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CONSTITUTIONAL PROHIBITION ON THE EXECUTION OF THE MENTALLY RETARDED CRIMINAL DEFENDANT

Lyn Entzeroth*

I. INTRODUCTION

Reversing a decision it had issued only thirteen years earlier,¹ the United States Supreme Court declared on June 20, 2002, in *Atkins v. Virginia*,² that the execution of mentally retarded³ criminal defendants violates the Cruel and

* Visiting Assistant Professor of Law, The University of Tulsa College of Law; B.A., University of Wisconsin (1982); J.D., Tulane Law School (1987). I would like to thank Jill Reamer and Jonathan Collins for their research assistance with this article.

1. See *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (plurality) (holding in 1989 that the Court “cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person . . . simply by virtue of his or her mental retardation alone”), *overruled in part by, Atkins v. Va.*, 122 S. Ct. 2242 (2002).

2. 122 S. Ct. at 2252.

3. The *Diagnostic and Statistical Manual of Mental Disorders* defines mental retardation as a significant sub-average of intellectual function accompanied with “significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.” *Diagnostic and Statistical Manual of Mental Disorders* 39-40 (4th ed., Am. Psychiatric Assn. 1994) [hereinafter *DSM-IV*]. Moreover, to fit within the *DSM-IV* definition of mental retardation, one’s intellectual and adaptive deficits must manifest themselves by the time the individual is eighteen years old. *Id.* at 39-40.

Sub-average intellectual functioning is based on Intelligence Quotient or IQ scores. The mean score for intelligence is an IQ score of 100. The *DSM-IV* rates the following IQ scores as indicative of mental retardation:

IQ 50-55 to approximately 70: mild mental retardation

IQ 35-40 to 50-55: moderate mental retardation

IQ 20-25 to 35-40: severe mental retardation

IQ below 20-25: profound mental retardation

Id. An IQ score of 70 is two standard deviations below the mean IQ score of 100. *Id.* The *DSM-IV* also notes that individuals with IQ scores in the range of 71 to 75 may be mentally retarded if they have significant deficits in adaptive functioning.

Employing a test similar, but not identical, to the one set out in the *DSM-IV*, the American Association on Mental Retardation (“AAMR”) considers an individual mentally retarded if he or she has: (1) an IQ below 70-75; (2) concurrently existing with limitations in two or more adaptive skill areas; and (3) which is manifested by age eighteen. See Am. Assn. on Mental Retardation, *Mental Retardation: Definition, Classification and Systems of Support* 5, 25 (9th ed., Am. Assn. on Mental Retardation 1992). For a more in-depth discussion of the attributes of mental retardation and the standards employed to determine this disability, see Lyn Entzeroth, *Putting the Mentally Retarded*

Unusual Punishment Clause of the Eighth Amendment of the United States Constitution.⁴ The Court's remarkable turn-around on this issue showcases the Court's modern interpretation of the Eighth Amendment as well as its current death penalty jurisprudence. This article will trace the evolution of this area of constitutional law, discuss previous rulings on the imposition of the death penalty on mentally retarded defendants, consider the Court's recent decision in *Atkins*, and examine the impact *Atkins* may have on mentally disabled individuals currently on death row as well as those individuals who in the future may face the possibility of being sentenced to death.

II. AN OVERVIEW OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT

To place in context the Supreme Court's decision to prohibit the execution of mentally retarded criminal defendants requires a brief overview of the history of the Eighth Amendment and the Supreme Court's interpretation of this constitutional provision.⁵ The idea that a punishment should be graduated to fit the crime can trace its roots to the Magna Carta, which contains language that fines imposed should be "in accordance with the degree of the offense."⁶ British courts extended this proportionality requirement to punishments in the 1600s.⁷ The prohibition against "cruel and unusual punishment" first "appeared in the English Bill of Rights of 1689, which was drafted by the British Parliament at the accession of William and Mary."⁸ The English Bill of Rights provides, "That excessive bail ought not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."⁹ This prohibition grew out of excesses that occurred during the reign of the Stuarts where illegal prosecutions occurred, unqualified jurors sat in judgment of British subjects, excessive fines and bail were imposed, and "illegal and cruel punishments inflicted."¹⁰ The illegal and cruel

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, 913-18 (2001).

4. The Eighth Amendment of the United States Constitution provides "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. XIII.

5. For interesting discussions on the Eighth Amendment and its historical roots, see Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 69 Tenn. L. Rev. 41, 41-59 (2000); Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 Cal. L. Rev. 839, 839-44 (1969).

6. Magna Carta ¶¶ 20-22 (reprinted in Neil H. Cogan, *Contexts of the Constitution* 660 (Found. Press 1999)).

7. See *Hodges v. Humkin*, 80 Eng. Rpt. 1015, 1016 (K.B. 1615) (Croke, J.) ("[I]mprisonment ought always to be according to the quality of the offence"), cited by Justice Scalia in Part I of his opinion in *Harmelin v. Michigan*, 501 U.S. 957, 967 (1991). In Part I of his opinion in *Harmelin*, Justice Scalia rejected the idea that the Eighth Amendment includes a proportionality requirement. *Id.* at 963-85. Only Chief Justice Rehnquist joined in this part of Justice Scalia's opinion in *Harmelin*.

8. English Bill of Rights ¶ 10 (reprinted in Cogan, *supra* n. 6, at 689); see *Gregg v. Ga.*, 428 U.S. 153, 169 (1976) (citing Granucci, *supra* n. 5, at 840).

9. English Bill of Rights, ¶ 10 (Dec. 13, 1689) (reprinted in Cogan, *supra* n. 6, at 689); see *Gregg*, 428 U.S. at 153 (citing Granucci, *supra* n. 5, at 840).

10. English Bill of Rights ¶¶ 1-12 (listing grievances reprinted in Cogan, *supra* n. 6, at 687-88).

punishments involved torture, such as breaking on the wheel and dissection.¹¹ The restriction on fines and punishments in the English Bill of Rights sought to prohibit fines or punishments that were not authorized by law, that were disproportionate to the crime, or punishments that employed the use of torture.¹²

Little more than a century later, the framers of the United States Constitution incorporated this “cruel and unusual punishment” proscription into the Eighth Amendment. Mirroring the English Bill of Rights, the Eighth Amendment, which was adopted in 1791, provides, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” The language of this amendment received little debate at the time of its adoption.¹³ However, commentators have concluded that the amendment was intended to prohibit forms of punishment outlawed at the time the Constitution was drafted¹⁴ and to prohibit torture and other barbarous forms of punishment.¹⁵

During the nineteenth century, the Court only availed itself of a few opportunities to comment upon the meaning of the Cruel and Unusual Punishment Clause. It is nonetheless evident that the Court construed the Eighth Amendment to prohibit not only torture, but also otherwise legal punishment that was carried out in a torturous manner. For example, in *Wilkerson v. Utah*,¹⁶ the Court noted 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; but it is safe to affirm that punishments of

11. See Granucci, *supra* n. 5, at 852-53; see Mark Spatz, Student Author, *Shame's Revival: An Unconstitutional Regression*, 4 U. Pa. J. Const. L. 827, 834-39 (2002).

12. *Id.* The Magna Carta also contains language that fines imposed should be “in proportion to the measure of the offence.” Magna Carta ¶¶ 20-22 (reprinted in Cogan, *supra* n. 6, at 660).

13. See *Weems v. U.S.*, 217 U.S. 349, 368-69 (1910). Justice McKenna writing for a majority of the Court observed:

The [cruel and unusual punishment] provision received very little debate in Congress. We find from the Congressional Register, p. 225, that Mr. Smith, of South Carolina, “objected to the words ‘nor- cruel and unusual punishment,’ the import of them being too indefinite.” Mr. Livermore opposed the adoption of the clause saying:

The clause seems to express a great deal of humanity, on which account I have no objection to it; but, as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms “excessive bail?” Who are to be the judges? What is understood by “excessive fines?” It lays with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we, in future, to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.

The question was put on the clause, and it was agreed to by a considerable majority.

Id. at 368-69.

14. *Id.*

15. *Gregg*, 428 U.S. at 169-71. One commentator posits that the framers of the Constitution misinterpreted the Cruel and Unusual Punishment Clause of the English Bill of Rights and did not comprehend that the English cruel and unusual punishment prohibition included excessive punishment, and not merely torturous punishment. Granucci, *supra* n. 5, at 865.

16. 99 U.S. 130 (1878).

torture, . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.”¹⁷ Likewise, in *In re Kemmler*,¹⁸ the Court stated that even though the Cruel and Unusual Punishment Clause did not, in and of itself, bar the death penalty, under certain circumstances the application of the death penalty or the method of its infliction might violate this constitutional protection.

As the twentieth century dawned, the Supreme Court delved more directly into the meaning of the Eighth Amendment.¹⁹ In 1910, the Court explicitly considered the scope of the Amendment in *Weems v. United States*.²⁰ At issue in *Weems* was the imposition of a sentence of fifteen years in prison in chains at hard and painful labor and a forfeiture of significant civil rights imposed by the Court of First Instance for the City of Manila for the offense of falsifying a public document.²¹ The Court observed that the punishment imposed on Weems for his relatively minor offense would “amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense.”²² Indeed, the Court noted that no American state imposed a similar punishment for such an offense, and that the federal government imposed a sentence of not more than two years for a similar crime.²³ After contrasting these sentences with the one imposed on Weems, the Court concluded that the punishment imposed on Weems was “cruel in its excess of imprisonment . . . unusual in its character. Its punishments come under the condemnation of the Bill of Rights, both on account of their degree and kind.”²⁴

17. *Id.* at 135-36.

18. 136 U.S. 436 (1890).

19. *Weems*, 217 U.S. at 366-82; see Entzeroth, *supra* n. 3, at 922-23 (discussing *Weems*, 217 U.S. 349).

20. 217 U.S. at 349.

21. In 1910, the Philippines were under the constitutional jurisdiction of the United States. *Weems*, 217 U.S. at 367-68. At issue in *Weems* was the Cruel and Unusual Punishment Clause of the Philippines' Bill of Rights. *Id.* at 367. The Court noted that the provision “was taken from the Constitution of the United States, and must have the same meaning.” *Id.* (citing *Kepner v. U.S.*, 195 U.S. 100, 121-25 (1904)). As Justice White noted in his dissent:

The Philippine Bill of Rights, which is construed and applied, is identical with the cruel and unusual punishment clause of the 8th Amendment. Because of this identity it is now decided that it is necessary to give to the Philippine Bill of Rights the meaning properly attributable to the provision on the same subject found in the 8th Amendment, as, in using the language of that Amendment in the statute, it is to be presumed that Congress intended to give to the words their constitutional significance. The ruling now made, therefore, is an interpretation of the 8th Amendment, and announces the limitation which that Amendment imposes on Congress when exercising its legislative authority to define and punish crime. The great importance of the decision is hence obvious.

Id. at 383-84.

22. *Id.* at 366-67. Although *Weems* appeared to apply a proportionality review, Justice Scalia disputes that proportionality is an element of Eighth Amendment analysis, at least in non-capital cases. See *Harmelin*, 501 U.S. at 963-85.

23. *Weems*, 217 U.S. at 377, 380.

24. *Id.* at 377.

Weems is particularly noteworthy because in finding the punishment imposed on Weems violated the Eighth Amendment, the Court specifically declined to limit the prohibition on cruel and unusual punishment to those forms of punishment outlawed at the time the Constitution was drafted.²⁵ Rather, the Court found that:

[A] principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. . . . In the application of a constitution, therefore, our contemplation cannot only be of what has been, but of what may be.²⁶

The Court observed 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.”²⁷ According to the Court, public opinion and a humane justice would not tolerate the hard labor, excessive and disproportionate sentence imposed on Weems.

Thirty-four years later in *Trop v. Dulles*,²⁸ the Court expanded the constitutional principles articulated in *Weems*. At issue in *Trop* was whether the punishment of denationalization for the crime of desertion was a cruel and unusual punishment. In posing this issue, Chief Justice Earl Warren asked “whether this penalty [of denationalization] subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment.”²⁹ In answering this question, the Court acknowledged that the precise contours of the Eighth Amendment had not been “detailed by this Court.”³⁰ Yet, tracing the roots of the Eighth Amendment to the English Bill of Rights and the Magna Carta, the Court found that “[t]he 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.”³¹ To achieve this end, “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”³² Relying on this “evolving standards of decency” concept, the Court observed that the international community was in virtual agreement that stripping a person of citizenship should not be imposed as a form of punishment for the crime of desertion.³³ Moreover, the Court found that denationalization was devastating in its effect on the individual as it rendered him stateless and at the mercy of the country where he was located.³⁴ Based on these

25. *Id.* at 372-73.

26. *Id.* at 373.

27. *Id.* at 378.

28. 356 U.S. 86 (1958). For general discussion on *Trop*, see Entzeroth, *supra* n. 3, at 923-24.

29. *Trop*, 356 U.S. at 99.

30. *Id.* at 99-100.

31. *Id.* at 100.

32. *Id.* at 101.

33. *Id.* at 102-03.

34. *Trop*, 356 U.S. at 101.

factors, and the “evolving standard of decency” test it had articulated, the Court concluded that stripping Trop of his United States citizenship violated the Eighth Amendment.³⁵

The trend of expanding the Cruel and Unusual Punishment Clause continued during the early 1960s. Four years after *Trop*, the Court extended the Clause to the states, finding that a sentence of ninety days in county jail for being a drug addict violated the Eighth Amendment.³⁶ Because drug addiction is an illness, the Court reasoned, “a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment.”³⁷ As the Court noted, “[t]o 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 abstract. Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”³⁸

In the 1970s, the Supreme Court directly considered the Cruel and Unusual Punishment Clause in the context of modern death penalty statutes. In 1972, in *Furman v. Georgia*,³⁹ the Court, by a vote of five-to-four, struck down the then-existing death penalty statutes in effect around the country. Each Justice issued a separate opinion on this issue, but a majority of the Justices found that death penalty statutes that gave the jury unfettered discretion to determine who would live and who would die violated the Cruel and Unusual Punishment Clause.⁴⁰ As a result of this decision, death penalty statutes across the country were rendered invalid.

Rather than doing away with capital punishment, states responded to *Furman* by revamping their death penalty statutes. Four years after *Furman*, the Court considered these new statutes in *Gregg v. Georgia*,⁴¹ and four companion cases,⁴² and found that the death penalty statutes of Georgia, Florida and Texas were constitutional. These pivotal cases set out the parameters and conditions governing the modern death penalty system, which in addition to other procedural safeguards require not only that a jury’s sentencing⁴³ decision be narrowed and

35. *Id.*

36. *Robinson v. Cal.*, 370 U.S. 660 (1962); see Entzeroth, *supra* n. 3, at 924-25.

37. *Robinson*, 370 U.S. at 667.

38. *Id.*

39. 408 U.S. 238 (1972) (per curiam). The previous year, a majority of the Court held that the death penalty did not violate the Due Process Clause of the Fourteenth Amendment. *McGautha v. Cal.*, 402 U.S. 183, 196 (1971).

40. See Randall Coyne & Lyn Entzeroth, *Capital Punishment and the Judicial Process* 128-29 (2d ed., Carolina Academic Press 2001).

41. 428 U.S. 153, 168 (1976).

42. *Jurek v. Tex.*, 428 U.S. 262 (1976) (upholding Texas’ death penalty statute); *Proffitt v. Fla.*, 428 U.S. 242 (1976) (upholding Florida’s death penalty statute); *Woodson v. N.C.*, 428 U.S. 280 (1976) (striking down North Carolina’s mandatory death penalty scheme); *Roberts v. La.*, 428 U.S. 325 (1976) (striking down Louisiana’s mandatory death penalty scheme).

43. In another landmark decision issued this Term, the Court found that a defendant has an absolute right to have a jury, and not a judge, decide whether he or she should be sentenced to death. *Ring v. Ariz.*, 122 S. Ct. 2428 (2002).

rationally guided,⁴⁴ but also mandated that the jury be allowed to exercise mercy in individual cases based on the mitigating circumstances of the crime and/or the defendant.⁴⁵ In sifting through the various post-*Furman* statutes, the Court acknowledged that the death penalty is different from all other criminal penalties. As a plurality of the Court noted in *Woodson v. North Carolina*:⁴⁶

[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.⁴⁷

Based on the difference in the penalty of death,⁴⁸ and following the reasoning of *Weems* and *Trop*, the Court then applied the evolving standard of decency test to the death penalty statutes at issue. In making their evaluation, the Court stated it was to assess the “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.”⁴⁹ After this examination, the Court then had to determine whether the punishment at issue was in “accord with ‘the dignity of man,’ which is the ‘basic concept underlying the Eighth Amendment.’ This means, at least, that the punishment not be ‘excessive.’”⁵⁰ The question of excessiveness has two elements. “First, the punishment must not involve the unnecessary and wanton infliction of pain,”⁵¹ which means that the death penalty as imposed must advance the penological goals of retribution and deterrence.⁵²

44. The modern death penalty statutes set forth criteria that are intended to provide a rational means for narrowing the class of individuals that may be sentenced to death. There has been considerable debate about whether the death penalty statutes achieve this goal, or whether it is even an obtainable objective. See *Callins v. Collins*, 510 U.S. 1141 (1994) (Blackmun, J., dissenting from denial of certiorari).

45. In order for the imposition of the death penalty to comport with the United States Constitution, the capital defendant must be allowed to present and the jury be allowed to consider all relevant mitigating evidence about the defendant and the circumstances of the crime. See *Penry*, 492 U.S. at 317-18 (plurality); *Eddings v. Okla.*, 455 U.S. 104, 113-14 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Justice Scalia finds this prong of the modern death penalty system not to be required by the Constitution and inconsistent with the Court’s holding in *Furman*. *Walton v. Ariz.*, 497 U.S. 639, 656-74 (1990) (Scalia, J., concurring), *overruled*, *Ring v. Ariz.*, 122 S. Ct. 2428 (2002).

46. 428 U.S. 280.

47. *Id.* at 305.

48. Justice Scalia has criticized severely the Court’s modern death penalty jurisprudence. See *Walton*, 497 U.S. at 656-74. In his concurring opinion in *Walton*, Justice Scalia asserts that the two objectives of the modern death penalty system—(1) to ensure channeled, rational narrowing of those defendants who may be subjected to the death penalty, and (2) to allow a wide range of mitigating evidence to be used in deciding whether ultimately to impose the death penalty—are inconsistent and irreconcilable. *Id.* at 664-65.

49. *Gregg*, 428 U.S. at 173.

50. *Id.* (citation omitted).

51. *Id.*

52. *Id.* at 183-86. The Court has found that retribution and deterrence are two legitimate goals advanced by the death penalty. However, most studies show that the death penalty does not deter capital murder. See Coyne & Entzeroth, *supra* n. 40, at 25, 31.

“Second, the punishment must not be grossly out of proportion to the severity of the crime.”⁵³

Since *Gregg*, the Court has held that the imposition of the death penalty for certain behavior is an excessive punishment that is cruel and unusual under the Constitution. For example, in *Coker v. Georgia*,⁵⁴ the Court found that the imposition of the death penalty for rape of an adult woman was an excessive punishment that violated the Eighth Amendment. In large measure, the Court based this conclusion on the fact that among the constitutionally valid post-*Furman* death penalty statutes, only Georgia’s statute provided the death penalty for the rape of an adult woman.⁵⁵ The lack of similar legislation from other states provided objective evidence that the punishment was out of step with the values of the nation.⁵⁶ Likewise, in *Enmund v. Florida*,⁵⁷ the Court struck down a Florida statute authorizing the imposition of the death penalty for felony-murder accomplices who did not take a life, attempt to take a life, or intend to take a life.⁵⁸ In so holding, the Court found persuasive the fact that only eight other death penalty states allowed the imposition of the death penalty in such cases.⁵⁹ In addition to this objective evidence, the *Enmund* Court found that imposing the death penalty under such circumstances would not advance the legitimate goals of retribution and deterrence, but would only inflict purposeless and needless pain and suffering, which is intolerable under the Constitution.⁶⁰

In the 1980s, the Court also exempted two classes of people from the death penalty. In *Thompson v. Oklahoma*,⁶¹ the Court exempted children under the age of sixteen from the death penalty. Among the critical facts in that case was that eighteen death penalty states specifically prohibited the execution of children who were under the age of sixteen at the time they committed capital murder. This legislative prohibition supported the conclusion that the country had found the execution of children to be inconsistent with contemporary standards of decency.⁶² However, the following year, the Court found that sixteen-year-olds could be

53. *Gregg*, 428 U.S. at 173. The Court noted in *Coker v. Georgia*, 433 U.S. 584, 591-92 (1977):

In sustaining the imposition of the death penalty in *Gregg*, however, the Court firmly embraced the holdings and dicta from prior cases, *Furman*, *Robinson*, *Trop*, and *Weems*, to the effect that the Eighth Amendment bars not only those punishments that are “barbaric” but also those that are “excessive” in relation to the crime committed. Under *Gregg*, a punishment is “excessive” and unconstitutional if it (1) 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 (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.

Id. (citations omitted).

54. 433 U.S. 584, 593-96 (1977).

55. *Id.* at 594-95.

56. *Id.*

57. 458 U.S. 782 (1982).

58. *Id.* at 789-801.

59. *Id.* at 789-93.

60. *Id.* at 798-99.

61. 487 U.S. 815 (1988).

62. *Id.* at 829.

subject to the death penalty in part because only fifteen death penalty states statutorily prohibited the execution of these juveniles.⁶³

The Court has also held that the government may not execute someone who is insane at the time he or she is to be executed.⁶⁴ No state allows the execution of someone who is insane at the time of the execution; indeed, at the time the Constitution was drafted, the common law prohibited such executions.⁶⁵ Although the legislative disapproval of inflicting the death penalty on the insane was critical in discerning contemporary standards of decency, the nature and effect of insanity and its impact on its victim also played a key role. As Justice Marshall so passionately opined, "Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment."⁶⁶

III. IMPOSITION OF CRIMINAL LIABILITY AND PUNISHMENT ON THE MENTALLY RETARDED CRIMINAL DEFENDANT

At the time the Eighth Amendment was adopted, the common law exempted certain mentally disabled individuals from criminal liability, which necessarily meant that such persons would be spared from the death penalty.⁶⁷ For centuries, the common law has recognized that mental retardation is an attribute that may affect an individual's capacity to be held liable for criminal conduct or correspondingly be subjected to criminal punishment. In the late 1700s, an individual who was deemed an "idiot" in the eyes of the court was not subject to criminal liability.⁶⁸ An "idiot" was described as "a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, etc., so as it may appear he hath no understanding of reason what shall be for his profit, or what for his loss."⁶⁹

By today's standards, an "idiot" would correspond to an individual with severe or profound mental retardation. Only a small number of mentally retarded individuals, perhaps five percent or less, are considered severely or profoundly retarded, and the limitations of an individual with severe or profound mental

63. *Stanford v. Ky.*, 492 U.S. 361 (1989).

64. *Ford v. Wainwright*, 477 U.S. 399 (1986); Entzeroth, *supra* n. 3, at 916. Although the Constitution protects the insane from being executed, it did not protect Rickey Ray Rector, a man with obvious and profound mental defects due to a severe head injury, who was executed by the State of Arkansas during Bill Clinton's first campaign for the presidency. Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 *Geo. J. on Fighting Pov.* 3, 43-44 (1996). When the Arkansas prison officials served Rector his last meal, he saved his dessert to be eaten after his execution. *Id.*

65. *See Ford*, 477 U.S. at 408-09.

66. *Id.* at 410.

67. For a general discussion on this topic, *see Entzeroth, supra* n. 3, at 916-18.

68. *Penry*, 492 U.S. at 331-32 (plurality).

69. James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 *Geo. Wash. L. Rev.* 414, 416 (1985) (quoting Sir William S. Holdsworth, *A History of English Law* 544-45 (4th ed., Meuthen & Co. 1966)); *see Atkins*, 122 S. Ct. at 2242 (2002) (Scalia, J., dissenting).

retardation are stark.⁷⁰ An individual with severe mental retardation has an IQ ranging between 20 and 40.⁷¹ The mean IQ is 100.⁷² The *DSM-IV* states that a person with such a low IQ would suffer from at least two significant limitations in adaptive functioning. Such limitations might include poor communication skills, as well as difficulty in self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.⁷³ Given this disability, a severely retarded individual is likely to attain little or no communication skills during early childhood years, although he or she may learn to talk and perform basic self-care skills during her school years.⁷⁴ As an adult, the individual may be able to perform simple skills under close supervision, but functions best in a group home or living with family.⁷⁵ A profoundly retarded individual is even more disabled with an IQ below 20 or 25.⁷⁶ This individual will exhibit considerable deficits in sensorimotor functioning, and will thrive best in a highly structured environment with constant supervision.⁷⁷

As evidenced by the above descriptions of severe and profound mental retardation, individuals suffering from such degrees of retardation experience considerable functional deficits. Thus, it is understandable that the common law found that an individual with either profound or severe mental retardation, *i.e.*, an individual who three centuries ago would have been classified as an "idiot," has such a limited reasoning capacity that he or she could not be considered capable of forming the requisite criminal intent to commit a criminal offense, nor could he or she be considered capable of distinguishing between good and evil.⁷⁸ To a certain extent, the law likened the capacity and culpability of such a disabled individual to the mental abilities and moral culpability of a child. This rule of common law served as the precursor to the modern insanity defense,⁷⁹ and on this basis, profoundly and severely retarded individuals were exempt from criminal liability at the time the United States Constitution was drafted.⁸⁰

70. *DSM-IV*, *supra* n. 3, at 40.

71. *Id.* There is some argument that the term "idiot" applies only to persons with IQs below 25. *Penry*, 492 U.S. at 333 (plurality). Thus, arguably it is possible that an individual with severe mental retardation could have been found criminally liable at the time the Eighth Amendment was drafted.

72. *DSM-IV*, *supra* n. 3, at 39.

73. *Id.* at 39-41.

74. *Id.* at 41.

75. *Id.*

76. *Id.*

77. *DSM-IV*, *supra* n. 3, at 41-42.

78. *Penry*, 492 U.S. at 333 (plurality).

79. *Id.* at 332-33.

80. *Ellis & Luckasson*, *supra* n. 69, at 416; *see Atkins*, 122 S. Ct. at 2260 (Scalia, J., dissenting). In his dissent, Justice Scalia notes that the mentally retarded, although escaping criminal liability and punishment, "were often committed to civil confinement or made wards of the State, thereby preventing them from 'go[ing] loose, to the terror of the king's subjects.'" *Id.* at 2260-61 (citation omitted).

A more sinister view of the mentally retarded emerged in the early twentieth century. *See Entzeroth*, *supra* n. 3, at 917. Segregation and even sterilization of the mentally retarded were some of the ideas advocated. *See e.g. Buck v. Bell*, 274 U.S. 200, 207 (1927) (infamously upholding Virginia eugenics statute authorizing the sterilization of the mentally disabled). These views were soundly

Today, under most circumstances, a judge or jury would find a severely or profoundly retarded person exempt from criminal liability. At the outset, it is likely that a jury would find an individual with such limited mental abilities incompetent to stand trial. An individual is not competent to stand trial unless he or she is capable of understanding the nature of the charges against him and is capable of assisting in his defense.⁸¹ Someone who is profoundly or severely retarded likely lacks one or both of these prerequisites. Moreover, mental retardation is a permanent disability that cannot be ameliorated with medication, and a mentally retarded defendant who is incompetent to stand trial due to his retardation will not be amenable to medical treatment so as to be rendered competent. However, even if a profoundly or severely retarded individual could be found competent to stand trial, he or she most likely will be found exempt from criminal liability under modern insanity statutes.⁸²

The majority of mentally retarded persons are not severely or profoundly retarded. Most mentally retarded persons are characterized by the medical community as either mildly or moderately retarded. Individuals with mild or moderate mental retardation have regularly been found competent to stand trial and have been found sane for the purposes of imposing criminal liability.⁸³ Moreover, these individuals were not exempt from criminal liability at the time the Constitution was drafted. Although subject to criminal liability, a mildly or moderately retarded person suffers from a significant mental disability that dramatically affects his life and his experience in the criminal justice system. Approximately eight-five percent of mentally retarded persons are classified as mildly retarded.⁸⁴ A mildly retarded individual has an IQ ranging between 50 or 55 and 70.⁸⁵ This IQ is two standard deviations below the mean IQ of 100.⁸⁶ In

rejected and today most Americans accept the view that mental retardation rarely, if ever, causes criminal behavior. Entzerth, *supra* n. 3, at 917.

81. See *Dusky v. U.S.*, 362 U.S. 402 (1960); *Cooper v. Okla.*, 517 U.S. 348 (1996) (holding defendant may bear the burden of proving incompetence but the standard of proof cannot be greater than a preponderance of the evidence).

82. See e.g. *Ariz. Rev. Stat. Ann.* § 13-502(A) (West 2002) (insanity may be found "if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong"); *Ala. Code* § 15-16-3 (2002) ("test for insanity requires a showing that at the time of the commission of the crime, the defendant was afflicted with a diseased mind to the extent that (1) she did not know right from wrong as applied to the particular act in question, or (2) if she did have such knowledge, she nevertheless, by reason of the duress of such mental disease had so far lost the power to select the right and to avoid doing the act in question as that her free agency was at the time destroyed, and (3) that, at the same time, the crime was so connected with such mental disease, in relation of cause and effect, as to have been the product of it solely"); *Cal. Penal Code Ann.* § 25 (applying *McNaughten* test); *Colo. Rev. Stat.* § 16-8-101.5 (2002) ("person is so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act is not accountable"); *Okla. Stat. Ann. tit. 21, § 152* (West 2002) (at the "time of committing the act charged against them they were incapable of knowing its wrongfulness").

83. For a general discussion on the definition of mental retardation, see Entzerth, *supra* n. 3, at 913-18.

84. *DSM-IV*, *supra* n. 3, at 41. For a discussion on mild and moderate mental retardation, see Entzerth, *supra* n. 3, at 913-15.

85. *DSM-IV*, *supra* n. 3, at 39-40.

86. *Id.* at 39.

addition, the mildly retarded person suffers from two significant limitations in adaptive functioning. The manifestation of the disability occurs by age eighteen.⁸⁷ While the term "mild" is used to describe this disability, the disability is substantial. For example, a mildly retarded individual will most likely be unable to attain academic skills beyond the sixth grade level,⁸⁸ which plainly curtails the scope of activities and employment he or she may enjoy. Although a mildly retarded person may achieve skills adequate for self-support, he or she will generally require supervision, guidance, and other support to live independently.⁸⁹

A person with moderate mental retardation suffers even greater limitations.⁹⁰ This person's IQ will range between 30 and 55.⁹¹ He or she also suffers from at least two significant deficits in adaptive functioning. The manifestation of the disability also occurs by the time he or she is eighteen years old.⁹² Not only is a moderately retarded individual unlikely to attain academic skills beyond the second grade level,⁹³ but also during adolescence he or she may experience difficulty recognizing social conventions and encounter problems in his or her peer relationships.⁹⁴

Needless to say, mild and moderate mental retardation significantly affects a person's experience with the criminal justice system. For example, one attribute of mental retardation is an incomplete or immature concept of blame and/or causation.⁹⁵ This characteristic can distort the mentally retarded criminal defendant's understanding of his or her participation in a criminal act.⁹⁶ Other attributes of mental retardation include limited communication skills, a desire to answer questions so as to please the questioner, a desire to hide one's mental retardation, the tendency to be easily led, a poor understanding of the consequences of one's actions, poor impulse control, and a tendency to be submissive.⁹⁷ Moreover, a mentally retarded defendant is unlikely to fully understand the cause and effect of his or her criminal actions, thus limiting his or her ability to fully understand what he or she has done, or the effects of his or her actions.⁹⁸ These characteristics can have a tremendous impact on a mentally retarded criminal suspect and may lead a mentally retarded defendant to confess to an act he or she did not commit,⁹⁹ or to accept greater blame or responsibility

87. *Id.* at 39-40.

88. *Id.* at 41.

89. *Id.*

90. *DSM-IV*, *supra* n. 3, at 41. Approximately ten percent of mentally retarded persons are moderately retarded.

91. *Id.* at 40.

92. *Id.* at 39-40.

93. *Id.* at 41.

94. *Id.*

95. Ellis & Luckasson, *supra* n. 69, at 445-52.

96. Morgan Cloud et al., *Words without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. Chi. L. Rev. 495, 512-13 (2002); Ellis & Luckasson, *supra* n. 69, at 437-40.

97. Cloud, *supra* n. 96, at 512-14; Ellis & Luckasson, *supra* n. 69, at 437-40.

98. Cloud, *supra* n. 96, at 510; Ellis & Luckasson, *supra* n. 69, at 437-40.

99. The case of Earl Washington demonstrates the risk of false confessions by innocent mentally retarded criminal suspects. Washington, a mentally retarded African-American, was convicted and

for criminal activity than he or she realistically should. A recent study revealed that many mentally retarded criminal suspects do not even understand the *Miranda* warnings, or the consequences of confessing to a criminal act.¹⁰⁰ In addition, after a mentally retarded suspect is charged with a criminal offense, the inherent attributes of his or her disability may adversely affect his or her ability to provide his or her lawyer with information that might aid in his or her defense or that might be of use in seeking a lighter penalty. Plainly, the mentally retarded individual faces unique problems and obstacles when charged with a criminal offense.

IV. EXECUTING THE MENTALLY RETARDED: THE *PENRY* DECISION

Although during the 1980s the Court excluded children under the age of sixteen and the insane from the death penalty,¹⁰¹ the Supreme Court explicitly sanctioned the execution of the mentally retarded in *Penry v. Lynaugh*.¹⁰² At issue in *Penry* was the imposition of the death penalty on Johnny Paul Penry, a young man with an IQ between 50 and 63,¹⁰³ which placed him in the mild to moderate range of mental retardation.¹⁰⁴ Although a mildly retarded person may attain skills up to the sixth grade level, Penry dropped out of school in the first grade.¹⁰⁵ Moreover, during his early childhood, Penry's mentally ill mother repeatedly and brutally abused him; this abuse included blows to Penry's head.¹⁰⁶ After bouncing in and out of state institutions, Penry eventually lived with his aunt. Penry's aunt taught him to print his name; it took him a year to learn this most basic of skills.¹⁰⁷ As an adult, Penry could not read or write.¹⁰⁸

As a young man, Penry was convicted of rape and sentenced to a term of imprisonment in the Texas Department of Corrections. Not long after he was released on parole for this first rape conviction, Penry raped and murdered

sentenced to death, based in part on his recanted confession that he had raped and murdered a young woman. Years later, DNA conclusively demonstrated that Washington was innocent and he was set free. James S. Liebman, *The New Death Penalty: What's DNA Got to Do with It?*, 33 Colum. Hum. Rights L. Rev. 527, 546 (2002); Paul T. Hourihan, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 Va. L. Rev. 1471 (1995).

100. Cloud, *supra* n. 96, at 499 (finding virtually all mentally retarded suspects studied were incapable of understanding the context of the interrogation, the text of the *Miranda* warnings, or the consequences of waiving their rights).

101. *See supra* nn. 11-12.

102. *Penry*, 492 U.S. 302 (plurality).

103. For a more detailed discussion of the facts of the *Penry* case, *see Entzeroth, supra* n. 3, at 918-22; *Penry*, 492 U.S. at 307-12 (plurality); Pet.'s Br. at 2-7, *Penry v. Johnson*, 2001 WL 237371 (Jan. 11, 2001) (IQ tests conducted over a twenty-three-year period on Penry revealed an IQ between 51 and 63).

104. *See supra* nn. 3, 89-99 and accompanying text on discussion of *DSM-IV* classification and skill levels.

105. *Penry*, 492 U.S. at 309 (plurality); Emily Fabrycki Reed, *The Penry Penalty: Capital Punishment and Offenders with Mental Retardation 2* (U. Press Am. 1993).

106. *Penry*, 492 U.S. at 308-09 (plurality); Reed, *supra* n. 105, at 1; Pet. for Cert. at 18, *Penry v. Johnson*, 2000 WL 33191345 (Oct. 20, 2000).

107. *Penry*, 492 U.S. at 309 (plurality).

108. *Penry v. Lynaugh*, 832 F.2d 915, 917 (5th Cir. 1987), *aff'd in part, rev'd in part*, 492 U.S. 302 (1989) (plurality).

Pamela Mosely Carpenter.¹⁰⁹ Carpenter was able to identify Penry as her attacker before her death.¹¹⁰ Penry gave two confessions to the crime,¹¹¹ and the state filed capital murder charges against him.¹¹²

A competency hearing¹¹³ was held to determine whether Penry was able to understand the charges against him and was capable to assist in his defense.¹¹⁴ Evidence was presented regarding Penry's mental retardation and head injuries. A psychologist who tested Penry advised the jury that "there's a point at which anyone with [Penry's] IQ is always incompetent, but, you know, this man is more in the borderline range."¹¹⁵ The jury found him competent to stand trial.

At his capital murder trial, Penry contended he was insane at the time he committed the murder and presented evidence of his mental retardation and brain damage to support his defense.¹¹⁶ The state responded with evidence showing Penry was sane at the time of his crime; however, the state did appear to concede that Penry's mental abilities were very limited.¹¹⁷ The jury found Penry's insanity defense unpersuasive and convicted him of capital murder.

The jury then turned to the question of punishment. In making its capital sentencing determination, this Texas jury was required to answer the following three questions:

- (1) whether 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.¹¹⁸

An affirmative answer to all three questions would result in the imposition of the death penalty.¹¹⁹ The jury answered "yes" to all three questions, and Penry was sentenced to death.

The United States Supreme Court decided to hear Penry's appeal of his death sentence in order to answer two questions: (1) whether the sentencing

109. *Penry*, 492 U.S. at 307 (plurality) (relying upon the facts set forth by the Fifth Circuit Court of Appeals in *Penry*, 832 F.2d at 917); Reed, *supra* n. 105, at 2.

110. *Penry*, 492 U.S. at 307 (plurality).

111. *See supra* nn. 96-99 and accompanying text for discussion on confessions by the mentally retarded.

112. *Penry*, 492 U.S. at 307 (plurality).

113. *See supra* nn. 80-82 and accompanying text for discussion of competency and mental retardation.

114. *Penry*, 492 U.S. at 307-08 (plurality).

115. *Id.* at 308.

116. *See supra* nn. 78-82 and accompanying text for discussion on insanity defense and mental retardation.

117. *Penry*, 492 U.S. at 309 (plurality).

118. *Id.* at 310 (citing Tex. Crim. Proc. Code Ann. § 37.071(2)(b) (1981 & Supp. 1989)).

119. *See Jurek*, 428 U.S. 262 (discussing Texas capital sentencing scheme).

instructions adequately advised the jury that it should consider Penry's mental retardation and other mental disabilities as evidence mitigating against the imposition of the death penalty and to weigh this mitigating evidence in its sentencing decision; and (2) whether the Cruel and Unusual Punishment Clause prohibited the execution of a mentally retarded criminal defendant.¹²⁰ The Court answered the first question in favor of Penry, but rejected his cruel and unusual punishment argument.

Justice O'Connor authored the Court's plurality opinion. In answering the first question, she joined with Justices Stevens, Brennan, Marshall, and Blackmun to find that the sentencing instructions were constitutionally defective because the judge failed to advise the jury to consider Penry's mental retardation and abusive childhood as evidence mitigating against the imposition of the death penalty.¹²¹ Because of this deficiency, the Court remanded the case for resentencing.¹²²

However, in answering the second question posed by Penry, Justice O'Connor teamed up with Chief Justice Rehnquist and Justices Scalia, White, and Kennedy to reject the argument that the imposition of the death penalty on the mentally retarded violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.¹²³ Justice Stevens, along with Justices Brennan, Marshall, and Blackmun, vigorously dissented to this portion of Justice O'Connor's plurality opinion.

In evaluating Penry's cruel and unusual punishment claim, Justice O'Connor echoed the standards discussed by the Court in *Weems*, *Trop* and *Gregg* that the Eighth Amendment prohibits punishments that offend society's evolving sense of decency.¹²⁴ She then articulated a two-part analysis, which followed the rationale and analysis of *Gregg*, *Ford*, *Coker*, *Edmund* and *Thompson*. Essentially, Justice O'Connor found that there were two issues to be considered in determining whether the death penalty was excessive when imposed on a mentally retarded defendant: (1) whether there is "objective evidence" demonstrating a national consensus that the execution of the mentally retarded is a cruel and unusual punishment; and (2) whether the imposition of the death penalty on a mentally retarded offender provides a measurable contribution to the acceptable goals of punishment and is proportionate to the crime.

120. *Penry*, 492 U.S. at 313 (plurality).

121. *Id.* at 314-28.

122. As a result of the Court's 1989 decision, Penry underwent a new sentencing hearing in 1990. The jury again sentenced Penry to death. Penry sought relief from this sentence in both state and federal court. Eventually, the Supreme Court granted certiorari to hear Penry's claims. Again, Justice O'Connor authored an opinion in which the Court found that the state trial court failed to properly instruct the jury that Penry's mental retardation and evidence of childhood abuse were factors that were to be considered as evidence mitigating against the imposition of the death penalty. *Penry v. Johnson*, 532 U.S. 782, 796-804 (2001). Accordingly, Penry's case was once again remanded for a proper sentencing trial. *Id.*

123. *Penry*, 492 U.S. at 328-40 (plurality); *Id.* at 350-51 (Stevens & Blackmun, JJ., concurring in part and dissenting in part).

124. *Id.* at 330-31 (plurality).

Turning to the objective evidence part of this analysis, Justice O'Connor opined that state legislatures and sentencing juries provided the most reliable, objective evidence of how contemporary society views a particular form of punishment.¹²⁵ Given the scant evidence as to how sentencing juries viewed the execution of the mentally retarded, Justice O'Connor focused on the actions of state legislatures and the federal government to provide objective evidence of society's view of executing mentally retarded offenders. In 1989, Georgia and the federal government had legislation explicitly exempting the mentally retarded from the death penalty.¹²⁶ Maryland also had enacted legislation barring the execution of the mentally retarded, which went into effect one week after the Court handed down *Penry*.¹²⁷ Justice O'Connor found these legislative actions insufficient to show a national consensus that excluded the mentally retarded from the death penalty even when the Georgia and Maryland statutory protections were combined with the fourteen states that rejected the death penalty completely. Moreover, Justice O'Connor was not persuaded by public opinion polls and positions taken by major organizations such as the American Association on Mental Retardation ("AAMR") that execution of the mentally retarded was at odds with contemporary standards of decency. In this regard, Justice O'Connor stated:

The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely. But at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment.¹²⁸

Having reached this determination with respect to the objective evidence, Justice O'Connor turned to the second part of her Eighth Amendment analysis. While recognizing that mental retardation "may diminish an individual's culpability for a criminal act," and acknowledging that mental retardation was a strong factor mitigating against imposition of the death penalty, Justice O'Connor nonetheless found that:

On the record before the Court today, . . . I cannot conclude that all mentally retarded people of *Penry*'s ability—by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility—inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty.¹²⁹

Justice O'Connor thus found that "it cannot be said on the record before us today that all mentally retarded people, by definition, can never act with the level of

125. *Id.* at 331.

126. *Id.* at 334.

127. *Id.* *Penry* was handed down on June 26, 1989; the Maryland statute went into effect on July 1, 1989.

128. *Penry*, 492 U.S. at 335 (plurality).

129. *Id.* at 338.

culpability associated with the death penalty.”¹³⁰ Accordingly, Justice O’Connor concluded that at least in some circumstances, the imposition of the death penalty on a mentally retarded criminal defendant could make a measurable contribution to the penological goals of deterrence and retribution and that it was not disproportionate to the crime.

Justice Scalia concurred with Justice O’Connor’s ultimate result on this question, but wrote separately setting out his analysis of the issue. In his concurring opinion, Justice Scalia adamantly stated that in determining whether a punishment comports with the Eighth Amendment, the Court should look only at how the state legislatures and the sentencing juries treat the issue.¹³¹ He opined that unless it was clear after an objective examination of the laws and jury determinations that the country had “set its face against” a particular form of punishment, such punishment was not prohibited by the Eighth Amendment.¹³² Although Justice Scalia referenced the *Trop* “evolving standard of decency” rule, he did not discuss *Gregg* or the Eighth Amendment analysis it applied in death penalty cases.¹³³ Justice Scalia then faulted Justice O’Connor for even discussing whether the death penalty as applied to the mentally retarded defendant advanced the goals of retribution and deterrence, or whether it was a proportionate penalty. In Scalia’s view, such analysis was unnecessary and had “no place in our Eighth Amendment jurisprudence.”¹³⁴ This is consistent with Justice Scalia’s apparent belief that the Eighth Amendment does not preclude excessive sentences and that it does not afford a proportionality review of punishment.¹³⁵

Justices Stevens, Blackmun, Marshall, and Brennan vigorously dissented from the Court’s decision on this issue. Citing evidence that persons with mental retardation lack sufficient impulse control, moral reasoning, and understanding of cause and effect, Justice Stevens concluded that the mentally retarded criminal defendant did not meet the level of moral culpability that must be found to impose the death penalty.¹³⁶ For this reason, Justice Stevens firmly and succinctly determined that the imposition of the death penalty on a mentally retarded criminal defendant was unconstitutional.

Justice Brennan wrote separately to explain his reasons for finding the execution of the mentally retarded constitutionally intolerable. In his dissent, Justice Brennan focused on whether executing a defendant who was mentally

130. *Id.* at 338-39.

131. *Id.*

132. *Penry*, 492 U.S. at 351 (Scalia, White & Kennedy, JJ., Rehnquist, C.J., concurring in part and dissenting in part).

133. Although not discussed in the *Penry* decision, Justice Scalia has repeatedly criticized the modern death jurisprudence that was set in motion by *Gregg* and its companion cases. *Walton*, 497 U.S. at 656-74 (Scalia, J., concurring).

134. *Penry*, 492 U.S. at 351 (Scalia, White & Kennedy, JJ., Rehnquist, C.J., concurring in part and dissenting in part). Justice Scalia elaborated on his views on Eighth Amendment analysis in *Stanford*, 492 U.S. 361, which was decided the same day as *Penry*. See *Walton*, 497 U.S. at 670-73 (Scalia, J., concurring).

135. See *Harmelin*, 501 U.S. at 967.

136. *Penry*, 492 U.S. at 350 (Stevens & Blackmun, JJ., concurring in part and dissenting in part).

retarded was a disproportionate punishment, and whether it reasonably advanced the goals of retribution and deterrence.¹³⁷ Like Justice Stevens, Justice Brennan found that,

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, whatever other punishment might be appropriate, the ultimate penalty of death is always and necessarily disproportionate to his or her blameworthiness and hence is unconstitutional.¹³⁸

Likewise, retribution, which requires that a criminal sentence must be directly related to the defendant's personal culpability, cannot be served by executing a mentally retarded offender whose moral blameworthiness is inherently limited by his or her disability.¹³⁹ Further, Justice Brennan reasoned, "It is highly unlikely that the exclusion of the mentally retarded from the class of those eligible to be sentenced to death will lessen any deterrent effect the death penalty may have for nonretarded potential offenders."¹⁴⁰ Brennan also found that the limitations of mental retardation make it unlikely that other mentally retarded people would be deterred from committing capital offenses.¹⁴¹ Even assuming, as Justice O'Connor suggested, that some mentally retarded defendants were sufficiently "blameworthy" and thus properly subject to the death penalty, Justice Brennan concluded that the capital sentencing process provided an inadequate mechanism to determine which mentally retarded defendant should be subject to the death penalty.¹⁴² Accordingly, Justice Brennan found that the execution of a mentally retarded defendant violated the Cruel and Unusual Punishment Clause.

While the views of Justice Stevens and Justice Brennan did not persuade a majority of Justices in 1989, Justice O'Connor hinted that her opinion might not be written in stone. After finding that the Cruel and Unusual Punishment Clause did not extend its protection to mentally retarded defendants sentenced to death, Justice O'Connor coyly suggested that "a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society.'"¹⁴³ It appeared that Justice O'Connor was looking for greater evidence of a national consensus.

V. LEGISLATIVE REACTION TO *PENRY*

Reaction to the Court's *Penry* decision was swift and strong. By the end of 2000, eleven more states, in addition to Maryland and Georgia, enacted legislation to protect the mentally retarded from the death penalty.¹⁴⁴ Thus, by December of

137. *Id.* at 343-49 (Brennan & Marshall, JJ., concurring in part and dissenting in part).

138. *Id.* at 346.

139. *Id.* at 348.

140. *Id.*

141. *Penry*, 492 U.S. at 348-49 (Brennan & Marshall, JJ., concurring in part and dissenting in part).

142. *Id.* at 346-47.

143. *Id.* at 340 (plurality).

144. See Ark. Code Ann. § 5-4-618(b) (LEXIS L. Publg. 1993) ("No defendant with mental retardation at the time of committing capital murder shall be sentenced to death"); Colo. Rev. Stat. §

2000, thirteen death penalty states plus the federal government explicitly prohibited the imposition of the death penalty on mentally retarded criminal defendants. In reaction to this changed legislative landscape, on March 26, 2001, the Court granted certiorari in *McCarver v. North Carolina*¹⁴⁵ to answer decide the following issue:

Whether significant objective evidence demonstrates a societal consensus against executing persons with mental retardation, reflecting that (a) such persons are not sufficiently personally culpable to merit the death penalty, and (b) allowing sentencers to weigh mental retardation as a mitigating factor in individual cases fails to prevent the execution of persons whose vastly diminished culpability makes the death penalty cruel and unusual.¹⁴⁶

As the Court prepared to hear *McCarver's* case, the pace of legislative change quickened. In early 2001, Arizona, Connecticut, Florida, Missouri, and North Carolina joined the procession of states that exclude the mentally retarded from the death penalty.¹⁴⁷ Thus, eighteen death penalty states, plus the federal

16-9-403 (repealed 2002) ("A sentence of death shall not be imposed upon any defendant who is determined to be a mentally retarded defendant pursuant to section 16-9-402. If any person who is determined to be a mentally retarded defendant is found guilty of a class 1 felony, such defendant shall be sentenced to life imprisonment"); Ga. Code Ann. § 17-7-131(j) (1990 & Supp. 1994) ("In the trial of any case in which the death penalty is sought which commences on or after July 1, 1988, should the judge find in accepting a plea of guilty but mentally retarded or the jury or court find in its verdict that the defendant is guilty of the crime charged but mentally retarded, the death penalty shall not be imposed and the court shall sentence the defendant to imprisonment for life"); Ind. Code § 35-36-9-6 (Supp. 1994) ("If the court determines that the defendant is a mentally retarded individual under section 5 of this chapter, the part of the state's charging instrument filed under IC 35-50-2-9(a) that seeks a death sentence against the defendant shall be dismissed."); Kan. Stat. Ann. § 21-4623(d) (Supp. 1994) ("If, at the conclusion of a hearing pursuant to this section, the court determines that the defendant is mentally retarded, the court shall sentence the defendant as otherwise provided by law, and no sentence of death shall be imposed hereunder"); Ky. Rev. Stat. Ann. § 532.140(1) (1990) ("no offender who has been determined to be a seriously mentally retarded offender under the provisions of KRS 532.135, shall be subject to execution"); Md. Code Ann. art. 27, § 412(g)(1) (repealed 2002) ("If a person found guilty of murder in the first degree was, at the time the murder was committed, less than 18 years old or if the person establishes by a preponderance of the evidence that the person was, at the time the murder was committed, mentally retarded, the person shall be sentenced to imprisonment for life or imprisonment for life without the possibility of parole and may not be sentenced to death"); Neb. Rev. Stat. § 28-105.01(2) (1997) ("Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person with mental retardation"); N.M. Stat. Ann. § 31-20A-2.1(B) (1994) ("The penalty of death shall not be imposed on any person who is mentally retarded"); N.Y. Crim. Proc. Law § 400.27(12)(c) (McKinney 1995) ("In the event the defendant is sentenced pursuant to this section to death, the court shall thereupon render a finding with respect to whether the defendant is mentally retarded. If the court finds the defendant is mentally retarded, the court shall set aside the sentence of death and sentence the defendant either to life imprisonment without parole or to a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole"); S.D. Codified Laws §§ 23A-27A-26.1 (2000) ("Notwithstanding any other provision of law, the death penalty may not be imposed upon any person who was mentally retarded at the time of the commission of the offense and whose mental retardation was manifested and documented before the age of eighteen years."); Tenn. Code Ann. § 39-13-203(b) (1991 & Supp. 1994) ("Notwithstanding any provision of law to the contrary, no defendant with mental retardation at the time of committing first degree murder shall be sentenced to death"); Wash. Rev. Code § 10.95.030(2) (Supp. 1995) ("In no case, however, shall a person be sentenced to death if the person was mentally retarded at the time the crime was committed").

145. 532 U.S. 941 (2001).

146. Pet.'s Br. for Cert., *McCarver v. N.C.*, 2001 WL 726608 (June 8, 2001).

147. See Ariz. Rev. Stat. Ann. 13-703.02(H) (2001) ("If the trial court finds that the defendant has mental retardation, the trial court shall dismiss the intent to seek the death penalty, shall not impose a

government, barred the execution of the mentally retarded. Significantly, at the time that *Thompson* was decided, eighteen death penalty states had enacted legislation that, at a minimum, protected fifteen-year-olds from the death penalty. Also while McCarver's case was pending, the Texas Legislature passed a bill to ban the execution of mentally retarded criminal defendants. Even though voicing approval of the bill, the Governor of Texas refused to sign the legislation because he did not believe that there were any mentally retarded defendants sitting on death row in Texas.¹⁴⁸ In 2001 and in early 2002, the legislatures of Virginia, Nevada, and Illinois had legislation pending to outlaw the execution of the mentally retarded.¹⁴⁹

These legislative changes were a welcome sign for the advocates of mentally retarded defendants who wanted the Court to reverse the *Penry* decision. However, the North Carolina legislation prohibiting the execution of mentally retarded defendants rendered McCarver's case moot. Accordingly, on September 29, 2001, the Court dismissed McCarver's writ of certiorari as improvidently granted.¹⁵⁰ This dismissal did not mean the end of the issue. On October 1, 2001, the Court granted a writ of certiorari filed by Darryl Renard Atkins limited to the question of whether the execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment.¹⁵¹

VI. IMPOSITION OF THE DEATH PENALTY ON DARRYL RENARD ATKINS: *ATKINS v. VIRGINIA*

On August 16, 1996, Atkins and William Jones abducted Eric Nesbit, robbed him, drove him to an isolated area, and murdered him.¹⁵² Atkins and Jones were

sentence of death on the defendant if the defendant is convicted of first degree murder"); Conn. Gen. Stat. §§ 53a-46a(h) (2001) ("The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict, as provided in subsection (e), that at the time of the offense (1) the defendant was under the age of eighteen years, or (2) the defendant was a person with mental retardation, as defined in section 1-1g, or (3) the defendant's mental capacity was significantly impaired or the defendant's ability to conform the defendant's conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution, or (4) the defendant was criminally liable under sections 53a-8, 53a-9 and 53a-10 for the offense, which was committed by another, but the defendant's participation in such offense was relatively minor, although not so minor as to constitute a defense to prosecution, or (5) the defendant could not reasonably have foreseen that the defendant's conduct in the course of commission of the offense of which the defendant was convicted would cause, or would create a grave risk of causing, death to another person."); Fla. Stat. § 921.137(2) (Supp. 2002) ("A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant has mental retardation."); Mo. Rev. Stat. § 565.030(4) (Supp. 2002) (death penalty may not be imposed where it is shown by a preponderance of the evidence that defendant is mentally retarded); 2001 N.C. Laws 346 (providing that a mentally retarded person convicted of first degree murder shall not be sentenced to death).

148. Raymond Bonner, *Argument Escalates on Executing Retarded*, N.Y. Times (July 23, 2001); Mark Babineck, *Perry: Death-Penalty Measure Needs Analyzing "We Do Not Execute the Mentally Retarded"*, Dallas Morning News 27A (May 31, 2001).

149. *Atkins*, 122 S. Ct. at 2249 n. 17.

150. *McCarver v. N.C.*, 533 U.S. 975 (2001).

151. *Atkins*, 122 S. Ct. 2242.

152. *Id.* at 2244.

arrested and charged with capital murder.¹⁵³ To escape the death penalty, Jones pleaded guilty and agreed to testify against Atkins.¹⁵⁴ At Atkins' trial, Williams related the events leading up to Nesbit's murder and told the jury that Atkins was the one who did the actual killing. Atkins also testified and told the jury that Williams was the one who killed Nesbit. The jury apparently found Williams more credible and convicted Atkins of first-degree murder. During the sentencing phase of the trial, the jury found the existence of two aggravating circumstances, which were not outweighed by the mitigating evidence, and sentenced Atkins to death.¹⁵⁵ Atkins appealed his conviction and sentence to the Virginia Supreme Court, which remanded the case for a second sentencing proceeding. Atkins was again sentenced to death. The Virginia Supreme Court affirmed this sentence.

According to the expert witness called by the defense at both sentencing proceedings, Atkins suffers from mild mental retardation with an IQ of 59.¹⁵⁶ In addition, Atkins' school records indicated that he did very poorly in school and that he was considered "slow," which was consistent with the diagnosis of mental retardation.¹⁵⁷ At the second sentencing hearing, the state also produced an expert witness, Dr. Stanton Samenow, to testify regarding Atkins' mental capabilities. The expert did not perform any IQ tests on Atkins, but based on an interview and a review of Atkins' school records, he concluded that Atkins was of average intelligence. It does not appear that the jury explicitly decided whether Atkins was mentally retarded although it did sentence him to death.¹⁵⁸

In reviewing Atkins's second appeal of his death sentence, a majority of the Supreme Court of Virginia noted the conflicting testimony regarding Atkins' mental abilities and raised questions about the mental retardation diagnosis.¹⁵⁹ In particular, the court indicated that there was no showing that Atkins suffered from at least two adaptive skill deficits. This finding is somewhat curious since Atkins failed to function in an academic setting, and also apparently failed to hold a job and did not live on his own. The court, nonetheless, affirmed Atkins' death sentence without affirmatively determining whether he was in fact mentally retarded.¹⁶⁰

Two Justices of the Virginia Supreme Court dissented. The dissenting justices excoriated the findings of the commonwealth's mental health expert. Indeed, Justice Hassell wrote, "I simply place no credence whatsoever in Dr. Samenow's opinion that the defendant possesses at least average intelligence. I

153. *Id.* at 2245 n. 1.

154. *Id.*

155. *Id.* at 2245.

156. *Atkins*, 122 S. Ct. at 2245.

157. *Id.*

158. *Atkins v. Commw.*, 534 S.E.2d 312 (Va. 2000), *rev'd, sub nom. Atkins v. Va.*, 122 S. Ct. 2242 (2002).

159. *Atkins*, 534 S.E. 2d at 320-21.

160. *Id.*

would hold that Dr. Samenow's opinion that the defendant possesses average intelligence is incredulous as a matter of law."¹⁶¹

While it was abundantly clear to both dissenting justices that Atkins was mentally retarded, a majority of the Virginia Supreme Court raised questions, albeit somewhat dubious, about the diagnosis. Justice Stevens, writing for the majority, acknowledged the conflicting evidence as to Atkins' mental capacity, but stated, "Because of the gravity of the concerns expressed by the dissenters, and in light of the dramatic shift in the state legislative landscape that has occurred in the past 13 years, we granted certiorari to revisit the issue that we first addressed in the *Penry* case."¹⁶²

Unlike the first time the Supreme Court tackled this issue, this time, Justice Stevens, one of the *Penry* dissenters, wrote the majority opinion. Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer joined Justice Stevens' decision. As noted earlier, Justices O'Connor and Kennedy both ruled against Penry's cruel and unusual punishment claim.¹⁶³ In *Penry*, as detailed above, Justice O'Connor separately set out her reasons for rejecting Penry's cruel and unusual punishment claim; Justice Kennedy had joined Justice Scalia's concurring opinion. Clearly, the implicit limitations of the mentally retarded had not changed in the previous thirteen years; the pivotal change, at least for Justices O'Connor and Kennedy, must have been the dramatic legislative changes in the wake of *Penry*. Justices Souter, Ginsberg and Breyer, who also joined the majority opinion, did not sit on the Supreme Court at the time of the *Penry* decision. In *Atkins*, unlike *Penry*, none of the Justices in the majority issued concurring opinions, thus indicating the strength of Justice Stevens' analysis of this issue.

In setting out the analysis to be applied to Atkins' cruel and unusual punishment claim, Justice Stevens stated plainly that the Eighth Amendment prohibited "excessive sanctions," which included punishments as well as fines, and reiterated the well-established "evolving standards of decency" analysis. In accord with this view, Justice Stevens made clear that a proportionality review was constitutionally required in an Eighth Amendment analysis, stating, "We explained 'that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense.' We have repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment."¹⁶⁴ In affirmatively stating that there is a proportionality component to the Eighth Amendment, Justice Stevens cited to Justice Kennedy's concurring opinion in *Harmelin v. Michigan*.¹⁶⁵ Justice Scalia's view that there is no proportionality component to the Eighth Amendment appears to have been flatly rejected by six members of the Court.¹⁶⁶

161. *Id.* at 323 (Hassell, J., concurring in part and dissenting in part).

162. *Atkins*, 122 S. Ct. at 2246.

163. *See supra* n. 122 and accompanying text.

164. *Atkins*, 122 S. Ct. at 2246 (citations omitted).

165. *Id.* (citing *Harmelin*, 501 U.S. 957).

166. *See supra* nn. 7, 22.

In performing this constitutionally mandated proportionality review, Justice Stevens then stated, "Proportionality review under those evolving standards should be informed by 'objective factors to the maximum possible extent,'" which means an examination of the actions of legislatures across the country.¹⁶⁷ Clearly, the "objective criteria," *i.e.*, the legislative decisions of the states, had changed dramatically in the thirteen years since *Penry*. Moreover, while *Atkins* was pending before the Court, the change in favor of legislatively protecting the mentally retarded from the death penalty continued at a brisk pace. By the time the Court decided *Atkins*, eighteen death penalty states prohibited the execution of the mentally retarded and several other death penalty states, including Virginia, had legislation pending that would likewise outlaw the execution of the mentally retarded. According to Justice Stevens, this objective evidence was significant not merely as evidence of the number of states that had enacted legislation to protect the mentally retarded, but also as evidence of the consistency in the trend to extend such protection.¹⁶⁸ In so doing, Justice Stevens neatly sidestepped setting an absolute number of death penalty states that when combined with the non-death penalty states would establish a national consensus sufficient to constitutionally prohibit the death penalty under certain circumstances. Thus, it cannot be said absolutely that "eighteen" is the magic number of death penalty states required to form a national consensus sufficient to exempt a class of individuals from the death penalty. However, when considered in conjunction with *Thompson*, a showing that eighteen death penalty states legislatively prohibit the imposition of the death penalty on a particular group of persons would be, at a minimum, strong probative evidence that the country has found a particular form of punishment to be outside the society's standards of decency.

Justice Stevens also noted that execution of the mentally retarded is disfavored by the leading national organizations that work with the mentally retarded, as well as the international community. Public opinion polls also have shown disapproval of the practice. These factors support the conclusion that evolving standards of decency abhor the imposition of the death penalty on the mentally retarded. In addition, Justice Stevens noted that only five mentally retarded capital defendants had been executed, indicating that the punishment was unusual.¹⁶⁹ This observation is subject to dispute, and Justice Scalia seized on the weakness of this point in his dissent.¹⁷⁰ Although Justice Stevens' finding on this point may be open to attack, it was not the controlling factor in his Eighth Amendment national consensus analysis.

Justice Stevens, however, did not end his analysis by simply counting the number of states that exempted, or that had legislation pending to exempt, the mentally retarded from the death penalty. Indeed, in keeping with the Court's traditional Eighth Amendment analysis, Justice Stevens also analyzed the

167. *Id.* at 2247 (internal quotation marks and citations omitted).

168. *Id.* at 2249.

169. *Id.*

170. *Atkins*, 122 S. Ct. at 2264 (Scalia & Thomas, JJ., Rehnquist, C.J., dissenting).

imposition of the death penalty on Atkins to determine whether it advanced either the goal of retribution or deterrence, and to determine if it was excessive.¹⁷¹ As he found in 1989, and echoing the reasoning discussed in Justice Brennan's *Penry* dissent, Justice Stevens found that neither retribution nor deterrence was advanced by executing a mentally retarded criminal defendant such as Atkins. First, the limited capabilities of the mentally retarded defendant lessens his moral culpability. To impose the death penalty on such an individual defeats the idea that the death penalty is to be meted out only to those who are sufficiently morally culpable. Second, Justice Stevens found that executing a mentally retarded person would not deter non-retarded defendants who are unaffected by a ban on the execution of mentally retarded defendants. Nor would it deter mentally retarded defendants, who lack the intellectual capacity to understand the consequences attendant to capital crimes. Thus, imposing the death penalty on a mentally retarded defendant does not advance the legitimate penological goals of the death penalty.¹⁷²

Additionally, Justice Stevens expressed concern that the mentally retarded defendant faces a heightened risk of wrongful conviction because of the greater risk of a false confession combined with a decreased ability to effectively assist their attorneys.¹⁷³ Over the past few years, increased attention has been focused on innocent criminal defendants who are sentenced to death. Significant national concern about the issue has been demonstrated, in part, by the moratorium on the death penalty in Illinois and the calls for a moratorium by the American Bar Association.¹⁷⁴ Justice O'Connor, in particular, has voiced concerns over this problem: "In July of 2001, Justice O'Connor publicly stated that the number of recently freed death row inmates suggests that 'the system may well be allowing some innocent defendants to be executed.'"¹⁷⁵ As discussed earlier, the mental limitations and attributes of the mentally retarded defendants create an increased risk that they will not understand the *Miranda* warnings, that they will confess to crimes that they did not commit, or that they will accept greater responsibility for criminal acts than they should.¹⁷⁶

In light of these concerns, and based on the objective evidence and the well-accepted modern Eighth Amendment analysis of the death penalty, Justice Stevens concluded:

Our independent evaluation of the issue reveals no reason to disagree with the judgment of "the legislatures that have recently addressed the matter" and

171. *Id.* at 2251.

172. Although neither Justice O'Connor nor Kennedy shared this view with respect to mentally retarded capital defendants in 1989, both Justices adhered to this aspect of Justice Stevens' analysis without issuing a separate opinion on this issue.

173. *Atkins*, 122 S. Ct. at 2251-52.

174. See *Coyne & Entzeroth*, *supra* n. 64.

175. Anne-Marie Moyes, Student Author, *Assessing the Risk of Executing the Innocent: A Case for Allowing Access to Physical Evidence for Posthumous DNA Testing*, 55 *Vand. L. Rev.* 953, 990 (2002) (quoting David G. Savage, '92 Execution Haunts Death Penalty Foes; Activists Fight for DNA Test in Hopes of Bolstering Doubts on Capital Punishment, *L.A. Times* A1 (July 22, 2001)).

176. See *supra* nn. 96-99.

concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our “evolving standards of decency,” we therefore conclude 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.¹⁷⁷

Chief Justice Rehnquist, Justice Scalia, and Justice Thomas bitterly dissented in *Atkins*. Foreshadowing the ultimate conclusion in *Atkins* and their impending caustic dissents in that case was an acerbic dissent by Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, to a 2002 decision to grant a stay of execution. In *Moore v. Texas*,¹⁷⁸ a Texas death row inmate asserted he was mentally retarded and asked the Court for a stay of execution pending its decision in *Atkins*. The thrust of Justice Scalia’s dissent to the stay of execution was that Moore was procedurally barred from raising this claim in a post-conviction proceeding.¹⁷⁹ However, the tone and the timing of the dissent made it evident that Justice Scalia was frustrated by the petitioner’s claim and the Court.

In *Atkins*, both Chief Justice Rehnquist and Justice Scalia issued separate written dissents. While agreeing with the points made by Justice Scalia in his dissent—including the claim that the majority opinion was nothing more than a rationalization of six Justices’ views of what the law should be—Chief Justice Rehnquist wrote separately to express his outrage over the majority’s reference to, and reliance on, international law, the viewpoints of professional organizations, and public opinion polls in making its Eighth Amendment analysis.¹⁸⁰ Not only did Chief Justice Rehnquist find that this evidence was not sufficiently “objective” to serve as a basis for discerning a national consensus, but he also stated that reliance on such evidence was antithetical to the principles of federalism.¹⁸¹

First, Chief Justice Rehnquist objected to any reliance on international law in discerning the nation’s consensus and stated that reliance on international law was inconsistent with the Court’s plurality opinion in *Stanford v. Kentucky*.¹⁸² However, the Court has considered international law in its Eighth Amendment analysis in *Thompson*,¹⁸³ *Enmund*,¹⁸⁴ *Coker*,¹⁸⁵ and *Trop*.¹⁸⁶ Only Chief Justice Rehnquist and Justices Scalia and Thomas appear to view any reference to international law as completely at odds with an Eighth Amendment analysis. The

177. *Atkins*, 122 S. Ct. at 2252.

178. 122 S. Ct. 2350 (2002).

179. *Id.* (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting).

180. *Atkins*, 122 S. Ct. at 2252-52 (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting).

181. *Id.* at 2253-54.

182. *Id.* at 2252-53 (discussing *Stanford*, 492 U.S. 361). The reliance on international law in the context of discerning the evolving standards of decency of the Eighth Amendment was also criticized by Justice Scalia in his dissenting opinion in *Thompson*, 487 U.S. 815, 869 n. 4 (1988).

183. *Thompson*, 487 U.S. at 830-31.

184. 458 U.S. 782, 796 n. 22 (1982).

185. 433 U.S. at 596 n. 10.

186. 356 U.S. at 101, 102 n. 35.

protestations of these three Justices notwithstanding, the brief reference to international law by Justice Stevens in the majority opinion in *Atkins* is not a departure from established Eighth Amendment jurisprudence.¹⁸⁷ Indeed, there is a strong argument to be made that the framers of the Constitution relied on international law in drafting the Eighth Amendment, which uses language nearly identical to the British Bill of Rights.¹⁸⁸

Chief Justice Rehnquist also argued that public opinion polls were not sufficiently “objective” to support a finding of cruel and unusual punishment because polls can be manipulated, at least to some extent, based on the form and content of the questions. However, even assuming the validity of Rehnquist’s complaint about public opinion polls, the opinion polls, nonetheless, appear to accurately reflect the wave of legislation outlawing the execution of the mentally retarded. It was the extent and momentum of this legislation that swayed the majority rather than simply the public opinion polls. Finally, Rehnquist criticized the majority’s reference to the opinions of religious organizations and professional organizations such as the AAMR. According to him, “none [of the opinions of these groups] should be accorded any weight on the Eight[h] Amendment scale when the elected representatives of a State’s populace have not deemed them persuasive enough to prompt legislative action.”¹⁸⁹ However, it is precisely the efforts and views of such organizations that prompted eighteen death penalty states to enact legislation protecting mentally retarded defendants and caused at least three more states to have legislation pending when the Court handed down *Atkins*. Indeed, these organizations in states from New York to Arizona successfully engaged their state legislators to bring an end to a form of punishment the organizations viewed as abhorrent. Contrary to Rehnquist’s suggestion, to consider the views of such groups does not seem to offend the democratic process or to be antithetical to the values of federalism, especially in light of the fact that state legislatures across the country have given effect to these views.

In his dissent, Justice Scalia launched a vicious attack on the majority opinion, injecting phrases such as “the Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus,’”¹⁹⁰ and “[t]he Court pays lipservice to these precedents as it miraculously extracts a ‘national consensus’ forbidding execution of the mentally retarded.”¹⁹¹ As noted earlier, in *Penry*, Justice Scalia stated his belief that an Eighth Amendment inquiry must be limited to an examination of the actions of state legislatures and sentencing juries. In *Atkins*, Justice Scalia deconstructs the actions of the eighteen death penalty states that forbid execution

187. For a compelling and interesting discussion of the importance of international law in analyzing the Eighth Amendment and the death penalty, see Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U. Cal. Davis L. Rev. 1085 (2002).

188. See *id.* at 1087-97 (discussing the reference to and reliance on international law and opinion in drafting the Constitution).

189. *Atkins*, 122 S. Ct. at 2255 (Rehnquist, C.J., dissenting).

190. *Id.* at 2264 (Scalia & Thomas, JJ., Rehnquist, C.J., dissenting).

191. *Id.* at 2261.

of the mentally retarded and ignores altogether the views of legislators in non-death penalty states.¹⁹²

Justice Scalia would only concede that seven states had enacted legislation completely banning the execution of the mentally retarded because legislation in eleven states did not expressly provide for retroactive application of the exclusion of mentally retarded criminal defendants. However, he failed to mention that although the Tennessee statute prohibiting execution of the mentally retarded did not provide for retroactive application, the Tennessee Supreme Court has retroactively applied that statute to those mentally retarded persons who were already sitting on death row at the time the statute was enacted.¹⁹³ Moreover, to the extent Justice Scalia grudgingly considers eighteen death penalty states as exempting the mentally retarded from the death penalty, Justice Scalia finds this number insufficient to form a national consensus.

Although Justice Scalia accurately pointed to other cases, such *Edmund* and *Coker*, in which a larger number of states had repudiated the death penalty in certain cases, he failed to mention *Thompson*, in which a plurality of the Court found eighteen states sufficient to form a national consensus. Justice Scalia further argued that the current legislation is too “new” to be considered probative of a national consensus, but never shed light on how “old” legislation would have to be in order to be indicative of a national consensus.

Not surprisingly, Justice Scalia also criticized Justice Stevens’ Eighth Amendment analysis for considering whether the death penalty serves the goals of retribution and deterrence. Justice Scalia found this analysis inappropriate, as he had stated previously. Moreover, Justice Scalia stated that the Eighth Amendment does not prohibit excessive punishment or require proportionate punishments.¹⁹⁴ Justice Scalia’s view on proportionate sentences, which appears to run counter to well-entrenched, modern Eighth Amendment jurisprudence,¹⁹⁵ has clearly been rejected by six of the current Justices on the Supreme Court. He further rejected the Court’s findings with respect to the moral blameworthiness of the mentally retarded and the deterrent effect of executing the mentally retarded.

In his final remarks in *Atkins*, Justice Scalia echoed a theme that he has maintained in other death penalty cases and which underlies his ideology in this context. Simply put, Justice Scalia found the Court’s entire death penalty jurisprudence as set out in *Gregg* and its progeny to be wrong. Justice Scalia writes:

Today’s opinion adds one more to 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. None of those requirements existed when the Eighth Amendment was adopted, and some of them were not even supported by current moral consensus. They include prohibition of

192. *Id.* at 2262-64.

193. *Van Tran v. St.*, 66 S.W.3d 790, 811 (Tenn. 2001).

194. See Justice Scalia’s opinion in *Harmelin*, 501 U.S. at 966-90.

195. Indeed, even the Magna Carta recognized the inherent justice in proportionate sentences.

the death penalty for “ordinary” murder, for rape of an adult woman, and for felony murder absent a showing that the defendant possessed a sufficiently culpable state of mind; prohibition of the death penalty for any person under the age of 16 at the time of the crime; prohibition of the death penalty as the mandatory punishment for any crime; a requirement that the sentencer not be given unguided discretion; a requirement, that the sentencer be empowered to take into account all mitigating circumstances; and a requirement that the accused receive a judicial evaluation of his claim of insanity before the sentence can be executed. There is something to be said for popular abolition of the death penalty; there is nothing to be said for its incremental abolition by this Court.¹⁹⁶

Moreover, Justice Scalia conjectured that exempting the mentally retarded will cause greater mischief than the other procedural and substantive safeguards that have been established in accord with the Court’s modern death penalty jurisprudence. In the wake of *Atkins*, he predicts a flood of “feigned” mental retardation claims that will allow death row inmates to escape the ultimate punishment of death.¹⁹⁷

VII. QUESTIONS ARISING AFTER *ATKINS*

Clearly, Justice Scalia fears a floodgate has been opened by *Atkins*. Whether the mischief portended by Justice Scalia emerges or not, several questions do seem imminent in light of the constitutional prohibition on the imposition of the death penalty on the mentally retarded criminal defendant. Among the questions raised by *Atkins* are whether the decision will be applied retroactively and what standard will be applied in determining whether a capital defendant is mentally retarded.

A. *Retroactive Application of Atkins*

By all accounts, there are mentally retarded criminal defendants currently sitting on death row across the country whose convictions and sentences became final before the Supreme Court ruled in *Atkins*. In seeking relief on the basis of *Atkins*, courts will have to consider whether *Atkins* is to be applied retroactively to these inmates. Justice Stevens did not address this issue in the majority opinion. However, it is evident that a majority of the Court in *Penry* would apply a constitutional rule exempting the mentally retarded from the death penalty retroactively. As Justice O’Connor made clear in *Penry*:

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

196. *Atkins*, 122 S. Ct. at 2267 (Scalia & Thomas, JJ., Rehnquist, C.J., dissenting) (citations omitted).

197. *Id.* at 2267-68.

regardless of the procedures followed, such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review.¹⁹⁸

Moreover, prior to the Supreme Court's ruling in *Atkins*, the Tennessee Supreme Court retroactively applied its statutory prohibition on execution of the mentally retarded. Thus, it seems evident that *Atkins* should be applied retroactively.¹⁹⁹

B. Standard for Reviewing Claims of Mental Retardation

While it is clear that mentally retarded criminal defendants cannot be executed, the tasks of determining who is mentally retarded and how a jury is to make that determination falls to the states. Although the Court did not set forth the standard for determining mental retardation, the *DSM-IV* definition of mental retardation,²⁰⁰ or a test similar to it, would presumably pass constitutional muster. It is unclear, however, if a more burdensome test would survive *Atkins*. For example, in Arkansas there is a rebuttable presumption of mental retardation when a defendant has an IQ of 65 or below.²⁰¹ The fate of this standard is less clear.

Moreover, the states that lacked legislation to protect the mentally retarded will now have to enact rules to apply in cases where mentally retarded individuals face the death penalty. For example, prior to *Atkins*, Oklahoma did not prohibit execution of the mentally retarded, although two of the judges on the Oklahoma Court of Criminal Appeals found that the Oklahoma Constitution prohibited the practice.²⁰² On September 4, 2002, in *Murphy v. State*,²⁰³ the Oklahoma Court of Criminal Appeals set forth the standard for Oklahoma courts to employ in determining whether a defendant is mentally retarded and thus subject to the death penalty.

Aspects of *Murphy* reflect some of the many issues that may emerge as states craft their death penalty exemption for mental retardation. First, the Oklahoma Court of Criminal Appeals ruled that the determination of mental retardation will be made during the capital sentencing proceeding rather than in a separate proceeding before trial. Two judges vigorously dissented to this approach, noting that the question of mental retardation was an issue of death-eligibility. As Judge Chapel observed, "In order to assure that the trial [to determine mental retardation] is not tainted with capital stage evidence which can only improperly appeal to jurors' emotions and passions (being irrelevant to any sentencing issue), I would require the trial court to settle the issue before the trial

198. *Penry*, 492 U.S. at 329-30 (plurality) (citations omitted).

199. *Van Tran*, 66 S.W.3d at 811.

200. *DSM-IV*, *supra* n. 3, at 39.

201. Ark. Code Ann. § 5-4-618 (LEXIS L. Publg. 1997).

202. See *Hammon v. St.*, 999 P.2d 1082, 1102 (Okla. Crim. App. 2000) (Strubhar & Chapel, JJ., dissenting); *Lambert v. St.*, 984 P.2d 221, 240-43 (Okla. Crim. App. 1999) (Chapel, J., concurring in part and dissenting in part).

203. 54 P.3d 556 (Okla. Crim. App. 2002).

begins.”²⁰⁴ Moreover, determining this issue before trial will reduce costs to the judicial system by obviating unnecessary capital sentencing proceedings in cases in which a defendant is mentally retarded and hence ineligible for the death sentence.

Second, the *Murphy* court also indicated that the question of mental retardation could be waived if a defendant did not raise it on direct appeal. Not only does this part of the opinion appear, at the minimum, inconsistent with the *Penry* retroactivity analysis, it is also inconceivable that a defendant could waive the imposition of an illegal sentence. As Judge Chapel noted, “[T]his issue of death-eligibility is fundamental. . . . I do not believe this Court can or should force the use of procedural waiver to prevent these claims.”²⁰⁵

Finally, while employing a standard of mental retardation similar to the one used by the *DSM-IV*, the *Murphy* court indicated that to be found mentally retarded a defendant must score below seventy on an IQ test administered after the crime, and that no person shall be deemed mentally retarded unless he scores below 70 on a contemporary test. Such a standard, while technically comporting with *Atkins*, appears to be designed to assure that the mentally retarded will be sentenced to death rather than protecting these disabled persons from this penalty. It is evident that as states craft and refine their standards for determining mental retardation, there will be further questions and issues to be litigated.

VIII. EPILOGUE

At the time the Court issued *Atkins*, *Penry* was in the middle of his third re-sentencing proceeding before a Texas jury. In light of the *Atkins* decision, the trial court instructed the jury that it was to make a determination as to whether *Penry* was mentally retarded, and if the jury found he was mentally retarded, it was to impose a sentence less than death. The jury found that *Penry* was not mentally retarded. He was again sentenced to death.

Atkins' case has been remanded to the Virginia courts for further proceedings.

204. *Id.* at 575-76 (Chapel, J., concurring in result).

205. *Id.* at 575.