SUPREME COURT OF THE UNITED STATES

No. 00–8452

DARYL RENARD ATKINS, PETITIONER *v.* VIRGINIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

[June 20, 2002]

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 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 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 learne[r]," 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 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] 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 (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 (1986), 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* v. *Lynaugh,* 492 U. S. 302, 330–331 (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 (1769) (hereinafter Blackstone); see also *Penry*, 492 U. S., at 331–332 ("[T]he 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.*, 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 "excuse[d] 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*, *supra*, at 331. Instead, they were often committed to civil confinement or made wards of the State, thereby preventing them from "go[ing] 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 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 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 (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 (1977) (plurality opinion); see also *Stanford*, *supra,* at 369; *McCleskey* v. *Kemp,* 481 U. S. 279, 300 (1987); *Enmund* v. *Florida,* 458 U. S. 782, 788 (1982). "First" among these objective factors are the "statutes passed by society's elected representatives," *Stanford* v. *Kentucky*, 492 U. S. 361, 370 (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).

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;[1] those already on death row, or consigned there before the statute's effective date, or even (in those 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 except the *severely* mentally retarded;[2] 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

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[1] See Ariz. Rev. Stat. Ann. §13–703.02(I) (Supp. 2001); Ark. Code Ann. §5–4–618(d)(1) (1997); *Reams* v. *State*, 322 Ark. 336, 340, 909 S. W. 2d 324, 326–327 (1995); Fla. Stat. §921.137(8) (Supp. 2002); Ga. Code Ann. §17–7–131(j) (1997); Ind. Code §35–36–9–6 (1998); *Rondon* v. *State*, 711 N. E. 2d 506, 512 (Ind. 1999); Kan. Stat. Ann. §§21–4623(d), 21–4631(c) (1995); Ky. Rev. Stat. Ann. §532.140(3) (1999); Md. Ann. Code, Art. 27, §412(g) (1996); *Booth* v. *State*, 327 Md. 142, 166–167, 608 A. 2d 162, 174 (1992); Mo. Rev. Stat. §565.030(7) (Supp. 2001); N. Y. Crim. Proc. Law §400.27.12(c) (McKinney Supp. 2002); 1995 Sess. N. Y. Laws, ch. 1, §38; Tenn. Code Ann. §39–13–203(b) (1997); *Van Tran* v. *State*, 66 S. W. 2d 790, 798–799 (Tenn. 2001).

[2] The Kansas statute defines "mentally retarded" as "having significantly subaverage general intellectual functioning . . . to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law." Kan. Stat. Ann. §21–4623(e) (2001). This definition of retardation, petitioner concedes, is analogous to the Model Penal Code's definition of a "mental disease or defect" excusing responsibility for criminal conduct, see ALI, Model Penal Code §4.01 (1985), which would not include mild mental retardation. Reply Brief for petitioner 3, n. 4.

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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"? Our prior cases have generally required a much higher degree of agreement before finding a punishment cruel and unusual on "evolving standards" grounds. In *Coker*, *supra,* at 595–596, we proscribed the death penalty for rape of an adult woman after finding that only one jurisdiction, Georgia, authorized such a punishment. In *Enmund*, *supra*, at 789, we invalidated the death penalty for mere participation in a robbery in which an accomplice took a life, a punishment not permitted in 28 of the death penalty States (78%). In *Ford*, 477 U. S., at 408, we supported the common-law prohibition of execution of the insane with the observation that "[t]his ancestral legacy has not outlived its time," since not a single State authorizes such punishment. In *Solem* v. *Helm,* 463 U. S. 277, 300 (1983), we invalidated a life sentence without parole under a recidivist statute by which the criminal "was treated more severely than he would have been in any other State." What the Court calls evidence of "consensus" in the present case (a fudged 47%) more closely resembles evidence that we found *inadequate* to establish consensus in earlier cases. *Tison* v. *Arizona,* 481 U. S. 137, 154, 158 (1987), upheld a state law authorizing capital punishment for major participation in a felony with reckless indifference to life where only 11 of the 37 death penalty States (30%) prohibited such punishment. *Stanford, supra,* at 372, upheld a state law permitting execution of defendants who committed a capital crime at age 16 where only 15 of the 36 death penalty States (42%) prohibited death for such offenders.

Moreover, a major factor that the Court entirely disre-

gards 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;[3] five were enacted last year;[4] over half were enacted within the past eight years.[5] 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 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,

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[3] Ga. Code Ann. §17–7–131(j).

[4] Ariz. Rev. Stat. Ann. §13–703.02; Conn. Gen. Stat. §53a–46a(h); Fla. Stat. Ann. §921.137; Mo. Rev. Stat. §§565.030(4)–(7); N. C. Gen. Stat. §15A–2005.

[5] In addition to the statutes cited n. 3 *supra*, see S. D. Codified Laws §23A–27A–26.1 (enacted 2000); Neb. Rev. Stat. §§28–105.01(2)–(5) (1998); N. Y. Crim. Proc. Law §400.27(12) (1995); Ind. Code §35–36–9–6 (1994); Kan. Stat. Ann. §21–4623 (1994).

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." 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.

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 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.

Even less compelling (if possible) is the Court's argument, *ante*, at 11, 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," *ibid.,* as even the sources cited by the Court suggest, see *ante,* at 11, n. 20 (citing D. Keyes, W. Edwards, & R. Perske, People with Mental Retardation are Dying Legally, 35 Mental Retardation (Feb. 1997) (updated by Death Penalty Information Center; available at http://www.advocacyone.org/deathpenalty.html) (June 12, 2002) (showing that 12 States executed 35 allegedly mentally retarded offenders during the period 1984–2000)). See also Bonner & Rimer, Executing the Mentally Retarded Even as Laws Begin to Shift, N. Y. Times, Aug. 7, 2000 p. A1 (reporting that 10% of death row inmates are retarded). *If*, however, execution of the mentally retarded *is* "uncommon"; and if it is not a sufficient explanation of this that the retarded comprise a tiny fraction of society (1% to 3%), Brief for American Psychological Association et al. as *Amici Curiae* 7; then

surely the explanation is that mental retardation is a constitutionally mandated mitigating factor at sentencing, *Penry*, 492 U. S., at 328. 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." To adapt to the present case what the Court itself said in *Stanford*, 492 U. S., at 374: "[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."

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.[6] 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. . . . [W]here there is not first a settled consensus among our

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[6] And in some cases positively counter-indicative. The Court cites, for example, the views of the United States Catholic Conference, whose members are the active Catholic Bishops of the United States. See *ante*, at 12, n. 21 (citing Brief for United States Catholic Conference et al. as *Amici Curiae* in *McCarver* v. *North Carolina*, O. T. 2001, No. 00–8727, p. 2). The attitudes of that body regarding crime and punishment are so far from being representative, even of the views of Catholics, that they are currently the object of intense national (and entirely ecumenical) criticism.

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*, 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. "'[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.'" *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. "[I]n 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." *Thompson, supra,* 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 (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, "[t]he 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:

> "[I]t 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 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

(1976) (joint 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 (1980) (plurality opinion). *Ante*, at 14–15. 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 princi-

ple 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*, *ante*, at 13–14, 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," *ante*, at 13, 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." *Ante*, at 15. Of course this leads to the same conclusion discussed earlier—that the mentally retarded (because they are less deterred) are more likely to kill—which neither I nor the society at large believes. In any event, even the Court does not say that *all* mentally retarded individuals cannot "process the information of the possibility of execution as a penalty and . . . control their conduct based upon that information"; it merely asserts that they are "less likely" to be able to do so. 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, but is simply an echo of the arguments denying a retribution rationale, discussed and rejected above. I am not sure that a murderer is

somehow less blameworthy if (though he knew his act was wrong) he did not fully appreciate that he could die for it; but if so, we should treat a mentally retarded murderer the way we treat an offender who may be "less likely" to respond to the death penalty because he was abused as a child. We do not hold him immune from capital punishment, but require his background to be considered by the sentencer as a mitigating factor. *Eddings* v. *Oklahoma,* 455 U. S. 104, 113–117 (1982).

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 (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 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 (1976) (plurality opinion), *Sumner* v. *Shuman,* 483 U. S. 66, 77–78 (1987); a requirement that the sentencer not be given unguided discretion, *Furman* v. *Georgia,* 408 U. S. 238 (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 (1978) (plurality opinion), *Eddings* v. *Oklahoma, supra,* at 110; and a requirement that the accused 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.

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, *ante,* at 2–3, n. 3) 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,* 463 U. S. 354, 370, and n. 20 (1983), the 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. See, *e.g.*, *Moore* v. *Texas*, 535 U. S. __ (2002) (SCALIA, J., dissenting from grant of applications for stay of execution).

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. . . .
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> "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.