

ATKINS V. VIRGINIA: LOOKING BACK AND LOOKING FORWARD

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In *Atkins v. Virginia*, the U.S. Supreme Court held that the execution of offenders with mental retardation was unconstitutional under the Eighth Amendment's ban on cruel and unusual punishment.¹ The Court found an emerging national consensus against the practice, but left to the states the work of "determining which offenders are in fact retarded" and "developing appropriate ways to enforce the constitutional restriction."² Five years after that landmark opinion, the Seventeenth Annual DePaul Law Review Symposium gathered a group of scholars and practitioners to reflect upon the *Atkins* decision, review the work of the states and of capital juries since *Atkins*, and identify the most significant challenges in applying the decision.

In his keynote address reproduced in this issue, Bill Kurtis, an acclaimed journalist and author of *The Death Penalty on Trial: Crisis in American Justice*, recalled hearing former Illinois Governor George Ryan pardon four death row inmates just a few days before the end of his last term.³ Kurtis described the sense of betrayal that motivated Ryan to grant the pardons and ultimately to commute the sentences of everyone on Illinois's death row. He poignantly noted how common sense and the most basic and indisputable statistics about the capital justice system in Illinois and in other parts of the country lead to just one conclusion: many of those sentenced to death have been short-changed by a system that is broken and that may not have ever functioned "correctly." Kurtis also described his own investigation of two wrongful convictions, which revealed a few of the myriad mistakes that can lead to the conviction and execution of innocent defendants. Kurtis's investigation and this country's recent experience with numerous DNA exonerations have demonstrated that there is not just

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1. 536 U.S. 304, 321 (2002).

2. *Id.* at 317.

3. Bill Kurtis, Clarence Darrow Keynote Address at the DePaul Law Review Symposium: Protecting a National Moral Consensus: Challenges in the Application of *Atkins v. Virginia* (Mar. 9, 2007), in 57 DEPAUL L. REV. 643 (2008).

one route to wrongful conviction and execution.⁴ Rather, there is a narrow path to acquittal for innocent defendants with a multitude of potentially deadly hazards and detours along the way. Navigating a capital trial, then, is necessarily less likely to result in a just outcome for defendants with mental retardation, given that “some characteristics of [the disability may] undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.”⁵

Additionally, Professor James Ellis, who represented Daryl Renard Atkins in front of the U.S. Supreme Court, traces changes in the Court’s understanding of mental retardation and its perception of individuals suffering from the disability.⁶ In the decades following *Buck v. Bell*, scholars and practitioners largely rejected the Court’s characterization of individuals with mental retardation as a drain on society and prone to criminal activity, as experts on mental retardation made great strides in understanding the disability and became more vocal about the treatment of individuals with mental retardation. But the Court’s own perception of mental retardation remained stagnant, fixed in its *Buck* decision for nearly fifty years, until the 1970s and early 1980s, when a targeted litigation campaign began to make inroads in protecting the liberty interests of those with mental retardation. Ellis argues that, rather than evolving gradually, the Court’s understanding of mental retardation has moved forward in fits and starts, case by case, with *Atkins* marking the most recent significant change. His article serves as a reminder that, if we are to improve our capital justice system and reduce the number of innocent and undeserving defendants ensnared in it, we must be diligent and persistent in educating the Court about the problems that exist in the system.

Next, Professor Ajitha Reddy’s article delves into the origins of IQ testing, originally developed to identify French children in need of extra help at school but co-opted and redesigned by American eugenicists for use with adults.⁷ Reddy argues that the Court’s partial reliance on IQ testing to demonstrate mental retardation and consequent reduced personal culpability is inequitable, not only because the test lacks basic validity in measuring intelligence and innate ability, but also because there is no constitutional impediment to executing capital offenders who similarly lack personal culpability by reason of other disabilities.

4. See The Innocence Project, <http://innocenceproject.org> (last visited Feb. 6, 2008).

5. *Atkins*, 536 U.S. at 317.

6. James W. Ellis, *Disability Advocacy and Atkins*, 57 DEPAUL L. REV. 553 (2008) (citing *Buck v. Bell*, 274 U.S. 200 (1927)).

7. Ajitha L. Reddy, *The Eugenic Origins of IQ Testing: Implications for Post-Atkins Litigation*, 57 DEPAUL L. REV. 667 (2008).

Professor Marla Sandys's article shifts the focus to respond to several objections raised by former Chief Justice Rehnquist and Justice Scalia in their dissents in *Atkins*.⁸ First, Sandys argues that *Atkins* is unlikely to engender the onslaught of mental retardation claims and *Atkins*-based habeas petitions feared by Justice Scalia. To illustrate this point, Sandys uses seven capital cases brought in Indiana before *Atkins* but after the state legislature passed an *Atkins*-like statute making capital defendants with mental retardation ineligible for the death penalty.

Second, Sandys notes that Rehnquist objected to the Court's finding of an "emerging consensus" on this issue. Rehnquist disagreed with the majority, because there was no evidence that juries consider death an inappropriate sentence for capital offenders with mental retardation. Sandys presents original data collected by the Capital Jury Project (CJP) that suggest that capital jurors, in fact, do *not* routinely avoid sentencing offenders with mental retardation to death, in part because they cannot agree on which offenders are mentally retarded. In addition, Sandys summarizes CJP data showing that capital jurors misunderstand the characteristic features of mental retardation, particularly mild mental retardation, and that, even when presented with expert testimony on the issue, jurors may rely on inaccurate stereotypes and unrepresentative personal experiences to assess whether capital defendants are mentally retarded. Finally, Sandys points to CJP data as an indication that *Atkins* alone cannot ensure that no offender with mental retardation will be sentenced to death, and she advises attorneys representing capital defendants with mental retardation post-*Atkins* to use voir dire to aggressively explore prospective jurors' understanding of mental retardation and their experiences with individuals suffering from the disability.

Similarly, Professor Andrea Lyon notes *Atkins*'s failure to ensure that offenders with mental retardation are not sentenced to death in the United States.⁹ Lyon describes the special challenges that arise in representing such clients post-*Atkins* and offers practical advice for selecting a jury that will give appropriate consideration to the client's mental retardation as a mitigating factor. In particular, Lyon urges capital defense attorneys to use jury questionnaires and fight for attorney-conducted and individual, sequestered voir dire, particularly when evidence of mental retardation will be presented. She notes that such

8. Marla Sandys, Adam Trahan & Heather Pruss, *Taking Account of the "Diminished Capacities of the Retarded": Are Capital Jurors up to the Task?*, 57 DEPAUL L. REV. 679 (2008).

9. Andrea D. Lyon, *But He Doesn't Look Retarded: Capital Jury Selection for the Mentally Retarded Client Not Excluded After Atkins v. Virginia*, 57 DEPAUL L. REV. 701 (2008).

measures provide jurors with a more comfortable way to disclose socially undesirable perspectives and, consequently, enhance capital defenders' abilities to discover the information necessary to select juries that will not choose the death penalty for their clients.

Next, Professors Carol Steiker and Jordan Steiker explore the underbelly of the Court's return to substantive regulation of the death penalty in the *Atkins* and *Simmons*¹⁰ decisions and explain how the absence of procedural components in those decisions risks legitimation of a capital justice system that remains inequitable at its core.¹¹ The Steikers point to the Court's decision last term in *Panetti*¹² as a roadmap for challenging the worst procedural barriers to full implementation of *Atkins*'s substantive ban. Finally, and perhaps most importantly, the Steikers argue that the Court's broad-armed embrace of sources other than state legislation and actual jury verdicts in assessing "evolving standards of decency" may suggest new strategies for pursuing abolition of the death penalty.

Finally, in his remarks, Bryan Stevenson cautioned that *Atkins* is not a watershed for those with mental retardation who most frequently become entangled in the capital justice system: the extremely poor. *Atkins* requires the manifestation and diagnosis of mental retardation before the age of eighteen, but many indigent capital defendants had little or no access to medical care as children or, if they did have access, were not properly diagnosed because of environmental and cultural issues. As a result, while *Atkins* prevents the execution of some with mental retardation, it does little for many capital offenders suffering from the disability. Stevenson encouraged us to act on *Atkins* in a more personal way, reminding us that we all have the power to change how our society thinks about capital clients and about individuals with mental retardation, if only by talking about these issues with the persons closest to us.¹³

The articles that follow provide an in-depth exploration of *Atkins*'s history and its future, its successes and its shortcomings, and they make clear that the battle for a just and equitable death penalty—or no death penalty at all—must wage on.

10. *Atkins*, 536 U.S. 304; *Roper v. Simmons*, 543 U.S. 551 (2005).

11. 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).

12. *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007).

13. 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).