The implications of the Atkins Concept on the Lives of People with Disabilities in Criminal and Civil Courts

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Abstract:

Atkins v. Virginia, a 2002 United States Supreme Court decision, in essence promised Eighth Amendment protections for defendants with mental retardation who were convicted of capital crimes. A recent review suggests that not only were those protections never delivered, but the group of individuals who were targeted for those protections may be more vulnerable to Cruel and Unusual Punishment than they were prior to the Supreme Court decision. Furthermore, the suggested failure may represent a general underlying prejudice or level of "sanism" that exists toward people with disabling conditions in criminal and civil courts. This paper attempts to illustrate both the encapsulated history and ongoing sanism within American Jurisprudence.

The Atkins Concept

The "Atkins Concept", and its resulting search to clearly define both "Cruel and Unusual Punishment" and the specific definition of the disability that would exclude a group of individuals who have been convicted of capital crimes from Capital Punishment,

may have implications regarding the granting or withholding of basic civil rights, and the provision of voluntary or involuntary treatment by civil courts, in addition to its impact on sentencing in criminal courts. This concept (or construct) may have had a profound influence on the delivery (or lack of it) of basic services to inmates in America's prisons. Furthermore, Deliberate Indifference, the Right to Treatment, the Right to Refuse Treatment, and other terms and concepts may have evolved as a result of this concept.

Jurisprudence, in the way that it is applied to criminal defendants with mental retardation, has begun to evolve amid constructs, theory, political reactions, and public opinion since the United States Supreme Court made a decision involving the disability and its constitutional status in 2002, deeming the execution of capital offenders with mental retardation to be an Eighth Amendment violation. The events following the Atkins decision in both criminal and civil courts may serve as a microcosm of society's attitude toward all people with all disabilities, including those with cognitive deficits.

The "Atkins Concept" shall be defined exclusively in this paper as "the ongoing pattern of flawed legislation and judicial decisions that, although designed to protect the rights of people with mental and other disabilities, which tends to exacerbate the impact of sanist attitudes and ongoing discrimination of such individuals in criminal and civil courts."

Sanism and Pretextuality

Michael Perlin, Founder and Chair of the Mental Disability Law Graduate Program at New York Law School, has spent a career addressing the issue of the impact

of ongoing prejudices and the practice of introducing disingenuous information, evidence, testimony and strategies within America's courts. As part of his ongoing mission, he has coined two terms that are quickly becoming universally accepted within the world of Mental Disability Law. According to Perlin (2000):

> …..***sanism*** is an irrational prejudice of the same quality and character of other prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry. It infects both our jurisprudence and our lawyering practices. Sanism is largely invisible and socially acceptable. It is based predominantly on stereotype, myth superstition, and deindividualization, and is sustained and perpetrated by our use of alleged "ordinary common sense" (OCS) and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process (pp. xviii-xix).

Perlin also suggests that ***pretextuality***:

> means the courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (frequent meretricious) decision making, specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their

> testimony in order to achieve desired ends. This pretextuality is poisonous; it infects all participants in the judicial system, breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and, at times, perjurious and/or corrupt testifying.

The aftermath of the United States Supreme Court decision in Atkins v. Virginia may have led to the unintentional impact of sanism, or sanist attitudes toward people with mental disabilities and the continued practice of pretextuality within the curst lessening, rather than strengthening, the rights of the population whose Eighth Amendment protections the Atkins decision was designed to uphold.

Atkins v. Virginia, 536 U.S. 304 (2002), left it up to the states to determine their own definition of mental retardation. Arguments regarding numerical IQ scores and the definition of Adaptive Behavior have since ensued. Atkins transcends the issue of capital punishment and has the potential to impact on non-capital cases where an eighth amendment violation may not have prominent importance.

The 2002 Supreme Court ruling has the potential to impact on such issues as “Incompetent to Stand Trial” decisions. In fact, the very nature of the Atkins decision provides both an implicit and explicit message that people with mental retardation may not be responsible (or liable) for their actions.

When New York re-instituted the death penalty, along with some other states, Perlin (1996) took a line from a Bob Dylan lyric, “when the executioner’s face is well-hidden”, in creating a title for a law review article that illustrates his concern regarding the fairness of the death penalty: According to Perlin:

> ……I am still certainly not convinced the death penalty will be administered fairly and even-handedly in each New York county. I am not convinced that judges and jurors will shed their sanist biases in dealing with allegedly mitigating mental disability evidence, and I am not convinced that the system will be one that will be administered in a manner free of pretextuality.

An analysis of the political and legal impact of Atkins on criminal proceedings and sentencing can be explored by reviewing such events in New Jersey, where there is no Capital Punishment, but where a large portion of incarcerated violent criminal offenders have cognitive deficits. An examination of the IST requests by defense attorneys on behalf of defendants with mental retardation, along with the court reactions to these requests, will be explored.

The Atkins Case and Judicial Policy

The Atkins case resulted in judicial policy regarding Capital Punishment that it is still being challenged in state courts. Judges and prosecutors alike were challenged to interpret the Atkins decision and to scrutinize the definition of mental retardation,

pursuant to making judicial decisions or posting challenges. Judge Prentiss Smiley, who presided over the series of Atkins cases, set a date for execution during the proceedings. The jury had determined that Atkins did not suffer from mental retardation, and therefore was eligible for the death penalty. Later, when defense attorneys provided evidence that the testimony of Trevor Jones, Atkins's partner in the crime, may have been the result of a "rehearsal" orchestrated by the lead prosecutor, he vacated the death sentence, rendering a sentence of life imprisonment. As of this writing, more than thirteen years after the crime, Daryl Atkins's sentence is still being challenged in Virginia courts.

However, the Atkins U.S. Supreme Court decision impacted on future judicial policy. In Smith v. Texas (2004) the Supreme Court determined that a convicted murderer with an IQ possibly in the mentally retarded range and documented learning disabilities should not receive the death penalty. The majority decision (7-2), made by the Rehnquist Court, followed the same path as Atkins v. Virginia, two years earlier. Scalia and Thomas were the lone dissenters.

Smith was nineteen years old at the time of the Taco Bell robbery. During the trial, evidence was not presented to the jury regarding possible mental retardation and/or a learning disability. The Texas court, seeing not connection between the crime and diminished capacity, rejected the claim as irrelevant. Nevertheless, the majority opinion of the U.S. Supreme Court that "There is no question that a jury might well have considered (Smith's) IQ scores and history of participation in special-education classes as a reason to impose a sentence more lenient than death,"

Nevertheless, following the Atkins decision, prosecutors challenged “Atkins Eligibility”, by scrutinizing the definition, or series of definitions, of mental retardation that were being used by the various states. Advocates who opposed the death penalty following the Atkins decision also challenged the definitions of Mental Retardation and the methods that were used to identify the condition. According to the American Association on Intellectual and Developmental Disabilities (AAIDD):

> Intellectual disability is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills. This disability originates before the age of 18.
>
> Intellectual functioning—also called intelligence—refers to general mental capacity, such as learning, reasoning, problem solving, and so on.
>
> One criterion to measure intellectual functioning is an IQ test. Generally, an IQ test score of around 70 or as high as 75 indicates a limitation in intellectual functioning.
>
> Standardized tests can also determine limitations in adaptive behavior, which comprises three skill types:
>
> - Conceptual skills—language and literacy; money, time, and number concepts; and self-direction.

- Social skills—interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), social problem solving, and the ability to follow rules/obey laws and to avoid being victimized.
- Practical skills—activities of daily living (personal care), occupational skills, healthcare, travel/transportation, schedules/routines, safety, use of money, use of the telephone.

On the basis of such many-sided evaluations, professionals can determine whether an individual has an intellectual disability and can tailor a support plan for each individual. But in defining and assessing intellectual disability, the American Association on Intellectual and Developmental Disabilities (AAIDD) stresses that professionals must take additional factors into account, such as the community environment typical of the individual's peers and culture. Professionals should also consider linguistic diversity and cultural differences in the way people communicate, move, and behave.

Finally, assessments must also assume that limitations in individuals often coexist with strengths, and

> that a person's level of life functioning will improve if appropriate personalized supports are provided over a sustained period.

Clearly, the last paragraph of AAIDD's definition provided ammunition for state prosecutor's to challenge the presence of mental retardation among defendants in death penalty cases. This suggestion that cognitive deficits may not necessarily be constant or permanent may be one of the reasons why Blume, et. al. suggest that the Atkins decision may have resulted in more, rather than less, executions since the U.S. Supreme Court announced its finding in 2002.

Other definitions of mental retardation have been offered by the educational, psychological/research, and medical communities, as well. However, the AIDD definition has left enough grey matter to allow the aforementioned challenges among state prosecutors. Nevertheless, a brief struggle has existed regarding whether the preferred method for diagnosing mental retardation was simply employing an IQ measurement or developing an adaptive behavior scale. The employment of an adaptive behavior scale for diagnostic purposes creates the dilemma of identifying those specific behaviors that are necessary in order to engage in a "normal" lifestyle. Since adaptive behavior includes the skill that is used to adjust to another type of requisite behavior that is necessary for successful, independent living, the ability to substitute an unconstructive or disruptive behavior for a more constructive outcome is essential. Unfortunately, the concept of adaptive behavior can lead to the interpretation of subjective issues by the

courts, whereas the employment of a numerical IQ measure provides a simpler conceptualization

Pre-Atkins Issues

John Paul Penry, a Texan with mental retardation, has been facing the death penalty, and several U. S. reviews of his case, for more than 30 years. Penry was diagnosed with mental retardation as a young child. Johnny Paul was originally convicted and sentenced to death in March of 1980. The U. S. Supreme Court twice revoked the death sentence on procedural grounds, prompting retrials. The U.S. Supreme Court first revoked his death sentence in June, 1989. A second trial resulted in another death sentence in July, 1990; the Supreme Court issued a stay of execution only three hours before Penry's scheduled execution on November 16, 2000. The U.S. Supreme Court revoked his death sentence once again, on June 4, 2001. Another trial took place on July 4, 2002, and Penry was re-sentenced to death on the same day. The Texas Court of Criminal Appeals overturned his death sentence on October 5, 2005, but the U.S. Supreme Court refused to reinstate the death sentence on July 12, 2006. A new trial is still possible. His attorneys assert that Penry has the mind of a seven year old. Yet, despite Atkins v. Virginia, Texas prosecutors continue to seek the death penalty.

Initially, the U.S. Supreme Court sanctioned the death penalty for mentally retarded convicted capital offenders in Johnny Paul Penry v. Lynaugh, (1989). In this case, the Court determined that the execution of mentally retarded convicted offenders did not constitute "cruel and unusual punishment" under the Eighth Amendment. Nevertheless, it was also determined that Texas law did not allow the jury to give

adequate consideration to the defendant's mental retardation as a mitigating factor. Thus, a new trial was ordered, and, in Penry v. Johnson (2001), Penry was once again sentenced to death. However, when the U.S. Supreme Court considered the defendant's mental retardation as a mitigating factor, Penry was again spared the death penalty. However, the Court did not declare those with mental retardation to be ineligible for the death penalty as a class. The blanket Eighth Amendment protection was not declared until the Atkins decision in 2002, when Associate Supreme Court Justices O'Connor and Kennedy reversed their position on the issue and declared that all such defendants should be ineligible for the death penalty. Chief Justice Rehnquist and Associate Justices Scalia and Thomas were the lone dissenters.

A case of similar note, with schizophrenia serving as the disabling condition rather than mental retardation, also arose in Texas. On September 8, 1982, Scott Panetti, a diagnosed schizophrenic, responded to the constant voices he was hearing. After shaving his head and sawing off the barrel of a shotgun, he drove to the home of his father and mother-in law, shooting them to death in the presence of his wife and child. Following the murder, Panetti showered and turned himself in to the police.

At his trial, Panetti served as his own lawyer, requesting that JFK, Pope John Paul II, Anne Bancroft and Jesus serve as witnesses. The jury found him guilty on September 21, 1995 and he was subsequently sentenced to death. As he awaits execution, Penetti's case is being brought before the Supreme Court with the argument that his sentence violates the Eighth Amendment to the Constitution. The Supreme Court previously ruled on a similar case in Ford v. Wainwright in 1986. In Ford, the Court, indeed, declared that

the execution of an insane person was an Eighth Amendment violation. An amicus brief was filed on February 26, 2007 and the U.S. Supreme Court was left to consider the following:

> Does the Eighth Amendment permit the execution of a death row inmate who has a factual awareness of the reason for his execution but who, because of severe mental illness, has a delusional belief as to why the State is executing him, and thus does not understand that his execution is intended to seek retribution for this capital crime?

The case was eventually remanded to the Federal District Court of the western district of Texas, where Panetti was found competent to be executed. According to Federal Judge Sam Sparks:

> Panetti was mentally ill when he committed his crime and continues to be mentally ill today. However, he has both a factual and rational understanding of his crime, his impending death, and the causal retributive connection between the two. Therefore, if any mentally ill person is competent to be executed for his crimes, this record establishes it is Scott Panetti.

Nevertheless the United States Supreme Court decided Panetti v. Quarterman in 2007, ruling that competency is a prerequisite for execution, and those convicted of capital offenses must understand the reason for their sentence in order for their sentence

to be carried out. Thus, the need for competency to be executed reaffirmed Ford v. Wainwright (1986), and Stewart v. Martinez-Villareal (1998).

Post-Atkins Results

Atkins v. Virginia has faced many challenges since the original ruling in 2002. A very recent challenge was made in the Pennsylvania Supreme Court decision in Commonwealth v. Vandiviner (2009), in which the court ruled that there must be evidence of a manifestation of mental retardation on the part of the defendant prior to the age of eighteen years. According to the Court:

> We see no error in the court's finding that appellant failed to present sufficient evidence to establish that the onset of his alleged mental retardation occurred prior to age eighteen. The court properly noted that there were no IQ tests from appellant's childhood produced; and his school records do not establish that he was placed in special education classes as a result of mental retardation. Indeed, the evidence demonstrated that such a placement could result from behavioral problems rather than from mental retardation. The trial court also recognized that appellant's excessive absences from school could very well have been the cause of his poor academic performance.

Nevertheless, local newspapers mistakenly reported the Vandiviner decision as a ruling by the Pennsylvania State Court that the execution of felons with mental retardation who are convicted in capital cases was now legal. In fact, the Pennsylvania State Court decision in no way challenged the U.S. Supreme Court decision. In actuality, the Pennsylvania State Court determined that, since frivolous defense claims of mental retardation were likely to occur, the manifestation of the disability must have been documented prior to the eighteenth birthday of the defendant. This was not an unusual ruling regarding the disability issue. In 1996, the U. S. Congress proclaimed, during a reauthorization of the Individuals with Disabilities Education Act, that young incarcerated adults could not receive special education services while in prison if an educational disability was not manifested prior to the eighteenth birthday of the inmate.

The obvious Atkins challenges began to emerge. In 2005, a Virginia jury decided that Atkins's IQ score had risen as a result of stimulation that occurred while preparing his defense with his lawyers. A new IQ score of 70 was accepted by the court to replace the old score of 59. Furthermore, the prosecution challenged his original IQ scores, claiming they were the result of drugs and alcohol, rather than innate intelligence deficits.

Nevertheless, the Atkins death sentence was set aside in January 2008, when Circuit Court Judge Prentiss Smiley learned that Atkins's co-defendant, Trevor Jones, was coached by the prosecution during the original trial. Citing prosecutorial misconduct, Judge Smiley commuted the sentence to life imprisonment. The inevitable appeal by prosecutors to the Virginia Supreme Court has yet to be resolved.

Since the initial Atkins decisions, the states have worked to create appropriate definitions of mental retardation. According to Blume, Johnson, and Seeds (2009), however, the scramble among the states to become "Atkins-Compliant" may have led to more defendants with mental retardation, rather than less, facing execution. According to Blume, Johnson, and Seeds:

> Under Atkins v. Virginia, the Eighth Amendment exempts from execution individuals who meet the clinical definitions of mental retardation set forth by the American Association on Intellectual and Developmental Disabilities and the American Psychiatric Association. Both define mental retardation as significantly sub-average intellectual functioning accompanied by significant limitations in adaptive functioning, originating before the age of 18. Since Atkins, most jurisdictions have adopted definitions of mental retardation that conform to those definitions. But some states, looking often to stereotypes of persons with mental retardation, apply exclusion criteria that deviate from and are more restrictive than the accepted scientific and clinical definitions.

The post-Atkins era has produced controversy regarding the possibility of frivolous claims of mental retardation by defendants. However, Melanie Farkas (2009) points out that, although the number of inmates with below-average intelligence is significant, there is a paucity of research that purports to measure it. According to Farkas:

> Concerns about malingered mental retardation in criminal settings have grown in the post- Atkins era. Despite the substantial proportion of inmates with below-average intellectual functioning, little research investigates the accuracy of malingering detection measures when respondents have genuine intellectual disabilities.

In addition, psychometricans took note of the Flynn Effect, or the rise of the average intelligence quotient (IQ) test scores over generations throughout most parts of the word to varying degrees. Applbaum (2009) has suggested that the gains have been continuous and relatively linear. In addition, Applbaum suggests, court decisions based on clinical findings often lead to confusion, such as the current struggle to identify mental retardation among defendants.

Bobby v. Bies

On April 27, 2009, the U.S. Supreme Court considered the oral argument in *Bobby v. Bies,* regarding whether the State could contest the mental retardation determination for a second time at a post-conviction *Atkins* hearing.

In 1992, during the pre-Atkins period, Michael Bies was sentenced to death for the murder of a child. During the penalty phase of his trial, a psychologist, serving as a defense expert witness, suggested to the court that Bies had an IQ within the mental retardation range. A subsequent appeal to the Ohio Supreme Court resulted in a finding

that the aggravating nature of the crime outweighed any mitigating factors. Subsequently, the death penalty was upheld.

Following his bid for post-conviction relief, Bies filed a petition in federal court, providing the eighth amendment argument against cruel and unusual punishment, citing his mental retardation. Bies also argued that, since the Ohio Supreme Court recognized his mental retardation, a double jeopardy issue now existed.

Returning to the State court, the prosecution argues that Ohio had not conclusively created a standard for determining mental retardation at the time of the original sentencing. By April, 2009 the case was returned to the United States Supreme Court, where arguments were heard on April 27, 2009, with a final decision by the court yet to be heard.

Wood v. Allen

The issue of providing a defendant in a Capital case with adequate counsel arose in Wood v. Allen.

Alabama death row inmate Holly Wood was granted a request for review by the United States Supreme Court on Monday, May 18, 2009. Wood is an African-American male with a measured IQ below 70. His court-appointed lawyer had no experience in criminal cases and, in fact, had passed the bar only a few weeks before the trial. More importantly, Wood's counsel never raised the issue of mental retardation at the trial or at the sentencing hearing. Now, the U.S. Supreme Court has been asked to respond to the failure of an inexperienced defense lawyer to present evidence of the defendant's mental

retardation. In addition, the Court is being asked to determine how federal courts should respond to state court factual findings.

The State of Alabama has challenged Wood's claim of mental retardation, although psychometric testing during the criminal trial revealed significant cognitive deficits. Moreover, the prosecution has asserted that the defense made a strategic decision in not raising mental retardation as a mitigating factor during the sentencing hearing.

As of this writing, oral arguments are expected in late 2009 or early 2010.

Aaron Hart

On June 10, 2009, an East Texas Court sentenced Aaron Hart, a teenager with a measured IQ of 47, to one-hundred year in jail for sexual assault. Interestingly, the jurors who convicted him never expected such a sentence would be imposed. In fact, some believed that the defendant would serve no jail time whatsoever. Nevertheless, the comment was made by one juror that Texas simply did not have the facilities to care for someone with Hart's disability.

The seventeen year old Hart was asked to "baby-sit" a neighbor's child. He is a meek young man who is often the target of bullies, but has proven otherwise to be a courteous individual who often ran errands for the neighbors. The parents of the child he was baby sitting claimed to have found Hart fondling the younger child. Aaron Hart cannot read or write and is barely articulate. Based on a public defender's recommendation, Aaron Hart pleaded guilty to aggravated sexual assault and indecency by contact. According to an Associated Press story released on June 10, 2009:

They say the case of Aaron Hart was mishandled from start to finish and raises questions over how to deal with the mentally disabled when they encounter the criminal justice system.

Texas Tech University law professor Daniel Benson called Hart's punishment absurd. Repeat child molesters and rapists have routinely received lighter sentences.

"That's not helpful to society or the offender," said Benson, an author of textbooks on criminal offenders with mental illness.

Advocates say counseling, probation or placement in a group home would have been more appropriate. But Young said a diversion program was not an option since the law doesn't allow that for serious felonies.

But David Pearson, Hart's appellate attorney, said the court-appointed doctor did the bare minimum to assess competency and ran tests geared for mental illness, not mental retardation.

Pearson also says Hart's court-appointed defense attorney, Massar, didn't do enough. The lawyer failed to present evidence and expert witnesses to testify about

> Hart's mental capacity and didn't ask for special accommodations, such as a liaison to explain to Hart what was happening in court, Pearson said.

Currently, Aaron Hart is serving his sentence in a special Texas prison for inmates with mental disabilities.

Certainly, the endemic level of sanism that existed in the courts against people with such levels of mental disabilities has not dissipated as a result of the Atkins Concept, nor do such Eighth Amendment protections appear to exist.

The Court and Citizens with Mental Retardation

The Court has taken a circuitous route in addressing the equal protection clause and its relevance to the rights of people with disabilities, including those with cognitive deficits. Buck v. Bell (1927) was among the first to address this issue. A Virginia statute required that those with mental retardation be sterilized when they reach the age of eighteen years. The Supreme Court ruled that the statute did not violate the Equal Protection Clause. Furthermore, Justice Oliver Wendell Holmes suggested that the Court's decision was benevolent in nature, both for those with cognitive impairments and for society as a whole:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices,

> often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes . . . . Three generations of imbeciles are enough.

The Supreme Court clearly held that the most compelling reason for its decision in Buck v. Bell was that it was in the best interest of society to prevent the future births of people with mental retardation. Nevertheless, there was no significant evidence that children born to those with limited intellectual ability would have similar cognitive issues. Nor did the Court move to protect the Equal Protection or Due Process rights of those who would be sterilized. Yet, given the cultural climate of the era, the Court's decision was considered appropriate by society.

Paul A. Lombardo, a professor of law at Georgia State University College of Law, has spent a professional lifetime exploring the case of Carrie Buck, the woman who was forcibly sterilized, and its implications regarding disability policy and its impact on American Jurisprudence. Lombardo has served as both a lawyer and historian in his

mission to raise awareness of an example of disheartening civil rights abuse. Lombardo's investigation into Buck v. Bell began with a 1982 doctoral dissertation and continues with a more recent (2008) book, "Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell". Professor Lombardo points out that Carrie Buck did not suffer from an intellectual disability, but the sanist views of the day, coupled with a total disregard for due process rights (which was also a frequent consequence during that period) resulted in a flagrant violation of reproductive rights.

Society's (and the Court's) attitude toward people with mental retardation did not rapidly improve after Buck v. Bell. In Heller v. Doe (1993), the Supreme Court ruled that Kentucky's policy to involuntarily commit people with mental retardation to residential treatment settings did not violate the Equal Protection Clause of the U.S. Constitution. The plaintiffs asserted that the procedure of involuntary civil commitment differed for those with mental retardation, when compared to individuals with mental (psychiatric) illness. Clearly, those with mental retardation did not enjoy the same Due Process rights as those with mental illness, when challenging their residential commitment in court. Associate Justice Kennedy wrote the majority opinion, stating that mental retardation was easier to diagnose than mental illness. Ostensibly, it was also easier to assess "dangerousness" among those with mental retardation than it was among those with mental illness.

Justice Souter wrote the dissent, stating that:

> Obviously there are differences between mental retardation and mental illness. They are distinct conditions, they have

> different manifestations, they require different forms of care or treatment, and the course of each differs. It is without doubt permissible for the State to treat those who are mentally retarded differently in some respects from those who are mentally ill. The question here, however, is whether some difference between the two conditions rationally can justify the particular disparate treatment accorded under this Kentucky statute.

One again, one must consider the relationship that such uncertainty has with the Daryl Atkins case. Should disparate treatment exist among those with mental illness versus mental retardation? Furthermore, have we clearly identified, given the confusion and challenges against the establishment of mental retardation among defendants, who may or may not be eligible for such Eighth Amendment protections?

US v. Georgia

An example that is presented by the disability community is that of US v. Georgia (2006). This case was decided only days before Samuel Alito took his seat on the United States Supreme Court. Similar cases, the disability community fears, may be decided differently. US v. Georgia was an Americans With Disabilities Act lawsuit filed by Tony Goodman, a paraplegic state prison inmate. Goodman complained that because of his disability he was being held in a high-security, lock-down wing of the prison in a cell so small he was unable to turn his wheel chair around.

Goodman's complaint also stated that the conditions were so restrictive that he could not use the toilet and sat for hours in his own urine and feces. Georgia responded

that the Congress violated Georgia's sovereign immunity in attempting to hold the State accountable to federal law. The Supreme Court held that Georgia violated the Eighth Amendment by subjecting Goodman to Cruel and Unusual Punishment. In addition Georgia violated the plaintiff's Fourteenth Amendment Due Process Rights. Furthermore, the treatment that Goodman received served as a violation of the Americans with Disabilities Act.

Tennessee v. Lane

Tennessee v. Lane, decided by the United States Supreme Court in 1994, has provides a detailed example of this issue, since it illustrates the struggle on the Court over what specific rights are actually guaranteed by the Americans with Disabilities Act (ADA). Justice Clarence Thomas suggested that the Americans with Disabilities Act does not guarantee citizens with disabilities the right to access to public buildings. In his dissent of Tennessee v. Lane (2004), he suggested that sovereign immunity prevented such individuals from asserting their rights in court when States withheld those rights.

Persons with disabilities were denied access to sections of the state courthouse because their physical limitations prevented them from gaining access. As part of a civil rights lawsuit, they asserted that the State of Tennessee violated Title II of the Americans with Disabilities Act (ADA). Not only does Title II prohibit the denial of access to public buildings because of a disability, but allows those who have been denied such services to file a lawsuit in federal court.

Tennessee claimed that the eleventh Amendment, which provides states with sovereign immunity, prohibited such litigation, and sought dismissal. The Supreme

Court, in a 5-4 vote, held that Tennessee had violated the fourteenth amendment due process rights of the plaintiffs. According to the ADA

> "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs or activities of a public entity, or be subjected to discrimination by any such entity."

Nevertheless, Thomas suggested that such individuals with disabilities had no rights to sue the State, despite being denied physical access to the upper floors of court houses. In the case of George Lane, a wheelchair bound person who initiated the suit, he was forced to pull himself up several flights of stairs for a court appearance.

Deliberate Indifference

Estelle v. Gamble (1976, 1977) illustrates the issue of Deliberate Indifference to the rights and needs of inmates in America's jails and prisons. Although this case did not address the mental health needs of inmates, its history and consequences have established a long-term impact on the attention given to the needs of inmates with mental illness.

On February 20, 2007, Associated Press writer Matt Curry reported that Dallas County, Texas had agreed to a one million dollar settlement in a lawsuit filed by inmate James Mins on behalf of himself and inmates Kennedy Nickerson and Clarence Lee Grant Jr., who died while incarcerated. All three inmates, who were diagnosed with

paranoid schizophrenia, were denied medication for months. Grant died from the complications of diabetes and pneumonia.

Mins nearly died when the water was shut of in his cell for five days. Nickerson was released from jail without medication and was found on the street dehydrated and suffering from fever and seizures.

Gamble's initial case began when a bail of cotton fell on him during a work detail. He continued to work for several hours until he complained of severe back pain. He was sent to the prison hospital for an examination, placed on pain medication, and was sent to his cell, with a prescription that required that he sleep in a lower, rather than a higher, berth. However, the prison failed to comply with this directive. The chronology of events regarding Gamble's case continued with the continued administration of pain medication.

The obvious attitude that is prevalent can be attributed to sanism, an emotion and thought process that is prevalent throughout the legal system, including the treatment of prisoners in America's jails and prison. If one were to evaluate the general treatment that Gamble received from the outset, it is obvious that he was considered a non-person. It should be noted that medical practitioners were not readily available to prisoners. Correctional facilities relied on inmates serving as prison pharmacists (without the training or certification). Thus, adequate diagnoses of serious medical illnesses were non-existent. Given Gamble's description of his injury and pain, an immediate x-ray was warranted. Nevertheless, rest was prescribed, along with pain medication. As previously mentioned, it was prescribed that he sleep in a lower, rather than an upper, berth (this was

never done). Thus, the sanist attitudes emanated not only from the prison staff, but fellow inmates, as well.

Had Justice Marshall and the other Justices (who held for the majority) held different underlying views, it is possible that inmates would not have the rights to medical treatment, nor, possibly, Eighth Amendment protection while incarcerated in America's Jails and Prisons. Nevertheless, Justice Marshall had already determined that every claim by a prisoner does not constitute a violation of the Eighth Amendment, which held that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

However, the concept of Deliberate Indifference was considered. Eventually, it was determined that:

> Deliberate indifference has three components: (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than mere negligence

Furthermore, Estelle V. Gamble was decided by the Burger Court. It can be argued that this Court was more liberal than the current Court. The recent addition of Chief Justice Roberts and Associate Justice Alito, both conservatives joining conservative Associate Justices Scalia and Thomas, suggests that the current Court may

prove to be the least amenable to inmate rights, when compared to previous Supreme Courts.

It is the responsibility of every residential treatment facility, whether a hospital or prison, to provide adequate medical treatment, including general medical and psychiatric services, to all prisoner/patients. The Court's interpretation of the Eighth Amendment is that the denial of such services equates cruel and unusual punishment.

A dissenting opinion was voiced by Associate Justice Stevens. Although I find strong arguments in the opinions voiced by Justices Marshall and Stevens, I find Justice Marshall's sharing of the Majority opinion more practical than the reasoning of Justice Steven's minority opinion. Although Justice Stevens is correct in stating that the rights of prisoners to medical care is expressed in ambiguous terms, Justice Marshall carefully states that every complaint cannot be viewed as deliberate indifference to a prisoner's right to medical care.

Neither opinion survives a strong test of clarity or completeness. The majority opinion, as expressed by Justice Marshall, leaves open the possibility of denying adequate medical care to prisoners, under the guise that the complaint did not meet Eighth Amendment standards. The minority opinion, as written by Justice Stevens, does not clarify how the guarantee of medical care can be delineated less ambiguously. Although Estelle v. Gamble serves as the "flagship" case regarding the rights of prisoners to appropriate medical care and served as a landmark by which Mins, Nickerson, and Grant could assert their right to appropriate treatment for mental illness, the majority

opinion is imperfect. Possibly, future litigation will clarify the confusion. However, it is interesting that a 1976 case may have had implications regarding a settlement in 2007.

Involuntary Treatment

According to the U.S. Supreme Court ruling in Jones v. the United States:

> "When a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society. Pp. (361-370).

Jones was subject to the District of Columbia Code. According to the code, "a criminal defendant may be acquitted by reason of insanity if his insanity is affirmatively established by a preponderance of the evidence". However, under the Code, the defendant will be committed to a mental hospital, but will be entitled to a judicial hearing within fifty days to determine his eligibility for release. Thus, the burden was left with the defendant to prove by a preponderance of the evidence "that he is no longer mentally ill or dangerous". The acquittee is entitled to a judicial hearing every six months, according to the code. During the hearing, the acquittee must establish (as the holder of the burden) that he is entitled to release a preponderance of the evidence.

The cases of Rivers v. Katz (1986), Washington v. Harper (1990), Riggins v. Nevada (1992), and Sell v. U.S. (2003) had similarities in the nature of the complaints, and fundamental differences in both the results and the impact on the involuntary administration of anti-psychotic medication. All four complaints were filed as protests against "forced drugging". However, an examination in possible consistencies in the nature of the cases requires co-mingling mentally ill patients in hospitals with criminal defendants in courtroom trials and inmates in jails and prisons. Furthermore, there were differences in the relief that was requested among the four complaints.

Unlike the other cases that we mention regarding involuntary treatment, Rivers v. Katz was a civil case in which litigation was filed against New York State by a group of mental patients who challenged the "forced drugging" or the involuntary administration of antipsychotic medications. The plaintiffs that "forced drugging" served as violations of their due process rights, except in emergency cases or when the patient was judicially declared incompetent.

The patients were denied relief at the lower and appellate court levels, where it was ruled that the "patients were per se incompetent to make treatment decisions and that there was no violation of due process because the patients had access to an administrative appeal".

However, the New York Court of Appeals ruled unanimously that:

> "involuntarily hospitalized mental patients cannot be forcibly treated with antipsychotic drugs unless they are

> either imminently dangerous to themselves or others, or have been found by a court, by clear and convincing evidence, to be not only mentally ill, but also mentally incompetent to make a reasoned decision concerning medication".

The New York Court of Appeals also ruled that medication could be administered if the hospital could demonstrate that it is the least intrusive treatment, given an analysis of the patient's best interest and the benefits versus side effects.

In Washington v. Harper, the plaintiff was an inmate in a correctional facility, rather than a mentally ill patient in a hospital setting. As in Rivers, the inmate sought to establish the right to refuse the administration of psychotropic medication. The plaintiff, who suffered from bi-polar disorder, based his complaint on constitutional grounds, asserting that forced drugging violated his first amendment right to free speech as well as his fourteenth amendment right to due process and equal protection.

The United States Supreme Court overruled a Washington State Supreme Court decision that provided the prisoner with a judicial hearing and procedural protections prior to the involuntary administration of medication. Under the State Supreme Court's ruling, the State was left with a burden to provide clear, concise proof that forced drugging was necessary.

The United States Supreme Court also decided that an internal decision to involuntarily administer medication served as an:

> "accommodation between an inmate's interest in avoiding the forced administration of antipsychotic medication and the State's interest in providing appropriate treatment to reduce the danger that an inmate suffering from a mental disorder represents to himself or others."

Rather than a case dealing with the rights of mentally ill patients (Rivers) or prison inmates (Harper), Riggins v. Nevada dealt with the right of defendant to refuse medication during a criminal trial. The defendant Riggins was evaluated and found competent to stand trial, although he was receiving a previous psychotropic medication on a regular basis. Riggins indicated that he would present an insanity defense and requested that administration of the medication be terminated during in order for the jury to witness his psychotic behavior. However, The U.S. Supreme Court was asked by the prosecution to uphold a lower court decision, forcing a defendant to be administered an antipsychotic drug, involuntarily, while on trial. According to the Supreme Court, due process rights would be violated, unless the State could prove that less intrusive alternatives were unavailable. In addition, the State would be required to demonstrate the appropriateness of the medication, and the necessity of the treatment in order to ensure safety. In addition, the Supreme Court declared that expert testimony in support of the medication would be negated by the impact of forced drugging.

Sell v. U.S. provides similarities and consistency with Riggins v. Nevada. The US Supreme Court in a 6-3 ruling stated that the government may involuntarily administer

antipsychotic medications to a mentally ill criminal defendant in order to render him competent to stand trial,

> "but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests."

Similar to Riggins, Sell dealt with whether a criminal defendant should be involuntary medicated for the purpose of restoring the defendant to competency so that he can stand trial. This case addresses issues related to involuntary medication of a criminal defendant in order to restore the defendant to competency so that he can stand trial. As a dentist, Sell was on trial for health care fraud. He was diagnosed as being "delusional" and the court decided that he was not competent to stand trial without anti-psychotic medication. Like Riggins, a First Amendment component existed in this case. A ruling by the Eighth Circuit upheld an order mandating “forced drugging”. Sell appealed to the US Supreme Court who agreed to address whether the Court of Appeals:

> "erred in rejecting petitioner's argument that allowing the government to administer antipsychotic medication against his will solely to render him competent to stand trial for non-violent

> offenses would violate his rights under the First, Fifth and Sixth Amendments."

The U.S. Supreme Court ruled that the government may involuntarily administer antipsychotic medications to a mentally ill criminal defendant in order to render him competent to stand trial,

> "but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests."

Like Riggins, the court in the Sell case ruled that:

> “no alternative, less intrusive approach is likely to achieve substantially the same result of restoring a defendant to competency; and the particular medication must be in the patient's best interest, taking into account both efficaciousness and side effects”.

Among these four cases, Riggins and Sell have the most similarities and are the most consistent regarding the involuntary administration of medication to a criminal defendant for the purpose of making the defendant competent to stand trial. All four cases are consistent in that at least one party has suggested that the issue of safety supersedes the right of the individual to refuse treatment.

The issues of "involuntarily administering psychotropic medication", or "forced drugging", transcends the field of mental disability treatment and services. Currently, forced drugging occurs among school children in America's schools, despite federal legislation that prohibits the coercion of parents to medicate their child as a condition for special services. Forced drugging occurs, readily, within residential treatment facilities for mentally ill patients. Currently, professionals representing both sides of the issue continue to enthusiastically argue their case.

Certainly, there is evidence that American Courts, whether at the State, Federal District, or U.S. Supreme Court level, has attempted to limit the degree to which defendants with mental disabilities will be protected from Cruel and Unusual Punishment in criminal courts. Similarly, there has been an attempt to protect the rights of these individuals in civil courts. Nevertheless, an analysis of the implementation of the "Atkins Concept" suggests that the legislation and judicial decisions have not overcome the existing sanist attitudes toward these individuals.

The New Supreme Court

The new United States Supreme Court will certainly address disability issues differently than the previous Court. The Roberts Court will be less likely to hold the

Equal Protection and Due Process rights of people with disabilities as a paramount issue when it hears arguments. The replacement of O'Connor with Alito has, no doubt, proven to be the catalyst that changed the Court's interpretation of legislation designed to protect the rights of individuals with special needs. However, new appointments to the Court have occasionally proven to exhibit a different philosophy of judicial issues than was evident when they were first selected by the President. William Brennan was a more liberal justice than Dwight D. Eisenhower envisioned. Anthony Kennedy and David Souter are not the conservatives they were believed to be when appointed by Ronald Reagan and the first President Bush.

Ruth Bader Ginsberg and David Breyer are, most assuredly, the liberal members of the Court. Stevens is a liberal who began his service on the court as a moderate. However, he has evolved over the years to have a liberal view on disability issues. Souter and Kennedy are the moderates who have alternately served as the "swing votes" on constitutional cases. Roberts, Scalia, Thomas, and Alito are the Court's conservatives. It is impossible to know, for certain, what direction the United States Supreme Court will take on disability issues. However, the background, record, and paper trails of the current members suggest that current civil rights legislation, designed to protect the rights of people with disabilities, can be significantly altered within the next few years. Furthermore, the addition of Sonia Sotomayor will undoubtedly move the Court to the left on civil rights issues.

The rights and protections of people with disabilities have changed over the years. Certainly, they have improved since the days of Buck v. Bell. Laws have been passed on the state and federal level; yet, litigation continues. The passage of the IDEA has not lessened litigation over the education of children with disabilities. Similarly, the inclusion of Section 504 in the Rehabilitation Act has not lessened the litigation over the exclusion of people with disabilities in educational and other public settings. Furthermore, the passage of the ADA has not lessened litigation over the quality of life and services for people with disabilities in the schools, employment settings, hospitals, and prisons. One might argue that the continued litigation is an extension of the IDEA, Section 504, and the ADA. In addition, the new Court and pending cases suggest that, during the current term, the Justices will examine the true protections under the eighth and fourteenth amendments, as well.

Conclusion

The impact of Atkins v. Virginia on people with mental retardation and other disabilities has implications beyond capital punishment, criminal prosecutions and sentencing, and the civil rights that may be granted or withheld in civil courts. Furthermore, the issue of what exactly constitutes cruel and unusual punishment is secondary to the issue of what constitutes a disability such as mental retardation.

The courts and legislators have attempted to end discrimination against people with disabilities by passing flawed laws and making flawed judicial decisions. Unfortunately, these examples of misdirected legislation and court rulings have

exacerbated the ongoing discriminatory treatment of the very people they were designed to protect.

The nature and reason behind the challenges that prosecutors have levied against the eligibility for Atkins protection among death penalty defendants are attributed by some to be zealousness in performing one's duty and those who believe they are representing the people of their respective states. Nevertheless, one must consider the possibility that such challenges to Eighth Amendment protections are a result of sanist attitudes toward individuals with mental retardation, leading, in some cases, to pretextual courtroom presentations by prosecutors. Furthermore, the nature and reason behind the decisions made by judges regarding the eligibility for Atkins protection among death penalty defendants at both the State and federal levels are attributed by some to be zealousness in performing one's duty and those who believe they are representing the people of their respective state. Once again, are such judicial decisions the result of sanist attitudes toward individuals with mental retardation, and courtroom acceptance of pretextual courtroom presentations by prosecutors? Is Perlin correct in his aforementioned assertion that death penalty courts may never be devoid of such sanism and pretextuality? If so, how do defense attorneys seek courtroom environments where such biases threaten the due process protections that all defendants are constitutionally guaranteed?

Paul Lombardo's life-long mission of pointing out such sanist attitudes toward people with mental retardation raises an interesting ethical issue. Carrie Buck, who was forcibly sterilized, was never intellectually challenged, according to Lombardo. Nevertheless, regardless of her intellectual functioning level, Carrie Buck was a person

who was not considered worthy of due process rights. In addition, the dominant thinking of the day allowed the United States Supreme Court to suggest that forced sterilization was a humanitarian act performed in the best interest of society.

People with disabilities and those who advocate for them continue to face significant challenges in the courtroom and in society, in general. Although such individuals have acquired new rights as a result of federal legislation and Supreme Court decisions, the delivery of such rights remains problematic. It is reasonable to consider that people with disabilities are second class citizens in a nation that prides itself in the concept of "equal rights for all". Whether the disability is physical, medical, psychiatric, or intellectual in nature, the Post-Atkins Era suggests that such individuals are challenged to struggle for their rights, rather than assume that federal guarantees will deliver them.

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