

EVOLVING STANDARDS OF DECENCY:
PUBLIC OPINION, THE DEATH PENALTY, AND THE SUPREME COURT

by

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(Under the Direction of RUTH ANN LARISCY)

ABSTRACT

This is an inquiry into the influence of public opinion on a case before the Supreme Court of the United States. First, a framework of public opinion is established. Next, the history of the death penalty before the Court and the role that public opinion has played in the evolution of death penalty jurisprudence is examined. The study then analyzes the influence of public opinion on the Court. Subsequent is an examination of *Atkins v. Virginia*, a recent case before the Supreme Court where public opinion played a major role. The author applies five commonly used classifications of public opinion aggregation, majoritarian, elite, group, and fiction, to the Court's use of public opinion and concludes that the Supreme Court inconsistently makes use of the concept of public opinion. The author concludes that members of the Court will cite public opinion as a reason to further the justice's personal ideas.

INDEX WORDS: Public Opinion, Death Penalty, Supreme Court of the United States, *Atkins v. Virginia*

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CHAPTER 1

INTRODUCTION

"The independence of judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjectures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the mean time to occasion dangerous innovations in the government..."
Alexander Hamilton, The Federalist No. 78

In the 78th Federalist Paper, Alexander Hamilton speaks of a utopian society where the judiciary sits outside the realm of the public sphere and rules on law alone. This process serves as a buffer to protect the people from themselves and allows even-minded judges to rule on the basis of law and not contemporary standards.

This, of course, is not true. Judges are human and therefore are influenced by outside factors when settling upon a judicial philosophy. According to Chief Justice William Rehnquist (1986), "I think it would be very wrong to say that judges are not influenced by public opinion. Indeed, I think it is all but impossible to conceive of

judges who are in any respect normal human beings who are not influenced by public opinion..." (p. 752)

Knowing this to be true, many have searched for answers concerning who influences the court and how. Lippmann (1965) states that "The existence of a force called Public Opinion is in the main taken for granted, and American political writers have been most interested either in finding out how to prevent the common will from subverting the purposes for which they believe the government exists." (p. 161) Interest groups, politicians, and individuals have all attempted to use the Court to implement their ideals into a system of checks and balances that is supposed to prevent just that from happening.

Policy is supposed to enter through the executive and legislative branches of government while the judicial provides a buffer when the other two overstep their bounds. Some have argued that the Supreme Court has exceeded their role and taken an activist stance and subverted the will of the people and their purpose in our governmental system. One commentator notes "It would be nice if they (Supreme Court) were a bit less confident that they know better than anyone else how to run the country. 'It would be most irksome,' as Judge Learned Hand wrote in 1958, 'to be ruled by a bevy of Platonic Guardians, even if I knew how to

choose them, which I assuredly do not.'" (Taylor, 2003, p. 2155) Many of the policies implemented by the Court are in accordance with what they perceive as public opinion while others defer to a public opinion that may not exist.

There is a long running debate in academic and political circles as to the existence of "public opinion." Is it, as Peters suggests, a social fiction that is played out through media and elites, or is it, as Lippmann suggests, a social and political force that can be measured and tapped for political power? Is it, as Noelle-Neumann suggests, a social control function that silences the minority, or is it polling numbers that serve to quantify a concept? This study will show how public opinion has been used recently in the Supreme Court of the United States to save one man from the ultimate punishment.

What role does the voice of the people play in judicial decisions and how has the court, most notably, our Supreme Court listened to that voice? This question gets to the heart of our representative republic established over 200 years ago, where the founders of the Republic valued an independent judiciary. Is this judiciary independent of the other branches of government or independent of the people as well? This question was addressed recently as the court heard the case of Daryl Atkins in his appeal to the Supreme

Court of the United States. In this case, the Court overruled the Commonwealth of Virginia as they sought the death penalty for a convicted murderer. The Court stated a shift in national consensus (public opinion) as a reason for their decision.

The purpose of this inquiry into this relatively obscure Supreme Court case is to delve into the influence of public opinion on a non-elected branch of the federal government of the United States. This analytical study will look at the concept of public opinion, the history of the interaction of public opinion with the Supreme Court, and an analysis of the case at hand and how public opinion is conceptualized within the case.

The first research question asked is; what is public opinion? Public opinion is defined by five competing conceptualizations that all find their way into the workings of the Court.

Next, the question is asked, what is the relationship between public opinion and the death penalty? Empirical evidence will show that the public is overwhelmingly in favor of the death penalty in the United States. The research will show that some scholars suggest that the

numbers are flawed and that support decreases when people are offered alternatives to the practice.

Next, has public opinion influenced the Supreme Court? Research will show that the Supreme Court can influence public opinion with its rulings, as in the *Furman* case. The study will also show how the concept and use of public opinion influences the decisions that the justices make.

The rest of the study will examine the *Atkins* case. First, a summary of the opinions will be put forth as well as the relevant conceptualizations of public opinion inherent within the decision. Next, the question will be addressed, if the Court believes that public opinion has shifted in this case, what assumptions do they make about public opinion to arrive at this conclusion? Finally, the reaction of several external sources will be shown to gauge reaction to the decision.

This study can be classified in a few areas of academia. One is law. Although not studied from a legal perspective, this analysis does deal with a case before the United States Supreme Court and therefore the legal underpinnings cannot be ignored. The second is political science. Much of the research involved in compiling this study came from various sources in political science. Finally, and most importantly, is the field of mass

communication. Public opinion is, at its heart, a mass communication phenomenon. This study, although considering legal and political concepts, is ultimately a paper about public opinion and therefore is most appropriately classified in mass communication literature.

The research will contribute to linking these three bodies of knowledge, using one specific case, in an attempt to show how the mass communication concept of public opinion has pervaded the legal system. Political scientists will find it relevant because it will show that the Court, although deferring to public opinion and a national consensus, has no succinct way of defining the topic. Mass communication scholars will find it relevant because it will show how a mass communication concept can be used, (or perverted) by outside fields.

As someone fascinated by both the Court and public opinion, I was drawn to the case. I find the Supreme Court to be one of the most captivating institutions in all of government. The power vested in these nine people is unlike anything else in government. For this reason, I understand the tendency to want to defer some of the duties of decision-making to others by the use of public opinion. I also believe that this deference can be a smokescreen used by the justices to insert their own ideals into the legal

system. I am also captivated by this case because it deals with public opinion. Why do a mass of people behave and think in unison? I come to the concept of public opinion from a sociological and philosophical perspective, hoping to find something descriptive and eternal in its nature. How has the concept been used to make the world a better place or how has it been misused to enhance just a few? With that understanding, and those questions in mind, I begin this analysis of the case of *Daryl Atkins v. the Commonwealth of Virginia*.

CHAPTER 2

WHAT IS PUBLIC OPINION?

"Vox Populi, Vox Dei?"

The Voice of the people, the voice of God?

"Vox populi may be vox dei, but very little attention shows that there has never been any agreement as to what Vox means or as to what Populous means.

Sir Henry Maine

The concept of public opinion has baffled philosophers and scholars from the beginning of time. Starting with the Garden of Eden, we have seen the consequences of making choices based on public opinion. Public opinion has been used and manipulated to enslave people, set others free, to further the will of God, and to silence those who claim to speak in his name.

Public opinion is a necessity in a society inundated with information. It is especially important in a representative republic where government is supposedly set up to embody the will of the people, but what public do they serve? Is it only the well informed or does anyone's opinion count? Even on a personal level, how does the individual decide what mechanic to go to, which movie to see, or where to shop? Often it is the view of a particular

public that leads to these decisions. As Edward Bernays (1921) stated, "If we had to form our own judgments on every matter, we should all have to find out many things for ourselves which we now take for granted." (p. 62)

Even armed with this knowledge, there seems to be little consensus as to what constitutes public opinion. In fact, defining the two words individually has puzzled those who study it. Because this study looks at the effects of public opinion on a government institution, a working definition of public opinion must be established.

The word public comes from the Latin *populus*, meaning people, and influenced by the related word *pubes*, meaning the adult male population. Plato distinguished between *doxa* (opinion) and *epistêmê* (knowledge). He believed that *doxa* was untested, fleeting and available to all. This form of understanding had not withstood the rigors of academic inquiry and was fickle. Each person on the street can put forth *doxa* on any subject, from biochemistry to baseball, but this *doxa* may have no basis in knowledge. *Epistêmê*, on the other hand, spoke to the eternal "ideas" that lay beneath the visual world. These were eternal and were available to only a select few. These ideas could be the learned and the chosen. Therefore, politics was not a

democratic system where every person had a voice, but a system where the elites deciphered the information from the *epistêmê* elite. (Peters, 1995, p. 4) This differentiation is seen in our system of government today, where people elect others to represent them, and to hopefully possess an *epistêmê* understanding of the issues. This analysis is rooted in the *epistêmê* understanding of opinion. The Supreme Court is comprised of nine elite jurists that serve as the pinnacle of judicial knowledge. The justices are charged with interpreting the Constitution and are appointed to serve as long as there is breath in their lungs.

James Bryce (1960) argued that, "The simplest form in which public opinion presents itself is when a sentiment spontaneously rises in the mind and flows from the lips of the average man upon his seeing or hearing something done or said." (p.3) This is a common view of public opinion and overly simplistic. This chapter will show the complexity of the topic. This study will look at some of the conceptualizations that now form what is believed to be public opinion and will establish a framework for the subsequent look into public opinion and its influence on the Supreme Court.

Researchers Glynn, Herbst, O'Keefe, and Shapiro (1999) broke down the public opinion concept into five competing ideas. Their framework of public opinion is unparalleled in mass communication and the ideas will be used to lead this inquiry into the topic.

Public Opinion as the aggregate of individual opinions

On a Tuesday morning early in November, citizens of the United States stand outside of schoolhouses, fire stations, and public parks to elect their representatives. These people are products of a system that was formed over 200 years ago in the Constitution. The framers of the document knew that a pure democracy was glacial and very unproductive, so they set out to form a government that would come to be known as a representative republic. The results of those November Tuesdays are processed, analyzed and are the purest form of measuring public opinion. In this instance, a mass of individuals give their opinions about a person or a referendum, and in most instances, the one with the most votes wins. Edward Bernays (1923) puts it this way, "Public opinion is a term describing an ill-defined, mercurial and changeable group of individual judgments. Public opinion is the aggregate result of individual opinions — now uniform, now conflicting — of men

and women who make up a society or any group of society.”

(p. 61) Based on this categorization, election results are the best barometer of public opinion.

Another common way to measure public opinion in this way is polling. The task of polling a segmented sample of society about topics and issues is now universal in academic and political circles. The generated numbers are then extrapolated to society as a whole. George Gallup, who is considered the father of polling, believed that polling brought the public back into government. He stated that, “It (public opinion polling) believes in the value of every individual’s contribution to political life, and in the right of ordinary human beings to have a voice in deciding their fate. Public opinion, in this sense, is the pulse of democracy” (Glynn, et al, 1999, p. 62) . Gallup, who was a very spiritual man, believed with an almost religious fervor, that polling was the best method to hear the voice of the public at large.

Azjen and Fishbein (1980) created a theory of reasoned action which purported that “human beings are quite rational and make systematic use of the information available to them.” (p. 5) Based on this assumption, the aggregation view of public opinion is quite valid as an indicator of public opinion because people would base their

thoughts and opinions on beliefs gained through experience. In fact, it has many advantages. One is that aggregation provides an easily quantifiable way to measure the public mood. The aggregation view provides the most straightforward and understandable method of looking at the topic making the most sense to an electorate that equates public opinion as the sum total of their individual opinions. This, however can lead to a few problems. One being that the public can be comprised of those who approach a topic with a cursory knowledge of the subject. What good is it to take an aggregation of opinions the public holds about lunar exploration if many in the public do not know what lunar means? The conceptualization of public opinion is a dangerous one when the issues are not understood by the "man on the street."

Public opinion is the reflection of majority beliefs

A. Lawrence Lowell (1913) related a story about the majoritarian point of view to public opinion. In it, two men were traveling on a road and meet a fellow journeyman on the path. The two men, forming a majority in this public, offer to relieve the man of his watch and wallet. Although the owner of the wallet and watch does not necessarily agree with the majority, he relinquishes

control of the possessions out of fear. This, of course, is an absurd proposition, and yet the majoritarian point of view purports that the majority voice is the only one heard. (p. 11)

The majoritarian point of view makes no judgment as to whether the mainstream point of view is right or wrong; it just bows to what the majority believes. Majoritarian theory believes in conformity, and in most cases people tend to side with the majority. This conformity may not be a product of agreement, but rather rises out of fear of isolation.

Much of the majoritarian research comes from the field of social psychology. Elisabeth Noelle-Neumann (1995) focused much of her research on this subject and titled the conformity the "spiral of silence." She states, "The central assumption of this theory is that all societies threaten with isolation individuals who deviate from the consensus, and that individuals, in turn, experience fear of isolation" (p. 42). This theory makes individuals, in a sense, sociologists who observe the world around them and make decisions based on their perception of the views expressed by the majority. An example of this theory would be ten friends going to the cinema together. One individual agonizes throughout the entire film and cannot wait to walk

out the door. As he or she does, the other nine friends rave about the movie and praise its direction and acting. The individual that thought that the film was horrible will keep quiet and not express his real view out of fear of isolation from the rest of the group.

This type of theory poses problems for those who feel that public opinion is the aggregation of individual opinions. They feel that public opinion polling causes people to say what they think the pollster wants to hear as opposed to what they truly believe. It also places emphasis on the modes people use to determine the majority viewpoint.

Another problem with the majoritarian point of view is that the majority can be wrong. For example, a 1998 Harris Interactive poll found that over half of all Americans (52%) believed that the world's population speaks English. The truth is that only 20% actually do speak the English language. (Taylor, 1998) In this instance, making judgments based on the view of the majority would lead to false results.

Because there are faults with the majoritarian view, many look to the media and elites as places where people go to decipher the public's opinion. This leads to a third conceptualization of public opinion.

Public opinion as media and elite opinion

People hear it all the time from the lips of politicians, "This is what the public wants." From campaign finance reform to universal health care, politicians are constantly claiming to heed the voice of the public when arriving at their policy goals. But is their decision a true reflection of what the public wants or just what the politician thinks they want? A study was conducted and participants were asked, "Do you happen to know the names of the two U.S. Senators from your state?" Only 25% of respondents answered correctly. (Glynn et al., 1999, p.23) How then can these people make statements based on public opinion?

Can a person make an informed opinion about any subject with complete objectivity and absent of bias? Many scholars would argue no, all opinions are filtered through a lens that influences the final opinion.

A key proponent of this understanding of public opinion is Walter Lippmann. Lippmann (1925) argued "My sympathies are with [private citizen]; for I believe that he has been saddled with the impossible task and that he is asked to practice an unattainable goal... I have not happened to meet anybody, from a president of the United States to a professor of political science, who came

anywhere near to embodying the accepted ideal of the sovereign and omniscient citizen." (p.29) With this understanding, one must ask, where does the public get its information? According to Lippmann, they do not. Their "opinion" is only the opinion of the elite speaking on their behalf.

Many scholars have proposed that the media is an elite group that can shape public opinion. This theory, commonly called agenda setting, states that the media, by choosing what is reported, can set the agenda for the public mood. McCombs and Shaw (1972) believed "While the mass media may have little influence on the direction or intensity of attitudes, it is hypothesized that the mass media set the agenda... influencing the salience of attitudes." (p.177) In other words, the media may not be able to tell the public what to think, but it can serve as the research to shape what people think about.

Because most people have neither the time nor effort to become informed on every issue, they allow these elites to shape their view in one of two ways. One is to allow someone to persuade the uninformed to see things as they do. This could happen in the form of a preacher persuading a congregation, a professor misleading their students, or a news editor deciding what news is fit to print. Another way

for elites to create public opinion is to project their personal opinion on the public they represent. This can be seen in the example of a congressman speaking about the will of the people" or when someone represents a group in front of the Supreme Court.

Public opinion is found in the clash of group interests

If opinions were spread along an axis for a given subject, a bell curve would show that the bulk of respondents would fall into the middle portion of the graph. Some scholars believe that the outliers will form and shape public opinion based on the clashing of their beliefs.

Many interest groups have the funding and political power to lobby the government on behalf of their interests. For instance, many people in a community may have no opinion as to whether or not a group of trees are cut down to make a new shopping center. A small group of business owners as well as environmental groups have a vested interest in the project and they serve to bring the topic to the public's attention. This public debate forms the basis of public opinion on the topic.

Many people define themselves in terms of their group memberships. This theory, known as the social identity

theory, states that people's behavior can be determined based on their group identity. For instance, most Americans still associate themselves with one of the two major political parties and therefore vote according to party lines. Gibson and Gouws (2000) suggest, "Social or group identities are psychological attributes of individuals - they may be grounded in objective characteristics, but they take on political significance to the extent that individuals are cognizant of their membership in a group and attach value to it." (p. 279) Because of this, much of the social and political debate centers on the decisions and opinions of those party leaders.

Some researchers believe that American society is actually moving away from group mentality, making it harder to gauge public opinion. Susan Herbst (1995) in an article titled *On the Disappearance of Groups*, stated "In contemporary American political discourse, the notion that the public is composed not of social groups but of atomized individuals..." (p. 101) This causes a large problem for theorists who have used group identification as a measure of public opinion. If, as she supposes, America is becoming more autonomous, then measuring public opinion becomes a monumentally difficult task.

Those who believe in the group formation of public opinion have a problem with polling because it takes into account individual opinions without taking into consideration group identity. Those individuals that are not part of a larger group with a vested interest in the issue may not wield much power.

Public opinion is a fiction

Finally, some scholars have gone so far as to say that public opinion does not exist. They argue that since there are no universally accepted quantifiable measures to definitively show public opinion, then people are able to mold the concept to be whatever they wish. Many in America believe that wrestling is real, man never walked on the moon, aliens are among us, and Elvis is at the Burger King down the street. Just because many believe these ideas, does it qualify as public opinion?

One way in which public opinion is a myth can be conceptualized as a false consensus. Sherman, et al (1984) theorized that people see their own opinions as common and therefore equate them with the public at large. The false consensus effect also assumes that people that carry another opinion are out of the mainstream. It can also be a social strategy used to make one feel more comfortable in

social settings. Either way, a person creates a public opinion that does not really exist.

The view of public opinion as fiction is very similar to the view of public opinion as the view of media and elites with one caveat, the scholar that sees public opinion as media/elites believes that there is something out there that constitutes public opinion, whereas the fiction scholar does not. The fiction scholar believes that the preacher, professor, and politician are creating public opinion for their own purposes.

The term public opinion is bantered so frequently, that many publics assume it to exist even though they cannot define it. Because the term has been watered down, there is no sufficient way to define or quantify the concept.

Scholars of this ilk, focus much of their research on rhetoric and how opinion is created. This rhetoric can take the form of well crafted questions on a poll or the gifted oratory of a seasoned politician that create public opinion where it does not really exist.

Each of these classifications of public opinion will be addressed in the subsequent opinions of the justices as they look at this particular Supreme Court case, *Atkins v. Virginia*. The basic understanding of public opinion is

needed to comprehend the opinions of the justices and the work of the scholars who study them.

CHAPTER 3

THE INTERACTION OF PUBLIC OPINION, THE DEATH PENALTY, AND THE SUPREME COURT

"It is a consoling idea (let us remark in passing), to think that the death penalty, which three hundred years ago still encumbered with its iron wheels, its stone gibbets, and all its paraphernalia of torture, permanent and riveted to the pavement... it is consoling to-day, after having lost successively all the pieces of its armor, its luxury of torment, its penalty of imagination and fancy, its torture for which it reconstructed every five years a leather bed at the Grand Châtelet, that ancient suzerain of feudal society almost expunged from our laws and our cities, hunted from code to code, chased from place to place, has no longer, in our immense Paris, any more than a dishonored corner of the Grève,--than a miserable guillotine, furtive, uneasy, shameful, which seems always afraid of being caught in the act, so quickly does it disappear after having dealt its blow.

-- Victor Hugo, The Hunchback of Notre Dame, Book Second, Chapter II

"We have a democracy; the death penalty is the will of the American people." (Whitman, 2001, p. 519)
President George W. Bush

An "evolving" history

The first known execution in the territory, now known as the United States, occurred in 1622 (Anchorage, 2003). Since then, the practice has been, in some way, a part of the criminal justice system. The death penalty, somewhat

like abortion, is one of the few areas where many Americans pay considerable attention to the rulings of the Court.

The Eighth Amendment states that citizens should not be inflicted with "cruel and unusual punishment." Through the years, this amendment has been interpreted numerous ways by the Court. According to former Chief Justice Warren, the court, when addressing what is cruel and unusual, must draw its meaning from the "evolving standards of decency that mark the progress of a maturing society" (*Trop v. Dulles*, 1958, p. 101) This standard, which is based on public opinion, has been the one used by the Court ever since. One commentator said, "It is only in lynch law (the direct ancestor and progenitor of the current system) that public opinion determines the sentence." (Hitchens, 2002, p.9) There is no other area of Constitutional law that is so dependant upon public opinion.

What constitutes public opinion when looking at the death penalty? Precedent states that the two mechanisms of determining 'evolving standards of decency' are to examine public opinion and to analyze trends in legislative decisions at the state level (McGarrell, 1996, p. 500)

Starting in 1930, the Bureau of Justice Statistics began compiling statistics on the death penalty. From 1930 to 1967, 3,859 people were executed under the civil

jurisdiction of the United States, with a high of 199 executions occurring in 1935 (Anchorage, 2003). Beginning in the late 1960's, pressure from external forces (public opinion) led to a moratorium of the death penalty. At that time (1966) more American's opposed the death penalty (47%) than favored the practice (42%). (Dillin, 2001, p.4)

Legal challenges to the death penalty culminated in a per curium decision by the court in *Furman v. Georgia* (1972). The decision put a halt to capital punishment, citing the way the practice was administered as "cruel and unusual." Nine separate opinions were written on the case outlining the individual views of the justices. In the most passionate of the opinions, Justice Thurgood Marshall asserted that the death penalty "violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history" (*Furman v. Georgia*, 1972, p. 360). He believed that the public was not well informed about the death penalty and that, if they were, they would overwhelmingly oppose it. This came to be known as the "Marshall Hypothesis."

The "Marshall Hypothesis" is a perfect example of court members rooting their definition of public opinion based on what people should think or what people would think if they were as enlightened as themselves. This falls

perfectly in line with the "elite" definition of public opinion and is one that will be used by justices and scholars for decades to come.

Other justice's opinions focused on "jury actions, discriminatory effects, or the 'freakish' inconsistency of the application of the penalty" (Marshall, 1989, p.50) This left the door open for the issue to be readdressed in later cases. The decision allowed the states to remedy the inconsistency of the administration of the practice without actually making a judgment as to the constitutionality of the death penalty.

Many argued that in spite of overwhelming support for the practice, the Court has reacted in a countermajoritarian way in regards to the death penalty. They question why the Court would subvert the "will of the people" as expressed in polls and ban the practice. What these people do not seem to address is the fact that the Court, according to the polls, was working with a bare majority, at best. What we actually see is a public with mixed views on the subject called to action by a Court that they felt ruled in a way they disagreed with.

The public responded with outrage to the Court's decision. "*Furman*, like other landmark Court cases such as *Roe v. Wade* (1973), had the effect of calling its opponents

to action" (Banner, 2002, p.71). This led to widespread support of the death penalty like never seen before. According to Gallup polls, in March of 1972, just a few months prior to Furman, the public was fairly split regarding their opinion of the practice with 50% in favor and 42% opposed. By November of 1972, the margin jumped to 57% in favor and 32% opposed. The margin separating those who were in favor of the practice versus those opposed jumped from 8% to 25% in the span of seven months (p.70) Similarly, a poll conducted by Harris interactive showed that in 1970, the gap between those who opposed and those who were in favor of the death penalty were separated by a mere five points. After the decision, in 1973, the difference had spread to 28 points, and the number in favor of the practice has stayed fairly consistent ever since. (Taylor, 2001)

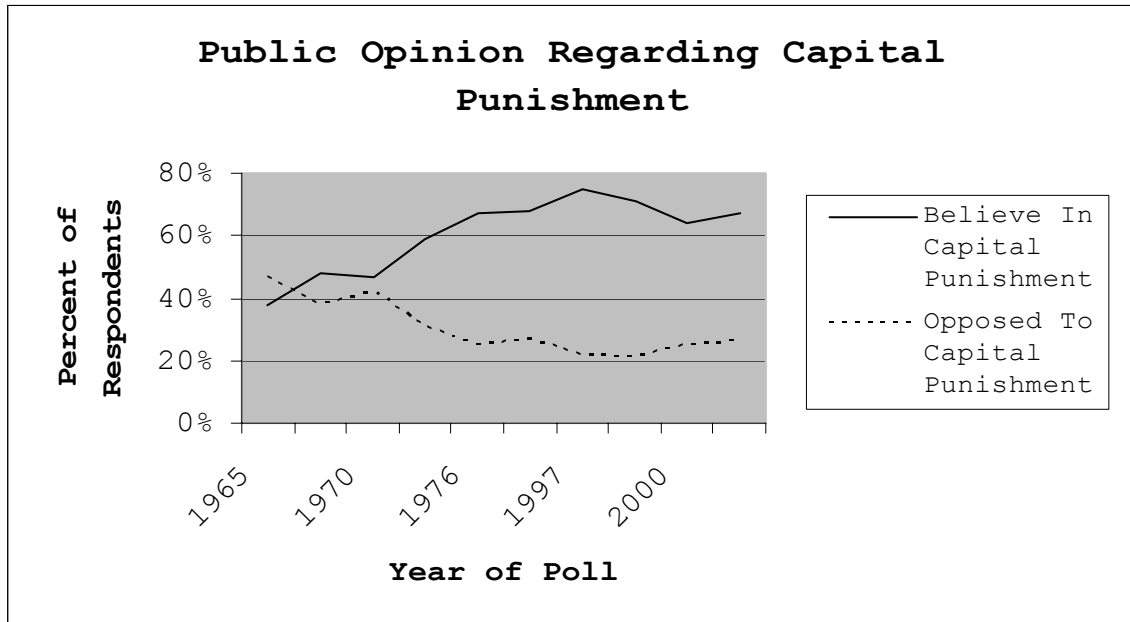
Table 1 shows how public opinion has shifted in the past 40 years. As can be seen in the table and the graph, public opinion was mixed until *Furman* (1972) caused a seismic shift in public attitude toward the practice.

TABLE 1

Public Opinion Regarding Capital Punishment

Question: "Do you believe in capital punishment, that is the death penalty or are you opposed to it?"

	Believe In Capital Punishment	Opposed To Capital Punishment
1965	38%	47%
1969	48%	38%
1970	47%	42%
1973	59%	31%
1976	67%	25%
1983	68%	27%
1997	75%	22%
1999	71%	21%
2000	64%	25%
2001	67%	26%



Source: Harris Interactive Group

The day after the court ruled in Furman, five states declared their intention to introduce bills reinstating the practice. President Nixon immediately sought out research conducted on the occurrences of convicted murderers acting

again. California, whose courts ruled that the state constitution barred the practice, saw a swelling of support for capital punishment and eventually landed on the ballot in November 1972 as a referendum to reinstate the death penalty. The referendum passed by more than a 2 to 1 margin. By 1976, 35 states along with the federal government enacted new capital punishment laws in response to *Furman* (Banner, 2002, p. 70)

The cessation of the death penalty continued until the 1976 term, when the Court defined what would be allowed in death penalty cases in three decisions, *Gregg v. Georgia* 428 U.S. 153 (1976), *Jurek v. Texas* 428 U.S. 262 (1976), and *Proffitt v. Florida* 428 U.S. 242 (1976). The first execution under the new law took place on January 17, 1977. In *Gregg*, three justices "cited legislation, referenda, and revised poll results since *Furman* to argue that public opinion supported revised death penalty statutes" (Marshall, 1989, p.51). Gone was the "elite" formation of public opinion cited by Marshall in *Furman*. It was relegated to a boisterous dissent. The aggregation view of public opinion carried more weight with the Court. This heavy reliance on public opinion to overturn past precedent solidified public opinion as a determinant in death penalty cases.

Although never reaching the level of the early 20th century, the rate of executions has slowly risen since (Anchorage, 2003). Gross (1998) argues that American views of capital punishment have stabilized and is at a near record high (p. 1448). He also states "We seem to have reached a new status quo in which the death penalty is an accepted part of our criminal justice system; it is widely available, widely supported, and less controversial than in decades past" (p. 1453)

Gross also points to numerous studies that disprove the Marshall Hypothesis – which state that support for the death penalty would weaken if people were more informed. This hypothesis is grounded in the media/elite view of public opinion, stating that those educated on the topic would oppose it. Gross points out that studies show, even when supplied with more information, the public continues to be "locked in place" (p. 1459)

Even with the flood of polling data to the contrary, there are many scholars who believe that the Marshall Hypothesis has merit. Much of the research on the Marshall Hypothesis is based in the theory of deliberative democracy. Selznick (1995) states "Deliberative democracy limits government by referendum, resists the influence of pollsters, and restrains the manipulation of opinion by

disinformation, deception, and appeals to prejudice or raw emotion." (p.107) These scholars believe that the public can be mislead and therefore checks must be in place to prevent the mass from themselves. One of those checks can be the Supreme Court. They also believe that the mass can be changed with more information.

McGarrell and Sandys (1996) argue that the public is misinformed about the death penalty and that elites and legislators are misinformed about the public's perceptions of the practice. The authors blame this partly on the media because "Sensationalism sells and thus the most heinous crimes are likely to receive the most media attention" (p. 502)

These researchers also feel that people are in support of the death penalty only when no other alternative is proposed. Their study of citizens in Indiana concluded that support for the death penalty drops substantially when the alternative of life without parole plus work is offered. "Rather than a public clamoring for executions, this line of research suggests that what the public wants is for persons convicted of a capital offense to be handled in a way that prevents them from ever repeating the offense again." (p. 508)

A similar study was conducted using dummy media stories in focus groups to see how the media distortion of the death penalty can sway public opinion. The authors concluded that media portrayal has led to a false consensus. Their research "suggests that that myth is in part fed by the media's willingness to ignore the complex nature of death penalty opinion and instead portray the issue as a matter of public consensus." (Niven, 2002 p. 683)

Many people opposed to the practice cite the lack of a defined alternative as the reason that there seems to be such overwhelming support. Niven (2002) quotes pollster Carol Arscott as saying, "I think the reason the support for the death penalty is so strong is that people don't believe there is a viable alternative. [Currently] life without parole isn't really life without parole." (p. 674)

Another common argument to support the Marshall Hypothesis is the lack of a proposed alternative for respondents to choose from in public opinion polling. Adherents to this view claim that poll numbers are unfairly skewed in favor of what would be an unpopular practice if it were viewed in comparison to the alternatives. "Using polls as indicators of majority will is an unstable barometer. The people's will consists of complex layers of

thoughts and feelings that cannot be easily reduced to yes and no answers... Since the will of the people cannot be determined with certainty, polling is a dubious basis for setting policy." (Whitman, 2001, p.519) These people present a valid question; if polls are unclear and misrepresent the public, how can one make policy based upon them?

Other's feel that polls will also be skewed because people have a misrepresented view of the actual effectiveness and use of the death penalty. "In large measure, the public's generalized acceptance of the death penalty has rested upon its faith in the police and prosecutors who are on the front lines of the war on crime." (Legal Intelligencer, 2002) This support has eroded recently as DNA evidence has shown that there are innocent people on death row. As a matter of fact, Justice John Paul Stevens said while addressing the 9th Circuit Judicial Conference "I think there is a greater consensus in communities and at the bar about the risk of executing an innocent person." (Legal Intelligencer, 2002) As has been said before, the death penalty invariably involves the deliberate destruction of evidence in a criminal case (by means of snuffing out the chief witness." (Hitchens, 2002, p.9)

Another reason that scholars point to a public shift in opinion concerning the death penalty is the scarcity of capital punishment worldwide. According to Amnesty International, since 1990 more than 30 countries in the Americas, Africa, Asia, and Europe have abolished the death penalty. Of those that still use the practice, nearly 90 percent of the executions take place in four countries; China, Saudi Arabia, the United States, and Iran.

(Christian Science Monitor, p.1) Some suggest that Americans, if they knew the way the world viewed them, would fall in line. Robert Bandinter, a French Senator and former Justice Minister stated that "Americans don't fully understand how their use of the death penalty has profoundly degraded the country's image in the eyes of democratic nations." (Whitman 2001, p. 523) These other countries, along with anti-death penalty interest groups in America, serve to frame public opinion and persuade the U.S. to abolish the practice. Strangely, there is a lack of "clash" in worldwide interest groups, which normally suffices to frame public opinion. Instead, there is a world heavily opposed to the practice and few countries are in support.

These doubts, along with others, Justice Harry Blackmun lamented on his final days on the court "From this

day forward, I no longer shall tinker with the machinery of death." (*Callins v. Collins*, 93-7054)

What we see in this brief but muddled history of death penalty jurisprudence is an ever changing definition of the concept. The majority in *Furman*, *Gregg*, and subsequent decisions framed public opinion in a different way than previous cases. Many stayed away from overt references to public opinion and instead focused on the practice itself. When the justices did focus on public opinion, they looked at revised legislation and poll results in many states as an indicator of the practice's acceptability to the public at large. Some cited the shift in poll results occurring after the *Furman* decision as a reason for the decision. This aggregation view of public opinion is one that is still looked at with apprehension on the court. This can be seen in the lack of the inclusion of poll numbers in many cases. Because of this, many justices find themselves looking at an elite's view of public opinion and use the determinations of state legislators as indicators of public opinion.

Marshall, in all of his dissents (in which other justices joined) uses an elite and "enlightened" view of public opinion. He held firm to the belief that the issue

was riddled with a lack of education on the topic and that the public, once enlightened, would see it the way that he does.

If it pleases the Court: Public opinion before the bench

So where does this leave the Supreme Court when deciding on the validity of the death penalty? In the 20 years following *Gregg*, the Court has ruled numerous times on the practice creating a muddled body of law that is complex and ever shifting.

Even with the acceptance that public opinion has some impact on death penalty jurisprudence, one still must ask, what influence does public opinion have on the actual decisions that Supreme Court justices make? Many, like Alexander Hamilton over 200 years ago, fear the inclusion of public opinion on the Court's decision-making process. But is it realistic to think that these nine men and women are not influenced by the outside world? "There is nothing unusual or improper about this link between public opinion and the court's decisions. The justices are chosen by an elected president and confirmed by an elected Senate, of course. And just as important, they are not hermits; they are influenced by the same trends in thought that influence us all" (Banner, 2002, p. A11). Many would find this

characterization frightening. The nine justices are unelected and serve life terms. The Constitution sets up safeguards in the appointment of justices with the presidential appointment and the advice and consent of the Senate, but there is much freedom that comes with a life appointment and many justices change their viewpoints after appointment to the High Court. Just because a popularly elected President and Senate approve of a person, does not guarantee a view of the Constitution consistent with popular sentiment. Because of this, scholars have sought to find out how much the justices are influenced by public opinion.

George and Epstein (1992) sought to discover how justices made decisions. They tested two models, the legal and extralegal. The legal model assumes that justices will make decisions based on legal doctrine generated by past cases. The extralegal model says that the legal model is too restrictive, and if stare decisis reigns, then the court will become static and not responsive to contemporary norms and values. The research on the influence of public opinion and the Supreme Court is grounded in this extralegal model. Their research looked at the Court as a whole, not at particular issues, and concluded that outside

factors, public opinion being one, influence the members of the Court.

Caldiera's (1991) foray into the relationship between the Supreme Court and public opinion was very limited. Because of a lack of sufficient research on the Supreme Court, he uses evidence of public opinion's influence in trial courts as support of his hypothesis. His exhaustive study concludes that it is extremely difficult to speak with any kind of precision on the impact of public opinion on the courts in the short run, and in the end "We know virtually nothing systematically about the effect of public opinion on the Supreme Court" (p. 313). However, his work laid the groundwork for other scholars to replicate his methods and to gain insight into the relationship of the Court and public opinion.

Building upon this, Mishler and Sheehan (1993) questioned the assumption of the court as a countermajoritarian institution. They stated, "The assumption has been that the Court functions, at least to a degree, independent of majority opinion or the popular mood" (p. 87). This assumption makes the court much more of a political actor than many people assume.

Their hypothesis, the political adjustment hypothesis, states that the Court's reaction to public opinion will be

gradual over time and almost imperceptible at that moment. It also presupposes that the Court will lag behind changes in the ideology of the public. They tested the Courts ideology against the Sitmson Mood Index and found that there seemed to be a five-year lag behind the change in the court's ideology and that of the country. This occurred regardless of whether there was a change in the composition of the Court was and also in opposition to the countermajoritarian argument. In fact, they argue that the Court can "not only reflect changes in public opinion but also serve to reinforce and legitimize opinion change in an iterative process" (p. 96). Their conclusion that the Court served a majoritarian view of public opinion was questioned by many scholars.

Norpoth and Segal (1994) took umbrage at this view of the Court as a group that looks at public opinion polls five years after the fact. They base their response to Mishler and Sheehan by first showing the misuse of public opinion by justices in their decision-making. For example, Justice Marshall argued in *Gregg v. Georgia* that the Court should not be guided by what public opinion polls said, but by what they would say if the public were fully enlightened to the practice (The Marshall Hypothesis). To the contrary, Justice Scalia argued that there was no national consensus

against the execution of mentally retarded criminals, even though three states that overwhelmingly supported the penalty – Texas, Florida, and Georgia – clearly felt that the practice in these instances was cruel and unusual. If justices could manipulate public opinion in this way, then how could scholars possibly measure its impact on the Court?

Instead, Norpoth and Segal conclude that there is an “overwhelming indifference of the justices’ opinions to public opinion...” (p. 712). They found the five-year lag to be ridiculous and suggested change in the composition of the court as the explanation. “It is not that the justices pay keen attention to public opinion but that they have been chosen by a president (with the advice and consent of the Senate) who presumably shares the public’s views” (p. 716). This elitist view of public opinion assumes that the Court is not much different from the other branches of government where the will of the people is expressed by their chosen representatives.

Mishler and Sheehan (1996) expanded their previous study to test the attitudinal model at the justice level. The attitudinal model suggests that the attitudes and views of individual justices influence their decisions. This seems obvious to many observers, but it runs counter to the

Hamiltonian tradition of justices objectively deciding on law alone. The authors conclude that public opinion affects individual justices, therefore affecting the court as a whole. They also concluded that public opinion has a greater effect on moderate justices rather than their more partisan counterparts.

Flemming and Wood (1997) also sought to test individual justice's responses to public opinion. They felt that past research was inconclusive because they conducted aggregate level research on an individual occurrence. The justices of the Supreme Court work as nine equals making decisions individually on a case-by-case basis. To test the Court as a whole was inadequate because the individual opinions of the justices form the final opinion of the Court. Instead, they proposed testing an individual justice's level of liberalism with shifts in the public mood. They concluded that no justice's response "is entirely or completely unresponsive to public mood" (p. 493). Public opinion has a minimal, but measurable effect. They also found that the response was not limited to certain justices' ideology but that all justices on the ideology spectrum showed some deference to public opinion. They also concluded that there was no lengthy lag between public opinion and the decisions of the Court.

Perhaps the most comprehensive analysis of public opinion and the Supreme Court was undertaken by Marshall (1989). His analysis covered a myriad of topics pertaining to the relationship between public opinion and the Supreme Court. He begins with two basic questions; how has the modern Supreme Court reflected public opinion and why?

Marshall's research concludes that the Court is essentially a majoritarian institution reflecting the values of the larger public. His research showed that the Court sided with the public when there was a clear consensus nearly 65% of the time. Interestingly, he finds that this does not differ much from the more "representative" branches of government. Also, when the Court acts in an activist role, overturning disputed law or policies, it does so in accordance with public opinion.

His research proposes three reasons for the Court's reliance on public opinion. One is the Court's deference to federal laws and policies, which are typically in line with public opinion. Second, the Court's shift toward the views of the public during times of crisis. Third, the fact that the Court understands that decisions that reflect the public mood tend to be more stable. (p.193)

These studies look at the Court and how a hypothetical "opinion" has affected the Court. What political science

lacks in its analysis of the Court is a uniform view of public opinion. As was shown earlier, public opinion can be seen in a myriad of ways and each may have a different impact on the Court. Studies have used the editorial pages of major newspapers, the Stimson Mood Index, poll numbers, election results, and legislative action as barometers of public opinion. Instead, research on a uniform definition of public opinion tested first on the Court as a whole and then against individual justices could yield more consistent results.

Another area that needs to be explored is in the testing of the Marshall Hypothesis. This enlightened view of public opinion has been postulated in the area of the death penalty and barely tested. Does this hypothesis have merit? As was shown, some scholars believe so, but could this hypothesis be extrapolated into other areas where public opinion is measured? Issues such as abortion, affirmative action, and assisted suicide could all be studied in light of this hypothesis as well.

In conclusion, most scholars would agree that the public has a definite opinion regarding the death penalty, but what that opinion entails is not entirely clear. Because of this, there has been a tangled web of jurisprudence that has grown out of the Court's deference

to or opposition of public opinion. Either way, many scholars believe that public opinion does have an influence on the Court, but the force and/or influence of that impact is not known.

CHAPTER 4

ATKINS V. VIRGINIA- THE CASE

The analysis of the Supreme Court and public opinion has found new life in a somewhat obscure ruling of the court during its 2001 term. The case examined the constitutionality of executing a mentally retarded person convicted of murder. Most of the attention on the case was focused around the aspect of the death penalty, but this inquiry will look at the public opinion facet of the case.

After a day of smoking marijuana and heavy drinking, Daryl Atkins and William Jones decided to rob a man. Armed with a semi-automatic handgun, they abducted Eric Nesbitt, robbed him of his money, drove him to an ATM, forced him to withdraw \$200 and then drove to an isolated location and shot him eight times. For this crime, Daryl Renard Atkins was convicted of murder and, under Virginia law, was sentenced to the death penalty (*Atkins v. Virginia*, No. 00-8452). His IQ was a paltry 59, well below the established levels of all medical groups, thus classifying him as mentally retarded. (Note: the term mentally retarded is

looked down upon in our current “politically correct” culture, but it is the term used throughout the case and thus will be used in this study as well). On June 20, 2002, the Supreme Court of the United States overturned his sentence.

Atkins v. Virginia is one of many cases that have dealt with the issue of the death penalty. This case brings to the forefront the role of public opinion on our judicial system, most notably the Supreme Court. This chapter will focus on the role that public opinion played in this decision by the Court. The chapter will analyze the opinions of the justices, the briefs submitted to the court in support of both sides, and two newspaper accounts of the decision.

What will be shown is a Court that defers to public opinion in a few ways. First, the voice of state legislators disallowed the practice of executing the mentally retarded. Second, the voice of the public is expressed in polls and used as reasoning for this decision. Third, the voices of interest groups in favor of abolishing the practice of executing the mentally retarded are heard. And finally, the cry of world opinion as expressed in briefs and practices are included.

The dissents in this case will oppose all but one of these characterizations of public opinion and their inclusion in the case. Instead, the dissent will offer the decisions of the juries and the renderings of state legislators as the only indicators of public opinion worthy of insertion into the proceedings of the Court.

Opinion of the Court - Justice John Paul Stevens

Justice John Paul Stevens wrote the majority opinion. He opens with an explanation of the case and the precedent upon which this case is to address, mainly that of *Penry v. Lynbaugh*, 492 U.S. 302 (1989). This case also involved the execution of a mentally retarded man.

Since the *Penry* decision, he argues, "the American public, legislators, scholars, and judges have deliberated over whether the death penalty should ever be imposed on a mentally retarded criminal" (p. 1). It is a rarity for a case to be addressed so soon after its precedent was set, but Stevens points to many shifts in society over the last thirteen years as the reason for this review. He quotes former Chief Justice Warren in saying that, "The Amendment (8th) must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (p.6)

Stevens then begins to cite reasons for his belief in an "evolving standard." He cites "public reaction" in 1986 to the State of Georgia's execution of Jerome Bowden, a mentally retarded man that led Georgia to establish the first law of its kind in the U.S., one banning the execution of the mentally retarded. Maryland quickly followed suit in 1989. At the time of the *Penry* decision, these two states, along with the 14 others who banned the death penalty all together, "do not provide sufficient evidence of a national consensus" (p. 8-9). This marks the genesis of the argument moving away from law and toward public opinion.

After *Penry*, 14 more states enacted similar laws over the next 12 years. Stevens felt that this trend marked a significant shift in public opinion, saying "It is not so much the number of these states that is significant, but the consistency in the direction of change" (p. 10). He used this to show, what he believed was a change in "our societal views" toward the execution of the mentally retarded.

Stevens also states that the scarcity of the practice of these types of executions shows that "a national consensus has developed against it." (p. 11)

Next, he cites the amicus curiae of the National Conference of Catholic Bishops (2001) as indicator of "national consensus." In their brief, which they cited was joined by those of many other faiths, they state,

"Few (if any) institutions can claim a greater tradition of working with and studying the conscience of the human person and related questions of guilt, blame and punishment than the religious community. These amici have developed a rich tradition of reflection and scholarship that has informed and been informed by the experience of countless millions of people over centuries. Failure to consider these views would diminish the authority of this court and would bring to the resolution of these essentially moral questions... It would be unwise to dismiss as 'uncertain' or 'unobjective' the considered judgment of the Nation's churches, synagogues, mosques, and temples..."

Finally, in his analysis, Stevens uses polling as an indicator of public opinion. Most of the polls were submitted by the American Association for Mental Retardation and the American Psychological Association. He does not list the polls and their results, but they are explained in detail in footnote number 21 of his opinion. In this footnote, he says "polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong."

In summary, Stevens points to four indicators of a "national consensus" on this issue. One, he relies on what is an elite definition of public opinion by using the consistency of legislative action toward the abolition of

this practice in the last 13 years as reasoning to outlaw the practice. Two, he relies on a majoritarian point of view citing that the majority of states have outlawed the practice leading to its scarcity since the *Penry* decision. Three, he composes a national consensus by defining public opinion as the views of interest groups when he defers to the analysis of the religious community as an indicator of the opinion of the public towards this issue. Fourth, he takes an aggregation viewpoint when he cites public opinion polling as showing a shift in the "national consensus." He also alluded to foreign laws as a reason for this decision (along with citing an amicus brief submitted by the European Union on behalf of Atkins). Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer joined in this decision.

The Dissenting Voices - Chief Justice William Rehnquist and Justice Antonin Scalia

The dissents in this case were heated and harsh, especially toward the idea of using public opinion as a reason for overturning legal precedent. Two dissents were written, one by Chief Justice Rehnquist and another by Justice Scalia, with Justice Thomas signing on to both of them.

Rehnquist focused his dissent on three areas; "the defects in the Court's decision to place weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion." To support his decision, he quotes from *Gregg v. Georgia* saying, "[I]n a democratic society, legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." (*Atkins v. Virginia*, Rehnquist dissent, p. 2)

Rehnquist takes umbrage to Stevens's categorization of a "national consensus." In stating what should be considered by the court, he says that:

"In my view, these two sources — the work product of legislatures and sentencing jury determinations — ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values firmly supported by our precedents. More importantly, however, they can be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection and publicly accepted criminal punishments." (Rehnquist dissent, p. 3)

Here, Rehnquist reveals what he sees as valid indicators of "publicly accepted criminal punishments." Both could be seen in the elite tradition because a select

group of people choose what suffices for the public at large. One is the "work product of legislatures" and two being the "sentencing jury determinations." Neither of these flirts with majoritarian or aggregation views of public opinion, but instead relies on those with intimate knowledge of the issues to decide for the larger public.

Rehnquist also felt that the briefs submitted on behalf of the religious and medical community were not applicable in this case. According to Rehnquist, these groups would not be an indicator of public opinion, but a self serving agency, therefore debunking the categorization of public opinion as a clash of interest groups as a valid indicator of a national consensus. He stated that because "the elected representatives of a state's populace have not deemed them persuasive enough to prompt legislative action... For the Court to rely on such data today serves only to illustrate its willingness to proscribe by judicial fiat - at the behest of private organizations speaking only for themselves..." (Rehnquist dissent, p. 5, 6) This opinion is heavily rooted in an elite view of public opinion, which is very similar to that of the characterizations used by Stevens.

Rehnquist's most heated objection was to the use of polling in the decision. Interestingly, he does not comment

much on the validity of polls as an indicator of public opinion, but instead he mention's the methodology of polls and their legal application to this case. His first objection was to the one-sided nature of the polls submitted and secondly to the validity of the polls. He cited the Federal Judicial Center's Reference Manual on Scientific Evidence in his assessment. He cites problems in methodology, sampling, wording of questions, and the sponsorship of the polls. Rehnquist also felt that because they were not submitted at trial, but rather only in friend of the court briefs, that these polls could not be used because their sponsors could not be "examined and cross-examined about these matters" (Rehnquist dissent, p. 7). He also included the results of all polls as an appendix to his decision.

Rehnquist's dissent was pointed and harsh. He closed by saying, "Believing this view to be seriously mistaken, I dissent." (Rehnquist dissent, p. 8) He glaringly omits the customary "respectfully" in his statement of dissention, showing his strong feelings concerning the issue at hand.

Scalia's dissent deals more with the legal issues and less with the categorization of public opinion, therefore this chapter will not look as in depth at this dissent. It will, however point out a few relevant areas.

One, Scalia feels that the individual justices substituted their opinion for the public and tried to use the cloak of "national consensus" as their justification. It could be argued that his objection is rooted in an elite perspective of public opinion, but it most likely is a criticism based on public opinion as fiction. He feels that the members of the Court have manufactured public opinion to support their personal beliefs. "Seldom has an opinion of this court rested so obviously upon nothing but the personal views of its members," he contends in his biting dissent. (Scalia dissent, p. 1)

He also calls to task the majority's opinion of a "national consensus" formed by a majority of state legislatures outlawing the practice. He explains that only 18 states have decided on this specific issue and that this in no way shows a national consensus on the subject. He feels that adding the 12 states that outlaw the death penalty all together is a fundamentally flawed assumption when trying to read a "national consensus on the issue."

By far, his most ruthless criticism concerns the inclusion of professional and religious community views. He sarcastically states, "the Prize for the most Feeble Effort to fabricate a 'national consensus' must go to its appeal (deservedly relegated to a footnote) to the views of

assorted professional and religious organizations...”

(Scalia dissent, p. 11). He criticizes the inclusion of the United States Catholic Conference’s brief because of the intense criticism they have received of late. Scalia is an outspoken Catholic, which makes this point even more interesting.

Scalia focuses the rest of his dissent on the method the court used to come to the decision, not the issue itself. In fact, he says “There is something to be said for the popular abolition of the death penalty; there is nothing to be said for its incremental abolition by this court.” (Scalia dissent, p. 17) Scalia felt so strongly about this opinion that he took the rare occasion to read from the bench, following the reading of the majority opinion.

Case Summary

Interestingly, both sides in this case used an elite framework of public opinion to argue for or against a national consensus in this case. However each side, comes to a different conclusion.

Stevens uses a four pronged definition of national consensus to derive his opinion on the case. The first prong is rooted in an elite view of public opinion when he

cites the consistency of legislative action toward the abolition of the practice. Second is a majoritarian view that cites the scarcity of the practice as an indicator of public opinion. Third is an interest group based view of public opinion, citing briefs submitted by religious groups (with a cursory mention of a brief submitted on behalf of the European Union). Fourth is an aggregation view citing polling data as an indicator of the shift in public opinion.

The dissents also take an elite view of public opinion in their decision. The first indicator of this view comes in the form of sentencing jury determinations as an indicator of public sentiment. The second, similar to the first, is in legislative action as a determinant. Both dissents find fault in the majority's use of legislative action, with Scalia going as far as to suggest that the majority has created public opinion where it does not exist to further their own goals.

CHAPTER 5

ATKINS V. VIRGINIA: THE ASSUMPTION AND FRAMEWORK OF PUBLIC OPINION

In the Atkins case, the court addressed the question of whether the execution of mentally retarded criminals amounts to cruel and unusual punishment, therefore making it unlawful under the Eighth amendment of the Constitution. By a 6-3 majority, the court decided that the practice was, in fact, cruel and unusual.

This decision overturned the Penry decision of 1989 allowing the practice. Justice John Paul Stevens, in his majority opinion, writes, "... in the 13 years since we decided *Penry v Lynaugh*, the American public, legislators, scholars, and judges have deliberated over the question of whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case..." (p. 1). The normative assumption by Stevens assumes that public opinion is an entity that can be measured and that it should be taken into account by the court. It has been said, "As long as political life is

not centered on a single place where the people can assemble as a single body, the expression of the people's voice(s) will always be inseparable from the various techniques of representation." (Peters, 85)

This chapter will analyze the assumptions of public opinion made throughout the case. First, it will attempt to identify the basis of the assumptions by Stevens in the opinion of the Court and the representations he uses to form those assumptions. This chapter will also examine the dissent's analysis of these assumptions. Next, the chapter will identify the bodies used by the Court in this case to frame public opinion and will attempt to examine their relevance. Finally, in the analysis of these points, the chapter will pose questions based on the assumptions made that may be looked at in future research.

The Opinion of the Court

The first assumption made by Stevens is toward the attitude of the American public in its response to the mentally retarded and the moral culpability that they hold for their crimes. Partially quoting a doctor whose testimony was used at trial; Stevens suggests that "it is indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their

criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way."

Another assumption purported by Stevens came tucked in the middle of the decision. He states, "Given the well known fact that anti-crime legislation is far more popular than legislation providing protections for the persons guilty of the violent crime..." (p. 11). Again, Stevens imposes his view of a public opinion to advance his case. Is it possible that need could be inferred as popularity? Does the fact that thousands of root canals are performed upon the American public imply a popularity of the practice? Rather, it could be argued, that there is less need for more legislation protecting criminals than there is for those laws protecting their victims. This is a prime example of an elite construction of public opinion where the decision maker casts their opinion on a larger public as the will of the people.

The final assumption Stevens places upon this case is his use of the number of states prohibiting the outright use of capital punishment as a mandate for prohibiting its limited use in the case of the mentally retarded. He uses

the 18 states with laws prohibiting the practice of executing mentally retarded criminals and adds to it the 12 states that outlaw the practice altogether. These states are needed to constitute his "national consensus" because, without them, he is left with only 47% of the states that specifically outlaw the practice. This assumption is a bold one, because there is not ample evidence to say that these 12 states have ever addressed the issue and it is an even bolder assumption to assume that they would all be in agreement on the issue.

Next, Stevens makes the attempt to show public opinion as the will of the people. He begins by making his case in a purely Jeffersonian reference (firmly entrenched in the aggregation view of public opinion), for a government that makes its judgment and garners power based on the "consent of the governed." He states that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (p. 6)

He uses public outrage to an execution in Georgia 16 years prior to this decision to shed light to his inference of public opinion. "In that year (1986), public reaction to the execution of a mentally retarded murderer in Georgia led to the enactment of the first state statute prohibiting such executions." (p. 8)

The next way that Stevens attempts to frame public opinion is in the expression of legislature in certain states. This view has precedence in the court, most notably in Justice O'Connor's majority opinion in the *Penry* case 13 years earlier. In that case, the culpability of a man with the mental capacity of a 7 year-old was brought before the court. O'Connor, among others reasoned that the small number of states that have outlawed the practice of executing the mentally retarded does "not provide sufficient evidence at present of a national consensus." (*Penry*). Stevens feels that the 13 years since then have provided that change. He first asks the question as to why the court is looking at this in light of these legislative decisions. Thus, in cases involving a consensus, our own judgment is "brought to bear"... by asking whether there is reason to disagree with the judgment reached by the citizenry and the legislators." (p. 8) He then provides the history of this type of legislation in the last 13 years. "It was in that year (1989) that we decided *Penry*, and concluded that those two state enactments (Georgia and Maryland), "even when added to the 14 states that have rejected capital punishment completely, do not provide sufficient evidence of a national consensus. Much has changed since then." (p. 9) He concludes with the

assertion, "it is not so much the number of these states (p. 18) that is significant, but the consistency of the direction of the change." (p. 10)

Stevens then makes the comment, "The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it." He then follows with footnote 21. In this footnote, Stevens provides the framework for his development of a national consensus. He starts by stating that "Additional evidence makes it clear that this legislative judgment reflects a broader social and professional consensus."

His first cog in the mechanism of this "national consensus" is organizations that have developed policies outlawing capital punishment. These include the European Union and many religious and professional groups. Concerning groups, he states "representatives of widely diverse religious co in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have filed an amicus curiae brief explaining that even though their views about the death penalty differ, they all 'share a conviction that the execution of persons with mental retardation cannot be morally justified.'" Finally, he cites polling data which alludes to a widespread consensus among Americans, even those that

support the death penalty that executing the mentally retarded is wrong."

One argument strangely creeps into his reasoning when discussing the definition of the mentally retarded. If, as he has tried to state, there is a consensus for prohibiting this practice, should this Court leave the issue of what suffices for mentally retarded up to the very states they feel act in this barbaric way. Stevens, with regards to the issue of insanity, states that the court will "leave to the State(s) the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." (p. 12)

The Dissents

In his dissent, Rehnquist assumes the normative view that Stevens does, that being one where public opinion does exist, however where he differs is in how the court deciphers that opinion. Rehnquist's view of this case is summed up in his quoting of *Gregg v Georgia* when he says "in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." (p. 2) Interestingly, this is in line with the Court's opinion on the case. Stevens makes this exact point throughout the majority's opinion and even

uses the same data as Rehnquist to make his points.

Rehnquist sees a different picture when he looks at the voice of the legislature. He does not agree with Stevens's interpretation that the legislative movement is moving towards the abolition of the practice. "The court pronounces the punishment cruel and unusual primarily because 18 states recently have passed laws limiting the death eligibility of certain defendants based on mental retardation alone, despite the fact that the laws of 19 other states besides that of Virginia continue to leave the question of proper punishment to the individuated consideration of sentencing judges or the juries familiar to the particular defender and his or her crime." (p. 1)

Rehnquist's logic is that the legislature has given voice to the people as spoken by the individual juries. He feels that these indicators can allow the court the clearest path towards deciphering the voice of the public. According to Rehnquist, "these two sources – the work product of legislatures and sentencing jury determinations – ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for the purposes of the Eighth Amendment." (p. 3)

Rehnquist does not focus as much time on this argument as he does the framing of public opinion as used in this

proceeding. "I write separately, however, to call attention to the defects in the Court's decision to place weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion." (p. 1,2)

His first criticism is directed towards the inclusion of laws from other countries when forming a justification of a national consensus. "I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination... For if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries are not relevant." (p. 4,5)

Next, Rehnquist takes offense with the inclusion of professional organizations and religious groups opinions in regards to this case. Why, he argues, if these are the voice of the "public" hasn't the legislature given heed to their voice? If opinion is so overwhelming in one way, would not the law reflect that opinion? For the court to rely on such data today serves only to proscribe by judicial fiat – at the behest of private organizations speaking only for themselves – a punishment about which no across-the-board consensus has developed through the

workings of normal democratic processes in the laboratories of the States." (p. 6)

Finally, Rehnquist questions the validity in using polling data as an indicator of public opinion. Even if I were to accept the legitimacy of the Court's decision to reach beyond the product of the legislatures and practices of sentencing juries to discern a national standard of decency, I would take issue with the blind-faith credence it accords the opinion polls brought to our attention." (p. 6) He cites possible problems in sample and sponsorship as reasons to reject these polls. He does not though; reject the idea that polls are an indicator of public opinion, just their use in this case.

Scalia's dissent deals much with the interpretation of public opinion along with tackling the Court's interpretation of mental retardation and it's relevance to the case at hand. Scalia also takes offense to what he feels is the Court's infringement of the rights of state legislatures to govern their respective states. Quoting his dissent from the *Thompson* case, he states that it "will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives." (p.

5) This reliance of election results as an indicator could be deemed a faulty representation of public opinion since the voter turnout in most elections hovers in the 25% range. Still, Scalia feels that this method has more validity than the views of Justices with a life long appointment.

Secondly, he feels that the Court has mistaken the view of those representatives. He makes the point that only 18 of the states, which is less than half of those that permit capital punishment, outlaw the practice. Also, only 7 of those 18 states outlaw the practice completely. Some however do allow certain exemptions that would make it possible for a mentally retarded person to receive the death penalty. Again, it is interesting that Scalia does not question whether there is public opinion on this issue, he just feels like the majority of the court is reading the public opinion wrong.

Next, he takes offense to the Courts assertion that the trend toward the abolition of the death penalty is a measure of a national consensus. This he feels is an erroneous assertion as well. "Given that 14 years ago all the death penalty statutes included the mentally retarded, any change (except precipitate undoing of what has just been done) was bound to be in the one direction the court

finds significant enough the lack of real consensus... In any event, reliance upon 'trends,' even those of much longer duration than a mere 14 years, is a perilous basis for constitutional adjudication..." (p. 8). In essence, he says that when something moves in the only way it can, is that a just indicator of a shift in public opinion or just natural regression towards the mean?

He makes an interesting attack on the Court's attempt to use margins in legislatures as a representation of public opinion. This, he says, is a weak argument because the percentage of votes for or against a bill does not reflect the total population at large. For example, the fact that 49% of the legislatures in a State with a population of 60 million voted against the bill should be more impressive than the fact that 90% of the legislators in a state with 2 million voted for it." (p. 10) This argument mirrors that of the larger states railing over the inequality of power that the small states had at the Constitutional convention over 200 years ago.

Scalia saves his most scathing critique of the Court's framework of public opinion for its inclusion of the views of various religious and professional organizations as well as those the "world community." He again quotes himself from the *Thompson* case, "We must never forget that it is a

Constitution for the United States of America that we are expounding... [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution." (p. 11,12)

Summary and Conclusion

One idea that the opinion of the Court shows is the willingness to override the opinion of state legislators in response to the "will of the people." This answers part of the question posed in the opening of this inquiry pertaining to the independence of the judiciary, but this case also represents a large assumption on behalf of the justices that proposes interesting problems for the future of the Court. All of the justices here seem to feel that public opinion is a real and tangible notion. All act under the belief that this concept is worthy enough to base an opinion of the court upon. What they do not agree on is the "yardstick" upon which public opinion will be measured.

Interestingly, none question the validity of the inclusion of public opinion as a means for deciding judicial cases. The dissents instead focus on the framework used by the Court to form a measurable public opinion. None

focus on the merits or pitfalls of the inclusion of public opinion. This will be an issue that the court will have to address in light of this decision.

It will be interesting to see if the the Court goes along with this opinion. Will future cases use an "Atkins" standard when judging cases? Will this standard accept the existence of public opinion or will the court devise a new standard to gauge public opinion? Or, will the Court reject the notion of public opinion as a means for deciding cases? If they do use *Atkins*, as a precedent for the inclusion of public opinion, what method will they use? Will it be Steven's categorization of the movement of states, his inclusion of polls, or the willingness to listen to the world community?

This case leaves many questions regarding the framework and application of public opinion. The court poses many of the questions that social scientists ask in their analysis of public opinion. Are the tools that the court uses good indicators of public opinion? Further research can be directed into these tools considering some of the arguments brought up by the dissent. Are these the best indicators of public opinion? If not, what indicators could the social scientists use to help the court in its conceptualization? Also, how do we apply public opinion to

our decision making process? The Court used public opinion as a large factor in its decision-making process. How is public opinion used in the decision-making process of the other branches of government? These are just a few of the many questions, which arise from this one seemingly obscure case.

CHAPTER 6

PUBLIC REACTION TO THE DECISION

The decision received a somewhat tepid reaction from media outlets and external sources across the country. The reaction varied almost as much as the opinions of the court.

The Medill School of Journalism at Northwestern University analyzes the Supreme Court's decisions annually. Their analysis pointed out the apparent contradiction in the decision of Sandra Day O'Connor, who wrote the majority opinion in *Penry* and now reversed course in siding with the majority on *Atkins*. They cite her lack of reliance on polls 13 years ago when she said "the public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values on which we rely." (Lobel, 2) Because of this, they question the logic leading to her reversal on the issue.

The *Washington Post*, in its analysis of the case, said that the court made its decision "amid an upsurge of public concern" on the subject. (Lane, A1) They never state where their source of public upsurge comes from. The *Post* also

printed an op/ed piece by Akhil Amar, a Yale Law professor, supporting the decision. In it, he states; "Finding ways to consult broader public sentiment when interpreting the Constitution is often a good thing..." (Amar, 3) The *Boston Globe* op/ed board agrees with this sentiment. They state that the Court's decision "to reverse itself and prohibit the execution of retarded people is a welcome indication that the justices listen to public opinion in an area of law where that should be an important factor." (A14) He does not explain the limitations to this application. He does not address the idea of public sentiment leading a Court. What if public opinion is for an issue that he does not agree with, would this willingness to listen to the public be tempered?

On the other side, the *San Francisco Chronicle* quotes a Vermont Law School professor who criticizes the decision by the court. "It looks like they're following the election returns. You can't make constitutional jurisprudence by Gallup Polls." (Egelko, A6) The *Wall Street Journal* editorial board agrees with him in an article called "The Supreme Court Pollsters." They claim that the "*Atkins* decision will make an American public already suspicious of the political nature of the judiciary all the more cynical." (A8)

Some have already used this opinion to suggest that the court readdress other areas where public opinion has shifted since a decision was made by the court. Deb Price, in the *Detroit News*, suggests "Having demonstrated a refreshing openness to being influenced by the values of a progressive society, the Supreme Court should search for a chance to rethink its definition to the right of privacy." She also quotes James Esseks of the ACLU in saying that "There is basis for the court to look around and say, the world has changed..." (Price).

It is still too early to properly gauge the reaction of the public at large about this decision. Many legislatures have not yet addressed the issue since many were awaiting the decision of the Court and only time will tell how far reaching this decision will be. The docket of the next few years' Court could be filled with cases citing public opinion and the ruling of *Atkins v. Virginia* as their precedent.

The current (2002) term of the Court addressed many cases that are considered "hot button" issues in public debate. Among them are affirmative action, gay rights, and cross burning. None of these decisions specifically mention public opinion like *Atkins*, but public opinion has played a role. The affirmative action case received a record number

of amicus briefs from interest groups on both sides of the debate. Editorials covering the cases pervaded newspapers across America and public opinion polling was conducted on every issue surrounding the cases. The debate did not end with the Court's rulings, but in many instances intensified once the decisions were published.

Some commentators suggest that the Court, although considered a conservative one, has shifted to the left of the public, taking a more liberal stance. "(Sandra Day) O'Connor or (Anthony) Kennedy, or both, join this liberal bloc often enough to put the Court consistently to the left of center of public opinion on the biggest social issues..." (Taylor Jr., 2003, p. 2154). A question for future research is to ask if the public shifted to the left and the Court is lagging behind as suggested by some political science scholars. Has the Court started a leftward shift and begun playing an agenda-setting role in the public debate?

Another aspect of this case that will be interesting for scholars to research is the overturning of precedent based on public opinion. Will the Court begin revisiting past cases based on a shift in public opinion since the original decision?

For now, all that is for sure is that Daryl Atkins is alive and that the law of the land states public opinion as a reason for this.

CHAPTER 7

CONCLUSION

In conclusion, this study has created a framework for analyzing public opinion. That framework consists of public opinion being conceptualized as an aggregation view, majoritarian view, elite/media view, group interest view, and finally the view of public opinion as fiction.

Based upon this conceptualization of public opinion, the relationship between public opinion and the death penalty was explored. The research showed that public opinion for the death penalty was somewhat ambiguous until the Furman decision in 1972. That decision caused a shift in public opinion in favor of the practice, which has continued to this day. Some suggest that the public opinion in favor of capital punishment is skewed due to a lack of proposed alternatives presented. They suggest that public opinion in favor of the death penalty would drop dramatically in light of these alternatives.

Next, the research showed that there is a connection between public opinion and the decisions made by the Supreme Court. Research indicates that the effect could be due to the change in composition of the Court, to the

appointment by a popularly elected President and confirmation by the Senate, as well as due to the fact that the justices are human and susceptible to outside sources.

What we see in the *Atkins* case is a Court that pays lip service to public opinion but cannot define the concept. Within the *Atkins* case, different models of public opinion are used to define opposite views within the same case. In one instance, public opinion is defined in the aggregation model as defined by public opinion polling. In another instance it is defined as the views of legislators. Public opinion is defined by interest groups such as religious and medical groups. The dissent assails all of these conceptualizations of public opinion in the case and even suggests that the public opinion that the majority uses as the reason for their decision does not exist.

All of the research I have conducted makes me speculate about Alexander Hamilton's idea of an independent judiciary. Has this design suffered irreconcilable harm? I doubt the Court ever served in the role that he envisioned or was his utopian ideal just a pipe dream. I question whether landmark cases such as *Brown v. Board of Education* would have ever reached their ultimate conclusions if the justices of that Court had looked to public opinion when

coming to their decisions instead of interpreting the Constitution as they saw fit.

This study has had a mixed effect on me personally. As a researcher, I had biases on the topic coming into the study. I would have identified myself as a death penalty supporter and an opponent of the inclusion on the judicial process. As a result of this inquiry, I have softened my views concerning the death penalty. I am now seeing the practice in a different light than before and question its validity as a punishment.

I can also see the use for well defined public opinion as an influence on Court proceedings as long as it is within well defined parameters. However, I do not have a problem with the inclusion of legislative action and interest groups with a bevy of scientific information on a topic weighing in on a decision. I believe that the elite should be listened to in cases of this magnitude. I do have a problem with the inclusion of poll numbers from an un-educated public being used as factors in what the highest Court in the land sees as their interpretation of the Constitution. The Court should not take the aggregation or majoritarian point of view into account when deciding on law and precedent.

In the end, what I think is of no consequence to Daryl Atkins and his appeal to the Supreme Court of the United States. His lawyers, armed with a multitude of research, polls and the opinions of interest groups from around the world, convinced six of the nine justices of the Supreme Court that he should not die for the crimes he committed and the public agreed.

REFERENCES

- Ajzen, I., & Fishbein, M. (1980). *Understanding attitudes and predicting social behavior* (Paperback ed.). Englewood Cliffs, N.J.: Prentice-Hall.
- Amar, A. R. (2002, June 30, 2002). Shouldn't we, the people, be heard more often by this high court. *Washington Post*, p. B3.
- Anchorage, J. C.-U. o. A. (2003). *History of the death penalty & recent developments*, from <http://www.uaa.alaska.edu/just/death/history.html>
- Atkins v. Virginia* (United States Supreme Court, 536 U.S. ____ 2002).
- Bernays, E. L. (1923). *Crystallizing public opinion*. New York,: Boni and Liveright.
- Board, E. (2002, June 21, 2002). Cruel and unusual. *Boston Globe*, p. A14.
- Board, E. (2002, June 21, 2002). The Supreme Court pollsters. *Wall Street Journal*, p. A8.
- Caldiera, G. (1991). Courts and public opinion. In J. Gates & C. Johnson (Eds.), *The American courts: A critical assesment* (pp. 303-334). Washington, DC: CQ Press.
- Conference, N. C. o. C. B. U. S. C. Execution of persons with mental retardation violates constitutional guarantee against cruel and unusual punishment, say Catholic conference, other religious groups (Vol. <http://www.usccb.org/comm/archives/2001/01-100.htm>).

- Egelko, B. (2002, June 30, 2002). Public opinion had role in court ruling on retarded; Limits on capital punishment linked to an evolving society. *San Francisco Chronicle*, p. A6.
- Erickson, R. J., & Simon, R. J. (1998). *The use of social science data in Supreme Court decisions*. Urbana: University of Illinois Press.
- Flemming, R., & Wood, B. D. (1997). The public and the Supreme Court: Individual justice responsiveness to American policy moods. *American Journal of Political Science*, 41(2), 468-498.
- Furman v. Georgia*, 408 U.S. 153 (United States Supreme Court, 408 U.S. 153 1972).
- Gallup. (2003). *Poll topic & trend - Death penalty*, from http://www.gallup.com/poll/topics/death_pen.asp?Version=p
- George, T., & Epstein, L. (1992). On the nature of Supreme Court decision making. *American Political Science Review*, 86(2), 323-337.
- Gibson, J. L., & Gouws, A. (2000). Social identities and political intolerance: linkages within the South African mass public. *American Journal of Political Science*, 44, 278-292.
- Glasser, T. L., & Salmon, C. T. (1995). *Public opinion and the communication of consent*. New York: Guilford Press.
- Glynn, C. J., Herbst, S., O'Keefe, G. J., & Shapiro, R. Y. (1999). *Public opinion*. Boulder, Colo.: Westview Press.
- Gross, S. (1998). Update: American public opinion on the death penalty - it's getting personal. *Cornell Law Review*, 84, 1448-1475.
- Hamilton, A., Madison, J., Jay, J., & Wills, G. (1983). *The Federalist papers*. New York, N.Y.: Bantam.

- Herbst, S. (1995). On the disappearance of groups. In T. L. Glasser & C. T. Salmon (Eds.), *The Guilford communication series* (pp. xxxiv, 475). New York: Guilford Press.
- Hugo, V. (1996). *The hunchback of Notre-Dame*. New York: Modern Library.
- Lane, C. (2002, June 21, 2002). Court bars execution of the mentally retarded. *Washington Post*, p. A1.
- Lippmann, W. (1925). *The phantom public*. New York,: Harcourt Brace.
- Lippmann, W. (1965). *Public opinion*. New York: Free Press.
- Lobel, H. (2001). A national consensus on executing the mentally retarded (Vol. <http://www.medill.northwestern.edu/docket/00-8452consensus.html>): Medill News Service.
- Lowell, A. L. (1914). *Public opinion and popular government* (New ed.). New York: Longmans Green.
- Marshall, T. R. (1989). *Public opinion and the Supreme Court*. Boston: Unwin Hyman.
- McCombs, M., & Shaw, D. (1972). The agenda setting function of the mass media. *Public Opinion Quarterly*, 36, 176-187.
- McGarrell, E., & Sandys, M. (1996). The misconception of public opinion toward capital punishment. *American Behavioral Scientist*, 39(4), 500-513.
- Mishler, W., & Sheehan, R. (1993). The Supreme Court as a countermajoritarian institution? The impact of public opinion on Supreme Court decisions. *American Political Science Review*, 87(1), 87-101.
- Mishler, W., & Sheehan, R. (1994). Popular influence on Supreme Court decisions: Response. *American Political Science Review*, 88(3), 716-724.

- Noelle-Neumann, E. (1995). Public opinion and rationality. In T. L. Glasser & C. T. Salmon (Eds.), *Public opinion and the communication of consent* (pp. 33-54). New York: Guilford Press.
- Norpoth, H., & Segal, J. (1994). Popular influence on Supreme Court decisions: Comment. *American Political Science Review*, 88(3), 711-716.
- Peters, J. D. (1995). Historical tensions. In T. L. Glasser & C. T. Salmon (Eds.), *The Guilford communication series* (pp. xxxiv, 475). New York: Guilford Press.
- Price, D. (2002). Death penalty ruling has ramifications (Vol. <http://detnews.com/2002/editorial/0207/01/a07-527272.htm>): Detroit News.
- Rehnquist, W. H. (1986). Constitutional law and public opinion. *Suffolk University Law Review*, 20, 751-769.
- Rehnquist, W. H. (2002). *The Supreme Court* (1st Vintage books ed.). New York: Vintage Books.
- Segal, J., & Cover, A. (1989). Ideological values and the votes of U.S. Supreme Court justices. *American Political Science Review*, 83(2), 557-565.
- Segal, J., Epstein, L., Cameron, C., & Spaeth, H. (1995). Ideological values and the votes of U.S. Supreme Court justices revisited. *The Journal of Politics*, 57(3), 812-823.
- Selznick, P. (1995). Defining democracy up. *Public Interest*, 119, 106-110.
- Sherman, S.J., Chassin, L., Presson, C.C., & Agostinelli, G. (1984). The role of evaluation and similarity principles in the false consensus effect. *Journal of Personality and Social Psychology*, 47, 1244-1262.
- Taylor, H. (2001). *The death penalty #41*, from http://www.harrisinteractive.com/harris_poll/printfr_iend.asp?PID=252

Taylor, H. (1998). *The Harris Poll #61*, from
http://www.harrisinteractive.com/harris_poll/index.asp?PID=146

Taylor Jr., S. (2003, July 5, 2003). Veering left: The art of judicial evolution. *National Journal*, 2154-2155.

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