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NOTES

KINDER, GENTLER, AND MORE CAPRICIOUS: THE DEATH PENALTY AFTER *ATKINS V. VIRGINIA*

JOHN F. ROMANO[†]

INTRODUCTION

William Jones and Daryl Atkins spent August 16, 1996 drinking alcohol and smoking marijuana.¹ They made several trips to a local convenience store to replenish their alcohol supply. On their final trip, Atkins concealed a handgun in his waistband as the two resorted to panhandling.² Eric Nesbitt, an airman from Langley Air Force Base,³ arrived at the store around 11:30 p.m.⁴ As Nesbitt entered his truck, Atkins pointed the gun at him and ordered him to move out of the driver's seat and to allow Jones to drive.⁵ Atkins then stole sixty dollars from Nesbitt's wallet and ordered him to remove two hundred dollars from an ATM.⁶ They then drove to a secluded area where Atkins ordered Nesbitt to exit the vehicle.⁷ Nesbitt took just a few steps

[†] J.D. Candidate, June 2004, St. John's University School of Law; B.A. Fordham University, 2001. I would like to dedicate this Note to the memory of my cousin, Brian Cannizzaro, SJU 1993, FDNY, whose ultimate sacrifice, along with that of thousands of others, on September 11, 2001, proved that glass and steel could be broken and bent, but that no force could destroy the bravery, freedom, and unity of the American people.

¹ *Atkins v. Commonwealth*, 510 S.E.2d 445, 449 (Va. 1999), *rev'd*, 122 S. Ct. 2242 (2002).

² *Id.* According to prosecutors and the testimony of William Jones, Atkins received the gun that day from a friend, explaining that "he wanted to use it, [and] he would bring it back in the morning." *Id.*

³ *Atkins v. Virginia*, 122 S. Ct. 2242, 2259 (2002) (Scalia, J., dissenting).

⁴ *Atkins*, 510 S.E.2d at 449.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

before Atkins unleashed eight shots from the handgun, striking Nesbitt in his thorax, chest, abdomen, arms, and legs.⁸

The jury found Atkins guilty of the murder of Eric Nesbitt.⁹ After hearing evidence about Atkins's violent past, which included eighteen felony convictions,¹⁰ the jury sentenced Atkins to death.¹¹ The Supreme Court of Virginia explicitly found that despite Atkins's IQ score of fifty-nine,¹² he was able to "appreciate the criminality of his conduct and understood that it was wrong to shoot Nesbitt."¹³ The court affirmed the sentence of death, finding that "the jury obviously found that Atkins's IQ score did not mitigate his culpability."¹⁴

In a six to three ruling, the United States Supreme Court reversed the death sentence imposed on Atkins and remanded the case for further proceedings.¹⁵ The Court did not find that Atkins could not appreciate the criminality of his conduct, that he was not deserving of punishment, or that he was not competent to stand trial.¹⁶ Rather, the Court ruled that Daryl

⁸ *Atkins*, 122 S. Ct. at 2259 (Scalia, J., dissenting).

⁹ *Atkins*, 510 S.E.2d at 451. William Jones pleaded guilty pursuant to a plea agreement in which he agreed to testify against Atkins. *Id.* at 449 n.3.

¹⁰ *Atkins v. Commonwealth*, 534 S.E.2d 312, 317 (Va. 2000), *rev'd*, 122 S. Ct. 2242 (2002) (detailing the gruesome facts of these incidents, including one in which Atkins shot a woman in the stomach without provocation).

¹¹ *Atkins*, 510 S.E.2d at 453. The Supreme Court of Virginia upheld the conviction of Atkins but remanded as to the sentence of death because of an improper verdict form. *Id.* at 456-57. At the new sentencing hearing, the jury again sentenced Atkins to death and the Supreme Court of Virginia affirmed this sentence. *Atkins*, 534 S.E.2d at 321. The Court found ample evidence to support the jury's finding of two statutory aggravating factors—future dangerousness and the vileness of the crime. *Id.* at 317.

¹² *Atkins*, 534 S.E.2d at 319. Sub-average intellectual functioning is one of three criteria required by the American Psychiatric Association in characterizing individuals as mentally retarded. See *Atkins v. Virginia*, 122 S. Ct. 2242, 2245 n.3 (2002) (listing the definitions used by the American Psychiatric Association and the American Association of Mental Retardation). The individual must also exhibit "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." *Id.* (quoting AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000)). The final requirement is that the onset of these characteristics must occur before age eighteen. *Id.* An IQ level of fifty to seventy is generally considered indicative of mild mental retardation. *Id.*

¹³ *Atkins*, 534 S.E.2d at 321.

¹⁴ *Id.* at 320.

¹⁵ *Atkins*, 122 S. Ct. at 2252.

¹⁶ *Id.* at 2250-51.

Atkins belonged to a class of defendants whom modern society no longer subjected to the death penalty because members of that class “do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.”¹⁷

This Note examines the current state of death penalty jurisprudence after the Court’s ruling in *Atkins v. Virginia*. This Note concludes that there is no basis for the Court’s recent attempt to exempt entire classes from the death penalty.¹⁸ This Note shows that such exemptions violate the tenets of the Eighth Amendment¹⁹ as enunciated by the Court in *Furman v. Georgia*,²⁰ and the spirit of that amendment as embodied in those cases following *Furman*. This Note begins, in Part I, with a background discussion of the Eighth Amendment and its application to death penalty cases, with emphasis on the requirements mandated by the Eighth Amendment after *Furman*. Part II analyzes the Court’s recent jurisprudence regarding the death penalty as imposed on the mentally retarded and on juveniles²¹ and argues that the Court’s approach to these problems is fundamentally inconsistent with its Eighth Amendment death penalty jurisprudence. Finally, Part III proposes a number of alternative approaches to the problems posed by the mentally retarded and juveniles who commit capital crimes. This Note argues that the alternative approaches conform more satisfactorily to the requirements of the Eighth Amendment.

¹⁷ *Id.* at 2244. *But see id.* at 2266 (Scalia, J., dissenting) (“As long as a mentally retarded offender knows ‘the difference between right and wrong,’ . . . only the sentencer can assess whether his retardation reduces his culpability enough to exempt him from the death penalty for the particular murder in question.”) (citations omitted).

¹⁸ *See In re Stanford*, 123 S. Ct. 472, 472–73 (2002) (Stevens, J., dissenting) (expressing the opinion that the Court should re-examine the constitutionality of subjecting a defendant who committed his crime while under eighteen years of age to the death penalty); *Patterson v. Texas*, 123 S. Ct. 24, 24 (2002) (Ginsburg, J., dissenting) (same). *But see Atkins*, 122 S. Ct. at 2252.

¹⁹ U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

²⁰ 408 U.S. 238 (1972).

²¹ *See Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion) (determining that the Eighth Amendment prohibited the execution of those defendants who were under sixteen years of age at the time they committed their crime).

I. BACKGROUND

A. *The Supreme Court and the Text of the Eighth Amendment*

The original meaning of the Eighth Amendment's prohibition of cruel and unusual punishments is one that is not readily deduced by its words or, based on the continued vitality of this debate, by its background.²² Early rulings by the Court interpreted the Amendment to apply only to punishments that were barbarous and inhumane.²³ In the past one hundred years, however, the Court has expanded the scope of the clause in a number of important ways. First, the Eighth Amendment is not to be read as prohibiting only those punishments found to be cruel and unusual at the time of the Bill of Rights.²⁴ The meaning of the amendment should be drawn "from the evolving standards of decency that mark the progress of a maturing society."²⁵ Second, punishment may be considered cruel and unusual not only because of its nature²⁶ but also because of its degree.²⁷ Thus, although one day in prison is not intrinsically a

²² See *Harmelin v. Michigan*, 501 U.S. 957, 966–75 (1991) (opinion of Scalia, J.) (discussing at length the English history of the cruel and unusual punishments clause and concluding that it was aimed at illegal punishments, not disproportionate ones). *But see Furman*, 408 U.S. 238, 331–32 (1972) (Marshall, J., concurring) (concluding that the Founders understood the clause to proscribe excessive punishments); Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839, 860, 865 (1969) (arguing that the English history of the clause indicated that it contained a guarantee against disproportionate punishments, but that the Framers misinterpreted it as outlawing only torturous punishments).

²³ See *In re Kemmler*, 136 U.S. 436, 446–47 (1890) (explaining that within the meaning of the Constitution, cruelty involved "something more than the mere extinguishment of life."); *Wilkerson v. Utah*, 99 U.S. 130, 131, 136 (1878) (upholding a sentence of death by public shooting because it was not torturous and thus not prohibited); see also Sherri Ann Carver, Note, *Retribution—A Justification for the Execution of Mentally Retarded and Juvenile Murderers*, 16 OKLA. CITY U. L. REV. 155, 157–62 (1991) (discussing these early Eighth Amendment cases).

²⁴ See *Weems v. United States*, 217 U.S. 349, 378 (1910) (determining that the Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice").

²⁵ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). In *Trop*, the Court ruled that the sentence of denationalization for the crime of desertion was cruel and unusual despite the absence of torture or physical mistreatment. *Id.* The Court determined that the consequences of statelessness were "obnoxious" and "offensive to cardinal principles for which the Constitution stands." *Id.* at 102.

²⁶ See *supra* note 23 (giving examples of what is and is not cruel and unusual).

²⁷ See *Weems*, 217 U.S. at 377. In *Weems*, the Court dealt with a sentence imposed by the Supreme Court of the Philippine Islands for the crime of falsifying a

cruel and unusual punishment, it would be considered excessive and thus prohibited “for the ‘crime’ of having a common cold.”²⁸ Third, despite early rulings to the contrary,²⁹ the cruel and unusual punishments clause of the Eighth Amendment does govern the actions of the states via the Fourteenth Amendment.³⁰

B. *Death Is Different: The Eighth Amendment and the Death Penalty*

As the Court has stated many times, the punishment of death is unique and qualitatively different than any other punishment.³¹ Thus, in addition to the general Eighth Amendment safeguards discussed above, the Court has interpreted the amendment as guaranteeing constitutional protections for death penalty defendants that are not available to those defendants facing lesser penalties.³²

This “death is different”³³ Eighth Amendment jurisprudence began with the Court’s ruling in *Furman v. Georgia*. *Furman*

public document. *Id.* at 357–58. The punishment imposed was fifteen years of Cadena, *id.* at 358, which involved hard labor, loss of rights, and surveillance for life, *id.* at 364. In response to this punishment, the Court stated, “It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind.” *Id.* at 377 (emphasis added); see also *Harmelin*, 501 U.S. at 997 (Kennedy, J., concurring) (acknowledging that the cruel and unusual punishments clause does apply to disproportionate punishments); *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding that imprisonment of ninety days for narcotic addiction is cruel and unusual punishment).

²⁸ *Robinson*, 370 U.S. at 667.

²⁹ See *In re Kemmler*, 136 U.S. 436, 448–49 (1890) (refusing to apply the Eighth Amendment to the states and instead analyzing the issue solely on the grounds of whether due process had been violated).

³⁰ See *Robinson*, 370 U.S. at 675 (Douglas, J., concurring) (stating that the Eighth Amendment is “applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment.”).

³¹ See *Harmelin*, 501 U.S. at 995 (declaring that there is a “qualitative difference between death and all other penalties”); *Woodson v. North Carolina*, 428 U.S. 280, 287 (1976) (plurality opinion) (determining that the issue to be decided was the proper procedure “employed by the State to select persons for the unique and irreversible penalty of death”); *Furman v. Georgia*, 408 U.S. 238, 287 (1972) (Brennan, J., concurring) (explaining that the penalty of death is “unusual in its pain, in its finality, and in its enormity”).

³² See *Harmelin*, 501 U.S. at 995 (refusing to extend the constitutional requirement of individualized sentencing from capital cases to non-capital cases).

³³ See, e.g., *Woodson*, 428 U.S. at 322–23 (Rehnquist, J., dissenting) (explaining the use of the term and criticizing its constitutional foundations).

consisted of a one paragraph per curiam opinion holding that the imposition of the death penalty on three specific defendants was cruel and unusual punishment. The Justices wrote separate opinions,³⁴ and, given the voting breakdown, the opinions of Justices Douglas, Stewart, and White deserve the most attention.³⁵ The crux of their opinions was that the Eighth Amendment was violated by statutes that allowed the death penalty to be “wantonly” and “freakishly” imposed.³⁶ The statutes at issue resulted in this situation because of their complete delegation of discretion to judges or juries.³⁷ Justice Douglas framed this argument in the context of discrimination. In a system in which “[p]eople live or die, dependent on the whim of one man or of [twelve],”³⁸ the result will inevitably be the selective imposition of the death penalty on minorities, outcasts, and unpopular groups.³⁹ Justice Douglas’s attack on unlimited jury discretion was echoed by Justice Stewart, who declared, “These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”⁴⁰ These Justices determined that death penalty statutes that resulted in infrequent imposition of death and that provided “no meaningful basis for distinguishing” those cases deserving of its

³⁴ *Furman*, 408 U.S. at 239–40.

³⁵ These three Justices were joined by Justices Brennan and Marshall in filing opinions supporting the per curiam judgment. The latter Justices, however, concurred on the ground that the death penalty is always cruel and unusual punishment. *Id.* at 286 (Brennan, J., concurring); *id.* at 358–59 (Marshall, J., concurring).

³⁶ *Id.* at 310 (Stewart, J., concurring).

³⁷ *Id.* at 311 (White, J., concurring). Justice White explained that the issue before the Court was the constitutionality of a death penalty statute in which “the legislature does not itself mandate the penalty in any particular class or kind of case . . . but delegates to judges or juries the decisions as to those cases, if any, in which the penalty will be utilized . . .” *Id.* (White, J., concurring).

³⁸ *Id.* at 253 (Douglas, J., concurring).

³⁹ *Id.* at 245 (Douglas, J., concurring); see also *Graham v. Collins*, 506 U.S. 461, 479–84 (1993) (Thomas, J., concurring) (giving an overview of the racial concerns that fueled the *Furman* ruling, especially as expressed in the opinion of Justice Douglas).

⁴⁰ *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring). Justice Stewart was troubled with the result that offenders “just as reprehensible as these” were receiving different punishments for no rational reason. *Id.* (Stewart, J., concurring).

imposition from those that were not so deserving, violated the Eighth Amendment.⁴¹

1. The Application of the *Furman* Criticisms

Following *Furman v. Georgia*, the Court concretely elucidated the safeguards present in the Eighth Amendment, which it had only hinted at in *Furman*. The Court first outlined these requirements in its 1976 ruling in *Gregg v. Georgia*.⁴²

The first requirement announced by the *Gregg* plurality⁴³ was that jury discretion must be channeled so as to focus the jury's attention on "the specific circumstances of the crime."⁴⁴

⁴¹ *Id.* at 313–14 (White, J., concurring). The dissenters seemed incredulous concerning both of these criticisms. Regarding the infrequency of its imposition, Chief Justice Burger wrote, "The selectivity of juries in imposing the punishment of death is properly viewed as a refinement on, rather than a repudiation of, the statutory authorization for that penalty." *Id.* at 388 (Burger, C.J., dissenting). Chief Justice Burger concluded that, in effect, the criticism amounted to a statement that "the flexible sentencing system created by the legislatures, and carried out by juries and judges, has yielded more mercy than the Eighth Amendment can stand." *Id.* at 398 (Burger, C.J., dissenting). Turning to the requirement that death penalty statutes must distinguish between worthy and unworthy recipients, the dissenters were even more incredulous. Chief Justice Burger cited the Court's ruling, only one year earlier, in *McGautha v. California*, 402 U.S. 183 (1971). *Id.* at 399 (Burger, C.J., dissenting). In *McGautha*, the Court considered the claim that death penalty statutes that did not guide jury discretion violated the Due Process Clause of the Fourteenth Amendment. *McGautha*, 402 U.S. at 196. The Court ruled that this was not the case. *Id.* at 207. In so doing, the Court concluded:

The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless "boiler-plate" or a statement of the obvious that no jury would need.

Id. at 207–08. In *Furman*, Chief Justice Burger acknowledged that *McGautha* was not an Eighth Amendment case, but he argued that the criticism of untrammelled jury discretion was a procedural argument and thus more at home with the Fourteenth Amendment and barred by the ruling in *McGautha*. *Furman*, 408 U.S. at 399 (Burger, C.J., dissenting); see also *Graham v. Collins*, 506 U.S. 461, 488 (1993) (Thomas, J., concurring) ("[T]he better view is that the Cruel and Unusual Punishments Clause was intended to place only substantive limitations on punishments, not procedural requirements on sentencing . . .").

⁴² 428 U.S. 153 (1976).

⁴³ The plurality consisted of Justices Stewart, Powell, and Stevens. *Id.* at 158.

⁴⁴ *Id.* at 197.

The statute in *Gregg* achieved this by requiring that the jury find that a statutory aggravating circumstance existed before it could even consider imposing the death penalty.⁴⁵ According to the Court, this alleviated the concern expressed in *Furman* that the death penalty was capriciously imposed, since the articulated standards for the jury created a meaningful system for distinguishing between those defendants who received the death penalty and those who did not.⁴⁶

Since *Gregg*, the Court has clarified the requirement that jury discretion be channeled. In *Godfrey v. Georgia*, the Court ruled that where the sole aggravating factor was that the crime was "outrageously or wantonly vile, horrible and inhuman" the imposition of the death penalty violated the Eighth Amendment.⁴⁷ The Court concluded that because the aggravating factor of wantonness did not adequately distinguish those defendants deserving of the death penalty from the average murderer, it reintroduced arbitrariness into the jury's decision.⁴⁸ In *Booth v. Maryland*,⁴⁹ the Court restated this Eighth Amendment requirement as one of "reasoned decisionmaking" in death penalty cases.⁵⁰

The second Eighth Amendment requirement announced by the *Gregg* plurality was that the sentencing body must consider the particularized circumstances of the individual defendant.⁵¹ The sentencing body must have sufficient information to make an informed decision, which includes having information about

⁴⁵ *Id.* at 196–97.

⁴⁶ *Id.* at 198.

⁴⁷ *Godfrey v. Georgia*, 446 U.S. 420, 428–29 (1980) (plurality opinion).

⁴⁸ *Id.* at 433 ("The petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder."); see also *Atkins v. Virginia*, 122 S. Ct. 2242, 2251 (2002) (stating that the Court's death penalty jurisprudence has been aimed at ensuring that "only the most deserving of execution are put to death").

⁴⁹ 482 U.S. 496, 504–05 (1987) (ruling that victim impact statements had no bearing on the blameworthiness of the defendant and thus could not be constitutionally used), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991).

⁵⁰ *Id.* at 509. In overruling *Booth*, the Court objected to the relative inequalities that had been created between the defendant's ability to present a flattering picture of himself, and the prosecution's inability to offer any evidence which tended to show the harm that the defendant's actions had caused. See *Payne v. Tennessee*, 501 U.S. 808, 825–27 (1991).

⁵¹ *Gregg*, 428 U.S. at 197 ("[T]he jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment . . .").

the character and circumstances of the particular defendant.⁵² In *Woodson v. North Carolina*, which was decided on the same day as *Gregg*, the Court declared that individualized sentencing for capital crimes was necessary so that individual defendants were not treated “as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.”⁵³

The general requirement of individualized sentencing in capital cases has been clarified by the Court on numerous occasions. First, defendants in capital cases must be allowed to present any and all evidence that could function in a mitigating fashion.⁵⁴ Second, the sentencing body may not exclude from its consideration, as a matter of law, any mitigating evidence presented to it.⁵⁵ Third, death penalty statutes must be designed so that sentencing bodies have a vehicle for giving effect to the mitigating evidence presented.⁵⁶ Thus, the Eighth Amendment

⁵² See *id.* at 189 & n.38; *Jurek v. Texas*, 428 U.S. 262, 271 (1976) (plurality opinion) (“A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.”).

⁵³ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion); see also *Williams v. New York*, 337 U.S. 241, 247 (1949) (“The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.”).

⁵⁴ See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). The statute at issue in *Lockett* provided for only a small number of statutorily enumerated factors that could be used in mitigation. *Id.* at 608. The Court deemed this statute to be unconstitutional, because by limiting mitigating evidence it “create[d] the risk that the death penalty [would] be imposed in spite of factors which may call for a less severe penalty.” *Id.* at 605. *But see id.* at 631 (Rehnquist, J., dissenting) (“By encouraging defendants in capital cases, and presumably sentencing judges and juries, to take into consideration anything under the sun as a ‘mitigating circumstance,’ it will not guide sentencing discretion but will totally unleash it.”). See generally *Graham v. Collins*, 506 U.S. 461, 492–96 (1993) (Thomas, J., concurring) (discussing the inevitable clash between channeling jury discretion and requiring the consideration of any and all evidence that could be used in mitigation).

⁵⁵ See *Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982) (ruling that trial judge improperly decided that he could not consider evidence of the defendant’s family history in mitigation).

⁵⁶ See *Penry v. Johnson*, 532 U.S. 782, 804 (2001). In *Penry v. Johnson*, the Court found that a supplemental instruction designed to ameliorate the constitutional deficiencies found in the Texas death penalty statute in *Penry v. Lynaugh*, 492 U.S. 302 (1989), was insufficient because the jury could only give effect to the mitigating evidence of the defendant’s mental retardation by, in effect, lying and disregarding its oath. *Id.* at 798–800; see also Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After Penry v. Johnson*, 35 AKRON L. REV. 327, 361–64 (2002) (discussing

requires that mitigating evidence be unlimited, fully considered, and amenable to effectuation in support of the defendant.⁵⁷

2. The Dual Deficiencies of the Mandatory Death Penalty

Responding to the *Furman* Court's prohibition against arbitrarily-imposed death penalty statutes, some states amended their death penalty statutes to provide for mandatory sentences of death as the punishment for certain crimes.⁵⁸ The Court found that this response violated both of the Eighth Amendment requirements announced by *Gregg*.⁵⁹

The most obvious deficiency of mandatory death penalty statutes is that by "fail[ing] to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death" they do not provide the individualized sentencing required by the Eighth Amendment in death penalty cases.⁶⁰ The Supreme Court has ruled that this deficiency cannot be overcome, even by narrowing the effect of the mandatory death penalty to apply only to those murderers who were previously sentenced to life without parole for another crime.⁶¹

The Supreme Court has also held that the mandatory death penalty violates the requirement that jury discretion be channeled.⁶² This somewhat counter-intuitive argument⁶³ relies on the premise that sentencing juries will exercise untrammelled, yet uninformed, discretion through nullification.⁶⁴ Thus,

the problems with the system set up by Texas as a response to *Penry v. Lynaugh*).

⁵⁷ See *Penry*, 532 U.S. at 797.

⁵⁸ See *Roberts v. Louisiana*, 428 U.S. 325, 328–29 (1976) (plurality opinion); *Woodson*, 428 U.S. at 285–86.

⁵⁹ See discussion *supra* Part I.B.1 (discussing the two requirements announced in *Gregg*).

⁶⁰ *Woodson*, 428 U.S. at 303.

⁶¹ See *Sumner v. Shuman*, 483 U.S. 66, 80–82 (1987) (ruling that just because a defendant was previously convicted and sentenced to life without parole does not mean that there are not mitigating factors which would militate against the imposition of the death penalty).

⁶² See *Roberts*, 428 U.S. at 335–36.

⁶³ See *Roberts*, 428 U.S. at 360 (White, J., dissenting) ("If it is truly the case that Louisiana juries will exercise *too much* discretion—and I do not agree that it is—then it seems strange indeed that the statute is also invalidated because it purports to give the jury *too little* discretion by making the death penalty mandatory.").

⁶⁴ See *id.* at 335 & n.11 (discussing the possibility that juries will engage in

although the mandatory death penalty might have been thought to solve the problems inherent in allowing jury discretion, the Court ruled that it fostered arbitrary and capricious decision-making and thus was in violation of the Eighth Amendment.⁶⁵

Related to both of these deficiencies is the notion that jury discretion should be channeled so as to result in the imposition of the death penalty on those defendants who are most blameworthy. By precluding meaningful individualized consideration of the defendant's blameworthiness vis-à-vis the death penalty⁶⁶ and by eliminating all jury discretion upon conviction of specified crimes, the mandatory death penalty creates a situation, found intolerable by *Furman*, in which there is no *meaningful* basis for distinguishing those defendants who get the death penalty from those that do not.⁶⁷

C. *The Superfluity of Safeguards for Some*

While the Court interpreted the Eighth Amendment to provide constitutional safeguards for those defendants facing capital punishment, it also did not hesitate to use the Eighth Amendment concepts of "evolving standards of decency" and proportionality⁶⁸ to limit the number of defendants upon which

nullification, thus reintroducing the element of capriciousness into the sentencing decision); *Woodson*, 428 U.S. at 302–03. The *Woodson* Court relied on the history of mandatory death penalty statutes to conclude that nullification is a very real problem, especially in light of the fact that sentencing juries in such a situation will not be presented with standards so as to determine which defendants are the most deserving of death. *Id.* at 303.

⁶⁵ See *Woodson*, 428 U.S. at 303 ("Instead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in *Furman* by resting the penalty determination on the particular jury's willingness to act lawlessly.").

⁶⁶ By this I mean that jury nullification is not an ideal or particularly tolerable method of expressing the belief that a particular defendant should not get the death penalty. See *Woodson*, 428 U.S. at 293 ("Nineteenth century journalists, statesmen, and jurists repeatedly observed that jurors were often deterred from convicting palpably guilty men of first-degree murder under mandatory statutes.").

⁶⁷ Cf. *Sumner v. Shuman*, 483 U.S. 66, 80 n.8 (1987). The Court stated:

Mandating that sentences imposed on inmates serving life terms be different from sentences imposed on other inmates could produce the odd result of a riot's more culpable participant's being accorded a less harsh sentence than the less culpable participant simply because the less culpable one is serving a life sentence and the more culpable one is serving a sentence of years.

Id.

⁶⁸ See discussion *supra* Part I.A.

that penalty could be imposed. Relying on its rulings in *Coker v. Georgia*,⁶⁹ and *Ford v. Wainwright*,⁷⁰ the Court applied these principles to certain classes of criminals.⁷¹

The first class of individuals that the Court examined was juveniles. Using a two-step approach, a plurality of the Court in *Thompson v. Oklahoma* determined that the imposition of the death penalty on defendants who committed their crimes while under sixteen years of age offended the Eighth Amendment.⁷² First, the plurality looked to the objective factors of the actions of legislatures and sentencing juries to determine if the juvenile death penalty was accepted by society. The plurality discovered that all states that had addressed the issue had determined that sixteen would be the minimum age for which a defendant would be eligible to receive the death penalty.⁷³ The plurality also concluded that the death penalty was rarely imposed on juveniles by sentencing juries.⁷⁴ Thus, based on these objective factors, the plurality concluded that the execution of defendants who were under sixteen years of age at the time of their crimes was "generally abhorrent to the conscience of the community"⁷⁵ and thus offensive to "civilized standards of decency."⁷⁶

The plurality next conducted its own proportionality review⁷⁷ to determine if the punishment of death was an

⁶⁹ 433 U.S. 584 (1977) (plurality opinion).

⁷⁰ 477 U.S. 399 (1986).

⁷¹ See *Penry v. Lynaugh*, 492 U.S. 302, 329–30 (1989) (citing *Ford* and *Coker* for the proposition that certain classes of criminals are exempt from the imposition of the death penalty); discussion *infra* Part II.A.

⁷² *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion). See *infra* note 85 (discussing the Court's holding as expressed in the concurring opinion of Justice O'Connor); see also Linda André-Wells, *Imposing the Death Penalty upon Juvenile Offenders: A Current Application of the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment*, 21 N.M. L. REV. 373, 381–83 (1991) (discussing the ruling in *Thompson*). See generally Susan M. Boland, Bibliography, *Walking the Edge of Death: An Annotated Bibliography on Juveniles, the Mentally Ill, the Mentally Retarded and the Death Penalty*, 21 N. ILL. U. L. REV. 131 (2001) (collecting cases and secondary materials).

⁷³ *Thompson*, 487 U.S. at 829.

⁷⁴ *Id.* at 832–33.

⁷⁵ *Id.* at 832.

⁷⁶ *Id.* at 830.

⁷⁷ *Id.* at 833 (discussing the persuasive nature of the actions of legislatures and juries, but indicating that it was ultimately the Court's job to determine if the punishment was constitutional); *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion) ("[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death

excessive one.⁷⁸ Pointing to the limited rights that society allows juveniles to enjoy,⁷⁹ the plurality determined that “adolescents as a class are less mature and responsible than adults.”⁸⁰ The plurality next looked to the principles of punishment that are generally considered the proper purposes of capital punishment.⁸¹ The plurality concluded that given the lesser culpability of juveniles, retribution was simply not a legitimate response to juvenile crime.⁸² Deterrence was deemed equally inapplicable because of the unlikelihood that juveniles considered the possibility of execution when weighing the consequences of their behavior.⁸³ Thus, the plurality determined that imposition of the death penalty on juveniles under sixteen served no valid purpose and was excessive and unconstitutional.⁸⁴ Justice O’Connor, who concurred on much narrower grounds,⁸⁵ refused to accept the proportionality analysis of the plurality. Justice O’Connor argued that the general observation that juveniles are less blameworthy than adults does not compel the conclusion “that all 15-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment.”⁸⁶ One year later, in *Stanford*

penalty under the Eighth Amendment.”).

⁷⁸ *Thompson*, 487 U.S. at 834–36. The *Coker* Court explained that punishment is disproportional if it “makes no measurable contribution to acceptable goals of punishment” or is “grossly out of proportion to the severity of the crime.” *Coker*, 433 U.S. at 592.

⁷⁹ *Thompson*, 487 U.S. at 823–25. *But see id.* at 871 n.5 (Scalia, J., dissenting) (“[T]he degree of maturity that is necessary fully to appreciate the pros and cons of smoking cigarettes, or even of marrying, may be somewhat greater than the degree necessary fully to appreciate the pros and cons of brutally killing a human being.”); Warren M. Kato, Note and Comment, *The Juvenile Death Penalty*, 18 J. JUV. L. 112, 128 (1997) (arguing that the denial of certain rights to juveniles has little relevance to the juvenile death penalty).

⁸⁰ *Thompson*, 487 U.S. at 834.

⁸¹ *See id.* at 836; *supra* note 78 (stating the two prongs of the proportionality review). Given that the crime here is murder, there can be little argument that the second prong (punishment is grossly out of proportion to the severity of the crime) could be established.

⁸² *Thompson*, 487 U.S. at 836–37.

⁸³ *Id.* at 837–38. The plurality did not mention the goal of incapacitation. *See Gregg v. Georgia*, 428 U.S. 153, 183 n.28 (1976) (plurality opinion) (discussing incapacitation as a purpose of the death penalty).

⁸⁴ *Thompson*, 487 U.S. at 838.

⁸⁵ *Id.* at 857–59 (O’Connor, J., concurring) (deciding this case only on the basis that it would be unconstitutional to execute a defendant under sixteen when the state’s death penalty statute does not specify a minimum age).

⁸⁶ *Id.* at 853 (O’Connor, J., concurring).

v. Kentucky, the Court refused to follow the *Thompson* plurality, albeit in a case concerning sixteen- and seventeen-year-old defendants.⁸⁷

The second class of individuals examined by the Court were the mentally retarded. In *Penry v. Lynaugh*, the Court undertook the same analysis as in *Thompson*, but it concluded that the objective standards used to determine evolving standards of decency did not reflect that society had turned away from executing mentally retarded defendants.⁸⁸ The Court, thus, did not find that the execution of the mentally retarded violated the Eighth Amendment.⁸⁹

As discussed in the introduction to this Note, however, this all changed with the Court's ruling in *Atkins v. Virginia*. Like the *Thompson* plurality before it, the *Atkins* Court first examined the actions of legislatures and sentencing juries. The Court noted that since *Penry* there had been a consistent move among the states toward outlawing the execution of the mentally retarded.⁹⁰ Also, even where the practice was allowed, sentencing juries infrequently made use of it.⁹¹ Thus, the Court

⁸⁷ *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989). The Court recently denied a petition for a writ of habeas corpus filed by Stanford. Four justices dissented and opined that the *Stanford* opinion should be revisited. See *In re Stanford*, 123 S. Ct. 472, 472 (2002) (Stevens, J., dissenting); see also *Patterson v. Texas*, 123 S. Ct. 24, 24 (2002) (Stevens, J., dissenting) (expressing the opinion that the Court should re-examine its decision in *Stanford*); André-Wells, *supra* note 72, at 383–85 (discussing the Court's ruling in *Stanford*).

⁸⁸ *Penry v. Lynaugh*, 492 U.S. 302, 334–35 (1989).

⁸⁹ *Id.* at 335. The Court held that the jury did not have a "vehicle for expressing its 'reasoned moral response'" to the mitigating evidence of the defendant's mental retardation, and thus remanded the case for resentencing. *Id.* at 328; see also John J. Gruttadaurio, Note, *Consistency in the Application of the Death Penalty to Juveniles and the Mentally Impaired: A Suggested Legislative Approach*, 58 U. CIN. L. REV. 211, 216–22 (1989) (predicting the ruling in *Penry* based on the briefs filed in the case, and discussing the problems with the Texas system regarding mitigating evidence); *supra* Part I.B.1.

⁹⁰ *Atkins v. Virginia*, 122 S. Ct. 2242, 2248–49 (2002); cf. *Thompson*, 487 U.S. at 854–55 (O'Connor, J., concurring) (explaining the danger of declaring that a societal consensus exists since the result would be "frozen into constitutional law, making it difficult to refute and even more difficult to reject"). But see *id.* at 2263 (Scalia, J., dissenting) (decrying the Court's reliance on the fact that legislative change was universally towards outlawing the execution of the mentally retarded given that change in the other direction would have been impossible).

⁹¹ *Atkins*, 122 S. Ct. at 2249 (stating that the execution of the mentally retarded is rare). But see *id.* at 2264 (Scalia, J., dissenting) (arguing that execution of mentally retarded might not be uncommon and that if it is, this is easily explained by their relative rarity in society as well as by that condition's status as a

concluded that the execution of the mentally retarded “has become truly unusual, and it is fair to say that a national consensus has developed against it.”⁹²

Following this examination of the objective factors, the Court applied a proportionality analysis. As in *Thompson*, the Court looked to see whether the principles of punishment were furthered by the execution of members of this class, which it deemed to have diminished personal culpability.⁹³ The Court concluded that because of this limited culpability, mentally retarded defendants were not deserving of the utmost form of retribution possible—execution.⁹⁴ Similarly, as in *Thompson*, the Court concluded that deterrence was inapplicable because of the reduced capacity of the mentally retarded to consider the consequences of their behavior.⁹⁵ Thus, the execution of mentally retarded defendants was deemed cruel and unusual punishment.⁹⁶

II. ANALYSIS

A. *The Court and Classes of Killers: The Blind Imposition of Evolving Standards of Decency*

In applying the “evolving standards of decency” test to classes of defendants, the Court relied on its decisions in *Coker v. Georgia* and *Ford v. Wainwright*.⁹⁷ Neither of these two cases, however, speaks to whether membership in a certain class should exempt murderers from the death penalty.

mitigating factor).

⁹² *Id.* at 2249.

⁹³ *Id.* at 2250–51. *But see id.* at 2252 (Rehnquist, C.J., dissenting) (pointing out that those mentally retarded defendants who actually face the risk of execution are those “whose mental retardation has been found an insufficiently compelling reason to lessen their individual responsibility for the crime”); *Brogdon v. Butler*, 824 F.2d 338, 341 (5th Cir. 1987) (holding that if mentally retarded defendant was deemed capable of being responsible for a crime, then he is capable of being punished for that crime).

⁹⁴ *Atkins*, 122 S. Ct. at 2251 (“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.”).

⁹⁵ *Id.*

⁹⁶ *Id.* at 2252.

⁹⁷ *See id.* at 2247; *Penry v. Lynaugh*, 492 U.S. 302, 329–30 (1989) (citing *Ford* and *Coker* for the proposition that the Eighth Amendment “prohibits imposing the death penalty on a certain class of defendants . . .”).

In *Coker v. Georgia*, the Court dealt with the question of whether the death penalty was a cruel and unusual punishment for the crime of the rape of an adult woman.⁹⁸ First, after examining the actions of legislatures and sentencing juries, the Court determined that society no longer sanctioned death as an appropriate punishment for the rape of an adult woman.⁹⁹ More specifically, the Court discovered that Georgia was the only state to allow the death penalty for the rape of an adult woman,¹⁰⁰ and that sentencing juries imposed the penalty in less than ten percent of cases.¹⁰¹ The Court then conducted its own proportionality review. Relying primarily on the fact that rape does not involve the loss of life, the Court concluded that the penalty of death for the crime of rape is excessive and, therefore, in violation of the Eighth Amendment.¹⁰²

It would seem reasonable to read *Coker* as saying that the violation of statutes prohibiting the rape of an adult woman is not behavior that is so egregious as to deserve the death penalty.¹⁰³ In the words of the *Coker* Court, "[A] sentence of death is grossly disproportionate and excessive punishment for the crime of rape and therefore forbidden by the Eighth Amendment as cruel and unusual punishment."¹⁰⁴ Despite this clear reasoning, the Supreme Court has seemingly read the decision in *Coker* to exempt from the death penalty a *class* of defendants—rapists. The Court has stated, "[T]he Eighth Amendment, as a substantive matter, prohibits imposing the

⁹⁸ *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

⁹⁹ *Id.* at 597. *But see id.* at 618 (Burger, C.J., dissenting) ("It is difficult to believe that Georgia would long remain alone in punishing rape by death if the next decade demonstrated a drastic reduction in its incidence of rape . . .").

¹⁰⁰ *Id.* at 594.

¹⁰¹ *Id.* at 597.

¹⁰² *Id.* at 598. The Court also found it persuasive that allowing capital punishment for the rapist could lead to a situation where rapists are executed for their conduct, but where premeditated murderers are not. *Id.* at 600. *But see id.* at 619–21 (Burger, C.J., dissenting) (disagreeing strenuously that there is constitutional significance to the fact that rape does not end in death). Chief Justice Burger wrote, "It is, after all, not irrational—nor constitutionally impermissible—for a legislature to make the penalty more severe than the criminal act it punishes in the hope it would deter wrongdoing." *Id.* at 619 (Burger, C.J., dissenting) (footnote omitted).

¹⁰³ In other words, the crime that is committed is not deserving of the punishment of death. *Cf. Furman v. Georgia*, 408 U.S. 238, 342 (1972) (Marshall, J., concurring) (stating that "breaking the law is the *sine qua non* of punishment").

¹⁰⁴ *Coker*, 433 U.S. at 592 (plurality opinion).

death penalty on a *certain class of defendants* because . . . of the nature of their offense.”¹⁰⁵ This reasoning blurs the line between exempting certain classes from the death penalty and declaring that the death penalty is an excessive punishment for certain crimes. It is the former which is implicated in *Thompson* and *Atkins* because both concern the punishment that is suitable for the crime of murder.¹⁰⁶

The Court’s ruling in *Enmund v. Florida*¹⁰⁷ is similarly unpersuasive in this context. In *Enmund*, the Court conducted the same two-prong test and concluded that the death penalty was an excessive punishment for the felony murderer who did not take life, did not attempt to take life, and did not intend or contemplate the taking of life.¹⁰⁸ Although *Enmund* is similar to both *Atkins* and *Thompson* because it concerns the proper punishment for the crime of murder, its holding is best understood as reserving the death penalty for those who intend to commit the crime of murder. That is, the death penalty was excessive for the *crime* committed by the defendant in *Enmund*.¹⁰⁹

The rulings in *Coker* and *Enmund* thus stand for the proposition that defendants who commit certain *crimes* will be *universally exempt* from the death penalty because of its excessiveness as applied to those crimes. The exemptions

¹⁰⁵ *Penry v. Lynaugh*, 492 U.S. at 329–30 (emphasis added) (citing *Coker* for this proposition).

¹⁰⁶ See Joseph L. Hoffmann, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229, 272–75 (1989). Hoffmann distinguished these cases not necessarily on the basis that one involves a class and the other a crime, but rather using the concept of perfect line-drawing. In other words, by exempting all rapists, the Court “drew a bright line that corresponded precisely to the very characteristics that made the death penalty inappropriate, in retributive terms, for the class of relevant defendants.” *Id.* at 274. On the other hand, age is not a perfect line. *Id.* Hoffmann calls age an imperfect proxy because it is not the characteristic that renders the death penalty inappropriate. *Id.* at 274–75. Age merely stands in for such factors as lack of responsibility, poor judgment, and immaturity. *Id.* at 275.

¹⁰⁷ 458 U.S. 782 (1982).

¹⁰⁸ *Id.* at 801. *But see* *Tison v. Arizona*, 481 U.S. 137, 157–58 (1987) (ruling that intent to kill requirement of *Enmund* is not a good indication of culpability and thus holding that felony murderer who was a major participant in the crime and who exhibited reckless indifference to human life may receive the death penalty).

¹⁰⁹ *Enmund*, 458 U.S. at 801; *see also* Hoffmann, *supra* note 106, at 274 (stating that it was “the defendant’s relative lack of culpability with respect to the victim’s death that made the death penalty unjust”).

created by the Court in *Atkins*, and contemplated by the plurality in *Thompson*, are antithetical to this concept.¹¹⁰

The other authority that the Court has relied on for its application of evolving standards of decency to classes of defendants is its ruling in *Ford v. Wainwright*. In *Ford*, the Court was faced with the question of whether it was cruel and unusual punishment to execute a man who had been convicted of murder and sentenced to death, but who later became insane.¹¹¹ The Court determined that no states allowed the execution of the insane and that the practice was historically considered cruel and unusual.¹¹² Given this history, as well as the limited retributive value of executing someone who has no comprehension of why he is being punished, the Court concluded that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane."¹¹³ This holding, however, becomes an issue "only after the prisoner has been validly convicted of a capital crime and sentenced to death."¹¹⁴ That is, the question raised and answered by the ruling in *Ford* "is not *whether*, but *when*" the execution of the prisoner could take place.¹¹⁵ *Atkins* and *Thompson*, on the other hand, deal exclusively with the question of "whether." The distinction is crucial because *Ford* does not exempt anyone from being validly sentenced to death.¹¹⁶

¹¹⁰ See Hoffmann, *supra* note 106, at 275 (declaring that exemption of juveniles or any other class on the basis of imperfect proxy would be "an unprecedented step in the modern-day jurisprudence of the [E]ighth [A]mendment"); Seung Oh Kang, *The Efficacy of Youth as a Mitigating Circumstance: Preservation of the Capital Defendant's Constitutional Rights Pursuant to Traditional Eighth Amendment Jurisprudence*, 28 SUFFOLK U. L. REV. 747, 771 (1994) (noting the unwillingness of the Court and commentators to declare that age alone exempts one from the death penalty); David L. Rumley, *A License to Kill: The Categorical Exemption of the Mentally Retarded from the Death Penalty*, 24 ST. MARY'S L.J. 1299, 1360 (1993) (stating that the crime of capital murder deserves the death penalty and that a categorical exemption for the mentally retarded gives them a license to kill).

¹¹¹ *Ford v. Wainwright*, 477 U.S. 399, 401-05 (1986).

¹¹² *Id.* at 406-08.

¹¹³ *Id.* at 409-10; see also Hall, *supra* note 56, at 337-40 (discussing *Ford v. Wainwright* and arguing that the holding actually speaks to competence, not insanity).

¹¹⁴ *Ford*, 477 U.S. at 425 (Powell, J., concurring).

¹¹⁵ *Id.* Justice Powell stated, and it was not in contention that, "[T]he State has a substantial and legitimate interest in taking petitioner's life as punishment for his crime." *Id.* Thus, "[I]f petitioner is cured of his disease, the State is free to execute him." *Id.* at n.5.

¹¹⁶ Obviously, if the defendant was insane at the time of the crime, then this

In addition to a lack of precedent, the Court's application of the "evolving standards of decency" test to classes of defendants would lead to unacceptable results. In the second part of its "evolving standards of decency" test, the Court looks to the actions of sentencing juries. The Court has explained that the actions of these bodies are a "significant and reliable objective index of contemporary values because [they are] so directly involved."¹¹⁷ Thus in *Atkins* and in *Thompson*, the Court found it persuasive that sentencing juries rarely imposed the death penalty on mentally retarded and juveniles defendants, respectively.¹¹⁸

If this rarity of imposition is all that is needed,¹¹⁹ then the Court can just as easily exempt a number of other classes from the death penalty. For example, despite accounting for roughly ten percent of murder arrests, women constitute only 1.2% of the executions that have taken place since 1973.¹²⁰ If the statistic in

would be a valid *defense* to the crime, and would not merely spare that defendant from the death penalty. See *Penry v. Lynaugh*, 492 U.S. 302, 332 (1989) ("The common law prohibition against punishing 'idiots' and 'lunatics' for criminal acts was the precursor of the insanity defense, which today generally includes 'mental defect' as well as 'mental disease' as part of the legal definition of insanity."); see also *Hall*, *supra* note 56, at 329–31 (discussing the exculpatory character of the insanity defense).

¹¹⁷ *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (plurality opinion); see also *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (plurality opinion) (quoting *Gregg* for this proposition).

¹¹⁸ See *Atkins v. Virginia*, 122 S. Ct. 2242, 2249 (2002) ("Moreover, even in those States that allow the execution of mentally retarded offenders, the practice is uncommon."); *Thompson v. Oklahoma*, 487 U.S. 815, 832–33 (1988) (plurality opinion) (citing statistics showing that of 1393 persons sentenced to death between 1982 and 1986, only five of them were less than sixteen years old at the time of the offense).

¹¹⁹ The Court has said that the legislation enacted by the states is "[t]he clearest and most reliable objective evidence of contemporary values," *Penry*, 492 U.S. at 331, but as will be discussed below, legislation is not constitutionally possible in the areas to be discussed. See *Thompson*, 487 U.S. at 870–71 (Scalia, J., dissenting) (arguing that the only justification used by the plurality for the exemption of those under sixteen years of age from the death penalty is "our own predilection for converting a statistical rarity of occurrence into an absolute constitutional ban").

¹²⁰ Victor L. Streib, *Death Penalty for Female Offenders: January 1, 1973, Through December 31, 2002*, available at <http://www.law.onu.edu/faculty/streib/femdeath.htm> (Jan. 9, 2003). The period from 1973 to the present has seen 807 executions. Ten of these were of women. *Id.* Streib does report that the execution of females has increased since 1998, but their share of total executions for this period still equals only 2.3%. *Id.* Women account for roughly 10% of murder arrests. *Id.*; see also *Thompson*, 487 U.S. at 870–71 (Scalia, J., dissenting) (positing that the same

Coker, that Georgia juries imposed death on less than ten percent of rapists,¹²¹ was found to show that society had rejected the punishment of death for rapists, then these statistics overwhelmingly show that the execution of women has been rejected by society as well.¹²² Similarly, a look at the statistics cited in *Furman* reveal that the *Coker* Court should have excluded a different class of defendants from the death penalty. Between 1930 and 1972, of the 455 persons executed for rape, only forty-eight were white.¹²³ In Georgia, only three of the sixty-one persons executed for rape were white.¹²⁴ The conclusion could be drawn that sentencing juries had rejected the death penalty for the class of white rapists only.¹²⁵ Although this is a logical result of simply applying the "evolving standards of decency" test, it is surely considered an intolerable conclusion.

analysis used for juveniles could just as easily be applied to women); Andrea Shapiro, *Unequal Before the Law: Men, Women and the Death Penalty*, 8 AM. U. J. GENDER SOC. POL'Y & L. 427, 430-31 (2000) (arguing that the infrequent imposition of the death penalty on women reveals an Equal Protection violation by the states). Compare Streib *supra* (finding that states executed five women between 1984 and 2000), with *Atkins*, 122 S. Ct. at 2264 (Scalia, J., dissenting) (citing statistics that show that thirty-five allegedly mentally retarded defendants were executed during the same period).

¹²¹ *Coker*, 433 U.S. at 597.

¹²² For the same reason that legislatures would not be able to institute such a rule, this conclusion cannot stand. The Equal Protection clause of the Fourteenth Amendment will not allow such discrimination based on gender absent a showing that it is substantially related to important governmental objectives. U.S. CONST. amend. XIV, § 1. Section 1 provides, in pertinent part, that no State shall "deny to any person within its jurisdiction the equal protection of the laws." *Id.*; see also *Thompson*, 487 U.S. at 871 (Scalia, J., dissenting) ("Surely the conclusion is not that it is unconstitutional to impose capital punishment upon a woman."); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982) (explaining the test to be applied when classification is based on gender); *Orr v. Orr*, 440 U.S. 268, 278-79 (1979) (same); *Furman v. Georgia*, 408 U.S. 238, 365 (1972) (Marshall, J., concurring) ("It is difficult to understand why women have received such favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes.").

¹²³ *Furman*, 408 U.S. at 364 (Marshall, J., concurring).

¹²⁴ *Graham v. Collins*, 506 U.S. 461, 482 (1993) (Thomas, J., concurring) (citing brief in *Jackson v. Georgia*).

¹²⁵ Of course, these figures could be the result of the number of black and white defendants, respectively, being tried for rape. Given their respective proportions of the population, however, this seems highly unlikely. See *Furman*, 408 U.S. at 364-65 (Marshall, J., concurring) (acknowledging that a higher crime rate may be partially responsible for the overrepresentation of blacks among the executed, but concluding that the figures reveal racial discrimination).

B. *Individualized No More: The Effect of Exempting Classes from the Death Penalty*

The exemptions issued by the Court in *Atkins* and contemplated in *Thompson*, besides being speciously supported and amenable to dangerous expansion, are contrary to the spirit of Eighth Amendment death penalty jurisprudence as expressed in the ideal of individualized sentencing and ultimately, to the tenets of the Eighth Amendment as expressed by *Furman* and its progeny.

1. The Spirit of Eighth Amendment Death Penalty Jurisprudence: Individualized Sentencing

Individualized sentencing is a constitutional prerequisite for the imposition of the death penalty. Much like mandatory death penalty statutes, however, class exemptions treat individual defendants “not as uniquely individual human beings, but as members of a faceless, undifferentiated mass.”¹²⁶ The creation of homogenous classes¹²⁷ universally exempt from the death penalty has the effect of abrogating the duties of the jury. As can be expected, in an area where individualized consideration is paramount, the Court has emphasized the importance of the jury in death penalty cases.

In *Witherspoon v. Illinois*, the Court declared, “[O]ne of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect ‘the evolving standards of decency that mark the progress of a maturing society.’ ”¹²⁸ Just four days after the

¹²⁶ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion); see also *Kang, supra* note 110, at 776 (“A bright-line test excluding the entire class of youths from the death penalty, however, would negate an individualized examination.”); *Kato, supra* note 79, at 135–36 (decrying the *Thompson* plurality’s reliance on cases requiring individual sentencing while at the same time completely destroying individualization for the class of defendants under sixteen years of age).

¹²⁷ See *Rumley, supra* note 110, at 1320–25 (discussing the various classifications of mental retardation and concluding that “[m]entally retarded individuals are not a homogenous group.”); see also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (explaining that mentally retarded individuals are not “all cut from the same pattern”); *André-Wells, supra* note 72, at 386 (“Perhaps the drafters of the Constitution declined to set a minimum age at which a state may impose a sentence of death because there is no magic age at which all individuals achieve competency.”).

¹²⁸ *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968) (quoting *Trop v.*

ruling in *Atkins*, the concurring opinion of Justice Breyer in *Ring v. Arizona* proclaimed, “[T]he jury remains uniquely capable of determining whether, given the community’s views, capital punishment is appropriate in the *particular case at hand*.”¹²⁹ It goes without saying that exempting classes of individuals from the imposition of the death penalty robs the jury of this ability to determine the punishment that the community seeks to impose on each particular defendant. The result is punishment by class, a result that was explicitly rejected by the Court in its decisions examining mandatory death penalty statutes. In the words of the Court, “a consistency produced by ignoring individual differences is a false consistency.”¹³⁰

2. The Court Re-introduces Caprice

The Eighth Amendment protects against the infliction of cruel and unusual punishment by the state. In the field of capital punishment, these protections become even more pronounced. The argument is easily made that individualized sentencing is a safeguard reserved for the capital defendant alone¹³¹ and thus should not be used as a weapon against him.¹³² The argument concludes that because the Court has determined that certain classes cannot be subject to the death penalty, then individual defendants that are part of those classes obviously do not require the added *protection* that individualized sentencing provides.

This argument, however, is flawed. By focusing entirely on individualized sentencing, it ignores the existence and objective

Dulles, 356 U.S. 86, 101 (1958)). The Court explained that the jury must “express the conscience of the community.” *Id.* at 519. The Court in *Witherspoon* concluded that a jury which was selected by the elimination of potential jurors who expressed general objections to the death penalty could not so express the conscience of the community. *Id.* at 522.

¹²⁹ *Ring v. Arizona*, 122 S. Ct. 2428, 2447 (2002) (Breyer, J., concurring) (emphasis added).

¹³⁰ *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

¹³¹ See *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) (refusing to extend individualized sentencing to cases dealing with life without parole); *State v. Standard*, 569 S.E.2d 325, 328–29 (S.C. 2002) (deciding after *Atkins* that a sentence of life without parole does not require individual sentencing).

¹³² See *supra* notes 51–57 and accompanying text (discussing the mitigating nature of the individualized sentencing requirement).

of the other procedural safeguard promulgated by the *Gregg* Court—channeled jury discretion.¹³³

Channeled jury discretion ensures that, as constitutionally required, a meaningful basis exists for distinguishing between those defendants who receive the death penalty and those who do not. By ruling that the death penalty cannot be considered for entire classes of defendants, the Court has created a situation that violates this goal.

The first problem is that the lines drawn by the Court's categories are not, in and of themselves, a meaningful basis for distinguishing between those defendants that receive the death penalty and those that do not. It is easy to imagine a set of comparable murders committed by individuals with comparable backgrounds. If, however, the IQ of one individual places him just within the range of mental retardation, and the IQ of the other places him just outside that range, then the result could be that one is subject to the death penalty while the other is not.¹³⁴ In this case, the only distinction to be made was that one defendant was classified as being mentally retarded, while the other was not. If this factor does not provide a meaningful basis for distinguishing between those defendants who are death-eligible and those who are not, then a system which decides on this basis is in violation of the Eighth Amendment.¹³⁵

By requiring that a defendant belong to the class of non-mentally retarded individuals before a death sentence may be imposed, the Court, in effect, made that status an aggravating factor.¹³⁶ In *Godfrey*, the Court determined that the aggravating factor of "outrageously or wantonly vile, horrible and inhuman" conduct, on its own, was not sufficient for distinguishing

¹³³ See *supra* notes 43–50 and accompanying text.

¹³⁴ See Hoffmann, *supra* note 106, at 245 (posing a similar hypothetical framed in the context of *Tison* and arguing that minority status should not save one defendant if he was equally as culpable as the other).

¹³⁵ See *Godfrey v. Georgia*, 446 U.S. 420, 432–33 (1980) (plurality opinion) (holding that the aggravating circumstance of wanton conduct did not distinguish those defendants worthy of the death penalty from those who were not). *But see* *McCleskey v. Kemp*, 481 U.S. 279, 306–07 (1987) ("[A]bsent a showing that the . . . capital punishment system operates in an arbitrary and capricious manner, [the defendant] cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty.").

¹³⁶ See *Gregg v. Georgia*, 428 U.S. 153, 197 (1976) (plurality opinion) (stating that an aggravating factor must be found before death sentence may be imposed); *Jurek v. Texas*, 428 U.S. 262, 270 (1976) (plurality opinion) (same).

between those murderers who were deserving of the death penalty and the average murderer.¹³⁷ When compared to the aggravating factor found lacking in *Godfrey*, it becomes clear that the non-mentally retarded aggravating factor is even more constitutionally deficient. Although it is not contended here that the status of non-mentally retarded on its own would be sufficient for a sentence of death, it is helpful to consider that factor in connection with the presence of other factors. For example, in the above hypothetical, if both murderers had committed their crimes for the purpose of receiving money,¹³⁸ then both would be eligible to receive the death penalty. But, if the aggravating factor of non-mentally retarded was required as well, then only one of the murderers would be eligible for execution. Thus, the only distinction between the two would be the aggravating factor of being non-mentally retarded. Given that wanton conduct alone was deemed an insufficient basis for distinguishing between the average murderer and one who is deserving of the death penalty, it seems difficult to maintain that the status of non-mentally retarded, by itself, provides a meaningful basis for that distinction.¹³⁹

The second problem is that the lines drawn result in the arbitrary and capricious administration of the death penalty. As discussed above, the Court determined that mandatory death

¹³⁷ *Godfrey*, 446 U.S. at 428–29.

¹³⁸ The statute considered in *Godfrey* consisted of ten aggravating factors, of which monetary gain was one. *Id.* at 423 n.2. Others included committing the murder while engaging in another capital felony, murdering a judicial officer, and committing the murder while escaping lawful custody. *Id.* at 423–24 n.2.

¹³⁹ *Cf. Hoffmann*, *supra* note 106, at 258–59 (stating that age alone does not provide a meaningful basis for distinction). Unlike wantonness, however, IQ does benefit from its objective nature and as a result, its easy application. The crux of this argument is discussed below. *See infra* notes 140–60 and accompanying text. In the context of the present argument, that IQ does not in and of itself provide a meaningful basis for distinction, it is helpful to consider the plethora of other factors that would be considered more objective than wantonness. A few examples are weight, height, hair color, name, and education. While, like IQ, some of these factors may prove to have some value in understanding a particular defendant, they are not in and of themselves meaningful bases for distinction because they do not have any relation to the *sine qua non* of punishment—the crime committed. That is, all or none of these factors may be useful to a jury in considering a possible punishment, but none, standing alone, compellingly distinguishes between those defendants who should face the possibility of death and those who should not. *See Furman v. Georgia*, 408 U.S. 238, 256 (1972) (Douglas, J., concurring) (positing that a law exempting individuals who make a certain amount of money would be violative of the Eighth Amendment because of its arbitrary nature).

penalty statutes were unconstitutional because they allowed too much discretion, in the form of uninformed decisions to mitigate via nullification, and too little discretion, by not allowing the circumstances of each individual to play a role in sentencing. Unless the line-drawing in *Atkins* and *Thompson* always corresponds to a reduced applicability of the principles of punishment served by the death penalty,¹⁴⁰ then the result will be to cause the exact same arbitrary and capricious application that the Court found intolerable in systems with mandatory death penalty statutes.

The first penological goal that the Court looks to in justifying the use of the death penalty is retribution.¹⁴¹ The Court has stated, "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."¹⁴² Thus, in exempting entire classes from the death penalty, the Court has declared that these groups are less culpable than society as a whole, and thus retribution in the form of the death penalty is not appropriate.¹⁴³

The argument made by the Court, while appealing in its plea to mercy, is unsatisfactory when compared to the standard set by the Court itself. Each and every defendant exempted must be less culpable than the least culpable defendant upon whom the death penalty is imposed; otherwise the entire system is fraught with the arbitrariness and capriciousness that the Eighth Amendment prohibits.¹⁴⁴ It cannot be true that a line drawn at a certain IQ score¹⁴⁵ or at a certain age¹⁴⁶ can perfectly

¹⁴⁰ See *Gregg*, 428 U.S. at 183 & n.28 (identifying the principles of punishment as retribution, deterrence, and incapacitation).

¹⁴¹ See Hoffmann, *supra* note 106, at 247–53, for an excellent discussion of the various tenets and requirements of retributivism.

¹⁴² *Tison v. Arizona*, 481 U.S. 137, 149 (1987).

¹⁴³ See *Thompson v. Oklahoma*, 487 U.S. 815, 836–37 (1988) (plurality opinion).

¹⁴⁴ This is not the same as saying that every defendant who receives the death penalty must be more culpable than those who do not. The Court has recognized that prosecutorial discretion, jury discretion, and other factors might create situations where less culpable defendants receive the death penalty and more culpable defendants do not. See *Gregg*, 428 U.S. at 199–204. The Court, however, was concerned with the final decision to impose the death penalty and whether that procedure "create[d] a substantial risk of arbitrariness or caprice." *Id.* at 203. The issue at hand—exemptions from the death penalty—deals with this final decision by creating a system that alone determines who may or may not be executed.

¹⁴⁵ See Rumley, *supra* note 110, at 1354–55 ("Mental retardation alone does not mean that an individual lacks the cognitive, volitional, and moral capacity to act

predict the relative culpability of each and every defendant who falls within (or without) its bounds.¹⁴⁷ Although this creation of classifications might serve the practical purpose of being easy to administer,¹⁴⁸ that effect is an unfit justification in a system that requires reasoned decision-making.¹⁴⁹ The argument of expedience is even more unsatisfactory given that the system is one that considers the final fate of a defendant charged with a serious crime. Outside the capital system, the criminal justice system as a whole is one that considers each and every individual separately.¹⁵⁰ It is thus hard to maintain that

with the degree of culpability associated with the death penalty.”). *But see* Gruttadaurio, *supra* note 89, at 228 (proposing the exemption of all mentally retarded defendants from capital sentencing).

¹⁴⁶ See Carver, *supra* note 23, at 224 (decrying the arbitrariness of drawing a line at a certain age); Hoffmann, *supra* note 106, at 272–83 (discussing line-drawing based on age and concluding that it is not an effective means for determining culpability for the death penalty). *But see* Mike Farrell, *Sixteenth Annual International Law Symposium: “Rights of Children in the New Millennium:” On the Juvenile Death Penalty*, 21 WHITTIER L. REV. 207, 208 (1999); Elisabeth Gasparini, *Juvenile Capital Punishment: A Spectacle of a Child’s Injustice*, 49 S.C. L. REV. 1073, 1090–91 (1998) (arguing that culpability of a juvenile is not same as that of an adult); Sherri Jackson, Note, *Too Young to Die—Juveniles and the Death Penalty—A Better Alternative to Killing Our Children: Youth Empowerment*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 391, 416 (1996) (“Juveniles lack the degree of blameworthiness that is a constitutional prerequisite for the imposition of the death penalty under the Eighth Amendment proportionality analysis.”).

¹⁴⁷ See *Atkins v. Virginia*, 122 S. Ct. 2242, 2266 (2002) (Scalia, J., dissenting) (“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 . . .”).

¹⁴⁸ See Kato, *supra* note 79, at 139 (“One of the benefits of line-drawing is practicality.”).

¹⁴⁹ See *supra* notes 43–50 and accompanying text.

¹⁵⁰ This is not to say that individualized consideration in sentencing exists outside the capital scheme. See *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) (refusing to extend the constitutional requirement of individualized sentencing beyond the capital system); *Oyler v. Boles*, 368 U.S. 448, 451 (1962) (stating that the constitutionality of statutes that impose mandatory sentences on repeat offenders “is no longer open to serious challenge”). Rather, the argument is simply that, on the whole, the criminal justice system deals with each defendant as a unique person. This is obvious when the system is compared to voting and driving laws. See *Stanford v. Kentucky*, 492 U.S. 361, 374–75 (1989) (opinion of Scalia, J.). The individualized treatment afforded by this country’s criminal justice system is also evident when compared to systems allowing bills of attainder. See *United States v. Brown*, 381 U.S. 437, 441–49 (1965) (discussing the history of bills of attainder and the Constitution’s prohibition of their enactment).

generalizations about culpability are justified based on their expedience.¹⁵¹

The second goal looked to by the Court is deterrence.¹⁵² In *Atkins* and *Thompson* the Court found that deterrence, as a goal for the imposition of the death penalty, was inapplicable to the respective classes because of the inability of members of those classes to consider the consequences of their actions. The Court's deterrence argument suffers from a number of shortcomings. The most glaring of these problems is that the Court, in effect, ruled that those individuals who were not deterred by the threat of capital punishment, because of their age or IQ, belonged to a class of defendants who are not deterred by capital punishment. The circularity of this argument is obvious.¹⁵³ Besides this shortcoming, the Court's argument suffers from the same deficiency that plagued its argument

¹⁵¹ See *Stanford*, 492 U.S. at 374–75 (opinion of Scalia, J.). Justice Scalia stated:

[Age statutes] do not represent a social judgment that all persons under the designated ages are not responsible enough to drive, to drink, or to vote, but at most a judgment that the vast majority are not. These laws set the appropriate ages for the operation of a system that makes its determinations in gross, and that does not conduct individualized maturity tests for each driver, drinker, or voter. The criminal justice system, however, does provide individualized testing.

Id.; see also *Kato*, *supra* note 79, at 140 (arguing that practicality of line-drawing is not required in a system of individualized judgment). The above argument also raises the question of whether the exemptions created by the Court have a rational basis such as to meet the requirements of the Equal Protection Clause regarding classifications based on age and mental retardation. See *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (explaining that classification based on age subject to rational basis test); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (finding that rational basis test applies to classifications based on mental retardation). Given that the criminal justice system is engaged in an individualized determination of culpability, is it rational to create a system of classifications that generalizes the actor's level of culpability based on class membership? Compare *Orr v. Orr*, 440 U.S. 268, 281 (1979) (ruling that there was no rationale for using sex as a proxy for need in an alimony statute since "individualized hearings at which the parties' relative financial circumstances are considered *already occur*"), with *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 316 (1976) (declaring that classification based on age is not irrational just because state did not choose to institute a system of individualized testing).

¹⁵² See *Atkins*, 122 S. Ct. at 2251 ("The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct.").

¹⁵³ See *Carver*, *supra* note 23, at 198–99 (discussing the problem of evaluating the effects of deterrence because those who commit crimes are the ones that obviously were not deterred).

concerning retribution. Why does a year or an IQ point definitively state the point at which one can be deterred?¹⁵⁴

The final goal of capital punishment is incapacitation.¹⁵⁵ Unlike retribution and deterrence, however, incapacitation is not universally mentioned by the Court as a justification for capital punishment. Dissenting in *Atkins*, Justice Scalia declared, "The Court conveniently ignores a third 'social purpose' of the death penalty—'incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future.'"¹⁵⁶ The incapacitation rationale for the death penalty is summed up simply by saying that "death finally forecloses the possibility that a prisoner will commit further crimes, whereas life imprisonment does not."¹⁵⁷ There can be no argument that incapacitation, as a justification for the death penalty, does not apply to mentally retarded and juvenile murderers.¹⁵⁸

In sum, a system that exempts juveniles and the mentally retarded from the death penalty suffers from the same deficiencies as the mandatory death penalty. First, the jury is given no discretion to decide, based on the particular circumstances of the case, whether the death penalty is an appropriate punishment.¹⁵⁹ Second, it can be said that the

¹⁵⁴ See *Stanford*, 492 U.S. at 378 (opinion of Scalia, J.) ("[I]t is not demonstrable that no 16-year-old is 'adequately responsible' or significantly deterred.").

¹⁵⁵ See generally *Kato*, *supra* note 79, at 147–48 (discussing incapacitation).

¹⁵⁶ *Atkins*, 122 S. Ct. at 2265 (Scalia, J., dissenting) (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 n.28 (1976)).

¹⁵⁷ *Roberts v. Louisiana*, 428 U.S. 325, 354 (1976) (White, J., dissenting); see also *Coker v. Georgia*, 433 U.S. 584, 605–06 (1977) (Burger, C.J., dissenting) ("The Court's holding, moreover, bars Georgia from guaranteeing its citizens that they will suffer no further attacks by this habitual rapist.").

¹⁵⁸ In fact, an argument can be made that incapacitation is a stronger justification for the death penalty as applied to mentally retarded and juvenile criminals. See *Johnson v. Texas*, 509 U.S. 350, 368 (1993) (holding that it is not unconstitutionally impermissible that a death penalty statute allowed the jury to consider the defendant's youth as an aggravating factor when determining future dangerousness); *Penry v. Lynaugh*, 492 U.S. 302, 323 (1989) (discussing the danger that mitigating evidence of mental retardation will be given the effect of aggravating evidence because it tends to show an inability to learn from mistakes, and thus future dangerousness); see also *Kato*, *supra* note 79, at 147–48 (arguing that incapacitation in the form of the juvenile death penalty is needed in order to eliminate the corrupting influence of the most heinous juvenile criminals on those that are amenable to reformation).

¹⁵⁹ Alone, this statement does not mean much. A jury in a non-capital case cannot exercise discretion to impose the death penalty either. But here I am

system is given too much discretion. Broad exemptions based on class can be seen as decisions to exercise mercy. Unguided mercy based on meaningless distinctions, however, is the reason that mandatory death penalty statutes were unconstitutional.¹⁶⁰ The result is arbitrary and capricious administration of the death penalty in violation of the Eighth Amendment.¹⁶¹

III. SOLUTIONS

The problem addressed by the Court in *Atkins* and *Thompson* is that the most severe of all penalties—the death penalty—might be imposed on defendants whose class membership raises the very real possibility that they are not as culpable as society as a whole.¹⁶² As discussed in this Note, however, the Court's solution to this problem was to create a system that is inconsistent with the tenets of the Eighth Amendment as explicated by the Court in *Furman* and its progeny. This Note will now discuss two possible solutions to the underlying problem which are consistent with the Court's Eighth Amendment jurisprudence.

A. *Declare the Death Penalty to Be Cruel and Unusual Punishment*

The possible injustice of the execution of juveniles and the mentally retarded that the Court sought to rectify masks a deeper and more intractable deficiency with the death penalty as currently applied. Based on the Court's interpretation of the Eighth Amendment, death penalty statutes must simultaneously channel jury discretion in order to identify those defendants most deserving of the death penalty, while also requiring the jury to consider any and all evidence of a mitigating nature.¹⁶³

concerned only with those cases where the jury would have had that discretion, but for the exemptions announced by the Court.

¹⁶⁰ See *supra* Part I.B.2.

¹⁶¹ See *Graham v. Collins*, 506 U.S. 461, 496 (1993) (Thomas, J., concurring) (“We have consistently recognized that the discretion to accord mercy—even if largely motivated by the desire to mitigate—is indistinguishable from the discretion to impose the death penalty.” (quoting *Furman v. Georgia*, 408 U.S. 238, 313, 314 (1972) (White, J., concurring))).

¹⁶² See *Atkins v. Virginia*, 122 S. Ct. 2242, 2244 (2002) (stating that members of class do not act with the “level of moral culpability that characterizes the most serious adult criminal conduct”); *Thompson v. Oklahoma*, 487 U.S. 815, 825 & n.23 (1988) (plurality opinion) (discussing limited culpability of the class).

¹⁶³ See *supra* Part I.B.1.

Thus at the same time that the focus of the jury is being sharpened, that same jury is also given nearly unlimited discretion to make its decision however it pleases.¹⁶⁴ Given the Court's belief that not even these safeguards will function to save undeserving defendants from the death penalty,¹⁶⁵ it becomes apparent that it may not be possible to write death penalty statutes in such a way as to meet all of these Eighth Amendment requirements. It may not be possible to write a statute that channels discretion, requires individualization and unlimited mitigating evidence, *and* creates additional safeguards for those defendants whose class membership creates the possibility of limited culpability. Because this task seems impossible, the death penalty should be declared cruel and unusual punishment.¹⁶⁶

B. Increased Individualization as the Remedy for Members of Needy Classes

An alternative solution would solve the problem by increasing the level of individualized consideration. The mentally retarded and juveniles will be handled separately here because of differences between these two groups.

¹⁶⁴ See *Callins v. Collins*, 510 U.S. 1141, 1151–53 (1994) (Blackmun, J., dissenting) (arguing that it is impossible to balance all of the safeguards required by the Eighth Amendment in capital cases); *Johnson v. Texas*, 509 U.S. 350, 373–74 (1993) (Scalia, J., concurring) (expressing the view that consideration of unlimited mitigating evidence conflicts with the principle of channeled jury discretion); *Graham*, 506 U.S. 461, 492–94 (1993) (Thomas, J., concurring) (discussing the arbitrariness of allowing jury decisions based on unlimited mitigating evidence). The Court has ruled that it is constitutional for a jury to be instructed that it cannot be “swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling . . .” *California v. Brown*, 479 U.S. 538, 539 (1987).

¹⁶⁵ That is, individualized sentencing and unlimited mitigating evidence is not enough of a safeguard to ensure that juries will be able to determine who is not sufficiently culpable for the death penalty. See *supra* note 164.

¹⁶⁶ See *Callins*, 510 U.S. at 1159 (Blackmun, J., dissenting) (declaring that the Court should abandon capital punishment because it is unworkable); Shapiro, *supra* note 120, at 467 (“It is unreasonable to think that the United States can perfect a sentencing system that strives to preserve both uniformity and individuality at the same time.”). But see *Callins*, 510 U.S. at 1142 (Scalia, J., concurring) (arguing that the conclusion reached by Justice Blackmun ignores the fact that the two diametrically opposed tenets of the Court's Eighth Amendment death penalty jurisprudence are creations of the Court and not constitutionally provided for).

1. Rebuttable Presumptions and Mental Retardation

As discussed above, the basic problem is the fear that mitigating evidence and individualized consideration will not be sufficient to save those mentally retarded individuals who did not act with the culpability required for the death penalty. Instead of avoiding this problem by simply exempting all mentally retarded defendants, the Court could have required a rebuttable presumption of insufficient culpability once mental retardation was established.¹⁶⁷ For example, once a defendant has shown that he is mentally retarded, the jury could be instructed to weigh all aggravating and mitigating factors with the understanding that the defendant's mental retardation creates a presumption of insufficient culpability which must be overcome by the aggravating factors.¹⁶⁸ Thus something more than a simple balancing of aggravating and mitigating factors would be required for the jury to impose the death penalty. The scale would be weighed in favor of mentally retarded defendants.

This proposal alleviates the fears that mentally retarded defendants of limited culpability could be executed despite the mitigating factor of mental retardation. By interpreting the Eighth Amendment to require such a presumption, the Court could have ensured that only deserving mentally retarded defendants are executed while avoiding the arbitrariness that results from exempting entire classes of individuals from capital punishment.

2. One Step Back: Protecting Juveniles in Their Waiver into Criminal Court

Like the problem of the death penalty and mentally retarded defendants, the problem of the juvenile death penalty can be solved by further individualizing the process. The unique problem posed by juveniles in the capital system is that "the jury might mistakenly conclude that because the defendant is in an adult court rather than a juvenile court, the judge has already taken youth into consideration."¹⁶⁹ Frequently, however, this is

¹⁶⁷ See *supra* note 12 for a definition of mental retardation that could be used by courts.

¹⁶⁸ Cf. Hoffmann, *supra* note 106, at 270-72 (discussing the possibility that rebuttable presumption of immaturity could be used for juveniles facing the death penalty).

¹⁶⁹ Gasparini, *supra* note 146, at 1090.

not the case. Judicial waiver into criminal court oftentimes is based on criteria irrelevant to the particular actor's level of responsibility or culpability.¹⁷⁰ The factors used by states, including Oklahoma in *Thompson*, are based¹⁷¹ on the criteria set out in an appendix of the Court's decision in *Kent v. United States*.¹⁷² Those factors include the seriousness of the offense, the level of violence used, the prosecutive merit of the case, the maturity level of the actor, the history of the actor, and the prospects for rehabilitation given available resources of the state.¹⁷³

Based on the multitude of factors used, none of which was considered by the Court in *Kent*,¹⁷⁴ it is apparent that the Court could introduce safeguards at this stage of the proceedings which would ensure that only those juveniles who exhibited the requisite culpability could be waived into criminal court.¹⁷⁵ For example, since waiver into criminal court subjects juveniles to adult punishments, including the possibility of receiving the death penalty, the Court could declare that the Eighth Amendment requires that every juvenile defendant be screened on the basis of his individual culpability alone before waiving him into criminal court. Thus, only those juveniles who acted with sufficient culpability would be subject to adult penalties.¹⁷⁶ Once in adult court, moreover, a rebuttable presumption similar to that discussed for mentally retarded defendants could be used

¹⁷⁰ See Katherine Hunt Federle, *Emancipation and Execution: Transferring Children to Criminal Court in Capital Cases*, 1996 WIS. L. REV. 447, 452 (1996); Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 713-22 (1998) (discussing at length the shortcomings of the waiver process); Lawrence A. Vanore, Note, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 IND. L.J. 757, 771 n.81 (1986) (explaining the many factors in the waiver decision that overshadow the maturity and culpability of the juvenile).

¹⁷¹ See Federle, *supra* note 170, at 453-64.

¹⁷² 383 U.S. 541 (1966).

¹⁷³ See *Kent v. United States*, 383 U.S. 541, 566-67 (1966).

¹⁷⁴ See *id.* at 561-63 (deciding the case only on the grounds that procedural safeguards were violated).

¹⁷⁵ See Federle, *supra* note 170, at 488-89 (explaining that many of the *Kent* criteria have absolutely nothing to do with the culpability of the juvenile); Logan, *supra* note 170, at 721 ("[T]here is scant reason to believe that waiver, in whatever form, serves to winnow in any reliable way only those juveniles that should be prosecuted as adults.")

¹⁷⁶ See Kato, *supra* note 79, at 129 (stating that certification into adult court should logically stand for the proposition that those juveniles should receive adult punishment).

to ensure that only those juveniles who truly deserve the death penalty will receive it.¹⁷⁷ These safeguards would solve the problem of unworthy juveniles possibly being executed while avoiding the problem that would be created by exempting a class of individuals from the death penalty.¹⁷⁸

CONCLUSION

In the sphere of capital punishment, the Eighth Amendment requires that a number of safeguards be implemented in order to avoid the arbitrary and capricious imposition of this most serious of all penalties. Jury discretion must be channeled in order to identify the most deserving defendants, yet juries must be given the opportunity to consider any and all evidence that serves to mitigate the individual's blameworthiness. In *Atkins v. Virginia*, the Supreme Court, without relevant precedent, pushed these safeguards aside and exempted an entire class from capital punishment. While the potentially far-flung scope of this ruling was likely not considered by the Court, the real danger lies in its complete abandonment of the goals that the Eighth Amendment supposedly stood for. While rhetoric and superficial analysis can lead to the conclusion that the death penalty today is kinder and gentler than in years past, constitutional scrutiny reveals it to be all the more capricious in its imposition.

¹⁷⁷ See Hoffmann, *supra* note 106, at 270–72 (discussing rebuttable presumptions and their applicability to the problem of the juvenile death penalty). Hoffmann also noted that Justice Scalia, in his dissent in *Thompson*, seemed to embrace the idea of a rebuttable presumption in favor of juveniles. *Id.* at 270.

¹⁷⁸ This would have another positive effect as well. Although the Court has focused on the possible injustices of the juvenile death penalty, it is important to note that juveniles waived into criminal court can still receive all other adult punishments, even though the Court has deemed them generally less culpable. See *Hawkins v. Hargett*, 200 F.3d 1279, 1285–86 (10th Cir. 1999) (finding that one-hundred-year sentence imposed on thirteen-year-old criminal was not cruel and unusual punishment); *State v. Standard*, 569 S.E.2d 325, 329 (S.C. 2002) (“[W]e find lengthy sentences or sentences of life without parole imposed upon juveniles do not violate contemporary standards of decency so as to constitute cruel and unusual punishment.”). Thus, by requiring that juveniles be screened on the basis of culpability alone, only those juveniles most deserving of the whole panoply of adult punishments would thus receive them. They would receive protection, not only from the death penalty, but also from all adult punishment. *Cf. Logan, supra* note 170, at 709–13 (discussing the need for proportionality analysis in evaluating the efficacy of sentences of life without parole when imposed on juveniles).

