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PROHIBITING THE EXECUTION OF THE MENTALLY RETARDED

[T]he penalty of death is qualitatively different from a sentence of life imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.¹

INTRODUCTION

On June 20, 2002, the Supreme Court held that executing a mentally retarded defendant was unconstitutional.² It concluded that in light of the evolving standards of decency, such a punishment was excessive.³ It reached this conclusion by noting that the practice of executing the mentally retarded had become truly unusual, and finding that a national consensus had developed against such a practice.⁴ Immediately prior to this decision, eighteen states⁵ and the federal

¹ Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (Stewart, J.).

² Atkins v. Virginia, 122 S.Ct. 2242 (2002).

³ *Id.* at 2244.

⁴ *Id.* at 2246-2250.

⁵ See ARIZ. REV. STAT. § 13-703 (2001) (“the court shall not impose the death penalty on a person who is found to have mental retardation”); ARK. CODE ANN. § 5-4-618(b) (Michie 1993) (“No defendant with mental retardation at the time of committing capital murder shall be sentenced to death.”); COLO. REV. STAT. § 16-9-403 (Supp. 1994) (“A sentence of death shall not be imposed upon any defendant who is determined to be a mentally retarded defendant pursuant to section 16-9-402.”); FLA. STAT. ch. 921.137(2) (2002) (“A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant has mental retardation.”); GA. CODE ANN. § 17-7-131(j) (1990 & Supp. 1994) (“In the trial of any case in which the death penalty is sought which commences on or after July 1, 1988, should the judge find in accepting a plea of guilty but mentally retarded or the jury or court find in its verdict that the defendant is guilty of the crime charged but mentally retarded, the death penalty shall not be imposed and the court shall sentence the defendant to imprisonment for life.”); IND. CODE ANN. § 35-36-9-6 (West Supp. 1994) (“If the court determines that the defendant is a mentally retarded individual under section 5 of this chapter, the part of the state’s charging instrument filed under IC 35-50-2-9(a) that seeks a death sentence against the defendant shall be dismissed.”); KAN. STAT. ANN. § 21-4623(d) (Supp. 1994) (“If, at the conclusion of a hearing pursuant to this section, the court determines that the defendant is mentally retarded, the court shall sentence the defendant as otherwise provided by law, and no sentence of death shall be imposed hereunder.”); KY. REV. STAT. ANN. § 532.140 (Michie 2001) (“[N]o offender who has been determined to be a seriously mentally retarded offender under the provisions of KRS 532.135, shall be subject to execution.”); MD. CODE ANN., art. 27 § 412(g)(1) (1992) (“If a person found guilty of murder in the first degree was, at

government prohibited the execution of the mentally retarded,⁶ a condition that affects approximately 2-3% of the population.⁷ However, the Court did leave the task of determining which defendants were mentally retarded to the states.⁸ Although I do not agree with the Court that a national consensus has developed against executing the mentally retarded, I do believe that the Court correctly concluded that this type of punishment is cruel and unusual.

This Note will look at the treatment of the mentally retarded and juveniles and attempt to establish that it violates the Eighth Amendment to execute both groups. It will prove that because the characteristics of mental retardation and juveniles are similar, the Supreme Court was correct in banning the executing of members from both groups. Just as the Court considered general characteristics of juveniles when holding that it is cruel and unusual punishment to execute them as a class, so too was it correct that the Court used generalizations about the mentally retarded to exempt that class from execution. Part I will discuss the different definitions of mental retardation and the characteristics that are associated with someone having this disease. Part II will provide the history of the death penalty from

the time the murder was committed, less than 18 years old or if the person establishes by a preponderance of the evidence that the person was, at the time the murder was committed, mentally retarded, the person shall be sentenced to imprisonment for life or imprisonment for life without the possibility of parole and may not be sentenced to death.”); MO. REV. STAT. § 565.030(1) (2001) (“The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor: (1) if the trier finds by a preponderance of the evidence that the defendant is mentally retarded.”); NEB. REV. STAT. § 28-105.01(2) (2001) (“Notwithstanding any other provision of law, the death penalty shall not be imposed on any person with mental retardation.”); N.M. STAT. ANN. § 31-20A-2.1(B) (Michie 1994) (“The penalty of death shall not be imposed on any person who is mentally retarded.”); N.Y. CRIM. PROC. LAW § 400.27(12)(c) (McKinney 2002) (“In the event the defendant is sentenced pursuant to this section to death, the court shall thereupon render a finding with respect to whether the defendant is mentally retarded. If the court finds the defendant is mentally retarded, the court shall set aside the sentence of death and sentence the defendant either to life imprisonment without parole or to a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.”); N.C. GEN. STAT. § 15A-2005 (2002) (“[N]o defendant who is mentally retarded shall be sentenced to death.”); S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie 2002) (“Notwithstanding any other provision of law, the death penalty may not be imposed upon any person who was mentally retarded at the time of the commission of the offense and whose mental retardation was manifested and documented before the age of eighteen years.”); TENN. CODE ANN. § 39-13-203(b) (1997) (“Notwithstanding any provision of law to the contrary, no defendant with mental retardation at the time of committing first degree murder shall be sentenced to death.”); WASH. REV. CODE ANN. § 10.95.030(2) (West 2002) (“In no case, however, shall a person be sentenced to death if the person was mentally retarded at the time the crime was committed.”); 2001 Conn. Legis. Serv. 151(h) (West) (“The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict . . . the defendant was a person with mental retardation.”).

⁶ See 18 U.S.C. § 3596(c) (2000) (“A sentence of death shall not be carried out upon a person who is mentally retarded.”).

⁷ Press Release, Am. Ass’n on Mental Retardation 1, 2 (May 7, 1993).

⁸ *Atkins*, 122 S. Ct. at 2250.

Furman v. Georgia⁹ to the present, focusing on the use of age and mental retardation as mitigating factors in sentencing. Part III will evaluate why executing juveniles and the mentally retarded is cruel and unusual punishment based on the test established in Gregg v. Georgia.¹⁰ This test states that punishment may be cruel and unusual if (1) the punishment was banned when the Bill of Rights was enacted, (2) evolving standards on decency make the punishment cruel and unusual now, or (3) the punishment is excessive. Finally, Part IV will propose a legislative approach that states should use to determine if a defendant is mentally retarded and thus excluded from the death penalty. This proposal uses the 1992 American Association on Mental Retardation (AAMR) definition of mental retardation and places the burden on the defendant to prove by a preponderance of the evidence the existence of this condition. This proposed test will add consistency to the application of the death penalty.

I. MENTAL RETARDATION

Before discussing why it was correct for the Court to treat the mentally retarded in the same manner as juveniles with regard to the death penalty, it is important to define what mental retardation is. This, however, is slightly more complicated than it sounds. First, there is more than one definition of mental retardation, and second, these definitions are not static.

Generally, courts and legislatures have accepted the American Association on Mental Retardation (AAMR) definition of mental retardation. Until 1992, this condition was defined as "significantly subaverage general intellectual functioning" existing concurrently with "impairments in adaptive behavior and manifested during the developmental period."¹¹ First, "general intellectual functioning" was measured by one or more standardized intelligence tests, and a "significant subaverage" score was quantified as an IQ of 70 or below.¹² The AAMR stressed that the IQ of 70 was not to be taken as an absolute; it was designed to be a flexible standard. This flexibility allows a person with an IQ over 70 who has special needs to be included in the definition while excluding those people who have an IQ under 70 but do not meet the other criteria of the definition.¹³ Second, "impairments in adaptive behavior" was defined as significant limitations

⁹ 408 U.S. 238 (1972).

¹⁰ 428 U.S. 153 (1976).

¹¹ AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 11 (Herbert J. Grossman ed., 1983).

¹² *Id.*

¹³ *Id.* at 23-24.

on the ability of the person to behave as a normal member of his age group.¹⁴ Finally, the “developmental period” was defined as the time between conception and the person’s eighteenth birthday.¹⁵ This definition is significant because most states that prohibit the execution of the mentally retarded define mental retardation according to this standard.¹⁶

In 1992, the AAMR refined its definition. Mental retardation is now defined as “(1) an IQ below 70-75, (2) concurrently existing with limitations in two or more adaptive skill areas, (3) which is manifested by age eighteen.”¹⁷ Diagnosis of mental retardation will result from a person’s performance on IQ tests and an analysis of functioning in ten sets of behavior skills.¹⁸ These ten sets are communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.¹⁹ Under this definition, environmental factors and mental health support play a significant role.²⁰ Two of the three criteria from the 1983 definition remain intact: there must be significant sub-average intellectual functioning, and mental retardation must manifest before age eighteen. However, the criterion for adaptive behavior has been greatly expanded. The AAMR had found that the previous adaptive behavior standard was too difficult to conceive and to measure.²¹ By clarifying this definition into ten skill areas, the concept of mental retardation was better understood by lay people and more firmly grounded.²²

The AAMR has developed a “Profile and Intensities of Needed Supports” that describes the different levels of support a mentally re-

¹⁴ *Id.* at 11.

¹⁵ *Id.*

¹⁶ New York and South Dakota are the two states that do not use a definition. See N.Y. CRIM. PROC. LAW § 400.27(12) (McKinney 2002); S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie 2002).

¹⁷ Jonathan L. Bing, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Penry and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE, 59, 67-70 (1996) (laying out the historical development of the definition of mental retardation used by the AAMR). For additional discussion of the AAMR definition of mental retardation, see AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORT 5 (9th ed. 1992) [hereinafter AAMR DEFINITION]; Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911, 915 (2001); William K. Wetzonis, *Capital Punishment for Mentally Retarded Defendants: A Boundary for the Eighth Amendment Is Drawn*, 34 HOW. L.J. 651, 655 (1991) (contrasting definitions of “mental disorder” with “mental retardation.”); John J. Gruttadaurio, Note, *Consistency in the Application of the Death Penalty to Juveniles and the Mentally Impaired: A Suggested Legislative Approach*, 58 U. CIN. L. REV. 211, 234 (1989) (discussing the older AAMR definition of mental retardation).

¹⁸ Bing, *supra* note 17, at 69.

¹⁹ *Id.* at 69 n.53.

²⁰ *Id.* at 69.

²¹ *Id.* at 70.

²² *Id.*

tarded person may require. These levels of support are intermittent, limited, extensive, and pervasive.²³ Intermittent support is provided for an individual who requires support on an as-needed basis, such as the loss of a job. Although the support is episodic in nature, it may be of high or low intensity. Limited support is support that is consistently required over a limited span of time. Extensive support involves regular involvement at home or work on a long-term basis. Finally, pervasive support is defined as constant, high-intensity support across all areas of life and may include life-sustaining measures.²⁴

The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) has a very similar, although not identical definition. Mental retardation is defined as "significantly subaverage general intellectual functioning"²⁵ accompanied by "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety"²⁶ that must manifest itself by the time the person is eighteen years of age.²⁷

The first prong, significantly subaverage general intellectual functioning, is based on IQ scores that are obtained through the use of standardized intelligence tests. The majority of people in the United States have IQs between 80 and 120, with an IQ of 100 considered average.²⁸ DSM-IV rates the following IQ scores as indicative of mental retardation:

IQ 50-55 to approximately 70: mild mental retardation

IQ 35-40 to 50-55: moderate mental retardation

IQ 20-25 to 35-40: severe mental retardation

IQ below 20: profound mental retardation.²⁹

Of the 2-3% of the population that is mentally retarded, 85% are mildly retarded, 10% are moderately retarded, 3-4% are severely retarded, and 1-2% are profoundly retarded.³⁰ This definition also rec-

²³ AAMR DEFINITION, *supra* note 17, at 26.

²⁴ *Id.*

²⁵ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 39 (4th ed. 1994) [hereinafter DSM-IV]. See also *Tran v. State*, 66 S.W.3d 790, 795 (Tenn. 2001) (discussing the DSM-IV definition of mental retardation and the scale used to determine the degree of mental retardation).

²⁶ DSM-IV, *supra* note 25, at 39.

²⁷ *Id.*

²⁸ *Beyond Reason: The Death Penalty and Offenders with Mental Retardation*, HUMAN RIGHTS WATCH, Vol. 13, No. 1(G) (2001), available at <http://www.hrw.org/reports/2001/ustat/> [hereinafter *Mental Retardation Website*].

²⁹ DSM-IV, *supra* note 25, at 40.

³⁰ *Id.* at 41-42.

ognizes that individuals with an IQ of 71 to 75 may also be mentally retarded if they have significant deficits in adaptive functioning.³¹

The second prong of this definition, adaptive functioning skills, is defined as "the presenting symptoms in individuals with Mental Retardation."³² This refers to how effectively individuals cope with common life demands and how well they meet the standards of independence expected of someone in their age group, socio-cultural background, and community setting.³³ Mildly retarded people "can reach sixth-grade level by [their] late teens, and as . . . adult[s] need[] supervision and guidance under 'unusual' social or economic stress."³⁴ In comparison, people who are considered moderately retarded are "unlikely to progress beyond a second-grade academic level."³⁵ These individuals may attend to their own personal care and perform unskilled or semi-skilled work under supervision. However, during adolescence, they may have difficulty recognizing social conventions, which may interfere with peer relationships.³⁶ Those who are severely retarded "may learn to talk during the school-age period and may be trained in elementary self-care skills."³⁷ Those who are profoundly retarded display considerable impairments that require constant care in a structured setting.³⁸

Finally, mental retardation is also present from childhood. Such factors as poor prenatal care, infections during pregnancy, physical abuse, and malnutrition are causes of this disease.³⁹ In other words, an ordinary adult cannot suddenly become mentally retarded. In addition, mental retardation is permanent. While a mentally retarded person can be taught skills and strategies that will enable him or her to function better in society, he or she cannot be "cured" by psychotherapy or medication.⁴⁰

The above discussion regarding the definitions of mental retardation and the effects of this condition seems to suggest that juveniles and the mentally retarded share many characteristics. Many mentally retarded people "have limited communication skills, poor impulse control, and underdeveloped conception of blameworthiness, a denial

³¹ See *id.* at 45.

³² *Id.* at 40.

³³ *Id.*

³⁴ Gruttadaurio, *supra* note 17, at 233 (quoting AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) (footnotes omitted)).

³⁵ *Id.*

³⁶ Entzeroth, *supra* note 17, at 914.

³⁷ *Id.*

³⁸ *Id.* at 914-15.

³⁹ *Id.*

⁴⁰ *Id.* at 916.

of their disability, a lack of knowledge of basic facts, and increased susceptibility to the influence of authority figures."⁴¹ Similarly, many juveniles are more vulnerable, more impulsive, and less self-disciplined than adults, and are without the same capacity to control their conduct and to think in long-range terms. They are particularly impressionable, subject to peer pressure, and lack experience, perspective, and judgment.⁴² The presence of these similar characteristics in the mental development of juveniles and the mentally retarded add credibility to the claim that both groups should be treated consistently when it comes to the death penalty.

II. HISTORY OF THE DEATH PENALTY SINCE *FURMAN*

The Eighth Amendment of the United States Constitution bans the use of cruel and unusual punishment. It states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."⁴³ In *Trop v. Dulles*,⁴⁴ the Court described the history behind this phrase:

The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is considered constitutionally suspect.⁴⁵

The framers of the Constitution were worried primarily about torture and barbarous methods of punishment.⁴⁶

A. *Furman v. Georgia*

In the 1972 case of *Furman v. Georgia*,⁴⁷ the Supreme Court held that the death penalty, as it was administered at that time, was

⁴¹ Bing, *supra* note 17, at 72.

⁴² Mirah A. Horowitz, Note, *Kids Who Kill Kids: A Critique of How the American Legal System Deals with Juveniles Who Commit Homicide*, LAW & CONTEMP. PROBS., Summer 2000, at 133, 165.

⁴³ U.S. CONST. amend. VIII.

⁴⁴ 356 U.S. 86 (1958).

⁴⁵ *Id.* at 100.

⁴⁶ *Gregg v. Georgia*, 428 U.S. 153, 170 (1976).

⁴⁷ 408 U.S. 238 (1972).

cruel and unusual punishment. Justices Brennan and Marshall thought that the death penalty was per se unconstitutional.⁴⁸ Justices Douglas, Stewart, and White did not hold the death penalty unconstitutional per se, but they did vote to strike down capital punishment on other grounds. These justices stated that unguided discretionary sentencing violated the Eighth Amendment because it was "pregnant with discrimination,"⁴⁹ it permitted the death penalty "to be so wantonly and so freakishly imposed,"⁵⁰ and it led to the death penalty's being "exacted with great infrequency even for the most atrocious crimes [with] no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."⁵¹ In a case in which every justice wrote his own opinion, Justices Douglas', Stewart's, and White's rationales have been what other courts and the Supreme Court have taken as the central holdings of *Furman*.

In 1976, the Court decided that the punishment of death was not inappropriate for the crime of murder under all circumstances.⁵² This decision was made because, after *Furman*, "[t]he legislatures of at least 35 States enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person."⁵³ In addition, "[a]t the close of 1974, at least 254 persons had been sentenced to death since *Furman*, and by the end of March 1976, more than 460 persons were subject to death sentences."⁵⁴

B. The Post-Furman Rules

Beginning with *Furman*, the Court has provided standards for a constitutional death penalty that "serve both goals of measured, consistent application and fairness to the accused."⁵⁵ *Furman* stands for the principle that the death penalty requires guided jury discretion and a narrowing of the class of those eligible to receive it. Most of the states that enacted new death penalty statutes attempted to address

⁴⁸ *Id.* at 305 (Brennan, J., concurring) (stating "the punishment of death is inconsistent with all four principles: Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment."). *Id.* at 370 n.163 (Marshall, J., concurring) (stating that "[t]here is too much crime, too much killing, too much hatred in this country. If the legislature could eradicate these elements from our lives by utilizing capital punishment, then there would be a valid purpose for the sanction and the public would surely accept it. . . . What purpose has it served? The evidence is that it has served none.").

⁴⁹ *Id.* at 257 (Douglas, J., concurring).

⁵⁰ *Id.* at 310 (Stewart, J., concurring).

⁵¹ *Id.* at 313 (White, J., concurring).

⁵² See *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁵³ *Id.* at 179-80.

⁵⁴ *Id.* at 182.

⁵⁵ *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982).

these problems in either one of two ways: (1) "by making the death penalty mandatory for specified crimes,"⁵⁶ or (2) "by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence."⁵⁷

In *Woodson v. North Carolina*,⁵⁸ the Court considered the first proposal: mandatory death sentences for certain crimes. In striking down this type of law, the Court stated that "individual culpability is not always measured by the category of the crime committed."⁵⁹ Instead, capital cases "require[] consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."⁶⁰ North Carolina's mandatory death penalty statute still encompassed the problems *Furman* sought to alleviate. Although the statute narrowed the class of people eligible to receive the death penalty, it did not provide any standards to guide the jury "in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die. And there is no way . . . for the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences."⁶¹

Other death penalty statutes have attempted to alleviate the problems addressed in *Furman* through a second proposal: requiring juries to find that the aggravating circumstances outweigh the mitigating factors. Aggravating circumstances are those factors that differentiate the capital defendant's crime from crimes that are not punishable by death. They increase the enormity of the crime, which singles it out for harsher treatment.⁶² Mitigating factors are those things that do not excuse or justify the offense, but which in "fairness and mercy" should be considered as reducing the degree of moral culpa-

⁵⁶ *Gregg*, 428 U.S. at 180.

⁵⁷ *Id.*

⁵⁸ 428 U.S. 280 (1976).

⁵⁹ *Id.* at 298 (quoting *Furman v. Georgia*, 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting)).

⁶⁰ *Id.* at 304.

⁶¹ *Id.* at 303. See also *(Harry) Roberts v. Louisiana*, 431 U.S. 633, 637 (1977) (per curiam) (stating that "[b]ecause the Louisiana statute does not allow for consideration of particularized mitigating factors, it is unconstitutional" in the case of a mandatory death penalty statute where there was first-degree murder of a police officer engaged in the course of his duties); *(Stanislaus) Roberts v. Louisiana*, 428 U.S. 325, 334-35 (1976) (stating "[t]his responsive verdict procedure not only lacks standards to guide the jury in selecting among first-degree murderers, but it plainly invites jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate"). But see *id.* at 334 n.9 ("Although even this narrow category does not permit the jury to consider possible mitigating factors, a prisoner serving a life sentence presents a unique problem that may justify such a law.").

⁶² RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 329 (2d ed. 2001).

bility.⁶³ The Court has recognized that in "the determination of sentences, justice requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender."⁶⁴ However, the Court has also realized that jurors cannot properly use the information given to them in the sentencing stage of the trial without adequate guidance.⁶⁵ In *Lockett v. Ohio*,⁶⁶ the Court concluded that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."⁶⁷ Not only is the sentencer not precluded from considering any mitigating factor, he or she is required to give it some weight in their consideration.⁶⁸

C. Age and Mental Retardation As Mitigating Factors

Both age and mental retardation are mitigating factors the jury should take into consideration when deciding to sentence someone to death. In *Eddings v. Oklahoma*,⁶⁹ the Court considered age as a mitigating factor. It stated that "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. . . . Particularly 'during the formative years of childhood and adolescence, minors often lack

⁶³ *Id.* at 389 (citing BLACK'S LAW DICTIONARY 903 (5th ed. 1979)).

⁶⁴ *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937).

⁶⁵ *Gregg v. Georgia*, 428 U.S. 153, 192 (1976):

But the provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury. Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. . . . It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing the organized society, deems particularly relevant to the sentencing decision.

⁶⁶ 438 U.S. 586 (1978).

⁶⁷ *Id.* at 604. The Court went on to say that a statute that does not afford the sentencer the opportunity to give independent weight to mitigating factors "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.* at 605. *But see California v. Brown*, 479 U.S. 538, 539 (1987) (upholding an instruction informing jurors that they "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling").

⁶⁸ *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982) (stating that the trial court may determine the weight it would like to give mitigating evidence, "[b]ut [it] may not give it no weight by excluding such evidence from [its] consideration").

⁶⁹ *Id.*

the experience, perspective, and judgment' expected of adults."⁷⁰ The Court cautioned that it was not suggesting an absence of responsibility for crimes committed by minors, only that the offender's status as a minor should count as a mitigating factor.⁷¹

Six years later the Court decided at what age executing a child violates the Eighth Amendment. *Thompson v. Oklahoma*⁷² banned the execution of juveniles under the age of sixteen.⁷³ One rationale behind this rule was that no state allowed a child under that age to be executed.⁷⁴ The Court explained that "[a]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment."⁷⁵ A year later, the Court held that it did *not* violate the Eighth Amendment to execute juveniles over the age of sixteen.⁷⁶ It again looked to the number of states that permitted capital punishment for juveniles over sixteen years old: "Of the 37 States whose laws permit capital punishment, 15 declined to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders. This does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual."⁷⁷ Since 1973, there have

⁷⁰ *Id.* at 115-16 (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)). The Court also quoted the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders when it stated "youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." *Id.* at 115 n.11.

⁷¹ *Id.* at 116.

⁷² 487 U.S. 815 (1988).

⁷³ *Id.* at 838.

⁷⁴ *Id.* at 824.

⁷⁵ *Id.* at 834 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11 (1982)). *But see id.* at 865-66 (Scalia, J., dissenting) (emphasis in original) (discussing the Comprehensive Crime Control Act of 1984 that lowered the age juveniles can be tried as adults from sixteen to fifteen because "in 1979 alone juveniles under the age of 15, *i.e.*, almost a year *younger* than Thompson, had committed a total of 206 homicides nationwide, more than 1000 forcible rapes, 10,000 robberies, and 10,000 aggravated assaults."); *Fare v. Michael C.*, 442 U.S. 707, 734 n.4 (1979) (Powell, J., dissenting) ("Minors who become embroiled with the law range from the very young up to those on the brink of majority. Some of the older minors become fully 'street-wise,' hardened criminals, deserving no greater consideration than that properly accorded all persons suspected of crime.").

⁷⁶ *Stanford v. Kentucky*, 492 U.S. 361 (1989). *But see Patterson v. Texas*, Nos. 02-6010, 02-6017, 2002 LEXIS 5341 (August 28, 2002) (Stevens, Ginsburg, and Breyer, J.J., dissenting from denial of stay) (arguing that *Stanford* should be reconsidered in light of the *Atkins* case).

⁷⁷ *Stanford*, 492 U.S. at 370-71; *cf. Eddings*, 455 U.S. 104; *Tison v. Arizona*, 481 U.S. 137, 154 (1987); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977) (discussing the definition of national consensus).

been 200 juveniles sentenced to death, and seventeen have been executed.⁷⁸

The same year the Court held that executing a juvenile over the age of sixteen was constitutional, it also decided *Penry v. Lynaugh*,⁷⁹ a 5-4 decision that held that executing the mentally retarded did not violate the Eighth Amendment protection against cruel and unusual punishment.⁸⁰ Justice O'Connor, the swing-vote, stated that although mental retardation is a factor that can diminish an individual's culpability for a criminal act, mental retardation alone was not sufficient for a person to lack the culpability necessary for the death penalty:

On the record before the Court today, however, I cannot conclude that all mentally retarded people of Penry's ability—by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility—inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty. Mentally retarded persons are individuals whose abilities and experiences can vary greatly. . . . In addition to the varying degrees of mental retardation, the consequences of a retarded person's mental impairment, including the deficits in his or her adaptive behavior, "may be ameliorated through education and habilitation."⁸¹

In addition, the Court stated that there was "insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses."⁸² At the time, only one state banned this type of execution.⁸³

In 2002, the Supreme Court overruled *Penry* when it held that executing the mentally retarded violated the Eighth Amendment's

⁷⁸ Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes Jan 1, 1973-December 31, 2000*, at <http://www.law.onu.edu/faculty/streib/juvdeath.htm> [hereinafter *Juveniles Death Penalty Website*].

⁷⁹ 492 U.S. 302 (1989).

⁸⁰ *Id.*

⁸¹ *Id.* at 338 (O'Connor, J., concurring) (quoting James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 424 n.54 (1985)). It is interesting that the Court's rationale focused on the fact that mentally retarded individuals vary in their abilities when it refused to exclude them from the death penalty. When the Court decided *Thompson*, it focused on juveniles as a class and made broad generalizations about their abilities. It seems as if the Court in *Thompson* ignored the fact that the generalizations used to describe juveniles may not apply to each individual. Because of the similar characteristics in both classes, the Court should have considered the mentally retarded as a class, not each defendant individually.

⁸² *Id.* at 335.

⁸³ See GA. CODE ANN. § 17-7-131 (1990 & Supp. 1994). Maryland had enacted a similar statute, but it did not take effect until after the *Penry* decision was announced. See MD. CODE ANN., art.27 § 412(f)(1) (1992).

prohibition against cruel and unusual punishment.⁸⁴ The Court reached this decision by concluding that such a practice violated the currently prevailing standards of decency.⁸⁵ In the thirteen years since *Penry* was decided, a significant number of states, sixteen, had concluded that the death penalty was not a suitable punishment for the mentally retarded,⁸⁶ and similar bills had passed in at least one house in a number of other states.⁸⁷ However, the Court stated that it was not only the number of states that have prohibited this practice that was significant, but also the consistency of the change and the fact that, even in states that allowed this type of punishment, it was uncommon:

Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crimes the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition. Moreover, even in those States that allow the execution of mentally retarded offenders, the practice is uncommon.⁸⁸

In addition, the Court reasoned that, because of the deficiencies associated with mental retardation, the execution of these defendants are not justified by either retribution or deterrence, the two justifications for the death penalty.⁸⁹ Finally, there is a special risk of wrongful execution because of the increased possibility of false confessions; the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation, give meaningful assistance to their counsel, or be good witnesses; and the fact that their demeanor may create an unwarranted impression of a lack of remorse for their crimes.⁹⁰ The

⁸⁴ *Atkins v. Virginia*, 122 S.Ct. 2242 (2002).

⁸⁵ *Id.* at 2248-2250.

⁸⁶ *Id.*

⁸⁷ See S. 497, 2002 Leg., 95th Sess. (Va. 2002); H.R. 236, 77th Leg., 353d Sess. (Tex. 2001); Assemb. 353, 236 Assemb., Reg. Sess. (Nev. 2001); H.R. 236, 77th Legis., 236th Sess. (Tex. 2001). In addition, a commission on capital punishment in Illinois recommended that the state should adopt a statute prohibiting executing the mentally retarded. State of Ill., REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 156 (2002).

⁸⁸ *Atkins*, 122 S.Ct. at 2249.

⁸⁹ *Id.* at 2250-52 (discussing diminished culpability because of impaired ability to reason logically, learn from experience, and control impulses).

⁹⁰ *Id.* at 2252.

Court also noted that there is disagreement about how to determine which defendants are mentally retarded but stated that it would leave that task up to the states.⁹¹ From 1976 to 2002, there have been thirty-five executions of people who are mentally retarded.⁹²

III. THE TEST FOR CRUEL AND UNUSUAL PUNISHMENT

The test used to determine whether a punishment is cruel and unusual, and the rationale the Court used to hold that executing juveniles under the age of sixteen violates the Eighth Amendment, provides further proof that executing the mentally retarded is cruel and unusual punishment. The Supreme Court established a three-step test in *Gregg v. Georgia*⁹³ to determine if a punishment violates the Eighth Amendment. For a punishment to pass muster under this test, the following must occur: First, the punishment must not be one that was considered a “‘barbarous’ method[] that [was] generally outlawed in the 18th century.”⁹⁴ Second, “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁹⁵ Finally, the punishment must not be excessive.⁹⁶ The inquiry into excessiveness requires a further two-step analysis. First, “the punishment must not involve the unnecessary and wanton infliction of pain,”⁹⁷ and second, “the punishment must not be grossly out of proportion to the severity of the crime.”⁹⁸

A. Generally Outlawed in the Eighteenth Century

The first step in analyzing whether a particular punishment is prohibited because it violates the Eighth Amendment is to evaluate whether the punishment was outlawed in the eighteenth century. Another way of stating this is to decide whether the punishment is one of “those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.”⁹⁹ The phrase “cruel and unusual punishment” first appeared in the English Bill of Rights of 1689, which was drafted by Parliament after the Glorious Revolution. Parliament was called into session to draft general statements containing such things that were “absolutely necessary to

⁹¹ *Id.* at 2250.

⁹² *Mental Retardation Website*, *supra* note 28.

⁹³ 428 U.S. 153, 171-73 (1976).

⁹⁴ *Id.* at 171.

⁹⁵ *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This sentence was also quoted in *Gregg*, so it is still considered part of the *Gregg* test that seemed to synthesize different elements of a cruel and unusual test. *See* 428 U.S. 153, 173 (1976).

⁹⁶ *Gregg*, 428 U.S. at 173.

⁹⁷ *Id.* *See also* *Furman v. Georgia*, 408 U.S. 238, 392-93 (Burger, C.J., dissenting).

⁹⁸ *Id.*

⁹⁹ *Ford v. Wainwright*, 477 U.S. 399, 405 (1986).

be considered for the better securing of . . . religion, laws and liberties."¹⁰⁰ This phrase appears to have been directed at punishments unauthorized by statute, beyond the jurisdiction of the sentencing court, and disproportionate to the offense involved.¹⁰¹ The language used in the American Bill of Rights was drawn verbatim from the English Bill of Rights. Similar to the English rationale, the American drafters were primarily concerned with prohibiting tortures and other barbarous methods of punishment.¹⁰² The history behind this phrase provides proof that the framers intended to provide at least the same protections as its English counterpart, if not an intention to go beyond those protections.¹⁰³

B. Evolving Standards of Decency

The second step in the cruel and unusual analysis is whether evolving standards of decency would prohibit this type of punishment. The Eighth Amendment "has been interpreted in a flexible and dynamic manner."¹⁰⁴ Therefore, the meaning of the provision changes and "may acquire meaning as public opinion becomes enlightened by a humane justice."¹⁰⁵ In order to determine if the evolving standards of decency have changed, the Court must look to objective criteria that reflect the public's current attitude towards the death penalty.¹⁰⁶ There are two objective criteria that the Court has decided accurately reflect the public's attitude: first, the "statutes [are] passed by society's representatives,"¹⁰⁷ and second, "the reluctance of juries to impose, and prosecutors to seek, such sentences."¹⁰⁸

¹⁰⁰ *Furman*, 408 U.S. at 318 (Marshall, J., concurring) (quoting Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CAL. L. REV. 839, 854 (1969)).

¹⁰¹ Granucci, *supra* note 100, at 860.

¹⁰² *Id.* at 842 n.17.

¹⁰³ *Ford*, 477 U.S. at 406. See also *Solem v. Helm*, 463 U.S. 277, 286 (1983) ("Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection."). See *supra* Part II for a discussion of the Eighth Amendment history.

¹⁰⁴ *Gregg v. Georgia*, 428 U.S. 153, 171 (1976). The Court went on to say that it "early recognized that 'a principle to be vital must be capable of wider application than the mischief which gave it birth.'" *Id.* (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910)). See also *Trop v. Dulles*, 356 U.S. 86, 103 (1958) ("The provisions of the Constitution are not time-worn adages or hollow shibboleths").

¹⁰⁵ *Weems*, 217 U.S. at 378.

¹⁰⁶ *Gregg*, 428 U.S. at 173.

¹⁰⁷ *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989). See also *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting) (stating that "in a democratic society legislatures, not the courts, are constituted to respond to the will and consequently the moral values of the people").

¹⁰⁸ *Stanford*, 492 U.S. at 373. Justice Scalia went on to state that "the very considerations which induce petitioners and their supporters to believe that death should *never* be imposed on

In the past, the Court has evaluated what constitutes a national consensus in different ways. However, at no point has the Court "set a minimum number of states needed to present a consensus."¹⁰⁹ In at least three cases, the Court has acknowledged the existence of a national consensus when there was unanimity or virtual unanimity among the states. In *Coker v. Georgia*,¹¹⁰ the Court held that executing a person for the rape of an adult woman is cruel and unusual punishment.¹¹¹ Only three states provided for the death penalty in this situation, and two of those statutes had been held unconstitutional by the Supreme Court.¹¹² In *Ford v. Wainwright*,¹¹³ the Court held that executing someone who had become insane after trial was cruel and unusual punishment when no state permitted this type of execution.¹¹⁴ In *Thompson*, the Court found that executing a juvenile under the age of sixteen was unconstitutional.¹¹⁵ The rationale supporting this decision was that "[w]hen [the Court] confine[d] [its] attention to the 18 States that have expressly established a minimum age in their death penalty statutes, [it found] that *all* of them require that the defendant have attained the age of 16 at the time of the capital offense."¹¹⁶ A year later, the Court found that when fifteen states out of thirty-six states that authorize the death penalty refuse to impose it upon sixteen-year-olds, this was not enough to establish a national consensus.¹¹⁷

In light of the above holdings, it would appear that a very high number of states, considerably more than a majority, must agree in order for a national consensus to be established. However, in *Atkins*, when eighteen out of thirty-eight states that had the death penalty (thirty out of fifty states total) did not allow the execution of the mentally retarded, this was enough to establish a national consensus.¹¹⁸ In addition, there appears to be a question regarding whether the Court

offenders under 18 cause prosecutors and juries to believe that it should *rarely* be imposed." *Id.* at 374. It has been argued that this passage proves that the majority in *Stanford* did not believe the use of jury sentences was sufficient evidence to determine a national consensus. Bing, *supra* note 17, at 103. For purposes of this Note, it will be assumed that jury sentences are sufficient evidence. See also *Gregg*, 428 U.S. at 181 ("The jury also is a significant and reliable objective index of contemporary values because it is so directly involved.").

¹⁰⁹ Bing, *supra* note 17, at 105.

¹¹⁰ 433 U.S. 584 (1977).

¹¹¹ *Id.*

¹¹² *Id.* at 594. Louisiana and North Carolina had provided for this type of execution. *Roberts* and *Woodson*, respectively, found these statutes to be unconstitutional. *Roberts v. Louisiana*, 431 U.S. 633 (1977); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

¹¹³ 477 U.S. 399 (1986).

¹¹⁴ *Id.* at 408-10.

¹¹⁵ 487 U.S. 815 (1988).

¹¹⁶ *Id.* at 829 (emphasis added).

¹¹⁷ *Stanford v. Kentucky*, 492 U.S. 361, 370-71 (1989).

¹¹⁸ 122 S.Ct. 2242 (2002).

considers those states that have outlawed the death penalty altogether. Justice Scalia has argued that those states should not be considered,¹¹⁹ while Justice O'Connor believes those states should be included in the analysis.¹²⁰

Not only is there a question of whether states that do not have the death penalty should be included in determining whether there is a national consensus, but there is also a question of what role, if any, other nations should play in determining the evolving standards of decency. The Court has looked to international practices in many other death penalty cases: "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."¹²¹ The Court has even looked to other nations, particularly those with similar legal and social traditions, in other contexts.¹²² Because of increasing globalization, "the opinions of other nations are more relevant today than at any time since the Founding."¹²³ However, at least one justice, Justice Scalia, does not think the opinion of other nations is relevant.¹²⁴

C. Excessive and Unnecessary

The final step in the cruel and unusual analysis examines whether executing the mentally retarded is excessive.¹²⁵ A punishment is considered excessive when it is unnecessary: "The infliction of a severe punishment by the State cannot comport with human dig-

¹¹⁹ See *Stanford*, 492 U.S. at 370-71 n.2 (stating that it is illogical to include those states that do not have capital punishment because they do not address the specific issues that are in question).

¹²⁰ See Linda Greenhouse, *Top Court Hears Argument on Execution of Retarded*, N.Y. TIMES, Feb. 21, 2002, at A21; see also Bing, *supra* note 17, at 104 (arguing that those states should be included in a national consensus computation).

¹²¹ Brief for Amici Curiae Diplomats Morton Abramowitz, et al. at 7, *McCarver v. North Carolina*, 533 U.S. 975 (2001), available at <http://www.deathpenaltyinfo.org/ForeignServiceBrief.html> [hereinafter Amici Brief]. See also *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (looking to international practices to determine that the death penalty was unconstitutional); *Ford v. Wainwright*, 477 U.S. 399, 409 (1986) (stating that "the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscious or deity is still vivid today"); *Enmund v. Florida*, 458 U.S. 782, 797 n.22 (1982) (stating 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) (looking at international practices regarding the death penalty for rape); *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (looking to international opinion to access "evolving standards of decency" for the Eighth Amendment).

¹²² See *Trop*, 356 U.S. at 101-02 (stating that "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.").

¹²³ Amici Brief, *supra* note 121 at 7.

¹²⁴ See *Atkins v. Virginia*, 122 S.Ct. 2242, 2264 (2002) (Scalia, J., dissenting).

¹²⁵ *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

nity when it is nothing more than the pointless infliction of suffering."¹²⁶ In addition, if there is a significantly less severe punishment that would achieve the same purpose for which the punishment was inflicted, then the punishment inflicted is excessive.¹²⁷ However, a punishment will not be found excessive if a two-step analysis is met: (1) the punishment serves some valid peneological purpose, and (2) the punishment is not "grossly out of proportion to the severity of the crime."¹²⁸

1. Valid Peneological Purpose

The first step in the excessiveness analysis is whether executing the mentally retarded serves any peneological purpose. The Supreme Court has stated that the death penalty serves two peneological purposes: deterrence and retribution.¹²⁹ Deterrence occurs when the punishment of one person discourages that person¹³⁰ or another person¹³¹ from committing a crime.¹³² This theory of punishment "rests on the assumption that the rational actor will conform his conduct to a socially acceptable standard because the potential costs of unacceptable activities outweigh the potential benefits."¹³³ In other words, it assumes the offender will perform a cost-benefit analysis.

The second peneological purpose that is served by the death penalty is retribution. This theory has two components: (1) the death penalty punishes "conduct that is so egregious, so violative of socially acceptable standards of behavior, that it merits the severest of penalties,"¹³⁴ and (2) the death penalty expresses "society's moral outrage" at the conduct.¹³⁵ "Retribution involves punishing the criminal because he deserves to be punished. Culpability is crucial . . ."¹³⁶ Ap-

¹²⁶ *Furman v. Georgia*, 408 U.S. 238, 279 (1972) (Brennan, J., concurring).

¹²⁷ *Id.*

¹²⁸ *Gregg*, 428 U.S. at 173. Justice Stewart also concluded that the "sanction imposed cannot be so totally without peneological justification that it results in the gratuitous infliction of suffering." *Id.* at 183. See also *Coker v. Georgia*, 433 U.S. 584, 592 (1977) ("Under *Gregg*, a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.").

¹²⁹ *Gregg*, 428 U.S. at 183.

¹³⁰ This type of deterrence is called specific deterrence.

¹³¹ This type of deterrence is called general deterrence.

¹³² Jamie Marie Billotte, *Is It Justified?: The Death Penalty and Mental Retardation*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 333, 341 (1994).

¹³³ Philip L. Fetzer, *Execution of the Mentally Retarded: A Punishment Without Justification*, 40 S.C. L. REV. 419, 439 (1989).

¹³⁴ *Id.* at 440.

¹³⁵ *Id.*

¹³⁶ Billotte, *supra* note 132, at 363. Justice Stewart stated that "[r]etribution is no longer the dominant objective of criminal law" but it does serve as an expression of society's moral outrage. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

propriateness of this punishment is a question of "personal responsibility and moral guilt,"¹³⁷ which is determined by the mental state of the defendant.¹³⁸

2. Proportionality

The second step of the excessiveness analysis examines whether executing the mentally retarded is grossly out of proportion to the severity of the crime. The constitutional principle of proportionality states that the "punishment should be directly related to the personal culpability of the criminal defendant."¹³⁹ This principle takes into account not only the injury to the victim and public caused by the crime, but also the moral depravity of the offender.¹⁴⁰ After weighing all the mitigating evidence, a court must rule that the punishment is disproportionate if the severity outweighs the defendant's individual culpability.¹⁴¹

D. Juveniles and the Cruel and Unusual Test

Executing juveniles below the age of sixteen violates the Eighth Amendment. In order to advance the argument that the Supreme Court should treat groups with similar characteristics in a consistent manner, it is necessary to evaluate why this punishment is cruel and unusual. There was no prohibition against executing juveniles when the Bill of Rights was enacted. At that time, "the common law set the rebuttable presumption of incapacity to commit any felony at the age of 14, and theoretically permitted capital punishment to be imposed on anyone over the age of 7."¹⁴² In 1642, the first juvenile, Thomas Graunger, a sixteen-year-old of the Plymouth Colony, was executed.¹⁴³ Since that date, at least 279 juvenile offenders have been executed.¹⁴⁴ Therefore, the execution of juveniles is not cruel and unusual punishment based on the first prong of the test.

¹³⁷ *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

¹³⁸ *See, e.g., Tison v. Arizona*, 481 U.S. 137, 156 (1987) (citing *Lockett v. Ohio*, 438 U.S. 586 (1978) for the proposition that a defendant's mental state is critical to assessing defendant's culpability).

¹³⁹ *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). *See also Solem v. Helm*, 463 U.S. 277, 293 (1983) (stating that the culpability of the offender is an important principle in determining proportionality of a punishment).

¹⁴⁰ Kathleen A. Strottman, Note, *Creating a Downward Spiral: Transfer Statutes and Rebuttable Presumptions as Answers to Juvenile Delinquency*, 19 WHITTIER L. REV. 707, 743 (1998).

¹⁴¹ *Id.*

¹⁴² *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989).

¹⁴³ VICTOR L. STREIB, *DEATH PENALTY FOR JUVENILES* 55 (1987).

¹⁴⁴ *Id.*

Because executing juveniles was an acceptable punishment during the eighteenth century, the analysis must progress to the second prong of the test: whether the evolving standards of decency have evolved so that executing juveniles is now considered cruel and unusual punishment. As was stated above,¹⁴⁵ executing juveniles was outlawed by *Thompson v. Oklahoma*. The Court found that the standards of decency have evolved to the extent that executing someone under the age of sixteen does violate the Eighth Amendment. However, objective indicators regarding the evolving standards of decency of executing juveniles have changed since the *Thompson* ruling. Even though the Supreme Court has held that no one under the age of sixteen can be executed,¹⁴⁶ violent crimes committed by juveniles in the United States have increased dramatically.¹⁴⁷ One in six murder arrests are of juveniles, and the age of those arrested gets younger every year.¹⁴⁸ For example, in 1999, two eleven-year-olds were charged with the murder of their father and the attempted murder of their mother and sister.¹⁴⁹ In addition, a public opinion poll has revealed that approximately 73% of Americans believe that juveniles who commit violent crimes should be charged as adults,¹⁵⁰ and 72% of Americans believe those juveniles should receive the death penalty.¹⁵¹

States have reacted to this increase in violent crimes committed by juveniles by adopting a “get-tough” approach. This approach has resulted in three different types of responses to teen violence. First, many states have lowered the age at which juveniles can be transferred to adult criminal court.¹⁵² The traditional method of transferring juveniles to adult court is called judicial waiver. This “involves a process whereby a statute empowers a juvenile court judge with the

¹⁴⁵ See *supra* Part II.C.

¹⁴⁶ *Thompson v. Oklahoma*, 487 U.S. 815 (1998).

¹⁴⁷ See Horowitz, *supra* note 42, at 134 (stating that between “the mid 1980s and the mid 1990s, the number of youths committing homicides had increased by 168%”).

¹⁴⁸ *Id.* In North Carolina in 1997, seventy juveniles were arrested on murder charges. Thirty-five were seventeen, twenty-four were sixteen, seven were fifteen, and four were between the ages of thirteen and fourteen. *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Kelly Keimig Elsea, *The Juvenile Crime Debate: Rehabilitation, Punishment, or Prevention*, 5 KAN. J.L. & PUB. POL’Y 135, 136 (1995).

¹⁵¹ Strottman, *supra* note 140, at 709. In addition, some politicians have advocated for a decrease in the age of juveniles subjected to the death penalty. Horowitz, *supra* note 42, at 150-51.

¹⁵² Irene Merker Rosenberg, *Teen Violence and the Juvenile Courts: A Plea for Reflection and Restraint*, 37 HOUS. L. REV. 75, 79 (2000). See, e.g., COLO. REV. STAT. § 19-2-518 (1999) (allowing waiver at 12 years of age for certain crimes); FLA. STAT. ch. 985.225(1) (2002) (allowing a waiver at any age for a crime punishable by death or life imprisonment).

discretion whether to transfer a case or not.”¹⁵³ The judge is given discretion to determine whether a particular juvenile can be rehabilitated in the juvenile system or should be tried as an adult because his or her offense requires a harsher punishment than can be provided in the juvenile system.¹⁵⁴ The discretion of the judge is limited only by *United States v. Kent*,¹⁵⁵ which states that a juvenile is entitled to a waiver hearing, representation by counsel, access to information upon which the waiver decision was to be based, and a statement of the reasons justifying the waiver decision.¹⁵⁶ However, some states have determined that this type of waiver gives the judge too much discretion. This leads to the second response to juvenile violence: prosecutorial or statutory waiver laws.¹⁵⁷ Prosecutorial waiver occurs when the district attorney selects the juveniles who will be prosecuted in criminal court.¹⁵⁸ Statutory waiver is when the legislature makes the determination of who will be transferred to criminal court “by automatically excluding children of a certain age charged with specified offenses from the jurisdiction of the juvenile court.”¹⁵⁹ Finally, some states have responded to juvenile violence by focusing more on punishment and retribution in the juvenile court system, instead of only rehabilitation.¹⁶⁰

Although many states have created more ways to transfer and lowered the age at which juveniles may be transferred to adult criminal court, and some politicians have advocated a decrease in the age at which juveniles may be given the death penalty,¹⁶¹ no state has upheld this punishment for any child under the age of sixteen. What this proves is that while states are more willing to hold juveniles accountable for their violent crimes, they still do not believe those offenders should be subjected to the death penalty.¹⁶² While juveniles are being held more accountable for their actions, they are still perceived as different than their adult counterparts.

¹⁵³ Katherine L. Evans, Comment, *Trying Juveniles as Adults: Is the Short Term Gain of Retribution Outweighed by the Long Term Effects on Society?*, 62 MISS. L.J. 95, 101 (1992).

¹⁵⁴ *Id.* at 101-02.

¹⁵⁵ 383 U.S. 541 (1966).

¹⁵⁶ *Id.* at 542.

¹⁵⁷ Merker Rosenberg, *supra* note 152, at 81.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 85. Many states have amended the purposes section of their juvenile codes to emphasize that juveniles should be punished and incarcerated, de-emphasizing rehabilitation as a goal. Other states have adopted determinate sentencing in juvenile courts so that the sentence depends on the severity of the crime. *Id.*

¹⁶¹ Horowitz, *supra* note 42, at 150-51.

¹⁶² See *Patterson v. Texas*, Nos. 02-6010, 02-6017, 2002 LEXIS 5341 (August 28, 2002) (Stevens, Ginsburg, Breyer, JJ., dissenting from denial of stay) (arguing that the execution of juveniles over the age of sixteen should be reconsidered in light of the *Atkins* case).

This leads to the third prong of the cruel and unusual test: excessiveness. Because juveniles are less culpable than adults are, executing them serves no valid penological purpose. Juveniles are less able to exercise choice freely and rationally. As stated in *Thompson v. Oklahoma*,¹⁶³ “[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.”¹⁶⁴ Juveniles are different than adults. They often believe that they are invincible, and because of this, they are more willing to take risks that endanger themselves and others.¹⁶⁵ In addition, a juvenile’s ability to use reason when making decisions is not as developed as an adult’s ability: “‘They are more vulnerable, more impulsive, and less self-disciplined than adults,’ and are without the same ‘capacity to control their conduct and to think in long-range terms.’”¹⁶⁶ Therefore, because of the characteristics of youth, the deterrence theory of punishment is not served.

Executing juveniles also does not serve the retributive theory of punishment. As the Supreme Court has recognized, “[c]rimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.”¹⁶⁷ They are not capable of acting with the degree of culpability necessary to justify the death penalty.

Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.¹⁶⁸

Because of this lack of culpability, executing juveniles does not serve the legitimate penological purpose of retribution. Because neither valid purpose of punishment is served by executing juveniles and culpability is a necessary element of proportionality, the death penalty

¹⁶³ 487 U.S. 815 (1985).

¹⁶⁴ *Id.* at 837.

¹⁶⁵ Horowitz, *supra* note 42, at 165.

¹⁶⁶ *Id.* (quoting *Stanford v. Kentucky*, 492 U.S. 361, 395 (1989) (Brennan, J., dissenting)).

¹⁶⁷ *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11 (1982) (quoting TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, *CONFRONTING YOUTH CRIME* 7 (1978)).

¹⁶⁸ *Thompson*, 487 U.S. at 835.

will be disproportionate to the crimes juveniles commit. As a result, capital punishment is reduced to "purposeless and needless imposition of pain and suffering."¹⁶⁹ Executing juveniles is against the evolving standards of decency and serves no purpose of punishment. It violates the Eighth Amendment protection against cruel and unusual punishment.

E. The Mentally Retarded and the Cruel and Unusual Test

Because executing juveniles is considered cruel and unusual punishment, the rationales that were used to determine this outcome should be applied to and compared with the issues surrounding the execution of the mentally retarded. As with juveniles, when the Bill of Rights was adopted, there was no per se prohibition against executing the mentally retarded. Instead, "idiots" and "lunatics" were not held liable for their criminal activities.¹⁷⁰ Idiocy was defined as "'a defect of understanding from the moment of birth,'"¹⁷¹ and lunacy was "'a partial derangement of the intellectual faculties, the senses returning at uncertain intervals.'"¹⁷² This prohibition against executing "idiots" and "lunatics" for criminal acts was the precursor to the insanity defense. This defense includes mental defects and mental disease in the definition of legal insanity.¹⁷³ The definition of "idiots" has some similarity to the definition of mental retardation.¹⁷⁴ As stated in *Penry*,

The common law prohibition against punishing "idiots" generally applied . . . to persons of such severe disability that they lacked the reasoning capacity to form criminal intent or to understand the difference between good and evil. In the 19th and early 20th centuries, the term "idiot" was used to describe the most retarded of persons, corresponding to what is called "profound" and "severe" retardation.¹⁷⁵

Although the term "mentally retarded" was not used, it seems that the general prohibition against punishing "idiots" and "lunatics" may

¹⁶⁹ *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

¹⁷⁰ *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). Blackstone stated that "'idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. . . . [A] total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses. . . .'" *Id.* (quoting 4 W. BLACKSTONE, COMMENTARIES *24 - *25).

¹⁷¹ *Id.* at 331 (quoting 1 W. HAWKINS, PLEAS OF THE CROWN 1-2 (7th ed. 1795)).

¹⁷² *Id.*

¹⁷³ *Id.* at 332.

¹⁷⁴ *Id.* See *supra* Part I for a discussion of the definition of mental retardation.

¹⁷⁵ *Id.* at 332-33.

have included some categories of mental retardation.¹⁷⁶ Even though the Supreme Court has recognized that executing the profoundly or severely mentally retarded may have been outlawed in the eighteenth century, most people who reach the point of sentencing are mildly retarded, and do not fall into the category of “idiots” and “lunatics.”¹⁷⁷ Therefore, the execution of the mentally retarded is not cruel and unusual punishment based on the first prong of the test.

Because executing the mentally retarded appears to have been an acceptable punishment in the eighteenth century, the analysis must continue to whether the evolving standards of decency have rendered this type of punishment cruel and unusual. The Court in *Atkins* found that a national consensus had developed against the execution of the mentally retarded. At the time this case was decided, thirty-eight states and the federal government provided for the death penalty for certain types of murder.¹⁷⁸ Of these jurisdictions, eighteen states and the federal government, or 47% of jurisdiction that have the death penalty, outlawed the execution of the mentally retarded.¹⁷⁹ When combined with the twelve states that do not have the death penalty, 60% of all states outlawed this type of execution.

This does not appear to be enough states to constitute a national consensus. Although there is not a minimum number of states needed to establish a national consensus, prior cases have generally required a much higher percentage of states: 75% or more.¹⁸⁰ In fact, the Court decided that a national consensus had not been established when 42% of the states with the death penalty and 58% of all states outlawed executing defendants who were sixteen years old when they committed their crime.¹⁸¹ It seems very strange that a national consensus is not formed when 42% of the death penalty states and 58% of all states outlaw a practice but is formed if 47% of the death penalty states and 60% of all states outlaw a practice. These miniscule differences in percentages do not seem significant enough to shift from no national consensus to forming one.

¹⁷⁶ *Id.* at 333. “The common law prohibition against punishing ‘idiots’ for their crimes suggests that it may indeed be ‘cruel and unusual’ punishment to execute persons who are profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions.” *Id.*

¹⁷⁷ *Id.* The Court seemed to suggest that the insanity defense and competency requirement to stand trial afford protection to those people who may have been categorized as “idiots” and “lunatics.” Because Penry was found to be competent to stand trial and the jury rejected his insanity defense, the Court rejected the notion that he belonged to either category. *Id.*

¹⁷⁸ *Juvenile Death Penalty Website*, *supra* note 78.

¹⁷⁹ *Mental Retardation Website*, *supra* note 28.

¹⁸⁰ *See supra* Part III.B.

¹⁸¹ *Stanford v. Kentucky*, 492 U.S. 361 (1989).

In addition, I agree with Justice Scalia's criticism of the majority's argument in *Atkins* that there is evidence of a national consensus because of the consistency in the direction of the change: "But in what *other* direction *could we possibly* see change? Given that 14 years ago *all* the death penalty statutes included the mentally retarded, *any* change (except precipitate undoing of what had just been done) was *bound to be* in the one direction the Court finds significant enough to overcome the lack of real consensus."¹⁸² Therefore, because the Court does not appear to have followed its own precedent, I do not agree with the Court that a national consensus has developed.

Although I do not agree with the Court that a national consensus has developed, I agree with the Court's decision that executing the mentally retarded is excessive. No valid penological purpose of punishment is served by executing the mentally retarded, and thus it is disproportionate. Deterrence rests on the assumption that the offender will perform a cost-benefit analysis before committing a crime. This assumption is not valid when applied to mentally retarded offenders. Characteristics of mental retardation include poor impulse control and incomplete or underdeveloped concepts of moral blameworthiness and causation.¹⁸³ Because of these characteristics, the mentally retarded are unable to distinguish between events that result from blameworthy behavior and those that do not, which in turn "impairs their abilities to understand that certain consequences flow directly from particular acts."¹⁸⁴

The mentally retarded are also not capable of acting with the degree of culpability that would justify the death penalty. The definition of mental retardation itself describes this lack of culpability: "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior."¹⁸⁵ As the Supreme Court has recognized, this means that the mentally retarded are limited in their general ability to meet the standards of maturity, learning, personal independence, and social responsibility that is expected of someone at the same age and from the same cultural group.¹⁸⁶ These disabilities preclude the culpability necessary to justify the death penalty. In addition, since *Gregg*, Supreme Court jurisprudence has confined the death penalty to a narrow category of the most serious crimes and criminals.¹⁸⁷ In fact, in *Godfrey v. Georgia*,¹⁸⁸ the Court

¹⁸² *Atkins v. Virginia*, 122 S.Ct. 2242, 2263 (2002) (Scalia, J., dissenting).

¹⁸³ Fetzer, *supra* note 133, at 439.

¹⁸⁴ *Id.*

¹⁸⁵ AAMR DEFINITION, *supra* note 17, at 25.

¹⁸⁶ See *Atkins*, 122 S.Ct. at 2250-51; *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 n.9 (1985).

¹⁸⁷ *Atkins*, 122 S.Ct. at 2251.

set aside the death sentence for a defendant whose crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder."¹⁸⁹ As the Court stated in *Atkins*, "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution."¹⁹⁰

Because the mentally retarded offenders are not able to perform a cost-benefit analysis and, because they have lesser personal culpability than normal adults, the death penalty would be disproportionate to the crimes that mentally retarded persons commit. Here, as with juveniles, the death penalty is reduced to "purposeless and needless imposition of pain and suffering."¹⁹¹ Therefore, executing the mentally retarded is cruel and unusual punishment.

IV. SUGGESTED LEGISLATIVE APPROACH

Executing the mentally retarded is cruel and unusual punishment. The Court left to the states how to determine if a defendant is mentally retarded.¹⁹² My suggested legislative approach reads as follows:

- (A) Death Sentence Excluded. A defendant may be sentenced to the maximum allowable term for a first-degree felony, but not sentenced to death, if the Court and Jury find that, at the time of the commission of the crime the defendant was mentally retarded.
- (B) As used in this section, mental retardation means:
 - (1) an IQ below 70-75,
 - (2) concurrently existing with limitations in two or more skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work, and
 - (3) which is manifested by age eighteen (18).
- (C) Standard of Proof. In order to exclude a defendant from the death penalty, he or she must prove by a preponderance of the evidence that he or she is mentally retarded.

First, this Note will analyze why this definition of mental retardation should be used by comparing what tests state legislatures have used. Then, it will analyze why the standard of proof should be a

¹⁸⁸ 446 U.S. 420 (1980).

¹⁸⁹ *Id.* at 433.

¹⁹⁰ *Atkins*, 122 S.Ct. at 2251.

¹⁹¹ *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

¹⁹² *Atkins*, 122 S.Ct. at 2250.

preponderance of the evidence and why that burden should be on the defendant. This Note will conclude by confronting one of the obstacles to this suggested legislative approach: the accuracy of IQ tests.

A. Which Definition of Mental Retardation?

Not only should the execution of the mentally retarded be treated in a manner consistent with how the Supreme Court has treated the execution of juveniles, but there should also be a standard definition of mental retardation. This definition is necessary to fulfill the goals of *Furman*: consistent application and fairness to the accused. By comparing the definitions of states that ban the execution of the mentally retarded, this Note will argue that the 1992 AAMR definition of mental retardation should be the one that is used to determine whether an individual is mentally retarded.

The eighteen states that banned the execution of the mentally retarded before *Atkins* used three primary legislative approaches. Fourteen states defined mental retardation as significantly subaverage general intellectual functioning combined with deficits in adaptive behavior that manifests during the developmental period.¹⁹³ Two states defined it as a performance that is two or more standard deviations from the mean score on standardized IQ tests combined with deficits in adaptive behavior that manifests by age eighteen.¹⁹⁴ Finally, two states did not include a definition of mental retardation.¹⁹⁵

Although the states used three different definitions for mental retardation, two of the definitions are actually synonymous. As was stated above,¹⁹⁶ significant sub-average intellectual functioning is quantified as an IQ of 70 or below. A performance that is two or more standard deviations from the mean score on a standardized IQ test is approximately the same as a score of 70 or below.¹⁹⁷ There-

¹⁹³ See ARIZ. REV. STAT. § 13-703 (2001); ARK. CODE ANN. § 5-4-618(b) (Michie 1993); COLO. REV. STAT. § 16-9-401 (Supp. 1994); GA. CODE ANN. § 17-7-131(j) (1990 & Supp. 1994); KY. REV. STAT. ANN. §§ 532.130 (Michie 2001); MD. CODE ANN. art. 27 § 412(g)(1) (1992); MO. REV. STAT. § 565.030(1) (2001); NEB. REV. STAT. § 28-105.01(2) (2001); N.M. STAT. ANN. § 31-20A-2.1(B) (Michie 1994); N.C. GEN. STAT. § 15A-2005 (2002); TENN. CODE ANN. § 39-13-203(b) (1997); WASH. REV. CODE § 10.95.040(2) (2002); 2001 Conn. Legis. Serv. 151 (West). Indiana is also counted in this group although its statute says that the mental retardation must exist before age twenty-two. See IND. CODE ANN. § 35-36-9-1-6 (West Supp. 1994).

¹⁹⁴ See FLA. STAT. ch. 921.137(1) (2002); KAN. STAT. ANN. § 76-12601(i) (1997).

¹⁹⁵ See N.Y. CRIM. PROC. LAW § 400.27(12) (McKinney 2002); S.D. CODIFIED LAWS § 23A-27A-26.2 (Michie 2002).

¹⁹⁶ See *supra* Part I.

¹⁹⁷ Ellis & Luckasson, *supra* note 81, at 422.

fore, it appears that all the states that utilized a definition of mental retardation used the 1983 AAMR definition.¹⁹⁸

Even though all the states used the 1983 AAMR definition of mental retardation, the 1992 revision should be utilized instead. The AAMR itself recognized that the 1983 definition was difficult for laypersons to understand.¹⁹⁹ The previous definition of adaptive behavior deficits was too difficult to conceive and measure.²⁰⁰ The 1992 definition is both more concrete and more flexible. It is concrete in the fact that it numerically establishes the maximum IQ that qualifies someone as mentally retarded and categorizes deficits in adaptive behavior into ten skill areas.²⁰¹ At the same time it is flexible by allowing a five-point IQ deviation.²⁰² More importantly, this definition places a strong emphasis on adaptive skill areas and the amount of support a mentally retarded person needs to function in the world.²⁰³ By taking the primary focus off IQ tests, the concept of mental retardation is more firmly grounded and better understood. This will lead to a more consistent application of this legislative approach.

B. Standard of Proof

The defendant has the burden of proving, by the preponderance of the evidence, that he or she is mentally retarded. Preponderance of the evidence is defined as "superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."²⁰⁴ This is the same standard of proof that was affirmed by the Supreme Court in *Walton v. Arizona*,²⁰⁵ when it held that it was constitutional for Arizona to impose upon the defendants the burden of establishing by a preponderance of the evidence the existence of mitigating factors.²⁰⁶ The Supreme Court has also upheld statutes that impose a preponderance of the evidence standard to claims of self-defense²⁰⁷ and the affirmative defense of extreme emotional disturbance.²⁰⁸

¹⁹⁸ For the definition and discussion of the 1983 AAMR definition of mental retardation, see *supra* notes 11-16 and accompanying text.

¹⁹⁹ Bing, *supra* note 17, at 70.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² AAMR DEFINITION, *supra* note 17, at 25.

²⁰³ See *supra* Part I (discussing the 1992 AAMR test and the levels of needed support).

²⁰⁴ BLACK'S LAW DICTIONARY 1201 (7th ed. 1999).

²⁰⁵ 497 U.S. 639 (1990).

²⁰⁶ *Id.* at 651.

²⁰⁷ *Martin v. Ohio*, 480 U.S. 228 (1987).

²⁰⁸ *Patterson v. New York*, 432 U.S. 197 (1977).

Although the role of mental retardation will change from being a mitigating factor to being akin to an affirmative defense against the death penalty, the standard of proof should remain the same. Even with the more accurate definition of what mental retardation is, establishing that a particular defendant is retarded will not be easy. Because of the nature of mental retardation, it is often more difficult for these offenders to contribute adequately to their defense: "The mentally retarded criminal defendant is more susceptible to police coercion and to forced waiver of procedural rights."²⁰⁹ Lawyers have difficulty effectively communicating with these clients. In addition, most people do not come into contact with mentally retarded individuals on a regular basis and do not fully understand the implications of mental retardation. Furthermore, there is a question about the accuracy of IQ tests.²¹⁰ Therefore, a lesser standard of proof than reasonable doubt should be used because a higher standard places a greater burden on the mentally retarded defendant. It is better to incorrectly find that a person is mentally retarded and impose a lesser penalty than to execute someone who is incorrectly found to be not retarded.

The burden of proof should be on the defendant. Since mental retardation will be an affirmative defense, defendants should have the burden of proof because that is the common practice when proving affirmative defenses. Also, it would seem unfair to place this burden on the prosecution. As the Court said in *Walton*, "[s]o long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged . . . a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency."²¹¹ Because the defendant is using mental retardation to call for an exemption from the death penalty, the defendant should have the burden of proof.

C. The Accuracy of IQ Tests

IQ tests are essential tools that are used to determine if someone is mentally retarded. Because mental retardation is partially defined as someone with an IQ of 70-75, it is crucial to discuss the accuracy and fairness of these tests. Since some researchers have found that IQ tests are ineffective as the sole determinant of mental retardation,²¹²

²⁰⁹ Bing, *supra* note 17, at 145.

²¹⁰ See *infra* Part IV.C.

²¹¹ 497 U.S. 639, 650 (1990).

²¹² David L. Rumley, *A License to Kill: The Categorical Exemption of the Mentally Retarded from the Death Penalty*, 24 ST. MARY'S L.J. 1299, 1329-40 (1993).

the 1992 AAMR definition is useful because it removes the sole emphasis for diagnosis from IQ tests and places more reliance on deficits in adaptive behavior skills.

One of the most popular IQ tests is the Wechsler Memory Scale-Revised (WAIS-R). This test is comprised of two parts: logical memory and visual reproduction. It is designed to measure informational knowledge, auditory recall, concentration and distractibility, comprehension, the ability to see relationships between events, and other factors.²¹³ There are guidelines and criteria for scoring this test.²¹⁴

IQ tests have received a number of criticisms, two of which are the testing procedure and the perceived bias against minorities. The WAIS-R test requires the subject to recount to the tester what he or she has seen. It is then up to the tester to determine if the subject's variation in vocabulary from the correct answer is acceptable. The attitude of the examiner or any bias the tester may have against the subject or the attitude of the examiner may play a role in scoring.²¹⁵ Not only do the testing procedures used create a bias, but the test itself also reflects a bias against minority groups. The WAIS-R test "reflects the values of the majority American culture, and persons reared within that culture, all other things being equal, will excel on that test."²¹⁶ Because mentally retarded individuals are heavily concentrated in the lowest socioeconomic segments of society,²¹⁷ this test may not reflect their values and will create a bias against them. The rationale behind this bias includes the different experiences and vocabulary among ethnic groups, the placement of many minority children into special education classes, which produces a stigma, and other more general problems that the poor must face, such as underfunded schools, inferior nutrition, and violent neighborhoods.²¹⁸ This cultural bias will lead to false positives; more people will be diagnosed as mentally retarded who are in fact not. While the rationale of prohibiting the execution of such individuals is based in part on their lack of culpability, this decision was not made with the idea of exempting more defendants than actually deserve it.

²¹³ Bing, *supra* note 17, at 73.

²¹⁴ *Id.*

²¹⁵ *Id.* (stating that "[a]ny bias the tester may have against the subject can play a large part in scoring. Those tested by a cold, austere professional are likely to score a few points lower than those who experienced a test with a friendly examiner.").

²¹⁶ *Id.* at 74 (quoting ROBERT J. GREGORY, ADULT INTELLECTUAL ASSESSMENT 150 (1987)).

²¹⁷ See MARY BEIRNE-SMITH ET AL., MENTAL RETARDATION 92-93 (4th ed. 1994) ("Children who are born and reared in deprived, lower socioeconomic groups are 15 times more likely to be labeled mentally retarded than children from the suburbs.").

²¹⁸ Bing, *supra* note 17, at 74.

Even with the above criticisms of IQ testing, such testing is still a reasonable method to utilize when determining if an individual is mentally retarded. First, there is no alternative, and it is better to have some method than no method at all. Second, this method "provides the practical benefit of a consistent standard generally accepted by mental health professionals."²¹⁹ Finally, and most importantly, the IQ test only determines one part of the definition of mental retardation. The condition still must manifest before the individual is eighteen and be coupled with existing limitations in two or more adaptive skill areas. This is the major reason why the 1992 AAMR definition of mental retardation should be used: it takes the emphasis off IQ tests.

CONCLUSION

Executing the mentally retarded violates the Eighth Amendment's protection against cruel and unusual punishment. Mental retardation is defined by the AAMR as an IQ below 70-75, existing concurrently with limitations in two or more adaptive skill areas, which is manifested by age eighteen. Many mentally retarded people have limited communication skills, poor impulse control, and an underdeveloped conception of blameworthiness. These same characteristics are shared by juveniles. The Supreme Court held that executing a child under the age of sixteen violated the Eighth Amendment because children are less culpable than adults and no state allows the execution of such juveniles.

The Supreme Court was correct that mental retardation should be treated as an absolute bar against the death penalty because it is cruel and unusual punishment. The test for determining whether a punishment is cruel and unusual is (1) it was a punishment that was outlawed during the Eighteenth century, (2) the standards of decency have evolved so that this punishment is now unacceptable, or (3) the punishment is excessive. When the Bill of Rights was enacted, it was acceptable to execute the mentally retarded. However, the Court incorrectly concluded that a national consensus was formed when only eighteen states and the federal government prohibited this type of punishment. When combined with the twelve states that do not have the death penalty, 60% of the states banned executing the mentally retarded. Based on past precedents, this was not a large enough percentage to form a national consensus. Even though the Court was incorrect in its evolving standards of decency analysis, it was correct that the punishment is excessive. Deterrence is not served because this theory of punishment rests on the assumption that the offender

²¹⁹ *Id.* at 75.

will make a cost-benefit analysis before committing a crime. Because of the characteristics of mental retardation, this cost-benefit analysis cannot be performed. In addition, the mentally retarded are limited in their general ability to meet the standards of maturity, learning, personal independence, and social responsibility that is expected of someone at the same age and from the same cultural group. These disabilities preclude the culpability necessary to require the death penalty. Therefore, no valid penological purpose of punishment is served by this type of execution. Because of the lack of culpability a mentally retarded person has, the death penalty becomes disproportionate to any crime committed.

It was correct for the Supreme Court to treat the mentally retarded in a manner consistent with the way it treats juveniles, but the states also need to establish a consistent definition of the disease and how to implement such a law. First, the 1992 definition of mental retardation should be used because it is more concrete and easier to apply. While it provides a numerical ceiling for diagnosis, it allows some flexibility for IQ tests. In addition, the focus is taken off these tests, which are criticized for their lack of accuracy, and places more emphasis on the deficits in behavioral skill areas. Second, the burden of proving the existence of mental retardation by the preponderance of the evidence should lie with the defendant. This recognizes that mental retardation may not be easily understood by laypersons by requiring a lesser burden of proof. At the same time, the burden of proving such an affirmative defense from the death penalty should be placed on the defendant, as all affirmative defenses are.

As Justice Stewart stated in *Woodson*, death is quantitatively different from life in prison. This punishment requires greater reliability in sentencing than any other punishment because this one is irreversible. How can a society say that this greater reliability is met when it executes someone who leaves the dessert from his last meal to cool because he believes he will have a chance to eat it the next day, not understanding that for him, there is no next day?²²⁰ Banning the execution of the mentally retarded does not excuse these individuals from their conduct. They are still punished; they are just not killed.

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²²⁰ *Id.* at 61 (describing the story of a mentally retarded Arkansas death row inmate).

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