Have American Standards of Decency Evolved to the Point Where Capital Punishment Inflicted upon the Mentally Retarded Can No Longer Be Tolerated?

Lindsay Raphael*
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* "I will be using the terms mentally retarded or mental retardation to refer to this group throughout the Article. The use of these words follows the American Association of Mental Retardation’s determination after much deliberation of acceptable terms.” Jonathan L. Bing, Comment, Protecting the Mentally Retarded From Capital Punishment: State Efforts Since Penry and Recommendations for the Future, 22 N.Y.U. REV. L. & SOC. CHANGE 63 n.22 (1996).
I. INTRODUCTION

"Should a civilized society levy its most extreme punishment against someone who cannot fully understand it? Against someone who could not help his own lawyers defend him? Against someone who may have confessed to 'help out' the police, not realizing he's just helped himself to the death chamber?" Today, on death rows across the United States, sit a number of men and women with the minds of children awaiting execution. These people are mentally retarded. Typical of these individuals is Ernest P. McCarver, who is currently on death row in North Carolina. McCarver was convicted of first-degree murder and robbery with a dangerous weapon, and he was sentenced to death. Although McCarver is now forty-one years old, he has the mental capacity of a ten-year, five-month-old child, and an IQ of sixty-seven. 

"[H]is impairments [are] such that he could not perform typical daily activities. For example, he [is] unable to use the telephone book to find a place where he could order pizza." In other words, his capacity to perform these activities satisfactorily without assistance is more like that of a preadolescent youth than an adult.

McCarver is to be executed despite the fact that he is mentally retarded and has the mind of a ten-year-old. In challenging his sentence, McCarver's

4. Id.
8. Id. at 7.
basis for prohibiting such executions is that his "execution would violate the Eighth and Fourteenth Amendments to the United States Constitution because [he] is retarded and there is now a national consensus against executing the mentally retarded." In McCarver's case, the United States Supreme Court considers whether attitudes have changed over the past twelve years to the point where executing people with mental retardation violates society's ideas of what is decent. Ernest McCarver is not a rarity among death row inmates. Although it is unknown how many of the 3700 people on death row in the United States are mentally retarded, experts say "between 200–300 inmates" suffer from mental retardation.

On June 12, 2001, Florida Governor Jeb Bush signed into law a bill banning the execution of mentally retarded persons. The United States Supreme Court, in its term beginning in October, will consider the question of whether executing those with mental retardation offends society's "evolving standards of decency" and thus violates the Eighth Amendment's ban on cruel and unusual punishment. Whether executing the mentally retarded offends society's "evolving standards of decency" and hence a violation of the Eighth Amendment, is a question that has plagued the criminal justice system and state legislatures since the Supreme Court decided *Penry v. Lynaugh* twelve years ago. Justice Sandra Day O'Connor, on behalf of the majority, wrote "[w]hile a national consensus against execution of the 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" to conclude that it is "categorically prohibited by the Eighth Amendment."

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9. *Id.* at 6; see also *Mental Retardation and the Death Penalty*, supra note 2.


13. *Pet. for Writ of Cert.*, supra note 7, at 9–14; see also *Bonner*, *supra* note 6, at A1 (discussing the Court's consideration of whether executing mentally retarded defendants offends society's evolving standards of decency); *Mental Retardation and the Death Penalty*, supra note 2 (discussing the Court's consideration of whether executing mentally retarded persons offends society's evolving standards of decency).

14. 492 U.S. 302 (1989) (holding that executing persons with mental retardation was not a violation of the Eighth Amendment).

15. *Id.* at 340.

At the time of the decision in Penry, in which the Supreme Court held that the Eighth Amendment did not prohibit the execution of the mentally retarded, only one state with the death penalty, Georgia, and the federal government barred execution of the mentally retarded. Since Penry, fifteen more states have enacted laws prohibiting the execution of mentally retarded capital offenders.

Florida, however, is the first state well-known for its frequent use of the death penalty to pass a law banning such executions. Therefore, the Supreme Court may finally determine that sufficient evidence exists to establish a national consensus indicating that society no longer approves of nor wishes to sanction the execution of the mentally retarded. Accordingly, Florida’s new law is important to our scheme of justice and is indicative of a national trend among states with the death penalty to pass such legislation outlawing the execution of the mentally retarded.

This article begins by explaining in detail Florida Senate Bill 238, which created section 921.137 of the Florida Statutes, titled, “Imposition of the death sentence upon a mentally retarded defendant prohibited.” Part II discusses the importance of Florida’s legislation. Part III explains the difference between mental retardation and mental illness. Part IV examines common attributes shared among individuals who suffer from mental retardation. Part V analyzes the rationales for executing the mentally retarded, and whether penological goals are furthered, focusing specifically on the elements of capital homicide, the inefficiency of capital punishment as a deterrent, and means of retribution when applied to mentally retarded defendants. Additionally, it examines the relevant Eighth Amendment principles and the mentally retarded defendant’s capacity to satisfy the culpable mens rea. Parts VI and VII give a brief overview of significant prior case law, and examine the United States Supreme Court’s position in Penry v. Lynaugh. Finally, Part VIII highlights the potential impact Florida
Senate Bill 238, banning the execution of mentally retarded persons, will have on future United States Supreme Court decisions and the emerging trend to ban such executions among states that have the death penalty.

This article addresses the issue of whether the application of the death penalty upon persons with mental retardation should be prohibited, because such a penalty is contrary to society's ideas of what is decent. In addition, this article explains the reason the death penalty is not necessary to accomplish the legitimate legislative purposes in punishment, since a less severe penalty, such as life imprisonment, would adequately serve the same purpose. Finally, this article discusses the impact Florida Senate Bill 238 will have on future death penalty cases and the emerging trend banning such executions among those states that have the death penalty.

This article ultimately concludes that the use of capital punishment against people who suffer from mental retardation is cruelly inhumane and without justification. Furthermore, Florida is indicative of both a growing national movement to end such executions, and American standards of decency that have evolved to the point where capital punishment inflicted upon the mentally retarded can no longer be tolerated.

II. FLORIDA STATUTE § 921.137: IMPOSITION OF THE DEATH SENTENCE UPON A MENTALLY RETARDED DEFENDANT PROHIBITED

A. Statutory Requirements

Florida Senate Bill 238 was enacted to ban the imposition of the death penalty on a defendant who suffers from mental retardation. Under section 921.137(1), mental retardation refers to "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age [eighteen]." Under section 921.137(1), the term "significantly subaverage general intellectual functioning... means performance that is two or more standard deviations from the mean score on a standardized intelligence
Florida Senate Bill 238 does not stipulate how low a defendant’s IQ level must reach to be considered retarded, but uses a definition that considers defendants “retarded if they have below-normal intellectual functions and behavior.”

“A legislative employee[,] however[,] found that the bill would likely spare any inmate with an IQ of 70 or less.”

A diagnosis of mental retardation requires the presence of impairments in adaptive behavior in addition to the deficit in intellectual functioning. Adaptive behavior is defined as an individual’s effectiveness or degree in meeting the “standards of personal independence and social responsibility expected of his or her age, cultural group, and community.” Individuals’ adaptive behavior refers to how effectively individuals cope with the demands and ordinary challenges of everyday life, such as cognition, communication, and impulse control.

Under section 921.137(4), a defendant who has already been convicted and sentenced to death may file a motion with the trial judge to determine whether the defendant has mental retardation. Accordingly, two court appointed independent experts examine the defendant to determine whether he or she is retarded. In addition, defense attorneys and the state can present evidence from their own experts on whether the defendant suffers from mental retardation.

23. § 921.137(1); see generally James W. Ellis and Ruth A. Luckasson, Symposium on the ABA Criminal Justice Mental Health Standards: Mentally Retarded Criminal Defendants, 53 GEO. WASH. L. REV. 414, 422 (1985). “The AAMD’s definition sets the upper boundary of mental retardation at an IQ level of 70, which is approximately two standard deviations from the mean score of 100.” Id.


25. Id. See generally Enrenreich, supra note 1.

26. Ellis, supra note 23, at 422.

27. § 921.137(1).

28. Billotte, supra note 22, at 338; see generally Entzeroth, supra note 16, at 913–14 (discussing definitions of mental retardation); Enrenreich, supra note 1 (analyzing limitations in adaptive skills, “e.g., communication, self-control, home living, social skills, community use, self-direction, health and safety . . . leisure, and work.”).

29. § 921.137(4).

30. Id.
mental retardation. If the trial court concludes by clear and convincing evidence that the criminal defendant suffers from mental retardation, he or she is exempt from the death penalty. The criminal defendant, however, remains subject to the other penalties that may be inflicted on a person convicted of a capital offense, such as life imprisonment.

Florida’s bill banning the execution of the mentally retarded is fairly weak. It does not contain a set IQ level, but does use a definition that considers intellectual functioning and adaptive behavior. Contributing to the weak nature of Florida Bill 238 is the fact that Florida does not do what most states practice, which is making the determination of mental retardation before trial. In Florida, the determination of mental retardation will go to the jury while deliberating the sentence. This means that the defendant has already been convicted and sentenced to death. Thus, the defendant must petition the trial judge to appoint mental health experts to make the determination after the jury has returned a recommended sentence of death. Since the jury considers mental retardation during the sentencing phase of trial, after already hearing the evidence of guilt, the jury is somewhat tainted.

Section 921.137 of the Florida Statutes is not retroactive. Thus, it does not apply to any of the 387 people now on Florida’s death row, all of whom were sentenced prior to June 12, 2001.
B. The Importance of Florida’s Legislation

Florida’s legislation is important to discuss, because it is the first state well-known for its frequent use of the death penalty to pass legislation banning the execution of mentally retarded capital offenders. As noted above, on June 12, 2001 Governor Jeb Bush, a Republican who is a strong supporter of the death penalty, signed Senate Bill 238 into law. The bill “unanimously passed the Florida Senate in March and was only one vote short of passing the House unanimously in May.” According to Governor Bush, “people with clear mental retardation should not be executed.” Bush also said “[t]his legislation will provide much-needed protection for the mentally retarded in the judicial process.”

Over the last twenty-four years since the death penalty was reinstated in 1976, at least thirty-five offenders with mental retardation have been executed in the United States. Florida has executed four mentally retarded inmates since 1976. Of the 3700 inmates currently on death row it is estimated “between 200-300 inmates are mentally retarded.” Executing offenders who have retardation is unconscionable and inhumane. The Eighth Amendment prohibits cruel and unusual punishment, which “has

40. Bing, supra note 16, at 105 (mentioning that other states well-known for their frequent use of the death penalty are Texas, California, and Louisiana).
41. Mental Retardation and the Death Penalty, supra note 2; see also Bonner, supra note 6, at A1 (discussing Florida’s new legislation banning the execution of the mentally retarded).
42. Bonner, supra note 11, at A1.
43. Fla. Law Bans Execution for Retarded, supra note 22.
44. Mental Retardation and the Death Penalty, supra note 2 (listing defendants with mental retardation executed in the United States since 1976, as updated by The Death Penalty Information Center). “William Ed, attorney with the Office of the Capital Collateral Counsel in Florida and an expert in death penalty and people with developmental disabilities, has identified at least nine persons to add to the list.” Telephone Interview by Human Rights Watch with William Ed, Attorney, Office of the Capital Collateral Counsel in Florida (Feb. 6, 2001) (Human Rights Watch can be found at www.hrw.org/reports).
45. Arthur F. Goode, III, a white male with an IQ between sixty and sixty-three, was executed April 5, 1974, James Dupree Henry, a black male with an IQ in the low seventies, was executed on July 12, 1974, Mollie Lee Martin, a white male with a dual diagnosis/mentally insane, was executed on May 12, 1992, and John Earl Bush, a black male with borderline mental retardation and organic brain damage, was executed on October 21, 1996. Death Penalty Information Center, Executions of Those with Mental Retardation, at http://www.deathpenaltyinfo.org/dplmxexecs.html (last visited June 15, 2001).
46. Mental Retardation and the Death Penalty, supra note 2.
47. Adams, supra note 11, at 10; see also Entzeroth, supra note 16, at 911 (stating “[b]etween twelve and twenty percent of current death row inmates are mentally retarded”).
been interpreted to include punishment that is disproportionate to the gravity of the offense and the defendant's moral culpability, and imposes purposeless pain and suffering."  

The Florida law banning the execution of mentally retarded persons protects people who do not have the capacity to understand the nature of the crime they have committed. In addition, when combined with the other sixteen states and the federal government that explicitly prohibit sanctioning the mentally retarded to death, these legislative enactments send out a stronger message of a national consensus.

Moreover, public opinion polling data also reflects society's consensus that the death penalty should not be imposed upon the mentally retarded. For example, in Florida, a 1986 statewide survey revealed Floridians oppose the use of the death penalty for mentally retarded defendants by seventy-one percent to twelve percent. This figure is noteworthy, because Florida is a death penalty state where eighty-four percent of residents favored capital punishment, while only thirteen percent opposed it.

Whether a national consensus has developed against executing those with mental retardation is the question the Supreme Court will consider this fall. This question is very important, as will be set forth in detail, because Justice O'Connor found that the Eighth Amendment's Cruel and Unusual Punishment Clause must be viewed in light of American conceptions of

49. Currently fifteen states forbid execution of the mentally retarded: Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Nebraska, New Mexico, New York, South Dakota, Tennessee, and Washington. The governors of Connecticut and Missouri have similar legislation sitting on their desks awaiting approval. Mental Retardation and the Death Penalty, supra note 2.
50. In Penry, Justice O'Connor, writing for the majority, said that presently there was no emerging national consensus against executing those with mental retardation convicted of capital offenses to conclude that it is "categorically prohibited by the Eighth Amendment." 492 U.S. 302, 335 (1989). See generally Mental Retardation and the Death Penalty, supra note 2; Bing, supra note 16, at 105 (discussing the emerging national consensus argument); Entzeroth, supra note 16, at 921-22 (discussing Justice O'Connor's considerations in reaching the Court's decision in Penry).
52. Id.
Although "the Supreme Court has not set a minimum number of states needed to represent a [national] consensus," the Florida law could strongly evince society's newly evolved consensus against executing the mentally retarded.

III. DIFFERENCES BETWEEN MENTAL RETARDATION AND MENTAL ILLNESS

It is critical for courts to understand the distinct differences between mental retardation and mental illness, rather than lump the two together as courts often do. This has serious and unfortunate consequences in the criminal justice system. It is imperative to recognize that mental retardation is not the same thing as mental illness. The most significant difference is that "mental retardation is not an illness." This is not to say that mental retardation and mental illness are mutually exclusive; some mentally retarded individuals might also suffer from mental illness. "Indeed, between twenty to thirty-five percent of all non-institutionalized mentally retarded persons also have been diagnosed with some form of mental illness."

Mental retardation is a developmental or functional disorder that is permanent, affecting a person's abilities to learn. The mentally ill, by contrast, encounter disturbances in their thought processes that may be episodic, temporary, or cyclical. Some forms of mental illnesses have the

56. Id. at 71.
57. Ellis, supra note 23, at 423-25; see also Bing, supra note 16, at 71-72 (stating mental retardation and mental illness are not the same thing, although the courts have lumped them together); Entzeroth, supra note 16, at 915-16 (stating "[i]t is important to recognize that mental retardation is not a form of mental illness.").
58. Ellis, supra note 23, at 423; see also Entzeroth, supra note 16, at 915-16 (stating mental retardation is not the same as mental illness).
59. Entzeroth, supra note 16, at 915; see also Ellis, supra note 23, at 425 (stating "some mentally retarded people are also mentally ill").
60. Entzeroth, supra note 16, at 915.
61. Ellis, supra note 23, at 424; see also Entzeroth, supra note 16, at 915-16 (stating "mental retardation . . . is a permanent developmental or functional disorder").
62. Ellis, supra note 23, at 423.

The American Psychiatric Association defines 'mental disorder' as 'an illness with psychologic or behavioral manifestations and/or impairment in functioning due to a social, psychologic, genetic, physical/chemical, or biologic disturbance. The disorder
prospect of being cured through appropriate psychiatric treatment or medication. In contrast, psychotherapy or medication will do nothing to help a mentally retarded individual, although the mentally retarded individual may be taught how to cope and function with day-to-day challenges in order to improve self-sufficiency and adaptive behavior. Thus, it is not possible to restore a mentally retarded individual's competency, unlike that of a mentally ill individual. In order to restore one's competency, one must be competent to begin with. Often, mental retardation manifests itself either at birth or early childhood; therefore, restoration of competence to stand trial is inappropriate and meaningless. In contrast, "[o]ften mental illness does not emerge until after the individual is eighteen years old."

IV. MENTAL RETARDATION: CHARACTERISTICS OF PEOPLE WITH MENTAL RETARDATION

To simply define mental retardation as "a condition in which there are limits in conceptual, practical, and social intelligence" does not necessarily help one understand what it means to be a person with mental retardation. Moreover, it is imperative to understand the problems that the mentally retarded individual faces in everyday life that a non-retarded individual does not. Thus, it is essential to examine characteristics of mentally retarded

63. Ellis, supra note 23, at 424; see also Entzeroth, supra note 16, at 915–16 (stating "the mentally ill experience disturbances in their thoughts . . . [while] mental retardation is not a psychological or medical disorder").

64. Entzeroth, supra note 16, at 916; see also Bing, supra note 16, at 71 (stating "the mentally retarded person can never be stripped of his retardation, though his abilities can be improved").

65. Ellis, supra note 23, at 424.

66. Id.

67. Id. See also Entzeroth, supra note 16, at 916 (stating "mental retardation manifests itself by the time the mentally retarded individual is eighteen").

68. Entzeroth, supra note 16, at 916.

individuals, especially since several of those character traits have important
implications for the criminal justice system.70

Many mentally retarded people have limited communication skills, poor
impulse control,71 an underdeveloped concept of moral blameworthiness and
causation, a denial of their disability, a lack of knowledge of basic facts, and
increased susceptibility to the influence of authority figures.72 People with
mental retardation will have limitations in cognitive functioning.73 A men-
tally retarded person will have limited abilities to learn in areas such as
reading, writing, and arithmetic.74 Furthermore, he or she will have limited
abilities to reason, plan, understand, judge, and discriminate.75 Moreover, a
person with mental retardation will have grave problems in logical
reasoning, strategic thinking, and foresight.76

As a result of a retarded individual's limited cognitive abilities, most
people with mental retardation will know less than most people without

70. Many of the following descriptions are borrowed from James Ellis' and Ruth
Luckasson's symposium article, Mentally Retarded Criminal Defendants, supra note 23, at
427–32. Although any attempt to describe individuals who suffer from mental retardation as a
group risks false stereotyping, "[s]ome characteristics occur with sufficient frequency to
warrant certain limited generalizations." Id. at 427; e.g., Blume, supra note 51, at 732.

71. "This characteristic is related to deficits in attention and involves attention span,
focus, and selectivity in the attention process. Thus, a mentally retarded person may have
difficulty, or under some circumstances, totally fail to weigh the consequences of the act." 
Blume, supra note 51, at 733.

72. Ellis, supra note 23, at 428–32 (listing characteristics of people with mental
retardation); see also Blume, supra note 51, at 732 (recapitulating Ellis and Luckasson).

73. Enrenreich, supra note 1; see Bing, supra note 16, at 72.

74. See also Enrenreich, supra note 1 (discussing limitations in cognitive function-
ing).

75. Id.

[One expert has summarized the attributes of mental retardation as follows:] Almost
uniformly, individuals with mental retardation have grave difficulties in language and
communication. They have problems with attention, memory, intellectual rigidity, and
in moral development or moral understanding. They are susceptible to suggestion and
readily acquiesce to other adults or authority figures .... People with mental
retardation have limited knowledge because their impaired intelligence has prevented
them from learning very much. They also have grave problems in logic, foresight,
planning, strategic thinking, and understanding consequences.

Id. (quoting Ruth Luckasson, The Death Penalty and the Mentally Retarded, 22 AM. J. CRIM.
L. 276 (1994)).

76. Bing, supra note 16, at 72; see Blume, supra note 51, at 732–34; Ellis, supra note
23, at 427–32; see also Enrenreich, supra note 1 (explaining the characteristics and
significance of mental retardation).
mental retardation, even concerning the most basic aspects of life.\textsuperscript{77} Furthermore, mental retardation limits the person’s ability to understand abstract concepts, including moral concepts. Often, the mentally retarded are unable to comprehend the relationship between cause and effect,\textsuperscript{78} and cannot understand certain results or consequences of their actions.\textsuperscript{79} While many mentally retarded defendants who have committed a crime know they have done something wrong, they often cannot explain, or are unable to understand, why the act was wrong.\textsuperscript{80} For example,

At the trial of a man with mental retardation convicted of raping and murdering an 87-year-old woman, a clinical psychologist testified that while the defendant could acknowledge that rape was “wrong,” he was nonetheless not able to offer any explanation for why. “Pressed for an answer, [the defendant] admitted not receiving ‘permission’ for the rape.... Pressed further, in desperation, he blurted out, ‘Maybe it’s against her religion!’ The jury gasped at such an explanation.”\textsuperscript{81}

As a result of the inability to comprehend abstract concepts, a mentally retarded person may be incapable of fully understanding the meaning of death or murder.\textsuperscript{82} For example, “Morris Mason, whose IQ was between sixty-two to sixty-six, was executed in 1985 in Virginia after being convicted of rape and murder. Before his execution, Mason asked one of his legal advisors for advice on what to wear to his funeral.”\textsuperscript{83}

Overall, people who suffer from mental retardation have problems with attention, memory, intellectual rigidity, and moral development and understanding.\textsuperscript{84} “The entirety of these characteristics may result in some

\textsuperscript{77} Ellis, supra note 23, at 431; Blume, supra note 51, at 734 (stating that people with mental retardation know less than most people without mental retardation).

\textsuperscript{78} Bing, supra note 16, at 72.

\textsuperscript{79} Blume, supra note 51, at 733. “[A] mentally retarded individual frequently has incomplete or immature concepts of moral blameworthiness and causation.” \textit{Id}. See also Bing, supra note 16, at 72 (stating that many mentally retarded persons have an underdeveloped conception of blameworthiness); Ellis, supra note 23, at 431.

\textsuperscript{80} Enrenreich, supra note 1 (explaining limitations concerning the ability to understand abstract concepts, including moral concepts).

\textsuperscript{81} \textit{Id}.

\textsuperscript{82} \textit{Id}.

\textsuperscript{83} \textit{Id}.

\textsuperscript{84} Bing, supra note 16, at 72.
mentally retarded individuals becoming dangerous without malice intended. 85

V. RATIONALES FOR SENTENCING A MENTALLY RETARDED PERSON TO DEATH: ARE LEGITIMATE PENOLOGICAL GOALS FURTHERED?

A. The Eighth Amendment’s Prohibition Against Cruel and Unusual Punishment

As noted above, the Eighth Amendment’s prohibition against cruel and unusual punishment has been interpreted to include punishment that is disproportionate to the severity of the crime and the defendant’s moral culpability, imposes purposeless pain and suffering, or does not measurably further the penological goals of either retribution or deterrence. 86 The Eighth Amendment has not been interpreted as a static concept. 87 The amendment is interpreted in a “flexible and dynamic manner that reflects society’s evolving standards of decency.” 88 The Supreme Court has consistently said that in interpreting the meaning of the amendment, they look to the “evolving standards of decency that mark the progress of a maturing society.” 89 Thus, an assessment of how contemporary society views the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. 90 If the punishment is found to be contrary to society’s standards of decency, then the punishment is prohibited by the Eighth Amendment. 91

When these Eighth Amendment principles are applied to a mentally retarded defendant who has impaired reasoning abilities, inability to control

85. Id.
86. See generally Blume, supra note 51, at 737–38 (discussing relevant Eighth Amendment principles); Entzeroth, supra note 16, at 922–26 (analyzing the Eighth Amendment’s prohibition on cruel and unusual punishment); Enrenreich, supra note 1 (discussing summary and recommendations and United States law).
88. Id. at 171.
90. Gregg, 428 U.S. at 173.
impulsive behavior, and lack of moral blameworthiness, the ultimate penalty of death is always and necessarily disproportionate to his or her blameworthiness, and hence unconstitutional serving no legitimate penological goal. Additionally, sentencing a mentally retarded person to death offends contemporary standards of decency; inherent in mental retardation is the person’s diminished ability to make responsible decisions, to appreciate the full consequences of his or her acts, and to relate competently and independently to the world around him or her. “At a minimum, ‘the Eighth Amendment forbids the execution ... of those who are unaware of the punishment they are about to suffer and why they are to suffer it.”

B. The Mentally Retarded Defendant’s Capacity to Satisfy the Culpable Mens Rea

1. Elements of Capital Homicide

Given the reduced ability found in every dimension of the retarded individual’s functioning, the question is whether a mentally retarded defendant has the capacity to satisfy the mens rea (“guilty mind”) requirement to be sufficiently culpable of murder. In the thirty-eight states that presently authorize the death penalty, “the trier of fact must determine

92. Id. at 346.
[Quoting from documents prepared by the American Association of Mental Retardation, Justice Brennan reasoned that all mentally retarded individuals share the common attributes of low intelligence and inadequacies of adaptive behavior [as well as] ‘a substantial disability in cognitive ability and adaptive behavior.’ The impairment of mentally retarded offender’s reasoning abilities, control over impulsive behavior, and moral development ... limits [their] culpability so that, whatever other punishment might be appropriate, the ultimate penalty of death is always and necessarily disproportionate to [their] blameworthiness and hence is unconstitutional.

Id. at 344–46 (Brennan, J., dissenting). See also Blume, supra note 51, at 738 (stating death is constitutionally excessive punishment serving no legitimate penological goals when applied to a mentally retarded individual); Enrenreich, supra note 1 (quoting Justice Brennan’s dissent in Penry v. Lynaugh, 492 U.S. 302, 344–46, 1989)).
95. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.01, at 101 (2d ed. 1995).
whether the elements of capital homicide have been met.  

For purposes of imposing the death penalty on mentally retarded capital offenders, the trier of fact may consider evidence of mental retardation as a mitigating factor. In general, mental retardation is offered in mitigation of punishment. It is also offered to ‘prove the existence of one or more statutory mitigating factors, [for example,] ‘the capacity of the defendant to appreciate the criminality of his conduct was substantially impaired,’ or that the defendant suffered from a mental disease or defect.”

The death penalty is reserved for the most culpable capital offenders who commit the most heinous crimes. A defendant may be sentenced to death if the defendant acted deliberately and unreasonably and would continue to be a threat to society. Acting deliberately, however, is not the only culpable mental state sufficient for a defendant to be sentenced to death. In Tison v. Arizona, the Supreme Court held that reckless indifference for human life is a highly culpable mental state sufficient to deserve death. In sum, for a defendant to be sentenced to death, the sentencer, at a minimum, must conclude that either the defendant intended to kill the victim and knew that there was a possibility that the victim could die, or was reckless and acted without excuse, justification, or in the heat of passion. Since a mentally retarded person is of lower intelligence and has

97. Billotte, supra note 22, at 337.
98. Blume, supra note 51, at 741.
99. Id.
100. Id.
101. See also Beyond Reason, supra note 1 (stating that mentally retarded offenders should never be placed in the category for the most culpable offenders for whom the death penalty is reserved).
102. Penry v. Lynaugh, 492 U.S. 302, 310 (1989); see also infra text accompanying note 197; see also Billotte, supra note 22, at 337–38 (stating that if a defendant acted deliberately and unreasonably and would continue to be a threat to society, then the defendant may be sentenced to death).
103. Billotte, supra note 22, at 338.

In Tison, the defendant, after helping his father escape from prison, watched his father murder a family of four. The defendant did not participate in the murder but also did not help the victims. The defendant drove away from the scene of the crime with his father in the victims’ car. Although the defendant did not kill anyone, he was convicted of felony-murder due to his reckless disregard for the victims’ lives.

Billotte, supra note 22, at 338.
106. Billotte, supra note 22, at 338. “Under the Model Penal Code, a defendant is guilty of murder when: ‘(a) it is committed purposely or knowingly; or (b) it is committed
reduced ability in language, ability to control impulsivity, self-concept, self-perception, moral development, knowledge of basic facts, and motivation, it is unlikely that such an individual could possess the requisite mens rea to be found guilty of murder. 107

2. Deterrence and Mentally Retarded Offenders: Inefficiency of Capital Punishment as a Deterrent

General deterrence is one of the purposes that can justify capital punishment. 108 It focuses on a punishment's effect on society, and whether the rest of society will be deterred from committing criminal acts. 109 General deterrence occurs when the punishment of one person discourages others from criminality, because of one's desire to avoid the punishment that a particular wrongdoer has suffered. 110 That is, "[the defendant] is punished in order to convince the general community to forego criminal conduct in the future." 111 The driving force behind general deterrent justification is the fear that one's action, if convicted, will result in punishment. 112

[Thus, the defendant's] punishment serves as an object lesson to the rest of the community; [the defendant] is used as a means to a desired end, namely, a net reduction in crime. [The defendant's] punishment teaches us what conduct is impermissible; it instills fear of punishment in would-be violators of the law; and, at least to a limited extent, it habituates us to act lawfully, even in the absence of fear of punishment. 113

The penological goal of deterrence is not advanced when applied to mentally retarded defendants. The threat of execution cannot deter a mentally retarded individual. Deterrence is premised upon the assumption

recklessly under circumstances manifesting extreme indifference to the value of human life." Wetzonis, supra note 95, at 656.
108. Billotte, supra note 22, at 336, 356; e.g., Enrenreich, supra note 1.
110. Id. at 356.
111. DRESSLER, supra note 95, § 2.03[B], at 10.
112. Billotte, supra note 22, at 357. While general deterrence is concerned with deterring others from committing a criminal act by punishing a particular wrongdoer, "[s]pecific deterrence focuses on the criminal actor and whether he will commit his criminal act again." Id. at 356.
113. DRESSLER, supra note 95, § 2.03[B], at 10 (alteration in original).
that an individual is both capable of considering and understanding the consequences of his or her actions and capable of controlling his or her impulses. In *Gregg v. Georgia*, the court stated that whether the death penalty is a deterrent depends on whether the possibility of the penalty of death will enter "into the cold calculus that precedes the decision to act." Accordingly, one must premeditate in order to be deterred.

When the deterrence rational is applied to mentally retarded defendants, it is highly difficult to convincingly maintain that a mentally retarded defendant has the capacity to premeditate a crime, and process and act upon the likelihood of death as a penalty for certain proscribed actions. As previously noted, mentally retarded people have limited impulse control. "[A] deterrent that depends on rational decision-making will fail to control these impulsive acts." A mentally retarded person may commit crimes on impulse that he or she does not realize will result in death. In addition, limitations in cognitive functioning lessen a retarded person’s capability to plan and calculate a crime, to understand and weigh its consequences, or assess their options, as do persons of average intelligence or better. According to Justice Brennan:

> [T]he goal of deterrence would not be advanced, as "[I]t is highly unlikely that the exclusion of the mentally retarded from the class of those eligible to be sentenced to death will lessen any deterrent effect the death penalty may have for non-retarded potential offenders . . . ." Moreover, because of the impairments in the ability of a mentally retarded person to understand the consequences of his or her actions and to control his or impulses, it is unlikely that the

115. 428 U.S. 153 (1976) (plurality opinion) (holding that the death penalty is not per se cruel and unusual punishment).
116. *Id.* at 185–86; *see also* Billotte, *supra* note 22, at 361 (stating the death penalty as a deterrent depends on "whether the possibility of execution will enter 'into the cold calculus that precedes the decision to act'"); e.g., Blume, *supra* note 51, at 742 n.67.
118. *Id.* E.g., Billotte, *supra* note 22, at 361.
120. Ellis, *supra* note 23, at 429; *see also* Blume, *supra* note 51, at 729–30 ("[M]ental retardation is a significant and devastating mental impairment which reduces a mentally retarded person’s moral blameworthiness to a level different in kind from other non-retarded persons accused of murder.").
121. Ellis, *supra* note 23, at 429; *see also* Billotte, *supra* note 22, at 361 (discussing a mentally retarded persons difficulty to weigh consequences); Blume, *supra* note 51, at 733 (discussing impaired impulse control).
execution of the mentally retarded would deter other mentally retarded criminal defendants from committing capital offenses.\textsuperscript{122}

Furthermore, mentally retarded individuals often cannot adequately understand the correlation between the imposition of a punishment on another wrongdoer and the result that would occur if they committed a similar crime.\textsuperscript{123} Thus, because the death penalty serves as a deterrent only when the criminal offense is a result of at least some premeditation and deliberation, "the execution of the mentally retarded cannot be justified under the deterrence rationale."\textsuperscript{124}

3. Means of Retribution When Applied to Mentally Retarded Defendants

Retribution is the second justified purpose of the death penalty. Some believe that punishment is justified if and only if the criminal defendant deserves it.\textsuperscript{125} "It is deserved when the wrongdoer freely chooses to violate society's rules."\textsuperscript{126} Retribution looks backward and focuses on the past behavior of the criminal defendant.\textsuperscript{127} Punishment is justified solely on the

\textsuperscript{122} Entzeroth, supra note 16, at 928 (quoting Penry v. Lynaugh, 492 U.S. 302, 348 (1989)).

\textsuperscript{123} Bing, supra note 16, at 80. In Penry, Justice Brennan argued that the execution of mentally retarded offenders violates the Eighth Amendment because such executions do not measurably further the goals of either retribution or deterrence. He reasoned that deterrence cannot be furthered because the intellectual impairments of persons with mental retardation preclude their ability to weigh the possibility of the death penalty and calculating different courses of action. As a result, "the execution of mentally retarded individuals is 'nothing more than the purposeless and needless imposition of pain and suffering.'" Enrenreich, supra note 1.

\textsuperscript{124} Bing, supra note 16, at 80; see Blume, supra note 51, at 742. Justice Brennan found, the "very factors that make [capital punishment] disproportionate and unjust to execute the mentally retarded also make the death penalty the most minimal deterrent effect so far as retarded potential offenders are concerned." Penry v. Lynaugh, 492 U.S. 302, 348 (1989) (Brennan, J., dissenting).

\textsuperscript{125} See generally DRESSLER, supra note 95, § 2.03[C], at 11 (stating "[r]etributivists believe... punishment is justified when it is deserved"); Billotte, supra note 22, at 362 (stating "punishment is 'just' if and only if the criminal deserves it").

\textsuperscript{126} DRESSLER, supra note 95, § 2.03[C], at 11. The rationale of retribution is based on the "view that humans possess free will and, therefore, may justly be blamed when they choose to violate society's mores." Id.

\textsuperscript{127} See id. See also Billotte, supra note 22, at 363 (stating "[r]etribution... focuses on the past behavior of the criminal rather than the future effect of his punishment").
basis of the voluntary commission of the crime.\textsuperscript{128} Thus, the defendant is punished based on what crime he committed and what he deserves.\textsuperscript{129}

The Supreme Court has consistently recognized, for purposes of imposing the death penalty, that it is essential that a defendant's punishment be limited to one's "personal responsibility and moral guilt."\textsuperscript{130} Critical in "determining personal responsibility and moral guilt, is the mental state of the defendant."\textsuperscript{131} The Supreme Court has recognized further that, "it is undeniable . . . that those who are mentally retarded have a reduced ability to cope and function in the everyday world."\textsuperscript{132}

Retribution is premised on the assumption that the defendant punished had full culpability of his own actions.\textsuperscript{133} Culpability is a crucial aspect to retributive thought.\textsuperscript{134} With retribution, the result of a defendant’s criminal actions does not determine the punishment; culpability must be factored in as well.\textsuperscript{135} Factors that influence moral development include intelligence, chronological age, mental age, living in an enriching environment, and opportunity for interaction with others.\textsuperscript{136} As noted above, the common attributes shared among mentally retarded individuals are low intelligence and inadequacies of adaptive behavior. In addition, they suffer from a reduced ability in areas of functioning such as the ability to control impulsivity, to communicate, remember, and understand.\textsuperscript{137} The severity of mental retardation diminishes the retarded person’s ability to both manage with and perform in the world.\textsuperscript{138} It is this diminished ability to function and the impaired mental state which limit the retarded defendant’s moral

\textsuperscript{128} DRESSLER, supra note 95, § 2.03[C], at 11.
\textsuperscript{129} Id. See also Billotte, supra note 22, at 363 (stating "[a] criminal is punished based on what he did and what he deserves").
\textsuperscript{130} Enmund v. Florida, 458 U.S. 782, 801 (1982); see also Billotte, supra note 22, at 365 (stating "the appropriateness of the death penalty is a question of 'personal responsibility and moral guilt'"); Blume, supra note 51, at 743 (stating "the appropriateness of the death penalty is essentially a question of 'personal responsibility and moral guilt'").
\textsuperscript{131} Tison v. Arizona, 481 U.S. 137, 156 (1987); see Blume, supra note 51, at 743–44.
\textsuperscript{132} Blume, supra note 51, at 744 (quoting Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)).
\textsuperscript{133} Bing, supra note 16, at 80.
\textsuperscript{134} Billotte, supra note 22, at 362.
\textsuperscript{135} Id. at 363.
\textsuperscript{136} Id. at 365; accord Ellis, supra note 23, at 429 n.78.
\textsuperscript{137} Blume, supra note 51, at 744.
\textsuperscript{138} Id.
culpability. In fact, due to the severe deficits from which the mentally retarded person suffers, such an individual cannot be said to be sufficiently blameworthy to justify the infliction of the sentence of death, because the defendant’s culpability is reduced. For these reasons, the mentally retarded “lack[] sufficient moral culpability to advance the goal of retribution, which requires that a criminal sentence be directly related to the defendant’s personal culpability.”

Moreover, retribution “depends on the defendant’s awareness of the penalty’s existence and purpose.” Reduced abilities in cognitive functioning may limit the mentally retarded individual’s ability to understand the nature and effects of the death penalty, and the reason for imposing it. Thus, executions of mentally retarded persons impose a uniquely cruel penalty and are generally inconsistent with one of the principal purposes of executions. At a minimum, “the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.”

In Ford v. Wainwright, the Court stated:

[T]oday, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life ... Similarly, 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

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139. See generally Blume, supra note 51, at 744 (stating that “this reduced ability to function and the impaired mental state which changes in kind, not degree, the mentally retarded person’s moral culpability”).
140. Blume, supra note 51, at 744.
143. See id. at 421–22.
144. See id. at 421.
145. Id. at 422 (Powell, J., concurring). “[S]tates have more rigorous standards, but none disputes the need to require that those who are executed know the fact of their impending execution and the reason for it.” Id.
146. 477 U.S. 399 (1986).
such an execution simply offends humanity is evidently shared across this Nation.\footnote{147}

Putting a mentally retarded individual to death does not further the punishment goals of deterrence nor of retribution, because it does not ensure that the criminal gets his just desserts.\footnote{148} Only when murder is the result of premeditation and deliberation, can the death penalty serve as a deterrent.\footnote{149} Since mentally retarded offenders lack the necessary culpability "that is a prerequisite to the proportionate imposition of the death penalty, it follows that execution can never be the 'just deserts' of a retarded offender."\footnote{150}

In summary, because a mentally retarded defendant's degree of culpability is qualitatively less than that of a non-retarded capital murderer, the legitimate penological goal in deterrence and retribution is neither furthered nor served by executing a mentally retarded offender. Thus, the death penalty when imposed upon the mentally retarded is cruel and unusual punishment, and hence unconstitutional, because it is excessive.\footnote{151}

VI. SIGNIFICANT PRIOR CASE LAW

In 1972, the Supreme Court held in \textit{Furman v. Georgia},\footnote{152} that the states cannot impose the death penalty on a selected group of offenders in an

\footnote{Id. at 409; see also Blume, supra note 51, at 744 n.74 (quoting Ford v. Wainwright, 477 U.S. 399, 409 (1986)).}
\footnote{Penry v. Lynaugh, 492 U.S. 302, 348 (1989) (Brennan, J., dissenting).}
\footnote{Enmund v. Florida, 458 U.S. 782, 799 (1982).}
\footnote{Penry, 492 U.S. at 348.}

Even if mental retardation alone were not invariably associated with a lack of the degree of culpability upon which death as a proportionate punishment is predicated, [Justice Brennan argued that he] would still hold the execution of the mentally retarded to be unconstitutional... [since there is] no assurance that an adequate individualized determination of whether the death penalty is a proportionate punishment will be made at the conclusion of each capital trial.... Lack of culpability as a result of mental retardation is simply not isolated... as a factor that determinatively bars a death sentence.\footnote{Id. at 346–47 (Brennan, J., dissenting).}

\footnote{In \textit{Gregg v. Georgia}... the Court defined “excessive” as consisting of two elements. First, “the punishment must not involve the unnecessary and wanton infliction of pain[,]” which means that the death penalty as imposed must advance the penological goals of retribution and deterrence. Second “the punishment must not be grossly out of proportion to the severity of the crime.”}

\footnote{Entzeroth, supra note 16, at 925.}
\footnote{408 U.S. 238 (1972).}
arbitrary, capricious, or discriminatory manner based solely on the offense committed. In 1976, the Supreme Court reexamined the death penalty issue in the context of the Eighth Amendment. In *Gregg v. Georgia*, the plurality of the Court declared that the Eighth Amendment must be "interpreted in a flexible and dynamic manner" that reflects society's evolving standards of decency, which is the standard used by the Court to test the validity of a punishment under the Eighth Amendment. The Court made clear, "so long as the class of murderers subject to capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant." The decision in *Gregg* further narrowed the class of people upon which the death penalty may be imposed.

Later, in *Ford v. Wainwright*, the Supreme Court held that the Eighth Amendment prohibits execution of the insane. In reaching its decision, the Court considered that common law prohibited executing the insane. In addition, the Court found that a national consensus existed, since no state permitted the execution of the insane, and twenty-six states had statutes expressly requiring stay of the execution of a capital murderer who became insane.

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153. *Id.* at 255-57; *see generally* Cohen, *supra* note 141, at 463.
154. *Id.* at 171 (plurality opinion).
155. *Id.* at 171.
156. *See id.* at 173; *see also* Cohen, *supra* note 141, at 463-64 (discussing the holding of *Gregg v. Georgia*). The Court looks primarily to existing state legislation to define these 'evolving standards' and the decision in *Gregg* emphasizes that, when considering capital punishment, great deference will be given to state legislatures. *Id.* at 464.

The Court stated: In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

*Id.* at 464 n.71 (quoting *Gregg v. Georgia*, 428 U.S. at 186-87 (1976)).
158. *See* Cohen, *supra* note 141, at 464; Bicknell, *supra* note 5, at 363 (discussing the significance of *Gregg v. Georgia*).
160. *Ford*, 477 U.S. at 409-10; *see also* Bicknell, *supra* note 5, at 363 (discussing the death penalty and significant cases).
161. *Ford*, 477 U.S. at 406-07 (1986); *see also* Bicknell, *supra* note 5, at 363-64 (discussing the death penalty and the significance of *Ford v. Wainwright*); Cohen, *supra* note 141, at 466 (discussing the holding in *Ford v. Wainwright*).
Moreover, the Court noted the insane should not be executed, because such an execution has questionable retributive value, no deterrent effect on people who cannot understand the reason for their execution and the full implication of the penalty, nor are they able to assist in their own defense. Finally, the Court declared that executing insane defendants offends humanity.

More recently, the Supreme Court's 1988 decision in *Thompson v. Oklahoma* held that executing a criminal defendant who was under the age of sixteen years old at the time of their offense constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. In examining the objective evidence of American conceptions of decency, the plurality found that eighteen states explicitly established in their death penalty statutes that the defendant has attained the minimum age of sixteen at the time of the offense.

In 1989, the Supreme Court's decision addressing the death penalty in *Penry v. Lynaugh*, did not continue its narrowing of the class of murderers eligible for the death penalty. The Court refused to find that executing a mentally retarded person was a per se violation of the cruel and unusual punishment clause of the Eighth Amendment. Instead, the Court held that the Eighth Amendment did not necessarily preclude the execution of all mentally retarded persons simply by virtue of their disability alone. The Court did hold, however, that the accused is entitled to instructions as to the...
mitigating effect of mental retardation. The Court reasoned, so long as mitigating circumstances are considered by the sentencer, “an individualized determination whether ‘death is the appropriate punishment’ can be made in each particular case.”

In examining objective evidence of the public’s attitude toward executing the mentally retarded, the Court found that only one state banned the execution of retarded persons who have been found guilty of a capital offense, and that one state was insufficient to constitute a national consensus. In addition, the Court noted that Maryland had enacted similar legislation, but the statute would not take effect until the following week.

VII. Supreme Court’s Position in Penry v. Lynaugh: Allowing the Imposition of the Death Penalty on the Mentally Retarded

In Penry v. Lynaugh, the Supreme Court, in a five to four vote, held the Eighth Amendment did not categorically prohibit the imposition of the death penalty on mentally retarded defendants. This was the first time the Supreme Court explicitly sanctioned the execution of a mentally retarded person. In the Court’s decision, Justice O’Connor wrote, “there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment.” Penry was convicted in Texas of brutally stabbing Pamela Carpenter with a pair of scissors after

172. Id.
173. Id.
174. Id. at 334.
175. Id.

On the other hand, the Court has ruled that a person who is insane at the time of his execution may not be executed. Nonetheless, on January 24, 1992, Rickey Ray Rector, a man with obvious and profound mental defects, was killed by lethal injection in Arkansas. Rector shot and killed a police officer, then shot himself in the forehead; he underwent brain surgery that required removal of three inches of frontal brain tissue. There was no question that Rector’s mental abilities were significantly impaired. In the days leading up to his execution, Rector’s behavior included such bizarre acts as barking like a dog, stamping his feet, snapping his fingers, repeatedly calling out the nickname of an old friend, and laughing. When his last meal was served, Rector devoured his dinner, but saved his dessert to be eaten later—after his execution.

Entzeroth, supra note 16, at 918 n.72 (citations omitted).
177. Entzeroth, supra note 16, at 918.
he raped and beat her in her home.\textsuperscript{179} Pamela died a few hours later while receiving emergency treatment.\textsuperscript{180} Before dying, however, she was able to identify Penry as her attacker.\textsuperscript{181} Subsequently, Penry confessed twice to the murder.\textsuperscript{182} He was charged with capital murder.\textsuperscript{183}

At a competency hearing before Penry's trial, expert testimony was presented showing he was mentally retarded.\textsuperscript{184} Evidence showed that previous testing indicated that his IQ fell between fifty and sixty-three, indicating mild to moderate mental retardation.\textsuperscript{185} The effect of mild to moderate retardation is, "mildly retarded individuals may learn skills up to the sixth grade level, and persons with moderate mental retardation are unlikely to achieve academic skills beyond the second grade level."\textsuperscript{186}

\begin{itemize}
  \item[179.] \textit{Id.} at 307.
  \item[180.] \textit{Id.}
  \item[181.] \textit{Id.}
  \item[182.] \textit{Id.}
  \item[183.] \textit{Penry,} 492 U.S. at 307.
  \item[184.] \textit{Id.}
  \item[185.] \textit{Id.} at 307--08.
\end{itemize}

In addition to his mental retardation, Penry grew up in a home where horrible abuse was regularly inflicted upon him. Shortly after his birth, Penry's mother suffered a nervous breakdown and was committed to a mental hospital for ten months. When she returned to her young son, she subjected him to severe beatings, including blows to his head and cigarette burns on his body. Penry dropped out of school in the first grade and was in and out of state institutions until he was twelve years old, after which he went to live with an aunt. It took his aunt a year to teach Penry the simple task of printing his name.

\begin{itemize}
  \item[186.] \textit{Entzeroth,} supra note 16, at 919.
\end{itemize}
Before the competency trial, IQ testing indicated that Penry had an IQ of fifty-four. Additionally, the evaluation revealed that Penry, who was twenty-two years old at the time of the murder, had the mental age of a six and one-half year old child, "which mean[t] that 'he ha[d] the ability to learn and the learning or the knowledge of the average 6½ year old kid.'" Penry's social maturity, his ability to function in the world, was that of a nine- or ten-year-old child. "[H]e could not read or write, name the days of the week or months of the year, or name the president of the United States." The psychiatrist who tested Penry testified that, "...there's a point at which anyone with [Penry's] IQ is always incompetent, but, you know, this man is more in the borderline range...." The jury found Penry competent to stand trial.

During the guilt/innocence phase of Penry's trial, the trial court found Penry's two confessions to be voluntary and were admitted into evidence. Penry raised an insanity defense, presenting testimony that his moderate mental retardation and organic brain damage, "resulted in poor impulse control and an inability to learn from [his] experience[s]." Additionally, the psychiatrist testified that the brain damage, which Penry was suffering from at the time of the offense, resulted in the inability "for him to appreciate the wrongfulness of his [action and] conform his conduct to the law." In rebuttal, the state put two psychiatrists on the stand that testified Penry was sane at the time of the crime. They conceded, however, that Penry had a limited mental ability, an inability to learn from his experiences, and a tendency to be impulsive and to violate society's norms.

188. Id.
189. Id.
191. Penry, 492 U.S. at 308.
192. Id.
193. Id. at 308–09.
194. The organic brain damage was "probably caused by trauma to the brain at birth."
195. Id. at 307.
196. Id. at 308.
197. Id. at 309.
198. Id. At the close of the penalty hearing, the jury was instructed, pursuant to the Texas death penalty statutory scheme, to answer three "special issues" to determine Penry's sentence. Id. at 310. Under § 19.03 of the Texas Penal Code, the jury had to answer:
Although Penry was sentenced to death, the Supreme Court overturned his sentence, because the trial court failed to instruct the jury “that it could consider and give effect to the mitigating evidence of Penry’s mental retardation and abused background by declining to impose the death penalty.”

The Court concluded that, by failing to provide the proper instruction, the trial court did not provide the jury with a “vehicle for expressing its ‘reasoned moral response’” to Penry’s evidence of mental retardation in handing down its sentence.

After Penry was sentenced to death, he sought, and was denied, habeas corpus relief in the United States District Court. Penry appealed to the Court of Appeals for the Fifth Circuit, which affirmed the District Court’s decision, and the United States Supreme Court granted certiorari.

Justice O’Connor acknowledged the common law prohibition against punishing “idiots” with the sentence of death, and that such a prohibition suggests that the execution of a severely retarded person may indeed be “cruel and unusual” under the Eighth Amendment.

The majority opinion strongly expressed that the insanity defense and their decision in Ford v. Wainwright afforded severely mentally retarded

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1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Id. at 310; e.g., Entzeroth, supra note 16, at 920–21. “If the jury answered “yes” to all three questions, the penalty of death would be imposed. The jury answered “yes” to all three questions, and accordingly, the trial court sentenced Penry to death.” Entzeroth, supra note 16, at 921.

200. Id.
201. Bicknell, supra note 5, at 365.
202. Penry, 492 U.S. at 312; see also Bicknell, supra note 5, at 365.
203. Penry, 492 U.S. at 331–33; see also Bicknell, supra note 5, at 365 (discussing Justice O’Connor’s majority opinion).
204. In Ford, the Court held that the Eighth Amendment prohibits the execution of people who cannot understand the full implication of the punishment they are about to suffer and the reason for suffering it. Penry v. Lynaugh, 492 U.S. 302, 333 (1989) (citing Ford v. Wainright, 477 U.S. 399, 422 (1986)); see also Bicknell, supra note 5, at 365 (stating the holding in Ford).
defendants protection in the criminal justice system. Since Penry did not classify as profoundly or severely retarded, the Court reasoned that he could not qualify for the defense of being unaware of his punishment or its consequences.

Unfortunately, the Court failed to recognize the differences between mental illness and mental retardation, so they lumped the two together. As noted above, it is imperative to recognize that mental retardation is not the same as mental illness. The most significant difference between the two is that mental retardation is not an illness. While some forms of mental illness can be treated with medication or psychotherapy, the same does not hold true for mental retardation. Medication or psychotherapy treatment will do nothing to minimize or cure a mentally retarded individual who is not mentally ill. Thus, the Court’s conclusion was flawed when it decided that a mentally retarded defendant is afforded adequate protection under the insanity defense when the mentally retarded are not insane, and under Ford v. Wainwright, where the Court held that the Eighth Amendment prohibits execution of the insane.

Although the Court declared that mental retardation alone does not forbid execution, Penry explicitly states that courts must specifically instruct

205. Penry, 492 U.S. at 333; see also Bicknell, supra note 5, at 365 (discussing the Court’s rationale).

206. Penry, 492 U.S. at 333; see also Bicknell, supra note 5, at 365 (stating the “Court reasoned that only severely or profoundly retarded persons could qualify for the defense of being unaware of their punishment or its consequences”).

207. Elllis, supra note 23, at 423-25; see also Bing, supra note 16, at 71-72 (stating mental retardation and mental illness are not the same thing, although the courts have lumped them together); Entzeroth, supra note 16, at 915-16 (stating “it is important to recognize that mental retardation is not a form of mental illness”).

208. Elllis, supra note 23, at 423; see also Entzeroth, supra note 16, at 915-16 (stating mental retardation is not the same as mental illness).

209. Elllis, supra note 23, at 424; see also Entzeroth, supra note 16, at 915 (stating “certain forms of mental illness can be treated with medication or psychotherapy”).

210. Elllis, supra note 23, at 424; see also Bing, supra note 16, at 71 (stating “the mentally retarded can never be stripped of his retardation, though his abilities can be improved”); Entzeroth, supra note 16, at 915 (stating “mental retardation cannot be ameliorated by drugs or psychotherapy”).

the jury to consider and give effect to all mitigating evidence of mental retardation and history of abuse.\textsuperscript{215} The Court reasoned that this instruction was necessary because any punishment imposed must be directly related to the defendant's personal culpability.\textsuperscript{213}

\textbf{VIII. A NATIONAL CONSENSUS: A SIGNIFICANT CHANGE IN SOCIETY'S STANDARDS OF DEGENCY REGARDING THE MENTALLY RETARDED SINCE} \textit{PENRY V. LYNNAUGH}

In Ernest P. McCarver's case this October, the Supreme Court will be revisiting the issue of whether attitudes have changed over the past twelve years to the point where executing people with mental retardation violates society's ideas of what is decent.\textsuperscript{214} One of the reasons the Supreme Court refused to exclude all mentally retarded defendants from the death penalty in \textit{Penry} was that the defendant did not present any legislation showing that the states were narrowing their sentencing procedures to exclude the retarded.\textsuperscript{215} In order for the \textit{Penry} decision to be changed and for the execution of the mentally retarded to end, the Supreme Court must look to "objective evidence, [such as actions of state legislatures,] to determine how our society views [this] particular punishment today."\textsuperscript{216} Therefore, the Court must assess whether this punishment offends American concepts of decency.\textsuperscript{217}

In the twelve years that have passed since \textit{Penry}, there has been a pivotal change in the public's perceptions of standards of decency with respect to sanctioning a mentally retarded person to death.\textsuperscript{218} At the time of the decision in \textit{Penry}, in which the Supreme Court held that the Eighth Amendment did not categorically prohibit the execution of the mentally retarded, only one state, Georgia, and the federal government banned

\begin{itemize}
\item \textsuperscript{212} Penry v. Lynaugh, 492 U.S. 302, 322 (1989); see also Bicknell, \textit{supra} note 5, at 366 (stating that the decision in \textit{Penry} clearly requires that courts "give specific jury instructions that allow the consideration of all mitigating evidence of mental retardation").
\item \textsuperscript{213} \textit{Penry}, 492 U.S. at 327–28; see also Bicknell, \textit{supra} note 5, at 366 (stating the Court held the instruction necessary, "because any punishment inflicted must be directly related to the personal culpability of the defendant").
\item \textsuperscript{214} \textit{See Mental Retardation and the Death Penalty, supra} note 2.
\item \textsuperscript{215} \textit{Penry}, 492 U.S. at 333–34.
\item \textsuperscript{216} \textit{Id.} at 331. Pet. for Writ of Cert., \textit{supra} note 7, at 12 (citing Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).
\item \textsuperscript{217} Pet. for Writ of Cert., \textit{supra} note 7, at 10.
\item \textsuperscript{218} \textit{Id.}
\end{itemize}
executions of people with mental retardation. Maryland had enacted legislation prohibiting the execution of the mentally retarded, but it did not go into effect until one week after the Court decided *Penry*. In her opinion, Justice O'Connor wrote that even when the Georgia and Maryland statutes prohibiting the execution of mentally retarded individuals were “added to the [fourteen] States that have rejected capital punishment completely, [such legislation did] not provide sufficient evidence at present of a national consensus” to exempt the mentally retarded from the punishment of death.

Since the decision in *Penry*, fifteen more states: Arizona, Arkansas, Colorado, Connecticut, Florida, Indiana, Kansas, Kentucky, Missouri, Nebraska, New Mexico, New York, South Dakota, Tennessee, and Washington have recognized that sentencing the mentally retarded to death is cruelly inhumane and therefore have outlawed such executions. Today, half of the states ban executing the mentally retarded—seventeen of the thirty-eight death penalty states prohibit executing the mentally retarded and twelve states and the District of Columbia do not have the death penalty at all. Also, the federal government does not allow for the mentally retarded to be executed. When combined, the majority of jurisdictions in this country prohibit the execution of the mentally retarded.

219. *Id.* at 11; *see also* Entzeroth, *supra* note 16, at 926 (stating at the time the Court decided *Penry*, only Georgia and the federal government prohibited executing the mentally retarded); *Mental Retardation and the Death Penalty*, *supra* note 2, at 1 (stating that Maryland and Georgia prohibited executing the mentally retarded).

220. *See* Pet. for Writ of Cert., *supra* note 7, at 11; *see also* Entzeroth, *supra* note 16, at 926 (stating that Maryland’s legislation prohibiting the execution of the mentally retarded went into effect a week after *Penry* was handed down).


222. Pet. for Writ of Cert., *supra* note 7, at 11; *see also* Bonner, *supra* note 7, at A1 (stating that “the federal government bars such executions, as do [fifteen] states”); *Mental Retardation and the Death Penalty*, *supra* note 2 (naming the states that currently forbid execution of the mentally retarded).

223. Pet. for Writ of Cert., *supra* note 7, at 11–12. It is important to note, however, that the Court has held:

[N]either the jurisdictions which do not impose capital punishment, nor the criminal law practices of the federal government, should be taken into account the figuring of a national consensus. The jury also discounted the use of jury determinations as a factor in consensus determination. The fact that sentencing juries were reluctant to impose capital punishment on the retarded was irrelevant to the question of a national consensus.

*Bing*, *supra* note 16, at 103.
The standard for determining the unconstitutionality of this challenged sanction is whether the selected penalty, here death, is cruelly inhumane and disproportionate to the crime committed. In addition, this constitutional test is intertwined with actions of state legislatures and an assessment of American contemporary standards. As noted above, the primary and most reliable indication of a consensus is the pattern of legislative enactment reflecting public attitude toward sanctioning mentally retarded individuals to death.

The fact that seventeen states now specifically prohibit death sentences for the mentally retarded sends out a stronger message of national consensus than existed when Penry was decided. However, it is unknown how many states are needed to represent a consensus, since the Supreme Court has not set a requisite number. In 1994, when eleven states banned the execution of mentally retarded individuals, these states accounted for only thirteen percent of total executions since the reinstatement of the death penalty. Most likely, the Supreme Court would have found that these eleven states did not represent a national consensus.

Today, however, there is plenty of objective evidence of a strong national consensus against executing retarded persons. So far, this year alone, four states, Florida, Missouri, Arizona, and Connecticut passed legislation outlawing the execution of mentally retarded individuals. Since the death penalty was reinstated in 1976, Florida has executed fifty-one inmates, four who were mentally retarded, Arizona has executed twenty-two inmates, one who was mentally retarded, and Missouri has executed fifty-one inmates, two of which were mentally retarded. Connecticut has not executed any inmates since 1976. Overall, as of 2001, these four states account for 17.71% of total executions in the United States. When combined with the other thirteen states banning the execution of the mentally retarded, they account for twenty-three percent of the total number of inmates executed. This percentage may not seem like a major representation of the national consensus in the United States, but this is only due to the

225. Id.
228. Mental Retardation and the Death Penalty, supra note 2; see also Bonner, supra note 7, at A1 (discussing states that bar the execution of mentally retarded individuals).
229. Mental Retardation and the Death Penalty, supra note 2.
230. Id.
231. See id.
232. See id.
fact that Texas accounts for such a high number of executions.\textsuperscript{233} Texas, by itself, accounts for 34.58\% of total executions to date.\textsuperscript{234}

Florida's legislation is indicative of a national trend towards abolishing the execution of mentally retarded individuals. As previously noted, on June 12, 2001, Florida became the fifteenth state to ban such executions. In the post-\textit{Furman} era, one of the leading states for executions is Florida.\textsuperscript{235} Florida accounts for 7.29\% of total executions.\textsuperscript{236} It is the country's third largest death penalty state, currently tied with Missouri.\textsuperscript{237} Missouri became the sixteenth state, on July 2, 2001, to outlaw the execution of mentally retarded inmates.\textsuperscript{238} When combined, Florida and Missouri account for 14.17\% of nationwide executions. Because Florida is well-known for its frequent use of the death penalty, it could influence other states to follow the national trend banning the execution of the retarded.\textsuperscript{239}

In contrast, one week after Florida's Governor Jeb Bush signed Senate Bill 238, Texas Governor, Rick Perry, vetoed similar legislation that would have banned the execution of those with mental retardation.\textsuperscript{240} Although Governor Perry chose to veto this bill, the legislature passed it.\textsuperscript{241} Texas's own representatives voted to ban executing the retarded, but unlike Governor Bush, Governor Perry himself did not stand behind the legislation. Texas, the country's number one death penalty state, has executed ten people this year, and 249 since 1982.\textsuperscript{242}

Because it accounts for such a large number of executions, Texas could have a negative influence on the Supreme Court when it assesses the public's attitude towards inflicting the death penalty on the mentally

\textsuperscript{233} Virginia is the country's second leading death penalty state accounting for 11.39\% of total executions. Together, Texas and Virginia alone carried out 300 of the 720 executions, accounting for 45.97\% of total executions. \textit{Id.}

\textsuperscript{234} \textit{Mental Retardation and the Death Penalty, supra} note 2.

\textsuperscript{235} It is important to note, however, that in 2000, Florida executed six inmates, and in 2001, executed one. \textit{Id.} Compare to Texas, which executed forty inmates in 2000 and ten inmates in 2001. \textit{Id.}

\textsuperscript{236} \textit{Id.}

\textsuperscript{237} \textit{Id.}

\textsuperscript{238} \textit{Id.}

\textsuperscript{239} \textit{See Bing, supra} note 16, at 105.

\textsuperscript{240} Bonner, \textit{supra} note 6, at A1; \textit{see also Mental Retardation and the Death Penalty, supra} note 2 (stating that Texas Governor vetoed legislation that would have prohibited the execution of the mentally retarded).

\textsuperscript{241} Telephone Interview with Paula Bernstein, Information Specialist, Death Penalty Information Center, Washington, D.C. (July 23, 2001).

\textsuperscript{242} \textit{Mental Retardation and the Death Penalty, supra} note 2 (these estimates are current through July 17, 2001).
retarded. Perhaps until a state like Texas passes such legislation, the Supreme Court may continue to find that there is insufficient evidence of a national consensus against executing mentally retarded individuals. On the other hand, the Supreme Court looks to the public’s perceptions of decency, which is ultimately reflected in legislation. Most likely, the Texas Legislature passed the bill according to how Texans view this particular type of sanction. The fact that Governor Perry vetoed the bill does not necessarily mean that the people of the state of Texas support his decision.

Governor Perry vetoed the bill, reasoning that Texas did not execute mentally retarded offenders, and that there are existing judicial safeguards implemented to protect the mentally retarded.243 While Governor Perry claimed that Texas has never executed anyone who was mentally retarded, supporters of the legislation and the Death Penalty Information Center both say six inmates with IQs of seventy or below have been executed since 1982, two of them while President Bush was governor.244

While the majority of Americans support the death penalty, opinion polls show that the majority of those people oppose the execution of the mentally retarded, “even in the fiercely pro-death penalty state of Texas.”245 Governor Perry’s decision to veto, “runs counter to a trend among states that have the death penalty.”246 Whether the movement to end the execution of the mentally retarded has reached the numbers necessary to reach a national consensus in the eyes of the Supreme Court is unknown. But one thing is for sure—if leading death penalty states like Florida continue to enact legislation banning such executions, there is a greater chance the Supreme Court will find there is an emerging national consensus against executing the mentally retarded, and that society no longer wishes to or agrees with sanctioning the mentally retarded to death.

IX. CONCLUSION

The use of capital punishment against people suffering from mental retardation is a penalty that is cruelly inhumane and without justification. Imposing society’s most severe punishment on individuals who possess significant impairments in intellectual functioning and adaptive skills, and who cannot understand the nature of the crime they have committed or

244. Bonner, supra note 6, at A1; see Mental Retardation and the Death Penalty, supra note 2.
245. Bonner, supra note 11.
punishment imposed, do not deserve this ultimate penalty. Sanctioning one of the most vulnerable and disadvantaged groups to death is nothing short of barbaric.

The Supreme Court has made clear that it is up to the state legislatures to protect, and hence exclude, the mentally retarded from execution by passing legislation.\textsuperscript{247} The only way the Supreme Court will find a national consensus exists against executing this particular group of people, is if states, particularly large death penalty states like Florida, continue to enact legislation banning execution of the retarded.

American standards of decency have evolved to the point where capital punishment inflicted upon the mentally retarded can no longer be tolerated. Executing those who may not even understand what death is or why they are being executed is a practice that must be ended. It is time for our state legislatures, whom we elect, to take a strong stance on this issue by outlawing the execution of the mentally retarded. Exempting the mentally retarded from the death penalty is not an issue of crime, but an issue of humanity.

Florida and the other sixteen states that oppose the execution of the mentally retarded do not argue that they should not be severely punished or held accountable for their crimes. They simply argue that the ultimate punishment of death, which is reserved for the most culpable criminals who commit the most heinous crimes, should not be sanctioned upon those individuals who are less morally culpable.\textsuperscript{248} The legislation clearly recognizes that it is excessively harsh to execute a mentally retarded person with limited intelligence and culpability instead of applying other punishments that will both punish the guilty and protect society.\textsuperscript{249}

\textit{Lindsay Raphael}

\begin{footnotesize}
\footnote{247. Penry v. Lynaugh, 492 U.S. 302, 331 (1989).}
\footnote{248. \textit{Id}.}
\footnote{249. \textit{See supra} text accompanying note 33.}
\end{footnotesize}