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## Executing the mentally retarded

*Mark George looks at the evolving standards of decency which lead to the recent decision of the Supreme Court in the case of Atkins.*

The Eighth Amendment to the US Constitution prohibits the imposition of cruel and unusual punishment. In February 2002 the US Supreme Court heard oral argument in the case of *Atkins v Virginia* on the key issue of whether the execution of a person suffering from mental retardation violates that person's rights under the Eighth Amendment. At the time of writing (early May) the decision of the Court is still awaited.

If the Court does rule in *Atkins*' favour it will be the end of a long campaign, which goes back until at least 1989, to prevent such executions. In that year the Supreme Court allowed the first appeal of Johnny Penry (*Penry v Lynaugh* 492 US 302 (1989)). Penry's death sentence was quashed. One of the grounds of his appeal, unsuccessful in the event, raised the same issue as in *Atkins*.

The starting point of this debate is the Eighth Amendment itself. As Stevens J noted in *Lackey v Texas* 115 S.Ct. 1421 (1995) '[in] *Gregg v, Georgia* 428 US 153 (1976) this Court held that the Eighth Amendment does not prohibit capital punishment. Our decision rested in large part on the grounds that the death penalty was considered permissible by the Framers of the Eighth Amendment.' The question raised in the *Atkins* case is whether it can be said that the Framers of the Eighth Amendment would nevertheless have regarded the execution of the mentally retarded as prohibited.

In the US system, the English common law as at the time of the writing of the Constitution and the first ten amendments that form the Bill of Rights has a place of fundamental importance. It is for this reason that US lawyers pay close attention to the writings of the great legal commentators of the seventeenth and eighteenth centuries, Coke, Blackstone and Hale. It is clear from their writings that the common law of England would not countenance the execution of those suffering from mental retardation. Sir Edmund Coke in his *Third Institute* (1644) described the execution of the mentally incompetent as 'a miserable spectacle ... of extreme inhumanity and cruelty', which was itself 'against the common law'. In Blackstone's *Commentaries on the Laws of England* (1768), he called such executions 'a savage and inhuman act'. Hale explained that the execution of the incompetent was unfair because of the inability of such persons to defend themselves as the

law might still allow. 'Were [the incompetent] of sound memory, he might allege somewhat in stay of judgment or execution' (M. Hale *History of the Pleas of the Crown* (1736)). By the time the Eighth amendment was framed, this prohibition was considered an 'ancient' rule, dating from at least the thirteenth or early fourteenth century (J. Stephen, *A History of the Criminal Law of England* (1833)).

The clarity of the position at common law led the Supreme Court in *Ford v Wainwright* 477 US 399 (1986) to conclude that the Framers of the Constitution undoubtedly intended the Eighth Amendment to incorporate this rule. The US Supreme Court has repeatedly stated that the US Constitution's prohibition of cruel and unusual punishment is not static: *Ford v Wainwright*; *Gregg v Georgia*. Rather, the Eighth Amendment draws 'its meaning from the evolving standards of decency that mark the progress of a maturing society': *Trop v Dulles* 356 US 86, 101 (1958). Accordingly, courts are required to 'interpret the [Eighth] Amendment in a flexible and dynamic manner': *Stanford v Kentucky* 492 US 361, 369 (1989); and in 'determining what standards have "evolved", a court's judgment should be informed by objective factors to the maximum possible extent' (*ibid.*). In *Penry v Lynaugh* 492 US 302, 331 (1989) the Court said "in discerning these "evolving standards", we have to look to objective evidence of how society views a particular punishment today'.

Unfortunately for Johnny Penry, in 1989 there was little evidence of any such evolutionary progress. He was only able to point to two states (Maryland and Georgia) that had passed statutes prohibiting the execution of the mentally retarded. Accordingly, even when added to the twelve states (plus the District of Columbia and the Federal government) that did not allow capital punishment at all, the Supreme Court concluded that this did not 'provide sufficient evidence *at present* of a national consensus against the execution of the mentally retarded' (emphasis added). On this point, therefore, the Court voted 5-4 that the execution of the mentally retarded did not violate the Eighth Amendment. In using the words 'at present', the Court was leaving the door open to future developments and recognised that such a consensus 'may someday emerge' (*ibid.*, 340). The Court

asserted that 'the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures' (*ibid.*, 331).

During the 1990s the elected representatives of public opinion were busy in this area. By the time Johnny Penry returned to the Supreme Court for his second appeal in 2000, ten further states (Tennessee, Kentucky, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York and Nebraska) had all voted to ban the execution of the mentally retarded. Penry's second appeal again raised the issue of executing the mentally retarded. The Supreme Court, however, side-stepped the issue, allowing the appeal on the narrow point that the jury were wrongly deprived of the chance to consider the evidence of mental retardation in his case in mitigation before deciding whether to vote to impose the death penalty.

The Supreme Court was persuaded to confront this issue and granted certiorari in the case of *McCarver v North Carolina*. However the legislature in North Carolina then passed a bill that outlawed the execution of the mentally retarded, rendering the argument in the case of *McCarver* moot, since the new law applied to those who were already on death row. The Supreme Court then decided to substitute the case of *Atkins v Virginia*, which raised the same issue.

By the time oral argument was heard in that case the number of states which had voted to ban the execution of the mentally retarded had increased further. In the last couple of years South Dakota, Arizona, Florida, Connecticut, Missouri and North Carolina have all voted to ban such executions and the total number of

such states is now eighteen. As there are twelve states that do not have a death penalty statute at all, there are now thirty states in which a person suffering from mental retardation would not be executed.

The obvious weight of these figures and the fact that they show, above all, how much public opinion, as expressed through elected representatives, has changed since 1989 did not prevent the assistant general attorney for Virginia

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from arguing that the Court should not include states which do not have a death penalty at all. Neither did they dissuade Justice Scalia, who is certain to vote against such wishy-washy liberal notions that people with mental retardation should not be executed, from suggesting that since a majority of death penalty states (twenty out of thirty-eight) still permit the execution of such persons this 'sounds like a consensus in the other direction'. Such arguments are to be expected from those fighting to maintain the right

to execute the mentally ill but it is clear that the flood-tide of public opinion is about to wash the exponents of such views from the lofty perch to which they have held for so long.

If the Supreme Court is true to the view that the legitimacy of the death penalty has to be determined by how the citizens of the states express the evolving standards of decency through the votes of their elected representatives in passing legislation, it may not now be too long before this particularly repugnant aspect of the death penalty is finally laid to rest.

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