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# DISABILITY ADVOCACY AND THE DEATH PENALTY: THE ROAD FROM *PENRY* TO *ATKINS*

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The Supreme Court's decision in *Atkins v. Virginia*,<sup>1</sup> holding that individuals with mental retardation are not eligible for the death penalty, has many implications, a number of which are explored in articles in this Symposium.<sup>2</sup> This article will focus on *Atkins* as an example of the Court's methodology in interpreting the Eighth Amendment, with its unique juxtaposition of legislative action and constitutional text. It will also explore the relationship of advocacy interests, in this case professional and voluntary organizations in the disability community, with both legislatures and the Court.<sup>3</sup>

## I. MENTAL RETARDATION AND THE DEATH PENALTY: THE CHRONOLOGY

The possibility that individuals with mental retardation might face capital punishment came into the nation's consciousness relatively recently, and thus the history of this issue is relatively brief. The first case that received national attention was the proposed execution of Jerome Bowden, an individual who had mental retardation, in Georgia in 1986. As a result of protests against the prospect that a person with mental retardation might be executed, the state Board of Pardons and Paroles granted a stay of execution to permit a clinical evaluation. That evaluation revealed Bowden to be a person with mental retardation, but despite this finding, the Board lifted the stay of execution, and he was executed the next day.<sup>4</sup>

The popular revulsion at this spectacle in the State of Georgia moved the state legislature to enact the nation's first statute prohibiting the execution of defendants with mental retardation.<sup>5</sup> Less noticed, but at least equally significant, was the awakening of the disability community to the possibility that individuals with mental retardation might be subject to the death penalty. The American Association on Mental Retardation (AAMR), the largest professional organization in the field, adopted a resolution opposing such executions in January 1988.<sup>6</sup> Within months, similar resolutions had been endorsed by the Association for Retarded Citizens (since renamed the Arc) and the American Bar Association.

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

2. *Beyond Atkins: A Symposium on the Implications of Atkins v. Virginia*, 33 N.M. L. REV. 173 (2003).

3. This article will not address implementation issues left open by the Court's opinion in *Atkins*, such as the definition of mental retardation and the procedures for adjudicating individual cases. Those issues are explored in James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY LAW REPORTER 11 (2003).

4. See Jim Galloway & Tracy Thompson, *Bowden Executed Day after "Mildly Retarded" Ruling*, ATLANTA CONST., June 25, 1986, at A1.

5. GA. CODE ANN. § 17-7-131(j) (Supp. 1988).

6. Brief of Amici Curiae American Association on Mental Retardation et al. at 19, *Penry v. Lynaugh*, 492 U.S. 302 (1989) (No. 87-6177) [hereinafter AAMR Brief for *Penry*].

It was at this juncture that the U.S. Supreme Court first addressed the issue. The Court granted certiorari in *Penry v. Lynaugh*<sup>7</sup> on the question whether "it [is] cruel and unusual punishment under the Eighth Amendment to execute a mentally retarded person."<sup>8</sup> The Court was presented with three principal arguments on the Eighth Amendment issue: (1) the execution of people with mental retardation had been prohibited at common law; (2) the culpability of defendants with mental retardation was disproportionate to the penalty of death; and (3) a national consensus opposed the execution of people with mental retardation.<sup>9</sup> The Court declined to find an Eighth Amendment violation based on the first two arguments, although Justice O'Connor's opinion indicated that she viewed the culpability argument as presenting a relatively close question.<sup>10</sup> The reason for rejecting the consensus issue was of a different character.

The Court began by reviewing its past decisions that had invalidated capital punishment laws because they violated a contemporary consensus of the American people.<sup>11</sup> The opinion then notes that at the time of the *Penry* briefing and argument, the evidence of the claimed consensus was limited to the resolutions of professional organizations, a modest amount of political polling results, and enactments by the Congress and the legislature of only one state (Georgia).<sup>12</sup> The Court found this to be an inadequate demonstration of a national consensus.

The 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. But at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment.<sup>13</sup>

Whether this passage was intended by the Court in 1989 as an indirect invitation to return with another case presenting the issue if further evidence of a national

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7. 832 F.2d 915 (5th Cir. 1987) *cert. granted*, 487 U.S. 1233 (1988) (No. 87-6177).

8. *Penry*, 492 U.S. at 313. The Court also had before it the issue of whether the jury instructions in the penalty phase of *Penry*'s trial had been given adequate opportunity to evaluate the mitigating significance of the defendant's mental retardation. The Court granted relief on this issue and remanded the case to the Texas courts for resentencing or retrial. *Id.* at 328, 340.

9. See AAMR Brief for *Penry*, *supra* note 6, at 9, 13, 17-18.

10. Four Justices concluded that the death penalty was disproportionate for all defendants with mental retardation. *Penry*, 492 U.S. at 343-44 (Brennan & Marshall, J.J., concurring in part and dissenting in part); *Id.* at 350 (Stevens & Blackmun, J.J., concurring in part and dissenting in part). Justice O'Connor noted that mental retardation has long been widely recognized as a factor mitigating against imposing the death penalty but was unwilling to base categorical relief on the presence of the condition.

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.

*Id.* at 338.

11. See discussion *infra* part III.

12. Between the date of the argument and the issuance of the Court's opinion, the state of Maryland passed a statute banning the execution of people with mental retardation. The printed version of the Court's opinion was modified to include the Maryland statute.

13. *Penry*, 492 U.S. at 335.

consensus became available or not, some people in the disability community read it that way.<sup>14</sup>

In 1990, Kentucky and Tennessee became the first states to consider the issue of mental retardation and the death penalty since the Court's decision in *Penry*, and each enacted a prohibition on the practice.<sup>15</sup> A decade later, a total of thirteen states had enacted statutes protecting individuals with mental retardation from the death penalty. At that point, the Supreme Court granted a writ of certiorari in the case of *McCarver v. North Carolina*,<sup>16</sup> a direct appeal from the state supreme court, which raised the question, "Does significant objective evidence demonstrate that national standards have evolved such that executing [the] mentally retarded [] would violate [the] Eighth Amendment prohibition against cruel and unusual punishment."<sup>17</sup> The briefs of Petitioner and supporting amici curiae were filed with the Court, but, prior to the filing of Respondent's brief, the North Carolina legislature enacted a statute preventing the execution of individuals with mental retardation. Upon learning of the passage of this statute (with its explicit provision for retrospective relief for individuals with mental retardation currently under death sentences), the Court dismissed the writ as improvidently granted.<sup>18</sup> Shortly thereafter, the Court granted certiorari in another case presenting the same issue, *Atkins v. Virginia*,<sup>19</sup> which was also on direct appeal. In the six months between the granting of the petition in *McCarver* and the grant in *Atkins*, five more states (Florida, Connecticut, Missouri, Arizona, and North Carolina) had enacted similar statutes.

On June 20, 2002, the Court issued its opinion in *Atkins*. A majority, consisting of six Justices including Justices O'Connor and Kennedy who had rejected a categorical ban in *Penry*,<sup>20</sup> held that the Eighth Amendment prohibited the execution of any individual with mental retardation.

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. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment

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14. I do not mean to suggest that influencing the Supreme Court was the principal (or even a particularly prominent) motivation for the advocacy efforts that followed in the states. In each state that considered enacting legislation over the next dozen years, the focus of the debate was on what the law should be in that state, and, in particular, whether people with mental retardation should be subject to *that state's* death penalty.

15. *Atkins*, 536 U.S. at 314 n.12 (providing citations to the laws in each of the states).

16. 548 S.E.2d 522 (N.C. 2001), *cert. granted*, 532 U.S. 941 (2001) (No. 00-8727).

17. 532 U.S. 941 (2001).

18. *McCarver v. North Carolina*, 533 U.S. 975 (2001).

19. 533 U.S. 976 (2001). Upon a motion from the organizations and individuals who had filed amicus curiae briefs in *McCarver*, those briefs were accepted by the Court as if they had been filed in support of Petitioner in *Atkins*. *Atkins v. Virginia*, 534 U.S. 1053 (2001). Thus, when the Court refers to amicus briefs in its opinion, its reference is to briefs that were filed in *McCarver*. *See, e.g., Atkins*, 536 U.S. at 316 n.21.

20. Justices O'Connor and Kennedy were joined by Justice Stevens, who had dissented on the Eighth Amendment issue in *Penry*, 492 U.S. at 349, and Justices Souter, Ginsburg, and Breyer, who had joined the Court since 1989.

is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender.<sup>21</sup>

The issue to be addressed is the analysis of what happened in the thirteen years between *Penry* and *Atkins* that altered the Court's interpretation of the Eighth Amendment.

## II. STATE LEGISLATION AND THE ROLE OF DISABILITY ADVOCATES

Public sentiment on the issue of mental retardation and the death penalty remained largely unchanged during the period between *Penry* and *Atkins*. As the *Penry* opinion noted, the handful of public opinion surveys available in 1989 clearly indicated that a substantial majority of Americans opposed executing defendants with mental retardation.<sup>22</sup> Over the next thirteen years, an abundance of additional surveys were taken on the subject, both from national samplings and also from individual states, and all produced similar results.<sup>23</sup> But agreement by the public with an abstract proposition of public policy does not automatically result in the enactment of legislation. The translation of public sentiment into public laws requires, above all, commitment of time and effort by advocates in the legislative arena.

The disability community did not accept the Supreme Court's opinion in *Penry* as the final word on the subject. Indeed, the publicity surrounding the Court case raised the visibility of the issue to disability advocates at the state level. In state after state, those advocates made death penalty bills a top priority for their legislative efforts.<sup>24</sup>

These advocacy groups were already well known to legislators.<sup>25</sup> On a wide array of issues, progress for people with mental retardation has been initiated and vigorously pursued by organizations composed largely of parents and other family members of individuals with intellectual disabilities.<sup>26</sup> These groups have dedicated themselves to such measures as special education opportunities and community alternatives to residential institutional placement.<sup>27</sup> Foremost among these

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21. *Atkins*, 536 U.S. at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

22. 492 U.S. at 334-35.

23. All of the publicly available polling results are collected in Appendix B to the AAMR amicus brief submitted in *McCarver*.

24. Not surprisingly, there was also considerable activity in the courts on the issue. See, e.g., *Fleming v. Zant*, 386 S.E.2d 339 (Ga. 1989) (holding that the execution of defendants with mental retardation violated the State Constitution); *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001) (same). But the primary arena for consideration of the issue was state legislatures.

25. Although many legislative efforts begin with a public relations campaign in order to mobilize public opinion in support of a proposed bill, others proceed directly to the legislative arena. ALAN ROSENTHAL, *THE THIRD HOUSE: LOBBYISTS AND LOBBYING IN THE STATES* 171-77 (2d ed. 2001). In no state was there a public relations effort in advance of the legislature's consideration of this issue.

26. The success of the efforts of such advocates has been noted by the Supreme Court. See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 445 (1985).

27. See, e.g., Anne Farber & Kay Marcel, *Parent Power: Change Through Grassroots Networking*, in *CREATING INDIVIDUAL SUPPORTS FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES* 373 (Valerie J. Bradley et al. eds., 1994); David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, L. & CONTEMP. PROBS., Winter 1985, at 63, 68-69; Frederick J. Weintraub & Alan R. Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037, 1042-44 (1972).

organizations has been the Arc, which operates both at the national level and also through state and local chapters.<sup>28</sup>

Often in alliance with other disability organizations (such as local chapters of AAMR, United Cerebral Palsy, and state Developmental Disabilities Planning Councils), Arc volunteers became the principal lobbyists in support of state legislation exempting people with mental retardation from the death penalty.<sup>29</sup> This was particularly crucial, given their expertise concerning the nature of the disability and the credibility they had established with legislators as a reliable, nonpartisan source of information about the condition experienced by their sons and daughters.<sup>30</sup>

Equally important was the effort's emphasis on the nature of mental retardation, rather than the more general debate about the desirability of the death penalty. Nowhere did the argument take the form of questioning the death penalty, or contending that the scope of the particular state's death penalty was excessively broad. Rather, the discussion focused on the nature of the disability that defendants with mental retardation had, and the advocates' contention that death was a disproportionate penalty for individuals who have lived with such limitations. Having the terms of legislative debate center on the culpability of individuals with mental retardation, rather than on the offenses with which they might be charged, was essential to the success of the effort, and disability advocates had a unique ability to maintain that focus. Given the general political unpopularity of criminal justice proposals that favored defendants,<sup>31</sup> the accomplishment of these advocates is all the more remarkable.

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28. See generally JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* 186 (1993). The Arc's website address is <http://www.thearc.org>.

29. In a number of states, the efforts of disability advocates were also supported by other groups whose principal concern was the criminal justice system or the death penalty. These included the local chapters of the ACLU, National Association of Criminal Defense Lawyers, state coalitions in opposition to the death penalty, and religious organizations. But in every state, it was the disability advocates who bore the brunt of proposing and securing enactment of the legislation.

30. But it is noteworthy that in lobbying for protection from the death penalty, Arc volunteers and other disability advocates were *not*, in fact, arguing on behalf of their own family members whose condition initially brought them into the legislative arena. The parents who had founded the Arc, and those who continued its leadership, dedicated themselves to the work in order to better the lives of their children: to get them into public schools, to get them decent special education, to construct quality community living facilities for them, etc. This commitment to the improvement of the lives of their children is both selfless in its dedication to their welfare and, at the same time, single-minded in pursuit of their individual interests. Despite the fact that none of the leaders of the Arc in any state has a son or daughter who has faced a capital prosecution, these leaders made the enactment of protection from the death penalty a high legislative priority. The fact that they did so, devoting to this task limited resources and political capital to a goal that would not benefit *their* children, reveals the moral imperative that these leaders ascribed to the potential that *any* individual with mental retardation might face the possibility of a death sentence. Indeed, for an organization that emphasizes the image of people with mental retardation as full, responsible citizens in society, pursuing an issue that calls attention to even a small minority of disabled individuals as criminal defendants is even more problematic.

31. *Atkins*, 536 U.S. at 315-16:

Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons . . . provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.

### III. LEGISLATURES AND THE EIGHTH AMENDMENT

The *Atkins* decision also illustrates the unique relationship between state legislatures and the Supreme Court under the Eighth Amendment. At first glance, it might seem incongruous for the Court to find an enactment of a state legislature to be unconstitutional because of the actions of the legislatures of *other* states. But while the Court, in interpreting other parts of the Constitution, occasionally observes that a particular state's statute is unique or unusual,<sup>32</sup> it is only in the context of the Punishments Clause of the Eighth Amendment that such comparisons are given doctrinal significance.

This unique feature of Eighth Amendment jurisprudence derives, of course, from the text's prohibition on the infliction of "cruel and unusual punishments." Having made the judgment that the amendment does more than just outlaw those punishments, such as drawing and quartering, that were unacceptable at the time of its adoption,<sup>33</sup> the Court needed a methodology for determining which punishments have become unacceptable through the "evolving standards of decency that mark the progress of a maturing society."<sup>34</sup>

In a series of cases in recent decades, the Court has invalidated state laws, particularly involving capital punishment, at least in part, because they represent a practice that is no longer accepted by the nation as a whole.<sup>35</sup> These adjudications, which the Court has carefully circumscribed, have two practical consequences. First, they serve a very limited modernizing function, so that the Punishments Clause is not restricted to a mere antiquarian search for remnants (or revivals) of punishments that had been deemed unacceptable in the late eighteenth century. Second, they offer a modicum of nationalization,<sup>36</sup> providing a check against isolated states that would impose punishments that are unacceptable in other areas of the country.<sup>37</sup>

But since it is committed to limiting judicial oversight of state legislative policy choices and concerned that its cases interpreting the Clause manifest both stability

32. See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102, 122-23 n.13 (1996) (procedural due process); *Maine v. Taylor*, 477 U.S. 131, 151 n.22 (1986) (dormant commerce).

33. This conclusion is consistent with the text of the Amendment. Had its framers only intended to outlaw punishments that were unacceptable at the time, they could have employed much more specific language. The selection of the more general language found in the Clause suggests an openness to adaptation to changing times. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 13-14 (1980).

34. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (opinion of Warren, C.J.).

35. See, e.g., *Coker v. Georgia*, 433 U.S. 584 (1977); *Enmund v. Florida*, 458 U.S. 782 (1982); *Thompson v. Oklahoma*, 487 U.S. 815 (1988). The laws of other states also serve a much more limited function in determining whether a non-capital punishment challenged under the Eighth Amendment is disproportionate to the offense the defendant has committed. See *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part and concurring in the judgment); *Ewing v. California*, 123 S. Ct. 1179, 1187 (2003) (O'Connor, J., plurality opinion); *id.* at 1194 (Breyer, J., dissenting).

36. This modest nationalization must be understood in the context of the Court's continued emphasis on the federalism-driven principle that states have considerable latitude in adopting and implementing their own public policies concerning punishment for crimes. See, e.g., *Ewing*, 123 S. Ct. at 1187 ("Our traditional deference to legislative policy finds a corollary in the principle that the Constitution 'does not mandate adoption of any one penological theory.'").

37. For example, the Court in *Atkins* noted that "even among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided *Penry*." 536 U.S. at 316. The Court identified the states as Alabama, Texas, Louisiana, South Carolina, and Virginia. *Id.* at 316 n.20. See also *Coker*, 433 U.S. at 595-96 (identifying Georgia as the only state that still imposed the death penalty for rape).

and accuracy in discerning contemporary standards, the Court has been particularly cautious in ascertaining whether a constitutionally adequate consensus exists. As exemplified in *Penry*, the Justices have resisted arguments based solely on public opinion surveys or other evidence that does not include legislative enactments, particularly by state legislatures.

The Court has not elaborated on all the reasons for this focus on state enactments, but some of its features are illustrated in the Court's decisions, including *Atkins*. These cases make clear that the consensus analysis under the Punishments Clause cannot be reduced to a simplistic formula.

What function do the state enactments serve in interpreting the Eighth Amendment? Obviously, it cannot be as a directly quantified majoritarian surrogate for the American electorate. If that were the case, a statute enacted by Congress (which represents the American people) to prohibit a punishment under federal law would be sufficient to define such a penalty as violative of the Eighth Amendment, and thus preclude its imposition by any state. The Supreme Court has repeatedly rejected that conclusion.<sup>38</sup> Similarly, if the function of legislative enactments were as direct reflections of the country's voters, the size of an enacting state's population would certainly matter. And yet there is no suggestion in the Court's opinions that laws passed by the representatives of voters in large states, like California or Texas, are to be given greater weight than enactments in Wyoming or North Dakota.<sup>39</sup> Nor do the decisions offer any support for a conclusion that the states are being counted as integral (and fungible) sovereigns in the federal system, which is the function they serve in the ratification process for amendments under Article V of the Constitution.

This seeming ambiguity of purpose became an issue in *Atkins*. The state of Virginia and its supporting amici grounded their central argument on the contention that the state enactments were insufficiently numerous. This argument was echoed in the opinions of the three dissenting Justices.<sup>40</sup> Indeed, one of the state's supporting amici referred disparagingly to the entire enterprise as a matter of "[c]ounting noses among the state legislatures."<sup>41</sup> But this argument misperceived the role of statutory enactments in ascertaining a national consensus about punishments. The Court had never suggested that determining national sentiment about an Eighth Amendment issue was simply a matter of tallying up the total of the bills passed by state legislatures. There is nothing in the Court's opinions to suggest

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38. *Stanford v. Kentucky*, 492 U.S. 361, 372-73 (1989) (rejecting the contention that the minimum age of 18 under the Federal death penalty was dispositive of the Eighth Amendment issue); *Penry*, 492 U.S. at 288 (reaching a similar conclusion regarding federal preclusion of the death penalty for defendants with mental retardation). In addition, although the Court has not addressed it directly, it would appear that any rule establishing congressional action alone as definitive of constitutional limitations on the states would carry implications for the Court's approach to federalism. Cf. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

39. Another issue is the seeming inconsistency of the Court's treatment of states whose laws do not authorize the death penalty. There was a suggestion in *Stanford* that the attitudes of such states were unknowable regarding particular categories of executions, and therefore, the population of those states should be excluded categorically from the process of ascertaining a national consensus. 492 U.S. at 370 n.2. By contrast, the Court in *Atkins* evaluated public opinion in the nation as a whole. 536 U.S. at 315-16.

40. 536 U.S. 304, 340-48 (Scalia, J., dissenting).

41. Brief of Amicus Curiae Criminal Justice Legal Foundation at 14, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452).



that the Justices consider the determination of a national consensus on any aspect of capital punishment to be comparable to scorekeeping in some form of game. None of the cases implies that there is a "target" or "magic number" of states, attainment of which mandates Eighth Amendment relief (and short of which, relief cannot be ordered). The cases do not describe a simplistic formula or recipe. On the contrary, the seriousness of the Court's approach to state legislation could not be clearer.

The Court has referred to the function of state legislation in ascertaining the presence or absence of a national consensus: "First among the objective indicia that reflect the public attitude toward a given sanction are statutes passed by society's elected representatives."<sup>42</sup> Among the attributes of legislation that commend it to the Court as a means of measuring public opinion are the political accountability of the members of state legislatures whose responsibility under our system is to reflect and codify public sentiment, and their "considered judgment."<sup>43</sup> It is the legislative *process* that helps guide the Court's consideration. If a proposal to reduce or mitigate a punishment has survived the legislative crucible of competing interests, it is a clear indication that undue weight is not being attributed to a transitory or ephemeral opinion.

This approach is fully consistent with the language the Court has employed to describe its use of legislative enactments. In no case, has it described the state and federal statutes as *constituting* the consensus. Rather, the cases discuss the statutes as "*evidence*" of the consensus.<sup>44</sup> The accumulation of enactments by different legislative bodies constitutes *confirmation* that a claimed consensus is sufficiently widespread and sufficiently durable to survive the process to passage in different political climates and divergent legislative settings. Thus, *Penry* is properly understood, not as a holding that there was no consensus against executing individuals with mental retardation, but rather that with only one federal and two state statutes enacted at the time of the Court's consideration, there was not adequate evidence of such a consensus.

Refocusing on legislation as *evidence* regarding a claimed consensus, rather than *constituting* the consensus itself, also explains the Court's reference to other forms of evidence. Justice Stevens' opinion for the Court in *Atkins* notes, in passing, that the judgments of state legislators on this issue are consistent with the positions of professional organizations, international and religious bodies, and the results of public opinion surveys.<sup>45</sup> These references elicited sharp criticism in the dissenting opinions.<sup>46</sup> But the observation that others have reached conclusions similar to those of state and federal legislators is perfectly consistent with the Court's approach to the Eighth Amendment. Since the statutes are viewed by the Court as evidence concerning a consensus (rather than constituting the consensus itself), there is no reason for the Court not to seek confirmation in other manifestations of the public's attitudes toward a practice.

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42. *Stanford*, 492 U.S. at 370 (internal quotations omitted).

43. *Thompson*, 487 U.S. at 852 (O'Connor, J., concurring in the judgment).

44. See, e.g., *Penry*, 492 U.S. at 334-35; *Atkins*, 536 U.S. at 312.

45. 536 U.S. at 315-16 n.21.

46. *Id.* at 326-28 (Rehnquist, C.J., dissenting); *id.* at 346-47 (Scalia, J., dissenting).

Thus, the Court's approach to identifying a possible national consensus is found, not by seeing *Atkins* as a departure from *Penry*, but by reading the cases together. Evidence from nonlegislative sources may help confirm the existence of a consensus, but legislative enactments are crucial and *indispensable* components of any such conclusion.

### CONCLUSION

The course of events from *Penry* in 1989 to *Atkins* in 2002 illuminates the Supreme Court's approach to the consensus component of Eighth Amendment analysis and the process by which constitutional change can be accomplished. Disability advocates, who had identified the prospect of individuals with mental retardation facing the death penalty as morally unacceptable, took their concerns to their state legislators. When their concerns and the force of their arguments proved persuasive in individual legislatures, those advocates accomplished more than the just changes they sought and obtained in the laws of their particular states. The accumulation of their efforts helped the Court to recognize the strength and durability of their moral arguments, and the Court properly read this as sufficient evidence of a national consensus against imposing the death penalty on any individual with mental retardation.