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Atkins v. Virginia: National Consensus or Six-Person Opinion?

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ATKINS V. VIRGINIA: NATIONAL CONSENSUS OR SIX-PERSON OPINION?

JOANNA HALL*

“The genius of the Constitution rests not in any static meaning it may have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and present needs.” – Justice William Brennan Jr.

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INTRODUCTION

In a dramatic shift for an institution that has repeatedly endorsed capital punishment, the United States Supreme Court ruled 6-3 in a landmark decision that executing persons with mental retardation violates the Eighth Amendment's prohibition of "cruel and unusual punishment."¹ Rather than taking the Court's preferred method of deciding death penalty cases on an incremental case-by-case basis, the Court categorically held all executions of mentally retarded persons unconstitutional.²

Although the Constitution does not define or provide guidance on the meaning of "cruel and unusual,"³ it appears that the drafters intended the provision to prohibit, at a minimum, the forms of punishment banned at the time the Constitution was drafted.⁴ During the twentieth century, the Supreme Court construed the Eighth Amendment to go beyond merely prohibiting those forms of punishment that were outlawed in colonial times.⁵ The Court decided that "evolving standards of decency that mark the progress of a maturing society"⁶ should dictate what is considered "cruel and unusual."⁷ The phrase "evolving standards of decency" introduced an

1. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); see also U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); see also *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (determining that excessive punishment "must not involve the unnecessary and wanton infliction of pain" and "must not be grossly out of proportion to the severity of the crime").

2. See *Atkins*, 536 U.S. at 321 (holding that executions of mentally retarded persons violate the Eighth Amendment); see also Kenneth W. Starr, *The Anthrax Term*, WALL ST. J., July 5, 2002, at A12 (noting that the Court held all executions of the mentally retarded as forbidden, regardless of the surrounding circumstances).

3. See Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911, 922 (2001) (noting that the Eighth Amendment prohibits "cruel and unusual" punishment but offers no definition or explanation of the phrase).

4. See *Ford v. Wainwright*, 477 U.S. 399, 405 (1986) ("There is now little room for doubt that the Eighth [Amendment] . . . embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.").

5. See *id.* at 406 (highlighting that the Eighth Amendment is not solely limited to practices condemned by common law in 1789).

6. *Penry v. Lynaugh*, 492 U.S. 302, 330-31 (1989) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)); see also *Weems v. United States*, 217 U.S. 349, 378 (1910) (declaring that the Eighth Amendment jurisprudence reflects contemporary values).

7. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (finding that the Eighth Amendment is to be interpreted in a flexible and dynamic manner that reflects society's evolving standards of decency); see also Larry Eichel, *'Constitutional' Now May Be 'Unconstitutional' in Future*, THE PHILA. INQUIRER, June 26, 2002, at A15 (reporting that what is usual and constitutional in one era can become unusual and

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expansion of Eighth Amendment analysis that allowed contemporary law and moral standards to determine what constitutes cruel and unusual punishment.⁸ Courts, reviewing cases under such evolving standards, should arrive at a national consensus that is based on objective factors, the clearest and most reliable of which is state legislation.⁹

Recently, the Supreme Court granted certiorari to Ernest McCarver in order to decide whether national standards have evolved such that executing a person with mental retardation would violate the Eighth Amendment.¹⁰ The Court later dismissed the case as moot because North Carolina passed legislation that prohibited the execution of mentally retarded offenders.¹¹ Soon after the dismissal, the Court granted certiorari to Daryl Atkins on the same issue, suggesting that the Court was ready to reevaluate its position on the constitutionality of such executions.¹²

This Note will discuss the constitutionality of executing persons with mental retardation as highlighted in the Supreme Court decision, *Atkins v. Virginia*.¹³ Part I will discuss the case's facts and procedural history, as well as the case history that played a role in the *Atkins* decision.¹⁴ Part II will provide a critical legal analysis of the Supreme Court's majority holding, its reasoning, and the dissenting opinions.¹⁵ This section will discuss the establishment of a national

thus unconstitutional in another).

8. See Oliver Kaufman, *Atkins v. Virginia: Is Executing the Mentally Retarded Constitutional?*, 85 MARQ. L. REV. 579, 582 (2001) (noting that the examination of evolving standards of decency expanded the cruel and unusual punishment clause to apply practices that society formerly accepted, but currently finds repugnant); see also *Thompson v. Oklahoma*, 487 U.S. 815, 821 (1988) (stating that future generations of judges will define the contours of cruel and unusual punishment).

9. See *Thompson*, 487 U.S. at 823 n.7 (acknowledging that "our capital punishment jurisprudence has consistently recognized that contemporary standards, as reflected by the actions of legislatures . . . provide an important measure of whether the death penalty is 'cruel and unusual'").

10. See *McCarver v. North Carolina*, 532 U.S. 941 (2001).

11. See *McCarver v. North Carolina*, 533 U.S. 975 (2001) (noting that the legislation's retroactive effect eliminated McCarver's standing to bring his case before the U.S. Supreme Court); see also N.C. GEN. STAT. § 15A-2005 (2002) (providing that "notwithstanding any provision of law to the contrary, no defendant who is mentally retarded shall be sentenced to death").

12. See *Atkins v. Virginia*, 533 U.S. 976 (2001) (granting certiorari); see also Aimee D. Borromeo, *Mental Retardation and the Death Penalty*, 3 LOY. J. PUB. INT. L. 175, 197 (2002) (conjecturing that "it is unlikely [that the Supreme Court] would grant certiorari if their objective was simply to restate the holding of *Penry*"). *Penry v. Lynaugh* held that executions of persons with mental retardation do not violate the Eighth Amendment. *Id.*

13. 536 U.S. 304 (2002).

14. See *infra* Part I, notes 20-50 and accompanying text.

15. See *infra* Part II, notes 51-86 and accompanying text.

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consensus prohibiting executions of persons with mental retardation and offer additional justification for finding such executions a violation of the Eighth Amendment.¹⁶ Part II will also analyze the predictability of the Supreme Court Justices' decisions.¹⁷ Part III will address the implications of this decision on states' administration of the death penalty and provide a recommendation of the type of legislation states should enact in order to comply with the Court's holding.¹⁸ Finally, the Note will conclude that, despite a few inconsistencies between the decision and past precedent, the Court correctly determined that executions of persons with mental retardation are "cruel and unusual punishments," and thus violate the Eighth Amendment.¹⁹

I. BACKGROUND

A. Facts and Procedural History

On the afternoon of August 16, 1996, Daryl Renard Atkins and his friend, William A. Jones, abducted Eric Nesbitt, a twenty-one-year-old Langley Air Force Base Airman.²⁰ The two men robbed Nesbitt of his money and transported him to an isolated location where he was killed as a result of eight gunshot wounds.²¹

Atkins corroborated most of the stipulated facts, but contradicted the assertion that he murdered Nesbitt.²² Despite his plea of not guilty, the jury convicted Atkins of abduction, armed robbery, and capital murder and sentenced him to death.²³ On appeal, Atkins did

16. See *infra* Part II, notes 87-116 and accompanying text.

17. See *infra* Part II, notes 117-32 and accompanying text.

18. See *infra* Part III, notes 133-65 and accompanying text.

19. See *infra* Conclusion, notes 166-70 and accompanying text.

20. See *Atkins v. Commonwealth*, 510 S.E.2d 445, 449 (Va. 1999), *aff'd*, 534 S.E.2d 312 (Va. 2000), *rev'd*, 536 U.S. 304 (2002).

21. See *Atkins*, 510 S.E.2d at 446 (recounting that Atkins and Jones abducted Nesbitt at gunpoint in the parking lot of a convenience store). They proceeded to steal his money, drive to an ATM to withdraw more money, and kill him in the parking lot of a nearby school. *Id.*

22. See *Atkins v. Virginia*, 536 U.S. 304, 307 (2002) (emphasizing that Atkins testified that Jones killed Nesbitt); see also *id.* at 308 n.1 (noting that initially both Jones and Atkins were indicted for capital murder). The prosecution, however, allowed Jones to plea bargain, protecting him from the death penalty in exchange for his testimony against Atkins. *Id.*

23. See *id.* at 307, 308 n.2 (pointing out that Atkins' incoherent testimony, that was substantially inconsistent with the statement he gave to the police upon his arrest, proved highly damaging to his credibility). Jones, on the other hand, offered coherent and credible testimony and had declined to make an initial statement to the authorities. *Id.* at 308 n.2.

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not argue that his punishment was excessive or disproportionate; rather, he claimed he should not be sentenced to death on the grounds that he is mentally retarded.²⁴ The Virginia Supreme Court affirmed his conviction, but remanded the case to the trial court for a new penalty proceeding because the jury received an improper verdict form.²⁵ The verdict form did not inform jurors of the option of sentencing Atkins to life imprisonment upon a finding that the prosecution did not prove “aggravating factors”²⁶ beyond a reasonable doubt.²⁷ On remand, a new jury convicted Atkins and sentenced him to death.²⁸ On appeal, the Virginia Supreme Court affirmed the lower court’s decision.²⁹ The U.S. Supreme Court granted certiorari because of the gravity of the concerns of the dissenters in the Virginia Supreme Court, and the apparent nationwide legislative shift in treatment of this issue.³⁰ The U.S. Supreme Court ultimately reversed the decision and held executions of persons with mental retardation to be a violation of the Eighth Amendment’s prohibition of “cruel and unusual punishment.”³¹

24. See *Atkins v. Commonwealth*, 534 S.E.2d at 318, *rev’d*, 536 U.S. 304 (2002) (stating that Atkins did not argue that his death sentence was disproportionate to the penalties imposed for crimes similar to the one he committed). Atkins asserted that his mental retardation precluded a death sentence because the death penalty had not been imposed on any defendant in Virginia with an IQ score comparable to his. *Id.*

25. See *Atkins*, 510 S.E.2d at 456-57; see also *Whaley v. Commonwealth*, 200 S.E.2d 556, 558 (Va. 1973) (holding that “when the principle of law is materially vital to [a] defendant in a criminal case, it is reversible error for the trial court to refuse a defective instruction instead of correcting it and giving it in the proper form”).

26. See VA. CODE ANN. § 19.2-264.4(C) (Michie 2001) (stating that the two aggravating factors in Virginia capital cases are future dangerousness and vileness of the offense); see also *Atkins*, 536 U.S. at 307-08 (noting that to prove the two aggravating factors, the state introduced evidence of Atkins’ prior felony convictions, testimony of previous victims, and pictures of the deceased).

27. See *Atkins*, 510 S.E.2d at 456-57 (reporting that the improper verdict form was incomplete and did not comport with the correct statement of law that the trial court gave to the jury in its first instruction).

28. See *Atkins*, 534 S.E.2d at 314 (reporting that the jury decided death was a proper sentence because there was a probability that Atkins would commit future acts of violence, constituting a continuing threat to society, and that his conduct in committing the murder was “outrageously or wantonly vile, horrible, or inhuman”).

29. See *id.* at 321 (holding that Atkins’ sentence was neither excessive nor disproportionate). In addition, the Virginia Supreme Court held that they were not willing to change Atkins’ sentence based on his IQ score because two experts testified at trial that Atkins could appreciate the criminality of his conduct. *Id.*

30. See *Atkins*, 536 U.S. at 310; see also *Atkins*, 534 S.E.2d at 324 (Hassell and Koontz, J.J., dissenting) (declaring that the imposition of a death sentence upon a defendant with the mental age of a child between the ages of nine and twelve is excessive). “It is indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts.” *Id.* at 325.

31. See *Atkins*, 536 U.S. at 321 (“[In] construing and applying the Eighth Amendment [according to] our ‘evolving standards of decency,’ we therefore conclude that such punishment is excessive and that the Constitution ‘places a

B. Mental Retardation

At both trials, Atkins' defense counsel introduced evidence of Atkins' mental capabilities as a mitigating factor.³² Dr. Evan Nelson, a forensic psychologist who had evaluated Atkins before trial, concluded that he was "mildly mentally retarded."³³ He based his conclusion on interviews with people who knew Atkins, a review of school and court records, and the administration of a standard intelligence test that indicated Atkins had an IQ of fifty-nine.³⁴ Atkins' IQ places him in a class of individuals that constitutes less than 3% of the population.³⁵

The American Association of Mental Retardation ("AAMR") describes mental retardation as a substantial limitation in present functioning.³⁶ It is a condition that places limits on a person's conceptual, practical, and social intelligence.³⁷ It is characterized by significantly sub-average intellectual functioning, existing concurrently with limitations in two or more of the following skill areas: "communication, self-care, home living, social skills, community

substantive restriction on the State's power to take the life' of a mentally retarded offender.").

32. See *Atkins*, 510 S.E.2d at 451-52 (noting that Dr. Evan Nelson testified as to Atkins' low IQ and urged a sentence of life imprisonment, rather than a death sentence, based on Atkins' diminished mental capabilities); see also *Atkins*, 534 S.E.2d at 319 (observing that Dr. Nelson testified that Atkins' death sentence should be reversed based on Atkins' mental retardation). In Virginia, the mental retardation of a defendant is a factor to be considered in mitigation of capital murder. *Id.* at 319-20.

33. See *Atkins*, 536 U.S. at 308 (reporting that Dr. Nelson testified that Atkins' low IQ and inability to function normally classified him as mildly mentally retarded); see also *Atkins*, 534 S.E.2d at 323 (stating that mild mental retardation encompasses those with an IQ range of fifty-five and seventy).

34. See *Atkins*, 534 S.E.2d at 321-22 (noting that Atkins was put in classes for slow learners with intensive instruction for remedial deficits, never graduated from high school, and never held a job or lived on his own). Atkins' low IQ revealed a mental age of a child between the ages of nine and twelve. *Id.*

35. See *Atkins*, 536 U.S. at 309 n.5 (citing 2 BENJAMIN J. SADOCK & VIRGINIA A. SADOCK, KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2952 (7th ed. 2000) (stating that it is estimated that 1-3% of the U.S. population has an IQ between seventy and seventy-five or lower, and thus can be deemed mentally retarded)).

36. See AMERICAN ASSOCIATION OF MENTAL RETARDATION, CLASSIFICATION IN MENTAL RETARDATION 11 (H. Grossman ed., 1983) [hereinafter AAMR I] (defining mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period").

37. See AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS xi (9th ed. 1992) [hereinafter AAMR II] (describing how many individuals with mental retardation have poor impulse control, limited communication skills, lack of knowledge of basic information, and a proneness to be influenced by others).

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use, self-direction, health and safety, functional academics, leisure and work.”³⁸ Mental retardation manifests before age eighteen and is classified into the following degrees of severity: mild, moderate, severe, and profound.³⁹ Like Atkins, the majority of mentally retarded individuals fall within the mild classification.⁴⁰

C. Case History: *Penry v. Lynaugh*

The Virginia Supreme Court rejected Atkins’ assertion that executions of persons with mental retardation are unconstitutional.⁴¹ The court defended its holding by relying on *Penry v. Lynaugh*.⁴² In *Penry*, the Supreme Court held that the Eighth Amendment does not preclude the execution of a mentally retarded person convicted of a capital offense.⁴³

Penry argued that his mental status should preclude his execution, because a death sentence would be disproportionate to his degree of culpability.⁴⁴ He relied on the reasoning in *Thompson v. Oklahoma*,⁴⁵ which held that a juvenile is less culpable than an adult

38. See *Atkins*, 536 U.S. at 309 n. 3 (citing AAMR II, *supra* note 37, at 5).

39. See *Atkins*, 534 S.E.2d at 323 (citing SADOCK & SADOCK, *supra* note 35, at 2598). “Mild” mental retardation describes individuals with an IQ ranging from fifty to sixty-nine and a mental age between nine and twelve. *Id.* “Moderate” mental retardation describes individuals with an IQ of thirty-five to forty-nine and a mental age between six and nine. *Id.* “Severe” mental retardation describes individuals with an IQ of twenty to thirty-four and a mental age between three and six. *Id.* “Profound” mental retardation describes individuals with an IQ lower than twenty and a mental age lower than three. *Id.*

40. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 1994) (reporting eighty-five percent of the population of mentally retarded individuals have “mild” mental retardation). Ten percent of the population has “moderate” mental retardation. *Id.* Three to four percent of the population has “severe” mental retardation. *Id.* One to two percent of the population has “profound” mental retardation. *Id.*

41. See *Atkins*, 534 S.E.2d at 321 (affirming the lower court’s decision that the Eighth Amendment does not prohibit execution of defendants with mental retardation).

42. See 492 U.S. 302 (1989); see also Kaufman, *supra* note 8, at 581 (reporting that *Penry* was the only Supreme Court case to examine the issue of precluding executions of the mentally retarded).

43. See *Penry*, 492 U.S. at 338 (noting that the Court did not make a categorical rule that executions of the mentally retarded are prohibited by the Eighth Amendment). However, the Court did hold that a suspect was entitled to an instruction that would allow the jury to consider evidence of mental retardation as a mitigating factor in imposing a sentence. *Id.* at 340.

44. See *id.* at 336 (reporting Penry’s assertion that because he had the intelligence of a seven-year-old, he had a lower degree of culpability).

45. 487 U.S. 815, 838 (1988) (plurality opinion) (setting aside the death sentence of a sixteen-year old). Justices Stevens, Brennan, Marshall, and Blackmun held that the Eighth and Fourteenth Amendments prohibited the execution of a person who was under the age of sixteen at the time of his or her offense. *Id.* Justice O’Connor filed a concurring opinion agreeing with the judgment on the narrow ground that

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for the same crime.⁴⁶ The Court found juveniles less culpable than adults based on the notion that society reserves the harshest criminal sentence for only the most culpable offenders, and juveniles possess a lower capacity than adults to control their conduct.⁴⁷

However, the Court's holding in *Penry* focused on the lack of a national consensus that would preclude such executions as a matter of law.⁴⁸ While *Penry* argued that numerous public opinion polls established a national consensus, the Court found that public sentiment expressed in the polls would need to be incorporated into legislation to provide an objective representation of public opinion.⁴⁹ *Penry* was significant because the Court's language left the door open to future challenges to the Eighth Amendment.⁵⁰

II. COURT'S ANALYSIS: NATIONAL CONSENSUS OR SIX-PERSON OPINION?

A. Majority Opinion

Since *Penry*, several state judges have perceived a national trend towards exempting the mentally retarded from capital punishment, and have thus concluded that such executions constitute "cruel and unusual punishments."⁵¹ In *Atkins v. Virginia*, the Supreme Court

the state could not execute the petitioner under the Oklahoma statute because the statute did not specify a minimum age for capital punishment. *Id.* at 857-58 (O'Connor, J., concurring).

46. *See id.* at 834-35 (reasoning that executions of sixteen-year-olds were unconstitutional because of distinctions society draws between adult and juvenile behavior). A juvenile is "not prepared to assume the full responsibilities of an adult." *Id.* at 825. Society assumes that adolescents do not act as adults do and thus restricts their choices and actions until they reach an age where they can appreciate the value of their decisions. *Id.* at 825 n.23.

47. *See id.* at 825 n.23 (highlighting that "it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully, rational, choosing agent").

48. *See Penry*, 492 U.S. at 334-35 (holding that two states' and the federal government's ban of executions of the mentally retarded did not provide a national consensus that would categorically prohibit such executions under the Eighth Amendment).

49. *See id.* (noting that these poll results may someday find representation in legislation, but that the poll results themselves are not objective indicators of contemporary social values). Rather, judgments of jurors and legislatures are objective factors that the Court can rely on in determining the existence of a national consensus. *Id.* at 335.

50. *See id.* at 334, 340 (concluding that a national consensus had not been established against execution of the mentally retarded because only two states had prohibited it). However, Justice O'Connor, in the majority opinion, suggested that this decision could be overruled at a later date if a national consensus were to emerge. *Id.* at 340.

51. *See, e.g.,* *People v. Smitley*, 978 P.2d 1171, 1224 (Cal. 1999) (Mosk, J., concurring) (asserting that *Penry* is no longer valid under the Eighth Amendment in light of the legislative changes that have taken place since 1989).

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directly confronted the issue of whether a national consensus condemning such executions had been established since it last addressed the issue in *Penry*.⁵²

The Supreme Court has applied “national consensus” standards vaguely, with some cases relying on a strict legislative tally and others encompassing a broader consideration of public opinion.⁵³

Since the Court has never provided an explicit threshold for what constitutes a national consensus, it is imperative to examine court decisions that pertain to this issue.⁵⁴

Since *Penry* was decided, sixteen states have abolished executions of the mentally retarded.⁵⁵ When added to the two states that banned

52. See *Atkins*, 536 U.S. at 307 (noting that the question presented by this case is whether a national consensus deprives Virginia of the constitutional power to impose the death penalty on capital murder defendants that are mentally retarded).

53. See *Thompson*, 487 U.S. at 830, 835 n.42 (utilizing recommendations from psychiatrists, the American Bar Association, and the American Law Institute). *But see Penry*, 492 U.S. at 331, 335 (arguing that the Court should look at legislative enactments rather than opinion poll results in determining the existence of a national consensus).

54. See *Coker v. Georgia*, 433 U.S. 584, 595-96 (1977) (plurality opinion) (holding that administering the death penalty for the rape of a woman constituted “cruel and unusual” punishment because only one state retained this practice); see also Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant after Penry v. Johnson*, 35 AKRON L. REV. 327, 346 (2002) (highlighting that the Court did not provide a specific number of state statutes required to establish a national consensus). Instead, the Court implemented a method of comparing evidence of a national consensus to previous decisions. *Id.* at 347. Compare *Stanford v. Kentucky*, 492 U.S. 361, 370-71 (1989) (finding that there was no national consensus among the thirty-seven states whose laws permit capital punishment: fifteen states decline to impose it on sixteen-year-old offenders and twelve states decline to impose it on seventeen-year-old offenders), with *Thompson*, 487 U.S. at 829 (plurality opinion) (prohibiting capital punishment for juveniles under the age of sixteen). Four judges held that a national consensus against execution of individuals under the age of sixteen existed where eighteen states expressly prohibited it. *Id.* Justice O’Connor filed a concurrence that set aside the verdict on narrower grounds, but she did state that these eighteen states added to the fourteen that outlaw capital punishment altogether could demonstrate a legislative consensus. *Id.* at 849. “Strong counter-evidence would be required to persuade me that a national consensus against this practice does not exist.” *Id.*

55. The sixteen states with statutes prohibiting the death penalty for persons with mental retardation are: Arizona, Arkansas, Colorado, Connecticut, Florida, Indiana, Kansas, Kentucky, Missouri, New Mexico, Nebraska, New York, North Carolina, South Dakota, Tennessee, and Washington. See ARIZ. REV. STAT. § 13-703.02(A) (2003); ARK. CODE ANN. § 5-4-618(b) (Michie 1993); COLO. REV. STAT. ANN. § 16-9-401-03 (West 1993); CONN. GEN. STAT. ANN. § 53a-46a(h)(2) (West 2001); FLA. STAT. ANN. § 921.137(2) (West 2002); IND. CODE ANN. § 35-36-9-6 (Michie 1998); KAN. STAT. ANN. § 21-4623(d) (1995); KY. REV. STAT. ANN. § 532.140(l) (Michie 1999); MO. ANN. STAT. § 565.030(4)(1) (West 1987); N.C. GEN. STAT. § 15A-2005(b) (West 2002); NEB. REV. STAT. ANN. § 28-105.01(2) (Michie 2000); N.M. STAT. ANN. § 31-20A-2.1(b) (Michie 2000); N.Y. CRIM. PROC. LAW § 400.27(12)(c) (McKinney 2003); S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie 2001); TENN. CODE ANN. § 39-13-203(b) (1997); WASH. REV. CODE ANN. § 10.95.030(2) (West 2002).

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such executions before 1990,⁵⁶ the federal government's prohibition,⁵⁷ and the twelve states that already outlaw capital punishment,⁵⁸ Atkins' defense argued that a clear national consensus expressing condemnation of death sentences for defendants with mental retardation had been established.⁵⁹

The Court ultimately agreed, but chose to defend its position by holding that it was not so much the number of these states that was significant, but the consistency in the direction of change.⁶⁰ By doing this, the Court departed from the strict legislative tally approach and evaded having an exact number determine a national consensus.⁶¹ The Court correctly determined that the swift movement in state law was even more convincing proof of a national consensus, given the nature and quantity of such legislation.⁶²

This argument is strengthened by the fact that legislatures that have addressed this issue have voted overwhelmingly in favor of the prohibition.⁶³ Even in states that permit such executions, the practical evidence suggests that there is still a public consensus that

56. See GA. CODE ANN. § 17-7-131(j) (1988); MD. CODE ANN. art. 27, § 412(f)(1) (1989) (prohibiting the death penalty for persons with mental retardation in Georgia and Maryland prior to 1990).

57. See Federal Death Penalty Act of 1994, 18 U.S.C. § 3596(c) (1994) (providing that a "sentence of death shall not be carried out upon a person who is mentally retarded").

58. See Death Penalty Information Center, at <http://www.deathpenaltyinfo.org/article.php?did=121&scid=11> (last visited Feb. 28, 2004) (reporting that Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin outlaw capital punishment).

59. See Brief for Petitioner at 40-44, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452) (asserting that the number of states prohibiting executions of mentally retarded persons was indicative of a national consensus).

60. See *Atkins*, 536 U.S. at 315; see also Brief for Petitioner at 41, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452) (highlighting that, in a little more than a decade, the number of states prohibiting the execution of the mentally retarded grew nine-fold); see also THE JUSTICE PROJECT, 2001 STATE LEGISLATION ON DEATH PENALTY REFORM AT A GLIMPSE, available at <http://justice.policy.net/relatives/20723.pdf> (last visited Feb. 28, 2004) (noting that in 2001, six states introduced legislation prohibiting the execution of the mentally retarded). This brought the total number of states banning that practice to eighteen. *Id.*

61. See *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989) (using the legislative tally approach to hold that two state prohibitions combined with the fourteen states that outlaw capital punishment did not constitute sufficient evidence to establish a national consensus).

62. See *Atkins*, 536 U.S. at 315 (highlighting that it is a well-known fact that anti-crime legislation is far more popular than legislation providing protections for persons guilty of violent crime). This fact coupled with the large number of states prohibiting the execution of mentally retarded persons, and the complete absence of states passing legislation reinstating the power to conduct such executions influenced the Court's determination of a national consensus. *Id.* at 315-16.

63. See *id.* at 314-15 (noting that beginning in 1990 sixteen states have passed legislation banning executions of persons with mental retardation).

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executing persons with mental retardation is cruel and unusual.⁶⁴

B. Flaws in the Majority's Reasoning

In discerning a national consensus, courts have also held that the actions of sentencing juries constitute objective factors.⁶⁵ Analysis of juries' performance in this area is particularly difficult to conduct because juries can and often do submit a decision without reference to mitigating circumstances.⁶⁶ Surprisingly, the Court in *Atkins* did not acknowledge the actions of juries.⁶⁷ The Court possibly avoided the opportunity to include jury performance because the data is difficult to gather and there was strong enough evidence in the legislative history to establish a national consensus. However, the Court should have stressed that the available data suggests that there is a consensus among juries that executions of mentally retarded persons violate the Eighth Amendment.⁶⁸ Other compelling

64. See Brief for Petitioner at 43, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452) (stating that the Illinois legislature passed a bill protecting people with mental retardation, but the governor vetoed the bill because he regarded the legislation as unnecessary because mentally retarded individuals were not being executed in the state); see, e.g., Governor's message, Senate J., 1st. Legis. Sess., at SJ-218 (Or. 1993) (reporting that the governor of Oregon vetoed legislation banning executions of the mentally retarded because its language failed to accomplish that goal). "The original intent of Senate bill 640 was to exempt mentally retarded individuals from the death penalty. I wholeheartedly support that goal." *Id.*; see, e.g., Veto Proclamation for H.B. No. 236 (2001) (noting that the House and Senate in Texas passed a legislation banning the execution of the mentally retarded, but that the Governor vetoed it due to a procedural flaw). In his veto statement, Governor Perry did not express dissatisfaction with the principle of categorically excluding the mentally retarded from the death penalty. *Id.*; see, e.g., *Atkins*, 536 U.S. at 316 (noting that although New Hampshire and New Jersey permit executions of the mentally retarded, both states have not carried out such an execution in decades); see also Akhil Reed Amar, *Shouldn't We, the People, Be Heard More Often by This High Court?*, WASH. POST, June 30, 2002, at B03 (reporting that since 1989, only five states have executed convicts known to be mentally retarded).

65. See *Thompson*, 487 U.S. at 822, 831 (holding that the Court looked to state statutes and the behavior of juries as objective factors in its determination of a national consensus); see also *Penry*, 492 U.S. at 331 (O'Connor, J., concurring) (indicating that she would have considered the behavior of sentencing juries as objective evidence had it been offered).

66. See Brief for Petitioner at 44 n.49, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452).

67. See *Atkins v. Virginia*, 536 U.S. 304, 324 (2002) (Rehnquist, J., dissenting) (noting that the Court did not include any statistics to either prove or disprove whether juries consider the death penalty a disproportionate punishment for mentally retarded offenders).

68. See Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 COLUM. L. REV. 1538, 1564 (1998) (reporting that of the studies conducted, mental retardation was listed as one of the most powerful mitigating factors considered at the sentencing phase of a capital trial). Evidence that the defendant was mentally retarded was almost as powerful as lingering doubt over his guilt. *Id.* Among the jurors surveyed, 73.8% reported that the defendant's mental retardation would make them less likely to vote for death. *Id.*

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evidence not mentioned by the Court was that the boundary drawn in *Penry*, between the levels of mental retardation, has been abandoned.⁶⁹

The decision in *Atkins* was also flawed because, in the Court's determination of a national consensus, the justices stepped out of the tradition of looking to established objective factors, and placed significance on public opinion polls as well as the views of religious and psychological institutions.⁷⁰ Although the Court in *Atkins* correctly determined the existence of a national consensus, the opinion would have been more persuasive had it relied solely on objective factors rather than subjective, non-traditional ones.⁷¹

C. Chief Justice Rehnquist's Dissent

In an unusual act by a Supreme Court Justice, Chief Justice Rehnquist expressed his extreme disapproval with the ruling by omitting the word "respectfully" from his dissent.⁷² Although Chief Justice Rehnquist failed to adhere to the majority opinion, he did contribute some noteworthy observations. Rehnquist properly criticized the Court for citing to an international consensus, discussing opinions of religious groups and psychological organizations, and noting public opinion polls in its reasoning for establishing a national consensus.⁷³ The Court's justification for

69. See Brief for Petitioner at 45 n.50, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452) (highlighting that the *Penry* Court speculated that the group of people ineligible for execution at common law corresponded to "severe" or "profound" mental retardation, yet the modern consensus has abandoned such distinctions). Since *Penry*, not a single state legislature has adopted a provision that treats individuals with severe or profound mental retardation differently from others with milder forms of mental retardation. *Id.*; see also AAMR II, *supra* note 37, at 34 (reporting that the mild/moderate/severe/profound classification model has been abandoned).

70. See *Atkins*, 536 U.S. at 316 n.21 (indicating that the condemnation of executions of persons with mental retardation as expressed by the American Psychological Association, the representatives of widely diverse religious communities, and widespread polling are factors the Court used in its determination of a national consensus). *But see Penry*, 492 U.S. at 331 (stressing the importance of looking to only objective factors in determining a national consensus).

71. Compare *Atkins*, 536 U.S. at 312 (noting that legislative history and jury determinations are objective factors to examine when determining a national consensus), with *id.* at 322-23 (Rehnquist, C.J., dissenting) (declaring that opinion polls, religious institutions, and the international community's viewpoint are subjective criteria that have no bearing in the determination of a national consensus).

72. See *id.* at 328 (Rehnquist, C.J., dissenting) ("Believing this view to be seriously mistaken, I dissent.").

73. See *id.* at 324-26 (Rehnquist, C.J., dissenting) (stating "I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination"). He also noted that the Court has explicitly rejected the use of sentencing practices of other countries to establish an Eighth Amendment prerequisite that "a practice is accepted among our people."

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relying on such factors is weak because it is a departure from the case law established by *Penry*, and advanced by Justice O'Connor.⁷⁴ Justice Rehnquist specifically focused on the Court's flawed reliance on public opinion polls.⁷⁵ The Court has rejected polling in past decisions because polls capture Americans' constantly changing views, vary in the quality of information gathered, may be unfairly biased, and suffer from a statistical margin of error.⁷⁶ Even though Rehnquist addressed the inconsistency between relying on public opinion polls and complying with precedent, he failed to recognize that data from legislatures is strong, compelling evidence of a national consensus.⁷⁷

D. Justice Scalia's Dissent

In an unusual fashion, Justice Scalia expressed his outrage with the majority opinion by reading his dissent from the bench.⁷⁸ Joined by Chief Justice Rehnquist and Justice Thomas, Justice Scalia described the majority opinion as a raw "assumption of power" that ignored the will of the public and lawmakers in the twenty states that permit

Id. at 325. In addition, opinions of religious and psychological organizations as well as public opinion polls, were expressly declined in *Penry* as objective factors to consider when determining a national consensus. *Id.* at 326. Such factors should not be relied on where the "public sentiment expressed in [them] had yet to find expression in state law." *Id.*

74. See *Penry*, 492 U.S. at 335 (stressing that opinion polls should not be relied upon because those public sentiments could ultimately find expression in legislation, an objective indicator of contemporary values); see also *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989) (plurality opinion) (refusing to "rest constitutional law upon such uncertain foundations" as "public opinion polls, the views of interest groups, and the positions adopted by various professional organizations").

75. See *Atkins*, 536 U.S. at 326-27 (stressing that opinion polls should not be considered as objective evidence because an extensive body of literature describes how statistical errors often affect the reliability and validity of the polls).

76. See *Stanford*, 492 U.S. at 377 (rejecting polling data as a factor to consider in determining a national consensus because of its subjective and uncertain nature); see also John M. Church, *A Market Solution to Green Marketing: Some Lessons from the Economics of Information*, 79 MINN. L. REV. 245, 253 n.16 (1994) (noting that reliability of survey responses is conditioned upon a variety of factors, including the experience of a research organization, sample size and composition, question format, question content, location of where the survey is administered, and length of survey); see also Thomas R. Marshall, *The Supreme Court and the Grass Roots: Whom Does the Court Represent Best?*, 76 JUDICATURE 22, 24 (1992) (reporting that modern polling techniques under count some minority groups).

77. See *Atkins*, 536 U.S. at 321-22 (Rehnquist, C.J., dissenting) (criticizing the majority's conclusion that the legislation of eighteen states barring executions of persons with mental retardation constitutes a national consensus). Justice Rehnquist failed to take into account that twelve states outlaw capital punishment altogether. *Id.*

78. See Charles Lane, *Court Bars Execution of Mentally Retarded; 6 to 3 Ruling Cites Ban in Death-Penalty States*, WASH. POST, June 21, 2002, at A01 (commenting that the reading of a dissent from the bench is a gesture usually reserved for those cases in which a justice disagrees especially strongly with the majority).

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executions of persons with mental retardation.⁷⁹ Scalia ridiculed Stevens' national trend spotting as "embarrassingly feeble," calling it "a fudged forty-seven percent" consensus because twenty of the thirty-eight capital punishment states still permit executions of persons with mental retardation.⁸⁰ Scalia also accused the Court of creating a national consensus in an effort to evade the legislative process.⁸¹

However, Justice Scalia's reasoning failed to take into account that twelve states outlaw capital punishment altogether.⁸² In fact, when all fifty states are considered, along with the District of Columbia, a total of thirty states, or sixty percent, outlaw the death penalty for defendants with mental retardation.⁸³ Justice Scalia's omission of states that do not permit capital punishment strikes against the very notion of a "national consensus."⁸⁴

Justice Scalia's dissent is also unpersuasive as a whole because he fails to recognize precedent requiring that the Eighth Amendment should be flexible in order to encompass evolving standards of decency.⁸⁵ Were it not for the constitutional notion of evolving standards of decency, many practices this country views as abhorrent would still exist.⁸⁶

79. See *Atkins*, 536 U.S. at 338, 348 (remarking that "[s]eldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members").

80. See *id.* at 343-45 (describing his disagreement with the finding of a national consensus). In his response, Scalia offered the majority "the Prize for the Court's Most Feeble Effort to fabricate a 'national consensus.'" *Id.* at 347.

81. See *id.* at 348 (stressing that the majority discovered an artificial national consensus and used it to undermine the legislative process so as to promote the moral judgment of "really good lawyers" as constitutional rule).

82. See Death Penalty Information Center, *supra* note 58 (listing the twelve states that outlaw capital punishment).

83. See Jonathan L. Bing, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Penry and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59, 104 (1996) (opining that states that have no death penalty should be considered in assessing a national consensus). For example, Kansas passed legislation to re-impose capital punishment, but claimed the mentally retarded as an exemption to the rule. *Id.* Before 1994, the Supreme Court would not have counted Kansas in determining a national consensus but now it does. *Id.* However, the possibility of a mentally retarded person receiving a death sentence in Kansas never changed. *Id.*

84. See *id.* (noting that states without a death penalty are no less a part of the nation than states with death penalties).

85. See Eichel, *supra* note 7, at A15 (noting that at conference in Chicago, Scalia voiced his underlying opinion that any punishment permitted when the Bill of Rights was established, was by definition constitutional, now and forever). "It means today not what current society, much less the Court, thinks it ought to mean, but what it meant when it was adopted." *Id.* But see *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (writing that the excessive punishment standard should not be judged by the standards that prevailed at the time of the Bill of Rights' adoption, but rather by "evolving standards of decency that mark the progress of a maturing society").

86. See *Juvenile Death Penalty*, ARIZ. DAILY STAR, Sept. 4, 2002, at B6 (explaining

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E. Purposes Underlying Capital Punishment

The majority's pivotal argument was the finding of a national consensus, but the opinion also stressed that mentally retarded offenders should not be sentenced to death, because their execution does not reflect the purposes underlying capital punishment.⁸⁷ Even if the majority opinion found the evidence to be insufficient to constitute a national consensus, it would still be within the Court's power to find such executions unconstitutional.⁸⁸ Instead of addressing the issue of a national consensus, the Court could have held that the mentally retarded, as a class, do not contain the necessary characteristics or underlying purposes for permitting the use of capital punishment.⁸⁹ Interpretation of the Eighth Amendment's prohibition against cruel and unusual punishment includes punishment that does not measurably further the two goals of capital punishment: retribution and deterrence.⁹⁰ Justice Brennan advanced these arguments in *Penry v. Lynaugh*⁹¹ and *Stanford v.*

that without an examination of evolving standards slavery would still exist and women would not have the right to vote); see also Anne Gearan, *Execution of Retarded People Ruled Out*, CHARLESTON GAZETTE, June 21, 2002 at 1A (noting that if it were not for evolving standards under the Eighth Amendment, it would still be considered acceptable to flog people in public).

87. See *Atkins*, 536 U.S. at 317 ("This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty.").

88. See *Penry*, 492 U.S. at 335 (highlighting that punishment is unconstitutional if 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").

89. See *Thompson*, 487 U.S. at 835-38 (holding that the imposition of the death penalty on persons under the age of sixteen is unconstitutional based on the reduced culpability of a juvenile and the fact that such a penalty does not adequately reflect or contribute to the essential purposes underlying capital punishment); see also Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 159 (1998) (stating that the Court looks to a number of factors in its determination of whether a class of defendants should be exempt from capital punishment: the evolving standards of decency, the excessiveness of the penalty, and whether deterrence or retribution will be achieved). But see *Penry*, 492 U.S. at 338 (O'Connor, J.) (stating that all mentally retarded offenders do not inevitably "lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty").

90. See *Gregg*, 428 U.S. at 183 (reporting that executions that do not serve one or both of the social purposes are unjust and unconstitutional); see also John Blume & David Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 ARK. L. REV. 725, 737-38 (1988) (noting that retribution and deterrence are the two social purposes served by the death penalty, and a punishment that does not further those purposes can constitute "cruel and unusual" punishment).

91. 492 U.S. 302, 343-49 (1989) (Brennan, J., dissenting) (noting that, notwithstanding the national consensus argument, the Court should have ruled that executing the mentally retarded was unconstitutional because such executions were disproportionate and would not advance the goals of deterrence or retribution). The

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Kentucky.⁹²

1. Retribution

The concept of retribution recognizes that the severity of the punishment depends on the level of the offender's culpability.⁹³ If the state does not impose the death penalty on all average murderers it surely should not be allowed to execute individuals who are less culpable by virtue of their mental state.⁹⁴ The Court has repeatedly identified four principles to examine when determining whether an individual's behavior is sufficiently culpable to warrant a death sentence.⁹⁵ First, capital punishment is employed on offenders who act rationally, purposefully, and deliberately.⁹⁶ Second, capital punishment is appropriate only for one who has the capacity to evaluate the consequences of his conduct.⁹⁷ Third, the punishment of death is sufficiently related to an individual's personal culpability, only when he or she can fairly be expected to conform to the

"impairment of a mentally retarded offender's reasoning abilities, control over impulsive behavior, and moral development" limits the offender's culpability so that the death penalty is disproportionate, and thus an unconstitutional punishment. *Id.* at 346.

92. 492 U.S. 361, 403-04 (1989) (recognizing that justification for execution and retribution depends on the degree of an offender's culpability and understanding).

93. See *Tison v. Arizona*, 481 U.S. 137, 149 (1987) (highlighting that "[t]he heart of retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender"); see also *Ford v. Wainwright*, 477 U.S. 399, 409 (1986) (stating "we may seriously question the 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").

94. See Joseph A. Nese, Comment, *The Fate of Mentally Retarded Criminals: An Examination of the Propriety of Their Execution Under the Eighth Amendment*, 40 DUQ. L. REV. 373, 379 (2002) (reporting that the diminished capacity to control impulsive behavior and to develop moral reasoning of a mentally retarded offender makes them less blameworthy); see also Brief for Petitioner at 33, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452) (noting that executing persons with mental retardation cannot fulfill the goal of retribution given the diminished level of personal culpability of defendants with mental retardation).

95. Brief for Petitioner at 26, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452).

96. See *Thompson*, 487 U.S. at 825-26 n.23 (noting the death penalty "takes as its predicate the existence of a fully rational, choosing agent"); see also *Tison*, 481 U.S. at 156 (stating that this predicate is grounded in the principle that the more purposeful the criminal conduct, the more seriously it ought to be punished); *Enmund v. Florida*, 458 U.S. 782, 799 (1982) (reporting the death penalty is only an appropriate punishment for those who act with deliberation or premeditation); *Thompson*, 487 U.S. at 835 n.43 (holding that the death penalty is disproportionate for those with an immature, undeveloped sense of reason or those without the capacity to make a fully reasoned choice).

97. See *Penry*, 492 U.S. at 333 (holding that a death sentence in the case of a person with severe or profound mental retardation is inappropriate because such persons are "wholly lacking in the capacity to appreciate the wrongfulness of their actions").

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behavior of a responsible, mature citizen.⁹⁸ Furthermore, the death penalty is proportionate only when a defendant's individual culpability and personal responsibility warrant the sanction of death.⁹⁹ Executions of persons with mental retardation do not coincide with these principles.¹⁰⁰

2. Deterrence

"The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out wrongful conduct."¹⁰¹ Capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.¹⁰² Executing persons with mental retardation will not measurably further the goal of deterrence because such persons have cognitive and behavioral impairments.¹⁰³

By allowing executions of persons with mental retardation, the death penalty will be imposed in spite of factors which call for a less severe penalty. Although the majority in *Penry* highlighted that mental retardation could be used as a mitigating factor, the Court failed to acknowledge that mental retardation itself poses a barrier to a successful showing of mitigation.¹⁰⁴ This barrier is apparent in the

98. See *Eddings v. Oklahoma*, 455 U.S. 104, 116 n.11 (1982) (plurality opinion) (recognizing that children who commit murder are not as culpable as adults because they are less mature and responsible and often have less capacity to control their conduct).

99. See *Tison*, 481 U.S. at 149 (noting the importance of individual culpability in capital punishment); see also *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (stressing that the Court insists on "individualized consideration as a constitutional requirement in imposing the death sentence").

100. See AAMR I, *supra* note 36, at 15, 40 (reciting that individuals with mental retardation do not have the same capacity as others to make reasoned choices, because of their diminished intelligence). Their diminished intelligence also makes them less able to appreciate the consequences of their actions and to act at a mature and responsible level. *Id.*

101. *Atkins*, 536 U.S. at 318.

102. See *Enmund*, 458 U.S. at 799 (stressing that imposing the threat of the death penalty will not deter someone who has no intention to kill).

103. See *Nese*, *supra* note 94, at 379 (noting that deterrence involves the defendant's "capacity to understand and control his wrongful behavior"). A person with mental retardation cannot be deterred, because he lacks the ability to predict the consequences of his behavior and does not possess the ability to learn from the consequences of someone else's wrongful actions. *Id.*; see also Brief for Petitioner at 33, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452) (recognizing that "the inability to imagine and assess competing courses of action is a core aspect of mental retardation"). This limitation significantly reduces the ability of mentally retarded persons to engage in the reasoning process, on which the notion of deterrence is predicated. *Id.*

104. See Brief for Petitioner at 34, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452) (noting that several factors have demonstrated a heightened risk of receiving the death penalty, despite the assurance advanced in *Penry* that defendants with

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existence of false confessions,¹⁰⁵ lack of ability to give meaningful assistance to counsel,¹⁰⁶ and overall appearance as poor witnesses.¹⁰⁷

F. Weaknesses, Strengths, and Surprises

Justice O'Connor declared in *Penry* that the imposition of the death penalty on the mentally retarded made a measurable contribution to the penological goals of deterrence and retribution.¹⁰⁸ She contradicts this reasoning when she adopts the majority opinion in *Atkins*.¹⁰⁹ Additionally, although the Court discussed the lack of culpability of mentally retarded defendants, it did not propose that they go unpunished for their crimes.¹¹⁰ It weakened the majority's argument to suggest in one sense that defendants with mental retardation can still be held culpable for their crimes but to discuss the likelihood of false confessions.¹¹¹ It is

mental retardation can plead their disability in mitigation).

105. See *Washington v. Commonwealth*, 323 S.E.2d 577, 584 (Va. 1984) (noting that defendant Earl Washington, a man with an IQ of sixty-nine, confessed to a crime). DNA evidence later revealed that Washington was in fact innocent. Jim Lobe, *Rights: U.S. Supreme Court Bans Executions for Mentally Retarded*, INTER PRESS SERVICE, June 20, 2002. See also Baker, *Death-Row Inmate Gets Clemency; Agreement Ends Days of Suspense*, WASH. POST, Jan. 15, 1994, at A1 (highlighting that a person with mental retardation on death-row unwittingly confessed to a crime he did not commit); American Bar Association Section of Individual Rights and Responsibilities, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, 63 OHIO ST. L.J. 487, 528 (2002) (mentioning that mentally retarded defendants "are prone to false confessions because of susceptibility to suggestion"). Such defendants are inclined to tell an authority figure what they think that person wants to hear. *Id.*

106. See ROSA EHRENREICH & JAMIE FELLNER, *BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION* 1, 4 (Malcolm Smart & Cynthia Brown eds., Human Rights Watch 2001) (noting that a mentally retarded person will often attempt to conceal his condition from lawyers, not realizing that his condition could constitute a major part of his defense).

107. See Nese, *supra* note 94, at 383 (stating that a person with mental retardation "tends to alienate the jury by sleeping, smiling or staring at nothing while in the court").

108. See *Penry*, 492 U.S. at 306 (asserting that she could not conclude that all mentally retarded people, by virtue of their mental retardation alone, "lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty").

109. See *Atkins*, 536 U.S. at 305 (holding that the execution of the mentally retarded will not measurably further the two goals of capital punishment: retribution and deterrence).

110. See *id.* at 317 (stressing that the Court was not advancing a lack of punishment for these individuals, rather it held they just shouldn't receive the most severe form of punishment). Pursuant to narrowing jurisprudence, which ensures that only the most culpable offenders receive the death penalty, executions of persons with mental retardation should be excluded based on their diminished culpability. *Id.* at 318.

111. See *id.* at 320 (noting that the risk of imposing the death penalty despite factors which require a less severe punishment is heightened by false confessions).

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understandable that the Court would not want to establish a blanket rule that would eliminate punishment altogether for defendants with mental retardation. However, by discussing evidence of diminished capacity in capital murder cases, one could make an argument that there is a lack of criminal intent to justify even a life sentence.

The Commonwealth of Virginia made a valid argument by claiming that a *per se* rule excluding all mentally retarded defendants contradicts the standard testing procedures which requires an individualized assessment of deficient functioning.¹¹² However, a stronger argument is that the *Atkins* decision is flexible enough to provide for individual assessments, but acknowledges that persons with mental retardation share basic qualities that render them less culpable.¹¹³

Surprisingly, the Supreme Court did not correlate the age capacity of a person with mild mental retardation to that of a juvenile.¹¹⁴ If they had, the *Thompson v. Oklahoma* prohibition of executing persons under the age of sixteen would have required that those with the mentality of a child not be subject to execution.¹¹⁵

112. See *Atkins*, 534 S.E.2d at 320 (arguing that it is not enough to merely look at a person's IQ score). A court must also consider an individual's adaptive functioning abilities. *Id.*; see also KATHY SWEDLOW, DOES THE EIGHTH AMENDMENT BAR EXECUTING MENTALLY RETARDED PRISONERS CONVICTED OF CAPITAL OFFENSES? 281 (2002) (stating that notwithstanding an individual's IQ score, a diagnosis of mental retardation under the DSM-IV, a test used to determine mental retardation, requires an analysis of the individual's "concurrent deficits or impairments in present adaptive functioning").

113. See AAMR I, *supra* note 36, at 5 (stating that persons with mental retardation share the basic quality of significantly subaverage intellectual functioning).

114. See SADOCK & SADOCK, *supra* note 35, at 2598 (defining a person with mild mental retardation as having an IQ between fifty and sixty-nine, and a mental age between nine and twelve); see also *Penry*, 492 U.S. at 339 (reporting that "[m]ental age is 'calculated as the chronological age of nonretarded children whose average IQ test performance is equivalent to that of the individual with mental retardation'").

115. See *Atkins*, 536 U.S. at 352 (noting that the Court did not rely on *Thompson* in its reasoning to support its holding); see also Claire Goldstein, *Mental Retardation and the Death Penalty Debate*, MEDILL NEWS SERVICE (2001) (citing that no state imposes the death penalty on children ages nine to twelve), available at <http://www.journalism.medill.northwestern.edu/docket/00-8452line.html> (last visited Mar. 18, 2004); see also Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 46 (1996) (commenting that if "a child of ten or eleven years of age should not be executed under any circumstances, then surely a person who may have a chronological age of twenty, but a mental and emotional age of ten or eleven, should not be put to death"). But see *Penry*, 492 U.S. at 339 (mentioning that courts have been reluctant to rely on the concept of mental age as a basis for exculpating a defendant because the concept is imprecise). It does not adequately account for individuals' varying experiences, ceases to change after a person reaches the age of fifteen or sixteen, and could have a disempowering effect if applied to mentally retarded persons in other areas of the law. *Id.* at 306.

G. Predictability of Justices' Decisions

The *Atkins* decision is unique considering that the Rehnquist Court has been quite determined to protect the interests of the states against encroachments by the federal government.¹¹⁶ Justice Stevens' decision condemning executions of persons with mental retardation was predictable considering he is the only member of the *Penry* dissent still on the Court.¹¹⁷ Similarly, the dissenting opinions of Chief Justice Rehnquist and Justice Scalia were not unexpected, considering they found that eighteen states did not establish a national consensus in *Thompson*.¹¹⁸ Also, these justices have indicated that they are unwilling to examine whether the punishment of defendants with mental retardation is proportionate and/or advances the criminal goals of deterrence and retribution.¹¹⁹

Justices Ginsburg, Souter, and Breyer were not on the bench when *Penry* was decided.¹²⁰ However, their decisions were predictable, considering they hold similar views with Justice Stevens regarding the Eighth Amendment and capital sentencing proceedings.¹²¹ Nevertheless, their decisions were not as predictable as those of Justices Stevens, Rehnquist, Scalia, and Thomas because they had not ruled prior to *Atkins* on a decision regarding a "national consensus"

116. See Kenneth W. Starr, *The Anthrax Term*, WALL ST. J., July 5, 2002, at A12 (opining that the *Atkins* decision was unusual because it made states abide by a categorical determination); see also Editorial, *Review and Outlook*, WALL ST. J., June 21, 2002, at A8 (criticizing the *Atkins* decision on the basis that the Supreme Court is not a legislative body).

117. See Entzeroth, *supra* note 3, at 934 (highlighting that Justice Stevens, in his dissent of *Penry*, did not discuss a national consensus, but held that execution of the mentally retarded was a violation of the Eighth Amendment).

118. See *Thompson*, 487 U.S. at 867 (Scalia, J., Rehnquist, C.J., & White, J. dissenting) (claiming that eighteen states did not provide a sufficient number to form a national consensus barring the infliction of the death penalty on a class of defendants).

119. See *Penry*, 492 U.S. at 351 (noting that an analysis of whether application of the death penalty to mentally retarded offenders violates the Eighth Amendment because it is grossly disproportionate and makes no measurable contribution to acceptable goals of punishment has no bearing on Eighth Amendment jurisprudence). If an objective examination of laws and jury determinations fails to demonstrate society's disapproval of the punishment, the punishment does not violate the Eighth Amendment, even if it is not in accordance with penological goals. *Id.*

120. See *id.* at 303, 341, 349-350 (stating that *Penry* was decided by Justices O'Connor, Brennan, Marshall, Stevens, Blackmun, Scalia, Rehnquist, White, and Kennedy).

121. See, e.g., *Ewing v. California*, 123 S. Ct. 1179, 1191-92 (2003) (Stevens, J., Souter, J., Ginsburg, J. & Breyer, J. dissenting) (asserting that a sentence imposed under California's three strike rule violated the Eighth Amendment's prohibition against cruel and unusual punishment; see also *O'Dell v. Netherland*, 521 U.S. 151, 168-78 (1997) (Breyer, J., Ginsburg, J., Souter, J. & Stevens, J. dissenting) (finding that fundamental errors occurred during capital sentencing procedures).

in the context of the Eighth Amendment, nor do they consistently agree with Justice Stevens on cases raising Eighth Amendment claims.¹²²

The two surprise votes that made the *Atkins* decision so unpredictable came from Justices Kennedy and O'Connor, the modest conservatives, known as the perennial "swing votes."¹²³ Justice Kennedy's decision was unusual considering he did not find a national consensus in *Stanford v. Kentucky*¹²⁴ and refrained from voting in *Thompson v. Oklahoma*.¹²⁵ Justice O'Connor's decision was less shocking because she noted in *Penry* that the Court would reconsider the constitutionality of executing persons with mental retardation if a national consensus emerged.¹²⁶ Considering there was a thirteen-year lapse of time between *Penry* and *Atkins*, it is likely that Justice O'Connor believed that the rapid movement of sixteen states banning executions of the mentally retarded established a "national consensus."¹²⁷ However, her voting record seems to contradict that notion, because her decisions on past Eighth Amendment cases reveal reluctance in finding a national consensus.¹²⁸ She, like Justice Kennedy, joined the dissent in *Stanford*, but unlike Kennedy, O'Connor joined a plurality opinion that exempted juveniles under the age of sixteen from the death penalty.¹²⁹ Justice O'Connor agreed with the case's holding but

122. See, e.g., *Harris v. Alabama*, 513 U.S. 504, 505, 515 (1995) (noting that Justice Stevens dissented while Justices Souter, Ginsburg, and Breyer joined the majority's holding that the "Eighth Amendment does not require the State to define the weight the sentencing judge must accord an advisory jury verdict").

123. See Victoria Ashley, Comment, *Death Penalty Redux: Justice Sandra Day O'Connor's Role on the Rehnquist Court and the Future of the Death Penalty in America*, 54 BAYLOR L. REV. 407, 414 (2002) (noting Justices O'Connor and Kennedy are deemed the "swing votes" in the battle between the three conservative Justices: Rehnquist, Scalia, and Thomas; and the four liberal Justices: Stevens, Souter, Ginsburg, and Breyer).

124. 492 U.S. at 382-391 (holding that a national consensus had not been established because, of the thirty-seven states which permitted capital punishment, fifteen declined to impose it on sixteen-year-olds and twelve declined to impose it on seventeen-year-olds).

125. 487 U.S. at 818, 848, 859 (stating that Justices Stevens, Brennan, Marshall, Blackmun, O'Connor, Rehnquist, Scalia, and White decided *Thompson*). Justice Kennedy did not participate in the decision. *Id.* at 815.

126. See *Penry*, 492 U.S. at 340.

127. See Hall, *supra* note 54, at 367 (noting that as soon as *McCarver* became moot, the court granted certiorari to *Atkins*); see also Borromeo, *supra* note 12, at 198 (recognizing that it is unlikely the Supreme Court would grant certiorari to *Atkins* if their objective was simply to restate the holding of *Penry*).

128. See *Penry*, 492 U.S. at 334 (declaring that sixteen states' prohibition of executions of the mentally retarded did not constitute a national consensus).

129. See *Thompson*, 487 U.S. at 848-49 (plurality opinion) (holding that eighteen states' prohibition of executions of juveniles established a national consensus).

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adopted a reasoning that did not reflect the finding of a national consensus.¹³⁰ However, the fact that Justice O'Connor, a consistent supporter of the death penalty, criticized the administration of the death penalty signaled a shift in her thinking that made her decision in *Atkins* more plausible.¹³¹

III. SIGNIFICANCE AND AFTERMATH OF *ATKINS*

A. Implications

The immediate impact of the *Atkins* decision was that Daryl Atkins' life was saved.¹³² More broadly, the decision could be the most sweeping limitation on capital punishment since the Supreme Court restored the death penalty in 1976.¹³³ A major implication of the *Atkins* decision is the placement of death penalty jurisprudence under critical review.¹³⁴ Since the Court made such a strong rule,

However, Justice O'Connor was "reluctant to adopt this conclusion as a matter of constitutional law." *Id.* at 849. Rather, she took the unusual approach of concluding that the state legislature had not intended by its silence to include fifteen-year-olds among those criminal defendants who were eligible for the death penalty. *Id.*

130. *See id.* at 857-58 (asserting that the fact that eighteen legislatures had banned the execution of individuals under sixteen meant that a national consensus forbidding the practice most likely exists, but this conclusion should not unnecessarily be adopted as a matter of constitutional law without better evidence than what is before the court).

131. *See A Justice's Doubts*, L.A. TIMES, July 5, 2001, at B12, (noting that Justice O'Connor delivered a speech in which she expressed "serious questions" about whether the death penalty is fairly administered); *see also* Ross Douthat, *Judging O'Connor*, NATIONAL REVIEW ONLINE, July 9, 2001, (commenting that while Justice O'Connor has traditionally supported individual states' rights to choose the implementation of the death penalty, recent public statements seem to indicate that her position may be wavering), available at http://www.nationalreview.com/nr_comment/nr_comment070901b.shtml (last visited Feb. 5, 2004); *see A Justice's Doubts*, L.A. TIMES, July 5, 2001, at B12, (noting that Justice O'Connor delivered a speech in which she expressed "serious questions" about whether the death penalty is fairly administered); *see also* Ross Douthat, *Judging O'Connor*, NATIONAL REVIEW ONLINE, July 9, 2001, (commenting that while Justice O'Connor has traditionally supported individual states' rights to choose the implementation of the death penalty, recent public statements seem to indicate that her position may be wavering), available at http://www.nationalreview.com/nr_comment/nr_comment070901b.shtml (last visited Feb. 5, 2004).

132. *See Atkins*, 536 U.S. at 321 (holding that it is unconstitutional to take the life of a mentally retarded offender, which precludes the Commonwealth of Virginia from executing Atkins).

133. *See* Bruce Shapiro, *Rethinking the Death Penalty: Politicians and Courts are taking their Cues from Growing Public Opposition*, THE NATION, July 22, 2002 at 14 (noting the decision could save the lives of three hundred other inmates with mental retardation on death row).

134. *See Atkins*, 536 U.S. at 316 n.21 (describing how the world community disapproves of the imposition of the death penalty for crimes committed by mentally retarded offenders). Justice Stevens included this footnote citing to an amicus brief

banning a whole class of defendants from death penalty prosecution, the Court may shift its focus to the inhumane dynamic of capital punishment as a whole. Although a national moratorium of the death penalty seems unlikely, the fact that six of the nine justices on the Court restricted the eligibility of candidates for the death penalty is an encouraging sign.¹³⁵ Justice Stevens specifically opened the door to increased anti-death penalty litigation when he wrote, “we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated.”¹³⁶

Another highly publicized implication is the potential for a flood of defendants claiming mental retardation in order to evade capital punishment.¹³⁷ Especially for the inmates on death row, states are predicting a great deal of litigation regarding mental capacity.¹³⁸ In addition to that increased litigation, Justice Scalia fears that offenders will try to feign their mental capabilities to avoid capital punishment,

filed by the European Union. *Id.* By citing the European Union, rather than a similar argument made by retired U.S. diplomats, the majority opinion invited further constitutional expression from death-penalty opponents abroad. *Id.*

135. See David Von Drehle, *Does Ruling Signal Shift in Thinking?*, WASH. POST, June 25, 2002, at A01 (commenting that that the *Atkins* decision was the closest thing to a road map the court has ever provided to abolitionists). See also Shapiro, *supra* note 134, at 14 (asserting that the initiatives for moratoriums in more states, which Congressman Jesse Jackson, Jr. proposed and Senators Feingold and Corzine endorsed, are ripe for support).

136. *Atkins*, 536 U.S. at 320 n.25; see also Anne Gearan, *Court Bans Death Penalty for Retarded: Such Executions Amount to Cruelty, the Supreme Court Ruled*, THE PHILADELPHIA INQUIRER, June 21, 2002, at A1 (noting that death penalty concern has increased with the recent exonerations based on DNA evidence and questions regarding the quality of appointed attorneys). Two states, Illinois and Maryland, have put executions on hold as a result of these concerns. *Id.* But see Marcia Coyle, *A Tale of Two Justices*, THE LEGAL INTELLIGENCER, Aug. 12, 2002, at 9 (noting that death penalty opponents should not automatically infer positive implications from the *Atkins* decisions because, in that same year, the Court decided in *Mickens v. Taylor* and *Bell v. Cone* against providing relief or reversals for ineffective counsel in capital cases).

137. See Mary Alice Robbins, *Some Say Flood of Atkins' Claims Will Slow Executions*, TEX. LAWYER, July 22, 2002, at 4 (reporting a Texas District Attorney's comment that she expected to see an influx of pleadings from death row inmates claiming to be mentally retarded). However, a Texas defense lawyer stated he does not expect a flood because defense attorneys will not advance theories that have no empirical proof as support. *Id.*

138. See Gearan, *supra* note 137, at A1 (citing that nationwide, an estimated 10% of the more than 3,700 inmates on death row are mentally retarded); see also Richard Lacayo, *Spared by Their Low IQ: the Supreme Court Bars Execution of the Mentally Retarded. But Which Death-Row Inmates Will Qualify?*, TIME, July 1, 2002, at 34 (reporting that 50 of the 213 condemned killers in North Carolina have petitioned for retrial based on their mental capacity, and at least 20 of the 455 death-row inmates in Texas will raise mental deficiency claims); see, e.g., Alexis Gilbert, *Trying to Define Retarded After Atkins Prosecutors, Defenders Predict a Wave of Motions*, THE LEGAL INTELLIGENCER, July 9, 2002, at 1 (commenting that Pennsylvania will most likely experience a wave of litigation because experts estimate that 10% of death-row inmates are possibly mentally retarded).

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thereby burdening and undermining the judicial system.¹³⁹ However, Justice Scalia's concern is misplaced because establishing mental retardation requires the assessment of authentic IQ scores, school reports, childhood test scores, and other evidence indicative of intellectual and adaptive problems that manifest before the age of eighteen.¹⁴⁰ Mentally retarded defendants do not generally accentuate their disability; rather they try to overcompensate for their limited cognitive abilities.¹⁴¹ In addition, studies suggest that only 1-3% of the population has an IQ between seventy to seventy-five and lower.¹⁴² Justice Scalia's argument is also unpersuasive because a concerned state can implement stricter procedures to combat possible abuse.¹⁴³

A major implication of the *Atkins* decision is the reconsideration of the death penalty for persons between the ages of sixteen and eighteen.¹⁴⁴ Since the Court acknowledged the diminished culpability of a mentally retarded offender based on his or her

139. See *Atkins*, 536 U.S. at 353 (Scalia, J., dissenting) (predicting that the Court's decision will turn death penalty trials into "a game," in which criminals fake mental retardation). Justice Scalia declared that the symptoms of mental retardation "can be readily feigned." *Id.*; see also Lane, *supra* note 78, at A01 (noting that death penalty supporters claim the Court has "opened the door to hundreds of phony claims of retardation, each of which would take years to litigate").

140. See Bing, *supra* note 83, at 90 (noting that a defendant who has not been diagnosed before the age of eighteen may not retroactively claim the mental retardation exemption); see also Emily Heller, *Faking Retardation to Escape Death Penalty Isn't Likely*, BROWARD DAILY BUS. REV., July 5, 2002, at 8 (asserting that in order to fake mental retardation effectively one would have to begin in elementary school).

141. See James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 428, 430 (1985) (noting that persons with mental retardation are unlikely to refuse to answer questions that are beyond their ability and tend to overrate their skills in order to resist the stigma that accompanies the label of retardation); see also Virginia G. Wilson, *Penry v. Lynaugh: Mentally Retarded Defendants and the Death Penalty*, 34 ST. LOUIS U. L.J. 345, 348 (1990) (recognizing that a criminal defendant with mental retardation often is able to hide his disability from untrained individuals around him).

142. See SADOCK & SADOCK, *supra* note 35, at 2952.

143. See Bing, *supra* note 83, at 90 (reporting that some states require the defendant to prove his mental retardation by either a preponderance of evidence standard or clear and convincing evidence standard). Also, states can require that their own independent psychiatrists examine the defendant. *Id.*

144. See *Juvenile Death Penalty*, ARIZ. DAILY STAR, Sept. 4, 2002, at B6 (mentioning that Justices Stevens, Ginsburg, and Breyer are advocating for a review of the law that allows juveniles to receive the death sentence); see also Jim Lobe, *Rights: U.S. Supreme Court Bans Executions for Mentally Retarded*, INTER PRESS SERVICE, June 20, 2002 (noting that the Missouri Supreme Court halted the execution of a juvenile who was convicted of murder while awaiting the outcome of *Atkins*); Anthony Mauro, *Historic Ruling Bans Death Penalty for Retarded*, THE RECORDER, June 21, 2002, at 1 (noting that Steven Hawkins, executive director of the National Coalition to Abolish the Death Penalty, suggests the decision "could energize the effort to abolish the death penalty for juveniles").

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individual capacity, a similar argument could apply to juveniles.¹⁴⁵ Also, the *Atkins* decision raises the question of whether the nation has reached a consensus about prohibiting the execution of juveniles.¹⁴⁶ The decision provides a significant precedent for the Court to reevaluate its position on juvenile executions.¹⁴⁷

Although the Court generally hesitates to define specific procedures to follow, in order to abide by a ruling, it is important for the court to set some standard guidelines.¹⁴⁸ The Court erred by leaving this responsibility to the sole discretion of the states. Although general statutory definitions conform to clinical definitions, the Supreme Court could have stressed that all states conform to those definitions.¹⁴⁹ By leaving this question open with no mention of the type of standard necessary, a drastic difference may emerge in the states' standards for declaring someone mentally incompetent. Consequently, the courts may need to revisit this issue. Additionally, states that do not support the Court's decision may delay passage of corresponding legislation.¹⁵⁰

States will have to grapple with drafting legislation that provides either a broad definition of mental retardation or encompasses

145. See *Juvenile Death Penalty*, *supra* note 145, at B6 (asserting that the similarity between mentally retarded people and youthful offenders is that neither class of individuals can be held fully accountable for their actions); see also John Blume & David Bruck, *Sentencing the Mentally Retarded to Death: an Eighth Amendment Analysis*, 41 ARK. L. REV. 725, 750 (1988) (highlighting that the cognitive disabilities of a mentally retarded person are similar to the inexperience and lack of knowledge that a juvenile possesses).

146. See Charles Lane, *Four Justices Oppose Executing Juveniles*, WASH. POST, Oct. 7, 2002, at A3 (stating that the federal government and sixteen of the thirty-eight states that permit capital punishment ban executions of persons under age eighteen). However, since 1989, the year *Stanford v. Kentucky* was decided, only two states have enacted laws prohibiting such executions. *Id.*

147. See *Roper v. Simmons*, 124 S. Ct. 1171 (2004) (accepting cert on the issue of whether executions of juveniles under the age of eighteen are prohibited by the Eighth Amendment).

148. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (holding that the Court had to define "promptness" for the purposes of a probable cause hearing for a warrantless arrest).

149. See James J. Kilpatrick, *Court's Term Ends - Uneventfully*, TULSA WORLD, July 12, 2002 (revealing Justice Stevens' acknowledgment that determining which offenders are mentally retarded is difficult, and that experts disagree on exact determinations of mental capacity). Justice Stevens' opinion did not clarify a method for the states to follow; rather, he encouraged the states that permit such executions to develop appropriate ways to enforce the constitutional restriction upon executions of the mentally retarded. *Id.*

150. See John Council, *The Penry Predicament How Should Texas Handle Mental Retardation Claims in Capital Cases*, TEX. LAWYER, July 15, 2002, at 1 (stating that Texas is not in a rush to pass legislation in compliance with the *Atkins* decision). State Representative Pete Gallego commented that, based on past experience, he did not expect death penalty reform to be a priority during the legislature's next term. *Id.*

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specific IQ levels. Both approaches have flaws because an overly broad definition could permit too much jury discretion, whereas a specific IQ level could encourage much debate between experts over the defendant's degree of mental retardation.¹⁵¹

Atkins is a significant decision because, unlike *Thompson*, a majority of the Court found a national consensus amongst the legislation of eighteen states.¹⁵² The Court distinguished this seeming inconsistency by noting that the number of states does not establish a national consensus *per se*, but rather the consistency in the direction of change establishes a consensus.¹⁵³ The introduction of this argument forced the Court to consider the number of states, timing of legislation, and the surrounding factors impacting legislation in its national consensus determination. This is a serious departure from past decisions where the Court has sought to incrementally introduce violations of the Eighth Amendment, based on overwhelming evidence of a national consensus.¹⁵⁴

B. Recommendations

With the Supreme Court providing little guidance on how states should implement legislation in compliance with the *Atkins* decision, lawmakers should look to the states that have enacted laws prohibiting the execution of defendants with mental retardation for guidance.¹⁵⁵ States should implement a definition of mental retardation that is in

151. See Hall, *supra* note 54, at 360 (asserting that in order to reduce bias and prejudice in capital punishment cases, juries must be given guidance and objective standards when applying the law in death penalty cases). *But see* Bing, *supra* note 83, at 73 (noting that IQ tests are not always accurate because the testing procedure and the identity of the tester factor into the determination of an IQ). Any bias the tester may have against the subject will affect the applicant's score because intended meaning, as interpreted by the tester, counts in scoring. *Id.*; see also Nese, *supra* note 94, at 376 (reporting that the revised definition of the AAMR still uses IQ scores but emphasizes the importance of culture and environment in properly identifying and classifying mental retardation).

152. See *Atkins*, 536 U.S. at 313-15.

153. See *id.* at 314-15 (noting that sixteen states have established legislation barring executions of the mentally retarded since *Penry*).

154. See *Stanford*, 492 U.S. at 370-71 (holding that fifteen of the thirty-seven states that permit capital punishment did not establish a national consensus); see also *Ford v. Wainwright*, 477 U.S. 399 (1986) (holding that twenty-six states established a national consensus).

155. See Janet Elliott, 'It All Comes Down to Definition'/States Grapple with Implementing Ban on Executing Retarded, HOUS. CHRON., June 22, 2002, at 19 (noting that states have generally agreed to implement the traditional definition of mental retardation in their laws, but disagree on specifics). For example, "Kentucky, Maryland, New Mexico, Nebraska, South Dakota, Tennessee and Washington look to an IQ level of seventy or below as evidence of mental retardation." *Id.* Arkansas, however, sets the level at sixty-five or less. *Id.* Kansas and Colorado use a widely accepted definition of mental retardation but do not specify an IQ level. *Id.*

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accordance with the traditional and widespread definition cited in the opinion.¹⁵⁶ In furtherance of that definition, courts can and should provide further specifications to avoid confusion.¹⁵⁷ A beneficial method would set a specific IQ level at seventy, but also indicate that the IQ test is not the only criterion to examine when establishing a finding of mental retardation.¹⁵⁸

Procedurally, an accused should raise his mental retardation as a factor barring execution before the trial.¹⁵⁹ A judge should have the option of deciding during the pre-trial process if the accused is mentally retarded. However, as a check on the judge, a jury should have sole discretion in ascertaining an accused's mental status during the trial.¹⁶⁰ The states should implement a standard of proof that requires the defendant to prove his or her mental retardation by a

156. See *Atkins*, 536 U.S. at 308 n.3 (citing two definitions provided by the AAMR and the American Psychiatric Association). A characteristic of mental retardation is: "significantly subaverage intellectual functioning" as well as significant limitations in adaptive functioning in at least two skill areas. *Id.* In addition, the onset of mental retardation must occur before age eighteen. *Id.*

157. See, e.g., Marie Price, *Mental Disabilities Ruling Spurs Call for New Hearing*, J. REC. (Okla. City), Sept. 5, 2002 (stating that a defendant in Oklahoma bears the burden of proving he or she is mentally retarded, and the court will not consider mental retardation unless the defendant has an IQ of seventy or below). *But see* Elliott, *supra* note 157, at 19 (noting that including a specific IQ level could lead to a battle among experts because IQ tests have subjective components).

158. See *id.*, *supra* note 83, at 140 (recommending that in addition to an IQ score, "court-appointed professionals should also examine the defendant's history of limitations in adaptive skill areas [when] making a diagnosis").

159. See *id.* at 141 (explaining the three reasons behind this recommendation). "First, if the pre-trial hearing determines that the defendant merits a death penalty exemption, a death-qualified jury [a procedure whereby jury members that are categorically opposed to the death penalty are removed] would not be necessary." *Id.* This would strengthen the jury system because it would allow more people to serve as jurors. *Id.* "Second, even if the defendant loses his claim in a pre-trial hearing, he can still present evidence of his mental retardation at trial." *Id.* This safeguard would be lost if the hearing occurred after the defendant had been convicted. *Id.* at 142. Finally, if the sentencing jury is the only body to determine a suspect's mental retardation, they may incorrectly assume the trial jury already considered the option and choose not to disagree with them. *Id.*

160. See *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (holding that the Sixth Amendment, which guarantees a trial by jury, means that only the jury, not the judge, has the power to decide upon the aggravating factors necessary to sentence a capital defendant to death); see also Elliott, *supra* note 157, at 19 (referring to the Texas Governor's veto of language that would bar executions for the mentally retarded because the proposed law would have enabled a judge to ignore a jury-imposed death sentence if he determined the defendant was mentally retarded). This procedure would undermine the jury system. *Id.*

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preponderance of the evidence, rather than the more difficult standard of clear and convincing evidence.¹⁶¹

In the field of experts, a court should appoint independent psychologists specialized in the area of mental retardation.¹⁶² The court should also require evaluations from more than one mental health professional in order to provide a safeguard against erroneous test results.¹⁶³

CONCLUSION

The Court has approached the scope of the Eighth Amendment's prohibition of "cruel and unusual punishments" by examining the public's evolving standards of decency.¹⁶⁴ An examination of state legislatures is an objective measure of those evolving standards.¹⁶⁵ The Court looks to those legislative enactments to determine whether the states have reached a national consensus that would prohibit a particular punishment as a violation of the Eighth Amendment.¹⁶⁶

By noting dramatic trends in legislation barring executions of persons with mental retardation, the Court, in *Atkins v. Virginia*, correctly determined that the states have reached a national

161. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 60 (2d ed. 1995) (noting that generally a defendant who has the burden of proof for an element of a defense need only prove the facts supporting the claim by a preponderance of the evidence); see also Bing, *supra* note 83, at 144-45 (recognizing that to impose a clear and convincing standard would be unjust given that affirmative defenses invoke lower standards). Imposing a higher degree of proof for an affirmative defense than what the civil law standard requires places a further burden on the mentally retarded defendant. *Id.* This is unfair because mentally retarded defendants already have a high burden given that they are "more susceptible to police coercion and to forced waiver of procedural rights," and they have difficulty communicating effectively with their lawyers. *Id.*

162. See AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, STANDARD 7-3.11 (2d ed. 1986) (noting that standards require professionals providing expert testimony to have substantial training and expertise in mental retardation); see also Bing, *supra* note 83, at 142 (commenting that independent, court-appointed psychologists are more objective and decrease arguments between experts because the personality of the expert becomes less important than the facts of the case).

163. See Bing, *supra* note 83, at 143 (arguing that the appointment of experts provides a safeguard that will lead to a decrease in appeals based on inaccurate determinations of mental retardation, which will then defray the costs of appointing mental health experts).

164. See *Weems v. United States*, 217 U.S. 349, 378 (1910) (indicating that "cruel and unusual" punishments are "not fastened to the obsolete but may acquire new meaning as public opinion becomes enlightened by a humane justice").

165. See *Thompson*, 487 U.S. at 822-23 (remarking that Eighth Amendment analysis has consistently gauged evolving standards of decency through the actions of legislatures, which provide a significant indication of whether a punishment is cruel and unusual).

166. See *Penry*, 492 U.S. at 331 (stating that legislations passed by the states are objective indicators of a national consensus).

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consensus deeming such executions to be in violation of the Eighth Amendment.¹⁶⁷ In addition, the Court recognized that individuals with mental retardation should not receive the death penalty because their executions do not serve the purposes underlying capital punishment.¹⁶⁸ At a time when the nature of capital punishment is highly controversial, the *Atkins* decision marks an important turning point in death penalty jurisprudence. The Court's judgment not only limits the scope of the death penalty on a class of defendants, but it also opens the door to additional constitutional scrutiny of this nation's severest form of punishment.

167. See *Atkins*, 536 U.S. 313-15 (holding that the consistent direction of change, as evidenced in sixteen states adopting prohibitions of executions of persons with mental retardation since *Perry*, establishes a national consensus).

168. See *id.* at 319 (noting that the underlying purpose of the death penalty is retribution and is thus reserved for only the most culpable offenders). Imposing the death penalty on the mentally retarded, however, does not serve this retributive purpose because their intellectual and adaptive skills are so deficient that their ability to understand the nature of their crime is diminished. *Id.* Furthermore, states cannot hope to deter mentally retarded individuals through the death penalty because they sustain cognitive and behavioral impairments that inhibit their capacity to comprehend and control their wrongful behavior. *Id.*