Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Punishments/Capital Punishment

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

Daryl Atkins on August 16, 1996, kidnapped, robbed, and murdered Eric Nesbitt. At his capital murder trial, a defense expert testified that Atkins was mentally retarded and had an I.Q. of 59 (today, the defense expert would use the phrase "intellectually disabled"). The jury nevertheless found Atkins guilty and sentenced him to death. Atkins appealed that sentence to the Supreme Court of Virginia. He claimed the Eighth Amendment, as incorporated by the due process clause of the Fourteenth Amendment, forbade executing mentally retarded criminals. The Supreme Court of Virginia rejected his appeal, partly on the basis of Penry v. Lynaugh *(1989). Justice O'Connor's opinion for the court in that case found "insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment." Atkins asked the* Penry *be overruled when appealed the Virginia Supreme Court decision to the Supreme Court of the United States.*

The American Association on Mental Retardation, the American Psychological Association, the European Union, prominent career diplomats, many religious organizations, and prominent liberal public interest groups submitted amicus briefs urging the Supreme Court to declare unconstitutional executing the mentally retarded. The brief of the European Union asserted,

> *There is a growing international consensus against the execution of persons with mental retardation. The European Union invites this Court to join with it in condemning the practice of such executions. The EU as a whole bars the imposition of capital punishment in all circumstances, but more importantly, since 1995 only three countries in the world are reported to have carried out executions of mentally retarded defendants: Kyrgyzstan, Japan, and the United States. . . . The only jurisdictions in the Western Hemisphere permitting the execution of the mentally retarded are those U.S. states that continue to pursue death sentences irrespective of a defendant's mental retardation. Because of this growing consensus against the execution of the mentally retarded, it is likely that extradition to the United States of mentally retarded defendants accused of capital crimes increasingly will require assurances that the death penalty not be imposed.*

Several States and the Criminal Justice Legal Foundation filed amicus briefs urging the justices to permit Atkins to be executed. The brief for the Criminal Justice Legal Foundation maintained,

> *Engrafting a per se exemption from capital punishment for mental retardation on to the Eighth Amendment would reopen many old wounds inflicted during the development of death penalty jurisprudence. The current system already protects those for whom a death sentence would be clearly unjust, and, to the extent any further protection is needed, legislation specifying the standards and procedures in advance is a far preferable method for the law to develop in this area. A judicially crafted categorical exemption for capital punishment for those who successfully claim that they are mentally retarded is contrary to the interests of victims and society that the CJLF was formed to protect.*

The Supreme Court by a 6–3 vote reversed the Virginia Supreme Court. Justice Stevens's majority opinion held that the Eighth and Fourteenth Amendments prohibited states from executing persons with severe mental

disabilities. Justice Stevens reached this conclusion after finding a national consensus against such executions and determining that executing persons with severe mental disabilities was inconsistent with "the penological purposes served by the death penalty." What reasons did Justice Stevens give for reaching this conclusion? In particular, what did he believe changed in the thirteen years between Penry *and* Atkins*? Why did the dissenting justices disagree? Who had the better of the argument?*

JUSTICE STEVENS delivered the opinion of the Court.

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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* (1958): "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

Proportionality review under those evolving standards should be informed by "'objective factors to the maximum possible extent.'" We have pinpointed that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." . . .

[T]he 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." . . .

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. . . 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 who is mentally retarded." In 1989, Maryland enacted a similar prohibition. It was in that year that we decided [*Penry v. Lynaugh*, (1989)] 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."

Much has changed since then. . . . 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. In 1995, when New York reinstated its death penalty, it emulated the Federal Government by expressly exempting the mentally retarded. Nebraska followed suit in 1998. There appear 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. The Texas Legislature unanimously adopted a similar bill, and bills have passed at least one house in other States, including Virginia and Nevada.

It is not so much the number of these States that is significant, but the consistency of the direction of change. 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 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. . . . [I]n those States that allow the execution of mentally retarded offenders, the practice is uncommon. . . . The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.

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This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty. Additionally, it suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.

[C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that

became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

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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. . . . 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—"it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.'" Exempting the mentally retarded from that punishment will not affect the "cold calculus that precedes the decision" of other potential murderers. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded 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. . . .

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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.

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

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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. . . .

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." 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." "First" among these objective factors are the "statutes passed by society's elected representatives," 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."

The Court . . . miraculously extracts a "national consensus" forbidding execution of the mentally retarded 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. . . .

. . . How is it possible that agreement among 47% of the death penalty jurisdictions amounts to "consensus"? Our prior cases have generally required a much higher degree of agreement before finding a punishment cruel and unusual on "evolving standards" grounds. . . .

Moreover, a major factor that the Court entirely disregards is that the legislation of all 18 States it relies on is still in its infancy. The oldest of the statutes is only 14 years old; five were enacted last year; over half were enacted within the past eight years. 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."

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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." 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 to be* in the one direction the Court finds significant enough to overcome the lack of real consensus. . . .

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Even less compelling (if possible) is the Court's argument, *ibid.,* that evidence of "national consensus" is to be found in the infrequency with which retarded persons are executed in States that do not bar their execution. To begin with, what the Court takes as true is in fact quite doubtful. It is not at all clear that execution of the mentally retarded is "uncommon." . . . If, however, execution of the mentally retarded *is* "uncommon"; and if it is not a sufficient explanation of this that the retarded constitute a tiny fraction of society (1% to 3%),; then surely the explanation is that mental retardation is a constitutionally mandated mitigating factor at sentencing. For that reason, even if there were uniform national sentiment in *favor* of executing the retarded in appropriate cases, one would still expect execution of the mentally retarded to be "uncommon." n"[I]t is not only possible, but overwhelmingly probable, that the very considerations which induce [today's majority] to believe that death should *never* be imposed on [mentally retarded] offenders . . . cause prosecutors and juries to believe that it should *rarely* be imposed."

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"'[T]he 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.' " 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. " '

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. . . [T]he Court gives two reasons why the death penalty is an excessive punishment for all mentally retarded offenders. First, the "diminished 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. (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." 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. Who says so? Is there an established correlation between mental acuity and the ability 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.

Assuming, however, that there is a direct connection between diminished intelligence and the inability to refrain from murder, what scientific analysis can possibly show that a mildly retarded individual who commits an exquisite torture-killing is "no more culpable" than the "average" murderer in a holdup-gone-wrong or a domestic dispute? Or a moderately retarded individual who commits a series of 20 exquisite torture-killings? Surely culpability, and deservedness of the most severe retribution, depends not merely (if at all) upon the mental capacity of the criminal (above the level where he is able to distinguish right from wrong) but also upon the depravity of the crime-which is precisely why this sort of question has traditionally been thought answerable not by a categorical rule of the sort the Court today imposes upon all trials, but rather by the sentencer's weighing of the circumstances (both degree of retardation and depravity of crime) in the particular case. The fact that juries continue to sentence mentally retarded offenders to death for extreme crimes shows that society's moral outrage sometimes demands execution of retarded offenders. By what principle of law, science, or logic can the Court pronounce that this is wrong? There is none. Once the Court admits (as it does) that mental retardation does not render the offender morally *blameless,* there is no basis for saying that the death penalty is *never* appropriate retribution, no matter *how* heinous the crime. As long as a mentally retarded offender knows "the difference between right and wrong," only the sentencer can assess whether his retardation reduces his culpability enough to exempt him from the death penalty for the particular murder in question.

As for the other social purpose of the death penalty that the Court discusses, deterrence: That is not advanced, the Court tells us, because the mentally retarded are "less likely" than their non-retarded counterparts to "process the information of the possibility of execution as a penalty and . . . control their conduct based upon that information." . . . But surely the deterrent effect of a penalty is adequately vindicated if it successfully deters many, but not all, of the target class. Virginia's death penalty, for example, does not fail of its deterrent effect simply because *some* criminals are unaware that Virginia *has* the death penalty. In other words, the supposed fact that *some* retarded criminals cannot fully appreciate the death penalty has nothing to do with the deterrence rationale . . . .

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 *requirements existed when the Eighth Amendment was adopted, and some of them were not even supported by current moral consensus. . . . 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.