Mandating Dignity: The United States Supreme Court's Extreme Departure From Precedent Regarding the Eighth Amendment and the Death Penalty [*Atkins v. Virginia*, 122 S. Ct. 2242 (2002)]

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> *'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.' Still, our Constitution quite clearly reflects the judgment . . . that capital punishment is, or at least can be, consistent with that dignity. The death penalty, then, is a problem whose resolution is left to the public square, not the courtroom.*[1]

I. INTRODUCTION

Dignity is a concept not easily defined with words, but rather easier to conceptualize through observance. It is something that humans can identify in others, strive for within themselves, and teach to their children along with the Golden Rule.[2] In terms of the Eighth Amendment, dignity is something required. The Eighth Amendment requires that society treat even the most culpable criminals with a certain level of dignity. This is an understandable protection in a maturing and evolving society where standards of decency change over time. However, changes in the standard of decency in the United States should be reflected through its citizens, not its judges. Changing levels of dignity should be determined through legislation, not court opinions.

In *Atkins v. Virginia*,[3] the United States Supreme Court held that it was a violation of the Eighth Amendment's Cruel and Unusual Punishment Clause to execute mentally retarded offenders.[4] The majority relied on recently passed legislation as well as national and international opinion polls to show a national consensus against the execu-

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1. Richard W. Garnett, *Personal Problems: The Supremes Ignore the Constitution in* Atkins, NATIONAL REVIEW ONLINE, ¶ 5 (June 20, 2002), *at* http://www.nationalreview.com/comment/comment-garnett062002.asp.
2. The Golden Rule is commonly known as do unto others as you would like them to do unto you.
3. 122 S. Ct. 2242 (2002) (*United States Reports* pagination not available at time of publication).
4. *Id.* at 2243.

tion of mentally retarded offenders.[5] In spite of this, the Court failed to use the established framework developed through precedent and ignored the fact that there is not an established national consensus in the United States on the issue presented in *Atkins*.[6] By making such a decision, the Court disregarded precedent, dramatically lowered the bar in determining what constitutes a national consensus, misapplied the objective standards used to determine a national consensus, and caused further non-uniformity in an already complex area of the law.

II. Case Description

On August 16, 1996, Daryl Atkins and William Jones, armed with semiautomatic weapons, abducted, robbed, and shot Eric Nesbitt eight times.[7] The jury convicted Atkins of "abduction, armed robbery, and capital murder."[8] He was sentenced to death.[9]

When Atkins was brought before the Circuit Court of York County, Virginia, on charges related to the death of Nesbitt, both Jones and Atkins testified in the guilt phase of Atkins' trial and most details coincided, except each blamed the other for the killing of Nesbitt.[10] The jury believed Jones' testimony and found it sufficient to establish Atkins' guilt.[11]

In the penalty stage, the prosecution presented evidence from the trial to prove the statutory factors of "vileness of the crime" and evidence of "future dangerousness" through records of Atkins' previous felony convictions and testimony from felony victims.[12] The defense focused on the testimony of Dr. Evan Nelson, a forensic psychologist,[13] who was able to conclude through a variety of sources that Atkins was mildly mentally retarded.[14] The doctor included interviews with Atkins' family, past school and court records, and the results of a

5. *Id.* at 2249 n.21.

6. *See generally id.*

7. *Id.* at 2244.

8. *Id.* Jones was able to plead to first degree murder, excluding him from the death penalty, in exchange for testimony against Atkins. *Id.* at 2244 n.1.

9. *Id.* at 2244.

10. Petitioner's Brief at 2, *Atkins* (No. 00-8452).

11. *Id.* at 8.

12. *Id.* at 8, 13. Atkins had twenty-one felony convictions as a result of six prior incidents. *Id.* at 13 n.20. At age thirteen, Atkins was convicted of breaking and entering and petty larceny. *Id.* At age seventeen, Atkins was convicted of two counts of grand larceny. *Id.* He served 120 days of incarceration on weekends. *Id.* From April to August of 1996, Atkins committed two robberies, an attempted robbery, and a burglary. *Id.* During the attempted robbery, Atkins hit the victim with a pistol, which knocked her down, and then helped her back up. *Id.* Atkins started to walk away, but then turned around and shot the victim in the stomach and left. *Id.* He confessed to these crimes when he was arrested for the murder of Nesbitt. *Id.*

13. *Id.* at 9.

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

standard intelligence test,[15] indicating that Atkins had an intelligence quotient (IQ) of fifty-nine.[16]

The American Association of Mental Retardation (AAMR) defines mental retardation as "substantial limitations in present functioning . . . characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more . . . applicable adaptive skill areas."[17] According to the AAMR, "[m]ental retardation manifests before the age of [eighteen]."[18] Other definitions closely follow the definition established by the AAMR.[19] Mild mental retardation is used mainly to describe people with an IQ level of fifty to fifty-five through seventy.[20] Despite this testimony, Atkins was sentenced to death.[21]

On appeal, the Virginia Supreme Court affirmed the conviction and sentence, but remanded the case back to the circuit court for resentencing because of an improper jury sentencing verdict form.[22]

At resentencing, the State brought into question the expert testimony presented by the defense that Atkins was mentally retarded.[23] The State presented Dr. Stanton Samenow, who testified that Atkins was of "average intelligence, at least," but did acknowledge that Atkins suffered from antisocial personality disorder.[24] He testified that Atkins' school performance was poor because he chose not to pay

15. *Id.* at 2245 n.5. Atkins was given the Wechsler Adult Intelligence Scales Test (WAIS-III), which is the standard test given in the United States to determine intellectual functioning. *Id.* The WAIS-III is scored by adding the number of points made on subtests and then using a formula to convert the raw score into a scaled score. ALAN S. KAUFMAN & ELIZABETH O. LICHTENBERGER, ESSENTIALS OF WAIS-III ASSESSMENT 60-61 (1999). The mean score of the test is 100, making the average level of intellectual functioning 100. *Id.* A person with an IQ of seventy to seventy-five or lower is typically determined to be mentally retarded. *Id.*

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

17. AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992). The adaptive skill areas are "communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." *Id.*

18. *Id.*

19. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000). The American Psychiatric Association's definition reads:

> [t]he essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by 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 (Criterion B). The onset must occur before age [eighteen] years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.

Id.

20. *Id.*

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

22. Atkins v. Commonwealth, 510 S.E.2d 445, 456-57 (Va. 1999).

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

24. *Id.* at 2246. Dr. Samenow interviewed Atkins twice, reviewed his school records, and interviewed correctional staff. *Id.* at 2246 n.6. Samenow based his testimony on answers that Atkins gave when asked questions from the 1972 Wechsler Memory Scale. *Id.* Samenow did not require Atkins to take an IQ test. *Id.*

attention and would not do what was required of him.[25] The defense once again focused on the testimony by Dr. Nelson and the allegation that Atkins was mildly mentally retarded.[26] With all the evidence presented, Atkins was again sentenced to death.[27]

Atkins raised eight issues on appeal to the Virginia Supreme Court.[28] The Virginia Supreme Court rejected all of them.[29] The Eighth Amendment issue raised before this court was not that Atkins' sentence was disproportionate to others handed down in Virginia for similar crimes, but rather that because of his mental retardation he could not be sentenced to death.[30] The Virginia Supreme Court rejected this argument because of the decision in *Penry v. Lynaugh*[31] handed down by the United States Supreme Court in 1989.[32] In *Penry*, the Court held that it was not a violation of the Eighth Amendment's Cruel and Unusual Punishment Clause to execute mentally retarded offenders.[33] Since the Supreme Court of Virginia could not find any error with the lower court's ruling, it affirmed the imposed death sentence.[34]

Atkins then appealed to the United States Supreme Court.[35] The Court granted certiorari to decide whether it was cruel and unusual

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25. *Id*.
26. *Id*. at 2246.
27. *Id*.
28. Atkins v. Commonwealth, 534 S.E.2d 312, 314 (Va. 2000). The first three issues raised concerned the mitigation evidence presented to the jury for consideration. *Id.* In the first issue, Atkins argued that Virginia's bifurcated jury system unconstitutionally limited a defendant's ability to introduce relevant evidence from the guilt phase of the previous trial. *Id.* Next, Atkins stated that limiting the defense's examination of the investigator was in error. *Id.* In doing so, Atkins claimed he was denied the opportunity to present a complete defense. *Id.* Finally, Atkins asserted "that the circuit court erred in refusing to instruct the jury about mitigating factors." *Id.* The Virginia Supreme Court found no merit in these claims. *Id.*

Atkins then raised two issues with respect to the "composition and selection of the jury." *Id.* at 316. The first contention that Atkins made was that "the circuit court erred in denying his motion to strike the entire venire because it did not accurately represent the demographic makeup of the population of York County." *Id.* Secondly, Atkins alleged that the Commonwealth used a peremptory strike to eliminate the lone black juror. *Id.* The Virginia Supreme Court denied Atkins' arguments in regard to these issues. *Id.* at 317.

Next, Atkins argued that the circuit court erred when it failed to grant his motion to strike the Commonwealth's evidence at resentencing because it did not prove future dangerousness or vileness. *Id.* Upon reviewing the record, the Virginia Supreme Court found sufficient evidence beyond a reasonable doubt of dangerousness and vileness. *Id.*

Also, just as in any case where the death penalty is imposed, the court must determine if the sentence handed down was under the influence prejudice or was disproportionate to the crime and the defendant. *Id.* at 318. Atkins raised both of these issues. *Id.* Atkins argued that because he was mentally retarded, the punishment of death was disproportionate to him. *Id.* The Virginia Supreme Court rejected this argument by citing the United States Supreme Court's decision in *Penry v. Lynauth*, 492 U.S. 302 (1989). *Id.* at 321. The Virginia Supreme Court did not address the issue of prejudice when handing down the death sentence in this case. *Id.* at 317.
29. *Id*. at 314.
30. *Id.* at 318.
31. 492 U.S. 302.
32. *Atkins*, 122 S. Ct. at 2246.
33. *Penry*, 492 U.S. at 305.
34. *Atkins*, 122 S. Ct. at 2246.
35. *See id.*

punishment, in violation of the Eight Amendment, to execute a mentally retarded criminal, as first addressed in *Penry*.[36]

III. Background

The Eighth Amendment of the United States Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*."[37]

Early decisions of the United States Supreme Court have held that the punishment for a crime must be "graduated and proportioned to [the] offense."[38] However, beyond that general language, the Court did not detail the exact scope of the Cruel and Unusual Punishment Clause of the Eighth Amendment until later decisions.[39] The Court recognized that there are two standards used to determine when a punishment is considered cruel and unusual under the Eighth Amendment.[40] The first standard was whether the mode of punishment was cruel and unusual when the Bill of Rights was adopted.[41] Under the second standard, the court determines if "evolving standards of decency that mark the progress of a maturing society" have been violated.[42]

Evolving standards of decency are to be determined by "objective factors to the maximum possible extent."[43] The United States Supreme Court alluded to these factors in early decisions such as *Gregg v. Georgia*.[44] However, the objective factors were finally spelled out by the Court in *Coker v. Georgia*[45] by stating that the objective standards that should be evaluated are "public attitudes concerning a particular sentence history and precedent, legislative attitudes, and the response of juries."[46] The Court held in *Penry* that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[47]

The Court used this type of objective factor in *Coker* when it held that the death penalty was excessive punishment for rape.[48] The

36. *Id.*
37. U.S. Const. amend. VIII (emphasis added). The Fourteenth Amendment of the Constitution makes the Eighth Amendment applicable to the states. U.S. Const. amend. XIV, § 2.
38. Weems v. United States, 217 U.S. 349, 367 (1910) (holding that punishment of twelve years in irons at hard and painful labor was excessive for falsifying records).
39. Trop v. Dulles, 356 U.S. 86, 100 (1958).
40. *See* Ford v. Wainwright, 477 U.S. 399, 406 (1986).
41. *Id.*
42. *Id*.
43. Coker v. Georgia, 433 U.S. 584, 592 (1977).
44. *See* Gregg v. Georgia, 428 U.S. 153, 186 (1976) (holding that the death penalty was not a violation of the Eighth Amendment under all circumstances for the crime of murder).
45. 433 U.S. 584.
46. *Id.* at 592.
47. Penry v. Lynaugh, 492 U.S. 302, 331 (1989).
48. *See Coker*, 433 U.S. at 600.

Court supported this decision by highlighting the legislative statutes made in regard to the issue.[49] In the fifty years before the decision in *Coker*, there had not been a majority number of states that had allowed the death penalty as punishment for "rape of an adult woman."[50] When the death penalty for murder was found not to violate the Eighth Amendment under *Gregg*, many states revised their capital punishment statutes, and the end result was that only Georgia still allowed the death penalty as punishment for "rape of an adult woman."[51] The United States Supreme Court ultimately held that there was a national consensus, therefore determining that the standard of decency had evolved and the sentence of death was no longer acceptable for the crime of rape.[52]

Additionally, in *Enmund v. Florida*,[53] the death penalty was found to be an excessive imposition on a defendant who was involved in a felony in which a murder was committed, but who did not himself commit murder.[54] When *Enmund* was decided, only eight jurisdictions in the country authorized the death penalty for one who aids and abets a felony in which a life is taken, but who is not the triggerman.[55] The Court admitted that the legislative evidence in *Enmund* was not as conclusive as it was in *Coker*, where only one state allowed the specific punishment.[56] However, it still found that the evidence supported the finding of a national consensus and therefore a change in the standard of decency.[57]

In *Stanford v. Kentucky*,[58] the Court held that there was not a national consensus against the execution of juveniles who committed a crime at sixteen or seventeen years of age.[59] At the time that *Stanford* was decided, thirty-seven states permitted the death penalty.[60] Fifteen of those states refused to impose it on sixteen-year-old offenders, while twelve states declined to impose it on seventeen-year-old offenders.[61] According to the Court, this did not establish "the degree of national consensus" it had previously decided was sufficient to deem a punishment cruel and unusual.[62] The majority rejected the dissent's argument that the states with no death penalty should be in-

49. *Id.* at 592.
50. *Id*.
51. *Id.* at 595-96.
52. *See id.* at 600.
53. 458 U.S. 782 (1982).
54. *Id.* at 801.
55. *Id.* at 789, 792.
56. *Id.* at 793.
57. *Id.* at 792-93.
58. 492 U.S. 361 (1989).
59. *Id.* at 370-71.
60. *Id.* at 370.
61. *Id*.
62. *Id.* at 370-71.

cluded as part of the national consensus.[63] The analysis by the majority was that while those states might be part of a national consensus against having the death penalty altogether, it was irrelevant to the specific question of whether persons under the age of eighteen were constitutionally exempt.[64] In examining the number of statutes enacted by the states, the majority of the Court found that there was not a national consensus against the execution of offenders under the age of eighteen.[65]

When *Penry* was decided in 1989, only two states, Georgia and Maryland,[66] had statutes that prohibited the execution of mentally retarded offenders.[67] Since *Penry*, other states around the country have passed legislation prohibiting the execution of mentally retarded offenders.[68] Tennessee and Kentucky both passed legislation banning the execution of mentally retarded offenders in 1990.[69] Nine other states passed the same type of legislation between 1991 and 2000.[70] In 2001, five more states – Arizona, Missouri, Florida, Connecticut, and North Carolina – all enacted statutes that prohibited the execution of mentally retarded offenders.[71] This made a total of eighteen states that had statutes prohibiting the execution of mentally retarded offenders in the United States.[72] Seven of the statutes were retroactive.[73]

The next objective factor in determining whether a national consensus exists is jury decisions.[74] In *Gregg*, the Court recognized that

63. *Id*. at 371 n.2.

64. *Id.* Justice Scalia stated that the dissent's reasoning in including states without the death penalty in the national consensus was "like discerning a national consensus that wagering on cockfights is inhumane by counting within that consensus those States that bar all wagering." *Id.*

65. *Id*. at 372.

66. GA. CODE ANN. § 17-7-131(j) (1988); MD. CODE ANN. art. 27, § 412(g) (1989).

67. Penry v. Lynaugh, 492 U.S. 302, 334 (1989). Penry raised the issues that his Eighth Amendment rights were violated because the jury was not allowed to consider mitigating evidence in his sentencing and that the Eighth Amendment prohibited his execution because he was mentally retarded. *Id.* at 307. Penry raped, beat, and stabbed Pamela Carpenter with scissors. *Id.* He twice confessed to the crimes. *Id.* Penry was found to be mentally retarded. *Id.* at 307-08. The United States Supreme Court agreed with Penry on the first issue that it was a violation of the Eighth Amendment not to have the jury consider mitigating evidence. *Id.* at 340. However, the Court did not find that it was a violation of the Eighth Amendment to execute mentally retarded offenders. *Id.*

68. Atkins v. Virginia, 122 S. Ct. 2242, 2248 (2002).

69. KY. REV. STAT. ANN. § 532.140 (Banks-Baldwin 1990); TENN. CODE ANN. § 39-13-203 (1990).

70. Those states were Arkansas, Colorado, Indiana, Kansas, Nebraska, New Mexico, New York, South Dakota, and Washington. ARK. CODE ANN. § 5-4-618 (Michie 1993); COLO. REV. STAT. ANN. § 16-9-403 (West 1993); IND. CODE ANN. § 35-36-9-6 (Michie 1994); KAN. STAT. ANN. § 21-4623 (1994); NEB. REV. STAT. § 28-105.01 (1998 & Supp. 2000); N.M. STAT. ANN. § 31-20A-2.1 (Michie 1991); N.Y. CRIM. PROC. LAW § 400.27 (McKinney 1995); S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie 2000); WASH. REV. CODE ANN. § 10.95.030(2) (West 1993).

71. 2001 Ariz. Sess. Laws 260; 2001 Conn. Acts 151 (Reg. Sess.); 2001 Fla. Laws ch. 202; 2002 Mo. Legis. Serv. 565.030 (West); 2001 N.C. Sess. Laws 346.

72. *Atkins*, 122 S. Ct. at 2261 (Scalia, J., dissenting).

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

74. Gregg v. Georgia, 428 U.S. 153, 181 (1976).

"the jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved."[75] The Court also stated that the function of the jury was important because in deciding between life imprisonment and death, it "maintain[ed] a link between contemporary community values and the penal system."[76] Due to the juries' direct involvement in its specific cases and its link between the community and the system, the Court found it was important to examine the sentencing decisions that juries have made regarding whether the death penalty was an appropriate punishment for the crime.[77] In *Gregg*, the petitioner argued that there had been a shift in the evolving standards of decency in the United States, and the evidence showed that very few juries were sentencing defendants to death.[78] The Court rejected that contention, reasoning that juries might have become more discriminating in imposing the death penalty, but that change does not indicate evolving standards of decency against the death penalty.[79] Rather, the Court found that the reluctance of juries to sentence an offender to death might be a reflection of the understanding that this irrevocable punishment should be reserved for only the most severe cases.[80]

In deciding *Coker*, the Court looked at the sentencing patterns of juries in Georgia for rape cases for further evidence to determine whether a national consensus had been reached.[81] It found that Georgia juries handed down the death penalty six times in rape cases since 1973.[82] The Court decided that in a vast majority of cases juries did not impose the death penalty on rapists, but also made the point that this could be because the juries reserve "the extreme sanction for extreme cases of rape."[83]

In *Enmund*, it was found that since 1954, when a defendant was sentenced to death for murder, 339 people out of 362 personally committed the murder.[84] The Court decided that these statistics were adequate to determine that juries considered the death penalty disproportionate for this type of crime.[85]

75. *Id*.
76. *Id*.
77. Enmund v. Florida, 458 U.S. 782, 794 (1982); Coker v. Georgia, 433 U.S. 584, 596 (1977); *Gregg*, 428 U.S. at 181-82.
78. *Gregg*, 428 U.S. at 179.
79. *Id.* at 182.
80. *Id*.
81. *Coker*, 433 U.S. at 596.
82. *Id.* at 596-97.
83. *Id*. at 597.
84. Enmund v. Florida, 458 U.S. 782, 794 (1982). In two of the cases, the person put to death had another person kill the victim for him, and in sixteen of the cases, the facts were not detailed enough to determine who committed the murder. *Id.* It was reported that only six cases out of the 362 were executions of a nontriggerman. *Id.*
85. *Id.* at 796.

The final possible objective standards used in determining a national consensus are national and international opinion polls.[86] In *Penry*, the Court stated that "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."[87] In regard to international opinion, the Court held in *Enmund* that it is "not irrelevant."[88] Yet in *Stanford*, the Court emphasized that it is "*American* conceptions of decency that are dispositive, rejecting . . . that the sentencing practices of other countries are relevant."[89]

This law helped establish the foundation of Eighth Amendment precedent in regards to the Cruel and Unusual Punishment Clause. By using the objective standards created by previous cases, the Court had a built-in framework in which to analyze *Atkins*. The evidence in *Atkins* did not seem to fit within the previously established framework in finding a national consensus, therefore the negative impacts of the decision in *Atkins* were not justified.

IV. Analysis

The issue in *Atkins v. Virginia* was whether it is a violation of the Eighth Amendment's Cruel and Unusual Punishment Clause to execute mentally retarded inmates.[90] To determine whether the punishment is cruel and unusual, the Court must determine whether a national consensus had been reached on the issue.[91] If a national consensus was found, the ruling would overturn *Penry v. Lynaugh*[92] and make executing mentally retarded offenders unconstitutional because it would violate the Eighth Amendment's Cruel and Unusual Punishment Clause.[93]

A. *Parties' Arguments*

Atkins argued that due to his mild mental retardation he could not be put to death.[94] The defense presented an expert witness who testified that Atkins had an IQ of fifty-nine, which classified him as mildly mentally retarded.[95] Due to his low IQ, Atkins asserted that his understanding and functioning were impaired.[96] Since his under-

86. Penry v. Lynaugh, 492 U.S. 302, 334 (1989).
87. *Id*.
88. *Enmund*, 458 U.S. at 796 n.22.
89. Stanford v. Kentucky, 492 U.S. 361, 370 n.1 (1989).
90. Atkins v. Virginia, 122 S. Ct. 2242, 2243 (2002).
91. *Id.* at 2244.
92. 492 U.S. 302.
93. *Atkins*, 122 S. Ct. at 2252.
94. Atkins v. Commonwealth, 534 S.E.2d 312, 318 (Va. 2000).
95. Petitioner's Brief at 9, *Atkins* (No. 00-8452).
96. *Id.* at 12.

standing was impaired, the defense contended that Atkins' personal culpability was reduced.[97]

Atkins argued that the death penalty was to be reserved for only the most culpable criminals.[98] He went on to state that due to his mental retardation, sentencing him to death would be grossly disproportionate to his personal culpability because he did not fully grasp the weight of his actions due to his diminished understanding.[99] Atkins also reasoned that the death penalty was only appropriate for an individual that was able to function in society as a "responsible, mature citizen."[100] Since Atkins suffered from diminished functioning and understanding, he argued that his actions, as well as those of other mentally retarded individuals, were not "morally reprehensible."[101]

Atkins also contended that the execution of mentally retarded criminals does not serve the purpose of the death penalty.[102] The death penalty had been justified because it was to form retribution and deterrence among criminals.[103] A mentally retarded criminal could not appreciate the punishment that could result from his or her crime, making the purpose of the death penalty unfulfilled.[104]

Finally, Atkins pointed out that even if there was no national consensus when *Penry* was decided, sixteen other legislatures had passed statutes since then prohibiting the execution of mentally retarded criminals.[105] Atkins argued that this change in society's view was substantial enough to constitute a national consensus, which would make it cruel and unusual to execute him under the Eighth Amendment of the Constitution.[106]

Virginia argued that there was a question as to Atkins' IQ and level of functioning, but it focused mostly on the fact that mental retardation does not decrease the culpability of these criminals.[107] Virginia argued that the IQ of a defendant should be a mitigating factor, but should not be the sole basis of determining whether the death penalty should be imposed.[108] Virginia further contended that there was not a national consensus when *Penry* was decided and that there was still not a consensus.[109] It argued that the legislative trend was

97. *Id.* at 22-26.
98. *See id.* at 28.
99. *Id.* at 26-27.
100. *Id.* at 27-28.
101. *Id*.
102. *Id.* at 33.
103. *Id*.
104. *Id*.
105. *Id.* at 41.
106. *Id.* at 45 n.50.
107. Official Tr., *Atkins*, 2002 WL 341765, *28-*29.
108. *Id*.
109. *Id.* at *36.

not enough to constitute a national consensus and that the standard should not be lowered to accommodate these criminals.[110]

B. *Majority Opinion*

The Court overturned its decision in *Penry* and held that the execution of mentally retarded offenders was a violation of the Eighth Amendment's Cruel and Unusual Punishment Clause.[111] The Court determined that in the thirteen years since *Penry*, a national consensus had evolved in the United States, rejecting the execution of mentally retarded offenders.[112]

The Court reiterated that the Eighth Amendment prohibits the use of excessive sanctions, and that the punishment issued must be "graduated and proportioned to the offense" committed.[113] Beyond this, even if the punishment was not excessive, it must not be cruel and unusual.[114] The majority went on to state that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[115]

In determining what was cruel and unusual punishment, the Court found that the punishment in *Atkins* was not considered cruel and unusual when the Bill of Rights was adopted, so the punishment must be examined under an evolving standard of decency.[116] In examining the objective factors set out by the Court in *Coker*, the majority found that the legislation that was lacking in *Penry* had established itself.[117] Since 1989, sixteen other states had passed statutes barring the execution of mentally retarded offenders.[118] Due to this change in the legislative climate, the majority found that a national consensus did exist.[119] The Court went even further in its analysis and explained that the touchstone was not the number of states that had passed legislation, but rather the consistent direction in which this legislation was moving.[120] The Court noted that even in the states that did allow the execution of mentally retarded criminals, the practice was rare.[121] Finally, the Court cited several organizations, religious groups, international communities, and opinion polls that surveyed people who felt

110. *See id*. at 321.
111. *Atkins*, 122 S. Ct. at 2252. The Court rendered a six to three decision with Chief Justice Rehnquist, Justice Scalia, and Justice Thomas dissenting. *Id.* at 2244.
112. *Id*. at 2252.
113. *Id.* at 2246.
114. *Id.* at 2247 n.7.
115. *Id*. at 2247 (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958)).
116. *Id*.
117. *Id.* at 2248-49.
118. *Id*.
119. *Id.* at 2249.
120. *Id*.
121. *Id*.

that the execution of mentally retarded criminals was cruel and unusual.[122]

C. *Dissenting Opinions*

The focus of Chief Justice William Rehnquist's dissent was that there was not a consensus among the states or the state legislatures that the standard of decency had changed.[123] He opined that it was the legislatures' job to determine these types of values, not the courts', and that the legislatures had not yet made these decisions.[124] Agreeing with Justice Antonin Scalia, Chief Justice Rehnquist felt that the majority's legislative interpretation regarding the issue raised in *Atkins* "more resembles a *post hoc* rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain . . . an evolving standard of decency."[125] Additionally, Chief Justice Rehnquist argued that after looking at what the legislatures had decided, deference must be given to the sentencing juries as a "reliable index of contemporary values."[126]

The crux of the Chief Justice's dissent though was his assertion that the majority used defective reasoning by placing weight in religious groups, foreign entities, and opinion polls to support its conclusion.[127] The opinion polls used lacked evidence to prove that they were scientifically conducted to ensure validity.[128] Consequently, the Chief Justice explained that international, religious, and public opinions should not be given any weight because these sources are not reliable indicators of the views of the American people.[129]

Justice Scalia began his dissent by establishing that, in prior decisions, the Court had "required a much higher degree of agreement before finding a punishment cruel and usual on 'evolving standards' grounds."[130] He argued that "the Court entirely disregards . . . that the legislation of all [eighteen] States it relies on is still in its infancy."[131] Justice Scalia found the new legislation problematic because it was unknown whether these laws would be effective in the long run.[132] He rejected the idea that the trend of the legislatures

122. *Id* at 2249 n.21.
123. *Id.* at 2252 (Rehnquist, C.J., dissenting).
124. *Id.* at 2253 (Rehnquist, C.J., dissenting).
125. *Id.* (Rehnquist, C.J., dissenting).
126. *Id*. (Rehnquist, C.J., dissenting).
127. *Id.* at 2254-56 (Rehnquist, C.J., dissenting) (appendix).
128. *Id.* at 2255 (Rehnquist, C.J., dissenting).
129. *Id.* at 2254 (Rehnquist, C.J., dissenting).
130. *Id.* at 2262 (Scalia, J., dissenting).
131. *Id.* (Scalia, J., dissenting).
132. *Id.* at 2263 (Scalia, J., dissenting).

should be followed because it would be nearly impossible to change later if the trend proved to be faulty.[133]

He also reasoned that the Eighth Amendment actually does not prohibit punishments seen in *Atkins*.[134] Rather, Justice Scalia explained that as long as the punishment itself was permissible, "the Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions."[135] Finally, he argued that mental retardation could be used as a mitigating factor in sentencing defendants, but that there must be a balancing scale in determining the culpability of each defendant.[136]

D. *Commentary*

In deciding *Atkins*, the Court ignored the precedent that had been used in determining what constituted a national consensus in regards to the Eighth Amendment's Cruel and Unusual Punishment Clause.[137] The evidence relied on by the majority in *Atkins* did not meet the objective standards of legislation passed by the states, jury decisions, and national and international opinion polls that were previously required by the Court.[138]

In examining the two Eighth Amendment standards of cruel and unusual punishment,[139] the first standard does not apply to *Atkins* because when the Bill of Rights was adopted only the severely mentally retarded, known as "idiots," were protected under the common law.[140] That was because "idiots," like "lunatics," suffered from an inability to tell right from wrong.[141] It was generally believed that "idiots" had an IQ of twenty-five or below, which is profoundly or severely retarded by today's standards.[142] Since Atkins was not severely retarded, his punishment cannot be deemed as being cruel and unusual at the time the Bill of Rights was adopted. Therefore, evolving standards of decency rejecting this type of punishment must be found, if it is to be a violation of the Eighth Amendment.

133. *Id.* (Scalia, J., dissenting).
134. *See id.* at 2265 (Scalia, J. dissenting).
135. *Id.* (Scalia, J., dissenting).
136. *Id.* at 2266-67 (Scalia, J., dissenting).
137. Stanford v. Kentucky, 492 U.S. 361, 370-73 (1989); Enmund v. Florida, 458 U.S. 782, 788-96 (1982); Coker v. Georgia, 433 U.S. 584, 593-97 (1977); Gregg v. Georgia, 428 U.S. 153, 179-82 (1976).
138. *See* cases cited *supra* note 137.
139. *See supra* notes 41-42 and accompanying text.
140. *Atkins*, 122 S. Ct. at 2260 (Scalia, J., dissenting).
141. *Id*. (Scalia, J., dissenting).
142. Penry v. Lynaugh, 492 U.S. 302, 333 (1989).

Regarding the second Eighth Amendment standard,[143] the Virginia Supreme Court agreed with the United States Supreme Court's decision in *Penry*, finding that there was not a national consensus against sentencing mentally retarded offenders to death.[144]

Atkins must be scrutinized under the objective standards of legislative decisions, jury decisions, and public opinion polls established by the United States Supreme Court.[145] The prior decisions of the Court have determined a threshold as to what constitutes a national consensus regarding the Eighth Amendment. *Coker*, *Enmund*, and *Stanford*, the three leading cases that addressed this type of issue, make up the substance of the threshold. To fully understand where *Atkins* fits in this constitutional framework, the prior decisions must be examined to establish where the lines are currently drawn.

Legislation passed prohibiting the execution of mentally retarded offenders has increased since the Court's decision in *Penry*.[146] However, this should only be viewed as a strong beginning because it still falls short of what has previously constituted a national consensus.[147] The highest and lowest parameters of the framework are strongly established in precedent. The United States Supreme Court has found that there was a national consensus concerning the Eighth Amendment when all but *one* state had adopted legislation prohibiting the execution of rape offenders in *Coker*.[148] It also found a national consensus when all but eight jurisdictions had statutes prohibiting the execution of a nontriggerman that participated in a felony where a murder occurred in *Enmund*.[149] In these two cases, the Court set the bar extremely high when determining a national consensus.

At the other end of the spectrum, the Court found in *Stanford* that there was not a national consensus when, of the thirty-seven states that allowed the death penalty, fifteen had legislation that prohibited the execution of sixteen-year-old offenders.[150] Twelve states having statutes prohibiting the execution of seventeen-year-old offenders also did not constitute a national consensus.[151] *Stanford* provided the important base standard to complete the framework that can be used to examine these types of Eighth Amendment questions.

These cases are extremely important to examine and understand because each has helped establish strong parameters that the Court

143. *See supra* note 42 and accompanying text.
144. Atkins v. Commonwealth, 534 S.E.2d 312, 319 (Va. 2000).
145. *See supra* notes 46, 86 and accompanying text.
146. *See supra* notes 67-73 and accompanying text.
147. *See* Enmund v. Florida, 458 U.S. 782, 792-93 (1982); Coker v. Georgia, 433 U.S. 584, 596 (1977).
148. *Coker*, 433 U.S. at 596 (emphasis added).
149. *Enmund*, 458 U.S. at 792-93.
150. Stanford v. Kentucky, 492 U.S. 361, 370-71 (1989).
151. *Id*.

should use in determining national consensus questions. The evidence relied upon by the majority in *Atkins* should have to fit within the Court's previously established framework and be evaluated accordingly. While this framework is broad and no specific standard has been established regarding what number must be met to gain a national consensus, the Court should use these prior cases as a guide to reach a logical conclusion.

The closer the evidence in *Atkins* falls to *Coker* and *Enmund*, the easier it should be for the Court to find a national consensus. While the further it slides down the scale towards *Stanford*, the harder it should be to establish that a national consensus exists. At the time *Atkins* was decided, thirty-eight states allowed capital punishment, and of those, eighteen states had statutes prohibiting the execution of mentally retarded offenders.[152] Based on previous Court decisions,[153] it is clear that the Court ignored the established framework in this case because the evidence was insufficient to support the objective standards.

In *Coker*, 98% of the states that had the death penalty had statutes prohibiting such punishment for the rape of an adult woman.[154] Similarly, over 75% of jurisdictions that allowed the death penalty in *Enmund* prohibited the death sentence for a nontriggerman when a death resulted.[155] In *Atkins*, only 47% of the states that allow the death penalty have statutes prohibiting the execution of the mentally retarded, which falls well short of the previous standards set by the Court to establish a national consensus.[156] Instead, the numbers presented in *Atkins* more closely resemble the ones that the Court found *inadequate* in *Stanford*, where 41% of states with the death penalty for sixteen-year-old offenders had statutes prohibiting the punishment.[157]

The Court has held that while states prohibiting the death penalty might be part of a national consensus against having the death penalty altogether, they are irrelevant to the specific issues raised in these

152. Atkins v. Virginia, 122 S. Ct. 2242, 2261 (2002) (Scalia, J., dissenting).

153. *See Stanford*, 492 U.S. at 370-71; *Enmund*, 458 U.S. at 792-93; *Coker*, 433 U.S. at 596.

154. At the time *Coker* was decided, thirty-five states had the death penalty. *Coker*, 433 U.S. at 593-94. Conversely, Georgia was the only state allowing the death penalty for the rape of an adult woman, making 98%. *Id.* at 595-96.

155. *Enmund*, 458 U.S. at 792-93. In *Enmund*, thirty-six state and federal jurisdictions allowed the death penalty. *Id.* at 789. Since eight jurisdictions sanctioned the death penalty for nontriggermen, over 75% of the jurisdictions prohibited the practice. *Id.* at 792.

156. *Atkins*, 122 S. Ct. at 2262 (Scalia, J., dissenting). In *Atkins*, thirty-eight states had the death penalty, but only eighteen prohibited it for mentally retarded defendants. *Id.* at 2261 (Scalia, J., dissenting).

157. *Id.* (Scalia, J., dissenting) (emphasis added). At the time *Stanford* was decided, thirty-seven states had capital punishment. *Stanford*, 492 U.S. at 370. The Court made a distinction in its analysis between sixteen and seventeen-year-old offenders. *Id.* The percentage of states prohibiting the death penalty for seventeen-year-olds was 32%. *Id.*

cases.[158] The majority in *Stanford* directly rejected this exact issue.[159] In *Atkins*, Justice Scalia furthered this argument in his dissent by pointing out that the states with the death penalty are the only ones for whom the issue even exists.[160]

Despite the fact that counting non-death penalty states has been directly rejected in precedent,[161] including those states in the numbers presented in *Atkins* does not bring the total high enough to reach the levels found to constitute a national consensus in past decisions. When including the states that do not authorize the death penalty plus the states that prohibit the execution of mentally retarded offenders, the total is only 60%.[162] Even this number falls short of previous United States Supreme Court decisions regarding a national consensus.[163] It is over half, which is a majority, but it seems inherent in the definition that a national consensus would be significantly more than half.[164] One commentator stated that "under current law a consensus can only be found when an overwhelming majority of legislatures condemn a particular punishment or procedure."[165] Even when the majority included the states that do not have capital punishment, the *Atkins* Court still fell well below two-thirds of the states. This decision was a very large leap from precedent, especially since the legislation of the states is supposed to be the best predictor of a change in standards of decency.[166]

Juries are regarded as the next best objective indicator of public sentiment after legislation.[167] The Court barely mentioned juries in its opinion and did not offer any statistical evidence as to the decisions juries are making in regard to this issue.[168] Juries are important indicators as to the "contemporary values" of Americans.[169] Atkins was sentenced to death not once, but twice by two separate juries.[170] The majority of the Court ignored this as a factor when making its decision in *Atkins*, despite the fact that jury decisions are the second portion of

158. *Stanford*, 492 U.S. at 371.
159. *See supra* notes 63-64 and accompanying text.
160. *Atkins*, 122 S. Ct. at 2261 (Scalia, J., dissenting).
161. *See supra* notes 63-64 and accompanying text.
162. This calculation was completed by adding the number of states that do not have the death penalty (twelve) to the number of states with legislation prohibiting the execution of mentally retarded offenders (eighteen) and dividing it by the total number of states in the Union (fifty). *Atkins*, 122 S. Ct. at 2261 (Scalia, J., dissenting).
163. Enmund v. Florida, 458 U.S. 782, 792-93 (1982); Coker v. Georgia, 433 U.S. 584, 596 (1977).
164. The definition of consensus is a "general agreement or concord; harmony." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 433 (2d ed. 1987).
165. Brief of Amicus Curiae Criminal Justice Legal Foundation at 5, *Atkins* (No. 00-8452).
166. *See supra* note 47 and accompanying text.
167. *Coker*, 433 U.S. at 592.
168. *See Atkins*, 122 S. Ct. at 2249.
169. *Id.* at 2253 (Rehnquist, C.J., dissenting).
170. *Id.* at 2245-46.

the objective standards established in *Coker*.[171] This important factor must be examined, and when thought about logically, it makes sense as to why very few mentally retarded offenders are put to death. The number of mentally retarded people in society is a small percentage, and the number of people sentenced to death is an even smaller percentage.[172] Because both of these populations are so small, it is inevitable that a small percentage of mentally retarded people are going to be sentenced to death regardless of the national sentiment about it.[173]

The Court has mentioned that public opinion polls can be used as an objective standard in determining a national consensus in regards to the Eighth Amendment.[174] The majority relied heavily on evidence presented by national and international opinion polls to show that the public opposes the execution of mentally retarded individuals.[175] In *Atkins*, the Court moved away from simply stating that opinion polls could be used as an objective standard to nearly basing its entire opinion upon these sources.[176] Of the fourteen states that had opinion polls cited by the Court, ten of them already had legislation prohibiting the execution of mentally retarded offenders.[177] Since the purpose of state legislation is to reflect the beliefs of its constituents, it is not surprising that these particular citizens are against the execution of mentally retarded offenders. The Court originally meant for public opinion polls to be used as a precursor to future legislation, not as a substitute for that particular legislation.[178]

In *Penry*, the Court stated that "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."[179] This statement shows that the Court never meant for national opinion polls to be an independent objective standard, let alone a primary standard used to change the Cruel and Unusual Punishment Clause of the Constitution.[180] Previously, the Court saw public opinion polls as legislative indicators, not an indication of a national consensus.[181] Since the majority of states that were cited by the Court in *Atkins* already have the legislation prohibiting this type of punishment, it strongly weakens the majority's position.[182]

171. *See Coker*, 433 U.S. at 596.
172. *Atkins*, 122 S. Ct. at 2264 (Scalia, J., dissenting).
173. *Id.* (Scalia, J., dissenting).
174. *See supra* note 87 and accompanying text.
175. *See Atkins*, 122 S. Ct. at 2249 n.21.
176. *See id*.
177. *Id*. at 2256 (Rehnquist, C.J., dissenting) (appendix).
178. Penry v. Lynaugh, 492 U.S. 302, 335 (1989).
179. *Id*.
180. *See id*.
181. *Id*.
182. *See Atkins*, 122 S. Ct. at 2256 (Rehnquist, C.J., dissenting) (appendix).

The majority virtually double counted these states and padded their statistics because the public opinion in these states has already led to legislation.[183] These polls are not an accurate depiction of a "national consensus," but rather represent a consensus among these few states. The majority in *Atkins* should have allowed the opinions in other states to be heard through legislation before it rested a national consensus on the beliefs of only a handful of states.

The evidence has been presented indicating that the majority in *Atkins* failed to meet the previous standard that constituted a national consensus. While it may seem inconsequential that the bar has been lowered, it actually has a grave impact not only on constitutional law, but also on the legal profession and the public as a whole. There is no doubt that it is important for the Court to recognize changing standards of decency. As members of an ever-maturing society, the citizens of America should expect nothing less. However, dramatic changes to the Constitution should be reserved for those times when the evidence is completely convincing. While the decision in *Atkins* may have seemed like the decent thing to do, there was no legitimate reason to create the negative repercussions that could impact the country for years to come because standards of decency in America seemingly have not changed.

If a national consensus on an issue does not exist, the Court has held that a person should be sentenced to death on an individual basis to determine whether "death is the appropriate punishment" in that particular case.[184] The Court has found individualized sentencing to be vital in capital cases.[185] In *Woodson v. North Carolina*,[186] the Court explained this notion by stating that "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[187] The Court has weighted individualized sentencing heavily because of its "insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all."[188] The Court held in *Eddings v. Oklahoma*[189] that to accomplish this consistency the sentencer must be required to look "on the characteristics of the person who committed the crime."[190] To stress the importance of individualized sentenc-

183. *See id.* (Rehnquist, C.J., dissenting) (appendix); sources cited *supra* notes 69-71.
184. *Penry*, 492 U.S. at 340.
185. *See* Eddings v. Oklahoma, 455 U.S. 104, 112 (1981).
186. 428 U.S. 280 (1976).
187. *Id.* at 304.
188. *Eddings*, 455 U.S. at 112.
189. 455 U.S. 104 (1982).
190. *Id.* at 112 (quoting Gregg v. Georgia, 428 U.S. 153, 197 (1976)).

ing, the Court went on to state that "justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender."[191] Finally, the Court has held that any "consistency produced by ignoring individual differences is a false consistency."[192]

In making its decision, the *Atkins* majority disregarded the advantages of individualized sentencing. Individualized sentencing is used to determine whether a death sentence should be imposed when there is no national consensus.[193] Despite the decision in *Atkins*, the numbers still seem to show no national consensus regarding the execution of mentally retarded offenders. Since a national consensus is hard to discern from the numbers presented in *Atkins*, it makes sense to use individualized sentencing not only because of precedent, but also because it is logical.

Individuals with the same IQ function at different levels.[194] The AAMR states that

> [t]he term *mental retardation*, as commonly used today, embraces a heterogeneous population, ranging from totally dependent to nearly independent people. Although all individuals so designated share the common attributes of low intelligence and inadequacies in adaptive behavior, there are marked variations in the degree of deficit manifested and the presence or absence of associated physical handicaps, stigmata, and psychologically disordered states.[195]

This statement only furthers the concept that mental retardation should not be seen as a broad generalization applying to all people with an IQ below seventy. The Court held in *Penry* that "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."[196] Despite the *Atkins* majority's finding that there is a national consensus in the United States regarding the execution of mentally retarded offenders, individuals with mental retardation will continue to have varying degrees of functional capacity regardless of the standard of decency. The principle that individuals with mental retardation may have the culpability associated with those sentenced to death is valid regardless of public opin-

191. *Id*. (quoting Pennsylvania v. Ashe, 302 U.S. 51, 55 (1937)).
192. *Id.*
193. *See supra* note 184 and accompanying text.
194. Penry v. Lynaugh, 492 U.S. 302, 338 (1989).
195. AM. ASS'N ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 12 (1983).
196. *Penry*, 492 U.S. at 338-39.

ion. This is especially true because of the natural arbitrariness that results from determining something as imprecise as IQ.[197]

The majority in *Atkins* stated that it wanted to protect those defendants who cannot protect themselves because of their disabilities.[198] Yet, this argument does not materialize in practice. In creating an exemption for mentally retarded offenders, the *Atkins* decision creates "little additional protection to those for whom the death penalty would be clearly unjust," but unfairly protects those offenders who otherwise would not be able to avoid a death sentence.[199] This shows that the decision in *Atkins* actually has the opposite effect the majority was trying to obtain. *Atkins* fails to protect those who need it because those who truly need the protection already receive it through the Constitution. Individualized sentencing and mitigating circumstances, two constitutional safeguards already in place, protect the defendants who truly need it, making the decision in *Atkins* inconsequential to them.

The true protection that the decision in *Atkins* creates is for those who do not deserve it. The offenders with a lesser degree of mental retardation and a higher level of culpability, who typically would have been found to be eligible for the death penalty, will now escape the punishment that they may deserve. Individualized sentencing protects those who truly cannot protect themselves while still punishing the most culpable offenders. *Atkins* takes this flexibility away and creates a judicial loophole by protecting offenders who do not deserve it without furthering the protection of the most vulnerable offenders.

When these negative impacts are placed into context with the weak legislative support regarding the national consensus, it does not make sense for the Court to make such a drastic decision. This point is further supported by the strong precedents of *Penry* and *Eddings*. These two cases promote individualized sentencing in death penalty cases, and it is not logical to change the way sentencing has been handled in these cases with a mentally retarded defendant.

Death penalty sentencing should protect the defendant from unfair prejudice while ensuring consistent application.[200] Since these goals should be maintained, individualized sentencing makes the most sense in safeguarding offenders with varied problems and circumstances while still punishing the most culpable defendants and protecting society. Individualized sentencing takes mental retardation into account without taking away the option of sentencing the most culpa-

197. Brief of Amicus Curiae Criminal Justice Legal Foundation at 5, Atkins v. Virginia, 122 S. Ct. 2242 (2002) (No. 00-8452).
198. *Atkins*, 122 S. Ct. at 2251-52.
199. Brief of Amicus Curiae Criminal Justice Legal Foundation at 5-6, *Atkins* (No. 00-8452).
200. *See* Eddings v. Oklahoma, 455 U.S. 104, 111 (1982).

ble and highly functioning mentally retarded defendants. The decision in *Atkins* disallows this type of sentencing when a defendant is found to be mentally retarded. It is a dangerous policy to lock juries and judges into mandated sentencing when individuals vary so dramatically.

There are many policy implications that will result from *Atkins.* Since the decision in *Atkins* made the execution of mentally retarded offenders retroactive, a flood of appeals by death row inmates is inevitable. Not only will offenders who raised the issue of mental retardation in the penalty phase of their sentencing be granted an appeal, but death row inmates on a habeas corpus appeal will be granted the same opportunity.[201] While this in and of itself has some legitimate policy concerns, such as time and cost, the major problem arises with an increased chance of fraud.

While psychologists can try to guarantee the validity of IQ tests, there is always going to be a level of error in the results of these tests.[202] Many tests used to determine intelligence produce false positives.[203] To ensure that the law is enforced consistently, it is vital that the IQ tests are valid. With proof that false positives often result from IQ tests, it greatly diminishes the confidence in these tests as the only gauge for determining death penalty sentencing.

The first way that IQ tests are flawed is that the results show false positives due to cultural biases.[204] Economically deprived people and ethnic minorities are the groups most often erroneously found to be mentally retarded.[205] The fact that more minorities are on death row[206] will result in a high number of minorities taking IQ tests to determine whether they are qualified for the death penalty because the *Atkins* decision was retroactive. The argument is not that more minorities are mentally retarded, but rather that IQ tests are inherently biased against minorities. Using IQ tests to make objective determinations is not appropriate for such a subjective issue. Therefore, the *Atkins* decision makes consistent application of the death penalty impossible. By shifting the focus away from individualized sentencing

201. Brief of Amicus Curiae Criminal Justice Legal Foundation at 17, *Atkins* (No. 00-8452).

202. Sandra Anderson Garcia & Holly Villareal Steele, *Mentally Retarded Offenders in the Criminal Justice System and Mental Retardation Services in Florida: Philosophical Placement and Treatment Issues,* 41 ARK. L. REV. 809, 815 (1988).

203. *Id*.

204. *Id.*

205. *Id.*

206. Over half of the inmates on death row are from a minority group. *Death Row U.S.A. Fall 2002: Death Row Statistics*, http://www.deathpenaltyinfo.org/DEATHROWUSArecent.pdf. Not only are more minorities currently on death row, but also over the last five years nearly three-fourths of the defendants recommended for the death penalty were minorities. Robert L. Jackson, *Government Study Finds Racial Gap on Death Row,* L.A. TIMES, Sept. 13, 2000, *available at* 2000 WL 25896108.

that takes various factors into consideration, *Atkins* forces IQ to be the only factor, which will compound racial biases.

The Court has held that it is vital that the death penalty be administered fairly or not at all.[207] With the current state of IQ tests, it seems obvious that it will be nearly impossible to enforce the decision in *Atkins* with any kind of consistency. This is especially problematic due to the severe consequences that will result from inconsistencies and the fact that individualized sentencing already addressed these types of uncertainties.[208]

Another problem with IQ tests is the fact that they must be renormed after a number of years.[209] It has been found that "an IQ of [seventy] lies [two] SDs [standard deviations] below the population mean of 100 and isolates the bottom 2.27% of the biologically normal population."[210] This means that 2.27% of the population is deemed mentally retarded. When a test is re-normed it is the most accurate that it can be, but it instantly begins to lose accuracy.[211] As years pass, the test begins to slip and fewer people are found to be mentally retarded.[212] The only way to remedy this problem is to once again renorm the test.[213] The Wechsler III test, which is the most popular IQ test currently, isolated 2.27% in 1972 at its creation and was only isolating .47% in 1989 when it was re-normed.[214]

The inconsistencies created by these IQ tests seem obvious. Offenders that are evaluated close to the time that the test is re-normed will have a better chance of being found mentally retarded because of the accuracy of the test. While those offenders who are tested later will not have the same advantages and could be mentally retarded, the test will not reflect that finding due to its inaccuracies. Dr. James Flynn[215] recommends that tests be re-normed every seven years.[216] Currently, IQ tests are re-normed about every twenty years.[217] These findings demonstrate the inaccuracies of IQ test and create tremen-

207. *See supra* note 188 and accompanying text.
208. *See supra* notes 184-200 and accompanying text.
209. James R. Flynn, *The Hidden History of IQ and Special Education Can the Problems Be Solved?*, 6 PSYCHOL. PUB. POL'Y & L. 191, 192 (2000). IQ test scores are determined by creating a norm. *See id.* Sampling a large population of the country creates a norm. *See id.* The test is administered to this population, creating a bell curve. *See id.* The raw scores are then tabulated and put on a scale, which translates to the IQ scores used to determine mental retardation. *See id.* Tests then have to be re-normed because the sample population that was tested changes over time. *See id.*
210. *Id*.
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. Dr. Flynn is a professor in the Department of Political Studies at the University of Otago in New Zealand. *Id.* at 198.
216. *Id.* at 197.
217. *Id.*

dous inconsistencies in an area of the law that demands the utmost uniformity.

Even if the IQ tests are administered with complete accuracy, there will still be doctors that analyze the results of the tests more liberally than others. This will cause a division between colleagues; there will be a strong divide between psychologists who testify for the defendant versus the ones testifying for the state. Juries will still have to decide which psychologist to believe, and this produces very little change from the individualized sentencing that was in place before the decision in *Atkins*. Dr. Flynn presents an even grimmer scenario. He states that

> psychologists are now empowered . . . . Psychologists who want their clients to be eligible should pick the most recent test and score it, allowing for obsolescence. On the other hand, psychologists who want pupils to escape the label of mental retardation should pick the oldest test they can get away with. Depending on the tests chosen, there will be no problem in rigging IQ scores by at least [ten] points.[218]

When presented with this type of information, it seems nearly impossible that the IQ tests will be administered with any type of consistency. With a psychologist having the ability to move test scores up or down ten points, it creates all types of administrative and ethical problems in the areas of law and psychology. These results will substantially impact whether an individual will live or die. With the importance *Atkins* places on IQ tests, these glaring inconsistencies make it obvious that the psychological community is ill-prepared for the responsibilities the majority placed before it.

The final problem resulting from basing sentencing entirely on IQ tests is the problem with malingering. The definition of malingering is "the conscious feigning or exaggeration of physical injury or mental illness for personal benefit."[219] Criminal defendants malinger because they are aware that their freedom, and maybe even their lives, could be at stake.[220] Previously, criminal defendants malingered for a number of reasons, whether it be to avoid prosecution by being found incompetent to stand trial or by using the defense of insanity or diminished capacity.[221] The decision in *Atkins* will only increase the risk of malingering because being found mentally retarded could make one ineligible for the death penalty. It has already been seen that the IQ tests are not accurate independently,[222] so the ramifications of inaccurate IQ tests plus malingering could be devastating. No

218. *Id.*
219. Steven I. Friedland, *Law, Science and Malingering*, 30 ARIZ. ST. L.J. 337, 342 (1998).
220. *Id.* at 372.
221. *Id.*
222. *See supra* notes 202-19 and accompanying text.

one can truly know what is going on in another person's mind, and a psychologist administering an IQ test to a death row inmate cannot guarantee that the inmate is not lying to make his or her IQ lower than it really is. This risk is enhanced even further when legal rules and procedures erode the safeguards that try to prevent malingering.[223]

The safeguards that the legal system has in place to detect malingering are "the cross-examination of witnesses, the requirement that witnesses swear or affirm that their testimony is truthful, and the opportunity to observe the demeanor of testifying witnesses."[224] These safeguards seem to make sense, but when put into context of capital murder trials, each begins to lose effectiveness. Very few criminal defendants take the stand to testify. Instead, most choose to invoke their Fifth Amendment right against self-incrimination. If the defendant does not take the stand, all of the potential safeguards created to detect malingering are rendered useless. The systematic safeguards put into place by courts will have very little effect on defendants after *Atkins* because they will simply refuse to take the stand. Consequently, it will be nearly impossible for the jury to determine whether malingering has taken place.

Under the Federal Rules of Evidence, expert testimony is permitted when it is based "on scientific or technical knowledge provided that the scientific basis for the evidence is reliable."[225] The United States Supreme Court held that the admissibility of expert testimony is a question that must be determined by the trial court.[226] It is quite possible that, due to the subjective nature of malingering, a court will not allow the expert testimony to be admitted. This will prevent the jury from hearing vital information regarding the defendant's performance on the IQ test and the validity of the results.

Even if the expert is allowed to testify to the issue of malingering, it will still become an issue of which expert to believe. The jury will still have to determine which side is telling the truth to determine whether the results of the IQ tests are valid. The same type of balancing by juries was required when individualized sentencing and mitigating circumstances were used by courts, but other evidence was presented to offset the effect of the IQ scores. Under *Atkins*, the only factor that is considered is mental retardation, therefore making the IQ test the lone factor of sentencing. Juries are no longer able to balance all of the mitigating circumstances to determine an individualized sentence. Under *Atkins*, a defendant's mental retardation could be

223. Friedland, *supra* note 219, at 344.
224. *Id.*
225. *Id.* at 346.
226. *Id.*

the only factor considered in determining whether he or she can be sentenced to death. The emphasis placed on this one aspect of a defendant skews the entire process of sentencing and punishment.

The next problem presented by malingering is that, even if it would be admissible into trial, malingering is nearly impossible to detect.[227] It has been said that "it may be difficult, even insuperable, to detect malingering."[228] *Atkins* increases the chance of malingering because there are now significant incentives to do so with no negative repercussions. Criminal examinations are even more susceptible to error because criminal defendants have a tendency to be more guarded and withholding.[229] Since all of the defendants affected by the *Atkins* decision are criminal defendants, it increases the probability that malingering will be even harder to detect, causing more errors in this area of the law.

Due to the change caused by *Atkins*, mental retardation claims will become increasingly complex.[230] While the Court's motives were pure, its application does more harm than good by eliminating effective sentencing tools, such as individualized sentencing and mitigating circumstances. This further complicates an already complex area of the law and opens the judicial system to inconsistencies and fraud.

VI. Conclusion

The issue in *Atkins* was whether it was a violation of the Eighth Amendment's Cruel and Unusual Punishment Clause to execute mentally retarded offenders. In evaluating all of the past precedents and the evidence presented in *Atkins*, it appears that a national consensus did not exist and that the United States Supreme Court drastically lowered the bar in determining what constitutes cruel and unusual punishment. The legislation that had been passed since *Penry* was not sufficient to meet the national consensus criterion. The Court did not offer sufficient evidence to meet the standard and did not offer any explanation as to why the previous standard was lowered. By deciding that the American public had reached a national consensus against the execution of mentally retarded offenders, the Court made it virtually impossible for the states to enforce the *Atkins* decision consistently and justly. The Constitution changes and grows with the society it protects. While everyone in our society should be treated with dig-

227. *Id.* at 349.
228. *Id*.
229. Michael Welner, *Lay Testimony Hammers Malingering Murder Defendant*, http://echo.forensicpanel.com/1997/6/1/laytestimony.html.
230. Brief of Amicus Curiae Criminal Justice Legal Foundation at 5, Atkins v. Virginia, 122 S. Ct. 2242 (2002) (No. 00-8452) (suggesting that "a new standard of proof, an additional hearing, and new procedures to govern the hearing" will be required).

nity, it is a trait that should always be determined by the citizens of that society, never reserved to be mandated by the courts of those people.