1-1-2008

Disability Advocacy and Atkins

James W. Ellis
University of New Mexico - School of Law

DISABILITY ADVOCACY AND *ATKINS*

*James W. Ellis**

INTRODUCTION

The U.S. Supreme Court's decision in *Atkins v. Virginia*,[1] which prohibited imposition of the death penalty upon defendants with mental retardation, has been widely discussed in the context of capital litigation and Eighth Amendment doctrine.[2] Such analysis is both appropriate and important, because *Atkins* represents a major doctrinal development in the Court's death penalty jurisprudence. But *Atkins* also represents a significant development in disability law.[3] In the decades before *Atkins*, the Court grappled with a number of constitu-

* Henry Weihofen Professor of Law, University of New Mexico. Professor Ellis represented the petitioner in *Atkins* and has represented national disability organizations as amici in a number of cases before the U.S. Supreme Court, including several discussed in this Article. He also served as President of the American Association on Mental Retardation (AAMR), which has recently been renamed the American Association on Intellectual and Developmental Disabilities (AAIDD).

1. 536 U.S. 304 (2002).

2. *See, e.g.*, Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia*: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. RICH. L. REV. 811 (2007); Elizabeth Rapaport, *Straight is the Gate: Capital Clemency in the United States from* Gregg *to* Atkins, 33 N.M. L. REV. 349 (2003); Christopher Slobogin, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 CATH. U. L. REV. 1133 (2005). *See also* Bill Kurtis, Clarence Darrow Keynote Address at the DePaul Law Review Symposium: *Atkins v. Virginia*: Protecting a National Moral Consensus (Mar. 9, 2007), *in* 57 DEPAUL L. REV. 643 (2008); Andrea D. Lyon, *But He Doesn't* Look *Retarded: Challenges to Capital Jury Selection for the Mentally Retarded Client Not Excluded Under* Atkins v. Virginia, 57 DEPAUL L. REV. 701 (2008); Ajitha L. Reddy, *Eugenic Origins of IQ Testing: Implications for Post-*Atkins *Litigation*, 57 DEPAUL L. REV. 667 (2008); Marla Sandys et al., *Taking Account of the "Diminished Capacities of the Retarded": Are Capital Jurors up to the Task?*, 57 DEPAUL L. REV. 679 (2008); Carol S. Steiker & Jordan M. Steiker, Atkins v. Virginia*: Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721 (2008); Bryan Stevenson, Effect of *Atkins* Below the Mason-Dixon Line, Address at the DePaul Law Review Symposium: *Atkins v. Virginia*: Protecting a National Moral Consensus (Mar. 9, 2007), *in* 57 DEPAUL L. REV. 741 (2008). For a discussion of the legislative issues arising in the implementation of *Atkins*, see James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11 (Jan.–Feb. 2003).

3. For example, it provided important doctrinal support for the Court's decision in *Roper v. Simmons*, 543 U.S. 551, 552–53 (2005) (banning the imposition of the death penalty on defendants who were juveniles at the time of their offense). *Atkins* has also been cited in the context of mitigation evidence regarding other forms of mental disability. *See, e.g.*, Tennard v. Dretke, 542 U.S. 274, 287 (2004) (discussing the use of a defendant's low IQ as mitigating evidence).

tional and statutory issues involving citizens with mental disabilities. During this period, the Court's perception of the nature of mental retardation had a dramatic impact on the resolution of the constitutional issues.

This Article examines the correlation between the Court's perception and its resolution of the constitutional issues, most dramatically exhibited in *Atkins*. Part II of this Article briefly examines the history of discrimination against persons with mental retardation.[4] Part III of this Article traces the history of the Court's decisions involving persons with mental retardation, giving special attention to the way in which the Justices' opinions reveal their apparent understanding of mental retardation and the relationship between individuals who have the disability and the law.[5] Finally, Part IV addresses the *Atkins* opinion itself, with emphasis on the Court's understanding of mental retardation.[6]

II. A LEGACY OF DISCRIMINATION AND CONFINEMENT

The mistreatment of individuals with mental retardation is one of the darker chapters in our nation's history. This history is marked by severe restrictions on personal liberty that can be traced to misperceptions, stereotypes, and fears that were prominent at the time. Indeed, five Justices have described our nation's treatment of citizens with mental retardation as "grotesque."[7]

The earliest chapters of that history included, along with fiscal and public safety issues, an admixture of charitable motivations.[8] While individuals with mental retardation were not exactly embraced by their communities, there was a concern that they receive proper care.[9] But, in the late nineteenth and early twentieth centuries, any such altruistic impulse was largely overwhelmed and supplanted by policies reflecting fear and antipathy. There was a widespread belief, often promoted by prominent individuals in the field of mental disability,

4. *See infra* notes 7–13 and accompanying text.

5. *See infra* notes 14–77 and accompanying text.

6. *See infra* notes 78–84 and accompanying text.

7. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 454 (1985) (Stevens, J., concurring); *see id.* at 461 (Marshall, J., concurring in the judgment in part and dissenting in part) (describing the treatment as "a lengthy and tragic history of segregation and discrimination that can only be called grotesque" (internal citation and internal quotation marks omitted)).

8. *See, e.g.*, SAMUEL GRIDLEY HOWE, ON THE CAUSES OF IDIOCY (Arno Press 1972) (1858); EDWARD JARVIS, INSANITY AND IDIOCY IN MASSACHUSETTS: REPORT OF THE COMMISSION ON LUNACY, 1855 (Harvard Univ. Press 1971) (1855); *see also* DAVID GOLLAHER, VOICE FOR THE MAD: THE LIFE OF DOROTHEA DIX 141–82 (1995).

9. *See, e.g.*, JAMES W. TRENT, JR., INVENTING THE FEEBLE MIND: A HISTORY OF MENTAL RETARDATION IN THE UNITED STATES 40–59 (1994).

that persons with mental retardation pose a major threat to society. In part, those with intellectual disabilities were perceived as creating an intolerable drain on society's resources for their care, criminality, and a wide array of other social ills.

The role that anticipated criminality of persons with mental retardation played in this movement is particularly striking. For example, Lewis M. Terman, a prominent leader in the field of mental disability and one of the developers of early intelligence tests, argued the following:

> The feeble-minded . . . [are] by definition a burden rather than an asset, not only economically but still more because of their tendencies to become delinquent or criminal. To provide them with costly instruction for a few years, and then to turn them loose upon society as soon as they are ripe for reproduction and crime, can hardly be accepted as an ultimate solution of the problem. The only effective way to deal with the hopelessly feeble-minded is by permanent custodial care.[10]

With warnings about criminality as a central argument, eugenics advocates had great success in alarming the public and influencing public policy in the early decades of the twentieth century. The public policy goals pursued by this alarmist movement involved eugenic sterilization and lifelong segregation of individuals who had mental retardation.[11] The eugenicists' successes left a morally indefensible legacy of involuntary sterilizations[12] and a public services system dominated by large residential institutions, whose founding purpose and continuing function was to segregate individuals with disabilities from their communities.[13] It was against this backdrop that the Court began its involvement in the lives of individuals with mental retardation.

---

10. LEWIS M. TERMAN, THE INTELLIGENCE OF SCHOOL CHILDREN: HOW CHILDREN DIFFER IN ABILITY, THE USE OF MENTAL TESTS IN SCHOOL GRADING AND THE PROPER EDUCATION OF EXCEPTIONAL CHILDREN 132–33 (1919); *see generally* NICOLE HAHN RAFTER, CREATING BORN CRIMINALS 55–72 (1997).

11. *See, e.g.*, Harry H. Laughlin, *The Eugenical Sterilization of the Feeble-minded*, 31 J. PSYCHO-ASTHENICS 210, 211 (1926) ("In any given case, when a potential source of producing feeble-minded offspring is located, it is the duty, and it should be the purpose of the state to prevent reproduction.").

12. *See generally* EDWIN BLACK, WAR AGAINST THE WEAK: EUGENICS AND AMERICA'S CAMPAIGN TO CREATE A MASTER RACE (2003); DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY (1985).

13. *See* TRENT, JR., *supra* note 9, at 96–130; WOLF WOLFENSBERGER, THE ORIGIN AND NATURE OF OUR INSTITUTIONAL MODELS (1975); David Braddock & Susan L. Parish, *An Institutional History of Disability*, *in* DISABILITY AT THE DAWN OF THE 21ST CENTURY AND THE STATE OF THE STATES 3 (David Braddock ed., 2002).

III. THE U.S. SUPREME COURT'S MENTAL DISABILITY CASES

This Part discusses the Court's major cases involving mental retardation prior to *Atkins*: *Buck v. Bell*,[14] *Jackson v. Indiana*,[15] *Youngblood v. Romeo*,[16] *City of Cleburne v. Cleburne Living Center*,[17] and *Penry v. Lynaugh*.[18]

A. Buck v. Bell

The Court first addressed mental retardation in *Buck v. Bell*.[19] In that well-known case, the Court upheld the involuntary sterilization of Carrie Buck, an inmate at the Virginia State Colony for Epileptics and Feebleminded, rejecting constitutional challenges to Virginia's 1924 eugenic sterilization statute.[20] Although the Court of that era had shown little reticence in striking down state laws in other contexts,[21] the eugenics statute was held to be constitutional.[22] With only one Justice dissenting,[23] the Court rejected challenges based on both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[24]

But the Court's holding was less remarkable than the startling language Justice Holmes used to characterize people with mental retardation. Justice Holmes began by describing Carrie Buck as "a feeble minded white woman" who was "the daughter of a feeble minded mother in the same institution, and the mother of an illegitimate feeble minded child."[25] Holmes then unfavorably contrasted Buck with Americans injured during military service:

> We have seen more than once that the public welfare may call upon *the best citizens* for their lives. It would be strange if it could not call upon *those who already sap the strength of the State* for these lesser

14. *See infra* notes 19–28 and accompanying text.
15. *See infra* notes 29–36 and accompanying text.
16. *See infra* notes 37–51 and accompanying text.
17. *See infra* notes 52–68 and accompanying text.
18. *See infra* notes 69–77 and accompanying text.
19. 274 U.S. 200 (1927). There is a growing body of literature discussing the background and legal reasoning of the *Buck* opinion. *See, e.g.*, HARRY BRUINIUS, BETTER FOR ALL THE WORLD: THE SECRET HISTORY OF FORCED STERILIZATION AND AMERICA'S QUEST FOR RACIAL PURITY 50–77 (2006); J. DAVID SMITH & K. RAY NELSON, THE STERILIZATION OF CARRIE BUCK (1989); Stephen Jay Gould, *Carrie Buck's Daughter*, 2 CONST. COMMENT. 331 (1985).
20. *Buck*, 274 U.S at 207–08.
21. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).
22. *Buck*, 274 U.S at 208.
23. *Id.* (Butler, J., dissenting without an opinion).
24. *Id.* at 205 (majority opinion).
25. *Id.* The factual premise about Buck and her family has been persuasively debunked. *See, e.g.*, Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30 (1985).

> sacrifices, often not felt to be such by those concerned, in order to prevent our being *swamped with incompetence*.[26]

Holmes then followed this confident declaration that persons with mental retardation were invariably a burden on society with an equally confident conclusion that, solely because of their mental disabilities, they were doomed to commit capital crimes:

> It is better for all the world, if instead of waiting *to execute* degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.[27]

The Court's opinion in *Buck* could hardly be clearer in its disparagement of citizens with mental retardation.[28] Its tone is grudging in acknowledging the possibility that they were entitled to anything from society at all, much less any claim to equal citizenship. The Court in *Buck* viewed people with mental retardation in the most negative light imaginable. In the eight decades since *Buck*, the Court has never overruled it.

B. Jackson v. Indiana

The next major case involving an individual with mental retardation came two generations later. During the intervening decades mental retardation professionals completely rejected eugenic sterilization and increasingly debated the service system's focus on confinement and care in large residential institutions.[29]

In *Jackson v. Indiana*, Theon Jackson was accused of two counts of petty robbery (with a combined "take" of nine dollars), but the trial court found him incompetent to stand trial and committed him to an institution until such time as he might regain his competence.[30] In a unanimous opinion written by Justice Blackmun, the Court held that Jackson was entitled to commitment procedures equivalent to those

---

26. *Buck*, 274 U.S. at 207 (emphasis added).

27. *Id.* (emphasis added) (internal citation omitted).

28. It is noteworthy that the opinion of the Virginia Supreme Court of Appeals, while reaching the same conclusion about the constitutionality of the statute, refrained from any similarly incendiary rhetoric. *See* Buck v. Bell, 130 S.E. 516 (Va. 1925).

29. *See* TRENT, JR., *supra* note 13, at 225–68 (1994); Braddock & Parish, *supra* note 13, at 34–41. For a discussion of the role of litigation in advancing those changes, see DAVID J. ROTHMAN & SHEILA M. ROTHMAN, THE WILLOWBROOK WARS (1984). For a view of these developments in a single state, see OUT OF THE DARKNESS AND INTO THE LIGHT: NEBRASKA'S EXPERIENCE WITH MENTAL RETARDATION (Robert L. Schalock & David L. Braddock eds., 2002).

30. 406 U.S. 715, 717, 719 (1972).

ensured by Indiana's law for civil commitment cases and to have "the nature and duration of [his] commitment bear some reasonable relation to the purpose for which the individual is committed."[31]

For purposes of this Article, the most significant aspect of the *Jackson* opinion is the Court's tone in describing Jackson's disability. Jackson was described as "a mentally defective deaf mute with a mental level of a pre-school child."[32] The Court cited a medical report from Jackson's competency hearing that "concluded that Jackson's almost nonexistent communication skill, together with his lack of hearing and his mental deficiency, left him unable to understand the nature of the charges against him or to participate in his defense."[33] Even though the case involved a criminal prosecution, the tone of alarmism and impatience with claims of constitutional rights that dominated Justice Holmes's opinion in *Buck* had been replaced with something more akin to sympathy and solicitude: "The record also fails to establish that Jackson is in need of custodial care or 'detention.' He has been employed at times, and there is no evidence that the care he long received at home has become inadequate."[34] The Court invalidated the Indiana statute, because it "condemn[ed] him in effect to permanent institutionalization without the showing required for commitment or the opportunity for release" afforded to those in the civil system.[35] Rather than expressing disdain for claims of constitutional rights by persons with mental disabilities, the Court appeared to invite more cases that would present opportunities to evaluate those claims.[36]

C. Youngberg v. Romeo

The Court's next consideration of the constitutional rights of those with mental retardation came a decade later in *Youngberg v. Romeo*.[37] In the interim, the Justices had occasion to consider the constitutional claims of an individual said to have mental illness[38] and the statutory rights of a class of individuals confined to a mental retardation institution.[39] The Court was also aware of the substantial body of class ac-

31. *Id.* at 738.
32. *Id.* at 717.
33. *Id.* at 718.
34. *Id.* at 728.
35. *Id.* at 730.
36. *Jackson*, 406 U.S. at 737 ("Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated.").
37. 457 U.S. 307 (1982).
38. O'Connor v. Donaldson, 422 U.S. 563, 564–65 (1975).
39. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 6 (1981).

tion litigation in the lower courts concerning conditions in mental retardation institutions.[40] That litigation had brought to light egregious violations of the most minimal standards of care and human decency in institutions that had been created originally for eugenic segregation.[41]

Unlike earlier class actions, *Romeo* was an individual lawsuit for damages brought on behalf of an individual institutionalized at Pennhurst State School and Hospital, a large residential facility in Pennsylvania.[42] Romeo had argued that he was entitled to compensation for violations of his constitutional rights, including the right to freedom from unnecessary confinement (in the form of physical restraints) and the right to minimally adequate training or habilitation.[43] The Court of Appeals for the Third Circuit had ruled in Romeo's favor,[44] and the Court, with concurring opinions but without dissent, agreed that Romeo was entitled to a new trial, albeit with a substantially narrower definition of his constitutional rights.[45]

Justice Powell, writing for the majority, described the plaintiff in terms that suggested a substantial and incapacitating level of disability: "Respondent Nicholas Romeo is profoundly retarded. Although 33 years old, he has the mental capacity of an 18-month-old child, with an I.Q. between 8 and 10. He cannot talk and lacks the most basic self-care skills."[46] The Court emphasized Romeo's mother's inability to care for him at home[47] and appeared to accept as indisputable that Romeo was incapable of living outside of an institution like Pennhurst.[48] The Court focused on the potential harm that an individual could suffer because of mistreatment in an institution.[49]

---

40. *See, e.g.*, Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, and rev'd in part*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); N.Y. State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973); *see generally* ROTHMAN & ROTHMAN, *supra* note 29.

41. *See generally* David J. Rothman & Sheila M. Rothman, *The Litigator as Reformer*, *in* MENTAL RETARDATION IN AMERICA: A HISTORICAL READER 445–65 (Steven Noll & James W. Trent, Jr. eds., 2004).

42. *Romeo*, 457 U.S. at 310–11.

43. *Id.* at 309.

44. Romeo v. Youngberg, 644 F.2d 147, 162–63 (3d Cir. 1980) (en banc).

45. *Romeo*, 457 U.S. at 324–25.

46. *Id.* at 309.

47. *Id.*

48. *Id.* The Court's assumption that Romeo could not live in the community was factually incorrect. Nicholas Romeo was living successfully in a group home in Philadelphia within a few years of the Court's decision. John Woestendiek, *The Deinstitutionalization of Nicholas Romeo*, INQUIRER: THE PHILA. INQUIRER MAG., May 27, 1984, at 18.

49. The Court's understanding of this peril was almost certainly informed by its earlier consideration of the class action from the same institution in *Pennhurst State School and Hospital v. Halderman*:

The *Romeo* opinion portrayed an individual with very substantial limitations in his functioning as a potential victim of mistreatment by a state institution. It is noteworthy that the Court explicitly held that neither the lawfulness of his commitment nor, implicitly, the severity of his intellectual disability prevented enforcement of liberty "interests that involuntary commitment proceedings do not extinguish."[50] Justice Blackmun's concurring opinion, joined by Justices Brennan and O'Connor, went even further in recognizing that the facility may have violated the constitutional rights of its inmates by failing to prevent the atrophy of skills caused by institutionalization.[51]

D. City of Cleburne v. Cleburne Living Center

The Court's next major ruling involving persons with mental retardation came three terms later in *City of Cleburne v. Cleburne Living Center*.[52] The plaintiff brought an equal protection challenge against a city ordinance that effectively excluded group homes for persons with mental retardation from substantial areas of the city.[53] The Court of Appeals for the Fifth Circuit invalidated the ordinance and held that individuals with mental retardation constituted a protected class entitled to intermediate scrutiny of laws alleged to discriminate against the class.[54] The Court rejected the Fifth Circuit's conclusion that mental retardation was a condition that appropriately triggered intermediate scrutiny but, while purporting to employ a rational basis standard, overturned the city's exclusion of the group home.[55]

Justice White's majority opinion rejected the intermediate scrutiny standard:

> [The District Court's] findings of fact are undisputed: Conditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the "habilitation" of the retarded. Indeed, the court found that the physical, intellectual, and emotional skills of some residents have deteriorated at Pennhurst.

451 U.S. 1, 7 (1981). The Court had also had occasion to express skepticism about the conditions at an institution for the treatment of mental illness. *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 567, 569 ("The evidence showed that Donaldson's confinement was a simple regime of enforced custodial care, not a program designed to alleviate or cure his supposed illness.").

50. *Romeo*, 457 U.S. at 315.

51. *Id.* at 329 (Blackmun, J., concurring) ("[If] respondent possessed certain basic self-care skills when he entered the institution, and was sufficiently educable that he could have maintained those skills with a certain degree of training, then I would be prepared to listen seriously to an argument that petitioners were constitutionally required to provide that training . . . .").

52. 473 U.S. 432 (1985).

53. *Id.* at 436–37.

54. Cleburne Living Ctr., Inc. v. City of Cleburne, 726 F.2d 191, 193 (5th Cir. 1984).

55. *Cleburne*, 473 U.S. at 446, 450.

> [W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.[56]

Justice White also noted several attributes of individuals with mental retardation that, in the majority's opinion, made intermediate scrutiny inappropriate, including differences within the class of persons who have mental retardation.[57] Individuals with mental retardation are "a large and diversified group," who are not "all cut from the same pattern: as the testimony in this record indicates, they range from those whose disability is not immediately evident to those who must be constantly cared for."[58]

The second reason offered by the majority was the existence of benevolent and assistive legislation:

> [T]he distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary.[59]

The Court stated that this legislation "reflects the real and undeniable differences between the retarded and others,"[60] in particular, "that those who are mentally retarded have a reduced ability to cope with and function in the everyday world."[61]

Justice Marshall's concurring and dissenting opinion, joined by Justices Brennan and Blackmun, was even more emphatic in the sympathy it evidenced for those with mental retardation.[62] The opinion detailed the nation's history of eugenic sterilization, segregation, and denial of basic civil liberties and concluded that Cleburne's ordinance and laws like it are a legacy of that earlier history and should be subjected to more than minimal judicial scrutiny.[63]

Perhaps the clearest indication of the evolution of the Court's perception of mental retardation was the Court's unanimous decision to overturn the exclusion of the group home by the city. The Court be-

---

56. *Id.* at 441–42.
57. *Id.* at 442.
58. *Id.*
59. *Id.* at 443.
60. *Id.* at 444.
61. *Cleburne*, 473 U.S. at 442.
62. *Id.* at 455–78 (Marshall, J., concurring in the judgment in part and dissenting in part).
63. *Id.*

gan by acknowledging that persons with mental retardation "as a group are indeed different from others not sharing their misfortune" but determined that the motive of the city was to acquiesce to objections by the home's neighbors.[64] Noting that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding are not permissible bases" for excluding the group home.[65] The Court observed that, while "'[p]rivate biases may be outside the reach of the law . . . the law cannot, directly or indirectly, give them effect.'"[66] The Court's opinion in *Cleburne*, although largely disappointing to advocates for individuals with mental retardation,[67] clearly reflected an evolving understanding of the disability that bears almost no resemblance to the views expressed in *Buck*.[68]

E. Penry v. Lynaugh

It was against this backdrop that the Court first considered mental retardation in the context of capital punishment. In *Penry v. Lynaugh*, the Court was asked to declare the death penalty unconstitutional for offenders with mental retardation.[69] Justice O'Connor's opinion for the Court rejected the argument that the Eighth Amendment prohibits such executions, but the Court vacated Penry's death sentence on the grounds that the sentencing jury had been given an inadequate opportunity to consider the mitigating significance of his mental disability.[70] In the Court's view, jurors may have concluded that Penry

64. *Id.* at 448 (majority opinion).

65. *Id.*

66. *Id.* (alterations in original) (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

67. *See, e.g.*, MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 114–20 (1990); 2 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 7.22 (1st ed. 1989); James W. Ellis, *On the "Usefulness" of Suspect Classifications*, 3 CONST. COMMENT. 375 (1986). Advocates' disappointment about *Cleburne*'s failure to provide more generalized constitutional protection for people with mental retardation was compounded when, in *Heller v. Doe*, the Court failed to require civil commitment procedures comparable to those afforded to individuals with mental illness. 509 U.S. 312, 314–15 (1993).

68. *See supra* notes 19–28 and accompanying text. *Cleburne* was the first of the constitutional cases in this series in which the Court received extensive amicus curiae briefing from organizations in the field of mental retardation.

69. 492 U.S. 302, 307 (1989).

70. *Id.* at 340. The *Penry* decision involved two separate five-Justice coalitions. Justice O'Connor was joined by Justices Brennan, Marshall, Blackmun, and Stevens in holding that Penry was entitled to a new sentencing procedure. *Id.* at 302. She was joined by Chief Justice Rehnquist and Justices White, Scalia, and Kennedy in rejecting the claim for categorical exclusion of defendants with mental retardation from the death penalty. *Id.* The latter majority's rejection of the Eighth Amendment claim rested, in large part, on the Court's perception that there was, at that time, inadequate evidence of a national consensus against the practice. *Id.* at 333–35. The subsequent adoption of legislation by sixteen additional states banning the death

was "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct," given the inadequate mitigation instruction and that Penry was mentally retarded.[71] Justice O'Connor then observed that "Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future."[72]

On whether the Eighth Amendment prohibits the execution of individuals with mental retardation, Justice O'Connor rejected the "mental age" analogy, noting that comparisons between adults with mental retardation and mentally typical children were imprecise.[73] Addressing intellectual impairment directly, the Court noted "that mental retardation has long been regarded as a factor that may diminish an individual's culpability for a criminal act."[74] But Justice O'Connor added the following:

> On the record before the Court today, however, I cannot conclude that all mentally retarded people of Penry's ability—by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility—inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty. . . . In addition to the varying degrees of mental retardation, the consequences of a retarded person's mental impairment, including the deficits in his or her adaptive behavior, may be ameliorated through education and habilitation.[75]

The concurring and dissenting opinion of Justices Brennan and Marshall, while agreeing with Justice O'Connor's basic factual description, disagreed as to its application to the Eighth Amendment issue: "I cannot agree that the undeniable fact that mentally retarded persons

---

penalty for defendants with mental retardation was a central feature of the *Atkins* Court's rationale for overturning of that portion of *Penry*. Atkins v. Virginia, 536 U.S. 304, 313–16 (2002).

71. *Penry*, 492 U.S. at 322.

72. *Id.* at 324. In later cases, the Court insisted that the state could not evade its duty to offer a full opportunity for considering the mitigating effect of mental retardation evidence or of evidence of other mental impairments. Penry v. Johnson (*Penry II*), 532 U.S. 782, 800 (2001); Tennard v. Dretke, 542 U.S. 274, 287 (2004). On the relevant attributes of individuals, like Tennard, with mental impairments that may not satisfy the definition of mental retardation, see THE FORGOTTEN GENERATION: THE STATUS AND CHALLENGES OF ADULTS WITH MILD COGNITIVE LIMITATIONS (Alexander J. Tymchuk et al. eds., 2001).

73. *Penry*, 492 U.S. at 339–40. It is perhaps noteworthy that the *Romeo* Court, in characterizing the level of disability experienced by Nicholas Romeo, described him in terms of his supposed mental age. "Although 33 years old, he has the mental capacity of an 18-month-old child, with an I.Q. between 8 and 10." Youngberg v. Romeo, 457 U.S. 307, 309 (1982). *See supra* notes 30 and 48 and accompanying text.

74. *Penry*, 492 U.S. at 337.

75. *Id.* at 338 (internal quotation marks omitted).

have diverse capacities and life experiences is of significance" to the constitutionality of the death penalty for individuals in the group.[76] Justice Brennan's opinion concluded that every individual with the disability was sufficiently impaired to make the death penalty constitutionally inappropriate.[77]

IV. *ATKINS V. VIRGINIA*

As noted above,[78] the principal change that occurred between the Court's consideration of *Penry* and *Atkins* was the enactment of statutory prohibitions on executing defendants with mental retardation in sixteen additional states. But the *Atkins* Court's opinion, authored by Justice Stevens, supplemented this additional evidence of a national consensus with the Court's own view of the culpability issue: "Our independent evaluation of the issue reveals no reason to disagree with the judgment of the legislatures that have recently addressed the matter and concluded that death is not a suitable punishment for a mentally retarded criminal."[79] Further, although the Court acknowledged that the impairment caused by mental retardation is not total and that individuals with the disability are not identical to one another, it concluded that there were relevant attributes shared by all members of the class:

> 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.[80]

---

76. *Id.* at 345 (internal quotation marks omitted) (Brennan, J., concurring in part and dissenting in part).

77. *Id.* at 348. Justice Stevens, who would later author the Court's opinion in *Atkins*, and Justice Blackmun reached the same conclusion. *Id.* at 350 (Stevens, J., concurring in part and dissenting in part).

78. *See supra* note 70 and accompanying text.

79. Atkins v. Virginia, 536 U.S. 304, 321 (2002) (internal quotation marks omitted).

80. *Id.* at 318. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, objected to this conclusion:

> Is there an established correlation between mental acuity and the ability to conform one's conduct to the law in such a rudimentary matter as murder? Are the mentally retarded really more disposed (and hence more likely) to commit willfully cruel and serious crime than others? In my experience, the opposite is true: being childlike generally suggests innocence rather than brutality.

Id. at 350 (Scalia, J., dissenting).

The Court then went out of its way to deny that mental retardation rendered individuals prone to criminality but noted that shared attributes made the death penalty unacceptable:

> 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. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.[81]

Justice Stevens's opinion also raised an issue not previously discussed in the Court's mental disability decisions: the likelihood that defendants who have mental retardation are at increased risk of wrongful conviction.[82]

> The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. . . . Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. . . . Mentally retarded defendants in the aggregate face a special risk of wrongful execution.[83]

This language clearly shows that the majority's concern about the potential for a miscarriage of justice was influenced by its increased understanding of the realities involved in capital prosecutions of individuals with mental retardation.

The Court's understanding of the realities of the lives of individuals with disabilities is a work in progress, but *Atkins* stands in contrast to other decisions in which the interests of persons with disabilities were treated with considerably less sympathy.[84] When viewed in light of the Court cases preceding it, *Atkins* represents significant progress in the Court's recognition of the realities of mental disability.

---

81. *Id.* at 318 (majority opinion).

82. *Id.* at 320–21.

83. *Id.* (internal quotation marks and citations omitted). The Court appeared to be alluding to the wrongful convictions of Earl Washington, Jr. in Virginia and Anthony Porter in Illinois. *See generally* MARGARET EDDS, AN EXPENDABLE MAN: THE NEAR-EXECUTION OF EARL WASHINGTON, JR. (2003); FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 160–61 (2003).

84. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (invalidating Title I of the Americans with Disabilities Act as applied to state defendants). *See generally* RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT (2005).

V. CONCLUSION

The U.S. Supreme Court's opinion in *Atkins* cannot be fully understood without considering its place in the development of mental disability law. In the preceding three decades, the Court had considered a number of cases involving individuals with mental retardation. The Court's decisions have not all been favorable to the rights of people with disabilities, nor have the characterizations of individuals with mental retardation been completely consistent. However, it is clear that the Court's understanding of mental retardation has moved substantially beyond the hostile mindset so clearly evidenced in *Buck v. Bell.*