Mentally Retarded Offenders and the Death Penalty – The Latest Supreme Court Ruling and Possible European Influences

By Lutz Eidam

A. Introduction[1]

The legal term "mental retardation" can be a life-saver since the summer of 2002. The possibility that had been announced in an earlier decision[2] by the U.S. Supreme Court finally came true: The Court decided in a 6–3 vote that the Constitution of the United States bars the execution of mentally retarded offenders.[3] With its "landmark death penalty ruling,"[4] as it was called by the *New York Times*, the Court saved the life of Mr. Atkins, a man with an I.Q. of 59 who was convicted of committing murder and robbery at the age of 18. Empirical estimates show that this decision could move 200 or more people off death row.[5] Unfortunately, the ruling is too late for at least 44 mentally retarded inmates who have been executed since 1976.[6]

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[2] See Penry v. Lynaugh, 492 U.S. 302 (1989). In approving the execution of mentally retarded people and holding that there is no violation of the Eighth Amendment and its standard of decency the Court stated: "While a national consensus against execution of mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society', there is insufficient evidence of such a consensus today." Id. at 340.

[3] Atkins v. Virginia, 122 S.Ct. 2242 (Decided June 20, 2002).

[4] Linda Greenhouse, The Supreme Court: The Death Penalty: Citing 'National Consensus', Justices bar Death Penalty for Retarded Defendants, New York Times June 21 2002, Section A Page 1.

[5] Id.

[6] Tom Zeller, Ideas & Trends: Tweaking Death Row, New York Times June 30 2002, Section 4 Page 16. This number is a minimum number because of the difficulty as to the definitions and measurements of mental capacity.

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Due to this significant change in handling death penalty cases, close attention must be paid to both the term "mental retardation"[7] that serves as the new legal key to saving lives as well as the legal rules underlying this decision.

Sparing the life of people with mental deficiencies is not a new issue in the criminal law. More than 200 years ago, Sir William Blackstone in his famous commentaries on the laws of England reveals in a chapter named "Of the Persons Capable of Committing Crimes" that "in criminal cases (…) idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities."[8] As to the execution of the latter he explicitly rejects this practice by stating that this constitutes an "extreme inhumanity and cruelty, and can be no example to others."[9] With these notions Blackstone describes what would later be known as the insanity defense.[10] Basically, the insanity defense creates the possibility that people may be exculpated on the ground that they were suffering from mental disease or defect when they acted as they did. The insanity defense serves the basic purpose of separating out certain persons who would otherwise be subjected to usual penal sanctions for special treatment.[11] Doctrinally speaking, if a defendant succeeds in proving the insanity defense he or she must be acquitted with regard to criminal sanctions.[12]

However, the term of mental retardation is to be distinguished from the legal term insanity. As opposed to insane offenders, mentally retarded offenders are criminal

[7] Terminology in this field is somewhat complex. "Mental retardation" is today the accepted term in common usage. It, however, specified old terms like "mental deficiency", "developmental disabilities" or the common law terms "idiots", "morons" and "feebleminded" that served at each occasion as some kind of umbrella terms and therefore included nowadays term of mental retardation.

[8] William Blackstone, Commentaries on the Laws of England, Book IV - Of Public Wrongs (1769), at 24. See also W. Lawrence Fitch, Mental Retardation and Criminal Responsibility, in: The Criminal Justice System and Mental Retardation 121 (1992), 122 citing M. Dalton, The countrey justice (1618), who stated:" [I]f one that is 'non compos mentis,' or an ideot, kill a man, this is no felony, for they have no knowledge of Good and Evil (…)".

[9] Blackstone, supra note 8, at 25.

[10] For a detailed overview of the insanity defense see Wayne R. La Fave, Criminal Law, 2nd ed (1986) Chapter 4 Sec. 4.1 – 4.6. For statutory provisions of the insanity defense see for instance Model Penal Code § 4.01; 18 U.S.C. § 17; New York Penal Law § 40.15.

[11] La Fave, supra note 10, at 305.

[12] Nevertheless the actual consequence of a successful insanity defense is quite different than with respect to any other defense. In every other case, a successful defense results in acquittal and outright release of the defendant, but with the insanity defense the probable result is commitment of the defendant to a mental institution until he has recovered sanity. See La Fave, supra note 10, § 4.6.

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responsible for whatever they do. The only difference in their treatment compared to others convicted of crimes is that they are not subject to the death penalty anymore. Every other criminal sanction is still possible. This is hard to understand at first sight, since a clear distinction between mentally retarded and insane prisoners is hard to draw.[13] Nevertheless, it seems to be a sign of progress in current death penalty debates that the possibility of death no longer exists for mentally retarded people.

The European approach to the death penalty is radically distinct from the American. The European Convention for the Protection of Human Rights, for instance, clearly bans the death penalty[14] and so do most European national constitutions.[15] It is fair to say that the death penalty, factually, is abolished among the members of the European Community. The Europeans have not, however, been content with pressing for the European abolition of the death penalty, but have engaged the issue on various fronts world-wide.[16] It should be no surprise, then, that Europe played a not insignificant role in this new decision of the highest American court. Thus, this article has the goal of analyzing the European "roots" of the Supreme Court's *Atkins* decision.

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[13] See e.g. United States v. Shorter, 343 A 2d. 569 (D.C. 1975) for a decision that sees no real difference between both concepts: "Mental retardation is a mental defect capable of affecting both mental processes and behavior controls to the extent that a defendant in a given situation might not be able to appreciate the wrongfulness of his conduct or might not be able to conform his conduct to the requirements of the law. Retardation is thus a basis for a defense of insanity, and was so regarded by the parties to this case." Id. at 572. See further In re Ramon M., 22 Cal 3d 419 (1978): "We conclude that the defense of idiocy proffered by defendant in the present case is defined by the ALI [= Model Penal Code] standard, and that defendant's mental retardation constitutes a defense to criminal conduct if 'at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Id at 428. See Murphy v. State, 54 P.3d 556 (2002) for a first effort of the state judiciary to define the concept of mental retardation after the Atkins decision.

[14] See Art. 2 (1) of the Original Draft (1950) of the Convention that has been modified with protocol No. 6. Protocol No. 6 clearly states that the death penalty is abolished and that nobody shall be subject of a judgement of death. See also Art. 2 (2) of the proposed draft for a Charta of Fundamental Rights of the European Union (2000). Here, the Charta explicitly bans the death penalty for the European Union.

[15] See e.g. German Constitution ("Grundgesetz") Art. 102: "Die Todesstrafe ist abgeschafft." BVerfGE 18, 112 (117) emphasizes the gravity the Federal Constitutional Court sees in this constitutional decision to abolish the death penalty.

[16] Directly in the Atkins case by way of an amicus brief and, as discussed below, through Germany's case against the U.S. in the ICJ following on the execution of two German citizens in the U.S. The European battle against the application of the death penalty in the U.S. has also been led by non-governmental forces, including, as only one example, the Italian anti-death penalty coalition which has arranged to mark every American execution by illuminating the Coliseum in Rome.

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To get an overview of how the issue mental retardation with regard to the death penalty is handled by the U.S. Supreme Court, the article will present a short overview and a summary of argumentation of the latest decision regarding the execution of mentally retarded prisoners, focusing particularly on the *Atkins* case [part B]. The European influence on this decision will then be discussed [part C]. As part of, but constituting a dramatic example of the European role in American death penalty policy, the German suit against the U.S. in the International Court of Justice (LaGrand brothers) will receive special consideration [part D]. The article will conclude with a short reconsideration of the presented materials and a brief discussion of the future of the death penalty in the U.S. [part E].

B. The *Atkins* Case

To get a sense of how important the term "mental retardation" is in the current capital punishment jurisprudence, let me begin by examining the latest decision of the United States Supreme Court, which ruled against the execution of mentally retarded individuals.

Having held in the past that the constitution prohibits the states from inflicting the penalty of death upon a prisoner who is insane,[17] the Court now went further to exclude mentally retarded persons from being executed. After 13 years, since the court decided *Penry v. Lynaugh* (1989),[18] the Court overruled this decision. The following is a summary of the basic arguments and doctrinal rules that were used to reach this decision.

I. Eighth Amendment Analysis – The Standard of Decency

The doctrinal beginning of an analysis of capital punishment cases is the Eighth Amendment of the U.S. Constitution. Here the Constitution prohibits "cruel and unusual punishment." The basic concept underlying this rule is nothing less than the dignity of man.[19] The standard to determine whether a punishment is cruel and unusual has been held by the Court to be the "evolving standards of decency that

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[17] Ford v. Wainwright, 477 U.S. 399. Here a prisoner, who at trial had not turned out to be insane while he committed his crimes turned insane while he was incarcerated. After a habeas corpus petition was filed on behalf of Mr. Ford that has been denied by a Florida District Court and the United States Court of Appeals for the 11th Circuit, the Supreme Court revisited the issue and held: "The Eight Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane. Petitioner's allegation of insanity in his habeas petition, if proved, therefore, would bar his execution." Id. at 410.

[18] Supra note 2.

[19] Atkins v. Virginia, supra note 3, at 2247.

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mark the progress of a maturing society."[20] In discerning those evolving standards, courts must look at objective evidence of how society views a particular punishment today. Certain opinions, however, disagree little when they demand that not only today's attitudes should be considered but also the attitudes from the time the Bill of Rights was adopted.[21]

II. State Legislation

With regard to the evolving standards of decency, the Court stresses that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[22] Responding to this analysis the Court reviewed the judgment of the various legislatures (federal and state) that have addressed the suitability of imposing the death penalty on mentally retarded people. The Court discovered that much has changed since 1989, the last time this review was conducted. At that time there were only two states[23] that rejected capital punishment for mentally retarded offenders. The Court's contemporary survey pursuant to the *Atkins* case revealed that between 1989 and 2002 sixteen states enacted statutes prohibiting the execution of mentally retarded people.[24] Not only the number of states but also the consistency of the direction of change lead the Court to the conclusion that it is fair to say that a national consensus against the execution of mentally retarded individuals had developed.[25]

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[20] Trop v. Dulles, 356 U.S. 86 (1958), 100 – 101; Penry v. Lynaugh, supra note 2, 330 – 331; Atkins v. Virginia, supra note 3, at 2247.

[21] Dissent of Justice Scalia following the Atkins decision (supra) at 2260; also Ford v. Wainwright, 477 U.S. 399 (1986), 405.

[22] Atkins v. Virginia, supra note 3, at 2247; Penry v. Lynaugh, supra note 2, at 331.

[23] Georgia enacted the first statute prohibiting such executions in 1986. Maryland enacted a similar provision (see Md. Ann. Code, Art 27, § 412 (f) (1) (1989)). Additionally to the prior mentioned states, Congress enacted legislation in 1988 reinstating the federal death penalty. Here it was expressly provided that a sentence of death shall not be carried out upon a person who is mentally retarded. See 21 U.S.C. § 848 (the Anti-Drug Abuse Act of 1988); see further new federal legislation on that issue that again included a provision against the execution of mentally retarded individuals 18 U.S.C. § 3596 (c) (Federal Death Penalty Act of 1994).

[24] Kentucky (1990), Tennessee (1990), New Mexico (1991), Arkansas (1993), Colorado (1993), Washington (1993), Indiana (1993), Kansas (1993), New York (1995), Nebraska (1998) and between 2000 and 2001 South Dakota, Arizona, Connecticut, Florida, Missouri, North Carolina.

[25] Atkins v. Virginia, supra note 3, at 2251.

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III. Purposes of punishment

Consistent with the discovery of a legislative consensus that the mentally retarded should be categorically excluded from execution, the Court also refers to the justification that is considered for capital punishment.[26] It questioned whether or not the justifications of retribution and deterrence, which are generally recognized as the acceptable grounds for retaining capital punishment, apply to mentally retarded offenders. The Court reasoned that, unless the execution of mentally retarded offenders "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 unconstitutionally punishment."[27] It is further explained that retribution, or in other words that the offender receives his or her "just deserts," relies on culpability. The mentally retarded are, however, less culpable than usual criminals. That's why their exclusion from the death penalty seems appropriate.[28] Second, with regard to the deterrence theory of capital punishment, the Court determined that deterrence only works when murder is the result of premeditation and deliberation.[29] Exempting the mentally retarded from punishment will not affect the cold calculus that precedes the decision of other potential murderers, because the mentally retarded usually don't calculate that precisely, suffering as they do from cognitive and behavioral impairments.[30] Thus, the Supreme Court concluded that executing the mentally retarded will not measurably advance the goal of deterrence.[31]

IV. Reduced culpability of mentally retarded offenders

As stated above, the Court sees mentally retarded people as less culpable compared to other offenders. The Court relied on this conclusion for more than one line of reasoning in the decision.[32]

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[26] Id.

[27] Id., citing Enmund v. Florida, 458 U.S. 782, at 798.

[28] Id.

[29] Id.

[30] Id.

[31] Id.

[32] Cf. Atkins v. Virginia, supra note 3, at 2249 & 2251. First, the issue of culpability comes up with regard to the legislation the Court detected against the execution of mentally retarded offenders. The Court held such legislation "provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." Id. at 2249. Second, culpability is mentioned in the context of the retribution theory of capital punishment. "With respect to retribution--the interest in seeing that the offender gets his 'just deserts'--the severity of the appropriate punishment necessarily depends on the culpability of the offender." Id. at 2251.

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V. Risk of wrongful execution

Lastly, the Court addressed the inherent risk of a wrongful execution of mentally retarded offenders, concluding that these people are more likely to give false confessions and may be less able to help lawyers defend them and to tell their side of the story.[33] Furthermore, they are often poor and their demeanor may create an unwarranted impression of lack of remorse for their crime risking that the jury find this to be an aggravating factor.[34]

In light of all these points, the Supreme Court concluded that the Eighth Amendment of the U.S. Constitution bars the execution of mentally retarded defendants.

C. European Influences

The Supreme Court's analysis in *Atkins* looks similar to its previous consideration of the Eight Amendment in the death penalty context. Emphasis is put on an Eighth Amendment analysis ("evolving standard of decency") framed with some supportive arguments derived from the purposes of punishment and the concept of culpability.[35] Except the new result as regards the constitutionality of executing the mentally retarded, the Court engaged in nothing new from a doctrinal point of view. Where, in this traditional Eighth Amendment analysis, could Europe have brought its influence to bear?

Although hidden, there was an important European role in the Supreme Court's *Atkins* decision, contained in a single footnote to the majority decision. During the Eighth Amendment analysis of the standard of decency[36] the Court concluded that a national consensus had developed against the execution of mentally retarded offenders.[37] Having drawn this conclusion, presumably from consideration of the American context, footnote 21 was added to present additional evidence that this

[33] Atkins v. Virginia, supra note 3, at 2252. See also J. McGee / F. Menolascino, The Evaluation of Defendants with Mental Retardation in the Criminal Justice System, in: The Criminal Justice System and Mental Retardation 55 (1992), 56. Here the authors label these impairments as a challenge for the legal system that greatly hinder the defendant's chances for a fair trial.

[34] Atkins v. Virginia, supra note 3 at 2252.

[35] See e.g. Penry v. Lynaugh, supra note 2.

[36] See supra B.I.

[37] Atkins v. Virginia, supra note 3, at 2249.

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judgment "reflects a much broader social and professional consensus." [38] Part of the material the Court considered that gave rise to its conclusions in footnote 21 was a brief of the European Union (EU) [39] as *amicus curiae*[40] that had originally been submitted in the case of *McCarver v. North Carolina*[41]. In McCarver, the issue also was the execution of a mentally retarded prisoner. But before the Supreme Court reached a decision, North Carolina adopted a statute that made executing the mentally retarded illegal. As a result, in September 2001, the Supreme Court dismissed the case as moot but granted certiorari in a similar case, namely *Atkins*. Thus, the E.U.'s *amicus* brief was incorporated in the *Atkins* case by motion. The following gives a short overview of the brief.

I. The European Community as amicus curiae *in* McCarver v. North Carolina

At the beginning of the brief, it is emphasized that, like the United States, the European Union (EU) "is founded on principles of liberty, democracy, respect for human rights, fundamental freedoms and the rule of law."[42] Additionally, the E.U. noted that all its member states oppose the death penalty in all cases. The *amicus* brief explained that this contributes "to the enhancement of human dignity and the progressive development of human rights."[43] Having laid out this general foundation, the brief presents more specific arguments with regard to the execution of mentally retarded people. The drafters of the brief first acknowledge that since the EU bans capital punishment generally, it of course prohibits the execution of mentally retarded prisoners as well.[44] Interesting is the presented fact that, since 1995, only three countries are reported to have carried out the execution of a mentally retarded defendant: Kyrgyzstan, Japan and the United States.[45]

[38] Id.

[39] Brief for the European Union as Amicus Curiae in McCarver v. North Carolina, O.T.2001, No. 00-8727 (2001 WL 648609).

[40] This Latin term is defined by Justice Rehnquist as " (...) a phrase that literally means 'friend of the court' – someone who is not a party to the litigation, but who believes that the court's decision may affect its interest." William H. Rehnquist, The Supreme Court, at 89. Amicus Curiae briefs are filed in many Supreme Court matters, both at the petition for Writ of Certiorari, and when the Court is deciding a case on its merits. Friend of the court briefs may provide valuable information about legal arguments, or how a case might affect people other than the parties to the case. See also Rule 29 of the Federal Rules of Appelate Procedure.

[41] 533 U.S. 975.

[42] Supra note 39, at 1.

[43] Id.

[44] Supra note 39, at 4.

[45] Supra note 39, at 4 citing a report for the U.N. Comission of Human Rights from 1996 (note 3).

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Additionally, the brief cites legal authorities like the Treaty of Amsterdam and a statement of the Council of Europe that clearly oppose the death penalty.[46] Out of those different movements the drafters of the brief identified an overall general trend against the death penalty; a trend that is thought to be accelerating. Leaving behind European policy on the issue, the brief discussed in the reach of the movement to "every corner of the globe."[47] This is even more true for the execution of mentally retarded offenders, the brief noted.[48] Following this, the brief emphasized a body of norms and standards, the United Nations have articulated to prohibit the execution of the mentally retarded.[49]

The drafters concluded that although the United States is a member of the world's community of nations, it stands apart from that community as one of the last remaining nations in the world still executing mentally retarded persons.[50] The position of the United States on the death penalty is reported as an "issue of great concern"[51] within the European Community and other nations. The drafters concluded by urging the United States to eliminate capital punishment for the mentally retarded, in keeping with the evidence from throughout the world demonstrating worldwide opposition to the execution of the mentally retarded.[52]

II. Supportive: Brief on behalf of nine retired American diplomats as Amicus Curiae in McCarver v. North Carolina

Not of European origin, but deeply influenced by this European position as well as international customs, was another *amicus* brief[53] that had been submitted to the Court in *McCarver* but ultimately found the Court's attention in *Atkins*, earning mention along with the E.U. amicus brief in footnote 21 of the *Atkins* decision. This *amicus* brief was submitted on behalf of nine retired American diplomats. The *amici*

[46] Supra note 39, at 5.

[47] Supra note 39, at 7. Note 9 shows two of those examples. South Africa abolished the death penalty 1995, Russia did the same in 1999.

[48] Supra note 39, at 7.

[49] Supra note 39, at 11. Here the brief refers to the Declaration on the Rights of Mentally Retarded Persons by the UN General Assembly and subsequent resolutions of the UN that share a common perspective protecting the fundamental human dignity of the mentally retarded person.

[50] Supra note 39, at 18.

[51] Id.

[52] Supra note 39, at 19.

[53] Brief for Morton Abramowitz et al. as Amicus Curiae in McCarver v. North Carolina, O.T.2001, No. 00-8727 (2001 WL 648607).

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curiae responsible for the submission of this brief had served all over the world representing the government of the United States. Based on this vast wealth of foreign service experience, the *amici* sought to advise the Court regarding the customs of nations with which they are familiar. Their argument can be summarized in 3 claims:

First, it is stated that the execution of people with mental retardation is inconsistent with "evolving global standards of decency."[54] On this point, the brief of the retired diplomats relied on essentially the same evidence as the *amicus* brief of the EU.

In its second claim, the amicus brief tries to show that the growing international consensus against the execution of people with mental retardation has increasingly isolated the United States diplomatically.[55] It is mentioned that the EU, which makes abolition of the death penalty a prerequisite for membership, has strongly criticized the execution of people with mental retardation in the U.S.[56] *Amici* predicted that U.S. persistence in the current practice will exacerbate diplomatic isolation and inevitably harm other U.S. foreign policy interest.[57]

In their third claim, the retired diplomats tried to show that in evaluating evolving standards of decency under the Eighth Amendment, the Supreme Court should weigh international as well as domestic opinions.[58] This argument is most important for purposes of this article because it suggests a point at which global influences may find an open door into the doctrinal rules of American Law. To strengthen this notion, the drafters of the brief referred to examples in which the U.S. Supreme Court has not only looked at national practices but at international practices as well. An example cited in this context is the Court's efforts at assessing the "contemporary standards of humanity," an analysis to which the Court applied international as well as municipal views.[59] Furthermore, the retired diplomats

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[54] Supra note 53, at 7.

[55] Supra note 53, at 10.

[56] Id.

[57] Supra note 53, at 12.

[58] Supra note 53, at 13.

[59] Supra note 53, at 14, citing Thompson v. Oklahoma, 487 U.S. 815, 830 (1988) (looking, among other things, to international practices in determining that the death penalty was unconstitutional as applied to a 15-year-old); Ford v. Wainright, 477 U.S. 399, 409 (1986) ("the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation") (emphasis added); Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982) (noting that "the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe)"; Coker v. Georgia, 433 U.S.

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argued that the phrase "cruel and unusual" in the text of the Eighth Amendment is said to have been meant to reflect "global opinions of mankind" when it first arose in the English Bill of Rights of 1689.[60] This too indicates a broader scope of the Amendment. Relying on these arguments, the drafters of the brief concluded that the opinions of other nations are more relevant today to the policy, law-making and jurisprudence of the United States than at any time since its founding.

III. Influences on the determination of the "evolving standards of decency"

As indicated above, both briefs, although referenced only in a footnote, had some influence on the holding of the Court in *Atkins* under the Eighth Amendment. The "standard of decency" is, after all, a very vague legal term that can harbor a broad range of possible results and seems highly susceptible to alternative and creative interpretive methods.[61]

1. Majority of the Court

Explicitly addressing these *amicus* briefs, the majority provided some evidence that these standards had at least a minor impact on the decision. It seems that the Court saw the necessity to sustain its new finding with broader evidence. Thus, emphasis is put on the issues presented in both *amicus* briefs to make the new course a stronger one. But this perspective, however, is only true for the majority of the Court. As already mentioned in the introductory statement, the *Atkins* decision was not a unanimous one. The weightiest dissent comes from Justice Scalia. It is not insignificant that it is exactly footnote 21 that seems to have most troubled Justice Scalia.

2. Justice Scalia's dissent

Justice Scalia explicitly mentions footnote 21 from the majority decision in his dissent.[62] He emphasizes that the Constitution is made for the United States only.

584, 596 (1977) (citing Trop v. Dulles, 356 U.S. at 102, to determine that international practices regarding the death penalty for rape were relevant to "evolving standards" analysis); Trop v. Dulles, 356 U.S. at 102 (1958) (looking to international opinion to assess "evolving standards of decency" for Eighth Amendment purposes).

[60] Supra note 53, at 15.

[61] Note the Court's quick reversal from Penry and the strong arguments made by the dissenters in Atkins itself.

[62] Dissent of Justice Scalia following the Atkins decision (supra) at 2264.

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That is why, from his point of view, the notions of the world community are plainly irrelevant.[63] "Thankfully", he added, "these notions of justice are not always those of our people."[64] His opinion and the core of his criticism can best be summarized in the following sentence: "[W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution."[65] Thus, Justice Scalia concluded that the majority decision is far from being representative[66] and furthermore risks an exercise of the arrogance of the assumption of power.[67] Lastly he addressed the majority of the court as a "small and unrepresentative segment of our society that sits on this Court."[68] A comparatively harsh critique and perhaps a hint at the importance of the views of the "world community" for the majority decision?

D. Execution of the LaGrand brothers

The last part of this article will try to set the not insignificant European and international influences on the *Atkins* decision in the context of a broader, global effort in the law to bring the U.S. death penalty under scrutiny. This broader effort is characterized by Germany's complaint filed against the U.S. before the International Court of Justice (ICJ) [69] in the *LaGrand Brothers Case*.[70]

I. The Facts[71]

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[63] Id.

[64] Id.

[65] Id.

[66] Id, footnote 6.

[67] Id., at 2265.

[68] Id., at 2265.

[69] For information on the Court see http://www.icj-cij.org/.

[70] LaGrand Case (Germany v. United States of America), Judgment of June 27, 2001. See http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm for an online version of the decision. The decision is partly published in German in JZ (Juristische Zeitung) 2002, 91 – 99 (with an annotation of Hillgruber). Since the ICJ's ruling in LaGrand, the Mexican government filed its own complaint against the U.S. in the ICJ, asserting the same issues in the context of more than twenty of its citizens facing the death penalty in the U.S. (Mexico v. United States of America, http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm). The LaGrand Case was preceded in the ICJ by the Paraguayan case of Angel Breard (Paraguay v. United States of America, http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm).

[71] For a brief but sufficient summary of the facts see Karin Oellers-Frahm, Die Entscheidung des IGH im Fall LaGrand – Eine Stärkung der internationalen Gerichtsbarkeit und der Rolle des Individuums im Völkerrecht, in: EuGRZ 2001, 265 (2001), 265; also Thomas Weigend, Der Fall LaGrand – Völkerrecht

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Karl and Walter LaGrand, both German nationals who had been permanently residing in the United States since childhood, were arrested in 1982 in Arizona for their involvement in an attempted bank robbery, in the course of which the bank manager was murdered and another bank employee seriously injured. In 1984, an Arizona court convicted both brothers of murder in the first degree and other crimes, and sentenced them to death. All appeals were futile and a habeas corpus petition[72] failed. Throughout most of these lengthy proceedings no one paid attention to the fact that both prisoners were of a foreign nationality. In 1992, the LaGrand brothers became aware of their rights as foreign citizens, presumably from other prisoners. In fact, Article 36 of the Vienna Convention on Consular Relations[73] required the United States to inform the LaGrands, without delay, of their right to communicate with a consulate of Germany. [74] It was acknowledged by the United States that this never occurred. Instead, the consulate was made aware of the case in 1992 by the LaGrands themselves. Attempts to assert the violation of this right turned out to be futile because, by the time the LaGrand brothers had become aware of the protections of Article 36, the doctrine of

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bricht Strafprozessrecht, in: Festschrift für Klaus Lüderssen zum 70. Geburtstag (Hrsg. Cornelius Prittwitz, u.a.), Baden Baden 2002, 463, 463.

[72] Lat. "you have the body". A habeas corpus petition is a petition filed with a court by a person who objects to his own or another's detention or imprisonment. The petition must show that the court ordering the detention or imprisonment made a legal or factual error. Habeas corpus petitions are usually filed by persons serving prison sentences.

[73] See http://www.un.org/law/ilc/texts/consul.htm.

[74] Article 36: "COMMUNICATION AND CONTACT WITH NATIONALS OF THE SENDING STATE
1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State: (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State; (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph; (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action. 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

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"procedural default" [75] prevented them from raising the issue on appeal. Instead, Karl LaGrand was executed on 24 February 1999. On 2 March 1999, the day before the scheduled date of the execution of Walter LaGrand, Germany brought the case to the International Court of Justice. On 3 March 1999, the International Court of Justice issued an Order indicating Provisional Measures, stating that the United States should take all measures at its disposal to ensure that Walter LaGrand was not executed pending a final decision of the International Court of Justice on the substance of Germany's complaint. Despite the awareness of the authorities of this order, Walter LaGrand was executed. Following this, Germany filed a suit against the United States in the ICJ. In spite of the executions, Germany insisted on pursuing its complaint with the ICJ, now seeking to have the Court declare that the United States violated the Vienna Convention on Consular Relations and therefore violated its international legal obligations. Additionally the Court was asked to find that the U.S. violated its international legal obligation to comply with the Order on Provisional Measures issued by the ICJ.[76] The Court ruled against the U.S. on all this points.

II. LaGrand in the context of Atkins

Before analyzing the significance of the *LaGrand Case* in the context of *Atkins*, it is appropriate to present some critical thoughts as well. First, it seems obvious that the case does not stand for the typical situation Art. 36 of the Vienna Convention on Consular Relations had in mind. Art. 36 tries to protect citizens of foreign nations because they neither know the customs nor the legal rules in a foreign country.[77] Additionally they usually don't speak the language well and this is why they are provided with the right of consular support.[78] This situation is clearly not given with regard to the LaGrand brothers, since they lived in the U.S. since 1967 and spoke the English language fluently.[79] Additionally, Germany's court actions before

[75] "A failure to follow state appellate procedure (as in the exhaustion of state remedies) that bars federal esp. habeas corpus review of a case in the absence of a showing of cause for and prejudice from the failure or sometimes in the absence of proof that the bar would result in a miscarriage of justice." Quoted from Find Law, Legal Dictionary, http://dictionary.lp.findlaw.com/.

[76] This is only a short summary of the main requests. Additionally an assurance was requested by Germany that the U.S. will not repeat its unlawful acts. For the detailed requests of Germany see IGH, Urteil v. 27.6.2001 – Der Fall LaGrand, JZ 2002, 91, 91 or see the online version of the judgement at http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm., No. 10 (1) - (4).

[77] Hillgruber, supra note 70, at 95.

[78] Id.

[79] Id.

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the ICJ were very late[80] having in mind that the case was brought to international attention in 1992. Keeping this in mind, it makes the American position a stronger one,[81] since the case was tried complying with national laws and regulations. Thus, the facts of the case seem to be of a rather small significance with regard to the general death penalty debate.

However, besides the weaknesses of the facts of the case, the verdict has a strong legal and general tenor with regard to the death penalty and international relations. The ICJ held the international law of nations to be a higher standard than national law.[82] This emphasizes the role of international obligations on the one hand and buttresses the law of the nations on the other hand.[83] What is more, the role of the individual receives stronger attention in international law and relations.[84] All these single points seem to be a general trend that finds its climax in the *LaGrand Case*. Lastly, from a procedural point of view, the Court found that it is a legal obligation to comply with the Order on Provisional Measures issued by the Court, which are legally binding for every nation under the jurisdiction of the Court.[85]

In light of all these points, Germany's complaint in the *LaGrand Case* brought the issue of the death penalty to a renaissance in the international discourse. That the U.S. proceeded with its execution of people of a foreign nationality, although an international court ordered it not to do so, was quite an issue for most of the observers of the case. There can be no doubt that the U.S. had some concern for the harm done to its reputation by the loss to Germany in the ICJ.[86] Indeed, the verdict showed more than the formality of not complying with international law. It stands for the wide-ranging disapproval of the death penalty in the world community. The *LaGrand Case* thus can be seen as a tool for demonstrating the very same international disapproval raised by the *amicus curie* in the *Atkins* case.

Atkins was the first decision on the Eighth Amendment that had the potential to deal with the rising intensity of international disapproval. The *LaGrand* decision, by

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[80] Id.

[81] Weigend, supra note 71, at 471.

[82] Weigend, supra note 71, at 472.

[83] Oellers-Frahm, supra note 71, at 272.

[84] Id.

[85] Hillgruber, supra note70, at 98 stresses this as a persuasive result. See Art. 41 (1) of the Vienna Convention on Consular Relations.

[86] Hillgruber, supra note 70, at 94 ("David v. Goliath").

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that time, was approximately one year old, and could thus still be in the mind of the Supreme Court justices, playing a still quite prominent role in death penalty discussions.

E. Conclusion & Resume

We have seen that the "standard of decency" is practically wide open. We've also seen that there are a lot of possible influences on this standard. Atkins suggests that they can be both national and international, although the Supreme Court still admits to some difficulties in embracing a role of influence for international and comparative jurisprudence. How do we assess our findings with regard to the Eighth Amendment "standard of decency"?

The United States is a democratic nation, in which policies are meant to be the expression of the will of a majority of the people. In such a polity, representative politicians are charged with pursuing the wishes of the public; if they don't they'll face the danger of not being reelected and loosing power. Since politics on many occasions are expressed through the law, the law serves as a tool to realize politics, especially in the area of the criminal law. Seeing the general trend of punishing people more harshly not only in the U.S. but also in Europe and other parts of the globe, the death penalty can quickly become a focus of discussion. Most people demand that criminals get their "just deserts" for what they did. Sometimes this amounts to demanding the death of an offender. Following these wishes from people living in a democratic nation and making them transparent in the law is certainly one of the tasks of the Eighth Amendment with regard to capital punishment. It is an understandable task in a democracy.

But, transforming wishes of the people into the every day life of the legal system is certainly not the only function of the Eighth Amendment in general and the "evolving standard of decency" in particular. The Eighth Amendment is part of the Bill of Rights, the history of which makes obvious that it is meant to set boundaries for a state under a constitution. The founding fathers, having finished the first draft of the U.S. Constitution, perceived the danger of governmental arbitrariness and the abuse of governmental power.[87] Thus they created the Bill of Rights, which had the main task of setting limits for the government and to secure people's freedom against the state. This is most important with regard to the criminal law.

[87] In fact, George Mason on September 12, 1787 noticed soon after the Committee of Style circulated copies of its draft of the constitution that the lack of a bill of rights is a "serious omission." See Pauline Maier in her introductory note to: The Declaration of Independence and the Constitution of the United States (1998), at 34. See also for further details.

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So far, we've considered two main tasks the Bill of Rights in general and the Eighth Amendment in particular: Being some kind of gate for people's political wishes and setting out limits or boundaries. Does the Bill of Rights work in both these ways?[88] If the law has the function to express (changing) wishes of criminal justice policy and therefore of the people it can hardly fulfill its duty to set boundaries.[89] Thus, everything seems to be possible without being limited by the law. It seems, there are no limits for politics, although the founding fathers intended to set limits.

Now, *Atkins* seems far cry from this. The Court followed the majority opinions from both national and international sources, and excluded mentally retarded offenders from being executed. It therefore preserved a part of people's freedom (the freedom to stay alive!). Why talking so critical about the Eighth Amendment?

Here is some evidence of the fact that the discussion under the generally wide-open "evolving standard of decency" admits of no obvious end, raising concerns that the achieved exclusion of the mentally retarded from capital punishment will last. Since the execution of insane and mentally retarded prisoners was found by the Supreme Court to be barred by the constitution, a Federal Appeals Court in St. Louis ruled that officials in Arkansas can force a prisoner on death row to take antipsychotic medication to make him sane enough to execute.[90] Without the drugs, his execution would be unconstitutional.[91] It seems the fissures under *Atkins* may already be opening up. Nobody knows what the future will be like and whether the current status quo will remain. That's why it is so important to deliver factors against cruel and unusual punishment (whatever this might be!) that may be of some weight on a ruling based on the Eight Amendment's standard of decency. This article has shown that besides the all important national factors, international factors can be of some influence too.

[88] For this problem see generally Wolfgang Naucke, Gesetzlichkeit und Kriminalpolitik, JuS 1989, 862 – 867.

[89] Naucke, supra note 88, at 864.

[90] See e.g. Adam Liptak, State Can Make Inmate Sane Enough to Execute, New York Times February 11 2003, Section A Page 1; also Heilung zur Hinrichtung – Todesstrafe trotz Geistesstörung, Frankfurter Allgemeine Zeitung February 12 2003, Page 9.

[91] Either under Atkins (supra note 3) or under Ford v. Wainwright (supra note 17).

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