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Jumping on the Bandwagon: The United States Supreme Court Prohibits the Execution of Mentally Retarded Persons in *Atkins v. Virginia*

Lisa Odom

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Jumping on the Bandwagon: The United States Supreme Court Prohibits the Execution of Mentally Retarded Persons in *Atkins v. Virginia*

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“... when [Ricky Ray] Rector was given his last meal, ‘he was so simple he asked to save the pecan pie for later.’”¹

“Eddie Mitchell, a retarded man on death row in Louisiana, waived all his rights during his interrogation. But when an attorney asked him if he had understood what ‘waiving his rights’ meant, Mitchell raised his right hand and waved.”²

I. INTRODUCTION

Mental retardation is not something you have, like blue eyes, or a bad heart. Nor is it something you are, like short, or thin. It is not a medical disorder, nor a mental disorder Mental retardation reflects the ‘fit’ between the capabilities of individuals and the structure and expectations of their environment.³

In light of this assertion, do mentally retarded persons have the same capacity to understand the nature and consequences of their actions as offenders of average intellect? Are mentally retarded persons deterred by the fear of a death penalty sentence being imposed for their criminal actions? Is there retribution in executing an individual who does not understand what he has done or cannot control his impulses, even when he has an understanding of right and wrong? These are questions that will be discussed in this article in light of the Supreme Court’s recent decision in *Atkins v. Virginia*.⁴

1. RAPHAEL GOLDMAN, CQ’S VITAL ISSUES SERIES: CAPITAL PUNISHMENT 60-61 (Ann Chih Lin ed., 2002). Ricky Ray Rector was an Arkansas death row inmate with mental retardation who, by all accounts, did not understand the nature of the punishment he was to receive the next day. *Id.* at 60.

2. ROSA EHRENREICH & JAMIE FELLNER, HUMAN RIGHTS WATCH, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION VI, available at <http://www.hrw.org/reports/2001/ustat/> (2001).

3. AMERICAN ASSOCIATION ON MENTAL RETARDATION, DEFINITION OF MENTAL RETARDATION, at http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited Jan. 19, 2004).

4. 536 U.S. 304 (2002).

A. *Mental Retardation Defined*

Mental retardation is defined by the American Association on Mental Retardation (AAMR)⁵ as “a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.”⁶ It is estimated that between 6.2 and 7.5 million persons in the United States are mentally retarded.⁷

The Diagnostic and Statistical Manual IV—Text Revision (DSM-IV) defines mental retardation using the following three criteria: (A) “significantly subaverage intellectual functioning,” meaning an IQ of approximately 70 or below on an individually administered IQ Test; (B) concurrent deficits or impairments in present adaptive functioning (i.e. the person’s effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: “communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety”; and (C) onset before 18 years of age.⁸ The DSM-IV further breaks down mental retardation into degrees of severity as follows: mild mental retardation—IQ level 50-55 to approximately 70; moderate retardation—IQ level 35-40 to 50-55; severe mental retardation—IQ level 20-25 to 35-40; profound mental retardation—IQ level below 20 or 25.⁹

In recent years, the threshold IQ standard for mental retardation has been lowered due to the social stigma associated with labeling a person as mentally retarded.¹⁰ Consequently, fewer persons with borderline intellectual functioning, persons with IQs between 75 and 80, are being given special education and other social assistance benefits.¹¹ Currently, an estimated 89% of all mentally retarded persons have IQs that fall in the 51 to 70 range for a diagnosis of mild mental retardation.¹² Daryl Renard Atkins, the defendant in *Atkins v. Virginia*, falls within this IQ range with an IQ

5. This appears to be the definition adopted by the Supreme Court. See *Atkins v. Virginia*, 536 U.S. 304, 309 n.3 (2002); *Penry v. Lynaugh*, 492 U.S. 302, 308 n.1 (1989).

6. AMERICAN ASSOCIATION ON MENTAL RETARDATION, *supra* note 3.

7. LEIGH ANN DAVIS, PEOPLE WITH MENTAL RETARDATION IN THE CRIMINAL JUSTICE SYSTEM, at <http://www.thearc.org> (2000). It is estimated that between 2% and 10% of prisoners have mental retardation. *Id.*

8. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41-42 (Michael B. First ed., 4th ed., text revision 2000) [hereinafter DSM-IV].

9. *Id.* at 42-43.

10. See EHRENREICH & FELLNER, *supra* note 2, at II. In 1959, the American Association on Mental Deficiency (later renamed the American Association on Mental Retardation [AAMR]) set 85 as the threshold IQ at which a person is considered mentally retarded. *Id.* The AAMR reduced the IQ standard to 70 to 75 in 1992. *Id.*

11. *Id.* at II n.16.

12. See *id.* at II.

assessment of 59.¹³ Since Atkins met the criteria set forth defining mental retardation, the Supreme Court was forced to confront whether capital punishment was an appropriate sentence for mentally retarded inmates in light of the Constitution of the United States and the “evolving standards of decency” which “mark the progress of a maturing society” that are used in determining if punishments are cruel and excessive.¹⁴

B. Cruel and Unusual Punishment

The Eighth Amendment of the Constitution of the United States provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual punishments inflicted*.”¹⁵ The Supreme Court has “not confined the prohibition embodied in the Eighth Amendment to ‘barbarous’ methods that were generally outlawed in the 18th century,” but instead interprets the amendment in a “dynamic and flexible” way.¹⁶ In assessing evolving standards of decency, the Court looks not to the individual Justices’ standards of decency, but rather to those of modern American society as evidenced through legislation, because of the deference given to state legislatures under the American federal system.¹⁷ Nevertheless, while legislation may indicate a change on a particular issue in the social climate, a movement against a particular type of punishment will not suffice to prove an evolving standard of decency unless it, combined with similar legislation in other jurisdictions, establishes a national consensus that a punishment should be prohibited as cruel and unusual.¹⁸

The Court tackled the cruel and unusual punishment issue in *Atkins* by examining recent legislation, public opinion polls, and de facto actions taken by state officials with respect to executing mentally retarded individuals, in order to determine whether society has evolved in such a way as to exclude this particular group from capital punishment.¹⁹ Consequently, based upon its examination of the legislative movement, the Court concluded that executing mentally retarded persons is cruel and unusual punishment.²⁰ However, no standard was set forth for implementing this new constitutional mandate, and the Court did not discuss its retroactive application.²¹

13. *Atkins v. Virginia*, 536 U.S. 304, 308-09 (2002). The doctor “administered the Wechsler Adult Intelligence Scales test [WAIS-III], the standard instrument in the United States for assessing intellectual functioning.” *Id.* at 309 n.5.

14. *See Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion) (holding that losing citizenship rights for deserting the armed services is cruel and unusual punishment).

15. U.S. CONST. amend. VIII (emphasis added).

16. *Gregg v. Georgia*, 428 U.S. 153, 171 (1976).

17. *Stanford v. Kentucky*, 492 U.S. 361, 369-70 (1989) (plurality opinion).

18. *Id.* at 370-71 (plurality opinion) (holding that the fact that, of the thirty-seven states that impose the death penalty, fifteen do not impose it on sixteen-year-old offenders and twelve do not impose it on seventeen-year-old offenders was insufficient to establish a national consensus).

19. *See generally Atkins v. Virginia*, 536 U.S. 304, 304 (2002).

20. *Id.* at 321.

21. *See id.* at 318-21.

Section II of this article will examine the history and background of Eighth Amendment jurisprudence and the developments that enabled the Court to change its mind about the application of the death penalty to the mentally retarded between its decision in *Penry v. Lynaugh*²² and *Atkins*. Section III will set the framework for the *Atkins* case. Section IV will analyze both the majority and dissenting opinions in the *Atkins* case. Finally, Section V will discuss potential abuses, problems, solutions, and ramifications of the Court's failure to set forth a standard for legislatures and state officials to adopt.

II. HISTORY AND BACKGROUND OF THE LAW

A. No National Consensus in Late 1980s

The first statute prohibiting the execution of mentally retarded persons was enacted in 1986 in response to the execution of Jerome Bowden, a man identified as having mental retardation and an IQ of 65, after an initial stay of execution was granted but then terminated the next day.²³ The Georgia Board of Pardons and Paroles determined that "Bowden understood the nature of his crime and his punishment and therefore that execution, despite his mental deficiencies, was permissible."²⁴ The Georgia state legislature disagreed and enacted legislation specifically prohibiting capital punishment of mentally retarded persons.²⁵ Maryland quickly followed suit and passed a similar prohibition.²⁶

Nevertheless, in the 1989 case of *Penry v. Lynaugh*, the Supreme Court refused to categorically hold that the execution of mentally retarded individuals was cruel and unusual punishment because there was not yet an established "national consensus" against this type of punishment.²⁷ At the

22. 492 U.S. 302 (1989).

23. *Atkins*, 536 U.S. at 313-14 n.8.

24. *Id.* at 314 n.8.

25. *Id.* at 313-14; see GA. CODE ANN. § 17-7-131(j) (1997) (stating that "should the . . . jury or court find in its verdict that the defendant is guilty of the crime charged but mentally retarded, the death penalty shall not be imposed and the court shall sentence the defendant to imprisonment for life"). The constitutionality of this statute was upheld in *Fleming v. Zant*, 386 S.E.2d 339 (1989).

26. *Atkins*, 536 U.S. at 314; see MD. ANN. CODE, art. 27, § 412(f)(1) (1996).

27. *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989). Johnny Paul Penry was convicted of the brutal rape, beating, and murder of Pamela Carpenter in her home. *Id.* at 307. Penry had just been released from prison after serving time for another rape conviction. *Id.* Jerome Brown, a clinical psychologist, testified at Penry's competency hearing that Penry was mentally retarded with an IQ between 50 and 63. *Id.* In *Penry*, the Court recognized that cruel and unusual punishment is "not limited . . . to those practices condemned by the common law in 1789," but that determinations of whether a punishment is cruel and unusual also include "evolving standards of decency that mark the progress of a maturing society." *Id.* at 330-31 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

time of the decision, only Georgia, Maryland, and the federal government had enacted legislation prohibiting the execution of the mentally retarded.²⁸ The majority, through Justice O'Connor, contrasted this with the Court's decision to prohibit the execution of the mentally insane as set forth in *Ford v. Wainwright*,²⁹ where "[n]o state permitted the execution of the insane, and twenty-six [s]tates had statutes explicitly requiring suspension of the execution of a capital defendant who became insane."³⁰

Penry relied heavily on public opinion surveys that demonstrated that the public disfavored executing mentally retarded individuals.³¹ The Court discounted the statistics and stated, "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."³² The combination of two states with specific legislation prohibiting the execution of the mentally retarded and fourteen states with legislation prohibiting the death penalty in general did not provide evidence of a "national consensus" against the practice.³³

In dicta, Justice O'Connor recognized that certain levels of mental retardation, i.e. severe mental retardation, would warrant exculpating such individuals from criminal culpability because they lack the requisite understanding of the impact of their criminal actions.³⁴ Furthermore, Justice O'Connor conceded that mental retardation may lessen the culpability of the capital offender.³⁵ Therefore, for those mentally retarded persons held to be competent to stand trial, as was Penry, some protection could be offered by mandating that "the sentencing body . . . consider mental retardation as a *mitigating circumstance* in making the individualized determination whether death is the appropriate punishment in a particular case" and not by categorically prohibiting the execution of the mentally retarded.³⁶ Justice

28. *Id.* at 334; see Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(l) (2000) (permitting the death penalty for persons involved in drug-related felonies who commit an intentional killing, but forbidding the execution of mentally retarded individuals who commit this crime); GA. CODE ANN. § 17-7-131(j) (1997); MD. ANN. CODE, art. 27, § 412(f)(1) (1996). Congress retained the provision against executing mentally retarded individuals in the Federal Death Penalty Act of 1994. See 18 U.S.C. § 3596(c) (2000).

29. 477 U.S. 399 (1986).

30. *Penry*, 492 U.S. at 334 (citing *Ford v. Wainwright*, 477 U.S. 399, 408 n.2 (1986)).

31. *Id.* In its amicus brief, the AAMR predicted that the public sentiment of these polls would eventually prey upon legislators and would thus become "an objective indicator of contemporary values upon which [the Court] can rely." *Id.* at 335.

32. *Id.* at 331.

33. *Id.* at 334.

34. See *id.* at 337 (opinion of O'Connor, J.). The *Penry* Court's reasoning was fragmented, with some Justices joining Justice O'Connor's opinion only as to some parts and others joining only as to other parts. Justice O'Connor was not joined by any of the other Justices in this portion of the opinion. *Id.*

35. *Id.* at 340.

36. *Id.* at 337-38 (emphasis added). Justice O'Connor used mitigation to reconcile the conflict between the AAMR's argument that "all mentally retarded people, regardless of their degree of retardation, have substantial cognitive and behavioral disabilities that reduce their level of blameworthiness for a capital offense," and the statement that, nevertheless, the mentally retarded can be "held responsible or punished for criminal acts they commit." *Id.* at 336. Justice O'Connor offered protection to mentally retarded defendants by providing that the jury must not only hear

O'Connor did leave open the possibility of revisiting the case once a "national consensus" had been sufficiently evidenced through legislation.³⁷

Justice O'Connor noted that the Court has also disallowed the death penalty when

application of the death penalty to particular categories of crimes or classes of offenders violates the Eighth Amendment because it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering" or because it is "grossly out of proportion to the severity of the crime."³⁸

In dissent, Justice Brennan argued that this statement required the Court to consider "whether a punishment is disproportionate by comparing 'the gravity of the offense,' understood to include not only the injury caused, but also the defendant's moral culpability, with 'the harshness of the penalty.'"³⁹ Furthermore, the punishment must further important "penal goals of deterrence or retribution."⁴⁰ While recognizing Justice O'Connor's reservation about stereotyping all mentally retarded persons as "'inevitably lack[ing] the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty,'"⁴¹ Justice Brennan noted that there is "no danger of spurious generalization because [the characteristics] are a part of the clinical definition of mental retardation."⁴² Thus, despite the ability of some mentally retarded persons to "'maintain themselves independently or semi-independently in the community,'"⁴³ their impairments in reasoning, controlling impulsivity, and moral development limit their culpability, making death "always and necessarily

evidence of mitigating circumstances but must also have a mechanism for giving effect to those mitigating circumstances. *Id.* at 319.

37. *Id.* at 340.

38. *Id.* at 335 (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

39. *Id.* at 343 (Brennan, J., dissenting) (quoting *Solem v. Helm*, 463 U.S. 277, 292 (1983)) (emphasis added).

40. *Id.*

41. *Id.* at 343-44 (quoting *Penry*, 492 U.S. at 338 (Opinion of O'Connor, J.)).

42. *Id.* at 344 (Brennan, J., dissenting). The definition specifically includes "'significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior . . .'" *Id.* (quoting AAMR, CLASSIFICATION IN MENTAL RETARDATION 11 (H. Grossman ed., 1983)). While recognizing that variations exist in the degree of the intellectual deficit, from mild mental retardation, with an IQ closer to 70, to profound mental retardation, with an IQ near 20, Justice Brennan pointedly asserted that regardless of degree "all individuals [designated as mentally retarded] share the common attributes of low intelligence and inadequacies in adaptive behavior." *Id.* at 344-45 (quoting AAMR, CLASSIFICATION IN MENTAL RETARDATION 11 (H. Grossman ed., 1983)); see also AMERICAN ASSOCIATION ON MENTAL RETARDATION, *supra* note 3.

43. *Penry*, 492 U.S. at 345-46 (quoting AAMR, CLASSIFICATION IN MENTAL RETARDATION 184 (H. Grossman ed., 1983)).

disproportionate to [the offenders'] blameworthiness and hence... unconstitutional."⁴⁴

Additionally, Justice Brennan argued that allowing judges and juries to hear and give effect to evidence regarding the offenders' mental retardation is insufficient to ensure proper individualized determinations of proportionality of punishment.⁴⁵ He feared that evidence of mental retardation would be outweighed by other factors in determining culpability.⁴⁶

Finally, Justice Brennan argued that executing mentally retarded persons fails to further the penal goals of deterrence and retribution.⁴⁷ According to Justice Brennan, the "heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender"⁴⁸ and, because mentally retarded offenders lack the requisite culpability, "execution can never be the 'just desserts' of a retarded offender."⁴⁹ Moreover, deterrence cannot be achieved when the person is unable to anticipate the consequences of his or her criminality and unable to control his or her impulses.⁵⁰ Thus, capital punishment of mentally retarded individuals is "nothing more than the purposeless and needless imposition of pain and suffering."⁵¹ Nevertheless, it was still an accepted practice in the wake of *Penry*.

B. International Consensus

There is a worldwide movement towards prohibiting capital punishment in all circumstances.⁵² One hundred and eleven out of the world's nearly 200 countries have abolished capital punishment entirely.⁵³ Of the countries

44. *Id.* at 346. *But cf.* Cathleen C. Herasimchuk, *Keep Inmates' IQs Out of Death Penalty Decisions*, HOUSTON CHRON., May 21, 1999, reprinted in THE DEATH PENALTY: OPPOSING VIEWPOINTS 188 (Mary E. Williams ed., 2002) (asserting that "[r]esponsibility in the criminal justice system is based on moral blameworthiness, not intellectual achievements"). Ms. Herasimchuk believes that moral blameworthiness is measured by the individual's entire state of mind, which includes "his factual knowledge, intellectual understanding, intent, [and] his spiritual and moral development." *Id.* at 189. This argument is circular, however, because a mentally retarded individual is likely to have less factual knowledge, certainly less intellectual understanding, perhaps lack of the requisite intent, and, most likely, deficiencies in both his spiritual and moral development, all of which relate back to the mentally retarded inmate's intellectual impairment.

45. *Penry*, 492 U.S. at 347 (Brennan, J., dissenting).

46. *Id.* The problem is that the death penalty is reserved for only the most heinous of crimes and therefore the judge or jury considers the mental retardation of the perpetrator in light of the heinousness of the offense, which has an emotionally powerful effect. *See id.* at 347. This makes it far more difficult, as a practical matter, to give effect to mental retardation as a mitigating factor. *See id.* For a description of John Paul Penry's offense, *see infra* note 172.

47. *Penry*, 492 U.S. at 348.

48. *Id.* (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)).

49. *Id.* (quoting *Enmund v. Florida*, 456 U.S. 762, 801 (1982)).

50. *Id.* at 349.

51. *Id.* (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1972)).

52. EHRENREICH & FELLNER, *supra* note 2, at III.

53. *See* DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY: AN INTERNATIONAL PERSPECTIVE, at <http://www.deathpenaltyinfo.org/article.php?did=127&scid=30> (2004).

that still employ capital punishment, only the United States, Japan, and Kyrgyzstan executed mentally retarded offenders when *Atkins* was decided.⁵⁴ Furthermore, the United States has continually been criticized by human rights activists for falling behind “the standard of decency of almost every other country in the world . . . when it comes to the death penalty.”⁵⁵ Before the *Atkins* decision was handed down, the United Nations High Commissioner for Human Rights issued a resolution on April 25, 2002 urging “all States that still maintain the death penalty . . . [n]ot to impose the death penalty on a person suffering from any form of a mental disorder.”⁵⁶

The United Nations Special Rapporteur was particularly concerned that, due to the nature of mental retardation, “mentally retarded persons are much more vulnerable to manipulation during arrest, interrogation, and confession. Moreover, mental retardation appears not to be compatible with the principle of full criminal responsibility.”⁵⁷

C. A Potential National Consensus?

While there was not yet a national consensus on the propriety of executing mentally retarded persons at the time of the *Penry* decision, Justice O'Connor indicated that the issue might be revisited upon a later showing of a national consensus.⁵⁸ In response to the 1989 *Penry* decision, a number of organizations supported the movement towards complete prohibition of capital punishment when the offender is mentally retarded.⁵⁹ For example, the American Bar Association created a policy disfavoring capital punishment of mentally retarded persons, asserting, “execution of such individuals is unacceptable in a civilized society, irrespective of their guilt or innocence.”⁶⁰

Despite the Court's attempt to force the lower courts to use mental retardation as a mitigating circumstance in capital punishment cases, thirty-

54. See EHRENREICH & FELLNER, *supra* note 2, at III (citing U.N. Commission on Human Rights, *Extrajudicial, Summary or Arbitrary Executions: Report by the Special Rapporteur*, E/CN.4/1995/61, para. 380 (1994)).

55. Jamie Fellner, *Mentally Retarded Don't Belong on Death Row*, S.F. CHRON., Jan. 4, 2000, at A19, available at <http://www.hrw.org/editorials/2000/death-0105-cron.htm>.

56. *The Question of the Death Penalty*, Res. 2002/77, U.N. Hum. Rts. Comm., 56th mtg., U.N. Doc. E/2002/23, available at <http://eurunion.org/legislat/DeathPenalty/UNCHRRes20277.htm> (2002).

57. EHRENREICH & FELLNER, *supra* note 2, at III (quoting U.N. Commission on Human Rights, *Extrajudicial, Summary or Arbitrary Executions: Report by the Special Rapporteur*, E/CN.4/1998/68/Add.3, para. 58 (1998)).

58. *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989).

59. Press Release, Death Penalty Information Center, Supreme Court Declares Execution of Persons with Mental Retardation Unconstitutional: Ruling Reflects Growing National Consensus on Issue, at <http://www.deathpenaltyinfo.org/PR-DPICAtkins.pdf> (June 20, 2002).

60. *Id.*

five mentally retarded offenders had been executed since 1976.⁶¹ Six of those offenders were executed in 1995 alone.⁶² Thus, using mental retardation as a mitigating factor was unlikely to stop the practice of executing mentally retarded persons.⁶³ Apparently recognizing this fact, sixteen state legislatures (Kentucky, Tennessee, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina) passed laws similar to those of Maryland and Georgia, prohibiting the execution of mentally retarded individuals.⁶⁴

The responses of these sixteen legislatures, coupled with Maryland, Georgia, and the federal government's prohibitions, led the Supreme Court to agree to review the case of Earnest McCarver, a North Carolina death row inmate, in March 2001.⁶⁵ However, North Carolina enacted legislation prohibiting the execution of mentally retarded offenders after certiorari was granted, rendering McCarver's plight moot.⁶⁶ Thus, in September 2001, the Court agreed to hear the case of a Virginia death row inmate with mental retardation, Daryl Atkins.⁶⁷

III. FACTS OF THE CASE

Daryl Renard Atkins was convicted of the armed robbery, abduction, and murder of Eric Nesbitt and was sentenced to death in the state of

61. Mary H. Cooper, *Issues, Viewpoints, and Trends*, in THE CQ RESEARCHER 3-23 (1999), reprinted in CQ'S VITAL ISSUES SERIES: CAPITAL PUNISHMENT 4 (Ann Chih Lin ed., 2002).

62. AMERICAN ASSOCIATION ON MENTAL RETARDATION, FACT SHEET: THE DEATH PENALTY, at http://www.aamr.org/Policies/faq_death_penalty.shtml (last modified Mar. 6, 2001). Moreover, in the criminal justice system mental retardation is present between 4% and 10% of the time, while in the general population the prevalence of mental retardation is between 1.5% and 2.5%. *Id.*

63. *See id.*

64. *See* ARIZ. REV. STAT. ANN. § 13-703.02 (West 2002); ARK. CODE ANN. § 5-4-618 (Michie 2002); COLO. REV. STAT. ANN. § 16-9-401 (West 2002); CONN. GEN. STAT. §§ 53a-46a (2002); FLA. STAT. ANN. § 921.137 (West 2002); IND. CODE §§ 35-36-9-2 to 35-36-9-6 (2002); KAN. STAT. ANN. § 21-4623 (2002); KY. REV. STAT. ANN. §§ 532.130, 532.135, 532.140 (Banks-Baldwin 2002); MO. REV. STAT. § 565.030 (2002); NEB. REV. STAT. § 28-105.01 (2002); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2002); N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2002) (excludes prohibition if the killing was done while incarcerated as stated in N.Y. CRIM. PROC. LAW § 400.27.12(d)); S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie 2002); TENN. CODE ANN. § 39-13-203 (2002); WASH. REV. CODE § 10.95.030 (2002).

65. *See* MEI LING REIN, CAPITAL PUNISHMENT: CRUEL AND UNUSUAL? 42 (2002).

66. *McCarver v. North Carolina*, 121 S. Ct. 1401 (2001) (mem.), *cert. dismissed*, 533 U.S. 975 (2001). Interestingly, McCarver's grant of certiorari was dismissed because North Carolina enacted legislation prohibiting the execution of mentally retarded persons with an IQ of 70 or below. *See* N.C. GEN. STAT. § 15A-2005(a)-(b) (2002). Unfortunately for McCarver, his initial IQ test result was 74, but when measured again his IQ was 67, resulting in an average IQ score of 70.5, one-half point higher than required to be excluded from capital punishment under North Carolina's statute. Stan Swofford, *Lawsuit Challenges Execution: Defining Retardation by IQs Questioned*, GREENSBORO NEWS & REC., Sept. 14, 2002, at B1. Currently, the statute is under attack on behalf of McCarver; these new proposals seek to include mentally retarded individuals with IQs between 71 and 75 in the prohibition. *Id.*

67. *See* REIN, *supra* note 65, at 42; *see also* *Atkins v. Virginia*, 533 U.S. 976 (2001) (granting cert.).

Virginia.⁶⁸ He committed these crimes with a cohort, William Jones, who pled guilty to murder in exchange for his testimony against Atkins.⁶⁹ Both men testified at trial, although Jones's testimony was more coherent and credible, that the other had been responsible for actually shooting Eric Nesbitt eight times after they had abducted him and forced him to withdraw cash from an automated teller machine.⁷⁰ Jones's testimony sufficiently proved Atkins's guilt, and he was convicted of capital murder.⁷¹

In the sentencing phase of the trial, the defense introduced Dr. Evan Nelson, who had determined that Atkins was mildly mentally retarded.⁷² His determination was "based on interviews with people who knew Atkins, a review of school and court records, and the administration of a standard intelligence test which indicated that Atkins had a full scale IQ of 59."⁷³ Nevertheless, Mr. Atkins was ultimately sentenced to death after the Virginia Supreme Court first reversed and remanded the initial death sentence for a second sentencing hearing because the first sentencing hearing had used a "misleading verdict form."⁷⁴ At the second sentencing hearing, the State used Dr. Stanton Samenow to rebut Dr. Nelson's testimony.⁷⁵ Importantly, Dr. Samenow never administered an intelligence test, but instead asked Atkins questions from the Wechsler Memory Scale.⁷⁶ This was not the test that Dr. Nelson had utilized.⁷⁷ Instead of diagnosing Atkins with mental retardation, Dr. Samenow diagnosed Atkins with antisocial personality disorder.⁷⁸ Dr. Samenow urged that Atkins was of "average intelligence,"⁷⁹ and attributed his terrible academic performance to Atkins being "a person who [chooses] to pay attention sometimes, not to pay attention others, and [who] did poorly because he did not want to do what he was required to do."⁸⁰ Atkins was again sentenced to death.⁸¹

This time, the Virginia Supreme Court upheld the capital punishment verdict, dismissing Atkins's argument that as a mentally retarded person he

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

69. *Id.* at 307 n.1. This made Jones ineligible for the death penalty. *Id.*

70. *Id.* at 307.

71. *Id.*

72. *Id.* at 308.

73. *Id.* at 308-09; *see also id.* at 309 n.4. Atkins was given the Wechsler Adult Intelligence Scales test (WAIS-III), which is the standard test given to evaluate intellectual functioning in the United States. *Id.* at 309 n.5. Mild mental retardation is defined by the Diagnostic and Statistical Manual as an IQ level between 50 to 55 and 70. *See DSM-IV, supra* note 8.

74. *Atkins*, 536 U.S. at 309; *see Atkins v. Virginia*, 510 S.E.2d 445 (1999).

75. *Atkins*, 536 U.S. at 309.

76. *Id.* at 309 n.6.

77. *Id.*

78. *Id.* at 309.

79. *Id.*

80. *Id.* at 309 n.6.

81. *Id.* at 309.

could not be sentenced to death.⁸² Moreover, the Virginia court blatantly refused “to commute Atkins’ sentence of death to life imprisonment merely because of his IQ score.”⁸³ Virginia Supreme Court Justices Hassell and Koontz dissented, stating that it was

indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. 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.⁸⁴

The gravity of the dissenters’ concerns coupled with the number of legislatures that had implemented legislation prohibiting the execution of mentally retarded individuals led the United States Supreme Court to review *Atkins v. Virginia*.⁸⁵

IV. ANALYSIS OF *ATKINS V. VIRGINIA*

A. The Eighth Amendment Draws Its Interpretation from Current Societal Standards of Decency.

The Court, in a 6-3 decision, began by emphasizing the mandates of the Constitution’s Eighth Amendment.⁸⁶ “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁸⁷ The majority, through Justice Stevens, explained that claims of excessive punishment must be judged by the standards that currently prevail rather than the standards adopted by the framers of the Bill of Rights.⁸⁸ In reviewing society’s current standard of decency in regard to a particular issue, the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”⁸⁹

82. *Id.* at 310; *see Atkins v. Virginia*, 534 S.E.2d 312, 318 (2000) (citing *Penry v. Lynaugh*, 492 U.S. 302, 336 (1989), as authority for the proposition).

83. *Atkins*, 536 U.S. at 310 (quoting *Atkins*, 534 S.E.2d at 321).

84. *Atkins*, 534 S.E.2d at 325 (Hassell, J., dissenting).

85. *Atkins*, 536 U.S. at 310; *see Atkins v. Virginia*, 533 U.S. 976 (2001) (mem.) (granting cert.).

86. *Atkins*, 536 U.S. at 311. Justice Stevens wrote for the majority, joined by Justice Breyer, Justice Ginsburg, Justice Kennedy, Justice O’Connor, and Justice Souter. *Id.* at 306.

87. *Id.* at 311-12 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958) (plurality opinion)).

88. *Id.* at 311.

89. *Id.* (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). The Court continued by noting several instances where the Court had previously relied on such evidence to reject certain punishments for certain crimes. *Id.*; *see, e.g., Coker v. Georgia*, 433 U.S. 584, 593-96, 97 (1977) (holding that capital punishment was excessive punishment for rape of an adult woman in light of the fact that a majority of state legislatures have rejected death as a permissible penalty for that crime); *Enmund v. Florida*, 458 U.S. 782, 789-93 (1982) (holding that capital punishment was

However, the Court noted that the Constitution still mandates that “in the end [the Justices] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”⁹⁰ For example, the Court in *Enmund v. Florida* agreed with legislative action that prohibited capital punishment when the offender did not have intent to commit the crime and did not actually commit the crime because in that case capital punishment did not “measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.”⁹¹ When a consensus is involved in determining whether there is a national standard, the Justices’ “judgment is ‘brought to bear’ by asking whether there is a reason to disagree with the judgment reached by the citizenry and its legislators.”⁹² Thus, the Court will accept evolving standards so long as there is no reason to disagree with the movement by the people and legislatures.⁹³

Of particular importance to the majority was not only the sheer number of states that had enacted legislation prohibiting the execution of mentally retarded persons, but also “the consistency of the direction of change,”⁹⁴ especially

[g]iven the well known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of [s]tates prohibiting the execution of mentally retarded persons (and the complete absence of [s]tates passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.⁹⁵

improper where the offender did not take life, intend to take life, or even attempt to take life, and citing the legislation of the majority of states as in accord). But what if several states adopted legislation only permitting the execution of female defendants? Would this necessarily indicate a societal movement in favor of killing women? While this may be a stretch, it would be imprudent to assume that all actions by state legislatures have good intentions behind them and are not bolstered by the legislators’ own political aspirations. Relying on the actions of state legislatures as “objective evidence” of contemporary values could prove dangerous should a strong, wealthy lobby appear.

90. *Atkins*, 536 U.S. at 312 (quoting *Coker*, 433 U.S. at 597).

91. *Id.* at 315 (quoting *Enmund*, 458 U.S. at 801).

92. *Id.* at 315-16 (quoting *Coker*, 433 U.S. at 597).

93. *See id.* However, there is a limitation on the national consensus approach to cruel and unusual punishments. Namely, the Court is expected to reject any consensus that is not in accord with the Constitution, specifically the guarantees of equal protection and due process. *See* U.S. CONST. amend. XIV. Therefore, in response to the question posed earlier, should the legislatures uniformly adopt a rule only allowing capital punishment for female offenders, the Court would likely (and hopefully) disagree with the movement and refuse to implement the consensus as proffered. *See id.*

94. *Atkins*, 536 U.S. at 315.

95. *Id.* at 315-16.

Furthermore, the Court noted that even in states where there is not express legislation prohibiting such executions, none have occurred in years.⁹⁶ Similarly, a number of organizations, including religious communities, share the belief that it is morally wrong to execute a mentally retarded offender.⁹⁷ National opinion polls also reflect a consensus among the citizenry, even among those in favor of capital punishment in other situations, that the practice should be forbidden.⁹⁸ Furthermore, most serious disagreements plaguing the issue of executing mentally retarded persons come in the form of determining who is actually retarded⁹⁹ because not all offenders claiming to be mentally retarded will fall within the standards that provide a national consensus.¹⁰⁰ Thus, the Court concluded that the evidence showed that a “national consensus” had been reached on the issue.¹⁰¹

B. The Penological Goals of Capital Punishment

In order to bear upon the judgment of the “national consensus,” the Court next turned to the penological goals of capital punishment.

Although mentally retarded persons often “know the difference between right and wrong and are competent to stand trial,”¹⁰² these individuals, by definition, have “diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”¹⁰³ Because of these limitations, the Court held that mentally retarded offenders should be entirely excluded from capital punishment, as they have been in eighteen jurisdictions, for the following two reasons.¹⁰⁴

96. *Id.* at 316 (referring to states such as New Hampshire and New Jersey).

97. *Id.* at 316 n.21. Among the groups that oppose the execution of mentally retarded persons are the American Psychological Association (APA), the AAMR, Christian, Jewish, Muslim, and Buddhist representatives, and the European Union. *Id.*

98. *Id.* (stating that “[a]lthough these factors are by no means dispositive, their consistency with the legislation evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue”). *But see id.* at 328 (Rehnquist, C.J., dissenting) (Appendix to Opinion) (asserting that the opinion polls, the positions of several organizations, and international opinion are unreliable evidence of a national consensus).

99. *Id.* at 317. Unfortunately, the Supreme Court opted to “leave to the [s]tates the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.” *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416-17 (1986)).

100. *Id.* However, the Court did assert that the definitions should be similar to those posed by either the AAMR or the APA. *Id.* at 317 n.22.

101. *See id.* at 313-17.

102. *Id.* at 318. If the offender is so profoundly retarded as to be classified as “mentally incompetent he or she will not be required to stand trial However, findings of mental incompetence are extremely rare.” EHRENREICH & FELLNER, *supra* note 2, at IV. Moreover, upon a determination of competency to stand trial, these individuals are “deemed capable of understanding the nature and purpose of the legal proceedings and of cooperating, communicat[ing] and working with defense counsel.” *Id.*

103. *Atkins*, 536 U.S. at 318. However, this does not entirely excuse them from punishment. *Id.*

104. *Id.* at 318-19.

1. Capital Punishment Should Serve the Important Goals of Deterrence and Retribution.

In *Gregg v. Georgia*, the Court identified the social purposes of capital punishment as “retribution and deterrence of capital crimes by prospective offenders.”¹⁰⁵ However, because of the cognitive limitations of mentally retarded offenders, there is serious doubt as to whether either one of these purposes is furthered by executing them.¹⁰⁶ Moreover, without achieving one of these two goals, capital punishment is nothing more than the “needless imposition of pain and suffering” and is unconstitutional.¹⁰⁷

Retribution is designed to insure that the offender receives what he or she deserves for the harm caused to the victim and the victim’s family.¹⁰⁸ Thus, “the severity of the appropriate punishment necessarily depends on the culpability of the offender.”¹⁰⁹ Since *Gregg v. Georgia*, the Court has narrowed the types of individuals and crimes that can be subject to this ultimate punishment.¹¹⁰ The *Atkins* Court logically inferred then that “[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the [s]tate, the lesser culpability of the mentally retarded offender . . . does not merit that form of retribution.”¹¹¹ Consequently, excluding mentally retarded persons from capital punishment was appropriate considering the narrowing jurisprudence in this area of law.¹¹²

The goal of deterrence is served by preventing the criminal activity of prospective offenders.¹¹³ Therefore, the death penalty “can serve as a deterrent only when [the] murder is the result of premeditation and deliberation.”¹¹⁴ The theory behind this notion is that the more final and severe a punishment, the more likely the prospect of the punishment will

105. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

106. *Atkins*, 536 U.S. at 319-20.

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

108. *Id.*

109. *Id.* However, a prerequisite for capital punishment is “high moral blameworthiness,” something mentally retarded individuals, by definition, are unable to satisfy. EHRENREICH & FELLNER, *supra* note 2, at VII.

110. *Atkins*, 536 U.S. at 319-20; see, e.g., *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (requiring a “consciousness more ‘depraved’ than that of any person guilty of murder” for capital punishment to be imposed).

111. *Atkins*, 536 U.S. at 319.

112. *Id.* Justice Stevens cited only the *Godfrey* case as evidence of narrowing death penalty jurisprudence. However, *Godfrey* hardly suggests a significant reduction in the number of people who can be sentenced to death, considering that 3,701 inmates currently sit on death row throughout the United States. See Jamie Fellner, U.S.: Supreme Court Ban Ends “Barbaric” Executions, HUM. RTS. NEWS, June 20, 2002, at <http://www.hrw.org/press/2002/06/deathpen.htm>.

113. *Atkins*, 536 U.S. at 319.

114. *Id.* (quoting *Enmund*, 458 U.S. at 799.)

prevent the potential offender from carrying out the criminal conduct.¹¹⁵ The Court explained that, because of the cognitive deficiencies of mentally retarded individuals, severe punishments are not likely to inhibit their criminality because they cannot appreciate the severe consequences of such behavior and thus a measurable deterrent effect will not be achieved by mandating execution.¹¹⁶ Furthermore, prohibiting execution of the mentally retarded will not reduce the deterrent effect on non-mentally retarded offenders because they will remain unprotected by the prohibition and continue to face the death penalty in the wake of heinous crimes.¹¹⁷

2. The Procedural Safeguards in the Criminal Justice System Are Insufficient to Protect Mentally Retarded Persons.

Finally, the *Atkins* Court recognized that mentally retarded offenders do not benefit from the procedural safeguards afforded by both case law and the Constitution.¹¹⁸ There are numerous hurdles that mentally retarded individuals encounter when entering the criminal justice system.¹¹⁹ Most importantly, “[t]he risk ‘that the death penalty will be imposed in spite of factors which may call for a less severe penalty’ . . . is enhanced . . . by the possibility of false confessions . . .”¹²⁰ 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.”¹²¹ Mentally retarded defendants “may be less able to give meaningful assistance to their counsel,”¹²² are ineffective witnesses, and “their demeanor may create an

115. *Id.* at 320.

116. *Id.* There is evidence that mentally retarded individuals are unable to understand abstract concepts such as death or murder. EHRENREICH & FELLNER, *supra* note 2, at II. For example, Morris Mason, who was convicted of rape and murder and subsequently executed in Virginia in 1985 was reported to have “asked one of his legal advisors for advice on what to wear to his funeral.” *Id.* (citing ROBERT PERSKE, UNEQUAL JUSTICE? WHAT CAN HAPPEN WHEN PERSONS WITH RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES ENCOUNTER THE CRIMINAL JUSTICE SYSTEM 100-01 (Abingdon Press 1991)).

117. *Atkins*, 536 U.S. at 320.

118. *Id.* at 320-21.

119. *See id.*

120. *Id.* at 320 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). A false confession nearly killed Earl Washington in Virginia until DNA evidence exonerated him just days before his execution. Tim McGlone et al., *A Near Fatal Injustice*, VIRGINIA-PILOT, Jan. 22, 2001, at A1. Even after the tests exonerated him, he was kept in prison and not fully pardoned for an additional five-and-a-half years. *Id.* A former employer of Mr. Washington noted that “[y]ou could get [him] to confess that he walked on the moon.” *Id.* This is exactly what the police did. *See id.* Upon questioning, the police asked a series of questions regarding the physical attributes of the female victim. *See id.* Mr. Washington answered every question incorrectly; however, by the time he signed the statement, “he had the facts straight.” *Id.* Ehrenreich & Fellner attribute false confessions of mentally retarded individuals to a desperate attempt for “approval and friendship.” EHRENREICH & FELLNER, *supra* note 2, at II. They theorize that, as a result of “abuse, taunts, and rejection because of their low intelligence[,] . . . [mentally retarded individuals are] [e]ager to be accepted and eager to please . . . [rendering them] highly suggestible.” *Id.*

121. *Atkins*, 536 U.S. at 320.

122. *Id.* at 320-21. Furthermore, coupled with inexperienced, overworked, or uninterested defense counsel, this can pose a serious threat to the offender’s ability to effectively mitigate the

unwarranted impression of lack of remorse for their crimes.”¹²³ The Court found that relying on mental retardation as a mitigating factor was not only ineffective in protecting mentally retarded offenders but might also “enhance the likelihood . . . of future dangerousness [being] found by the jury.”¹²⁴

Ultimately, the Court concluded, in a 6-3 decision,¹²⁵ that they agreed with the movement of the eighteen legislatures, the organizations and religious groups, and the opinion polls that the death penalty “is not a suitable punishment for a mentally retarded criminal.”¹²⁶

C. Was Too Much Weight Given to the “National Consensus” Theory when the Evidence Did Not Support Such a Conclusion?

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, focused his dissent on the inadequacy of the sources used by the majority to bolster the “national consensus” reasoning.¹²⁷ He argued that while eighteen states have recently passed legislation prohibiting the execution of mentally retarded offenders, twenty states, including Virginia, “continue to leave the question of proper punishment to the individuated consideration of sentencing judges or juries familiar with the particular offender and his or her crime.”¹²⁸ Chief Justice Rehnquist dismissed the notion that other sources, including opinion polls, the views of professional and religious organizations, and international public policy were at all relevant in determining the constitutionality of this type of punishment.¹²⁹ Furthermore, the inclusion of this type of evidence, according to the Chief Justice, was “antithetical to considerations of federalism, which instruct that any ‘permanent prohibition upon all units of democratic government must [be

circumstances of his crime by introducing evidence of mental retardation. EHRENREICH & FELLNER, *supra* note 2, at IV. This is another possible reason that thirty-five mentally retarded offenders have been executed since the reinstatement of the death penalty in 1976, despite the mitigation protection assured in *Penry*. See *Penry v. Lynaugh*, 492 U.S. 302, 337-38 (1989).

123. *Atkins*, 536 U.S. at 321. Ehrenreich & Fellner note that

[l]ow intelligence and limited adaptive skills also mean that people with mental retardation often miss social “cues” that other adults understand They may act in ways that seem suspicious, even when they have done nothing wrong. When questioned by police . . . they often smile inappropriately, fail to remain still when ordered to do so, or act agitated and furtive when they should be calm and polite. Others may fall asleep at the wrong moment.

EHRENREICH & FELLNER, *supra* note 2, at II.

124. *Atkins*, 536 U.S. at 321.

125. Justice O’Connor joined the opinion of the majority in *Atkins*, although she had written the opinion in *Penry* that refused to categorically prohibit the execution of mentally retarded persons. See *Penry*, 492 U.S. at 340. Apparently she found the movement by the state legislatures to be indicative of a “national consensus.” See *Atkins*, 536 U.S. at 321.

126. *Atkins*, 536 U.S. at 321.

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

128. *Id.*

129. *Id.*

apparent] in the operative acts (laws and the application of laws) that the people have approved.”¹³⁰ In other words, to determine if a change has occurred in American notions of the standard of decency, Eighth Amendment jurisprudence demands that legislation alone bolster this evolution, not opinion polls and the like.¹³¹ Consequently, because legislation is the most objective evidence of a national consensus, followed perhaps by the decisions of juries (although these should be given considerably less weight than legislation), these should be the only two indicators of a national consensus.¹³² This notion is based on the idea that legislatures and juries are “better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.”¹³³

Furthermore, Chief Justice Rehnquist not only dismissed the majority’s use of opinion polls but also discounted the accuracy of the opinion polls.¹³⁴ The Chief Justice opined that the opinion polls referenced in the majority opinion were not sufficiently proven to have been “conducted in accordance with generally accepted scientific principles or [to be] capable of supporting valid empirical inferences about the issue”¹³⁵ Chief Justice Rehnquist noted the ease with which results from polls can be skewed by sampling different populations, varying survey methodologies, and varying the questions asked of the sample.¹³⁶ Moreover, the opinion polls cited by the *Atkins* majority did not disclose the targeted sample populations or the techniques used by the researchers.¹³⁷ Thus, for the Chief Justice, the use of any poll data was error.¹³⁸

While the Chief Justice conceded that the international climate on a cruel and unusual punishment issue could reinforce conclusions regarding an evolving standard of decency, it cannot alone evidence the movement of opinion on domestic soil.¹³⁹ Precedent has “explicitly rejected the idea that

130. *Id.* (quoting *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989) (plurality opinion)).

131. *Id.* at 322-23.

132. *Id.* at 323. Chief Justice Rehnquist asserted that evidence of the actions of sentencing juries could also have “significant and reliable” weight, although less than that of legislative actions. *Id.*; see *Coker v. Georgia*, 433 U.S. 584, 596-97 (1977) (noting that nine out of ten juries in Georgia did not impose the death penalty for rape convictions); *Enmund v. Florida*, 458 U.S. 782, 793-94 (1982) (giving great weight to evidence that sentencing juries did not impose the death penalty when a person did not attempt to, intend to, or actually take a life, despite the lack of legislative action in the same direction).

133. *Atkins*, 536 U.S. at 324. *Atkins* did not include statistical evidence regarding whether juries believe that executing mentally retarded defendants is disproportionate to their moral blameworthiness. *Id.*

134. *Id.* at 322.

135. *Id.*

136. *Id.* at 326.

137. *Id.* at 327.

138. *Id.* at 328.

139. *Id.* at 324-25; see also *Stanford v. Kentucky*, 492 U.S. 361, 370 n.1 (1982). The *Stanford* Court stated, “[w]e emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant.” *Stanford*, 492 U.S. at 370. Although these arguments are relevant, how much weight did the majority really give to the fact that international consensus is against capital punishment in this context? The Court

the sentencing practices of other countries [can] 'serve to establish . . . that [a] practice is accepted among our people.'"¹⁴⁰ Accordingly, evidence of a *national* consensus has to be from actions taken by Americans and not by the actions of foreign legislatures and populace.¹⁴¹

Finally, Chief Justice Rehnquist rejected the amicus briefs of organizations, both professional and religious, that supported Atkins's contention that there is a national consensus against executing mentally retarded persons.¹⁴² The Chief Justice asserted that this type of evidence should be afforded no weight, particularly where the "elected representatives of a [s]tate's populace have not deemed them persuasive enough to prompt legislative action."¹⁴³

Ultimately, the Chief Justice found that the evidence introduced by Atkins in support of a national consensus was insufficient to prove its existence.¹⁴⁴ He feared that the Justices' subjective views on the issues of mental retardation and capital punishment weighed too heavily on the majority's decision in this case, particularly in light of the Court's Eighth Amendment jurisprudence and evolving standards of decency.¹⁴⁵

D. Do All Persons with Mental Retardation, No Matter How Slight, Lack the Moral Culpability Required of a Death Penalty Offender?

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, began his dissent by reiterating the facts of the case, paying particular attention to the testimony of Atkins's previous victims—he had been convicted of sixteen various crimes before this case—especially with regard to the violence they were subjected to by Atkins.¹⁴⁶ Moreover, Atkins's "mental retardation was a *central issue* at sentencing."¹⁴⁷ Nevertheless, "[t]he jury concluded . . . that his alleged retardation was not a compelling reason to exempt him from the death penalty in light of the brutality of his crime and his long demonstrated propensity for violence."¹⁴⁸ Justice Scalia

referred to international opinion in only one footnote of the opinion. See *Atkins*, 536 U.S. at 316 n.21.

140. *Atkins*, 536 U.S. at 325 (quoting *Stanford*, 492 U.S. at 369).

141. *Id.*

142. *Id.* at 326.

143. *Id.*

144. *Id.* at 328.

145. *Id.*

146. See, e.g., *id.* at 338-39. Atkins hit a victim with a beer bottle and slapped a gun across the face of a victim before using it to shoot her in the stomach. *Id.* Justice Scalia's analysis of the facts also gave deference to the testimony of Atkins's co-conspirator, William Jones, which bolstered the notion that Atkins actually shot Nesbitt eight times. *Id.* at 338.

147. *Id.* at 339 (Scalia, J., dissenting).

148. *Id.* Justice Scalia appears to be insinuating that the jury did consider Atkins's mental retardation as a mitigating factor, but it was not strong enough to forbid the death penalty under the circumstances of this particular case. See *id.*

disagreed with the majority's decision to "'upset[] this particularized judgment on the basis of a constitutional absolute' . . . conclud[ing] that no one who is even slightly mentally retarded can have sufficient 'moral responsibility to be subjected to capital punishment . . .'"¹⁴⁹

Justice Scalia acknowledged that Eighth Amendment jurisprudence regarding cruel and unusual punishment has developed around two categories: either the punishment was considered cruel and unusual at the time of the adoption of the Bill of Rights or it is a punishment method that is inconsistent with "modern 'standards of decency,' as evinced by objective indicia, the most important of which is 'legislation enacted by the country's legislatures.'"¹⁵⁰

As to the first category, "[o]nly *severely* or *profoundly* mentally retarded . . . enjoyed any special status under the law at that time."¹⁵¹ According to Justice Scalia, this was attributed to a "'deficiency in will' rendering them unable to tell right from wrong."¹⁵² However, "[m]entally retarded offenders with less severe impairments—those who were not 'idiots'—suffered criminal prosecution and punishment, including capital punishment."¹⁵³ Accordingly, *Atkins*'s constitutional protection could not fall under the first category of cruel and unusual punishments because his punishment would not have been considered cruel and unusual at the time the Bill of Rights was drafted.¹⁵⁴

According to Justice Scalia, however, the majority's resort to the evolving standards of decency category posed a great problem for the Justices.¹⁵⁵ "Before [this decision], our opinions consistently emphasized that Eighth Amendment judgments regarding the existence of social 'standards' 'should be informed by objective factors to the maximum possible extent' and . . . 'not be . . . the subjective views of individual Justices.'"¹⁵⁶ The most objective of these factors is the legislation passed by society's elected representatives.¹⁵⁷ Justice Scalia lamented that the majority paid only "lip service" to this notion and instead "miraculously extract[ed] a 'national consensus' forbidding execution of the mentally retarded."¹⁵⁸

149. *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 863-64 (1988) (Scalia, J., dissenting)). This is precisely the issue: do mentally retarded persons automatically lack moral blameworthiness solely because they are defined as mentally retarded (the majority's position) or are mentally retarded persons, to some degree, able to appreciate the wrongfulness of their conduct and be held accountable for their actions? The Court in *Atkins* acknowledged that mentally retarded persons may have the ability to distinguish between right and wrong, yet still held that, because of their disability, they necessarily lack the moral blameworthiness required to justify capital punishment. *Id.* at 318.

150. *Id.* at 340 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331-32 (1989)).

151. *Id.* Justice Scalia was referring to the year 1791, when the Bill of Rights was drafted. *See id.* Instead of being subjected to criminal punishment, these "idiots" were committed civilly or made wards of the state, either route having the effect of keeping them from harming another again. *Id.*

152. *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *24 (1769)).

153. *Id.* at 340-41.

154. *Id.*

155. *Id.* at 341.

156. *Id.* (quoting *Coker v. Georgia*, 433 U.S. 584, 592, 597 (1977)).

157. *Id.*

158. *Id.* at 342.

Justice Scalia had particular trouble with the fact that only eighteen of the thirty-eight states (47%) that employ the death penalty have forbidden this type of execution.¹⁵⁹ Justice Scalia argued that this is “not a statement of absolute moral repugnance, but one of current preference between two tolerable approaches,” and it is not indicative of a “national consensus.”¹⁶⁰

Justice Scalia urged that prior case law mandates more agreement among the states before finding a punishment “cruel and unusual.”¹⁶¹ Furthermore, Justice Scalia criticized the majority for not considering the infancy of these statutes, the eldest statute being only fourteen years old, not nearly enough time for the states to have evaluated their practicality.¹⁶² According to the dissent, it was “myopic to base sweeping constitutional principles upon the narrow experience of [a few] years.”¹⁶³ Justice Scalia further dismissed the majority’s attempt to “bolster its embarrassingly feeble evidence of ‘consensus’” by arguing that the number of states that have actually enacted legislation prohibiting the execution of mentally retarded persons has less authoritative weight than the “consistency of the direction of change.”¹⁶⁴ Instead, Justice Scalia scathingly rewrote the “consistency-of-the-direction-of-change” argument posed by the Court as “[n]o state has yet undone its exemption of the mentally retarded, one for as long as 14

159. *Id.* Of the states that have enacted such legislation, only seven of those eighteen jurisdictions found the death penalty to be so “morally repugnant” that the legislation was applied retroactively to persons with mental retardation who were already on death row. *Id.* Important for Justice Scalia was that the other eleven states specifically limited the prohibition to mentally retarded defendants convicted after the effective date of the statute. *Id.* It is possible that these states feared that all death row inmates would suddenly claim to be mentally retarded if they instituted a retroactivity clause. However, Justice Scalia drives the point home: if executing the mentally retarded is so “morally repugnant,” then is it not worth risking false claims to ensure that no one is wrongfully executed? *See id.*

160. *Id.* Two of the states with such prohibitions permit execution of the mentally retarded in limited circumstances. *Id.* The Kansas statute permits execution of all but the most severely mentally retarded. *Id.*; see KAN. STAT. ANN. § 21-4623(e) (2001). The New York statute allows execution of mentally retarded offenders if they commit murder while in prison. N.Y. CRIM. PROC. LAW § 400.27.12(d) (McKinney 2001); N.Y. PENAL LAW § 125.27 (McKinney 2002).

161. *Atkins*, 536 U.S. at 343; see, e.g., *Ford v. Wainwright*, 477 U.S. 389, 408 (1986) (exempting the insane from execution because not a single state authorized that punishment); *Enmund v. Florida*, 458 U.S. 782, 789 (1982) (noting that 78% of death penalty jurisdictions disallow capital punishment where the offender was a participant in the underlying crime but did not commit the murder); *Coker*, 433 U.S. at 595-96 (stating that only one jurisdiction proscribed the death penalty as punishment for rape of a woman). In fact, the Court specifically refused to find the execution of juveniles to be cruel and unusual punishment even though twenty-seven of the thirty-eight death penalty states had enacted legislation prohibiting the execution of children sixteen and younger. *See Stanford v. Kentucky*, 492 U.S. 361, 370-71 (1989) (plurality opinion). This was an outstanding 71%, yet the Court still refused to find that there was a “national consensus.” *See id.* at 373.

162. *Atkins*, 536 U.S. at 344. Of these eighteen statutes, five were created within the past year. *Id.* The speed with which these statutes are being enacted, however, does suggest the immediacy of the concern, particularly in light of the fact that life is at stake. *See id.*

163. *Id.* (quoting *Coker*, 433 U.S. at 614).

164. *Id.* at 344.

whole years.”¹⁶⁵ Justice Scalia charged the majority with “thrashing about for evidence of ‘consensus,’” and poked fun at its use of the states’ infrequent execution of mentally retarded persons as evidence and its consideration of the views of professional and religious organizations.¹⁶⁶

Justice Scalia accused the majority of “empty talk of a ‘national consensus,’” and asserted that, in reality, “it is the *feelings* and *intuition* of a majority of the Justices that count . . . ‘a majority of the small and unrepresentative segment of our society that sits on [the] Court.’”¹⁶⁷ According to his dissent, the majority rested its decision on the false assumption that judges and juries are unable to “take proper account of mental retardation,” which undermines a crucial understanding in our society that they actually “play an *indispensable* role in such matters.”¹⁶⁸

Furthermore, Justice Scalia criticized the Court for ignoring a third and important societal interest in the death penalty, the “incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future.”¹⁶⁹ He dismissed the majority’s argument that retribution is not served by executing mentally retarded offenders because they “are *no more culpable* than the average murderer.”¹⁷⁰ He urged that culpability and “deservedness of the most severe retribution[] depends not merely . . . upon the mental capacity of the criminal . . . but also upon the depravity of the crime,” which has traditionally been decided by the sentencing body weighing the circumstances (mental capacity versus heinousness of the crime) to reach the appropriate outcome, and not by a “categorical rule . . . impose[d] upon all trials.”¹⁷¹ Justice Scalia reasoned that “[t]he fact that juries continue to sentence mentally retarded offenders to death for extreme crimes shows that society’s moral outrage sometimes demands execution of retarded offenders.”¹⁷²

165. *Id.* at 345.

166. *Id.* at 346-48. Justice Scalia attributed the infrequency with which mentally retarded persons are actually executed to the fact that mental retardation is a “constitutionally mandated mitigating factor.” *Id.* at 347. Furthermore, he dismissed the professional organizations, the world community, and the opinion polls as irrelevant. *Id.* at 347-48.

167. *Id.* at 348-49 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 873 (1988) (Scalia, J., dissenting)).

168. *Id.* at 349.

169. *Id.* at 350 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 n.28 (1976)). Justice Scalia criticized the failure to recognize this third societal purpose, yet he also ignored it except to point out the majority’s oversight. *See id.*

170. *Id.* Justice Scalia appeared troubled by a lack of evidence showing that the mentally retarded are naturally more disposed to murder than others and by the evidence that, in fact, quite the opposite is true: their childlike qualities actually suggest “innocence rather than brutality.” *Id.*

171. *Id.* at 350-51.

172. *Id.* at 351. Justice Scalia’s assertions are bolstered by John Paul Penry’s account of the brutal rape and murder of Pamela Mosely Carpenter on October 25, 1979, discussed *supra* note 27 and accompanying text. Penry described the events of that day as follows:

I went over to her house and circled around the block to see if her husband was there. I saw a pickup, so I went to the kitchen door to see if he was there. She came to the door. I asked her if her husband was there and she said “no.” That’s when I jerked the screen door open, pulled my knife out and grabbed her. She was screaming and hollering for help and knocked the knife out of my hand

Regarding the deterrence argument, Justice Scalia contended that the majority never stated that *all* persons with mental retardation cannot process the nature of the penalty; rather the majority assumed that mentally retarded persons are less likely to be able to process this information.¹⁷³ The dissent argued instead that “the deterrent effect of a penalty is adequately vindicated if it successfully deters many, but not all, of the target class.”¹⁷⁴ Thus, for Justice Scalia, the fact that the death penalty for some mentally retarded offenders may not serve societal purposes is acceptable because, for other offenders, it will serve both the deterrent and retributive purposes of criminal sanctions.¹⁷⁵ Therefore, it should be the role of the sentencing body to determine whether these goals will be adequately met, and not the categorical decision of the Supreme Court.¹⁷⁶

Finally, the fact that mentally retarded persons might suffer “wrongful execution” was of no weight to the dissent because similar risks—ineffective assistance of counsel, lessened ability to show mitigating circumstances, and making poor witnesses—could arise for “just plain stupid people, inarticulate people, even ugly people.”¹⁷⁷

V. CRITIQUE

A. What Constitutes a “National Consensus”?

The result in *Atkins* seems to be the reasonable and moral choice for a compassionate society, one “which is naturally drawn to protect the less fortunate, especially those plagued by physical or mental deficiencies.”¹⁷⁸ But does “the high [C]ourt’s decision overstep[] some important legal boundaries, and ultimately undermine[] our basic democratic traditions[?]”¹⁷⁹ Some argue that creating a blanket prohibition against capital punishment of mentally retarded offenders offends the rules, which the Court created through case law, by limiting the application of the Eighth

Mona Charen, *The Retarded, Too, Must Pay for Their Crimes*, in *THE DEATH PENALTY AND THE DISADVANTAGED* 114 (Gary E. McCuen ed., 1997). This account reflects the deliberateness of Penry’s actions. See *id.* Penry appears to have thought out his actions well before acting; for example, he checked to see if the victim’s husband was there before entering the home. *Id.* Thus, these actions do not appear to be impulsive activities that were beyond his control. See *id.*

173. *Atkins*, 536 U.S. at 351.

174. *Id.*

175. *Id.* at 351-52.

176. *Id.*

177. *Id.* at 352.

178. Matthew Woessner, *Court Ruling Missed Point on Execution*, *THE HARRISBURG PATRIOT*, July 1, 2002, at A7.

179. *Id.*

Amendment's "cruel and unusual" provision.¹⁸⁰ Namely, some argue that the Court must look for a "national consensus" before unilaterally declaring a punishment to be cruel and unusual and therefore unconstitutional.¹⁸¹ There is widespread criticism, consistent with the dissenting opinions of Justice Scalia and Chief Justice Rehnquist, that the national consensus reached by the majority falls short of the typical notion that a consensus requires "a broad, stable base of public support."¹⁸² However, others concede that a "national consensus" is emerging because of the number of legislatures that have enacted such legislation.¹⁸³

The dissent accurately points out flaws in the majority's conclusion that there is a national consensus.¹⁸⁴ Considering the Court's jurisprudence in this area, the Court has never found a "national consensus" to exist when there was less than 78% agreement among legislatures.¹⁸⁵ Furthermore, as Justice Scalia points out, taken together "the population of the death penalty [s]tates that exclude the mentally retarded is only 44% of the population of all death penalty [s]tates."¹⁸⁶ For the dissent and other legal professionals, "[a] national consensus has to be broad, clear and enduring," and the new state statutes, which the majority uses to strengthen its opinion, amount to only "a blip on the radar screen of public opinion."¹⁸⁷ However, the dissent did not consider the enormous decisions that the Court made in abortion cases like *Roe v. Wade* about issues that were highly controversial, where no firm national opinion had emerged, and where the Court even had to establish a right to achieve the desired outcome.¹⁸⁸

Moreover, although only eighteen of the thirty-eight states with the death penalty have enacted legislation prohibiting the execution of mentally retarded persons, another twelve have completely rejected the death penalty as a possible sentence for violent crimes.¹⁸⁹ Justice Ginsburg called this a "super majority" during oral arguments for the *Atkins* petition, and Justice

180. *Id.*

181. *Id.*

182. *See id.* Thus, the blanket rule constitutes an abuse of judicial discretion and a "usurpation of the state legislatures' lawmaking authority." *Id.*

183. *Executing the Mentally Retarded*, AMERICA, Apr. 29, 2002, at 3.

184. *See Atkins v. Virginia*, 536 U.S. 304, 342 (2002) (Scalia, J., dissenting).

185. *See, e.g., supra* note 161 and accompanying text. These examples show a much higher threshold for attaining a national consensus than in *Atkins*.

186. *Atkins*, 536 U.S. at 346 (citing U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 21 (121st ed. 2001)).

187. Linda Greenhouse, *Top Court Hears Argument on Execution of Retarded*, N.Y. TIMES, Feb. 21, 2002, at A21 (quoting Pamela A. Rumpz).

188. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (extending the right to privacy and creating a sliding scale standard for determining when the state's interest in protecting the potential for human life outweighs the woman's right to privacy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (establishing a right to privacy located in the penumbras of the 1st, 4th, 5th, 9th, and 14th amendments); *Loving v. Virginia*, 388 U.S. 1 (1967) (finding a fundamental right to marry). Neither of these two areas were "settled law," and they might be considered examples of the Court basing its decision on the Justices' own opinions regarding morality, as Justice Scalia asserted that the majority did in *Atkins*. *See Atkins*, 536 U.S. at 348.

189. Greenhouse, *supra* note 187, at A21.

O'Connor could not "imagine that [a person] wouldn't count those states" in establishing a national consensus.¹⁹⁰ Justice Scalia, however, responds that while "[t]here is something to be said for popular abolition of the death penalty[,] there is nothing to be said for its incremental abolition by this Court."¹⁹¹ By inference, counting these states could result in precedent that could be used to sustain future categorical rejections of the death penalty.¹⁹²

However, some scholars argue that the narrowing death penalty jurisprudence is because

[the] primary concern . . . today—whether by the press, governors, legislators, or judges—is not squeamishness about the state taking the lives of criminals Instead, the focus today is on the risk—and over time, the certainty—that a nation that imposes the death penalty will eventually take the life of an innocent person, assuming it hasn't already.¹⁹³

This is largely because of the revolution of DNA forensic testing that began in the late 1980s, which can "implicate a guilty person with near mathematical certainty" and also can "exonerate the innocent with equal authoritativeness."¹⁹⁴ Since *Furman v. Georgia*, more than one hundred "offenders" have been released from death row because of strong evidence of their innocence.¹⁹⁵ For many, this may be further compounded by mentally retarded persons' tendency to unwittingly confess to crimes that they did not commit.¹⁹⁶

Regardless of the Justices' personal views on executing mentally retarded persons, and regardless of whether there are moral or procedural

190. *Id.*

191. *Atkins*, 536 U.S. at 353. Justice Scalia provided a laundry list of procedural and substantive impositions that have been placed on the death penalty by the Supreme Court, which have had the effect of slowly narrowing the circumstances in which the death penalty can be imposed on a criminal offender. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (prohibiting the death penalty for offenders under the age of sixteen at the time of the crime); *Enmund v. Florida*, 458 U.S. 762, 801 (1982) (prohibiting the death penalty for felony murder charges absent a showing the defendant possessed a sufficiently culpable state of mind); *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (holding that rape charges cannot carry a sentence of the death penalty); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (prohibiting the death penalty as mandatory punishment for any crime). The list could go on and on. But even if the Supreme Court is slowly preventing the death penalty as a sentence, is that necessarily so bad? The risk of executing an innocent person weighs so heavily on the public conscience that perhaps it would be better to not execute anyone rather than risk executing even one innocent person.

192. See *Atkins*, 536 U.S. at 353. For example, persons under the age of 18 could be the next group to be excluded by the Court.

193. Roger Parloff, *The New Abolitionism*, AM. LAW., Aug. 30, 2002, at 130.

194. *Id.*

195. *Id.* In fact, "at least 12 had made their way to death row before science granted them their eleventh-hour reprieves." *Id.* In many of the cases, the state officials actually admitted error. *Id.*

196. *Id.*; see also *supra* note 120, discussing the case of Earl Washington.

justifications for their views, the fact remains that the Justices, political officials, and American people are “continually conflicted: [o]ne instinct is to guide and protect [mentally retarded persons] from the world, but our fears lead us to try to protect the world from them. We coddle them, and sometimes we kill them.”¹⁹⁷ This dilemma plagued state legislatures around the country prior to the *Atkins* decision.¹⁹⁸ Despite Justice Scalia’s concern with the majority’s reliance on the statutes, because of their infancy, in determining a “national consensus,” the fact remains that, in the thirteen years that have passed since *Penry v. Lynaugh*, eighteen state legislatures and the federal government have felt the issue was important enough to move through their legislative systems.¹⁹⁹ Moreover, three additional states had bills prohibiting such executions awaiting legislative approval at the time *Atkins* was handed down.²⁰⁰ This is particularly powerful when considered in the context of American society’s preference for *stricter* anti-crime legislation and sentencing rules.²⁰¹ Coupled with the positions of numerous religious and professional organizations and public opinion polls, there does appear to be an emerging view that the practice of executing mentally retarded offenders is morally and legally wrong.²⁰² Is this enough to justify banning capital punishment in the case of mentally retarded offenders? Yes, according to the current United States Supreme Court.²⁰³

Despite the emerging opinion in favor of banning the execution of mentally retarded offenders, the Justices did not agree about the use of the views of these organizations, international public policy, and public opinion polls in determining whether there is a “national consensus.”²⁰⁴ Justice Scalia thought that these references won a prize as “the Court’s Most Feeble Effort to fabricate ‘national consensus.’”²⁰⁵ Chief Justice Rehnquist objected to these references because, in his view, they were “antithetical to considerations of federalism, which instruct that any ‘permanent prohibition upon all units of democratic government must [be apparent] in the operative

197. Evan P. Schultz, *Mice, Men and Us: Surveys Say to Stop Killing the Mentally Retarded. What Will They Say Next?*, 169 N. J. L. J. 380 (2002).

198. See *supra* note 64 and accompanying text.

199. *Atkins v. Virginia*, 536 U.S. 304, 342-46 (2002).

200. Douglas Mossman, *Psychiatry in the Courtroom*, PUB. INT., Jan. 1, 2003, at 22. Ironically, the State Senate of Virginia had already passed a bill banning the death penalty in cases of mentally retarded offenders, but it was delayed in passing the state house because the legislature was awaiting the outcome of *Atkins*. Greenhouse, *supra* note 187, at A21. In Texas, the bill banning executing mentally retarded offenders had already been passed through both houses, but it was struck down by Texas Governor Rick Perry who urged that, in Texas, no one with mental retardation had been executed. *Executing the Mentally Retarded*, *supra* note 183, at 3. The senate sponsor of the Texas bill, Rodney Ellis, disagrees, claiming that six mentally retarded offenders have been executed since 1982 when Texas resumed capital punishment. *Id.*

201. *Atkins*, 536 U.S. at 315-16 (arguing that this trend, combined with a complete absence of legislatures repealing the prohibition, is indicative of a movement by the legislatures in favor of banning such executions).

202. *Id.* at 315 n.21.

203. *Id.* at 321.

204. See *id.* at 346-47.

205. *Id.* at 347.

acts . . . that the people have approved.”²⁰⁶ In reality, the majority only dedicated one footnote to the views of these various organizations and the results of these opinion polls.²⁰⁷ The footnoted material may have been interesting to the majority, particularly because of the divergent groups that expressed their shared opinion that the death penalty should not be imposed on mentally retarded persons, but this does not mean the majority found this information to be authoritative.²⁰⁸ The great weight of the authority was vested in the numerous states that have adopted anti-capital punishment legislation in this context.²⁰⁹ Thus, the dissents’ criticism of the use of these subjective sources by the majority appears to be unfounded.²¹⁰ The fact remains that, before the *Atkins* decision, the United States “[was] the only established democracy *in the world* that [was] known regularly to execute people with mental retardation.”²¹¹ While the Chief Justice, Justice Scalia, and others discount the importance of world opinion,²¹² former United States diplomats and the European Union have asserted that U.S. policy on capital punishment has created a “foreign policy problem.”²¹³

Even if the “national consensus” discussed by the majority is enough to constitute a societal movement against executing the mentally retarded, many have questioned whether society benefits by moving with social trends.²¹⁴ “Constitutional values, most people would agree, should have more durability than the latest push poll.”²¹⁵ However, society would not benefit from rigid application of the Constitution as it applied in 1788.²¹⁶

206. *Id.* at 322 (quoting *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989) (plurality opinion)). In other words, legislation is the chief indicator of changing attitudes toward a particular act, and therefore it is required before the Court can permanently prevent that act from occurring again. *See id.*

207. *See id.* at 316 n.21. The organizations appear to be mentioned to demonstrate the varying types of groups that oppose this practice. *See id.* For example, representatives from various religious communities “reflecting Christian, Jewish, Muslim, and Buddhist traditions . . . explain[ed] that even though their views about the death penalty differ, they all ‘share a conviction that the execution of persons with mental retardation cannot be morally justified.’” *Id.*

208. *See id.*

209. *See id.* at 313-17.

210. *See id.* at 316 n.21.

211. *Greenhouse*, *supra* note 187, at A21 (quoting the amicus brief of the European Union) (emphasis added).

212. *See id.*

213. *Id.* However, the United States Constitution derives its meaning from American ideals and beliefs, not the opinions of other countries regarding our domestic practices. *See Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (plurality opinion) (stating that “[t]he practices of other nations . . . cannot serve to establish . . . that the practice is accepted among our people”).

214. *Schultz*, *supra* note 197.

215. *Id.*

216. *Id.* In 1788, slavery was not only legal, it was constitutional; surely few would prefer applying that law today. *See id.*; U.S. CONST. art. I, § 2.

Reaching a balance between the social views of an era and rigid application of the Constitution is where the difficulty arises.²¹⁷

B. Divesting Mentally Retarded Persons of Culpability: The Anomaly

“Those mentally retarded persons who meet the law’s requirements for criminal responsibility should be tried and punished when they commit crimes.”²¹⁸ However, according to the majority, despite mentally retarded offenders’ inability to give meaningful assistance to counsel, to be effective witnesses, and to persuasively show mitigation to lessen their culpability, “[t]heir deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.”²¹⁹ The problem is that if the mentally retarded offender cannot aid his own defense and potentially faces wrongful execution, will there not also be a possibility that the mentally retarded offender will be unable to disprove his guilt even when he is innocent?²²⁰ In his dissent in *Atkins*, Justice Scalia noted that if the majority’s claim that mentally retarded offenders are less able to present their cases because of their condition, then this “might support a due process claim in all criminal prosecutions of the mentally retarded.”²²¹ “[W]hy do we have any more faith in their ability to defend themselves against felony charges that could land them in prison for life than against capital crimes that could strap them to a gurney?”²²²

The answer to this question lies in the majority’s belief that mentally retarded persons know the difference between right and wrong.²²³ Thus, mental retardation impairs culpability but does not entirely exonerate the offender from guilt for the offense and, as a result, only precludes the imposition of capital punishment, which has been historically reserved for only the most culpable of offenders.²²⁴ Nevertheless, it is hard to imagine how offenders like Daryl Renard Atkins, given his violent history, and John Paul Penry, given the forethought that went into his criminal activity, could

217. See, e.g., *United States v. Drayton*, 536 U.S. 194 (2002). In *Drayton*, the Court validated police searches and interrogation of bus passengers without the police informing the passengers of their right to decline. *Id.* This was justified as a security measure in the wake of the terrorist attacks that occurred on September 11, 2001, despite constitutional protections to the contrary. See *id.*

218. *Atkins v. Virginia*, 536 U.S. 304, 306 (2002). This is the first line of Justice Stevens’s majority opinion. *Id.*

219. *Id.* at 318.

220. See Schultz, *supra* note 197 (citing *Atkins*, 536 U.S. at 320-21); see also McGlone, *supra* note 118, at A1.

221. *Atkins*, 536 U.S. at 352 (Scalia, J., dissenting).

222. Schultz, *supra* note 197. Schultz argues that it is not only unconstitutional to sentence a mentally retarded offender to death, it is also unconstitutional that they were “put on trial in the first place.” *Id.* The American Law Institute’s Model Penal Code states that “[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of [the] law.” *Id.*; MODEL PENAL CODE § 401(1) (American Law Inst. 1962).

223. See *Atkins*, 536 U.S. at 318 (stating that “[m]entally retarded persons frequently know the difference between right and wrong and are competent to stand trial”).

224. *Id.*

be presumed to have diminished culpability as a result of their mental retardation.²²⁵ Justice Scalia argued that culpability “and deservedness of the most severe retribution, depend[] not merely (if at all) upon the mental capacity of the criminal (above the level where he is able to distinguish right from wrong) but also upon the depravity of the crime.”²²⁶ Furthermore, “[t]he fact that juries continue to sentence mentally retarded offenders to death for extreme crimes shows that society’s moral outrage sometimes demands execution of retarded offenders.”²²⁷

However, mental retardation by definition “entails serious limitations on the ability to appreciate the consequences and gravity of one’s actions and to exercise mature control over one’s conduct.”²²⁸ Professor James W. Ellis²²⁹ argues that mentally retarded offenders should still be punished for their crimes but not with the death penalty, because although “[r]etarded people may know right from wrong and be able to form the intent to commit a criminal act . . . [they] may lack the ability to understand the legal system and participate fully in their own defense[s]. For that reason, the retarded face a higher risk than others of wrongful convictions.”²³⁰ Moreover, in *Ford v. Wainwright*,²³¹ the Court recognized the reduced “retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.”²³² Accordingly, there are excellent arguments on both sides, and the final result depends largely on

225. For a synopsis of John Paul Penry’s crime, see Charen, *supra* note 172, at 114. Daryl Atkins, by age eighteen, had robbed and then murdered Eric Nesbitt by shooting him eight times, had participated in two armed robberies, hitting a victim on the head with a bottle after one of the robberies, and “[t]wo weeks before the murder, Atkins attacked a woman and shot her in the stomach.” Mossman, *supra* note 200. But also consider the case of Limmie Arthur, who truly believed he was sentenced to death because he could not read. Rodney Ellis & Joseph Fiorenza, *Criminal to Be Executing Mentally Retarded Inmates*, HOUSTON CHRON., May 3, 1999, reprinted in THE DEATH PENALTY: OPPOSING VIEWPOINTS 184 (Mary E. Williams ed., 2002). “He diligently tried to learn [to read] so he could earn his general equivalency diploma because he thought he would get a reprieve if he was successful.” *Id.* Regardless of Limmie Arthur’s crime, it is hard not to feel sympathy for his misunderstanding of the nature of the punishment in front of him.

226. *Atkins*, 536 U.S. at 350 (Scalia, J., dissenting) (asking “what scientific analysis can possibly show that a mildly retarded individual who commits an exquisite torture-killing is ‘no more culpable’ than the ‘average’ murderer in a holdup-gone-wrong or a domestic dispute?”).

227. *Id.* at 351.

228. EHRENREICH & FELLNER, *supra* note 2, at V.

229. Mr. Ellis is the former president of the AAMR and a professor of law at the University of New Mexico School of Law. Greenhouse, *supra* note 187, at A21.

230. *Id.* Another author further argues that “the bottom line is mental retardation doesn’t go to intent, but rather stands as an intellectual lack of capacity ‘Do you hold a sixth-grader to the level you hold an adult for the crime? Society doesn’t think so.’” Maria Vogel-Short, *When Should Low IQs Void Executions? Test Coming*, N.J. LAW., Oct. 14, 2002, at 1.

231. 477 U.S. 399 (1986).

232. EHRENREICH & FELLNER, *supra* note 2, at V (quoting *Ford v. Wainwright*, 477 U.S. 299, 409 (1986)). The categorical exclusion of the insane from capital punishment serves as precedent for categorically excluding the mentally retarded. *Id.*; see also *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (categorically excluding juveniles under the age of sixteen from capital punishment).

society's, and the Justices', opinions of the death penalty in general.²³³ The trend has been to narrow the circumstances in which the death penalty is appropriate, and the Court in *Atkins* followed that trend.²³⁴

C. Categorical Exclusion of the Mentally Retarded

Justice Scalia disagreed with the Court's statement "that no one who is even slightly mentally retarded can have sufficient moral responsibility to be subjected to capital punishment for any crime."²³⁵ Ironically, despite its fervent support for the *Atkins* decision, the American Psychiatric Association (APA) and others have continually opposed the categorization of mentally retarded persons and persons with other disabilities and mental disorders for legal and social purposes.²³⁶ This is largely "to reduce the stigma associated with having a mental [disability or] disorder."²³⁷ Furthermore, the APA "has vigorously endorsed the Americans [w]ith Disabilities Act (ADA), which provides broad protection against discrimination based on mental or physical disabilities."²³⁸ The APA also said, in its 1997 position statement, that

[c]ategorical distinctions based on mental disorder are tantamount to class discrimination because they assume that everyone who has received a particular diagnosis or treatment is identical. In fact, individuals with the same diagnosis . . . may manifest different kinds of symptoms; even when the symptoms are the same, they may vary widely in their severity. Nor is there a direct or simple connection between symptoms['] severity and impairments that may be relevant to a particular decision.²³⁹

Making categorical determinations about mentally retarded persons, such as denying employment, accommodations, or public services because of the ignorant belief that they are less responsible, is now illegal because of the Americans with Disabilities Act.²⁴⁰ But this is exactly what was done in the *Atkins* case.²⁴¹ The majority effectively determined that "persons diagnosed with mental retardation necessarily lack the capacity to accept full moral

233. See *Atkins v. Virginia*, 536 U.S. 304, 348 (2002) (Scalia, J., dissenting).

234. See *id.* at 314-15. It has been argued that the decision in *Atkins* is akin to the decision not to sentence children to death for murder. Jim Marcus, *The Next Task: Who is Mentally Retarded?* 47 TEX. LAW. (2002). He argues that the disparity in treatment between children and the mentally retarded is "not based on an otherwise arbitrary criterion of chronological age [or IQ score]; it is premised on the recognition that punishing someone as if they were possessed of average adult intelligence, when they are not, is excessive and cruel." *Id.*

235. *Atkins*, 536 U.S. at 339.

236. Mossman, *supra* note 200.

237. *Id.*

238. *Id.* In its 1997 position statement, the APA actually admonished against "the use of psychiatric diagnoses in making decisions regarding employment, insurance, housing, or credit." *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

responsibility for their actions.”²⁴² An approach more consistent with the Americans with Disabilities Act requires that determinations of moral culpability be made on a case-by-case basis.²⁴³

VI. IMPACT AND SIGNIFICANCE

A. Failure to Set Forth a Standard

The biggest issue confronting state courts after *Atkins* will be whether defendants are in fact mentally retarded.²⁴⁴ Some mentally retarded defendants appear to be normal, but inside their head there is a completely different picture.²⁴⁵ In Oklahoma, LaQuarius D. Hainta was convicted of murdering a local ballerina and her friend.²⁴⁶ The jury and assistant district attorney rejected his claim of mental retardation, the attorney asserting, “[h]e isn’t mentally retarded. He is faking it.”²⁴⁷ Despite Justice Scalia’s belief that the *Atkins* ruling will turn capital punishment cases into a game “with killers faking retardation,” most find this unlikely, particularly because the “faking would have to start in elementary school.”²⁴⁸ In order to circumvent “faking,” Georgia requires evidence of mental retardation in the form of school records and test scores, not IQ alone.²⁴⁹ Most importantly, “Georgia’s ban [on execution of the mentally retarded] hasn’t caused the faking of retardation.”²⁵⁰

242. *Id.*

243. *Id.* This is what was suggested in the *Penry* case. But does the fact that, in the thirteen years since *Penry* was decided, sixteen states have felt this case-by-case basis was inadequate for appropriately sentencing the mentally retarded change the landscape?

244. See *Atkins v. Virginia*, 536 U.S. 304, 339 (2002) (stating “we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences”) (quoting *Ford v. Wainwright*, 477 U.S. 339, 405 (1986)).

245. Diana Baldwin, *Jury Finds Man Guilty in Slayings*, THE DAILY OKLAHOMAN, Oct. 2, 2002, at 1A.

246. *Id.*

247. *Id.* Can you fake mental retardation? No mention was made in the article of whether a clinician had evaluated Mr. Hainta prior to trial. Importantly, Oklahoma does not yet have a statute prohibiting the execution of mentally retarded offenders, and therefore that state may not yet have adequate standards for handling this defense. See *id.*

248. Emily Heller, *Faking Retardation to Escape Death Penalty Isn’t Likely*, MIAMI DAILY BUS. REV., July 5, 2002, at 8. Stephen B. Bright, director of the Southern Center for Human Rights in Atlanta, Georgia, which was the first state to enact legislation banning the execution of mentally retarded persons, urges that “[o]f all the things you could feign, mental retardation is just not one of them.” *Id.*

249. *Id.*

250. *Id.* (quoting B. Michael Mears, head of the state’s multi-county public defender’s office). Mears says that if there is strong evidence of mental retardation, prosecutors will accept and arrange for plea bargains; when they do not accept a defendant’s mental retardation claim, the issue becomes a “question for the jury during the guilt-innocence phase of the trial.” *Id.*; see also Marcus, *supra* note 234.

Interestingly, the APA argued in its amicus brief that “making psychiatric diagnosis the basis for a life-or-death legal decision would cause no scientific or practical problems. Both ‘incorrect diagnoses’ and ‘unnecessary legal wrangling’ could be avoided because mental retardation can be identified using time-tested instruments and protocols with proven validity and reliability.”²⁵¹ However, this does not necessarily appear to be the case.²⁵² Mental health professionals contend that three criteria must be met to diagnose a person with mental retardation: “significant limitations in intellectual functioning, significant limitations in practical or adaptive functioning, and onset before adulthood.”²⁵³ Although mental health professionals urge that the examinations used to measure intelligence and adaptive functioning result in objective determinations, such that professionals “undertaking separate assessments should reach the same conclusion,”²⁵⁴ even under the best testing conditions IQ test results usually err by about five points.²⁵⁵ Moreover, clinicians may have difficulty objectively interpreting the offender’s responses when they know that life and limb rests on their shoulders.²⁵⁶

Although the Court in *Atkins* suggested that “by definition” mentally retarded persons are distinct from non-retarded persons, the truth is that “mental retardation is an artificial category imposed on a spectrum of human capability.”²⁵⁷ The diagnostic scale that separates the retarded and the non-retarded is continually changing; the AAMR has “updated” its definition of mental retardation ten times over the past century.²⁵⁸ In actuality, “[i]f persons with mental retardation were members of a homogenous, discrete biological or psychological category of persons, readily distinguishable from persons without mental retardation, professional organizations might have an easier time settling on clinical criteria for diagnosing the condition.”²⁵⁹

The problem is that retarded offenders’ impairments vary greatly, largely due to the variations in biology and environment that can cause the substantial mental impairment that renders a person “mentally retarded.”²⁶⁰ While some mentally retarded persons (only 15%) are easily identifiable

251. Mossman, *supra* note 200 (quoting the APA amicus brief). Mental health professionals have praised the Court’s decision in *Atkins* for the most part. *Id.*

252. *See id.*

253. *Id.*

254. *Id.* However, consider the case of Earnest Paul McCarver, who received an IQ score of 74 the first time he was tested and a score of 67 the second time he was tested, which averaged out to a 70.5. Swofford, *supra* note 66, at B1. Other professionals find this assertion “remarkable.” Mossman, *supra* note 200.

255. Mossman, *supra* note 200. An individual who scores 68 on the first IQ test “has a 95% chance of scoring between 63 and 73 on subsequent administrations [of the exam].” *Id.*

256. *Id.*

257. *Id.* *See generally* EHRENREICH & FELLNER, *supra* note 2, at II (explaining the three criteria for determining mental retardation).

258. Mossman, *supra* note 200.

259. *Id.*

260. *Id.* Medical conditions that can cause intellectual impairment range from chromosomal defects to infections that alter the developing brain either before or after birth. *Id.* Sometimes there is no specific medical reason for a person’s mental retardation. *Id.*

because of their limited communication skills or their extremely poor academic performance through grade school, the remaining persons are often able to develop the skills necessary to support themselves, only needing guidance when they have to make complicated decisions.²⁶¹ This compounds the problem of determining who is mentally retarded for purposes of excluding from the death penalty because some persons will have limited cognitive capabilities yet be able to carry on daily living functions like a non-retarded person.²⁶² Consequently, the use of numerical scores from IQ tests actually “belie[s] the inherent subjectivity and complexity of the problem.”²⁶³

Furthermore, if IQ scores are used, what clinical level of impaired functioning, in terms of IQ score, will the states utilize as their cutoff for mental retardation?²⁶⁴ Will the states without such legislation use an “I.Q. of 70 [as a] bright line test” or will they create a more flexible standard to account for those offenders who have IQs slightly above 70 but who still do not have the moral blameworthiness of the average offender?²⁶⁵ What will the result be when the offender has scored inconsistently, averaging a score of 70.5?²⁶⁶ This is particularly troublesome given that someone who “scores 69 on an IQ test is *practically indistinguishable* from someone who scores 71, and that two persons with IQ scores of 67 and 73 have much more in common with each other than with a person who scores 88.”²⁶⁷ It truly is “this gray area of how to assess mental retardation that . . . could be the biggest issue” facing legislatures today.²⁶⁸ As the attorney representing Earnest McCarver put it, “[u]sing an inflexible number [like 70] . . . might be OK to decide whether to promote someone to the 10th grade . . . [b]ut it’s not something [on which] to base a decision . . . whether or not to execute someone.”²⁶⁹ Of the eighteen states with legislation banning the execution

261. *Id.*

262. *Cf. id.*

263. *Id.*

264. Vogel-Short, *supra* note 230, at 1.

265. *Id.*

266. Swofford, *supra* note 66, at B1. Interestingly, this story involves the case of Earnest McCarver, the capital defendant whose case the Supreme Court was going to consider until North Carolina enacted legislation prohibiting the execution of mentally retarded offenders. See REIN, *supra* note 65, at 42. His execution became a moot point until it was revealed that his IQ scores were a 74 before trial and a 67 after conviction, resulting in an average of 70.5. Swofford, *supra* note 66, at B1. Because North Carolina adopted an IQ score of 70 as a bright line test for mental retardation, the statute does not protect McCarver. *Id.* Unfortunately, he is only one-half of a point away from being spared from death. *Id.* His attorneys are currently attacking the constitutionality of the statute for its lack of flexibility and seeking to enjoin McCarver’s death sentence. *Id.*

267. Mossman, *supra* note 200 (emphasis added).

268. Vogel-Short, *supra* note 230, at 1.

269. Swofford, *supra* note 66, at B1 (quoting lawyer Stanley Hammer). Hammer emphasizes that new professional literature and the AAMR say that IQs of 71 to 75 can also indicate mental retardation. *Id.*

of the mentally retarded, Arizona, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Missouri, New York, and the federal government have adopted flexible standards for determining mental retardation, thereby not specifically including an IQ score.²⁷⁰

Finally, Professor Ellis fears the unsuccessful implementation of *Atkins* because of inadequate clinical evaluation of each offender's intellectual functioning.²⁷¹ He asserts that implementation will require "compliance with Supreme Court [precedent] concerning the role of defense counsel and access to the assistance of clinical experts."²⁷² In *Ake v. Oklahoma*,²⁷³ the Court held that an "indigent capital defendant whose mental condition [is] at issue [is] entitled to the assistance of 'a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.'"²⁷⁴ Professor Ellis argues that, while implementing the *Atkins* decision also requires professional clinical assistance, this assistance does not necessarily have to come in the form of a psychiatrist.²⁷⁵ According to Professor Ellis, to adequately implement *Atkins*, defense counsel will need to hire a clinician with expertise in mental retardation who is able to administer and evaluate IQ tests and able to assess the offender's adaptive behavior and intellectual impairment.²⁷⁶

B. The Problem of Retroactivity

The majority opinion in *Atkins* left much for the states to determine in implementing *Atkins's* new constitutional prohibition.²⁷⁷ In addition to problems with determining the constitutional standard for mental retardation, what consideration, if any, should be given to the mentally retarded

270. See DEATH PENALTY INFORMATION CENTER, STATE STATUTES PROHIBITING THE DEATH PENALTY FOR PEOPLE WITH MENTAL RETARDATION, at <http://www.deathpenaltyinfo.org/article.php?scid=28&did=138> (2004); see also Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(l) (2003); ARIZ. REV. STAT. § 13-4021 (2001); COLO. REV. STAT. § 16-9-401 (repealed 2002); CONN. GEN. STAT. § 53a-46a (2003); FLA. STAT. ANN. § 921.137 (West 2002); GA. CODE ANN. § 17-7-131(j) (1997); IND. CODE §§ 35-36-9-2 to 35-36-9-6 (2003); KAN. STAT. ANN. § 21-4623 (2002); MO. REV. STAT. § 565.030 (2003); N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2003). Two others, Arkansas and South Dakota, have adopted rebuttable presumptions of mental retardation at a certain IQ level. See ARK. CODE ANN. § 5-4-618 (2003) (adopting a rebuttable presumption of mental retardation when the offender has an IQ of 65 or less); S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie 2003) (stating that "an IQ exceeding 70 is presumptive evidence that defendant does not have significant subaverage general intellectual functioning").

271. See JAMES W. ELLIS, MENTAL RETARDATION AND THE DEATH PENALTY: A GUIDE TO STATE LEGISLATIVE ISSUES 10, at <http://www.deathpenaltyinfo.org/MREllisLeg.pdf> (last visited Feb. 6, 2004).

272. See *id.*

273. 470 U.S. 68 (1985) (discussing providing clinical assistance for offenders asserting the insanity defense).

274. ELLIS, *supra* note 271, at 10-11 (quoting *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985)).

275. *Id.* at 11.

276. *Id.*

277. See *Atkins v. Virginia*, 536 U.S. 304, 348 (2003).

offenders currently on death row?²⁷⁸ What about persons already on death row who never raised the issue of their mental retardation?²⁷⁹ Although the Court did not address retroactivity in *Atkins*, the Court in *Penry* indicated that if mental retardation had been held to violate the Eighth Amendment, the new rule of law would have applied retroactively.²⁸⁰ Prior to the *Atkins* decision, the Tennessee Supreme Court had tackled the retroactivity of its statutory prohibition against executing mentally retarded persons in *Van Tran v. Tennessee*.²⁸¹ The Tennessee Supreme Court became the second state supreme court to hold that executing mentally retarded persons is unconstitutional despite the absence of “clear statutory language providing for retroactivity” of the state law.²⁸² Thus, there is support for the retroactive application of the *Atkins* decision.²⁸³ However, between setting a standard for determining who qualifies as mentally retarded and potentially applying

278. This issue was not considered in Justice Stevens’s majority opinion. Lyn Entzerth, *Constitutional Prohibition on the Execution of the Mentally Retarded Criminal Defendant*, 38 TULSA L. REV. 299, 326 (2002). Only seven of the eighteen states constituting the “national consensus” actually have legislation prohibiting all executions of mentally retarded persons; the other eleven provide that their statutes only apply prospectively. See *Atkins*, 536 U.S. at 342 (Scalia, J., dissenting) (arguing that if society felt that executing the mentally retarded was so “morally repugnant,” then society would not allow the execution regardless of the conviction in light of the current prohibition). But see Cynthia Han, “Evolving Standards of Decency”: Legislative and Judicial Developments Leading to *Atkins v. Virginia*, 9 GEO. J. ON POVERTY L. & POL’Y 469, 471 (2002) (noting that, in Florida, “the absence of a retroactivity provision was simply a concession made in order to gain the support of state prosecutors”).

279. Professor Carol S. Steiker opines that *Atkins* may “reinvigorate claims of ineffective assistance of counsel” against defense attorneys that failed to “investigate or present evidence relating to the defendant’s childhood, educational difficulties, or mental infirmity.” Carol S. Steiker, *Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475, 1480 (2002) (citing *Brownlee v. Haley*, No. 00-15858, 2002 U.S. App. LEXIS 19069 (11th Cir. Sept. 16, 2002) for the proposition that appellate courts will vacate death sentences when defense counsel fails to investigate claims of mental retardation).

280. Entzerth, *supra* note 278, at 326. In *Penry*, the Court stated that the decision of *Teague v. Lane*, 489 U.S. 288 (1989), means

that a new rule will not be applied retroactively to defendants on collateral review unless it falls within one of two exceptions [T]he first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense. Thus, if we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons such as *Penry* regardless of the procedures followed, such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review.

Penry v. Lynaugh, 492 U.S. 302, 329-30 (1989) (plurality opinion) (citations omitted).

281. 66 S.W.3d 790, 800 (Tenn. 2001).

282. Han, *supra* note 278, at 473 (citing *State v. Van Tran*, 66 S.W.3d 790, 798 (Tenn. 2001)).

283. State courts appear to support the retroactive application of *Atkins*. See, e.g., *Pickens v. Oklahoma*, 74 P.3d 601, 603 (Okla. Ct. Crim. App. 2003) (holding that the clear intention of the Court was to apply *Atkins* to all death row inmates, including offenders currently on death row); *Clemons v. Alabama*, No. CR-01-1355, 2003 WL 22047260, at *3 (Ala. Ct. Crim. App. Aug. 29, 2003) (concluding that the *Atkins* decision “falls within *Teague*’s first exception to the general rule of nonretroactivity and applies retroactively to cases that are on collateral review”).

the *Atkins* decision to all death penalty inmates who claim to be mentally retarded, a floodgate of litigation may have been opened.²⁸⁴

According to Professor Ellis, the best method of implementing the *Atkins* decision is for states to adopt the approach of North Carolina.²⁸⁵ The North Carolina statute applies to “both prospective cases and those that might be challenged by individuals already under a death sentence, and provide[s] separate procedures for the retrospective cases.”²⁸⁶ He advises state legislatures to utilize the following statutory language: “[n]o person with mental retardation is eligible for the death penalty.”²⁸⁷ Ellis also warns that while the states are free to adopt their own variations in defining mental retardation, “they cannot adopt a definition that encompasses a smaller group of defendants.”²⁸⁸

C. Significance

Death penalty abolitionists view *Atkins* as a step in the right direction towards ending capital punishment altogether.²⁸⁹ These groups argue that “[i]n 2002, the death penalty continued to come under increasing scrutiny,”²⁹⁰ particularly in light of the Court’s decisions in *Atkins* and *Ring v. Arizona*.²⁹¹ It is urged that these two decisions effectively invalidated the administration of the death penalty in two-thirds of the states that still permit the death penalty.²⁹² Thus, death penalty abolitionist groups are ecstatic with the Court’s rulings and hope to see further decisions limiting death penalty sentences.²⁹³

However, while the *Atkins* and *Ring* decisions may have cut the number of persons who will actually be put to death, the decisions probably will not end the death penalty.²⁹⁴ Professor Steiker argues that *Atkins* and *Ring* “are the predictable products of a long-term meliorist approach to capital punishment, which itself is the product of a consistent struggle between two

284. See Entzeroth, *supra* note 278, at 326-28. Likewise, Professor Steiker asserts that [w]hile the effect of *Atkins* . . . will be measured in part by the number of inmates who escape the death penalty or get a second chance at a sentencing hearing, perhaps a larger part of the impact of the . . . case[] will be in the uncertainty and massive litigation [it] will spawn, which will temporarily halt the administration of capital punishment in some places, and certainly slow it down everywhere.

Steiker, *supra* note 279, at 1479.

285. ELLIS, *supra* note 271, at 4.

286. *Id.*; see N.C. GEN. STAT. § 15A-2005 (2002).

287. See ELLIS, *supra* note 271, at 4.

288. See *id.* at 5 (emphasis omitted).

289. See, e.g., DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2002: YEAR END REPORT, at www.deathpenaltyinfo.org/yrendrpt02.pdf (2002).

290. *Id.*

291. 536 U.S. 584 (2002) (holding that it is unconstitutional for judges to determine sentences rather than juries).

292. Steiker, *supra* note 279, at 1475.

293. See MISSY LONGSHORE, SUPREME COURT RULING ON RETARDATION TIP OF ICEBERG ON DEATH PENALTY WOES, at <http://www.deathpenalty.org/facts/other/MR%20stmt.html> (June 20, 2002).

294. Steiker, *supra* note 279, at 1488.

political poles on the Court.”²⁹⁵ She reasons that the decisions actually “contribute to the stabilization of capital punishment” because “[t]he more the Supreme Court slows down, muddies up, and nibbles around the edges of the administration of capital punishment, the harder it becomes to sharpen the focus of the debate in a way that is necessary for abolition to occur.”²⁹⁶ Thus, the Court, in imposing limitations on the administration of death sentences, may have reduced abolitionists’ concerns and struck a balance between the deterrence and retribution rationales for the punishment.²⁹⁷

The decision will also impact future attempts to narrow the death penalty.²⁹⁸ “*Atkins* will likely inspire . . . efforts to create categorical death penalty exemptions for defendants with other serious mental limitations” and sometimes defendants with not-so-serious limitations.²⁹⁹ Thus, the floodgate opened in *Atkins* may eventually apply to not only mental retardation cases, but also to Eighth Amendment cases generally.³⁰⁰ By analogy, there may be a movement to extend the *Atkins* decision and its reasoning to juveniles and the mentally ill.³⁰¹ There is even a possibility that one day someone will try to exclude from capital punishment persons diagnosed with Attention-Deficit/Hyperactivity Disorder (ADHD).³⁰² Despite the controversy surrounding that disorder, mental health professionals regard ADHD as a “real disorder that can severely disrupt functioning in children, and that often persists into adulthood.”³⁰³ ADHD, according to the APA’s Diagnostic and Statistical Manual, “interferes ‘with developmentally appropriate social, academic, or occupational functioning’ and may lead to

295. *Id.* at 1489.

296. *Id.* Professor Steiker argues that despite the high reversal rates of death penalty sentences, the capital justice system is stabilizing because the longer capital defendants spend on death row, the more time there is to conduct a thorough review of the evidence and use DNA to exonerate the innocent. *Id.* A primary concern for most abolitionists of the death penalty is that an innocent person will be executed. *See id.*

297. *See id.*

298. *See generally* Mossman, *supra* note 200.

299. *Id.* The decision is most likely to spawn arguments against executing juveniles, the mentally ill, and mentally retarded offenders with an adult onset of symptoms, which are often referred to as “cognitive disorders” *Id.* Examples of cognitive disorders include Alzheimer’s disease, mental deterioration following drug abuse, and head injuries. *Id.* One court has already used *Atkins* to hold that capital punishment of juveniles is unconstitutional. *See State ex. rel. Simmons v. Roper*, 112 S.W.3d 397, 399 (Mo. 2003) (prohibiting the execution of juveniles as unconstitutional because of a “national consensus” against the practice).

300. Steiker, *supra* note 279, at 1480. Professor Steiker reasons that the “‘evolving standards of decency’” standard is “‘tantalizingly vague,’” leaving a lot of room for attempts to extend the reasoning beyond the actual *Atkins* holding. *Id.* (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002)).

301. *Id.* Four justices have already indicated that *Atkins* should be extended to exempt juveniles from capital punishment. *Id.*; *In re Stanford*, 536 U.S. 968 (2002) (Stevens, J., joined by Souter, Ginsberg, and Breyer, JJ., dissenting from the denial of certiorari and “calling for [an] end to [the] ‘shameful practice’ of executing juveniles”).

302. *See* Mossman, *supra* note 200.

303. *Id.*

‘engagement in potentially dangerous activities without consideration of possible consequences.’”³⁰⁴

Finally, and perhaps most importantly, the *Atkins* decision will impact the victims’ families.³⁰⁵ The families want the criminal defendants to get their “just desserts” to vindicate the lives of their loved ones.³⁰⁶ The fact that the offender was mentally retarded does not change the fact that someone lost a family member, friend, or lover in a heinous crime.³⁰⁷ Regardless of whether the offender is mentally retarded, mentally ill, or just a terrible person, it is understandable that these “victims” want closure and seek revenge. These feelings are not unexpected or incorrect, and only someone who has lost a loved one can really understand this grief.³⁰⁸ Nevertheless, the law has a duty to protect persons who cannot protect themselves. The *Atkins* result is an unsettled desire for revenge by the victim’s friends and family and the American people, and a mentally retarded person who may have done something morally repugnant but who will not pay the ultimate price for his horrific crime.

VII. CONCLUSION

As the great Justice Marshall once said, “the question with which we must deal is not whether a substantial portion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.”³⁰⁹ The Supreme Court in *Atkins* felt that, if the American populace understood the nature of mental retardation, they would also agree that capital punishment is barbarously cruel in light of the circumstances surrounding the offender.³¹⁰ Perhaps their decision was based on the Justices’ own moral beliefs regarding the righteousness of executing someone with mental retardation,³¹¹ or perhaps their decision was entirely based on the supposed “national consensus” evidenced by the state legislatures.³¹² Regardless, the decision of the United States Supreme Court has effectively equalized the United States with other civilized countries in this respect.³¹³ It insures that even if a mentally retarded person is coerced into a confession, cannot properly assist counsel in his or her defense, or is

304. *Id.* (quoting the APA Diagnostic and Statistical Manual). At what point these arguments will become far-fetched is hard to say. However, so long as offenders legitimately argue that they have lessened culpability, the Court may continue to consider issues such as whether a person with ADHD is sufficiently less culpable to be exempt from the death penalty. *See id.*

305. *See* John Gibeaut, *Death Delayed*, A.B.A. J., Nov. 2002 (discussing John Paul Penry’s long-awaited death sentence and the family that prays that he will die despite the *Atkins* decision).

306. *See Atkins v. Virginia*, 536 U.S. 304, 319 (2003).

307. *See, e.g.*, Gibeaut, *supra* note 305.

308. *See id.*

309. *Furman v. Georgia*, 408 U.S. 238, 362 (1972) (Marshall, J., concurring).

310. *See Atkins*, 536 U.S. at 315-17.

311. *Id.* at 348-49 (Scalia, J., dissenting).

312. *See id.* at 313-17.

313. *See Greenhouse, supra* note 187, at A21.

an ineffective witness, he or she will not die for the inability to fully understand the scrutiny he or she is under.³¹⁴

Lisa Odom³¹⁵

314. *See id.* at 313-17.

315. J.D. Candidate, Pepperdine University School of Law, May 2004. I would like to thank my husband, Doug, for his endless love and support through the last three years of law school, my mother, Claudia, for always being a shoulder to cry on and ensuring me that I could achieve great things, my dad, Mike, for always pushing me to work harder, and my sister, Tina, for teaching me to laugh at myself.

