ATKINS v. VIRGINIA

SUPREME COURT OF THE UNITED STATES
536 U.S. 304
June 20, 2002
[6 - 3]

OPINION: Justice Stevens...**[M]entally retarded** persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities..., 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 reliability and fairness of capital proceedings against [them]. Presumably for these reasons, in the 13 years since we decided *Penry v. Lynaugh (1989)*[1], **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...[is that such executions are "cruel and unusual punishments."]

Daryl Renard Atkins was convicted of abduction, armed robbery, and capital murder, and sentenced to death...Atkins and William Jones, armed with a semi-automatic handgun, abducted Eric Nesbitt, robbed him of the money on his person, drove him to an **automated teller machine** in his pickup truck where 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...[agreed with] most of the details...of the incident, with the important exception

[1]Case 8A-CUP-17 on this website.

that each stated that the other had actually shot and killed Nesbitt. Jones' testimony, which was both more coherent and credible than Atkins', was obviously credited by the jury and was sufficient to establish Atkins' guilt. At the penalty 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...pictures of the deceased's body and the autopsy report.

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"...[with] a full scale IQ of 59.

The jury sentenced Atkins to death, but the Virginia Supreme Court ordered a second sentencing hearing because the trial court had used a misleading verdict form. At the re-sentencing, Dr. Nelson again testified. The State presented an expert rebuttal witness, Dr. Stanton Samenow, who expressed the opinion that Atkins was not mentally retarded, but rather was of "average intelligence, at least," and diagnosable as having antisocial personality disorder. The jury again sentenced Atkins to death.

...Atkins...contend[ed] "that he is mentally retarded and thus cannot be sentenced to death."... [R]elying on our holding in *Penry,* [t]he [Virginia Supreme] Court was "not willing to commute Atkins' sentence of death to life imprisonment merely because of his IQ score."

...**[I]n 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.

...A claim that punishment is excessive is judged not by the standards that prevailed in 1685...or when the Bill of Rights was adopted, but rather by those that currently prevail...*Trop v. Dulles*[2]...[In 1986,] the public reaction to the execution of a mentally retarded murderer in Georgia apparently led to the enactment of the first state statute prohibiting such executions. 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*, 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

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[2]Case 8A-CUP-5 on this website.

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**....[that] provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal...Moreover, even in those States that allow the execution of mentally retarded offenders, the practice is uncommon...[and, therefore,] **truly unusual...[I]t is fair to say that a national consensus has developed against it.**

Now that the High Court has determined what "*We, the People*" believe, I suppose there is no need to debate this issue in a Presidential or Congressional campaign.

To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded...Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus..."**[We leave that task to the States.]**

In other words, "we" do not define "mental retardation." "We" will let the states try their hand at doing so, then when a case reaches us, "we" will let them know if "they" got it right.

...The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," *Lockett v. Ohio*[3], is enhanced, not only by the possibility of false confessions, 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 are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes...Mentally retarded defendants in the aggregate face a special risk of wrongful execution.

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**

[3]Case 8A-CUP-14 on this website.

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

Chip, chip.

DISSENT: Chief Justice Rehnquist/Scalia/Thomas...**The question presented by this case is whether a national consensus deprives Virginia of the constitutional power to impose the death penalty on capital murder defendants...**who indisputably are competent to stand trial, aware of the punishment they are about to suffer and why, and whose mental retardation has been found an insufficiently compelling reason to lessen their individual responsibility for the crime. 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 Virginia continue to leave the question of proper punishment to the individuated consideration of sentencing judges or juries familiar with the particular offender and his or her crime.

I agree with Justice Scalia that the Court's assessment of the current legislative judgment... more resembles a *post hoc* rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency. I write separately...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. The Court's suggestion that these sources are relevant to the constitutional question...is **antithetical to considerations of federalism...**The Court's uncritical acceptance of the opinion poll data...warrants additional comment, because we lack sufficient information to conclude that the surveys were conducted in accordance with generally accepted scientific principles or are capable of supporting valid empirical inferences about the issue before us.

Hard to believe that this majority of the Supreme Court of the United States considers opinion polls at all, but much less without them having first been put through the test of cross-examination **in evidence** in the trial court.

...[W]e have emphasized that legislation is the "clearest and most reliable objective evidence of contemporary values" (*Penry v. Lynaugh (1989))...*And because the specifications of punishments are "peculiarly questions of legislative policy," **our cases have cautioned against using "the aegis of the Cruel and Unusual Punishment Clause" to cut off the normal democratic processes.** Our opinions have also recognized that data concerning the actions of sentencing juries..."is a significant and reliable index of contemporary values" because of the jury's intimate involvement in the case and its function of "maintaining a link between contemporary community values and the penal

system."...

In my view, these two sources...[legislation and jury sentences]...ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are...**better suited than courts** to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.

In reaching its conclusion today, the Court does not take notice of the fact that neither petitioner nor his *amici* have adduced any comprehensive statistics that would conclusively prove (or disprove) whether juries routinely consider death a disproportionate punishment for mentally retarded offenders like petitioner. Instead, it adverts to the fact that **other countries** have disapproved imposition of the death penalty for crimes committed by mentally retarded offenders. I fail to see... how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination...[I]f it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant...

To further buttress its appraisal of contemporary societal values, the Court marshals public opinion poll results and evidence that several professional organizations and religious groups have adopted official positions opposing the imposition of the death penalty upon mentally retarded offenders...In my view, none should be accorded any weight on the Eighth Amendment scale when 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 -- a punishment about which no across-the-board consensus has developed through the workings of normal democratic processes in the laboratories of the States...Looking at the polling data..., one cannot help but observe how unlikely it is that the data could support a **valid** inference about the question presented by this case...

DISSENT: Justice Scalia/Chief Justice Rehnquist/Thomas...Today's decision is the pinnacle of our Eighth Amendment **death-is-different** jurisprudence. Not only does it...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 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.**

...The jury convicted Atkins of capital murder...[and] heard extensive evidence of petitioner's alleged mental retardation...[which the State contested.] The jury also heard testimony about petitioner's **16 prior felony convictions** for robbery, attempted robbery, abduction, use of a firearm, and maiming. The victims of these offenses provided graphic depictions of petitioner's violent tendencies: He hit one over the head with a beer bottle; 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. The jury...concluded...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. [The Supreme Court of Virginia affirmed...]

[T]he 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."

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" and modes of punishment that are inconsistent with modern "standards of decency," as evinced by objective indicia, the most important of which is "legislation enacted by the country's legislatures." *Penry.*

The Court [realizes] that execution of the mildly mentally retarded would [not] 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...Due to their incompetence, idiots were "excused from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses." 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." Mentally retarded offenders with less severe impairments -- those who were not "idiots" -- suffered criminal prosecution and punishment, including capital punishment...

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*[4]. "First" among these objective factors...[is legislation] 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 pays lip service to these precedents as it 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. 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; those already on death row, or consigned there before the statute's effective date, or even (in those States using the date of the

[4]Case 8A-CUP-13 on this website.

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 except the *severely* mentally retarded; New York permits execution of the mentally retarded who commit murder in a correctional facility.

But let us accept, for the sake of argument, the Court's faulty count. That bare number of States alone -- *18* -- should be enough to convince any reasonable person that no "national consensus" exists. **How is it possible that agreement among 47% of the death penalty jurisdictions amounts to "consensus"?**...

The Court attempts to bolster its embarrassingly feeble evidence of "consensus" with the... "***consistency* of the direction of change**."...[R]eliance 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...
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> 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 law, making it difficult to refute and even more difficult to reject."

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.

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. 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 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.) 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.** Even less compelling (if possible) is the Court's argument 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...[E]ven 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." To adapt to the present case what the Court itself said in *Stanford:* "It 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."

But the Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal...to the views of assorted **professional and religious organizations**, members of the so-called "**world community**," and [responses] to **opinion polls**. I agree with the Chief Justice...that the views of professional and religious organizations and the results of opinion polls are irrelevant. Equally irrelevant are the practices of the "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." 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." **(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 mercy, entertained...by a majority of the small and unrepresentative segment of our society that sits on this Court."

When I started this journey in early 2005, I must say that I felt confident I would be able to back the Supreme Court far more than I am today. While it remains to be seen how I feel about the totality of their work and, still for the most part, I am supportive of it, I truly did not believe we would come upon cases of this nature. At the very beginning, I said the greatest attribute a judge can have is "humility." Unfortunately, I have to agree with Justice Scalia. The ARROGANCE of a majority of the Court in most of these relatively recent Eighth Amendment cases is shocking. It appears they have abused their power and created a definite imbalance among the three branches of government. Others may disagree.

...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*...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...

I am gaining a better understanding of Jefferson's quote that "a Democracy can never be ignorant and free." In this context, perhaps he meant that we must first educate ourselves and then be vigilant to preserve our freedoms. It appears this is an attempt to "chip away" at the "right to trial by jury." We cannot criticize the majority opinion until we understand it and the history of the Eighth Amendment.

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 capacities" of the mentally retarded raise a "serious question" whether their execution contributes to the "social purposes" of the death penalty – 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," *Gregg v. Georgia*[5]. 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

[5]Case 8A-CUP-11 on this website.

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...impose[d] 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...

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. They include prohibition of the death penalty for "ordinary" murder, *Godfrey,* for rape of an adult woman, *Coker,* and for felony murder absent a showing that the defendant possessed a sufficiently culpable state of mind, *Enmund*[6]*;* prohibition of the death penalty for any person under the age of 16 at the time of the crime, *Thompson*; prohibition of the death penalty as the mandatory punishment for any crime, *Woodson*[7]*;* a requirement that the sentencer not be given unguided discretion, *Furman,* a requirement that the sentencer be empowered to take into account all mitigating circumstances, *Lockett;* and a requirement that the accused receive a judicial evaluation of his claim of insanity before the sentence can be executed, *Ford*. **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.**

This newest invention promises to be more effective than any of the others in turning the process of capital trial into a game. One need only read the definitions of mental retardation adopted by the American Association of Mental Retardation and the American Psychiatric Association (set forth in the Court's opinion) to realize that the symptoms of this condition can readily be feigned. And whereas the capital defendant who feigns insanity risks commitment to a mental institution until he can be cured (and then tried and executed), *Jones v. United States,* the

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[6]Case 8A-CUP-15 on this website.

[7]Case 8A-CUP-12 on this website.

capital defendant who feigns mental retardation risks nothing at all. The mere pendency of the present case has brought us petitions by death row inmates claiming for the first time, after multiple habeas petitions, that they are retarded...

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...