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IS *ATKINS* THE ANTITHESIS OR APOTHEOSIS OF ANTI-DISCRIMINATION PRINCIPLES?: SORTING OUT THE GROUPWIDE EFFECTS OF EXEMPTING PEOPLE WITH MENTAL RETARDATION FROM THE DEATH PENALTY

*Christopher Slobogin**

In *Atkins v. Virginia*,¹ the U.S. Supreme Court held that people with mental retardation may not be executed.² Many advocates for people with disability cheered the decision, because it provides a group of disabled people with protection from the harshest punishment imposed by our society. But other disability advocates were dismayed by *Atkins*, not because they are fans of the death penalty, but because they believe that declaring disabled people ineligible for a punishment that is accorded all others denigrates disabled people as something less than human. If people with disability are to be treated equally, these dissenters suggest, they should be treated equally in all areas of the law, including capital sentencing.

This brief piece explores these two views of *Atkins* more fully. My conclusion is that, while *Atkins* is neither the apotheosis nor the antithesis of anti-discrimination principles, overall *Atkins* is good for the disability rights movement and for disabled people. After describing the *Atkins* decision and its critics, I explain why those who believe *Atkins* stigmatizes people with disability are wrong.

I. *ATKINS* AND ITS CRITICS

Atkins held that execution of people with retardation violates the Constitution, specifically the Eighth Amendment's ban on cruel and unusual punishment.³ Justice Stevens' opinion for the Court gave essentially two rationales for this result. First, as it has in all of its Eighth Amendment cases involving the death penalty, the Court looked at the degree of national support for the practice in question.⁴ It found that 18 of the 36 states with the death

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

2. *Id.* at 321.

3. *Id.*

4. *Id.* at 313-16.

penalty enforced a prohibition on execution of people with retardation,⁵ and that even those states which had no such prohibition rarely executed them.⁶ Justice Stevens also pointed to the statements of various national and international organizations and to national polls as evidence of professional and popular opinion favoring the ban.⁷

In addition to these so-called “objective” measures of consensus, the Court carried out its own “independent evaluation” of the propriety of executing people with retardation.⁸ It reasoned that because of their significant impairments in cognition, judgment, and volition, people with mental retardation who commit murder are both less culpable and less deterrable than most murderers.⁹ And as Justice Stevens stated, “If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”¹⁰

Justice Scalia wrote a scathing dissent. With respect to the first rationale, he noted that the legislative support for the majority’s holding—amounting to 47% of those states with the death penalty—was trivial compared to the type of consensus usually demanded by the Court in the Eighth Amendment context.¹¹ And cross-referencing to Chief Justice Rehnquist’s opinion challenging the methodology of surveys,¹² Scalia dismissed as “feeble” the majority’s efforts to find consensus by reference to organizational and popular opinion.¹³

5. *Id.* at 313-15 (also stating that a mere fourteen years earlier, only two states had such a prohibition). The stunning change is attributable in large part to disability rights advocates such as James Ellis.

6. *Id.* at 316.

7. *Id.* at 316 n.21.

8. *Id.* at 317-21.

9. *Id.* at 318-20 (stating that because people with retardation 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[,]” their execution does not “measurably contribute[.]” to either the retributive or deterrence goal of capital punishment).

10. *Id.* at 319. A third rationale given by the majority for its decision in *Atkins* was the greater likelihood that people with retardation will confess falsely and provide inadequate assistance to trial and sentencing counsel. *Id.* at 320. This rationale, however, amounts to an attack on all criminal prosecutions of people with retardation, not just capital prosecutions.

11. *Id.* at 343 (Scalia, J., dissenting). In most of the Court’s cases finding an Eighth Amendment violation, every state, or virtually every state, had already banned the practice, whether it was execution of incompetent individuals or execution for committing rape. See *Ford v. Wainwright*, 477 U.S. 399, 410 (1986); *Coker v. Georgia*, 433 U.S. 584, 592 (1977). Prior to *Atkins*, the lowest degree of consensus in a case finding a violation of the Eighth Amendment had been 78%. See *Enmund v. Florida*, 458 U.S. 782, 789 (1982) (noting that 28 out of 36 death penalty states prohibited the death penalty for a robbery in which an accomplice took a life). In contrast, in two cases where the percentage of death penalty states prohibiting a particular type of execution was only 30% and 42%, respectively, the Court refused to find the death penalty cruel and unusual. See also *Tison v. Arizona*, 481 U.S. 137, 154 (1987) (noting that 11 of 37 death penalty states prohibited execution of those who participated in a felony with reckless indifference to life); *Stanford v. Kentucky*, 492 U.S. 361, 372 (1989) (citing that 15 out of 36 states prohibited capital punishment of 16 year-old murderers).

12. *Atkins*, 536 U.S. at 321-336 (Rehnquist, C.J., dissenting).

13. *Id.* at 347 (Scalia, J., dissenting).

Scalia was even more bothered by the Court's "independent evaluation." His main concern was that this part of the majority's opinion was untethered to any objective considerations, and thus smacked of "pretension" and "arrogance."¹⁴ More relevant to the topic of this article, he also argued that categorical exemptions based on assessments of relative culpability and deterrability do not work in an individualized sentencing context like the one the Court has tried to create in the death penalty setting.¹⁵ As he put it,

Surely culpability, and deservedness of the most severe retribution, depends not merely (if at all) upon the mental capacity of the criminal (above the level where he is able to distinguish right from wrong) but also upon the depravity of the crime--which is precisely why this sort of question has traditionally been thought answerable not by a categorical rule of the sort the Court today imposes upon all trials, but rather by the sentencer's weighing of the circumstances (both degree of retardation and depravity of crime) in the particular case.¹⁶

More specifically addressing the majority's assertions about the average murderer, he asked "what scientific analysis can possibly show that a mildly retarded individual who commits an exquisite torture-killing is 'no more culpable' than the 'average' murderer in a holdup-gone-wrong or a domestic dispute?"¹⁷

Although Scalia's opinion does not directly advance it, there is a third, related criticism of the majority opinion in *Atkins*—one voiced by disability rights advocates. Probably the best statement of this criticism comes from Donald Bersoff, a well-known champion of disability rights whose views need to be taken seriously.¹⁸ In a recent *Law & Human Behavior* article, he put forward two complaints about the stigmatizing impact of *Atkins*.¹⁹ First, he wrote, it mischaracterizes the capacities of people with mental retardation.²⁰ As he put it, "[a]s important as it is to protect those who cannot protect themselves, it is equally important to promote the right of all persons to

14. *Id.* at 348.

15. *See, e.g.,* *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (requiring "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death")

16. *Atkins*, 536 U.S. at 350-51.

17. *Id.* at 350.

18. Bersoff, who is a Professor of Law Emeritus at Villanova Law School, has published on a wide array of topics in mental health law, once partnered with Bruce Ennis and the Mental Health Law Project, and has served as General Counsel to the American Psychological Association.

19. Donald N. Bersoff, *Some Contrarian Concerns About Law, Psychology, and Public Policy*, 26 *LAW & HUM. BEHAV.* 565, 568-69 (2002). Bersoff emphasizes that, despite his complaints, he remains "adamantly opposed to the death penalty for anyone." *Id.* at 568. However, he believes that "Justice Scalia's particularized approach is, in the long run, more protective of the rights of people with mental retardation." *Id.* at 569 n.2.

20. *Id.* at 568.

make their own choices and, as a corollary, to be accountable for those choices.”²¹ Echoing Justice Scalia, he then stated, “It is simply untrue that no person with mental retardation is incapable of carrying out a horrible murder with the requisite [degree of] intent or foresight.”²² Secondly, Professor Bersoff suggested that *Atkins* may even lead to a retraction of the rights and privileges that people with disability currently possess. He asserted,

If we accept the concept of blanket incapacity [which *Atkins* endorses], we relegate people with retardation to second class citizenship, potentially permitting the State to abrogate the exercise of such fundamental interests as the right to marry, to have and rear one’s children, to vote, or such everyday entitlements as entering into contracts or making a will.²³

II. WHY *ATKINS* DOES NOT STIGMATIZE

If true, Professor Bersoff’s objections to the *Atkins* majority’s “independent evaluation” are potent.²⁴ I think that his objections are off-base, however. Indeed, I have argued in a recent article that *Atkins* is not only a good decision, but that it should be expanded to prohibit execution of people who were seriously mentally ill at the time of the offense.²⁵ My disagreement with Professor Bersoff can be stated succinctly.

With respect to the mischaracterization issue, it is true, as both Justice Scalia and Professor Bersoff state, that some people with serious mental disability can commit murder with intent and even foresight. I also have doubts about the *Atkins* majority’s statement that *no* mentally retarded person who murders is as culpable or deterrable as the average murderer²⁶ (and am especially leery of the lesser deterrability assertion, given the evidence that *most* criminals pay little attention to criminal prohibitions).²⁷ Nevertheless, I think it is clear that *no murderer whose retardation or psychosis contributes to the crime is as culpable as the rare murderer who should be put to death*. If we are to have the death penalty, only the most depraved indi-

21. *Id.*

22. *Id.*

23. *Id.*

24. I express no opinion here about the debate over the “objective” analysis of national consensus.

25. Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293 (2003).

26. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

27. See generally Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 458-64 (1997) (describing reasons why most criminals are not deterred by criminal prohibitions). I have tried to develop a definition of “true” undeterrability, which would apply only to a very narrow group composed primarily of seriously disabled people and individuals who would knowingly choose crime over freedom. Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 40-46 (2003).

viduals should be executed, as the Court has said over and over again.²⁸ No person with serious disability is that depraved.

But what about Justice Scalia's mentally retarded torturer? Or someone like John Penry, who had an IQ in the 60s, but who cased the residence of his victim to make sure she was alone, forced his way in when she grew suspicious of his repairman story, and stabbed her after deciding she might tell the police about the rape?²⁹ Or someone like Renard Atkins, a mildly retarded individual who, along with another individual, abducted his victim, forced him to withdraw money from an ATM, then took him to a deserted area and shot him eight times?³⁰ These people intended, and even premeditated their crimes, knowing that they were wrong in doing so.

It can be assumed that all of these offenders were legally sane at the time of their crime. Because of their retardation, however, people like Scalia's torturer, Penry, and Atkins lack the full appreciation of wrongfulness that less disabled people have and that should be required before we can execute someone.³¹ While there is not necessarily a directly inverse relationship between intellectual vulnerability and evil, or between madness and badness, the criminal law has long acknowledged that mental and emotional problems compromise the cognitive and volitional capacities that are equated with blameworthiness.³² As recognized most explicitly by the California Supreme Court in the 1960s, culpability is diminished by an inability

28. See, e.g., *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (setting aside a death sentence because the crime did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder"). See generally *Zant v. Stephens*, 462 U.S. 862, 876-77 (1983) (speaking of the "fundamental requirement that . . . an aggravating circumstance . . . genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder").

29. Respondent's Brief at 2, *Penry v. Johnson*, 532 U.S. 782 (2001) (No. 00-6677).

30. *Atkins*, 536 U.S. at 338 (Scalia, J., dissenting).

31. Consider these statements by the American Association on Mental Retardation (quoted by Justice Brennan in *Penry*):

"Every individual who has mental retardation"--irrespective of his or her precise capacities or experiences--has "a substantial disability in cognitive ability and adaptive behavior." This is true even of the "highest functioning individuals in the 'mild' retardation category," and of course of those like Penry whose cognitive and behavioral disabilities place them on the borderline between mild and moderate retardation. Among the mentally retarded, "reduced ability is found in every dimension of the individual's functioning, including his language, communication, memory, attention, ability to control impulsivity, moral development, self-concept, self-perception, suggestibility, knowledge of basic information, and general motivation."

Penry v. Lynaugh, 492 U.S. 302, 345 (1989) (Brennan, J., concurring in part and dissenting in part) (quoting brief of American Association on Mental Retardation) (citations omitted). See also C. Benjamin Crisman & Rockne J. Chickinell, *The Mentally Retarded Offender in Omaha-Douglas County*, 8 CREIGHTON L. REV. 622, 646 (1975) (stating that although mentally retarded persons "may be able to distinguish right from wrong in the abstract," they have difficulty "applying . . . abstract concepts to specific factual settings"); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 441 (1985).

32. The insanity, diminished capacity, and diminished responsibility defenses are all examples of this. More to the point, every death penalty statute explicitly or implicitly stipulates that mental disorder at the time of the offense be considered as a possible mitigating circumstance. See Ellen Fels Berkman, *Mental Illness As an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 296-98 (1989). See generally, GARY MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 190-208 (2d ed. 1997).

to “maturely and meaningfully reflect upon the gravity of [the] contemplated act.”³³ People with retardation, by definition, are compromised in that ability. According to the latest edition of the *American Psychiatric Association’s Diagnostic and Statistical Manual*, even people with “mild” mental retardation at most can develop academic skills up to approximately the sixth-grade level, amounting to the maturity of a twelve year-old.³⁴ By exempting this whole category of people from its purview, *Atkins* constitutionalized the idea that the death penalty may only be imposed on people who are particularly culpable.

Of course, many people would not draw the line where the *Atkins* majority did. For instance, three separate juries found that Penry was deprived enough to warrant the death penalty.³⁵ *Atkins*, in essence, held that those juries were wrong in defining depravity so broadly. It also implicitly rejected Justice Scalia’s position that the brutality of a murder by itself, regardless of the associated mental state, can make a sane person sufficiently “depraved.”

Most importantly for present purposes, *Atkins*’s holding (as distinguished, perhaps, from some of its language about the average murderer) does not mischaracterize the capacities of people with disability in the way Professor Bersoff suggests. *Atkins* does not say that people with retardation are incapable of committing crime with intent or foresight. Nor, of course, does it say that murderers with serious disability should not be held accountable for their choices, as they still can be given life sentences. All *Atkins* says is that people with retardation, even those who commit a “horrible” murder, can never be as evil as the most evil murderers in our society (and thus that the ultimate punishment may not be imposed on them).

For related reasons, I also disagree with Professor Bersoff’s claim that *Atkins* will encourage use of categorical disability-based exemptions in the civil rights setting. While people with serious disability never deserve the death penalty, it is an empirical fact, demonstrated by research examining both people with significant mental illness and mental retardation,³⁶ that even very disabled people can be competent to make treatment decisions and engage in other decision-making tasks. Nothing in *Atkins* can be used to contest that fact, not even its (possibly erroneous) statement that people

33. *People v. Wolff*, 394 P.2d 959, 975 (1964) (emphasis omitted).

34. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 43 (4th ed.-revised 2000).

35. An account of Penry’s first two death sentences, both of which were overturned by the Supreme Court, is found at *Penry v. Johnson*, 261 F.3d 541 (5th Cir. 2001). Penry was retried and resentenced to death a third time, prior to *Atkins*. *Penry v. Coker*, No. 15918-04, 2003 WL 21401978, at *1 (Tex. Crim. App. June 18, 2000).

36. Thomas Grisso & Paul Appelbaum, *Abilities of Patients to Consent to Psychiatric and Medical Treatments*, 19 *LAW & HUM BEHAV.* 149, 171 (1995) (finding that nearly one-half of the schizophrenia group performed in the “adequate” range across all decision-making measures, and that a significant portion performed at or above the mean for persons without mental illness); MELTON ET AL., *supra* note 32, at 144 (reporting research finding that many people with mental retardation are competent to stand trial, whether measured psychometrically, or judicially).

with retardation cannot be as culpable or deterrable as the average murderer.³⁷ The inquiry in the civil setting is not whether the disabled person is “average,” but whether the person meets a minimum level of competence.³⁸ In other words, even a person whose capacities are “below average” can, under the law, contract, marry, vote, and so on.³⁹ Thus, neither the holding *nor* the unnecessarily broad language of *Atkins* sabotages these types of laws.

If *Atkins* does anything in terms of stigma, it *de*-stigmatizes people with mental disability. Research clearly shows that, despite the fact that offenders with serious disorders are no more likely to reoffend than the general offender population,⁴⁰ the public tends to equate mental disorder with dangerousness.⁴¹ Capital sentencing juries are not immune from this misperception, with the result that they often treat mental disorder not as a mitigating circumstance (as the law requires)⁴² but as an *aggravating* circumstance supporting imposition of the death penalty.⁴³ *Atkins* can and should be interpreted to mean that this equation of disorder with danger is wrong. Its message should be: we cannot execute people (or do anything else to them) simply because we are irrationally scared of them.

37. *Atkins v. Virginia*, 536 U.S. 304, 319-20 (2002).

38. See, e.g., UNIF. PROBATE CODE § 5-101 (amended 1982 and 1989), which permits an incompetency finding for a person with mental disability only if he or she “lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.”

39. However, I disagree with Steven Schwartz’s suggestion, in his talk for this Symposium, that all people with disability should be considered competent. Steven J. Schwartz, *Disabling Protections, Preferential Rights and a Vision of Equality*, presented at The University of Alabama School of Law, *Equality and Difference: A Symposium on American Disability Law and the Civil Rights Model* (Nov. 7, 2003). Permitting a person with an IQ of 40 to sign a contract, for instance, makes a mockery of the idea of autonomy, and presumably would occur only if the person were told to do so, in good faith or bad, a paternalistic outcome which a disability rights advocate such as Schwartz would presumably find repugnant.

40. See James Bonta et al., *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta Analysis*, 123 PSYCHOL. BULL. 123 (1988) (meta-analysis finding that the major predictors of recidivism were the same for mentally disordered offenders as for non-disordered offenders, and that psychopathology should be de-emphasized as a predictor).

41. See, e.g., Bernice A. Pescosolido et al., *The Public’s View of the Competence, Dangerousness, and Need for Legal Coercion of Persons with Mental Health Problems*, 89 AM. J. PUB. HEALTH 1339, 1341 (1999) (reporting that 17% of a random sample of citizens felt that a “troubled person” was “very likely” or “somewhat likely” to be violent, 33.3% said the same of the depressed person, and 60% said the same of a person with schizophrenia).

42. See Berkman, *supra* note 32, at 296-98.

43. The empirical evidence for this assertion, which is very strong, is collected in Christopher Slobogin, *Mental Illness and the Death Penalty*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 667, 669-70 (2000).

