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

Lisa Odom

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

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"... when [Ricky Ray] Rector was given his last meal, 'he was so simple he asked to save the pecan pie for later.'"\(^1\)

"Eddie Mitchell, a retarded man on death row in Louisiana, waived all his rights during his interrogation. But when an attorney asked him if he had understood what 'waiving his rights' meant, Mitchell raised his right hand and waved."\(^2\)

I. INTRODUCTION

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

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

1. **RAPHAEL GOLDMAN,** *CQ's Vital Issues Series: Capital Punishment* 60-61 (Ann Chih Lin ed., 2002). Ricky Ray Rector was an Arkansas death row inmate with mental retardation who, by all accounts, did not understand the nature of the punishment he was to receive the next day. *Id.* at 60.


A. Mental Retardation Defined

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

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

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

5. This appears to be the definition adopted by the Supreme Court. See Atkins v. Virginia, 536 U.S. 304, 309 n.3 (2002); Penry v. Lynaugh, 492 U.S. 302, 308 n.1 (1989).
6. AMERICAN ASSOCIATION ON MENTAL RETARDATION, supra note 3.
7. LEIGH ANN DAVIS, PEOPLE WITH MENTAL RETARDATION IN THE CRIMINAL JUSTICE SYSTEM, at http://www.thearc.org (2000). It is estimated that between 2% and 10% of prisoners have mental retardation. Id.
9. Id. at 42-43.
10. See EHRENREICH & FELLNER, supra note 2, at II. In 1959, the American Association on Mental Deficiency (later renamed the American Association on Mental Retardation [AAMR]) set 85 as the threshold IQ at which a person is considered mentally retarded. Id. The AAMR reduced the IQ standard to 70 to 75 in 1992. Id.
11. Id. at II n.16.
12. See id. at II.
assessment of 59. Since Atkins met the criteria set forth defining mental retardation, the Supreme Court was forced to confront whether capital punishment was an appropriate sentence for mentally retarded inmates in light of the Constitution of the United States and the “evolving standards of decency” which “mark the progress of a maturing society” that are used in determining if punishments are cruel and excessive.

B. Cruel and Unusual Punishment

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

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


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

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


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


20. Id. at 321.

21. See id. at 318-21.
Section II of this article will examine the history and background of Eighth Amendment jurisprudence and the developments that enabled the Court to change its mind about the application of the death penalty to the mentally retarded between its decision in *Penry v. Lynaugh* and *Atkins*. Section III will set the framework for the *Atkins* case. Section IV will analyze both the majority and dissenting opinions in the *Atkins* case. Finally, Section V will discuss potential abuses, problems, solutions, and ramifications of the Court's failure to set forth a standard for legislatures and state officials to adopt.

II. HISTORY AND BACKGROUND OF THE LAW

A. No National Consensus in Late 1980s

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

Nevertheless, in the 1989 case of *Penry v. Lynaugh*, the Supreme Court refused to categorically hold that the execution of mentally retarded individuals was cruel and unusual punishment because there was not yet an established “national consensus” against this type of punishment. At the
time of the decision, only Georgia, Maryland, and the federal government had enacted legislation prohibiting the execution of the mentally retarded. The majority, through Justice O'Connor, contrasted this with the Court's decision to prohibit the execution of the mentally insane as set forth in Ford v. Wainwright, where "[n]o state permitted the execution of the insane, and twenty-six [s]tates had statutes explicitly requiring suspension of the execution of a capital defendant who became insane." Penry relied heavily on public opinion surveys that demonstrated that the public disfavored executing mentally retarded individuals. The Court discounted the statistics and stated, "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." The combination of two states with specific legislation prohibiting the execution of the mentally retarded and fourteen states with legislation prohibiting the death penalty in general did not provide evidence of a "national consensus" against the practice.

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

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

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

32. Id. at 331.

33. Id. at 334.

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

35. Id. at 340.

36. Id. at 337-38 (emphasis added). Justice O'Connor used mitigation to reconcile the conflict between the AAMR's argument that "all mentally retarded people, regardless of their degree of retardation, have substantial cognitive and behavioral disabilities that reduce their level of blameworthiness for a capital offense," and the statement that, nevertheless, the mentally retarded can be "held responsible or punished for criminal acts they commit." Id. at 336. Justice O'Connor offered protection to mentally retarded defendants by providing that the jury must not only hear
O'Conner did leave open the possibility of revisiting the case once a “national consensus” had been sufficiently evidenced through legislation.\textsuperscript{37}

Justice O'Connor noted that the Court has also disallowed the death penalty when application of the death penalty to particular categories of crimes or classes of offenders violates the Eighth Amendment because it “makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering” or because it is “grossly out of proportion to the severity of the crime.”\textsuperscript{38}

In dissent, Justice Brennan argued that this statement required the Court to consider “whether a punishment is disproportionate by comparing ‘the gravity of the offense,’ understood to include not only the injury caused, but also the defendant’s moral culpability, with ‘the harshness of the penalty.’”\textsuperscript{39} Furthermore, the punishment must further important “penal goals of deterrence or retribution.”\textsuperscript{40} While recognizing Justice O'Connor's reservation about stereotyping all mentally retarded persons as “inevitably lack[ing] the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty,”\textsuperscript{41} Justice Brennan noted that there is “no danger of spurious generalization because [the characteristics] are a part of the clinical definition of mental retardation.”\textsuperscript{42} Thus, despite the ability of some mentally retarded persons to “maintain themselves independently or semi-independently in the community,”\textsuperscript{43} their impairments in reasoning, controlling impulsivity, and moral development limit their culpability, making death “always and necessarily
disproportionate to [the offenders’] blameworthiness and hence... unconstitutional."44

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

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

B. International Consensus

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

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

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

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

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

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

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

50. Id. at 349.

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

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

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

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

C. A Potential National Consensus?

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

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

\textsuperscript{60} Id.
five mentally retarded offenders had been executed since 1976. Six of
those offenders were executed in 1995 alone. Thus, using mental
retardation as a mitigating factor was unlikely to stop the practice of
executing mentally retarded persons. Apparently recognizing this fact,
sixteen state legislatures (Kentucky, Tennessee, New Mexico, Arkansas,
Colorado, Washington, Indiana, Kansas, New York, Nebraska, South
Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina) passed
laws similar to those of Maryland and Georgia, prohibiting the execution of
mentally retarded individuals.

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

III. FACTS OF THE CASE

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

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

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

69. Id. at 307 n.1. This made Jones ineligible for the death penalty. Id.
70. Id. at 307.
71. Id.
72. Id. at 308.
73. Id. at 308-09; see also id. at 309 n.4. Atkins was given the Wechsler Adult Intelligence Scales test (WAIS-III), which is the standard test given to evaluate intellectual functioning in the United States. Id. at 309 n.5. Mild mental retardation is defined by the Diagnostic and Statistical Manual as an IQ level between 50 to 55 and 70. See DSM-IV, supra note 8.
75. Atkins, 536 U.S. at 309.
76. Id. at 309 n.6.
77. Id.
78. Id. at 309.
79. Id.
80. Id. at 309 n.6.
81. Id. at 309.
could not be sentenced to death. Moreover, the Virginia court blatantly refused “to commute Atkins’ sentence of death to life imprisonment merely because of his IQ score.” Virginia Supreme Court Justices Hassell and Koontz dissented, stating that it was indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way.

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

IV. ANALYSIS OF ATKINS V. VIRGINIA

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

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

83. Atkins, 536 U.S at 310 (quoting Atkins, 534 S.E.2d at 321).
84. Atkins, 534 S.E.2d at 325 (Hassell, J., dissenting).
86. Atkins, 536 U.S. at 311. Justice Stevens wrote for the majority, joined by Justice Breyer, Justice Ginsburg, Justice Kennedy, Justice O’Connor, and Justice Souter. Id. at 306.
87. Id. at 311-12 (quoting Trop v. Dulles, 356 U.S. 86, 100-101 (1958) (plurality opinion)).
88. Id. at 311.
89. Id. (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)). The Court continued by noting several instances where the Court had previously relied on such evidence to reject certain punishments for certain crimes. Id; see, e.g., Coker v. Georgia, 433 U.S. 584, 593-96, 97 (1977) (holding that capital punishment was excessive punishment for rape of an adult woman in light of the fact that a majority of state legislatures have rejected death as a permissible penalty for that crime); Enmund v. Florida, 458 U.S. 782, 789-93 (1982) (holding that capital punishment was
However, the Court noted that the Constitution still mandates that “in the end [the Justices] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”

For example, the Court in *Enmund v. Florida* agreed with legislative action that prohibited capital punishment when the offender did not have intent to commit the crime and did not actually commit the crime because in that case capital punishment did not “measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.” When a consensus is involved in determining whether there is a national standard, the Justices’ “judgment is ‘brought to bear’ by asking whether there is a reason to disagree with the judgment reached by the citizenry and its legislators.”

Thus, the Court will accept evolving standards so long as there is no reason to disagree with the movement by the people and legislatures.

Of particular importance to the majority was not only the sheer number of states that had enacted legislation prohibiting the execution of mentally retarded persons, but also “the consistency of the direction of change,” especially given the well known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of states prohibiting the execution of mentally retarded persons (and the complete absence of states passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.
Furthermore, the Court noted that even in states where there is not express legislation prohibiting such executions, none have occurred in years.96 Similarly, a number of organizations, including religious communities, share the belief that it is morally wrong to execute a mentally retarded offender.97 National opinion polls also reflect a consensus among the citizenry, even among those in favor of capital punishment in other situations, that the practice should be forbidden.98 Furthermore, most serious disagreements plaguing the issue of executing mentally retarded persons come in the form of determining who is actually retarded99 because not all offenders claiming to be mentally retarded will fall within the standards that provide a national consensus.100 Thus, the Court concluded that the evidence showed that a "national consensus" had been reached on the issue.101

B. The Penalogical Goals of Capital Punishment

In order to bear upon the judgment of the "national consensus," the Court next turned to the penalogical goals of capital punishment.

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

96. Id. at 316 (referring to states such as New Hampshire and New Jersey).
97. Id. at 316 n.21. Among the groups that oppose the execution of mentally retarded persons are the American Psychological Association (APA), the AAMR, Christian, Jewish, Muslim, and Buddhist representatives, and the European Union. Id.
98. Id. (stating that "[a]lthough these factors are by no means dispositive, their consistency with the legislation evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue"). But see id. at 328 (Rehnquist, C.J., dissenting) (Appendix to Opinion) (asserting that the opinion polls, the positions of several organizations, and international opinion are unreliable evidence of a national consensus).
99. Id. at 317. Unfortunately, the Supreme Court opted to "'leave to the [s]tates the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.'" Id. (quoting Ford v. Wainwright, 477 U.S. 399, 405, 416-17 (1986)).
100. Id. However, the Court did assert that the definitions should be similar to those posed by either the AAMR or the APA. Id. at 317 n.22.
101. See id. at 313-17.
102. Id. at 318. If the offender is so profoundly retarded as to be classified as "mentally incompetent he or she will not be required to stand trial . . . . However, findings of mental incompetence are extremely rare." EHRENREICH & FELLNER, supra note 2, at IV. Moreover, upon a determination of competency to stand trial, these individuals are "deemed capable of understanding the nature and purpose of the legal proceedings and of cooperating, communicat[ing] and working with defense counsel." Id.
103. Atkins, 536 U.S. at 318. However, this does not entirely excuse them from punishment. Id.
104. Id. at 318-19.

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

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

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

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107. *Id.* at 319 (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)).
108. *Id.*
109. *Id.* However, a prerequisite for capital punishment is "high moral blameworthiness," something mentally retarded individuals, by definition, are unable to satisfy. *Ehrenreich & Fellner*, supra note 2, at VII.
110. *Atkins*, 536 U.S. at 319-20; see, e.g., *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (requiring a "consciousness more 'depraved' than that of any person guilty of murder" for capital punishment to be imposed).
111. *Atkins*, 536 U.S. at 319.
112. *Id.* Justice Stevens cited only the *Godfrey* case as evidence of narrowing death penalty jurisprudence. However, *Godfrey* hardly suggests a significant reduction in the number of people who can be sentenced to death, considering that 3,701 inmates currently sit on death row throughout the United States. See Jamie Fellner, *U.S. Supreme Court Ban Ends "Barbaric" Executions*, HUM. RTS. NEWS, June 20, 2002, at http://www.hrw.org/press/2002/06/deathpen.htm.
114. *Id.* (quoting *Enmund*, 458 U.S. at 799.)
prevent the potential offender from carrying out the criminal conduct. The Court explained that, because of the cognitive deficiencies of mentally retarded individuals, severe punishments are not likely to inhibit their criminality because they cannot appreciate the severe consequences of such behavior and thus a measurable deterrent effect will not be achieved by mandating execution. Furthermore, prohibiting execution of the mentally retarded will not reduce the deterrent effect on non-mentally retarded offenders because they will remain unprotected by the prohibition and continue to face the death penalty in the wake of heinous crimes.

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

Finally, the Atkins Court recognized that mentally retarded offenders do not benefit from the procedural safeguards afforded by both case law and the Constitution. There are numerous hurdles that mentally retarded individuals encounter when entering the criminal justice system. Most importantly, “the risk ‘that the death penalty will be imposed in spite of factors which may call for a less severe penalty’... is enhanced... by the possibility of false confessions... “ and “the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors.” Mentally retarded defendants “may be less able to give meaningful assistance to their counsel,” are ineffective witnesses, and “their demeanor may create an

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115. Id. at 320.
116. Id. There is evidence that mentally retarded individuals are unable to understand abstract concepts such as death or murder. EHRENREICH & FELLNER, supra note 2, at II. For example, Morris Mason, who was convicted of rape and murder and subsequently executed in Virginia in 1985 was reported to have “asked one of his legal advisors for advice on what to wear to his funeral.” Id. (citing ROBERT PERSKE, UNEQUAL JUSTICE? WHAT CAN HAPPEN WHEN PERSONS WITH RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES ENCOUNTER THE CRIMINAL JUSTICE SYSTEM 100-01 (Abingdon Press 1991)).
117. Atkins, 536 U.S. at 320.
118. Id. at 320-21.
119. See id.
120. Id. at 320 (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)). A false confession nearly killed Earl Washington in Virginia until DNA evidence exonerated him just days before his execution. Tim McGlone et al., A Near Fatal Injustice, VIRGINIA-PILOT, Jan. 22, 2001, at A1. Even after the tests exonerated him, he was kept in prison and not fully pardoned for an additional five-and-a-half years. Id. A former employer of Mr. Washington noted that “[y]ou could get [him] to confess that he walked on the moon.” Id. This is exactly what the police did. See id. Upon questioning, the police asked a series of questions regarding the physical attributes of the female victim. See id. Mr. Washington answered every question incorrectly; however, by the time he signed the statement, “he had the facts straight.” Id. Ehrenreich & Fellner attribute false confessions of mentally retarded individuals to a desperate attempt for “approval and friendship.” EHRENREICH & FELLNER, supra note 2, at II. They theorize that, as a result of “abuse, taunts, and rejection because of their low intelligence[...][mentally retarded individuals are] eager to be accepted and eager to please...[rendering them] highly suggestible.” Id.
121. Atkins, 536 U.S. at 320.
122. Id. at 320-21. Furthermore, coupled with inexperienced, overworked, or uninterested defense counsel, this can pose a serious threat to the offender’s ability to effectively mitigate the
unwarranted impression of lack of remorse for their crimes.”123 The Court
found that relying on mental retardation as a mitigating factor was not only
ineffective in protecting mentally retarded offenders but might also “enhance
the likelihood . . . of future dangerousness [being] found by the jury.”124

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

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

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

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123. Atkins, 536 U.S. at 321. Ehrenreich & Fellner note that
[1]ow intelligence and limited adaptive skills also mean that people with mental
retardation often miss social “cues” that other adults understand . . . . They may act in
ways that seem suspicious, even when they have done nothing wrong. When questioned
by police . . . they often smile inappropriately, fail to remain still when ordered to do so,
or act agitated and furtive when they should be calm and polite. Others may fall asleep at
the wrong moment.


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

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

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

128. Id.

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

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

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

\begin{itemize}
\item \textsuperscript{130} Id. (quoting Stanford v. Kentucky, 492 U.S. 361, 377 (1989) (plurality opinion)).
\item \textsuperscript{131} Id. at 322-23.
\item \textsuperscript{132} Id. at 323. Chief Justice Rehnquist asserted that evidence of the actions of sentencing juries could also have “significant and reliable” weight, although less than that of legislative actions. \textit{Id}; \textit{see} Coker v. Georgia, 433 U.S. 584, 596-97 (1977) (noting that nine out of ten juries in Georgia did not impose the death penalty for rape convictions); Enmund v. Florida, 458 U.S. 782, 793-94 (1982) (giving great weight to evidence that sentencing juries did not impose the death penalty when a person did not attempt to, intend to, or actually take a life, despite the lack of legislative action in the same direction).
\item \textsuperscript{133} \textit{Atkins}, 536 U.S. at 324. \textit{Atkins} did not include statistical evidence regarding whether juries believe that executing mentally retarded defendants is disproportionate to their moral blameworthiness. \textit{Id}.
\item \textsuperscript{134} Id. at 322.
\item \textsuperscript{135} Id.
\item \textsuperscript{136} Id. at 326.
\item \textsuperscript{137} Id. at 327.
\item \textsuperscript{138} Id. at 328.
\item \textsuperscript{139} Id. at 324-25; \textit{see also} Stanford v. Kentucky, 492 U.S. 361, 370 n.1 (1982). The \textit{Stanford} Court stated, “[w]e emphasize that it is American conceptions of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant.” \textit{Stanford}, 492 U.S. at 370. Although these arguments are relevant, how much weight did the majority really give to the fact that international consensus is against capital punishment in this context? The Court
\end{itemize}
the sentencing practices of other countries [can] 'serve to establish . . . that [a] practice is accepted among our people.' Accordingly, evidence of a national consensus has to be from actions taken by Americans and not by the actions of foreign legislatures and populace.

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

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

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

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

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

140. Atkins, 536 U.S. at 325 (quoting Stanford, 492 U.S. at 369).
141. Id.
142. Id. at 326.
143. Id.
144. Id. at 328.
145. Id.
146. See, e.g., id. at 338-39. Atkins hit a victim with a beer bottle and slapped a gun across the face of a victim before using it to shoot her in the stomach. Id. Justice Scalia's analysis of the facts also gave deference to the testimony of Atkins's co-conspirator, William Jones, which bolstered the notion that Atkins actually shot Nesbit eight times. Id. at 338.
147. Id. at 339 (Scalia, J., dissenting).
148. Id. Justice Scalia appears to be insinuating that the jury did consider Atkins's mental retardation as a mitigating factor, but it was not strong enough to forbid the death penalty under the circumstances of this particular case. See id.
disagreed with the majority’s decision to “‘upset[.] this particularized judgment on the basis of a constitutional absolute’ . . . conclud[ing] that no one who is even slightly mentally retarded can have sufficient ‘moral responsibility to be subjected to capital punishment . . . ’”149

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

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

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

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

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

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

152. Id. (quoting 4 William Blackstone, Commentaries *24 (1769)).

153. Id. at 340-41.

154. Id.

155. Id. at 341.

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

157. Id.

158. Id. at 342.
Justice Scalia had particular trouble with the fact that only eighteen of the thirty-eight states (47%) that employ the death penalty have forbidden this type of execution. Justice Scalia argued that this is "not a statement of absolute moral repugnance, but one of current preference between two tolerable approaches," and it is not indicative of a "national consensus." Justice Scalia urged that prior case law mandates more agreement among the states before finding a punishment "cruel and unusual."

Furthermore, Justice Scalia criticized the majority for not considering the infancy of these statutes, the eldest statute being only fourteen years old, not nearly enough time for the states to have evaluated their practicality. According to the dissent, it was "myopic to base sweeping constitutional principles upon the narrow experience of [a few] years." Justice Scalia further dismissed the majority's attempt to "bolster its embarrassingly feeble evidence of 'consensus'" by arguing that the number of states that have actually enacted legislation prohibiting the execution of mentally retarded persons has less authoritative weight than the "consistency of the direction of change." Instead, Justice Scalia scathingly rewrote the "consistency-of-the-direction-of-change" argument posed by the Court as "[n]o state has yet undone its exemption of the mentally retarded, one for as long as 14

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

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

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

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

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

164. Id. at 344.
whole years.” Justice Scalia charged the majority with “thrashing about for evidence of ‘consensus,’” and poked fun at its use of the states’ infrequent execution of mentally retarded persons as evidence and its consideration of the views of professional and religious organizations.

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

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

Justice Scalia reasoned that “[t]he fact that juries continue to sentence mentally retarded offenders to death for extreme crimes shows that society’s moral outrage sometimes demands execution of retarded offenders.”

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165. Id. at 345.
166. Id. at 346-48. Justice Scalia attributed the infrequency with which mentally retarded persons are actually executed to the fact that mental retardation is a “constitutionally mandated mitigating factor.” Id. at 347. Furthermore, he dismissed the professional organizations, the world community, and the opinion polls as irrelevant. Id. at 347-48.
167. Id. at 348-49 (quoting Thompson v. Oklahoma, 487 U.S. 815, 873 (1988) (Scalia, J., dissenting)).
168. Id. at 349.
169. Id. at 350 (quoting Gregg v. Georgia, 428 U.S. 153, 183 n.28 (1976)). Justice Scalia criticized the failure to recognize this third societal purpose, yet he also ignored it except to point out the majority’s oversight. See id.
170. Id. Justice Scalia appeared troubled by a lack of evidence showing that the mentally retarded are naturally more disposed to murder than others and by the evidence that, in fact, quite the opposite is true: their childlike qualities actually suggest “innocence rather than brutality.” Id.
171. Id. at 350-51.
172. Id. at 351. Justice Scalia’s assertions are bolstered by John Paul Penry’s account of the brutal rape and murder of Pamela Mosely Carpenter on October 25, 1979, discussed supra note 27 and accompanying text. Penry described the events of that day as follows:

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

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

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

V. CRITIQUE

A. What Constitutes a "National Consensus"?

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

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

173. Atkins, 536 U.S. at 351.
174. Id.
175. Id. at 351-52.
176. Id.
177. Id. at 352.
179. Id.
Amendment’s “cruel and unusual” provision. Namely, some argue that the Court must look for a “national consensus” before unilaterally declaring a punishment to be cruel and unusual and therefore unconstitutional. There is widespread criticism, consistent with the dissenting opinions of Justice Scalia and Chief Justice Rehnquist, that the national consensus reached by the majority falls short of the typical notion that a consensus requires “a broad, stable base of public support.” However, others concede that a “national consensus” is emerging because of the number of legislatures that have enacted such legislation.

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

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

180. Id.
181. Id.
182. See id. Thus, the blanket rule constitutes an abuse of judicial discretion and a “usurpation of the state legislatures’ lawmaking authority.” Id.
185. See, e.g., supra note 161 and accompanying text. These examples show a much higher threshold for attaining a national consensus than in Atkins.
186. Atkins, 536 U.S. at 346 (citing U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 21 (121st ed. 2001)).
188. See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (extending the right to privacy and creating a sliding scale standard for determining when the state’s interest in protecting the potential for human life outweighs the woman’s right to privacy); Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing a right to privacy located in the penumbras of the 1st, 4th, 5th, 9th, and 14th amendments); Loving v. Virginia, 388 U.S. 1 (1967) (finding a fundamental right to marry). Neither of these two areas were “settled law,” and they might be considered examples of the Court basing its decision on the Justices’ own opinions regarding morality, as Justice Scalia asserted that the majority did in Atkins. See Atkins, 536 U.S. at 348.
O'Connor could not “imagine that [a person] wouldn’t count those states” in establishing a national consensus.\textsuperscript{90} Justice Scalia, however, responds that while “[t]here is something to be said for popular abolition of the death penalty[,] there is nothing to be said for its incremental abolition by this Court.”\textsuperscript{91} By inference, counting these states could result in precedent that could be used to sustain future categorical rejections of the death penalty.\textsuperscript{92}

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

[the] primary concern . . . today—whether by the press, governors, legislators, or judges—is not squeamishness about the state taking the lives of criminals . . . . Instead, the focus today is on the risk—and over time, the certainty—that a nation that imposes the death penalty will eventually take the life of an innocent person, assuming it hasn’t already.\textsuperscript{93}

This is largely because of the revolution of DNA forensic testing that began in the late 1980s, which can “implicate a guilty person with near mathematical certainty” and also can “exonerate the innocent with equal authoritiveness.”\textsuperscript{94} Since \textit{Furman v. Georgia}, more than one hundred “offenders” have been released from death row because of strong evidence of their innocence.\textsuperscript{95} For many, this may be further compounded by mentally retarded persons’ tendency to unwittingly confess to crimes that they did not commit.\textsuperscript{96}

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

\textsuperscript{90} Id.

\textsuperscript{91} \textit{Atkins}, 536 U.S. at 353. Justice Scalia provided a laundry list of procedural and substantive impositions that have been placed on the death penalty by the Supreme Court, which have had the effect of slowly narrowing the circumstances in which the death penalty can be imposed on a criminal offender. \textit{See, e.g.}, Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (prohibiting the death penalty for offenders under the age of sixteen at the time of the crime); \textit{Enmund} v. Florida, 458 U.S. 762, 801 (1982) (prohibiting the death penalty for felony murder charges absent a showing the defendant possessed a sufficiently culpable state of mind); \textit{Coker} v. Georgia, 433 U.S. 584, 600 (1977) (holding that rape charges cannot carry a sentence of the death penalty); \textit{Woodson} v. North Carolina, 428 U.S. 280, 305 (1976) (prohibiting the death penalty as mandatory punishment for any crime). The list could go on and on. But even if the Supreme Court is slowly preventing the death penalty as a sentence, is that necessarily so bad? The risk of executing an innocent person weighs so heavily on the public conscience that perhaps it would be better to not execute anyone rather than risk executing even one innocent person.

\textsuperscript{92} \textit{See Atkins}, 536 U.S. at 353. For example, persons under the age of 18 could be the next group to be excluded by the Court.


\textsuperscript{94} Id.

\textsuperscript{95} Id. In fact, “at least 12 had made their way to death row before science granted them their eleventh-hour reprieves.” Id. In many of the cases, the state officials actually admitted error. Id.

\textsuperscript{96} Id.; \textit{see also supra note 120}, discussing the case of Earl Washington.
justifications for their views, the fact remains that the Justices, political officials, and American people are “continually conflicted: [o]ne instinct is to guide and protect [mentally retarded persons] from the world, but our fears lead us to try to protect the world from them. We coddle them, and sometimes we kill.”\textsuperscript{197} This dilemma plagued state legislatures around the country prior to the \textit{Atkins} decision.\textsuperscript{198} Despite Justice Scalia’s concern with the majority’s reliance on the statutes, because of their infancy, in determining a “national consensus,” the fact remains that, in the thirteen years that have passed since \textit{Penry v. Lynaugh}, eighteen state legislatures and the federal government have felt the issue was important enough to move through their legislative systems.\textsuperscript{199} Moreover, three additional states had bills prohibiting such executions awaiting legislative approval at the time \textit{Atkins} was handed down.\textsuperscript{200} This is particularly powerful when considered in the context of American society’s preference for stricter anti-crime legislation and sentencing rules.\textsuperscript{201} Coupled with the positions of numerous religious and professional organizations and public opinion polls, there does appear to be an emerging view that the practice of executing mentally retarded offenders is morally and legally wrong.\textsuperscript{202} Is this enough to justify banning capital punishment in the case of mentally retarded offenders? Yes, according to the current United States Supreme Court.\textsuperscript{203}

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

\textsuperscript{198} See supra note 64 and accompanying text.
\textsuperscript{200} Douglas Mossman, \textit{Psychiatry in the Courtroom}, PUB. INT., Jan. 1, 2003, at 22. Ironically, the State Senate of Virginia had already passed a bill banning the death penalty in cases of mentally retarded offenders, but it was delayed in passing the state house because the legislature was awaiting the outcome of Atkins. Greenhouse, supra note 187, at A21. In Texas, the bill banning executing mentally retarded offenders had already been passed through both houses, but it was struck down by Texas Governor Rick Perry who urged that, in Texas, no one with mental retardation had been executed. \textit{Executing the Mentally Retarded}, supra note 183, at 3. The senate sponsor of the Texas bill, Rodney Ellis, disagrees, claiming that six mentally retarded offenders have been executed since 1982 when Texas resumed capital punishment. \textit{Id}.
\textsuperscript{201} Id. at 315 n.21.
\textsuperscript{202} Id. at 321.
\textsuperscript{203} Id. at 346-47.
\textsuperscript{204} Id. at 346-47.
acts... that the people have approved.'

In reality, the majority only dedicated one footnote to the views of these various organizations and the results of these opinion polls. The footnoted material may have been interesting to the majority, particularly because of the divergent groups that expressed their shared opinion that the death penalty should not be imposed on mentally retarded persons, but this does not mean the majority found this information to be authoritative. The great weight of the authority was vested in the numerous states that have adopted anti-capital punishment legislation in this context. Thus, the dissents' criticism of the use of these subjective sources by the majority appears to be unfounded.

The fact remains that, before the Atkins decision, the United States "'[was] the only established democracy in the world that [was] known regularly to execute people with mental retardation.'" While the Chief Justice, Justice Scalia, and others discount the importance of world opinion, former United States diplomats and the European Union have asserted that U.S. policy on capital punishment has created a "foreign policy problem.

Even if the "national consensus" discussed by the majority is enough to constitute a societal movement against executing the mentally retarded, many have questioned whether society benefits by moving with social trends. "Constitutional values, most people would agree, should have more durability than the latest push poll." However, society would not benefit from rigid application of the Constitution as it applied in 1788.

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

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

208. See id.

209. See id. at 313-17.

210. See id. at 316 n.21.

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

212. See id.

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

214. Schultz, supra note 197.

215. Id.

216. Id. In 1788, slavery was not only legal, it was constitutional; surely few would prefer applying that law today. See id.; U.S. CONST. art. I, § 2.
Reaching a balance between the social views of an era and rigid application of the Constitution is where the difficulty arises.\footnote{See, e.g., United States v. Drayton, 536 U.S. 194 (2002). In Drayton, the Court validated police searches and interrogation of bus passengers without the police informing the passengers of their right to decline. \textit{Id.} This was justified as a security measure in the wake of the terrorist attacks that occurred on September 11, 2001, despite constitutional protections to the contrary. \textit{See id.}}

B. Divesting Mentally Retarded Persons of Culpability: The Anomaly

"Those mentally retarded persons who meet the law’s requirements for criminal responsibility should be tried and punished when they commit crimes."\footnote{Atkins v. Virginia, 536 U.S. 304, 306 (2002). This is the first line of Justice Stevens’s majority opinion. \textit{Id.}} However, according to the majority, despite mentally retarded offenders’ inability to give meaningful assistance to counsel, to be effective witnesses, and to persuasively show mitigation to lessen their culpability, "[t]heir deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability."\footnote{Id. at 318.} The problem is that if the mentally retarded offender cannot aid his own defense and potentially faces wrongful execution, will there not also be a possibility that the mentally retarded offender will be unable to disprove his guilt even when he is innocent?\footnote{Schultz, supra note 197 (citing \textit{Atkins}, 536 U.S. at 320-21); see also McGlone, supra note 118, at A1.} In his dissent in \textit{Atkins}, Justice Scalia noted that if the majority’s claim that mentally retarded offenders are less able to present their cases because of their condition, then this "might support a due process claim in all criminal prosecutions of the mentally retarded."\footnote{Schultz, supra note 197. Schultz argues that it is not only unconstitutional to sentence a mentally retarded offender to death, it is also unconstitutional that they were "put on trial in the first place." \textit{Id.} The American Law Institute’s Model Penal Code states that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of [the] law." \textit{Id.; MODEL PENAL CODE § 401(1)} (American Law Inst. 1962).} The problem is that if the mentally retarded offender will be unable to disprove his guilt even when he is innocent?\footnote{Schultz, \textit{supra} note 197. Schultz argues that it is not only unconstitutional to sentence a mentally retarded offender to death, it is also unconstitutional that they were "put on trial in the first place." \textit{Id.} The American Law Institute’s Model Penal Code states that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of [the] law." \textit{Id.; MODEL PENAL CODE § 401(1)} (American Law Inst. 1962).}

The answer to this question lies in the majority’s belief that mentally retarded persons know the difference between right and wrong.\footnote{Atkins, 536 U.S. at 352 (Scalia, J., dissenting).} Thus, mental retardation impairs culpability but does not entirely exonerate the offender from guilt for the offense and, as a result, only precludes the imposition of capital punishment, which has been historically reserved for only the most culpable of offenders.\footnote{See Atkins, 536 U.S. at 318 (stating that "[m]entally retarded persons frequently know the difference between right and wrong and are competent to stand trial").} Nevertheless, it is hard to imagine how offenders like Daryl Renard Atkins, given his violent history, and John Paul Penry, given the forethought that went into his criminal activity, could
be presumed to have diminished culpability as a result of their mental retardation.\textsuperscript{225} Justice Scalia argued that culpability "and deservedness of the most severe retribution, depend[] not merely (if at all) upon the mental capacity of the criminal (above the level where he is able to distinguish right from wrong) but also upon the depravity of the crime."\textsuperscript{226} Furthermore, "[t]he fact that juries continue to sentence mentally retarded offenders to death for extreme crimes shows that society's moral outrage sometimes demands execution of retarded offenders."\textsuperscript{227}

However, mental retardation by definition "entails serious limitations on the ability to appreciate the consequences and gravity of one's actions and to exercise mature control over one's conduct."\textsuperscript{228} Professor James W. Ellis\textsuperscript{229} argues that mentally retarded offenders should still be punished for their crimes but not with the death penalty, because although "[r]etarded people may know right from wrong and be able to form the intent to commit a criminal act . . . [they] may lack the ability to understand the legal system and participate fully in their own defense[s]." For that reason, the retarded face a higher risk than others of wrongful convictions.\textsuperscript{230} Moreover, in \textit{Ford v. Wainwright},\textsuperscript{231} the Court recognized the reduced "retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life."\textsuperscript{232} Accordingly, there are excellent arguments on both sides, and the final result depends largely on

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

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

\textsuperscript{227} \textit{Id}. at 351.

\textsuperscript{228} \textit{EHRENREICH & FELLNER, supra note 2}, at V.

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

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

\textsuperscript{231} 477 U.S. 399 (1986).

\textsuperscript{232} \textit{EHRENREICH & FELLNER, supra note 2}, at V (quoting \textit{Ford v. Wainwright}, 477 U.S. 299, 409 (1986)). The categorical exclusion of the insane from capital punishment serves as precedent for categorically excluding the mentally retarded. \textit{Id.}; see also Thompson v. Oklahoma, 487 U.S. 815 (1988) (categorically excluding juveniles under the age of sixteen from capital punishment).
society's, and the Justices', opinions of the death penalty in general. The trend has been to narrow the circumstances in which the death penalty is appropriate, and the Court in *Atkins* followed that trend.

**C. Categorical Exclusion of the Mentally Retarded**

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

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

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

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234. See id. at 314-15. It has been argued that the decision in *Atkins* is akin to the decision not to sentence children to death for murder. Jim Marcus, *The Next Task: Who is Mentally Retarded?* 47 TEX. L. REV. (2002). He argues that the disparity in treatment between children and the mentally retarded is "not based on an otherwise arbitrary criterion of chronological age [or IQ score]; it is premised on the recognition that punishing someone as if they were possessed of average adult intelligence, when they are not, is excessive and cruel." *Id.*
237. *Id.*
238. *Id.* In its 1997 position statement, the APA actually admonished against "the use of psychiatric diagnoses in making decisions regarding employment, insurance, housing, or credit." *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
responsibility for their actions." An approach more consistent with the Americans with Disabilities Act requires that determinations of moral culpability be made on a case-by-case basis.

VI. IMPACT AND SIGNIFICANCE

A. Failure to Set Forth a Standard

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

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242. Id.
243. Id. This is what was suggested in the Penry case. But does the fact that, in the thirteen years since Penry was decided, sixteen states have felt this case-by-case basis was inadequate for appropriately sentencing the mentally retarded change the landscape?
244. See Atkins v. Virginia, 536 U.S. 304, 339 (2002) (stating "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences") (quoting Ford v. Wainwright, 477 U.S. 339, 405 (1986)).
246. Id.
247. Id. Can you fake mental retardation? No mention was made in the article of whether a clinician had evaluated Mr. Hainta prior to trial. Importantly, Oklahoma does not yet have a statute prohibiting the execution of mentally retarded offenders, and therefore that state may not yet have adequate standards for handling this defense. See id.
248. Emily Heller, Faking Retardation to Escape Death Penalty Isn’t Likely, MIAMI DAILY BUS. REV., July 5, 2002, at 8. Stephen B. Bright, director of the Southern Center for Human Rights in Atlanta, Georgia, which was the first state to enact legislation banning the execution of mentally retarded persons, urges that “[o]f all the things you could feign, mental retardation is just not one of them.” Id.
249. Id.
250. Id. (quoting B. Michael Mears, head of the state’s multi-county public defender’s office). Mears says that if there is strong evidence of mental retardation, prosecutors will accept and arrange for plea bargains; when they do not accept a defendant’s mental retardation claim, the issue becomes a “question for the jury during the guilt-innocence phase of the trial.” Id.; see also Marcus, supra note 234.
Interestingly, the APA argued in its amicus brief that “making psychiatric diagnosis the basis for a life-or-death legal decision would cause no scientific or practical problems. Both ‘incorrect diagnoses’ and ‘unnecessary legal wrangling’ could be avoided because mental retardation can be identified using time-tested instruments and protocols with proven validity and reliability.”\textsuperscript{251} However, this does not necessarily appear to be the case.\textsuperscript{252} Mental health professionals contend that three criteria must be met to diagnose a person with mental retardation: “significant limitations in intellectual functioning, significant limitations in practical or adaptive functioning, and onset before adulthood.”\textsuperscript{253} Although mental health professionals urge that the examinations used to measure intelligence and adaptive functioning result in objective determinations, such that professionals “undertaking separate assessments should reach the same conclusion,”\textsuperscript{254} even under the best testing conditions IQ test results usually err by about five points.\textsuperscript{255} Moreover, clinicians may have difficulty objectively interpreting the offender’s responses when they know that life and limb rests on their shoulders.\textsuperscript{256}

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

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

\textsuperscript{251} Mossman, \textit{supra} note 200 (quoting the APA amicus brief). Mental health professionals have praised the Court’s decision in \textit{Atkins} for the most part. \textit{Id.}
\textsuperscript{252} See \textit{id.}
\textsuperscript{253} \textit{id.}
\textsuperscript{254} \textit{id.} However, consider the case of Earnest Paul McCarver, who received an IQ score of 74 the first time he was tested and a score of 67 the second time he was tested, which averaged out to a 70.5. Swofford, \textit{supra} note 66, at B1. Other professionals find this assertion “remarkable.” Mossman, \textit{supra} note 200.
\textsuperscript{255} Mossman, \textit{supra} note 200. An individual who scores 68 on the first IQ test “has a 95% chance of scoring between 63 and 73 on subsequent administrations [of the exam].” \textit{Id.}
\textsuperscript{256} \textit{id.}
\textsuperscript{257} \textit{id.} See generally \textit{EHRENREICH} & \textit{FELLNER}, \textit{supra} note 2, at II (explaining the three criteria for determining mental retardation).
\textsuperscript{258} Mossman, \textit{supra} note 200.
\textsuperscript{259} \textit{id.}
\textsuperscript{260} \textit{id.} Medical conditions that can cause intellectual impairment range from chromosomal defects to infections that alter the developing brain either before or after birth. \textit{Id.} Sometimes there is no specific medical reason for a person’s mental retardation. \textit{id.}
because of their limited communication skills or their extremely poor academic performance through grade school, the remaining persons are often able to develop the skills necessary to support themselves, only needing guidance when they have to make complicated decisions. This compounds the problem of determining who is mentally retarded for purposes of excluding from the death penalty because some persons will have limited cognitive capabilities yet be able to carry on daily living functions like a non-retarded person. Consequently, the use of numerical scores from IQ tests actually "believe[s] the inherent subjectivity and complexity of the problem." 

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

261. Id.
262. Cf. id.
263. Id.
265. Id.
266. Swofford, supra note 66, at B1. Interestingly, this story involves the case of Earnest McCarver, the capital defendant whose case the Supreme Court was going to consider until North Carolina enacted legislation prohibiting the execution of mentally retarded offenders. See REIN, supra note 65, at 42. His execution became a moot point until it was revealed that his IQ scores were a 74 before trial and a 67 after conviction, resulting in an average of 70.5. Swofford, supra note 66, at B1. Because North Carolina adopted an IQ score of 70 as a bright line test for mental retardation, the statute does not protect McCarver. Id. Unfortunately, he is only one-half of a point away from being spared from death. Id. His attorneys are currently attacking the constitutionality of the statute for its lack of flexibility and seeking to enjoin McCarver's death sentence. Id.
267. Mossman, supra note 200 (emphasis added).
268. Vogel-Short, supra note 230, at 1.
269. Swofford, supra note 66, at B1 (quoting lawyer Stanley Hammer). Hammer emphasizes that new professional literature and the AAMR say that IQs of 71 to 75 can also indicate mental retardation. Id.
of the mentally retarded, Arizona, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Missouri, New York, and the federal government have adopted flexible standards for determining mental retardation, thereby not specifically including an IQ score.270

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

B. The Problem of Retroactivity

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

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


272. See id.


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

275. Id. at 11.

276. Id.


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offenders currently on death row?  

What about persons already on death row who never raised the issue of their mental retardation?  

Although the Court did not address retroactivity in Atkins, the Court in Penry indicated that if mental retardation had been held to violate the Eighth Amendment, the new rule of law would have applied retroactively.  

Prior to the Atkins decision, the Tennessee Supreme Court had tackled the retroactivity of its statutory prohibition against executing mentally retarded persons in Van Tran v. Tennessee.  

The Tennessee Supreme Court became the second state supreme court to hold that executing mentally retarded persons is unconstitutional despite the absence of “clear statutory language providing for retroactivity” of the state law.  

Thus, there is support for the retroactive application of the Atkins decision.  

However, between setting a standard for determining who qualifies as mentally retarded and potentially applying
the Atkins decision to all death penalty inmates who claim to be mentally retarded, a floodgate of litigation may have been opened.284

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

C. Significance

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

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

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

Steiker, supra note 279, at 1479.


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

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


290. Id.

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

292. Steiker, supra note 279, at 1475.

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

294. Steiker, supra note 279, at 1488.
political poles on the Court."\(^{295}\) She reasons that the decisions actually "contribute to the stabilization of capital punishment" because "[t]he more the Supreme Court slows down, muddies up, and nibles around the edges of the administration of capital punishment, the harder it becomes to sharpen the focus of the debate in a way that is necessary for abolition to occur."\(^{296}\) Thus, the Court, in imposing limitations on the administration of death sentences, may have reduced abolitionists' concerns and struck a balance between the deterrence and retribution rationales for the punishment.\(^{297}\)

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

\(^{295}\) \textit{Id.} at 1489.

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

\(^{297}\) \textit{See id.}

\(^{298}\) \textit{See generally Mossman, supra note 200.}

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

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

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

\(^{302}\) \textit{See Mossman, supra note 200.}

\(^{303}\) \textit{Id.}
'engagement in potentially dangerous activities without consideration of possible consequences.'

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

VII. CONCLUSION

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

304. Id. (quoting the APA Diagnostic and Statistical Manual). At what point these arguments will become far-fetched is hard to say. However, so long as offenders legitimately argue that they have lessened culpability, the Court may continue to consider issues such as whether a person with ADHD is sufficiently less culpable to be exempt from the death penalty. See id.
305. See John Gibeaut, Death Delayed, A.B.A. J., Nov. 2002 (discussing John Paul Penry's long-awaited death sentence and the family that prays that he will die despite the Atkins decision).
307. See, e.g., Gibeaut, supra note 305.
308. See id.
310. See Atkins, 536 U.S. at 315-17.
311. Id. at 348-49 (Scalia, J., dissenting).
312. See id. at 313-17.
an ineffective witness, he or she will not die for the inability to fully understand the scrutiny he or she is under.\textsuperscript{314}

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\textsuperscript{314} See id. at 313-17.

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