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ATKINS V. VIRGINIA: IS EXECUTING THE MENTALLY RETARDED CONSTITUTIONAL?

I. INTRODUCTION

The Eighth Amendment's preclusion of cruel and unusual punishment has been used to bar the execution of certain classes of individuals in capital cases.¹ While state legislatures may decide whether to adopt the death penalty, the U.S. Supreme Court has limited the states' ability to execute minors and the insane because those defendants' diminished capacity for reasoned judgment limits their culpability.² Recently, similar challenges to the constitutionality of executing the mentally retarded have been presented.³

A recent challenge came to the U.S. Supreme Court in *McCarver v. North Carolina*,⁴ but a bill signed by the Governor of North Carolina,⁵ barring the execution of the mentally retarded, has rendered *McCarver* moot.⁶ Consequently, the U.S. Supreme Court dismissed *McCarver* on September 25, 2001.⁷ On the same day, the Court granted certiorari to Virginia inmate Daryl Renard Atkins.⁸ The Court granted stays of execution to two other inmates pending its decision in *McCarver*,⁹ but

1. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (plurality opinion).

2. See *id.* at 838 (holding that the purposes of capital punishment are not satisfied by executing those under sixteen); *Ford v. Wainwright*, 477 U.S. 399, 409 (1986) (questioning the retributive value of executing the insane when they do not know why they are being executed).

3. See generally *Atkins v. Commonwealth*, 534 S.E.2d 312 (Va. 2000); *State v. McCarver*, 462 S.E.2d 25 (N.C. 1995).

4. *McCarver*, 462 S.E.2d 25.

5. See 2001 N.C. Sess. Laws 346.

6. See Paul Duggan & Glenda Cooper, *Court Asked to Dismiss N.C. Death Row Appeal; Ruling on Executing Retarded May Be Delayed*, WASH. POST, Aug. 8, 2001, at A3. See also Michael Kirkland, *Court May Duck Executions of Retarded*, UNITED PRESS INT'L, Aug. 7, 2001; Tony Mauro, *Death Is Coming Into Court*, LEGAL TIMES, Aug. 13, 2001, at 7; Tony Mauro, *Scalia Steps Out of High-Profile Death Case*, RECORDER, Aug. 13, 2001, at 3.

7. *McCarver v. North Carolina*, 2001 U.S. Lexis 5345 (Sept. 25, 2001).

8. *Atkins v. Virginia*, 2001 U.S. Lexis 5356 (Sept. 25, 2001).

9. See Duggan & Cooper, *supra* note 6, at A3. "At least three other death row inmates—James Atkins in Virginia, Glenn Holladay in Alabama and Antonio Richardson in Missouri . . . have asked the Supreme Court to hear their . . . appeals. The [C]ourt issued stays of execution in Holladay's and Richardson's cases, pending a ruling in the *McCarver* case." *Id.*

ultimately it chose to address *Atkins's* petition. The Court granted certiorari to *Atkins* in order to decide the following question: "Whether the execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment."¹⁰ While this question seems fairly benign and straight forward, the Court's treatment of the *McCarver* case suggests otherwise. The Court granted certiorari to *McCarver* in order to decide Question One of *McCarver's* petition: "Whether significant objective evidence demonstrates a societal consensus against executing persons with mental retardation."¹¹ The question's meaning by the invocation of a "societal consensus" is unclear. The question is important because it provides some insight into the standards that are implicated in the Court's consideration of *Atkins*. When the Court has in the past considered "significant objective evidence"¹² of societal consensus, it analyzed the historical roots of the ban on cruel and unusual punishment,¹³ the reduced intellectual and psychological capabilities of the defendant,¹⁴ the penological goals of retribution and deterrence,¹⁵ and state legislative consensus.¹⁶ What is unclear is whether the Court granted certiorari to *Atkins* to merely consider the societal consensus as reflected by state legislatures or whether the broader analysis suggested by case law will be determinative.

This Note will examine the Court's reasoning in the development of Eighth Amendment law and determine how the Court should apply it to the question presented in *Atkins*. Part II will begin by summarizing the facts of *Atkins*. The application of Eighth Amendment law before *Atkins* is discussed in Part III. Before concluding with Part V, Part IV

10. *Atkins v. Virginia*, 2001 U.S. Lexis 5463 (Oct. 1, 2001).

11. Petitioners Brief at i, *McCarver v. North Carolina*, 121 S. Ct. 1401 (2001) (mem.) (No. 00-8727). Petitioners Brief stated:

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 sentences to weigh mental retardation as a mitigating factor in individual cases fails to prevent the execution of persons whose vastly diminished capacity makes the death penalty cruel and unusual.

Id.

12. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

13. *E.g.*, *Ford v. Wainwright*, 477 U.S. 399, 406-07 (1986).

14. *E.g.*, *Penry*, 492 U.S. at 339.

15. *E.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 836-38 (1988) (plurality opinion).

16. *E.g.*, *Penry*, 492 U.S. at 334.

of this Note will present an analysis of how and why the U.S. Supreme Court should adopt a ban on executing the mentally retarded. This Note urges that the Court abandon Justice O'Connor's analysis in *Penry v. Lynaugh*: the only case in which the Court has considered precluding execution of the mentally retarded. Limiting *Atkins* to a question of state legislative consensus ignores the precedents that incorporate the broad definition of "societal consensus." This Note will generally assume that the "societal consensus" in Question One refers to evolving standards of decency in which all Eighth Amendment case law is fundamentally grounded.

II. FACTS OF *ATKINS V. VIRGINIA*

In 1998, Daryl Renard Atkins was tried and convicted for the capital murder of Eric Michael Nesbitt in the Circuit Court of York County, Virginia.¹⁷ On appeal, the Virginia Supreme Court affirmed Atkins's conviction,¹⁸ but because the verdict form did not give the jury the option of life imprisonment when it considered sentence,¹⁹ the case was remanded for a new penalty proceeding.²⁰ On remand, a new jury once again "fixed Atkins' punishment at death."²¹ Atkins appealed to Virginia's highest court a second time.²² The Court subsequently found no merit in any of Atkins's eight assignments of error and affirmed his sentence.²³

At Atkins's trial, the jury was provided with evidence that he has an IQ of 59.²⁴ Of particular significance was that Atkins "has the cognitive ability or mental age of a child between 9 and 12 years of age."²⁵ In the first appeal, the court concluded that the trial court should have instructed the jury to consider Atkins's mental retardation as mitigating evidence.²⁶ In the second appeal, the Court's proportionality review found that Virginia had never executed someone with an IQ as low as

17. *Atkins v. Commonwealth*, 534 S.E.2d 312, 314 (Va. 2000).

18. *Atkins v. Commonwealth*, 510 S.E.2d 445, 457 (Va. 1999).

19. *Id.* at 456. "[T]he verdict form failed to provide the jury with the option of sentencing Atkins to life imprisonment upon a finding that neither of the aggravating factors of future dangerousness or vileness was proven beyond a reasonable doubt." *Id.*

20. *Id.* at 457.

21. *Atkins*, 534 S.E.2d at 314.

22. *See generally id.*

23. *Id.*

24. *Id.* at 319.

25. *Id.* at 323 (Hassell, J., dissenting).

26. *Atkins v. Commonwealth*, 510 S.E.2d 445, 457 (Va. 1999).

Atkins's.²⁷ Yet they declined to impose a life sentence "merely because of his IQ score,"²⁸ despite additional professional psychological testimony that established that Atkins suffered from a "limited capacity for adaptive behavior."²⁹ At trial, imposition of capital punishment was predicated on the jury finding "aggravating factors."³⁰

III. EVOLVING NATIONAL STANDARDS: EIGHTH AMENDMENT LAW PRIOR TO *ATKINS V. VIRGINIA*

When addressing Eighth Amendment questions, the Court examines current societal policies in light of "evolving standards of decency that mark the progress of a maturing society."³¹ This allows the limitations on cruel and unusual punishment to expand in order to apply to practices that society formerly accepted, yet now finds repugnant.³² An examination of the Eighth Amendment's history, principles, and applications is essential to any understanding of its relevance to the execution of mentally retarded defendants.

A. *The Common Law Prior to the Bill of Rights*

In order to understand and apply the decidedly limited phraseology used in the Eighth Amendment,³³ the U.S. Supreme Court has repeatedly attempted to gauge the Framers' intentions for including the provision.³⁴ English common law is often the starting point for the Court's analysis into the Framers' reasons for including the prohibition against cruel and unusual punishment in the Bill of Rights.³⁵

27. *Atkins*, 534 S.E.2d at 318.

28. *Id.*

29. *Id.* at 322 (Hassell, J., dissenting).

30. *Atkins*, 510 S.E.2d at 453. The jury found that "Atkins both represented a future danger to society and that the murder . . . [was] outrageously or wantonly vile." *Id.*

31. *Penry v. Lynaugh*, 492 U.S. 302, 330-31 (1989) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

32. *See id.* at 330. "At a minimum, the Eighth Amendment prohibits punishment considered cruel and unusual at the time the Bill of Rights was adopted." *Id.*

33. *See* U.S. CONST. amend. VIII. The Eighth Amendment in its entirety states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.* *See also* *Thompson v. Oklahoma*, 487 U.S. 815, 821 (1988). "The authors of the Eighth Amendment . . . made no attempt to define the contours of that category." *Id.*

34. *See* Eric L. Schwartz, *Penry v. Lynaugh: "Idiocy" and the Framers' Intent Doctrine*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 315, 328 (1990).

35. *See, e.g., Penry v. Lynaugh*, 492 U.S. at 330-31 (examining the common law prohibitions against executing "lunatics" and "idiots"); *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (examining the common law prohibitions against executing the insane).

The common law barred the execution of "idiots" and "lunatics."³⁶ The term "lunatic" was used to refer to the insane,³⁷ while the term "idiot" seemingly referred to the mentally retarded.³⁸ Individuals who fell into either one of these categories were not subject to capital punishment because they were "not chargeable for their own acts."³⁹ An additional reason for these prohibitions is that the execution of the insane "provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment."⁴⁰

B. Principles of Eighth Amendment Law

The protections afforded by the Eighth Amendment are not limited to common law principles.⁴¹ Practices that were accepted at the time the Bill of Rights was drafted may be prohibited if they are inconsistent with "evolving standards of decency."⁴² This is supposed to allow contemporary law and moral standards to dictate whether a punishment is cruel and unusual.⁴³ If a punishment is challenged, the Court will consider "objective evidence" when deciding if it is precluded by contemporary moral standards.⁴⁴

C. Thompson and Ford: A Broad Application of "Societal Consensus"

Earlier U.S. Supreme Court cases that confronted Eighth Amendment issues applied a broad spectrum of factors to determine whether society's standards had evolved to preclude execution of certain

36. *Penry*, 492 U.S. at 331.

37. *Id.* at 301-02.

38. *Id.* at 332. "In its emphasis on a permanent, congenital mental deficiency, the old common law notion of 'idiocy' bears some similarity to the modern definition of mental retardation." *Id.* (citation omitted).

39. *Id.* at 331 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *24-*25); *see also Ford*, 477 U.S. at 406 (quoting BLACKSTONE, *supra*).

40. *Ford*, 477 U.S. at 407 (citing 3 SIR EDWARD COKE, INSTITUTES 6 (6th ed. 1680)).

41. *See Penry*, 492 U.S. at 330; *see also Ford*, 477 U.S. at 405. "There is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Id.*

42. *Penry*, 492 U.S. at 330-31 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)); *Ford*, 477 U.S. at 406; *see also Thompson v. Oklahoma*, 487 U.S. 815, 821 n.4 (1988) (discussing the genesis of this phrase).

43. *See Thompson*, 487 U.S. at 821 (stating "future generations of judges" must "define the contours" of cruel and unusual punishment).

44. *Penry*, 492 U.S. at 331 (citing *Coker v. Georgia*, 433 U.S. 584, 593-97 (1977) and *Enmund v. Florida*, 458 U.S. 782, 788-96 (1982)).

classes of people.⁴⁵ While the Court included state legislative opinion in these factors,⁴⁶ it was not ultimately dispositive.⁴⁷ The common law,⁴⁸ penological goals,⁴⁹ as well as knowledge from accepted professional disciplines⁵⁰ were all considered.

In *Ford v. Wainwright*, overwhelming evidence that the common law banned the execution of lunatics⁵¹ was an important factor influencing the Court's determination that the Eighth Amendment exempts the insane from capital punishment.⁵² A Court survey of state legislatures found that no state allowed the execution of the insane.⁵³ The Court noted that this information was indicative of how the common law's "ancient and humane limitation upon the State's ability to execute its sentences" had been applied in modern lawmaking.⁵⁴

In *Thompson v. Oklahoma*, Justice Stevens found a societal consensus, but also utilized recommendations from psychiatrists,⁵⁵ the American Bar Association, the American Law Institute, and even the laws of "other nations that share our Anglo-American Heritage"⁵⁶ before finding that the Eighth Amendment precludes executing a person who at the time of the offense was under the age of sixteen.⁵⁷ Justice Stevens concluded that the penological goals of retribution and deterrence were not served by executing people under the age of sixteen because of their lessened culpability.⁵⁸ Noting that "[t]he basis for this conclusion is too obvious to require extended explanation,"⁵⁹ the Court nonetheless referenced a study of fourteen juveniles sentenced to

45. See generally *Thompson*, 487 U.S. 815; *Ford*, 477 U.S. 399.

46. See *Thompson*, 487 U.S. at 829 n.30; *Ford*, 477 U.S. at 408 n.2.

47. See generally *Thompson*, 487 U.S. 815; *Ford*, 477 U.S. 399.

48. *Ford*, 477 U.S. at 406-07.

49. *Thompson*, 487 U.S. at 836-38; *Ford*, 477 U.S. at 409.

50. *Thompson*, 487 U.S. at 830, 835 n.42 (stating that, for example, the "American Bar Association and the American Law Institute have formally expressed their opposition to the death penalty for juveniles").

51. *Ford*, 477 U.S. at 406-08.

52. *Id.* at 408-10.

53. *Id.* at 408 n.2.

54. *Id.* at 409.

55. *Thompson*, 487 U.S. at 835 n.42.

56. *Id.* at 830.

57. *Id.* at 838 (limiting its analysis to the case before it involving a juvenile under the age of sixteen at the time of his offense, and not determining whether to prohibit executions of all persons under the age of eighteen at the time of the offense despite numerous *amici curiae* advocating that position).

58. *Id.* at 836-38.

59. *Id.* at 835.

death,⁶⁰ and found that "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct."⁶¹ The use of legislative consensus was only a factor in *Thompson*.⁶² Justice Stevens argued that the decision of whether to impose the death penalty on a class of people, while influenced by evidence of legislative action and jury determinations, is ultimately up to the Court.⁶³

D. *Penry v. Lynaugh: A Narrow Standard*

In *Penry v. Lynaugh*, the U.S. Supreme Court employed a survey of "objective evidence" similar to that found in *Thompson* and *Ford*.⁶⁴ Professional opinions were considered in *Penry*,⁶⁵ but the majority did not find much merit in the evidence presented on appeal concerning the disabilities of the mentally retarded.⁶⁶ Since the Court questioned the limited culpability that was implicated by evidence of lower levels of intellectual functioning, it followed that the penological goals of retribution and deterrence could be served by imposing the death penalty on the mentally retarded.⁶⁷ In his dissent, Justice Brennan disagreed with Justice O'Connor's interpretation of the data and

60. *Id.* at 835 n.42 (citing LEWIS ET AL., NEUROPSYCHIATRIC, PYSCHOEDUCATIONAL [SIC], AND FAMILY CHARACTERISTICS OF 14 JUVENILES CONDEMNED TO DEATH IN THE UNITED STATES 11 (1987)).

61. *Id.* at 835.

62. See generally *id.*

63. *Id.* at 833.

64. Compare *Penry v. Lynaugh*, 492 U.S. 302, 330-40 (1989) (using other factors, but ultimately focusing on legislative consensus since it did not find expert opinion dispositive), with *Thompson*, 487 U.S. at 829-38 (using evidence from experts and professionals, as well as legislative opinion, to decide if defendants under sixteen years old could have the requisite culpability to warrant the death penalty), and *Ford v. Wainwright*, 477 U.S. 399, 405-10 (1986) (using legislative consensus and earlier common law principles to conclude that the Constitution bars executing the insane).

65. *Penry*, 492 U.S. at 335. The Court was presented with an amicus brief from the American Association on Mental Retardation opposing the execution of the mentally retarded. *Id.* Other groups submitted similar amicus briefs. *Id.* at 336. This brief argued "that all mentally retarded people, regardless of their degree of retardation, have substantial cognitive and behavioral disabilities that reduce their level of blameworthiness for a capital offense." *Id.*

66. See *id.* at 338-40 (questioning the accuracy of "mental age" assessments used by the American Association on Mental Retardation (AAMR) and noting the "diverse capacities and life experiences" of the mentally retarded).

67. See *id.* at 338-39. "In light of the diverse capacities and life experiences of mentally retarded persons, it cannot be said on the record before us today that all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty." *Id.*

believed that the modern evidence submitted by the American Association on Mental Retardation (AAMR) demonstrated that common impairments in adaptive ability relieve the mentally retarded of the degree of culpability necessary to deserve a death sentence.⁶⁸

Writing for the majority in *Penry*, Justice O'Connor felt that the common law prohibition against executing "idiots" only applied to people who would be considered "profound[ly]" or "severe[ly]" mentally retarded by current standards.⁶⁹ She felt that the profoundly or severely mentally retarded would find sanctuary from conviction and capital punishment in the established insanity defense.⁷⁰ Four justices in *Penry* believed the AAMR's definition should replace this common law definition of mental retardation.⁷¹ Justice Brennan asserted that the AAMR definition included common deficiencies among the mentally retarded, which reduce their culpability as a class of people.⁷² This definition, therefore, makes such distinctions between "severe" and "mild" irrelevant.

Consequently, the *Penry* Court found that the consensus of the state legislatures provides the "clearest and most reliable objective evidence of contemporary values."⁷³ Justice O'Connor found that only two states had specifically outlawed the execution of the mentally retarded, so there was no national consensus.⁷⁴ The Court further noted that it would give credence to other factors, such as "data concerning the actions of sentencing juries"⁷⁵ and the "decisions of prosecutors."⁷⁶ Since

68. *Id.* at 346 (Brennan, J., concurring in part and dissenting in part).

69. *Id.* at 333. O'Connor's argument, therefore, implicitly accepts that there are gradations, or degrees, of mental retardation. For support of this view, see Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911, 913 (2001). The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) identifies four categories of mental retardation: mild (IQ 50-55 to approximately 70), moderate (IQ 35-40 to 50-55), severe (IQ 20-25 to 35-40) and profound (IQ below 20-25). *Id.*

70. *Penry*, 492 U.S. at 333.

71. *Id.* at 344-45 (Brennan, J., concurring in part and dissenting in part); *id.* at 349-50 (Stevens, J., concurring in part and dissenting in part).

72. *Id.* at 345-46.

73. *Id.* at 331.

74. *Id.* at 334 (finding no national consensus despite the fact that two states expressly outlawed the execution of the mentally retarded and fourteen other states had rejected capital punishment altogether).

75. *Id.* at 331 (citing *Edmund v. Florida*, 458 U.S. 782, 794-96 (1982)); see also *Thompson v. Oklahoma*, 487 U.S. 815, 831 (1988) (plurality opinion).

76. *Penry*, 492 U.S. at 334.

there was no national consensus against the practice, the Court decided the execution of the mentally retarded was not unconstitutional.⁷⁷

IV. THE EIGHTH AMENDMENT DEMANDS A COMPLETE ANALYSIS OF "NATIONAL CONSENSUS"

Even though the U.S. Supreme Court's holding in *Penry* focused on state legislative consensus, it adhered to precedent by examining relevant factors of Eighth Amendment jurisprudence.⁷⁸ *Thompson* and *Ford* also held that courts should look beyond legislative consensus.⁷⁹ In *Thompson*, Justice Stevens said, "[a]lthough the judgments of legislatures, juries and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty."⁸⁰ When the U.S. Supreme Court granted certiorari in *McCarver*,⁸¹ prior analysis suggests it meant to address the broader factors that are essential to any effective analysis of Eighth Amendment claims, and not a narrow application of the phrase "societal consensus." Otherwise, the Court might ignore the precedents set in *Penry*, *Thompson* and *Ford*.⁸²

A. A Legislative Consensus Exists Against Executing the Mentally Retarded

When *Penry* was decided, only two states and the federal government had enacted legislation banning the execution of convicted mentally retarded people.⁸³ When the U.S. Supreme Court hears arguments in *Atkins*, at least seventeen more states will have been

77. *Id.* at 340.

78. *See supra* Part III.D.

79. *See supra* Part III.C.

80. *Thompson*, 487 U.S. at 833 (quoting *Enmund*, 458 U.S. at 797). The genesis of this proposition goes back to *Marbury v. Madison*. *Id.* at 833 n.40 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). "It is emphatically the province and duty of the judicial department to say what the law is."). Judge Chapel's partial dissent in *Lambert v. State* stands for the similar proposition that "[t]o suggest that the issue in today's opinion can or ought to be decided by the legislature, while politically correct in some circles, is patently absurd." 984 P.2d 221, 240 n.2 (Okla. Crim. App. 1999) (Chapel, J., concurring in part and dissenting in part).

81. *McCarver v. North Carolina*, 121 S. Ct. 1401 (2001) (mem.).

82. *See supra* Part III.C.

83. *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989). When *Penry* was decided, Georgia had a statute banning the execution of the mentally retarded, GA. CODE ANN. § 17-7-131(j) (1997) (precluding application of death penalty to the mentally retarded in any case commencing on or after July 1, 1988), and Maryland had enacted legislation, MD. CODE ANN., art. 27, § 412(f)(1) (1989), that was to take effect ten months later. *Id.*

added to this number.⁸⁴ Combine these nineteen with the twelve states that have banned the death penalty altogether,⁸⁵ and over half of the states outlaw imposition of the death penalty upon the mentally retarded. When *Ford* banned the execution of the insane, no state permitted the death penalty for the insane, and twenty-six states required the suspension of a capital sentence if the prisoner became insane before the sentence was carried out.⁸⁶ Moreover, the *Thompson* Court found that eighteen states had established a minimum age in their death penalty legislation.⁸⁷ Given these statistics, there is a compelling argument that a national legislative consensus against executing the mentally retarded has indeed been reached. However, a survey of legislative consensus does not consider the goals of retribution and deterrence.

B. The English Common Law Supports a Ban on the Execution of the Mentally Retarded

Justice O'Connor's assessment of the common law bar on executing "idiots"⁸⁸ is flawed. Four justices in *Penry* believed the AAMR definition should replace the common law definition of mental retardation.⁸⁹ Justice O'Connor's reliance on the old common law definitions of mental retardation failed to take into account the "contemporary values" standard she attempted to apply. Justice Brennan asserted that evidence of common deficiencies among the mentally retarded reduces their culpability as a class of people, and

84. Entzeroth, *supra* note 69, at 929 n.175, accumulated the relevant state statutes barring the execution of the mentally retarded: ARIZ. REV. STAT. ANN. § 13-703(B) (West 2001); ARK. CODE ANN. § 5-4-618(b) (Michie 1997); COLO. REV. STAT. ANN. § 16-19-403 (West Supp. 1994); GA. CODE ANN. § 17-7-131(j) (1997); IND. CODE ANN. § 35-36-9-6 (Michie 1998); KAN. STAT. ANN. § 21-4623(d) (1995); KY. REV. STAT. ANN. § 532.140(1) (Banks-Baldwin 1995); NEB. REV. STAT. ANN § 28-105.01(2) (Michie Supp. 2000); N.M. STAT. ANN. § 31-20A-2.1(B) (Michie 2000); N.Y. CRIM. PROC. LAW § 400.27(12)(c) (Consol. 1996); S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie Supp. 2001); TENN. CODE ANN. § 39-13-203(b) (1997); WASH. REV. CODE ANN. § 10.95.030(2) (West 1993). Since the time of her article's publication, however, numerous states have enacted or are considering enacting similar laws: 2001 Ariz. Legis. Serv. 13-703 (West); 2001 Conn. Legis. Serv. 53a-46a(i) (West); 2001 Fla. Sess. Law Serv. 921.137 (West); 2001 Miss. S. B. 2654; 2001 Mo. S. B. 267; and 2001 N.C. Sess. Laws 346.

85. Linda Greenhouse, *Justices Take Up Issue of Executing Retarded Killers*, N.Y. TIMES, Mar. 27, 2001, at A1.

86. *Ford v. Wainwright*, 477 U.S. 399, 408 & n.2 (1986).

87. *Thompson v. Oklahoma*, 487 U.S. 815, 829 (1988) (plurality opinion).

88. See *supra* Part III.D.

89. *Penry v. Lynaugh*, 492 U.S. 302, 341, 344-45 (1989) (Brennan, J., concurring in part and dissenting in part); *id.* at 349-50 (Stevens, J., concurring in part and dissenting in part).

makes such arbitrary distinctions between "severe" and "mild" irrelevant.⁹⁰ Justice O'Connor's assessment of this evidence in *Penry* has been refuted by scholars who contend the common law understanding of "idiot" included the mildly mentally retarded.⁹¹

As mentioned earlier in this Note, evolving standards build on common law ideas of what constituted cruel and unusual punishment.⁹² Therefore, if the execution of "idiots" was not allowed at common law,⁹³ then current evidence of public opinion,⁹⁴ professional testimony,⁹⁵ which demonstrates that all mentally retarded individuals have "substantial disability in cognitive ability and adaptive behavior,"⁹⁶ and the growing number of states barring the execution of the mentally retarded since *Penry*,⁹⁷ is surely enough to allow current law to be updated to include mentally retarded people among those barred from capital punishment.

C. Modern Understanding and Analysis Adequately Assess Mental Retardation

Justice O'Connor's belief that retribution and deterrence might still be served on the mentally retarded⁹⁸ reflects her belief that current modes of assessing mental retardation are inaccurate.⁹⁹ The law has fallen behind society's standards by refusing to acknowledge

90. See *id.* at 345. "In light of this clinical definition of mental retardation, I cannot agree that the undeniable fact that mentally retarded persons have 'diverse capacities and life experiences' is of significance to the Eighth Amendment proportionality analysis we must conduct in this case." *Id.* (citation omitted).

91. Shwartz, *supra* note 34, at 330. Of particular relevance is a reference to Sir Edward Coke (1552–1634), the "greatest common lawyer in the history of English jurisprudence." *Id.* (citation omitted). Coke recognized two degrees of "idiocy," roughly corresponding to today's categories of the mentally retarded, yet he would have believed that both conditions precluded capital punishment. *Id.*

92. See *supra* Part III.B.

93. See *supra* Part III.A.

94. *Penry*, 492 U.S. at 334–35. "For example, a poll taken in Texas found that 86% of those polled supported the death penalty, but 73% opposed its application to the mentally retarded." *Id.* See also Bryan Lester Dupler, *Another Look at Evolving Standards: Will Decency Prevail Against Executing the Mentally Retarded?*, 52 OKLA. L. REV. 593, 604–09 (1999) (discussing recent nationwide polls that show an overwhelming consensus against executing the mentally retarded).

95. See *supra* Part III.C–D (including psychiatrists and the American Association on Mental Retardation among others).

96. *Penry*, 492 U.S. at 345 (quoting Amici Curiae Brief of the American Association on Mental Retardation et al. 5–9, 13–15).

97. See *supra* Part IV.A.

98. See *Penry*, 492 U.S. at 338–39.

99. See *id.*

professional advice from the AAMR. Justice Brennan found considerable merit in the AAMR's amicus brief, which noted that mentally retarded people have common "'intellectual impairments . . . in logical reasoning, strategic thinking, and foresight,' the lack of the intellectual and developmental predicates of an 'ability to anticipate consequences,' and 'impairment in the ability to control impulsivity.'"¹⁰⁰ These characteristics bear a striking resemblance to the juvenile characteristics that Justice Stevens found in *Thompson* that lessen juveniles' culpability.¹⁰¹ But the *Penry* majority chose to hold the ability of the mentally retarded to improve their situation against them,¹⁰² encouraging the same disempowerment of the mentally retarded that they wanted to avoid.¹⁰³

D. The Execution of the Mentally Retarded does Not Satisfy Penological Goals

Retribution and deterrence are at the core of any analysis of capital punishment. In his *Penry* dissent, Justice Brennan noted that because of the common impediments that afflict all mentally retarded people, the mentally retarded lack the requisite moral culpability, which is a "prerequisite to the proportionate imposition of the death penalty."¹⁰⁴ He went on to say, "execution can never be the 'just deserts' of a retarded offender."¹⁰⁵ Justice Brennan also concluded that executing the mentally retarded fails to deter other mentally retarded persons from committing capital crimes.¹⁰⁶ These inherent deficiencies will prevent the mentally retarded from considering the risk of capital punishment

100. *Id.* at 348–49 (Brennan, J., concurring in part and dissenting in part) (quoting Amici Curiae Brief of the American Association on Mental Retardation et al. 6–7).

101. *See Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988) (plurality opinion). Justice Stevens quoted a passage formerly quoted by Justice Powell in *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982), stating that youth "generally are less mature and responsible than adults." *Id.* Furthermore, Justice Powell quoted a passage from the 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders that stated that adolescents are "more vulnerable, more impulsive, and less self disciplined than adults." *Id.*; *see also supra* Part III.C.

102. *See Penry*, 492 U.S. at 338 (stating that the mentally retarded have varying degrees of mental retardation, and are "capable of learning, working, and living in their communities") (quoting Amici Curiae Brief for the American Association on Mental Retardation et al. 6).

103. *See id.* at 340 (stating that reliance on mental age to measure the capabilities of the mentally retarded could effect their rights to contract or marry).

104. *Id.* at 348 (Brennan, J., concurring in part and dissenting in part).

105. *Id.* (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

106. *Id.*

when making assessments of their activity.¹⁰⁷ Justice Brennan concluded that the penological goals of capital punishment are not satisfied, and to execute the mentally retarded would be "nothing more than the purposeless and needless imposition of pain and suffering."¹⁰⁸ That Justice Brennan engaged in this analysis is not surprising. He followed the same steps previously used in *Thompson*¹⁰⁹ and *Ford*.¹¹⁰ The *Ford* Court's inquiry into the reasons for the historical ban on such punishments yielded to a long held principle that the goals of capital punishment have never been served by executing insane people.¹¹¹ The Court concluded by questioning "the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life,"¹¹² and found the execution of the insane unconstitutional.¹¹³ The same analysis applies to the question presented in *Atkins*, and the Court should hold accordingly.

E. A Per Se Bar to Execution

The Eighth Amendment significantly affects the procedural aspects of the death penalty,¹¹⁴ and the sentencing phase in this process is no exception. All evidence of mental retardation should be examined at the sentencing phase of a capital trial. In an insanity defense, procedures are used to gauge the sanity of the defendant and are therefore important when determining whether the Constitution prohibits the execution of the defendant.¹¹⁵ Since there are inherent similarities between insanity and mental retardation,¹¹⁶ similar procedures are also necessarily implicated when evidence of a mental defect is presented. The Court has recognized the need for a "heightened standard of reliability" in the fact-finding procedures of capital proceedings.¹¹⁷ This heightened standard should be implemented at the above-discussed sentencing phase of a capital trial. If the

107. *Id.* at 349.

108. *Id.* (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

109. *Thompson v. Oklahoma*, 487 U.S. 815, 831–38 (1988) (plurality opinion).

110. *Ford v. Wainwright*, 477 U.S. 399, 409 (1986).

111. *Id.* at 408.

112. *Id.* at 409.

113. *Id.* at 401.

114. *Id.* at 405.

115. *Id.*

116. *See Penry v. Lynaugh*, 492 U.S. 302, 332 (1989) (noting that the insanity defense includes "mental disease" as well as "mental defect").

117. *Ford*, 477 U.S. at 411 (citing *Spaziano v. Florida*, 468 U.S. 447, 456 (1984)).

sentencer finds that a defendant suffers from mental retardation, nothing more than a life sentence should be imposed.

V. CONCLUSION

A class of defendants whose inherent disability reduces their culpability should not be subjected to capital punishment. If the U.S. Supreme Court utilizes all of the Eighth Amendment standards it has at its disposal, it will be apparent that the Constitution bars the execution of the mentally retarded. Further, if the Court limits its inquiry to an analysis of state legislative consensus, it will largely ignore other factors it has previously found to be relevant and continue to defy the societal consensus against such executions. The U.S. Supreme Court has more compelling evidence before it than a simple tally of state legislative opinion.

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