

5-2003

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Jaime L. Henshaw

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Recommended Citation

Jaime L. Henshaw, *Atkins v. Virginia: The Court's Failure to Recognize What Lies Beneath*, 37 U. Rich. L. Rev. 1185 (2002).
Available at: <https://scholarship.richmond.edu/lawreview/vol37/iss4/10>

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CASENOTE

ATKINS V. VIRGINIA: THE COURT'S FAILURE TO RECOGNIZE WHAT LIES BENEATH

[Determination of a person's incapacity] is a matter of great difficulty, partly from the easiness of counterfeiting this disability . . . and partly from the variety of the degrees of this infirmity, whereof some are sufficient, and some are insufficient to excuse persons in capital offenses.

Yet the law of England hath afforded the best method of trial, that is possible, of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses . . . , and by the inspection and direction of the judge.¹

I. INTRODUCTION

The common law excluded “idiots” and “lunatics” from punishment for criminal acts.² The Supreme Court of the United States initially fortified the common law rule in *Ford v. Wainwright*,³ holding that the Eighth Amendment⁴ prohibits execution of the insane.⁵ It is to the other side of the common law that this

1. *Atkins v. Virginia*, 122 S. Ct. 2242, 2268 (2002) (Scalia, J., dissenting) (quoting 1 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 32–33 (Philadelphia, Robert H. Small 1847)).

2. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

3. 477 U.S. 399 (1986).

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

5. *Ford*, 477 U.S. at 409–10.

casenote turns: the diminished capacity of the mentally retarded as it applies to punishment for crimes. Under the common law, “the term ‘idiot’ was generally used to describe persons who had a total lack of reason or understanding, or an inability to distinguish between good and evil.”⁶ This definition of “idiocy” is similar to the modern term “mental retardation.”⁷ It is important to note, however, that idiots under the common law were persons with such severe disability that they completely lacked the reasoning capacity necessary to distinguish between good and evil or form criminal intent.⁸ This level of mental incapacity corresponds with the “severe” or “profound” retardation categories recognized under modern psychiatric medicine.⁹

At the time of the ratification of the Bill of Rights, the law allowed the punishment and execution of individuals who were mentally retarded so long as they did not reach the level of idiocy described above.¹⁰ The question has arisen, though, as to whether it is cruel and unusual punishment under the Eighth Amendment to allow the execution of the mentally retarded. The Supreme Court first addressed this issue in *Penry v. Lynaugh*, holding that such executions were not in violation of the Eighth Amendment.¹¹

6. *Penry*, 492 U.S. at 331–32.

7. *Id.* at 332. Mental retardation is defined as “a lifelong condition of impaired or incomplete mental development characterized by three criteria: significantly sub-average intellectual functioning; concurrent and related limitation in two or more adaptive skill areas; and manifestation of symptoms before age eighteen.” Aimee D. Borromeo, *Mental Retardation and the Death Penalty*, 3 LOY. J. PUB. INT. L. 175, 178 (2002) (citing American Association on Mental Retardation, *Definition of Mental Retardation*, available at http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited Mar. 21, 2003)).

Similarly, the American Psychiatric Association’s definition requires significantly subaverage intellectual functioning, onset before age eighteen, and significant adaptive functioning limitation in at least two skill areas, including “communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.” *Athins*, 122 S. Ct. at 2245 n.3.

8. *Penry*, 492 U.S. at 333.

9. *Id.* For a person to be diagnosed as mentally retarded, he or she must have an IQ of seventy or less. *Id.* at 308 n.1. The American Association on Mental Retardation classifies “mild” retardation as an IQ score between fifty to fifty-five and seventy. *Id.* “Moderate” retardation includes individuals scoring between thirty-five to forty and fifty to fifty-five. *Id.* Individuals are categorized as “severely” retarded if they score between twenty to twenty-five and thirty-five to forty. *Id.* “Profoundly” retarded individuals have IQ scores less than twenty or twenty-five. *Id.*

10. *See id.* at 333.

11. *See id.* at 335.

The Court recently overturned the *Penry* ruling however, in *Atkins v. Virginia*.¹²

In Section II, this casenote reviews precedent relevant to the *Atkins* holding. In Section III, this casenote depicts the facts of *Atkins* and summarizes the majority and dissenting opinions in that case. Section IV provides a discussion of *Atkins* in light of the Eighth Amendment and a discussion of the validity of the Court's analysis. Finally, Section V concludes that the *Atkins* decision, while appearing straightforward on its face, actually enhances and ignores several underlying issues regarding the punishment of the mentally retarded.

II. DEATH PENALTY JURISPRUDENCE REGARDING THE MENTALLY RETARDED

A. *The Jury's Responsibilities at Sentencing*

Traditionally, the decision whether or not a mentally retarded offender should receive the death penalty was left to the jury.¹³ In *Lockett v. Ohio*,¹⁴ the Supreme Court held that the sentencer could "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."¹⁵ In simpler terms, the Court held that the jury could consider mitigating factors when determining sentencing verdicts.¹⁶ Such mitigating factors include, but are not limited to, "[t]he defendant's character, prior criminal history, mental capacity, background, and age."¹⁷ Soon after *Lockett*, in *Eddings v. Oklahoma*,¹⁸ the Court held that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as

12. 122 S. Ct. 2242, 2252 (2002).

13. See *Penry*, 492 U.S. at 319.

14. 438 U.S. 586 (1978).

15. *Id.* at 604.

16. See *id.*

17. *Simmons v. South Carolina*, 512 U.S. 154, 163 (1994).

18. 455 U.S. 104 (1982).

a matter of law, any relevant mitigating evidence.”¹⁹ Thus, the jury was required to consider a defendant’s mental retardation as a mitigating factor under the Court’s holding in *Eddings*.²⁰

The Court’s ruling in *California v. Brown*²¹ further clarified the principles stated in *Lockett* and *Eddings*.²² Essentially, Justice O’Connor reasoned that punishment should be correlative to culpability asserting that “the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant’s background, character, and crime.”²³

B. *Penry v. Lynaugh: Execution of the Mentally Retarded Is Permissible*

In 1989, the jury determination system was questioned.²⁴ *Penry v. Lynaugh* asked the Supreme Court of the United States to determine whether the execution of the mentally retarded was a per se violation of the Eighth Amendment.²⁵ The defendant in that case argued that he was sentenced to death because the jury was not adequately instructed to consider all of the mitigating factors.²⁶ The Court held that execution of the mentally retarded was not cruel and unusual punishment, effectively continuing the practice of considering mental retardation merely as a mitigating factor.²⁷

1. History of the *Penry* Case

In *Penry*, the defendant, Johnny Paul Penry, brutally raped, beat, and stabbed a woman with a pair of scissors while in her

19. *Id.* at 113–14.

20. *See id.* at 105.

21. 479 U.S. 538 (1987).

22. *See id.* at 545 (“*Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant.”) (O’Connor, J., concurring).

23. *Id.* (O’Connor, J., concurring).

24. *Penry*, 492 U.S. at 302.

25. *Id.* at 313.

26. *Id.*

27. *Id.* at 335.

home.²⁸ The victim died several hours later, but was able to describe her assailant before her death.²⁹ Her description led the police to suspect Penry, who later made two confessions to the police.³⁰ As a result, Penry was charged with capital murder.³¹

Prior to trial, at Penry's competency hearing, Dr. Jerome Brown, a clinical psychologist, testified that Penry was mentally retarded.³² Penry's condition was likely due to trauma to the brain at birth, and IQ testing prior to the murder revealed Penry "as having an IQ between [fifty] and [sixty-three], which indicates mild to moderate retardation."³³ Testing conducted by Dr. Brown prior to trial showed Penry as having an IQ of fifty-four.³⁴ Dr. Brown's evaluation also concluded that Penry had the mental age of a six-and-a-half-year-old, even though he was twenty-two years old at the time of the crime.³⁵ Despite Dr. Brown's testimony, "[t]he jury found Penry competent to stand trial."³⁶

At trial, Penry raised an insanity defense and presented testimony from Dr. Jose Garcia.³⁷ Dr. Garcia, a psychiatrist, testified that "Penry suffered from organic brain damage and moderate retardation, which resulted in poor impulse control and an inability to learn from experience."³⁸ Dr. Garcia diagnosed Penry as suffering from organic brain disorder while committing the offense, which kept him from acting as a lawful citizen and understanding the wrongfulness of his conduct.³⁹

28. *Id.* at 307.

29. *Id.*

30. *Id.* Penry was on parole following his conviction on an earlier rape charge. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 307-08.

34. *Id.* at 308.

35. *Id.* Dr. Brown's conclusion as to Penry's mental age suggested that Penry "ha[d] the ability to learn and the learning or the knowledge of the average [six-and-a-half-year-old] kid." *Id.* Moreover, Dr. Brown's testimony revealed his opinion that "Penry's social maturity, or ability to function in the world, was that of a [nine or ten]-year-old." *Id.*

36. *Id.*

37. *Id.*

38. *Id.* Dr. Garcia indicated that Penry's brain damage likely resulted at birth, but acknowledged that the illness could have resulted from beatings and brain injuries at an early age. *Id.* at 308-09.

39. *Id.* at 309.

The prosecution presented testimony from two psychiatrists, Dr. Kenneth Vogtsberger and Dr. Felix Peebles.⁴⁰ Dr. Vogtsberger testified that "although Penry was a person of limited mental ability, he was not suffering from any mental illness or defect at the time of the crime, and that he knew the difference between right and wrong and had the potential to honor the law."⁴¹ Dr. Vogtsberger conceded that Penry was impulsive, tended to break the law, and appeared unable to learn from experience, but argued that these problems were due to Penry's antisocial personality.⁴² In addition, Dr. Vogtsberger testified that Penry's IQ scores did not indicate his true ability as those scores underestimated both Penry's understanding of the world around him and his alertness.⁴³

Dr. Peebles testified that Penry had an anti-social personality and that Penry was legally sane when he committed the crime.⁴⁴ Dr. Peebles had previous experience with Penry, as he had diagnosed Penry in both 1973 and 1977 as being mentally retarded.⁴⁵ Both of the State's psychiatrists "acknowledged that Penry was a person of extremely limited mental ability, and that he seemed unable to learn from his mistakes."⁴⁶

Rejecting Penry's insanity defense, the jury found Penry guilty of capital murder and sentenced him to death.⁴⁷ The Supreme Court granted certiorari on two issues, including whether it is

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 310.

47. *Id.* at 310-11. In deciding the sentence to impose on Penry, the jury was required by Texas law to answer three questions:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Id. at 310. (quoting TEX. CRIM. PROC. CODE ANN. § 37.071(b) (Vernon 1981 and Supp. 1989)). Under this statutory requirement, if the jury answers "yes" to all three special issues, the defendant must be sentenced to death, but if the jury does not answer "yes" to all three questions, the defendant must be sentenced to life imprisonment. *Id.*

“cruel and unusual punishment under the Eighth Amendment to execute a mentally retarded person with Penry’s reasoning ability.”⁴⁸ Penry pointed to several factors, arguing that the execution of the mentally retarded is unconstitutional under the Eighth Amendment.⁴⁹ First, Penry argued that the disabilities of the mentally retarded leave them without the moral culpability necessary to justify the death penalty.⁵⁰ In addition, Penry argued that application of the death penalty for the mentally retarded should be considered cruel and unusual punishment due to an “emerging national consensus” against such executions.⁵¹ The State responded by arguing that existing procedural safeguards served to adequately protect the mentally retarded and that no national consensus existed which would support a ban against executing the mentally retarded.⁵²

2. The Court Rejects Penry’s Argument

The Court reiterated the fact that under the common law, execution of the mentally retarded—at least those not severely retarded—was considered legal.⁵³ The Court acknowledged that “[t]he prohibitions of the Eighth Amendment are not limited . . . to those practices condemned” at the time the Constitution was ratified,⁵⁴ stating that “the prohibition against cruel and unusual punishments also recognizes the ‘evolving standards of decency that mark the progress of a maturing society.’”⁵⁵ Thus, in questioning whether the Eighth Amendment precluded execution of the mentally retarded, the Court considered Penry’s argument

48. *Id.* at 313. The Court also granted certiorari to determine whether Penry “[was] sentenced to death in violation of the Eighth Amendment because the jury was not adequately instructed to take into consideration all of his mitigating evidence and because the terms in the Texas special issues were not defined in such a way that the jury could consider and give effect to his mitigating evidence in answering them.” *Id.* For a listing of the Texas special issues, see *supra* note 47. See also *Penry*, 492 U.S. at 328 (discussing the Court’s holding regarding the jury instructions).

49. *Penry*, 492 U.S. at 328–29.

50. *Id.*

51. *Id.* at 329.

52. *Id.*

53. *Id.* at 331–32.

54. *Id.* at 330 (citing *Ford v. Wainwright*, 477 U.S. 399, 406 (1986); *Gregg v. Georgia*, 428 U.S. 153, 171 (1976)).

55. *Id.* at 330–31 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

that there was in fact an emerging national consensus against such punishment.⁵⁶ The Court found that no such national consensus existed, as only two states had legislation banning execution of the mentally retarded.⁵⁷ The Court briefly pointed out that in order to find national consensus, it was necessary to find a greater number of states with similar legislation.⁵⁸ Thus, as there was no national consensus, execution of the mentally retarded was found constitutional.⁵⁹

3. *Penry's* Effect

Following *Penry*, the United States Congress banned execution of mentally retarded federal defendants.⁶⁰ Moreover, Tennessee became the first state to pass legislation abolishing execution of the mentally retarded in reaction to the *Penry* holding.⁶¹ Eighteen states, in total, enacted statutes restricting the application of the death penalty regarding the mentally retarded.⁶² However, eleven of the statutes enacted were not retroactive and applied only to those offenders committing crimes after the effective date of the legislation.⁶³ Due to this change in the legislative arena—the reduced availability of the death penalty as it applies to mentally retarded offenders—the Court was pressed to reconsider whether

56. *See id.* at 333–34.

57. *Id.* at 334. At the time arguments were heard in *Penry*, only Georgia banned execution of the mentally retarded. *Id.* Maryland had enacted a statute banning execution of the mentally retarded, but it was not slated to take effect until July, 1989. *Id.*

58. *Id.*

59. *Id.* at 335.

60. *See* 18 U.S.C. § 3596(c) (2000).

61. Cynthia Han, “*Evolving Standards of Decency*”: *Legislative and Judicial Developments Leading to Atkins v. Virginia*, 9 GEO. J. ON POVERTY L. & POL’Y 469, 470 (2002).

62. *Atkins v. Virginia*, 122 S. Ct. 2242, 2248–49 (2002). Five states enacted legislation regarding the susceptibility to the death penalty of the mentally retarded in 2001. Han, *supra* note 61, at 470. For an example of the statutes enacted after *Penry*, see FLA. STAT. ANN. § 921.137(8) (West Supp. 2003); KY. REV. STAT. ANN. § 532.140 (Michie 1999); and TENN. CODE ANN. § 39-13-203(b) (1997).

63. *Atkins*, 122 S. Ct. at 2261–62 (Scalia, J., dissenting). In addition, two of the statutes enacted to restrict the execution of the mentally retarded actually allow such executions under certain circumstances. *Id.* at 2262 (Scalia, J., dissenting). For example, a mentally retarded convict committing murder while in prison is eligible for the death penalty in New York. *Id.* (Scalia, J., dissenting) (citing N.Y. CRIM. PROC. LAW § 400.27.12(d) (Consol. 2002); N.Y. PENAL LAW § 125.27 (Consol. 1998)). Kansas restricts execution of only the severely mentally retarded. *See id.* (Scalia, J., dissenting) (referencing KAN. STAT. ANN. §§ 21-4623(d)–(e), 21-4631(c) (1995)).

the Eighth Amendment bans the execution of the mentally retarded.⁶⁴

III. *ATKINS V. VIRGINIA*: THE COURT BANS EXECUTION OF THE MENTALLY RETARDED

A. *History of the Atkins Case*

On August 16, 1996, Daryl Atkins and William Jones robbed a customer at a convenience store.⁶⁵ Armed with a semiautomatic handgun, they abducted Eric Nesbitt, robbed him, forced him to withdraw additional money from an automated teller machine, and took him to an “isolated location” where they ordered him out of the vehicle and shot him eight times.⁶⁶ Upon arrest, Jones declined to make an initial statement to the police.⁶⁷ Although Atkins made an initial statement to the police, it differed greatly and was substantially inconsistent with his later testimony at trial.⁶⁸ Both Jones and Atkins were indicted for capital murder after their arrest, but the prosecution later allowed Jones to plead guilty to first-degree murder in exchange for his testimony against Atkins at trial.⁶⁹ During Atkins’s trial, both Jones and Atkins testified as to the details of the incident.⁷⁰ The two defendants’ testimonies were substantially similar regarding their actions on the night of August 16—the one exception being that each asserted the other had shot and killed Nesbitt.⁷¹ The jury believed Jones’s testimony to be true and found Atkins guilty of capital murder for killing Nesbitt.⁷²

During the penalty phase of Atkins’s trial, the prosecution presented evidence regarding Atkins’s “future dangerousness and the ‘vileness of the offense’” committed.⁷³ In an effort to prove fu-

64. *See id.* at 2248–50.

65. *Id.* at 2244.

66. *Id.*

67. *Id.* at 2245 n.2.

68. *Id.*

69. *Id.* at 2244 n.1.

70. *Id.* at 2244.

71. *Id.*

72. *Id.* at 2244–45.

73. *Id.* at 2245.

ture dangerousness, the prosecution presented evidence of Atkins's prior felony convictions and testimony from the victims of his other robberies and assaults.⁷⁴ Atkins had "[sixteen] prior felony convictions for robbery, attempted robbery, abduction, use of a firearm, and maiming."⁷⁵ In order to prove the "vileness of the offense," the Commonwealth relied on the trial record, which included an autopsy report and pictures of the victim's body.⁷⁶

The defense, on the other hand, relied solely on the testimony of one witness during the penalty phase of Atkins's trial, Dr. Evan Nelson.⁷⁷ Dr. Nelson, a forensic psychologist, testified that Atkins was "mildly mentally retarded."⁷⁸ Dr. Nelson also stated that, "in his opinion, Atkins'[s] limited intellect had been a consistent feature throughout his life, and that his IQ score of [fifty-nine] is not an 'aberration, malingered result, or invalid test score."⁷⁹ After weighing the evidence presented by the Commonwealth and the defense during the penalty phase of Atkins's trial, the jury sentenced Atkins to death.⁸⁰

Due to a misleading verdict form, however, the Supreme Court of Virginia overturned the verdict and ordered a second sentencing hearing.⁸¹ Once again, the defense presented Dr. Nelson to testify during the penalty phase.⁸² He testified that Atkins "was a 'slow learne[r],' who showed a 'lack of success in pretty much every domain of his life' and that he had an 'impaired' capacity to appreciate the criminality of his conduct and to conform his conduct to the law."⁸³ In addition, the defense presented several of Atkins's family members to testify that he was a "follower."⁸⁴

74. *Id.* One of Atkins's prior victims described how Atkins hit him over the head with a beer bottle, while another victim told the jury how Atkins "slapped a gun across [her] face, clubbed her in the head with it, knocked her to the ground, and then helped her up, only to shoot her in the stomach." *Id.* at 2260 (Scalia, J., dissenting).

75. *Id.* at 2260 (Scalia, J., dissenting).

76. *Id.* at 2245.

77. *Id.*

78. *Id.* Dr. Nelson based his conclusion on his review of education and judicial records, discussions with people who knew Atkins, and Atkins's tested IQ of fifty-nine. *Id.*

79. *Id.* at 2245 n.5.

80. *Id.* at 2245.

81. *Id.* at 2245-46.

82. *Id.* at 2246.

83. *Id.* at 2259-60 (Scalia, J., dissenting) (alteration in original) (citation omitted).

84. *Id.* at 2260 (Scalia, J., dissenting).

The Commonwealth introduced an expert rebuttal witness, Dr. Stanton Samenow, who testified that no evidence, aside from the IQ score, indicated that Atkins was mentally retarded.⁸⁵ Samenow also testified that Atkins was at least of average intelligence.⁸⁶ Once again, the jury sentenced Atkins to death, and this time the Supreme Court of Virginia affirmed the sentence.⁸⁷ In response to Atkins's argument that the death penalty should not apply to him due to his mental retardation, the Supreme Court of Virginia relied on *Penry*⁸⁸ and stated that it was "not willing to commute Atkins'[s] sentence of death to life imprisonment merely because of his IQ score."⁸⁹

Justice Hassell and Justice Koontz dissented due to their conclusion that imposition of the death penalty was excessive for a mentally retarded defendant with the mental age of a young child.⁹⁰ They asserted that mentally retarded individuals are less culpable for their criminal acts, at least to some degree, due to their mental limitations.⁹¹ They further stated that "[a] moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way."⁹²

The Supreme Court of the United States, in an opinion by Justice Stevens, reversed the judgment of the Supreme Court of Virginia in finding that the execution of the mentally retarded was indeed cruel and unusual punishment in violation of the Eighth Amendment—a holding that effectively overturned *Penry*—and remanded the case for further proceedings.⁹³

85. *Id.* (Scalia, J., dissenting).

86. *Id.* (Scalia, J., dissenting). Dr. Samenow based his opinion on several factors, including review of Atkins's school records, two interviews with Atkins, and discussions with correctional facility staff. *Id.* at 2246 n.6. Admittedly, Dr. Samenow did not give Atkins an intelligence test, but he did incorporate and "ask . . . questions taken from the 1972 version of the Wechsler Memory Scale." *Id.*

87. *Id.* at 2246.

88. See *supra* Part II.B for further discussion of *Penry*.

89. *Atkins v. Commonwealth*, 534 S.E.2d 312, 321 (2000).

90. *Id.* at 323–24.

91. *Id.* at 325.

92. *Id.*

93. *Atkins v. Virginia*, 122 S. Ct. at 2242, 2252 (2002).

B. *Majority Opinion*

1. A Test To Determine Whether Punishment Is Excessive

Justice Stevens announced the judgment of the Court and delivered an opinion in which Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer joined.⁹⁴ In considering whether the execution of the mentally retarded violated the Eighth Amendment, the Court found it necessary to lay out a framework in which to review the issue.⁹⁵ Referring to *Weems v. United States*,⁹⁶ in which the Court ruled that punishment must be graduated and proportioned to the initial offense,⁹⁷ the Court stated that it had "read the text of the [Eighth] [A]mendment to prohibit all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive."⁹⁸ The Court then asserted that when determining whether a punishment is excessive, it is necessary to apply modern standards rather than the standards which existed when the Eighth Amendment was adopted.⁹⁹ The Court clarified this point, indicating that in order to determine today's standard one must look to objective evidence.¹⁰⁰ Despite the importance of objective evidence, however, the Court concluded that objective evidence alone does not determine the answer.¹⁰¹ The Court reasoned that "the Constitution contemplates that in the end [the Court's] judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."¹⁰² According to the Court, their judgment is brought to bear "by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators."¹⁰³ Thus, the Court found it necessary to first consider objective fac-

94. *Id.* at 2244.

95. *See id.* at 2247.

96. 217 U.S. 349 (1910).

97. *Id.* at 367.

98. *Atkins*, 122 S. Ct. at 2246, n.7.

99. *Id.* at 2247. Specifically, the Court cited *Trop v. Dulles*, in which Chief Justice Warren stated that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. 86, 101 (1958).

100. *Atkins*, 122 S. Ct. at 2247.

101. *Id.*

102. *Id.* (citing *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

103. *Id.* at 2247-48.

tors in determining the existence of a national consensus and to next bring their own judgment to “bear” on the issue.¹⁰⁴

2. A Finding of National Consensus

Acknowledging the *Penry* finding of no national consensus against the eligibility of the mentally retarded for the death penalty,¹⁰⁵ the Court concluded that many changes have occurred since *Penry*.¹⁰⁶ The Court opined that the best evidence of society’s contemporary values is legislation enacted by state and national legislatures.¹⁰⁷ Reviewing legislative action since *Penry*, the Court found that eighteen states now have statutes restricting the use of the death penalty for the mentally retarded.¹⁰⁸ In the Court’s view, “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.”¹⁰⁹ The Court found such actions to provide evidence that today’s society believes mentally retarded offenders are less culpable than average criminals.¹¹⁰ Moreover, the Court acknowledged that “even in those States which allow execution of mentally retarded offenders, the practice is uncommon.”¹¹¹ Pointing to the increased enactment of legislation, the rare use of the death penalty for the mentally retarded, the views indicated by religious and private organizations, other nations, and public opinion polls, the Court found a national consensus against the application of the death penalty to mentally retarded offenders.¹¹²

3. The Justices Bring Their Judgment To “Bear” on the Issue

Next, the Court turned to the second part of their overall framework—bringing their own judgment to “bear” on the issue.¹¹³ Immediately, the Court turned to the reason behind the

104. *Id.* at 2248.

105. *Id.* at 2248 (citing *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989)).

106. *Id.*

107. *Id.* at 2247 (quoting *Penry*, 492 U.S. at 331).

108. *Id.* at 2248–49.

109. *Id.* at 2249.

110. *Id.*

111. *Id.*

112. *Id.* at 2249 n.21.

113. *See id.* at 2250–52.

disagreement surrounding the issue.¹¹⁴ The Court suggested that dispute over the execution of mentally retarded offenders is in fact due to the difficulty in determining whether or not an offender is mentally retarded.¹¹⁵ In an effort to resolve the problems inherent in such determinations, the Court stated:

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. As was our approach in *Ford v. Wainwright*, with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."¹¹⁶

The Court also discussed whether there was any reason to disagree with the apparent national consensus.¹¹⁷ Discussing the deficiencies of mentally retarded persons—including diminished capacity to understand, communicate, learn from mistakes, and control impulses—the Court found that "[t]heir deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability."¹¹⁸ Considering the aforementioned deficiencies of the mentally retarded, the Court found that death penalty jurisprudence provided two reasons to follow the national consensus and exempt the mentally retarded from the death penalty.¹¹⁹ Those two reasons are: (1) the retributive and deterrent justifications recognized as a basis for the death penalty may not apply to mentally retarded offenders,¹²⁰ and (2) mentally retarded offenders bear an enhanced risk that the imposition of the death penalty will occur despite mitigating factors that call for a less severe punishment.¹²¹

First, the Court found that retribution does not justify executing the mentally retarded since retribution requires punishment which increases in severity with an offender's culpability.¹²² Reciting the fact that the death penalty is confined to only the most serious crimes, the Court suggested that "[i]f the culpability of the average murderer is insufficient to justify the most extreme

114. *See id.* at 2250.

115. *Id.*

116. *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986)).

117. *See id.* at 2250.

118. *Id.* at 2250–51.

119. *Id.* at 2251.

120. *Id.* (citing *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

121. *Id.* (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

122. *Id.*

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."¹²³

In addition, the Court suggested that the deterrence requirement is not met in applying the death penalty to the mentally retarded.¹²⁴ The deficiencies of the mentally retarded which make them less culpable "also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."¹²⁵ The Court opined that because the goal of the death penalty is to deter offenders from committing capital crimes, its use among the mentally retarded is not necessary or beneficial, as mentally retarded offenders are unlikely to understand the consequences of their actions or to act accordingly with that knowledge.¹²⁶ Finally, the Court found that "the possibility of false confessions . . . [and] 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," coupled with the fact that mentally retarded defendants are less capable of assisting their counsel and are usually poor witnesses, increases the risk of imposition of the death penalty in unwarranted situations.¹²⁷ For the reasons cited above, the Court held that there was no basis on which to disagree with the national consensus to abolish the death penalty for the mentally retarded, and accordingly ruled that such punishment was excessive and unconstitutional under the Eighth Amendment.¹²⁸

C. Chief Justice Rehnquist's Dissent

Chief Justice Rehnquist filed a dissenting opinion in which Justices Scalia and Thomas joined.¹²⁹ Specifically, Chief Justice Rehnquist wrote a dissenting opinion to point out the problems

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 2251–52.

128. *Id.* at 2252.

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

inherent in the Court's decision to consider foreign laws, the views of professional and religious organizations, and opinion polls in determining the presence of a national consensus.¹³⁰ Chief Justice Rehnquist asserted that if the Court is attempting to assess whether or not there is a national consensus, it is not necessary to look at viewpoints from other countries, nor is it supported by precedent.¹³¹ In addition, he referred to several factors suggesting that opinion polls should not be considered, including the reduced reliability and validity of opinion polls.¹³² He also suggested that the particular polls reviewed by the Court in *Atkins* should not be considered as evidence for a national consensus, because the Court had no knowledge of the targeted population, specificity of questions, or background reasons for conducting the polls.¹³³ Moreover, in Chief Justice Rehnquist's view, the opinion-based evidence relied on by the Court should not "be accorded any weight on the Eight [sic] Amendment scale when the elected representatives of a State's populace have not deemed them persuasive enough to prompt legislative action."¹³⁴

Regarding determination of a national consensus, Chief Justice Rehnquist argued that in order to determine today's standard of decency, one should look only to the actions of legislatures and juries.¹³⁵ Chief Justice Rehnquist based this opinion, in part, on the idea that "in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."¹³⁶ Chief Justice Rehnquist also disagreed with the majority's finding of national consensus based upon state statutes imposing restrictions on the execution of mentally retarded offenders.¹³⁷ While conceding that eighteen states recently passed such laws, he noted that twenty other states do not have similar laws and leave the sentencing determination up to

130. *Id.* at 2252-53 (Rehnquist, C.J., dissenting).

131. *Id.* at 2254 (Rehnquist, C.J., dissenting).

132. *Id.* at 2254-55 (Rehnquist, C.J., dissenting).

133. *Id.* at 2255 (Rehnquist, C.J., dissenting). In an appendix to the opinion, he provided examples of the polls presented to the Court as evidence of a national consensus against execution of the mentally retarded. *See id.* at 2256-59 (Rehnquist, C.J., dissenting).

134. *Id.* at 2255 (Rehnquist, C.J., dissenting).

135. *Id.* at 2256 (Rehnquist, C.J., dissenting).

136. *Id.* at 2253 (Rehnquist, C.J., dissenting) (quoting *Gregg v. Georgia*, 428 U.S. 153, 175-76 (1976) (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972))).

137. *Id.* at 2252 (Rehnquist, C.J., dissenting).

the factfinder, who is more familiar with the defendant's case and capabilities.¹³⁸ Basically, Chief Justice Rehnquist's theory hinges on the assertion that a national consensus cannot exist where only a minority of the state legislatures allowing capital punishment have acted to limit its application for the mentally infirm.¹³⁹

Finally, Chief Justice Rehnquist criticized the majority for failing to review jury sentences for mentally retarded offenders.¹⁴⁰ Conceding that jury sentences are entitled to less weight than legislative actions,¹⁴¹ he maintained that the actions of juries are a reliable indicator of the contemporary views of society.¹⁴² Since Atkins introduced no evidence concerning mentally retarded jury sentences, Chief Justice Rehnquist argued that the majority did not consider juries as a relevant indicator of contemporary values—thereby ignoring one of the two sources that actually indicate whether or not there is a national consensus regarding Eighth Amendment issues.¹⁴³

D. Justice Scalia's Dissent

1. National Consensus Lacking

Justice Scalia filed a separate dissenting opinion in which Chief Justice Rehnquist and Justice Thomas joined.¹⁴⁴ Justice Scalia asserted that the majority's declaration of a national consensus further reinforced the "death-is-different" approach taken by the Court in the context of Eighth Amendment jurisprudence.¹⁴⁵ Reciting the fact that only severely retarded offenders were excluded from the death penalty under common law at the time of the Eighth Amendment's creation,¹⁴⁶ Justice Scalia opined that there is no national consensus suggesting that all mentally

138. *See id.* (Rehnquist, C.J., dissenting).

139. *See id.* (Rehnquist, C.J., dissenting).

140. *Id.* at 2254 (Rehnquist, C.J., dissenting).

141. *Id.* at 2253 (Rehnquist, C.J., dissenting).

142. *See id.* (Rehnquist, C.J., dissenting) (finding that a jury's close relationship with a trial provides an illustrative link between modern societal values and the justice system).

143. *See id.* at 2253–54 (Rehnquist, C.J., dissenting).

144. *Id.* at 2259 (Scalia, J., dissenting).

145. *Id.* (Scalia, J., dissenting).

146. *Id.* at 2260 (Scalia, J., dissenting).

retarded individuals should be exempted from the death penalty, and that the majority's ruling was founded solely upon the Justices' personal opinions on the matter.¹⁴⁷ While agreeing that objective factors were the only appropriate considerations in determining whether there was a national consensus, Justice Scalia disagreed with the majority's interpretation of such factors.¹⁴⁸

First, Justice Scalia reviewed the legislative actions examined by the majority in making its determination.¹⁴⁹ Although eighteen states had enacted legislation restricting the use of the death penalty for the mentally retarded, Justice Scalia argued that such actions did not indicate a national consensus.¹⁵⁰ Reasons given for this conclusion included: (1) that the states enacting such legislation comprise only forty-seven percent of the thirty-eight states that allow capital punishment;¹⁵¹ (2) only seven of the states enacting legislation prohibit execution of the mentally retarded in all instances;¹⁵² (3) the referenced state legislation is so recent that the states themselves have not had an adequate opportunity to review the validity of the overall scheme through practice,¹⁵³ and (4) the Supreme Court has generally required a greater indication of national consensus before finding that contemporary values dictate the Eighth Amendment's abolition of a punishment.¹⁵⁴

In addition, Justice Scalia questioned the majority's assertion that a national consensus could be determined by examining the rarity of the imposition of the death penalty on the mentally retarded in states allowing their execution.¹⁵⁵ Accordingly, Justice Scalia contended that even the evidence cited by the majority was unclear on whether or not the execution of the mentally retarded is "uncommon."¹⁵⁶ Justice Scalia suggested that even if execution of the mentally retarded is uncommon, there are two primary factors which make it so: the fact that the mentally retarded com-

147. *See id.* at 2265 (Scalia, J., dissenting).

148. *See id.* at 2260-65 (Scalia, J., dissenting).

149. *See id.* at 2261-64 (Scalia, J., dissenting).

150. *Id.* at 2261-62 (Scalia, J., dissenting).

151. *Id.* at 2261 (Scalia, J., dissenting).

152. *Id.* (Scalia, J., dissenting).

153. *Id.* at 2262-63 (Scalia, J., dissenting).

154. *Id.* at 2262 (Scalia, J., dissenting).

155. *Id.* at 2264 (Scalia, J., dissenting).

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

prise only one to three percent of society and the fact that “mental retardation is a constitutionally mandated mitigating factor at sentencing.”¹⁵⁷ Thus, Justice Scalia asserted that one would expect juries rarely to impose the death penalty against mentally retarded offenders—that is, if the majority’s assertion of lesser culpability on the part of the mentally retarded is valid.¹⁵⁸

Justice Scalia characterized the majority’s use of opinion-based evidence as “the Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus.’”¹⁵⁹ Justice Scalia termed these sources “irrelevant” in the matter of determining national consensus.¹⁶⁰ Specifically, Justice Scalia pointed out that the Court’s determinations are based on the Constitution and that “the views of other nations, however enlightened the Justices of [the] Court may think them to be, cannot be imposed upon Americans through the Constitution.”¹⁶¹

2. A Tailored Ruling To Fit the Majority’s Personal View

Finally, Justice Scalia discussed his principal objection to the holding in *Atkins*—that the majority ruling was not justified by a national consensus, but instead was the result of the Justices placing their personal opinions above all else in an effort to shape the Eighth Amendment to fit their own personal ideologies.¹⁶² Justice Scalia believed this personal bias to be evident in the majority’s assertion that “[their] *own judgment* will be brought to bear” concerning the issue.¹⁶³ In Justice Scalia’s view, that interpretation of the Eighth Amendment suggests “that really good lawyers have moral sentiments superior to those of the common herd, whether in 1791 or today.”¹⁶⁴ Moreover, he argued that the Court is a tiny, unrepresentative portion of society wrongfully imposing its own perceptions of decency upon the nation.¹⁶⁵

157. *Id.* (Scalia, J., dissenting) (citing *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989)).

158. *Id.* (Scalia, J., dissenting) (citing *Stanford v. Kentucky*, 492 U.S. 361, 374 (1989)).

159. *Id.* (Scalia, J., dissenting).

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

161. *Id.* (Scalia, J., dissenting) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 868–69 n.4 (1988)).

162. *See id.* at 2265 (Scalia, J., dissenting).

163. *Id.* (Scalia, J., dissenting).

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

165. *Id.* (Scalia, J., dissenting).

To that end, Justice Scalia argued that the Court's view was incorrect as to whether the execution of the mentally retarded fulfills the goals of the death penalty.¹⁶⁶ Justice Scalia asserted that the majority's opinion "rests on two fundamental assumptions: (1) that the Eighth Amendment prohibits excessive punishments, and (2) that sentencing juries or judges are unable to account properly for the 'diminished capacities' of the retarded."¹⁶⁷ In response to the first assumption, Justice Scalia argued that a temporary consensus should not create a permanent limit on an acceptable punishment under the Eighth Amendment.¹⁶⁸ Regarding the second assumption, Justice Scalia railed against the limitation on the judge and jury, which play an indispensable role in the American justice system.¹⁶⁹

Moreover, Justice Scalia argued that the majority misinterpreted the application of the death penalty's social purposes.¹⁷⁰ Furthermore, he pointed out that the majority left out one of the death penalty's social purposes—incapacitation.¹⁷¹ Justice Scalia asserted that the imposition of the death penalty for mentally retarded offenders clearly meets this social purpose.¹⁷² As to whether retribution—one of the social purposes the majority examined—is satisfied, Justice Scalia argued that culpability and the imposition of retribution may be satisfied.¹⁷³ Specifically, he asserted that retribution is not determined solely by the mental capacity of the offender, but also by the depravity of the crime.¹⁷⁴ Therefore, he argued that there should not be a categorical rule as the majority suggests, but rather, the sentence should be left to the judge and jury so that the specific facts of each case can be reviewed.¹⁷⁵ In addition, Justice Scalia argued that the deterrent purpose can also be met by imposing the death penalty upon the

166. *Id.* at 2265–67 (Scalia, J., dissenting).

167. *Id.* at 2265 (Scalia, J., dissenting).

168. *Id.* (Scalia, J., dissenting) (citing *Harmelin v. Michigan*, 501 U.S. 957, 966–90 (1991)).

169. *Id.* (Scalia, J., dissenting).

170. *Id.* at 2265–66 (Scalia, J., dissenting).

171. *Id.* (Scalia, J., dissenting).

172. *Cf. id.* at 2265 (Scalia, J., dissenting) (finding that the majority "conveniently" avoided the issue of incapacitation).

173. *Id.* at 2266 (Scalia, J., dissenting).

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

175. *Id.* (Scalia, J., dissenting).

mentally retarded.¹⁷⁶ Justice Scalia suggested that the purpose of deterrence is met even if it only deters many, not all, of the targeted group.¹⁷⁷ Specifically, he emphasized that “the Court does not say that *all* mentally retarded individuals cannot ‘process the information of the possibility of execution as a penalty and . . . control their conduct based upon that information,’ [but] merely asserts that they are ‘less likely’ to be able to do so.”¹⁷⁸ Once again, Justice Scalia concluded that since the death penalty may have a deterrent effect for some mentally retarded individuals, the safest course is to leave the punishment and culpability of any such offenders up to the judge or jury.¹⁷⁹

Finally, Justice Scalia asserted that the majority’s argument—that mentally retarded offenders face an enhanced risk of wrongful execution due to their diminished capacities—is not logical because many defendants face the same enhanced risk due to other factors (i.e., lack of intelligence and inability to articulate).¹⁸⁰ Moreover, Justice Scalia suggested that continuing to allow mental retardation as a mitigating factor is a better course of action because the symptoms of mental retardation are easy to feign.¹⁸¹ If an offender gains acquittal by feigning mental retardation, he or she does not face the possibility of confinement to a mental institution, like those persons claiming insanity, when it comes time to re-enter society.¹⁸²

IV. DESPITE A VALID TEST, THE *ATKINS* HOLDING IS INHERENTLY FLAWED

The Eighth Amendment states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹⁸³ When considering whether a punishment is constitutional, the Eighth Amendment’s ban adheres to those punishments considered cruel and unusual in 1789, when

176. *Id.* (Scalia, J., dissenting).

177. *Id.* (Scalia, J., dissenting).

178. *Id.* (Scalia, J., dissenting) (quoting *id.* at 2251).

179. *See id.* (Scalia, J., dissenting).

180. *Id.* at 2267 (Scalia, J., dissenting).

181. *See id.* (Scalia, J., dissenting).

182. *See id.* at 2267–68 (Scalia, J., dissenting).

183. U.S. CONST. amend. VIII.

the Bill of Rights was adopted.¹⁸⁴ In addition, the Eighth Amendment's prohibition against cruel and unusual punishment "recognizes the 'evolving standards of decency that mark the progress of a maturing society.'"¹⁸⁵ To determine such "evolving standards," it is necessary to examine objective evidence of contemporary views on punishment.¹⁸⁶ Thus, the *Atkins* Court was correct to review evidence concerning the possibility of a national consensus against the execution of the mentally retarded.¹⁸⁷

The Court's finding that such a national consensus exists and its subsequent ruling that it is cruel and unusual punishment to execute a mentally retarded person effectively ends the common law allowance of the death penalty as a possible punishment for the moderate to mildly retarded.¹⁸⁸ It is impossible to argue that the Court's opinion is entirely invalid. After all, the ruling does reinforce the common law rule that "idiots" cannot be executed.¹⁸⁹ The Court's ruling in *Atkins* is not beyond question, however, and in fact has two inherent problems: (1) the Court's basis for finding a national consensus against executing the mentally retarded; and (2) the fact that the Court mandates a bright-line rule regarding mental retardation, when it is often impossible to make such a concrete distinction concerning those whose abilities fall within the borderline ranges.

A. A False Finding of National Consensus

First, the legislative actions determined by the Court to indicate a national consensus would not traditionally mandate such a

184. See *Ford v. Wainwright*, 477 U.S. 399, 405 (1986); *Furman v. Georgia*, 408 U.S. 238, 264 (1972) (Brennan, J., concurring); *McGautha v. California*, 402 U.S. 183, 226 (1971) (Black, J., concurring).

185. *Penry v. Lynaugh*, 492 U.S. 302, 330–31 (1989) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

186. *Id.* at 331; see also *Enmund v. Florida*, 458 U.S. 782, 788–89 (1982) (holding that a court should examine a number of factors before determining whether a punishment is cruel and unusual); *Coker v. Georgia*, 433 U.S. 584, 593 (1977) (examining objective evidence to determine whether death is an acceptable penalty for rape).

187. For a complete discussion of the Court's findings concerning the national consensus against the execution of the mentally retarded, see *supra* Part III.B.2.

188. For a discussion of the common law rule regarding punishment of the mentally retarded, see *supra* Part I.

189. *Id.*

finding.¹⁹⁰ The Court found that legislation enacted in eighteen states—which restricted the availability of the death penalty for the mentally retarded—indicated a national consensus against executing the mentally retarded.¹⁹¹ Yet, those eighteen states comprise only forty-seven percent of the thirty-eight states that allow capital punishment, and only seven of the states actually prohibit execution of the mentally retarded in all instances.¹⁹² Traditionally, a much greater degree of agreement has been necessary in order to find a national consensus.¹⁹³ For example, in *Ford v. Wainwright*¹⁹⁴—which held execution of the insane to be unconstitutional under the Eighth Amendment—the finding of a national consensus was based on the fact that no state permitted execution of the insane.¹⁹⁵ In addition, a plurality of the Court found evidence of national consensus in *Thompson v. Oklahoma*¹⁹⁶ due to the fact that there was a minimum age listed in eighteen states' death penalty statutes and each required that the defendant be sixteen years old at the time of the offense in order to be eligible for the death penalty.¹⁹⁷

Moreover, the Court's reliance on public opinion polls and the opinions of other nations is misplaced. In determining whether the Eighth Amendment invalidates certain forms of punishment the Court should look only to the laws of the United States, legislative actions taken by individual states, and the sentencing actions of juries.¹⁹⁸ Other nations' opinions do not result from re-

190. See *Atkins v. Virginia*, 122 S. Ct. 2242, 2262 (2002) (Scalia, J., dissenting).

191. *Id.* at 2248–49.

192. *Id.* at 2261 (Scalia, J., dissenting). The other eleven states, which prohibit executing the mentally retarded, enacted legislation which is not retroactive and only applies to those defendants convicted or committing crimes after the effective date of the legislation. *Id.*

193. *Id.* at 2262 (Scalia, J., dissenting).

194. 477 U.S. 399 (1986).

195. *Id.* at 409–10.

196. 487 U.S. 815 (1988).

197. *Id.* at 829. The Court also required a greater degree of national consensus in *Coker v. Georgia*, declaring the death penalty cruel and unusual punishment in response to an offender's raping a woman (only one state allowed such punishment at the time). 433 U.S. 584, 599 (1977). Similarly, in *Enmund v. Florida*, the Court declared that a person cannot be subject to the death penalty for participation in a robbery when it was actually an accomplice who killed the victim. 458 U.S. 782, 801 (1982). The ruling relied heavily on the fact that twenty-eight states (seventy-eight percent) of the states allowing imposition of the death penalty did not permit the death penalty under similar circumstances. *Id.* at 789.

198. See *supra* Part III.D.

view of the United States Constitution, state legislative action, or the opinion of the United States populace.¹⁹⁹ Thus, the opinions of other nations are irrelevant when determining the requirements of the Eighth Amendment.

In addition, the Court should not place great emphasis on the results of public opinion polls, as their results can be affected by the targeted population, the questions asked, and the definitions of relevant issues given to the poll's participants.²⁰⁰ As Justice O'Connor stated in *Penry*, "[t]he public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely."²⁰¹ Thus, public opinion polls should not be given substantial weight in considering whether there is a national consensus regarding execution of the mentally retarded. Instead, one should look to enacted legislation as a reliable objective factor that represents a culmination of opinions voiced to legislators. As the Court had already reviewed legislative action in *Atkins*,²⁰² it was redundant and unacceptable to then review public opinion polls as objective indicators of national consensus.

B. A Bright-Line Rule Applied to a Complicated Issue

Next, the Court's opinion is inherently flawed because it creates a bright-line rule where there is often no bright-line answer. The Court bases its ruling that the national consensus is correct, at least in part, on the idea that execution of the mentally retarded does not meet the social purposes of the death penalty.²⁰³ To a certain extent this argument is true. Some mentally retarded offenders are less morally culpable due to the level of their retardation and do not understand the consequences of their actions. The execution of these offenders fails to promote either of the primary goals of the death penalty: retribution and deterrence. For the individual whose retardation results in an unques-

199. For further discussion of the irrelevancy of the opinion of other nations, see *supra* Part III.C and Part III.D.1.

200. For further discussion of polls and issues, see *supra* Part III.C and Part III.D.1.

201. *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989).

202. See *Atkins v. Virginia*, 122 S. Ct. 2242, 2248–50 (2002).

203. See *id.* at 2250–52.

tionable inability to learn from experience, communicate effectively, and control actions, there can be no retributive or deterrent effect by imposing the death penalty.²⁰⁴ The problem with the majority's ruling arises, however, from the fact that "[a]ll persons diagnosed with mental retardation vary in both ability to reason and to adapt to life circumstances."²⁰⁵

The variation within the abilities of those who are mentally retarded suggests that the Court should have considered a categorized ruling, instead of a bright-line ruling that eliminates the question of whether the death penalty is ever applicable to mentally retarded individuals. The problem arises when a person claiming to be mentally retarded is found competent to stand trial. When a person is found competent to stand trial, it means that he has "the ability to consult with his lawyer with a reasonable degree of rational understanding, and was found to have a rational as well as factual understanding of the proceedings against him."²⁰⁶ Thus, being found competent to stand trial suggests that the mentally retarded offender understands the criminal actions he or she took and the criminal proceedings brought against him or her as a result. The problem is that the culpability of a mentally retarded offender who is found competent to stand trial is much greater than a mentally retarded offender who lacked the competence to stand trial—meaning that the level of moral culpability among the mentally retarded varies.

Just as the abilities and competence of the mentally retarded vary, whether or not their actions and abilities fulfill the social purposes set out by the death penalty must also vary. As Justice Scalia asserts, the goal of retribution is determined by both the mental capacity of the offender and the depravity of the crime.²⁰⁷ Since the factfinder sees the specific facts and circumstances of each case and is in a better position to judge the offender's culpability, it would make more sense to have the factfinder decide whether or not to impose the death penalty in cases where the mentally retarded offender is competent to stand trial.²⁰⁸

204. For further discussion of why the incapacities of those with mental retardation result in the lack of retributive or deterrent effect, see *supra* Part III.B.3.

205. Borromeo, *supra* note 7, at 180.

206. *Penry*, 492 U.S. at 333.

207. See *Atkins*, 122 S. Ct. at 2266 (Scalia, J., dissenting).

208. See *id.* (Scalia, J., dissenting).

In addition, the goal of deterrence is met in some cases involving the mentally retarded. Since the effects of mental retardation vary among individuals, some of these individuals are capable of understanding the consequences of their actions and the possible punishment.²⁰⁹ Once again, the varied ability present among the mentally retarded suggests that borderline cases should be left to the factfinder to determine the appropriate punishment because they are in a better position to interpret the particular facts of a certain case.

In its effort to prove that there is a national consensus against execution of the mentally retarded, the Court points out that the death penalty is rarely given to a mentally retarded offender.²¹⁰ But, in fact, such rarity suggests that juries take their responsibility seriously. Keeping mental retardation in mind as a mitigating factor, they look closely at the facts of the case in an effort to provide just punishment based upon the offender's moral culpability and understanding of his or her actions. In borderline cases such scrutiny is necessary.

V. CONCLUSION

The Court's ruling appears simple; it is unconstitutional to execute the mentally retarded.²¹¹ Yet, there are several problems that will materialize once the states begin to apply *Atkins*. First, the Court does not define "mental retardation." The lack of a set standard will lead to varied definitions of mental retardation throughout the nation. This, in turn, will mean that persons considered mentally retarded in one state will not be classified as mentally retarded in another state, raising equal protection issues. Though the variance in definition is likely to be slight—a difference of a point or two on the IQ scale—the result will be an inconsistent application of the Court's ban on execution of the mentally retarded. This will undermine the Court's ultimate goal, as individuals with mental disabilities will face death due to the heightened requirements of one state's definition.

209. See *id.* (Scalia, J., dissenting).

210. See *id.* at 2249.

211. *Id.* at 2252.

Second, the Court's decision to sidestep the issue of determining actual mental retardation in borderline cases will result in a divergence of state rules. The Court acknowledges potential disagreement in determining whether an offender is mentally retarded, and admits that some offenders will not be "so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus [against execution]."²¹² The Court's answer to this problem, however, is to let the states devise appropriate means of applying the restriction on execution of the mentally retarded.²¹³ Consequently, the states will once again diverge on the application of the Eighth Amendment's restriction because they will not agree on the appropriate means of determining mental retardation for borderline defendants. Thus, the Court should have limited its ruling and allowed juries to continue to perform their function of considering mental retardation as a mitigating factor, at least in borderline cases.

Due to the Court's failure to define mental retardation, the United States Congress or the Supreme Court will be forced to revisit the *Atkins* holding and apply a set standard so that mentally retarded offenders are afforded a level, consistent playing field.

Jaime L. Henshaw

212. *Id.* at 2250.

213. *See id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416–17 (1986)).
