸ They then drove Nesbitt to an isolated location and shot him eight times.⁶⁹ The cameras at the ATM recorded their picture, leading to their arrest.⁷⁰ Jones pled to first degree murder in exchange for his testimony against Atkins and a life sentence.⁷¹ During the sentencing phase of Atkins's trial, both Atkins and Jones testified, agreeing on most of the important details but each alleging that the other had pulled the trigger.⁷² The jury believed Jones, whose testimony the Court characterized as "both more coherent and credible than Atkins's [testimony]."⁷³ Atkins's testimony was discredited by the fact that his statements at trial varied greatly from his statement to the police after the arrest.⁷⁴

B. PROCEDURAL HISTORY

1. The First Sentencing Hearing

In the sentencing phase of Atkins's trial, the state presented his prior convictions for assault and robbery to prove future dangerousness.⁷⁵ The trial record itself, including the autopsy report and pictures of Nesbitt's body, was used as another aggravating factor.⁷⁶ Atkins called only one witness, a forensic psychologist, Dr. Evan Nelson, who testified that Atkins was "mildly mentally retarded."⁷⁷ This classification was based upon a review of school and court records, interviews of people associated with

⁶⁷ *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

⁶⁸ *Atkins v. Virginia*, 536 U.S. 304, 307 (2002).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 307 n.1.

⁷² *Id.* at 307.

⁷³ *Id.*

⁷⁴ *Id.* at 307 n.2.

⁷⁵ *Id.* at 308.

⁷⁶ *Id.*

⁷⁷ *Id.*

Atkins, and an intelligence test showing that Atkins had a full scale IQ of 59.⁷⁸ After hearing this evidence, the jury was not convinced that Atkins's retardation mitigated his culpability and returned a verdict of death.⁷⁹

2. *The Second Sentencing Hearing*

The Virginia Supreme Court ordered another sentencing hearing because the trial court used a misleading jury verdict form.⁸⁰ The defense again called Dr. Nelson to testify about Atkins's mental abilities.⁸¹ This time the state presented its own doctor, who testified that "Atkins was not mentally retarded, but rather was of 'average intelligence at least,' and diagnosable as having antisocial personality disorder."⁸² The jury again sentenced Atkins to death, unconvinced that Atkins's retardation mitigated his culpability enough to reduce the maximum penalty.⁸³

3. *The Virginia Supreme Court decision*

Atkins' attorneys appealed the second death sentence to the Virginia Supreme Court under the theory that Atkins was not eligible to be sentenced to death because of his mental retardation.⁸⁴ The court reviewed the sentence for proportionality of "the penalty [to that] imposed in similar cases, considering both the crime and the defendant."⁸⁵ Basing their decision on *Penry*, a divided court upheld the sentence.⁸⁶ The majority recognized that the *Penry* decision required consideration of an individual's mental retardation as a mitigating factor, but did not allow retardation alone to exempt an individual from eligibility for the death penalty.⁸⁷

Under the Virginia sentencing scheme, the jury could consider mental retardation as a mitigating factor in capital murder cases.⁸⁸ The jury was presented with conflicting expert opinions as to Atkins's retardation, and determination of the credibility of these witnesses was the role of the finder

⁷⁸ *Id.* at 308-09.

⁷⁹ *Id.* at 309.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Atkins v. Virginia*, 534 S.E.2d 312, 318 (Va. 2000), *cert. granted*, 533 U.S. 976 (2001).

⁸⁵ *Id.*; *see also* VA. CODE ANN. §17.1-313(C) (2003).

⁸⁶ *Atkins*, 534 S.E.2d at 321.

⁸⁷ *Id.* at 319-20.

⁸⁸ VA. CODE ANN. §19.2-264.4(B) (2000 & Supp. 2003).

of fact.⁸⁹ Thus, the majority held that the jury had properly considered this testimony and upheld their sentence of death.⁹⁰

Justices Hassell and Koontz dissented from the majority opinion. Hassell's opinion (in which Koontz joined) went through a complete review of the record of the case and picked apart the expert testimony given by both parties' witnesses.⁹¹ He concluded that the state's witness, Dr. Samenow, had not completely tested Atkins and thus his testimony was far less credible.⁹² Hassell opined that Atkins' case was distinguishable from the *Penry* decision because it was not a constitutional question but was to be considered under section 17.1-313(C) of the Virginia Code as "disproportionate to the penalty imposed in similar crimes, considering both the crime and the defendant."⁹³ Justice Koontz wrote separately to make a more philosophical argument against sentencing a mentally retarded individual to death.⁹⁴ Koontz stated that "it is indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts."⁹⁵ Both of these opinions advocated the reduction of Atkins's sentence to life without the possibility of parole.⁹⁶

Atkins appealed this decision to the United States Supreme Court. The Court granted certiorari based on the serious concern expressed by the dissenting justices on the Virginia Supreme Court.⁹⁷ In light of the shift in the legislative landscape, the Court thought it proper to re-examine the *Penry* decision and reconsider the eligibility of mentally retarded offenders for the death penalty.⁹⁸

C. THE UNITED STATES SUPREME COURT

1. *The Majority Opinion*

Relying on long-standing precedent, Justice Stevens, writing for the majority,⁹⁹ opines that the Eighth Amendment "must draw its meaning from

⁸⁹ *Atkins*, 534 S.E.2d at 319-20.

⁹⁰ *Id.* at 321.

⁹¹ *Id.* at 323-24 (Hassell, J., dissenting).

⁹² *Id.* at 324 (Hassell, J., dissenting).

⁹³ *Id.* (Hassell, J., dissenting).

⁹⁴ *Id.* at 324-25 (Koontz, J., dissenting).

⁹⁵ *Id.* at 325 (Koontz, J., dissenting).

⁹⁶ *Id.* at 323 (Hassell, J., dissenting); *id.* at 325 (Koontz, J., dissenting).

⁹⁷ *Atkins v. Virginia*, 536 U.S. 304, 310 (2002).

⁹⁸ *Id.*

⁹⁹ The majority opinion is written by Justice Stevens and joined by Justices O'Connor, Kennedy, Souter, Ginsberg, and Breyer.

the evolving standards of decency that mark the progress of a maturing society.”¹⁰⁰ Legislation is the best objective measure of where the “standard of decency” lies within today’s society.¹⁰¹ Where a national consensus has developed against a certain behavior or punishment, the Court “ha[s] no reason to disagree with that judgment for purposes of construing and applying the Eighth Amendment.”¹⁰² However, “the objective evidence, though of great importance, [does] not ‘wholly determine’ the controversy”¹⁰³ Instead, the Constitution requires the Court to impose its own judgment in cases where there is a consensus “by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.”¹⁰⁴

The majority first examines the recent legislation passed regarding the treatment of mentally retarded individuals under various states’ sentencing schemes.¹⁰⁵ The Court juxtaposes the legislative situation now with what existed at the time of the *Penry* decision.¹⁰⁶ In 1989, only the federal government and the state of Georgia had statutes prohibiting the execution of mentally retarded individuals.¹⁰⁷ Since this decision was handed down (and possibly in reaction to it), eighteen states have enacted similar legislation.¹⁰⁸ “It is not so much the number of these States that is significant, but the consistency of the direction of the change.”¹⁰⁹ This legislation is particularly compelling given the increase in anti-crime legislation and the decline of laws granting rights to those convicted of crimes.¹¹⁰ Further, the eighteen state statutes have passed with overwhelming support in the states that have addressed the issue, further compelling the notion that “today our society views mentally retarded offenders as categorically less capable than the average criminal.”¹¹¹

¹⁰⁰ *Atkins*, 536 U.S. at 311-12 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). The Eighth Amendment states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

¹⁰¹ *Atkins*, 536 U.S. at 322-23.

¹⁰² *Id.* at 313 (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982)) (emphasis removed).

¹⁰³ *Id.* at 312.

¹⁰⁴ *Id.* at 313.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 314.

¹⁰⁷ *Penry v. Lynaugh*, 492 U.S. 302 (1989).

¹⁰⁸ *Atkins*, 536 U.S. at 314-15. The state of Maryland enacted legislation prohibiting mentally retarded offenders from being sentenced to death in 1989 while the *Penry* case was being decided.

¹⁰⁹ *Id.* at 315.

¹¹⁰ *Id.* at 315-16.

¹¹¹ *Id.* at 316.

Beyond legislation, the statistics show that since 1989, only five executions have been carried out on mentally retarded individuals.¹¹² Combining these factors, the Court concludes that “[t]he practice . . . has become truly unusual, and it is fair to say that a national consensus has developed against it.”¹¹³

In a footnote, the Court considers the viewpoints of the world community, religious organizations and professional organizations.¹¹⁴ The Court finds persuasion in the conglomeration of professional organizations that have filed amicus briefs in various death penalty cases.¹¹⁵ The American Psychological Association and the American Association on Mental Retardation (AAMR) both have adopted official positions against sentencing mentally retarded offenders to death.¹¹⁶ Multiple religious organizations wrote together to oppose the practice, with the Court noting that “though their views about the death penalty differ, they all ‘share a conviction that the execution of persons with mental retardation cannot be morally justified.’”¹¹⁷ The European Union filed on behalf of multiple countries in opposition to the practice.¹¹⁸ Polling data submitted by the AAMR shows a “widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong.”¹¹⁹ Although the statements of these organizations are in no way dispositive, the “consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.”¹²⁰

Justice Stevens states that the legal dispute is not whether the *practice* of executing mentally retarded offenders should be legal, but in *who* qualifies as mentally retarded.¹²¹ “Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.”¹²² The Court declines to define the term “mentally retarded,” stating, “we leave to the State[s] the

¹¹² *Id.* In making this statistical determination, the Court looks to executions of people with an IQ less than seventy.

¹¹³ *Id.*

¹¹⁴ *Id.* at 316 n.21.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* (citing Brief of Amici Curiae United States Catholic Conference et al. at 2, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (No. 00-8727)).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 317.

¹²² *Id.*

task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences.”¹²³

After evaluating the national consensus against the practice of executing mentally retarded individuals evidenced by the objective indicia, the Court turns to an examination of how the reduced capacity of mentally retarded persons justifies exclusion from the death penalty.¹²⁴ The Court first discusses whether the practice of executing mentally retarded offenders accomplishes the goals of the death penalty: retribution and deterrence.¹²⁵ “Unless the imposition of the death penalty on a mentally retarded person ‘measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering,’ and hence an unconstitutional punishment.”¹²⁶

The relative culpability of mentally retarded offenders determines whether retribution is served by allowing the sentence of death.¹²⁷ While “[m]entally retarded persons frequently know the difference between right and wrong and are competent to stand trial,” the impairments associated with being mentally retarded are such that personal culpability is diminished.¹²⁸ “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.”¹²⁹ Precedent establishes that only the most heinous of offenders are to be sentenced to death.¹³⁰ “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.”¹³¹

In evaluating the deterring effect of the death sentence for mentally retarded offenders, the Court looks to *Enmund*, stating that “capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.”¹³² The deterrence theory in capital

¹²³ *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 416 (1986)) (alteration in original). This is the same approach the Court took when they outlawed execution of the insane.

¹²⁴ *Id.* at 318.

¹²⁵ *Id.* at 319-20.

¹²⁶ *Id.* at 319 (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)).

¹²⁷ *Id.* at 318.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 319. See *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (setting aside the sentence of death for an offender whose crimes did not show “a consciousness materially more ‘depraved’ than that of any person guilty of murder”).

¹³¹ *Id.* at 319.

¹³² *Id.* (quoting *Enmund v. Florida*, 458 U.S. 782, 799 (1982)).

sentencing is based on the idea that increasingly serious consequences (such as death) will discourage the criminal contemplating murder.¹³³ However, because of the “cognitive and behavioral impairments” of the mentally retarded, this deterring effect is lost.¹³⁴ Because they suffer from a “diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses,” mentally retarded offenders are not deterred from committing murder by the possible consequence of being sentenced to death.¹³⁵

The Court also looks at how the mentally retarded offender’s culpability affects the sentencing process.

The risk “that the death penalty will be imposed in spite of factors which may call for a less severe penalty,” is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors.¹³⁶

This argument is bolstered by at least one conviction of a mentally retarded individual that was recently overturned when it was discovered that the individual had confessed to a crime in which he was not involved.¹³⁷ Mentally retarded individuals are also less likely to be helpful to their own counsel in mounting a defense, make poor witnesses, and are not prone to showing remorse in the courtroom.¹³⁸ These factors may enhance the likelihood that a jury will sentence the retarded offender to death when an average individual would receive a lesser sentence.¹³⁹ The Court also looks at *Penry*, where it was shown that jurors considered the offender’s mental retardation to be indicative of future dangerousness (and thus an aggravating rather than mitigating factor in the sentencing equation) and sentenced the offender to death.¹⁴⁰

Because of the consensus national opinion against the execution of mentally retarded individuals and the lack of a deterring and retributive effect of the possibility of death, the Court concluded that “such punishment is excessive” and therefore unconstitutional under the Eighth Amendment.¹⁴¹

¹³³ *Id.* at 320.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

¹³⁷ *Id.* at 320 n.25.

¹³⁸ *Id.* at 320-21.

¹³⁹ *See id.*

¹⁴⁰ *Id.* at 321. *See Penry v. Lynaugh*, 492 U.S. 302, 323-25 (1989).

¹⁴¹ *Atkins*, 536 U.S. at 321.

2. *The Dissenting Opinions*

a. Rehnquist's Dissent

Chief Justice Rehnquist (joined by Scalia and Thomas) writes separately to argue against the majority's reliance on "foreign laws, the views of professional and religious organizations, and opinion polls."¹⁴² This reliance has little basis in precedent and goes against all notions of federalism in the Constitution.¹⁴³ While Rehnquist acknowledges that the Court has recognized the influence of international viewpoints in previous cases, "[the Court has] since explicitly rejected the idea that the sentencing practices of other countries could 'serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people.'"¹⁴⁴ This precedent developed, because "if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant."¹⁴⁵ Rehnquist criticizes the majority's reliance on expressed viewpoints of religious organizations, stating "none should be accorded any weight on the Eighth Amendment scale when the elected representatives of a State's populace have not deemed them persuasive enough to prompt legislative action."¹⁴⁶

Of particular concern for the Chief Justice is the majority's "blind faith" acceptance of the opinion polls proffered by the petitioner and various outside organizations.¹⁴⁷ "An extensive body of social science literature describes how methodological and other errors can affect the reliability and validity of estimates about the opinions and attitudes of a population derived from various sampling techniques."¹⁴⁸ Any opinion poll data should have been offered at trial, where the results could have been examined and cross-examined.¹⁴⁹ Rehnquist considers the polls flawed for reasons such as the questions asked by those conducting the polls, the polls failure to disclose the population that was sampled, the sampling techniques, who conducted the poll or why the poll was conducted.¹⁵⁰ All

¹⁴² *Id.* at 322 (Rehnquist, C.J., dissenting).

¹⁴³ *Id.* (Rehnquist, C.J., dissenting).

¹⁴⁴ *Id.* at 325 (Rehnquist, C.J., dissenting) (quoting *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989)).

¹⁴⁵ *Id.* (Rehnquist, C.J., dissenting).

¹⁴⁶ *Id.* at 326 (Rehnquist, C.J., dissenting).

¹⁴⁷ *Id.* (Rehnquist, C.J., dissenting).

¹⁴⁸ *Id.* (Rehnquist, C.J., dissenting).

¹⁴⁹ *Id.* at 327-28 (Rehnquist, C.J., dissenting).

¹⁵⁰ *Id.* at 327 (Rehnquist, C.J., dissenting).

of these issues could have affected the objectivity of the results of the polling.¹⁵¹

Instead, the Court should look solely to “the work product of legislatures and sentencing jury determinations” to “ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment.”¹⁵² “[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.”¹⁵³ The Court also should give more deference to jury verdicts as indicative of society’s views because of the “jury’s intimate involvement in the case and its function of ‘maintain[ing] a link between contemporary community values and the penal system.’”¹⁵⁴ Rehnquist takes particular issue with the majority’s refusal to acknowledge that neither petitioner nor the amici had presented “comprehensive statistics that would conclusively prove (or disprove) whether juries routinely consider death a disproportionate punishment for mentally retarded offenders.”¹⁵⁵

b. Scalia’s Dissent

Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) writes a scathing dissent, characterizing the majority’s decision as “an opinion . . . rest[ing] upon nothing but the personal views of its Members.”¹⁵⁶ The only way that a punishment could be considered “cruel and unusual,” is to either fit within the definition of “cruel and unusual” at the time the Constitution was written, or be “inconsistent with modern ‘standards of decency,’ as evinced by objective indicia, the most important of which is ‘legislation enacted by the country’s legislatures.’”¹⁵⁷ Because the majority does not argue that execution of mentally retarded individuals was considered “cruel and unusual” at the time of the writing of the Constitution, this issue is not addressed.¹⁵⁸ Instead, Scalia concentrates his

¹⁵¹ *Id.* (Rehnquist, C.J., dissenting).

¹⁵² *Id.* at 324 (Rehnquist, C.J., dissenting).

¹⁵³ *Id.* at 323 (Rehnquist, C.J., dissenting) (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)).

¹⁵⁴ *Id.* (Rehnquist, C.J., dissenting) (quoting *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.)).

¹⁵⁵ *Id.* (Rehnquist, C.J., dissenting). The dissent also expressed doubt about the existence of any such statistics. *Id.* (Rehnquist, C.J., dissenting).

¹⁵⁶ *Id.* at 338 (Scalia, J., dissenting).

¹⁵⁷ *Id.* at 339-40 (Scalia, J., dissenting) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330-31 (1989)).

¹⁵⁸ *Id.* at 340 (Scalia, J., dissenting).

argument on the majority's use of the recently enacted legislation to find a national consensus against execution of mentally retarded offenders.¹⁵⁹

Scalia looks at the legislation passed in eighteen states prohibiting the execution of mentally retarded offenders in a completely different manner than the majority.¹⁶⁰ He notes that only forty-seven percent, eighteen out of the thirty-eight states that allow executions, had outlawed executions of mentally retarded individuals.¹⁶¹ Also, because only seven of those eighteen states allowed for the legislation to be applied retroactively, the legislation "is not a statement of absolute moral repugnance, but one of current preference between two tolerable approaches."¹⁶² Additionally, two states have stipulations within their laws that allow for the imposition of the death penalty upon *certain* mentally retarded offenders.¹⁶³ Finally, Scalia takes issue with the time frame of the passing of these eighteen statutes.¹⁶⁴ After breaking down how long each had been in existence (the longest of which was fourteen years), he states that "[i]t is 'myopic to base sweeping constitutional principles upon the narrow experience of [a few] years.'"¹⁶⁵

For the sake of argument, Scalia accepts the questionable figure of eighteen for how many states have legislation outlawing the execution of mentally retarded offenders.¹⁶⁶ "That bare number of States alone—18—should be enough to convince any reasonable person that no 'national consensus' exists. How is it possible that agreement among 47% of the death penalty jurisdictions amounts to 'consensus'?"¹⁶⁷ Scalia compares the majority's definition of a "consensus" with past Supreme Court findings.¹⁶⁸ Previous decisions had determined that a consensus existed when all but one state was punishing an offender in a certain way or when seventy-eight percent of states had decided in a certain manner.¹⁶⁹ The instant case is

¹⁵⁹ *Id.* at 341-42 (Scalia, J., dissenting).

¹⁶⁰ *Id.* at 342 (Scalia, J., dissenting).

¹⁶¹ *Id.* (Scalia, J., dissenting).

¹⁶² *Id.* (Scalia, J., dissenting).

¹⁶³ *Id.* at 342-43 (Scalia, J., dissenting). "Kansas apparently permits execution of all except the *severely* mentally retarded; New York permits execution of the mentally retarded who commit murder in a correctional facility." *Id.* (Scalia, J., dissenting).

¹⁶⁴ *Id.* at 344 (Scalia, J., dissenting).

¹⁶⁵ *Id.* (Scalia, J., dissenting) (alteration in original) (quoting *Coker v. Georgia*, 433 U.S. 584, 614 (1977) (Burger, C.J., dissenting)).

¹⁶⁶ *Id.* at 343 (Scalia, J., dissenting).

¹⁶⁷ *Id.* (Scalia, J., dissenting).

¹⁶⁸ *Id.* (Scalia, J., dissenting).

¹⁶⁹ *Id.* (Scalia, J., dissenting). See *Coker*, 433 U.S. at 595-96 (invalidating death penalty for a rapist because Georgia was the only state that had this sentencing scheme); *Solem v. Helm*, 463 U.S. 277, 300 (1983) (invalidating life sentence for repeat offender because his sentence was more severe than it would have been in any other jurisdiction); *Ford v.*

more closely related to situations where the Court had *failed* to find the existence of a consensus, such as when thirty percent and forty-two percent of the states were aligned.¹⁷⁰

After breaking apart the statistics for “consensus” upon which the majority opinion was based, Scalia moves on to criticize the majority’s reliance on the direction of the change as persuasive.¹⁷¹ “Given that 14 years ago *all* the death penalty statutes included the mentally retarded, *any* change . . . was *bound to be* in the one direction the Court finds significant enough to overcome the lack of real consensus.”¹⁷² Scalia cautions against reliance on any trend by recounting how public opinion towards the death penalty in general has swayed through the years.¹⁷³

Scalia also questions the reliance by the majority on the “*margins* by which state legislatures have enacted bans on execution of the retarded” as indicative of their conviction against the topic.¹⁷⁴ The majority relies upon “the fact that 49% of the legislators in a State with a population of 60 million voted *against* the bill should be more impressive than the fact that 90% of the legislators in a State with a population of 2 million voted *for* it.”¹⁷⁵ Scalia characterizes this pattern of reasoning as “absurd,” stating that “the Eighth Amendment is a consensus of the same sort as the consensus that *adopted* the Eighth Amendment: a consensus of the sovereign States that form the Union, not a nose count of Americans for and against.”¹⁷⁶

Scalia questions the validity of the statistics that the majority used to show that executions of mentally retarded persons are rare.¹⁷⁷ Two different sources reported that twelve states had executed thirty-five allegedly mentally retarded offenders from 1984-2000, and that ten percent of all individuals currently on death row are retarded.¹⁷⁸ Scalia also

Wainwright, 477 U.S. 399, 408 (1986) (disallowing the execution of insane offenders because no state permits it).

¹⁷⁰ *Atkins*, 536 U.S. at 343-44 (Scalia, J., dissenting). See *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (upholding state law that allowed an offender convicted of felony murder to be sentenced to death because only thirty percent of the death penalty states prohibited such a sentence); *Stanford v. Kentucky*, 492 U.S. 361, 372 (1989) (allowing execution of a sixteen-year-old because only forty-two percent of states prohibited death for such an offender).

¹⁷¹ *Atkins*, 536 U.S. at 344 (Scalia, J., dissenting).

¹⁷² *Id.* at 344-45 (Scalia, J., dissenting).

¹⁷³ *Id.* at 345 (Scalia, J., dissenting) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 854-855 (1988) (O’Connor, J., concurring)).

¹⁷⁴ *Id.* at 346 (Scalia, J., dissenting).

¹⁷⁵ *Id.* (Scalia, J., dissenting).

¹⁷⁶ *Id.* (Scalia, J., dissenting).

¹⁷⁷ *Id.* (Scalia, J., dissenting).

¹⁷⁸ *Id.* at 346-47 (Scalia, J., dissenting) (citing D. Keyes et al., *People with Mental*

construes the scarcity of executions of mentally retarded offenders differently than the majority.¹⁷⁹ Instead of being indicative of society's complete abhorrence of the practice, the scarcity can be characterized as showing that prosecutors and juries believe that the death penalty should *rarely* be imposed on mentally retarded offenders.¹⁸⁰

The dismantling of the majority's "consensus" moves on with Scalia awarding the "Prize for the Court's Most Feeble Effort to fabricate 'national consensus'" to the reliance on "the views of assorted professional and religious organizations, members of the so-called 'world community,' and respondents to opinion polls."¹⁸¹ Scalia restates his approval of Chief Justice Rehnquist's dissent calling these views "irrelevant."¹⁸² "We must never forget that it is a Constitution for the United States of America that we are expounding [W]here there is not first a settled consensus among our own people, the views of other nations . . . cannot be imposed upon Americans through the Constitution."¹⁸³

Scalia disagrees with the majority's conclusion that the Eighth Amendment fundamentally prohibits "excessive punishments."¹⁸⁴ The Eighth Amendment was not written to prevent "excessive punishments," but rather to forbid "always-and-everywhere 'cruel' punishments, such as the rack and the thumbscrew."¹⁸⁵ The death penalty for the mentally retarded does not fit into this category because it is not considered to be cruel everywhere or on everyone. Not every state has declared the practice cruel, nor is "[t]he Eighth Amendment . . . a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions."¹⁸⁶

Scalia also criticizes the majority's argument that juries are unable to account for an offender's mental retardation, as well as the characterization

Retardation Are Dying Legally, 35 MENTAL RETARDATION (Feb. 1977); Bonner & Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, N.Y. TIMES, Aug. 7, 2000, at A1).

¹⁷⁹ *Id.* at 347 (Scalia, J., dissenting).

¹⁸⁰ *Id.* (Scalia, J., dissenting).

¹⁸¹ *Id.* (Scalia, J., dissenting).

¹⁸² *Id.* (Scalia, J., dissenting).

¹⁸³ *Id.* at 348 (Scalia, J., dissenting) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 n.4 (1988) (Scalia, J., dissenting)).

¹⁸⁴ *Id.* at 349 (Scalia, J., dissenting).

¹⁸⁵ *Id.* (Scalia, J., dissenting).

¹⁸⁶ *Id.* (Scalia, J., dissenting) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991)).

It is apparent from the oral arguments that Scalia is concerned with ratcheting up the standards surrounding the death penalty, as once precedent has been established states are precluded from making individual decisions based upon their needs and desires.

of retarded individuals as being “no more culpable” than the average offender.¹⁸⁷ “[W]hat scientific analysis can possibly show that a mildly retarded individual who commits an exquisite torture-killing is ‘no more culpable’ than the ‘average’ murderer in a holdup-gone-wrong or a domestic dispute?”¹⁸⁸ Culpability depends not only upon the offender’s mental condition but also upon the depravity of the crime, and this is “precisely why this sort of question has traditionally been thought answerable not by a categorical rule of the sort the Court today imposes upon all trials, but rather by the sentencer’s weighing of the circumstances.”¹⁸⁹ The majority’s blanket prohibition on the imposition of the death penalty on mentally retarded offenders misplaces the power of judgment.¹⁹⁰ “[O]nly the sentencer can assess whether [the offender’s] retardation reduces his culpability enough to exempt him from the death penalty for the particular murder in question.”¹⁹¹

Scalia logically breaks apart the majority’s argument that mentally retarded offenders are not deterred from commission of murders by the threat of a death sentence.¹⁹² The assumption that retarded individuals are less likely to be deterred by a possible punishment leads to the conclusion “that the mentally retarded (because they are less deterred) are more likely to kill.”¹⁹³ Because this conclusion is patently untrue, the precepts cannot be valid.¹⁹⁴ The majority doesn’t claim that *all* retarded offenders can not appreciate the possibility of a death sentence, so “surely the deterrent effect of a penalty is adequately vindicated if it successfully deters many, but not all, of the target class.”¹⁹⁵ Instead of precluding all mentally retarded offenders from being sentenced to death,

we should treat a mentally retarded murderer the way we treat an offender who may be ‘less likely’ to respond to the death penalty because he was abused as a child. We do not hold him immune from capital punishment, but require his background to be considered . . . as a mitigating factor.¹⁹⁶

In conclusion, Scalia laments over the Court’s multiple procedural and substantive exceptions to the death penalty under their “death-is-different”

¹⁸⁷ *Id.* at 349-50 (Scalia, J., dissenting).

¹⁸⁸ *Id.* at 350 (Scalia, J., dissenting).

¹⁸⁹ *Id.* at 350-51 (Scalia, J., dissenting).

¹⁹⁰ *Id.* (Scalia, J., dissenting).

¹⁹¹ *Id.* at 351 (Scalia, J., dissenting).

¹⁹² *Id.* (Scalia, J., dissenting).

¹⁹³ *Id.* (Scalia, J., dissenting).

¹⁹⁴ *Id.* (Scalia, J., dissenting).

¹⁹⁵ *Id.* (Scalia, J., dissenting).

¹⁹⁶ *Id.* at 352 (Scalia, J., dissenting) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 113-17 (1982)).

jurisprudence.¹⁹⁷ “There is something to be said for popular abolition of the death penalty; there is nothing to be said for its incremental abolition by this Court.”¹⁹⁸ Because many of the components of the definition of mental retardation can be faked, the majority’s decision will turn “the process of capital trial into a game.”¹⁹⁹ Under this decision, faking retardation comes without consequence.²⁰⁰ Scalia dissents from the blanket ban on execution of mentally retarded offenders, preferring to leave the sentencing decision to the jury.²⁰¹

IV. ANALYSIS

A. CONSENSUS OR NOT?

The Supreme Court first established that the best indicator of the modern perception of “evolving standards of decency” is legislation in *Coker v. Georgia*.²⁰² Since this case, current state laws have been the main consideration in the Court’s attempt to determine the country’s stance on various intricacies of the death penalty.²⁰³ This analytical pattern was continued in the *Atkins* decision.²⁰⁴

1. A Comparison of the Atkins’ Consensus with Previously Determined Cases Involving a National Consensus

In *Coker*, the Court evaluated the legislation regarding the possible sentences for a person found guilty of the rape of an adult.²⁰⁵ At the time, only Georgia allowed an offender to be sentenced to death.²⁰⁶ The Court was persuaded by this fact, but also by the trend in legislation over the previous ten years.²⁰⁷ Only five years prior to the decision in *Coker*, *Furman v. Georgia* was handed down, effectively invalidating every state

¹⁹⁷ *Id.* (Scalia, J., dissenting).

¹⁹⁸ *Id.* at 353 (Scalia, J., dissenting).

¹⁹⁹ *Id.* (Scalia, J., dissenting).

²⁰⁰ *Id.* (Scalia, J., dissenting). This is contrasted to the feigning of insanity where, under *Jones v. United States*, 463 U.S. 354, 370 n.20 (1983), the offender can be committed until cured, then tried and executed.

²⁰¹ *Id.* at 354 (Scalia, J., dissenting).

²⁰² See *Coker v. Georgia*, 433 U.S. 584, 593 (1977).

²⁰³ See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989); *Thompson v. Oklahoma*, 487 U.S. 817, 826-29 (1988); *Enmund v. Florida*, 458 U.S. 782, 789-93 (1982).

²⁰⁴ *Atkins*, 536 U.S. at 312.

²⁰⁵ *Coker*, 433 U.S. at 594-96.

²⁰⁶ *Id.* at 595-96.

²⁰⁷ *Id.* at 594-96.

death penalty statute.²⁰⁸ At that time, sixteen states allowed an offender convicted of the rape of an adult to be sentenced to death.²⁰⁹ In the wake of *Furman*, every state was forced to re-evaluate their sentencing scheme to comply with the new standards.²¹⁰ While thirty-five states re-instated the death penalty for certain specific crimes, only three states included rape amongst their capital offenses.²¹¹ Thus, thirteen states evaluated their death penalty statutes and eliminated rape from those offenses eligible for capital punishment. When two of the three capital rape state statutes were invalidated by *Woodson v. North Carolina*,²¹² Georgia was the sole jurisdiction left that allowed for a sentence of death when the rape victim was an adult woman.²¹³

Beyond legislation, the Court also looked to jury verdicts as objective indicators of society's views.²¹⁴ They determined that only six juries in Georgia had sentenced rapists to death between 1973 and 1977; nine times out of ten, death was not imposed.²¹⁵ This evidence showed that a national consensus had developed against the punishment of death for an offender convicted of the rape of an adult.²¹⁶

In *Enmund v. Florida*, similar (albeit more complicated) statistics existed relating to the death sentence for an individual who had neither killed nor contemplated death in their offense.²¹⁷ The Court looked at the thirty-six states that had death penalty statutes in place in 1982.²¹⁸ Of these thirty-six, felony murder was not a capital offense in four of the states.²¹⁹ Another state rejected outright death for an offender who did not commit the actual murder.²²⁰ Eleven more states had culpability requirements in their capital murder sentencing schemes, requiring the prosecutor to prove that the offender had some degree of culpability for the murder.²²¹ Nine

²⁰⁸ *Id.* at 593.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 593-94.

²¹² 428 U.S. 280, 301 (1976). In Louisiana and North Carolina, death was the mandatory penalty for rape; *Woodson* established the requirement of individualized sentencing for death penalty jurisdictions.

²¹³ *Coker*, 433 U.S. at 595-96.

²¹⁴ *Id.* at 596.

²¹⁵ *Id.* at 597.

²¹⁶ *Id.* at 596.

²¹⁷ 458 U.S. 782, 789-90 (1982).

²¹⁸ *Id.* at 789.

²¹⁹ *Id.*

²²⁰ *Id.* at 791.

²²¹ *Id.* at 789. The actual degree of culpability varied in different jurisdictions. Eight states required the prosecutor to prove the offender's culpability was at the level of

other states had statutes that did not allow for the death penalty when an offender had merely participated in a felony and did not cause the death of the victim.²²² These states considered the offender's minor role in the crime as a mitigating circumstance and thus, without culpability as an aggravator, death could not be imposed.²²³ Two jurisdictions did not allow for death when the defendant played only a minor role in the crime.²²⁴ Another state's definition of capital felony murder was so narrow that the facts of the *Enmund* case did not apply.²²⁵ This left only eight jurisdictions that would have allowed *Enmund* to be sentenced to death.²²⁶

The trend of enacted legislation was also compelling to the Court.²²⁷ "[O]f the eight states which have enacted new death penalty statutes since 1978, none authorize capital punishment in such circumstances."²²⁸ The Court looked past the legislation to the jury verdicts and found that out of 362 individuals executed since 1954, only six people who were not the actual triggermen in felony murder cases were put to death and all six of

"knowing, intentional, purposeful, or premeditated killing." *Id.* See ALA. CODE §§ 13A-2-23, 13A-5-40(a)(2), 13A-6-2(a)(1) (1977 & Supp. 1982) (to be found guilty of capital murder, accomplice must have had "intent to promote or assist the commission of the offense" and murder must be intentional); 38 ILL. COMP. STAT. 9/1(a)(3), 9/1(b)(6) (1979) (capital crime only if defendant killed intentionally or with knowledge that his actions "created a strong probability of death or great bodily harm"); LA. REV. STAT. ANN. § 14:30(1) (West Supp. 1982) ("intent to kill or inflict great bodily harm"); N.M. STAT. ANN. §§ 30-2-1(A)(1), 31-18-14(A), 31-20A-5 (Supp. 1981) (felony murder is a capital crime but death penalty may not be imposed absent intent to kill unless victim was a peace officer); OHIO REV. CODE ANN. §§ 2903.01(B), (C), (D), 2929.02(A), 2929.04(A)(7) (1982) (accomplice not guilty of capital murder unless he intended to kill); TEX. PENAL CODE ANN. §§ 19.02(a), 19.03(a)(2) (1974) ("intentionally commits the murder in the course of [a felony]"); UTAH CODE ANN. § 76-5-202(1) (1978) ("intentionally or knowingly causes the death of another"); VA. CODE ANN. § 18.2-31 (1982) ("The willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery."). The remaining three required something less, more similar to "reckless or extreme indifference to human life." *Enmund*, 458 U.S. at 789. See ARK. CODE ANN. § 41-1501(1)(a) (1977) ("extreme indifference to . . . life"); see also § 41-1501, Commentary ("an inadvertent killing in the course of a felony will not . . . support . . . a conviction entailing punishment by death"); DEL. CODE ANN. tit. 11, §§ 636(a)(2), (6) (1979) ("recklessly" or "with criminal negligence" causes death during the commission of a felony); KY. REV. STAT. ANN. § 507.020(1)(b) (Supp. 1980) (defendant must manifest "extreme indifference to human life" and "wantonly engage" in conduct which creates a grave risk of death . . . and thereby causes . . . death").

²²² *Enmund*, 458 U.S. at 791.

²²³ *Id.* at 792.

²²⁴ *Id.* at 791.

²²⁵ *Id.*

²²⁶ *Id.* at 792.

²²⁷ *Id.*

²²⁸ *Id.*

these executions were in 1955.²²⁹ Only sixteen individuals out of the 739 offenders then on death row had been sentenced to die for murders committed when they were not physically present.²³⁰ Of this sixteen, only three (including Enmund) had not hired or conspired to hire someone else to commit the murder.²³¹

Table 1

Case	Percentage that Would Allow the Death Penalty for the Respective Offender	Outcome
Coker v. Georgia	3% (1 state out of 35)	Unconstitutional
Enmund v. Florida	22% (8 states out of 36)	Unconstitutional
Atkins v. Virginia	46% (18 jurisdictions out of 39) ²³²	Unconstitutional

In *Atkins*, the totality of the state legislation with regard to mentally retarded offenders was not nearly as unbalanced as in *Coker* or *Enmund*.²³³ At the time of this decision, at least eighteen of the thirty-nine death penalty jurisdictions implicitly allowed mentally retarded offenders to be sentenced to death.²³⁴ Under Supreme Court precedent, if the majority decision in *Atkins* was based purely on numbers of states with the requisite legislation, the decision would have been wrongly decided. However, Stevens did not rely only on the numerical data; the *trend of the legislation* was extremely persuasive to him.²³⁵ The *Atkins* decision, therefore, is in line with *Coker* and *Enmund* with respect to this facet of the analysis.²³⁶ The majority in *Atkins* was persuaded by the fact that since the *Penry* decision was handed down in 1989, eighteen states had enacted legislation precluding the mentally retarded from eligibility for the death penalty.²³⁷ Not a single

²²⁹ *Id.* at 794-95.

²³⁰ *Id.*

²³¹ *Id.*

²³² This number includes the federal jurisdiction.

²³³ *Atkins*, 536 U.S. at 313-16; *Enmund*, 458 U.S. at 789-93; *Coker v. Georgia*, 433 U.S. 584, 593-96 (1977).

²³⁴ *Atkins*, 536 U.S. at 342 (Scalia, J., dissenting). These statistics are uncertain because of the various legislative requirements that established what constituted mental retardation. In *Atkins*, the Court left it to the states to determine the level of retardation necessary to exclude an offender from eligibility for the death penalty. *Id.* at 313.

²³⁵ *Id.* at 313-17.

²³⁶ See *Enmund*, 458 U.S. at 793-95; *Coker*, 433 U.S. at 594-95.

²³⁷ *Atkins*, 536 U.S. at 313-16.

jurisdiction had gone the other way, expressly permitting mentally retarded individuals to be sentenced to death under their sentencing schemes.²³⁸ However, the majority does not address the fact that even with this trend of legislation, only twenty of the thirty-nine death penalty jurisdictions (forty-six percent) have excluded mentally retarded offenders from death within their sentencing schemes.²³⁹ This is less than half of the states that had previously been required to establish a national consensus.²⁴⁰

2. *A Comparison of the Death Penalty Age-Related Cases and Atkins—The “Numerator / Denominator Game”*

The consensus debate has most recently been visited by the Court with regard to the treatment of juvenile offenders under the death penalty.²⁴¹ Age-related death penalty cases are a compelling comparison to the cases of mentally retarded offenders like *Atkins* because the states legislation is similarly aligned.²⁴² The debate between the majority and dissent in *Atkins* relating to legislative statistics originated when the Court confronted the issue of a minimum age for eligibility for the death penalty.²⁴³ The Court's statistics battle can be described as the “Numerator / Denominator Game.”²⁴⁴ The Numerator / Denominator Game is the debate over which states should be included in percentage calculations when evaluating the objective indicia of the “evolving standards of decency” in current society.²⁴⁵ One issue in this game is whether the denominator should include all fifty states, D.C., and the federal jurisdiction or only the so-called death states (states with active death penalty sentencing schemes).²⁴⁶ Another aspect of this game is whether the Court should draw inferences

²³⁸ *Id.*

²³⁹ *Id.* at 316.

²⁴⁰ *Id.*

²⁴¹ See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 369-73 (1989); *Thompson v. Oklahoma*, 487 U.S. 817, 826-30 (1988).

²⁴² See, e.g., *Atkins*, 536 U.S. at 315-17; *Stanford*, 492 U.S. at 369-73; *Thompson*, 487 U.S. at 826-30.

²⁴³ *Stanford*, 492 U.S. at 369-73.

²⁴⁴ Norman J. Finkel, *Prestidigitation, Statistical Magic, and Supreme Court Numerology in Juvenile Death Penalty Cases*, 1 PSYCHOL. PUB. POL'Y. & L. 612, 624 (1995).

²⁴⁵ *Id.*

²⁴⁶ The calculations done in this analysis assume that the District of Columbia and the federal jurisdiction are treated equally with the fifty states resulting in a maximum denominator of fifty-two.

from a state's inaction towards a particular issue otherwise known as the explicit v. implicit distinction.²⁴⁷

In *Thompson v. Oklahoma*, the Court found that there was a national consensus against executing an offender who was under the age of sixteen at the time of the crime.²⁴⁸ When the Court was deciding this case, fourteen jurisdictions (twenty-nine percent) did not allow the death penalty at all, nineteen states (thirty-seven percent) had no explicit minimum age, and the remaining eighteen states (thirty-five percent) had minimum ages ranging from sixteen to eighteen.²⁴⁹

To bolster his argument for a national consensus, Stevens argued

if . . . we accept the premise that some offenders are simply too young to be put to death, it is reasonable to put [the non-death states and states without a minimum age in the sentencing scheme] to one side because they do not focus on the question of where the chronological age line should be drawn.²⁵⁰

This reasoning allowed him to remove thirty-three states (the fourteen states that did not allow the death penalty at all and the nineteen implicit states—those that had not expressly set a minimum age for executions) from both the numerator and the denominator in the statistical calculations.²⁵¹ One hundred percent of the remaining eighteen states had set the baseline to exclude offenders under the age of sixteen.²⁵²

The dissent, written by Scalia, argued that the nineteen states without a minimum age in their sentencing schemes “are of the view that death is not different insofar as the age of juvenile criminal responsibility is concerned.”²⁵³ Thus, a majority (nineteen out of thirty-seven or fifty-one percent) of the death penalty states allowed for the possible execution of offenders under the age of sixteen.²⁵⁴

²⁴⁷ See Finkel, *supra* note 244, at 624. For example, justices have previously reasoned that a non-death penalty state has, by outlawing the punishment altogether, taken a clear stance against the death penalty for juvenile offenders and used that state in their statistics calculations. *Thompson v. Oklahoma*, 487 U.S. 817, 828-29 (1988).

²⁴⁸ *Thompson*, 487 U.S. at 838.

²⁴⁹ *Id.* at 826-29.

²⁵⁰ *Id.* at 828-29.

²⁵¹ Finkel, *supra* note 244, at 626. In doing this, Stevens ignored the fact that in some of these states, fifteen-year-olds were eligible to be tried for first degree murder and thus could be sentenced to death. *Thompson*, 487 U.S. at 868 (Scalia, J., dissenting).

²⁵² *Thompson*, 487 U.S. at 829.

²⁵³ *Id.* at 868 (Scalia, J., dissenting).

²⁵⁴ *Id.* at 867-68 (Scalia, J., dissenting). Whether or not an offender would be sentenced to death in each of these states depends on the juvenile transfer statutes, not on the death penalty sentencing scheme. *Id.* at 868 n.3 (Scalia, J., dissenting).

Table 2
Comparison of Reasoning used by Stevens and Scalia
in Thompson v. Oklahoma

		States that would not execute a 15 year old	Percentage
Stevens	Numerator (Explicit Age Death Penalty States)	18	100
	Denominator (Explicit Age Death Penalty States)	18	
Scalia	Numerator (Explicit Age Death Penalty States)	18	49
	Denominator (All Death Penalty States)	37	

At the time *Stanford v. Kentucky* was decided, fifteen jurisdictions (twenty-nine percent) did not have the death penalty, twelve (twenty-three percent) states' capital sentencing schemes had a minimum age of eighteen, and in another three (six percent) the minimum age was seventeen.²⁵⁵ The majority in *Stanford* used these statistics to conclude that only thirty-two percent (twelve out of thirty-seven) of states excluded a seventeen-year-old offender from being sentenced to death.²⁵⁶ Similarly, under the majority's reasoning, only forty-one percent (fifteen out of thirty-seven) disallowed the execution of a sixteen-year-old.²⁵⁷ The denominator used by the majority was thirty-seven, all of the jurisdictions that allowed the death penalty at this time.²⁵⁸ The Court held that this percentage "does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual."²⁵⁹

In dissent, Brennan takes these same numbers and comes up with two very different results.²⁶⁰ Brennan included all fifty states as well as the federal jurisdiction and the District of Columbia in his denominator, totaling fifty-two.²⁶¹ For the numerator, he combined the states that outlawed the death penalty outright with those states whose sentencing schemes included a minimum age.²⁶² The result of this was fifty-four

²⁵⁵ *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 370-71.

²⁶⁰ *Id.* at 384 (Brennan, J., dissenting).

²⁶¹ *Id.* (Brennan, J., dissenting).

²⁶² *Id.* (Brennan, J., dissenting).

percent (twenty-eight out of fifty-two)²⁶³ did not allow a seventeen-year-old to be executed and sixty percent (thirty-one out of fifty-two) precluded the execution of a sixteen-year-old offender.²⁶⁴

Table 3
Comparison of Statistical Reasoning in Stanford v. Kentucky

		States that would not execute a 16 year old	Percentage
Scalia	Numerator (states with minimum age of 17)	15	41
	Denominator (all death penalty states)	37	
Brennan	Numerator (non-death states and states with minimum age of 17)	31	60
	Denominator (all fifty states, D.C. and federal)	52	

		States that would not execute a 17 year old	Percentage
Scalia	Numerator	12	32
	Denominator (all death penalty states)	37	
Brennan	Numerator	28	60
	Denominator (all fifty states, D.C. and federal)	52	

Brennan went further with his statistics game by eliminating the nineteen states that had not explicitly set a minimum age for executions from both the numerator and denominator.²⁶⁵ “[D]ecisions of legislatures that are only implicit . . . lack the ‘earmarks of careful consideration that we have required for other kinds of decision leading to the death penalty’ [and therefore] must count for little.”²⁶⁶ With only thirty-three jurisdictions for the denominator, the statistics revealed that ninety-four percent of the

²⁶³ The number twenty-eight includes the federal jurisdiction and the District of Columbia.

²⁶⁴ Finkel, *supra* note 244, at 624.

²⁶⁵ *Stanford v. Kentucky*, 492 U.S. 361, 385 (1989) (Brennan, J., dissenting).

²⁶⁶ *Id.* at 385 (Brennan, J., dissenting) (quoting *Thompson v. Oklahoma*, 487 U.S. 817, 857 (1988) (O’Connor, J., concurring)).

jurisdictions would not allow a sixteen-year-old and eighty-five percent would not allow a seventeen-year-old to be executed.²⁶⁷

If this statistical game is applied to the death penalty legislation concerning treatment of mentally retarded offenders, it becomes clear that the majority's consensus in *Atkins* establishes a new definition of "national consensus."²⁶⁸ Taking a baseline look at the statutory statistics, eighteen states and the federal jurisdiction disallow mentally retarded offenders to be executed.²⁶⁹ Dividing this number by the forty death penalty jurisdictions, the result is forty-eight percent of the possible death jurisdictions do not allow imposition of the death penalty on mentally retarded individuals.²⁷⁰ This number is similar to the results (forty-one percent for sixteen-year-olds and thirty-two percent for seventeen-year-olds) found inadequate for a consensus by the majority in *Stanford*.²⁷¹

The majority in *Thompson* held that eighteen states (out of a possible thirty-seven death penalty jurisdictions) were enough to constitute a national consensus.²⁷² If eighteen states were enough in *Thompson*, it would seem that the nineteen jurisdictions in *Atkins* should be enough to find a consensus.²⁷³ However, the strength of the majority opinion in *Thompson* relied on the ability to remove the states that had not expressly set a minimum age in their sentencing schemes.²⁷⁴ Justice Stevens made the argument that because the nineteen states had not specifically set a minimum age, they should be removed from the equation because their sentencing schemes did not focus on the issue of age.²⁷⁵ This reasoning doesn't cross over to the legislation faced by the Court in *Atkins*. Many of the states that do not exclude mentally retarded offenders from the death penalty have given explicit consideration to the mental capacity of the offender as a mitigating factor within the sentencing scheme.²⁷⁶ In devising their sentencing schemes, these legislatures debated the role that mental

²⁶⁷ *Id.* (Brennan, J., dissenting).

²⁶⁸ *Atkins*, 536 U.S. at 316.

²⁶⁹ *Id.* at 314-15. Scalia disputes this number by stating that only seven states allow their statutes to be applied retroactively and thus only seven states truly outlaw all executions of mentally retarded offenders. *Id.* at 342 (Scalia, J., dissenting). Also, Scalia points to the two states that have caveats in the statute allowing for certain offenders to be executed even if they are mentally retarded. *Id.* at 342-43 (Scalia, J., dissenting).

²⁷⁰ See Finkel, *supra* note 244, at 626.

²⁷¹ *Stanford v. Kentucky*, 492 U.S. 361, 370-71 (1989).

²⁷² *Thompson v. Oklahoma*, 487 U.S. 817, 826-29 (1988).

²⁷³ *Id.*; *Atkins*, 536 U.S. at 314-15.

²⁷⁴ *Thompson*, 487 U.S. at 828-29.

²⁷⁵ *Id.*

²⁷⁶ *Atkins*, 536 U.S. at 322.

capacity should play in death penalty proceedings and determined that mental capacity is not a dispositive factor, but merely one to be considered among other mitigating and aggravating circumstances.²⁷⁷ Because of this caveat, the twenty jurisdictions that do not explicitly exclude mentally retarded offenders from eligibility for the death sentence cannot be removed from statistical calculations.²⁷⁸ This weakens the *Atkins* decision in relation to the *Thompson* decision.

The statutes in *Atkins* can be evaluated in another way and still fall short of prior precedent. If you combine the nineteen jurisdictions that explicitly preclude mentally retarded offenders from being sentenced to death with the twelve states where the death penalty does not exist, a majority (sixty-one percent) of jurisdictions do not allow mentally retarded offenders to be executed.²⁷⁹ This methodology is similar to that used by the dissent in *Stanford* and the results (fifty-four percent and sixty percent in *Stanford*) are similar as well.²⁸⁰ These percentages were not enough to persuade a majority of the Court to find a national consensus in *Stanford* and the Court's reliance on this number in *Atkins* redefines "national consensus" within Eighth Amendment jurisprudence.²⁸¹

B. FUTURE IMPLICATIONS OF THE *ATKINS* DECISION—WILL THE COURT RE-EXAMINE THE MINIMUM AGE FOR THE DEATH PENALTY?

Following *Atkins*, the Court will likely come to a different conclusion the next time it considers the minimum age for the death penalty.²⁸² When *Stanford* was handed down in 1989, twelve states had statutory language that expressly set the minimum age at eighteen.²⁸³ Since that time, four additional states have legislatively raised the bar to eighteen and two state

²⁷⁷ *Id.* at 322-23 (Rehnquist, C.J., dissenting).

²⁷⁸ *Id.* (Rehnquist, C.J., dissenting).

²⁷⁹ *See id.* at 314-15. The denominator in this case was fifty-one because the federal jurisdiction is included in the numerator and thus must be included in the denominator.

²⁸⁰ *Stanford v. Kentucky*, 492 U.S. 361, 384-85 (1989) (Brennan, J., dissenting).

²⁸¹ *Id.*; *Atkins*, 536 U.S. at 316.

²⁸² The Court has indicated that it may soon do so. Three Justices (Stevens, Ginsberg and Breyer) dissented from a denial for a stay of execution for an offender who was seventeen-years-old at the time he committed murder. *In re Toronto M. Patterson*, 536 U.S. 984 (2002). Even more recently, Justice Souter joined the other three Justices in dissenting from a reconsideration of the case involving Stanford himself. *In re Kevin Nigel Stanford*, 537 U.S. 968 (2002). However, the Court has since denied certiorari to another age-related death case without issuing an opinion. *Hain v. Mullin*, 537 U.S. 1173 (2003).

²⁸³ *Stanford*, 492 U.S. at 370.

supreme courts have effectively done so.²⁸⁴ Three more states have had bill pass one of their houses in the last legislative session.²⁸⁵ Considering the emphasis that the Court put on the trend of legislation in the *Atkins* decision, these six states could push the Justices to determine that a national consensus has developed.²⁸⁶

Amnesty International argues that the Court should follow the reasoning of the dissent in *Stanford*.²⁸⁷ The dissent argued that the non-death penalty states should be included with those that specifically prohibit juveniles from being eligible for the death penalty.²⁸⁸ Amnesty argues “a state which does not allow the execution of anyone, juvenile or adult, has by definition taken a stronger stand against the death penalty than by only exempting youthful offenders. . . .”²⁸⁹ Certainly combining the six states that have recently prohibited juvenile executions with the twelve that already set the minimum age at eighteen in 1989 and the thirteen current abolitionist jurisdictions would cause the Court to find a national consensus.²⁹⁰ Under this method of statistical analysis, in the United States today, sixty percent (thirty-one out of fifty-two) of the jurisdictions do not allow an offender under the age of eighteen to be sentenced to death.²⁹¹ Following *Atkins*, the Supreme Court should find that a national consensus exists.²⁹²

The Court also noted in *Atkins* that “the complete absence of States passing legislation reinstating the power to [execute mentally retarded offenders] provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.”²⁹³ The same can be said for the death penalty and juveniles.²⁹⁴

²⁸⁴ *In re Stanford*, 537 U.S. at 968-69 (Stevens, J., dissenting). See IND. CODE ANN. §35-50-2-3, §3(b)(1)(A) (West Supp. 2003); KAN. STAT. ANN. §21-4622 (1995); MONT. CODE ANN. §45-5-102(2) (2001); N.Y. PENAL LAW §125.27(1)(b) (McKinney 2003); *State v. Furman*, 858 P.2d 1092, 1103 (Wash. 1993); *State v. Roper*, 112 S.W.3d 397, 399 (Mo. 2003).

²⁸⁵ Stephen K. Harper, *End the Death Penalty for Juveniles*, TAMPA TRIB., Sept. 22, 2002.

²⁸⁶ See *Atkins*, 536 U.S. at 316.

²⁸⁷ *Indecent and Internationally Illegal: The Death Penalty Against Child Offenders*, AMNESTY INT'L, Sept. 2002, at 5 [hereinafter *Child Offenders*].

²⁸⁸ *Stanford*, 492 U.S. at 384 (Brennan, J., dissenting).

²⁸⁹ *Child Offenders*, *supra* note 287, at 28.

²⁹⁰ See *id.*

²⁹¹ *Id.* at 29. The fifty-two jurisdictions in this equation include both the District of Columbia and the Federal jurisdiction.

²⁹² See *Atkins*, 536 U.S. at 316.

²⁹³ *Id.* at 315-16.

²⁹⁴ *In re Stanford*, 537 U.S. 968, 971-72 (2002) (Stevens, J., dissenting). See also *Child*

No state has lowered their minimum age requirement for the death penalty since *Stanford* was decided in 1989.²⁹⁵ This argument becomes even stronger when you consider that the two states that have reinstated the death penalty (Kansas and New York) both specifically exclude juveniles from eligibility.²⁹⁶ Legislation to reinstate the death penalty has been proposed in at least three other abolitionist states and each of these proposals exempted individuals under the age of eighteen.²⁹⁷ These states chose this stance in the face of consistent public pressure to be tough on crime and to lower the minimum age for children to be prosecuted as adults.²⁹⁸

Continuing with the reasoning used by the majority in *Atkins*, jury verdicts for offenders under the age of eighteen are also telling of a national consensus against their executions.²⁹⁹ Of the twenty-one states that authorize juveniles to be sentenced to death, seven of those states currently have no juveniles waiting for execution.³⁰⁰ Overall, juveniles make up only two percent of the overall population of death row.³⁰¹ As of August 2002, fifteen states had a total of eighty-two juvenile offenders on death row but only six states had actually executed anyone in this category since 1990.³⁰² Arkansas and Delaware have statutes that allow mentally retarded offenders as well as juveniles to be sentenced to death.³⁰³ Both of these states executed mentally retarded offenders in the years between *Penry* and *Atkins* (Arkansas—two, Delaware—one).³⁰⁴ However, neither of these states has executed a juvenile offender since 1927 and not a single juvenile offender has been sentenced to death in Delaware since *Furman*.³⁰⁵ As of July 2000, only three states (Mississippi, Alabama, and Texas) had more than four

Offenders, *supra* note 287, at 4.

²⁹⁵ *In re Stanford*, 537 U.S. at 971 (Stevens, J., dissenting).

²⁹⁶ *Child Offenders*, *supra* note 288, at 28.

²⁹⁷ *Id.* at 29.

²⁹⁸ *See id.*

²⁹⁹ *Id.* at 31.

³⁰⁰ Harper, *supra* note 285. It has been argued that the absence of a juvenile on death row causes an inherent inertia within that state's legislature. This furthers the contention that the legislation of a state may not be truly indicative of the viewpoints of the constituency with regard to the juvenile death penalty. *See State v. Roper*, 112 S.W.3d 397, 410 (Mo. 2003).

³⁰¹ *In re Stanford*, 537 U.S. 968, 971-72 (2002) (citing Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Execution for Juvenile Crimes*, January 1, 1973-September 30, 2002, 12, at <http://www.law.onu.edu/faculty/streib> (updated Oct. 9, 2002)).

³⁰² Bob Dart, *Amnesty: Death Penalty for U.S. Youths 'Indecent'*, ATLANTA JOURNAL-CONSTITUTION, Sept. 26, 2002.

³⁰³ *See Child Offenders*, *supra* note 287, at 31-32.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

juveniles on their death row.³⁰⁶ It would seem that “[t]he practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.”³⁰⁷

Following *Atkins*, it can be safely concluded that the Court has re-established a precedent of looking to outside sources such as opinion polls, statements of professional and religious organizations and the international community in its consensus debate.³⁰⁸ If the external perspectives on mental capacity and the death penalty were strong enough to persuade the Court in *Atkins*, they would surely be enough for juveniles and the death penalty. “The international consensus on the juvenile issue is at least as strong as on the mental retardation issue, and more explicit in international treaty law.”³⁰⁹ Besides the United States, only Iran, Pakistan, and the Congo have executed juveniles in the last two years.³¹⁰ Pakistan recently commuted the death sentences of all juvenile offenders and the Congo has placed a moratorium on such executions.³¹¹ An international treaty entitled “Convention on the Rights of the Child” includes a prohibition on the execution of anyone under the age of eighteen.³¹² This treaty has been ratified by 191 countries since 1989—all of the members of the United Nations except the United States and Somalia.³¹³ The United States has signed this treaty but is the only country to specifically exempt itself from compliance with the juvenile death penalty provision.³¹⁴ The United States

³⁰⁶ *United States of America. Crying Out for Clemency: The Case of Alexander Williams, Mentally Ill Child Offender Facing Execution*, AMNESTY INT’L, Sept. 2000, at app. 1.

³⁰⁷ *Atkins*, 536 U.S. at 316. Stevens concluded the practice of executing mentally retarded offenders was “truly unusual” because only five states had executed mentally retarded individuals since 1989. *Id.*

³⁰⁸ See *Thompson v. Oklahoma*, 487 U.S. 817, 830-31 (1982); *Atkins*, 536 U.S. at 316 n.21. See generally *Stanford v. Kentucky*, 492 U.S. 361 (1989). This contention was discussed and dismissed in Section V of the majority opinion. *Id.* However, because Justice O’Connor wrote separately to express her disagreement with this section, it has no precedential value. *Id.* The combination of O’Connor with the four dissenting justices (who would have the Court consider the outside sources) proves that a majority of the justices are in favor of this approach. *Id.*

³⁰⁹ *Child Offenders*, *supra* note 287, at 91.

³¹⁰ Arianna Aryanpur, *U.S. Is Urged to Quit Executing Youth Offenders*, L.A. TIMES, Sept. 26, 2002, at A21. See also Strieb, *supra* note 301.

³¹¹ Aryanpur, *supra* note 310. Iran’s judiciary has presented a bill to parliament raising the minimum age for the death penalty to eighteen. *Iran Moves Towards Ending Death Penalty Practices for 15-18 Year Olds*, AGENCE FRANCE PRESSE, Sept. 28, 2003.

³¹² *Child Offenders*, *supra* note 287, at 83.

³¹³ *Id.* at 83-84.

³¹⁴ *Id.* at 84.

has carried out fifty-six percent of the worldwide juvenile executions since 1990 and seventy percent since 1998.³¹⁵

A recent poll indicated that sixty-nine percent of the American public opposes the death penalty for juveniles under eighteen and only twenty-six are in favor of it.³¹⁶ These numbers are a complete reversal from a similar poll taken in 1994, another indicator that there is a societal trend against juvenile executions.³¹⁷ Another study, in 2001, found that although sixty-two percent of those polled were generally in favor of the death penalty, only thirty-four percent supported it for juvenile offenders.³¹⁸ Similar to the situation in *Atkins*, multiple professional organizations have adopted an official stance against juvenile executions.³¹⁹

This information should lead the Court to conclude that a “national consensus” exists against juvenile executions.³²⁰ The combination of state legislation, jury verdicts, polling data, international treaties, and professional organizations opposed to a juvenile death penalty will likely lead the Court to reconsider *Stanford* and establish eighteen as the minimum age for eligibility for the death penalty.

V. CONCLUSION

In *Atkins v. Virginia*, the Supreme Court redefined the term “national consensus” within their Eighth Amendment jurisprudence. The objective indicia of a “national consensus” relied upon by the Court was nowhere near the previous benchmark required to find a sentencing practice

³¹⁵ *Id.* at 85.

³¹⁶ Aryanpur, *supra* note 310.

³¹⁷ *Id.* In 1994, the poll announced that sixty-one percent of Americans were in favor of juvenile execution and thirty percent were opposed to the idea. *Id.*

³¹⁸ *Child Offenders*, *supra* note 287, at 35.

³¹⁹ Harper, *supra* note 285. See also *Child Offenders*, *supra* note 287, at 34 (listing professional organizations that have adopted a stance against execution of offenders that are under the age of eighteen: American Bar Association, American Psychiatric Association, American Academy of Child and Adolescent Psychiatry, American Society for Adolescent Psychiatry, National Mental Health Association, Children’s Defense Fund, Center on Juvenile and Criminal Justice, Coalition for Juvenile Justice, Child Welfare League of American, Juvenile Law Center, Mid-Atlantic Juvenile Defender Center, and Youth Law Center).

³²⁰ There have also been studies released in the past few years detailing decreased psychological development of teenagers. Because my analysis of the *Atkins* decision was limited to the objective indicators of a national consensus, these studies were outside of the scope of this paper. However, the Court will probably consider these studies persuasive in the realm of juvenile executions not serving a legitimate retributive purpose as juveniles are less culpable than adults for their actions. See *Child Offenders*, *supra* note 287, at 54-80.

unconstitutional. With this opinion as precedent, the Court should examine age-related death penalty legislation and overturn *Stanford v. Kentucky*.³²¹

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³²¹ 492 U.S. 361 (1989).