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## Cultural Context Matters: *Terry's "Seesaw Effect"*

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## COMMENT

### Constitutional Law: Retarded Justice: The Supreme Court's Subjective Standards for Capital Punishment of the Mentally Retarded

*[W]e must never forget, that it is a [C]onstitution we are expounding.*

— Chief Justice Marshall<sup>1</sup>

#### *I. Introduction*

For the first time in thirteen years, the U.S. Supreme Court revisited the question of whether capital punishment of mentally retarded criminals is cruel and unusual under the Eighth Amendment in *Atkins v. Virginia*.<sup>2</sup> In a landmark decision, the Court decided to “tighten the noose” on states that wish to impose the death penalty on mentally retarded criminals. However, the rationale behind this holding calls into question whether the Court has overstepped its constitutional boundaries by subjectively legislating for the American people.

This Comment will argue that the Court erred in its decision in *Atkins v. Virginia*, misinterpreting established principles of Eighth Amendment jurisprudence. First, neither the text nor the history of the Eighth Amendment support the Court’s holding that capital punishment for mentally retarded criminals is unconstitutional.<sup>3</sup> Second, in calibrating the evolving standards of decency under the Eighth Amendment, the decision gives little weight to objective indicators that the Court has previously declared to be “[t]he clearest

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1. *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

2. 536 U.S. 304 (2002). The Supreme Court last addressed the issue of capital punishment of mentally retarded criminals in *Penry v. Lynaugh*, 492 U.S. 302 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002). The Court had granted certiorari in *McCarver v. North Carolina*, 532 U.S. 941 (2001). However, the Court remanded that case to state court because of a change in North Carolina’s capital sentencing scheme and factual controversy. Karl Keys, CAP. DEF. WKLY., Sept. 24, 2001, <http://www.capitaldefenseweekly.com/archives/010924.htm>. In *McCarver*, Ernest Paul McCarver and an accomplice were convicted of the ambush and subsequent murder of an elderly man in 1987. The apparent motive for the crime was revenge, as McCarver had suspected that the victim was responsible for the revocation of McCarver’s probation three years earlier. A forensic psychologist testified that McCarver suffered from “borderline intellectual functioning with the intellectual and emotional capacity of a ten- or twelve-year-old.” Paul B. Herbert & Kathryn A. Young, *Capital Punishment and the Mentally Retarded*, AAPL NEWSLETTER, Sept. 2001, at 19-20.

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

and most reliable objective evidence of contemporary [American] values.”<sup>4</sup> Lastly, in prohibiting capital punishment of all mentally retarded criminals, the Court erroneously concluded that no mentally retarded person can have the requisite culpability for the imposition of a death sentence.<sup>5</sup>

Part II of this Comment addresses the Court’s Eighth Amendment jurisprudence by tracing the evolution of the Eighth Amendment itself and then discussing how the element of mental retardation can affect a criminal’s treatment under the Amendment. Part III focuses specifically on *Penry v. Lynaugh*,<sup>6</sup> the Supreme Court’s 1989 decision that established the precedent allowing capital punishment for mentally retarded criminals. Part IV then provides a background of Oklahoma law regarding capital punishment of mentally retarded criminals. Part V provides a statement of the case for *Atkins v. Virginia*, including the facts, holding, and the Court’s reasoning. Part VI analyzes the Court’s holding, and Part VII describes the impact of the holding on federal, state, and Oklahoma law.

## II. The Supreme Court’s Framework for Analysis

### A. Evolution of Eighth Amendment Jurisprudence

The Eighth Amendment to the U.S. Constitution prohibits excessive bail, excessive fines, and cruel and unusual punishment.<sup>7</sup> Although the text of the Eighth Amendment appears simple on its face, the Supreme Court’s interpretation of the exact meaning of the terms “cruel and unusual” has proven to be elusive.<sup>8</sup> Unfortunately for the Court, the Framers of the Constitution left little evidence of their intent for including a clause prohibiting cruel and unusual punishments.<sup>9</sup> Furthermore, legislative history surrounding the adoption of the Eighth Amendment into the Bill of Rights provides minimal guidance to ascertain what is truly meant by the phrase “cruel and unusual punishment.”<sup>10</sup>

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4. *Penry*, 492 U.S. at 331; *see also* *Thompson v. Oklahoma*, 487 U.S. 815, 831 (1988) (plurality opinion); *Enmund v. Florida*, 458 U.S. 782, 788-96 (1982).

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

6. 492 U.S. 302 (1989).

7. U.S. CONST. amend. VIII.

8. RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 51 (2d ed. 2001); *see also* *Trop v. Dulles*, 356 U.S. 86, 100-01 n.32 (1958) (plurality opinion) (stating that it is unclear whether the word “unusual” has any qualitative meaning different from the word “cruel,” and that the Court has failed to draw precise distinctions between punishments that are cruel but not unusual or punishments that are unusual but not cruel).

9. COYNE & ENTZEROTH, *supra* note 8, at 51.

10. *Id.*

Despite this lack of concrete historical evidence, the basis of the Eighth Amendment's ban on cruel and unusual punishment appears to have been developed in seventeenth-century England.<sup>11</sup> It is believed that this terminology originated with the English Declaration of Rights in 1689.<sup>12</sup> The English adopted a clause against cruel and unusual punishments for two reasons. First, they wanted to abolish punishments that were "unauthorized by statute and outside the jurisdiction of the sentencing court."<sup>13</sup> Second, the English sought to reaffirm a social policy against disproportionate criminal penalties.<sup>14</sup>

It is upon these two principles that the U.S. Supreme Court has built its framework for analyzing whether or not certain punishments are cruel and unusual. In *Weems v. United States*,<sup>15</sup> the Court held that a fifteen-year prison sentence for the crime of falsifying a public and official document was unconstitutional on the basis that the Eighth Amendment forbids punishment that is deemed "excessive."<sup>16</sup> In so holding, the Court reasoned that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense."<sup>17</sup> The Court has continued to use this proportionality analysis in determining whether a punishment is disproportionate to the crime committed, and if so, rendering it unconstitutional.<sup>18</sup>

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11. Anthony F. Granucci, "*Nor Cruel and Unusual Punishments Inflicted*": *The Original Meaning*, 57 CAL. L. REV. 839 (1969).

12. *Id.* at 840.

13. *Id.* at 860.

14. *Id.*

15. 217 U.S. 349 (1910).

16. *Id.* at 381.

17. *Id.* at 367. In *Weems*, an officer of the Bureau of Coast Guard and Transportation of the U.S. Government of the Philippine Islands intentionally defrauded the U.S. government by falsifying a cash book that was under his supervision. *Id.* at 357. *Weems* was convicted, sentenced to fifteen years of cadena (imprisonment at hard labor), and ordered to pay a fine of 4000 pesos. *Id.* at 358.

18. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 997-98 (1991). In *Harmelin*, the Supreme Court held that a sentence of life imprisonment without the possibility of parole for possession of 672 grams of cocaine was not "cruel and unusual" within the meaning of the Eighth Amendment. *Id.* at 961, 996. In a concurring opinion, Justice Kennedy restated the concept of proportionality in that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence," rather it only prohibits "'grossly disproportionate'" punishments. *Id.* at 1001 (Kennedy, J., concurring). Justice Kennedy further laid out the common principles that the Court should apply when performing a proportionality analysis. These principles include "the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors." *Id.* (Kennedy, J., concurring); see also *Solem v. Helm*, 463 U.S. 277, 290 (1983) (holding that if the Court finds a punishment to be "grossly

Building on the *Weems* theory of “excessiveness” in judging the constitutionality of punishment, the Court in *Trop v. Dulles*<sup>19</sup> went so far as to state that “[t]he basic concept underlying the Eighth Amendment [was] nothing less than the dignity of man.”<sup>20</sup> The Court recognized that the words of the Eighth Amendment, while imprecise in nature and scope, were not static.<sup>21</sup> Indeed, the Court determined that the meaning of the Eighth Amendment could only properly be derived from the “evolving standards of decency that mark the progress of a maturing society.”<sup>22</sup>

In 1976, the Supreme Court further elaborated on its framework for analyzing Eighth Amendment cruel and unusual punishment issues. In *Gregg v. Georgia*,<sup>23</sup> the Court reasoned that a punishment is excessive only if it “involve[s] the unnecessary and wanton infliction of pain.”<sup>24</sup> According to the Court, the death penalty serves the two principal social purposes of deterrence and retribution.<sup>25</sup> The Court also reiterated its proportionality analysis from *Weems*, reasoning that a punishment is excessive if it was “grossly out of proportion to the severity of the crime.”<sup>26</sup>

One year later, in *Coker v. Georgia*,<sup>27</sup> the Court labeled barbaric and

disproportionate” to the crime, the penalty can be struck down as excessive punishment prohibited by the Eighth Amendment); *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

19. 356 U.S. 86 (1958) (plurality opinion). In *Trop*, a U.S. Army private had escaped during wartime from a stockade, where he was being punished for a previous crime. *Id.* at 87. Although his escape was discovered upon his return to the stockade the next day and he willingly surrendered, he was dishonorably discharged and sentenced to three years of hard labor. *Id.* at 87-88. Additionally, because of his conviction for wartime desertion, he had lost his U.S. citizenship per section 401(g) of the Nationality Act of 1940. *Id.* at 88.

20. *Id.* at 100.

21. *Id.* at 100-01.

22. *Id.* at 101.

23. 428 U.S. 153 (1976) (plurality opinion) (*Gregg I*). In *Gregg*, the petitioner was convicted of two counts of armed robbery and murder and sentenced to death. *Id.* at 160. However, the Georgia Supreme Court vacated the death sentences for the two armed robberies, despite armed robbery being a capital offense under Georgia law, on the basis that the death penalty had rarely been imposed in Georgia for armed robbery. *Gregg v. State*, 210 S.E.2d 659, 667 (Ga. 1974) (*Gregg II*). Using this same reasoning, the U.S. Supreme Court upheld the death sentence for the two murder convictions on the basis that the sentence, when compared to the evidence and sentencing in similar cases, was not excessive or disproportionate to sentences for comparable crimes. *Gregg I*, 428 U.S. at 187.

24. *Gregg I*, 428 U.S. at 173.

25. *Id.* at 183. The Court also recognized another possible purpose for the death penalty as being the incapacitation of dangerous criminals and the consequent prevention of future crimes that they may commit. This is known as the “specific deterrence” rationale. *Id.* at 183 n.28; see also *People v. Anderson*, 493 P.2d 880, 896 (Cal. 1972).

26. *Gregg I*, 428 U.S. at 173.

27. 433 U.S. 584 (1977). In *Coker*, a prisoner who was serving sentences for murder, rape,

excessive forms of meaningless punishment as “nothing more than . . . [a] needless imposition of pain and suffering.”<sup>28</sup> In reaching its conclusion, the *Coker* Court emphasized that its decisions regarding Eighth Amendment issues should not be, or appear to be, derived from the subjective views of the Justices.<sup>29</sup> Rather, the Court emphasized the importance of objective factors such as the attitudes of state legislatures and responses of sentencing juries when handing down Eighth Amendment judgments.<sup>30</sup> In regard to sentencing juries, the Court restated its position in *Gregg* that the jury is a “significant and reliable objective index of contemporary values because it is so directly involved.”<sup>31</sup>

The vital role of the sentencing jury, emphasized by the Court in *Gregg*, was a critical factor in the Court’s reasoning in *Enmund v. Florida*.<sup>32</sup> In reversing a capital sentence, the Court again strongly emphasized the actions of sentencing juries in capital punishment cases.<sup>33</sup> The *Enmund* Court was persuaded by statistics showing that an overwhelming number of juries were unwilling to impose the death penalty on a defendant who was merely an accomplice to a murder.<sup>34</sup> Additionally, the *Enmund* Court held that defendants facing the imposition of the death penalty have a constitutional right to have a sentencing jury render an “individual appraisal” of their criminal culpability.<sup>35</sup>

In the late 1980s, four cases came to the forefront that would set the tone for the Supreme Court’s Eighth Amendment jurisprudence with respect to the

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kidnapping, and aggravated assault, escaped from a Georgia prison, committed armed robbery, and raped an adult woman. *Id.* at 587. He was convicted of the armed robbery and the rape, and sentenced to death for the rape. *Id.* at 591. The Court held that “the Eighth Amendment bars not only those punishments that are ‘barbaric’ but also those that are ‘excessive’ in relation to the crime.” *Id.* at 592. In this case, a sentence of death for the crime of rape was considered “grossly disproportionate and excessive punishment;” thus, it violated the Eighth Amendment. *Id.*

28. *Id.* at 592.

29. *Id.*

30. *Id.*

31. *Id.* at 596.

32. 458 U.S. 782 (1982) (*Enmund I*).

33. *Id.* at 794-95. In *Enmund*, an elderly couple was robbed and fatally shot at their Florida home. *Id.* at 784. *Enmund* did not take part in the actual shooting but instead drove the getaway car. *Id.* He was convicted under Florida law as a constructive aider and abettor and, more importantly, as a principal to first-degree murder. *Id.* at 785. As a principal to first-degree murder, *Enmund* was eligible for a death penalty sentence. *Id.* The Florida Supreme Court found it irrelevant that *Enmund* had not killed anybody, and that he was not even in the house at the time of the killings. *Enmund v. State*, 399 So. 2d 1362, 1370 (Fla. 1981) (*Enmund II*).

34. *Enmund I*, 458 U.S. at 794.

35. *Id.* at 801; see also *Cabana v. Bullock*, 474 U.S. 376, 395-96 (1986).

personal characteristics of defendants. Two of these cases, *Thompson v. Oklahoma*<sup>36</sup> and *Stanford v. Kentucky*,<sup>37</sup> addressed the issue of whether capital punishment of minors is cruel and unusual. Two other cases, *Ford v. Wainwright*<sup>38</sup> and *Penry v. Lynaugh*, required the Court to address the issue of whether capital punishment of mentally challenged criminals was cruel and unusual.

In *Thompson*, the U.S. Supreme Court reversed the Oklahoma Court of Criminal Appeals' decision upholding a capital sentence for a fifteen-year-old individual who had committed murder.<sup>39</sup> A plurality of the Court held that executing a person under the age of sixteen is cruel and unusual punishment within Eighth Amendment principles because there is considerable risk inherent in a death penalty statute that does not establish a minimum age for the punishment.<sup>40</sup> In arriving at this conclusion, the Court reviewed relevant legislation and jury determinations as well as the reasons why a mature society would choose to accept or reject capital punishment for a person who was under sixteen years old at the time that they commit their crimes.<sup>41</sup>

Despite its holding, the Supreme Court was unwilling to conclude that a national consensus existed, even though eighteen of the thirty-seven states

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36. 487 U.S. 815 (1988) (plurality opinion). In *Thompson*, a fifteen-year-old actively participated with three older persons in a brutal murder. *Id.* at 819. According to the evidence, the victim had been shot and his throat, chest, and abdomen had been slashed. Additionally, his body had been chained to a concrete block and thrown into the river. Authorities found the body four weeks later. Each of the four participants in the murder was separately convicted and sentenced to death. *Id.*

37. 492 U.S. 361 (1989). In *Stanford*, the petitioner was a seventeen-year, four-month old individual at the time when he and an accomplice were involved in the robbery, rape, sodomization, and murder of a twenty-year-old gas station attendant. *Id.* at 365. He actually shot the victim in the face and the back of the head at point-blank range. The men ended up only getting away with cigarettes, a couple gallons of fuel, and a small amount of cash. Petitioner explained that he had shot the victim because she lived next door to him and would be able to recognize him. *Id.*

38. 477 U.S. 399 (1986). In *Ford*, the petitioner was convicted of murder and sentenced to death. *Id.* at 401. At the time that he committed the crime, at his trial, and at sentencing there was no sign that petitioner was incompetent. *Id.* However, eight years subsequent to his conviction, petitioner began to gradually experience signs of mental illness, mostly in the form of delusions, which included a belief that he was Pope John Paul III and that he had appointed nine new justices to the Supreme Court of Florida. *Id.* at 402. Numerous evaluations deemed petitioner to have ““a severe, uncontrollable, mental disease which closely resembles “Paranoid Schizophrenia With Suicide Potential”” — a ‘major mental disorder.’” *Id.* at 402-03.

39. *Thompson*, 487 U.S. at 838, *vacating* *Thompson v. State*, 1986 OK CR 130, 724 P.2d 780.

40. *Id.* at 857.

41. *Id.* at 822.

allowing capital punishment had set a minimum age at sixteen.<sup>42</sup> In a concurring opinion, Justice O'Connor reasoned that these statistics were inconclusive because they did not indicate how many juries had been faced with sentencing a juvenile to death, nor did they indicate how many times a prosecutor had exercised discretion by refraining from seeking the death penalty against a juvenile offender.<sup>43</sup> Furthermore, Justice O'Connor voiced her concern that state legislatures such as Oklahoma's had not fully considered what the minimum age for capital punishment ought to be, whereas the legislatures of the states that had a minimum age had fully considered the issue.<sup>44</sup>

In a similar case one year later, the Supreme Court in *Stanford* affirmed the death penalty conviction of a seventeen-year-old who had committed murder.<sup>45</sup> Following its reasoning in *Enmund*, the *Stanford* Court held that in the realm of capital punishment, the Constitution requires individual consideration of each defendant's case.<sup>46</sup> The Court noted that the petitioner had failed to meet his heavy burden of proving that a national consensus existed against capital punishment for criminals under eighteen years of age.<sup>47</sup> The Court further reasoned that the most primary and reliable evidence of a national consensus, and thus an evolving standard of decency, is found in the pattern of federal and state legislation.<sup>48</sup> The *Stanford* Court held that public opinion polls, as well as the views of interest groups and professional organizations, could not provide an adequate foundation on which to base a constitutional decision.<sup>49</sup>

In a decision addressing the issue of mental incapacity, the Supreme Court in *Ford v. Wainwright* reversed a death sentence imposed on a defendant for

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42. *Id.* at 826-27.

43. *Id.* at 850-51 (O'Connor, J., concurring).

44. *Id.* at 849-51 (O'Connor, J., concurring).

45. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989). The Court also decided *Wilkins v. Missouri* as a companion case to *Stanford*. *Id.* at 361. In *Wilkins*, a sixteen-year-old male murdered a convenience store clerk during a robbery. *Id.* at 366. According to the record, Wilkins had intended to rob the store and shoot "whoever was behind the counter" because "a dead person can't talk." *Id.* Wilkins succeeded in his plan, but rather than shooting his victim, he stabbed her in the chest and neck, leaving her to die. *Id.*

46. *Id.* at 375; see also *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (stating that within the criminal justice system, and especially in cases dealing with capital punishment, individualized consideration is a constitutional requirement).

47. *Stanford*, 492 U.S. at 373 (applying the standard set in *Gregg v. Georgia* that "[i]t is not the burden of [the state] to establish a national consensus approving what [its] citizens have voted to do; rather, it is the 'heavy burden' of petitioners to establish a national consensus against it") (citation omitted).

48. *Id.*

49. *Id.* at 377.

a murder that he committed prior to becoming insane.<sup>50</sup> The Court held that imposing capital punishment on criminals unable to comprehend the basis for the punishment or its consequences is cruel and unusual by Eighth Amendment standards.<sup>51</sup> The *Ford* Court reasoned that at the time the Framers drafted the Bill of Rights, capital punishment of the insane was deemed to be cruel and unusual punishment.<sup>52</sup> Furthermore, at that time, no state legislatures allowed capital punishment to be enforced against the insane.<sup>53</sup> Although *Ford* dealt with the insane criminal rather than the mentally retarded criminal, the Court's reasoning served as precedent for its later decisions regarding capital punishment of mentally retarded criminals.

### *B. Mental Retardation and Criminal Punishment*

The most critical aspect in an analysis of the effect that mental retardation has on the culpability of a criminal is that mental retardation and insanity are not one and the same.<sup>54</sup> Insanity can be described in terms of social and legal norms and is not a medical phenomenon.<sup>55</sup> Persons who are declared insane have such a severe mental disorder that they are rendered legally incapacitated and are excused from civil or criminal liability.<sup>56</sup>

Mental retardation, unlike insanity, is not a legal phenomenon and does not prevent a person from having legal capacity; furthermore, it is not even considered a mental illness.<sup>57</sup> A distinction can be made that "[m]entally ill people encounter disturbances in their thought processes and emotions," while

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50. *Ford v. Wainwright*, 477 U.S. 399, 418 (1986).

51. *Id.* at 417.

52. *Id.* at 408.

53. *Id.*

54. Juliet L. Ream, *Capital Punishment for Mentally Retarded Offenders: Is It Morally and Constitutionally Impermissible*, 19 SW. U. L. REV. 89, 122 (1990).

55. COYNE & ENTZEROTH, *supra* note 8, at 268.

56. BLACK'S LAW DICTIONARY 797 (7th ed. 1999).

57. James Ellis & Ruth Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 423-25 (1985). Important consequences for the criminal justice system flow from the difference between mental illness and mental retardation. *Id.* at 423. Many forms of mental illness are "temporary, cyclical, or episodic." *Id.* at 424. In contrast, mental retardation involves a permanent mental impairment. *Id.*; see also 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 (2001); Salvador Uy, *From the Ashes of Penry v. Lynaugh: The Diminished Intent Approach to the Trial and Sentencing of the Mentally Retarded Offender*, 21 COLUM. HUM. RTS. L. REV. 565, 577-78 (1990). "Mental illness and mental retardation are not mutually exclusive conditions; some mentally retarded people are also mentally ill." Ellis & Luckasson, *supra*, at 425. "Dr. Frank Menolascino has estimated that the incidence of mental illness among mentally retarded people is approximately thirty percent." *Id.*

“mentally retarded people have limited abilities to learn.”<sup>58</sup> The American Association of Mental Retardation (AAMR) defines mental retardation as “[a person having] substantial limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.”<sup>59</sup>

To test whether a person has sub-average general intellectual functioning, the standard instrument used is the Wechsler Adult Intelligence Scales test (WAIS-III).<sup>60</sup> This test determines a person’s intellectual quotient (IQ) by adding together the number of points the person attains on various subtests and then converts these points into a scaled score.<sup>61</sup> The test measures intelligence levels ranging from 45 to 155.<sup>62</sup> The average test score is 100; the person scoring 100 is considered to have an average level of “cognitive functioning.”<sup>63</sup>

Although all mentally retarded people share the characteristic of sub-average intellectual functioning, they do not all function at the same level.<sup>64</sup>

58. Ellis & Luckasson, *supra* note 57, at 424.

59. AM. ASS’N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 8 (10th ed. 2002). See also AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th rev. ed.) [hereinafter DSM-IV-TR], which states:

Four degrees of severity can be specified, reflecting the degree of intellectual impairment: Mild, Moderate, Severe, and Profound.

Mild Mental Retardation	IQ Level 50-55 to approximately 70
Moderate Mental Retardation	IQ Level 35-40 to 50-55
Severe Mental Retardation	IQ Level 20-25 to 35-40
Profound Mental Retardation	IQ Level Below 20 or 25

... Mild mental retardation is roughly equivalent to what used to be referred to as the educational category of “educable.” This group constitutes the largest segment (about 85%) of those with the disorder. As a group, people with this level of Mental Retardation typically develop social and communication skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to approximately the sixth-grade level. During their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. Without appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings.

*Id.* § 317.00, at 43.

60. *Atkins v. Virginia*, 536 U.S. 304, 309 n.5 (2002).

61. *Id.*

62. *Id.*

63. *Id.*

64. Morgan Cloud & George B. Shepherd, *Words Without Meaning: The Constitution*,

As a group, mentally retarded people vary considerably in their abilities.<sup>65</sup> A mentally retarded individual can “be anywhere on a continuum from independent to dependent.”<sup>66</sup> Furthermore, there are four degrees of mental retardation, ranging from mild to profound, each based on the level of an individual’s IQ.<sup>67</sup> Overall, mildly mentally retarded people make up an overwhelming majority of the mentally retarded population.<sup>68</sup> These individuals, although classified as mentally retarded, can live successfully within a social community.<sup>69</sup>

It is generally accepted without argument that those mentally retarded people who qualify under the law for criminal responsibility should be tried and punished when they have committed a crime.<sup>70</sup> However, does a criminal’s mental retardation significantly hinder his ability to receive a fair trial? In *Penry v. Lynaugh*, the Court described how the knowledge that a criminal is mentally retarded could both aid and impede a jury’s ability to sentence him for a crime.<sup>71</sup> In one sense, mental retardation can be viewed as a mitigating factor, in that juries may believe that a person’s mental retardation reduces both his criminal capability and culpability.<sup>72</sup> Alternatively, mental retardation can also be viewed as an aggravating factor, in that a jury may consider a person who suffers from impaired intellectual and emotional development to present a greater risk of committing future crimes in society.<sup>73</sup> Because of the imprecise effect that mental retardation has on different instances of criminal activity, the *Penry* Court failed to impose a blanket exclusion of capital punishment for all mentally retarded criminals.

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*Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 509 (2002) (“People with mental retardation are not a homogeneous group. They vary enormously in aptitude, personality, achievement, and temperament.”).

65. Ellis & Luckasson, *supra* note 57, at 427.

66. *Id.*

67. See also *supra* note 59 and accompanying text.

68. *Atkins v. Commonwealth*, 534 S.E.2d 312, 323 (Va. 2000) (“Mild mental retardation (I.Q., 55 to 70) characterizes the largest group of persons with mental retardation, possibly as many as 85 percent of the total.”), *rev’d*, 536 U.S. 304 (2002).

69. David L. Rumley, *A License to Kill: The Categorical Exemption of the Mentally Retarded from the Death Penalty*, 24 ST. MARY’S L.J. 1299, 1323 (1993).

70. *Atkins*, 536 U.S. at 306.

71. See *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

72. *Id.* at 337.

73. *Id.* at 324.

### III. Establishing Precedent — *The Supreme Court's Ruling in Penry v. Lynaugh*

In *Penry*, the Supreme Court held in a 5-4 decision that capital punishment of mentally retarded criminals does not violate the Eighth Amendment's ban on cruel and unusual punishment.<sup>74</sup> The petitioner, Johnny Paul Penry, had been convicted of capital murder and sentenced to death.<sup>75</sup> Although the jury found Penry competent to stand trial, psychological tests confirmed that Penry suffered from mild to moderate mental retardation.<sup>76</sup>

For the purpose of measuring mental retardation, the Supreme Court relied on the American Association of Mental Deficiency's (AAMD) classification system.<sup>77</sup> According to this system, individuals with an IQ ranging from 50-55 to 70 were labeled as "mildly" retarded.<sup>78</sup> Penry's IQ measured between 50 and 63.<sup>79</sup> The State introduced evidence from two psychologists, both of whom concluded that Penry "knew the difference between right and wrong and had the potential to honor the law" at the time he committed the murder.<sup>80</sup> Furthermore, one of the psychologists stated that Penry's low IQ score may, in fact, have "underestimated his [level of] alertness and understanding of what went on around him."<sup>81</sup>

Justice O'Connor's opinion for the Court adhered strictly to established principles of Eighth Amendment jurisprudence. The Court began its analysis by looking to the text and history of the Eighth Amendment and by noting that at common law, only the capital punishment of those considered "idiots" and "lunatics" was prohibited.<sup>82</sup> The Court next determined whether there was

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74. *Id.* at 340. In *Penry*, the petitioner brutally raped, beat, and stabbed the victim with a pair of scissors. *Id.* at 307. He had recently been released on parole after a prior conviction of rape. *Id.* Petitioner confessed to the crime, and although he was diagnosed as mentally retarded, the jury found him competent to stand trial. *Id.* at 307-08. Petitioner's mother testified that he "was unable to learn in school and never finished the first grade." *Id.* at 309. Additionally, petitioner's sister testified that when he was a child, his mother routinely beat him over the head with a belt and locked him in a room for long periods of time without access to a toilet. *Id.*

75. *Id.* at 310-11.

76. *Id.* at 307-08.

77. *Id.* at 308 n.1.

78. *Id.*

79. *Id.* at 307.

80. *Id.* at 309.

81. *Id.*

82. *Id.* at 331-33. Justice O'Connor quoted Blackstone: "[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities . . . [A] total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal

objective evidence of an emerging national consensus against executing mentally retarded criminals. The Court accurately stated that “[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”<sup>83</sup> The Court observed that the fact that only two states had banned the execution of mentally retarded criminals at that time served as insufficient evidence of a national consensus.<sup>84</sup>

The Court also addressed Penry’s argument that public opinion polls and professional organizations strongly supported prohibiting capital punishment for mentally retarded criminals. In keeping with established Eighth Amendment principles, the Court refused to give weight to this evidence because it had not yet materialized into an objective factor — specifically, state-enacted legislation.<sup>85</sup>

Next, the Court concentrated on the issue of whether capital punishment of mentally retarded criminals serves the social purposes of retribution and deterrence for which the death penalty is intended. The rationale behind these dual purposes for capital punishment is that “‘a criminal sentence must be directly related to the personal culpability of the criminal offender.’”<sup>86</sup> Using this rationale, the Court refused to “conclude that all mentally retarded people of Penry’s ability — by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility — inevitably lack . . . the degree of culpability associated with the death penalty.”<sup>87</sup> The Court recognized that while all mentally retarded people share the characteristics of low intelligence and poor adaptive behavior, there are obvious variations among the levels at which the mentally retarded suffer.<sup>88</sup>

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action committed under such deprivation of the senses . . . .” *Id.* at 331 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*24-\*25) (alterations in original).

83. *Id.* at 331.

84. *Id.* at 334. Georgia, GA. CODE ANN. § 17-7-131(j) (Supp. 1988), and Maryland, MD. CODE ANN., art. 27, § 412(f)(1) (1989), were the only two states that had banned capital punishment for a mentally retarded criminal who had committed a capital offense. *Penry*, 492 U.S. at 334.

85. *Penry*, 492 U.S. at 335. Penry pointed to several public opinion polls that indicated a strong public opposition to capital punishment for mentally retarded criminals. This included “a poll taken in Texas” finding “that 86% of those polled supported the death penalty.” *Id.* at 334. Additionally, Penry indicated that the AAMR, the nation’s “oldest and largest organization” that works with mentally retarded people, opposed capital punishment for mentally retarded criminals. *Id.* at 335.

86. *Id.* at 336 (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)).

87. *Id.* at 338.

88. *Id.* Penry argued that the Court should rely on the concept of the “mental age” of the mentally retarded criminal to hold that any criminal with a mental age below seven should not be eligible for capital punishment. *Id.* at 339. The Court rejected this argument and pointed out the various problems associated with using mental age as a determinant in whether a mentally

The Court reasoned that the abilities of mentally retarded people vary greatly “from totally dependent to nearly independent people.”<sup>89</sup>

In conclusion, the Court recognized that mental retardation may, in fact, lessen a person’s culpability regarding a capital offense.<sup>90</sup> However, the Court declined to rule that the Eighth Amendment bars capital punishment of those criminals suffering from similar levels of mental retardation as *Penry* solely on the basis of their mental retardation.<sup>91</sup> Rather, the Court stated that sentencing juries should give credence to a criminal’s mental retardation as a mitigating factor, allowing for the determination of whether capital punishment is an appropriate punishment to be made on a case-by-case basis.<sup>92</sup>

Although the Supreme Court’s holding in *Penry* established that mentally retarded criminals could be sentenced to capital punishment, not all states with death penalty statutes were willing to follow suit. Over the next thirteen years, sixteen states passed legislation barring the execution of mentally retarded criminals.<sup>93</sup> Oklahoma, on the other hand, continued to allow such punishment.<sup>94</sup> Even as the Oklahoma courts complied with *Penry* by allowing juries to consider mental retardation as a mitigating factor,<sup>95</sup> the Oklahoma legislature was not yet willing to exclude all mentally retarded criminals from capital punishment.

#### IV. Oklahoma Law Prior to *Atkins*

The Oklahoma Constitution grants greater protection to its citizens regarding criminal punishment than does the U.S. Constitution. Article II, section 9 of the Oklahoma Constitution forbids the state from imposing any punishment that is “cruel or unusual.”<sup>96</sup> This determination differs from the

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retarded criminal is eligible for capital punishment. *Id.*

89. *Id.* at 338 (quoting AM. ASS’N ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 12 (Herbert J. Grossman ed., 1983)); see also Ellis & Luckasson, *supra* note 57.

90. *Penry*, 492 U.S. at 340.

91. *Id.*

92. *Id.*

93. *Atkins v. Virginia*, 536 U.S. 304, 314-15 (2002) (Kentucky, Tennessee (1990), New Mexico (1991), Arkansas, Colorado, Washington, Indiana, Kansas (1993-1994), New York (1995), Nebraska (1998), South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina (2000-2001)).

94. “Oklahoma has executed several prisoners with developmental disabilities, including Wanda Jean Allen, Robert Eagle Clayton, Cornel Cooks, Charles Foster, and Bobby Ross.” Oklahoma Coalition to Abolish the Death Penalty, *Governor Keating Vetoes House Bill 2635*, [www.ocadp.org/news/2002/HB2635\\_update.html](http://www.ocadp.org/news/2002/HB2635_update.html) (last visited Mar. 11, 2004).

95. *Salazar v. State*, 1998 OK CR 70 ¶ 37, 973 P.2d 315, 327; *Penry*, 492 U.S. at 340.

96. OKLA. CONST. art. II, § 9 (emphasis added); see also *Dodd v. State*, 1994 OK CR 51,

Eighth Amendment to the U.S. Constitution, which requires a punishment to be "cruel *and* unusual" before it is forbidden.<sup>97</sup> Although providing greater protection to those facing criminal punishment in general, Oklahoma has chosen not to afford specific protection to mentally retarded criminals who are facing capital punishment.

In *Lambert v. State*,<sup>98</sup> the Oklahoma Court of Criminal Appeals refused to hold that the Oklahoma Constitution prohibits capital punishment of mentally retarded criminals.<sup>99</sup> Judge Lumpkin, in a concurring opinion, pointed out that it is not the role of the judiciary to determine what type of punishment should be considered cruel or unusual.<sup>100</sup> Rather, it should be a legislative determination.<sup>101</sup> He reasoned that a "judicial branch of government, especially a court sitting only in review of appeals from criminal cases, is ill-equipped to make any determination[s] of public policy."<sup>102</sup> Therefore, according to Judge Lumpkin, the Oklahoma Court of Criminal Appeals has a constitutional duty to apply only those public policies that are codified in the Oklahoma statutes.<sup>103</sup>

In *Hammon v. State*,<sup>104</sup> the Oklahoma Court of Criminal Appeals again

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

98. 1999 OK CR 17, 984 P.2d 221 (*Lambert I*). In *Lambert*, the defendant was convicted of robbery, kidnapping, and murder. *Id.* ¶ 3, 984 P.2d at 226. In 1987, Robert Wayne Lambert and Scott Hain locked their two victims into the trunk of a car, cut the gas line and set the car on fire. *Id.* ¶ 2, 984 P.2d at 226. "The victims died of asphyxiation and thermal burns." *Id.* Lambert claimed that he should not receive the death penalty because he had previously been hospitalized for mental illness and that he did not understand the nature of the charges brought against him. *Lambert v. State*, 1991 OK CR 22, ¶ 5, 808 P.2d 72, 73 (*Lambert II*). However, in a post-examination competency hearing, the trial court found Lambert competent to stand trial. *Lambert I*, ¶ 20, 984 P.2d at 230.

99. *Lambert I*, ¶ 59, 984 P.2d at 238.

100. *See id.* ¶ 11, 984 P.2d at 247 (Lumpkin, J., concurring).

101. *Id.* ¶ 6, 984 P.2d at 245 (Lumpkin, J., concurring); *see also* *Hammon v. State*, 2000 OK CR 7, ¶ 93, 999 P.2d 1082, 1101 ("It would properly be a legislative function, not a judicial function, to determine whether certain mentally retarded persons could be convicted of capital murder and yet be exempt from the death penalty, to decide what level of retardation would be required, and to define a reliable and objective test that would distinguish those persons entitled to that exemption."); *Salazar v. State*, 1998 OK CR 70, ¶ 47, 973 P.2d 315, 329.

102. *Lambert I*, ¶ 11, 984 P.2d at 247 (Lumpkin, J., concurring).

103. *Id.* ¶ 6, 984 P.2d at 245-46 (Lumpkin, J., concurring).

104. 2000 OK CR 7, 999 P.2d 1082 (*Hammon I*). In *Hammon*, the defendant was charged with felony murder in connection with the death of a convenience store employee during a robbery in which he participated. *See id.* ¶ 17, 999 P.2d at 1087-88. At the post-examination competency hearing, Hammon was found competent to stand trial. *Id.* ¶ 47, 999 P.2d at 1094. Forensic psychologists reported that Hammon had an IQ of 67, but he was able to understand the nature of the charges brought against him and was able to adequately assist his lawyer in the preparation of his defense. *Hammon v. State*, 1995 OK CR 33, ¶ 47, 898 P.2d 1287, 1298-99

faced the question of whether to uphold the death sentence of a mentally retarded criminal. Rather than re-examine the court's established precedent that banning capital punishment of the mentally retarded was a legislative decision, the court upheld the conviction.<sup>105</sup> Likewise, in *Pickens v. State*,<sup>106</sup> the court declined to legislate for the citizens of Oklahoma, holding that under current Oklahoma statutes, no legislative action existed that prevented the State from seeking the death penalty against a person on the basis of his mental retardation.<sup>107</sup>

Dissenting in each of the aforementioned cases, Judge Chapel vehemently questioned the decency of Oklahoma society in allowing mentally retarded criminals to be sentenced to death.<sup>108</sup> He focused his reasoning on the equivalent mental age of a retarded criminal, arguing that the execution of a mentally retarded criminal with an IQ of 67, for example, is equivalent to executing a nine-year-old.<sup>109</sup> In *Hammon*, Judge Chapel's push for abolishing capital punishment of the mentally retarded was strengthened by Judge Strubhar, who noted that a growing number of states had prohibited the execution of mentally retarded criminals.<sup>110</sup> Moreover, Judge Chapel concluded that the Oklahoma Court of Criminal Appeals should address this proposition rather than waiting for the legislature to do so.<sup>111</sup>

Recently, there was a strong push within the Oklahoma Legislature to pass a bill that would ban capital punishment of all mentally retarded criminals. In January 2001, legislators drafted Oklahoma House Bill No. 2635. The bill prohibited capital punishment for mentally retarded criminals and outlined the

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(*Hammon II*).

105. *Hammon I*, ¶¶ 91-95, 999 P.2d at 1101.

106. 2001 OK CR 3, 19 P.3d 866, *post-conviction relief granted in part, denied in part*, 2003 OK CR 16, 74 P.3d 601. In *Pickens*, the defendant was charged with first degree murder in connection with the 1990 shooting death of a Sapulpa, Oklahoma convenience store employee. *Id.* ¶ 2, 19 P.3d at 872. *Pickens* had robbed the convenience store and then shot the employee four times. *Id.* *Pickens* was found competent to stand trial, despite the fact that experts estimated that he had the mental capacity of a nine-year-old. *Id.* ¶ 11, 19 P.3d at 887. However, two years later *Pickens* was granted post-conviction relief based on the United States Supreme Court's decision in *Atkins*. 2003 OK CR 16 ¶ 11, 74 P.3d at 604. The Oklahoma Court of Criminal Appeals remanded the case for a jury determination regarding *Pickens*' mental retardation claim. *Id.*

107. *Id.* ¶ 51, 19 P.3d at 883.

108. *Pickens*, ¶¶ 1-13, 19 P.3d at 884-88 (Chapel, J., concurring in part, dissenting in part); *Hammon I*, ¶¶ 1-2, 999 P.2d at 1102-03 (Chapel, J., dissenting); *Lambert I*, ¶¶ 1-11, 984 P.2d at 240-44 (Chapel, J., concurring in part, dissenting in part).

109. *Pickens*, ¶ 11, 19 P.3d at 887 (Chapel, J., concurring in part, dissenting in part).

110. *Hammon I*, ¶ 2, 999 P.2d at 1102 (Stubhar, J., dissenting).

111. *Id.* ¶ 2, 999 P.2d at 1102-03 (Chapel, J., dissenting).

procedure to determine whether a person was mentally retarded.<sup>112</sup> This procedure would include a pretrial hearing at which time the defendant would have to prove by clear and convincing evidence that he has “significantly sub-average general intellectual functioning, significant limitations in adaptive functioning, and that mental retardation was manifested before the age of eighteen.”<sup>113</sup> Despite successfully passing both the House and the Senate, Oklahoma Governor Frank Keating vetoed the bill on June 7, 2002.<sup>114</sup> In support of his veto, Governor Keating stated that Oklahoma “already has laws which protect developmentally disabled persons from being executed.”<sup>115</sup> Governor Keating’s statement finds support in the Oklahoma Court of Criminal Appeal’s decisions, which hold that if a person is unable to appreciate the wrongfulness of his or her acts, such person cannot be convicted or punished for a crime.<sup>116</sup> The sentiments expressed by those in support of House Bill 2635 came to fruition in *Atkins*, a case that the U.S. Supreme Court decided less than one month after Governor Keating vetoed the bill.

### V. Statement of the Case — *Atkins v. Virginia*

#### A. Facts

On August 16, 1996, Daryl Renard Atkins “spen[t] [his] day drinking alcohol and smoking marijuana.”<sup>117</sup> Around midnight, Atkins met up with William Jones.<sup>118</sup> The two men, armed with semiautomatic handguns, intended to rob a customer at a convenience store.<sup>119</sup> It was at the convenience store that Atkins and Jones found their victim, Eric Nesbitt.<sup>120</sup> The men first robbed Nesbitt of the money that he had on his person and then forced him to

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112. H.B. 2635, 48th Leg., 2d Sess. (Okla. 2001). See Appendix A for the full text of the bill, as introduced by Representative Opio Toure of Oklahoma City.

113. *Id.* § 1(c).

114. Oklahoma Coalition to Abolish the Death Penalty, *supra* note 94. “House Bill 2635 passed by a 53-46 vote in the House on May 23, [2002] and by a 25-16 vote in the Senate on May 24, [2002].” *Id.*

115. [http://www.ocadp.org/news/2002/HB2635\\_update.html](http://www.ocadp.org/news/2002/HB2635_update.html) (last visited Mar. 11, 2004).

116. *Hammon I*, 2000 OK CR 7, ¶ 92, 999 P.2d at 1101; *Davis v. State*, 1995 OK CR 5, ¶ 13, 888 P.2d 1018, 1022; *Smith v. State*, 1982 OK CR 77, ¶ 12, 646 P.2d 1285, 1288; see also 21 OKLA. STAT. § 152 (2001). In this instance, it appears that Governor Keating, like many, has erroneously assumed that all mentally retarded individuals suffer from a mental illness. See *supra* note 54 and accompanying text.

117. *Atkins v. Virginia*, 536 U.S. 304, 338 (2002) (*Atkins I*) (Scalia, J., dissenting).

118. *Id.* at 307.

119. *Id.* at 307, 338.

120. *Id.* at 338.

drive to an automatic teller machine where they compelled him to withdraw an additional \$200.<sup>121</sup>

Despite Nesbitt's repeated pleas to be released unharmed, Atkins and Jones drove him to a deserted area where Atkins ordered Nesbitt out of the vehicle.<sup>122</sup> Nesbitt had only walked a few feet from the vehicle when Atkins shot him eight times.<sup>123</sup> Nesbitt was hit "in the thorax, chest, abdomen, arms, and legs."<sup>124</sup> He died at the scene.<sup>125</sup>

### B. Procedural History

At trial, Atkins "was convicted of abduction, armed robbery, and capital murder."<sup>126</sup> He was sentenced to death.<sup>127</sup> During the penalty phase of the trial, the State of Virginia focused upon "victim impact evidence" to prove both the "vileness of the offense" and the risk of Atkins' future dangerousness to society.<sup>128</sup> The State introduced to the jury that Atkins had sixteen prior felony convictions, the majority of which were violent crimes.<sup>129</sup> Additionally, four of his previous victims testified as to the graphic nature of his "violent tendencies."<sup>130</sup>

The defense relied upon evidence from a forensic psychologist, who stated that Atkins' full-scale IQ score of 59 categorized him as being "mildly mentally retarded."<sup>131</sup> The psychologist described Atkins as a "slow learner,"

121. *Id.* at 307, 338.

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

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

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

125. *Atkins v. Commonwealth*, 510 S.E.2d 445, 450 (Va. 1999), *rev'd*, 536 U.S. 304 (2002).

126. *Id.* at 307; *see* VA. CODE ANN. § 18.2-31 (Michie Supp. 2003) (defining capital murder and punishment).

127. *Atkins I*, 536 U.S. at 309; *see* VA. CODE ANN. § 19.2-264.2 (Michie 2000) (specifying "[c]onditions for imposition of the death sentence").

128. *Atkins I*, 536 U.S. at 308. To prove the vileness of the offense, the State introduced into evidence pictures of the deceased and an autopsy report. *Id.* In proving the future dangerousness factor, "the State relied on Atkins' prior felony convictions as well as the testimony [from] victims" of Atkins' past crimes. *Id.*

129. *Id.* at 339 (Scalia, J., dissenting). Atkins had been convicted of robbery, attempted robbery, abduction, use of a firearm and maiming. *Id.* (Scalia, J., dissenting).

130. *Id.* (Scalia, J., dissenting). One victim described how Atkins hit him over the head with a beer bottle. Another victim described how Atkins used his gun to slap another in the face. A third victim told the story of Atkins hitting her in the head with a gun, which knocked her to the ground. Atkins then proceeded to help her up, but only so that he could shoot her in the stomach. *Id.* (Scalia, J., dissenting).

131. *Id.* at 308-09. Atkins "had a verbal IQ score of 64 and a performance IQ score of 60." *Atkins v. Commonwealth*, 534 S.E.2d 312, 319 n.8 (Va. 2000), *rev'd*, 536 U.S. 304 (2002). It should also be pointed out that Dr. Nelson, who administered the IQ test to Atkins, stated that

his score would likely be two to three points higher if Atkins had not been suffering from

whose “capacity . . . to conform his conduct to the law” was “impaired.”<sup>132</sup> The psychologist further stated that Atkins’ limited mental capacity “had been a consistent feature throughout his life.”<sup>133</sup>

However, a second psychologist testified that no evidence outside of Atkins’ IQ score indicated that he ““was in the least bit mentally retarded.””<sup>134</sup> Instead, the psychologist deemed Atkins to be suffering from antisocial personality disorder.<sup>135</sup> Consequently, the jury sentenced Atkins to death.<sup>136</sup>

On appeal to the Supreme Court of Virginia, Atkins argued that because he was mentally retarded, he could not be sentenced to death.<sup>137</sup> A majority of the court was not persuaded by this argument and denied Atkins’ request to have his death sentence commuted to life imprisonment.<sup>138</sup> The court was unwilling to reduce the sentence to life imprisonment merely because Atkins suffered from a mild degree of mental retardation.<sup>139</sup> The U.S. Supreme Court granted certiorari<sup>140</sup> to address the constitutionality of capital punishment for the mentally retarded in light of stronger evidence of a national consensus against such punishment than was present in *Penry*.<sup>141</sup>

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depression. *Id.* at 319.

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

133. *Id.* at 309 n.5. Dr. Nelson also testified that Atkins’ IQ score of 59 was “not an ‘aberration, malingered result, or invalid test score.’” *Id.*

134. *Id.* at 338-39 (Scalia, J., dissenting).

135. *Id.* at 309. An individual suffering from antisocial personality disorder “engages in deviant behaviour with lack of remorse.” Antisocial Personality Disorder, <http://medical-dictionary.com> (Jan. 13, 1998). An expert for the Commonwealth of Virginia, Dr. Stanton Samenow, based his conclusion on two interviews with Daryl Atkins, a review of Atkins’ high school records, and interviews with correctional staff. *Id.* at 309 n.6. He accredited Atkins’ extremely poor academic performance “to the fact that he ‘is a person who chose to pay attention sometimes, not to pay attention others, and did poorly because he did not want to do what he was required to do.’” *Id.* at 310 n.529. However, Dr. Samenow did not administer an intelligence test. *Id.* at 309 n.6.

136. *Id.* at 309; *see also* *Atkins v. Commonwealth*, 534 S.E.2d 312, 321 (Va. 2000) (indicating that the court was “not willing to commute Atkins’ sentence of death to life imprisonment merely because of his IQ score”), *rev’d*, 536 U.S. 304 (2002) (*Atkins II*).

137. *Atkins I*, 536 U.S. at 318.

138. *Id.* at 321.

139. *See id.*

140. *Atkins v. Virginia*, 534 U.S. 809 (2001).

141. *See Atkins I*, 536 U.S. at 307. The Supreme Court had granted certiorari in *McCarver v. North Carolina*, but subsequently remanded the case to state court. *See supra* note 2 and accompanying text.

### C. Holding

The U.S. Supreme Court, in a 6-3 decision, held that mentally retarded criminals should be categorically excluded from capital punishment.<sup>142</sup> The Court stated that it did not believe that the dual purposes of the death penalty — deterrence and retribution — could be served through the execution of mentally retarded criminals.<sup>143</sup> In reaching this conclusion, the Court examined the “standards of decency” model for criminal punishment encompassed in the Eighth Amendment and the evolution of those standards.<sup>144</sup>

### D. Majority Reasoning

The Court began its Eighth Amendment analysis by stating that the constitutional limitation on criminal punishment “prohibits all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.”<sup>145</sup> According to the majority, the determination of “excessiveness” must be made in the context of society’s “evolving standards of decency.”<sup>146</sup> The Court explained that a proportionality review of the evolving standards of decency should be derived from objective factors, the most clear and reliable being enacted legislation.<sup>147</sup>

The Court next embarked upon a review of the various state legislatures that have addressed the appropriateness of inflicting the death penalty upon mentally retarded criminals.<sup>148</sup> The Court also noted that in 1988, when Congress reinstated the federal death penalty, it specifically prohibited the execution of mentally retarded criminals.<sup>149</sup> Furthermore, Congress retained this provision when it expanded the federal death penalty law in 1994.<sup>150</sup>

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142. *Atkins*, 536 U.S. at 318 (The majority consisted of Justices Stevens, O’Connor, Kennedy, Souter, and Ginsburg. Dissenting from the majority were Justices Scalia, Rehnquist, and Thomas.).

143. *Id.* at 321.

144. *Id.* at 311-17.

145. *Id.* at 311 n.7.

146. *Id.* at 311-12.

147. *Id.* at 312; *see also* *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991); *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002); *Rummell v. Estelle*, 445 U.S. 263, 274-75 (1980).

148. *Atkins I*, 536 U.S. at 313-17.

149. *Id.* at 314; *see* Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(*l*) (2000) (stating that “[a] sentence of death shall not be carried out upon a person who is mentally retarded”).

150. *Atkins I*, 536 U.S. at 314 n.10; *see* Federal Death Penalty Act of 1994, 18 U.S.C. § 3596(c) (2000).

The majority reasoned that because of the Court's decision in *Penry* and the subsequent federal death penalty legislation by Congress, many state legislatures had enacted statutes forbidding capital punishment of the mentally retarded.<sup>151</sup> Rather than focusing on the mere number of states that had enacted such legislation, the majority opted to examine "the consistency of the direction of change."<sup>152</sup> The majority further reasoned that because more and more states were enacting legislation against executing the mentally retarded, there was "powerful evidence" supporting the conclusion that "society views mentally retarded [criminals] as categorically less culpable than the average criminal."<sup>153</sup>

Having established its belief that a national consensus had developed against executing the mentally retarded, the majority next examined whether imposing capital punishment on mentally retarded criminals serves the dual purposes of the death penalty: deterrence and retribution.<sup>154</sup> The majority then analyzed the AAMR's definition of mental retardation and reasoned that because of their diminished capacity, mentally retarded people often act on impulses rather than through predetermined planning and are extremely susceptible to following the lead of others in a group setting.<sup>155</sup> The Court reasoned that although they may not be more likely to actually engage in criminal conduct than people of average intelligence, mentally retarded individuals are not able to control their impulses to commit crime.<sup>156</sup> The majority stated that this fact should not spare mentally retarded people from criminal punishment.<sup>157</sup> However, the Court stated that this fact demonstrated that a mentally retarded criminal does not have the personal culpability of an ordinary person who commits a crime.<sup>158</sup>

The majority initially reasoned that this lack of personal culpability prevents a mentally retarded criminal from actually understanding the "retribution" aspect of being sentenced to death.<sup>159</sup> Therefore, the Court held that one social purpose of the death penalty, retribution, is not applicable in the case of a mentally retarded criminal.<sup>160</sup> Second, the majority examined

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151. *Atkins I*, 536 U.S. at 314; *see supra* note 93.

152. *Atkins I*, 536 U.S. at 315.

153. *Id.* at 315-16. In further support of its conclusion, the majority "noted that the legislatures that have addressed [this] issue have voted overwhelmingly in favor of the prohibition." *Id.* at 316.

154. *Id.* at 319.

155. *Id.* at 318; *see supra* note 59.

156. *Atkins I*, 536 U.S. at 318.

157. *Id.*

158. *Id.*

159. *Id.* at 319.

160. *Id.*

whether the death penalty serves as a deterrent to a mentally retarded person committing a serious crime.<sup>161</sup> Once again, the majority pointed out that “the same cognitive and behavioral impairments that make [a] mentally retarded [criminal] less . . . culpable also make [him] less likely” to understand the severity of execution as a form of punishment.<sup>162</sup> Therefore, the Court held that the second social purpose of the death penalty — deterrence — also did not apply to mentally retarded criminals.<sup>163</sup>

### *E. Dissent Reasoning*

Chief Justice Rehnquist’s dissent, joined by Justices Scalia and Thomas, focused on the majority’s determination that a national consensus exists against administering capital punishment to the mentally retarded.<sup>164</sup> To the dissenters, it appeared that the majority had arrived at its opinion through a subjective rather than objective analysis of the evolving standards of decency. Chief Justice Rehnquist strongly criticized the majority’s decision to consider foreign laws, the views of professional and religious organizations, and opinion polls in determining the modern standards of decency in the United States.<sup>165</sup>

The dissenters argued that in determining “whether a [criminal] punishment is ‘cruel and unusual’ under the evolving standards of decency, [the Court had] emphasized that legislation is ‘the clearest and most reliable objective evidence of contemporary values.’”<sup>166</sup> Furthermore, Chief Justice Rehnquist stated that only two sources — the work product of legislatures and sentencing-jury determinations — ought to be given weight in gauging the American standards of decency for the purpose of Eighth Amendment jurisprudence.<sup>167</sup>

Chief Justice Rehnquist’s dissent also attacked the majority’s use of opinion poll data to determine evolving standards of decency.<sup>168</sup> He pointed

161. *Id.* at 319-20.

162. *Id.* at 320.

163. *Id.*

164. *Id.* at 321 (Rehnquist, C.J., dissenting).

165. *Id.* at 322 (Rehnquist, C.J., dissenting); *see also* *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989) (“[P]etitioners seek to demonstrate [a consensus against capital punishment for sixteen- and seventeen-year-old offenders] through other indicia, including public opinion polls, the views of interest groups, and the positions adopted by various professional associations. We decline the invitation to rest constitutional law upon such uncertain foundations.”).

166. *Atkins I*, 536 U.S. at 322-23 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)) (Rehnquist, C.J., dissenting); *see also* *McClesky v. Kemp*, 481 U.S. 279, 300 (1987).

167. *Atkins I*, 536 U.S. at 322-24 (Rehnquist, C.J., dissenting); *see, e.g.*, *Enmund v. Florida*, 458 U.S. 782, 793-94 (1982).

168. *Atkins I*, 536 U.S. at 325-26 (Rehnquist, C.J., dissenting).

out the numerous possibilities for error that exist through the use of such sampling techniques.<sup>169</sup> Additionally, he observed that none of the opinion polls divulged the target survey population or the sampling techniques used in the survey.<sup>170</sup> In conclusion, Justice Rehnquist condemned opinion poll evidence as highly unreliable in establishing evolving standards of decency.<sup>171</sup>

Justice Scalia's dissent centered on his belief that the majority's opinion had no basis in the text or history of the Eighth Amendment and likewise no support in "current social attitudes" regarding the imposition of capital punishment on mentally retarded criminals.<sup>172</sup> Justice Scalia noted that under the Court's Eighth Amendment jurisprudence, a punishment is cruel and unusual if it either (1) would have been considered cruel and unusual at the time of the adoption of the Bill of Rights or (2) is inconsistent with modern "standards of decency," as determined through objective indicators.<sup>173</sup>

Justice Scalia began his analysis by pointing out that the majority never argued that execution of the mildly mentally retarded would have been deemed cruel and unusual in 1791.<sup>174</sup> Next, he analyzed the second factor in Eighth Amendment jurisprudence — the evolving standards of decency. He noted that until this decision, the Court had focused on objective factors rather than the subjective views of the Justices in determining the modern standards of decency.<sup>175</sup>

In reasoning that the majority failed to base its decision on objective factors, Justice Scalia emphasized that less than half (47%) of the thirty-eight states that permit capital punishment have enacted legislation barring the execution of the mentally retarded.<sup>176</sup> He then discredited the majority's

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169. *Id.* at 326 (Rehnquist, C.J., dissenting); *see infra* note 237.

170. *Atkins I*, 536 U.S. at 326 (Rehnquist, C.J., dissenting).

171. *Id.* at 328 (Rehnquist, C.J., dissenting). Furthermore, Chief Justice Rehnquist found the use of such opinion poll data to be a serious mistake when performing an analysis for the establishment of a national consensus. Accordingly, he clearly demonstrated his disapproval by not only writing a dissenting opinion in *Atkins*, but also by failing to state that he "respectfully" dissented. *See id.* (Rehnquist, C.J., dissenting).

172. *Id.* at 337-38 (Scalia, J., dissenting).

173. *Id.* at 339-40 (Scalia, J., dissenting).

174. *Id.* at 341 (Scalia, J., dissenting).

175. *Id.* (Scalia, J., dissenting); *see also* *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989); *Enmund v. Florida*, 458 U.S. 782, 788 (1982); *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

176. *Atkins I*, 536 U.S. at 342 (Scalia, J., dissenting). Justice Scalia claimed that of the eighteen states that have barred the execution of mentally retarded criminals, over half of the states have passed the legislation within the last eight years. *Id.* at 344 (Scalia, J., dissenting). Justice Scalia argued that, given the infancy of the legislation in the respective states, the states have had insufficient experience under the statutes and thus are not capable of knowing whether the legislation is a sensible law. *Id.* (Scalia, J., dissenting). Justice Scalia noted that "[i]t is 'myopic to base sweeping constitutional principles upon the narrow experience of [a few]

argument that it is not just the number of states that have enacted legislation, but instead that the important evidence is the direction of the change.<sup>177</sup>

Justice Scalia concluded his dissent by criticizing the majority's reasoning that the death penalty is an excessive punishment for mentally retarded criminals.<sup>178</sup> He stated, "[S]urely culpability, and deservedness of the most severe retribution, depends not merely . . . upon the mental capacity of the criminal . . . but also upon the depravity of the crime . . ."<sup>179</sup> Furthermore, Justice Scalia questioned why a mentally retarded criminal who does know right from wrong cannot be adequately assessed by a sentencer, who can then determine whether the criminal's "retardation reduces his culpability enough to exempt him from the death penalty."<sup>180</sup>

## VI. Analysis

### A. No Support in the Text or History of the Eighth Amendment

The text of the Eighth Amendment to the U.S. Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>181</sup> As is evident, the actual text of the Amendment does not provide any analytical framework for assessing whether capital punishment for mentally retarded criminals is constitutional. However, it must be noted that its text does not on its face prohibit punishment of those individuals who are mentally retarded, nor does it expressly prohibit capital punishment as a constitutional form of punishment. Therefore, an analysis of this issue relies on both the interpretation of the constitutional language by the Supreme Court and the intent of the Framers who drafted the Bill of Rights.

In its interpretation of the terms "cruel and unusual punishment," the Supreme Court has categorized punishment as cruel and unusual if it would have been considered cruel and unusual at the time the Bill of Rights was adopted or if it violates the modern standards of decency that mark the progress of a maturing society.<sup>182</sup> This section of the analysis will focus on the forms of punishment that were considered cruel and unusual at the time of

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years." *Id.* (quoting *Coker*, 433 U.S. at 614 (Burger, C.J., dissenting)) (Scalia, J., dissenting).

177. *Atkins I*, 536 U.S. at 344 (Scalia, J., dissenting). For more on consistency-of-the-direction-of-change argument, see *infra* Part V.B.

178. *Id.* at 349-52 (Scalia, J., dissenting).

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

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

181. U.S. CONST. amend. VIII.

182. *Ford v. Wainwright*, 477 U.S. 399, 405 (1986); see also *Trop v. Dulles*, 356 U.S. 86,

101 (1958) (plurality opinion).

the Bill of Rights, while section B will address the modern standards of decency.

In *Atkins*, the Court failed to establish any argument in support of the view that capital punishment of “mildly” mentally retarded criminals would have been considered “cruel and unusual” to the Framers of the Constitution, who drafted the Bill of Rights in 1791.<sup>183</sup> At common law, those people deemed to be “severely or profoundly” mentally retarded were labeled “idiots” and as such were not held accountable for their criminal actions.<sup>184</sup> An idiot was defined as an individual who had a total lack of reason or understanding or an inability to distinguish between good and evil.<sup>185</sup> The IQ of an idiot was usually found to be at or below 25, which under modern standards would be considered severe mental retardation.<sup>186</sup> It was these “idiots” for whom the common law barred the infliction of capital punishment, mainly on the basis that they were unable to recognize the wrongfulness in their actions.<sup>187</sup> According to Blackstone, “a total idiocy . . . excuses from the guilt, and of course from the punishment, of any criminal action committed when under such depravation of the senses.”<sup>188</sup> This common law prohibition against punishing idiots became the basis for the modern day insanity defense.<sup>189</sup> *Atkins*, however, did not raise the defense of insanity, rendering the presumptive conclusion that *Atkins*’ counsel did not feel that he was in any way insane.

The quandary that developed at common law was in determining whether an individual was actually an “idiot,” and thus not subject to criminal punishment, or whether he was merely an “imbecile.”<sup>190</sup> An imbecile suffered from a lesser form of mental retardation in that the individual actually

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183. *Atkins I*, 536 U.S. at 340 (Scalia, J., dissenting).

184. 4 WILLIAM BLACKSTONE, COMMENTARIES \*24-\*25; see also *Penry v. Lynaugh*, 492 U.S. 302, 331-33 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

185. *Penry*, 492 U.S. at 333; see AM. ASS’N ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 179 (Herbert J. Grossman ed., 1983) [hereinafter CLASSIFICATION].

186. CLASSIFICATION, *supra* note 185, at 9.

187. *Penry*, 492 U.S. at 333; see also *Ford*, 477 U.S. at 422 (noting that someone who is “unaware of the punishment they are about to suffer and why they are about to suffer it” cannot be executed).

188. 4 BLACKSTONE, *supra* note 184, at \*25.

189. *Penry*, 492 U.S. at 332. Today, the defense of insanity “generally includes ‘mental defect’ as well as ‘mental disease’ as part of the legal definition of insanity.” *Id.*; see, e.g., MODEL PENAL CODE § 4.01 (1985) (“A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.”) (alteration in original).

190. *Atkins v. Virginia*, 536 U.S. 304, 340-41 (2002) (*Atkins I*).

possessed some intellectual capacity, albeit less than the average citizen.<sup>191</sup> The line of demarcation that developed focused on

where a person shall be said to be so far deprived of his sense and memory as not to have any of his actions imputed to him [idiot]: or where notwithstanding some defects of this kind he still appears to have so much reason and understanding as will make him accountable for his actions [imbecile].<sup>192</sup>

Given the historical context of what was considered to be cruel and unusual punishment for mentally deficient criminals, it can be concluded that an individual with similar mental characteristics as Daryl Atkins would not have been considered an idiot under the common law. First, Atkins' IQ score of 59 would categorize him as "mildly" mentally retarded, placing him significantly above the IQ score of 25, which qualified an individual for "idiot" status under the common law. Upon examining Atkins, a clinical psychologist determined that he displayed "absolutely no evidence other than the IQ score . . . indicating that [petitioner] was in the least bit mentally retarded."<sup>193</sup> In fact, the psychologist testified that Atkins was "'of average intelligence, at least."<sup>194</sup>

The most important evidence take from Atkins' psychological examinations showed that he did, in fact, comprehend the wrongfulness of his actions.<sup>195</sup> Psychologists testified that his appreciation for "the criminal nature of his conduct was impaired, but not destroyed,"<sup>196</sup> making it clear that Atkins possessed the necessary mental capability to conform to the law. Atkins knew right from wrong when he planned the robbery of a convenience store patron, kidnapped the patron, and executed his innocent victim. Therefore, under the common law, it is more than likely that Atkins would have been labeled an imbecile and would have been subject to the imposition of capital punishment for the murder that he committed.

### *B. Lack of Objectivity in the Standards of Decency*

Aside from what would be considered cruel and unusual punishment at the time the Bill of Rights was drafted, the Supreme Court's Eighth Amendment jurisprudence requires that criminal punishments be analyzed in the context

191. ISAAC RAY, *MEDICAL JURISPRUDENCE OF INSANITY* 91 (W. Overholser ed., 1962).

192. ANTHONY HIGHMORE, *A TREATISE ON THE LAW OF IDIOCY AND LUNACY* 200 (1807).

193. *Atkins I*, 536 U.S. at 338-39 (alteration in original) (Scalia, J., dissenting).

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

195. *Atkins v. Commonwealth*, 534 S.E.2d 312, 319 (Va. 2000), *rev'd*, 536 U.S. 304 (2002) (*Atkins II*).

196. *Id.*

of the “evolving standards of decency that mark the progress of a maturing society.”<sup>197</sup> In determining these evolving standards, the Court has vehemently stressed the importance of using objective indicators.<sup>198</sup> The Court has clearly stated that in a democratic society, legislation passed by elected representatives and sentencing juries consisting of American citizens should be the sole factors considered in analyzing the modern standards of decency.<sup>199</sup>

However, in *Atkins*, the majority paid little homage to this established principle and instead subjectively reasoned that Atkins could not constitutionally be sentenced to capital punishment by the State of Virginia. The majority made this decision despite the fact that a jury of American citizens had declared Atkins to be competent to stand trial and capable of understanding his punishment. Furthermore, a jury had determined that his mild mental retardation was not sufficient to spare Atkins from a death sentence.<sup>200</sup>

In assessing the standards of decency under the Eighth Amendment, it is imperative that the Court ““be informed by objective factors to the maximum possible extent”” and that its decisions ““not be, or appear to be, merely the subjective views of individual Justices.””<sup>201</sup> A true determination of which standards have evolved and how far they have evolved can only be made by society itself, as a whole, in the form of legislation. The federal system within which the United States operates dictates that the Court’s deference to the views of the American people is not only appropriate, it is mandated.<sup>202</sup> The question then becomes what evidence is most representative of the views of society. According to established Eighth Amendment jurisprudence, an analysis into the standards of decency for a maturing society must begin with statutes passed by society’s elected representatives, for it “will rarely if ever be the case that the Members of this Court will have a better sense of the

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197. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

198. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002); *see Coker v. Georgia*, 433 U.S. 584, 593-97 (1977).

199. *Enmund v. Florida*, 458 U.S. 782, 794-96 (1982); *see also Thompson v. Oklahoma*, 487 U.S. 815, 831 (1988) (plurality opinion).

200. *Atkins II*, 534 S.E.2d at 314.

201. *Atkins v. Virginia*, 536 U.S. 304, 341 (2002) (quoting *Coker*, 433 U.S. at 592) (*Atkins I*).

202. *Stanford v. Kentucky*, 492 U.S. 361, 369-70 (1989); *see also Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (plurality opinion) (“The deference we owe to the decisions of the state legislatures under our federal system is enhanced where the specification of punishments is concerned . . .”) (citation omitted).

evolution in views of the American people than do their elected representatives."<sup>203</sup>

In determining whether a punishment is "cruel and unusual" under the Eighth Amendment, the voice of the American people as evidenced through state legislation has been declared by the Court to be "[t]he clearest and most reliable objective evidence of contemporary values."<sup>204</sup> The Court has also acknowledged that "'in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."<sup>205</sup> Additionally, specifications of punishment have long been held to be "peculiarly questions of legislative policy," not determinations made by a court making an ad hoc judgment concerning appropriate punishment for a criminal.<sup>206</sup>

Despite this clear and convincing preference for objectiveness, the *Atkins* court chose to infuse a subjective element into its determination of the evolving standards of decency. As a basis for its decision, the Court concluded that a national consensus existed against capital punishment of mentally retarded criminals.<sup>207</sup> According to the majority, "cases involving a [national] consensus" require the individual Justices to pass judgment on the consensus.<sup>208</sup> Therefore, the Court first reviewed the basis of the national consensus and then gave its reasons for agreeing or disagreeing with the findings.<sup>209</sup> This approach unashamedly rid the analysis of its objectivity and rendered the Court as final arbitrator.

The Court's conclusion that capital punishment of mentally retarded criminals is cruel and unusual resulted primarily from the fact that eighteen states had recently "passed laws limiting the death eligibility of certain defendants based on mental retardation alone."<sup>210</sup> However, given that thirty-eight states allowed capital punishment, these eighteen states represented a mere 47%, not a consensus by any stretch.<sup>211</sup> Even more astonishing than a

203. *Thompson*, 487 U.S. at 865 (Scalia, J., dissenting).

204. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

205. *Gregg v. Georgia*, 428 U.S. at 175-76 (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)).

206. *Gore v. United States*, 357 U.S. 386, 393 (1958); *see also* *Robinson v. California*, 370 U.S. 660, 664-65 (1962); *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (plurality opinion).

207. *Atkins v. Virginia*, 536 U.S. 304, 315-16 (2002) (*Atkins I*).

208. *Id.* at 313.

209. *Id.* at 304.

210. *Id.* at 322 (Rehnquist, C.J., dissenting) (Georgia, Maryland, Kentucky, Tennessee, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, South Dakota, Arizona, Connecticut, Florida, Missouri, North Carolina).

211. *Id.* at 342 (Scalia, J., dissenting). The majority in *Atkins* failed to sufficiently argue that

47% “consensus” was the fact that only seven states that had capital punishment had banned its imposition on *all* mentally retarded criminals.<sup>212</sup> Consensus? Absolutely not. Given these statistics, it can be concluded that the national consensus the majority claimed existed against capital punishment for *all* mentally retarded criminals was supported by *only 18%* of the states that have capital punishment. The Court’s arrival at such a subjectively based conclusion can only be described as a feeble attempt at arithmetic manipulation and a blatant disregard for the concept of consensus.

Included in the Court’s attempt at fabricating a national consensus was its awkward analysis of the “*margins* by which state legislatures have enacted bans on execution of the retarded.”<sup>213</sup> According to the Court, it is relevant to an analysis of a national consensus to weigh not only how many states have passed a certain form of legislation, but also how much support the legislation had in its enactment.<sup>214</sup> Basically, this process boiled down to a “nose count” of the number of Americans in each individual state who supported or opposed the legislation.<sup>215</sup> Established Eighth Amendment jurisprudence dictates that the determination of the evolution of the standards of decency should be based upon the same framework of analysis as that which took place when the Amendment itself was adopted.<sup>216</sup> This framework established that a consensus is comprised of states, not of individual Americans.<sup>217</sup> This analysis is merely another example of the Court desperately searching for any sort of concrete statistical evidence that could, in even the slightest way, support its subjectively based decision.

Because of the weak statistical evidence of a national consensus, the majority attempted to strengthen its position by placing significance not only on the number of States that had passed legislation, but also on the

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the number of states that have completely abandoned capital punishment should be included in the count of states that do not execute mentally retarded criminals in establishing a national consensus. *Id.* at 314. In *Penry*, however, the Court allowed states that did not have capital punishment to be included in the analysis of whether a national consensus existed. *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002). At the time of *Penry*, even the addition of the states completely rejecting capital punishment did not suffice to establish a consensus. *Id.* However, in *Atkins*, had the majority strongly pursued the precedent in *Penry*, it could have argued that the twelve states that did not have capital punishment at all, added to the eighteen states that had capital punishment but did not execute the mentally retarded, would result in 60% of the states choosing not to sentence mentally retarded criminals to death.

212. *Atkins I*, 536 U.S. at 342 (Scalia, J., dissenting).

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

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

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

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

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

“consistency of the direction of change” that State legislatures had taken.<sup>218</sup> However, given that fourteen years prior to *Atkins* every state that had the death penalty allowed for execution of the mentally retarded, there was really only one direction that state legislation could have gone.<sup>219</sup> Therefore, the conclusion from this evidence is that “[n]o state has yet undone its exemption of the mentally retarded.”<sup>220</sup> Given this conclusion, the “consistency of the direction of change” argument proposed by the Court had practically no probative value in determining the evolving standards of decency.

The second objective indicator that the Court has identified as a determinant for the evolving standards of decency is the decisions of sentencing juries. Although Eighth Amendment jurisprudence has given less weight to the actions of sentencing juries than to decisions of state legislatures,<sup>221</sup> the Court has stated that data concerning the actions of sentencing juries remains “a significant and reliable objective index of contemporary values.”<sup>222</sup> Because the jury is so “intimately” involved in the facts and circumstances surrounding the case before it, the jury serves a vital function of “maintain[ing] a link between contemporary community values and the penal system.”<sup>223</sup>

By design, the purpose of a sentencing jury in a criminal proceeding is to impose a “publicly acceptable” punishment.<sup>224</sup> These jury determinations alone have a strong tendency to show just how far the standards of decency have evolved regarding criminal punishment. However, the Court, in reaching its conclusion, failed to address the fact that no evidence had been presented to support a finding that sentencing juries deem capital punishment to be a disproportionate penalty for a mentally retarded criminal.<sup>225</sup> In fact, experts have estimated that close to 10% of all death row inmates are mentally retarded, which suggests that sentencing juries have not been overly reluctant to sentence mentally retarded criminals to death.<sup>226</sup>

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

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

220. *Id.* at 345 (Scalia, J., dissenting).

221. *Id.* at 323 (Rehnquist, C.J., dissenting); *see also* *Coker v. Georgia*, 433 U.S. 584, 596 (1977).

222. *Coker*, 433 U.S. at 596 (quoting *Gregg v. Georgia*, 428 U.S. 153, 181 (1976)); *see also* *Furman v. Georgia*, 408 U.S. 238, 439-40 (1972).

223. *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968)).

224. *Atkins I*, 536 U.S. at 324 (Rehnquist, C.J., dissenting).

225. *Id.* (Rehnquist, C.J., dissenting). Chief Justice Rehnquist noted that “[a]pparently no such statistics exist.” *Id.* at 324 n.\*.

226. R. Bonner & S. Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*,

N.Y. TIMES, Aug. 7, 2000, at A1.

Despite the Court's inability to establish a legitimate *objective* basis for its finding of a national consensus, it was able to muster some evidence — albeit less than compelling in nature and anything but objective — to support its finding of a national consensus. This evidence consisted of the laws of foreign countries, public opinion polls, and the views of professional and religious organizations.<sup>227</sup> Although the Court creatively articulated its reasoning as to why these forms of evidence were relevant, none of these factors are appropriate when trying to determine whether there is a national consensus against capital punishment for mentally retarded criminals.<sup>228</sup> Therefore, it is difficult to characterize the Court's analysis of the standards of decency performed as being motivated by anything other than the subjective views of the Justices.

In support of its finding of a “national consensus,” the Court stated that in many prominent foreign countries, the “imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”<sup>229</sup> Amazingly, given this statement, it appears the Court not only struggled with the definition of the word “consensus,” but it also had difficulty deciphering the meaning of the word “national.” If the Court were actually looking to establish a *national* consensus against capital punishment for mentally retarded criminals, then how could *foreign* laws enter into the scope of relevancy?

Established Eighth Amendment precedent dictates that only American ideals of decency regarding criminal punishment are “dispositive.”<sup>230</sup> Although legislation imposed by foreign democracies may be relevant for comparative purposes, foreign legislation cannot serve as evidence to establish the Eighth Amendment requirement that a certain punishment coincide with American citizens' view of decency.<sup>231</sup> While the “climate of international opinion” may serve to reinforce a conclusion by the Court that certain standards of decency have evolved within the United States, “where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”<sup>232</sup>

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227. *Atkins I*, 536 U.S. at 316 n.21.

228. *Id.* at 322.

229. *Id.* at 316-17 n.21.

230. *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989).

231. *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 n.4 (1988) (Scalia, J., dissenting); see also *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969).

232. *Thompson*, 487 U.S. at 868-69 n.4.

Regardless of how “enlightened” the Court may have found the fact that many foreign communities prohibit capital punishment of mentally retarded criminals, each Justice in the majority must remember “that it is a constitution [they] are expounding.”<sup>233</sup> Furthermore, it is the *U.S. Constitution* that they are expounding. Therefore, using the laws of foreign communities to establish a national consensus of the American standards of decency not only constituted a serious misinterpretation of Eighth Amendment jurisprudence, but it was “antithetical to [the] considerations of federalism” upon which the Constitution is based.<sup>234</sup>

The second piece of unpersuasive evidence that the Court offered as proof of a national consensus was public opinion poll data. According to this data, an overwhelming number of Americans felt that capital punishment of mentally retarded criminals was cruel or unusual punishment and thus unconstitutional.<sup>235</sup> Reliance upon such data is precarious however, because of the many variations inherent in an opinion poll that may skew the results.<sup>236</sup> Public opinion polls often produce unreliable and invalid data that results in methodological errors and misguided inferences about how America as a society actually feels about certain issues.<sup>237</sup> There are three significant errors in the public opinion poll data upon which the Court relied in establishing a national consensus. These errors include the imprecise and broad categorical nature of the questions, the lack of identification of the targeted survey population, and the lack of evidence pertaining to why the surveys were conducted and the manner in which they were conducted.<sup>238</sup>

The first methodological error evident in the public opinion poll data is that the various opinion polls cited by the majority did not actually present questions to respondents that were representative of the constitutional question presented in *Atkins*. Most of the opinion poll questions took a broad categorical approach to the issue of capital punishment for mentally retarded criminals.<sup>239</sup> For example, the question presented to respondents in North Carolina and South Carolina asked, “Should the Carolinas ban the execution

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233. *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

234. *Atkins I*, 536 U.S. at 322 (Rehnquist, C.J., dissenting) (referring to the majority’s use of foreign laws, views of professional and religious organizations, and opinion polls as relevant sources to the constitutional question of capital punishment for the mentally retarded).

235. *Id.* app. at 328 (Rehnquist, C.J., dissenting).

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

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

238. *Atkins I*, 536 U.S. at 327 (Rehnquist, C.J., dissenting).

239. *Id.* (Rehnquist, C.J., dissenting) (citing as an example, “Do you think that persons convicted of murder who are mentally retarded should or should not receive the death penalty?”).

of people with mental retardation?"<sup>240</sup> While this question would yield accurate results pertaining to the issue of whether or not mentally retarded criminals should be executed, it does not yield results that pertain to the specific nature of the case in *Atkins*.

In *Atkins*, the issue before the Court was whether *any* criminal with *any* level of mental retardation can *ever*, under *any* circumstances, act with the requisite culpability for the imposition of the death penalty.<sup>241</sup> With regard to this issue, the questions in the opinion poll data submitted to the Court were imprecise and categorically overbroad. A more accurate representation of how American citizens view capital punishment for mentally retarded criminals could have been obtained through a more precise question, such as:

Suppose you are sitting on a jury where the defendant has been convicted of capital murder. The defendant has also been determined to be mentally retarded. Given the following circumstances, do you feel that the defendant should be sentenced to capital punishment?

A. The defendant is mentally retarded, but he/she is deemed to be culpable of the crime that he/she has committed, meaning that at the time of the crime he/she *did know* the difference between right and wrong.

B. The defendant is mentally retarded and is deemed not to be culpable of the crime that he/she has committed, meaning that at the time of the crime he/she *did not know* the difference between right and wrong.

A survey using a question similar to this example would have given researchers a more accurate pulse of how American citizens feel about imposing a death sentence on a mentally retarded criminal. It is quite

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240. *Id.* app. at 331 (Rehnquist, C.J., dissenting). In response to this survey question, 64% of citizens in North Carolina and South Carolina answered "yes," while 21% answered "no," and 14% answered "not sure." *Id.* A similar survey was conducted in Oklahoma in July 1999, where citizens were asked the following categorically overbroad question: "Some people think that persons convicted of murder who are mentally retarded (or who have a mental age of between five and ten years) should not be executed. Other people think that 'retarded' persons should be subject to the death penalty like anyone else. Which is closer to the way you feel, that 'retarded' persons should not be executed, or that 'retarded' persons should be subject to the death penalty like everyone else?" *Id.* app. at 333-34 (Rehnquist, C.J., dissenting). In response to this survey question, 83.5% of Oklahomans responded that mentally retarded criminals "should not be executed," while 10.8% responded that mentally retarded criminals "should be executed;" 5.7% of the respondents answered that it "depends." *Id.* app. at 333 (Rehnquist, C.J., dissenting).

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

probable that many of those participants in the surveys at issue might have answered differently given a more precise question. For example, an individual might have felt that because mental retardation hindered a defendant's ability to determine right from wrong, capital punishment was not appropriate. Therefore, that individual would have answered the survey by opposing capital punishment for mentally retarded criminals. However, that same individual might have felt that in some instances, such as those in which mental retardation has not hindered a defendant's ability to determine right from wrong, that capital punishment was appropriate.

The second methodological error evident in the opinion poll data is the lack of the identification of the targeted survey population. Not even one of the twenty-seven public opinion polls submitted to the Court offered a description of the population of people surveyed.<sup>242</sup> It is, therefore, impossible to determine whether the sample was an adequate representation of the views of the citizens in the individual state or the American public as a whole.<sup>243</sup> Therefore, the use of this public opinion poll data as support that a national consensus existed against capital punishment for mentally retarded criminals is unwarranted.

A third methodological error of the public opinion poll data was the lack of evidence describing the purpose for which the surveys were conducted and the manner in which they were administered.<sup>244</sup> These are two important factors that speak to the objectivity of the survey itself. For example, suppose the purpose of the survey was to support a state legislative bill that was seeking to exclude mentally retarded criminals from capital punishment. In this situation, a high probability exists that the people targeted by the survey were likely to be in support of this legislation, which tends to reduce the probative value of the opinion poll data when offered to show a consensus among all people in a given geographic area. Likewise, the method in which the survey was conducted could have had a bearing on the accuracy of the data obtained. For example, if the survey was conducted via telephone by a researcher who was in favor of the aforementioned legislation, there is a real possibility that the researcher might have influenced the person to whom the survey was being given. These risks of bias, while hypothetical in nature, are two prime examples of how unreliable public opinion poll data can be in establishing a consensus.

The final pieces of questionable evidence that the Court offered for proof of a national consensus were the views of professional and religious

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

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

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

organizations that believe mentally retarded criminals should not be subject to capital punishment.<sup>245</sup> The majority noted in its support of a national consensus that “representatives of widely diverse religious communities . . . reflecting Christian, Jewish, Muslim, and Buddhist traditions, . . . ‘share a conviction that the execution of persons with mental retardation cannot be morally justified.’”<sup>246</sup> Professional and religious organizations seek to serve their own purposes when giving opinions on certain issues and can in no way be representative of the views of American society.<sup>247</sup> The majority’s willingness to adopt the views of interest groups indicates a total lack of objectivity in the determination of whether a national consensus exists.

In a comprehensive analysis of the evidence put forth by the majority in holding that capital punishment of mentally retarded criminals is contrary to evolving standards of decency, one resounding theme seems to be apparent: lack of objectivity. The majority completely disregarded the two objective indicators of a national consensus — state legislation and sentencing jury determinations. Instead it embarked on its own personal mission to establish a national consensus in favor of its preferred ruling. This blatant abuse of judicial power is obvious not only in the majority’s interpretation of the standards of decency but also in the majority’s reasoning behind categorically excluding all mentally retarded criminals from capital punishment.

### *C. Categorical Exclusion of Culpability*

In prohibiting capital punishment of all mentally retarded criminals, the Court essentially has concluded that no person who is in any way mentally retarded possesses the requisite culpability for the imposition of a death sentence.<sup>248</sup> This overbroad holding encompasses the Court’s reasoning that because mentally retarded criminals have “diminished capacities,” the imposition of a death sentence on them should always be considered excessive punishment under the Eighth Amendment.<sup>249</sup> This ruling effectively deems both judges and juries incapable of taking the mental retardation of the defendant into account when deciding whether capital punishment is warranted for a given crime. It is apparent from this decision that the Court firmly believes that “in the end *our own judgment* will be brought to bear on

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

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

247. *Id.* at 347 n.6.

248. *Id.* at 306.

249. *Id.* at 306-07.

the question of the acceptability of the death penalty under the Eighth Amendment.”<sup>250</sup>

The Court offered two rationales to support its conclusion that the death penalty is an excessive punishment for all mentally retarded criminals: (1) that the diminished capacity of a mentally retarded criminal poses a “‘serious question’” as to whether the imposition of a death sentence for such a criminal actually serves the “‘social purposes’ of the death penalty”;<sup>251</sup> (2) the diminished capacity of mentally retarded criminals exposes them to “‘a special risk of wrongful execution.’”<sup>252</sup> While both rationales may indeed have a factual basis, the erroneous assumption underlying both is that all mentally retarded people suffer from the same extent of diminished capacity.<sup>253</sup> Therefore, to justify a ruling on the supposition that mentally retarded criminals compose a homogenous group with similarly diminished capacities lacks discernment.

Three main flaws in the Court’s reasoning must be analyzed in regard to this categorical exclusion of the mentally retarded from capital punishment. First, it is erroneous to conclude that the social purposes of capital punishment can never be furthered through the execution of a mentally retarded criminal.<sup>254</sup> Second, it is the role of the judge and the jury to determine whether a mentally retarded criminal has the requisite culpability for a death sentence.<sup>255</sup> Finally, the risk of a mentally retarded criminal being wrongfully executed does not warrant a categorical exclusion from capital punishment for all mentally retarded criminals.<sup>256</sup>

Based on Eighth Amendment precedent, the Court correctly identified the two social purposes of the death penalty — retribution and deterrence.<sup>257</sup> According to the Court, “[u]nless the imposition of the death penalty on a

250. *Id.* at 312 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)) (emphasis added).

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

252. *Id.* at 352 (Scalia, J., dissenting). Justice Scalia referred to the majority’s argument that the death penalty may be imposed against a mentally retarded criminal “‘in spite of factors which may call for a less severe penalty.’” *Id.* at 320 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

253. *See id.* at 317 (“Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.”).

254. *Id.* at 319.

255. *Id.* at 349 (Scalia, J., dissenting) (“[I]t is very difficult to define the indivisible line that defines perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes . . .”) (quoting 1 HALE, PLEAS OF THE CROWN 30 (1736) (alterations in original)).

256. *Id.* at 352 (Scalia, J., dissenting).

257. *Id.* at 305; *see also* *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion).

mentally retarded person ‘measurably contributes to one or both of these goals, it is . . . an unconstitutional punishment.’”<sup>258</sup> The goal of retribution is based on the theory that capital punishment is a way for society to express its “moral outrage at particularly offensive conduct.”<sup>259</sup> Deterrence, on the other hand, focuses on the interest of states in preventing capital crimes by prospective offenders.<sup>260</sup>

The Court incorrectly concluded that capital punishment of mentally retarded criminals does not further the social policy of retribution. It reasoned that retribution is not served by the death penalty because the mentally retarded criminal is no more culpable than the average criminal who has committed a capital crime.<sup>261</sup> This reasoning was founded on the assumption that mentally retarded persons, because of their diminished capacity or “childlike” minds, are more likely to willfully commit serious crimes than the average person.<sup>262</sup> Is there really rational scientific evidence with which one can prove that a person with a “childlike” mind who commits a brutal murder is no more culpable than a person who commits a “run-of-the-mill” domestic dispute murder?<sup>263</sup>

Included in an analysis of retribution must be some consideration of the nature of the crime committed. In the case of a mentally retarded criminal, the sentencing jury has traditionally weighed both the degree of the defendant’s mental retardation and the depravity of the crime.<sup>264</sup> The Court’s categorical ruling that no mentally retarded criminal possesses the requisite culpability for capital punishment prohibits this “weighing of the circumstances.”<sup>265</sup> This determination is an important part of the process in capital cases because “the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response

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258. *Atkins I*, 536 U.S. at 319 (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (internal quotes omitted)).

259. *Gregg*, 428 U.S. at 183; see also *Enmund*, 458 U.S. at 799 (“[I]t seems likely that ‘capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation . . . .’”) (quoting *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)).

260. *Enmund*, 458 U.S. at 798; see also *Atkins I*, 536 U.S. at 320 (“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 murderous conduct.”).

261. *Atkins I*, 536 U.S. at 350 (Scalia, J., dissenting).

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

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

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

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

may be the penalty of death.”<sup>266</sup> Given that sentencing juries continue to impose capital punishment on mentally retarded criminals in extreme cases, clear evidence demonstrates that American society is sometimes so outraged at the crime that it feels the death penalty is a proper form of retribution for the mentally retarded criminal.<sup>267</sup>

The Court itself has admitted that mental retardation does not always render a criminal “morally blameless.”<sup>268</sup> Therefore, there is no actual basis to conclude that capital punishment can never serve the purpose of retribution for a mentally retarded criminal.<sup>269</sup> If a mentally retarded criminal knows the difference between right and wrong yet makes the decision to commit a heinous crime, society needs to express its moral outrage and exact retribution for the harm that the criminal has done to it.

Turning attention to the second social purpose for capital punishment, deterrence, the Court again based its categorical exclusion of mentally retarded criminals on faulty assumptions. According to the Court, deterrence is not advanced because a mentally retarded criminal is not as likely as a “non-retarded” criminal to “process the information of the possibility of execution as a penalty and . . . control [his] conduct based upon that information.”<sup>270</sup> This conclusion is based on the assumption that because mentally retarded criminals are less deterred, they are, as a group, more likely to commit a capital offense.<sup>271</sup> However, given the language of the majority — “more likely” — it would appear that the Court is reluctant to conclude that mentally retarded criminals can ever be deterred from committing crimes because of the presence of capital punishment.<sup>272</sup>

As with the social purpose of retribution, the Court erred in categorically excluding mentally retarded criminals from the death penalty based on its fallacious assumption that *none* of them can be deterred from crime by a capital punishment statute. The fact that some mentally retarded criminals cannot fully comprehend and appreciate the seriousness of a death sentence does not necessarily mean that *no* mentally retarded criminal can comprehend and appreciate capital punishment.<sup>273</sup> If a state death penalty statute succeeds in dissuading even a portion of mentally retarded persons from committing

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266. *Gregg v. Georgia*, 428 U.S. 153, 184 (1976) (plurality opinion).

267. *Atkins I*, 536 U.S. at 350-51 (Scalia, J., dissenting).

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

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

270. *Id.* at 320.

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

272. *Id.* at 351-52 (Scalia, J., dissenting).

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

capital crimes, then does it not, by definition, serve the purpose of deterrence?<sup>274</sup>

A second flaw inherent in the categorical exclusion of the mentally retarded from capital punishment is that judges and juries are no longer permitted to determine objectively whether a mentally retarded criminal has the requisite culpability to warrant a death sentence. In essence, this categorical exclusion proscribes a jury from deciding whether a mentally retarded criminal knew right from wrong at the time the crime was committed.<sup>275</sup> Rather, a categorical exclusion ignores any individualized determination of the effect that mental retardation had on a defendant's criminal activity.<sup>276</sup> According to the Court, neither judges nor sentencing juries are able "to account properly for the 'diminished capacities' of the retarded."<sup>277</sup> This line of reasoning begs the question: If not judges or juries, then *who* is capable of "accounting properly" for the diminished capacity of a mentally retarded person? In short, by proclaiming mental retardation to be an absolute barrier to capital punishment, the Court has answered: the Supreme Court.

Before the *Atkins* decision, many states allowed mental retardation to be considered by the sentencing jury as a mitigating factor, thus permitting the jury to consider both the diminished mental capacity of the criminal and the severity of the crime that he committed.<sup>278</sup> These factors, weighed together, allowed the sentencing jury to make an individualized determination of whether the criminal defendant was able to distinguish between right and wrong at the time the crime was committed.<sup>279</sup> This process firmly adhered to established Eighth Amendment jurisprudence. In *Furman v. Georgia*,<sup>280</sup> the Court held that "in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant."<sup>281</sup> Furthermore, in *Penry*, the Court noted that "it is precisely because the

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

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

276. *Penry v. Lynaugh*, 492 U.S. 302, 337-38 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

277. *Atkins I*, 536 U.S. at 349 (Scalia, J., dissenting). Justice Scalia also noted that "[t]he . . . inability of judges or juries to take proper account of mental retardation — is not only unsubstantiated, but contradicts the immemorial belief, here and in England, that they play an indispensable role in such matters." *Id.* (Scalia, J., dissenting).

278. *Penry*, 492 U.S. at 337 n.2.

279. *Atkins I*, 536 U.S. at 350-51 (Scalia, J., dissenting).

280. 408 U.S. 238 (1972).

281. *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (plurality opinion) (discussing the holding of *Furman*).

punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense."<sup>282</sup> The Court has even stated that the Eighth Amendment "mandates an individualized assessment of the appropriateness of the death penalty."<sup>283</sup>

In *Penry*, the Court recognized that a defendant's mental retardation may decrease his culpability for a capital crime.<sup>284</sup> However, the Court was unwilling to interpret the Eighth Amendment to categorically exclude criminals with any form of mental retardation from being sentenced to death based on their mental retardation alone.<sup>285</sup> Instead, the Court held that "[s]o long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence, an individualized determination whether 'death is the appropriate punishment' can be made in each particular case."<sup>286</sup> Despite the precedent established in *Penry*, the *Atkins* court chose to focus more on a "death is different" theory of capital punishment, rather than on the "death is appropriate" theory of capital punishment.<sup>287</sup>

As a result of *Atkins*, sentencing juries can no longer make an individualized assessment of whether capital punishment is appropriate because the jury will have to consider the diminished capacity of the criminal defendant apart from the facts surrounding the crime. In cases where capital punishment is appropriate, mental retardation is no longer a mitigating factor — it is an absolute barrier to a death sentence. Therefore, a sentencing jury that deems a criminal defendant to be even minutely mentally retarded will be precluded from imposing a sentence of capital punishment, regardless of the facts of the case. This conclusion calls into question the vital role of the jury in a capital case as the "trier of fact."<sup>288</sup>

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282. *Penry*, 492 U.S. at 327-28.

283. *Id.* at 317.

284. *Id.* at 340.

285. *Id.*

286. *Id.*

287. *Atkins v. Virginia*, 536 U.S. 304, 337-38 (2002) (Scalia, J., dissenting) (*Atkins I*). In *Penry*, the Court focused more on whether death is an appropriate sentence for an individual defendant given the fact that mitigating evidence pointed to the defendant being mentally retarded. *Penry*, 492 U.S. at 340. In contrast, the *Atkins* Court focused more on whether mentally retarded criminals as a group should be treated differently regarding the death penalty because it is a "different" form of punishment. *Atkins I*, 536 U.S. at 337 (Scalia, J., dissenting).

288. *Spaziano v. Florida*, 468 U.S. 447, 480 (1984); see also *McClesky v. Kemp*, 481 U.S. 279, 310 n.32 (1987) (discussing a jury's "broad discretion" in a capital case, as recognized by the Court in *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)). In *Witherspoon*, "[t]he Court expressly recognized that the purpose of the 'broad discretion' given to a sentencing jury is 'to decide whether or not death is 'the proper penalty' in a given case,' noting that 'a juror's

A final flaw inherent in the categorical exclusion of the mentally retarded from capital punishment is that the risk of wrongful execution does not warrant the uncompromising wholesale exclusion of mentally retarded criminals. The Court reasoned that the reduced capacity of the mentally retarded enhances the possibility of false confessions, renders them less helpful to their counsel, hinders them from testifying well, and creates in their demeanor the impression that they lack remorse.<sup>289</sup> While all of these risks are valid, they are equally possible in the prosecution of capital crimes where the defendant is not mentally retarded. Similarly, these risks are apparent in all criminal prosecutions of mentally retarded criminals, not only in capital cases.

For example, suppose the defendant is not mentally retarded by definition, but suffers from an antisocial personality disorder that makes him particularly inarticulate. An inarticulate defendant may very well have conveyed information to authorities that the prosecution has deemed a confession, when in fact the defendant did not intend to confess. Likewise, a defendant suffering from antisocial personality disorder may not testify well on the stand and may not be able to clearly express important information to counsel. Furthermore, if the antisocial defendant does not eloquently express remorse at a sentencing hearing, the jury may interpret his stoicism to be a lack of remorse and take that into consideration in imposing a sentence. Would it then be appropriate to say that all capital defendants who are neither insane nor mentally retarded should be categorically excluded from capital punishment on the basis that they suffer from antisocial personality disorder?

Given the nature of these “special risks” identified by the Court, it is logical to assume that these risks are apparent not only when mentally retarded criminals face capital sentences, but also in every other criminal prosecution against a mentally retarded offender. The identification of these special risks further illustrates the intent of the *Atkins* Court to focus on the “death is different” doctrine.<sup>290</sup> For example, suppose that a mentally retarded person has committed rape. A mentally retarded person may confess to the crime when in reality he did not commit the crime. Likewise, a mentally retarded defendant may be less able to give meaningful assistance to counsel than a nonretarded defendant. Furthermore, if the mentally retarded defendant does not testify well at trial, his lack of rhetorical skill could add to his risk of being wrongfully convicted. It is also very possible that if the mentally retarded defendant is convicted of rape, the jury may misconceive that he lacks remorse. Would it then be appropriate to say that mentally retarded criminals

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general views about capital punishment play an inevitable role in any such decision.” *McClesky*, 481 U.S. at 310 n.32.

289. *Atkins I*, 536 U.S. at 320-21.

290. *Id.* at 337-38 (Scalia, J., dissenting); see *supra* note 286 and accompanying text.  
<https://digitalcommons.law.ou.edu/olr/vol56/iss4/3>

who are convicted of rape cannot be sentenced to the maximum allowable punishment?

The Court's conclusion that mentally retarded criminals are more susceptible to receiving harsher sentences than the crime warrants should be phrased as a Due Process claim rather than an Eighth Amendment claim.<sup>291</sup> The Supreme Court has "never before held it to be cruel and unusual punishment to impose a sentence in violation of some *other* constitutional imperative."<sup>292</sup> There are risks inherent in every judicial proceeding, not just capital cases and not just proceedings involving mentally retarded defendants. Therefore, a categorical exclusion of every group of people who may be at risk of a wrongful conviction or even a wrongful execution would render our criminal justice system unworkable.

The Supreme Court's decision to categorically exclude mentally retarded criminals from capital punishment is purely a reflection of the personal views of those justices who sat on the majority in *Atkins*. This decision lacked support not only from the original intent of the Framers of the Eighth Amendment and prior judicial interpretations of the Amendment, but also from the moral beliefs of American society. By acting as a legislature for the American people, these Justices substituted their own personal views for those of elected state legislators. To quote an old cliché, "only time will tell" what impact the Supreme Court's decision in *Atkins* will have, but one thing is certain: the Court failed to articulate a sound constitutional basis upon which to justify its decision.

## VII. *The Aftermath of Atkins*

### A. *Federal Impact*

The Supreme Court's decision in *Atkins* will not affect federal cases wherein a mentally retarded criminal has committed a serious crime. Congress originally outlawed capital punishment of the mentally retarded in all federal cases through the Anti-Drug Abuse Act of 1988.<sup>293</sup> The Federal Death Penalty Act of 1994 reinforced this prohibition against sentencing the mentally retarded to death.<sup>294</sup> Despite the fact that both statutes assert that capital punishment will not be

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291. *Id.* at 352 (Scalia, J., dissenting).

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

293. *See supra* note 149 and accompanying text.

294. Federal Death Penalty Act of 1994, 18 U.S.C. § 3596(c) (2000) ("A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person.").

administered against any person suffering from mental retardation, neither statute attempts to define mental retardation.

Although capital punishment has been outlawed in federal criminal cases, the vast majority of capital punishment prosecutions arise in state courts. At the time of *Atkins*, twenty states still had death penalty statutes that allowed for the capital punishment of mentally retarded criminals.<sup>295</sup> After the Court's ruling in *Atkins*, these states face the challenging task of developing new procedures for sentencing mentally retarded criminals who had been convicted of capital crimes.<sup>296</sup>

### B. Oklahoma Impact

The Supreme Court's decision in *Atkins* will greatly impact Oklahoma criminal cases in which the State seeks the death penalty against a mentally retarded criminal. Before *Atkins*, Oklahoma allowed mentally retarded criminals to be sentenced to death.<sup>297</sup> More than likely, inmates currently on death row and those being prosecuted for capital crimes will argue that they are mentally retarded and, therefore, cannot be constitutionally sentenced to death. The ambiguous nature of determining mental retardation will result in a capital trial becoming a game in which capital defendants attempt to feign the conditions of mental retardation in order to avoid a death sentence.<sup>298</sup> As of February 2004, Oklahoma has four inmates on death row with scheduled or pending mental retardation hearings.<sup>299</sup>

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295. *Atkins I*, 536 U.S. at 342 (Scalia, J., dissenting) (Alabama, California, Delaware, Idaho, Illinois, Louisiana, Mississippi, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, Virginia, and Wyoming).

296. To help meet this challenge, James Ellis, Regents Professor of Law at the University of New Mexico School of Law, has written a guide to aid state legislatures in developing and implementing death penalty legislation that fully conforms to the constitutional requirements set forth by the *Atkins* court. James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, at <http://www.deathpenaltyinfo.org/MREllisLeg.pdf> (last visited Mar. 5, 2004). Professor Ellis has outlined two alternative approaches, each of which provides for an impartial evaluation of the defendant's mental retardation. *Id.* at 17. The first alternative (Alternative A) offered by Professor Ellis "begins with a pretrial bench hearing on death eligibility, with a subsequent opportunity for the defense to present the issue to a trial jury." *Id.* The second alternative (Alternative B) provides for separate juries for the two proceedings, one jury to initially decide the issue of mental retardation, and another jury to be the ultimate "trier of fact." *Id.* In comparing the two alternatives, Professor Ellis has concluded that, although both are constitutionally proper, Alternative A is "the more economical approach because it involves the costs attendant to only one jury proceeding." *Id.* at 18.

297. See *supra* note 94.

298. *Atkins I*, 536 U.S. at 353-54 (Scalia, J., dissenting).

299. Oklahoma Coalition to Abolish the Death Penalty, available at <http://www.ocadp.org> (Execution Watch — Oklahoma Link) (last visited Mar. 17, 2004).

In September 2002, the Oklahoma Court of Criminal Appeals had its first opportunity to address the constitutional principles established by the *Atkins* decision. The goal of the court in *Murphy v. State*<sup>300</sup> was “to give guidance to the various district court judges, attorneys, and death row inmates who may be affected by what appears to be a new rule of constitutional law.”<sup>301</sup> As mentioned previously, prior to *Atkins*, mentally retarded individuals in Oklahoma were capable of committing crimes and were sentenced to the full extent of the law.<sup>302</sup> The State of Oklahoma’s ability to sentence the mentally retarded to death would have changed during the 2002 legislative session if not for Governor Frank Keating’s veto of House Bill 2635.<sup>303</sup> Because of the disagreement that currently exists in Oklahoma between the legislative and executive branches of government, “the task falls upon this Court to develop standards to guide those affected until the other branches of government can reach a meeting of the minds on this issue.”<sup>304</sup>

Although the Supreme Court in *Atkins* was adamant in barring the execution of mentally retarded criminals, the Court was unwilling to endorse a specific definition of “mental retardation.”<sup>305</sup> The Court preferred to leave to the States the task of establishing criteria for determining “who is or who is not mentally retarded for purposes of eligibility for a death sentence.”<sup>306</sup> Accordingly, the

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300. 2002 OK CR 32, 54 P.3d 556. In *Murphy*, the petitioner had been convicted of first-degree murder and sentenced to death. *Id.* ¶ 1, 54 P.3d at 560. In February 2002, he filed for postconviction relief on the basis that his trial and appellate counsel failed to present available mitigating evidence of his deprived background and mental retardation. *Id.* ¶ 5, 54 P.3d at 561.

301. *Id.* ¶ 27, 54 P.3d at 566-67.

302. 21 OKLA. STAT. § 152 (2001) (“All persons are capable of committing crimes,” including mentally retarded individuals, unless the individual can show that “at the time of committing the act charged against them they were incapable of knowing its wrongfulness.”); see also *supra* note 94.

303. *Murphy*, ¶ 27 nn.13-14, 54 P.3d at 567 nn.13-14.

304. *Id.* ¶ 30, 54 P.3d at 567.

305. *Id.* ¶ 29, 54 P.3d at 567 (citing *Atkins v. Virginia*, 536 U.S. 304, 317 (2002)).

306. *Id.* (citing *Atkins*, 536 U.S. at 317); see, e.g., *State v. Williams*, 831 So. 2d 835 (La. 2002). The State of Louisiana has defined mental retardation as “‘significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period.’” *Id.* at 853 (quoting LA. REV. STAT. ANN. § 28:381(28) (West 2001)). Within this definition, “[g]eneral intellectual functioning” is shown by “‘the results obtained by assessment with one or more of the individually administered general intelligence tests developed for that purpose.’” *Id.* (quoting LA. REV. STAT. ANN. § 28:381(18)). Furthermore, “[t]o be ‘significantly subaverage’” means that “one must be ‘more than two standard deviations below the mean for the test of intellectual functioning.’” *Id.* (quoting LA. REV. STAT. ANN. § 28:381(42)). In addition to the basic definition of mental retardation accepted by Louisiana, the state requires that the defendant establish that his developmental disability is attributable to mental retardation, which requires a showing that the disability was present prior to age twenty-two and is likely to continue ad infinitum. *Id.*

Oklahoma Court of Criminal Appeals, in lieu of a legislative amendment to the Oklahoma Criminal Code, has instituted the following definition of mental retardation to be applied to individuals who claim to be ineligible for capital punishment on the basis of mental retardation:

A person is “mentally retarded”: (1) If he or she functions at a significantly sub-average intellectual level that substantially limits his or her ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others; (2) The mental retardation manifested itself before the age of eighteen (18); and (3) The mental retardation is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication; self-care; social/interpersonal skills; home living; self-direction; academics; health and safety; use of community resources; and work.<sup>307</sup>

The *Murphy* court placed the burden of proof on the defendant to show by a preponderance of the evidence that he is mentally retarded.<sup>308</sup> It is interesting to note that the court elected not to apply the “clear and convincing” standard for proving mental retardation that the Oklahoma legislature adopted as part of

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(quoting LA. REV. STAT. ANN. § 28:381(12)).

307. *Murphy*, ¶ 31, 54 P.3d at 567-68 (citation omitted). The Court explains what is meant by “manifestation before the age of eighteen” in a footnote, stating that it is “a fact question intended to establish that the first signs of mental retardation appeared and were recognized before the [age of] eighteen. Lay opinion and poor school records may be considered. Thus, a defendant need not, necessarily, introduce an intelligent quotient test administered before the age of eighteen or a medical opinion given before the age of eighteen . . .” *Id.* ¶ 31 n.19, 54 P.3d at 568 n.19. Justice Chapel in a concurring opinion noted certain issues that may arise given the majority’s definition of mental retardation. He pointed out practical problems, such as where a defendant, who is clearly mentally retarded and has “an IQ of 56, tested near the time of the crime, and a showing of little or no ability to function according to the enumerated categories,” may be subject to the death penalty due to a lack of “proof of manifestation before the age of 18.” *Id.* ¶ 8, 54 P.3d at 574 (Chapel, J., concurring). In his view, “the definition of mental retardation should be flexible enough that an entire class of mentally retarded persons is not automatically (and illegally) exposed to the death penalty simply because their situation prevents them from bringing forth evidence from childhood.” *Id.* (Chapel, J., concurring).

In the case of Patrick Dwayne Murphy, his alleged “mild mental retardation” was one of those “borderline cases” where experts could disagree on the issue of whether Murphy actually suffered from mental retardation. *Id.* ¶ 29 n.17, 54 P.3d at 567 n.17. In fact, Murphy’s own expert stated that Murphy’s mental deficiencies could possibly be the result of “testing conditions [and] cultural factors.” *Id.* Murphy performed “reasonably well in school, although some of his school records indicated [that] he was ‘educable mentally handicapped.’” *Id.*

308. *Id.* ¶ 31, 54 P.3d at 568.

House Bill 2635.<sup>309</sup> While recognizing this discrepancy, the court was quick to point out that other states have been split between the adoption of a preponderance standard or a clear and convincing standard for proof of mental retardation.<sup>310</sup> The court also noted that in meeting this burden of proof, IQ should be considered as a factor, but cannot alone determine a defendant's mental retardation.<sup>311</sup> However, the court held that "no person shall be eligible to be considered mentally retarded unless he or she has an intelligence quotient of seventy or below, as reflected by at least one scientifically recognized, scientifically approved, and contemporary intelligent quotient test."<sup>312</sup>

In addition to providing the criteria for determining mental retardation, the Oklahoma Court of Criminal Appeals outlined the process for determining whether a defendant is eligible for a death sentence. The court held that a defendant alleging mental retardation in an attempt to avoid the death penalty must give notice to the court of his intent to claim mental retardation no fewer than forty-five days before trial.<sup>313</sup> If such notice is properly given, the issue of mental retardation will be decided in the sentencing stage of the defendant's capital murder trial.<sup>314</sup> At the time of sentencing, if the jury concludes that the

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309. See Appendix A for the text of the bill. Justice Chapel in his concurrence in *Murphy* pointed out that the U.S. Supreme Court has deemed a clear and convincing burden of proof to be unconstitutional in the "competency context." *Murphy*, ¶ 5 n.7, 54 P.3d at 573 n.7 (Chapel, J., concurring) (citing *Cooper v. Oklahoma*, 517 U.S. 348 (1996)).

310. *Murphy*, ¶ 31 n.20, 54 P.3d at 568 n.20 ("[A]pproximately five states utilize a clear and convincing standard while approximately eleven states use preponderance of the evidence.")

311. *Id.* ¶ 31, 54 P.3d at 568.

312. *Id.* (citation omitted). The Court of Criminal Appeals explained that a contemporary IQ test was one that "was administered some time after the capital crime was committed or is one that may be understood by contemporary standards." *Id.* ¶ 31 n.21, 54 P.3d at 568 n.21. Furthermore, Justice Chapel noted that by limiting the issue of mental retardation in capital cases only to those with an IQ below 70, the Court has taken a more narrow approach than the Oklahoma Legislature, who in House Bill 2635 did not prohibit those defendants with an IQ over 70 from raising the issue of mental retardation. *Id.* ¶ 7, 54 P.3d at 574 (Chapel, J., concurring).

313. *Id.* ¶ 32, 54 P.3d at 568.

314. *Id.* The "Jury Instruction To Be Used When Issue of Mental Retardation Has Been Raised" reads as follows:

A conviction for Murder in the First Degree is punishable by death, life imprisonment without the possibility of parole, or life imprisonment. The Defendant has raised mental retardation as a bar to the imposition of the death penalty in this case. You must determine if the Defendant suffers from mental retardation as it is defined below before deciding what sentence to impose.

You are advised that a person is "mentally retarded" if he or she functions at a significantly sub-average intellectual level that substantially limits his or her ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and

convicted defendant is mentally retarded, then it cannot render a sentence of death.<sup>315</sup> However, if the convicted defendant fails to meet his burden of proof, and the jury concludes that he is not mentally retarded, the intellectual capabilities of the defendant may still be considered by the jury as a mitigating factor in rendering punishment upon the defendant.<sup>316</sup> Furthermore, if the jury imposes a death sentence despite the alleged mental retardation of the defendant, the court has provided for the possibility of postjudgment relief in the form of an *Atkins* hearing.<sup>317</sup>

A postjudgment *Atkins* hearing will take place only at the defendant's request.<sup>318</sup> The hearing allows the judge to "determin[e] if the jury's decision on the issue of mental retardation has resulted in an excessive sentence, i.e., a sentence that imposed the death penalty upon a defendant who is mentally

to understand the reactions of others. Intelligence quotients are one of the many factors that may be considered, but are not alone determinative.

In reaching your decision, you must determine:

(1) Is the defendant a person who is mentally retarded as defined in this instruction?

(2) Was the mental retardation present and known before the defendant was eighteen (18) years of age?

(3) Does the defendant have significant limitations in adaptive functions in at least two of the following skill areas: communication; self-care; social/interpersonal skills; home living; self-direction; academics; health and safety; use of community resources; and work?

If you find by a preponderance of the evidence that the answer to *each* of these questions is yes, then you must so indicate on your verdict form. You must then decide whether the defendant shall be sentenced to life imprisonment or life imprisonment without the possibility of parole and so indicate on your verdict form. If you find the answer to *any* of the above questions is no, you must so indicate on your verdict form. You must then decide whether the defendant shall be sentenced to life imprisonment, life imprisonment without the possibility of parole or death.

Preponderance of the evidence means more probable than not.

*Id. app.*, 54 P.3d app. at 570-71. Justice Johnson in a dissenting opinion proposed an alternative procedure for the determination of mental retardation. He stated,

The trial court should hold a pretrial evidentiary hearing to determine mental retardation. If the trial court determines by a preponderance of the evidence that the defendant is mentally retarded, the trial would proceed as a non-capital first-degree murder case. If the court should not so find, the jury then would make this determination prior to any second stage evidence.

*Id.* ¶ 2, 54 P.3d at 572 (Johnson, V.P.J., concurring in part, dissenting in part).

315. *Id.* ¶ 33, 54 P.3d at 568.

316. *Id.*

317. *Id.* ¶ 34, 54 P.3d at 568.

318. *Id.*

retarded, as herein defined.”<sup>319</sup> The defendant must make his written request for an *Atkins* hearing “within ten (10) days of the jury verdict and prior to formal sentencing.”<sup>320</sup> During the *Atkins* hearing, both parties will be allowed to make oral arguments; however, no additional evidence apart from that in the trial record will be admitted.<sup>321</sup> Upon completion of the *Atkins* hearing, the judge will determine if the jury’s imposition of capital punishment was made “under the influence of passion, prejudice, or any other arbitrary factor,” which would cause the sentence to be excessive.<sup>322</sup> Additionally, the judge will make his own determination of the defendant’s mental retardation, based upon the same evidence and definition of mental retardation presented to the jury.<sup>323</sup> Applying the same preponderance of the evidence standard, the judge will “make written findings and conclusions upon whether or not the defendant is mentally retarded . . . and file those written findings and conclusions in the record within fifteen (15) days of the hearing, as an exhibit to the trial judges [sic] report.”<sup>324</sup>

The impact of the U.S. Supreme Court’s decision in *Atkins* will not only affect future capital criminals in Oklahoma, but it will also affect those currently on death row who may in fact be able to prove mental retardation. In *Murphy*, the Oklahoma Court of Criminal Appeals held that criminals with pending capital appeals and those seeking post-conviction relief from a capital conviction may raise the issue of mental retardation by filing an application if the following circumstances are met:

[I]n those cases where evidence of the defendant’s mental retardation was introduced at trial and/or the defendant either (1) received an instruction that his or her mental retardation was a mitigating factor for the jury to consider, (2) appealed his death sentence and therein raised the claim that the execution of the mentally retarded was cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution (or a substantially similar claim relating to his or her mental retardation), or (3) raised a claim of ineffective assistance of counsel, on appeal or in a previous post-conviction application, in which he or she asserted trial counsel or appellate counsel failed to raise the claim that the

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319. *Id.* ¶ 34, 54 P.3d at 568-69 (citation omitted).

320. *Id.* ¶ 34 n.22, 54 P.3d at 568 n.22.

321. *Id.*

322. *Id.* ¶ 35, 54 P.3d at 569. The Oklahoma Court of Criminal Appeals has been given the duty of conducting a sentence review of every criminal defendant who has been sentenced to death. *See* 21 OKLA. STAT. § 701.13 (2001).

323. *Murphy*, ¶ 35, 54 P.3d at 569.

324. *Id.*

execution of the mentally retarded was cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution.<sup>325</sup>

Although the true impact of the *Atkins* decision is yet to be seen in Oklahoma, there is no doubt that in the near future, the Oklahoma legislature will be pressured to adopt a statutory process for dealing with capital criminals who raise the issue of mental retardation. Whether the legislature will incorporate any of the procedural requirements outlined by the Oklahoma Court of Criminal Appeals is unknown. However, one thing is for certain: while the U.S. Supreme Court did not give the Oklahoma legislature the opportunity to decide whether it would allow mentally retarded criminals to be sentenced to death, it did allow the legislature to determine which criminals would be considered mentally retarded.

### VIII. Conclusion

As this Comment has demonstrated, the Supreme Court's decision in *Atkins* is a prime example of the Court acting as a legislature for the people. Rather than following clearly established principles of Eighth Amendment jurisprudence, the Court subjectively chose to ban capital punishment for all mentally retarded criminals. The Court's holding is not supported by the history or the text of the Eighth Amendment, does not give proper weight to objective factors in analyzing the standards of decency, and fails to allow for an individualized determination of a mentally retarded person's moral culpability for his crime. Ultimately, it is the mentally retarded *criminal* whose life has been spared, while the U.S. Constitution and the will of the American people have been executed.

Daniel Nickel

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325. *Id.* ¶ 36, 54 P.3d at 569.  
<https://digitalcommons.law.ou.edu/olr/vol56/iss4/3>

## APPENDIX A

Rep. Opio Toure of Oklahoma City introduced House Bill 2635, which reads as follows:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 701.10b of Title 21, unless there is created a duplication in numbering, reads as follows:

A. For purposes of this act:

1. "Mentally retarded" means significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning, both of which were manifested before the age of eighteen (18);

2. "Significant limitations in adaptive functioning" means significant limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health, safety, functional academics, leisure skills and work skills; and

3. "Significantly subaverage general intellectual functioning" means an intelligence quotient of seventy (70) or below.

B. Regardless of any provision of law to the contrary, no defendant who is mentally retarded shall be sentenced to death.

C. Upon motion of the defendant, supported by appropriate affidavits, the court may order a pretrial hearing to determine if the defendant is mentally retarded. The defendant has the burden of production and persuasion to demonstrate mental retardation by clear and convincing evidence by showing significantly subaverage general intellectual functioning, significant limitations in adaptive functioning, and that mental retardation was manifested before the age of eighteen (18). An intelligence quotient of seventy (70) or below on an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist is evidence of significantly subaverage general intellectual functioning; however, it is not sufficient, without evidence of significant limitations in adaptive functioning and without evidence of manifestation before the age of eighteen (18). If the court determines the defendant to be mentally retarded, the court shall declare the case noncapital, and the state may not seek the death penalty against the defendant. The pretrial determination of the court shall not preclude the defendant from raising any legal defense during the trial.

D. If the court does not find the defendant to be mentally retarded in the pretrial proceeding, upon the introduction of evidence of the mental retardation of the defendant during the sentencing hearing, the court shall

submit a special issue to the jury as to whether the defendant is mentally retarded as defined in this section. This special issue shall be considered and answered by the jury prior to the consideration of aggravating or mitigating factors and the determination of sentence. If the jury determines the defendant to be mentally retarded, the court shall declare the case noncapital, and the defendant shall be sentenced to life imprisonment or life without parole. The defendant has the burden of production and persuasion to demonstrate mental retardation to the jury by a preponderance of the evidence.

E. If the jury determines that the defendant is not mentally retarded as defined by this section, the jury may consider any evidence of mental retardation presented during the sentencing hearing when determining aggravating or mitigating factors and the sentence of the defendant.

F. The provisions of this section do not preclude the sentencing of a mentally retarded offender to any other sentence authorized by Section 701.9 of Title 21 of the Oklahoma Statutes for the crime of murder in the first degree.

G. The court shall give appropriate instructions in those cases in which evidence of the mental retardation of the defendant requires the consideration by the jury of the provisions of this section.

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1089A of Title 22, unless there is created a duplication in numbering, reads as follows:

A. In cases in which the defendant has been convicted of first-degree murder, sentenced to death, and is in custody awaiting imposition of the death penalty, the defendant may seek appropriate relief from the death sentence of the defendant upon the ground that the defendant was mentally retarded, as defined in Section 1 of this act, at the time of the commission of the capital crime.

B. A motion seeking appropriate relief from a death sentence on the ground that the defendant is mentally retarded, shall be filed:

1. On or before January 31, 2003, if the conviction of the defendant and sentence of death were entered prior to July 1, 2002; and

2. Within one hundred twenty (120) days of the imposition of a sentence of death if the trial of the defendant was in progress on July 1, 2002. For purposes of this section, a trial is considered to be in progress if the process of jury selection has begun.

C. All matters regarding the motion, seeking relief from a death sentence upon the ground that the defendant was mentally retarded, not specifically governed by the provisions of this section shall be subject to provisions of Section 1089 of Title 22 of the Oklahoma Statutes. If the provisions of this

section conflict with the provisions of Section 1089 of Title 22 of the Oklahoma Statutes, the provisions of this section shall govern.

**SECTION 3.** This act shall become effective July 1, 2002.

**SECTION 4.** It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

