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ATKINS V. VIRGINIA, 122 S.Ct. 2242 (2002)

IMPLICATIONS

DEFINITION OF MENTAL RETARDATION

Though unequivocal on the *inapplicability* of capital punishment to those with mental retardation, the Court deferred to individual states to determine who *qualifies* as such, “We leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.”¹ The Court offered the states only indirect guidance by accepting similar 3-criteria definitions from two relevant professional organisations (*American Association of Mental Retardation* and *American Psychiatric Association*) to define such categorical executions as “truly unusual” and, therefore, proscribed.

*Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.*²

*The 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 18 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.*³

¹ *Atkins v. Virginia*, 122 S.Ct. 2242, 2250 (2002).

² American Association of Mental Retardation definition from Mental Retardation: Definition, Classification, and Systems of Supports p 5 (9th ed. 1992).

³ American Psychiatric Association definition from Diagnostic and Statistical Manual of Mental Disorders p 41 (4th ed. 2000). “Mild” mental retardation is typically used to describe people with an IQ level of 50—55 to approximately 70. *Id.*, at 42—43 [Court’s added emphasis]

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Given this instruction, states are expected to comply in good faith, though already Texas has acted otherwise.⁴ While more specific instruction in the *Atkins* decision would have been preferred, arguably some internal negotiating and “trade-offs” were required among the Justices to secure the margin of victory (6-3).

RECOGNITION OF NATIONAL CONSENSUS

As outlined in the summary document, objective and subjective sources were reviewed to reach the *Atkins* decision. Whether the *subjective* judgement of the Court’s majority dictated how the *objective* sources were chosen and interpreted, or vice versa, it is notable that the threshold has been lowered to prove a national consensus.

In the majority opinion, there was no mention of *jury sentencing decisions* as a relevant objective source of contemporary values of national consensus, whereas formerly such evidence has been necessarily instructive. When considering the relative number of states with prohibitive legislation concerning executions of persons with mental retardation, the 47% margin⁵ was sufficient, though formerly inadequate, to recognise a national consensus.⁶ Specifically downplaying the fact that 47% remains a minority, the Court announced, “It is not so much the number of these States that is significant, but the consistency of the direction of change.”⁷ Moreover, these 18 relevant categorically-exclusive statutes are not long-standing, whereas greater age and interpretative experience was formally required for recognition and consideration.

Furthermore, many of the 18 statutes have conditions attached, serving to diminish the prohibition against executing offenders with mental retardation, and yet these were not formally considered by the *Atkins* majority to detract from their finding of national consensus, though they have been in the past. The margins of passage of the 18 statutes were also accepted as consensus-finding evidence, though such relative legislative voting record consideration has no precedent and might result in relative population size serving as a logically similar (yet unsupportive) measure of consensus. Finally, formally introducing the perspectives of associated professional, religious organisations, the “world community”, and polling data (even if all in a footnote to the decision) also lacks

⁴ In partial reaction to the *Atkins* decision & employing its uncertainty with less-than-good-faith, Penry was recently sentenced to death for the third time. Following the trial, a juror stated that Penry was “faking” his disability (since age 6!), therefore agreeing with Justice Scalia’s fear that “the symptoms of this condition can readily be feigned”.

⁵ 18 retentionist states (sufficiently, if conditionally) opposed to executing those with mental retardation & 38 retentionist states total

⁶ Note that abolitionist states were purposely not included in the calculation.

⁷ *Atkins*, 122 at 2249.

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precedent. Writing in dissent, Justice Scalia revealed the magnitude of the institutionalised reservation to such an extension of relevant consensus-finding evidence,

“Equally irrelevant are the practices of the “world community,” whose notions of justice are (thankfully) not always those of our people.”⁸

RELEVANCE OF INTERNATIONAL LAW

Although being careful not to refer to such data as "dispositive," in footnote twenty-one of the *Atkins* decision, the majority rehabilitated the opinions of "organizations with germane expertise."⁹ The Court highlighted the views of professional and religious

organisations, the "world community," and polling data as relevant evidence of consensus. As acknowledged by Chief Justice Rehnquist's dissent,¹⁰ this development seems to overturn the Court's precedent, which rejects these objective sources as irrelevant.¹¹ Regardless of the apparent significance of this citation in *Atkins*, it remains to be seen in future cases if this will serve as a new binding precedent, though it does indeed indirectly invite further arguments of international law and standards.

This argument, however, is not guaranteed to be successful. Notwithstanding this oblique footnoted reference to international consensus and foreign laws, there was never a word in the text of the opinion specifically on the issue of international law and standards. Though noteworthy, six members of the court seem to have accepted the expansion of the evaluation of evolving standards of decency to include international consensus. Therefore, it is potentially a very important reference, revealing in turn that the European Union's *Amicus* brief attached to *Atkins* was a valuable element in the decision making process.

IMPACT ON JUVENILE DEATH PENALTY

Atkins is a positive decision for juvenile offenders convicted of murder committed at age 16 or 17.¹² The *objective* and *subjective* rationale offered by the Court in support of their *Atkins* holding can be applied almost directly to juvenile offenders. There exist numerous similarities in regard to the number of states statutorily excluding the death penalty for each category. Moreover, there exists abundant professional, religious, international, and

⁸ *Id.* at 2264.

⁹ *Id.* at 2249.

¹⁰ Rehnquist, C.J. argued, "Stanford's reasoning [rejecting international opinion] makes perfectly good sense, and the Court offers no basis to question it. For if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant." (*Id.* at 2254)

¹¹ *Stanford v. Kentucky*, 492 U.S. 361 (1989).

¹² The Court ruled in 1988 that it was unconstitutional to execute those who were younger than 16 at the time of their crimes. *Thompson v. Oklahoma*, 487 U.S. 815 (1988). But the next year, in an earlier appeal by Mr. Stanford, the justices refused to extend that ruling to 16- and 17-year olds, finding no national consensus against such executions (*Stanford v. Kentucky* (1989)).

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public abolitionist consensus on the matter. Finally, there is similar direct overlap on all of the relevant substantive issues (retribution, deterrence, and enhanced risk).

In sum, the *Atkins* reasoning seems to be an important tool to prohibiting the application of capital punishment to juvenile offenders. This question of the argument's extendibility will soon be resolved. A habeas corpus petition on behalf of Kevin N. Stanford¹³ is now before the US Supreme Court, and their decision is expected after their 2002 summer recess.

Objective Sources of Consideration

In footnote eighteen of the *Atkins* majority opinion, the Court explicitly distinguished those with mental retardation from juveniles. When signifying the "consistency of the direction of change," Justice Stevens noted that the list of states barring execution of those with mental retardation had grown by 16 states since the original 1989 *Penry v.*

Lynaugh, 492 U.S. 302, holding.¹⁴ However, with specific reference to juvenile offenders, he said:

*A comparison to Stanford v. Kentucky, in which we held that there was no national consensus prohibiting the execution of juvenile offenders over age 15, is telling. Although we decided Stanford on the same day as Penry, apparently only two state legislatures have raised the threshold age for imposition of the death penalty.*¹⁵

The *Atkins* Court held that 18 states barring the death penalty for persons with mental retardation is sufficient to deduce an evolving national consensus. Despite these statutes' infancy, this recent legislative activity has been in a consistent (if abolitionist) direction and has passed with wide legislative support. Equally sufficient, therefore, should be the 16 states that bar capital punishment for juvenile offenders.¹⁶ With no state legislation backtracking on the juvenile issue since *Stanford* (as the Court notes with regard to the mental retardation issue), this represents just as much of an established norm.¹⁷

The *Stanford-Penry* comparison in footnote eighteen has been labelled "illegitimate" by some abolitionists. Since 1989, the pressing need to confront the statutory guidelines has

¹³ At the age of 17, Stanford robbed, raped, and murdered a female gas station attendant and has lived on death row in Kentucky since 1982.

¹⁴ *Id.* at 2249. *Penry* (decided on the same day as *Stanford* in 1989) found no national consensus against the execution of persons with mental retardation, and it therefore allowed its continuation.)

¹⁵ *Id.* Referring to Montana and Indiana.

¹⁶ Again, as in *Atkins*, the abolitionist states are ignored from the equation.

¹⁷ 42% of states (16 of 38) have statutorily outlawed the execution of juveniles, with an even greater number having done so customarily.

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involved the executions of persons with mental retardation, not juveniles. The same legislative energy has not been applied to the juvenile issue, because juveniles have

generally enjoyed greater statutory protection than persons with mental retardation. Legislative energy is not going to thrive where sufficient protection already exists.¹⁸ While there are exceptions, the 16 states from whom the Court deduced an evolving national consensus on the execution of those with mental retardation all had statutory exclusion of juveniles prior to 1989. At the time *Stanford* was decided, this minority number of states was insufficient to deduce a national consensus, but may be sufficient given the recently-lower threshold defined in *Atkins*.

The *Atkins* decision could have been reached in another manner. In order to similarly exclude those with mental retardation, the Court could have found that the non-death penalty states should also be included in the equation to deduce national consensus. Presumably, however, the defence strategy argued the inapplicability of abolitionist states in reliance on *Stanford*,¹⁹ despite the fact that the inclusion of longer-standing statutes (in the abolitionist states) would have constructed a stronger consensus. The statutory evidence for juveniles is likely stronger than for persons with mental retardation, because the juvenile statutes in retentionist states setting the eligibility age at 18 have generally existed for much longer.

With approximately 82 (as of June 2002) offenders now on death row who committed their crimes at age 16 or 17, the United States is as much out of step with the world on this issue at it was on execution of the retarded.²⁰ Given this fact, the Inter-American Commission on Human Rights (IACHR) is expected to issue a report on *Dominguez v. Nevada* in late 2002, stating that the United States is violating a *jus cogens* norm, which prohibits the death penalty for persons who were under 18 at the time of their offence.²¹ While surely not as a result of this possible IACHR finding, but bolstered by increasingly strong abolitionist support abroad and in its own jurisprudence, it is foreseeable that future US Supreme Court decisions will apply its *Atkins* reasoning to the juvenile question.

¹⁸ That being said, however, in the 2002 legislative season there were 6-7 states considering raising the eligibility age to eighteen.

¹⁹ Which held that the non-death penalty states were irrelevant.

²⁰ Since 1990, only seven countries have reportedly executed juveniles: Iran, Saudi Arabia, Nigeria, the Democratic Republic of Congo (DRC), Yemen, Pakistan and the United States. In the last three years this small number of nations known to have executed child offenders has further declined to only three: the DRC, Iran and the United States.

²¹ *Jus cogen* norms describe such a bare minimum of acceptable behavior that *no* Nation State may derogate from it. It is argued that the overwhelming application of the norm against executing juvenile offenders has rendered it a *jus cogens* norm (others include the prohibitions against genocide, torture, and systematic racial discrimination). Federal courts have wrestled with the relationship between *jus cogens* norms and the US constitution, suggesting that they are at least on an equal par as authority.

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Subjective sources of consideration

The similarities in abolitionist argument concerning juveniles and those with mental retardation extend far beyond the simple fact that 22 states permit the execution of juveniles and 20 states permit the execution of persons with mental retardation. Elsewhere in the law, juveniles are afforded a different status to reflect their diminished moral reasoning abilities, as evidenced by permission requirements for marriage and medical procedures. Furthermore, in recognition of their diminished impulse control, alcohol is forbidden until age 21. The critics of the *Atkins* decision fear the feigning of mental retardation and otherwise future dangerousness, while with respect to juveniles, age is more difficult to fake, and maturity can rehabilitate. The Court's characterisation of persons with mental retardation in *Atkins* shares remarkable similarities with what has been observed and proven about juvenile offenders:

Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.²²

The similar diminished capacity of juveniles is not caused by "impairment," but simply physical immaturity, and, therefore, abolitionist argument increasingly relies upon recent medical evidence. Modern brain scan technology reveals that the juvenile prefrontal cortex does not finish developing until the early 20s. This portion of the brain governs impulsivity, logical reasoning, the ability to foresee consequences of actions, and the ability to understand reactions of others. These findings stand as proof that juveniles are uniquely likely to act on impulse and under the influence of peer pressure, which in turn diminishes their moral culpability.

Given similar deficiencies, the personal culpability of juveniles is similar to that of persons with mental retardation, and, therefore, the penological purposes of *retribution* and *deterrence* are also ill-served by the application of the death penalty to juveniles as a class. In a future decision, the "juvenile" category may word-for-word replace every mention of "mental retardation."

²² *Atkins*, 122 at 2243.

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[T]he lesser culpability of the mentally retarded offender surely does not merit [the death penalty as a] form of retribution.²³

The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioural impairments that make these defendants less morally culpable -- for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses -- that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.²⁴

Enhanced Risk

The last factor mentioned in *Atkins* regarding the “reduced capacity” of persons with mental retardation also affects juveniles; both categories possess the relative inability to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. This in turn enhances both categories’ risk of wrongful execution, due to their relatively deficient characteristics. Manifestation of this enhanced risk for juveniles involves interrogator-coerced false confessions, poor assistance to defence counsel, and their unintended demeanour of remorselessness. *Atkins* refers to the trial “demeanour” of persons with mental retardation as creating an “unwarranted impression of lack of remorse for their crimes.”²⁵ Similarly, juveniles are unable to comprehend what is going on around them in the trial process and will characteristically

have this same demeanour, also likely misleading the jury about remorse.²⁶ This second subjective consideration (following the consideration of penology) was sufficiently noteworthy for the *Atkins* decision to make reference to it, and it is similarly applicable to juveniles as an entire category, thereby supporting the constitutional proscription of juvenile executions.

²³ *Id.* at 2243.

²⁴ *Id.* at 2251.

²⁵ *Id.* at 2252.

²⁶ Napoleon Beazley stands as a classic case of misunderstanding and misinterpretation. While at trial, Napoleon was limited by his developmental level from being able to have sufficient insight into his crime to adequately defend himself. His reduced capacity was in turn interpreted by the jury as remorselessness.