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## Parsing Personal Predilections: A Fresh Look at the Supreme Court's Cruel and Unusual Death Penalty Jurisprudence

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# PARSING PERSONAL PREDILECTIONS: A FRESH LOOK AT THE SUPREME COURT'S CRUEL AND UNUSUAL DEATH PENALTY JURISPRUDENCE

*Susan M. Raeker-Jordan*

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## PARSING PERSONAL PREDILECTIONS: A FRESH LOOK AT THE SUPREME COURT'S CRUEL AND UNUSUAL DEATH PENALTY JURISPRUDENCE

Susan M. Raeker-Jordan\*

### I. INTRODUCTION

The now well-known case of *Atkins v. Virginia*<sup>1</sup> decided that the execution of those with mental retardation constituted cruel and unusual punishment under the Eighth Amendment.<sup>2</sup> The more recent case of *Roper v. Simmons*<sup>3</sup> decided that execution of those who were under the age of eighteen when they committed their crimes also constituted cruel and unusual punishment. Both decisions changed the law that had existed since 1989, when the Court held in *Penry v. Lynaugh*<sup>4</sup> and *Stanford v. Kentucky*<sup>5</sup> that executions of members of both classes were not unconstitutional.

Writing for the Court in *Atkins v. Virginia*, Justice Stevens was joined by Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer.<sup>6</sup> That the majority opinion

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\* Professor of Law, Widener University School of Law. The author would like to thank Professors Mary Kate Kearney and David Raeker-Jordan for their comments on drafts of this article. The author would also like to thank Sarah Brown for her excellent research assistance, Paula Heider for her characteristic pleasant and perfect clerical assistance, and the Widener University School of Law for research support in its preparation.

1. 536 U.S. 304 (2002). Much has been written about the *Atkins* decision. See, e.g., Bill Lockyer and Taylor S. Carey, *Capital Punishment and the Mentally Retarded: Implementing Atkins*, 15 STAN. L. & POL'Y REV. 329 (2004); Michael L. Perlin, "Life is in Mirrors, Death Disappears": Giving Life to Atkins, 33 N.M. L. REV. 315 (2003); Victor R. Scarano & Brian A. Liang, *Mental Retardation and Criminal Justice: Atkins, the Mentally Retarded, and Psychiatric Methods for the Criminal Defense Attorney*, 4 HOUS. J. HEALTH L. & POL'Y 285 (2004); Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293 (2003); Matthew C. Brewer, Note, *Constitutional Law: Broadening the Criteria for Defining Cruel and Unusual Punishment*, 55 FLA. L. REV. 731 (2003); Matthew Debbis, Note, *The Cruel and Unusual Punishment Clause of the Eighth Amendment Prohibits the Execution of Mentally Retarded Defendants: Atkins v. Virginia*, 41 DUQ. L. REV. 811 (2003); Joanna Hall, Comment, *Atkins v. Virginia: National Consensus or Six-Person Opinion?*, 12 AM. U.J. GENDER SOC. POL'Y & L. 361 (2004); Jaime L. Henshaw, Note, *Atkins v. Virginia: The Court's Failure to Recognize What Lies Beneath*, 37 U. RICH. L. REV. 1185 (2003); *The Supreme Court—Leading Cases*, 116 HARV. L. REV. 200, 220 (2002); Daniel Nickel, Comment, *Constitutional Law: Retarded Justice: The Supreme Court's Subjective Standards for Capital Punishment of the Mentally Retarded*, 56 OKLA. L. REV. 879 (2003); Note, *Implementing Atkins*, 116 HARV. L. REV. 2565 (2003); Lyndsey Sloan, Comment, *Evolving Standards of Decency: The Evolution of a National Consensus Granting the Mentally Retarded Sanctuary*, 31 CAP. U.L. REV. 351 (2003); Jennifer J. van Dulmen-Krantz, *The Changing Face of the Death Penalty in America: The Strengths and Weaknesses of Atkins v. Virginia and Policy Considerations for States Reacting to the Supreme Court's Eighth Amendment Interpretation*, 24 HAMLIN J. PUB. L. & POL'Y 185 (2002).

2. *Atkins v. Virginia*, 536 U.S. at 321. See U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

3. 125 S. Ct. 1183 (2005).

4. 492 U.S. 302 (1989).

5. 492 U.S. 361 (1989).

6. 536 U.S. at 305.

commanded the support of six justices and not the narrower five, as is often the case of late on the Rehnquist Court, was somewhat unexpected but not wholly surprising. The clear national trend and dialogue had tended toward expressing some discomfort with executing people with mental retardation. More and more legislatures were deciding to ban the execution of people with mental retardation and governors were signing the bills into law.<sup>7</sup> At the same time, more people were questioning the use of capital punishment at all,<sup>8</sup> since so many death row inmates had been exonerated either by DNA or other evidence.<sup>9</sup> A number of states imposed moratoria against executions because of the errors<sup>10</sup> and others empanelled commissions to study their systems.<sup>11</sup> In other decisions, too, such as *Ring v. Arizona*<sup>12</sup> and *Wiggins v. Smith*,<sup>13</sup> the Court surprised capital punishment watchers with rulings recognizing the primacy of jury determinations of fact in death penalty sentencing and uncommonly upholding an ineffective assistance of counsel claim regarding counsel's performance in the sentencing phase of a capital case.

The Court in *Roper v. Simmons* surprised again, in an opinion authored by Justice Kennedy and joined by Justices Stevens, Souter, Ginsburg, and Breyer.<sup>14</sup> The five-to-four decision in *Roper* employed the same Eighth Amendment tests as in *Atkins* and probably created as much of a stir as that case did.<sup>15</sup>

Of the recent decisions though, *Atkins* provides the best opportunity to revisit the Court's Eighth Amendment cruel and unusual punishment jurisprudence. It reversed the trend in those cases involving the categorical exemption of classes of offenders from eligibility for the death penalty.<sup>16</sup>

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7. There is at least one notable exception in Texas. There, both houses of the legislature had voted for a ban but Governor Rick Perry vetoed the bill when it reached his desk. *See id.* at 315 n.16.

8. According to the Death Penalty Information Center, public support for the death penalty has dropped considerably in the last several years, from approximately 80% in 1994 to approximately 64% in 2003. Richard C. Dieter, *Innocence and the Crisis in the American Death Penalty* (Sept. 2004), <http://www.deathpenaltyinfo.org/article.php?scid=45&did=1149#rn12> (last visited Oct. 13, 2005). In addition, "[t]here now exists a close split within the American public between the death penalty and life-without-parole sentences that has grown even narrower since the attacks of September 11." *Id.*

9. "Since the reinstatement of capital punishment in the 1970s, more than 110 individuals who were wrongly convicted and sentenced to death have been freed when persuasive evidence of innocence emerged, sometimes by means of DNA testing." Press Release, Senator Patrick Leahy, *Bipartisan Death Penalty Reform Bill Passes House Of Representatives By Overwhelming Majority* (Nov. 6, 2003), <http://www.leahy.senate.gov/press/200311/110603.html>.

10. *See, e.g.*, Dirk Johnson, *Illinois, Citing Verdict Errors, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1.

11. *See, e.g.*, *University Study Finds Race Disparities In Maryland's Administration of Death Penalty*, 71 U.S.L.W. 2455, Jan. 21, 2003 ("In September 2000, Maryland Governor Parris N. Glendening called for a comprehensive empirical review of the imposition of capital punishment in the state and imposed a moratorium on all executions until the completion of the study.").

12. 536 U.S. 584 (2002).

13. 123 S. Ct. 2527 (2003).

14. 125 S. Ct. 1183 (2005).

15. Because of *Atkins*, the decision in *Roper* may have been a bit more expected than *Atkins* itself was, and the *Roper* case comprises an interesting and rich set of opinions. The focus of this Article is on *Atkins*, however, and analysis of *Roper* and its impact on Eighth Amendment jurisprudence will be the subject of a future article.

16. The last decision to categorically exempt a class of offenders was *Thompson v. Oklahoma*, 487 U.S.

I have previously argued that the Court's "evolving standard of decency" test, the primary portion of the standard for judging the cruel and unusual nature of a punishment, is pro-death and self-fulfilling.<sup>17</sup> For that reason, the Court should not use it as the sole determinant of what is cruel and unusual in the death penalty context. Rather, I have argued that the Court must continue to bring its own judgment to bear on the question, above and beyond what is shown by the evolving standard. But some justices, most notably Justice Scalia, argue that such an approach injects the justices' personal preferences where they do not belong, into the constitutional determination.

A careful review of *Atkins* shows that Justice Scalia may be right, and that is part of the thesis of this Article. The majority opinion in *Atkins* and some of the majority justices' prior opinions arguably betray the injection of some personal views into the constitutional analysis. So perhaps Justice Scalia has a point after all. But Justice Scalia has a long paper trail of very strongly-worded opinions in this area of the law, and he wrote a stinging dissent in *Atkins*. Careful analysis of that dissent and portions of his other opinions allows one to charge justifiably that Justice Scalia is letting his personal predilections get the better of his constitutional reasoning as well.

If both of these lines of analysis are accurate and supportable—that both sides of the debate are injecting their views into the constitutional assessment of the death penalty—the next question becomes which of the two approaches should prevail. The answer to that question should ultimately depend on ideas about democratic values and the Court's role in constitutional adjudication.

Accordingly, this Article, in Part II, will briefly outline the Court's constitutional construct of the Eighth Amendment. It will also summarize this author's criticism of the evolving standards of decency test and why there is a need to go beyond that test in the cruel and unusual punishment analysis. The discussion will then turn to Justice Scalia's long-standing charge that going beyond the evolving standards test injects the justices' personal preferences into the constitutional analysis. Part III will then analyze the majority opinion in *Atkins* with an eye toward determining if Justice Scalia's charges of subjective judging by the majority are valid. But in the issue-by-issue analysis, a critical eye will also be cast onto Justice Scalia's approach to discover any personal predilections filtering into his Eighth Amendment analysis. Where pertinent, Part III will also interject aspects of the *Roper v. Simmons* opinions that support the same observations. Finally, given that personal preferences demonstrably enter into the Court's decision-making in this area, Part IV will suggest some considerations that should factor into a determination of which of the subjective approaches to Eighth Amendment analysis should prevail at the end of the day.

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815 (1988), and it exempted defendants who were fifteen years old or younger at the time of their crimes and did so with only a plurality. See *Roper v. Simmons*, 125 S. Ct. at 1196. Almost immediately thereafter, *Stanford* and *Penry* refused to exempt sixteen-to-seventeen year olds and those with mental retardation, respectively.

17. See Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court's Evolving Standard of Decency for the Death Penalty*, 23 HASTINGS CONST. L.Q. 455 (1996).

## II. EIGHTH AMENDMENT DEATH PENALTY JURISPRUDENCE

A. *The Basic Outline*

The Supreme Court has approached its Eighth Amendment decisions from both a substantive and a procedural perspective.<sup>18</sup> The Court has identified substantive limits on the death penalty, most notably identifying those classes of offenders that are exempt from it. It is mainly here, in deciding which classes of offenders may be put to death, where the Court has developed a test for cruelty and unusualness that relies heavily on the “evolving standards of decency” and its component “objective indicia.”<sup>19</sup> Under those indicia, the Court examines legislative judgments and jury decision-making<sup>20</sup> to peg the standard of decency at a particular evolutionary level; if the punishment at issue violates that evolving standard, then it will be deemed cruel and unusual. But the test has historically looked beyond the evolving decency standards to determine the cruel and unusual nature of the death penalty. The test has turned to ideas about penology and proportionality, considering the cruel and unusual nature of the death penalty imposed on a class of offenders by the penalty’s furtherance of deterrence and retribution and by its proportionality to the severity of the offender’s crime and to his culpability.<sup>21</sup> All of these analyses comprise the substantive aspect of the Eighth Amendment cruel and unusual punishment determination.

More practically, the second strand of the Court’s Eighth Amendment jurisprudence has focused on procedure: it has examined *how* the death penalty is imposed and seeks to ensure that it is not imposed in an arbitrary and capricious manner.<sup>22</sup> The Court has developed a complex jurisprudence in this regard, imposing procedural requirements that seek to ensure both uniformity (through consistency of application) and accuracy (achieved through individualization in sentencing).<sup>23</sup> But these two goals are arguably in tension. The Court has sought to achieve uniformity or consistency in application of the penalty through guided discretion, requiring that jurors’ discretion is “suitably directed and limited,”<sup>24</sup> most commonly by requiring jurors to find the

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18. These aspects of the Court’s doctrine are set forth in more detail in Raeker-Jordan, *supra* note 17, at 459-513.

19. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion).

20. *See id.* at 175, 181; *Woodson v. North Carolina*, 428 U.S. 280, 288, 293-95 (1976).

21. *See Gregg v. Georgia*, 428 U.S. at 173, 182-87. It is these factors that go into the Court’s own judgment on the Eighth Amendment questions.

22. *See id.* at 172 (recognizing “substantive limits imposed by the Eighth Amendment on what can be made criminal and punished” and the then-recent application of the Eighth Amendment to “procedures employed to select convicted defendants for the sentence of death” in *Furman v. Georgia*, 408 U.S. 238 (1972)); *see also id.* at 188 (stating that “*Furman* held that [the death penalty] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner”); *Walton v. Arizona*, 497 U.S. 639, 657-62 (1990) (Scalia, J., concurring in part and concurring in the judgment) (acknowledging that *Furman* began the development of the administration aspect of Eighth Amendment jurisprudence and sought to ensure that the death penalty was not inflicted in an arbitrary and capricious manner, and setting out some of the cases comprising this strand of the doctrine).

23. *See Walton v. Arizona*, 497 U.S. at 656-73 (Scalia, J., concurring in part and concurring in the judgment) (discussing the decisions and the development of the complex jurisprudence); *id.* at 714-19 (Stevens, J., dissenting) (discussing the same); *Callins v. Collins*, 510 U.S. 1141, 1143-59 (1994) (Blackmun, J., dissenting) (also discussing the same).

24. *Gregg v. Georgia*, 428 U.S. at 189.

existence of aggravating factors that are not vague or overbroad.<sup>25</sup> If the narrow aggravating factors are applied to all defendants, then uniformity of death sentences should be the result. Uniformity or consistency ensures that death sentences are not arbitrarily imposed and thus are not cruel and unusual.

At the same time, however, the Court has sought to achieve accuracy in sentencing through individualization, by providing the defendant the opportunity to introduce mitigating evidence or factors that may argue for a sentence less than death.<sup>26</sup> Here the defendant must be allowed to present to the jury a picture of himself as a unique human being, infused with the “diverse frailties of humankind.”<sup>27</sup> In this regard, the defendant can introduce, and have the jury consider and give effect to, anything relevant to his character and record and the circumstances of his offense.<sup>28</sup> This process is intended to ensure that the sentence imposed on the defendant is the one this defendant deserves, considering his character, his record, the circumstances of his offense, and the “diverse frailties” in him, as in all of us. This sort of accuracy or individualization in sentencing ensures, too, that death sentences are not arbitrarily imposed and thus are not cruel and unusual.<sup>29</sup>

Both substantive and procedural aspects of the Court’s jurisprudence seek to ensure that death sentences are not cruel and unusual. If the death sentence imposed on a member of a particular class does not offend the evolving standard, is proportional, and achieves penological goals, then it will not violate the Eighth Amendment. Likewise, if the procedure by which the defendant was sentenced to death fairly achieves the two goals of uniformity and accuracy, then the sentence will not violate the Eighth Amendment.

*B. Rigged: The Problems with the Evolving Standards of Decency Test for Cruel and Unusual Punishments Under the Eighth Amendment*

The substantive and procedural aspects of the Court’s doctrine are not separate. I have argued that, in fact, the Court’s decisions regarding procedure have impacted the substantive evaluation under the evolving standards test in a way that helps shape, if not determine, the outcome about the standard of decency.<sup>30</sup> A number of the Court’s decisions make it more likely for a jury to sentence a defendant to death, making the prong of the test that examines jury sentencing self-fulfilling, and certainly not “objective” on the question of the acceptability of death to juries.<sup>31</sup>

For example, the Court decided in *Payne v. Tennessee* that victim impact evidence is admissible in the sentencing phase of a capital case.<sup>32</sup> Whether the merits of the

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25. The Court recognized as early as *Gregg* the danger that vague aggravating factors may fail to limit the sentencer’s discretion. *See id.* at 195 n.46.

26. *Woodson v. North Carolina*, 428 U.S. at 303-04.

27. *Id.* at 304.

28. *Id.*

29. In recognizing that this individualization was necessary “for reliability in the determination that death is the appropriate punishment in a specific case,” *id.* at 305, a plurality opinion for the Court in *Woodson* anchored this necessity in the Eighth Amendment, *id.* at 304.

30. *See generally* Raeker-Jordan, *supra* note 17.

31. *See id.* at 513-46 for a full discussion of these arguments.

32. 501 U.S. 808, 825-27 (1991).

decision are right or wrong, one cannot deny that the admission of victim impact evidence is more likely to influence a jury to impose the death penalty by generating sympathy for the victim and the victim's survivors. The Court also decided in *Saffle v. Parks*<sup>33</sup> that states may instruct juries to "avoid any influence of sympathy" in their death penalty determinations.<sup>34</sup> Such an instruction on its own arguably neutralizes any sympathetic effect of mitigating evidence, which evidence the Court has said must be considered by the sentencer in individualizing the sentence. The anti-sympathy instruction may also therefore allow more focus on the aggravating evidence, making a death sentence then seem more likely. One could argue further that the victim impact evidence coupled with the anti-sympathy instruction tilts the sentencer's determination even more in favor of death.<sup>35</sup> The resultant death sentences from juries suggest that juries do not find the sentences repugnant to their sense of decency, and the evolving standard is influenced accordingly.

Still other procedural decisions influence jury decision-making toward death. The Court has allowed a state to use a broad, vague aggravating factor that could easily cover many defendants and thus sweep many more defendants into the death sentence net.<sup>36</sup> At the same time, the Court has tolerated states' limiting of mitigating evidence under the guise of guiding the sentencer's discretion as to that evidence.<sup>37</sup> Each of these trends alone is more likely to increase death sentences, but together they work an even stronger pro-death effect on sentencing determinations. Again, the resultant death sentences from juries appear to show jurors' acceptance of the sentences and set the level of decency accordingly.

Another procedural decision influencing jury decision-making concerns death qualification. The Court has approved the prosecution's striking of jurors for cause if a juror's views about the death penalty "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath,'" and therefore prevent his imposing death in a proper case.<sup>38</sup> Whether the death qualification decisions are constitutionally correct or not, the result is a jury devoid of people who are opposed to the death penalty or even have some scruples against it. What necessarily is then omitted from the data on jury decision-making is any anti-death penalty sentiment; the jury is comprised solely of people who favor or at least are not opposed to capital punishment. Decisions from death qualified juries therefore demonstrate only pro-death jurors' views and influence the standard of decency in a one-sided, pro-death manner.

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33. 494 U.S. 484 (1990).

34. *Id.* at 487 (quoting Appellate Record at 13).

35. See generally Markus Dirk Dubber, *Regulating the Tender Heart When the Axe is Ready to Strike*, 41 BUFF. L. REV. 85 (1993); see also Raeker-Jordan, *supra* note 17, at 514-21.

36. See *Arave v. Creech*, 507 U.S. 463, 471-76 (1993) (finding the aggravator's "utter disregard for human life" sufficiently narrowed to mean "cold-blooded, pitiless slayer," which in turn meant "kills without feeling or sympathy").

37. See *Johnson v. Texas*, 509 U.S. 350 (1993).

38. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). The death qualification decisions presuppose that there are proper cases for death sentences and that jurors opposed to the death penalty will simply buck what is right and fail to impose it in those proper cases. But any more detailed analysis of that issue is beyond the scope of this Article.

Because all of these decisions from the Court either influence jury decisions toward death sentences or omit anti-death penalty sentiment from those decisions, jury decision-making is not an entirely *objective* indicator of *society's* views about the propriety of the death penalty. Rather, and in fact, it appears to be a skewed-toward-death indicator of death penalty proponents' views. That component of the evolving standards test, then, is a questionable indicator of the societal level of decency regarding the death penalty.

The final piece of my criticism about the evolving standards test implicates the other "objective" indicator: legislative enactments. Some members of the Court would look only to death penalty states for the standard of decency, making the standard inherently pro-death.<sup>39</sup> Those Justices will not consider the fact that twelve states will not execute anyone. Whether there is some merit to that approach or not, the fact remains that the standard of decency reflected in non-death penalty states' rejection of the penalty in all cases would never make its way into the overall assessment of the level to which decency has evolved. This component, too, can be and has been skewed in a pro-death fashion.

For all of these reasons, I have argued that the evolving standards of decency test for cruel and unusual punishments is rigged toward death. Because it is capable of being and has been rigged, the evolving standards test cannot be the sole determinant of cruel and unusual punishments in this context.

*C. Venturing Beyond Evolving Standards and into the Court's "Own Judgment":  
The Necessity and the Danger*

The rigging of the evolving standards test demonstrates why, although it may be some indicator of society's level of decency regarding the death penalty, it should not be the sole consideration comprising the cruel and unusual punishment assessment. Currently, it appears that perhaps just a bare majority of the Justices, led by Justice Stevens, would routinely proceed beyond the evolving standards test to bring what they call their "own judgments" to bear on the Eighth Amendment question.<sup>40</sup> They engage in that exercise in large part by assessing the punishment's furtherance of the general goals of punishment; they determine whether executing a member of a particular class of offender advances the goals of retribution and deterrence. Simply put, for retribution, they decide whether the severity of the penalty matches the culpability of this

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39. See Raeker-Jordan, *supra* note 17, at 546-49 for a more detailed discussion of this argument.

40. Apart from Justice Stevens, Justice O'Connor has routinely gone beyond the evolving standards test to assess a death sentence's constitutionality and has expressed her view about the necessity of the further analysis. See *Stanford v. Kentucky*, 492 U.S. 361, 382 (1989) (O'Connor, J., concurring in part and concurring in the judgment); *Penry v. Lynaugh*, 492 U.S. 302, 335-36 (1989) (opinion of O'Connor, J.). The group applying the Court's "own judgment" now also includes newer Justices Souter, Ginsburg, and Breyer, all of whom joined the majority in *Atkins*. See *Atkins v. Virginia*, 536 U.S. 304, 305 (2002). Justice Kennedy joined these Justices on this doctrinal point in *Atkins*, but has usually not done so. See *Stanford v. Kentucky*, 492 U.S. at 363, 378 (Justice Kennedy joining Justice Scalia in stating that "we emphatically reject [the] suggestion that the issues in this case permit us to apply our 'own informed judgment'"); *Penry v. Lynaugh*, 492 U.S. at 350, 351 (Scalia, J., concurring in part and dissenting in part) (Justice Kennedy joining in Justice Scalia's statement that "I think this inquiry has no place in our Eighth Amendment jurisprudence").

defendant or the class of offender of which this defendant is a member, such that the death penalty is the person's just desserts.<sup>41</sup> For deterrence, the Justices decide whether the possibility of receiving the death penalty is likely to deter this defendant or the class of which this defendant is a member.<sup>42</sup> They also consider whether exemption of this class of offender from the death penalty will negatively impact the death penalty's deterrent effect on the general population.<sup>43</sup> I believe that these additional tests are necessary counterweights to the pro-death and self-fulfilling nature of the evolving standards of decency test.

But the danger is that Justices applying their "own judgments" in the way described above may in fact be infusing their Eighth Amendment analyses with their personal views on the death penalty. Perhaps the determination of whether the death penalty is a defendant's just desserts cannot help but be influenced by personal opinion; perhaps one could say the same about the assessment of the deterrent effect of the death penalty on a class of offender. In fact, three and perhaps four of the Justices, most vociferously Justice Scalia, oppose this "own judgment" assessment and rail against it for precisely the reason that the assessment is in their view influenced by personal opinion. Justice Scalia argues that members of (what I will call) the Justice Stevens faction are succumbing to their personal predilections on what should be not a subjective determination but a strict text-based, objective determination. The Justice Scalia cohort has therefore advocated stopping the cruel and unusual punishment analysis at the evolving standards of decency analysis, which those Justices view as being entirely objective.<sup>44</sup>

I have previously argued that the employment of the justices' own judgment does not inject the Justices' personal views but can be an objective assessment and is part of their constitutional duty to say what the law is. While the latter part of that statement may be true, the various aspects of the majority opinion in *Atkins v. Virginia* raise the possibility that as to the former portion of that statement, Justice Scalia's criticism may instead be accurate.<sup>45</sup> It is to the *Atkins* decision that this Article now turns.

### III. ATKINS AND THE BETRAYAL OF PERSONAL PREDILECTIONS

The *Atkins* Court's approach to the determination of what constitutes cruel and unusual punishment followed the approach used by the Court for decades.<sup>46</sup> It therefore serves well to illustrate in some depth not only the Court's Eighth Amendment evolving standard of decency analysis but also the application of its "own judgment"

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41. See *Gregg v. Georgia*, 428 U.S. 153, 183-84 (1976) (plurality opinion).

42. See *id.* at 184-86.

43. Retribution, deterrence, and proportionality were previously discussed in terms of their places in the Court's substantive Eighth Amendment analysis. See *supra* note 21 and accompanying text.

44. But in *Atkins*, Justice Scalia's objection was not only to the "own judgment" prong of the analysis but to the entire majority opinion: "Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members." *Atkins v. Virginia*, 536 U.S. at 338.

45. Other commentators have made a similar observation. See, e.g., Nickel, *supra* note 1, at 905-919; *Leading Cases*, *supra* note 1, at 230.

46. For example, the Court cited to *Weems v. United States*, 217 U.S. 349 (1910), *Trop v. Dulles*, 356 U.S. 86 (1958), and *Robinson v. California*, 370 U.S. 660 (1962) for the foundations of the doctrine. *Atkins v. Virginia*, 536 U.S. at 311.

to the issue and the vehement disagreement on the Court about that “own judgment” aspect of the doctrine.

In *Atkins*, the Court described the general Eighth Amendment inquiry variously as examining the “excessiveness” of a punishment,<sup>47</sup> its “proportionality” to the offense,<sup>48</sup> or the punishment’s cruel and unusual nature despite the lack of excessiveness.<sup>49</sup> In any case, the excessiveness, proportionality, or cruel and unusual nature of a punishment is judged in the first instance by the “‘evolving standards of decency that mark the progress of a maturing society.’”<sup>50</sup> The majority reasserted that the components of the evolving standards analysis are considered to be objective, adding that “the ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.’”<sup>51</sup> Although not relied upon by the majority, “data concerning the actions of sentencing juries” was mentioned by Chief Justice Rehnquist as another component of the evolving standards test.<sup>52</sup> Because these factors are seen as “objective,” all members of the Court again agreed that those are appropriate indicators of the current standard of decency in society and therefore comprise an appropriate test of constitutionality.<sup>53</sup> Members of the Court disagreed, however, about the application of the indicators and about whether other indications of decency may also inform the evolving standards determination.<sup>54</sup> Those disagreements will be examined in more detail in sections to follow.

Predictably, more heated disagreement arose over the “own judgment” step in the analysis.<sup>55</sup> But there are those who believe the Court’s job as interpreter of the

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47. *Atkins v. Virginia*, 536 U.S. at 311.

48. *Id.*

49. *Id.* at 311 n.7.

50. *Id.* at 312 (quoting *Trop v. Dulles*, 356 U.S. at 100-01).

51. *Id.* (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

52. *Id.* at 323 (Rehnquist, C.J., dissenting). Although this factor has long been acknowledged as a component of the evolving standards of decency, the majority in *Atkins* did not rely on it apparently because the defendant did not present statistics concerning the frequency of jury imposition of death sentences on offenders with mental retardation. *See id.* at 324. The one statement of the majority that may bear on the jury sentencing prong of the test is the following: “even in those States that allow the execution of mentally retarded offenders, the practice is uncommon. . . . 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*.” *Id.* at 316 (majority opinion). Otherwise, the majority made no attempt formally to base its evolving standards determination in part on jury sentencing behavior.

53. *See* the statements at *id.* at 311-12 (stating that excessiveness and “[p]roportionality review under those evolving standards should be informed by objective factors to the maximum possible extent” (internal quotations omitted)), in which Justices Stevens, O’Connor, Kennedy, Souter, Ginsburg, and Breyer joined; and *id.* at 339-40 (stating that a punishment is cruel and unusual if it falls within those “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’”), in which Justice Scalia, the Chief Justice, and Justice Thomas joined, *id.* at 321 (Scalia, J., dissenting) (internal citations omitted).

54. In dissent, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, criticized as “seriously mistaken” the majority’s “decision to place weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion” on the evolving standards of decency issue. *Id.* at 322, 328 (Rehnquist, C.J., dissenting).

55. *See id.* at 348-52 (Scalia, J., dissenting) (skewing the majority’s imposition of its “own judgment” on the Eighth Amendment question).

Constitution requires it to go beyond the so-called objective indicators reiterated in *Atkins* that “in cases involving a consensus, our own judgment is ‘brought to bear’ by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.”<sup>56</sup> Discussion of the various justices’ application of the two major components of the cruel and unusual punishments test—the “evolving standards of decency” and the Court’s “own judgment”—follows.

A. *The Evolving Standards of Decency Test*

1. *The Objective Evidence*

a. *Analyses of Majority and Dissent*

After setting out the full parameters of the test,<sup>57</sup> the Court began its analysis of the legislative enactments prong of the evolving standards test. Primarily because it saw a growing “procession”<sup>58</sup> of states that had enacted laws banning execution of people with mental retardation since the 1989 decision in *Penry*, the majority found enough legislative evidence of an evolving standard against such executions.<sup>59</sup> The final count was eighteen states and the federal government that had enacted bans. The Court did not, as it has in other decisions, include in the tally the non-death penalty states that do not execute anyone. The count would then have been thirty states and the federal government that do not execute people with mental retardation. The absence of those states’ inclusion in this portion of the Court’s analysis leaves open the question of the evidence’s relevance in future cases.<sup>60</sup> In any event, what the Court found significant was “not so much the number of these States . . . but the consistency of the direction of change.”<sup>61</sup> In light of the recent dominant legislative tendency to enact anti-crime rather than pro-criminal rights legislation, and in light of the “complete absence of States passing legislation reinstating the power to conduct . . . executions [of people with mental retardation],” the consistent adoption of this exemption demonstrated an evolving standard that would categorically exempt the class of people with mental retardation.<sup>62</sup>

But the majority added other reasons for its decision under this portion of its analysis. The Court found it significant that “the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition” and that “even in those States that allow the execution of mentally retarded offenders, the practice is uncommon.”<sup>63</sup> All of this evidence led the Court to the following conclusion: “The

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56. *Id.* at 313 (majority opinion) (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)) (internal citation omitted).

57. *See id.* at 311-13.

58. *Id.* at 315.

59. *Id.* at 316.

60. For a discussion of the appropriateness or not of including non-death penalty states in the calculation, see Raeker-Jordan, *supra* note 17, at 546-49.

61. *Atkins v. Virginia*, 536 U.S. at 315.

62. *Id.* at 316.

63. *Id.* It is not clear if the Court is discussing jury sentencing behavior, which is an acknowledged component of the evolving standards of decency analysis. *See supra* note 52. Rather, it may simply be noting what it sees as the infrequency of these executions and not discussing the separate issue of the

practice [of executing people with mental retardation], therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.”<sup>64</sup>

Justice Scalia in dissent, joined by Chief Justice Rehnquist and Justice Thomas,<sup>65</sup> leveled many criticisms at the majority’s opinion. Not confining his “personal predilections” criticism to the “own judgments” prong of the analysis, Justice Scalia began his dissent by charging that the Court’s entire opinion “rested so obviously upon nothing but the personal views of its members,”<sup>66</sup> and asserted again later that “[t]he Court pays lipservice to . . . precedents” that emphasize the objective nature of the evolving standards test.<sup>67</sup>

Chief Justice Rehnquist also attacked the majority’s evolving standards of decency analysis on that ground, asserting that “the Court’s assessment of the current legislative judgment regarding the execution of defendants like petitioner 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.”<sup>68</sup> Although the thesis of this Article focuses on whether personal views influence the cruel and unusual punishments determination through the “own judgments” prong of the test, clearly the dissenters are charging that those views also factor into the evolving standards of decency analysis. By making that charge in the manner that they do, however, the dissenters arguably betray their own personal predilections and how those predilections influence their analyses. Because of the dissent’s assault on the entire opinion, an issue-by-issue assessment of the case for the influence or personal predilections on either side is appropriate.

The dissenters first strongly disagreed with the Court’s conclusion that the tally of eighteen states plus the federal government demonstrated a level of consensus that should lead to the abolition of these executions on constitutional grounds. After all, Justice Scalia noted, “18 States [is] less than *half* (47%) of the 38 States that permit capital punishment . . .”<sup>69</sup> He cited other cases in which the Court found the level of consensus inadequate to mandate a ban; the numbers in those cases were similar to the 47% in *Atkins*.<sup>70</sup> Other cases have discerned consensus when all but one state banned the sentence, when 78% banned the sentence, and when all states banned the sentence.<sup>71</sup> And even the 47%, Justice Scalia says, is a “fudged 47%,”<sup>72</sup> because only seven states prohibit all executions of those with mental retardation; the other eleven states are prospective only, prohibiting only executions of offenders with mental

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numbers of people with mental retardation on death row generally, which would more accurately give an indication of jury sentencing behavior.

64. *Id.*

65. *Id.* at 337 (Scalia, J., dissenting).

66. *Id.* at 338.

67. *Id.* at 342.

68. *Id.* at 322 (Rehnquist, C.J., dissenting).

69. *Id.* at 342.

70. *Id.* at 343-44 (citing *Tison v. Arizona*, 481 U.S. 137, 153-54 (1987) (finding that 30% of states banning execution of the class was inadequate to show consensus); *Stanford v. Kentucky*, 492 U.S. 361, 372 (1989) (42% of states banning execution of the class inadequate to show consensus)).

71. *Cf. Atkins v. Virginia*, 536 U.S. at 343 (citing *Coker v. Georgia*, 433 U.S. 584, 595-96 (1977); *Enmund v. Florida*, 458 U.S. 782, 789 (1982); *Ford v. Wainwright*, 477 U.S. 399, 408 (1986)).

72. *Id.*

retardation who are “convicted after, or convicted of crimes committed after, the effective date” of the statute.<sup>73</sup> The legislation, therefore, did not show “absolute moral repugnance” but only a “current preference between two tolerable approaches.”<sup>74</sup> The dissenters also took issue with the Court’s consideration of the underlying legislative votes in the states with the exemption, finding it “absurd” that the Court would count the noses of legislators who voted in favor of the legislation.<sup>75</sup> Finally, in regard to the legislative evidence, Justice Scalia criticized what he called the Court’s “attempt[] to bolster its embarrassingly feeble evidence of ‘consensus’”: the Court’s “‘consistency of the direction of change’” point.<sup>76</sup> He assailed the majority’s reasoning with the following: “[I]n what *other* direction *could we possibly* see change? Given that 14 years ago *all* the death penalty statutes included the mentally retarded, *any* change . . . was *bound to be* in the one direction the Court finds significant enough to overcome the lack of real consensus.”<sup>77</sup> For this reason, and because the mental retardation legislation was fairly young (fourteen years), he saw no constitutional significance in either the numbers or the direction of change.<sup>78</sup>

Regarding the majority’s contention of execution infrequency even in states that have not barred execution of members of this class, Justice Scalia challenged the factual assertion that these executions are uncommon. He relied in part on evidence that some 10% of death row inmates are people with mental retardation.<sup>79</sup> But even assuming the majority was correct about infrequent death sentences for this group, Justice Scalia advanced two other reasons for that infrequency apart from an evolving consensus against the sentences: one was the small representation in society as a whole of people with mental retardation (which he cited as 1% to 3%), and the other was the requirement that mental retardation be considered a mitigating factor at sentencing.<sup>80</sup> “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.’”<sup>81</sup> But more importantly, again assuming execution infrequency of this class of offender, Justice Scalia challenged the more basic idea that infrequency of execution can indicate anything at all about decency standards. He repeated a statement he made in another case: “[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 . . .

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73. *Id.* at 342 (emphasis omitted).

74. *Id.*

75. *Id.* at 346. Justice Scalia argued that if individual legislative tallies were significant, then surely also significant would be “the number of people *represented* by the legislators voting for the bill . . .” The death penalty states that ban these executions comprise “only 44% of the population of all death penalty States.” *Id.* But reliance on this, too, he found absurd. *Id.*

76. *Id.* at 344-45.

77. *Id.*

78. *Id.*

79. *Id.* at 347.

80. *Id.* In 1989, the Court in *Penry v. Lynaugh* followed precedent concerning the jury’s consideration of mitigating evidence and required that evidence of mental retardation was a mitigating circumstance about which Texas, under its unique scheme, was constitutionally required to instruct the jury. 492 U.S. 302, 328 (1989).

81. *Atkins v. Virginia*, 536 U.S. at 347 (Scalia, J., dissenting).

cause prosecutors and juries to believe that it should *rarely* be imposed.”<sup>82</sup> He saw no tilt, therefore, toward a consensus for indecency from this evidence.

*b. Revelations of Personal Predilections*

In this dispute between the majority and Justice Scalia over the determination of the evolving standard of decency as gleaned from the legislative and sentencing evidence, one can see the seeds of the larger dispute: the role of the Court’s “own judgment” and the potential for personal predilections to sway the analysis. Even though the justices all agree that the components of the evolving standards test are objective, Justice Scalia is even here charging that the majority’s assessment of the objective evidence is skewed by the justices’ personal views—that their personal opposition to the death penalty for those with mental retardation colors their perceptions of the legislative tally and what it shows.<sup>83</sup> Among his arguments was the observation that, in the past, one needed to show that an overwhelming number of death penalty states had disallowed execution of members of the class. But in *Atkins*, the level of consensus represented by the pure numbers does seem to fall a bit short of what has been found sufficient consensus in the past, as Justice Scalia contended.<sup>84</sup> Further, how *can* the Court say that eighteen states find the execution of members of this class categorically indecent if some of them would still allow executions for those class members convicted before a certain date? The evidence is not as clear as the majority would suggest, so the question is what is leading the majority to put the gloss on the numbers? Perhaps it is simply the trend evidenced by the “procession” of states adopting a ban that persuaded the majority, but there is at least some valid question about the Court’s motives. It essentially has to hang its hat on the “consistency of the direction of change” argument, which in comparison to prior cases seems a slim reed.

The arguments about the execution infrequency also raise some questions about the majority’s analysis. If 10% of death row defendants are people with mental retardation, and if those people make up only 1% to 3% of the general population,<sup>85</sup> then the figures seem to suggest the opposite of what the majority gleans from the evidence; the numbers could suggest no hesitancy at all about executing members of this class. The majority’s potential fudging of the numbers here suggests that it may be reading the numbers to achieve the result that it wants, and the entirety of the majority’s analysis of the evolving standard seems to reflect a desire to exempt this class of defendants from the death penalty.

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82. *Id.* at 346 (quoting *Stanford v. Kentucky*, 492 U.S. 361, 374 (1989)).

83. Chief Justice Rehnquist stated explicitly that “I agree with Justice Scalia that the Court’s assessment of the current legislative judgment regarding the execution of defendants like petitioner 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.” *Id.* at 322 (Rehnquist, C.J., dissenting) (internal citation omitted).

84. See *supra* notes 70 and 71 and accompanying text.

85. The majority also indicated, as had Justice Scalia, that people whose IQ scores classify them as having mental retardation comprise approximately 1% to 3% of the population. *Atkins v. Virginia*, 536 U.S. at 309 n.5.

But a closer reading of Justice Scalia's criticism here also raises questions about motivation. While he may have a point about the "fudged 47%," his statement that the prospective ban evidences only a "current preference between two tolerable approaches" seems to be clear understatement. Justice Scalia leaves the impression that the legislatures that chose the prospective approach were persuadable either way, that execution or not of people with mental retardation were both tolerable approaches so those legislatures chose a middle road. But that view seems clearly wrong and misleading. True, some of those legislatures made the ban prospective, but they clearly intended there to be a ban. At some point in the not-too-distant future, *no one* with mental retardation will be executable in those states. It simply does not ring true that execution of people with mental retardation is viewed as tolerable in those states because at some point it will be outlawed in total. The question then is, if Justice Scalia is overstating the case for ambivalence, are his personal views influencing what can be argued as his crabbed interpretation of the legislative enactments? Certainly the case could be made that his analysis is not purely objective, either.

Justice Scalia's attack on the majority's "consistency of the direction of change" assessment also seems to miss the mark and betray his personal views. He argues that the direction of change argument is wholly without merit because any change would only be in the direction of exempting those with mental retardation anyway. He asserts that the states' serial exemptions show nothing, essentially, because the legislatures would not have done the opposite and explicitly included those with mental retardation within their legislation; those with mental retardation already were included in the general applicability statutes. But there is a flaw in this argument. It is entirely possible that a state that wished to ensure that it could continue to execute people with mental retardation would enact a statute making explicit that those people were intended to be eligible for the death penalty. A state may have taken such a step, especially in response to the 1989 decision in *Penry v. Lynaugh*,<sup>86</sup> in which the Court found no consensus *at that time* for a categorical exclusion of people with mental retardation. The evolving standards of decency test was no secret; nor was it a secret that the Court would look to legislative enactments for that standard of decency. A state could easily see that the *Penry* Court was counting legislative noses and that one state had exempted this class of defendants and another was about to do so. Had a state wanted to influence the standard of decency in another direction, it could have done so by specifically and explicitly including people with mental retardation within the scope of its death penalty statute.<sup>87</sup> The dissent's ignoring of this very real possibility, indeed, contending in essence that it would never happen, arguably reveals its bias.<sup>88</sup>

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86. 492 U.S. 302, 334 (1989).

87. Indeed, there recently was a similar, though not completely analogous, phenomenon with respect to the gay marriage bans. After the Massachusetts Supreme Court interpreted a marriage statute in a way some people opposed, many legislatures acted quickly to make it clear that their marriage statutes did not permit gay marriage. See Linda J. Lacey & D. Marianne Blair, *The Legislative Backlash to Advances in Rights for Same-Sex Couples: Symposium Foreword: Coping with the Aftermath of Victory*, 40 TULSA L. REV. 371, 373 (2005) ("It was inevitable that the court victories for gay marriage and the less heralded daily victories for gay acceptance in the popular culture would generate a backlash . . . Congress and the legislatures of the majority of American states have rushed to pass laws and promote constitutional amendments prohibiting gays from marrying.").

88. A stylistic observation could also be made about Justice Scalia's response to the consistency of

The second flaw in the criticism is much more basic: if one were to continue to respond to the legislative exemption of classes of offenders the way Justice Scalia does, then the legislative enactments prong of the evolving standards of decency test would be nullified. Presumably, and working from the assumption from which Justice Scalia is working, the extant death penalty statutes are ones of general applicability (assuming that at initial enactment they did not exempt any classes of offenders) and permit executions of members from all classes. In that case, in Justice Scalia's view, any exemption thereafter would show nothing about an evolving decency standard because that could be the *only* direction of change for that statute. Even if many states were to do it, he could still argue that the direction of change toward exemption is irrelevant and indicative of no evolving standard of decency. He seems unwilling to acknowledge changes against capital punishment as indicating an evolving standard of decency against the punishment. He further appears to believe that a state *could* only exempt classes of offenders once they have enacted any statute at all. But he ignored the most likely scenario: that a state could retain its statute just as it is. Because it could stay the same, the fact that the legislature has removed a class of offender from eligibility from the death penalty *is* significant, particularly in the face of a Supreme Court decision addressing the number of states with this very exemption. In failing to grant any significance to such a change, Justice Scalia removed any objectivity from the evolving standards of decency test and instead read evidence subjectively, with an eye toward refusing to find consensus against the punishment. It appears that nothing would convince him of a consensus against capital punishment.

Justice Scalia has approached and continues to approach jury sentencing statistics in much the same way. His dissent in *Atkins*, on the question of execution infrequency and what it shows, is illustrative. Although Justice Scalia has some valid criticisms of the majority approach to the relevant numbers, he has even less claim himself to a pure, preference-free interpretation. Execution infrequency shows, to him, simply that juries take their jobs very seriously and only sentence people with mental retardation to death when it is truly warranted.<sup>89</sup> We may never know whether juror care and seriousness in meting out the punishment are the reasons for the fewer numbers or whether an evolved sense of decency is the cause, but what seems clear is Justice Scalia's intent here to strip even the evolving standards "objective" test of any capacity to ever find a death sentence unconstitutional. In that intent one can see his personal views influencing his judging. He may fundamentally believe that the Constitution does not prohibit the death penalty under any circumstances, but he has said that he agrees that the evolving standards of decency is the proper test for making the constitutional determination. If so, jury sentencing is one of the recognized "objective" indicia and is meant to show by small numbers that fewer juries feel comfortable with these sentences. Yet Justice Scalia interpreted this indicator so narrowly that not only would

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change analysis. His arguably excessive use of italics, *see supra* note 77 and accompanying text, shows his anger at the majority's analysis and in that way appears to betray the injection of his own very personal (as opposed to legal/professional) views about the right outcome in this case.

89. It is a point he has made before. *See* *Stanford v. Kentucky*, 492 U.S. 361 (1989). But even if Justice Scalia is right on this point, then that still means that jurors are deciding that mental retardation *is* a mitigating factor in many cases, in turn proving the point that they have turned their faces against capital punishment for many members of this class.

it never show indecency (just seriousness of jury purpose), but it is also stripped of any objectivity. If small numbers can mean anything that he wants them to mean, rather than what that portion of the test was chosen to determine, then his is the ultimate in subjective judging because it turns an objective indicator into his own subjective assessment.<sup>90</sup> On this score, Justice Scalia's approach is just as subjective as that of any justice.

## 2. Other Indications of Decency Standards

Another aspect of the majority's and dissent's opinions concerns the valuation of another type of standard of decency evidence, in addition to the key categories of legislative enactments and jury sentencing behavior. In a footnote, the majority thought it worth mentioning four other categories of evidence. Introducing its point, the Court stated, "[a]dditional evidence makes it clear that this legislative judgment [against execution of people with mental retardation] reflects a much broader social and professional consensus."<sup>91</sup> In detailing that broader societal consensus, the Court noted that "several organizations with germane expertise," such as the American Psychological Association and the American Association on Mental Retardation, have adopted positions against these executions, as have "widely diverse religious communities" who filed briefs with the Court urging the ban on moral grounds.<sup>92</sup> In addition, the Court recognized the overwhelming disapproval of the world community on this issue and the apparent disapproval, based on polling data, of a widespread segment of the American public.<sup>93</sup>

Two points are worth noting here. First, the Court's use of this evidence is relegated to a footnote and limited to buttressing its conclusion from the legislative evidence. The Court indicated that "these factors are by no means dispositive" but are "consisten[t] with the legislative evidence" and therefore "lend[] further support to our conclusion that there is a consensus among those who have addressed the issue."<sup>94</sup> Whether these sorts of evidence should inform the analysis is a matter of debate, but if they should, one could argue that the majority here placed little reliance on them. Second, the Court has a long record of employing these indicators of decency, and if anything, the majority's relegation of them to a footnote appears aimed at dodging an unpleasant reaction from the dissent. The attempted dodge did not succeed,<sup>95</sup> and the dissent did not disappoint, delivering a strongly-worded rebuke to the majority for factoring these views into the evolving standards of decency.

Chief Justice Rehnquist, firing the first shot, addressed his entire dissent to this issue, arguing that:

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90. This subjective judging may be worse, because Justice Scalia affirmatively and misleadingly cloaks his subjective analysis in objective language, while the majority does not.

91. *Atkins v. Virginia*, 536 U.S. at 316 n.21.

92. *Id.* (citing briefs of American Psychological Association and the American Association on Mental Retardation as amici curiae).

93. *Id.* (citing brief for European Union as amicus curiae).

94. *Id.*

95. For Chief Justice Rehnquist's dissent, see *id.* at 324-28 (Rehnquist, C.J., dissenting) and for Justice Scalia's dissent, see *id.* at 347-48 (Scalia, J., dissenting).

the work product of legislatures and sentencing jury determinations . . . ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values firmly supported by our precedents. More importantly, however, they can be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.<sup>96</sup>

First, one can quibble with the Chief Justice about what it is to be “firmly supported” by precedent and whether there is “firm support” for employing other indicia of contemporary standards. One can quite strongly argue that there is indeed firm support in precedent for the views of the international community and professional organizations; the Court has considered such evidence for some time and in many cases.<sup>97</sup> The Chief Justice contended there had already been an explicit and “sound rejection”<sup>98</sup> of the employment of international opinion for evolving standards of decency purposes in *Stanford v. Kentucky*.<sup>99</sup> But this aspect of *Stanford* garnered a bare five-member majority and seems to have been the first opinion for the Court explicitly to reject this type of evidence.

The Court has not reiterated any rejection of this evidence but in fact at least partially re-embraced it in *Atkins*’ six-member majority opinion. Notably, Justices O’Connor and Kennedy joined the *Atkins* consideration of this evidence despite their joining of the majority rejecting it in *Stanford*. This latter fact seriously undermines Chief Justice Rehnquist’s contention that *Stanford* contained a “sound rejection” of this other evidence.<sup>100</sup>

Justice Scalia’s dissenting opinion, perhaps more colorfully, also took the *Atkins* majority to task for reliance on this extra evidence. His less-than-scholarly assault began and ended with his award to the Court of “the Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus.’”<sup>101</sup> Justice Scalia deemed these other sources of decency standards simply “irrelevant.”<sup>102</sup>

One may speculate that a major factor in the Chief Justice’s and Justice Scalia’s rejection in particular of international opinion evidence is that evidence’s testament to a rejection of capital punishment in almost all of the western world, if not almost all of the world. That assertion may appear to be a stretch, but when these justices’ approach is considered as a whole, one suspects that as much anti-death penalty

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96. *Id.* at 324 (Rehnquist, C.J., dissenting).

97. See Raeker-Jordan, *supra* note 17, at 485 n.156.

98. *Atkins v. Virginia*, 536 U.S. at 325.

99. 492 U.S. 361, 369 n.1 (1989) (“We . . . reject[] the contention of petitioners . . . that the sentencing practices of other countries are relevant.”). Justice Scalia wrote Part II of the opinion of the Court, which was joined by Chief Justice Rehnquist and Justices O’Connor, White, and Kennedy. *Id.* at 363.

100. Justice O’Connor did not join the portion of *Stanford* in which Justice Scalia, the Chief Justice, and Justices White and Kennedy rejected the consideration of “other indicia, including public opinion polls, the views of interest groups, and the positions adopted by various professional associations.” *Id.* at 377.

101. *Atkins v. Virginia*, 536 U.S. at 347.

102. *Id.*

sentiment as possible is excluded somehow by the analysis, through employment of one device or another. In rejecting the evidence of international opinion, Chief Justice Rehnquist and Justice Scalia have often made the point that “[i]n determining what standards have ‘evolved,’ . . . we have looked not to our own conceptions of decency, but to those of modern American society as a whole.”<sup>103</sup> They have further “emphasize[d] that it is *American* conceptions of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant. . . . [The practices of other countries] cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.”<sup>104</sup> At first blush, the argument seems sound: if it is the *American* Constitution that the Court is interpreting, and if the cruel and unusual punishments clause in that *American* document calls for some assessment of standards of decency, then those standards would be American standards. The problem is that the Justice Scalia faction of the Court does not look to the “conceptions of decency . . . of modern American society as a whole”<sup>105</sup> as it purports to do, but rather confines its determination of decency to American death penalty states. It is the death penalty states’ conceptions of decency that they find utterly controlling on these decency questions. In fact, that segment of the Court looks to *no other sources* than those that favor capital punishment. There is no source among the ones they would consider that shows any opposition to the death penalty.<sup>106</sup> When viewed in that light, Justice Scalia’s and Chief Justice Rehnquist’s rejection of international opinion evidence seems driven at least in part by personal predilections and predetermined outcomes.

Scrutiny of both the majority opinion and the dissenting opinions on the “evolving standards of decency” permits the assertion that personal views are factoring into both sides’ opinions. Nonetheless, Justice Scalia saved his most scathing criticism for the Court’s “own judgments”<sup>107</sup> prong of the test. He continues to agree that at least the evolving standards of decency aspect of the Eighth Amendment cruel and unusual punishments test is part of a proper test. Because he believes that the “own judgments” prong is simply personal views and nothing else, it has no place in the constitutional assessment. It is appropriate to turn now to that portion of the majority opinion that raises most the ire of the dissent.

### *B. Beyond Evolving Standards—The Court’s “Own Judgment”*

#### *I. Analyses of Majority and Dissent*

The next step the majority took in *Atkins* consisted of the Court applying its “own judgment” to the question of the constitutionality of the death penalty in this case. It said, “the objective evidence, though of great importance, d[oes] not ‘wholly

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103. *Stanford v. Kentucky*, 492 U.S. at 369.

104. *Id.* at 369 n.1.

105. *Id.* at 369.

106. Even those sources such as jury sentencing behavior that may evidence some disfavor with the death penalty for a certain class are shunted aside by these justices’ reasoning; evidence of infrequent imposition of the sentence by the jury is transformed from disfavor into utmost care with its imposition. *See supra* notes 82 and 89 and accompanying text.

107. *Atkins v. Virginia*, 536 U.S. at 313.

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.'"<sup>108</sup> The Court explained further: "Thus, in cases involving a consensus, our own judgment is 'brought to bear' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators."<sup>109</sup> Typically, this approach has required an inquiry into the penological justification for the punishment and into its proportionality to the severity of the crime, which assessment factors in the defendant's blameworthiness or personal culpability.<sup>110</sup> Essentially, the Court considers the legislative evidence a demonstration of states' views regarding the penological purposes of the penalty and the culpability of the offender, but the Court examines these factors independently for confirmation that the national consensus is supportable.<sup>111</sup>

The Court in *Atkins* focused mainly on the penological justification issues as applied to people with mental retardation. The Court explained,

*Gregg v. Georgia* 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."<sup>112</sup>

The first reason that the Court upheld what it viewed as the "legislative consensus that the mentally retarded should be categorically excluded from execution,"<sup>113</sup> then, involved the goals of retribution and deterrence.

It was important for the Court first to recall the clinical definitions of mental retardation, and so the characteristics of people who fit within those definitions, that it had cited at the outset of the case. The definitions were those of the American Association of Mental Retardation (AAMR)<sup>114</sup> and the American Psychiatric

108. *Id.* at 312 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

109. *Id.* at 313 (quoting *Coker v. Georgia*, 433 U.S. at 597).

110. *See, e.g.*, *Gregg v. Georgia*, 428 U.S. 153, 173, 182-87 (1976) (plurality opinion).

111. *See Atkins v. Virginia*, 536 U.S. at 317 ("The [legislative] 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.").

112. *Id.* at 319 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (opinion of J.J. Stewart, Powell, and Stevens) and *Enmund v. Florida*, 458 U.S. 782, 798 (1982)) (citations omitted).

113. *Id.* at 318.

114. *See* MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992). The Court quoted the AAMR definition 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.

*Atkins v. Virginia*, 536 U.S. at 309 n.3.

Association (APA)<sup>115</sup> and were very similar. The Court reasoned from these definitions and from scholarly writings that:

[B]y definition [people within this class] 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. . . . [T]here 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 . . . diminish their personal culpability.<sup>116</sup>

With those observations, the Court engaged in its own analysis of the excessiveness of the death penalty for people with mental retardation.

Under the retribution analysis, the Court evaluates whether the culpability of the offender is sufficient to warrant this most severe penalty; only after answering that question can we know whether we are serving the retributive goal of punishment, giving the offender what he deserves based on his level of culpability. The *Atkins* Court reasoned that “[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State [under our narrowing jurisprudence], the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”<sup>117</sup> Exclusion of people with mental retardation from the operation of the death penalty was therefore fitting and fit with the legislative evidence excluding them as well.

As for deterrence, the Court reasoned that an offender with mental retardation is the direct opposite of the calculating, premeditating killer for whom the threat of the death penalty might serve as a deterrent, because offenders with mental retardation have deficits that “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.”<sup>118</sup> And because exempting this class of people will not affect any deterrent value for those offenders who do not fall within the exemption, exemption of this class will not negatively affect any general deterrent force of the penalty.<sup>119</sup> Execution of this class of offenders, the Court concluded, will “not measurably further

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115. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. text revision 2000). The Court quoted the APA definition as follows:

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.

*Atkins v. Virginia*, 536 U.S. at 309 n.3.

116. *Id.* at 318 & nn.23-24.

117. *Id.* at 319.

118. *Id.* at 320.

119. *Id.*

the goal of deterrence.”<sup>120</sup> The Court’s independent analysis of this penological purpose as well supported the evidence from legislatures.

Finally, the Court added another new consideration into the mix when it opined that the “reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty.”<sup>121</sup> This reduced capacity, in the Court’s view, made false confessions more likely and inhibited the ability of these defendants to meaningfully assist their counsel in making “a persuasive showing of mitigation,” particularly because they usually make poor witnesses and may present a demeanor that misleadingly suggests a lack of remorse.<sup>122</sup> All of these factors combine to increase the risk of wrongful execution to an intolerable level,<sup>123</sup> thereby adding to the objective evidence supporting a categorical rule.

In dissent, Justice Scalia railed most vehemently, and in his typical style, against the Court’s employment of its “own judgment” to answer the Eighth Amendment question. In Justice Scalia’s view, and also in the views of the Chief Justice and Justice Thomas, who joined in this dissent, the Eighth Amendment’s cruel and unusual punishments clause bars only those punishments that were barred at the time of adoption of the Eighth Amendment and those punishments that offend contemporary standards of decency according to objective indicators.<sup>124</sup> To go beyond those two categories and methods of assessment is to make clear that it is only “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.””<sup>125</sup> Justice Scalia continued by noting that:

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.” . . . 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.<sup>126</sup>

Although obviously strongly critical of the majority’s Eighth Amendment approach, Justice Scalia would not require the Court to hew exclusively to original intent, or to what was constitutional punishment at the time of the ratification of the Bill of Rights, but he recognized a role for contemporary notions of cruelty in interpretation of the amendment.<sup>127</sup> Nonetheless, he refused to go so far as to say that the Court has some

120. *Id.*

121. *Id.* at 320.

122. *Id.* at 320-21.

123. *Id.* at 321 (stating that “[m]entally retarded defendants in the aggregate face a special risk of wrongful execution”).

124. *See id.* at 339-40 (Scalia, J., dissenting).

125. *Id.* at 348-49 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 823 (1988) (Scalia, J., dissenting)).

126. *Id.* at 348 (Scalia, J., dissenting) (citations omitted).

127. There have been some opinions, however, in which Justice Scalia seemed to think irrelevant even contemporary standards of decency. *See, e.g., Callins v. Collins*, 510 U.S. 1141, 1142 (1994) (Scalia, J.,

further role in constitutional interpretation. The attacks he has consistently leveled at Court pluralities and majorities in this regard have been brutal. His opinion in *Stanford v. Kentucky*<sup>128</sup> for a plurality<sup>129</sup> is probably the best illustration of the vituperation:

To say, as the dissent says, that “it is for *us* ultimately to judge whether the Eighth Amendment permits imposition of the death penalty,”—and to mean that as the dissent means it, *i.e.*, that it is for *us* to judge, not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what we perceive the society through its democratic processes now overwhelmingly disapproves, but on the basis of what we think “proportionate” and “measurably contributory to acceptable goals of punishment”—to say and mean that, is to replace judges of the law with a committee of philosopher-kings.<sup>130</sup>

Justice Scalia then went about tearing down the substance of the majority’s “own judgment.”

He first argued that the majority has no authority for stating that murderers with mental retardation are less culpable than the average murderer, no matter how heinous the former’s crime. In Justice Scalia’s view, these questions are suitable only for a sentencer’s consideration:

[T]his 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 . . . . [O]nly the sentencer can assess whether [the offender’s] retardation reduces his culpability enough to exempt him from the death penalty for the particular murder in question.<sup>131</sup>

As for deterrence, Justice Scalia argued that even if people with mental retardation are “less likely” to be deterred by threat of the death penalty, that fact does not mean that they are never deterred or that none in the class is deterred.<sup>132</sup> The rationale for a categorical rule therefore fails. Instead, Justice Scalia argued again for the relevance of mental retardation as a mitigating factor: an inability to be deterred because of mental retardation should be considered by the sentencer as a mitigating factor and not as a reason for blanket immunity.<sup>133</sup>

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concurring) (“Convictions in opposition to the death penalty are often passionate and deeply held. That would be no excuse for reading them into a Constitution that does not contain them, even if they represented the convictions of a majority of Americans.”); *Walton v. Arizona*, 497 U.S. 639, 671-72 (1990) (Scalia, J., concurring in part and concurring in the judgment) (noting that it is “quite immaterial that most States have abandoned the practice of automatically sentencing to death all offenders guilty of a capital crime . . . ; still less is it relevant that mandatory capital sentencing is (or is alleged to be) out of touch with ‘contemporary community values’ regarding the administration of justice”) (citations omitted).

128. 492 U.S. 361 (1989).

129. Only Chief Justice Rehnquist and Justices White and Kennedy joined Justice Scalia in this part of the opinion. *Id.* at 363. Justice O’Connor joined all but this and another small portion of Justice Scalia’s opinion to form the majority. *Id.*

130. *Id.* at 379 (quoting *Id.* at 391 (Brennan, J., dissenting), and *Enmund v. Florida*, 458 U.S. 782, 797 (1982)).

131. *Atkins v. Virginia*, 536 U.S. at 350-51 (Scalia, J., dissenting).

132. *Id.* at 351-52.

133. *See id.* at 352.

Finally, he derided the majority's "special risk of wrongful execution" argument, accusing the Court of using a "grab bag" approach to the excessiveness question, since this "'special risk' could be said to exist for just plain stupid people, inarticulate people, even ugly people."<sup>134</sup> In this way, Justice Scalia essentially accused the Court of using any (unsupported) reasons it could produce for reaching the majority Justices' desired result of finding these executions unconstitutional.

## 2. Revelations of Personal Predilections

### a. Majority Predilections

It may be true that simply analyzing whether a punishment furthers the penological goals of retribution and deterrence, as the majority does, requires Justices to personalize their decision-making. Justice Scalia's arguments appear to boil down simply to one that judges are not the appropriate people to decide culpability questions, since ultimately such decisions reflect merely personal views. It is true that historically, we have strived to anchor individual death penalty determinations to the conscience of the community as reflected in jury decisions. But otherwise, there does not seem to be any other special reason that juries are better suited to deciding the bigger general questions about excessiveness of punishment than are judges. Indeed, because the Court is charged with deciding when state action violates the Constitution, it would seem to be the better decision maker when the issues involve a bigger question about an identifiable and arguably vulnerable minority class.<sup>135</sup>

But a more troubling aspect of the majority's opinion for the purposes of this article was its failure to connect the group of people about whom it finds some consensus—in the evolving standards part of its opinion—with the group of people discussed in the "own judgment" portion of the opinion, whom they find minimal to no penological benefit in executing. As noted, at the outset the Court set forth two quite similar definitions of mental retardation from the AAMR<sup>136</sup> and the APA.<sup>137</sup> But the majority did not say, in its discussion of the legislative consensus, that these definitions are the constitutionally significant ones. In fact, the majority only indicated in a footnote that "[t]he [state] statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth [by the AAMR and the APA]."<sup>138</sup> Instead of delineating precisely the characteristics of mental retardation

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134. *Id.*

135. For an argument that the majority in this case may not stand on firm sociological or psychological ground in its analysis of retributive and deterrent effects with regard to this class in part because of the very difficulty in defining the class, see Douglas Mossman, M.D., *Atkins v. Virginia: A Psychiatric Can of Worms*, 33 N.M. L. REV. 255, 264-271 (2003).

136. *See supra* note 114.

137. *See supra* note 115.

138. *Atkins v. Virginia*, 536 U.S. at 317 n.22. One commentator has stated the opposite, that in fact "[t]here is no uniformity in the states' current definitions of mental retardation, and consequently, someone who is legally retarded in one state may not be in another." Alexis Krulish Dowling, Comment, *Post-Atkins Problems with Enforcing the Supreme Court's Ban on Executing the Mentally Retarded*, 33 SETON HALL L. REV. 773, 789 (2003). For discussions describing the difficulty with implementing *Atkins* precisely because of the difficulty in defining mental retardation and determining who falls within the class, see generally Mossman, *supra* note 135; Dowling, *supra*; and Note, *Implementing Atkins*, *supra* note 1.

about which there is a consensus, and therefore deciding whom the ban covers because of that consensus, the Court wrote the following:

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. As was our approach in *Ford v. Wainwright*, with regard to insanity, “we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.”<sup>139</sup>

It seems that the Court here left its task unfinished. It is one thing to delegate to state courts the job of establishing procedures for determining the people who fall within the class. But it appears that the Court is also delegating the more basic task of determining just *who comprises the class*.<sup>140</sup> By stating that the state definitions “generally conform” to the AAMR and APA definitions, perhaps the Court is signaling that those definitions are controlling, but it is by no means clear that the Court intended that result. In fact, on remand in *Atkins* itself, the Supreme Court of Virginia stated that “the [United States Supreme] Court did not decide which defendants fit within th[e] range [of mentally retarded offenders about which there is a consensus] or whether *Atkins* does, nor did it define the term ‘mental retardation.’”<sup>141</sup>

The Court’s failure to nail down the definition of the class not only presents obvious problems for defendants who argue they should be exempted from capital punishment because they fall within the class, but also raises questions about the Court’s motivations when it ultimately applies its “own judgment” to the question of constitutionality. The majority originally purported to bring its own judgment to bear, “in cases involving a consensus, . . . by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.”<sup>142</sup> In this latter part of the Court’s opinion, where the Court began its inquiry into the penological goals of the death penalty and their application to this class of offender, the majority summarized

139. *Atkins v. Virginia*, 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

140. Dr. Mossman has stated:

The decision uses the diagnostic criteria of experts in mental disability to show that persons with mental retardation are “by definition” less culpable and can never deserve a death sentence. Yet nothing in *Atkins* requires states to follow diagnostic criteria used by mental health professionals when they effectuate the decision’s constitutional mandate. To the contrary, the *Atkins* majority specifically left the task of codifying criteria for mental retardation to the states.

Mossman, *supra* note 135, at 274 (citations omitted). See also Victor L. Streib, *Adolescence, Mental Retardation, and the Death Penalty: The Siren Call of Atkins v. Virginia*, 33 N.M. L. REV. 183, 196-97 (2003); Note, *Implementing Atkins*, *supra* note 1, at 2565; Phyllis Coleman & Ronald A. Shellow, *Toward a Uniform Standard for Mental Retardation in Death Penalty Cases*, 41 MENTAL RETARDATION 203, 204 (2003), available at [http://aamr.allenpress.com/aamronline/?request=get-document&doi=10.1352%2F0047-6765\(2003\)41%3C203:TAUSFM%3E2.0.CO%3B2](http://aamr.allenpress.com/aamronline/?request=get-document&doi=10.1352%2F0047-6765(2003)41%3C203:TAUSFM%3E2.0.CO%3B2) (arguing that the Court did not but should have adopted either the APA or AAMR definition of mental retardation).

141. *Atkins v. Commonwealth*, 581 S.E.2d 514, 515-16 (Va. 2003). See also *Bell v. Cockrell*, 310 F.3d 330, 332 (5th Cir. 2002) (stating that “[t]he Supreme Court neither conclusively defined mental retardation nor provided guidance on how its ruling should be applied to prisoners already convicted of capital murder”).

142. *Atkins v. Virginia*, 536 U.S. at 313.

from the scholarly scientific literature the qualities of people with mental retardation that make the death penalty unsuitable for them. But the Court never tethered this retribution and deterrence discussion to the evolving standards of decency consensus discussion.<sup>143</sup> It is not clear that the group about which there is a consensus is the same group about which the Court is talking here, because the Court did not set the parameters for the group based on a consensus. It gives many reasons, based on class characteristics and penological purposes, why members of that class should not be executed, but it failed to say that it is these characteristics about which there is a national consensus.<sup>144</sup> Either the Court engaged in somewhat loose reasoning or it had in mind a group of people whom it wanted to exempt: the Court exempted a class with certain characteristics—because of those characteristics—yet left it to the states to define those characteristics. How did the Court know they needed to be exempted if the Court had not defined the class? This aspect of the opinion could encourage the charge that the majority justices are infusing their personal views into the constitutional analysis if it looks like *they think* one particular group is excludable from the death penalty, whether that group is the subject of the consensus or not.

One could argue that because the Court did not define what that legislative judgment was beyond “mental retardation,” because it left to states the task of figuring out who belongs in the class, it has not yet identified a consensus on definitions or on the characteristics that should exempt people but has created that class out of its own personal predilections.

On the other hand, perhaps the Court was simply imprecise by failing to articulate a clear definition. It may suffice for guidance to state courts that the Court was examining legislative enactments with definitions of mental retardation that it said “generally conform to the clinical definitions set forth [by the AAMR and the APA].”<sup>145</sup> If so, then perhaps the case for personal predilections is lessened, since the Court relied on the clinical definitions as to class attributes and therefore the consensus definitions in applying its “own judgment” to the furtherance of penological purposes and, ultimately, the constitutional question. In any event, the apparent failure to connect the Court’s “own judgment” analysis with the evolving standards consensus discussion allows just one more criticism of the result.

#### *b. Dissent Predilections*

There is arguably no counter, however, to the charge that Justice Scalia is employing his personal predilections in his dissenting opinion. The aspect of Justice Scalia’s dissent that most seems to reveal his personal bias against any exemptions from the death penalty lies in his insistence ultimately that retribution and deterrence

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143. Somewhat relatedly, another commentator observed, “[i]nsofar as science provides suggestions that vary from the understanding of mental retardation that underlies the consensus impelling *Atkins*, consulting scientific definitions would seem to be in tension with the notion that evolving standards of decency are to inform the legal standard of cruel and unusual punishment.” Note, *Implementing Atkins*, *supra* note 1, at 2570.

144. Indeed, according to some, there appears to be no real consensus among state legislatures about who belongs in that group. *See supra* note 138 and accompanying text.

145. *Atkins v. Virginia*, 536 U.S. at 317 n.22.

considerations are not the province of judges, but should be indirectly considered by juries who may consider the vulnerabilities of certain classes as mitigating factors for their members. Anyone who has followed Justice Scalia's jurisprudence in death penalty cases would find his argument hollow. For decades, the Court has said that "the sentencer . . . [cannot] be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."<sup>146</sup> Justice Scalia has repeatedly asserted, however, that the jury's consideration of mitigating evidence can and should be directed and channeled by the legislature.<sup>147</sup> More specifically, he has written, "In my view, the . . . principle that the sentencer must be allowed to consider 'all relevant mitigating evidence' is quite incompatible with the *Furman* principle that the sentencer's discretion must be channeled."<sup>148</sup> For that reason, he has questioned "whether, in the process of the individualized sentencing determination, the society may specify which [mitigating] factors are relevant, and which are not . . ."<sup>149</sup> His answer ultimately has been that he "will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted,"<sup>150</sup> as, for example, by enumerating mitigating factors the jury may consider. Therefore, under his approach, a state could (and perhaps constitutionally should be required to) list and limit the mitigating circumstances that a jury could consider and give effect to, which means the state could exclude mental retardation entirely from the list of mitigating factors.<sup>151</sup>

The last pre-*Atkins* case to discuss mental retardation as a mitigating factor was *Penry v. Lynaugh*. Justice Scalia dissented<sup>152</sup> to the portion of the opinion mandating that Texas juries be given a special instruction "informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation . . . by declining to impose the death penalty."<sup>153</sup> By dissenting, Justice Scalia showed that he would not find exclusion of mental retardation mitigating evidence constitutionally offensive, and his acceptance of such an exclusion would seem to impugn his evisceration of the majority's position in *Atkins*. He argued that it would be sufficient,

146. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

147. *See, e.g., Callins v. Collins*, 510 U.S. 1141, 1141-42 (1994) (Scalia, J., concurring in denial of writ of certiorari); *Johnson v. Texas*, 509 U.S. 350, 373-74 (1993) (Scalia, J., concurring); *Walton v. Arizona*, 497 U.S. 639, 656-74 (1990) (Scalia, J., concurring in part and concurring in the judgment).

148. *Johnson v. Texas*, 509 U.S. at 373 (Scalia, J., concurring).

149. *Walton v. Arizona*, 497 U.S. at 666 (Scalia, J., concurring in part and concurring in the judgment).

150. *Id.* at 673.

151. Although in *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court required Texas courts, because of Texas's unique statutory scheme, to instruct juries specifically about mental retardation as a mitigating factor, that specific directive does not apply in every death penalty state. For a discussion of the *Penry* case, see *supra* note 80. The more general requirement, known in shorthand as the *Woodson-Lockett-Eddings* doctrine, dictates that juries not be precluded from considering and giving effect to mitigating evidence the defendant presents. *See Woodson v. North Carolina*, 428 U.S. 280 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion); *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The above requirement is the one that Justice Scalia refuses to apply, opining that it was "invented" and is "the product of . . . 'intellectual, moral, and personal' perceptions . . . ." *Callins v. Collins*, 510 U.S. at 1142 (Scalia, J., concurring in denial of writ of certiorari).

152. *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (Scalia, J., dissenting).

153. *Id.*

instead of categorically excluding this class of people from the death penalty, to simply allow their vulnerabilities to be considered in mitigation by the jury. But that argument, in light of his positions on mitigating evidence, seems disingenuous when one realizes that he would not object to the states' wholesale removal of that mitigating factor from consideration. The disingenuous nature of the argument betrays his personal opposition to any exemption from capital punishment.

#### IV. SOME THOUGHTS ON A PROPER APPROACH<sup>154</sup>

The preceding discussion has shown that both sides of the decision in the *Atkins* case are likely allowing their personal views about the death penalty, or at least about certain classes of offenders subject to the death penalty, to influence their application of the constitutional test for cruel and unusual punishments. Some would also argue that the justices' personal views are influencing the very choice of the appropriate test to use. But establishing that potential bias exists on both sides begs the question about which approach, which test, should be the one to prevail.

The Justice Stevens faction retains that piece of the Eighth Amendment test that requires the Court to exercise its own judgment in deciding the cruel and unusual nature of a punishment.<sup>155</sup> The group goes beyond what is considered to be the objective indicators of the evolving standards of decency, believing that those indicia are a good start, but that ultimately it is for the Court to decide what punishments the Constitution prohibits.

The faction represented most often by Justice Scalia insists that, apart from the historical application of the death penalty as a constitutional yardstick, the only valid test for cruel and unusual punishments under the Eighth Amendment consists of the objective indicia comprising the evolving standards of decency.<sup>156</sup> For this group, the application of the Court's "own judgment" to the constitutional question is merely a screen for the application of justices' personal opinions, even if those justices employ a test requiring them to determine whether the punishment at issue is excessive in that it fails to further the recognized goals of punishment.

To decide which of these two approaches is the one that should prevail, one needs first to recognize a central flaw in Justice Scalia's insistence that the objective indicia of the evolving standards of decency should be the only test. As the examination in this article shows, there are various reasons why those factors are decidedly not objective.

First, the Court's other Eighth Amendment decisions rig the outcome under those indicators, robbing them of their purity as objective factors. Second, those factors' ingredient information can be interpreted by the justices in such a subjective manner that the factors lose any objective quality they may seem to have.

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154. Because the main purpose of this Article is to examine Justice Scalia's assertions regarding justices' personal preference-based decision-making in the Eighth Amendment context, a full discussion of the theoretical underpinnings of constitutional interpretation is beyond the scope of this Article.

155. For a list of the justices comprising this group, see *supra* note 40.

156. For a discussion of which justices comprises this group, see *supra* note 40. See also *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989) (stating that "our job is to *identify* the 'evolving standards of decency' . . . . [W]e emphatically reject [the] suggestion that the issues in this case permit us to apply our 'own informed judgment' regarding the desirability of permitting the death penalty [in this case]") (plurality opinion of Scalia, J., joined by Chief Justice Rehnquist and Justices White and Kennedy).

So if Justice Scalia is resting his argument in part on the claim that the objective factors get the right result because they get pure societal information about the evolving standard, then his argument is on very shaky ground; the evolving standards analysis does not yield the pure results that he claims. That reason, therefore, does not justify jettisoning the Court's employment of its "own judgment" on the ground that the latter is a facade for personal views while the evolving standard assessment is not.

More fundamentally, however, there are other reasons why the Court should apply its "own judgment" to questions concerning the constitutionality of the death penalty and why it should not rely solely on the evolving standards test. Those reasons implicate ideas about democratic values and the Supreme Court's role in constitutional adjudication.

Democratic values are implicated because the Constitution's Bill of Rights, of which the Eighth Amendment is a part, is often seen as safeguarding the rights of the individual against the tyranny of the majority, which includes the tyranny imposed through the majority's representatives.<sup>157</sup> The cruel and unusual punishments clause, then, is meant to act as a check against legislatures. If the Eighth Amendment is construed solely according to societal consensus, with ideas about cruelty derived from the majority as reflected in legislative enactments and jury decisions, that protection afforded by the Bill of Rights is negated. As Justice Brennan has written, "[j]udicial enforcement of the [Cruel and Unusual Punishments] Clause . . . cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes. That is precisely the reason the Clause appears in the Bill of Rights."<sup>158</sup>

Judicial enforcement, then, obviously means that judges must enforce the Eighth Amendment prohibitions by looking to something other than, but certainly at least in addition to, evidence of societal consensus. While the dangers inherent in looking beyond that consensus likely include the injection of personal judicial predilections, the broader discussion in this article demonstrates that such danger inheres in just about any exercise of judicial review. That danger must not dissuade the Court from enforcing the constitutional limit against cruel and unusual punishments.

It follows then that the Court's role in constitutional adjudication is also important to this discussion about the appropriate role for application of the Court's own judgment to Eighth Amendment questions. Not only must the Court assume a role to enforce constitutional restrictions residing in the Bill of Rights, but the very function of the judicial branch mandates that it must take a larger role in applying the Eighth Amendment limitations than simply counting the noses of legislatures and juries.

As long ago as *Marbury v. Madison*, the Court said, "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply

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157. See *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.").

158. *Furman v. Georgia*, 408 U.S. 238, 269 (1972) (Brennan, J., concurring). See also Margaret J. Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1036 (1978) ("To glean a list of permissible punishments from those enacted by legislatures . . . allows the legislature to define permissible punishments by its enactments. Such a view removes any role for a constitutional check.").

the rule to particular cases, must of necessity expound and interpret that rule.”<sup>159</sup> Judicial review requires nothing less, and it should certainly require something more than leaving the determination of the meaning of a constitutional provision to the very institutions that are meant to be limited. Again, the danger in allowing or requiring the judiciary to say what the law means, in this case what the Eighth Amendment means, is that the judges’ personal predilections may factor to some extent into the analysis.<sup>160</sup> But the courts are human institutions, judges are human beings, and so perhaps such infiltration of biases cannot be helped. And it does not seem to matter whether a justice calls himself a strict constructionist or not; the discussion in this article shows that even those justices can infuse their analyses and opinions with their personal views. The danger of that happening should not restrain the Court from doing its constitutional duty to say what constitutes cruel and unusual punishment and what does not.

#### V. CONCLUSION

This article has sought to establish that both sides of the Court in *Atkins* appear to be infusing their personal views into their Eighth Amendment analyses of cruel and unusual punishments in the death penalty context. The majority seems eager to exempt offenders with mental retardation from the death penalty, and that view comes across clearly in its opinion. Justice Scalia seems ardently opposed to exemptions from the death penalty, and that view also comes through loud and clear in his opinion. Given that it may be unavoidable that justices’ personal predilections influence all aspects of their Eighth Amendment analyses, the argument that the Court should confine itself to so-called objective indicators of the cruel and unusual nature of a punishment loses force.

Ideas involving democratic values and the Court’s role in constitutional adjudication argue further that, in addition to consideration of objective factors, the Court should undertake an independent evaluation of what the cruel and unusual punishments clause prohibits in a given case. The Court therefore should retain that portion of the Eighth Amendment test that requires it to apply its “own judgment” to the question of the death penalty’s conformance to the dictates of the Eighth Amendment in particular cases.

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159. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

160. Again Justice Brennan cautioned, “[i]n formulating those constitutional principles, we must avoid the insertion of ‘judicial conception[s] of . . . wisdom or propriety,’ yet we must not, in the guise of ‘judicial restraint,’ abdicate our fundamental responsibility to enforce the Bill of Rights.” *Furman v. Georgia*, 408 U.S. at 269 (Brennan, J., concurring) (quoting *Weems v. United States*, 217 U.S. 349, 379 (1910)).