

NO DEATH PENALTY FOR MENTALLY RETARDED

DARYL RENARD ATKINS, PETITIONER v. VIRGINIA

No. 00-8452

SUPREME COURT OF THE UNITED STATES

*536 U.S. 304; 122 S. Ct. 2242; 153 L. Ed. 2d 335; 2002 U.S. LEXIS 4648; 70
U.S.L.W. 4585; 2002 Cal. Daily Op. Service 5439; 2002 Daily Journal DAR 6937; 15
Fla. L. Weekly Fed. S 397*

February 20, 2002, Argued

June 20, 2002, Decided

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NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

SUBSEQUENT HISTORY: On remand at, *Remanded by Atkins v. Commonwealth, 2003 Va. LEXIS 71* (Va., June 6, 2003)

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA. *Atkins v. Commonwealth, 260 Va. 375, 534 S.E.2d 312, 2000 Va. LEXIS 111* (2000)

DISPOSITION: Reversed and remanded.

COUNSEL:

James W. Ellis, for the petitioner.

Pamela A. Rumpz, for the respondent.

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*307] reliability and fairness of capital proceedings against mentally retarded defendants. Presumably for these reasons, in the 13 years since we decided *Penry v. Lynaugh, 492 U.S. 302, 106 L. Ed. 2d 256, 109 S. Ct. 2934* (1989), the American public, legislators, scholars, and judges have deliberated over the question 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: whether such executions are

JUDGES: STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined.

OPINIONBY: STEVENS

OPINION: [****2244**] [*****341**] [***306**]

JUSTICE STEVENS delivered the opinion of the Court.

Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the

"cruel and unusual punishments" prohibited by the Eighth Amendment to the Federal Constitution.

I

Petitioner, Daryl Renard Atkins, was convicted of abduction, armed robbery, and capital murder, and sentenced to death. At approximately midnight on August 16, 1996, Atkins and William Jones, armed with a semiautomatic handgun, abducted Eric Nesbitt, robbed him of the money on his person, drove him to an automated teller machine in his pickup truck where

536 U.S. 304, *; 122 S. Ct. 2242, **;
153 L. Ed. 2d 335, ***; 2002 U.S. LEXIS 4648

cameras recorded their withdrawal of additional cash, then took him to an isolated location where he was shot eight times and killed.

Jones and Atkins both testified in the guilt phase of Atkins' trial. n1 Each confirmed most of the details in the other's account of the incident, with the important exception that each stated that the other had actually shot and killed Nesbitt. Jones' testimony, [***342] which was both more coherent and credible than Atkins', was obviously credited by the jury and was [**2245] sufficient to establish Atkins' guilt. n2 At the penalty [*308] phase of the trial, the State introduced victim impact evidence and proved two aggravating circumstances: future dangerousness and "vileness of the offense." To prove future dangerousness, the State relied on Atkins' prior felony convictions as well as the testimony of four victims of earlier robberies and assaults. To prove the second aggravator, the prosecution relied upon the trial record, including pictures of the deceased's body and the autopsy report.

n1 Initially, both Jones and Atkins were indicted for capital murder. The prosecution ultimately permitted Jones to plead guilty to first-degree murder in exchange for his testimony against Atkins. As a result of the plea, Jones became ineligible to receive the death penalty.

n2 Highly damaging to the credibility of Atkins' testimony was its substantial inconsistency with the statement he gave to the police upon his arrest. Jones, in contrast, had declined to make an initial statement to the authorities.

In the penalty phase, the defense relied on one witness, Dr. Evan Nelson, a forensic psychologist who had evaluated Atkins before trial and concluded that he was "mildly mentally retarded." n3 His conclusion was based on interviews with people who knew Atkins, n4 a review of school and court [*309] records, and the administration of a standard intelligence test which indicated that Atkins had a full scale IQ of 59. n5

n3 The American Association of Mental Retardation (AAMR) defines mental retardation as follows: "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the

following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992).

The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." *American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed. 2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id.*, at 42-43.

* * * *

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At the sentencing phase, Dr. Nelson testified: "[Atkins'] full scale IQ is 59. Compared to the population at large, that means less than one percentile Mental retardation is a relatively rare thing. It's about one percent of the population." App. 274. According to Dr. Nelson, Atkins' IQ score "would automatically qualify for Social Security disability income." *Id.*, at 280. Dr. Nelson also indicated that of the over 40 capital defendants that he had evaluated, Atkins was only the second individual who met the criteria for mental retardation. *Id.*, at 310. He testified that, in his opinion, Atkins' limited intellect had been a consistent feature throughout his life, and that his IQ score of 59 is not an "aberration, malingered result, or invalid test score." *Id.*, at 308.

536 U.S. 304, *; 122 S. Ct. 2242, **;
153 L. Ed. 2d 335, ***; 2002 U.S. LEXIS 4648

The jury sentenced Atkins to [***343]
death[.]

* * * *

[*310]

The Supreme Court of Virginia affirmed the imposition of the death penalty. 260 Va. 375, 385, 534 S.E.2d 312, 318 (2000). Atkins did not argue before the Virginia Supreme Court that his sentence was disproportionate to penalties imposed for similar crimes in Virginia, but he did contend "that he is mentally retarded and thus cannot be sentenced to death." *Id.*, at 386, 534 S.E.2d at 318. The majority of the state court rejected this contention, relying on our holding in *Penry*. 260 Va. at 387, 534 S.E.2d at 319. The Court was "not willing to commute Atkins' sentence of death to life imprisonment merely because of his IQ score." *Id.*, at 390, 534 S.E.2d at 321.

Justice Hassell and Justice Koontz dissented. They rejected Dr. Samenow's opinion that Atkins possesses average intelligence as "incredulous as a matter of law," and concluded that "the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 is excessive." *Id.*, at 394, 395-396, 534 S.E.2d at 323-324. In their opinion, "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." *Id.*, at 397, 534 S.E.2d at 325.

Because of the gravity of the concerns expressed by the dissenters, and in light of the dramatic shift in the state legislative landscape that has occurred in the past 13 years, we granted certiorari to revisit the issue that we first addressed in the *Penry* case. 533 U.S. 976, 150 L. Ed. 2d 805, 122 S. Ct. 24 (2001). [*311]

II

The Eighth Amendment succinctly prohibits "excessive" sanctions. It provides: "Excessive bail shall not be required, nor excessive [***344] fines imposed, nor cruel and unusual punishments inflicted." In *Weems v. United States*, 217 U.S. 349, 54 L. Ed. 793, 30 S. Ct. 544 (1910), we held that a punishment of 12 years jailed in irons at hard and painful labor for the crime of falsifying records was excessive. We explained "that it is a precept of justice that punishment

for crime should be graduated and proportioned to the offense." *Id.*, at 367. We have repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment. See *Harmelin v. Michigan*, 501 U.S. 957, 997-998, 115 L. Ed. 2d 836, 111 S. Ct. 2680 (1991) (KENNEDY, J., concurring in part and concurring in judgment); see also *id.*, at 1009-1011 (White, J., dissenting). n7 Thus, even [**2247] though "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual," it may not be imposed as a penalty for "the 'status' of narcotic addiction," *Robinson v. California*, 370 U.S. 660, 666-667, 8 L. Ed. 2d 758, 82 S. Ct. 1417 (1962), because such a sanction would be excessive. As Justice Stewart explained in *Robinson*: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.*, at 667.

n7 Thus, we have read the text of the amendment to prohibit all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.

A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in his opinion in *Trop v. Dulles*, 356 U.S. 86, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958): [HN4] "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the [*312] evolving standards of decency that mark the progress of a maturing society." *Id.*, at 100-101.

Proportionality review under those evolving standards should be informed by "objective factors to the maximum possible extent," see *Harmelin*, 501 U.S. at 1000 (quoting *Rummel v. Estelle*, 445 U.S. 263, 274-275, 63 L. Ed. 2d 382, 100 S. Ct. 1133 (1980)). We have pinpointed that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry*, 492 U.S. at 331. Relying in part on such legislative evidence, we have held that death is an impermissibly excessive punishment for the rape of an adult woman, *Coker v. Georgia*, 433 U.S. 584, 593-596, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (1977), or for a defendant who neither took life, attempted to take life, nor intended to take life, *Enmund v. Florida*, 458 U.S. 782, 789-793, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982). In *Coker*, we focused primarily on the then-recent legislation that had been enacted in response to

536 U.S. 304, *; 122 S. Ct. 2242, **;
153 L. Ed. 2d 335, ***; 2002 U.S. LEXIS 4648

our decision 10 years earlier in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) (*per curiam*), to support the conclusion that the "current judgment," though "not wholly unanimous," weighed very heavily on the side of rejecting capital punishment as a "suitable penalty for raping an adult woman." *Coker*, 433 U.S. at 596. [***345] The "current legislative judgment" relevant to our decision in *Enmund* was less clear than in *Coker* but "nevertheless weighed on the side of rejecting capital punishment for the crime at issue." *Enmund*, 458 U.S. at 793.

We also acknowledged in *Coker* that the objective evidence, though of great importance, did not "wholly determine" the controversy, "for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." 433 U.S. at 597. For example, in *Enmund*, we concluded by expressing our own judgment about the issue:

"For purposes of imposing the death penalty, *Enmund's* criminal *culpability* must be limited to his participation [*313] in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting *Enmund* to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts. This is the judgment of most of the legislatures that have recently addressed the matter, and we have no reason to disagree with that judgment for purposes of construing and applying the Eighth Amendment." 458 U.S. at 801 (emphasis added).

Thus, in cases involving a consensus, our own judgment is "brought to bear," *Coker*, 433 U.S. at 597, by asking whether there is reason to disagree with [**2248] the judgment reached by the citizenry and its legislators.

Guided by our approach in these cases, we shall first review the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded and then consider reasons for agreeing or disagreeing with their judgment.

III

The parties have not called our attention to any state legislative consideration of the suitability of imposing the death penalty on mentally retarded offenders prior to 1986. In that year, the public reaction to the execution of a mentally retarded murderer in Georgia n8 apparently led to the enactment [*314] of the first state statute prohibiting such executions. n9 In 1988,

when Congress enacted legislation reinstating the federal death penalty, it expressly provided that a "sentence of death shall not be carried out upon a person [***346] who is mentally retarded." n10 In 1989, Maryland enacted a similar prohibition. n11 It was in that year that we decided *Penry*, and concluded that those two state enactments, "even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus." 492 U.S. at 334.

* * * *

n11 Md. Ann. Code, Art. 27, § 412(f)(1) (1989).

Much has changed since then. Responding to the national attention received by the Bowden execution and our decision in *Penry*, state legislatures across the country began to address the issue. In 1990 Kentucky and Tennessee enacted statutes similar to those in Georgia and Maryland, as did New Mexico in 1991, and Arkansas, Colorado, Washington, Indiana, and Kansas in 1993 and 1994. n12 In 1995, when New York reinstated its death penalty, it emulated the Federal Government by expressly exempting the mentally retarded. n13 Nebraska followed suit in 1998. n14 There appear [*315] to have been no similar enactments during the next two years, but in 2000 and 2001 six more States -- South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina -- joined the procession. n15 The Texas Legislature unanimously adopted a similar [**2249] bill, n16 and bills have passed at least one house in other States, including Virginia and Nevada. n17

* * * *

It is not so much the number of these States that is significant, [***347] but the consistency of the direction of change. n18 Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the [*316] complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition. n19 Moreover, even in those States that allow the execution

536 U.S. 304, *; 122 S. Ct. 2242, **;
153 L. Ed. 2d 335, ***; 2002 U.S. LEXIS 4648

of mentally retarded offenders, the practice is uncommon. Some States, for example New Hampshire and New Jersey, continue to authorize executions, but none have been carried out in decades. Thus there is little need to pursue legislation barring the execution of the mentally retarded in those States. And it appears that even among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided *Penry*. n20 The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it. n21

* * * *

n21 *Additional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus. For example, several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender. See Brief for American Psychological Association et al. as Amici Curiae; Brief for AAMR et al. as Amici Curiae.* In addition, representatives of widely diverse religious communities 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." See Brief for United States Catholic Conference et al. as *Amici Curiae* in *McCarver v. North Carolina*, O. T. 2001, No. 00-8727, p. 2. Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O. T. 2001, No. 00-8727, p. 4. Finally, polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong. R. Bonner & S. Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, N. Y. Times, Aug. 7, 2000, p. A1; App. B to Brief for AAMR as *Amicus Curiae* in *McCarver v. North Carolina*, O. T. 2001, No. 00-8727 (appending approximately 20 state and national polls on the issue). Although these factors are by no means dispositive, their consistency with the

legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue. See *Thompson v. Oklahoma*, 487 U.S. 815, 830, 831, 101 L. Ed. 2d 702, 108 S. Ct. 2687, n. 31 (1988) (considering the views of "respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community").

[**2250] [*317]

* * * *

In light of these deficiencies, our death penalty jurisprudence provides [***349] two reasons consistent with the legislative consensus that the mentally retarded should be categorically excluded from execution. First, there is a serious question as to whether either justification that we have recognized as [*319] a basis for the death penalty applies to mentally retarded offenders. *Gregg v. Georgia*, 428 U.S. 153, 183, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976), identified "retribution and deterrence of capital crimes by prospective offenders" as the social purposes served by the death penalty. Unless the imposition of the death penalty on a mentally retarded person "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Enmund*, 458 U.S. at 798.

With respect to retribution -- the interest in seeing that the offender gets his "just deserts" -- the severity of the appropriate punishment necessarily depends on the culpability of the offender. Since *Gregg*, our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes. For example, in *Godfrey v. Georgia*, 446 U.S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759 (1980), we set aside a death sentence because the petitioner's crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." *Id.*, at 433. If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.

With respect to deterrence -- the interest in preventing capital crimes by prospective offenders --

536 U.S. 304, *; 122 S. Ct. 2242, **;
153 L. Ed. 2d 335, ***; 2002 U.S. LEXIS 4648

"it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation,'" *Enmund*, 458 U.S. at 799. Exempting the mentally retarded from that punishment will not affect the "cold calculus that precedes the decision" of other potential murderers. *Gregg*, 428 U.S. at 186. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded [*320] offenders. The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable -- for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses -- that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. [***350] Thus, executing the mentally retarded will not measurably further the goal of deterrence.

The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," *Lockett v. Ohio*, 438 U.S. 586, 605, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978), is enhanced, not only by the [**2252] possibility of false confessions, n25 but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and [*321] are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As *Penry* demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. 492 U.S. at 323-325. Mentally retarded defendants in the aggregate face a special risk of wrongful execution.

n25 See *Everington & Fulero* 212-213.
Despite the heavy burden that the prosecution must shoulder in capital cases, we cannot

ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated. As two recent high-profile cases demonstrate, these exonerations include mentally retarded persons who unwittingly confessed to crimes that they did not commit. See Baker, *Death-Row Inmate Gets Clemency; Agreement Ends Days of Suspense*, *Washington Post*, Jan. 15, 1994, p. A1; Holt & McRoberts, *Porter Fully Savors First Taste of Freedom; Judge Releases Man Once Set for Execution*, *Chicago Tribune*, Feb. 6, 1999, p. N1.

Our independent evaluation of the issue reveals no reason to disagree with the judgment of "the legislatures that have recently addressed the matter" and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender. *Ford*, 477 U.S. at 405.

The judgment of the Virginia Supreme Court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

536 U.S. 304, *; 122 S. Ct. 2242, **;
153 L. Ed. 2d 335, ***; 2002 U.S. LEXIS 4648

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[**2259] [***363] [*337]

JUSTICE SCALIA, with whom the CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

Today's decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence. Not only does it, like all of that jurisprudence, find no support in the text or history of the Eighth Amendment; it does not even have support in current social attitudes regarding the conditions that render [*338] an otherwise just death penalty inappropriate. Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members.

I

I begin with a brief restatement of facts that are abridged by the Court but important to understanding this case. After spending the day drinking alcohol and smoking marijuana, petitioner Daryl Renard Atkins and [***364] a partner in crime drove to a convenience store, intending to rob a customer. Their victim was Eric Nesbitt, an airman from Langley Air Force Base, whom they abducted, drove to a nearby automated teller machine, and forced to withdraw \$ 200. They then drove him to a deserted area, ignoring his pleas to leave him unharmed. According to the co-conspirator, whose testimony the jury evidently credited, Atkins ordered Nesbitt out of the vehicle and, after he had taken only a few steps, shot him one, two, three, four, five, six, seven, eight times in the thorax, chest, abdomen, arms, and legs.

The jury convicted Atkins of capital murder. At resentencing (the Virginia Supreme Court affirmed his conviction but remanded for resentencing because the trial court had used an improper verdict form, 257 Va. 160, 179, 510 S.E.2d 445, 457 (1999)), the jury heard extensive evidence of petitioner's alleged mental retardation. A psychologist testified that petitioner was mildly mentally retarded with an IQ of 59, that he was a "slow learner," App. 444, who showed a "lack of success in pretty much every domain of his life," *id.*, at 442, and that he had an "impaired" capacity to [**2260] appreciate the criminality of his conduct and to conform his conduct to the law, *id.*, at 453. Petitioner's family members offered additional evidence in support of his mental retardation claim (*e.g.*, that petitioner is a "follower," *id.*, at 421). The State contested the evidence of retardation and presented testimony of a psychologist who found "absolutely no evidence other than the IQ score . . . indicating that [petitioner] [*339] was in the least bit mentally retarded" and concluded that petitioner was "of average intelligence, at least." *Id.*, at 476.

The jury also heard testimony about petitioner's 16 prior felony convictions for robbery, attempted robbery, abduction, use of a firearm, and maiming. *Id.*, at 491-522. The victims of these offenses provided graphic depictions of petitioner's violent tendencies: He hit one over the head with a beer bottle, *id.*, at 406; he slapped a gun across another victim's face, clubbed her in the head with it, knocked her to the ground, and then helped her up, only to shoot her in the stomach, *id.*, at 411-413. The jury sentenced petitioner to death. The Supreme Court of Virginia affirmed petitioner's sentence. 260 Va. 375, 534 S.E.2d 312 (2000).

II

As the foregoing history demonstrates, petitioner's mental retardation was a *central issue* at sentencing. The jury concluded, however, that his alleged retardation was not a compelling reason to exempt him from the death penalty in light of the brutality of his crime and his long demonstrated propensity for violence. "In upsetting this particularized judgment on the basis of a constitutional absolute," the Court concludes that no one who is even slightly mentally retarded can have sufficient "moral responsibility to be subjected to capital punishment for any crime. As a sociological and moral conclusion that is implausible; and it is doubly implausible as an interpretation of the United States Constitution." *Thompson v. Oklahoma*, 487 U.S. 815, 863-864, 101 L. Ed. 2d 702, 108 S. Ct. 2687 [***365] (1988) (SCALIA, J., dissenting).

Under our Eighth Amendment jurisprudence, a punishment is "cruel and unusual" if it falls within one of two categories: "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted," *Ford v. Wainwright*, 477 U.S. 399, 405, 91 L. Ed. 2d 335, 106 S. Ct. 2595 (1986), and modes of punishment that are inconsistent with [*340] modern "standards of decency," as evinced by objective indicia, the most important of which is "legislation enacted by the country's legislatures," *Penry v. Lynaugh*, 492 U.S. 302, 330-331, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989).

The Court makes no pretense that execution of the mildly mentally retarded would have been considered "cruel and unusual" in 1791. Only the *severely* or *profoundly* mentally retarded, commonly known as "idiots," enjoyed any special status under the law at that time. They, like lunatics, suffered a "deficiency in will" rendering them unable to tell right from wrong. 4 W. Blackstone, Commentaries on the Laws of England 24

536 U.S. 304, *; 122 S. Ct. 2242, **;
153 L. Ed. 2d 335, ***; 2002 U.S. LEXIS 4648

(1769) (hereinafter Blackstone); see also *Penry*, 492 U.S. at 331-332 ("The term 'idiot' was generally used to describe persons who had a total lack of reason or understanding, or an inability to distinguish between good and evil"); *id.*, 492 U.S. at 333 (citing sources indicating that idiots generally had an IQ of 25 or below, which would place them within the "profound" or "severe" range of mental retardation under modern standards); 2 A. Fitz-Herbert, *Natura Brevium* 233B (9th ed. 1794) (originally published 1534) (An idiot is "such a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, etc., so as it may appear that he hath no understanding of reason what shall be for his profit, or what for his loss"). Due to their incompetence, idiots were "excused [**2261] from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses." 4 Blackstone 25; see also *Penry*, 492 U.S. at 331. Instead, they were often committed to civil confinement or made wards of the State, thereby preventing them from "going loose, to the terror of the king's subjects." 4 Blackstone 25; see also S. Brakel, J. Parry, & B. Weiner, *The Mentally Disabled and the Law* 12-14 (3d ed. 1985); 1 Blackstone 292-296; 1 M. Hale, *Pleas of the Crown* 33 (1st Am. ed. 1847). Mentally retarded offenders with less severe impairments -- those who were not "idiots" -- suffered criminal prosecution [*341] and punishment, including capital punishment. See, e.g., I. Ray, *Medical Jurisprudence of Insanity* 65, 87-92 (W. Overholser ed. 1962) (recounting the 1834 trial and execution in Concord, New Hampshire, of an apparent "imbecile" -- imbecility being a less severe form of retardation which "differs from idiocy in the circumstance that while in [the idiot] there is an utter destitution of every thing like reason, [imbeciles] possess some intellectual capacity, though infinitely less than is possessed by the great mass of mankind"); A. Highmore, *Law of Idiocy and Lunacy* 200 (1807) ("The great difficulty in [***366] all these cases, is to determine where a person shall be said to be so far deprived of his sense and memory as not to have any of his actions imputed to him: or where notwithstanding some defects of this kind he still appears to have so much reason and understanding as will make him accountable for his actions . . .").

The Court is left to argue, therefore, that execution of the mildly retarded is inconsistent with the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958) (plurality opinion) (Warren, C. J.). Before today, our opinions consistently emphasized that Eighth Amendment judgments regarding the existence of social "standards" "should be informed by objective factors to the maximum possible extent" and "should not be, or appear to be, merely the

subjective views of individual Justices." *Coker v. Georgia*, 433 U.S. 584, 592, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (1977) (plurality opinion); see also *Stanford*, *supra*, at 369; *McCleskey v. Kemp*, 481 U.S. 279, 300, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (1987); *Enmund v. Florida*, 458 U.S. 782, 788, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982). "First" among these objective factors are the "statutes passed by society's elected representatives," *Stanford v. Kentucky*, 492 U.S. 361, 370, 106 L. Ed. 2d 306, 109 S. Ct. 2969 (1989); because 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," *Thompson, supra*, at 865 (SCALIA, J., dissenting). [*342]

The Court pays lipservice to these precedents as it miraculously extracts a "national consensus" forbidding execution of the mentally retarded, *ante*, at 12, from the fact that 18 States -- less than *half* (47%) of the 38 States that permit capital punishment (for whom the issue exists) -- have very recently enacted legislation barring execution of the mentally retarded. Even that 47% figure is a distorted one. If one is to say, as the Court does today, that *all* executions of the mentally retarded are so morally repugnant as to violate our national "standards of decency," surely the "consensus" it points to must be one that has set its righteous face against *all* such executions. Not 18 States, but only seven -- 18% of death penalty jurisdictions -- have legislation of that scope. Eleven of those that the Court counts enacted statutes prohibiting execution of mentally retarded defendants *convicted after, or convicted of crimes committed after, the effective date* of the legislation; n1 those already on [**2262] death row, or consigned there before the statute's effective date, or even (in those [***367] States using the date of the crime as the criterion of retroactivity) tried in the future for murders committed many years ago, could be put to death. That is not a statement of absolute moral repugnance, but one of current preference between two tolerable approaches. Two of these States permit execution of the mentally retarded in other situations as well: Kansas apparently permits execution of all [*343] except the *severely* mentally retarded; n2 New York permits execution of the mentally retarded who commit murder in a correctional facility. N. Y. Crim. Proc. Law § 400.27(12)(d) (McKinney 2001); N. Y. Penal Law § 125.27 (McKinney 202).

* * * *

Moreover, a major factor that the Court entirely disregards is that the [***368] legislation of all 18 States it relies on is still in its infancy. The oldest of the

536 U.S. 304, *; 122 S. Ct. 2242, **;
153 L. Ed. 2d 335, ***; 2002 U.S. LEXIS 4648

statutes is only 14 years old; n3 five were enacted last [**2263] year; n4 over half were enacted within the past eight years. n5 Few, if any, of the States have had sufficient experience with these laws to know whether they are sensible in the long term. It is "myopic to base sweeping constitutional principles upon the narrow experience of [a few] years." *Coker*, 433 U.S. at 614 (Burger, C. J., dissenting); see also *Thompson*, 487 U.S. at 854-855 (O'CONNOR, J., concurring in judgment).

* * * *

The Court attempts to bolster its embarrassingly feeble evidence of "consensus" with the following: "It is not so much the number of these States that is significant, but the *consistency* of the direction of change." *Ante*, at 10 (emphasis added). But in what *other* direction *could we possibly* see change? Given that 14 years ago *all* the death penalty statutes included the mentally retarded, *any* change (except precipitate undoing of what had just been done) was *bound* [*345] *to be* in the one direction the Court finds significant enough to overcome the lack of real consensus. That is to say, to be accurate the Court's "*consistency-of-the-direction-of-change*" point should be recast into the following unimpressive observation: "No State has yet undone its exemption of the mentally retarded, one for as long as 14 whole years." In any event, reliance upon "trends," even those of much longer duration than a mere 14 years, is a perilous basis for constitutional adjudication, as JUSTICE O'CONNOR eloquently explained in *Thompson*:

"In 1846, Michigan became the first State to abolish the death penalty In succeeding decades, other American States continued the trend towards abolition Later, and particularly after World War II, there ensued a steady and dramatic decline in executions In the 1950's and 1960's, more States abolished or radically restricted capital punishment, and executions ceased completely for several years beginning in 1968"

In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional [***369] law,

making it difficult to refute and even more difficult to reject." 487 U.S. at 854-855.

Her words demonstrate, of course, not merely the peril of riding a trend, but also the peril of discerning a consensus where there is none. [*346]

The Court's thrashing about for evidence of "consensus" includes reliance upon the margins by which state legislatures have enacted bans on execution of the retarded. *Ante*, at 11. Presumably, in applying our Eighth Amendment "evolving-standards-of-decency" jurisprudence, we will henceforth weigh not only how many States have agreed, but how many States have agreed *by how much*. Of course if the percentage of legislators voting for the bill is significant, surely the number of people *represented* by the legislators voting for the bill is also significant: the fact that 49% of the legislators 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 [**2264] a state with a population of 2 million voted *for* it. (By the way, the population of the death penalty States that exclude the mentally retarded is only 44% of the population of all death penalty States. U.S. Census Bureau, Statistical Abstract of the United States 21 (121st ed. 2001).) This is quite absurd. What we have looked for in the past to "evolve" the Eighth Amendment is a consensus of the same sort as the consensus that *adopted* the Eighth Amendment: a consensus of the sovereign States that form the Union, not a nose count of Americans for and against.

* * * *

But the Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called "world community," and respondents to opinion polls. *Ante*, at 11-12, n. 21. I agree with the CHIEF JUSTICE, *ante*, at 4-8 (dissenting opinion), that the views of professional and religious organizations and the results of opinion polls are irrelevant. n6 Equally irrelevant are the practices of the [*348] "world community," whose notions of justice are (thankfully) not always those of our people. "We must never forget that it is a Constitution for the United States of America that we are expounding. . . . Where 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." *Thompson*,

536 U.S. 304, *; 122 S. Ct. 2242, **;
153 L. Ed. 2d 335, ***; 2002 U.S. LEXIS 4648

[**2265] 487 U.S. at 868-869, n. 4 (SCALIA, J., dissenting).

* * * *

III

Beyond the empty talk of a "national consensus," the Court gives us a brief glimpse of what really underlies today's decision: pretension to a power confined *neither* by the moral sentiments originally enshrined in the Eighth Amendment (its original meaning) *nor even* by the current moral sentiments of the American people. "The Constitution," the Court says, "contemplates that in the end *our own judgment* will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Ante*, at 7 (quoting *Coker*, 433 U.S. at 597) (emphasis added). (The unexpressed reason for this unexpressed "contemplation" of the Constitution is presumably that really good lawyers have moral sentiments superior to those of the common herd, whether in 1791 or today.) The arrogance of this assumption of power takes one's breath away. And it explains, of course, why the Court can be so cavalier about the evidence of consensus. It is just a game, after all. "In the end," it is the *feelings* and *intuition* of a majority of the Justices that count -- "the perceptions of decency, or of penology, or of [***371] mercy, entertained . . . by a majority of the small and [*349] unrepresentative segment of our society that sits on this Court." *Thompson*, 487 U.S. at 873 (SCALIA, J., dissenting).

The genuinely operative portion of the opinion, then, is the Court's statement of the reasons why it agrees with the contrived consensus it has found, that the "diminished capacities" of the mentally retarded render the death penalty excessive. *Ante*, at 13-17. The Court's analysis rests on two fundamental assumptions: (1) that the Eighth Amendment prohibits excessive punishments, and (2) that sentencing juries or judges are unable to account properly for the "diminished capacities" of the retarded. The first assumption is wrong, as I explained at length in *Harmelin v. Michigan*, 501 U.S. 957, 966-990, 115 L. Ed. 2d 836, 111 S. Ct. 2680 (1991) (opinion of SCALIA, J.). The Eighth Amendment is addressed to always-and-everywhere "cruel" punishments, such as the rack and the thumbscrew. But where the punishment is in itself permissible, "the Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions." *Id.*, at 990. The second assumption -- inability of judges or juries to take proper account of

mental retardation -- is not only unsubstantiated, but contradicts the immemorial belief, here and in England, that they play an *indispensable* role in such matters:

"It is very difficult to define the indivisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes . . ." 1 Hale, Pleas of the Crown, at 30.

Proceeding from these faulty assumptions, the Court gives two reasons why the death penalty is an excessive punishment for all mentally retarded offenders. First, the "diminished [*350] capacities" of the mentally retarded raise a "serious question" whether their execution contributes to the "social purposes" of the death penalty, viz., retribution and deterrence. *Ante*, at 13-14. (The Court conveniently ignores a third "social purpose" of the death penalty -- "incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future," *Gregg v. Georgia*, 428 U.S. 153, 183, n. 28, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) (joint [**2266] opinion of Stewart, Powell, and Stevens, JJ.). But never mind; its discussion of even the other two does not bear analysis.) Retribution is not advanced, the argument goes, because the mentally retarded are *no more culpable* than the average murderer, whom we have already held lacks sufficient culpability to warrant the death penalty, see *Godfrey v. Georgia*, 446 U.S. 420, 433, 64 L. Ed. 2d 398, 100 S. Ct. 1759 (1980) (plurality opinion). *Ante*, at 14-15. Who says so? Is there an established correlation between mental acuity and the ability [***372] to conform one's conduct to the law in such a rudimentary matter as murder? Are the mentally retarded really more disposed (and hence more likely) to commit willfully cruel and serious crime than others? In my experience, the opposite is true: being childlike generally suggests innocence rather than brutality.

* * * *

The Court throws one last factor into its grab bag of reasons why execution of the retarded is "excessive" in all cases: Mentally retarded offenders "face a special risk of wrongful execution" because they are less able "to make a persuasive showing of mitigation," "to give meaningful assistance to their counsel," and to be effective witnesses. *Ante*, at 16. "Special risk" is pretty flabby language (even flabbier than "less likely") -- and I suppose a similar "special risk" could be said to exist for just plain stupid people, inarticulate people, even ugly people. If this unsupported claim has any substance to it

536 U.S. 304, *; 122 S. Ct. 2242, **;
153 L. Ed. 2d 335, ***; 2002 U.S. LEXIS 4648

(which I doubt) it might support a due process claim in all criminal prosecutions of the mentally retarded; but it is hard to see how it has anything to do with an *Eighth Amendment* claim that execution of the mentally retarded is cruel and unusual. We have never before held it to be cruel and unusual punishment to impose a sentence in violation of some *other* constitutional imperative.

* * *

Today's opinion adds one more to the long list of substantive and procedural requirements impeding imposition of the death penalty imposed under this Court's assumed power to invent a death-is-different jurisprudence. None of those [*353] requirements existed when the Eighth Amendment was adopted, and some of them were not even supported by current moral consensus. They include prohibition of the death penalty for "ordinary" murder, *Godfrey*, 446 U.S. at 433, for rape of an adult woman, *Coker*, 433 U.S. at 592, and for felony murder absent a showing that the defendant possessed a sufficiently culpable state of mind, *Enmund*, 458 U.S. at 801; prohibition of the death penalty for any person under the age of 16 at the time of the crime, *Thompson*, 487 U.S. at 838 (plurality opinion); prohibition of the death penalty as the mandatory punishment for any crime, *Woodson v. North Carolina*, 428 U.S. 280, 305, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976) (plurality opinion), *Sumner v. Shuman*, 483 U.S. 66, 77, 97 L. Ed. 2d 56, 107 S. Ct. 2716-78 (1987); a requirement that the sentencer not be given unguided discretion, *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) (*per curiam*), a requirement that the sentencer be empowered to take into account all mitigating circumstances, *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978) (plurality opinion), *Eddings v. Oklahoma*, *supra*, at 110; and a requirement that the accused [***374] receive a judicial evaluation of his claim of insanity before the sentence can be executed, *Ford*, 477 U.S. at 410-411 (plurality opinion). There is something to be said for popular abolition of the death penalty; there is

nothing to be said for its incremental abolition by this Court.

* * * *

Perhaps these practical difficulties will not be experienced by the minority of capital-punishment States that have very recently changed mental retardation from a mitigating factor (to be accepted or rejected by the sentencer) to an absolute immunity. Time will tell -- and the brief time those States have had the new disposition in place (an average of 6.8 years) is surely not enough. But if the practical difficulties do not appear, and if the other States share the Court's perceived moral consensus that *all* mental retardation renders the death penalty inappropriate for *all* crimes, then that majority will presumably follow suit. But there is no justification for this Court's pushing them into the experiment -- and turning the experiment into a permanent practice -- on constitutional pretext. Nothing has changed the accuracy of Matthew Hale's endorsement of the common law's traditional method for taking account of guilt-reducing factors, written over three centuries ago:

"[Determination of a person's incapacity] is a matter of great difficulty, partly from the easiness of counterfeiting this disability . . . and partly from the variety of the degrees of this infirmity, whereof some are sufficient, and some are insufficient to excuse persons in capital offenses. . . .

"Yet the law of England hath afforded the best method of trial, that is possible, of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses . . . , and by the inspection and direction of the judge." 1 Hale, Pleas of the Crown, at 32-33.

I respectfully dissent.