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***Atkins v. Virginia*: How Flawed Conclusions Convert Good Intentions Into Bad Law**

*"It may be truly said to have neither FORCE nor WILL, but merely judgment"*¹

I. INTRODUCTION

Defending what some labeled a potentially tyrannical judiciary, Alexander Hamilton authored the above phrase of art, concluding that, so long as the judiciary never co-mingled with the other branches of government, it could do no true harm to the young republic.² This notion usually will hold true, and the American people will not lash out against the courts or demand accountability unless they perceive a decision to be unjust or infringe on some right they believe to be "fundamental."³ Rarely, however, does the public at large demand that judicial heads be counted in response to an opinion which has the appearance of extending liberties.⁴ Self-interested complacency of this sort is magnified when courts address difficult scientific issues, leaving the populous trapped as pawns in a game of experts. Therefore, it is imperative that tortuous cases like these be scrutinized with common sense and disinterested thought. The usual suspects often forgo such exercises, with many media outlets and "health organizations" failing to sufficiently analyze rules of law based on complex and dynamic scientific constructs.⁵

In the summer of 2002, the United State Supreme Court ruled on *Atkins v. Virginia*⁶ and held that executing mentally retarded capital offenders violates the Eighth Amendment's protection against cruel and unusual punishments.⁷ Not many people truly know what it

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1. The Federalist No. 78 (Alexander Hamilton).

2. *Id.*

3. One need look no further than the extreme backlash of public opinion after *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525 (2000), to see how angry the public can get, even if only half of the public is angry with the decision.

4. It is probably important to distinguish the issue of abortion, which may appear to some to extend liberties with regards to the mother, but enrages many because of what they perceive to be the infringement of the rights of the unborn child.

5. See, e.g., AAMR, AAMR Applauds U.S. Supreme Court Decision to Ban Execution of Persons with Mental Retardation, at http://www.aamr.org/Reading_Room/pdf/atkins_062002.pdf (last visited Dec. 22, 2004) for the organization's response to *Atkins* and general agreement with all of its findings; Linda Greenhouse, *Top Court Hears Argument on Execution of Retarded*, N.Y. Times, Feb. 21, 2002, at A1; Morgan Cloud and George Shepherd, *Low IQ and the Death Penalty*, N.Y. Times, Feb. 20, 2002, at A21.

6. 536 U.S. 304, 122 S. Ct. 2242 (2002).

7. U.S. Constitutional amendment VIII states "Excess punishments shall not

means for a person to be “mentally retarded,” and may get the impression that those so diagnosed make up a clearly defined group with the same illness and deficiencies. The American Association of Mental Retardation (AAMR) defines mental retardation by using a three-dimensional framework, in which a person is not considered to be mentally retarded unless he first exhibits limitations in intellectual functioning, typically manifested by an IQ of less than seventy.⁸ One assessing a suspected mentally retarded person must also find that his ability to function in the world or adapt to his environment is significantly impaired.⁹ Finally, the AAMR suggests that in order to accurately diagnose someone with mental retardation, the intellectual and adaptive deficiencies must manifest before the person reaches the age of eighteen.¹⁰

Unfortunately, however, assessing mental retardation is anything but a precise science. The majority in *Atkins* failed to adequately consider this, making its holding very confusing and functionally difficult for states to implement. Essentially, the majority based its holdings on two legal findings. First, the majority held that executing mentally retarded offenders is unconstitutional because a “consensus” of states have proclaimed that the practice is cruel and unusual and therefore violates the Eighth Amendment. To support this assertion, however, the majority ignored the methodologies of previous cases undertaking this exact exercise, opting instead to sketch a make-shift method that is unworthy to effect a constitutional determination. Such constitutionally inappropriate methodology is devastating and may unleash a chilling effect upon what Justice Brandeis referred to as the “experimentation” of state legislatures in the fields of social and economic policy.¹¹ Second, the majority buttressed its lackluster “consensus” analysis with a scientific conclusion that is anything but scientific, making the holding unsupportable and confusing for state courts and legislatures to follow.

be required, nor excess fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII.

8. AAMR, *Definition of Mental Retardation*, at http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited Dec. 29, 2002). To quote it literally, AAMR website defines mental retardation as a “disability characterized by significant limitations both in intellectual functioning and in adaptive behavior, as expressed in conceptual, social, and practical adaptive skills. The disability originates before the age of 18.” *Id.* The AAMR suggests that these limits on intellectual functioning are usually represented by an IQ score below seventy on one of the recognized standardized testing devices. *Id.*

9. *Id.*

10. *Id.*

11. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S. Ct. 371, 386–87 (1932) (Brandeis, J., dissenting).

Part II of this note discusses the facts and opinions of *Atkins* as well as United States Supreme Court cases that preceded it concerning the Eighth Amendment and a defendant's mental state. Part III analyzes the majority's holding that there existed a "consensus" of states that found the execution of mentally retarded capital offenders to violate the Eighth Amendment, and concludes by subjecting the majority's other rationale, its scientific findings, to criticism from experts and authors in the field of psychology. Part IV discusses some of the early ways that courts and state legislatures have attempted to deal with *Atkins*, and Part V offers concluding thoughts.

II. *ATKINS V. VIRGINIA*

A. *The Facts*

At approximately midnight on August 16, 1996, after spending most of the day drinking alcohol and smoking marijuana, the defendant Daryl R. Atkins and a partner, William Jones, drove to a convenience store intending to rob a customer at gunpoint.¹² Instead of carrying out the crime at the store, the pair chose to abduct their male victim, Eric Nesbitt, and drive him to a nearby automated teller machine where they forced him to withdraw two-hundred dollars.¹³ After the violently forced extraction, the pair smuggled the victim to a deserted area, and, ignoring his relentless pleas for life, ordered him out of the vehicle, at which time Atkins shot him eight times.¹⁴ Atkins and Jones failed to avoid the ATM's cameras, however, and were arrested and charged with capital murder.¹⁵ Each suspect told police a similar story of the events, with the key distinction being that both claimed that the other had pulled the trigger to murder Nesbitt.¹⁶ Deciding that Jones's story was more credible, the state chose to use his testimony and seek the death penalty against Atkins, who it believed was the shooter.¹⁷ At trial, the jury heard testimony from both Atkins and Williams, agreed with the state's assessment of the case, and convicted Atkins of capital murder.¹⁸ They sentenced him to death.¹⁹

12. *Atkins v. Virginia*, 536 U.S. 304,338, 122 S. Ct. 2242, 2259 (2002).

13. *Id.*

14. *Id.*

15. *Id.* at 307 & n.1, 122 S. Ct. at 2244 & n.1.

16. *Id.*

17. *Id.* at 307 & n.1, 122 S. Ct. at 2244-45 & n.1.

18. *Id.*

19. *Id.* at 309, 122 S. Ct. at 2245.

The initial death sentence was overturned.²⁰ The trial court conducted a new sentencing hearing, in which the defense presented mitigating evidence in the form of psychological testimony that sought to establish that Atkins should not be executed because he was mentally retarded.²¹ In expert testimony, Dr. Evan Nelson opined that Atkins was “mildly mentally retarded,” and possessed an IQ of fifty-nine.²² Nelson also suggested that Atkins displayed certain adaptive behavioral impairments, that “he was a ‘slow learner,’ 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 conform to the law.²³ Nelson based his diagnostic conclusions on results from the Wechsler Adult Intelligence Test, and grounded the adaptive findings upon his review of past school and court records along with interviews of people who knew Atkins.²⁴

In response, the prosecution offered testimony from its own expert witness, Dr. Stranton Samenow, who, after interviewing Atkins twice and asking him questions from the standard IQ test, testified that there was no evidence that he was mentally retarded, and that he was at least of average intelligence.²⁵ Refusing to suggest that Atkins was completely normal, the prosecution’s expert submitted that he believed the defendant suffered from anti-social personality disorder and an overall distaste for academic exercise.²⁶ Aggravating evidence included photos of Nesbitt’s badly mutilated body and the testimony of victims from Atkins’s sixteen prior felony convictions.²⁷ After weighing all of the testimony, and being judicially reinstructed according to Virginia law, the jury once again sentenced Atkins to death.²⁸ Affirming the sentence, the Virginia Supreme Court declared that they would not commute Atkins’s sentence to life solely because of his IQ score.²⁹

20. *Id.* at 338, 122 S. Ct. at 2259. The Virginia Supreme Court affirmed the conviction but ordered resentencing because the trial court had used an “improper verdict form.” *Id.*

21. *Id.*

22. *Id.* at 308–09, 122 S. Ct. at 2245–46. It should also be noted that the standard error of measurement for the test is five, therefore Atkins real IQ should be fifty-four to sixty-four.

23. *Id.* at 338, 122 S. Ct. at 2259–60 (citations omitted).

24. *Id.* at 308–09 & n.5, 122 S. Ct. at 2245 & n.5.

25. *Id.* at 309 & n.6, 122 S. Ct. at 2246 & n.6.

26. *Id.*

27. *Id.* at 339, 122 S. Ct. at 2260. Atkins’s previous felony convictions included robbery, attempted robbery, abduction, use of a firearm, and maiming. The victims testified as to the extreme violence in these crimes, such as when one was hit over the head by Atkins with a beer bottle, and another victim shot in the stomach. *Id.*

28. *Id.*

29. *Id.* at 310, 122 S. Ct. at 2246 (quoting *Atkins v. Commonwealth*, 534 S.E.2d 312, 321 (Va. 2000)).

B. *The Road to Atkins*

1. *Judging the Mental State: Early Findings*

The Supreme Court's first efforts to distinguish accused offenders on the basis of their mental state concerned the most severe mental impairment: insanity. Insanity, of course, does not affect a court's ability to impose a harsh sentence, but rather is an affirmative defense to a conviction altogether. Scholars and advocates usually trace judicial treatment of this issue back to *M'Naughten's Case*,³⁰ an old English opinion which continues to be the basis of the American legal standard. *M'Naughten's Case* identified insanity as an affirmative defense to prosecution if the accused did not know the "nature or quality of what he was doing; or if he did know it, that he did not know he was doing what was wrong."³¹

The United States Supreme Court confronted the issue of mental capacity in the context of the death penalty in *Ford v. Wainwright*³² and held that imposing the death penalty upon a person who was insane violated the Eighth Amendment.³³ In *Ford*, the defendant murdered several individuals and told police that the killings were a part of an effort to save his friends, who, along with Senator Edward Kennedy, had been taken captive.³⁴ Unable to locate his kidnapped friends, Ford claimed that those he murdered had killed many of them and placed their bodies in concrete boxes disguised as beds.³⁵ He told doctors during evaluations that there was no chance he would be executed because he owned the prison and controlled the governor through mind waves.³⁶ Per Justice Marshall, the Court reversed the conviction using a traditional analysis that executing the insane was a form of punishment considered cruel and unusual at the time the Bill of Rights was adopted.³⁷ Justice Marshall emphasized, however, that the Court would not be bound by the notions of what was humane in 1789.³⁸ The Eighth Amendment, he reasoned, also recognizes "evolving standards of decency that mark the progress of a maturing society,"

30. 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843) (cited in George E. Dix & M. Michael Sharlot, *Criminal Law: Cases and Materials* 853 (5th ed. 2002)).

31. *Id.*

32. *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595 (1986).

33. *Id.*

34. *Id.* at 402, 106 S. Ct. at 2598.

35. *Id.*

36. *Id.* at 403, 106 S. Ct. at 2598.

37. *Id.* at 405, 106 S. Ct. at 2599.

38. *Id.* at 406, 106 S. Ct. at 2600.

embodied, in his opinion, by what objective evidence shows contemporary people believe.³⁹

While insanity is the ultimate and probably most popular mental impairment that criminal defendants seek to assert, a criminal defendant can avoid trial altogether if he can successfully prove he lacks the capacity to stand trial. The insanity inquiry focuses on the defendant's state of mind at the time of the offense; competency concerns a defendant's "present" ability to understand the criminal processes at the beginning of prosecution.⁴⁰ The United States Supreme Court explained the test for competency in *Dusky v. United States*:⁴¹ a trial court must determine whether the defendant has the "present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."⁴² It should be noted, however, that the Courts' analysis regarding incompetency is generally one grounded in the Fifth and Fourteenth Amendment guarantees of due process and not any interpretation of the Eighth Amendment's prohibition of cruel and unusual punishments.⁴³

2. *Have We Evolved Yet?: Stanford v. Kentucky*⁴⁴

Ford challenged the way that states viewed executing capital offenders, but its evolving standard provoked serious debate for years to come.⁴⁵ In *Stanford v. Kentucky*, the Court addressed whether society had "evolved" to the point where a "consensus" of states disfavored executing juveniles.⁴⁶ Here, the defendant, then seventeen years and four months old, robbed a gas station and repeatedly raped and sodomized the twenty-year old female attendant.⁴⁷ Following the robbery, the defendant and an accomplice drove the victim to a

39. *Id.* The language "evolving standards of decency" was taken from the plurality opinion in *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598 (1958).

40. *See, e.g.*, Jeffrey A. Wertkin, *Competency To Stand Trial*, 90 Geo. L.J. 1514 (2002); *United States v. Santos*, 131 F.3d 16, 20 (1st Cir. 1997) (the standards for incompetency and insanity are different in procedure and substance).

41. 362 U.S. 402, 80 S. Ct. 788 (1960).

42. *Id.* at 402, 80 S. Ct. at 789.

43. *See, e.g.*, Wertkin, *supra* note 40.

44. 492 U.S. 361, 109 S. Ct. 2969 (1989).

45. *See* Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After Penry v. Johnson*, 35 Akron L. Rev. 327, 364 (2002); Harold Hongju Koh, *Paying "Decent Respect" To World Opinion on the Death Penalty*, 35 U.C. Davis. L. Rev. 1085, 1121 (2002); Joseph A. Nese, Jr., *The Fate of Mentally Retarded Criminals: An Examination of the Propriety of Their Execution Under the Eight Amendment*, 40 Duq. L. Rev. 373, 398–401 (2002).

46. *Stanford*, 492 U.S. 361, 109 S. Ct. 2969.

47. *Id.* at 365, 109 S. Ct. at 2973.

secluded area near the station where Stanford shot her twice and killed her.⁴⁸ The jury convicted him of murder, robbery, and sodomy, and sentenced him to death.⁴⁹ Believing that objective manifestations of purpose were needed to conclude that that societal opinion had “evolved” on the issue of executing juveniles, Justice Scalia denied the defendant’s request for relief, reasoning that only fifteen of the thirty-seven states that permitted capital punishment banned the execution of sixteen-year-olds and twelve of the thirty-seven banned the execution of seventeen-year-olds.⁵⁰ The majority also shed light on what the court would recognize as true objective evidence. Responding to *amicus* briefs filed by national and international political and human rights organizations, the Court declared that public opinion polls, views of interests groups, and the suggestions of professional organizations were too uncertain to serve as foundations of constitutional law and refused to give them any weight in the analysis.⁵¹

3. *Genesis of Controversy: Penry and Mental Retardation*

In *Penry v. Lynaugh*,⁵² the Supreme Court issued its first opinion regarding the constitutionality of executing mentally retarded defendants convicted of capital murder.⁵³ On October 25, 1979, Pamela Carpenter was brutally raped, beaten, and stabbed with scissors at her Livingston, Texas home.⁵⁴ Before the victim died, she was able to give the police a description of her attacker.⁵⁵ This led police to John Paul Penry, a twenty-two year old who had recently won parole on another rape conviction.⁵⁶ At a pre-trial competency hearing, the defense presented psychological testimony suggesting that Penry was mildly to moderately mentally retarded, possessed an IQ between fifty and sixty-three, and had the mental age of a six and a half year old and the social maturity of a nine or ten year old.⁵⁷ After a finding that he was competent to stand trial, Penry’s lawyers presented evidence suggesting he was insane at the time of the murder.⁵⁸ Testifying during trial, Penry’s expert opined

48. *Id.*

49. *Id.* at 366, 109 S. Ct. at 2973.

50. *Id.* at 370–71, 109 S. Ct. at 2975–76.

51. *Id.* at 377, 109 S. Ct. at 2979.

52. 492 U.S. 302, 109 S. Ct. 2934 (1989).

53. Nese, *supra* note 45, at 388 (citing *Penry*, 492 U.S. 302, 109 S. Ct. 2934).

54. *Penry*, 492 U.S. at 307, 109 S. Ct. at 2941.

55. *Id.*

56. *Id.*

57. *Id.* at 307–08, 109 S. Ct. at 2941.

58. *Id.* at 308, 109 S. Ct. at 2941.

that it was impossible for Penry to appreciate the wrongfulness of his conduct or to conform his conduct to the law.⁵⁹ The prosecution's expert, who had extensive interaction with Penry and had diagnosed him with mental retardation twice in the past, disagreed with the defense's conclusions and testified that Penry's mental deficiencies did not preclude him from being able to appreciate the wrongfulness of his actions, thereby making him legally sane at the time of the offense.⁶⁰ The prosecution's expert further explained that Penry's seemed inability to conform to the law could be traced to his having an anti-social personality disorder.⁶¹ Rejecting Penry's plea of insanity, the jury convicted him of capital murder and sentenced him to death.⁶²

On appeal, Penry argued that, because he was mentally retarded, his execution would violate the Eighth Amendment.⁶³ In response, the Court once again discussed the "evolving standards of decency" and "consensus" analyses, and expressly chose to focus once again on objective criteria only.⁶⁴ These objective criteria, Justice O'Connor held, can most clearly be discovered by looking to state and federal legislation along with how juries had reacted in the past when faced with the issue.⁶⁵ Viewing the objective state evidence in light of that considered in *Ford* and *Thompson*, the Court held

59. *Id.* at 309, 109 S. Ct. at 2941.

60. *Id.*, 109 S. Ct. at 2942.

61. *Id.*

62. *Id.* at 310-11, 109 S. Ct. at 2942-43.

63. *Id.* at 313, 328, 109 S. Ct. at 2943-44, 2952. Actually, there were two issues of error. Penry's first issue of error was that the jury was not adequately instructed on all of the mitigating evidence, because, he asserted, the special issues mandated under Texas law did not adequately define certain important terms (i.e., deliberately). The Court reversed the sentence and remanded on this issue, holding that the jury was not provided with a vehicle for expressing its "reasoned moral response" to the mitigating evidence. *Id.* at 328, 109 S. Ct. at 2951.

64. *Id.* at 330-31, 109 S. Ct. at 2953. Justice O'Connor also undertook a discussion as to whether this execution would be prohibited if the definition of "cruel and unusual" preferred by Justice Scalia in *Stanford* were controlling, that being if the practice was "cruel and unusual," or barbaric, at the time of the amendment. *Id.* at 330-31, 109 S. Ct. at 2953. Citing Blackstone, she noted that, at common law, the "idiot" and the "lunatic," were generally not candidates for execution. *Id.* at 331, 109 S. Ct. at 2953. She also quoted eighteenth century legal text to note that this classification was reserved for "those who are under a natural disability to distinguish between good and evil." *Id.* Such persons, she noted would probably be deemed "profoundly" or "severely" retarded today. *Id.* at 333, 109 S. Ct. at 2954. This would not present a problem such as in the present case, however, as she concluded that these people would either be afforded the insanity defense or would be declared incompetent to stand trial. *Id.*

65. *Id.*

that no “evolution” had occurred.⁶⁶ In the case of mentally retarded capital offenders, however, Penry could only show that one state had banned their execution.⁶⁷

Rejecting the assertion that society’s standards for executing mentally retarded capital offenders had changed, the Court then addressed Penry’s contention that capital sentencing such offenders would be disproportionate to their degree of culpability, thereby violating the Eighth Amendment.⁶⁸ Justice O’Connor recognized that it is clear that mental retardation, at any stage, can have some effect on culpability, and that very severe cases may extinguish culpability altogether.⁶⁹ However, she reasoned, executing mentally retarded offenders did not violate the Eighth Amendment *per se*, in that the Court was not willing to generalize that all those diagnosed mentally retarded do not act with the volition and moral capacity necessary to possess the degree of culpability associated with the death penalty.⁷⁰ Justice O’Connor noted that the majority’s caution was necessitated by the fact that the state of science in the field of mental retardation was not clear enough to justify a broad judgment that the death penalty was unconstitutional for these offenders.⁷¹ The assessment of defendants who plead mental retardation must be done on an individual basis, the Court held, in which juries must be able to hear all mitigating evidence concerning a defendant’s mental state.⁷²

66. *Id.* at 334, 109 S. Ct. at 2955. In *Ford*, the objective state evidence showed that no state had permitted the execution of a person insane during the commission of the act. *Ford v. Wainwright*, 477 U.S. 399, 408, 106 S. Ct. 2595, 2961 (1986). The objective state evidence in *Thompson* revealed that eighteen states had expressly established a minimum age of sixteen for eligibility for execution. *Thompson v. Oklahoma*, 487 U.S. 815, 829, 108 S. Ct. 2687, 2695-96 (1988).

67. *Penry*, 492 U.S. at 334, 109 S. Ct. at 2955. The Court also noted that the petitioner had failed to present any evidence of the general behavior of juries with respect with respect to sentencing mentally retarded defendants, nor decisions of prosecutors. *Id.*

68. *Id.* at 336, 109 S. Ct. at 2956. In support of this theory of proportionality, the Court cited language from *Tison v. Arizona*, 481 U.S. 137, 149, 107 S. Ct. 1676, 1683 (1987), in which the Court stated that “[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.” It also cited Justice O’Connor’s dissent in *Enmund v. Florida*, 458 U.S. 782, 825, 102 S. Ct. 3368, 3391 (1982), for the notion that the Eighth Amendment’s concept of proportionality requires a nexus between the punishment imposed and the defendant’s blameworthiness. The *Penry* majority based these assertions on the statement in *Greg v. Georgia*, 428 U.S. 153, 183, 96 S. Ct. 2909, 2940 (1976), that “[t]he death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.”

69. *Id.* at 337-38, 109 S. Ct. at 2956-57.

70. *Id.* at 338, 109 S.Ct. at 2956.

71. *Id.* at 340, 109 S. Ct. at 2958.

72. *Id.*

Two sets of justices concurred in part and dissented in part.⁷³ Justices Brennan and Marshall opined in their dissent that executing mentally retarded offenders violates the Eighth Amendment as a *per se* rule.⁷⁴ These dissenting justices chose not to argue the point of whether a consensus of society's "evolving standards of decency" dictated this result, but rather chose to focus on the defendant's contention that a capital sentence was disproportionate to a capital crime when committed by a mentally retarded individual.⁷⁵ Relying mostly on a brief presented as *amicus curiae* by the American Association of the Mentally Retarded (AAMR), Justices Marshall and Brennan explained that because these offenders experienced an impaired ability to control their impulsive behavior and an overall limitation of their "moral development," their culpability is limited to such a degree to make death an unconstitutional punishment.⁷⁶

In 2001, the Supreme Court reversed Penry's conviction, and Texas re-tried the case (hereinafter *Penry II*), and Penry was again sentenced to die.⁷⁷ On appeal, the United States Supreme Court reversed the death sentence for procedural reasons.⁷⁸ *Penry II* is less important to the present inquiry for what it said than for what it did not. Despite eleven years passing between the first and second opinions, and several legislative changes regarding executing mentally retarded offenders, the defense did not attempt to re-present the issue of an emerging consensus of like-minded states on the issue. This void is especially peculiar considering the numerous *amicus* briefs filed in the case by organizations which regularly advocate against the death penalty. For example the AAMR, which has long

73. Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Kennedy, dissented regarding whether the Texas jury forms dealing with jurors' consideration of mitigating factors were a violation of the constitution. *Id.* at 350, 109 S. Ct. at 2963 (Scalia, J., dissenting).

74. *Id.* at 341, 109 S. Ct. at 2958.

75. *Id.*

76. *Id.* at 346, 109 S. Ct. at 2961.

77. *Penry v. Johnson*, 532 U.S. 782, 786, 121 S. Ct. 1910, 1915 (2001).

78. *Id.* at 790-99, 121 S. Ct. at 1917-21. Seeking to comply with the *Penry I* order regarding the jury's ability to consider mitigating evidence, the Texas court charged the jury with supplemental instructions forcing the jury to consider Penry's mental status when making its sentencing decisions. *Id.* at 796, 121 S. Ct. 1920. The Court, once again per Justice O'Connor, found that the jury instructions were insufficient and declared that the Texas trial court had "misapprehended" *Penry I*. *Id.* at 797, 121 S. Ct. at 1920. Because the second set of jury instructions did not explicitly mention the mitigating factors, the jury would be forced to answer untruthfully in order to give the factors complete relevance, a situation that the state felt was adequate, but that the majority deemed illogical and unethical. Making this choice would violate the juror's oath to follow instructions and answer truthfully, and the Court refused to sanction such a selection as a "reasoned, moral response." *Id.* at 797-800, 121 S. Ct. at 1920-22.

zealously advocated that the mentally retarded should not be executed, filed an *amicus* brief which failed to mention recent legislative treatment of the issue.⁷⁹

After *Penry II* and before *Atkins*, the Supreme Court was given the opportunity to re-evaluate the possibility of a new consensus of states which agreed that mentally retarded capital offenders should not be executed. In *McCarver v. North Carolina*⁸⁰ the defendant was convicted of capital murder despite his being diagnosed mentally retarded and sought *habeas* relief from the Court.⁸¹ The Supreme Court granted *certiorari* and noted that it would only address the consensus issue, and not some of the broader scientific and procedural issues that McCarver had sought to argue.⁸² The issue became moot, however, and the writ was denied, after the Court learned that the recent North Carolina law banning the execution of the mentally retarded would be applied retroactively.⁸³ Less than a year would pass, however, before *Atkins*'s case was heard in oral arguments.

C. *Atkins v. Virginia*.⁸⁴ *The Analysis*

1. *The Majority Opinion: Echoes of the Penry I Dissent*

Writing for a six-to-three majority,⁸⁵ Justice Stevens held that, as a *per se* rule, executing capital offenders deemed mentally retarded violated the Eighth Amendment's prohibition of cruel and unusual punishments.⁸⁶ The majority based its holding on two legal findings. First, the majority held that a national consensus against executing mentally retarded offenders, manifested by legislative and opinion change since *Penry I*, mandated that these offenders be exempt from capital punishment. Second, they reasoned that executing mentally retarded capital offenders violated the Eighth Amendment because

79. See Amicus Brief of AAMR, *Penry v. Johnson*, 532 U.S. 782, 121 S. Ct. 1910 (2001).

80. 532 U.S. 941, 121 S. Ct. 1401 (2001).

81. *McCarver v. Lee*, 221 F.3d 583 (4th Cir. 2000).

82. *McCarver v. North Carolina*, 532 U.S. at 941, 121 S. Ct. at 1401.

83. Hall, *supra* note 45, at 366.

84. 536 U.S. 304, 122 S. Ct. 2242 (2002).

85. *Id.* at 305, 122 S. Ct. at 2244. Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer joined in the majority opinion entirely. It may be worthy to note that Justice Kennedy joined Justice Scalia's part concurrence/part dissent in *Penry I*. There, he concurred with the judgment that the Eighth Amendment did not prohibit executing mentally retarded offenders as a "*per se*" rule, and dissented with O'Connor's finding that the jury instructions were inadequate. *Penry v. Lynaugh*, 492 U.S. 302, 351, 109 S. Ct. 2934, 2964 (1989).

86. *Atkins*, 536 U.S. at 321, 122 S. Ct. at 2252.

death is a disproportionate sentence to give a mentally retarded capital offender. Decreased mental functioning, coupled with an impaired adaptive behavior, Justice Stevens reasoned for the majority, must result in a less morally culpable offender who does not deserve to be executed for his crime.

a) Consensus Found

The *Atkins* majority never expressly defined what it meant by a "consensus," but made use of several methods to find one. Initially, Justice Stevens suggested that the majority's quest to find a consensus of like-minded states would be the same objective exercise used in *Penry I*, and he noted that the best way to make a consensus determination would be to look at how state legislation addressed the issue.⁸⁷ This would not be the controlling methodology, however, for instead of counting state legislation for and against the practice of executing the mentally retarded as was done in *Penry I*, the majority chose a different approach. It decided that the best way to show a consensus of like-minded states on whether to execute a mentally retarded offender would be to look at legislation since *Penry I* and read the legislative trend.⁸⁸ Justice Stevens labeled this analysis as being the "consistency of the direction of change," and asserted that this exercise should be more significant when making Eighth Amendment determinations.⁸⁹ Seeking to support its consensus findings, the majority also undertook a comparative analysis and contrasted the state of legislative action at the time of *Atkins* with others it had faced in past Eighth Amendment cases. For example, the majority compared the legislative movement with regard to executing mentally retarded offenders to the movement dealing with executing youthful capital offenders and found a much stronger trend against executing mentally retarded offenders.⁹⁰

The *Atkins* majority would not stop its inquiry with objective evidence, however. Opting to go further to demonstrate what it saw as an "emerging" national consensus of like-minded states against the execution of mentally retarded capital offenders, they incorporated a host of outside materials and studies from different interested parties. In particular, the majority referenced official positions on the issue

87. *Id.* at 312, 122 S. Ct. at 2247 (quoting *Penry*, 492 U.S. at 331, 109 S. Ct. at 2953).

88. *Id.* at 315, 122 S. Ct. at 2249.

89. *Id.*

90. *Id.* at 315 n.18, 122 S. Ct. at 2249 n.18. Since *Stanford v. Kentucky*, the *Atkins* Court discussed in footnote 18, only two state legislatures raised the threshold age for imposing the death penalty: Montana (Mont. Code Ann. § 45-5-102 (West 1999)) and Indiana (Ind. Code § 35-50-2-3 (West 1998)). *Id.*

from such organizations as the AAMR and the Catholic Church should be seriously weighed to further tip the consensus scales.⁹¹ The majority also stated that international sentiment and public opinion polls should also bear on the question, and cited the *amicus* brief filed by the European Union and several opinion surveys offered by Atkins's counsel.⁹² From these opinions and data the court concluded that a direction of change disfavoring the execution of mentally retarded offenders existed and held that this wave of change demanded that the practice of executing mentally retarded capital offenders be stopped because it violates the Eighth Amendment.⁹³

b) *Punishment Not Fitting the Criminal*

Next, the Court addressed whether the death penalty was a proportionate punishment to give a mentally retarded offender who commits a capital crime.⁹⁴ Supporting this further inquiry, the majority asserted that the Court would not be limited to objective numerical calculations, reasoning that, in the end, "our (the Court's) *own judgment* will be brought to bear" on whether this particular punishment violates the Eighth Amendment.⁹⁵ Justice Stevens divided the proportionality argument between the two common justifications for capital punishment: retribution and deterrence.⁹⁶ The majority argued that the theory of retribution, or "just desserts," depended on the moral culpability of the offender.⁹⁷ Because mentally retarded offenders regularly possess, in the majority's opinion, considerably impaired mental and functional capacities, they are *as a rule* not as morally culpable for their criminal activity.⁹⁸ Thus, the *Atkins* majority concluded that society cannot justly avenge the capital murders of these offenders.

The majority also held that the absence of the deterrent component warranted the abolition of the death penalty for mentally retarded capital offenders because they *often* fail to possess the level of premeditation and deliberation necessary for deterrence to be effective.⁹⁹ The same cognitive and behavioral impairments that

91. *Atkins*, 536 U.S. at 316 n.21, 122 S. Ct. at 2249 n.21.

92. *Id.*

93. *Id.*

94. *Id.* at 312, 122 S. Ct. at 2247.

95. *Id.* (quoting *Coker v. Georgia*, 433 U.S. 584, 597, 97 S. Ct. 2861, 2868 (1977)) (emphasis added).

96. *Id.* at 319, 122 S. Ct. at 2251 (citing *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S. Ct. 2909, 2929 (1976)).

97. *Id.*

98. *Id.* at 320, 122 S. Ct. at 2251.

99. *Id.* at 319, 122 S. Ct. at 2251 (emphasis added).

make such defendants less morally culpable, they reasoned, mandated that these offenders will not undertake the mental processes necessary for deterrence to be effective.¹⁰⁰ Because these individuals, as a rule, possess mental deficiencies that negate the two justifications for the death penalty, the majority declared that the ultimate penalty cannot be constitutionally applied to them.

2. *The Dissent: Challenging the Majority's Math and Methods*

In his dissent, Chief Justice Rehnquist challenged the majority's pronouncement of unconstitutionality by first questioning its consensus conclusions. Here, overall legislative evidence, which he claimed the Court had previously held to be the most reliable, showed that more states which allowed the death penalty at the time of oral arguments left the individual decision of executing mentally retarded offenders to properly instructed juries than those that prohibited the execution of such offenders as a *per se* rule.¹⁰¹ Citing previous cases which attempted to find a "consensus" of state opinion on a subject, the Chief Justice's dissent recalled that the court had always made such petitioners bear a heavy burden of successfully demonstrating a changing national consensus.¹⁰² If an overall look at legislative evidence does not clearly manifest a changing national opinion, Chief Justice Rehnquist asserted, then there has been no objective change in opinion from the states, and the constitutional inquiry should end.¹⁰³

The Chief Justice further admonished the majority for using international notions and opinion polls to find a consensus of like-minded states on the issue of executing the mentally retarded, declaring that this betrays the concept of federalism.¹⁰⁴ He qualified

100. *Id.* at 320, 122 S. Ct. at 2251.

101. *Id.* at 322, 122 S. Ct. at 2252 (Rehnquist, J., dissenting).

102. *Id.* at 324, 122 S. Ct. at 2254 (quoting *Stanford v. Kentucky*, 492 U.S. 361, 373, 109 S. Ct. 2969, 2977 (1989)).

103. *Id.*

104. *Id.* at 325, 122 S. Ct. at 2254. To support this statement, Justice Rehnquist cited language from *Stanford v. Kentucky* in which the Court stated that "permanent prohibition upon all units of democratic government must [be apparent] in the operative (laws and application of laws) that the people have approved. 492 U.S. 361, 377, 109 S. Ct. 2969, 2979 (1989). Justice Rehnquist also scolded the majority for accepting as evidence of some national sentiment opinion polls which the Court "lack[s] sufficient information to conclude" are conducted according to "generally acceptable scientific principles or are capable of supporting valid empirical inferences" about this issue. *Atkins*, 536 U.S. at 322, 122 S. Ct. at 2253. He also questioned the ability of the questions asked to find an adequate answer. For example, if one is asked "Do you think that persons convicted of murder who

this assertion by noting that federalism and the idea and promise of democratic accountability mandated by our system of government necessitate that only the work product of legislatures or findings of sentencing juries be used.¹⁰⁵ Elaborating further, he stated that international data was grossly inappropriate for ascertaining an *American* concept of what is right and wrong or cruel and unusual.¹⁰⁶ Regarding jury actions, the Chief Justice failed to see comprehensive statistics in the briefs that would indicate either way how most juries had handled the issue of executing the mentally retarded.¹⁰⁷

In a separate dissent, Justice Scalia suggested that “[s]eldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members.”¹⁰⁸ Justice Scalia employed a mathematical analysis, calculating that, at most, eighteen of the overall thirty-eight states (forty-seven percent) allowing the death penalty prohibited executing those deemed mentally retarded.¹⁰⁹ Only seven of those thirty-eight states (eighteen percent), he noted, prohibit the execution of *all* offenders deemed mentally retarded.¹¹⁰

are mentally retarded should or should not receive the death penalty?”, the answer would say nothing about the interviewee’s opinions or knowledge of the culpability or lack thereof by diagnosed individuals with differing degrees of severity. *Id.* at 327, 122 S. Ct. at 2255. Thus, those who believe that some who are diagnosed with mental retardation can be held to be morally culpable, would be left to either answer completely yes or no, thereby skewing the overall result. *Id.*

105. *Id.* at 323, 122 S. Ct. at 2253. Regarding sentencing juries however, the Court held that this evidence, though compelling, is entitled to less weight than legislative judgments. *Id.* In referring to sentencing juries, the Court meant criminal juries which have the option of imposing a death sentence upon a convicted offender who possesses some of the traits identified here. Justice Rehnquist noted that jury evidence was considered more helpful in *Coker v. Georgia* due to the overwhelming statistical evidence presented that “at least 9 out of 10 juries” in Georgia did not impose the death sentence when faced with rape convictions. *Id.* (quoting *Coker v. Georgia*, 433 U.S. 584, 596-97, 97 S. Ct. 2861, 2867-68 (1977)).

106. *Id.* at 325, 122 S. Ct. at 2254 (quoting *Stanford*, 492 U.S. at 369 n.1, 109 S. Ct. at 2975 n.1).

107. *Id.* at 324, 122 S. Ct. at 2254.

108. *Id.* at 338, 122 S. Ct. at 2259 (Scalia, J., dissenting). Justice Scalia also argued that the Court did not even address the interpretation given much weight by the Court in previous cases that the Eighth Amendment prohibits punishment that would have been “cruel and unusual” in 1791. *Id.* He recalled Justice O’Connor’s discussion of the common law “idiot” in *Penry I*, and saw no evidence of this conclusion changing for the present case. *Id.*

109. *Id.* at 342, 122 S. Ct. at 2261.

110. *Id.* The others, he wrote, allow for such executions if the offender was convicted before the effective date, thereby allowing some “mentally retarded” offenders to be executed. *Id.*, 122 S. Ct. at 2261-62. Therefore, he argued, this change is not evidence of a “statement of absolute moral repugnance, but one of current preference between two tolerable approaches.” *Id.*

Justice Scalia also criticized the majority's newly created approach of looking to what states had done recently in the context of executing mentally retarded offenders to find a consensus of like-minded opinion, rather than looking to what all states have done. He opined that this methodology is illogical, because if a state's law already leaves such determinations to juries on an individual basis, there is no way to change this course except to outlaw the practice.¹¹¹ Therefore, he concluded, only the abolition of the practice altogether would constitute real *change*.¹¹² Regarding the majority's use of extraneous materials such as opinion polls, Justice Scalia elaborated on Chief Justice Rehnquist's federalism argument by stating that the Court had in the past, and should in the future, follow the same methods to interpret the Eighth Amendment which the Constitution mandated to pass the Eighth Amendment in 1789—a vote of the *American states*.¹¹³ In other words, the states had adopted this Amendment, and therefore their opinions, and not international opinion, should decide exactly what it means.

While a greater portion of the two dissents focused on the data they felt came short of providing the necessary consensus, Justice Scalia addressed the majority's conclusion that mentally retarded offenders are *per se* less culpable than the average capital offender. He disagreed with the majority's findings that mentally retarded people are, as a rule, more disposed to commit capital crimes than are other people.¹¹⁴ He further reasoned that culpability must not be confined to the mental strength of the criminal, in that sentencing juries are also always allowed to assess one's culpability relative to the heinousness or depravity of the criminal act.¹¹⁵ As to the majority's stance that this implementation of the death penalty lacks deterrence, Justice Scalia noted that the supposed fact that *some* criminals will not be fully deterred does not lessen the penalty's impact any more than the fact that some fully cognizant offenders are unaware that Virginia has a death penalty.¹¹⁶ The fact that some mentally retarded offenders will be deterred and some will not, in his opinion, only buttresses the argument that this is a determination that

111. *Id.* at 344–45, 122 S. Ct. at 2263.

112. *Id.* at 345, 122 S. Ct. at 2263. Justice Scalia would rather the Court have worded its “consistency-in-the-direction-of-change” approach to state “No State has yet undone its exemption of mentally retarded, one for as long as 14 whole years.” *Id.*

113. *Id.* at 346, 122 S. Ct. at 2264.

114. *Id.* at 350, 122 S. Ct. at 2266. Justice Scalia stated that, in his experience, the opposite is true: being childlike generally suggests innocence rather than brutality. *Id.*

115. *Id.* at 351, 122 S. Ct. at 2266.

116. *Id.*

should be made on an individual basis by a jury with a defendant's diminished intellectual development acting only as a proper mitigating factor.¹¹⁷

A final point addressed by Justice Scalia's dissent was the majority's argument that prosecutors should not be able to seek death when trying such offenders because of their lesser ability to assist counsel as well as their propensity to offer unsolicited confessions and contradict themselves in testimony. Justice Scalia's dissent argued that if such offenders are found competent to stand trial, that they cannot be treated any different than merely lesser intelligent, inarticulate, or even ugly individuals, who some believe also face a special risk of wrongful execution.¹¹⁸ If this argument rests anywhere, the dissent reasoned, it may rest in a due process claim, which has nothing to do with whether the death penalty violates the Eighth Amendment.¹¹⁹

III. ANALYZING *ATKINS V. VIRGINIA*: AN EXERCISE IN LOGICAL VIGILANCE

The *Atkins* majority erred because its holding relied on two legal findings which do not pass a thorough test of logical vigilance. Logical vigilance requires that the Court be held to account for the serious deficiencies of its reasoning. The holding failed first because it relied on a suspect and novel "consensus" analysis, which grouped states together as a force of moral will without acknowledging serious differences in their opinions on the issue. The majority also refused to truly address and appreciate the dynamic and uncertain state of the science of mental retardation, particularly the ramifications from troubled methodology regarding assessment. Diving further into error, the majority held that mentally retarded offenders are less culpable as a *per se* rule, an assertion that finds little true scientific support beyond advocacy, leaving the overall holding nothing more than a watered down constitutional postulate.

A. Relying on "Consensus"

1. General Shortcomings

Writing for the *Atkins* majority, Justice Stevens asserted plainly that he found an adequate nationwide consensus of opinion suggesting that mentally retarded capital offenders should not be

117. *Id.* at 351–52, 122 S. Ct. at 2266–67.

118. *Id.* at 352, 122 S. Ct. at 2267.

119. *Id.*

executed.¹²⁰ Though sounding powerful, assiduous analysis reveals that the majority was only able to form a consensus by departing from the commonly understood meaning of the word¹²¹ and dismissing the exercise used by previous courts to demonstrate a consensus of constitutional thought.¹²²

The danger in the novel approach is important to critique because future courts will be bound by this analysis when interpreting the Eighth Amendment in the future. When the overall question of whether the death penalty is unconstitutional is tried again, courts will have to sort out this new process. By changing the process, the majority essentially changed what it was counting. Previous cases took the total amount of states that allowed the death penalty and asked whether they allowed the execution of a person who met the particular issue of concern.¹²³ *Atkins* has made this objective consensus process entirely too complicated. Now, one must look to recent legislation, but the majority failed to state *how recent* the legislation must be. It would have courts look to extraneous data such as opinion polls, but failed to provide standards by which to judge a poll's scientific adequacy. It would also have courts take into account the opinions of the international community, but failed to say why this is allowed or which bodies truly represent the opinion of the international community. Overall, future courts are left with guesses and uncertainty, all the more reason to keep the test objective and explicit.

Further illustrating the Court's inadequate analysis in *Atkins*, the majority completely refused to acknowledge the reasoning that had guided the Court in so many previous Eighth Amendment cases. This form of constitutional interpretation, that of assessing whether the particular crime would have been considered cruel and unusual at the time of the adoption of the Eighth Amendment in 1789, was used by the Court in both *Ford v. Wainwright*¹²⁴ and *Stanford v. Kentucky*.¹²⁵ This is not to say that the *Atkins* majority is wrong because it does not adhere to the originalist view of constitutional interpretation. It is only to say that the consistency in direction of change test and its questionable methodology, although accepted by six of the Justices, is an exercise never before seen in the Supreme Court's many past

120. *Id.* at 315, 122 S. Ct. at 2249 (Stevens, J., for the Court).

121. Webster's dictionary defines "consensus" as "general agreement" or "unanimity." Webster's New Collegiate Dictionary (9th ed. 1991).

122. *Atkins*, 536 U.S. at 315-16, 122 S. Ct. at 2249. Previous precedent (e.g. *Stanford*) had looked to the state's laws to see if a consensus of opinion existed, whereas Stevens opted to look for the "consistency of the direction of change." *Id.*

123. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969 (1989); *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989).

124. 477 U.S. 399, 106 S. Ct. 2595 (1986).

125. 492 U.S. 361, 109 S. Ct. 2969 (1989).

interpretations of the Eighth Amendment. This note will concede that there is a credible argument that what a constitution means should evolve somewhat with the evolution of its citizenry, but will not concede that *Atkins*'s make-shift analysis should form the basis of bedrock constitutional law.¹²⁶ The Court's test does not pass the benchmark of such an important process, and this is even more apparent when one scrutinizes the statutes of the majority's eighteen "consensus" states.

2. *Clear Declaration of Moral Will?: A Closer Look at the Eighteen Statutes*

A close investigation of the eighteen statutes of the states addressing this issue reveals that they possess such important differences that they cannot be considered a manifestation of collective moral will. The majority suggested that although there are differences in specifics, the idea is the same: mentally retarded capital offenders should not be executed. In the areas that are considered essential to making accurate assessment of the mentally retarded, however, there should be adequate consistency. In order to be a collective voice of moral will for the purposes suggested in *Atkins*, these statutes must announce a consistent policy as to both who is exempt from execution and why that person is exempt. This differentiates moral will from state experimentation with criminal law. The Constitution is structured around a notion of federalism that demands that states be allowed to legislate freely (within constitutional bounds) in order to perform their role as "laboratories of experimentation."¹²⁷ Further, this experimental legislation is important to properly flesh out what policies work for particular localities and which do not.¹²⁸ To be true to recent precedent regarding both Eighth Amendment interpretation and notions of how states should be allowed to experiment with legislation; therefore, the Court should have been especially hesitant to group together potential "pilot legislation" as a national voice. This subsection distinguishes the statutes that the majority saw as its embodiment of collective moral will by using the AAMR definition of mental retardation, also used by the majority opinion.¹²⁹

Each state attempted to fit their targeted offender somewhat closely into the intellectual and adaptive framework of the AAMR's definition.¹³⁰ The AAMR, of course, requires a third "age of onset"

126.

127. *United States v. Lopez*, 514 U.S. 549, 581, 115 S. Ct. 1624, 1641 (1995) (Kennedy, J., concurring).

128. *Id.*

129. *Atkins v. Virginia*, 536 U.S. 304, 308-09, 122 S. Ct. 2242, 2245 (2002).

130. Brief of Amici Curiae for the States of Alabama, Mississippi, Nevada,

finding: that the individual display the intellectual and adaptive impairments before the age of eighteen.¹³¹ Nebraska and New Mexico, however, two of the purported “consensus” states, do not include this in their definition.¹³² The failure to require manifestation before a certain age should seriously undercut the majority’s assertion of a voice of collective moral will (considering that Atkins’s counsel suggested in briefs that this part of the definition was essential to an accurate assessment) because it is the key element that insures against an offender malingering his tests to escape execution. Because a definite age of onset is so important to insuring that a diagnosis is accurate, states without this requirement should not be considered as part of a collective voice.

Even states that include language reverent to the AAMR’s developmental period disagree as to when this period should commence. Maryland and Indiana law set their maximum age of onset at twenty-two.¹³³ While even the AAMR does not mandate that eighteen be the age by which these symptoms must be present, only suggesting this age, these further differences illustrate how dynamic the study of this field of science really is. Apparently age of onset is extremely important, as discussed above, but two of the “consensus” states would give an offender four more years to “develop” these symptoms. Individuals age eighteen to twenty-four are, percentage-wise, the largest group of violent criminals.¹³⁴ Considering concerns of malingering, this difference would dilute the accuracy of assessment for the greatest percentage of violent offenders. Clearly, therefore, Maryland and Indiana illustrate the experimentation with a dynamic field of science, and not collective and considered moral will on an issue of crime and punishment.

Other members of the supposed “consensus” have set forth differing definitions of what constitutes sufficient intellectual or

South Carolina, and Utah at 7, *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002).

131. AAMR, *supra* note 8. Atkins’s counsel suggested in briefs that this part of the definition was a necessary element of an accurate assessment because of the additional effects of mental retardation during early, developmental years. Petitioner’s Brief at 22-24, *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002).

132. Brief of Amici Curiae, *supra* note 130, at 14 n.19. The Nebraska and New Mexico statutes missing this key element are Neb. Rev. Stat. Ann. § 28-105.01(3) (1998) and N.M. Stat. Ann. § 31-20A-2.1(A) (1991). *Id.*

133. Brief of Amici Curiae, *supra* note 130, at 14 n.22; *see also* Md. Code Ann., [Crim. Law] § 2-202 (2004); Ind. Code. § 35-36-9-2 (2004).

134. U.S. Dep’t of Justice, Office of Justice Programs, at www.ojp.usdoj.gov (Last visited Nov. 15, 2002) (Department of Justice statistics show that, although violent crime is at its lowest point ever in the United States, the highest percentage is committed by offenders in the 18-24 age group.).

adaptive impairments to deem an offender mentally retarded and exempt from execution.¹³⁵ In fact, some of these states have chosen not to define these elements at all.¹³⁶ These differences are also crucial, in that the differences can lead to increased dependency on IQ test data, which suffers from serious limitations.¹³⁷ Particularly in the condensed assessment atmosphere of a capital murder proceeding, Supreme Court review of undefined or non-uniform statutes can lead to offenders with similar deficiencies receiving different justice. Six states define “intellectual deficiency” as an intelligent quotient of seventy or below.¹³⁸ Three states do not use such a strict numerical definition, opting instead to define the element as a performance on an intelligence quotient test “which is two or more standard deviations from the mean score on a standardized intelligent test.”¹³⁹ The differing IQ standards may appear docile, but often lead to differing determinations as to the *level* of mental retardation, an important determination in assessing impairment.¹⁴⁰ Differing levels of impairment and differing definitions as to who meets the necessary impairment tests will cause differing diagnoses from state to state, and do not manifest states speaking with one voice about this complex issue.

The language of Kansas’s statute is another good illustration of how these states may have been experimenting with policy and not making a joint declaration of moral will. Kansas law states that a person is mentally retarded if he has “significantly sub-average general intellectual functioning, as defined by Kansas Statutes Annotated 76-12b01 and amendments thereto, to an extent which substantially impairs one’s capacity to appreciate the criminality of one’s conduct or to conform one’s conduct to the requirements of law.”¹⁴¹ Nowhere in the other seventeen states making up this consensus is there any hint of such language regarding capacity to appreciate criminality or conform conduct. By being more explicit in its definition, Kansas would

135. Brief of Amici Curiae, *supra* note 130, at 8.

136. *Id.*

137. See *infra* Part III.B.1.a. for a further discussion of the limitation of these tests.

138. Brief of Amici Curiae, *supra* note 130, at 8 (citing statutes from Arizona: Ariz. Rev. Stat. Ann. § 13-703.02(J)(4) (2001); Kentucky: Ky. Rev. Stat. Ann. § 532.130(2) (1990); Maryland: Md. Code Ann. Art. 27, § 412 (f)(3) (1989) (repealed 2002) (current version at Md. Code Ann., [Crim. Law] § 2-202 (2004)); North Carolina: N.C. Gen. Stat. § 15A-2005(a)(1)(c) (2001); Tennessee: Tenn. Code Ann. § 39-13-203(a)(1) (1990); Washington: Wash. Rev. Code Ann. § 10.95.030(2)(c) (1993)).

139. *Id.* (citing statutes from Connecticut: Conn. Gen. Stat. Ann. § 1-1g(b) (2001); Florida: Fla. Stat. Ann. § 921.137(1) (West 2001); and Kansas: Kan. Stat. Ann. § 76-12b1(i) (1994)).

140. See *infra* III.B.1.a. for a complete discussion of this phenomenon.

141. Kans. Stat. Ann. § 21-4623(e) (1995).

apparently exclude some offenders who meet the AAMR intellectual, adaptive, and age of onset requirements. Kansas's qualifications of the normal definitions alter the process and make it less determinative on a clinical definition alone. This more probably is Kansas experimenting with legislation than it being part of a consensus of thought on whether to execute a particularly defined group of capital offenders.

Evidence of this group of states embodying a moral consensus is even further questionable if one analyzes New York's comparable law. Instead of quibbling over a definition of mental retardation, New York opts to use the suggested AAMR definition.¹⁴² Interestingly, however, this exemption does not apply to all mentally retarded individuals because New York allows the execution of a person who meets the AAMR definition but commits the murder while in state custody.¹⁴³ Therefore, New York would allow a mentally retarded offender to be executed. Clearly, this *cannot* manifest a will of the people of New York to not execute mentally retarded offenders, for they expressly allow it. With so many differing views as to who is considered mentally retarded, one cannot logically group these states together as a collective voice suggesting that the same group should be spared from execution. These states differ because each has its own policy and reasons for acting as it does, and this is not the collective moral will which should be used to make a sweeping constitutional declaration like that in *Atkins*.

A procedural analysis shows more non-consensus thinking within the purported consensus, with states disagreeing as to the proper burden of proof allocated,¹⁴⁴ whether the trial court or the jury should be responsible for determining if an individual is mentally retarded,¹⁴⁵ and whether these statutes should be applied prospectively or retroactively.¹⁴⁶ These states obviously cannot agree exactly who they would like to exempt from capital punishment or how a court should properly make this determination. Therefore, their statutes should not be combined to represent a collective force of moral will.

B. Relying on "Science"

The *Atkins* majority also held that executing mentally retarded offenders is unconstitutional because death is a disproportionate penalty to give a mentally retarded individual because these individuals are not sufficiently morally culpable. While the majority's culpability

142. N.Y. Code Crim. Proc. § 400.27(12) (2003).

143. *Id.*

144. Brief of Amici Curiae, *supra* note 130, at 14–15.

145. *Id.* at 15–16.

146. *Id.* at 17–18.

conclusions are not always wrong, the opinion erred by applying its conclusions across the mentally retarded spectrum. Some in the field of psychology believe that such conclusions are overly broad because they lack true scientific backing.¹⁴⁷ *Atkins's* broad assertion that mentally retarded offenders are *per se* less morally culpable is also logically flawed if one considers that there is a “changing” definition of mental retardation among the scientific community¹⁴⁸ and that there are serious limitations on the methodology used to make an accurate mental retardation diagnosis.

1. *Problems with Methods*

Well-known publications recognize that there is limitation to the methodology of accurately assessing potentially mentally retarded individuals.¹⁴⁹ Johnny L. Matson, Ph.D., a psychologist who has diagnosed mentally retarded individuals for over thirty years and received the AAMR Region V Researcher of the Year Award in 1991, suggests that the most troubling thing about these limitations is that they occur in the ideal clinical environment.¹⁵⁰ Therefore, Dr. Matson says, these limitations increase exponentially when a psychologist must operate in the highly-stressed situation of a capital murder trial, where a person who has never sought treatment is being diagnosed, and the outcome will affect his life or death.¹⁵¹ This heightened concern applies to *Atkins's* situation, in that he had never before been assessed to determine whether he was mentally retarded.¹⁵²

a) *Measuring Intellectual Deficiencies*

Disagreements over assessing a patient's intellectual deficiencies can range from what is actually measured by intelligence tests to more sophisticated criticism that there are “potentially serious implications of arbitrarily classifying individuals as mentally subnormal based upon theoretical, statistical constructs of

147. Interviews with Johnny L. Matson, Ph.D., Director of Clinical Training in Psychology, Louisiana State University, in Baton Rouge, LA (Sept. 2002–Nov. 2002).

148. Although there is agreement that a three-dimensional approach is best, and most do focus on cognitive, adaptive, and onset issues, there is always change going on in the community regarding different organizations and their respective definitions. For example, after *Atkins*, the AAMR's website boasted that one should pick up a copy of the 2002 edition of its journal to see the “new definition for 2002!” AAMR, at <http://www.aamr.org> (last visited Sept. 5, 2002).

149. Steven Beck, Overview of Methods, in *Assessing the Mentally Retarded* 3–4 (Johnny Matson and Stephen E. Breuning eds., 1983).

150. Matson Interviews, *supra* note 147.

151. *Id.*

152. *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002).

intelligence."¹⁵³ There is agreement, however, that two major tests, the Weschler (WAIS-III)¹⁵⁴ and Stanford-Binet tests,¹⁵⁵ are the most accurate. The singular reliance given to the intelligence quotient scores often limits these standardized forms of testing.¹⁵⁶ Therefore, if one bases determinations of mental retardation or the level of mental retardation primarily on these tests, one will face serious trouble in making accurate diagnoses, because some consider this form a rigid determination of cognitive impairment.¹⁵⁷

While other methods of analysis are encouraged and recognized by the scientific community, such as adaptive and behavioral factors, the limitations associated with these tests are important, because a person's mental retardation level is tied *only* to the statistical score he achieves on either of the respected standardized tests.¹⁵⁸ In the widely respected and oft-cited book on mental retardation *Assessing the Mentally Retarded*, for example, the classifications of mentally retarded individuals ranges from mild to profound based entirely on IQ scores from the Stanford-Binet and Weschler tests.¹⁵⁹ According to the data provided, a person scoring from fifty-two to sixty-seven on the Stanford-Binet and fifty-five to sixty-nine on the Weschler is considered by the scientific community to be mildly mentally retarded, whereas an individual who scores nineteen or below on the Stanford-Binet and twenty-four or below on the Weschler is considered profoundly retarded.¹⁶⁰ No account is given as to how these individuals perform on the adaptive or behavioral assessments. The result is a system truly based on a standardized written test. For example, a person whose adaptive deficiencies barely fit the requirements to be considered mentally retarded could be a poor reader or poor test taker and score very low of the IQ portion. Despite the fact that this person behaves close to normally, he would

153. Beck, *supra* note 149, at 4.

154. The WAIS-III, or the Weschler Adult Intelligence Scale, Third Edition, is scored by adding together the number of points earned on different subtests, and using a mathematical formula to convert this raw score into a sealed score. The test measures an intelligence range from forty-five to 155, with 100 being the median score, indicating an average level of cognitive functioning. A. Kaufman & E. Lichtenberger, *Essentials of WAIS-III Assessment* 60 (1990).

155. Similar to the Weschler test, the Stanford-Binet test is more popular in its role of assessing children with mental deficiencies. There are seven broad categories to the test, covering language, memory, conceptual thinking, reasoning, numerical reasoning, visual-motor, and social intelligence. See Beck, *supra* note 149, at 15.

156. Beck, *supra* note 149, at 16.

157. *Id.*

158. *Id.* at 7.

159. *Id.*

160. *Id.*

be considered moderately or severely retarded. This diagnosis would therefore be misleading, because the only severe part of the patient would be his ability to take a test, not his ability to function in the world, which is where he committed the capital offense. These limitations further illustrate a dynamic field of science which is not yet ready for sweeping *per se* conclusions of culpability and functioning.

b) *Behavioral/Adaptive Assessment Limitations*

In order to make an accurate diagnosis of mental retardation, it is also necessary to assess adaptive functioning of the patient. Although other strategies for doing so may exist, it is generally accepted that an interview is an indispensable part of any type of behavioral assessment.¹⁶¹ While intelligence tests have been criticized for their rigidity, interviews are criticized for their over-subjectivity with too much reliance on self-reported data.¹⁶² Because the psychological interview process requires the psychologist to formulate a developmental history of the patient, interviews with parents and family members are very often necessary.¹⁶³ According to experts, it is well documented, however, that information obtained from parents may not be very accurate or valid and that information from each parent is often contradictory.¹⁶⁴ Dr. Johnny Matson suggests that there are serious limitations on behavioral assessment in an ideal environment and that the even more grave limitations in the criminal trial setting mandate that there should not be a “knee-jerk reaction” to what a particular expert finds in this limited context.¹⁶⁵

Considering Dr. Matson’s suggestions and the literature presented, *Atkins* is even more troubling, because the majority saw the methodology of assessing the mentally retarded (in the criminal trial context) as leading to a concrete diagnoses of capacity, rather than the severely limited and ill-suited environment that the *Atkins* experts encountered. For example, Dr. Stanton Samenow, the forensic psychologist who testified for the state in the penalty phase, interviewed Atkins and deputies at the jail and reviewed Atkins’s school records.¹⁶⁶ Despite his having the IQ score obtained from defendant’s counsel, he concluded that the behaviors disclosed by those who knew Atkins did not meet the requirements of mental

161. *Id.* at 12.

162. *Id.*

163. *Id.* at 13.

164. *Id.* at 14.

165. Matson Interviews, *supra* note 147.

166. *Atkins v. Virginia*, 536 U.S. 304, 309 n.6, 122 S. Ct 2242, 2246 n.6.

retardation.¹⁶⁷ In this case, however, the Supreme Court chose to second guess the findings of a jury that believed Dr. Samenow's testimony that Atkins and his family failed to convince him that Atkins lacked the capacity to be executed. Reasoning from this, it is entirely possible, considering these limitations, for a jury to listen to both experts, but make a credibility call for themselves that the defendant and his parents were not being completely truthful in describing the defendant's adaptive capabilities.

Some recent studies also find that the methods used in *Atkins* are simply inadequate to determine if an individual is indeed mentally retarded.¹⁶⁸ Behavioral aspects of mental retardation can be more elusive or problematic than these tests allow, some suggest, and more tests are needed to truly measure the level of functioning.¹⁶⁹ This research concludes that measures of motivational status, social competence in a variety of situations, and physical dexterity are not adequately emphasized in normal assessment practice.¹⁷⁰ Many modern examinations, they charge, completely ignore socio-cultural factors, which they see as key aspects of a true behavioral diagnosis.¹⁷¹

The lack of accuracy and limitation of assessment, especially in the criminal trial context, makes the majority's *per se* conclusions of lack of culpability (rather than individual assessments), which are predicated on diagnoses from the methods, unscientific and logically unsound.

C. Culpability Conclusions

Throughout *Atkins*, in both the majority and the dissent, the justices speak of both culpability and moral culpability. There does not appear to be a definition for the latter phrase, and it is not a legal term of art. Thus, fleshing out how juries can find moral culpability or a lack thereof is particularly tricky. The Court here appears to be confusing the "right and wrong" of culpability, which has merit in the present discussion, with the ability to perceive "right and wrong" in general a discussion better left when assessing whether a particular defendant is able to stand trial *at all*, as is the case of the insanity defense.¹⁷² Outside the context of insanity, courts focusing on the

167. *Id.*

168. J.R. Mercer, *The Impact of Changing Paradigms of Disability on Mental Retardation in the Year 2000 in Mental Retardation in the Year 2000* 15, 33-34 (L. Rowitz ed., 1997).

169. *Id.*

170. *Id.*

171. *Id.*

172. Most people associate the term "moral" with its common definition "of or

degree of blameworthiness to which a particular defendant should be attributed usually speak in terms of *criminal* culpability. With these limitations in mind, it is probably better to critique *Atkins* using this phraseology.¹⁷³

Despite its more frequent usage, the concept of criminal culpability is very elusive. Most courts agree, however, that in order to receive a death sentence, an offender must possess the highest level of criminal culpability.¹⁷⁴ The Model Code of Criminal Law, for example, has chosen to take the route suggested by some scholars and proscribes different divisions of culpability, with the highest being "purposeful," and the lowest being "faultless" or "absolute liability."¹⁷⁵ Criminals act purposefully if their conscious objective is to cause a desired result.¹⁷⁶ Justifying a broad ban on executing mentally retarded individuals, the majority stated that such offenders "by definition" have diminished capacities to understand and process information, abstract and learn from mistakes, reason logically, and control impulses.¹⁷⁷ They fail, however, to allege that these individuals cannot act purposefully, or consciously desire the final result. Suppose, for example, that a mildly mentally retarded individual, who does not read very well, often touches the clothing iron when hot, and has trouble controlling his need for free money, sticks up a liquor store and shoots all three attendants. There is nothing in the majority's definition that suggests that he could not seek out and want the result of having the free cash. The majority would have the world believe that a person must understand something deeper about killing the attendant (apart from the fact that it is wrong, of course), than "if I kill them, they cannot kill me, and I get the money."

Countless journal articles attempt to justify a conclusion that mentally retarded offenders are less culpable by suggesting that these individuals may commit crimes on impulse and often cannot correct improper behaviors.¹⁷⁸ These considerations may have weight in a

relating to principles of right and wrong in behavior." Webster's New Collegiate Dictionary 742 (9th ed. 1991).

173. The two concepts of culpability, or legal or criminal culpability, and moral culpability, appear from research to often be intertwined. Because this note focuses on criminal consequences for criminal conduct, and for the reasons in the paragraph above, this note will only deal with criminal culpability.

174. See *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909 (1976).

175. Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 *Hastings L.J.* 815, 818-19 (1980).

176. *Id.* (citing Model Penal Code § 2.02(2)(a)(i) (Proposed Original Draft, 1962)).

177. *Atkins v. Virginia*, 536 U.S. 317, 318, 122 S. Ct. 2242, 2250.

178. See, e.g., Jonathan L. Bing, *Protecting the Mentally Retarded From Capital Punishment: State Efforts Since Penry and Recommendations for the Future*, 22

criminal matter, such as in mitigating evidence, but they do not address the issue of culpability, or the desire of a person to act purposefully to create a result. It is not logical to conclude that an impulsive armed robber who killed every gas station attendant encountered, and continued until properly punished, was not as culpable (if not much more) than a person who committed an armed robbery or murder for the first time.

Avoiding concrete analysis, some commentators suggest that the definition of mental retardation alone demonstrates the lack of culpability.¹⁷⁹ This statement is never backed up by anything but the words of the definition itself. The plain language of the AAMR definition, however, does not mention culpability or address consciously seeking an intended result, nor does this suggestion address the many differing levels of mental retardation. Considering differing levels of mental retardation is essential to making an accurate determination of capacity, because research from the American Medical Association states that mildly mentally retarded persons differ from non-retarded persons *only* in their rate and degree of intellectual development.¹⁸⁰ One can conclude from this that a mildly retarded offender possesses the same adaptive or behavioral traits of the average person, which means that they are merely less intelligent than the normal offender, and certainly not *per se* less culpable.

No scientific research concludes that a person with a differing degree of intellectual development cannot consciously and actively act to achieve a result.¹⁸¹ In fact, thorough analysis reveals that some advocates who make these broad conclusions of lesser culpability cite sources that do not agree with their assertions.¹⁸² An excellent example of these jumps of reasoning can be seen in the *amici curiae* brief filed on behalf of the AAMR and several other health organizations in *McCarver v. North Carolina*,¹⁸³ in which the *amici* sought to convince the court that it is widely recognized that the culpability of defendants with mental retardation is lessened by their mental impairments. One of the sources that the petitioner cited to support this conclusion is a well respected handbook on mental

N.Y.U. Rev. L. & Soc. Change 59, 80-81 (1996); Jamie Marie Billotte, *Is it Justified?—The Death Penalty and Mental Retardation*, 8 Notre Dame J.L. Ethics & Pub. Pol'y 333, 366-67 (1994).

179. See Bing, *supra* note 178, at 80.

180. AMA Handbook on Mental Retardation 14-15 (Hebert J. Grossman & George Tarjan eds., 1987).

181. Matson Interviews, *supra* note 147.

182. *Id.*

183. Brief of Amici Curiae for AAMR, et al. at 33, *McCarver v. North Carolina*, 532 U.S. 941, 122 S. Ct. 22 (2001).

retardation authored by Johnny Matson, Ph.D.¹⁸⁴ While Dr. Matson agrees that mentally retarded individuals do suffer from mental impairments, thereby making them mentally retarded in the first place, he suggests that it is “patently false” that either any of his, nor any of the widely respected scientific research, can lead one to conclude that a diagnosis of mental retardation necessitates a conclusion that the offenders is less culpable for his acts.¹⁸⁵ Certainly a mentally retarded capital offender can be less culpable, Dr. Matson recognizes, and such culpability *could* possibly stem from his impairment.¹⁸⁶ Dr. Matson suggests that the only truly scientific way to assess whether such an offender possesses the proper mental state to consciously and actively seek out an intended result is through individual assessment, because not all of those who suffer from mental retardation, as defined by the AAMR, will be unable to undergo these mental processes.¹⁸⁷

Conclusions should be backed up with science, not advocacy. The majority’s broad culpability conclusions have no scientific backing on a *per se* level, and therefore cannot support a *per se* holding. Thus, the dynamic field of mental retardation demands individualized assessment and individual culpability conclusions.

IV. THE AFTERMATH OF *ATKINS V. VIRGINIA*

While the central holding of *Atkins* is clear, the opinion essentially left to the states the task of deciding both which offenders to deem mentally retarded and what procedures to put in place to make this determination.¹⁸⁸ The final answer, of course, will come from state legislatures, but as cases with mentally retarded offenders pile up, courts have been forced to carve out rules and mandate definitions. Louisiana, for example, had never considered the issue of mental retardation in the criminal context before *Atkins*.¹⁸⁹ But, in *State v. Williams*, the state’s supreme court wrestled with which definition of mental retardation to use for *Atkins* petitions, pointing to different legislative language concerning those seeking mental retardation disability services.¹⁹⁰ The Court eventually settled on a

184. *Id.*

185. Matson interviews, *supra* note 147.

186. *Id.*

187. *Id.*

188. *State v. Williams*, 2001-1650 (La. 11/1/02), 831 So.2d 835, 853. For example, *Atkins* did not mandate substantively any definition of mental retardation, nor did the Court procedurally mandate whether the issue of mental retardation *must* be decided by a judge or jury.

189. *Id.*

190. *Id.* The *Williams* court referred by analogy to Louisiana’s definition of

definition that most closely fit within the AAMR three-part framework that the United States Supreme Court referred to in *Atkins*, but noted that apparently any definition would suffice.¹⁹¹

Attempting to fashion *Atkins* procedure, the *Williams* Court explained that not every person currently in jail who suggests he is mentally retarded would be entitled to “post-*Atkins*” relief.¹⁹² A defendant must present objective evidence, the Court noted, which shows that his mental state is at issue.¹⁹³ These proceedings would resemble those deciding whether a defendant would be entitled to a pre-trial competency hearing.¹⁹⁴ Once relief was granted, the *Williams* Court ordered trial courts to conduct an evidentiary hearing to decide whether the defendant is mentally retarded.¹⁹⁵ The Court ordered that a “sanity commission,” comprised of two or three experts, and appointed by the court itself, be put together and subjected to questioning from both parties at the hearing.¹⁹⁶ The Court explicitly noted, however, that the final decision must be made by the judge and not by the panel of experts.¹⁹⁷ Louisiana jurisprudence applying *Williams* has utilized its procedure without suggesting any serious changes or announcing any apparent shortcomings.¹⁹⁸

The Louisiana Legislature reacted to *Atkins* with Code of Criminal Procedure Article 905.5.1 that demands that both the state and the defendant *must agree* in order for the issue of mental retardation to be tried by the court alone in a preliminary proceeding, to be proven by the defendant by a preponderance of the evidence.¹⁹⁹ Otherwise, the article mandates that the issue of mental retardation is to be tried by the jury during the capital sentencing hearing.²⁰⁰ The prosecution is entitled under the article to independently examine the defendant, and any pretrial determination by a judge does not preclude the defendant from re-presenting the issue to the jury at the capital sentencing phase.²⁰¹ It remains to be seen how this article will

mentally retarded found in Louisiana Revised Statutes title 28, section 381(12).

191. *Id.* at 854.

192. *Id.* at 857.

193. *Id.* at 857.

194. *Id.* at 858.

195. *Id.*

196. *Id.* at 859.

197. *Id.*

198. *See, e.g., State v. Dunn*, 2001-1635 (La. 11/1/02), 831 So.2d 862; *State v. Tate*, 2001-1658 (La. 5/20/03), 851 So. 921.

199. Cheney C. Joseph & P. Raymond Lamonica, *Criminal Jury Instructions and Procedure* § 7.01, in 17 *Louisiana Civil Law Treatise* (2d. ed.) 79, 107 (2003).

200. La. Code. Crim. Proc. art. 905.5.1 (C) (1).

201. *Id.* art. 905.5.1 (F), (C)(2). Further, section G declares that if the defendant fails to comply with an order to fully disclose all relevant information regarding his

be interpreted by Louisiana courts.

While some states have followed Louisiana jurisprudence on the issue of whether the judge or jury should decide the issue of mental retardation,²⁰² others have demanded it be a question for the jury.²⁰³ Some states have also decided to make the determination on evidence already in the record, instead of a trial court appointing a commission of experts.²⁰⁴ Instead of looking to their own statutes for definitions of what it means for a person to be mentally retarded, some states have opted to simply adopt the AAMR definition mentioned in *Atkins*.²⁰⁵ Seemingly confused just how far *Atkins* demanded that states go in defining mental retardation, Alabama opted to apply the *broadest* definition in those states that prohibit the execution of the mentally retarded.²⁰⁶

States have also differed when considering exactly which type of evidence to consider to accurately assess whether a defendant possesses the necessary intellectual component of mental retardation. Oklahoma courts have held that IQ scores are not needed at all to prove that a defendant is mentally retarded, and therefore do not include numbers at all in their definition,²⁰⁷ whereas Ohio has stuck to a stricter numerical approach, mandating that a person with an IQ score above seventy is presumptively not mentally retarded.²⁰⁸

Not surprisingly, federal courts have not been exempt from post-*Atkins* experimenting. Recognizing that *Atkins*'s allowed states to set definitions and procedures, some federal courts have refused to extend *Atkins* relief beyond what states offer. For example, the United States Fifth Circuit recently held that there is no constitutional duty to offer the defendant a jury determination of his mental retarded status when the state's law doesn't require such a finding.²⁰⁹

mental capacity or to submit to state examination, he will not receive any pretrial hearing nor be granted the opportunity to convince a jury at capital sentencing that he is mentally retarded. *Id.* art. 905.5.1(G).

202. See, e.g., *Lott v. State*, 779 N.E.2d 1011, 1015 (Ohio 2002) (The matter of whether the defendant is mentally retarded should be decided by the trial judge and is not a jury question).

203. See, e.g., *Murphy v. State*, 54 P.3d 556, 568 (Okla. Crim. App. 2002) (The jury must determine if a defendant is mentally retarded, and if so, he is no longer eligible for the death penalty).

204. *Id.* at 568–69.

205. *Lott*, 779 N.E.2d at 1014.

206. *Yeomans v. State*, 2004 WL 362229, 21 (Ala. Crim. App. 2004) (citing *Ex parte Perkins*, 851 So.2d 453 (Ala. 2002)).

207. *Murphy*, 54 P.3d at 568.

208. *Lott*, 779 N.E.2d at 1014.

209. *In re Johnson*, 334 F.3d 403, 404–05 (5th Cir. 2003).

While states wait on their legislatures to act, their courts have interpreted the opinion to give them great latitude on the specifics of how to implement the *Atkins* order of not executing mentally retarded offenders. There are stark differences in procedure and definitions as seen above, and only time will tell if this lack of uniformity weakens the mandate of the Supreme Court's broad ruling of unconstitutionality.

V. CONCLUSION

In *Atkins v. Virginia*, the Supreme Court of the United States spared all those diagnosed as mentally retarded from capital punishment.²¹⁰ But in doing so, the Court announced a new way to interpret the Eighth Amendment, one that will lead to uncertainty due to its subjective and irresponsible methodology. The methodology included labeling eighteen states as a force of collective will without acknowledging that, in many important aspects, the laws were not really the same. States now seeking to pass criminal laws in response to local concern will now have to worry about becoming part of a national or world-wide voice, which could make local decisions more permanent than the individual states had intended, and may lead to a chilling effect on state legislative experimentation in the criminal law field. This effectively deprives the entire nation of the results of Justice Brandeis's "state laboratory experiments," and may have railroaded a more meaningful legislative progression on this topic.

While the majority zealously "discovered" a consensus of state will, it failed to recognize the true dynamic state of the study of mental retardation. Limitations on the methodology needed to assess the necessary intellectual and adaptive traits, especially in the criminal trial context, as well as changing notions of what the disorder really is, demand that individual assessments, rather than *per se* judgments, are necessary to make accurate diagnoses. The majority also made the fatal error of not considering science when concluding that mentally retarded offenders should not be executed because they are less culpable. Once more, the state of science in this field rebukes this broad conclusion, and again demands individual assessments.

Assessing potentially mentally retarded offenders individually and making case by case conclusions about their mental states was the method utilized by capital punishment states before *Atkins*. Waiting for legislative action after *Atkins*, some state courts have fashioned procedural frameworks to respond to defendants rushing to seek *Atkins* relief. Other state legislatures quickly moved into action to

210. *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002).

implement *Atkins* demanded change. In both cases, one is forced to wait to see whether the Supreme Court of the United States will agree that these states have complied with its broad holding and imprecise directions.

In the end, one could suggest that this note's vigilance is futile and unnecessary because even if the majority is wrong, no one is hurt by the result. Those who would suggest such passiveness in the face of judicial overreaching and would be content to continue the one-sided advocacy before the ruling must subscribe to Arthur Leff's notion that "[t]he propositions . . . are logically incoherent; they are not evil."²¹¹ Good and evil is not the inquiry here. Rather, it is our duty to go further, for, if we do not, it will be our own fault if Hamilton's promise is not fulfilled.

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211. Arthur A. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 Va. L. Rev. 451, 478 n.70 (1974).

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