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Capital Punishment and the Intellectually Disabled: Controversies, Constitutionality, and the Supreme Court

Dill Ayres '12

In 2002, the Supreme Court essentially shut the door on the question of the constitutionality of capital punishment for the intellectually disabled. Daryl Atkins, whose intellectual capacity was equivalent to that of a nine- to twelve-year-old, was convicted of armed robbery and murder and sentenced to death. Atkins' sentence was upheld by the Virginia Supreme Court, but reversed by the United States Supreme Court in a landmark decision.[1] Thus, the Court finally determined that the death penalty, when applied to the intellectually disabled, constituted "cruel and unusual punishment" banned by the Eighth Amendment. However, even after years of legal precedent and increasingly favorable public opinion, this 6-3 decision included passionate dissents and sparked debate among legal scholars and the public. Some questioned how exactly "mentally retarded" would be defined and whether the decision would create a new loophole that could be used to escape the death penalty. Death penalty abolitionists, on the other hand, applauded the decision, arguing that executing the intellectually disabled did not fulfill the goal of retribution or deterrence, the two principle justifications for capital punishment.

This paper will explore the controversies, constitutional questions, and legal precedents leading up to the *Atkins v. Virginia* decision. It will also attempt to answer a few important questions regarding the issue as a whole: What were the most significant factors and legal precedents that led to the new constitutional interpretation in *Atkins*? On what legal grounds did the minority justices dissent and how strong were their arguments? How does the exemption of the intellectually disabled affect the institution of capital punishment in America? What issues have yet to be resolved?

In order to trace the evolution and legal reasoning behind the issue of capital punishment for the intellectually disabled through the Supreme Court, it is necessary to first explore how it became a federal issue. Until the 1960s, American capital punishment was entirely an issue of states' rights, leaving virtually every aspect from civil procedure through method of execution to the discretion of individual states. This individual discretion led to a very wide range of policies and little accountability for those states, especially in the South, whose policies proved to be particularly discriminatory. However, by the 1960s, movements to abolish the death penalty quickly began to

gain momentum. Since the goal of these groups was to abolish the death penalty nationally, its supporters felt the most effective way to do so was to frame the question as a federal issue, not one for individual states to decide. The framing of capital punishment as a federal question incorporated the diverse policies of many states into one entity, the constitutionality of which could only be decided by the United States Supreme Court.[2] As a result, the Supreme Court decided not only the constitutionality of the institution of capital punishment as a whole, but also the many individual and controversial aspects of its application. These included rulings on exactly what types of due process rights are sufficient to meet the standards of the Eighth Amendment (*Gregg v. Georgia*), whether rape should be considered a capital crime (*Cocker v. Georgia*), the constitutionality of executing a person that is declared "insane" at the date of their execution (*Ford v. Wainwright*), claims of racial discrimination (*McCleskey v. Kemp*), the execution of juveniles (*Thompson v. Oklahoma, Stanford v. Kentucky, Wilkins v. Missouri*), and the execution of the "mentally retarded" (*Penry v. Lynaugh, Atkins v. Virginia*).[3]

To understand how the Court came to a decision in *Atkins*, it is important to study the relevant cases leading up to it, the opinions of the various justices, and the evolution of the constitutional interpretation, especially with regard to the Eighth Amendment. The first case that would directly affect the evolution of the Eighth Amendment's application to the death penalty for the intellectually disabled was *Weems v. United States*. In 1910, Paul A. Weems was sentenced to 15 years in prison (including hard labor) by the Philippine courts, for the crime of falsifying a public document for the purpose of defrauding the government.[4] The U.S. Supreme Court ruled that this sentence was "cruel and unusual" in that such a severe punishment was excessive relative to the minor crime that was committed. *Weems* is largely credited for creating the "proportionality" principle for determining the constitutionality of any type of punishment. The case established the standard that "all punishments (including the death penalty) are excessive and therefore constitutionally prohibited if not 'graduated and proportioned to the offence.'"[5] This decision became a significant tool used by the majority in *Atkins*, who argued that the intellectually disabled were less culpable, and therefore, proportionally, their punishments should be less severe.

The 1958 Supreme Court decision in *Trop v. Dulles* was a significant next step in the evolution of the Eighth Amendment. The Court ruled that the punishment of removal of citizenship, when applied to a natural-born citizen, was always excessive and therefore unconstitutional because it involved "the total destruction of the individual's status in organized society."[6] Most importantly, in his majority opinion, Chief Justice Earl Warren established the precedent that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[7] These words established the "cruel and unusual punishment" clause of the

Eighth Amendment as a living, constantly evolving principle. In other words, this concept validated the importance of a "national consensus" in proving, in *Atkins,* that society's standards of decency had indeed evolved to the point of invalidating the death penalty for the intellectually disabled.

Gregg v. Georgia (1976), the case that largely reinstated the death penalty after the *Furman v. Georgia* (1972) decision resulted in a nation wide *de facto* moratorium, also had a significant impact on the majority's reasoning in *Atkins* twenty-two years later. In *Gregg*, the Court held that if criminal sanctions do not "measurably" contribute to retribution, deterrence, or both, they should be deemed "excessive" and therefore unconstitutional.[8] Since it is difficult to argue that the execution of the intellectually disabled contributes to either retribution or deterrence, the majority in *Atkins* was later able to use this important decision to their advantage.

Ford v. Wainwright (1986) was the first decision to limit the ability of the State to execute a person based on their mental diagnosis. During his years on death row, Alvin Ford developed a mental disorder that included "paranoid obsession on the KKK and delusions of power and control."[9] Ford's psychiatrist concluded that his mental disorder was "severe enough to substantially affect" his "present ability to assist in the defense of life."[10] As a result, the Court ruled in a 5-4 decision that the Eighth Amendment did not allow "the execution of an inmate who is incompetent at the time of execution."[11] Much of the majority's reasoning in *Ford* would be closely echoed in the ideas expressed later in *Atkins*. These included assertions that executing the incompetent "offends humanity" and that it is "uncivilized for society to so avenge itself on the person… disabled by mental illness."[12] The majority also emphasized a lack of evidence for deterrence and retribution as well as the defendant's inability to understand "the finality of the death penalty"[13] as reasons for ruling in favor of Ford.

Eighth Amendment protection was further strengthened after the Supreme Court ruled that the execution of capital offenders at or below the age of 15 was unconstitutional in *Thompson v. Oklahoma* (1988).[14] However, despite this evolution of the Eighth Amendment, in *Penry v. Lynaugh* (1989) the Supreme Court ruled that the execution of the "mentally retarded" did not violate the Constitution. In this case, Penry's intellectual disability was disputed. His IQ was estimated to be between 50 and 60, he had the mental age of a six- to seven-year-old, had suffered brain damage from birth, was repeatedly beaten and abused as a child, and dropped out of school in the first grade.[15] Although this mental retardation did diminish his "personal culpability for the murder,"[16] during the sentencing phase of his trial the jury was not instructed that they could take these factors into account as mitigating evidence, which might have resulted in a lesser sentence. Despite this, the Supreme Court still voted 5-4 for keeping the death penalty in place for the intellectually disabled, emphasizing the fact that there was not yet

a "national consensus" against it. However, Justice Sandra Day O'Connor, writing for the majority, did simultaneously argue that the jury should be allowed to consider "mental retardation" a mitigating factor during the sentencing phase of capital trials.

Finally, in 2002, the U.S. Supreme Court accepted *Atkins v. Virginia* on appeal from the Virginia Supreme Court. In 1998, Daryl Atkins was convicted of armed robbery and murder, and consequently sentenced to death. Atkins had an IQ of 59, equivalent to that of a nine- to twelve-year-old, and was classified as "mildly mentally retarded" by a forensic psychologist testifying on behalf of the defense. In the first case to reconsider the death penalty for the "mentally retarded" since *Penry* in 1989, the Court had to once again answer the question of whether executing individuals in this group constituted "cruel and unusual punishment" under the Eighth Amendment taking into account the "evolving standards of decency" of a 21st century society. In a 6-3 decision, the Court ruled to reverse *Penry*, led by Justice Stevens who wrote on behalf of the majority.

Stevens wrote that the mentally handicapped could not be assigned the same degree of moral blame for the "most serious adult criminal conduct" because of their "disabilities in the areas of reasoning, judgment, and control of their impulses."[17] When addressing the issue of the proportionality of the punishment, the Court relied on statistical evidence, arguing that since *Penry* was decided, a "national consensus" had developed against the execution of those with intellectual disabilities. This was established by examining the "consistency in the direction of change" with regard to the 16 states that retained the death penalty but had outlawed its application to the "mentally retarded" since 1989.[18] In an attempt to remain consistent with the *Ford* ruling, the Court left the individual states free to determine what criteria would be used to decide which offenders were in fact "mentally retarded." In accordance with the principles of *Gregg*, the majority argued that the two justifications for capital punishment, retribution and deterrence, were not furthered by the execution of the intellectually disabled. The majority argued the mentally handicapped did not have the ability to perform a fully "calculated" murder worthy of execution because of their mental deficiencies. The Court also mentioned that the exemption of the intellectually disabled from execution would not have an effect on those of full mental capacity, who would be not qualify for the exemption. Finally, it was determined that the "reduced capacity" of defendants with intellectual disabilities left them particularly vulnerable to wrongful convictions, especially because they were easily coerced into giving a false confession.

Justice Scalia, who in his opinions consistently defends the constitutionality of the death penalty, wrote a passionate dissent, joined by Chief Justice Rehnquist and Justice Thomas. Scalia claimed that the majority's decision relied upon "nothing but personal views" and was an example of what he

refers to as Eighth Amendment "death-is-different jurisprudence."[19] He argued in favor of the traditional interpretation of the exemption only for the severely retarded or "idiots," which was in place in 1791. Only these "idiots," he argued, displayed a clear "deficiency in will" and an inability to tell right from wrong significant enough to be exempt from the death penalty. Scalia also disputed the majority's "national consensus" and "evolving standards of decency" arguments, pointing out that only 18 of the 38 states where capital punishment was legal (47 percent) had enacted exemptions for the mentally retarded.[20] The decision, Scalia protested, only added to the long list of impediments limiting the use of the death penalty, none of which existed at the time of the Constitution's ratification. Additionally, Scalia worried that the symptoms of mental retardation can be easily feigned and that those who do so "risk nothing at all."[21]

Despite the controversy that surrounded it, there is no doubt that the *Atkins* decision has had significant effects on the institution of capital punishment. First, the decision immediately affected hundreds of death row inmates who were either able to be exempted from execution altogether or were given new sentencing hearings. According to a Cornell Law School study, of the 3,700 inmates on death row,[22] 234, or about seven percent, had filed *Atkins* claims as of 2009.[23] The success of defendants who have been able to prove their disability depends largely upon the specific procedures employed in each state. For example, the success rate of *Atkins* claims in North Carolina has been about 80 percent, while the success rate in Alabama has been 12 percent.[24] This discrepancy is due to the availability of funding for post-conviction litigation and the different definitions of mental retardation, as well as other factors.[25] As states refine their definitions of mental retardation and procedural restrictions, these factors will continue to have a significant impact on the implementation of *Atkins*.

Though the *Atkins* decision has been largely helpful thus far, the discrepancy between states' different definitions of mental competency and their struggle to create clear-cut criteria has been the biggest roadblock to its implementation. The most relevant example of how the implementation of these criteria can be unclear ironically comes back to the case of Atkins himself. Although Atkins' execution was ruled unconstitutional in the 2002 Supreme Court decision, this was because, at the time, his test results clearly showed that he was "mildly mentally retarded" under the definition that was in place in the State of Virginia. In Virginia, the IQ threshold for a diagnosis of mental retardation was, and still is, a score of 70. When Atkins was tested in 1998 he scored an IQ of 59, well below the threshold.[26] However, the State of Virginia continued their prosecution of Atkins even after the Supreme Court's decision, claiming that he was not truly mentally retarded. In fact, when Atkins was tested again in 2004, two years after the Supreme Court decision, defense experts discovered his IQ had jumped to 74, while prosecutors claimed

it was 76.[27] Dr. Nelson, who tested Atkins in 1998 and 2004, attributed this jump to Atkins' constant exposure to the lawyers that worked on his case and the "intellectual stimulation" that came with his long trial, which included "practicing his reading and writing skills, learning abstract legal concepts, and communicating with professionals."[28]

After these tests were made public, many called for the resentencing of Atkins and felt that the death penalty was now not only constitutional, but also necessary in his case. Doubts arose about the accuracy of both the 1998 and 2004 tests, and many claimed that this was sufficient evidence that intellectual disability could be faked through the manipulation of IQ tests. However, some psychologists claimed that while it may be possible to deliberately score poorly on an IQ test, "it would be very difficult to feign low cognition across time, different settings and multiple examiners."[29] The prosecution argued that Atkins' 1998 tests and diagnosis were tainted because his prior poor performance in school was due to drugs and alcohol, not to a mental deficiency.

The discrepancies in these tests raise important unanswered questions surrounding capital punishment. The Court's decision to give the states discretion in formulating the criteria for implementation led to controversy over who should be responsible for deciding a criminal's competency. Leading up to the mental competency trial, many of those familiar with the *Atkins* case also expressed concern over the objectivity of the jury that was responsible for determining Atkins' mental state, as they were all informed of the full details of the murder. Richard Dieter of the Death Penalty Information Center claimed that this knowledge would "infect" the objectivity of the jury.[30] Referring back to the 2002 *Atkins* decision, Dieter argued that, "The Supreme Court ruled that we should not execute the mentally retarded, it did not say it should be a balancing act with the gruesomeness of the crime."[31]

Following the trial, Atkins' execution date was set once again, this time for December 2, 2005, due to his alleged newly acquired mental competency.[32] As the accuracy of this diagnosis continued to be questioned, Atkins' execution was stayed once more. However, in 2008 Judge Prentis Smiley Jr. received notifications of allegations of substantial prosecutorial misconduct. After a two-day hearing regarding these allegations, Judge Smiley determined that these allegations were, in fact, credible and subsequently commuted Atkins' sentence, replacing it with life imprisonment without possibility of parole, leaving the ultimate question of Atkins' intellectual disability unanswered.[33]

In conclusion, although the question of whether to apply the death penalty to the intellectually disabled is still a complex and difficult one, it is clear that *Atkins* made a substantial leap in protecting this vulnerable group. Despite the ongoing discrepancies between state practices, there is no doubt that fewer intellectually handicapped criminals are being unjustly and pointlessly executed without serving any type of criminal justice function. However, the

Atkins decision and the strengthening of the Eighth Amendment through this line of cases, though celebrated by abolitionists, presents a type of "double-edged sword."[34] If the goal for abolitionists continues to be a nationwide rejection of the death penalty, these types of cases may actually serve to stabilize it as an institution. If these cases continue to eliminate particular moral concerns about the application of the death penalty, abolitionists, through these victories, may simultaneously eliminate the elements of capital punishment most vulnerable to attack. As the Court continues to carve out these important categorical exemptions, it may also undermine "the power of abolitionists' objections to capital punishment by exempting the most powerful 'poster children' of the abolitionist movement."[35] Given the conservative composition of the current Court and wide-spread popular support, it does seem that the death penalty is here to stay for the foreseeable future. For this reason, the Court's categorical exemptions and strengthening of Eighth Amendment protection in order to make the institution more balanced and humane are a move in the right direction.

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