

No. 00-8727

IN THE
Supreme Court of the United States
OCTOBER TERM, 2000

ERNEST PAUL MCCARVER,
Petitioner,
v.
STATE OF NORTH CAROLINA,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

**BRIEF OF AMICI CURIAE DIPLOMATS MORTON ABRAMOWITZ,
STEPHEN W. BOSWORTH, STUART E. EIZENSTAT, JOHN C. KORNBLUM,
PHYLLIS E. OAKLEY, THOMAS R. PICKERING, FELIX G. ROHATYN, J.
STAPLETON ROY, AND FRANK G. WISNER IN SUPPORT OF PETITIONER**

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INTEREST OF AMICI CURIAE¹

Amici curiae have served as diplomats representing the government of the United States at home and abroad in both Republican and Democratic administrations.² Four of their number (Abramowitz, Pickering, Roy, Wisner) retired with the rank of Career

Ambassador, the highest rank that can be awarded to members of the United States Foreign Service. Amici submit this brief as friends of the Court to advise regarding the customs of nations with which amici are familiar, and the likely impact the continuing administration of the death penalty against individuals with mental retardation would have upon our diplomatic relations with foreign governments and upon our standing in the international community.³

Some of the signatories to this brief oppose the administration of the death penalty principally with respect to the execution of people with mental retardation; others oppose its application in all circumstances. But all amici agree upon three basic principles: first, that the current United States practice of executing people suffering from mental retardation is inconsistent with evolving international standards of decency; second, that North Carolina's continuation of the practice in this case would strain diplomatic relations with close American allies, increasing America's diplomatic isolation and impairing other United States foreign policy interests; and third, that these considerations (along with other arguments presented by petitioner McCarver and other amici supporting petitioner) should lead this Court to conclude that the practice of executing people with mental retardation offends our "evolving standards of decency" and hence, the Eighth and Fourteenth Amendments of the United States Constitution. U.S. Const. amends. VIII, XIV.

Amici curiae include the following:⁴

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Felix G. Rohatyn is the President of Rohatyn Associates. He was previously Counselor at the Council on Foreign Relations. He is a Trustee of the Center for Strategic and International Studies. He served from 1997-2000 as U.S. Ambassador to France, and before that time as Partner and Managing Director of Lazard Freres, Chairman of the Municipal Assistance Corporation, and Member of the Board of Governors of the New York Stock Exchange.

J. Stapleton Roy is Managing Partner of Kissinger Associates, Inc. A Career Ambassador, during his diplomatic career, he served as U.S. Ambassador to Indonesia, U.S. Ambassador to the Peoples' Republic of China, and U.S. Ambassador to Singapore. He also served as Assistant Secretary of State for Intelligence and Research, Executive Secretary of the Department and Special Assistant to the Secretary, and as Deputy Assistant Secretary for East Asian and Pacific Affairs.

Frank G. Wisner is Vice-Chairman of the American International Group. A Career Ambassador, during his diplomatic career, he served as U.S. Ambassador to India, U.S. Ambassador to the Philippines, U.S. Ambassador to Egypt, and U.S. Ambassador to Zambia. He also served as Under Secretary of Defense for Policy, Under Secretary of State for International Security Affairs, and Senior Deputy Assistant Secretary of State for African Affairs.

SUMMARY OF ARGUMENT

The United States of America is the only established democracy in the world that is known regularly to execute people with mental retardation. As former diplomats, amici curiae make three submissions, based upon their first-hand observation. First, the current United States practice of executing people with mental retardation has become manifestly inconsistent with evolving international standards of decency. Second, permitting North Carolina to execute petitioner Ernest Paul McCarver, an adult with a demonstrated IQ of 67,⁵ will strain diplomatic relations with close American allies, provide diplomatic ammunition to countries with demonstrably worse human rights records, increase U.S. diplomatic isolation, and impair other United States foreign policy interests. Third, amici believe that under the jurisprudence of the Eighth and Fourteenth Amendments, this Court cannot meaningfully evaluate "evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958), without weighing international as well as domestic opinion. Sustaining the practice of executing people with mental retardation would not only deny the "decent respect to the opinions of mankind" accorded by our Founding Fathers, but would also offend broad universal "concepts of dignity, civilized standards, humanity and decency" that lie at the core of the Eighth and Fourteenth Amendments' bar against cruel and unusual punishments. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

ARGUMENT

The United States of America is the only established democracy in the world that is known regularly to execute people with mental retardation. At least 108 of the world's nations have now abolished capital punishment by law or by practice. Of the minority of nations that still retain the practice of capital punishment, only two—the United States and Kyrgyzstan—are reported regularly to execute people with mental retardation.⁶ In diplomatic settings, the United States faces daily and growing criticism from the international community for maintaining a cruel and uncivilized practice. As former diplomats, amici curiae make three submissions, based upon their first-hand observation.

I. THE EXECUTION OF PEOPLE WITH MENTAL RETARDATION IS INCONSISTENT WITH EVOLVING GLOBAL STANDARDS OF DECENCY

The current United States practice of executing people with mental retardation has become manifestly inconsistent with evolving international standards of decency. Numerous international and regional intergovernmental bodies have passed resolutions, statements and judgments expressing opposition to capital punishment for people with mental retardation. As far back as 1989, the United Nations Economic and Social Council (ECOSOC) passed by consensus a resolution that recommended "eliminating the death penalty for persons suffering from mental retardation or extremely limited mental competence." Implementation of the Safeguards Guaranteeing Protection of the Rights of

Those Facing the Death Penalty, E.S.C. Res. 1989/64, U.N. ESCOR, para. 1, U.N.Doc. E/RES/1989/64 (1989).

In 1999, 2000, and 2001, the U.N. Commission on Human Rights adopted resolutions urging those states that retain capital punishment "not to impose the death penalty on persons suffering from any form of mental disorder," a term understood by the Commission to include both mental illness and mental retardation. See *The Question of the Death Penalty*, Hum. Rts. Comm. Res. 2001/68, U.N. GAOR, 57th Sess., para. 4, U.N.Doc. E/CN.4/RES/2001/68 (2001); *The Question of the Death Penalty*, Hum. Rts. Comm. Res. 2000/65, U.N. GAOR, 56th Sess., para. 3, U.N.Doc. E/CN.4/RES/2000/65 (2000); *Question of the Death Penalty*, Hum. Rts. Comm. Res. 1999/61, U.N. GAOR, 55th Sess., para. 3, U.N.Doc. E/CN.4/RES/1999/61 (1999).

The U.N. Special Rapporteurs on Extrajudicial, Summary or Arbitrary Executions have also repeatedly criticized the U.S. for the practice of executing people with mental retardation. See *Extrajudicial, Summary or Arbitrary Executions: Report by the Special Rapporteur*, U.N. GAOR, Hum. Rts. Comm., 54th Sess., para. 145, U.N.Doc. E/CN.4/1998/68/Add.3 (1998). In his 1998 report, the Special Rapporteur (Mr. Bacre Waly Ndaiye) stated: "Because of the nature of mental retardation, mentally retarded persons are much more vulnerable to manipulation during arrest, interrogation, and confession. Moreover, mental retardation appears not to be compatible with the principle of full criminal responsibility." *Id.* para. 58. In 2000, the Special Rapporteur urged governments that continue to use the death penalty "to take immediate steps to bring their domestic legislation and legal practice into line with international standards prohibiting the imposition of death sentences in regard to minors and mentally ill or handicapped persons."

Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur, U.N. GAOR, Hum. Rts. Comm., 56th Sess., para. 97, U.N.Doc. E/CN.4/2000/3 (2000). The most recent report of the Special Rapporteur (Ms. Asma Jahangir) noted that during the previous year she had sent urgent, unsuccessful appeals on behalf of at least four persons facing execution in the United States "despite indications that they were suffering from mental illness or disability." *Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, U.N. GAOR, Hum. Rts. Comm., 57th Sess., para. 82, U.N.Doc. E/CN.4/2001/9 (2001).

II. THE GROWING INTERNATIONAL CONSENSUS AGAINST THE EXECUTION OF PEOPLE WITH MENTAL RETARDATION HAS INCREASINGLY ISOLATED THE UNITED STATES DIPLOMATICALLY

Amici submit that permitting North Carolina to execute petitioner Ernest Paul McCarver will create friction with and alienate countries who have been American allies of long standing. Nations that are otherwise our allies, with strong rule-of-law traditions and histories, legal systems and political cultures similar to ours, have most consistently

protested our practice of executing people with mental retardation. The European Union—which now makes abolition of the death penalty a prerequisite for membership—has strongly criticized the U.S. execution of people with mental retardation both in formal diplomatic demarches to the United States and in letters expressing distress at specific executions.⁷ In numerous foreign nations—including many to which amici have been accredited—the media and the general public have expressed growing outrage at the continued existence and frequency of capital punishment in our country, with particular emphasis on the U.S. practice of executing people with mental retardation.⁸

Amici believe that persisting in this aberrant practice will further the United States' diplomatic isolation and inevitably harm other United States foreign policy interests. The degree to which this issue has strained our diplomatic relations can be measured by the extent to which important bilateral meetings with our closest allies are now consumed with answering diplomatic demarches challenging these practices.⁹ The persistence of this practice has caused our allies and adversaries alike to challenge our claim of moral leadership in international human rights. If this Court were again to sustain the practice of executing people with mental retardation, it would provide fresh anti-American diplomatic ammunition to countries who have exhibited far worse human rights records.¹⁰

In *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 385 (2000), this Court recently found that "statements of foreign powers necessarily involved in the President's [foreign policy] efforts . . . indications of concrete disputes with those powers, and opinions of senior National Government officials are competent and direct evidence of the frustration" of Congress' foreign policy objectives by state law. In this case, this Court should similarly find that analogous statements, indications and opinions of former officials constitute relevant evidence that sustaining North Carolina's law and practice of executing people with mental retardation would act to frustrate our broader national foreign policy goals.

III. IN EVALUATING "EVOLVING STANDARDS OF DECENCY" UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS, THIS COURT SHOULD WEIGH INTERNATIONAL AS WELL AS DOMESTIC OPINION

Third and finally, amici believe that sustaining the practice of executing people with mental retardation would offend our "evolving standards of decency" and violate the Eighth and Fourteenth Amendments of the United States Constitution. See U.S. Const. amends. VIII, XIV. The Eighth Amendment's bar against Cruel and Unusual Punishments embodies broad "concepts of dignity, civilized standards, humanity and decency." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). These concepts are not static; rather, they change with the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). While this Court has primarily discerned these standards by reference to the actions of state legislatures and juries, it has regularly looked to international practices as well. Indeed, in assessing the contemporary standards of "humanity," this Court has consistently recognized the

obvious fact that "humanity" encompasses citizens of nations other than our own. See *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. 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).¹¹

Our earliest understandings of the Eighth Amendment reflected the opinions and practices of other civilized nations. Indeed, the phrase "cruel and unusual" originated in the English Bill of Rights of 1689. The framers of the Constitution understood that the customs of nations and the global "opinions of mankind" would play an important role in the new nation. See Louis Henkin, *A Decent Respect to the Opinions of Mankind*, 25 *John Marshall L. Rev.* 215 (1992). The American Declaration of Independence itself famously announced:

When in the Course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them with one another . . . a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

The Declaration of Independence, para. 1 (U.S. 1776) (emphasis added). Such respect for world opinion proved particularly important in the drafting of the Eighth Amendment to the Constitution. As Justice Blackmun noted, "[T]he drafters of the [Eighth] Amendment were concerned, at root, with 'the dignity of man,' and understood that 'evolving standards of decency' should be measured, in part, against international norms." Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 *Yale L.J.* 39, 45-46 (1994) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)). Moreover, since the founding of the nation, this Court has, in non-Eighth Amendment contexts, often noted that Americans' social values reflect and are informed by those of other nations, particularly those with similar legal and social traditions. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (pointing out that "[p]olygamy has always been odious among the northern and western nations of Europe"); *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) ("In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide."); *id.* n.8 (citing Canadian decision discussing assisted-suicide provisions in Austria, Spain, Italy, the United Kingdom, the Netherlands, Denmark, Switzerland, and France).

International opinion has always informed this Court's understandings of the social values of the United States and, in particular, what our society considers to be "cruel and unusual punishments." U.S. Const. amend VIII. In an increasingly globalized society, the opinions of other nations are more relevant today than at any time since the Founding. In this context, the Court's evaluation of "evolving standards of decency" must continue to reflect not just the views of the American community, but the views of the international community as a whole.

When this Court last considered this question, in the 1989 case of *Penry v. Lynaugh*, 492 U.S. 302 (1989), only two states (Maryland and Georgia) and the federal government statutorily prohibited executing people with mental retardation. Today, 14 states and the federal government prohibit the practice by statute.¹² Taken in conjunction with the 12 states and the District of Columbia which prohibit all capital punishment, 26 states, the federal government and the District of Columbia now prohibit execution of the people with mental retardation. In four other states—Connecticut, Florida, Missouri, and Texas—similar bills have passed the legislature and are currently awaiting gubernatorial signature.¹³ Several additional states are in various stages of legislative action concerning a ban on the execution of people with mental retardation.¹⁴ Public opinion polls now show that a large majority of Americans—even those who support capital punishment—today are opposed to executing people with mental retardation. See, e.g., Sheryl McCarthy, *The Mentally Retarded Should Be Spared the Chair*, *Newsday*, April 2, 2001, at A2 (citing a Gallup nationwide poll finding that two-thirds of Americans oppose executing people with mental retardation); Steve Brewer & Mike Tolson, *A Deadly Distinction: Part III*, *Houston Chronicle*, Feb. 6, 2001, at A6 (citing a nationwide poll showing that only 16 percent of those people who otherwise support the death penalty support the execution of a person who is mentally impaired).

International condemnation of the United States practice of executing people with mental retardation has been a significant factor in state legislative moves to eliminate the practice.¹⁵ The last time this issue was considered, 12 years ago in *Penry*, this Court acknowledged that executing people with mental retardation might be cruel and unusual punishment, *Penry*, 492 U.S. at 333, but held that there was "insufficient evidence of a national consensus against [the practice]." *Penry*, 492 U.S. at 335. Indeed, the Court in *Penry* stated that public sentiment expressed in polls and resolutions indicating opposition to execution of people with mental retardation showed only that it was perhaps an appropriate subject for legislative intervention, "which is an objective indicator of contemporary values upon which we can rely." *Penry*, 492 U.S. 302, 334-35 (emphasis added).

Amici respectfully submit that abundant evidence now exists of both an international and a national consensus against executing persons with mental retardation. For that reason, this Court should now take the step postponed in *Penry* and bring this country's practices with regard to execution of people with mental retardation into line with that of all other civilized nations.

In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), this Court held that Oklahoma's application of the death penalty to a defendant who was 15 years old at the time of the offense violated the Cruel and Unusual Punishments clause of the Eighth Amendment. Justice Stevens, writing for the plurality, took note of the views of "other nations that share our Anglo-American heritage, and . . . the leading members of the Western European community," *id.* at 830. Justice O'Connor's concurrence invoked the United States' ratification of Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365 (entered into force for United States on Feb. 2, 1956), "to undercut any assumption that [recent congressional legislation has intended] to authorize the death penalty for some 15-year-old felons." 487 U.S. at 852 (O'Connor, J., concurring in the judgment). It would be tragic if this Court were now to ignore an equally strong expression of international practice and opinion and affirmatively authorize imposition of the death penalty upon an adult with the mind of a 10-year-old.¹⁶

CONCLUSION

For the foregoing reasons, the Court should vacate the order of the Supreme Court of North Carolina.

Respectfully submitted,

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Endnotes

1. In accordance with Sup. Ct. R. 37.6, amici curiae disclose that the law firm of Debevoise & Plimpton made a contribution in kind to the printing, preparation and submission of this brief.
2. Blanket consents have been granted by all parties for the filing of amicus briefs.
3. This Court has long held that international law standards "may be ascertained by consulting the . . . general usage and practice of nations," *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820), and by examining "the customs and usages of civilized nations; and as evidence of these . . . the works of . . . commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat." *The Paquete Habana*, 175 U.S. 677, 700 (1900) (emphasis added).
4. The current affiliations of amici are provided here for identification purposes only, and are not intended to convey the views of their affiliated institutions on the questions at issue here.
5. According to the American Association on Mental Retardation, a person possesses the intellectual-deficit component of mental retardation, inter alia, if he or she has an IQ of "70 to 75 or below." American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Support* 25 (9th ed. 1992). At the sentencing phase in this case, a psychologist who had tested McCarver testified that his disability, which had manifested at an early age, left McCarver with the reading comprehension of a 7-year-old and the writing ability of an 8-year-old. Tr. at 732-33. A national expert on mental retardation further determined that McCarver possessed an age-equivalent score in adaptive behavior of 10 years and 5 months.
6. In 1994, the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions expressed concern that an execution in Japan may have involved a person with mental retardation, but we have not been able to independently verify that claim. Nor does that report suggest that Japanese law and practice authorize the regular, knowing and deliberate execution of individuals with mental retardation. Extrajudicial, Summary or Arbitrary Executions: Report by the Special Rapporteur, U.N. GAOR, Hum. Rts. Comm., 51st Sess., para. 380, U.N.Doc. E/CN.4/1995/61 (1994). Given this near-unanimity of state practice followed out of a sense of legal obligation, amici believe that the current U.S. practice violates customary international law, which "is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. . . ." *The Paquete Habana*, 175 U.S. 677, 700 (1900).
7. See, e.g., European Union, Press Release, May 10, 2001, at <http://www.eurunion.org/legislat/DeathPenalty/ Demarche10May.htm> (last consulted

June 6, 2001), reporting that "[i]n line with established EU practice, the Swedish Presidency of the European Union on May 10, 2001 made a demarche to the US Administration presenting the EU positions of principle on the death penalty," and noting that "[i]n individual cases, the EU makes clemency demarches in cases involving mentally retarded persons." See also *The Daily Telegraph* (London), Mar. 8, 2001, at 15, reporting that "Willy Helin, spokesman for the EU in Washington, said the EU was opposed to the death penalty in principle but particularly highlighted cases involving people who were minors at the time of the offence, mentally retarded or foreign nationals." In 2000, the European Union expressed its concern, via a demarche, that the United States continues to carry out the death penalty against those who suffer from mental disorders. See European Union, *EU Policy on the Death Penalty: EU Demarche on the Death Penalty*, Feb. 25, 2000, at <http://www.eurunion.org/legislat/deathpenalty/Demarche.htm> (last consulted June 6, 2001) (containing the European Union's demarche on the death penalty of February 25 2000, forwarded to the United States with a European Union Memorandum on the Death Penalty). On March 26, 2001 the European Union, via its Presidency (Sweden), the subsequent President (Belgium) and the European Commission, appealed to the Governor of Nevada not to execute Thomas Nevius, a defendant with an IQ between 57 and 68. The European Union's letter noted that Nevius's execution would be contrary to the United Nations Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty as well as to the most recent resolution on capital punishment by the Commission on Human Rights. See European Union, *Letter to Nevada Governor Guinn on Behalf of Thomas Nevius*, Mar. 26, 2001, available at <http://www.eurunion.org/legislat/DeathPenalty/NeviusGovLett.htm> (last consulted June 6, 2001).

8. See, e.g., Felix G. Rohatyn, Op-Ed, *America's Deadly Image*, *Washington Post*, Feb. 20, 2001, at A23, noting that "[r]epeated protests in front of the embassy in Paris, protests at our consulates and, just recently, a petition signed by 500,000 French men and women delivered to our embassy in Paris were part of a constant refrain. . . . There is a strong belief among our European allies that [the death penalty] has no place in a civilized society. . . . [T]he United States is seen as executing people who have not had appropriate legal assistance, people who may be innocent, people who are mentally retarded as well as minors" (emphasis added). See also Marcus Mabry, *A Bad Case of Euro Envy: The Rift Between U.S. and Old World Values is Threatening America's Claim to Global Leadership*, *Newsweek*, Apr. 16, 2001, at 2: "Human-rights organizations and thousands of demonstrators bear down on U.S. embassies with each controversial execution in America. . . . [Karsten] Voigt [coordinator for German-American relations at the Foreign Ministry in Berlin] predicts that in coming years, disagreements over values will become intractable. . . . [A]ll this discord will eventually have political ramifications. . . . Increasingly, Europe will find it difficult (and unpopular) to be allied with a nation whose values it doesn't share—not to mention to be led by it." See *A Cultural Gulf*, *International Herald Tribune*, May 14, 2001, at 8: "European politicians and intellectuals, who view the death penalty as a human rights issue, are incredulous that Americans support a punishment that . . . is used on the mentally retarded and has often gotten the wrong man" (emphasis added); Editorial, *Europe's View of the Death Penalty*, *New York Times*, May 13, 2001, § 4, at 12 (suggesting that the U.S. position on this issue may have

contributed to the U.S. failure to gain reelection to the United Nations Human Rights Commission); Gay Alcorn, *News Review*, *Sydney Morning Herald*, May 12, 2001, at 37: "Why would the U.S., champion of human rights and justice, be so alone among its allies . . . ?"

9. See *The Economist*, *A Covenant with Death*, May 12, 2001, at 34 ("Colin Powell, the secretary of state, is routinely confronted about his country's use of the death penalty when he meets his counterparts around the world.").

10. The Peoples' Republic of China, for example, regularly raises the U.S. practice of executing people with mental retardation when demarched about its own human rights practices. Although the Peoples' Republic executed nearly three times as many people in 1998 as the rest of the world combined (nearly 1800 people), it has reportedly banned the execution of people with mental retardation for centuries. Stephen Davis, *The Death Penalty and Legal Reform in the PRC*, 1 *Journal of Chinese Law* 303, 307 (1987).

11. In *Stanford v. Kentucky*, the opinion announcing the Court's judgment stated in a footnote that exclusively American conceptions of decency were "dispositive" of the analysis. *Stanford v. Kentucky*, 492 U.S. 361, 370, n.1 (1989). This view seems clearly aberrant, however, when viewed in light of this Court's established Eighth Amendment jurisprudence, cited in text above. That precedent has consistently considered international opinion when evaluating evolving standards of decency for purposes of the Eighth Amendment. As Justice Blackmun has noted, "if the substance of the Eighth Amendment is to turn on 'evolving standards of decency' of the civilized world, there can be no justification for limiting judicial inquiry to the opinions of the United States." Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 *Yale L.J.* 39, 48 (1994).

12. Arizona, Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, Nebraska, New Mexico, New York, South Dakota, Tennessee, and Washington.

13. See Fla. S. 238, 2001 Reg. Sess. (2001); Conn. S. 1161, 2001 Reg. Sess. (2001); Mo. S. 267, 2001 Sess. (2001); Tex. H.B. 236, 77th Sess. (2001). If signed by their respective governors, these bills will bring to 18 the number of states that retain the death penalty, but not for people with mental retardation. One of the four governors, Florida's Jeb Bush, has said that he supports the measure and has vowed publicly not to sign death warrants for prisoners with mental retardation. See *National Briefing South: Florida: Legislature Bans Execution of Mentally Retarded*, *New York Times*, May 5, 2001, at A9; *National Briefing Southwest: Texas: Compromise on Death Penalty*, *New York Times*, May 25, 2001, at A16; *Sparing the Retarded Law*, *St. Louis-Dispatch*, May 16, 2001, at B6. Missouri Governor Bob Holden has also indicated that he will sign his state's bill. See Bill Bell Jr., *Legislation Sent to Holden Would Ban Death Penalty for Mentally Retarded*, *St. Louis Post Dispatch*, May 12, 2001, at 11. Similarly, Connecticut Governor John Rowland has indicated that he will sign the Connecticut measure in light of his public support for a death penalty exemption for defendants with mental retardation. See Lisa Chedekel, *Senate OK's Changes in Death Penalty*, *The Hartford Courant*, June 6, 2001, at

A3. Governor Rick Perry has not decided yet whether he will allow the Texas bill to become law. See Jim Yardley, Texas Death Bill Is in Hotter Spotlight, *New York Times*, June 5, 2001 at A18; Jim Yardley, Texas Set to Shift in Wake of Furor Over Death Penalty, *New York Times*, Jun. 1, 2001, at A1.

14. Several state legislatures (e.g., Louisiana, North Carolina, and Oregon) have active bills pending. See 2001 LA H.B. 886 (La.); 2001 NC H.B. 141 (N.C.); 2001 NC S.B. 173 (N.C.); 2001 OR S.B. 140 (Or.). At least two states that ban all capital punishment (Massachusetts and Minnesota) saw efforts to restore the death penalty but proposed legislation including specific exemptions for persons with mental retardation. See 2001 MA H.B. 4003 (Mass.); 2001 MN H.B. 329 (Minn.). And at least two state legislatures (Nebraska and New Hampshire) passed bills establishing a moratorium on executions, including those of persons with mental retardation, only to have them be vetoed by their governors. See Henry Weinstein, Death Penalty Moratorium Gaining Unlikely Adherents, *Los Angeles Times*, Oct. 17, 2000, at A1; Bush Campaign Unfazed by Death-Penalty Debate; Gore Also Favors Execution, *Telegraph Herald* (Dubuque, Iowa), Aug. 8, 2000, at A7.

15. See, e.g., Rodney Ellis, The Hard-Line Punishment Texans Don't Support, *New York Times*, June 2, 2001, at A13 (Texas state senator states that "[s]ince the death penalty was ruled constitutionally permissible in 1976, 35 offenders with mental retardation have been executed nationwide. Texas leads the way, having executed six. Around the globe this makes Texas look barbaric and concerned with revenge, not justice." (emphasis added)).

16. See Eric Dyer, Death Penalty Measure Passes in State Senate: The Legislation Would Prohibit Prosecutors from Seeking Capital Punishment for Anyone with an IQ of 70 or Below, *News-Record* (Greensboro, N.C.), Apr. 24, 2001, at A1 (quoting North Carolina Republican state Senator Hamilton Horton after the state Senate passed a bill that would revise the state statute at issue here by exempting the people with mental retardation from the death penalty: "This act addresses the situation of a child's mind in an adult's body. . . . I want the world to know that in North Carolina, we aren't in the business of executing children.")