Eighth Amendment — Cruel and Unusual Punishments — Defendants with Intellectual Disability —
Hall v. Florida

In 2002, the Supreme Court ruled in *Atkins v. Virginia*[1] that the Eighth Amendment prohibits the execution of defendants with intellectual disability.[2] However, the Court declined to establish a uniform protocol for identifying protected individuals, instead leaving to the states "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."[3] Subsequently, the Florida Supreme Court construed Florida's criminal code to bar any person with an IQ over 70 from offering evidence of intellectual disability.[4] Last Term, in *Hall v. Florida*,[5] the U.S. Supreme Court found that such a bar violates the Eighth and Fourteenth Amendments by "creat[ing] an unacceptable risk that persons with intellectual disability will be executed."[6] In finding Florida's evidentiary process insufficient to vindicate *Atkins*'s substantive guarantee, the Court relied on "strong evidence of consensus" against a 70-point IQ cutoff.[7] Inquiry into national consensus to evaluate a largely procedural point was not inevitable and, unless *Hall* is convincingly limited, could create a precedential toehold for challenges to other outlier sentencing practices.

In 1978, twenty-one-year-old Karol Hurst, then seven months pregnant, was abducted, sexually assaulted, and shot dead.[8] Freddie Lee Hall and his codefendant, Mack Ruffin, were arrested and convicted for Hurst's murder.[9] Hall received a death sentence, which the Florida Supreme Court affirmed.[10] In 1987, the U.S. Supreme Court decided *Hitchcock v. Dugger*,[11] holding that a capital sentencer must consider

---

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

[2] *See id.* at 321. *Atkins* referred to "mental retardation" instead of "intellectual disability," *see id.*, but the terms describe "identical phenomen[a]," Hall v. Florida, 134 S. Ct. 1986, 1990 (2014). This comment uses the latter term to reflect the Court's currently preferred terminology. *See id.*

[3] *Atkins*, 536 U.S. at 317 (alteration in original) (quoting Ford v. Wainwright, 477 U.S. 399, 416–17 (1986) (opinion of Marshall, J.)) (internal quotation mark omitted).

[4] *See* Cherry v. State, 959 So. 2d 702, 711–13 (Fla. 2007) (construing FLA. STAT. § 921.137(1) (2013)).

[5] 134 S. Ct. 1986.

[6] *Id.* at 1990.

[7] *Id.* at 1998.

[8] Hall v. State, 403 So. 2d 1321, 1323 (Fla. 1981) (per curiam).

[9] *Id.* at 1323 & n.1. Hall and Ruffin were also convicted for the murder of Deputy Sheriff Lonnie Coburn, who had tried to apprehend them after Hurst's murder. *Id.* Hall was sentenced to death for Coburn's murder, but this sentence was later reduced. *Hall*, 134 S. Ct. at 1990.

[10] *Hall*, 403 So. 2d at 1322. Hall then filed several unsuccessful motions for relief in state court and, subsequently, sought federal habeas corpus relief to no better effect. Hall v. State, 109 So. 3d 704, 706 (Fla. 2012) (per curiam).

[11] 481 U.S. 393 (1987).

all relevant mitigating evidence the defendant presents.[12] Relying on *Hitchcock*, Hall challenged his sentence in state court and was ultimately granted a new sentencing proceeding.[13] At resentencing, the trial court cited Hall's intellectual disability as a mitigating factor but nevertheless imposed the death sentence again.[14] After the U.S. Supreme Court decided *Atkins*, Hall moved to vacate his sentence on the grounds that his intellectual disability exempted him from the death penalty.[15] Although Hall had previously been judged "probably somewhat retarded"[16] and had previously presented an IQ score of 60,[17] Hall failed to establish an IQ of 70 or below at his *Atkins* hearing, rendering him incapable of satisfying Florida's intellectual disability standard.[18] The court therefore denied relief, and Hall appealed.[19]

The Florida Supreme Court affirmed.[20] To prove intellectual disability under Florida law, a defendant must show "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18."[21] "[S]ignificantly subaverage general intellectual functioning"[22] is statutorily defined as "performance that is two or more standard deviations from the mean score on a standardized intelligence test."[23] Relying on a precedential interpretation of this provision that created a rigid 70-point IQ cutoff for intellectual disability claims,[24] the court rejected Hall's contention that his IQ scores ought to be interpreted as part of a range.[25] Moreover, the court found no error in the trial court's refusal to permit Hall to present evidence of deficits in adaptive behavior; because Florida's intellectual disability standard re-

---

12 *See id.* at 398–99.

13 *Hall*, 109 So. 3d at 706.

14 *See id.* The Florida Supreme Court affirmed the sentence, Hall v. State, 614 So. 2d 473, 479 (Fla. 1993) (per curiam), over a vigorous dissent that emphasized Hall's intellectual disability and the cruel treatment Hall endured in childhood, *see id.* at 479–80 (Barkett, C.J., dissenting). Hall once again sought state postconviction relief, which he was once again denied. Hall v. State, 742 So. 2d 225, 230 (Fla. 1999) (per curiam).

15 *See Hall*, 109 So. 3d at 706–07.

16 *Hall*, 742 So. 2d at 230 (internal quotation mark omitted).

17 *See Hall*, 614 So. 2d at 479 (Barkett, C.J., dissenting).

18 *Hall*, 109 So. 3d at 707. Hall was able to introduce IQ scores of 71, 73, and 80 into evidence. *Id.*

19 *Id.*

20 *Id.* at 711.

21 FLA. STAT. § 921.137(1) (2013).

22 *Id.* (internal quotation marks omitted).

23 *Id.*

24 *Hall*, 109 So. 3d at 708 (citing Cherry v. State, 959 So. 2d 702, 712–13 (Fla. 2007)). The Florida Supreme Court has held that this definition of intellectual disability falls within the range of discretion that *Atkins* afforded states. *See* Franqui v. State, 59 So. 3d 82, 92 (Fla. 2011) ("[T]he Supreme Court did not mandate a specific IQ score or range for a finding of mental retardation in the capital sentencing process."); Nixon v. State, 2 So. 3d 137, 142 (Fla. 2009).

25 *Hall*, 109 So. 3d at 709–10.

quires both subaverage intellect *and* adaptive deficits, Hall's failure to prove subaverage intellect was dispositive.[26] Finally, the court found no error in the trial court's refusal to consider evidence of Hall's intellectual disability from past sentencing hearings.[27] Relying on the U.S. Supreme Court's decision in *Bobby v. Bies*,[28] the court noted that "[m]ental retardation as a mitigator and mental retardation under *Atkins* . . . are discrete legal issues."[29] Thus, the court denied relief.[30]

The Supreme Court reversed.[31] Writing for the majority, Justice Kennedy[32] found Florida's scheme unconstitutional because it "contravene[d] our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world."[33] After noting that executing the intellectually disabled serves "[n]o legitimate penological purpose"[34] and threatens trial integrity,[35] the Court proceeded to determine "how intellectual disability must be defined in order to implement these principles and the holding of *Atkins*."[36]

The Court first inquired into "the medical community's opinions" because "[s]ociety relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue."[37] The Court found that Florida's "mandatory cutoff" contravened professional practice in two ways: First, it left courts unable to consider evidence of intellectual disability, such as medical and behavioral histories, for a defendant with an IQ above the cutoff, "even though the medical community accepts that all of this evidence can be probative of intellectual disability, including for [such] individuals."[38] Second, it failed to account for the fact that each IQ test has a "standard error of

---

[26] *Id.* at 710.

[27] *Id.*

[28] 556 U.S. 825 (2009) (holding that a finding of intellectual disability as a mitigating factor at capital sentencing does not preclude relitigation of intellectual disability in the context of an *Atkins* claim, *id.* at 828–29).

[29] *Hall*, 109 So. 3d at 711 (second alteration in original) (quoting *Bies*, 556 U.S. at 836).

[30] *Id.* Justice Pariente concurred, agreeing that precedent dictated the case's outcome, but expressing concern that states' differing standards would create "inconsistency in findings of mental retardation based on the exact same circumstances." *Id.* at 715 (Pariente, J., concurring). Justice Labarga dissented, finding the 70-point cutoff inconsistent with *Atkins*'s requirement that states adopt "appropriate" means of protecting the intellectually disabled, *id.* at 717 (Labarga, J., dissenting) (quoting Atkins v. Virginia, 536 U.S. 304, 317 (2002)), and urging the court to reconsider its precedent, *see id.* at 718. Justice Perry also dissented, finding it problematic that Florida's statute barred those with IQs above 70 from presenting evidence of intellectual disability but did not preclude execution of those with IQs of 70 or below. *Id.* at 720 (Perry, J., dissenting).

[31] *Hall*, 134 S. Ct. at 2001.

[32] Justice Kennedy was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

[33] *Hall*, 134 S. Ct. at 2001.

[34] *Id.* at 1992.

[35] *See id.* at 1993.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 1994.

measurement" (SEM),[39] and that professionals therefore agree that an IQ score "should be read not as a single fixed number but as a range."[40]

The Court next considered "objective indicia of society's standards."[41] Finding "at most nine States [that] mandate a strict IQ score cutoff at 70,"[42] the Court concluded that "in 41 States an individual in Hall's position . . . would not be deemed automatically eligible for the death penalty."[43] Furthermore, because "[c]onsistency of the direction of change is also relevant,"[44] the Court emphasized that "every state legislature to have considered the issue after *Atkins* — save Virginia's — and whose law has been interpreted by its courts has taken a position contrary to that of Florida."[45] The Court read these objective indicia as "strong evidence of consensus that our society does not regard [a 70-point] cutoff as proper or humane."[46]

Finding this evidence of consensus instructive, the Court proceeded to exercise the "independent judgment" that is "the Court's judicial duty" when assessing a death penalty practice.[47] Given its understanding that clinical definitions of intellectual disability were a "fundamental premise of *Atkins*,"[48] the Court found that "a State must afford [IQ] test scores the same studied skepticism that those who design and use the tests do."[49] Ultimately, the Court found it inappropriate to make one factor "dispositive of a conjunctive and interrelated assessment" and therefore held that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant

---

[39] *Id.*

[40] *Id.* at 1995. Using the SEM to convert a fixed IQ score into a range increases a clinician's confidence that the "true" IQ falls within the range of scores thereby created. *See id.*

[41] *Id.* at 1996 (quoting Roper v. Simmons, 543 U.S. 551, 563 (2005)) (internal quotation marks omitted).

[42] *Id.* at 1997. Kentucky and Virginia have legislated such cutoffs; Alabama's law has been construed to mandate such a cutoff; and Arizona, Delaware, Kansas, North Carolina, and Washington have statutes that could be so construed. *See id.* at 1996–97.

[43] *Id.* at 1997. The Court included in this total the eighteen states that have abolished the death penalty, either completely or for new offenses. *Id.*

[44] *Id.*

[45] *Id.* at 1998.

[46] *Id.*

[47] *Id.* at 2000.

[48] *Id.* at 1999.

[49] *Id.* at 2001. Although *Atkins* "'did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation' falls within the protection of the Eighth Amendment," *id.* at 1998 (quoting Bobby v. Bies, 556 U.S. 825, 831 (2009)), the Court found significant *Atkins*'s recognition that clinical definitions of intellectual disability referred to an IQ of "*approximately* 70," *id.* (emphasis added) (quoting Atkins v. Virginia, 536 U.S. 304, 308 n.3 (2002)) (internal quotation mark omitted), or "between 70 and 75 or lower," *id.* at 1999 (quoting *Atkins*, 536 U.S. at 309 n.5), and that "the States' standards, on which the [*Atkins*] Court based its own conclusion, conformed to those definitions," *id.*

must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits."[50]

Justice Alito dissented.[51] He disparaged the majority's use of "the evolving standards of *professional societies*" as a benchmark for national consensus.[52] Looking instead to legislative enactments as democratic indicators of society's standards, Justice Alito found that "the same absence of a consensus that th[e] Court found in *Atkins* persists today."[53] According to Justice Alito's tally, "of the death-penalty states, 10 (including Florida) do not require that the SEM be taken into account, 12 consider the SEM, and 9 have not taken a definitive position on this question."[54] Moreover, the dissent faulted the majority for including non–death penalty states in its calculations because "[t]he fact that a State has abolished the death penalty says nothing about how that State would resolve the evidentiary problem of identifying defendants who are intellectually disabled."[55]

Further, Justice Alito noted that he would not strike down Florida's system even if there *were* a contrary national consensus sufficient to require the Court to "look beyond the evidence of societal standards."[56] First, Justice Alito defended Florida's threshold reliance on IQ scores, noting that professionals consider IQ score "the best measure of intellectual functioning."[57] He found no fault with Florida's refusal to permit a defendant with an IQ above the cutoff to present evidence of adaptive deficit because even strong evidence of adaptive deficit does not prove subaverage intelligence — without which "a person simply cannot be classified as intellectually disabled."[58] Second, Justice Alito defended Florida's use of IQ score as a fixed number. Each IQ test has its own SEM,[59] and that SEM can be used to construct any number of different confidence intervals.[60] The range corresponding to any given IQ score therefore depends both on the IQ test used and on the desired

---

[50] *Id.* at 2001.

[51] Justice Alito was joined by Chief Justice Roberts and Justices Scalia and Thomas.

[52] *Hall*, 134 S. Ct. at 2002 (Alito, J., dissenting). Justice Alito noted that the views of professional organizations change often and may conflict with one another, and that diagnosing intellectual disability in the clinical context is distinct from the legal question of "whether the imposition of a death sentence in a particular case would serve a valid penological end." *Id.* at 2006.

[53] *Id.* at 2003.

[54] *Id.* at 2004. Justice Alito added Idaho to the majority's list of eight states with laws similar to Florida's. *See id.* He further noted that even states that do require consideration of the SEM differ on what role the SEM must play in identifying the intellectually disabled. *See id.* at 2005.

[55] *Id.* at 2004.

[56] *Id.* at 2007.

[57] *Id.*

[58] *Id.* at 2009.

[59] *Id.* Although many IQ tests have SEMs between 3 and 5, Hall's most recent test had an SEM of 2.16. *Id.* at 2010.

[60] *Id.* at 2011. For example, an individual's "true" IQ is 95% certain to fall within two SEMs of her test score but only 66% certain to fall within one SEM of that score. *See id.* at 2010.

level of confidence that the "true" IQ falls within that range. Because "[t]he appropriate confidence level is ultimately a judgment best left to legislatures" and because "Florida's system already accounts for the risk of testing error by allowing the introduction of multiple test scores,"[61] Justice Alito would have affirmed.[62]

Despite *Hall*'s emphasis on procedural reliability, the Court employed a national consensus test typically used to identify capital punishment's substantive limits. Unless convincingly limited, *Hall* could plausibly be read to extend national consensus inquiry into the realm of procedure. Given the Court's readiness to find national consensus against *substantive* death penalty practices, such a reading could open long-accepted outlier *sentencing* practices to renewed attack.

Eighth Amendment death penalty jurisprudence falls roughly into two categories.[63] The first category defines the substantive limits of acceptable punishment with reference to the "evolving standards of decency that mark the progress of a maturing society,"[64] as evidenced by objective indicia of national consensus.[65] Originally, the Eighth Amendment's Cruel and Unusual Punishments Clause was understood to prohibit only extreme or torturous *types* of punishment.[66] The Court has expanded this initial categorical understanding to require that punishments "be graduated and proportioned to [the] offense,"[67] such that an otherwise constitutional punishment can violate the Eighth Amendment if it is disproportionate to the underlying offense.[68] In the capital punishment context, courts rely on national consensus in assessing whether a given method of execution is categorically cruel

---

[61] *Id.* at 2011.

[62] *Id.* at 2012.

[63] *See, e.g.*, Ian P. Farrell, *Abandoning Objective Indicia*, 122 YALE L.J. ONLINE 303, 310 (2013) (describing a problematic divide between "categorical-bar" cases and "process" cases); Kimberly A. Orem, *Evolution of an Eighth Amendment Dichotomy: Substantive and Procedural Protections Within the Cruel and Unusual Punishment Clause in Capital Cases*, 12 CAP. DEF. J. 345, 346 (2000) (distinguishing between substantive and procedural Eighth Amendment protections).

[64] Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

[65] Although national consensus is the starting point of the Eighth Amendment inquiry, "in the end [a court's] own judgment will be brought to bear" on the appropriateness of the punishment. Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion).

[66] *See, e.g.*, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947) (plurality opinion) ("The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment . . . ."); Wilkerson v. Utah, 99 U.S. 130, 136 (1879) ("[P]unishments of torture . . . [and] unnecessary cruelty, are forbidden by [the Eighth] [A]mendment to the Constitution.").

[67] Weems v. United States, 217 U.S. 349, 367 (1910).

[68] *See, e.g.*, Graham v. Florida, 130 S. Ct. 2011, 2021 (2010) ("The concept of proportionality is central to the Eighth Amendment."); Ewing v. California, 538 U.S. 11, 20–24 (2003) (plurality opinion) (discussing cases). *But see* Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (opinion of Scalia, J.) ("[T]he Eighth Amendment contains no proportionality guarantee.").

and unusual,[69] and whether the death penalty is disproportionate when applied to a given category of crime[70] or offender.[71]

The second category requires that the process by which a state identifies the death-eligible be sufficiently reliable to encourage confidence in its outcomes. Although reliability in capital sentencing implicates due process,[72] it also comes within the Court's Eighth Amendment jurisprudence.[73] Justice Stewart, joining the Court in invalidating the death penalty as practiced in 1972,[74] famously noted that arbitrary imposition of the death penalty is "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[75] While some early process cases inquired into national consensus,[76] the Court has typically weighed challenged processes against precedential notions of fair process rather than against other states' contemporary practices.[77] Indeed, in a 1984 decision finding no constitutional defect in allowing

---

[69] *See, e.g.*, Baze v. Rees, 553 U.S. 35, 53 (2008) (plurality opinion) (lethal injection by three-drug combination); Campbell v. Wood, 511 U.S. 1119, 1120–21 (1994) (Blackmun, J., dissenting from denial of certiorari) (hanging); Gomez v. U.S. Dist. Court, 503 U.S. 653, 657–58 (1992) (Stevens, J., dissenting) (cyanide gas).

[70] *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 423–26 (2008) (rape of a child); Enmund v. Florida, 458 U.S. 782, 789–93 (1982) (felony murder as an accomplice without intent to kill); *Coker*, 433 U.S. at 593–96 (plurality opinion) (rape of an adult).

[71] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 564–67 (2005) (juveniles); Atkins v. Virginia, 536 U.S. 304, 314–16 (2002) (persons with intellectual disability); Thompson v. Oklahoma, 487 U.S. 815, 824–29 (1988) (plurality opinion) (juveniles under the age of sixteen); Ford v. Wainwright, 477 U.S. 399, 408–10 (1986) (insane persons).

[72] *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion) ("[T]he sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause.").

[73] *See, e.g.*, Maynard v. Cartwright, 486 U.S. 356, 361–62 (1988) (distinguishing between due process vagueness claims and Eighth Amendment vagueness claims); Godfrey v. Georgia, 446 U.S. 420, 423, 433 (1980) (plurality opinion) (finding that the Eighth Amendment requires a "principled way to distinguish" cases in which the death penalty is imposed "from the many cases in which it [i]s not," *id.* at 433).

[74] Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam).

[75] *Id.* at 309 (Stewart, J., concurring).

[76] *See, e.g.*, Caldwell v. Mississippi, 472 U.S. 320, 333–34 (1985) (finding that "legal authorities almost uniformly have strongly condemned" intimations to the sentencing jury that ultimate responsibility for the defendant's fate lies elsewhere, *id.* at 333); Beck v. Alabama, 447 U.S. 625, 637 (1980) (finding that "the nearly universal acceptance of the rule in both state and federal courts establishes the value" of a lesser included offense instruction); Woodson v. North Carolina, 428 U.S. 280, 298–301 (1976) (plurality opinion) (relying on national consensus to invalidate the mandatory death sentence).

[77] *See, e.g.*, Walton v. Arizona, 497 U.S. 639, 649–51 (1990) (opinion of White, J.) (finding it constitutionally permissible to require the defendant to prove all mitigating circumstances by a preponderance of the evidence); *Maynard*, 486 U.S. at 361–62 (describing Eighth Amendment vagueness doctrine without locating it in national practice); Skipper v. South Carolina, 476 U.S. 1, 4–5 (1986) (requiring that defendants be permitted to introduce mitigating evidence of good prison conduct); Eddings v. Oklahoma, 455 U.S. 104, 113–15 (1982) (requiring capital sentencers to consider all relevant mitigating evidence). Indeed, Justices dissenting in process cases have sometimes faulted the majority's failure to consider national consensus. *See, e.g.*, Harris v. Alabama, 513 U.S. 504, 515–16, 524 (1995) (Stevens, J., dissenting) (performing the national consensus inquiry absent in the majority opinion); California v. Ramos, 463 U.S. 992, 1027–28 (1983) (Marshall, J., dissenting) ("The majority breezily dismisses . . . consensus with the terse statement that

a trial judge to override a capital sentencing jury's recommendation of mercy, the Court noted that "[t]he Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws."[78] As recently as 2012, the Court remarked that it need not "tall[y] legislative enactments" when issuing a decision that "does not categorically bar a penalty for a class of offenders or type of crime . . . [but that] mandates only that a sentencer follow a certain process."[79]

Hall seemingly bridges these two categories. The case's central question of "*how* intellectual disability must be *defined*"[80] could plausibly be read as either a substantive or a procedural conundrum. On the one hand, by pegging its understanding of intellectual disability to clinical definitions,[81] *Atkins* may have created a substantive protection yoked to professional diagnoses.[82] On this reading, *Atkins* protects those whom medical consensus recognizes as intellectually disabled, and *Hall* simply relied on national consensus to identify today's protected class.[83] On the other hand, this reading sits oddly with what *Hall* ultimately established: a constitutional baseline as to when a state must *admit evidence* of intellectual disability, but no new guidance on what that evidence must show to establish such a disability.[84] Thus, in ruling on how a state may "*implement* the protections of *Atkins*,"[85] *Hall* may be better read as establishing a procedural guarantee aimed at vindicating a preexisting substantive right. On the latter reading, it was not inevitable that the Court would look to national consensus when assessing the reliability of Florida's sentencing procedures.[86]

'States are free to provide greater protections . . . than the Federal Constitution requires.'" (quoting *id.* at 1014 (majority opinion) (second alteration in original))).

78 Spaziano v. Florida, 468 U.S. 447, 464 (1984).

79 Miller v. Alabama, 132 S. Ct. 2455, 2471 (2012). Although the *Miller* Court noted in addition that it was only free to eschew national consensus inquiry because its decision "flow[ed] straightforwardly" from precedent, *id.*, the *Hall* Court would have been equally free to do so, *see Hall*, 134 S. Ct. at 1999 (reading *Atkins* to provide "substantial guidance" and rooting its judgment in "[t]he actions of the States *and the precedents of this Court*" (emphasis added)).

80 *Hall*, 134 S. Ct. at 1993 (emphases added).

81 *See* Atkins v. Virginia, 536 U.S. 304, 317 n.22 (2002).

82 *Cf. Hall*, 134 S. Ct. at 2002 (Alito, J., dissenting) (lamenting that the majority "str[uck] down a state law based on the evolving standards of *professional societies*").

83 Even on this reading, it is unclear why *Hall* required new inquiry into *state* practices; *Atkins* would already have established the relevant national consensus — "a consensus against execution of persons with mental retardation, informed by the clinical definition of that condition" — leaving the *Hall* Court to inquire only into how that clinical definition had since evolved. Reply Brief for Petitioner at 16, *Hall*, 134 S. Ct. 1986 (No. 12-10882).

84 *See Hall*, 134 S. Ct. at 2001 ("Freddie Lee Hall may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability . . . .").

85 *Id.* at 1996 (emphasis added).

86 *See* Reply Brief for Petitioner, *supra* note 83, at 16 ("The Court is not being asked to adopt a new Eighth Amendment rule in this case, but to enforce the one it recognized in *Atkins*. A new inquiry into national consensus is thus unnecessary.").

Insofar as the latter reading expands the use of national consensus inquiry, death penalty abolitionists may embrace it. After all, the Court's national consensus methodology has grown increasingly friendly toward abolition. In 1977, the Court found national consensus against imposing the death penalty for the rape of an adult when only one state authorized such a penalty.[87] Five years later, the Court found a national consensus against imposing the death penalty on accomplices to felony murder because "only about a third of American jurisdictions" authorized the death penalty for such defendants.[88] By *Atkins*, in 2002, a "bare" eighteen states were sufficient to form a consensus,[89] with the Court explaining that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."[90] Three years later, against a similar legislative tally, the Court found consensus against the juvenile death penalty despite an even "slower pace of abolition" because the "consistent *direction* of the change" was toward abolition.[91] *Hall*'s inclusion of abolitionist states in its national consensus inquiry into a question of evidentiary procedure,[92] as well as *Hall*'s characterization of "psychiatric and professional studies" as relevant to the question of consensus,[93] demonstrates that the Court continues to employ national consensus aggressively against challenged death penalty practices.

Therefore, unless *Hall*'s methodology is persuasively confined to the diagnostic context, the extension of national consensus inquiry into the procedural realm could threaten other outlier sentencing practices. Most germane to *Hall*, states permitting intellectually disabled defendants to prove their disability by a mere preponderance of the evidence well outnumber those that impose a more stringent burden of proof.[94] Ambitious litigants could seek to extend national consensus inquiry still further into capital procedure. Given that both heightened-

---

[87] *See* Coker v. Georgia, 433 U.S. 584, 594–96 (1977) (plurality opinion).

[88] Enmund v. Florida, 458 U.S. 782, 792 (1982).

[89] Atkins v. Virginia, 536 U.S. 304, 343 (2002) (Scalia, J., dissenting).

[90] *Id.* at 315 (majority opinion). *Atkins* understood consensus especially broadly, giving weight to unenacted bills, *see id.* at 315 & n.17, the margin by which legislation was passed, *see id.* at 316, opinion polls, *see id.* n.21, and the views of professional and religious organizations and foreign nations, *see id.*

[91] Roper v. Simmons, 543 U.S. 551, 566 (2005) (emphasis added). Conversely, the Court has been reluctant to find consistent change in the direction of *expanding* the death penalty. *See* Kennedy v. Louisiana, 554 U.S. 407, 431–33 (2008). Justice Scalia has correspondingly lamented that the Court uses the Eighth Amendment as a "ratchet, whereby a temporary consensus on leniency . . . fixes a permanent constitutional maximum." Harmelin v. Michigan, 501 U.S. 957, 990 (1991) (opinion of Scalia, J.).

[92] *See Hall*, 134 S. Ct. at 2004–05 (Alito, J., dissenting).

[93] *Id.* at 1993 (majority opinion).

[94] *See* Jeffrey Usman, *Capital Punishment, Cultural Competency, and Litigating Intellectual Disability*, 42 U. MEM. L. REV. 855, 884 (2012).

reliability procedural guarantees and proportionality-based substantive guarantees are rooted in the concern that the death penalty be imposed on only the most culpable,[95] it is arguably arbitrary to apply a distinct methodology to each type of case. Under this logic, all manner of outlier practices could become assailable.[96] For example, state schemes permitting a jury to return a death sentence without unanimity could run against national consensus.[97] Still further, capital sentencing schemes in which the jury's sentence is not final — long recognized as constitutional[98] — might not survive a national consensus inquiry.[99] Indeed, last Term, Justice Sotomayor, joined by Justice Breyer, drew on national consensus when dissenting from a denial of certiorari on Alabama's practice of allowing judges to overturn a capital sentencing jury's recommendation of mercy.[100]

Of course, while such arguments are available, they are hardly assured of success. The death penalty itself is after all an increasingly outlier practice,[101] and yet the Court has not in recent years entertained challenges to its constitutionality on that basis,[102] even though, as a purely substantive matter, it more clearly merits national consensus analysis than did the point at issue in *Hall*. But despite *Hall*'s uncertain future impact, savvy litigants may well find it to be more than the narrow procedural decision it appears at first blush to be.

---

[95] *Compare, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (striking down the mandatory death penalty for providing insufficient process to ensure "reliability in the determination that death is the appropriate punishment in a specific case"), *with, e.g.*, *Atkins*, 536 U.S. at 319 ("[P]ursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.").

[96] For a survey of prominent outlier practices, see generally AM. BAR ASS'N, THE STATE OF THE MODERN DEATH PENALTY IN AMERICA 13–15 (2013), http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/aba_state_of_modern_death_penalty_web_file.authcheckdam.pdf [http://perma.cc/QJS2-MBSE].

[97] *See, e.g.*, Chenyu Wang, Comment, *Rearguing Jury Unanimity: An Alternative*, 16 LEWIS & CLARK L. REV. 389, 404–06 (2012) (suggesting that Florida's unique refusal to require jury unanimity at sentencing violates the Eighth Amendment).

[98] *See* Spaziano v. Florida, 468 U.S. 447, 464 (1984).

[99] *See* Woodward v. Alabama, 134 S. Ct. 405, 407 (2013) (Sotomayor, J., dissenting from denial of certiorari) (finding only "four States in which the jury has a role in sentencing but is not the final decisionmaker"); Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 ALA. L. REV. 1091, 1139–53 (2003) (laying out the Eighth Amendment argument in favor of jury sentencing). Indeed, Justice Breyer has already made his position known. *See* Ring v. Arizona, 536 U.S. 584, 619 (2002) (Breyer, J., concurring in the judgment) ("[T]he Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death.").

[100] *See Woodward*, 134 S. Ct. at 407–08 (Sotomayor, J., dissenting from denial of certiorari).

[101] *See* DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2013, at 1 (2013), http://www.deathpenaltyinfo.org/documents/YearEnd2013.pdf [http://perma.cc/3S3E-RLDS] (reporting only thirty-nine executions in a total of nine states in 2013).

[102] *See, e.g.*, Baze v. Rees, 553 U.S. 35, 47 (2008) (plurality opinion) ("We begin with the principle . . . that capital punishment is constitutional.").