Falling Between the Atkins and Heller Cracks: Intellectual Disabilities and Firearms

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INTRODUCTION

With citizenship comes certain rights: the right to vote,[1] the right to marry,[2] and now, the individual right to bear arms—at least the right to possess handguns for personal self-defense purposes.[3] The right to bear arms may be taken away, but that is done either through a judicial determination of incompetency or as a consequence to related or even unrelated occurrence of criminal conviction.[4] However, with the United States Supreme Court's recent application of the Second Amendment to the states, having determined that the Second Amendment included the individual right to possess handguns in one's home for self-defense purposes, that right to bear arms, left unclear, may do more harm than good.[5] The future of Second Amendment litigation will be in challenging those laws that restrict rights of gun ownership and use. Without a clear standard of review,[6] it is difficult to predict if many of the existing limitations in gun control will survive challenges.

But case law does not live in a vacuum. One judgment, addressing one right, can surely affect—or be affected by—another judgment addressing a seemingly unrelated issue. This occurs at the intersection of that right to bear arms and intellectual disabilities.

Addressing the Eighth Amendment in 2002, the Supreme Court, reversing precedent only thirteen years old, held that the execution of persons with intellectual disabilities was a violation of the Eighth Amendment's prohibition against cruel and

1 Although the right to vote is not explicitly granted in the Constitution, the Constitution does prohibit the denial of the right to vote based on race, U.S. CONST. amend. XV, § 1, gender, U.S. CONST. amend. XIX, § 1, or age if that age is eighteen or over, U.S. CONST. amend. XXVI, § 1. However, some interpret the Fourteenth Amendment as granting the right to vote as a political right, not a civil right. *See* Steven G. Calabresi, *Does the Fourteenth Amendment Guarantee Equal Justice for All?*, 34 HARV. J.L. & PUB. POL'Y 149, 152 (2011). *See also* Harper v. Virginia. Bd. of Elections, 383 U.S. 663, 665 (1966).

2 *See* Loving v. Virginia, 388 U.S. 1, 11 (1967). *See generally* Ariela R. Dubler, *Sexing* Skinner*: History and the Politics of the Right to Marry*, 110 COLUM. L. REV. 1348 (2010) (revisiting Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) and *Loving* under the question of current issues related to the right to marry).

3 McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (applying the Second Amendment to the States); District of Columbia v. Heller, 544 U.S. 570, 570 (2008) (interpreting a right to possess handguns for personal self-defense).

4 16 U.S.C. § 922(g) (2006); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 513–14 (2010).

5 *See, e.g.*, Michael D. de Leeuw et al., *Ready, Aim, Fire?* District of Columbia v. Heller *and Communities of Color*, 25 HARV. BLACKLETTER L.J. 133, 148–50 (2009).

6 *See, e.g.*, Brannon P. Denning & Glenn H. Reynolds, *Five Takes on* McDonald v. Chicago, 26 J.L. & POL. 273, 296–97 (2011) (pointing out the repeated denial of the Court (even the plurality) to articulate a standard of review in either *Heller* or *McDonald*).

unusual punishment.[7] Persons in this population do not have the same criminal culpability as others, and the death penalty should not be applied.[8] Given that the Court has prohibited the execution of persons with intellectual disabilities because of this lower culpability,[9] perhaps that right to arms under the Second Amendment should not apply equally to persons with intellectual disabilities either. Rather than debating over executions, preventing some of the crimes that could lead to an execution might be even better.

Congress may have tried to address this over forty years ago. One of the major objectives of the Gun Control Act of 1968 (Gun Control Act) was to deny specific populations access to firearms—felons, minors, and "persons who had been adjudicated as mental defectives or committed to mental institutions."[10] The goal was to deny access to firearms to these "special risk groups" or, at the very least, punish those who provided such access.[11] The Gun Control Act barred the knowing transfer of guns or ammunition to the named groups.[12] The Gun Control Act achieved this task easily with some groups: determining who is a minor is as easy as seeing proof of age, something most people have.[13] Also, felony convictions are recorded and tracked.[14]

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7 Atkins v. Virginia, 536 U.S. 304, 321 (2002).

8 *Id.* at 320–21.

9 The term "intellectual disability" is synonymous with "mental retardation." *FAQ on Intellectual Disability*, AAIDD (last visited Sept. 15, 2011), http://www.aaidd.org/content_104.cfm. But intellectual disability is gaining currency as the preferred term. In fact, the American Association on Mental Retardation changed its name in 2007 to the American Association on Intellectual and Developmental Disabilities. *Id.* Based on the preference for the former term, it will be used throughout this article, although the author will recognize the use of "mental retardation" in quoted material. The AAIDD has noted:

> It is crucial that "mental retardation" and "intellectual disability" should be precisely synonymous in definition and in all related classification because current federal and state laws contain the term "mental retardation." That is the term used in law and public policy to determine eligibility for state and federal programs, including the Individuals With Disabilities Education Act—IDEA (2004), Social Security Disability Insurance, and Medicaid Home and Community Based Waiver. Also, the term "mental retardation" is used for citizenship and legal status, civil and criminal justice, early care and education, training and employment, income support, health care, and housing and zoning.

Id.

10 Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 149 (1975).

11 *Id.* at 152.

12 18 U.S.C. § 922(g) (2006).

13 However, as has been argued and seen in voter disenfranchisement situations, many citizens do not have government-issued identification. *See* Julien Kern, *As-Applied Constitutional Challenges, Class Actions, and Other Strategies: Potential Solutions to Challenging Voter Identification Laws After* Crawford v. Marion County Election Board, 42 LOY. L.A. L. REV. 629, 631–32 (2009). This calls into question issues of discrimination regarding the lawful purchase of firearms for persons, especially rural persons without

But the restriction regarding persons with intellectual disabilities is too vague to measure, track, or enforce in the manner surely intended.[15] Further, the rights we have taken away from minors and felons fall in line with other rights similarly removed. Minors' rights are restricted in a number of ways: they cannot vote, marry, enter into contracts, etc.[16] But a person with intellectual disabilities often explicitly has all the rights of a person without similar disabilities by way of bills of rights that explicitly guarantee all rights will be recognized unless a person is adjudicated incompetent.[17]

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proof of age.

14 The Brady Handgun Violence Prevention (Brady Bill) Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–22 (2006)) requires that background checks are conducted prior to sales by licensed firearms dealers, and as a method to complete those checks, Congress required the FBI to implement the National Instant Criminal Background Check System (NICS), which tracks felony convictions, within five years of the passage of the Brady Bill. *See* James B. Jacobs & Jennifer Jones, *Keeping Firearms Out of the Hands of the Dangerously Mentally Ill*, 47 CRIM. L. BULL. 388, 393 (2011); *see also National Instant Criminal Background Check System*, FED. BUREAU OF INVESTIGATION (last visited Sept. 15, 2011), http://www.fbi.gov/about-us/cjis/nics. However, states did not necessarily submit the required data to the NICS, which led to the passage of the NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180 § 2, 121 Stat. 2559 (2008).

15 *See generally* Jacobs & Jones, *supra* note 14.

16 *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 824 (1988):

> There is . . . complete or near unanimity among all 50 States and the District of Columbia in treating a person under sixteen as a minor for several important purposes. In no State may a fifteen-year-old vote or serve on a jury. Further, in all but one State a fifteen-year-old may not drive without parental consent, and in all but four States a fifteen-year-old may not marry without parental consent.

17 States have individualized bills of rights that explicitly state that rights may not be denied unless a formal adjudication has occurred: "To articulate the existing legal and human rights of persons with developmental disabilities so that they may be exercised and protected. Persons with developmental disabilities shall have all the rights enjoyed by citizens of the state and the United States." FLA. STAT. ANN. § 393.13(2)(d) (West 2011).

> Because persons with mental retardation have been denied rights solely because of their retardation, the general public should be educated to the fact that persons with mental retardation who have not been adjudicated incompetent and for whom a guardian has not been appointed by a due process proceeding in a court have the same rights and responsibilities enjoyed by all citizens of this state. All citizens are urged to assist persons with mental retardation in acquiring and maintaining rights and in participating in community life as fully as possible.

TEX. HEALTH & SAFETY CODE ANN. § 591.002(e) (West 2010). "Each person with mental retardation in this state has the rights, benefits, and privileges guaranteed by the constitution and laws of the United States and this state." HEALTH & SAFETY § 592.011(a). Further, the federal government has noted that rights are not reduced based on an intellectual disability:

> Congress finds that—(1) disability is a natural part of the human experience that does not diminish the right of individuals with developmental disabilities to live independently, to exert control and choice over their own lives, and to fully participate in and contribute to their communities through full

However, the effectiveness of the language that addresses persons with intellectual disabilities is debatable. The Gun Control Act, and subsequent amendments, left a wide gap in its limitations on "mental defective," ignoring not only the need to use control measures to protect society, but also to protect special risk groups, namely, those with intellectual disabilities. And regardless of whether such persons are covered, indeed, their coverage is inadequate. There is no database of persons with intellectual disabilities,[18] and the prohibition against owning a firearm applies only to those so adjudicated by a court as mental defectives and only when notice of the adjudication is provided to a national database.[19] If this hole cannot be filled, clearly, denying rights of access is not enough. Therefore, to achieve the goal of protecting society as well as persons with intellectual disabilities, we must aim to prevent access to guns through an alternative avenue: criminalize allowing a person with intellectual disabilities access to a personally-owned firearm.

> integration and inclusion in the economic, political, social, cultural, and educational mainstream of United States society.

42 U.S.C. § 15001(a)(1) (2006). "The rights of individuals with developmental disabilities described in findings made in this section shall be considered to be in addition to any constitutional or other rights otherwise afforded to all individuals." 42 U.S.C. § 15009(b).

18 This is not to suggest that a database of persons with intellectual disabilities is recommended. Such a database could too easily lead to improper discrimination in areas of housing, employment, and the like. *See, e.g.*, City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 442, 450 (1985) (although refusing to find persons with intellectual disabilities to belong to a quasi-suspect class, holding that equal protection was violated for failure of any rational basis to justify requiring a special permit for homes for persons with intellectual disabilities).

19 18 U.S.C. § 922(d)(1) (2006). "Adjudicated as a mental defective" has been defined as:

> (a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:
>
> (1) Is a danger to himself or to others; or
>
> (2) Lacks the mental capacity to contract or manage his own affairs.
>
> (b) The term shall include—
>
> (1) A finding of insanity by a court in a criminal case; and
>
> (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b

27 C.F.R. 478.11(a) (2010). *See also* Allen Rostron, *Incrementalism, Comprehensive Rationality, and the Future of Gun Control*, 67 MD. L. REV. 511, 551–52 (2008) [hereinafter Rostron, *Incrementalism*].(addressing the lack of notice of mental illness adjudication in Virginia which allowed Seung-Hui Cho to purchase firearms in spite of a background check). In 2008, only four states regularly provided the information needed to keep the database current, and less than half of the states provided any information regarding mental health records. *Id.* at 552–53. Of particular concern, though, is what qualifies as that court, "board, commission, or other lawful authority" as an entity that could remove someone's (now-understood) Constitutional right.

This Article begins this discussion and supports adopting such legislation for two distinct reasons. First, guns should not be possessed by persons with significantly limited cognitive and reasoning skills.[20] Second, similar to child-access prevention laws, legislation should hold accountable those persons who improperly store their guns. Part I provides background, including legislative information as related to the Gun Control Act and its implementation, focusing on its language and applicable amendments regarding persons prohibited from firearm possession. Part I also explains child-access prevention laws, a newer area of gun control legislation. Part II reviews judicial interpretation of legislative language related to persons with intellectual disabilities under the Gun Control Act before moving to a discussion of the Supreme Court's holding in *Atkins v. Virginia*, the case in which the Court held the execution of persons with intellectual disabilities to be unconstitutional.[21] By comparing the justifications of *Atkins* and other Court language, there exists an argument that child-access prevention laws should be extended to cover persons with intellectual disabilities. Thus, Part III proposes ways in which to fill the gap of the population mentioned, but for all practical purposes unaddressed, in gun control legislation by extending child-access prevention laws to persons with intellectual disabilities.

I. RELEVANT GUN CONTROL LEGISLATION

A. Intellectually Disabled Under the Gun Control Act of 1968: "Mental Defects"

In 1968, in the wake of assassinations of Dr. Martin Luther King, Jr. and Senator Robert Kennedy, Congress passed the Gun Control Act.[22] One of the primary purposes of the Gun Control Act was to restrict firearms possession, prohibiting certain special risk groups from possessing guns and prohibiting the

20 *See generally* Richard J. Bonnie, *The American Psychiatric Association's Resource Document on Mental Retardation and Capital Sentencing: Implementing* Atkins v. Virginia, 28 MENTAL & PHYSICAL DISABILITY L. REP. 11 (2004) (discussing the meaning of "significant").

21 Atkins v. Virginia, 536 U.S. 304, 304 (2002).

22 Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921–928 and in scattered sections of 26 U.S.C. (2006)). This was the first primary firearms legislation since the National Firearms Act, 26 U.S.C. §§ 5801–5872, passed in 1934, which had been prompted especially by concerns of gangsters and organized crime. *See* Zimring, *supra* note 10, at 138 ("The National Firearms Act of 1934, after the handgun registration provisions were deleted, was a concentrated attack on civilian ownership of machine guns, sawed-off shotguns, silencers, and other relatively rare firearms that had acquired reputations as gangster weapons during the years preceding its passage.").

transfer of guns to such groups by licensed dealers.[23] The Gun Control Act addresses this in two provisions. The first provision states: "It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . has been adjudicated as a mental defective or has been committed to any mental institution."[24] The second provision states:

> It shall be unlawful for any person . . . who has been adjudicated as a mental defective or has been committed to any mental institution . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.[25]

The only reference to persons with intellectual disabilities could be found under the inclusion of persons "who have been adjudicated as a mental defective."[26]

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23 Zimring, *supra* note 10, at 149.

24 18 U.S.C. § 922(d)(4) (2006). Other prohibitions include the ability to sell firearms to one who has been convicted of a felony, dishonorably discharged from the Armed Forces, or has been convicted of a misdemeanor crime of domestic violence. 18 U.S.C. § 922(g)(1), (6), (9). Congress couches its prohibitions under commerce restrictions; however, the Supreme Court held that Congress exceeded its Commerce Clause authority in enacting the Gun-Free School Zones Act of 1990. *See* United States v. Lopez, 514 U.S. 549, 549 (1995) (holding 18 U.S.C. § 922(q)(1) unconstitutional because it is a "criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly those terms are defined").

25 18 U.S.C. § 922(g)(4). Although the *Lopez* Court held that the Gun-Free School Zones Act was unconstitutional, some circuits have upheld subsequent constitutional challenges to the Act because it contained a "jurisdictional" clause. *See* United States v. Dorsey, 418 F.3d 1038, 1045–46 (9th Cir. 2005). Interestingly, despite the Court finding Congress does not generally have the power to regulate guns, the Court has been willing to find that Congress has the authority to regulate drugs. *See* Gonzales v. Raich, 545 U.S. 1, 42 (2005) (Scalia, J., concurring) (recognizing that Congress has the authority to regulate controlled substances under the Commerce Clause).

26 18 U.S.C. §§ 922(d)(4), (g)(4). States use a variety of terms to discuss mental impairment in gun legislation. The District of Columbia prohibits the sale of firearms to persons whom the seller "has reasonable cause to believe is not of sound mind" or who is under the age of twenty-one. D.C. CODE § 22-4507 (LexisNexis through 2011 legislation). Alabama prohibits the delivery of a pistol to a person "of unsound mind." ALA. CODE § 13A-11-76 (LexisNexis 2005). California bans firearm possession by (and transfer to) persons adjudicated as "a danger to others as a result of a mental disorder or mental illness, or who has been adjudicated to be a mentally disordered sex offender." CAL. WELF. & INST. CODE § 8103(a)(1) (West 2010). Key in California is section 8103 of its Welfare and Institutions Code. Under this section, persons who have "been placed under conservatorship by a court . . . because the person is gravely disabled as a result of a mental disorder or impairment by chronic alcoholism" may not possess a firearm. *Id.* at § 8103(e)(1). Further, section 8101 states that no one shall "knowingly supply, sell, give, or allow possession or control of a firearm," to anyone covered in section 8103, violation of which is subject to a two-to-four-year prison sentence. *Id.* at § 8101(b). However, California appellate courts have stated that a person who is "capable of surviving safely in freedom with the help of willing and responsible family members, friends, or third parties" is not gravely disabled and may still own a firearm. San Diego Cnty. Dep't of Soc. Serv. v. Neal (*In re* Conservatorship of Neal), 235 Cal. Rptr. 577, 578 (1987); Estate of Davis v. Treharne (*In re* Conservatorship of Davis), 177 Cal. Rptr. 369, 373 (1981).

The ban against transferring guns to the special risk populations was not strengthened with any means of verification for any group other than minors; a purchaser merely needed to state he or she was eligible, and the dealer was able to rely on her word.[27]

In 1993, after the shooting of President Ronald Reagan, Congress responded with the Brady Bill,[28] which attempted to address the hole in the 1968 Gun Control Act by implementing a waiting period before the purchase of a handgun and by establishing a national background system check.[29] This law was implemented in two stages, giving states time to gather the records and time to institute the computerized system to maintain those records.[30] But the Bill did not seem to account for how it would motivate states to provide information related to those who had been adjudicated "as a mental defective."[31] It would be fifteen years before any attempt was successful in trying to strengthen the meaning behind the Brady Bill regarding this particular group, and even then, the group is again only a tag-along.[32]

That improvement to the Brady Law came after the shooting at Virginia Polytechnic Institute and State University (Virginia Tech),[33] in which thirty-two people were murdered and twenty-four wounded by Seung-Hui Cho, who had purchased firearms in spite of having been ordered to receive outpatient treatment for

Further, the Welfare and Institutions Code specifically states that "gravely disabled does not include mentally retarded persons by reason of being mentally retarded alone." CAL. WELF. & INST. CODE § 5008(h)(3) (West 2010).

27 Zimring, *supra* note 10, at 152–53.

28 Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–22). Scholars note that the piecemeal approach to gun legislation should be replaced with a comprehensive reform. *See, e.g.*, Rostron, *Incrementalism*, *supra* note 19, at 568.

29 Brady Handgun Violence Prevention Act § 103.

30 *Id.*

31 *Id.*

32 In the interim, other gun control legislation passed, including the controversial federal assault weapons ban, which subsequently expired in 2004. Public Safety and Recreational Firearms Use Protection Act, Pub. L. No 103-322, 108 Stat. 1996 (1994) (repealed 2004). Whether a renewed assault weapons ban would survive constitutional scrutiny under *Heller* is debatable. It has been concluded that the type of arm possessed can indeed be regulated, and if the arm is not in "common use at the time" among Americans, the arm is not protected under the Second Amendment. District of Columbia v. Heller, 554 U.S 570, 624–27 (2008); Allen Rostron, *Protecting Gun Rights and Improving Gun Control After* District of Columbia v. Heller, 13 LEWIS & CLARK L. REV. 383, 388 (2009) [hereinafter Rostron, *Protecting*].

33 *See Investigation of April 16, 2007 Critical Incident At Virginia Tech*, OFFICE OF THE INSPECTOR GEN. FOR MENTAL HEALTH, MENTAL RETARDATION & SUBSTANCE ABUSE SERVICES 3, *available at* http://www.oig.virginia.gov/documents/VATechRpt-140.pdf. Gun control legislation often follows shootings that gain national recognition. *See, e.g.*, Rostron, *Incrementalism*, *supra* note 19, at 561–62.

mental illness.[34] After that shooting, Congress passed the NICS Improvement Amendments Act.[35] The Act was intended to strengthen the Brady Bill's background check system through the National Instant Check System (NICS).[36]

As part of the desired improvement, Congress sought to increase the availability of information that would result in disqualification of gun ownership by automating the information related to mental illness.[37] That access could be automated, or at least improved, if the information were computerized.[38] The Act required that federal agencies with information related to a person falling under the categories of prohibited possessors[39] report that information to the Attorney General at least quarterly.[40] The Attorney General is then charged with updating the NICS.[41] Further, states are to make similar information available when a person is adjudicated as a mental defective.[42] Federal funds may be withheld from states that fail to comply.[43] States were to be provided grants to assist with the cost of upgrading their information—creating electronic systems, and collecting and analyzing data.[44] Failure to comply results in loss of funds as allocated under the Crime Control and Safe Streets Act of 1968.[45] The initial review period to determine compliance would not begin until 2011; that review would extend for two years.[46]

The deadline to comply with the NICS Improvement Amendments Act has come and gone, and in spite of the threat of losing federal funds, not all states are complying.[47] In February

34 *See, e.g.*, Rostron, *Incrementalism*, *supra* note 19, at 550–51.

35 NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 121 Stat. 2559 (2008).

36 § 2, 121 Stat. at 2559–60.

37 *Id. See also* Associated Press, *Mental Health Records Not in Gun Database*, MSNBC.COM (Nov. 26, 2005), http://www.msnbc.msn.com/id/10214838/ns/us_news-crime_and_courts/. Some complained that prohibiting gun possession by persons with mental illness was unfair in that it denied their rights based on a medical condition. Associated Press, *supra*. Although Justice Scalia, writing for the majority in *Heller* seemed to dismiss any question of constitutionality of this prohibition, it certainly has not been analyzed as a distinct issue. *See Heller*, 554 U.S. at 626. The NRA, however, supported the NICS Improvement Act; it also negotiated for a release from disabilities provision, which was included. *See* Rostron, *Incrementalism*, *supra* note 19, at 555.

38 § 2, 121 Stat. at 2560.

39 This applies to persons listed under 18 U.S.C. § 922 (g) and (n). § 101, 121 Stat. at 2561.

40 *Id.*

41 *Id.*

42 *Id.* at 2566–67.

43 *Id.* at 2565.

44 *Id.* at 2567.

45 *Id.* at 2569.

46 *Id.*

47 Greg Bluestein, *Most U.S. States Don't Follow Mental Illness Gun Law*,

2011, a month after the compliance deadline passed, nine states had provided no information,[48] and seventeen other states had sent fewer than twenty-five names.[49] Surely, those states have more than twenty-five persons who have been adjudicated as mental defects.

In passing the NICS Improvement Amendments Act of 2007, Congress stated:

> On April 16, 2007, a student with a history of mental illness at the Virginia Polytechnic Institute and State University shot to death 32 students and faculty members, wounded an additional 26 individuals, and then took his own life. The shooting, the deadliest campus shooting in United States history, renewed the need to improve information-sharing that would enable Federal and State law enforcement agencies to conduct complete background checks on potential firearms purchasers. In spite of a proven history of mental illness, the shooter was able to purchase the two firearms used in the shooting. Improved coordination between State and Federal authorities could have ensured that the shooter's disqualifying mental health information was available to NICS.[50]

Further, in discussing the findings and definitions, the focus regarding the inadequate data was on "mental health" and mental illnesses.[51] Congress did not appear to focus on issues of intellectual disabilities, which left an entire population of persons often considered incompetent in other ways, able to purchase and possess firearms.

Of course, regulations can cover only those who are required to abide by them. Not covered by the Gun Control Act or the NICS Improvement Amendment Act are private sales of firearms to persons.[52] While gun possession itself is prohibited for persons adjudicated mentally defective, the transfer of the gun is not prohibited so long as that transfer is done by a private individual who is not engaged in the business of selling firearms.[53] Some have estimated that half of all gun sales involve used guns, and thus are likely not covered by the required background checks.[54]

HUFFINGTON POST (Feb. 17, 2011, 02:04 PM), http://www.huffingtonpost.com/2011/02/17/few-states-follow-mental-_n_824738.html.

48 *Id.* Problems with the distribution of promised funds and with privacy laws were cited as roadblocks to the information being submitted by the states. *Id.*

49 *Id.*

50 NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 2(9), 121 Stat. at 2559, 2260 (2008).

51 *Id.* at 2560–61.

52 *See* Rostron, *Incrementalism*, *supra* note 19, at 556.

53 *See id.* Some states, such as California and Pennsylvania, have implemented the background-check requirement for all transfers. *Id.*

54 *See* Philip J. Cook, Stephanie Molliconi & Thomas B. Cole, *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 1, 69–70 (1995) (finding data supportive of the

B. Child-Access Prevention Laws[55]

The federal prohibition against providing firearms to minors has been in place for over forty years, but child-access prevention laws (CAP laws) are, by comparison, relatively recent. Although possession by a minor and transfer to a minor is prohibited under federal law and most state laws, CAP laws extend this one step further by holding a private gun owner criminally liable when a minor gains access to that person's gun.[56]

Although not a part of federal law, at least twenty-seven states and the District of Columbia have enacted CAP laws.[57] A handful of these states actually provide for criminal liability even if the child who gains access does not cause injury.[58] Some statutes merely prevent providing a firearm to a minor, while others impose criminal liability for negligently storing even unloaded firearms such that a minor gains access to it.[59]

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conclusions that approximately half of all gun sales involve used guns and that approximately forty percent occur in secondary markets rather than in regulated markets).

55 This Article accepts CAP laws as a beneficial part of gun policy. For an informative analysis of CAP laws, see Andrew J. McClurg, *Child Access Prevention Laws: A Commonsense Approach to Gun Control*, 18 ST. LOUIS U. PUB. L. REV. 47, 51–53, 58 (1999). For a listing and categorization of CAP laws, see generally *Child Access Prevention*, LEGAL COMMUNITY AGAINST VIOLENCE (Feb. 2008), http://www.lcav.org/content/child_access_prevention.pdf.

56 Other statutes create civil liability for similar situations when the minor gains access to a gun and injures herself or another. *See* Rostron, *Protecting*, *supra* note 32, at 385 (arguing that the decision in *Heller* will, contrary to popular thought, help push toward "strong, sensible gun laws").

57 CAL. PENAL CODE §§ 12035-12036 (West 2009); CAL. CIV. CODE § 1714.3 (West 2009); COLO. REV. STAT. ANN. § 18-12-108.7 (West 2004); CONN. GEN. STAT. ANN. § 29-37(i) (West 2009); CONN. GEN. STAT. ANN. § 52-571(g) (West 2005); CONN. GEN. STAT. ANN. § 53(a)A-217(a) (West 2007); DEL. CODE ANN. tit. 11, §§ 603, 1456 (2007); D.C. CODE § 7-2507.02 (LexisNexis 2008); FLA. STAT. ANN. § 790-174 (West 2007); GA. CODE ANN. § 16-11-101.1 (2011); HAW. REV. STAT. ANN. § 134-10.5 (LexisNexis 2006); HAW. REV. STAT. ANN. §§ 707-714.5 (LexisNexis 2007); 720 ILL. COMP. STAT. 5/24-9(a) (West 2010); 430 ILL. COMP. STAT. 65/4(c) (West 2004); IND. CODE ANN. § 35-47-10-7 (West 2004); IOWA CODE ANN. § 724.22(7) (West 2003); KY. REV. STAT. ANN. § 527.110 (West 2006); MD. CODE ANN., CRIM. LAW § 4-104 (LexisNexis 2002); MASS. GEN. LAWS ANN. ch. 140, § 131L (West 2002); MINN. STAT. ANN. § 609.666 (West 2009); MISS. CODE ANN. §§ 97-37-14, 97-37-15 (West 2011); MO. REV. STAT. § 571.060(1)-(2) (West 2003); NEV. REV. STAT. ANN. §§ 41.472, 202.300 (LexisNexis 2006); N.H. REV. STAT. ANN. § 650-C:1 (LexisNexis 2007); N.J. STAT. ANN. § 2C:58-15 (West 2005); N.C. GEN. STAT. § 14-315.1 (LexisNexis 2009); OKLA. STAT. ANN. tit. 21, § 1273(B) (West 2002); R.I. GEN. LAWS ANN. § 11-47-60.1 (2002); TENN. CODE ANN. §§ 39-17-1319, 39-17-1320 (2010); TEX. PENAL CODE ANN. § 46.13 (West 2011); UTAH CODE ANN. § 76-10-509.6 (LexisNexis 2008); VA. CODE ANN. § 18.2-56.2 (2009); WIS. STAT. ANN. § 948.55 (West 2005).

58 HAW. REV. STAT. ANN. § 134-10.5 (LexisNexis 2006); HAW. REV. STAT. ANN. § 707-714.5 (LexisNexis 2007); MD. CODE ANN., CRIM. LAW § 4-104 (LexisNexis 2002); MASS. GEN. LAWS ANN. ch. 140, § 131L (West 2002); MINN. STAT. ANN. § 609.666 (West 2009); N.J. STAT. ANN. § 2C:58-15 (West 2005); TEX. PENAL CODE ANN. § 46.13 (West 2011).

59 *See* HAW. REV. STAT. ANN. § 134-10.5 (LexisNexis 2006); HAW. REV. STAT. ANN. § 707-714.5 (LexisNexis 2007); MASS. GEN. LAWS ANN. ch. 140, § 131L (West 2002).

Gun control legislation tends to be reactive rather than proactive. This is how many of the child-access prevention laws have come about.[60] However, the idea that a person with limited intellectual functioning can access a firearm seems absurd to most, but nothing works to actually prevent it. No database exists. A gun dealer has no way to determine whether a person has been adjudicated mentally defective. We could not expect a dealer to refuse to sell a gun to a person merely because that person was unable to complete an application form; after all, nothing in the regulations prohibit illiterate persons from gun possession.[61] Gun shows have even less controlled measures for selling firearms.[62]

Of course, given Congress's already reactionary manner, the likelihood of legislation being enacted before a problem is noticed is quite low. This is why the incremental nature of gun policy harms our full picture of the issues.[63]

Although states vary widely, review of specific statutory language can be instructive as to the nature of CAP laws. Below, the laws in California and the District of Columbia are examined.

i. California

In California:

> a person commits the crime of "criminal storage of a firearm of the first degree" if he or she keeps any loaded firearm within any premises that are under his or her custody or control and he or she knows or reasonably should know that a child is likely to gain access to the firearm without the permission of the child's parent or legal guardian and the child obtains access to the firearm and thereby causes death or great bodily injury to himself, herself, or any other person.[64]

This becomes "criminal storage of a firearm of the second degree" if the child causes injury other than serious bodily injury or carries the firearm "either to a public place or in violation of section 417 (drawing a weapon in a rude or threatening manner).[65]

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60 Although most have come about as a means to prevent accidental shootings by children, CAP laws can also be useful in reducing intentional shootings. *See* McClurg et al., *supra* note 55, at 53 ("CAP laws are a reasonable and feasible way to reduce all variety of gun tragedies that result from guns getting into the hands of unauthorized users.").

61 This would also work a great discrimination against those uneducated or undereducated.

62 One of the primary areas of legislative debate involves the gun show loophole.

63 *See, e.g.*, Rostron, *Incrementalism*, *supra* note 19, at 552–53.

64 CAL. PENAL CODE § 12035(b)(1) (West 2009).

65 § 12035(b)(2); CAL. PENAL CODE § 417 (West 2010).

Criminal liability, though, extends only so far. It is not a crime if the child "obtains the firearm as a result of an illegal entry to any premises by any person," or if the firearm was kept locked such that a reasonable person believed it to be secure, the firearm was carried on the person or was locked with a locking device, or if the person has no reason to believe a child would be present on the premises.[66] Further, it is not a violation if the person whose firearm is accessed was performing her duties as a peace officer of the armed forces or National Guard, or if the child obtains the firearm and uses it "in a lawful act of self-defense or defense of another person . . . ."[67]

California extends the liability further if the child removes the gun from the owner's premises. If the child who gains access to the firearm carries it off the premises from where it was obtained, a separate crime occurs leading to up to one year in jail and/or a fine up to $1000.[68] If the child carries the firearm to a school or school activity, that fine increases to up to $5000.[69] Factors that are considered in arrest and punishment include: if the child is injured, if the firearm obtained belonged to the child's parent, and if the person in possession of the firearm had taken a firearms safety training course.[70]

ii. District of Columbia

Having had part of its gun control legislation at the center of *District of Columbia v. Heller*, the District of Columbia revised its laws and enacted the Firearms Registration Amendment Act of 2008.[71] Included in the District's current firearms law is the imposition of criminal liability if a minor gains access to one's firearm.

> No person shall store or keep any firearm on any premises under his control if he knows or reasonably should know that a minor is likely to gain access to the firearm without the permission of the parent or

66 § 12035(c).
67 § 12035(c).
68 § 12035(b).
69 § 12036(c).
70 § 12036(f)–(h).
71 Firearms Registration Amendment Act of 2008, 17-372, 56 D.C. Reg. 1365 (Jan. 28, 2008); *see* Rostron, *Protecting*, *supra* note 32, at 398–99 (discussing the District of Columbia's response to *Heller*). Among the changes, the District of Columbia extended the waiting period, allowed registration of even semi-automatic pistols (previously prohibited), and banned extremely high-powered rifles. *Id.*; *see* D.C. CODE § 7-2502.01 (LexisNexis 2008). In the year after *Heller*, the District first passed emergency legislation (the Firearms Registration Emergency Amendment Act), with the laws becoming permanent by that December. *See Firearm Registration in the District of Columbia*, METROPOLITAN POLICE DEPARTMENT (last visited Sept. 18, 2011), http://mpdc.dc.gov/mpdc/cwp/view,a,1237,q,547431,mpdcNav_GID,1523,mpdcNav,%7C.asp.

> guardian of the minor unless such person: (1) Keeps the firearm in a securely locked box, secured container, or in a location which a reasonable person would believe to be secure; or (2) Carries the firearm on his person or within such close proximity that he can readily retrieve and use it as if he carried it on his person.[72]

Violation of this law results in criminal liability including a fine up to $1000 and/or 180 days in jail.[73] The punishment increases to $5000 and/or five years of imprisonment if injury or death is caused by the minor.[74] However, liability is not found if the minor gains access by "unlawful entry or burglary to any premises by any person."[75]

II. SINGLING OUT THE INTELLECTUALLY DISABLED

One of the hallmarks of legislation advocating for the rights of persons with intellectual disabilities is how they deserve the same rights and the same treatment as persons without intellectual disabilities. Groups advocate for bills of rights in which it is declared, and often codified as law, that persons with intellectual disabilities have all the same rights guaranteed to others under the Constitution.[76] Organizations promote policies assuring such equal treatment. For example, The Arc "promotes and protects the human rights of people with intellectual and developmental disabilities and actively supports their full inclusion and participation in the community throughout their lifetimes,"[77] and the American Association on Intellectual and Developmental Disabilities "promotes progressive policies, sound research, effective practices, and universal human rights for people with intellectual and developmental disabilities."[78] In spite of all of the effort to achieve equality, the law has not treated persons with intellectual disabilities the same as persons without such limitations. Nor should it—at least not when it comes to their protection involving firearms.

First, in the Gun Control Act, persons with intellectual disabilities seem to be a part of a list of identified "special risk groups" whose rights are limited. Second, the Supreme Court

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72 D.C. CODE § 7-2507.02(b). This second section, though, is arguably without bite as this could allow a person to keep a loaded weapon within reach but also not on one's person.

73 § 7-2507.02(c)(1).

74 § 7-2507.02(c)(2).

75 § 7-2507.02(c)(3).

76 *See supra* text accompanying note 17.

77 *Mission & Core Values*, THE ARC (last visited Sept. 20, 2011), http://www.thearc.org/page.aspx?pid=2345.

78 *Mission,* AAIDD (last visited Feb. 21, 2011), http://www.aaidd.org/content_443.cfm?navID=129.

has also, in reversing itself, determined that persons with intellectual disabilities are not as culpable as persons without similar disabilities.

A. Understanding "Mental Defective" Under the Gun Control Act

When the Gun Control Act was passed, debate took place regarding who should be, as a matter of law, prohibited from possessing firearms. In discussing the prohibition that eventually resulted in the adopted language, "adjudicated as a mental defective or has been committed to any mental institution," senators most often used "mentally incompetent"[79] to describe such persons, intermittently using "psychotics,"[80] "psychopaths,"[81] "mentally deficient,"[82] "mentally or emotionally disturbed persons,"[83] and "deranged persons."[84] Despite this wide variety of terms used in the process of passing the Act, no actual definition of "mental defective" appears in the Act.

The Supreme Court had the opportunity to comment on the language of the Gun Control Act in *Huddleston v. United States*.[85] In dicta, the Court considered the aims of the legislation prohibiting possession by specified groups. The goal involved "keeping 'these lethal weapons out of the hands of criminals, drug addicts, mentally disordered persons, juveniles, and other persons whose possession of them is too high a price in danger to us all to allow.'"[86] Thus, if we look too closely at legislative history solely as related to the phrase "adjudicated mentally defective," it could be determined that persons deficient in learning and rationalization are not included. On the other hand, the Court also noted that the goal was to keep firearms from persons where it "would be contrary to public interest."[87] The Court later noted that the Act was intended, in addition to

79 *See* Anthony P. Dunbar, *Torts—Liability of a Gun Dealer for Selling to a "Mental Incompetent,"* 58 TUL. L. REV. 1263, 1276 (1984) (citing congressional remarks in revealing the history of the Gun Control Act's adopted language including 114 CONG. REC. 26,718 (1968) (remarks of Sen. Dodd)); *Id.* at 27,406 (letter submitted by Sen. Ervin); *Id.* at 25,786 (statement submitted by Sen. Mansfield & Sen. Tydings); *Id.* at 26,826, 27,409, 27,416 (remarks of Sen. Tydings); *Id.* at 23,070 (remarks of Rep. Corman).

80 114 CONG. REC. 23,070 (1968) (remarks of Rep. Anderson).

81 *Id.* at 23,072 (remarks of Rep. Horton).

82 *Id.* at 27,404 (remarks of Sen. Percy).

83 *Id.* at 27,420 (remarks of Sen. Cannon).

84 *Id.* (remarks of Sen. Byrd).

85 Huddleston v. United States, 415 U.S. 814, 825 (1974).

86 *Id.* (commenting about who Congress wanted to keep firearms from (quoting 114 CONG. REC. 13,219 (1968) (remarks of Sen. Tidings)).

87 *Huddleston*, 415 U.S. at 824.

affect sales, to "keep firearms away from the persons Congress classified as potentially irresponsible and dangerous."[88]

Circuit Courts have also addressed the language in the Gun Control Act. In defining "adjudicated as mental defective or who has been committed to a mental institution," the Eighth Circuit concluded that "mental defective" differed from mental illness.[89] The court referred to the testimony of the doctor from the case who said he understood "mental defective" to be "synonymous with mental retardation."[90] Further, as the court noted, "[i]n law, a distinction has usually been made between those persons who are mentally defective or deficient on the one hand, and those who are mentally diseased or ill on the other."[91] The conclusion focused on subnormal intelligence as the target of legislation prohibiting those adjudicated as mentally defective from possessing firearms.[92] And although the court pointed to at least one other decision that interpreted "mental defective" differently, the court asserted it was giving the phrase its general meaning.[93] Finally, the court distinguished a person with intellectual disabilities from a person with mental illness by stating: "A mental defective, therefore, as has often been said, is a person who has never possessed a normal degree of intellectual capacity, whereas in an insane person faculties which were originally normal have been impaired by mental disease."[94]

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88 Barrett v. United States, 423 U.S. 212, 212, 218 (1976) (addressing the conviction of a person who possessed a firearm in violation on the Gun Control Act due to his status as a convicted felon and concluding that the Act applied to the behavior in question, the intrastate receipt of a firearm that had previously been transported in interstate commerce).

89 United States v. Hansel, 474 F.2d 1120, 1123 (8th Cir. 1973). In *Hansel*, the defendant had been admitted to a hospital "for a brief period of observation." *Id.* at 1122. Because this hospitalization was not in accord with civil commitment statutes in Nebraska, the State conceded that the defendant had not been "committed." *Id.* Thus, the case turned on whether it could be held that the defendant had been "adjudicated" mentally defective. The Mental Health Board found that the defendant was mentally ill. *Id.* at 1123. However, even if that could be an "adjudication," the Eighth Circuit held it was not the same as being adjudicated as mental defective. *Id.*

90 *Id.*

91 *Id.* at 1124.

92 *Id.* at 1124–25.

93 *Id.* at 1125.

94 *Id.* at 1124. The court concluded that Congress had not intended to prohibit possession from all persons who had any history of mental illness. *Id.* at 1125. This is in stark contrast to what is often understood about the Gun Control Act. The Eighth Circuit thus concluded that, for a person with a mental illness to be prohibited from possessing a firearm, that person must have been committed to a mental institution. *Accord* United States v. Giardina, 861 F.2d 1334, 1337 (5th Cir. 1988) (following *Hansel*); *cf.* United States v. Vertz, 40 F. App'x 69, 74 (6th Cir. 2002) (refusing to rely on Michigan commitment requirements in determining whether the defendant had been "committed" such as would preclude legal firearm possession: "[t]o give preclusive effect to each state's individual definition of terms in the firearms statute would be to frustrate one of the main purposes of the law, which is to provide for national uniformity in the application of

Disagreeing with the Eighth Circuit's interpretation of "mental defective," one district court specifically concluded that the definition provided by Federal Firearms Regulations showed that the Eighth Circuit's interpretation was incorrect:

> Adjudicated as a mental defective.
>
> (a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:
>
> (1) Is a danger to himself or to others; or
> (2) Lacks the mental capacity to contract or manage his own affairs.[95]

The use of "as a result of marked subnormal intelligence" is instructive, but not determinative; how far below normal is unspecified.[96] Regardless, the Code of Federal Regulations seems to clarify that the term addresses both intellectual disabilities (subnormal intelligence) and mental illness.

On the other hand, in interpreting the same phrase, but as used in another statute, the Second Circuit excluded those with subnormal intelligence as being covered by the language: "The term 'mentally defective,' as used in the statute, is a concept embracing more than intellectual capacity or the lack thereof. The statute in subsection (a) specifically provides for the exclusion of those lacking in intellectual capacity."[97]

Although one may argue that the specific reference to persons with subnormal intelligence in one section of the statute and the addition of those with a mental defect in a subsequent section indicates that the two mean different things, the Gun

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firearms restrictions"). The Sixth Circuit further distinguished the term "mental defect" as a condition *requiring* formal adjudication, whereas commitment to a mental institution, by contrast due to the language used in the statute, did not require a court's involvement. *Id.* at 75.

95 United States v. Vertz, 102 F. Supp. 2d 787, 788 (W.D. Mich. 2000) (quoting 27 C.F.R. § 178.11 (2010) (current version at 27 C.F.R. § 478.11 (2010)).

96 For a person to receive a diagnosis of intellectual disability, there must be a "significant limitation" in intellectual functioning. *Definition of Intellectual Disability*, AAIDD (last visited Sept. 20, 2011), http://www.aaidd.org/content_100.cfm ("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."). Although not required, an IQ test may be used, and that score must typically measure below seventy—more than two standard deviations below the median—for such a diagnosis. *See, e.g.*, *id.* This provides some sort of objective data regarding how far below normal qualifies as an intellectual disability and means that only people who fall *statistically* and *significantly* below the "normal" scale, and not merely those with below average intelligence, are considered disabled.

97 United States v. Flores-Rodriguez, 237 F.2d 405, 409–11 (2d Cir. 1956) (interpreting a statute prohibiting the immigration of "idiots, imbeciles, feebleminded persons [and those certified as mentally defective]").

Control Act did not list both. This is unclear, but it would appear the Eight Circuit's interpretation—at least that "mental defect" does cover those with subnormal intelligence—is correct.

B. Reducing Criminal Culpability: From *Penry* to *Atkins*

i. *Penry v. Lynaugh*: Crafting a National Consensus

In 2002, responding to dissenters in precedent and to the changing national consensus regarding death penalty issues, the Supreme Court held that executions of persons with developmental disabilities constitute "cruel and unusual punishment" in violation of the Eighth Amendment.[98] In so doing, the Court reversed its 1989 precedent from *Penry v. Lynaugh*, which had been based in great part on the Court's analysis of the history of the Eighth Amendment, the then-present death penalty national consensus (or lack thereof), and historical common law treatment of "lunatics" and "idiots."[99] Understanding the Court's treatment of this history sheds great light on the wording—and almost certain interpretation of that wording—of the Gun Control Act of 1968.[100]

Johnny Paul Penry was convicted of the 1979 rape and murder of Pamela Carpenter, a crime committed when Penry was twenty-two.[101] Penry had been diagnosed as a child with organic brain syndrome, his IQ having been measured between 50 and 63—a number falling in the mild range for developmental disabilities.[102] His mental ability was limited, compared to that of a six and one-half year-old child.[103] After his conviction and

98 *See* Atkins v. Virginia, 536 U.S. 304, 304, 321 (2002).

99 *See* Penry v. Lynaugh, 492 U.S. 302, 331–40 (1989). The conviction, however, was reversed on other grounds, granting Penry a new trial. *Id.* Penry was again convicted in the subsequent trial, and the Supreme Court again reversed the verdict. Penry v. Johnson, 532 U.S. 782, 804 (2001). The second reversal resulted in a third trial for sentencing issues, in which Penry was once again sentenced to death. Penry v. State, 178 S.W.3d 782, 784 (Tex. Crim. App. 2005). The Texas Court of Criminal Appeals reversed that sentence and ordered a new punishment trial. *Penry*, 178 S.W.3d at 789. Penry's sentencing issues ended, however, with a plea deal in 2008 in which he agreed to three life sentences, with no parole, and in which he was required to stipulate that he was not mentally retarded. Mike Tolson, *Deal Keeps Penry Imprisoned for Life*, HOUSTON CHRONICLE, Feb. 16, 2008, at B1, *available at* http://www.chron.com/disp/story.mpl/front/5546646.html. Guilt was never a factor as Penry had signed a confession. *Id*. at B1. The Supreme Court's decisions left untouched, though, the issue of the risk of false confessions by persons with developmental disabilities. *See, e.g.*, Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 143–45 (2010).

100 *See supra* Part I (discussion of "mental defect" in the Gun Control Act).

101 *Penry*, 492 U.S. at 307–10.

102 *Id.* at 307–08.

103 *Id.* at 308. Disturbingly, after Penry's death sentence was reversed a third time, prosecutors accepted three life sentences for him in lieu of seeking the death penalty a fourth time. Tolson, *supra* note 99, at B1. The State had likely spent millions of dollars on Penry's appeals. *See* Adam M. Gershowitz, *Statewide Capital Punishment: The Case*

sentence to death, Penry's appeal was eventually heard by the Supreme Court, where he argued that executing a person with the reasoning capacity of a seven-year-old, a person with developmental disabilities, would be cruel and unusual punishment in violation of the Eighth Amendment.[104]

In holding against Penry, the Court first considered the Eighth Amendment. The Court noted that punishment considered cruel and unusual at the time of the Eighth Amendment's drafting would also be prohibited in modern times.[105] The Court recognized, however, that "evolving standards of decency" must also be considered in determining if newer punishments might too be prohibited.[106]

Turning first, then, to eighteenth century common law, the Court accepted that "idiots" and "lunatics" were not subject to punishment.[107] Idiocy, "understood as 'a defect of understanding from the moment of birth,'" was distinguished from lunacy, "a partial derangement of the intellectual faculties, the senses returning at uncertain intervals."[108] But the Court also indicated the general common law understanding for an "idiot" was one who had "a total lack of reason or understanding."[109] And from this, the Court, focusing on the "permanent, congenital mental deficiency," found a similarity for previous treatment of "idiocy" and the modern definition of developmental disabilities.[110] But the Court then narrowed the application of the prohibition on punishing idiots to those persons who lacked the "capacity to form criminal intent or to understand the difference between good and evil," drawing comparisons to the modern understanding of one diagnosed as having severe or profound mental retardation.[111] The Court, however, sidestepped

for Eliminating Counties' Role in the Death Penalty, 63 VAND. L. REV. 307, 310 n.14 (2010). As part of Penry's deal, though, the State required Penry to state he did not have intellectual disabilities. Tolson, *supra* note 99, at B1. And although it would appear the prosecutors never believed Penry when he, his doctors, and his lawyers said he had intellectual disabilities—a claim supported by medical evidence, IQ tests, and by anecdotal evidence such as Penry's taking a year of daily instruction, as an adult, to learn to write his name. Brief of Petitioner at 6, Penry v. Lynaugh, 492 U.S. 302 (1989) (No. 87-6177). They and others took Penry's word when he said he was not mentally retarded—a statement made in a deal to avoid yet another death sentence. Tolson, *supra* note 99, at B1 (quoting the victim's niece: "[Penry] admitted he is not retarded. Now we know that he was lying. He's committed the biggest fraud ever on the criminal justice system").

104 *Penry*, 492 U.S. at 328.

105 *Id.* at 330.

106 *Id.* at 330–31 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

107 *Id.* at 331.

108 *Id.* (quoting W. HAWKINS, PLEAS OF THE CROWN 1–2 n.2 (7th ed. 1795).

109 *Id.* at 331–32.

110 *Id.* at 332.

111 *Id.* at 333. The person with a diagnosis of severe mental retardation has an IQ measured between 20–25 and 35–40. *Id.* at 308 n.1 (citing AM. ASS'N ON MENTAL

addressing whether punishing such persons would today be violative of the Eighth Amendment, relying instead on an assumption that such persons would find protections under an insanity defense.[112]

Addressing the case before it, the Court rationalized that because Penry had been found competent to stand trial, and because the jury rejected his insanity defense, Penry was deemed to have known that what he had done was wrong and thus could have conformed his conduct to the legal requirements.[113] In doing so, the Court essentially ignored the fact that Penry's IQ was measured under sixty-three, that he never finished the first grade, and that he had "the ability to learn and the learning or the knowledge of the average six and one-half year-old kid."[114]

In urging the Court to so hold, the State noted that intellectual disabilities fell under the phrase "mental defect" as used in insanity defenses.[115] Because insanity defenses relied on functional and not clinical components, the State argued, so too should the application of the death penalty.[116]

In spite of having noted that at common law at the time of the drafting of the Eighth Amendment it would have been considered cruel and unusual to punish a "lunatic" or "idiot," the Court pushed aside that analysis in favor of maintaining the not-prohibited (as opposed to actually accepted and implemented) practice among states, that is, that other states had not outright prohibited the practice of executing persons with intellectual disabilities.[117] The Court used this to conclude there was not a

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DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 1, 13 (H. Grossman ed., 1983)). One with a diagnosis of profound mental retardation has an IQ measured below 20 or 25. *Id*.

112 *Id.*

113 *Id.* But incompetence and intellectual disabilities are not the same. In addressing the differences regarding the application of the death penalty and criminal trials, one legal scholar said, "[y]ou can't stand trial if you are unable to understand the death penalty but there is a vast chasm between incompetence and mental retardation. . . . If you are mentally retarded you are not protected." Maria F. Durand, *Texas Executes Two Inmates*, ABCNEWS.COM (Aug. 10, 2000), http://abcnews.go.com/US/story?id=96212&page=1 (quoting University of Texas at Austin law professor Jordan Steiker).

114 *Penry*, 492 U.S. at 307–08 (quoting Dr. Jerome Brown, a clinical psychologist who testified at Penry's competency hearing).

115 Respondent's Brief at 47, Penry v. Lynaugh, 492 U.S. 302 (1989) (No. 87-6177). In the same brief, though, the State analogized intellectual disabilities to "mental disorder," showing further confusion of the two terms. *Id.* at 48. As later pointed out by Penry, though, the two are not the same. Reply Brief of Petitioner at 7, Penry v. Lynaugh, 492 U.S. 302 (1989) (No. 87-6177) ("There are reasonably precise tests that measure the degree of retardation and in addition mental retardation will be apparent from an early age or else can be traced to an accident that damaged the brain.").

116 Respondent's Brief, *supra* note 115, at 47.

117 *Penry*, 492 U.S. at 330–31.

national consensus against the practice.[118] The Court did not, however, indicate that the practice was actually used—that any states regularly pursued the death penalty when faced with a capital crime committed by a person with an intellectual disability.

The Court heavily relied on a national consensus when it addressed such support for its decision in *Ford v. Wainwright*, in which it held that executing the insane violated the Eighth Amendment.[119] The Court in *Penry* clearly accepted that the prohibition against punishing the mentally insane was established at common law, therefore, it seems redundant to have had to rely on a national consensus in agreeing with that practice, but it did. Even with the historical analysis against executing the insane, the *Penry* Court justified its holding in *Wainwright* based on a national consensus.[120] And in considering execution of persons with intellectual disabilities, the Court recognized that only the federal government and two states had enacted legislation prohibiting the execution of persons with intellectual disabilities.[121] The Court then concluded that the two states prohibiting these executions, even when considered with the fourteen states that rejected *any* application of the death penalty, did not support the finding of a national consensus.[122]

Finally, the Court also analyzed whether punishing a particular class of offenders, here, persons with intellectual disabilities, contributed to the goals of punishment, namely, retribution and deterrence, when considering the death

118 *Id.* at 331–34.

119 Ford v. Wainwright, 477 U.S. 399, 408 (1986). The Court used the term "insane" in deciding *Ford*, yet the case makes clear that the issue was mental illness as Ford had a condition similar to paranoid schizophrenia. *Id*. at 402–03.

120 *Penry*, 492 U.S. at 334 (citing *Wainwright*, 477 U.S. at 408, which held that execution of the insane violated the Eighth Amendment). The Court also relied on a national consensus in *Thompson v. Oklahoma*, in which it considered a minimum age for consideration of the death penalty. Thompson v. Oklahoma, 487 U.S. 815, 826–29 (1988).

121 *Penry*, 492 U.S. at 334 (These two states were Georgia and Maryland). Chief Justice Rehnquist, however, dissenting in *Atkins*, pointed out that some studies have estimated that as many as ten percent of death row inmates have an intellectual disability. Atkins v. Virginia, 536 U.S. 304, 325, n.* (2002) (Rehnquist, J., dissenting) (citing R. Bonner & S. Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, N.Y. TIMES, Aug. 7, 2000, at A1, *available at* http://www.nytimes.com/2000/08/07/us/executing-the-mentally-retarded-even-as-laws-begin-to-shift.html). However, also pointed out was the fact that "[m]ost people charged with capital murder are poor, and so are represented by appointed lawyers. Many of these lawyers are inexperienced, even incompetent, and often fail during the mitigation phase of the trial to present the evidence of mental retardation that could persuade the jury to spare their client's life." *Id.* Further, the problem is exacerbated by defendants who are ashamed to admit to being disabled. Bonner & Rimer, *supra* note 121, at A1.

122 *Penry*, 492 U.S. at 335.

penalty.[123] For retribution to be meaningful, the sentence needs to be related to the culpability of the offender.[124] The Court considered Penry's argument that because his reasoning capacity was like that of a seven-year-old (due to his intellectual disability), executing him would be cruel and unusual in the same way the Court had held that executing a juvenile was cruel and unusual.[125] Supporting Penry's arguments, the AAIDD[126] argued as *amici* that executing persons with intellectual disabilities would not serve the retributive purposes of punishment; their moral culpability was not the same as others'.[127]

Again, the Court focused narrowly only on those with the most severe disabilities, agreeing their moral culpability was less.[128] Additionally, the Court highlighted language in some states' statutes: "mental defect."[129] The Court noted that the states that explicitly used that term did so as part of identified mitigating circumstances that could be used by a fact-finder in deciding whether the defendant's capacity to "appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."[130] But the Court maintained that the issue of intellectual disabilities should be only that: mitigating evidence.[131] The Court refused to hold that all persons with intellectual disabilities should be similarly treated.[132]

With the vast range of persons who are classified as having an intellectual disability, the Court seemed uncomfortable with a blanket prohibition on executing people based on which side of seventy their IQ fell.[133] Even on looking at "mental age," with an argument by Penry that his was effectively seven years or younger, the Court declined to rely on that due to several noted

123 *Id.* at 335–36. Unless the punishment of imposing death contributes to one of the two identified purposes of the death penalty, retribution and deterrence, then that punishment is "nothing more than the purposeless and needless imposition of pain and suffering"—an unconstitutional punishment. Enmund v. Florida, 458 U.S. 782, 798 (1982).

124 *Penry*, 492 U.S. at 336.

125 *Id.* (citing Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion)).

126 The American Association on Mental Retardation (AAMR) changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD) in 2007. *FAQ on Intellectual Disability*, *supra* note 9.

127 *Penry*, 492 U.S. at 336–37.

128 *Id.* at 337.

129 *Id.*

130 *Id.* (citing several state statutes including Alabama, New Hampshire, and Wyoming).

131 *Id.* at 337–38.

132 *Id.* at 338–39.

133 *Id.*

problems.[134] Using the AAIDD amicus brief as support, the Court pointed out that the "equivalence between nonretarded children and retarded adults is, of course, imprecise."[135] The Court appeared concerned that limiting executions strictly based on the classification of having an intellectual disability could be extended to limit such persons' other rights, such as the right to marry and the right to contract.[136] The Court concluded that because of those considerations, reiterating the lack of a national consensus, it would not hold that executing persons with intellectual disabilities was, per se, a violation of the Eighth Amendment.[137]

The Court punted on the issue of national consensus. There was no consensus favoring the execution of persons with intellectual disabilities, there was merely not one with specific prohibitions. Even if a disproportionate number of persons sentenced to death have an intellectual disability, this is no indication that the issue was presented in each case.[138] But the Court proceeded to craft one due to this lack of widespread prohibitions. It seemed, though, that the real issue was the Court's desire to avoid a bright line: the persons that would be protected under such a prohibition. In this case, a hard decision led to a bad decision. At least it was not in place for long.

ii. *Atkins v. Virginia*: Evolving Standards in the Wake of *Penry*

Thirteen years after *Penry*, the Court changed direction. In 2002, revisiting the issue of executing persons with intellectual disabilities, the Court concluded that applying the death penalty to such persons was excessive and in violation of the Constitution, citing "evolving standards of decency" as reflected by the debate and review engaged in by the American public, legislators, scholars, and judges since *Penry*.[139]

A jury convicted Daryl Renard Atkins for a 1996 armed robbery and capital murder of Eric Nesbitt.[140] Atkins and

134 *Id.* at 339.

135 *Id.* (quoting Brief of AAMR et al. as *Amici Curiae* in Support of Petitioner at 14 n.6, Penry v. Lynaugh, 492 U.S. 302 (1989) (No. 87-6177)).

136 *Id.* at 340. Of course, the Court seemed to review most of this information through a frame of considering exculpating criminal responsibility—something Penry never requested.

137 *Id.*

138 *See supra* text accompanying note 121. A deeper analysis of this issue would be instructive, especially one that categorized the manner in which the crimes had been committed.

139 Atkins v. Virginia, 536 U.S. 304, 307, 321 (2002).

140 *Id.* at 307.

William Jones, armed with a semiautomatic handgun, abducted Nesbitt, drove him to an automatic teller machine, and took him to an isolated location.[141] Nesbitt was shot eight times.[142] Confronted with a video recording of Atkins and Jones at the ATM with Nesbitt, both testified.[143] Their stories differed, however, regarding who did the shooting.[144] Jones' story, though, was more coherent and credible, and the State allowed Jones to plead guilty to first-degree murder and to become ineligible for the death penalty.[145] Jones' testimony appeared to be crucial in the jury's determination of the guilt of Atkins and its sentence of death.[146]

In determining the sentence, the jury heard conflicting testimony regarding Atkins' mental capacity. Originally, a forensic psychologist testified that Atkins was mildly mentally retarded based on interviews with persons who knew Atkins, reviews of school and court records, and the administration of an intelligence test in which Atkins' IQ was measured at 59.[147] During a second sentencing phase,[148] the same forensic psychologist testified similarly, but the State this time presented a rebuttal witness who said that Atkins was of "average intelligence, at least" and suffered from antisocial personality disorder.[149] The State's witness concluded that Atkins' "by and large terrible" academic performance was due to Atkins' choices.[150]

Facing the death penalty, Atkins appealed and argued that he could not be sentenced to death because of his intellectual disability.[151] The Virginia Supreme Court disagreed, but two justices dissented and stated that the State's witness's "opinion

141 *Id.*

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.* at 307 n.1.

146 *Id.* Additionally, Jones refused to provide an initial statement on arrest. Atkins, however, failed to refuse; the inconsistencies between his initial and subsequent statements further hurt his credibility. *Id.* at 307 n.2. As one defense attorney has stated, "[t]he smart guy who doesn't confess, who knows better than to give evidence against himself, gets the deal. . . . But the guy who is retarded, who doesn't understand all the words of his Miranda warning, he gets death." Bonner & Rimer, *supra* note 121, at A1 (quoting Jeffrey Pokorak, defense counsel for Oliver Cruz, sentenced to death and executed in Texas in spite of an IQ of 64 or 76). *See generally* Eugene R. Milhizer, *Confessions after* Connelly*: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMP. L. REV. 1 (2008).

147 *Atkins*, 536 U.S. at 308–09.

148 The Supreme Court of Virginia reversed the first sentence of death due to a misleading verdict form. *Id.* at 309.

149 *Id.*

150 *Id.* at 310 n.6.

151 *Id.* at 310.

that Atkins possesses average intelligence [was] 'incredulous as a matter of law,' and concluded that 'the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 [was] excessive.'"[152] The United States Supreme Court agreed to revisit the issue.[153]

Since the Court's decision in *Penry*, legislatures across the country had been spurred to take action. Recognizing this, the Court highlighted seventeen states that had enacted legislation exempting persons with intellectual disabilities from application of the death penalty.[154] It was not simply about how many states had done so, though. The Court pointed out that more notable was the move toward laws that protected persons who were guilty of violent crime, something that was by no means popular.[155] Further, no states had moved to *allow* such executions.[156] The Court concluded that this was evidence that society did not see criminals with intellectual disabilities as having the same level of culpability as possessed by other criminals.[157] Thus, a national consensus had developed.[158]

The matter that made this issue difficult though, still existed.[159] The Court had to decide to whom the prohibition would apply. Unable to hide behind a contrived lack of national consensus, the Court had to take a stand. And making the situation even more challenging, the parties in *Atkins* actually disagreed whether Atkins had intellectual disabilities.[160] The Court dipped back into its purpose of punishment reasoning for assistance.

The Court highlighted some definitional requirements to determine whether a person has intellectual disabilities,

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152 *Id.* (quoting Atkins v. Commonwealth, 534 S.E.2d 312, 323–24 (Va. 2000) (Hassell, J., dissenting)).

153 *Id.*

154 *Id.* at 314–15.

155 *Id.* at 315.

156 *Id.* at 315–16.

157 *Id.* at 316.

158 *Id.* Or more likely, a national consensus had been made known. After all, even the Court acknowledged that the change across the country was likely prompted by the Court's ruling in *Penry*. In other words, the states that enacted the prohibitive legislation likely already adhered to the practice of not executing persons with intellectual disabilities, but after *Penry* those states recognized the need to enact formal legislation. The Court further pointed to other evidence of a consensus, highlighting positions taken by religious communities and the AAIDD opposing the use of the death penalty for offenders with intellectual disabilities. *Id.* at 316 n.21. However, this was not *new*; it just had not been affirmatively stated by all such organizations before.

159 *See id.* at 340 (Scalia, J., dissenting) (discussing the easily discernable cases of those who are severely or profoundly mentally retarded and contrasting them to cases involving mild cases).

160 *Id.* at 317.

including "subaverage intellectual functioning" and "significant limitations in adaptive skills."[161] However, persons in this population also likely possess deficiencies in communication, learning, reasoning, and impulse control.[162] These deficiencies, while not enough to eliminate responsibility for criminal acts, do reduce the personal culpability involved.[163] With a reduced culpability, the retributive purposes of the death penalty are not served.[164]

Further, deterrent purposes are not served because persons with intellectual disabilities, being less likely to control impulses and to learn from experience, are less likely to think through the potential consequences and less likely to premeditate an action—the very sort of thing targeted with deterrent-objective punishments.[165] For deterrence to have an effect as a reason for punishment, the person being deterred must be able to appreciate the weight of the decision to commit the crime and be able to choose to proceed or not with the conduct based on the risk of the punishment.

The Court's decision was not unanimous. Both Justice Rehnquist and Justice Scalia, joined by each other and Justice Thomas, wrote separately. Both dissenting opinions primarily focused on a complaint that the majority's holding that executing persons is unconstitutional as a violation of the Eighth Amendment was based too much on a determination that eighteen additional states represented a "national consensus" and on review of foreign law and the views of professional or religious organizations.[166] Justice Rehnquist asserted that setting a national standard based on such was an improper application of federalism.[167] Instead, he argued, to analyze whether punishment violates the Eighth Amendment, the best evidence of contemporary values is current legislation.[168] Legislatures respond to the will of the people, not courts,[169] and punishment is about legislative policy.[170]

In spite of the dissent's strong language, the law changed. Even though individual states had used intellectual disabilities

161 *Id.* at 318.
162 *Id.*
163 *Id.*
164 *Id.* at 319 (recognizing the death penalty should apply to "a narrow category of the most serious crimes").
165 *Id.* at 320.
166 *Id.* at 322, 342.
167 *Id.* at 322.
168 *Id.* at 322–23.
169 *Id.* at 323.
170 *Id.*

as a factor to consider in assessing punishment, the Court determined that the risk of false confessions, the reduced ability to show mitigating factors, and a reduced capacity to assist counsel all supported a conclusion that executing persons with intellectual disabilities would violate the Eighth Amendment to the Constitution. What the Court could not address, as it had nothing to do with the issues presented, was how Atkins had access to a firearm at all. Without that firearm, Eric Nesbitt could not have been shot eight times.

III. FALLING BETWEEN THE CRACKS

The Gun Control Act of 1968 prohibits transfer of a firearm to, or possession of a firearm by, minors and felons and persons with mental illness or who have been adjudicated mentally defective.[171] In the recent Supreme Court cases that have—finally—addressed the Second Amendment, not only did no one question this area (it was not before the Court), but Justice Scalia, writing for the majority in *Heller,* noted that some of these prohibitions are almost presumed to be Constitutional:

> Like most rights, the right secured by the Second Amendment is not unlimited. . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[172]

Thus, the limitation in the Gun Control Act prohibiting transfer of firearms to persons with mental illness appears to be an acceptable limitation to the recognized Second Amendment right to possess a handgun in one's home for self-defense purposes.[173] Justice Scalia does not, however, offer any explanation for this conclusion, only that the regulation is presumptively lawful.[174]

Of course, as is common, the group referenced in *Heller* was persons with mental illness—not those with intellectual disabilities.[175] This serves as another example of how those with intellectual disabilities are seemingly included in the Gun Control Act yet are also ignored as part of the groups who are

171 18 U.S.C. § 922(d) (2006).

172 District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008). *See generally* cases cited *supra* note 3.

173 *Heller*, 554 U.S. at 626–27.

174 *See id.*; *see also* Rostron, *Protecting*, *supra* note 32, at 387.

175 *Heller*, 554 U.S. at 626; *see* 18 U.S.C. § 922.

prohibited from possessing guns. But because "adjudicated as a mental defective or has been committed to any mental institution" is stated together, as a phrase, in the Act, it would appear the treatment of one identified special risk group (those with mental illness) applies to the other (those with intellectual disabilities). The problem, though, is that this is unclear. Not only is this lack of clarity a problem for dealers, who must determine to whom they may sell firearms, but it is also a problem for society.

Not discussed specifically by Justice Scalia in the *Heller* opinion, though, was the prohibition pertaining to minors. In spite of legislation specifying age restrictions regarding firearms existing in every state, many states knew that such a limitation was not enough and that a gap existed between the goal of preventing minors from possessing firearms—and harming someone—and actual enforcement.[176] After all, the Act covers only the transfer from a firearms dealer. Nothing prevented the private transfer. Thus, many states enacted child-access prevention laws.[177] The same gap exists, though, for persons with intellectual disabilities. The gun used by Daryl Renard Atkins to shoot Eric Nesbitt came from somewhere. Therefore, legislation similar to CAP laws should be in place that would

176 *See, e.g.*, ALASKA STAT. § 11.61.210 (2010); ARIZ. REV. STAT. ANN. § 13-311 (2000); TEX. PENAL CODE ANN. § 46.06(2) (West 2011). This and many other restrictions involved in state gun policy remain prime for challenges after *Heller* and *McDonald*. *See, e.g.*, Derek P. Langhauser, *Gun Regulation on Campus: Understanding* Heller *and Preparing for Subsequent Litigation and Legislation*, 36 J.C. & U.L. 63, 66 (2009); Brannon P. Denning & Glenn H. Reynolds, Heller*, High Water(mark?) Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1245 (2009). Although neither *Heller* nor *McDonald* clarified how future challenges regarding the Second Amendment rights should be reviewed, courts have begun to establish a standard of review. The United States Court of Appeals for the D.C. Circuit applied intermediate scrutiny in its opinion in which it upheld the constitutionality of a ban against assault weapons and high-capacity magazines. Heller v. District of Columbia, No. 10-7036, 2011 WL 4551558, at *10, *13–15 (D.C. Cir. Oct. 4, 2011). The United States Court of Appeals for the Seventh Circuit adopted a standard of review similar to that used in First Amendment challenges:

> First, a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end. Second, laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right.

Ezell v. City of Chicago, No. 10-3525, 2011 U.S. App. LEXIS 14108, at *59 (7th Cir. July 6, 2011) (case to be published at 651 F.3d 684). The court determined that requiring training to be eligible to possess firearms is improper when the city also banned such training facilities from within the city limits. *Id.* at *61–62.

177 *See supra* text accompanying note 55.

criminalize allowing a person with intellectual disabilities access to one's personally owned firearm.

A. Clarifying the Gun Control Act

The first step in addressing the cracks between *Heller* and *Atkins* is to clarify the language in the Gun Control Act.[178] The Act prohibits possession of firearms by persons adjudicated as a mental defect.[179] This, though, does not solve the concern that the wrong persons may possess guns.

First, at issue is the need for an adjudication. Nothing requires persons with an intellectual disability to be assigned guardianship. Many people who live with intellectual disabilities but who have no family involved in their lives are simply wards of the state; this does not mean, though, that anyone has become guardian of their person or estate.

As personal experience, the author spent over seven years working with persons with intellectual disabilities. Although some of her clients had legal guardians, not all did—not even those with severe and profound diagnoses. This confuses the public, who seem to believe that if someone has an intellectual disability, the person will have been assigned a guardian by the court, but that required a person to petition the court and to be willing to be that guardian.

For example, a dentist, upon determining that a client needed sedation to receive a dental cleaning, requested an informed consent be signed by the client's guardian, as the client had an IQ measured probably between 40 and 55. When told that the client did not have a guardian, the dentist, surely attempting to be diligent, requested paperwork as proof. Trying hard not to be too glib, but wanting to make the point, the author asked the dentist if he carried paperwork to prove he was his own guardian. He did not, of course.[180]

178 The recommendations here are aimed at federal legislation. States too, though, would benefit from amending their legislation to adequately address similar gaps.

179 18 U.S.C. § 922(g).

180 As based on the author's personal experience working for a decade with persons with mental illness and intellectual disabilities, when a person lives in an in-patient treatment setting, typically a group such as a Human Rights Commission is established to review all issues related to treatment and care when those issues could infringe on human rights, such as the decision to subject the patient or resident to medical procedures, prescribed psychotropic medications, and behavioral modification programs. *See, e.g.*, 40 TEX. ADMIN. CODE § 5.406(d) (requiring approval of HRC for implementation of behavioral modification programs); Division of Developmental Disabilities, *Human Rights Committee*, DSHS 3 (May 1, 2009), http://www.dshs.wa.gov/pdf/adsa/ddd/policies/policy5.10.pdf (describing the role of the HRC).

But the Gun Control Act prohibits possession by persons only if they have been *adjudicated* mental defect.[181] The Federal Firearms Regulations clarify that such adjudication can be by "a court, board, commission, or other lawful authority," but that determination must also include a finding that the person is either a danger or unable to contract and manage her own affairs.[182] With managing one's finances as the ultimate measure of independence, that is one area advocates for persons with intellectual disabilities want to remove only when absolutely necessary. However, that is not to say the capacity for actually doing so, without assistance, exists.

When a person enters into a contract, that person can void the agreement if proven that at the time of the contract, the person did not have the capacity required.[183] In other words, the burden is on the party without diminished capacity to assure that the one with whom she is contracting actually has the capacity to do so. The law should be similar for dealers of firearms.

Granted, there is no capacity identification system, and there should not be. But if dealers were required to ensure a person had the capacity, then we could reduce any risk that a person with a *statistically significant* limitation in intelligence could not purchase a firearm.

Alas, implementing some database that lists persons with intellectual disabilities is not ideal. Groups who advocate for the rights of the intellectually disabled would certainly object to such information for fear of discrimination regarding housing, rights to marry, etc. And such fears surely are not unfounded. Thus, one way to address issues of persons with intellectual disabilities having access to firearms is to target the privately-owned arms. This, it is presumed, is a more common way firearms are obtained.

B. Access Prevention Laws

In his dissent in *Atkins*, Justice Scalia disagreed that a person with intellectual disabilities should not be subject to the death penalty.[184] He believed culpability should be analyzed by each jury individually.[185] However, he also agreed that in his

181 18 U.S.C. § 922(d)(4).

182 27 C.F.R. § 478.11.2 (2011).

183 *See* Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 10 (1984).

184 Atkins v. Virginia, 536 U.S. 304, 350 (2002) (Scalia, J., dissenting).

185 *See id.* at 350–51.

experience, those with intellectual disabilities are childlike and more likely to behave innocently than brutally.[186] But the key quality that the majority of the Court focused on was the reduced culpability. It was not about any conclusion that most people with intellectual disabilities would not be likely to behave brutally; the issue was that the ones who did should not be viewed as culpable. Similarly, it is not that we think all children will commit violent acts, it is just that the ones who do are not as culpable as adults who do.[187]

If we look at the decision to draw lines based on age, we can see why lines need to be drawn based on intelligence, especially when we are dealing with intelligence that is measured *statistically* and *significantly* below the average. Applying this to gun control is not about reducing one's criminal liability as the Court did in *Atkins*. Instead, this is about protecting society. But with the holes in the national system of information and because we do not, and likely cannot,[188] have a complete list of all persons who have intellectual disabilities, we need a back-up method for this protection.

A risk exists, though, in comparing a person with intellectual disabilities to a person who is a minor. Groups that advocate for persons with intellectual disabilities are quick to dissuade making such comparisons, and it certainly is devaluing to an adult to say she has child-like qualities, more so to say the person *is* child-like. This issue, though, focuses on the reasoning capability of persons. Those with a significantly reduced capacity to reason and foresee a consequence of behavior should not have firearms.

The Court has recognized and acknowledged that maturity and age is a factor that should be considered in assessing punishment. "[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and

186 *Id.*

187 Roper v. Simmons, 543 U.S. 551, 551 (2005) (holding that the execution of persons who committed a crime under the age of eighteen is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment). The Court compared *Roper* to *Atkins*, noting that one of the primary factors it relied on in *Atkins*—the increase in the number of states that had adopted prohibitions against executing those with intellectual disabilities—did not exist in a similar fashion for deciding the issue of whether persons who were juveniles at the time of the crime should be executed, noting sixteen states had made the change in *Atkins* but only five in *Roper*. *Id.* at 565. However, the Court pointed out the significant point was the direction of the change. *Id.* at 565–66.

188 The author is incredibly uncomfortable with the thought of a national database of all persons who have intellectual disabilities. This could be used to remove additional rights or to increase discrimination, neither of which are acceptable consequences. Thus, the access prevention law may be the better method for protecting society and persons with intellectual disabilities.

are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." "[Youth] is a time . . . when a person may be most susceptible to influence . . . . [M]inors . . . generally are less mature and responsible than adults."[189] Furthermore, adolescents are not as able to control their conduct as adults, nor are they able to think in long-range terms.[190] It is the capacity to rationalize, to understand consequences, and to be influenced that makes us treat juveniles differently than adults. It is this same reason we accept, without challenge, other limits on juveniles such as gun possession and driving.

And it is those reasons that we must consider the stronger protection for society and persons with disabilities by making access prevention laws apply not only to children, but also to persons with intellectual disabilities. The Court has stated that "[m]ental retardation . . . diminishes personal culpability even if the offender can distinguish right from wrong."[191] When it comes to criminal culpability, we look at the person's ability to make decisions and judge actions. We should do the same for gun possession.

The Gun Control Act prohibits dealers from selling firearms to underage persons—no rifles or shotguns to anyone under age eighteen, and no other type of firearm to one under twenty-one years of age.[192] Rarely in the debate is this prohibition questioned. We ban use of alcohol based on age,[193] and states base driving privileges on age.[194] Age is a bright-line cut-off where, magically, rights or privileges are bestowed upon reaching a certain birthday.

And many states hold persons criminally liable when the adult, in legal possession of a firearm, allows a child to access that firearm and an injury results.[195] We should have the same laws regarding persons with intellectual disabilities.

Granted, enacting legislation that criminalizes allowing access by a person with an intellectual disability to one's

189 Thompson v. Oklahoma, 487 U.S. 815, 834 (1988) (quoting Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982)).

190 *Id.* (quoting *Eddings*, 455 U.S. at 115 n.11). Penry's doctor in 1973 noted that due to Penry's organic brain damage, he "would be subject to influence and manipulation by people more intelligent or sophisticated than he was." Brief of Petitioner at 44, Penry v. Lynaugh, 492 U.S. 302 (1989) (No. 87-6177).

191 *Roper*, 543 U.S. at 563 (citing Atkins v. Virginia, 536 U.S. 304, 318 (2002)).

192 18 U.S.C. § 922 (b) (2006).

193 23 U.S.C. § 158(a)(1) (2000).

194 *See, e.g.*, CAL. VEH. CODE § 12814.6 (Deering 2000); IND. CODE ANN. § 9-24-3-2 (West 2004); TEX. TRANSP. CODE ANN. § 521.204 (West 2007).

195 *See supra* note 56.

personally-owned firearm is not the entire solution: we should address the issue regarding the definition and information available to firearm dealers as well. And the burden on the private owner is heavy: she must know if the visitor coming into her house has an intellectual disability—one of the areas even the Court struggled with in not applying the death penalty *after* one's IQ is known. This proposal requires the private gun owner to be aware of anyone in her home who might gain access to her gun. If it could be a minor, she must prevent that access. If the person might have an intellectual disability, so too should she prevent any access.

Of course, the firearms dealer need only check the NICS database, and if the person with an intellectual disability who is attempting to purchase a gun is listed in the NICS, the dealer simply refuses to conduct the transaction. But there is no similar NICS system to use when allowing guests into one's home.

Then again, a private owner of firearms should know more about who is in her house. And if she is unsure, all she need do is safely store her firearm. After all, a firearm owner may be unaware if her child's friend is above or below the specified age in the CAP law, but the liability would be the same. But this is irrelevant. The CAP laws do not impose some sort of strict liability regarding a minor accessing one's firearm. Instead, all but a very few are clear on proper storage that would exculpate one from criminal liability. The same should apply to any extended legislation.

Additionally, this legislation not only would encourage safe storage of firearms by the individual owner, this would add a layer of punishment and an extra crime to anyone who might use a person with intellectual disabilities as a tool in committing crimes. Many persons with intellectual disabilities are easier to persuade and very eager to please those believed to be friends. Perhaps if the mere providing the weapon to a person with an intellectual disability were a crime, any such person who did so could be more likely to be found guilty of a crime and punished, with proof easier than that of accomplice or conspiratorial liability.

CONCLUSION

The problem surrounding gun legislation is not so much the guns as it is who has the guns. As is often said, "guns don't kill people; people kill people." The Supreme Court has recognized that many long-standing prohibitions are surely constitutional,

even in light of recent decisions.[196] But these prohibitions are not without holes in coverage and implementation. And the holes, when we consider the Court's treatment of and our reduced culpability attributed to persons with intellectual disabilities, form cracks in legislation. Our aim needs to be to avoid allowing anyone to fall in these cracks.

The person with intellectual disabilities does not rationalize the same as one without these limitations, nor does she foresee the consequences of all of her acts. If we have determined that, therefore, she is not to be punished in the same manner as others, then we should also work to prevent crimes that we can—to protect the less-culpable person from being in that situation. This applies especially to gun possession, targeting reducing crimes and acts committed with such a deadly weapon.

The current prohibition against a person adjudicated as mental defect does not go far enough. Adjudication is not as common as many believe, and this leaves a vast population of people eligible to purchase a gun. This hole should be closed by removing the requirement for adjudication if a person has intellectual disabilities. Not only might such a prohibition protect persons with intellectual disabilities, but it might also allow better, more consistent treatment. So often when someone with an intellectual disability uses that as part of his defense or as a mitigating factor, public perception and doubt create an additional hurdle. Even in *Penry*, in the prosecution of a man with an IQ of 56, after the Supreme Court sent John Paul Penry's case back for another trial, the Texas Attorney General noted his doubt of Penry's disabilities: "Penry is 'a schemer, a planner and can be purposefully deceptive.'"[197]

Conversations about gun control lead to heated debates, strong opinions, and bantered statistics. The sides that normally cite civil liberties often change their tone when it comes to issues of gun use under the Second Amendment, while those who favor fewer restrictions on gun possession argue about constitutionality and against states' rights to control. However we define gun legislation—as control or rights—we need to better define who falls under restrictions. Failing to do so leaves open categories of citizens who should not possess or use firearms.

The solution is to seek another approach: criminalize allowing access. This will not prevent all access of firearms by persons with reduced criminal culpability, but it is a step in the

196 District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

197 *Top Court Stops Controversial Execution*, CBS NEWS (Feb. 11, 2009, 9:35 PM), http://www.cbsnews.com/stories/2000/11/17/deathpenalty/main250352.shtml.

right direction. Assuming, as the jury decided, that Daryl Renard Atkins did shoot Eric Nesbitt eight times, he could not have done so had he not had a gun.