Atkins v. Virginia: Death Penalty for the Mentally Retarded - Cruel and Unusual - The Crime, Not the Punishment

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ATKINS v. VIRGINIA: DEATH PENALTY FOR THE MENTALLY RETARDED—CRUEL AND UNUSUAL—THE CRIME, NOT THE PUNISHMENT

INTRODUCTION

In the last decade, the imposition of the death penalty has created continued debate and controversy. This debate has long struggled over such fundamental issues as whether the execution of criminals is constitutional when imposed for certain offenses and whether it is constitutional in any case—regardless of the severity of the crime. At the heart of this debate lies the issue of whether the death penalty, as applied in certain circumstances, withstands constitutional muster under the Eighth Amendment to the United States Constitution.¹ Specifically, the argument turns on whether the execution of certain types of criminals violates the Cruel and Unusual Punishment Clause within the Eighth Amendment.² Recently, this issue has sparked con-

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¹ The Eighth Amendment to the United States Constitution states: “Extensive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. The debate over the scope of the Eighth Amendment often focuses on the intentions of the framers and their purpose in including the “Cruel and Unusual Punishment” clause in the Eighth Amendment. See, e.g., 2 J. Elliot’s Debates 111 (2d ed. 1876) (citing Representative Abraham Holmes of Massachusetts during the Massachusetts convention). Representative Holmes expressed the view that little is known about the framers’ intent in adding the Cruel and Unusual Punishment Clause into the Eighth Amendment; therefore, the interpretation is left to Congress to define. Representative Holmes stated:

What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and determine, what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline.

Id.

² See, e.g., Wilkerson v. Utah, 99 U.S. 130 (1879) (challenging the death sentence imposed for the offense of first degree murder under the Eighth Amendment); Weems v. United States, 217 U.S. 349 (1910) (challenging the sentence of fifteen years hard labor, wearing chains on wrists and ankles, and perpetual loss of civil liberties for the crime of falsifying a public document under the Eighth Amendment); Trop v. Dulles, 356 U.S. 86 (1958) (challenging the sentence of three years of hard labor, forfeiture of all pay and allowances, and dishonorable discharge for the crime of military desertion under the Eighth Amendment); Robinson v. California, 370 U.S. 660 (1962) (Eighth Amendment challenge to a sentence of ninety days in jail for the “crime” of narcotics addiction); Gregg v. Georgia, 428 U.S. 153 (1976) (challenging the death penalty sentence imposed for the offenses of armed robbery and murder under the Eighth Amendment);
siderable controversy regarding the imposition of the death penalty for mentally retarded criminals.\textsuperscript{3} Those supporting the application of the death penalty in cases involving mentally retarded offenders argue that the Eighth Amendment does not prohibit imposing the death penalty on mentally retarded offenders because the Cruel and Unusual Punishment Clause cannot be interpreted so broadly as to encompass this entire class of criminals. In response to the argument that contemporary society no longer finds it acceptable to execute these offenders, supporters further argue that no evidence has been shown that there is a "national consensus" or agreement against such punishment. Also, some supporters argue that a procedural safeguard exists

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\textsuperscript{3} The Court in \textit{Atkins v. Virginia}, 536 U.S. 304 (2002), relied on the definition of mentally retarded provided by the American Association of Mental Retardation (AAMR), which defines mental retardation as follows:

\textit{Mental retardation} refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

\textit{Id.} at 308 n.3. \textit{See also Mental Retardation: Definition, Classification, and Systems of Supports 5} (9th ed. 1992). At the time \textit{Penry v. Lynaugh} was decided, the Court found that persons who were mentally retarded were described as having "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." \textit{Penry}, 492 U.S. at 308 (quoting \textit{AM. ASS’N ON MENTAL DEFICIENCY (NOW Retardation) (AAMR), CLASSIFICATION IN MENTAL RETARDATION} 13 (Herbert J. Grossman ed., 1983)) (internal quotation marks omitted). Individuals who have an IQ of 70 or below fall within the classification of mentally retarded. \textit{Id.} According to the AAMR classification system, referenced by the \textit{Penry} Court and also by the Court in \textit{Atkins}, individuals with scores between 50-55 and 70 are classified as having "mild" retardation; those with scores between 35-40 and 50-55 have "moderate" retardation; and those with scores between 20-25 and 35-40 have "severe" retardation. Those individuals whose scores fall below 20 or 25 are classified as "profoundly" retarded. At the time of the \textit{Penry} decision, according to the statistics available to the Court at that time, approximately 89% of retarded persons were "mildly" retarded (citing James W. Ellis & Ruth A. Luckasson, \textit{Mentally Retarded Criminal Defendants, 53 GEO. WASH. L. REV.} 414, 423 (1985)). Those individuals whose scores fall below 20 or 25 are classified as "profoundly" retarded. \textit{Id.} At the time of the \textit{Penry} decision, according to the statistics available to the Court, approximately 89% of retarded persons were "mildly" retarded.

Additionally, the Court in \textit{Atkins} noted the estimate that between 1% and 3% of the population had an IQ score between 70-75 or lower, and this is typically the cutoff IQ score for the intellectual function prong of the mental retardation definition. \textit{Id.} at 309 n.5 (citing 2 BENJAMIN J. SADOCK & VIRGINIA A. SADOCK, \textit{COMPREHENSIVE TEXTBOOK OF PSYCHIATRY} 2952 (7th ed. 2000)).
because consideration of a criminal's mental disability lies within the sentencing portion of the trial when the jury considers "mitigating factors" in determining a convicted criminal's sentence.\(^4\)

In contrast, opponents of the death penalty as punishment for mentally retarded offenders argue that the purposes of the penalty—retribution to punish those who cannot be rehabilitated and deterrence of future crime—are not being served through their execution.\(^5\) This argument is based on the idea that mentally retarded offenders lack culpability for the crimes they commit;\(^6\) consequently, the death penalty is a cruel, excessive, and disproportionate punishment when applied to such offenders.\(^7\) Opponents also argue that contemporary society, through indications of a "national consensus," does not accept the execution of individuals with mental disability and little reasoning capacity.\(^8\) Finally, opponents argue that executing these criminals violates the proportionality test inherent in the Eighth Amendment because the punishment is excessive compared with the individuals' lack of culpability.\(^9\)

As the United States Supreme Court, along with other federal courts and state legislatures,\(^10\) has attempted to reconcile these death

\(^4\) See Penry, 492 U.S. at 328; but see id. at 346-47 (Brennan, J., dissenting) ("The consideration of mental retardation as a mitigating factor is inadequate to guarantee, as the Constitution requires that an individual who is not fully blameworthy for his or her crime because of a mental disability does not receive the death penalty.").

\(^5\) For an ancillary discussion discussing the view that imposition of the death penalty runs the risk of executing potentially innocent individuals and the recent impact DNA testing has had in this area, see Crime and Punishment: The Death Penalty Becomes a High-Profile Issue, FED. LAW., Sept. 2002, at 34. This article examines the recent action Congress has taken in attempts to replace state DNA testing laws with a uniform standard law and, in effect, encourage the use of DNA in the criminal judicial process. Id.

\(^6\) See Penry, 492 U.S. at 346 (Brennan, J., dissenting). Justice Brennan stated: "The impairment of a mentally retarded offender's reasoning abilities, control over impulsive behavior, and moral development in my view limits his or her culpability so that . . . the ultimate penalty of death is always and necessarily disproportionate to his or her blameworthiness and hence is unconstitutional." Id.


\(^8\) See Penry, 492 U.S. at 343 (Brennan, J., dissenting) (arguing that execution of the mentally retarded (1) is disproportionate to such an offender's crime due to lack of moral culpability; and (2) does not further the penal goals of deterrence or retribution).

\(^9\) See generally Stanford v. Kentucky, 492 U.S. at 404 (Brennan, J., dissenting) (noting that "[a] punishment that fails the Eighth Amendment test of proportionality because disproportionate to the offender's blameworthiness by definition is not justly deserved").

\(^10\) Some States currently have a moratorium on death penalty executions. Illinois and Maryland are two such states. Atkins, 536 U.S. 304. In January 2000, Illinois Governor George Ryan imposed a moratorium on executions in Illinois. Maurice Possely & Steve Milk, "There is No Honorable Way to Kill," He Says, CHI. TRIB., Jan. 12, 2003, §1, at 1. This action was due to investigation revealing defects in Illinois' capital punishment system resulting in the exoneration
penalty issues, the recent wave of decisions coming down from the highest court has created more confusion in the application of the death penalty. While death penalty legislation in the area of mentally retarded offenders appeared to be well-settled for over a decade,\textsuperscript{11} the Supreme Court, in 2002, defied precedent and found that sentencing mentally retarded offenders to death violates the Eighth Amendment.\textsuperscript{12} In \textit{Atkins v. Virginia}, Justice John Paul Stevens, writing for the majority, concluded, on the basis of "evolving standards of decency," that there was a "national consensus" against subjecting mentally retarded individuals to the death penalty.\textsuperscript{13} In \textit{Atkins}, Justice Stevens emphasized the role of the proportionality principle—comparing a punishment with the offense committed—in determining whether the sentence violates the Eighth Amendment's prohibition of thirteen Death Row inmates. \textit{Id.} It is noteworthy that Justice John Paul Stevens stated that the majority's decision was influenced, in part, by one of the recommendations, Recommendation 68, made by Governor Ryan's capital punishment commission in the \textit{Report of the Illinois Governor's Commission on Capital Punishment}. See John Paul Stevens, \textit{Judicial Activism: Ensuring the Powers and Freedoms Conceived by the Framers for Today's World}, CHI. B. Ass'n Rec., Oct. 2002, at 25. On January 10, 2003, at DePaul University College of Law, in one of his last official acts in office, Governor Ryan issued sweeping pardons to four men who were wrongfully convicted and sentenced to death—reemphasizing his criticisms of an allegedly "broken" judicial system. \textit{Id.} The next day, on January 11, 2003, Governor Ryan announced his decision to issue a blanket commutation of all death sentences of those criminals who were then on death row in Illinois. \textit{Clemency for All, Ryan Commutes 164 Death Sentences to Life in Prison Without Parole}, CHI. Trib., Jan. 12, 2003, § 1, at 1. The commutation converted every death sentence—a total of 164 inmates—to life in prison without parole. \textit{Id.} Concluding that "[Illinois's] capital system is haunted by the demon of error—error in determining guilt, and error in determining who among the guilty deserves to die," Governor Ryan announced this decision and pointed to flaws in Illinois's judicial system that resulted in such errors. \textit{Id.} Specifically referring to the Illinois death penalty system as "arbitrary and capricious," Governor Ryan declared that he would no longer "tinker with the machinery of death." \textit{Id.}

This decision incited mixed praise and criticism from opponents and proponents of the death penalty. Speaking out against the blanket clemency, Cook County State's Attorney, Richard A. Devine, rejected Governor Ryan's assertion that Illinois's capital punishment system is "broken." Richard A. Devine, \textit{It Is Up to Us To Rebuild a Criminal Justice System}, CHI. DAILY L. Bull., Jan. 20, 2003, at 5. Lamenting the clemency decision, Devine declared that Governor Ryan "tossed aside the work of trial judges, juries and appellate justices. The system is now indeed broken." \textit{Id.}


Interestingly, although Maryland's governor imposed a moratorium on execution, he is a supporter of the death penalty. Like Governor Ryan (who was also a supporter of the death penalty), Maryland's Governor imposed the moratorium due to conflicts with imposition of the death penalty and the state's criminal process. \textit{See Crime and Punishment: The Death Penalty Becomes a High-Profile Issue, supra note 5.}

\begin{enumerate}
  \item \textit{See Penry}, 492 U.S. 302.
  \item \textit{See Atkins}, 536 U.S. 304.
  \item \textit{Id.}
  \item \textit{Id.}
\end{enumerate}
against cruel and unusual punishment.\textsuperscript{15} This decision directly overruled the Court's conclusion fourteen years ago in \textit{Penry v. Lynaugh}\textsuperscript{16} and effectively stayed the execution of those offenders nationwide who fell within the classification of "mentally retarded."\textsuperscript{17}

This Note will discuss the history of death penalty law and the Eighth Amendment's Cruel and Unusual Punishment analysis leading up to the Supreme Court's decision in \textit{Atkins}. Part II will outline the history of death penalty law as applied in state and federal cases, including the purpose and intentions of both the United States Legislature and state legislatures in enacting death penalty laws.\textsuperscript{18} Part II will also explore the issues that surfaced in the decisions prior to \textit{Atkins} and the challenges that arose in attempting to apply the death penalty to mentally retarded individuals. Finally, Part II will discuss the Court's decision in \textit{Atkins}, including the issues raised, rules discussed, and rationale applied by the Court in leading to its conclusion.\textsuperscript{19} Part III will then analyze the \textit{Atkins} decision, discussing the legal and policy implications the ruling has created, as well as the impact on future and present cases.\textsuperscript{20} Further, Part III will explore the \textit{Atkins} Court's proposition that mentally retarded offenders lack the culpability to deserve the penalty of death and will argue that this analysis is inherently flawed because it ignores the reason the offender is convicted in the first place.\textsuperscript{21} Part III will also examine the Court's rationale and argue that applying the "evolving standards of decency" test alone encourages subjective, case-by-case determinations of which punishments are constitutional, which is subject to change depending on the whim of society's ideology at the time.\textsuperscript{22} Finally, Part IV will argue that the \textit{Atkins} decision has created a burdensome complexity for lower courts applying this ruling. Further, the Supreme Court has opened the floodgates to countless challenges to the constitutionality of death sentences on Eighth Amendment and other constitutional grounds.\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{15} \textit{Id.} at 311-12.
\item \textsuperscript{16} \textit{Penry}, 492 U.S. 302.
\item \textsuperscript{17} For a discussion of Intelligence Quotient (IQ) ranges and classifications defining "mentally retarded" individuals, see \textit{supra} note 3.
\item \textsuperscript{18} See \textit{infra} notes 24-141 and accompanying text.
\item \textsuperscript{19} See \textit{infra} notes 142-229 and accompanying text.
\item \textsuperscript{20} See \textit{infra} notes 230-239 and accompanying text.
\item \textsuperscript{21} See \textit{infra} notes 240-295 and accompanying text.
\item \textsuperscript{22} See \textit{infra} notes 296-317 and accompanying text.
\item \textsuperscript{23} \textit{Id.}
\end{itemize}
II. BACKGROUND: HISTORY OF THE EIGHTH AMENDMENT AND THE DEATH PENALTY

Early in the United States Supreme Court's history, in cases involving an offender's challenge to a sentence under the Eighth Amendment, the Court faced the difficult task of determining the scope of the Amendment's prohibition against "cruel and unusual punishments."\(^{24}\) The Court examined the particular circumstances of an offender's crime, as well as the nature and degree of the resulting punishment, in order to determine whether a sentence violated the Eighth Amendment, insofar as whether a punishment passed the "cruel and unusual punishment" test.\(^{25}\)

A. Historical Interpretation of the Cruel and Unusual Punishment Clause

In 1910, in *Weems v. United States*,\(^{26}\) the Supreme Court began to explore the scope of the Cruel and Unusual Punishment Clause and started by focusing on the concept of "humane justice."\(^{27}\) The Court held that a fifteen-year sentence subjecting a prisoner to hard labor, wearing chains on his wrists and ankles, and the perpetual loss of civil liberties was cruel and unusual punishment for the crime of falsifying a single public document.\(^{28}\) In *Weems*, the Court first fully expressed the principle of proportionality and declared that for a sentence to comport with the Cruel and Unusual Punishment Clause, the punishment for a crime "should be graduated and proportioned to [the] offense."\(^{29}\) In addition, the Court introduced the idea that those punishments barred by the Eighth Amendment will change depending

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24. See Wilkerson v. Utah, 99 U.S. 130 (1879). Analyzing the scope of the Eighth Amendment, the Court observed that "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted." *Id.* at 135-36.

25. *In re Kemmler*, 136 U.S. 436 (1890) (denying petitioners application for a writ of error that his sentence of imprisonment constituted cruel and unusual punishment). The Court declared that if a punishment proscribed for an offense was "manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like," then it would be "the duty of the courts to adjudge such penalties to be within the constitutional prohibition. And we think this equally true of the Eighth Amendment, in its application to Congress." *Id.* at 446-47. The Court, applying this "manifestly cruel and unusual" test stated that "[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." *Id.* at 447 (citing Wilkerson, 99 U.S. at 135).


27. *Id.* at 378.

28. *Id.* at 357-58, 363-64.

29. *Id.* at 367.
on society’s view and declared that the Cruel and Unusual Punishment Clause “may be therefore progressive,” and “is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.” As a result of this idea, the Court established the notion that sentences should comport with society’s view, and the principle of “evolving standards of decency” began to structure Eighth Amendment analysis.

In 1958, the Supreme Court had an opportunity to further develop Eighth Amendment analysis in *Trop v. Dulles*. Specifically, the Supreme Court analyzed the scope of the Eighth Amendment and addressed the issue of what constitutes “cruel and unusual” punishment in light of the Eighth Amendment’s prohibition against excessive punishments. In *Trop*, the petitioner was convicted by court martial for deserting the United States Army during wartime. The petitioner was sentenced to three years of hard labor, forfeiture of all pay and allowances, and given a dishonorable discharge. The petitioner subsequently lost his American citizenship pursuant to a federal statute as a result of his conviction and dishonorable discharge. Challenging this federal statute, the petitioner claimed his sentence was “an unconstitutionally disproportionate ‘punishment’” that constituted “cruel and unusual” punishment within the scope of the Eighth Amendment. Finding the petitioner’s punishment barred by the Eighth Amendment, the Court issued an opinion, using language that has

30. Id. at 378.
32. 356 U.S. 86 (1958) (plurality opinion).
33. Id. at 87. This Court continued to struggle with the issue of the Eighth Amendment’s scope just as the Court struggled with the issue more than fifty years before the *Trop* decision. See *Wilkerson*, 99 U.S. at 135-36.
35. Id.
36. The petitioner was punished pursuant to a provision of the Nationality Act of 1940, amended in 1944, which provided that a convicted deserter would lose his citizenship only if he was dismissed from the service or dishonorably discharged. *Id.* at 90 n.5; Nationality Act of 1940, § 401(g), 54 Stat. 1168, 1169, as amended, 9 U.S.C. § 1481(a)(8) (1944).
38. Chief Justice Earl Warren first found denationalization a problematic sanction because the authority to strip an individual of citizenship does not extend to Congress. *Id.* at 99. Specifically, the Court was faced with the question whether the Constitution permits Congress through a federal statute to take away citizenship as a punishment for crime. *Id.* Here the Court responded in the negative. *Id.* However, assuming that Congress had the power to divest an individual of citizenship, the issue then became whether denationalization is a “cruel and unusual” punishment within the meaning of the Eighth Amendment. *Id.*
come to be a blueprint for interpreting the Cruel and Unusual Punishment Clause.\textsuperscript{39}

Chief Justice Earl Warren, writing for the plurality, considered the scope of the phrase "cruel and unusual" and noted it had not been discussed in detail by the Supreme Court prior to this case.\textsuperscript{40} Discussing the lengthy history of the phrase "cruel and unusual," Chief Justice Warren concluded that the "dignity of man" is the underlying concept of the Eighth Amendment and that no punishment should ever exceed the bounds of "civilized standards."\textsuperscript{41} Chief Justice Warren declared that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," further emphasizing the idea that Eighth Amendment analysis should focus on society’s standards.\textsuperscript{42}

Several years after \textit{Trop}, the Court revisited the scope of the cruel and unusual punishment prohibition in \textit{Robinson v. California}.\textsuperscript{43} In \textit{Robinson}, the Court found that the petitioner’s sentence of ninety days in jail for his crime of narcotics addiction constituted cruel and unusual punishment in violation of the Eighth Amendment.\textsuperscript{44} Concluding that one who suffers from a narcotics addiction suffers from an illness, the Court declared that any punishment—even one day in prison—would violate the Eighth Amendment’s prohibition against cruel and unusual punishment because individuals should not be punished on the basis of such a disability.\textsuperscript{45}

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\item \textsuperscript{40} \textit{Trop}, 356 U.S. at 99. While \textit{Trop} represents the first instance in which the court in detail explores the scope of the phrase "cruel and unusual," the Court acknowledged the phrase had been discussed in prior Supreme Court cases such as \textit{Weems v. United States}, 217 U.S. 349 (1910); \textit{Howard v. Fleming}, 191 U.S. 126 (1903); \textit{O’Neil v. Vermont}, 144 U.S. 323 (1892); \textit{In re Kemmler}, 136 U.S. 436; \textit{Wilkerson v. Utah}, 99 U.S. 130 (1879); and \textit{Trop}, 356 U.S. at 99 n.29.
\item \textsuperscript{41} Chief Justice Warren declared:

But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.

\textit{Trop}, 356 U.S. at 99-100.
\item \textsuperscript{42} \textit{Id.} at 101.
\item \textsuperscript{43} 370 U.S. 660 (1962).
\item \textsuperscript{44} \textit{Id.} at 667.
\item \textsuperscript{45} The Court reasoned, "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the ab-
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\end{footnotesize}
Having established and applied the "evolving standards of decency" principle to numerous cruel and unusual punishment challenges, the Court soon began to apply this principle to Eighth Amendment death sentence challenges. In 1972, the Supreme Court consolidated three cases and granted certiorari to decide whether the imposition of the death penalty upon defendants convicted of murder and rape was unconstitutional in light of the Eighth Amendment's prohibition of cruel and unusual punishments. In *Furman v. Georgia*, the Court held that even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold. "Id."

While the principle of assessing a punishment in light of the "evolving standards of decency" was accepted by the majority of Justices, the idea was met with some resistance during its early development. *See McGautha v. California*, 402 U.S. 183 (1971) (Black, J., concurring) (affirming death sentences for defendants' murder convictions, despite his agreement with the majority's conclusion, arguing against applying this constantly-changing standard to determine whether a sentence surpasses constitutional muster under the Eighth Amendment). Justice Hugo Black noted that "[a]lthough some people have urged that this Court should amend the Constitution by interpretation to keep it abreast of modern ideas, I have never believed that lifetime judges in our system have any such legislative power." *Id.* at 226 (Black, J., concurring). Justice Black next stated his view that the framers never intended to end capital punishment by inclusion of the Cruel and Unusual Punishment Clause. *Id.* Justice Black noted that while the Eighth Amendment forbids "cruel and unusual punishments," in his view, "these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted." *Id.*

*See Furman v. Georgia, 408 U.S. 238 (1972).*

*Petitioner William Henry Furman was convicted of murdering a woman whose home he was attempting to break into at night in the state of Georgia. Furman v. State, 167 S.E.2d 628 (Ga. 1969). Furman, who was diagnosed with mental deficiency and had a history of psychotic episodes, was twenty-six years-old at the time he committed the murder. *Furman,* 408 U.S. at 252.*

*Petitioner Lucious Jackson, Jr. was convicted of raping a twenty-one-year-old woman in the state of Georgia. Jackson v. State, 171 S.E.2d 501 (Ga. 1969). Jackson entered the woman's house after her husband left for work. Furman, 408 U.S. at 252. Jackson, holding scissors against his victim's neck, demanded money from her. *Id.* When she could not find any, he then raped her—keeping the scissors pressed against her neck. *Id.* Jackson was previously convicted of auto theft and had escaped from a work gang in the area at the time he committed this offense. *Id.* During the three days he was at large, he committed numerous other offenses including burglary, auto theft, assault, and battery. *Id.*

*Petitioner Elmer Branch was convicted of rape in Texas. Branch v. State, 447 S.W.2d 932 (Tex. Crim. App. 1969). Branch broke into the rural home of a sixty-five-year-old widow while she slept and raped her. He then demanded money and waited as the woman searched for thirty minutes, but found very little. Furman, 408 U.S. at 253. Branch had previously been convicted of felony theft and was also found to be a "borderline mental deficient and well below the average IQ of Texas prison inmates." *Id.* He had the equivalent of five-and-one-half-years of grade school education. *Id.*

*Furman,* 408 U.S. 238.
that the imposition of the death penalty, within the meaning of the Eighth Amendment, as applied to the states by the Fourteenth Amendment,\textsuperscript{51} constituted cruel and unusual punishment.\textsuperscript{52} Justice William O. Douglas, concurring in the opinion, emphasized what he perceived as unequal and disproportionate application of the death penalty for various defendants due to racial, social, and economic discrimination.\textsuperscript{53}

Justice William J. Brennan, in his concurring opinion, focused on the small amount of evidence revealing the framers' intent in including the Cruel and Unusual Punishment Clause in the Eighth Amendment.\textsuperscript{54} Justice Brennan concluded that "[i]t does not follow . . . that the framers were exclusively concerned with prohibiting torturous punishments,"\textsuperscript{55} and argued that the Cruel and Unusual Punishment Clause should be broadly interpreted and not be construed to include only those punishments prohibited at the time the clause was drafted.\textsuperscript{56} Reiterating the Court's established principle of weighing a punishment against the "evolving standards of decency" that "mark the progress of a maturing society,"\textsuperscript{57} Justice Brennan contended that despite historical employment and usage of the death penalty, modern society no longer condoned such punishment.\textsuperscript{58} He declared that the

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  \item[51.] The Court stated that "the [Fourteenth Amendment's] requirements of due process ban cruel and unusual punishment is now settled." \textit{Id.} at 241.
  \item[52.] \textit{Id.} at 240.
  \item[53.] \textit{Id.} at 242-57. The Court stated that "[t]here is increasing recognition of the fact that the basic theme of equal protection is implicit in 'cruel and unusual' punishments," and that "[a] penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily." \textit{Id.} at 249 & n.12 (citing Arthur J. Goldberg & Alan M. Dershowitz, \textit{Declaring the Death Penalty Unconstitutional}, 83 HARV. L. REV. 1773, 1790 (1970)). The Court also focused on the economic disparity factor—believing it to be a significant factor in the decision to impose death penalty sentences, "One searches our chronicles in vain for the execution of any member of the affluent strata of this society." \textit{Furman}, 408 U.S. at 251-52.
  \item[54.] \textit{Id.} at 257-64.
  \item[55.] \textit{Id.} at 260. Justice Brennan further stated:
    \[W\]e cannot now know exactly what the [f]ramers thought "cruel and unusual punishments" were. Certainly they intended to ban torturous punishments, but the available evidence does not support the further conclusion that only torturous punishments were to be outlawed . . . [T]he [f]ramers were well aware that the reach of the Clause was not limited to the proscription of unspeakable atrocities. Nor did they intend simply to forbid punishments considered "cruel and unusual" at the time. The "import" of the Clause is, indeed, "indefinite," and for good reason.
    \textit{Id.} at 263.
  \item[56.] Justice Brennan opined: "Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth." \textit{Id.} at 264 (citing \textit{Weems v. United States}, 217 U.S. 349, 373 (1910)).
  \item[57.] \textit{Id.} at 269-70.
  \item[58.] Justice Brennan stated:
    What was once common punishment has become, in the context of a continuing moral debate, increasingly rare. The evolution of this punishment evidences, not that it is an
progressive decline in the infliction of death and the rarity of it at the time "demonstrate that our society seriously questions the appropriateness of this punishment today" and that "[a]t the very least, [he] must conclude that contemporary society views this punishment with substantial doubt." Thus, Justice Brennan concluded that imposing the death penalty constituted cruel and unusual punishment in violation of the Eighth Amendment.

I. Modern Application of the "Evolving Standards of Decency" Principle

In 1976, in the case that gave birth to modern death penalty jurisprudence, the Supreme Court applied the "evolving standards of decency" principle to a case involving a death sentence challenge. In Gregg v. Georgia, the Court held that the death penalty as punishment for murder does not invariably violate the Eighth Amendment. In Gregg, the petitioner challenged the constitutionality of his death sentence as punishment for armed robbery and murder. Rather than apply a subjective determination of whether a punishment violates the Cruel and Unusual Punishment Clause, the Court called for inevitable part of the American scene, but that it has proved progressively more troublesome to the national conscience. The result of this movement is our current system of administering the punishment, under which death sentences are rarely imposed and death is even more rarely inflicted.

Furman, 408 U.S. at 299.

59. Id. at 299-300. For further support of the decision, see also Justice Thurgood Marshall's concurring opinion. Id. at 314 (Marshall, J., concurring) (concluding that the death penalty violates the Cruel and Unusual Punishment Clause of the Eighth Amendment). Justice Marshall discussed four standards that have previously guided the Court's analysis in death penalty challenges to the Eighth Amendment. Id. at 330-32. First, Justice Marshall stated that there are "certain punishments that inherently involve so much physical pain and suffering that civilized people cannot tolerate them." Id. at 330. Second, "there are punishments that are unusual, signifying that they were previously unknown as penalties for a given offense." Id. at 331 (citing United States ex rel. Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 435 (1921) (Brandeis, J., dissenting)). Third, "a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose." Furman, 408 U.S. at 331 (citing Weems, 217 U.S. 349). Fourth, "where a punishment is not excessive and serves a valid legislative purpose, it still may be invalid if popular sentiment abhors it." Id. at 332.

60. Id. at 295.

61. See Lyn Entzeroth, Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus To Exempt the Mentally Retarded from the Death Penalty, 52 Ala. L. Rev. 911, 924 (2001).


63. Id.

64. Id. Petitioner Troy Gregg was charged with committing armed robbery and murder. Id. at 158. Gregg and his companion, hitchhiking in Florida, murdered the two men who picked them up. Id. at 159. Gregg and his companion threw the victims' bodies into a ditch in Georgia where they were later discovered. Id.

65. Gregg, 428 U.S. at 171-75.
an examination of "objective indicia" indicating society's attitude toward a punishment. The Court noted in its discussion of the "evolving standards of decency" that empirical data, such as death penalty legislation and jury sentencing behavior did not reflect the belief that society had rejected the death penalty as cruel and unusual. In addition, the Court stated that the punishment must also "accord with the dignity of man"... the "basic concept underlying the Eighth Amendment." According to the Court, this meant the punishment must not be "excessive." Defining "excessive" required a review of two elements. First, the punishment "must not involve the unnecessary and wanton infliction of pain." Thus, the death penalty, when imposed, must advance the penological goals of retribution and deterrence. Second, the punishment "must not be grossly out of proportion to the severity of the crime."

66. Id. at 173. The Court emphasized the need, in reviewing the constitutionality of a sentence potentially in violation of the Eighth Amendment, to assess "contemporary values concerning the infliction of a challenged sanction... [T]his assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction." Id. This approach has been labeled by some commentators as the "Contemporary Consensus Approach" to describe where the Court examines "objective indicia," such as legislative enactments and jury sentencing behavior, to determine contemporary society's views on a particular punishment. See Licia A. Esposito, The Constitutionality of Executing Juvenile and Mentally Retarded Offenders: A Precedential Analysis and Proposal for Reconsideration, 31 B.C. L. Rev. 901 (1990).

67. The Court first considered the empirical data of death penalty legislation of all of the states, which the Court reasoned was the most significant indication of society's acceptance or rejection of the death penalty. Gregg, 428 U.S. at 179-80. Specifically, the Court noted that legislatures, not the courts, are "constituted to respond to the will and consequently the moral values of the people." Id. at 175-76 (quoting Furman v. Georgia, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)). The Court also acknowledged the importance in giving substantial deference to legislatures in establishing punishments for offenses. Id. Additionally, the Court noted that at least thirty-five states authorized the death penalty for certain crimes resulting in the death of the victim. Id. at 179-80.

68. The Court next considered jury sentencing behavior as an indicator of public attitude toward capital punishment as juries are directly involved in the sentencing decision and whether an individual will receive death as punishment for a crime. Gregg, 428 U.S. at 181. The Court concluded that jury sentencing behavior, like state death penalty legislation, supported the belief that a large portion of society approved of capital punishment. Id.

69. Id. at 179-80.

70. Gregg, 428 U.S. at 173 (quoting Trop v. Dulles, 356 U.S. at 100) "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." Id.

71. Id.

72. Id. at 173.

73. Id. at 173.

74. Id. The Court noted that "[t]he death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." Gregg, 428 U.S. at 183.

75. Id. But see Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (Scalia and Rehnquist, JJ., dissenting) ( Eighth Amendment challenge to life sentence for possession of more than 650
While the Court utilized several methods in assessing the constitutionality of the death penalty in light of the Eighth Amendment, the Court relied primarily on empirical data in ascertaining the evolving standards of decency.\textsuperscript{76} The Court continues to use this approach, for the most part, when considering the constitutionality of the death penalty.\textsuperscript{77}

2. \textit{Court Splits in Approach to Determining "Evolving Standards of Decency"}

In 1989, the Supreme Court decided two landmark cases involving death penalty and Eighth Amendment analysis.\textsuperscript{78} In \textit{Stanford v. Kentucky},\textsuperscript{79} involving an Eighth Amendment challenge to the death penalty imposed on a juvenile offender, and \textit{Penry v. Lynaugh},\textsuperscript{80} involving an Eighth Amendment challenge to the death penalty imposed on a mentally retarded offender, the Justices took differing approaches in determining the "evolving standards of decency."\textsuperscript{81} In both of these cases, the majority of the Court declared that it was proper to allow some independent judicial approach when determining the evolving standards; however, the Justices disagreed on the degree to which the subjective judicial role should play in the ultimate determination of the "evolving standards of decency" as well as the role of proportionality analysis.\textsuperscript{82}
a. *Penry v. Lynaugh*: Death Penalty and Mentally Retarded Offenders

In 1989, the Supreme Court decided *Penry v. Lynaugh*\(^83\) and rejected the petitioner's contention that the Eighth Amendment prohibits execution of mentally retarded offenders.\(^84\) In *Penry*, the Court, using a contemporary consensus approach,\(^85\) held that the Eighth Amendment did not prohibit the execution of mentally retarded offenders.\(^86\)

In October 1979, Johnny Paul Penry entered the home of Pamela Carpenter, raped and brutally beat her and stabbed her repeatedly with a pair of scissors.\(^87\) Before she died, Carpenter gave a description of her attacker which led the police to Penry, a twenty-two-year-old man who lived near the victim.\(^88\) Penry later confessed to the crime and was charged in Texas state court.\(^89\)

Prior to trial, Penry underwent a competency hearing in which his history of mental retardation was assessed and his competency determined.\(^90\) As a child, Penry was diagnosed as having organic brain damage—probably caused by trauma to the brain at birth—as well as moderate retardation.\(^91\) Tested throughout his lifetime, Penry was assessed as having an Intelligence Quotient (IQ) between fifty and sixty-three—indicating mild to moderate retardation. In fact, during a competency hearing prior to trial, Penry was found to have an IQ of fifty-four.\(^92\) Testimony from the clinical psychologist also indicated he had the mental age of a six-and-a-half-year-old child.\(^93\) Despite the evidence of mental retardation and other limited mental ability, Penry was found competent to stand trial.\(^94\) In addition, the trial court con-

\(^83\) 492 U.S. 302.
\(^84\) *Id.* at 335.
\(^85\) The Court considered "objective indicia" of contemporary society's view of the punishment and concluded there was no national consensus against execution of mentally retarded offenders. *Id.* at 340; see Esposito, *supra* note 66.
\(^86\) "[W]e cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person of Penry's ability convicted of a capital offense simply by virtue of his or her mental retardation alone." *Id.* at 340.
\(^88\) *Id.*
\(^89\) *Penry*, 691 S.W.2d 636.
\(^90\) *Penry*, 492 U.S. at 307.
\(^91\) *Id.* at 308. The defense also presented an extensive history of physical abuse as a child, as well as institutionalization. *Id.*
\(^92\) *Id.*
\(^93\) *Id.* While the psychologist testified that the petitioner had the learning and knowledge of an average six-and-a-half-year-old child, he also testified Penry had the social maturity and ability to function in the world as would a nine- or ten-year-old child. *Id.*
\(^94\) *Penry*, 492 U.S. at 308.
cluded that Penry’s confessions to police were voluntary and they were admitted into evidence.95

At trial, Penry presented various witnesses attempting to bolster his “insanity” defense by highlighting his early learning problems and attributing his brain damage to possible early age beatings and injuries.96 The State introduced the evidence of several psychiatrists who testified that, while Penry was of “limited mental ability,” he did not suffer from any mental illness or defect at the time he committed the crime.97 Furthermore, these experts testified that he was capable of and knew the difference between right and wrong.98 The State also presented testimony indicating that Penry suffered from a “full-blown anti-social personality,” yet was legally sane at the time he committed the crime.99

Rejecting Penry’s insanity defense, the jury found him guilty of capital murder.100 At the penalty hearing, the jury was instructed to impose Penry’s sentence by answering three “special issues.”101 Answering affirmatively to all three, the jury sentenced Penry to death.102 The Texas Court of Criminal Appeals affirmed both the conviction and the sentence.103 The United States Supreme Court denied Penry’s petition for certiorari on direct review,104 but granted his

95. Penry, 691 S.W.2d at 641. In his first confession, Penry stated:
I went on and f__ed her on the bedroom floor and then after I got through I got up and walked over to the kitchen door where the scissors had landed and picked them up.
I walked back to her and got down on her. I sat down on her stomach and I told her that I loved her and hated to kill her but I had to so she wouldn’t squeal on me.

Id. In his second confession, Penry not only related his desire to rape and rob the victim, but also his logical reasoning that he would have to kill her in order to avoid punishment: “I knew that if I went over to the Chick’s house and raped her that I would have to kill her because she would tell who I was to the police and I didn’t want to go back to the pen.” Id.

96. Penry, 492 U.S. at 308-09.
97. Id.
98. Id.
99. Id.
100. Id. at 310.
101. The jury was instructed to consider:
(1) [W]hether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Id. Defense counsel made numerous objections to these issues that were overruled by the trial court. Penry, 492 U.S. at 310-11.
102. Id. at 311.
103. Penry, 691 S.W.2d 636.
federal habeas corpus petition challenging his death sentence in order to resolve two questions. 105 First, the Court addressed whether Penry was sentenced in violation of the Eighth Amendment because the jury was not adequately instructed to take into account all of his mitigating evidence. Second, whether it was cruel and unusual punishment under the Eighth Amendment to execute a mentally retarded person with Penry’s reasoning ability. 106

Addressing whether the execution of the mentally retarded constitutes cruel and unusual punishment, in violation of the Eighth Amendment, the Court found that the punishment did not violate the Constitution. 107 Penry argued that the execution of a mentally retarded person with the reasoning capacity of a seven-year-old child was a “cruel and unusual punishment,” stating that, as a result of their mental disabilities, mentally retarded people “do not possess the level of moral culpability to justify imposing the death sentence.” 108 Penry also contended that there was an “emerging national consensus against executing the mentally retarded.” 109

Writing for the plurality of the Court, Justice Sandra Day O’Connor considered two factors in evaluating whether the execution of the mentally retarded was contrary to the “evolving standards of decency.” 110 Justice O’Connor first discussed whether “objective evidence” 111 demonstrated a “national consensus” against executing mentally retarded offenders, 112 and second, whether imposing the death penalty on the mentally retarded violated the Eighth Amendment. 113 Justice O’Connor noted that at that time, only two state statutes prohibited the execution of the mentally retarded, 114 and fourteen states rejected capital punishment completely—which was

106. Penry, 492 U.S. at 313.
107. Id. at 340.
108. Id. at 328-29.
109. Id. at 329.
110. Id. at 330-31.
111. “In discerning . . . ‘evolving standards,’ we have looked to objective evidence of how our society views a particular punishment today.” Id. (citing Coker v. Georgia, 433 U.S. at 593-97); see also Enmund v. Florida, 458 U.S. 782, 788-96 (1982). Justice O’Connor stated that the “clearer and most reliable objective evidence” showing “contemporary values is the legislation enacted by the country’s legislatures. We have also looked to data concerning the actions of sentencing juries.” Penry, 492 U.S. at 331.
112. Penry, 492 U.S. at 333-35.
113. Id. at 335.
114. At this time, only Georgia had a statute expressly prohibiting execution of the mentally retarded and Maryland had enacted a similar statute that was to take effect in July of 1989. Id. at 334.
not sufficient evidence that a “national consensus” existed against executing the mentally retarded.\textsuperscript{115}

Addressing Penry’s claim that execution of the mentally retarded was a cruel and unusual punishment because it was disproportionate to his degree of personal culpability, Justice O’Connor noted that a punishment could violate of the Eighth Amendment if it “makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering or because it is grossly out of proportion to the severity of the crime.”\textsuperscript{116} Justice O’Connor acknowledged that mental retardation has been recognized as a factor that may reduce an individual’s culpability for a criminal act.\textsuperscript{117} However, because there were procedural safeguards to protect mentally retarded offenders—juries consider this concern as a mitigating factor in imposing a sentence—the mental retardation factor alone was not sufficient to bar execution as a punishment.\textsuperscript{118} Thus, the Court could not conclude that the Eighth Amendment prohibited the execution of a mentally retarded person convicted of a capital offense “simply by virtue of his or her mental retardation alone.”\textsuperscript{119} This Court found it significant that Penry, while diagnosed as mentally retarded, was found competent to stand trial, was found to have the capacity to consult with his lawyer “with a reasonable degree of rational understanding,” and was also found to have a rational and factual understanding of the trial and the charges against him.\textsuperscript{120} Justice O’Connor emphasized that it was impossible to make a blanket conclusion that “all mentally retarded people of Penry’s ability” lack the “capacity to act with the degree of culpability

\textsuperscript{115} Id. Justice O’Connor stated: “In our view, the two state statutes prohibiting execution of the mentally retarded, even when added to the [fourteen] States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus.” Id.


\textsuperscript{117} Id. at 340. In contrast, Justice Brennan, writing for the dissent, argued that the mere fact that sentencing jurors can consider and weigh a criminal’s mental state as a mitigating factor “provides no assurance that an adequate individualized determination of whether the death penalty is a proportionate punishment will be made at the conclusion of each capital trial.” Id. at 347. Justice Brennan next theorized that a sentencing juror may discount an individual’s mental retardation when weighing it “against the heinousness of the crime and other aggravating factors.” Id. According to Justice Brennan, the alleged lack of culpability that results from mental retardation is not a factor that should be considered at the sentencing stage, but rather, should be a factor which should determinatively bar a death sentence. Id.

\textsuperscript{118} Id. at 340. Justice O’Connor emphasized that as juries consider the issue of mental retardation as a mitigating factor in sentencing decisions, “an individualized determination whether ‘death is the appropriate punishment’ can be made in each particular case.” Penry, 492 U.S. at 340.

\textsuperscript{119} Id.

\textsuperscript{120} Id. at 333.
associated with the death penalty."\textsuperscript{121} Rather, an individualized consideration of each individual's responsibility is a more accurate indicator than just the factor of mental retardation alone.\textsuperscript{122}

Justice O'Connor acknowledged that a national consensus "may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society,'" but at this time there was "insufficient evidence" of such a consensus.\textsuperscript{123}

Justice Antonin Scalia, concurring with Justice O'Connor's conclusion that executing the mentally retarded was not prohibited by the Eighth Amendment, disagreed with Justice O'Connor's conclusion that a punishment may violate the Eighth Amendment if it fails to make a "measurable contribution to acceptable goals of punishment" or if it is disproportionate to the offense committed.\textsuperscript{124} Justice Scalia found it unnecessary to address either of these issues, arguing that such proportionality analysis "has no place in our Eighth Amendment jurisprudence."\textsuperscript{125} He concurred with Justice O'Connor's ultimate conclusion on the constitutionality of imposing the death penalty for the mentally retarded, but found it unnecessary to apply the extensive proportionality analysis employed by Justice O'Connor.\textsuperscript{126}

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\textsuperscript{121} Id. at 338.
\textsuperscript{122} Id. at 340.
\textsuperscript{123} Id. The Court noted that juries had the opportunity to consider mental retardation as a "mitigating evidence" during sentencing and as long as that opportunity existed, "an individualized determination whether death is the appropriate punishment can be made in each particular case." Penry, 492 U.S. at 340.
\textsuperscript{124} Id. at 351-60.
\textsuperscript{125} Id. at 351. For more discussion of Justice Scalia's view that proportionality analysis should not play a role in Eighth Amendment analysis, see Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (Scalia, J. and Rehnquist, C.J. dissenting) (noting that "the Eighth Amendment contains no proportionality guarantee"). In Penry, Justice Scalia stated that in determining if a particular punishment withstands the Eighth Amendment "cruel and unusual punishments" test, he primarily examined how state legislatures and sentencing juries—"objective indicia"—view the issue. Penry, 492 U.S. at 350-60.
\textsuperscript{126} Id. at 350-60 (Scalia, J., joined by Rehnquist, C.J., White and Kennedy, JJ. concurring in part and dissenting in part). Justice Scalia stated:

The punishment is either "cruel and unusual" (i.e., society has set its face against it) or it is not . . . If it is not unusual, that is, if an objective examination of laws and jury determinations fails to demonstrate society's disapproval of it, the punishment is not unconstitutional even if out of accord with the theories of penology favored by the Justices of this Court.

Id. at 351 (quoting Stanford v. Kentucky, 492 U.S. 361, 378 (1989)).
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b. Stanford v. Kentucky: Eighth Amendment Analysis Applied to Juvenile Offenders

The same day Penry was decided, the Supreme Court also issued its decision in Stanford v. Kentucky, which involved two Eighth Amendment challenges to the constitutionality of death sentences imposed upon individuals who committed crimes at age sixteen and seventeen. In these consolidated cases, the two defendants challenged the death penalty for their murder convictions, claiming

127. Dissenting, Justice Brennan argued against the plurality's conclusion that imposing the death penalty on mentally retarded offenders did not violate the Eighth Amendment. Id. at 341-49. (Brennan, J., dissenting) (arguing against the plurality's holding that the Eighth Amendment does not prohibit the execution of mentally retarded offenders). Bypassing the “national consensus” argument supporting the plurality opinion, Justice Brennan instead concentrated his cruel and unusual punishment analysis on two issues: first, whether execution of the mentally retarded advanced the goals of deterrence and retribution, and second, whether the death penalty was a disproportionate punishment when imposed on the mentally retarded. Id. at 343. In response to the first issue, Justice Brennan concluded the mentally retarded lacked sufficient moral culpability to advance the goal of retribution, which requires that a sentence be directly related to the defendant's personal culpability. Justice Brennan contended that “killing mentally retarded offenders does not measurably further the penal goals of either retribution or deterrence.” Id. at 348. He reasoned that “[s]ince mentally retarded offenders as a class lack the culpability that is a prerequisite to the proportionate imposition of the death penalty, it follows that execution can never be the ‘just desserts’ of a retarded offender.” Id. (citing Enmund v. Florida, 458 U.S. 782, 801 (1982)). Furthermore, Justice Brennan reasoned, that due to their impaired ability of “logical reasoning, strategic thinking and foresight,” the death penalty does not serve the goal of deterrence because such offenders are unable to anticipate consequences of their actions. Penry, 492 U.S. at 348-49. Thus, “[i]n these circumstances, the execution of mentally retarded individuals is ‘nothing more than the purposeless and needless imposition of pain and suffering’ and is unconstitutional under the Eighth Amendment.” Id. (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)). Therefore, it would be unlikely due to these mental impairments the execution of mentally retarded offenders would have a deterrent effect on other mentally retarded offenders. Id.

Addressing the second issue, Justice Brennan emphasized the principle that a sentence should not be disproportionate with the offense committed. Citing principles adhered to by the Court in Stanford (decided on the same day as Penry) and Coker, Justice Brennan argued that the Court must determine “whether a punishment is disproportionate by comparing ‘the gravity of the offense’ . . . with the ‘harshness of the penalty.’” Id. at 343 (quoting Solem v. Helm, 463 U.S. 277, 292 (1983)). When assessing the gravity of the offense, the Court considers not only the injury caused but also the defendant's moral culpability. Id. Again pointing to a mentally retarded individual's lack of culpability, Justice Brennan argued that due to his or her impairments, the death penalty “is always and necessarily disproportionate to [an offender's] blameworthiness.” Id. at 346. Justice Brennan noted the impairment of a mentally retarded offender's reasoning abilities, control over impulsive behavior, and moral development. Penry, 492 U.S. at 346. Thus, according to Justice Brennan, the punishment of death for a mentally retarded offender is always unconstitutional. Id. 492 U.S. 361 (1989).

128. Id.

129. Petitioner Kevin Stanford was a Kentucky juvenile delinquent while Petitioner Heath A. Wilkins was a juvenile delinquent from Missouri. Id. at 364-65.

130. On January 7, 1981, Stanford and his accomplice raped and sodomized their female victim both during and after their commission of a robbery of the gas station where the victim worked as an attendant. Id. at 365. The proceeds from the robbery were about 300 cartons of
that the Eighth Amendment prohibits the imposition of the death penalty on juvenile offenders. In its decision, the Court affirmed the death penalty convictions for the defendants who were both under eighteen years of age at the time they committed murder.

Justice Scalia, writing for the plurality, recognized the need to analyze Eighth Amendment challenges in light of a "national consensus" and modern standards of decency. However, Justice Scalia emphasized the idea that American conceptions of decency are dispositional, and rejected the notion that "the practices of other nations"

cigarettes, two gallons of fuel, and a small amount of cash. Id. Stanford, who was seventeen years old at the time, said he and his accomplice committed murder, then drove the victim to a secluded area where Stanford proceeded to shoot her point-blank in the face and again in the back of the head. Id. A corrections officer testified how Stanford explained the murder:

[Stanford] said, "I had to shoot her, [she] lived next door to me .... I guess we could have tied her up or something or beat [her up] .... and tell her if she tells, we would kill her.” Then after [Stanford] said that he started laughing.

Stanford, 492 U.S. at 365 (quoting Stanford v. Commonwealth, 734 S.W.2d 781, 788 (Ky. 1987)).

Stanford was convicted of murder, first-degree sodomy, first-degree robbery and receiving stolen property. Id. at 365-66. He was then sentenced to death and forty-five years in prison. His sentence was affirmed by the Kentucky Supreme Court, which rejected Stanford's claim that he had "a constitutional right to treatment." Stanford, 734 S.W.2d at 792.

On July 27, 1985, Petitioner Wilkins, while in the commission of robbing a convenience store, stabbed a twenty-six-year-old mother of two who owned and operated the store with her husband. State v. Wilkins, 736 S.W.2d 409 (Mo. 1987). While Wilkins's accomplice held the victim, Wilkins stabbed her. Id. at 412. Then, when the two had trouble operating the cash register, the victim spoke to assist him and Wilkins responded by stabbing her three more times in her chest. Id. When the victim began to plead for her life, Wilkins stabbed her four more times in the neck. Id. After stealing liquor, cigarettes, rolling papers, and approximately $450 in cash and checks, Wilkins and his accomplice left the victim to die on the floor. Id. Wilkins was later charged with first-degree murder, armed criminal action, and carrying a concealed weapon and was sentenced to death. Wilkins, 736 S.W.2d 409. According to evidence presented in the trial court, approximately two weeks before the murder, defendant's friend, Patrick Stevens, told the defendant that he needed some money. "I [Wilkins] said, 'I know where we can get some money.' .... I told him exactly how we were going to do it and where we were going to do it. Defendant then described to Stevens a plan to rob [the liquor/convenience store], which was later communicated to two other confederates ...." Id. at 411.

Affirming Wilkins's death sentence, the Supreme Court of Missouri rejected Wilkins's argument that the punishment violated the Eighth Amendment. Wilkins, 736 S.W.2d 409. The court emphasized that “[i]t can be no doubt that, given defendant's attitude, he will hesitatingly kill anyone who 'gets in his way' unless and until he is prevented from doing so by the forces of civilized society. Id. at 417. The sentence of death imposed upon defendant is the only reliable means of achieving that aim.” Id.

131. Id. at 368.

132. Id. Petitioner Stanford was seventeen-years-and-four-months-old at the time he committed murder. Stanford, 492 U.S. at 365. Wilkins was sixteen-years-and-six-months old at the time he committed murder. Id. at 366.

133. Id. at 369-70.

134. Justice Scalia explained the standard by which the Court would assess a sentence:

The punishment is either "cruel and unusual" (i.e., society has set its face against it) or it is not. The audience for these arguments ... is not this Court but the citizenry of the United States. It is they, not we, who must be persuaded. For as we stated earlier, our
are relevant in establishing which practices are acceptable under the Eighth Amendment.\textsuperscript{135} Justice Scalia further rejected the idea that the Court should base its Eighth Amendment analysis on evidence such as public opinion polls, the views of interest groups, the positions adopted by various professional associations, or on the subjective views of individual Justices.\textsuperscript{136} Declaring the Court's decision to "decline the invitation to rest constitutional law upon such uncertain foundations,"\textsuperscript{137} Justice Scalia stated that the Court's judgment should be informed by "objective indicia"—specifically state legislation—which truly reflect society's attitude toward appropriate sentences for particular offenses.\textsuperscript{138} Only then would the Court recognize the emergence of an "enduring" national consensus.\textsuperscript{139}

Justice O'Connor, concurring in the Court's decision, noted the lack of a "national consensus" among the states opposing the death penalty.\textsuperscript{140} Thus, in the absence of a clear national consensus in opposition to the death penalty, and an absence of any legislative rejection of imposition of a death sentence for crimes committed at the age of sixteen and older, Justice O'Connor found no reason to find the sentences constitutionally problematic.\textsuperscript{141}

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job is to identify the "evolving standards of decency"; to determine, not what they should be, but what they are. We have no power under the Eighth Amendment to substitute our belief in the scientific evidence for the society's apparent skepticism. In short, we emphatically reject petitioner's suggestion that the issues in this case permit us to apply our "own informed judgment"... regarding the desirability of permitting the death penalty for crimes by 16- and 17-year-olds.

\textit{Id.} at 378.

135. \textit{Id.} at 369 n.1.

136. \textit{Id.} at 377.


138. \textit{Id.}

139. \textit{Id.}

140. Justice O'Connor found particularly significant the absence of any explicit "legislative rejection" of the execution of minor offenders. \textit{Id.} at 380-82 (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor opined: "The day may come when there is such general legislative rejection of the execution of 16- or 17-year-old capital murderers that a clear national consensus can be said to have developed. Because I do not believe that day has yet arrived... I concur in [the Court's] judgment." \textit{Id.} at 381-82.

141. Although Justice O'Connor concurred with the conclusion reached by the Court and the greater part of the reasoning applied by the plurality, Justice O'Connor did reiterate the necessity of applying proportionality analysis when assessing an Eighth Amendment challenge to a particular sentence. \textit{Id.} at 382. However, while Justice O'Connor asserted that the Court had "a constitutional obligation to conduct proportionality analysis," she concluded that she did not believe "these particular cases" could be resolved through proportionality analysis. \textit{Stanford,} 492 U.S. at 382. Responding to the plurality's rejection of conducting proportionality analysis when considering the age-based statutory classifications and the age of an offender, Justice O'Connor rejected the suggestion "that the use of such analysis is improper as a matter of Eighth Amendment jurisprudence." \textit{Id.} at 374-76, 382.
C. Subject Opinion: Atkins v. Virginia

Two years ago, the Supreme Court had an opportunity to address the questions raised above in Atkins v. Virginia. In Atkins, the Court reconsidered whether it is constitutional to execute mentally retarded offenders in light of the Eighth Amendment's prohibition against "cruel and unusual punishments." In holding that the execution of the mentally retarded violates the Constitution, Justice Stevens, writing for the majority, noted recent legislation as a sign of change in the national attitude toward the execution of the mentally retarded. He declared that changes in state legislation prohibiting the death penalty for the mentally retarded reflect a shift in contemporary society's view of the punishment and indicate that a "national consensus" has emerged against the punishment for such offenders.

1. Trial and Appellate Court Decisions

In 1996, Daryl Renard Atkins and an accomplice, William Jones, spent a day drinking alcohol and smoking marijuana, then headed to a convenience store to buy more beer. Around midnight, armed with a semiautomatic handgun, Atkins and Jones abducted Eric Nesbitt, an airman at Langley Air Force Base, from the store parking lot. The two men robbed Nesbitt of all of his money, drove him in a truck to an automated teller machine where cameras recorded their withdrawal of $200 cash, then took him to an isolated location—ignoring his pleas to be left unharmed. According to Jones, Atkins ordered Nesbitt out of the car and, after he had taken only a few steps, shot him eight times—in the thorax, chest, abdomen, arms, and legs.

Each of the men testified in the preliminary hearing during Atkins's trial and they confirmed most of the details in the other's account of the incident. The two men disagreed on the issue of who had actually shot and killed Nesbitt; however, the jury found Jones's testimony

143. Id. at 307.
144. Id. at 313-17.
145. Id. at 316. Justice Stevens declared, "The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition . . . The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it." Id.
147. According to Jones' testimony, Atkins borrowed the handgun from a friend who gave it to him after Atkins said "that he wanted to use it, he would bring it back in the morning." Id.
148. Id.
149. Id. at 449.
150. Id. at 449-50.
151. Id. at 451.
more credible, establishing Atkins's guilt.\footnote{Atkins, 510 S.E.2d at 451.} During the sentencing phase of the trial, the Commonwealth sought to impose the death penalty based on evidence of two aggravating factors: "future dangerousness" and "vileness of the offense."\footnote{Id.} To support the future dangerousness circumstances, the State presented evidence of Atkins's prior felony convictions,\footnote{Id. at 491-522.} graphic testimony from four victims of his prior robberies and assaults,\footnote{Id.} and testimony depicting Atkins's violent tendencies.\footnote{Id.}

In 1998, Atkins was tried and convicted in the Circuit Court of York County, Virginia.\footnote{Id. at 445.} On appeal, the Virginia Supreme Court affirmed Atkins's conviction,\footnote{Id. at 457.} but the decision was later remanded for a new sentencing proceeding because the verdict form used during the trial did not give the jury the "life imprisonment" option when it considered the sentence.\footnote{Id. at 456. The jury was not properly instructed because the verdict form failed to provide the jury with the option of sentencing Atkins to life imprisonment if it was found that neither of the aggravating factors was proven beyond a reasonable doubt. Id.} On remand to the circuit court, a new jury again gave Atkins a death sentence and Atkins appealed to the Virginia Supreme Court for the second time.\footnote{Atkins v. Commonwealth, 534 S.E.2d 312 (Va. 1999).}

Before the Supreme Court of Virginia, Atkins did not argue that his sentence was disproportionate to the penalties imposed for similar crimes in Virginia,\footnote{One of the key factors a court considers in determining whether a sentence is disproportionate to an offense is an intrastate comparison of penalties imposed for similar crimes. This was part of a three-part "proportionality review" test first established in Rummel v. Estelle, 445 U.S. 263, 274-75 (1980), and later revised in Harmelin v. Michigan, 501 U.S. 957, 1000 (1991). The test has consistently been used by the Supreme Court as a guide for proportionality review in light of Eighth Amendment sentencing challenges. Id.} but instead argued that he was mentally retarded and thus could not be sentenced to death.\footnote{Atkins, 534 S.E.2d at 318.} While the court's proportionality review revealed that Virginia had never executed an individual with an IQ as low as Atkins's score, the court was not willing to commute Atkins's sentence to life imprisonment merely on the basis
of his IQ score. Accordingly, the Supreme Court of Virginia again affirmed the imposition of the death penalty.

2. United States Supreme Court Decision

In 2002, the United States Supreme Court granted certiorari to hear Atkins's claim that his death sentence was "cruel and unusual" in violation of the Eighth Amendment because he was a mentally retarded offender. Justice Stevens, writing for the majority, held that executions of mentally retarded criminals are "cruel and unusual punishments" prohibited by the Eighth Amendment. Chief Justice William Rehnquist, joined by Justices Scalia and Clarence Thomas, dissented from the majority's holding. Justice Scalia also filed a separate dissenting opinion, joined by Justice Rehnquist and Justice Thomas. The dissenting Justices not only expressed disagreement with the decision, but also what may be characterized as disdain for the majority's holding.

a. The Majority Opinion

Justice Stevens, in the majority opinion, first acknowledged the evolution of Eighth Amendment analysis in death penalty cases before the Court. He stated that when assessing a sentence challenged under the Eighth Amendment, "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Justice Stevens acknowledged that review of those standards should be guided by "objective factors" to the greatest possible extent; however, Justice Stevens then stated that the Court itself makes the final determination in whether a sentence is acceptable in light of the Eighth Amendment's Cruel and Unusual Punishment Clause. Specifically, Justice Stevens announced that,
while objective evidence was of great importance, it “did not ‘wholly determine’ the controversy, ‘for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eight Amendment.’”171 Thus, according to Justice Stevens’s rationale, in cases involving a consensus, the Court’s “own judgment is ‘brought to bear’ by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.”172

Considering the issue in contemporary society, Justice Stevens declared that in the decade since Penry was decided, an American “consensus” had materialized with regard to execution of the mentally retarded and it is this consensus that informed the Court’s decision.173 Justice Stevens referred to the American public, legislators, scholars, and judges in arriving at the conclusion that a “consensus” has emerged with regard to whether executions for the mentally retarded are prohibited by the Eighth Amendment.174 Justice Stevens found it significant that in those states in which the execution of the mentally retarded was still permissible, only five had executed offenders with a known IQ of less than seventy since the Court decided Penry. Justice Stevens pronounced that this evidence showed that “the practice, therefore, has become truly unusual and it is fair to say that a national consensus has developed against it.”175 Additionally, Justice Stevens found it significant that several organizations with “germane expertise” had adopted official positions against imposing the death penalty upon mentally retarded offenders.176 Justice Stevens noted various religious organizations that had filed amicus curiae briefs announcing they all “share[d] a conviction that the execution of persons with mental retardation cannot be morally justified.”177 Justice Stevens also noted polling data which, according to the Court, “shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong.”178 Justice Stevens acknowledged that not all people who claimed to be men-

171. Id. at 312 (citing Coker v. Georgia, 433 U.S. 584, 597 (1977)).
172. Id. at 313 (citing Coker, 433 U.S. at 597).
173. Id. at 307.
174. Id.
175. Atkins, 536 U.S. at 316.
176. Id. at 316 n.21. Justice Stevens noted briefs filed by the American Psychological Association as well as the AAMR. Additionally, Justice Stevens claimed that “within the world community” there is “overwhelming” disapproval of the death penalty as punishment for mentally retarded offenders. Id.
177. Id. at 326 (quoting an amicus brief from the American Psychological Association). Among these religious groups were Christian, Jewish, Muslim, and Buddhist organizations. Id.
178. Id.
tally retarded fall within the range of mentally retarded offenders "about whom there is a national consensus." Thus, the Court left the task to the states to develop "appropriate ways to enforce the constitutional restriction upon its execution of sentences." 179

In support of its decision, the majority reasoned that due to a mentally retarded individual's disability in the area of "reasoning, judgment and control of their impulses," such individuals "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." 180 The Court conceded that mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. However, it is due to their "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience" as well their inability to engage in logical reasoning and control impulses, which distinguishes them from other offenders. 181 Thus, due to a decreased level of personal and moral culpability, the death penalty is not an appropriate punishment for such offenders. 182

In support of this argument, the Court referred to the two social purposes served by the death penalty: retribution and deterrence. 183 Justice Stevens stated that unless imposing the death penalty on mentally retarded offenders "measurably contributes to one or both of these goals," then "it is nothing more than the purposeless and needless imposition of pain and suffering" and is therefore an unconstitutional punishment. 184 Reviewing the punishment with respect to retribution, Justice Stevens asserted that the severity of the punishment depended on the culpability of the particular offender and proclaimed that imposition of the death penalty was reserved for "a narrow category of the most serious crimes." 185 Thus, pursuant to this narrow jurisprudence, which imposes the penalty of death on only the most deserving of criminals, mentally retarded offenders should be excluded. 186

Next, addressing the goal of deterrence, Justice Stevens reasoned that the death penalty could serve as a deterrent "only when murder is

179. Id. at 317 n.21 (quoting Ford v. Wainwright, 477 U.S. 399 (1986)) (internal quotation marks omitted).
180. Atkins, 536 U.S. at 306.
181. Id. at 318.
182. Id. While a mentally retarded person's "deficiencies do not warrant an exemption from criminal sanctions they do diminish their personal culpability." Id.
183. Id. at 318-19 (citing Gregg v. Georgia, 428 U.S. 153, 183 (1976)).
184. Id. at 319 (quoting Enmund v. Florida, 458 U.S. 782, 798 (1982)).
185. Atkins, 536 U.S. at 319.
186. Id.
the result of premeditation and deliberation." According to this rationale, because mentally retarded offenders lack logical reasoning ability, the death penalty would be less likely to effectively deter these offenders; in contrast to those offenders who can understand and process information.

The Court also offered a second justification for excluding mentally retarded offenders from death penalty eligibility. Justice Stevens argued that the mentally retarded could suffer from an "enhanced" risk that the death penalty may be imposed on them "in spite of factors which may call for a less severe penalty." Specifically, Justice Stevens theorized that mentally retarded offenders may be more prone to become victims of giving false confessions, may have the inability to make a convincing showing of mitigating factors when there are aggravating factors also present, may be unable or less able to give "meaningful assistance" to their counsel, and are "typically poor witnesses." Justice Stevens revealed his view that establishing mental retardation, while possibly a mitigating factor in certain cases, may be a harmful factor in other cases. Further, Justice Stevens declared mentally retarded offenders "in the aggregate face a special risk of wrongful execution." In conclusion, Justice Stevens held that death was "not a suitable punishment for a mentally retarded criminal."

b. Chief Justice Rehnquist's Dissent

In his dissenting opinion, Chief Justice Rehnquist criticized the majority's reliance on foreign laws and views of professional and religious organizations and opinion polls, which are inherently inaccurate,

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187. Id. (quoting Enmund, 458 U.S. at 799).
188. Justice Stevens argued that "it is the same cognitive and behavioral impairments that make these defendants less morally culpable . . . that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." Id. at 320.
189. Id. (quoting Lochett v. Ohio, 438 U.S. 586, 605 (1978)) (internal quotation marks omitted).
190. Id.
191. "As Penry demonstrated . . . reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." Atkins, 536 U.S. at 321.
192. Id.
193. Id.
194. Id. at 325-26. Chief Justice Rehnquist stated:
   I fail to see . . . how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination . . . [W]e have . . . explicitly rejected the idea that the sentencing practices of other countries could "serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people."
Id. at 324-35 (citing Stanford v. Kentucky 492 U.S. 361, 369 n.1 (1989)).
in addition to state legislation, in reaching its conclusion. Chief Justice Rehnquist declared that legislation is the "clearest and most reliable objective evidence of contemporary values" and is therefore the primary factor upon which the Court should rely when determining whether a national consensus has emerged—not one factor among many unreliable sources upon which the Court has historically placed little weight. He further argued that in a democratic society such as the United States, it is the role of the legislatures, not the courts, to "respond to the will and consequently the moral values of the people." According to the Chief Justice, only legislation and sentencing jury determinations should be considered by the Court as "indicators" by which the Court may ascertain the contemporary American view of decency with regard to Eighth Amendment issues. Chief Justice Rehnquist argued that these two factors are the "only objective indicia of contemporary values firmly supported by our precedents."

Chief Justice Rehnquist also emphasized that, while eighteen states recently enacted legislation that would limit the death eligibility of mentally retarded offenders, nineteen other states, besides Virginia, still left the question of appropriate punishment to the individualized consideration of sentencing judges and juries who are more familiar with the particular offender and the facts of his or her crime. Chief Justice Rehnquist criticized the majority's assessment of the legislation prohibiting the death penalty for the mentally retarded and accused the Court of rationalizing the legislative evidence in order to arrive at its own "subjectively preferred result" rather than objectively viewing the evidence in ascertaining the current standard of decency.

195. Id. at 322.
196. Atkins, 536 U.S. at 322-23 (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).
197. Id. at 323 (quoting Gregg v. Georgia, 428 U.S. 153, 175-76) (Stewart, Powell, and Stevens, JJ.) (internal quotation marks omitted).
198. Id. at 324. Chief Justice Rehnquist emphasized the value of the two "objective indicia" and stated:

More importantly . . . [the objective indicia] can be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design, 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.

Id. at 324.
199. Id. at 322.
200. Id. Chief Justice Rehnquist stated his agreement with Justice Scalia that "the Court's assessment of the current legislative judgment regarding the execution of defendants like petitioner more resembles a post hoc rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency." Atkins, 536 U.S. at 322.
Reemphasizing his amazement at the Court's reliance on evidence of foreign laws and public opinion polls, Chief Justice Rehnquist concluded that such reliance served only to highlight the majority's goal to arrive at its own subjective conclusion and find that the execution of the mentally retarded was an unconstitutional punishment. 201 Particularly concerned with the Court's reliance on unreliable public opinion polls, Chief Justice Rehnquist included the polling survey data and questions proffered by pollsters to illustrate the flawed methodology and easily observable errors in the results. 202 Particularly alarming were the categorical questions posed to various respondents that did not allow the respondent to consider particularly heinous crimes or aggravating factors. Instead, the general questions merely asked whether a respondent was in favor of or opposed to the death penalty as a punishment for mentally retarded individuals. 203 Further, Chief Justice Rehnquist noted that the information given to the Court did not indicate why a particular survey was conducted, and in some cases, by whom—factors which could significantly bear on the objectivity of the results. 204

Chief Justice Rehnquist noted that there are valid reasons the Court has historically limited its inquiry into what constitutes an evolving standard of decency when considering acceptable punishments under the Eighth Amendment. Reiterating his disagreement with the Court's holding, Chief Justice Rehnquist lamented that the majority's decision went "beyond these well-established objective indicators of contemporary values" and derived support for its conclusion from flawed and unreliable sources. 205

c. Justice Scalia's Dissenting Opinion

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, expressed his disagreement with the majority's holding that execution as a punishment for the mentally retarded violated the Eighth Amendment. 206 Justice Scalia, articulating his opposition to the majority's conclusion, declared that "[s]eldom has an opinion of

201. Id. at 326.
202. Id. at 328-37.
203. Poll and Survey questions reported in the amicus brief for the American Association on Mental Retardation asked: "Do you think that persons convicted of murder who are mentally retarded should or should not receive the death penalty?"; "Would you vote for the death penalty if the convicted person is mentally retarded?" and "Should the Carolinas ban the execution of people with mental retardation?" Id. at 328-37.
204. Id. at 326.
205. Id. at 328.
206. Atkins, 536 U.S. at 338.
this Court rested so obviously upon nothing but the personal views of its Members." Justice Scalia further attacked the Court's holding, declaring that the analysis used by the majority had "no support in the text or history of the Eighth Amendment; [nor did it] have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate." In addition, Justice Scalia expressed his disagreement by attacking the judicial activism and subjective judicial determination that surfaced in the majority decision.

Responding to the Court's conclusion that imposing the death penalty on mentally retarded offenders is unconstitutional, Justice Scalia argued that a punishment is cruel and unusual in violation of the Eighth Amendment only if it falls into one of two categories. First, the punishment may violate the Eighth Amendment if the punishment has historically been considered cruel and unusual, and was so considered when the Bill of Rights was drafted. Second, the punishment may be prohibited if it is inconsistent with contemporary standards of decency. According to Justice Scalia, these modern standards are evidenced through objective indicia—the most important of which is "legislation enacted by the country's legislatures."

Applying the facts of Atkins and addressing the first category, Justice Scalia found that here, the majority did not attempt to argue that execution of the "mildly mentally retarded would have been considered 'cruel and unusual' in 1791" when the Bill of Rights was adopted. Justice Scalia additionally noted that at this time, while only those offenders with severe or profound mental retardation were excused from extreme punishment, those offenders with less severe impairments suffered criminal prosecution and punishment—includ-

207. Id. at 338.
208. Id. at 337-38.
209. Id. Justice Scalia's statements echo Justice Powell's frustration with his fellow Justices as he expressed disagreement with what he viewed to be the majority's "judicial overreaching" in Furman v. Georgia, 408 U.S. 238, 470 (1972).
210. Id. at 339-40.
211. Atkins, 536 U.S. at 339 (citing Ford v. Wainwright, 477 U.S. 399, 405 (1986)).
212. Id. at 340 (citing Penry v. Lynaugh, 492 U.S. 302, 330-31 (1989)).
213. Id. (quoting Penry v. Lynaugh, 492 U.S. at 330-31 (1989)).
214. "Only the severely or profoundly mentally retarded, commonly known as 'idiots,' enjoyed any special status under the law at that time. They, like lunatics, suffered a 'deficiency in will' rendering them unable to tell right from wrong." Id. (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 24 (1769)). Justice Scalia noted that the term "idiot" was generally used in Eighteenth Century common law to describe persons "who had a total lack of reason or understanding, or an inability to distinguish between good and evil." Id. (quoting Penry, 492 U.S. at 331-32) (internal quotation marks omitted).
ing capital punishment. Thus, the only argument the Court had left to make was that execution of the mentally retarded was contrary to society's standards of decency.

Next, Justice Scalia addressed the issue of whether execution of the mentally retarded fell within the second category of punishments—punishments that are inconsistent with the "evolving standards of decency." Justice Scalia emphasized that the Court has consistently adhered to the principle that when making a determination of the "existence of social 'standards,'" objective factors guide, to the greatest possible extent, and "should not be, or appear to be, merely the subjective views of individual Justices." Expanding on the importance of examining objective indicia and reaffirming Chief Justice Rehnquist's opinion, Justice Scalia declared that the Court should place the greatest weight on statutes passed in the various legislatures because elected representatives best reflect the "evolution in views of the American people." Like the Chief Justice, Justice Scalia expressed his disagreement with the majority's reliance on factors other than legislation in concluding there was a new "national consensus" against executions for the mentally retarded. Justice Scalia went so far as to accuse the Court of defying its duty of considering only objective indicia and instead "miraculously extract[ing] a 'national consensus' forbidding execution of the mentally retarded."

Further expanding on his discussion of the national consensus debate, Justice Scalia found it significant that despite the majority's claim of a "national consensus," only seven of the eighteen states that the majority counted in its idea of "national consensus" had actually enacted statutes prohibiting execution of mentally retarded offenders. Justice Scalia challenged the majority's conclusion and stated:

215. Id. at 341 (citing ISAAC RAY, MEDICAL JURISPRUDENCE OF INSANITY 65, 87-92 (Winfred Overholser ed., 1962)).
218. Id. (quoting Thompson v. Oklahoma, 487 U.S. 815, 865 (1988) (Scalia, J. dissenting)). "First' among these objective factors are the 'statutes passed by society's elected representatives'... because it 'will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people do their elected representatives.'" Id.
219. Id. at 342.
220. Id. (emphasis added).
221. Atkins, 536 U.S. at 342-43. Justice Scalia, disagreeing with the majority's count of eighteen states that have enacted limiting legislation, theorized that even were he to accept this "faulty count" of eighteen, that "bare number of states alone... should enough to convince any reasonable person that no 'national consensus' exists." Id. at 343.
If one is to say, as the Court does today, that all executions of the mentally retarded are so morally repugnant as to violate our national "standards of decency," surely the "consensus" it points to must be one that has set its righteous face against all such exceptions. Not all 18 States, but only seven—18% of death penalty jurisdictions—have legislation of that scope. Eleven of those that the Court counts enacted statutes prohibiting execution of the mentally retarded defendants convicted after, or convicted of crimes committed after, the effective date of the legislation...222

Attempting to understand the majority's reasoning, Justice Scalia agreed to consider for a moment "the Court's faulty count" of eighteen states but still did not understand how this number could amount to a "consensus." According to Justice Scalia, the fact that a small fraction of states had legislation prohibiting execution of the mentally retarded could hardly be considered enough of an agreement among states to deem it a "national consensus." He questioned the majority's logical reasoning: "How is it possible that agreement among 47% of the death penalty jurisdictions amounts to 'consensus'?"223 He further argued that even within this small number of states, mentally retarded offenders could still be put to death as long as the crime was committed before the legislation was enacted; thus, the evidence of state legislation was "not a statement of absolute moral repugnance."224 Justice Scalia reflected that in prior cases, the Court generally required a much higher degree of agreement before concluding a consensus had been established, and that what the majority deemed 'consensus' in the present case (a fudged 47%) more closely resembled evidence that we found inadequate to establish consensus in earlier cases.225 Further bolstering his argument against the majority's reliance on the legislation of the eighteen particular states, Justice Scalia noted the majority's failure to acknowledge that the legislation of all eighteen states it relied on was "not a statement of absolute moral repugnance." Therefore, according to Justice Scalia, few, if any of these states had "sufficient experience" with these laws to know whether they were prudent in the long term.226

222. Id. at 342. Justice Scalia emphasized that offenders already on death row at the time the legislation was enacted and offenders (in those States using the date of the crime as the criterion of retroactivity) who committed crimes years ago could still be put to death. Id.
223. Id. at 343.
224. Id. at 342.
225. Justice Scalia cited Coker, 433 U.S. 584 (1977), and Tison v. Arizona, 481 U.S. 137 (1987), in support of his argument that the Court historically required more than 47% agreement among States before recognizing a consensus had developed. Id. at 343-44.
226. Atkins, 536 U.S. at 344
227. Id.
III. Analysis: Life for Mentally Retarded Offenders

This section will analyze the effects of the recent United States Supreme Court decision regarding imposition of the death penalty on mentally retarded offenders. Specifically, this section will explore the decision’s effects on the status of death penalty law and the effect on state courts, especially in states in which the death penalty is actively employed. Although some state legislatures have enacted statutes abolishing the execution of mentally retarded offenders, which the Court finds to be sufficient evidence to prohibit the punishment, as the dissent points out in Atkins, the issue of whether it is constitutional to impose the death penalty on mentally retarded offenders has not been foreclosed.

This section will also examine and criticize the Atkins Court’s failure to provide any valid reason for arriving at its conclusion that execution of mentally retarded offenders violates the Eighth Amendment, other than the argument that the punishment is contrary to the “evolving standards of decency” in society. This section will also critique the basis on which the Court justifies its determination of the current “national standard,” as well as challenge the Court’s proposition that because a few more state legislatures have banned imposition of the death penalty for mentally retarded offenders, this necessarily means that there is a “national consensus” against the practice.

Furthermore, this section will analyze the shift the Atkins ruling has caused in treatment of mentally retarded offenders who have been sentenced to death. This segment will focus on how the issue in such cases has shifted from application of case law and Supreme Court precedent to a subjective determination of what constitutes “mentally retarded.” Finally, this section will assert that not only do these subjective determinations threaten uniformity and predictability of judicial decisions, the Court places the entirety of the burden on the lower courts to make such a determination, yet fails to provide a clear standard with which to guide such assessment.

A. The New Era of Death Penalty Jurisprudence

The Atkins decision signifies a new era in death penalty jurisprudence, specifically with respect to the types of offenders permitted to be executed in light of the Eighth Amendment. At the time the Court decided Penry and Stanford, indications of a clear “national consensus” against the execution of the mentally retarded reflecting the “evolving standards of decency that mark the progress of a maturing
In 1989, only Georgia, Maryland, and the federal government had enacted or introduced legislation excluding the mentally retarded from imposition of the death penalty. However, in the last decade, legislation contemplating punishment for the mentally retarded has caught considerable attention and evolved significantly within several state legislatures. Currently, in addition to Georgia and Maryland, fifteen additional states have enacted legislation banning the execution of mentally retarded offenders in certain circumstances: Arizona, Arkansas, Colorado, Florida, Indiana, Kansas, Kentucky, Missouri, Nebraska, North Carolina, New Mexico, New York, South Dakota, Tennessee, and Washington. However,
as Justice Scalia argued, only eleven states—out of the thirty-eight total which permit the death penalty—actually have legislation prohibiting the executions of all mentally retarded offenders. Some states—Alabama, Mississippi, and Oklahoma—have introduced legislation that would preclude the future imposition of the death penalty on mentally retarded individuals.233

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233. Ala. S.B. 7, 60 (Ala. Reg. Sess. 2000); Miss. Bill No. 2389 (Reg. Sess. of Miss. Leg. 2000); Okla. H.B. 2713 (2000). During oral argument in Atkins, the Chief Justice and Justice Scalia noted that of the States that have enacted legislation prohibiting the execution of retarded persons, a number of them have adopted the legislation only prospectively which means the law would apply only to any future sentences imposed. Petitioner's Oral Argument, No. 00-8452, Penry v. United States, at *6-7, available at 2002 WL 341765. Thus, the Justices found it significant that the states were not so adverse to imposing the death penalty on mentally retarded persons that they would enact the law and apply it retroactively: "I thought when you were talking about a consensus, you're talking about a consensus that something is so- so terrible that it should not be permitted. And these states are permitting it. They're just not going to do it in the future." Id. at *7. This fact lends support to the proposition that the States have not reached a consensus—because when there is a consensus among States, in effect the States are declaring that a punishment is so "undesirable" that it should not be permitted. Questioning
Considering the recent legislative changes in death penalty jurisprudence, the crucial question has become: Are these changes in state legislation sufficient evidence that a “clear national consensus” has emerged against imposing the death penalty on mentally retarded offenders? Specifically, is this the type of compelling evidence Justice O'Connor was searching for in \textit{Penry} when she declared there was insufficient evidence to compel the conclusion that contemporary society rejected the death penalty for mentally retarded offenders?\textsuperscript{234}

\textbf{B. National Consensus? Forty-Seven Percent is Not a Consensus}

How much do you need for a consensus? According to Justice Stevens’s reasoning in \textit{Atkins}, it would appear that consensus no longer means “agreement.” While some states have prohibited the penalty for mentally retarded offenders, the majority of states that do permit the death penalty are \textit{not} in agreement against imposing the punishment at all on the mentally retarded. It is doubtful that the type of consensus Justice O'Connor was searching for years ago in \textit{Penry} would pass with less than even half—only forty-seven percent—of death penalty states in agreement.

In \textit{Atkins}, Justice Stevens placed a substantial amount of weight on the evidence that, since \textit{Penry}, several more states have enacted legislation designed to prohibit imposition of the death penalty on the mentally retarded. In contrast, Justice Rehnquist stated that for Eighth Amendment purposes, statutes enacted by state legislatures, and even somewhat the determinations of sentencing juries, are only \textit{indicators} a court should examine in determining contemporary American standards of decency.\textsuperscript{235} What, then, is the proper weight these indicia should be given?

According to the Court, almost the entire weight of this decision should be placed on the evidence of state legislation or, more accurately, the “direction of change” of the legislation. The majority claimed that the existence of an alleged consensus based on evidence of recent state legislation indicated “widespread judgment about the

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\textsuperscript{234} According to some commentators, while Justice O'Connor may have left open the question of a society which potentially does not accept the death penalty for the mentally retarded, she, along with Chief Justice Rehnquist, and Justices Scalia and Kennedy, will unlikely ever be satisfied with evidence of change in state legislation. \textit{See} Entzeroth, \textit{supra} 61, at 936.

\textsuperscript{235} \textit{Atkins}, 536 U.S. at 324.
relative culpability of mentally retarded offenders” and also reflected a changing attitude about the “relationship between mental retardation and the penological purposes served by the death penalty.” However, forty-seven percent is not equivalent to a “consensus” when considering the idea of general agreement. A reader may, in vain, scan the majority’s opinion for a clue—a number, a figure or statistic—that would indicate clear consensus among the states. The opinion is absent of any such evidence (unless unscientific person-on-the-street opinion polls, the laws of foreign countries, and religious organization amicus curiae briefs are compelling and convincing evidence). Inexplicably, the Court concluded primarily by basing the decision on the new legislation of states signifying a clear national consensus—yet the Court failed to explain how a national consensus is a “consensus” with only a minority of states.

Interestingly, the majority relied heavily on the idea of weighing a punishment against the “evolving standards of decency”; yet, the Court seemed to ignore this standard, and instead, declared the punishment did not comport with these evolving standards. Noting the majority’s jump from one consensus to another—without any evolution in the middle—Justice Scalia emphasized that the Eighth Amendment was drafted in the first place by a consensus, and for the Court to “evolve” the Amendment, there should necessarily be “a consensus of the same sort as the consensus that adopted the Eighth Amendment: a consensus of the sovereign States that form the Union, not a nose count of Americans for and against.” Justice Scalia further pointed out the absurdity in jumping to a baseless conclusion and finding a consensus because it defies the principal of assessing a punishment against an “evolving standard of decency.”

Not only did the majority fail to present compelling evidence regarding the number of states that have enacted recent legislation against imposing death upon mentally retarded offenders, the majority also failed to meet its own requirement of weighing a punishment with the evolving standards of decency. The Court pointed to evidence of professional and religious organizations, the views of foreign countries, the direction of change in state legislation, and the “uncommon” occurrence death sentences for the mentally retarded in attempt to bolster its conclusion that a national consensus had been established.

236. Id. at 317.
237. Id. at 346.
238. Id.
1. Problematic Mental Retardation Classification

The Court, in deciding to categorically prohibit the imposition of the death penalty on all mentally retarded individuals, relied on an ambiguous definition of "mentally retarded." By failing to clearly define "mentally retarded," the state courts are therefore left with the problematic issue of classifying and determining who is, and is not, mentally retarded. The majority pointed out that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus."239 However, the Court never established where the cut-off point lies in distinguishing the different types of mentally retarded individuals. This raises two problems: First, the Court did not clarify where lower courts should draw the line; second, the Court did not clearly explain, based on the facts presented in Atkins, why Atkins was found to be of diminished mental capacity.

a. Where Do Courts Draw the Line?

It is significant to note that the majority did not refer to a distinction between those offenders who are mentally retarded and those who are not, but rather, referred to a distinction between those individuals who are mentally retarded and those who are not "so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus."240 In effect, the Court's rationale created an amorphous distinction between mentally retarded people who cannot be executed—those about whom there is a national consensus against executing, and mentally retarded people who (theoretically) can be executed—those about whom there is not a national consensus against executing. What is worse, the Court failed to explain the distinction between the two types and to provide a clear guideline for lower courts to follow. Rather, the Court delegated to the states the task of formulating "appropriate ways to enforce the constitutional restriction upon its execution of sentences."241

Thus, after stating that mentally retarded individuals should not be given the death penalty and declaring that there is a difference between those mentally retarded offenders about whom there is a national consensus against executing, the Court failed to offer a bright line with which to guide the lower courts in this determination.

239. Id. at 317 (emphasis added).
240. Id. (emphasis added).
b. Mental Retardation and Diminished Mental Capacity—Daryl Atkins?

The majority claimed that while "mentally retarded [offenders] frequently know the difference between right and wrong and are competent to stand trial," it is due to their "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" that, while not warranting total exemption from criminal punishment, do diminish their personal capacity. However, the Court failed to explain how it could conclude that Atkins did not "understand and process" that all of his actions on the night of August 16, 1996, were criminal and unacceptable. Taking a closer look at the facts of the case, it is impossible to conceive how the Court could conclude that Atkins was incapable of understanding and processing information as he committed his heinous crimes. Specifically, Atkins understood and processed the information that drinking beer and smoking marijuana all day would "mess him up"; he understood and reasoned that when he needed more beer but had no money with which to buy it, he needed to obtain money any way that he could; he logically reasoned that taking a gun from his friend and pointing it at an innocent victim would enable him to rob the victim; he understood that his victim, if not shot to death, would probably go to the authorities, resulting in his arrest. Finally, Atkins understood that shooting a loaded gun at a person eight times would have the effect of killing the victim.

The facts of this particular case are not the central focus of whether the death penalty is an appropriate punishment for mentally retarded offenders in light of the Eighth Amendment. However, the facts here are relevant in questioning the majority's rationale in concluding that a mentally retarded criminal has a "diminished personal culpability" for such horrific acts of violence and due to this "diminished capacity," are undeserving of the proscribed punishment—a punishment permitted by the majority of states that allow the death penalty.

What is "cruel and unusual" in this case is not handing this horrendous offender his deserved punishment; but rather, it is "cruel and unusual" to allow another class of offenders to escape statutorily proscribed punishment due to meritless Eighth Amendment challenges. Worse in this particular case is the Court's conclusion considering the absence of any compelling evidence that a national consensus exists.

242. Id.
243. Id. at 318.
2. The Majority's Reliance on Professional and Religious Organizations; Foreign Countries

Alarming is the Court's reliance on evidence of the laws and opinions of foreign nations in an attempt to bolster its erroneous conclusion. Adding to the already flimsy evidence of public opinion polls and a faulty percentage of states prohibiting execution of the mentally retarded, the majority referred to the views of professional and religious organizations, as well as the members of the alleged "world community" in support of its conclusion that there is a trend or general agreement that the death penalty for mentally retarded offenders is not an acceptable punishment. It does not require too much explanation to detail why the Supreme Court of the United States need only place minor significance, if any, on the views and practices of other nations, which are not reflective of the views of American citizens. As Justice Scalia stated, "irrelevant are the practices of the 'world community,' whose notions of justice are [thankfully] not always those of our people." Furthermore, the idea of a "national consensus" is one based on the implicit principal that the "consensus" will be among citizens of the United States and not of foreign nations.

244. For a discussion of the usefulness of public opinion polls, see Furman, 408 U.S. at 361 (Marshall, J., concurring). Justice Marshall concluded that "[w]hile a public opinion poll obviously is of some assistance in indicating public acceptance or rejection of a specific penalty, its utility cannot be very great." Id. Justice Marshall explained that "[t]his is because whether or not a punishment is cruel and unusual depends . . . on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable." Id.

245. Atkins, 536 U.S. at 316 n. 21. Justice Scalia makes the interesting point in his dissent that in some cases the majority's reference to the briefs filed on behalf of particular religious organizations are actually counter-indicative. Specifically, Justice Scalia pointed to a brief filed on behalf of the United States Catholic Church and noted that the attitudes of the group that filed the brief—the active Catholic bishops—on crime and punishment are far from being representative—even among members of the Catholic church. Id. at 347 n.6 (Scalia, J., dissenting).

246. Id. at 347-48.

247. Justice Scalia emphasized this idea, stating:

We must never forget that it is a Constitution for the United States of America that we are expounding . . . . Where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution. Id. at 348 (quoting Thompson v. Oklahoma, 487 U.S. 815, 868-69 n.4 (1988)) (internal quotation marks omitted).
3. **Consistency of the Direction of Change? But There was Only One Way to Go**

Not only did the *Atkins* Court fail to provide a numerically impressive figure in support of its consensus conclusion, but the Court’s reasoning in assessing the trend of national legislation against the death penalty for the mentally retarded was flawed. Specifically, the majority found notable the “consistency of the direction of change” that state legislation had taken—moving away from execution of the mentally retarded.\(^{248}\) Yet, this argument has no merit because, as Justice Scalia emphasized in his dissent fourteen years ago when *Penry* was decided, all death penalty statutes in existence permitted execution of the mentally retarded; therefore, common sense compels the conclusion that the only “change” legislation could make would necessarily have to be in the opposite direction.\(^{249}\) As Justice Scalia commented, “[T]o be accurate the Court’s ‘consistency-of-the-direction-of-change’ point should be recast into the following unimpressive observation: ‘No State has yet undone its exemption of the mentally retarded, one for as long as 14 whole years.’”\(^{250}\) The Court’s notice of the “consistency of the direction of change” in state legislation was baseless and lent no support to its already-flawed conclusion.

4. **Execution of the Mentally Retarded—an “Uncommon” Occurrence**

The majority found significant the “infrequency with which retarded persons are executed in [s]tates that do not bar their execution.”\(^{251}\) Not only did the majority note the “infrequency” with which mentally retarded offenders are executed, the Court declared that the practice had become “truly unusual,” relying on the evidence that only five states had executed mentally retarded offenders since *Penry*.\(^{252}\) What is interesting, and consequently flawed, about this ar-

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248. *Id.* at 315 (Stevens, J.). Justice Stevens, discussing the state legislatures which had recently enacted legislation prohibiting execution of the mentally retarded, declared: “It is not so much the number of these States that is significant, but the consistency of the direction of change.” *Id.*

249. Justice Scalia, expressing his disbelief at the majority’s apparent lack of common sense, wondered:

> But in what other direction could we possibly see change? Given that 14 years ago all the death penalty statutes include the mentally retarded, any change (except precipitate undoing of what had just been done) was bound to be in the one direction the Court finds significant to overcome the lack of real consensus.

*Id.* at 344-45 (Scalia, J., dissenting).

250. *Id.* at 345 (emphasis added).

251. *Atkins*, 536 U.S. at 316 (Stevens, J.).

252. *Id.*
argument is that the Court failed to recognize that the mentally retarded make up only a small portion of society (one to three percent),\textsuperscript{253} which in part explains why so few mentally retarded offenders are actually given the death penalty. Further, as Justice Scalia noted in his dissent, the Court failed to take into consideration the opportunity of sentencing jurors to intervene and opt for a lesser punishment if persuaded by an offender's mental retardation.\textsuperscript{254} In light of these factors, one could reasonably predict that even if every state that permitted the death penalty also permitted execution of the mentally retarded, the resulting death sentences imposed on mentally retarded offenders would still constitute only a small percentage of death penalty sentences.\textsuperscript{255} Therefore, the only feature that might be classified as "uncommon" is the number of mentally retarded individuals within the United States population.

\textbf{C. The Death Penalty and the Goals of Criminal Law

Generally, opponents of the death penalty—especially in the case of mentally retarded offenders—allege that the death penalty does not serve the goals of criminal law—retribution and deterrence.\textsuperscript{256} Yet, while the idea of retribution has been criticized, the Supreme Court has acknowledged and repeatedly affirmed "the existence of a retributive element in criminal sanctions and has never heretofore found it impermissible."\textsuperscript{257} While retribution may no longer be the "dominant objective" of criminal law, it has certainly not been rejected by the

\textsuperscript{253} See Brief of Amici Curiae American Psychological Ass'n. et al., at *7, McCarver v. North Carolina, 532 U.S. 941 (2001) (No. 00-8727), available at 2001 WL 648606 ("Although there is no precise consensus of the number of people with mental retardation, studies invariably put the number at less than 3% of the general population, usually in the 1% to 3% range"); Petitioner's Brief at *21, \textit{Atkins}, 536 U.S. 304 (No. 00-8452), available at 2001 WL 1663817 ("By definition, anyone who has [mental retardation] is within the lowest 3 percent of the population in measured intelligence.").

\textsuperscript{254} \textit{Atkins}, 536 U.S. at 346 (Scalia, J. dissenting).

\textsuperscript{255} See Justice Scalia's dissent, commenting that "even if there were uniform national sentiment in favor of executing the mentally retarded in appropriate cases, one would still expect execution of the mentally retarded to be "uncommon." \textit{Id.} at 346.

\textsuperscript{256} \textit{Id.} See also \textit{Gregg v. Georgia}, 428 U.S. 153, 183-84 (1976)
Court altogether. Additionally, Justice Scalia noted a third social purpose of the death penalty—eliminating dangerous offenders and the resulting prevention of crimes they may otherwise commit in the future—which is realized when capital punishment is imposed upon mentally retarded offenders. Despite the alleged diminished mental capacity of mentally retarded offenders and resulting sentencing risks alleged by the majority, the goals of criminal law are realized even when the punishment is imposed on mentally retarded offenders.

In Atkins, the Court rejected the death penalty for the mentally retarded, alleging it did not fulfill the goals of criminal law. The Court claimed the punishment could not serve the two-fold goals of the death penalty due to a mentally retarded offender’s lack of mental capability to conform his or her conduct to the law. Yet, the Court offered no scientific evidence suggesting that a mildly mentally retarded individual like Atkins (one who does know the difference between right and wrong) lacks the mental ability to refrain from murder. Additionally, the Court offered no evidence to show that a mildly retarded individual who commits a gruesome murder is less culpable, and therefore less deserving of punishment, than any other murderer who commits a crime deserving of the death penalty. Although the Court criticized the failure of capital punishment to deter mentally retarded offenders from criminal behavior, it failed to offer any scientific evidence on which to base such a conclusion.

Furthermore, because the majority conceded that mental retardation does not render the offender morally blameless and explicitly stated that “[t]heir deficiencies do not warrant an exemption from

258. Gregg, 428 U.S. at 183-84. See also Furman, 408 U.S. at 452 (Powell, J., joined by Rehnquist, C.J., and Blackmun, J., dissenting) (noting that “[w]hile retribution alone may seem an unworthy justification in a moral sense, its utility in a system of criminal justice requiring public support has long been recognized”); id. at 453; Powell v. Texas, 392 U.S. 514, 530 (1968) (Marshall, J., plurality opinion) (noting that this Court “has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects”); United States v. Lovett, 328 U.S. 303, 324 (1946) (Frankfurter, J., concurring) (“Punishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted.”).

259. Atkins, 536 U.S. at 348.

260. Id. at 318. Justice Stevens noted that “there is a serious question as to whether either justification [retribution and deterrence] that we have recognized as a basis for the death penalty applies to mentally retarded offenders.” Id. at 318-19.

261. Id.

262. The Court concedes “[t]here is no evidence that [the mentally retarded] are more likely to engage in criminal conduct than others” but only indicates that often the mentally retarded “act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.” Id. at 318.
criminal sanctions,” the Court lacked justification in concluding that all death sentences imposed on mentally retarded offenders should be categorically prohibited.

1. Retribution Without Deterrence

Opponents of the death penalty for mentally retarded offenders argue that the punishment is not an appropriate sanction because it does not effectively deter nor prevent future similar crimes committed by such individuals. However, it has long been acknowledged that some crimes are so heinous that they are deserving of punishment that is fitting for their crime, regardless of whether it deters potential offenders or prevents future crime. Dating as far back as Biblical times, significant support can be found for the argument that citizens must submit to governing authorities and that the state, acting as a “minister of God,” may impose sanctions, even death, upon those who violate society’s laws. Thus, regardless of an offender’s mental

263. Id.

264. Gregg v. Georgia, 428 U.S. 153, 184 (1976) (“the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.”); Furman, 408 U.S. at 453 (Powell, J., joined by Rehnquist, C.J., and Blackmun, J., dissenting) (citing ROYAL COMM’N ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE, Dec. 1, 1949, at 207 (1950)). Lord Justice Denning, Master of the Roll of the Court of Appeal in England, on the subject of the utility of punishments in the criminal justice system stated:

Many are inclined to test the efficacy of punishment solely by its value as a deterrent: but this is too narrow a view. Punishment is the way in which society expresses its denunciation of wrong doing; and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else. If this were so, we should not send to prison a man who was guilty of motor manslaughter, but only disqualify him from driving; but would public opinion be content with this? The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.

Id. (emphasis added).

265. The Apostle Paul wrote in the book of Romans:

Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. For rulers hold no terror for those who do right, but for those who do wrong . . . But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God’s servant, an agent of wrath to bring punishment on the wrongdoer.

Romans 13:1-5 (New International Version). See also Justice Scalia’s remarks emphasizing the core of St. Paul’s message in Romans that government “derives its moral authority from God” and acts as the “minister of God” to “revenge, to execute wrath, including wrath by the sword”—which is, according to Justice Scalia, “unmistakably a reference to the death penalty.”
capabilities, the state has the authority to impose severe punishments to match the most serious of crimes.

In light of the Court's historical recognition and support of the two primary goals of criminal law, it is difficult to understand how the majority in Atkins argued that the purposes of criminal law and punishment will not effectively be served by imposing the death penalty on those criminals, including the mentally retarded, who commit the most horrendous of crimes. The majority attempted to dodge the retribution and deterrence arguments merely by sticking to their contention that mentally retarded offenders "lack the personal culpability" (due to diminished mental capacity) at which retribution is geared. However, the majority failed to appreciate the fact that those mentally retarded offenders who do receive the death penalty receive it because of the horrific nature of the crimes they commit. In such cases, retribution serves as a reminder that there are certain crimes that society does not permit or tolerate. Therefore, it could hardly be argued that the goal of retribution is any less served in giving equal punishment to those who commit equally offensive crimes—regardless of an offender's slightly lower mental capacity.

Speaking at a conference on the topic of capital punishment, Justice Scalia recognized the long established principle that many crimes—such as domestic murder committed in the heat of passion—are neither deterred by punishment doled out to other criminals for the same act, nor are such crimes likely to be committed again by the same offender. Yet, as Justice Scalia commented, "capital punishment opponents do not object to sending such an offender [one who commits murder in the heat of passion] to prison, perhaps for life, because he deserves punishment, because it is just." In the same way the goals of criminal justice are achieved—at the very least, the


266. Considering prior discussion of the goals of retribution, the majority's argument is not completely unfounded. "The heart of the retribution rationale is that a criminal sentence must be directed related to the personal culpability of the criminal offender." Penry v. Lynaugh, 492 U.S. 302, 336 (1989) (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)) (internal quotation marks omitted); see also Enmund v. Florida, 458 US. 782, 825 (1982) (O'Connor, J., dissenting) (The Eighth Amendment concept of "proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness."). Id. However, the flaw occurs in the majority's inability to acknowledge that in cases, such as Penry and Atkins, these offenders clearly evidence the capacity to logically reason, communicate with attorneys, and generally understand the criminal process going on around them. Thus, because with these offenders there is not a "lack of diminished capacity" to understand and reason, these offenders do not merit exception from the proscribed punishment and the goal of retribution will be served.

267. Antonin Scalia, supra note 265.

268. Id.
goal of retribution—by the imposition of death on an offender who commits such a horrific “spur of the moment” crime, the goals of criminal justice are met when a mentally retarded offender who commits rape, torture, and then murder receives the death penalty.

2. The Third Social Purpose of the Death Penalty

In his dissent, Justice Scalia pointed to a third social purpose of the death penalty—eliminating dangerous offenders and the resulting prevention of crimes they may otherwise commit in the future.269 Established by the Court almost three decades ago in Gregg v. Georgia270 in an opinion joined by Justice Stevens himself, this purpose is clearly realized through the imposition of the death penalty because the punishment serves to eliminate convicted offenders—mildly mentally retarded or not—from civilized society.

In reality, both opponents and proponents of the death penalty generally group all categories of offenders together in arguing for or against the punishment. From a legal perspective, as well as the perspective of an average citizen living in a free and civilized society structured by rules and codes of conduct, one must consider capital punishment in the context of why it was implemented in the first place, as well as why it was carried out for decades. Considering that the original intent of the framers was to structure laws and punishments that would serve the goals of criminal law, this penalty serves its purpose even in situations in which the offender who commits the most despicable of crimes happens to have a lower IQ score.

3. Reduced Mental Capacity and Sentencing Risks

The Court argued that an additional justification for categorically prohibiting the death penalty, and why the penalty was “excessive” in all cases, was due to the “special risk” that the penalty would be imposed because of the reduced mental capacity characteristic of mentally retarded offenders.271 The Court feared that a mentally retarded offender might be at an enhanced risk of receiving the death penalty because of “the lesser ability . . . to make a persuasive showing of

269. Atkins v. Virginia, 536 U.S. 304, 350 (2002). Justice Scalia commented that “[t]he Court conveniently ignores a third ‘social purpose’ of the death penalty—‘incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future.’” Id. (quoting Gregg, 428 U.S. at 183 n.28).

270. 428 U.S. 153.

271. Atkins, 536 U.S. at 320. The Court concluded, after discussing such special risks, that “such punishment is excessive and that the Constitution ‘places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender.” Id. at 321 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).
mitigation in the face of prosecutorial evidence of one or more aggravating factors” and such defendants may be “less able to give meaningful assistance to counsel and are typically poor witnesses” and their demeanor “may create an unwarranted impression of lack of remorse for their crimes.” Yet the Court failed to acknowledge that many types of individuals could be said to face similar “special risks.” As Justice Scalia speculated, “a similar ‘special risk’ could be said to exist for just plain stupid people, inarticulate people, even ugly people.” Furthermore, this claim that mentally retarded offenders face these types of “special risks” does not have anything to do with an Eighth Amendment challenge. The Cruel and Unusual Punishment Clause was not designed to protect defendants in criminal trials from every possible threat of unfairness or risk of potential discrimination.

While the Court appeared concerned about the mentally retarded defendant’s ability to assist in his or her own case, in effect, it appears the Court attempted to give a special deal to these offenders merely because of the “enhanced” possibility that they might not get their desired proceeding and outcome. Yet, in what criminal case, in any court, is there not a risk that a jury might fail to equally weigh mitigating and aggravating factors? In what criminal case is there not a risk that a defendant will not be a perfect witness for him or herself and who will not help his or her counsel to the fullest possible extent? The Court, unfortunately, envisions a utopia in which all jurors are perfectly impartial and neutral and weigh all factors equally, in which the defendant is a perfect witness for him or herself, and in which the defendant expresses the perfect amount of remorsefulness for the benefit of the perceptive jurors who then accurately weigh that impression in their decision. Because such perfection cannot be realized in any court, the majority needlessly fears the “special” possible risks faced by mentally retarded offenders. The only “special” aspect in these cases is the treatment of guilty mentally retarded offenders who now, as a result of the Atkins decision, have the ability to slip out of their statutorily proscribed death sentences.

D. Judicial Activism and Overreaching

Declaring a new national consensus in the absence of clear legislative support, the Court overstepped its bounds and trespassed into the realm of declaring public policy—a task not reserved for courts. Effectively ignoring the principle of stare decisis and the precedent set

272. Id. at 320-21.
273. Id. at 352.
274. Id.
over a decade ago in *Penry*, the Court embarked down a path of judicial activism and overreaching. The majority ignored the inherent power of authority granted to the states to prohibit those punishments that their legislatures see fit. Despite evidence that a majority of the states that do permit the death penalty also allow execution of the mentally retarded, the Court erroneously interfered with the states' power to prohibit certain punishments by declaring such punishment *per se* unconstitutional.

The philosophy of the framers clearly indicated their desire to construct a government structured around a system of checks and balances, with each branch of government subject to the review of another. However, the Supreme Court is the least subject to such review due to the very nature of judicial review, which gives the Court the power to radically interpret and expand on existing law. The Court's decision in *Atkins* defies the framers' intentions as it oversteps its boundaries in declaring the "view" and "consensus" of society in the absence of clear and valid evidence of majority agreement. The Court's decision in this case is the type of behavior and radical interpretation that the framers feared and attempted to restrain through our carefully constructed constitutional system of checks and bal-

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276. *See* Weems v. United States, 217 U.S. 349, 404 (1910) (White, J., dissenting) (arguing that the Court should not interfere with the legislature's decisions setting punishments for certain crimes as the Constitution has given legislatures discretion to set such punishments). The dissent in *Weems* argued:

> It would be an interference with matters left by the Constitution to the legislative department of the government for us to undertake to weigh the propriety of this or that penalty fixed by the legislature for specific offenses. So long as they do not provide cruel and unusual punishments, such as disgraced the civilization of former ages, and made one shudder with horror to read of them . . . the Constitution does not put any limit upon legislative discretion.

*Id.*

277. James Madison described the philosophy of the original drafters in *The Federalist, No. 51*: "In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself." *The Federalist, No. 51* (James Madison).


> The very nature of judicial review . . . makes the courts the least subject to Madisonian check in the event that they shall, for the best of motives, expand judicial authority beyond the limits contemplated by the [framers]. It is for this reason that judicial self-restraint is surely an implied, if not an expressed, condition of the grant of authority of judicial review.

*Id.*
However, given judicial review, and its inherent grant of authority to the individual Justices to pass judgment unhindered by review from another branch, the Atkins Court ignored judicial restraint. Instead, the Court abused its authority as it trampled over precedent by declaring the "view" of the nation—as determined by a group of five Justices encouraged by suspect public opinion polls and suspect statistics offered by opponents of the death penalty.

1. Stare Decisis and Death of Penry

Long before Penry, the Court was faced with numerous sentence challenges under the Cruel and Unusual Punishment Clause. As evidenced by the enormous amount of case law, defining the precise scope of the clause has not been an easy task. Yet the Court has consistently adhered to evidence from objective indicia—most importantly state legislation—in determining whether a punishment violates the Eighth Amendment. Whereas no Court has ever agreed upon a concrete definition or boundary of the Clause, each Court has undertaken to assess every Eighth Amendment challenge in light of a clear signal that a majority of contemporary society no longer accepts a particular punishment. However, in Atkins, the Court diverged from this precedential approach and instead transformed itself into a policy-making body.

Undoubtedly, it is the task of the Court to determine which punishments violate constitutional provisions; yet it is also the duty of the Court to practice judicial restraint in areas in which the Court has traditionally tread cautiously and with great deference to state legislatures.

a. Ignoring the Guide of Stare Decisis

The principle of stare decisis has long guided the Court in treading into areas possibly in need of reform. However, according to the prin-

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279. For a brief discussion of the danger of judicial overreaching, see Furman, 408 U.S. at 470 (Powell, J., joined by Rehnquist, C.J., and Blackmun, J., dissenting) ("'Judicial overreaching may result in the sacrifice of the . . . important right of the people to govern themselves.").

280. See cases cited supra note 2.

281. In Furman, the Court recognized:

The Cruel and Unusual Punishments Clause, like the other great clauses of the Constitution, is not susceptible of precise definition. Yet we know that the values and ideals it embodies are basic to our scheme of government. And we know also that the clause imposes upon this Court the duty, when the issue is properly presented, to determine the constitutional validity of a challenged punishment, whatever that punishment may be. In these cases, "[t]hat issue confronts us, and the task of resolving it is inescapably ours."

Furman, 408 U.S. at 258 (citing Trop v. Dulles, 356 U.S. 86, 103 (1958)).
ciple, in the absence of a great need for reform, the Court should respect precedent.\textsuperscript{282} To overrule precedent in the absence of clear need and justification "would run counter to the view repeated in [Supreme Court] cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."\textsuperscript{283} The Supreme Court has, for decades, cautioned against defying precedent and has consistently emphasized that a decision should be based upon "principle justification."\textsuperscript{284} However, when the justification is given apposite legal principle, "something more is required" and the justification given "must be beyond dispute."\textsuperscript{285} Specifically, the Court must base its decision on grounded legal principle and "not as compromises with social and political pressures having ... no bearing on the principled choices that the Court is obliged to make."\textsuperscript{286}

\subsection*{b. Death of \textit{Penry} Precedent}

In \textit{Atkins}, the Court did not base its decision on legal principle, but instead, based its decision on an inaccurate national consensus in an area already settled by \textit{Penry}. Clearly flawed in the Court's decision to overrule precedent is the reality, that while the majority offers a few insubstantial justifications for its conclusion, these justifications are not even "beyond dispute." Primarily, the Court relies on the idea

\begin{itemize}
  \item \textsuperscript{282} See Planned Parenthood v. Casey, 505 U.S. 833, 864 (1992) (supporting the principle of stare decisis in affirming precedent).
  \item \textsuperscript{283} \textit{Planned Parenthood}, 505 U.S. at 864; see e.g., Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve."); Mapp v. Ohio, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting) ("It certainly has never been a postulate of judicial power that mere altered disposition, or subsequent membership on the Court, is sufficient warrant for overturning a deliberately decided rule of Constitutional law.").
  \item \textsuperscript{284} \textit{Planned Parenthood}, 505 U.S. at 865; Helvering v. Hallock, 309 U.S. 106 (1940). The Court recognized that stare decisis "embodies an important social policy" as it represents "an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations." \textit{Id.} at 119. However, the Court also recognized that stare decisis is a principle of policy and "not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." \textit{Id.} The Court indicated in \textit{Hallock} that stare decisis would not support the Court's decision to stick with recent precedent if such precedent "collides" with prior sound doctrine. In \textit{Atkins}, the Court sets a new, unsound precedent which collides with the doctrine upheld in \textit{Penry} which held that imposition of the death penalty on the mentally retarded as a class was not per se unconstitutional. Therefore, until clear and objective evidence of a national consensus emerges against imposition of the death penalty for the mentally retarded, the Court does not have a valid reason for disregarding the decision in \textit{Penry}.
  \item \textsuperscript{285} \textit{Planned Parenthood}, 505 U.S. at 865.
  \item \textsuperscript{286} \textit{Id.} at 865-66.
\end{itemize}
that a new "national consensus" has emerged against imposition of the death penalty on the mentally retarded, yet the Court offers only forty-seven percent, in place of a clear majority. Also in support of its "national consensus" argument, the Court points to public opinion polls and the views of religious organizations and foreign countries, yet again, these opinions are not valid justifications beyond dispute which would call for the overruling of established precedent.

As the Supreme Court has declared, the Court's legitimacy as an authoritative body "depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the [n]ation."\(^{287}\) Here, the nation is asked to accept the Court's decision, which claims to represent the views of society as a whole. Yet, as the Court offered erroneous evidence and justifications in support of this view, along with the lack of consensus among states, the Court also failed to offer sound Eighth Amendment legal reasoning and analysis in support of its holding. A punishment may be found to violate the Eighth Amendment's Cruel and Unusual Punishment Clause if a national consensus and the evolving standards of decency indicate opposition. But here, there was no national consensus against the death penalty for the mentally retarded and no evidence that society has set its face against such punishment. Thus, the Court not only fabricated the view of contemporary society, but in so doing, the Court violated the principle of stare decisis and rendered void the established precedent set forth over a decade ago in *Penry*.

2. Judicial Activism in Atkins

This Court's decision in *Atkins* is nothing more than judicial activism in its purest form, complete with unsupported evidence to sustain an erroneous conclusion. Foregoing application of traditional Eighth Amendment analysis, Justice Stevens and the majority instead chose to implement a new, revolutionary constitutional interpretation of the Eighth Amendment. This interpretation creates a new contemporary view while ignoring objective indicia and relies instead upon inaccurate and highly suspect subjective evidence.

Rather than decide the constitutionality of imposing the death penalty upon the mentally retarded based on the words of the Eighth Amendment, the Court instead chose to insert its own subjective reasoning and conclusion rather than base its decision on objective evidence and the words of the Constitution.

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\(^{287}\) *Id.* at 866.
a. Traditional Eighth Amendment Analysis Versus the \textit{Atkins} Analysis

The Cruel and Unusual Punishment Clause mandates that certain punishments be prohibited and requires the Court to invalidate punishments that are excessive, unusual, cruel or otherwise intolerable in modern society.\textsuperscript{288} In the evolution of Eighth Amendment challenges, the Court had developed a method to determine whether a punishment is excessive in violation of the clause that involved weighing the punishment against the evolving standards of decency as evidenced through a national consensus. If a punishment was found to offend such standards of decency, then the Court could conclude that the punishment violates constitutional proscription.

In \textit{Atkins}, the Court correctly recognized this established traditional method of interpreting the Eighth Amendment and even spent considerable time discussing the principle of "evolving standards of decency" and the idea of "national consensus."\textsuperscript{289} However, the Court did not logically interpret the available evidence and conclude that while there was some movement heading in the direction against imposing the death penalty on the mentally retarded, a clear national consensus had not yet fully emerged. Rather, the Court diverged down a path of subjective interpretation by claiming that the number of states against such punishment was sufficient to form a consensus, and as a result, arrived at an erroneous conclusion. This action showed the Court's determination to declare its own result, rather than allow the majority view of the nation to be heard and represented.

b. Revolutionary Constitutional Interpretation

Justice Stevens himself recognized the Court's radical action in \textit{Atkins} and attempted to justify the Court's conclusion by expressing his view of the way the Constitution should be interpreted.\textsuperscript{290} In response to criticism that the decision in \textit{Atkins} exemplified an act of judicial activism, Justice Stevens acknowledged that the decision went against

\textsuperscript{288} U.S. \textsc{const.} amend VIII.

\textsuperscript{289} Justice Stevens re-emphasized the Court's acknowledgment of these Eighth Amendment guidelines in discussing the \textit{Atkins} decision several months later. \textit{See} Stevens, \textit{supra} note 10, at 30. Justice Stevens stated that the Court held in \textit{Atkins} that prior precedents "required us to interpret the evolving standards of decency in a maturing society in answering the question whether the Eighth Amendment's prohibition of cruel and unusual punishment precludes imposing the death penalty on the mentally retarded, and that under those standards the death sentence could not be justified." \textit{Id.}

\textsuperscript{290} \textit{Id.} at 31-33.
However, Justice Stevens declared that his understanding of constitutional interpretation was to "focus . . . primary attention on the future" rather than concern oneself with what the founders explicitly stated when the Constitution was drafted. It would appear that, according to Justice Stevens, the framers intended this type of radical judicial interpretation—or, more accurately, judicial expansion on constitutional principles that have guided this nation for decades. Specifically, Justice Stevens declared that the Constitution is more like an "instruction manual" for a developing country rather than a "narrow line of negative prohibitions" upon its citizens. In other words, Justice Stevens declared that the Constitution—the document that has structured and guided this nation for over two hundred years—is comparable to a book of suggestions informing its Justices how to decide cases. If the Constitution of the United States is comparable to a mere "instruction manual," this author questions how Justice Stevens might characterize individual state constitutions and laws. Based upon this reasoning, it is clear how the majority was able to arrive at the conclusion that a national consensus had emerged and reflected the views of this society.

IV. IMPACT: THE ATKINS RULING AND THE FUTURE OF DEATH PENALTY JURISPRUDENCE

The United States Supreme Court's decision in Atkins created a blanket prohibition against imposing the death penalty upon the mentally retarded as a class. This exemption treats all mentally retarded defendants as "one undifferentiated mass," which contradicts the principle underlying individualized sentencing. This categorical exemption treats all mentally retarded, or alleged mentally retarded, offenders as a homogenous group and ignores the clear distinction between the varying levels of mental retardation. Unfortunately, this

291. Id. at 31-32.
292. According to Justice Stevens, the words of the Preamble to the Constitution "clearly tell us" the Justices should focus their attention on the future rather than the past. Id. at 33. This assertion leaves one to wonder how the principle of stare decisis fits into this Justice's theory.
293. Justice Stevens stated:

[The]majority's decision reflected its understanding of the Constitution as containing broad grants of power to respond to social and economic changes that were unforeseen in the Eighteenth Century. Rather than a narrow set of negative prohibitions, it is more like an instruction manual explaining how a newly created entity can assemble and exercise governmental power to achieve the goals set forth in its Preamble.

Id.

295. See supra note 3 (describing the various levels of mental retardation).
categorical exemption is not without substantial costs and burdens that trial courts must now endure as a result of this arbitrary exemption.

The Court's decision has thus raised the following three problems: (1) the decision creates an enormous amount of complexity in courts involving alleged mentally retarded offenders and disrupts state capital sentencing systems; (2) the decision invites invalid Eighth Amendment challenges from numerous petitioners claiming diminished mental capacity; and (3) the decision precludes any room for state legislation in the area of mentally retarded offenders because the Supreme Court may never reverse the declaration that a new national consensus has emerged.

A. Implications of the Supreme Court's Ruling in Cases Involving the Mentally Retarded

The Atkins decision creates a considerable amount of complexity for trial courts to distinguish between those who are and those who are not mentally retarded. Now, adding greater complexity in the trial courts, the determination must be made by the trial judge before inception of the trial—a subjective factor that in itself creates a serious threat to uniform application of criminal laws to various defendants. Also, the Atkins decision removes the mental retardation factor from consideration by a jury, thereby disrupting capital sentencing schemes. Finally, and perhaps most alarming, in defying precedent and objective rationale, this decision undermines the consistency of the judicial system and taints the legitimacy and authority of judicial rulings.

1. Creation of Complexity Within the Trial Courts

Setting the standard for determining something as ambiguous as "mental retardation" necessarily involves drawing an arbitrary line between those who are and are not exempt on the basis of their intelligence. Even more complex and burdensome is the fact that judges will face instances in which defendants will try to fake the easily-faked symptoms of mental retardation in attempts to avoid the death penalty. Yet the Court ignored these troubling factors when

296. CJLF Brief, supra note 294, at *5.
297. See Justice Scalia's comments noting that "[o]ne need only read the definitions of mental retardation adopted by the American Association of Mental Retardation and the American Psychiatric Association . . . to realize that the symptoms of this condition can readily be feigned," Atkins, 536 U.S. at 353; see also CJLF Brief, supra note 294 (noting that "[d]etermining who is mentally retarded . . . adds randomness to capital punishment" and that "[f]alse positives are a common problem in mental retardation testing.")
deciding to impose this arbitrary categorical exemption. The Court also failed to recognize the potential threat to uniformity created in placing this determination into the hands of various judges. Such subjective determination, based on the vague definition of "mental retardation" relied upon by the Court, will undoubtedly lead to inconsistent assessments of mental ability from state to state.

2. Disruption of State Capital Sentencing Systems

The Court's decision in *Atkins* has effectively removed the consideration of a defendant's mental retardation out of the mitigating factors stage and has placed it into the pretrial determination realm to be decided by the trial judge. What the Court failed to recognize is that *Penry* had already established a system whereby individual states—through legislation—could determine whether or not to allow imposition of the death penalty for mentally retarded offenders in the state. Not only does this new categorical rule undermine a long-utilized system of sentencing tradition, this new rule poses a considerable threat to the capital sentencing scheme. As the Criminal Justice Legal Foundation argued, "Capital defendants will have considerable incentive to abuse this hard-to-define but potentially very strong defense." Specifically, because a claim of mental retardation applies retroactively on federal habeas petitions, an inmate is exempt from filing successive habeas corpus petitions. Further, such a petitioner is also exempt from default for failing to develop the mental retardation fact during trial proceedings in the lower courts. As a result, an inmate on death row may attempt to raise a claim of mental retardation on a federal habeas petition. Considering the nature of mental retardation and the subjective method in which it is both displayed and assessed, federal and state courts now face the serious risk of being flooded with countless claims demanding relief on such a subjective basis. Further, as noted by the Criminal Justice Legal Foundation, even in cases in which those petitioners who are malingering are identified and thrown out after careful assessment, the process will "further delay the already overdue process of capital punishment." Unfortunately, the Court in *Atkins* did not deem the risk—or rather, the probability—of court caseload buildup and resulting process delay a substantial enough concern to prevent imposing this categorical exemption.

298. CJLF Brief, *supra* note 294, at *27.
299. *Id.* at *17.
301. See CJLF Brief, *supra* note 294, at *17.
3. Undermining the Legitimacy of the Judicial System

One commentator noted that "[t]he cornerstone of any legal system is consistency," and that "[i]nconsistency tends to breed disrespect, contempt, and lack of faith in the arbiter of justice." In no other place is this idea more clearly important than in the decisions of the United States Supreme Court. It is in this Court that the final decisions are made determining the future of the laws affecting the entire nation and often affecting the lives of many individual citizens. It is for this reason that the Justices should strictly adhere to the principle of consistency in the absence of a compelling need for change or significant evidence that reform is necessary to comport with a change in society's view. Especially with regard to Eighth Amendment analysis and interpretation, the Court should follow closely the guidelines established by precedent and follow the path paved by previous decisions involving Eighth Amendment challenges. Without such consistency, national uniformity in the application of criminal laws will cease to exist.

B. Implications of the Supreme Court's Ruling on Other Eighth Amendment Challenges

Based significantly more on subjective reasoning than on objective reasoning and evidence, the Court's decision in Atkins has paved the way for countless future Eighth Amendment challenges. In fact, as Justice Scalia noted in conclusion of his dissent, the floodgates have already opened to meritless Eighth Amendment challenges. Similar to the aftermath experienced after the Court's decision in Furman v. Georgia, in which the Court struck down a death sentence on Eighth Amendment grounds, this decision encourages petitions


303. Justice Scalia noted that "[t]he mere pendency of the present case has brought us petitions by death row inmates claiming for the first time, after multiple habeas petitions, that they are retarded." Atkins v. Virginia, 536 U.S. at 353-54; see e.g., Moore v. Texas, 535 U.S. 1044 (2002) (Scalia, J., dissenting) (arguing against grant of applications for stay of execution).

304. Furman v. Georgia, 408 U.S. 238 (1972). Following the Court's decision finding the defendant's death sentence for murder was cruel and unusual within the meaning of the Eighth Amendment because the defendant was diagnosed with mental deficiency, the Court experienced a flood of petitions from inmates seeking similar relief under the Eighth Amendment. For a complete discussion on the effects of opening the door to additional Eighth Amendment challenges, see CJLF Brief, supra note 294, at *7-12. In this Brief, the CJLF argues against "any major expansion of the death penalty defendant's Eighth Amendment rights" as it will undoubtedly "reopen [the] can of worms" that the Court was faced with in the aftermath of Furman. Id. at *8.
from desperate inmates eager to have their death sentences reviewed yet another time at the expense of taxpayers.

The Court has created a per se ban on death sentences for all individuals who fall under the characterization "mentally retarded"—regardless of the degree of mental retardation. Therefore, no matter how borderline retarded a defendant might be, as long as his or her IQ meets certain standards then the death sentence will be automatically tossed out—without regard to the horrific nature of the crime he or she committed.

In *Atkins*, the Court declared it must protect and defend the Eighth Amendment rights of those who are so mentally deprived that they cannot effectively assist themselves in their defense. In addition, the Court indicated it was obliged, in light of the Eighth Amendment, to protect those who do not possess the mental ability sufficient to be held accountable by the most severe punishment even though they have committed the most severe of crimes. Yet the Court failed to consider the risks involved in enlarging the already considerable protection given to defendants under the Eighth Amendment. As Justice Scalia noted, the Court threw another requirement onto the "long list of substantive and procedural requirements impeding imposition of the death penalty imposed under this Court's assumed power to invent a death-is-different jurisprudence."

In light of the Court's reasoning and resulting conclusion, the *Atkins* decision paves the way for reconsideration of the constitutionality of executing juvenile offenders. According to some commentators, the facts surrounding the death sentence of a juvenile offender are directly analogous to the facts surrounding the death sentence of a

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305. Justice Scalia listed a number of the requirements the Court has adopted in the continuing evolution of death penalty jurisprudence under the Eighth Amendment. *Atkins*, 536 U.S. at 352-53. These requirements include: prohibition of the death penalty for "ordinary" murder (Godfrey v. Georgia, 446 U.S. 420, 433 (1980)); for rape of an adult woman (Coker v. Georgia, 433 U.S. 584, 592 (1977)); for felony murder absent a showing that the defendant possessed a sufficiently culpable state of mind (Enmund v. Florida, 458 U.S. 782, 801 (1982)); for any person under the age of sixteen at the time of the crime (Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (plurality opinion)); prohibition of the death penalty as the mandatory punishment for any crime (Woodson v. North Carolina, 428 U.S. 280, 305 (1976)) (plurality opinion); Sumner v. Shuman, 483 U.S. 66, 77-78 (1987)); a requirement that the sentencer not be given unguided discretion (Furman v. Georgia, 408 U.S. 238 (1972) (per curiam)); a requirement that the sentencer be empowered to take into account all mitigating circumstances (Lockett v. Ohio, 438 U.S. 586, 604, (1978) (plurality opinion)); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); and a requirement that the accused receive a judicial evaluation of his claim of insanity before the sentence can be executed (Ford v. Wainwright, 477 U.S. 399, 410-11 (1986) (plurality opinion)). *Id.*

306. *Id.* at 352.

mentally retarded offender. Specifically, these commentators contend that the line of reasoning applied in Atkins "compel the conclusion that executing juvenile offenders is cruel and unusual punishment" primarily because: (1) an evolving standard of decency against the execution of the mentally retarded also demonstrates such a standard against the execution of juvenile offenders; and (2) because juvenile offenders, like the mentally retarded, are less capable and less culpable than adult offenders and therefore do not warrant the most severe punishment of death. In addition, commentators argue that juveniles possess characteristics similar to those of the mentally retarded "that undermine the procedural safeguards that the Constitution requires for the imposition of the death penalty."

The consequences of expanding on the Eighth Amendment are yet to be seen. However, recalling the aftermath of Furman and the chaotic flood of Eighth Amendment challenges that resulted when the Court gave criminal defendants more latitude under the Eighth Amendment, the wave of new petitions is inevitable.

This newest addition to the list of Eighth Amendment per se prohibitions will not only elicit scores of petitions and demands for capital punishment relief from convicted criminals, the decision will impose an unthinkable amount of work on trial judges who will now be forced to make arbitrary determinations in assessing the mental capability and corresponding culpability of every defendant who claims to be mentally retarded or, in the case of juveniles, those who claim to have reduced culpability to be held responsible for their crimes.


309. Id.

310. Id. Similar to Justice Stevens's argument in Atkins, one commentator argued that because juveniles cannot "understand and invoke their constitutional rights" then the result is that "procedural safeguards are absent, the chances for fair trials decrease while the chance of mistaken convictions increase and the reliability that the Constitution requires of death sentences becomes an impossibility." Id. at 112.

311. Id. at 100. Specifically, one concern is the inability of mentally retarded defendants to understand and invoke their constitutional rights. Id. at 112. This concern leads to one factor that allegedly implicated the cruel and unusual nature of death sentences for mentally retarded offenders: the "disturbing number" of exonerated death row inmates including "mentally retarded persons who unwittingly confessed to crimes that they did not commit." Power, supra note 308, at 112-13. These "disturbing" false confessions also frequently occur with juvenile suspects. Id. at 113.

312. As one commentator notes, "Already, advocates have attempted to expand upon the logic of Atkins's reduced culpability rationale, arguing that other groups with limited abilities 'to engage in logical reasoning [and] to control impulses' should exempt from the death penalty." Criminal Law and Procedure, 116 HARV. L. REV. 220, 230 (2002) (quoting Atkins, 536 U.S. at 305).
C. Implications of Atkins and National Death Penalty Jurisprudence: "We Can Never Go Back"

Despite evidence of recent legislation proffered by the majority, there is considerable evidence that a "national consensus" still has not clearly emerged as there is not unanimous opposition to death penalty for mentally retarded offenders. During oral argument in Atkins, the Chief Justice and Justice Scalia challenged the petitioner's contention that a clear national consensus had emerged—a fact evident from the lack of state legislation prohibiting execution for the mentally retarded.\(^3\) Specifically, these Justices pointed out the extreme significance of finding a "new" national consensus because "we can't go back.\(^4\) The Justices further emphasized the serious impact in deciding that a "new national consensus" had been established because once the Court made its ruling regarding the constitutionality of this particular sentence, legislatures around the country would never be able to legislate in this area again.\(^5\)

As is evident from the majority's decision, the Court failed to consider, or maybe just chose to ignore, the seriousness of declaring that a national consensus had evolved absent any clear objective evidence.

V. Conclusion

This Note suggests that the United States Supreme Court's decision in Atkins ignores the principle of stare decisis and the decades of established precedent forming the Court's analysis in Penry and other cases involving Eighth Amendment death penalty challenges. Further, this Note argues that the majority incorrectly determined that a national consensus has emerged reflecting contemporary American society's view that imposition of the death penalty on the mentally retarded is unacceptable in modern society. However, it is important to acknowledge that underlying the Court's rationale is a concern for

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314. Id.
315. Id. at *8-10. Justice Scalia cautioned:

[W]e have to be very careful about finding a new consensus... [b]ecause... [w]e won't be able to go back, will we? Because the evidence of the consensus is supposed to be legislation, and once we've decided that you cannot legislate the execution of the mentally retarded, there can't be any legislation that enables us to go back. So, we better be very careful about the national consensus before we come to such a judgment... .

Id. at *8-9. Another Justice further emphasized that "states cannot constitutionally pass any laws allowing the execution of the mentally retarded... once we agree... that it's unconstitutional. That is the end of it," and concluded that if the Court were to agree with the Petitioner's contention, then "[w]e will never be able to go back because there will never be any legislation that can reflect a changed consensus." Id. at *10.
protecting the rights of those individuals who suffer from mental impairment and severely diminished reasoning capacity, as well as a concern for protecting rights guaranteed by the Eighth Amendment to the United States Constitution. On the other hand, these concerns must be balanced by the role of proportionality so that decisions regarding national standards of decency—what is acceptable and what is not—should be guided by objective factors, not the random whim of a particular court.

What is evident in the aftermath of Atkins is that courts are now tossed into an undefined role of determining a particular defendant’s level of mental retardation—a determination which may or may not save the defendant from capital punishment. Additionally, the only clear result of Atkins is that it opens the door and invites endless future Eighth Amendment challenges to sentences.

Imposing the country’s most severe punishment upon a person with alleged mental impairments and diminished logical reasoning capacity may indeed be harsh. However, it has long been recognized that harsh penalties do not always constitute violations of the Eighth Amendment, nor are penalties necessarily “cruel and unusual” by virtue of their harshness. The Supreme Court has long held Eighth Amendment jurisprudence must be guided by a consideration of objective factors such as state legislation and clear evidence of a national consensus. In light of this established jurisprudence, the break from Penry was illogical and drastic, defying consideration of evolving standards of decency. Until more substantial evidence of a “national consensus” emerges against execution of the mentally retarded, the consideration of a particular defendant’s mental impairments was properly conducted during the presentation of the mitigating factors portion of the sentencing hearing. The Atkins ruling ignored the fact that there is already this procedural safeguard for juries to consider a defendant’s mental retardation or mental disability. In addition to reviewing aggravating factors, during the sentencing phase a jury considers all mitigating factors—including the defendant’s mental state and reasoning capability in determining the proper sentence for a particular defendant. This is the proper realm for considering such factors. There was no justification for a sweeping constitutional ban against imposition of a death penalty sentence for mentally retarded offenders.

VI. ADDENDUM

Offenders who claim they are “mentally retarded” have begun to bring petitions for appeal based on Atkins claims. Since the writing of
this Note, the United States Supreme Court has applied the *Atkins*
decision to cases involving mentally retarded offenders.\footnote{316} Without a
doubt, *Atkins* has created a new avenue of review for petitioners who
present a claim relying on the *Atkins* decision as it states a new, retro-
actively applicable rule of constitutional law that was previously un-
available to the petitioner.\footnote{317} In addition, federal district courts have
begun to analyze and apply the *Atkins* holding in reviewing petitions
for writs of habeas corpus filed by petitioners seeking one last chance
to have their death sentences thrown out.\footnote{318} While some petitions
have been granted based upon the showing of evidence suggesting
mental retardation, other petitions have been denied on the basis that
a petitioner has not met the "*Atkins* criteria."\footnote{319}

Commentators argue that this course of collateral review has
spawned a new movement in support of revisiting whether it is constitu-
tional to execute juvenile offenders.\footnote{320} In addition, one commenta-
tor argued that the *Atkins* decision may have advantageous
implications on the execution of people with mental illness.\footnote{321} While
it is uncertain at this time whether the Supreme Court will decide to

writ of certioraris granted; judgment vacated and case remanded to the Supreme Court of Ala-
abama for further consideration in light of *Atkins*); but see Perkins v. United States, 2004 U.S.

317. In Re Johnson, 334 F.3d 403, 404 (5th Cir. 2003). The court established that, in addition,
a petitioner must also show that the petitioner's claims in a proposed successive habeas corpus
application have not previously been presented in any prior application to the court and that the
applicant can be categorized as "mentally retarded" within the understating of *Atkins*, 536 U.S.

318. See, e.g., In Re Morris, 328 F.3d 739 (5th Cir. 2003) (petitioner's motion to file successive
petition for writ of habeas corpus granted, in part, based upon petitioner's showing that he was
mentally retarded).

319. See In Re Johnson, 334 F.3d at 404 (movant's application for authorization to file succes-
sive habeas petition and motion for stay of execution denied for failure to state a prima facie
case of mental retardation under *Atkins*).

320. For an interesting discussion on the ramifications of revisiting the juvenile offender death
penalty issue, see Robin M.A. Weeks, *Comparing Children to the Mentally Retarded: How the
Decision in Atkins v. Virginia Will Affect the Execution of Juvenile Offenders*, 17 BYU J. PuB. L.
451, 479-483 (2003). See also Power, supra note 308 (Power compares the similarity of character-
istics between mentally retarded offenders and juvenile offenders as articulated in *Atkins*, and
argues that it is time to reconsider the execution of juvenile offenders).

321. See Christopher Slobogin, *What Atkins Could Mean for People With Mental Illness*, 33
N.M. L. REV. 293 (2003). Slobogin argues that states which prohibit the execution of mentally
retarded people or juveniles violate the Equal Protection Clause if they continue to authorize
the imposition of the death penalty on people with mental illnesses. Id.
revisit these issues, it is certain, that the debate on both sides will con-
tinue indefinitely.

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