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JURISPRUDENCE IN FLORIDA

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THE STATE CONSTITUTION'S CRUEL OR UNUSUAL PUNISHMENT CLAUSE: THE BASIS FOR FUTURE DEATH PENALTY JURISPRUDENCE IN FLORIDA?

DONNA E. BLANTON

Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.¹

I. INTRODUCTION

THE *Florida Constitution's* cruel or unusual punishment clause, found in article I, section 17, historically has been ignored by the Florida Supreme Court in capital cases.² The court generally decides capital cases on Eighth Amendment grounds, occasionally citing the Florida constitutional provision, but rarely construing it differently or distinguishing it from its federal counterpart.³ However, the supreme court's lockstep approach to the Eighth Amendment provision and article I, section 17 may be changing. Three Florida Supreme Court cases decided in 1991 and 1992 signal a new approach to state constitutional jurisprudence that may lead to an independent interpretation of article I, section 17.

The court in 1992 sent a clear message in *Traylor v. State*⁴ that it intends to rely on the state constitution to protect individual liberties, particularly in criminal cases. The case includes strong language about federalism and the primacy of the *Florida Constitution* in the majority opinion by Justice Shaw and in the separate opinions by Justices

1. FLA. CONST. art. I, § 17.

2. David C. Hawkins, *Florida Constitutional Law: 1991 Survey of the State Bill of Rights*, 16 NOVA L. REV. 167, 218-19 (1991) [hereinafter *1991 Survey*]; David C. Hawkins, *Florida Constitutional Law: A Ten-Year Retrospective on the State Bill of Rights*, 14 NOVA L. REV. 693, 803 (1990) [hereinafter *Ten-Year Retrospective*].

3. See, e.g., *Raulerson v. State*, 358 So. 2d 826 (Fla.), cert. denied, 439 U.S. 959 (1978) (holding that capital punishment is not per se violative of either the Eighth Amendment or article I, § 17 with no separate discussion of the state constitutional provision). See also *LeCroy v. State*, 533 So. 2d 750, 758 (Fla. 1988) (Barkett, J., dissenting) (arguing that imposing the death penalty on juveniles violates the Eighth Amendment and article I, § 17 and treating the federal and state constitutional provisions as indistinguishable), cert. denied, 492 U.S. 925 (1989); *Ten-Year Retrospective*, supra note 2, at 803.

4. 596 So. 2d 957 (Fla. 1992).

Kogan and Barkett.⁵ *Traylor* deals specifically with constitutional provisions relating to self-incrimination and the right to counsel, but the court's message regarding the importance of the state constitution's Declaration of Rights⁶ is not limited to those provisions and is instead viewed as a broad statement about the importance of state constitutional law.⁷

The court held in *Tillman v. State* that the requirement that the death penalty be administered proportionately comes in part from the state constitution's express prohibition against unusual punishment.⁸ The court noted that it is "unusual" to impose death based on facts similar to those in cases where death was found to be improper.⁹ Additionally, the court stated in a footnote that the use of "or" in the phrase "cruel or unusual punishment" indicates that alternatives were intended.¹⁰ The footnote suggests, without explicitly stating, that

5. Justice Shaw's opinion states:

When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state constitution and to give independent legal import to every phrase and clause contained therein. We are similarly bound under our Declaration of Rights to construe each provision freely in order to achieve the primary goal of individual freedom and autonomy.

Id. at 962-63 (footnote omitted).

As did Justice Shaw in the majority opinion, Justice Kogan wrote at length about federalism and encouraged both judges and lawyers to put increased emphasis on the *Florida Constitution*: Clearly, state constitutional issues must be considered first whenever fundamental rights are at stake. Far too often, both bench and bar fail even to consider the possibility that some principle of the Florida Constitution may be dispositive of the issue. This practice clearly is contrary to the two central policies upon which the doctrine of primacy rests.

First, primacy promotes judicial economy. As is obvious to all, lawyers and courts need address federal claims only if no violation is found under the Florida Constitution. . . . Second and most importantly, primacy gives the state Constitution the respect and effect its framers manifestly intended it to have. The Florida Constitution is not a nullity to be ignored. Its words are not meaningless. When the state constitution creates a fundamental right, that right must be respected, even if no similar right is recognized by the federal courts.

Id. at 982-83 (Kogan, J., concurring in part and dissenting in part).

Justice Barkett wrote: "I agree with the recital of the law on federalism. It is, of course, axiomatic that Florida can interpret its constitution independently of the federal courts." *Id.* at 974 (Barkett, J., concurring in part and dissenting in part).

6. Article I of the *Florida Constitution* encompasses the Declaration of Rights.

7. Randolph Pendleton, *Go Beyond U.S. To Protect Accused, Court Says*, FLA. TIMES-UNION, Jan. 20, 1992, at B1. The court in *Traylor* upheld the second-degree murder conviction of John Edward Traylor for the fatal stabbing of a woman in Jacksonville in 1980. Pendleton found it noteworthy that rather than disposing of the case in a short opinion, the court wrote at length about the relationship between the federal and state constitutions and the protections the state constitution provides the accused.

8. 591 So. 2d 167, 169 (Fla. 1991).

9. *Id.*

10. *Id.* n.2.

“cruel or unusual” in the *Florida Constitution* is different from “cruel and unusual” in the *United States Constitution*.¹¹ *Tillman* represents the first time that the court has found independent meaning in article I, section 17 in a capital case.

The third recent case that may be important in future state constitutional jurisprudence is *Department of Law Enforcement v. Real Property*,¹² a decision that provides a framework for resolving state due process issues and elevates the protection of property rights under the *Florida Constitution*.¹³ The court found in *Real Property* that the substantive due process component of article I, section 9 (the *Florida Constitution*'s due process clause) protects “the full panoply of individual rights” from unjustified interference by the State.¹⁴ This statement suggests that personal rights declared throughout the constitution give substantive content to the state due process clause.¹⁵ In *Real Property* the court also specifically mentioned article I, section 17, noting that Floridians have a substantive right to be free from “excessive punishments.”¹⁶ Although *Real Property* is not a capital case and does not deal with the cruel or unusual punishment clause, it nonetheless illustrates the court's willingness to explore article I, section 17 and to interpret it independently of the Eighth Amendment. Much like *Traylor*, the *Real Property* decision signals the court's intention to rely exclusively on the *Florida Constitution* to resolve an array of constitutional issues.¹⁷

This Comment interprets the signs that the Florida Supreme Court intends to rely more frequently on the *Florida Constitution* in the context of “New Federalism,” the phrase most often used to describe the trend of state courts to construe their own constitutional provisions more broadly than the United States Supreme Court construes similar federal provisions, particularly in the area of individual rights. This Comment outlines the development of New Federalism; reviews

11. The Eighth Amendment reads: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

12. 588 So. 2d 957 (Fla. 1991).

13. The case dealt with the procedures used by the State to execute a property seizure and forfeiture under the Florida Contraband Forfeiture Act. For a thorough discussion of *Real Property* and its implications for various provisions of the *Florida Constitution*'s Declaration of Rights, see *1991 Survey*, *supra* note 2, at 181.

14. 588 So. 2d at 960.

15. *1991 Survey*, *supra* note 2, at 189-90.

16. 588 So. 2d at 964. The phrase comes from the title of article I, § 17, which has no independent significance. The construction of a constitutional provision is determined by its text, not its title. FLA. CONST. art. X, § 12(h). The discussion of “excessive punishments” in *Real Property* results in a different approach to forfeiture than is found in Eighth Amendment jurisprudence. See *1991 Survey*, *supra* note 2, at 219.

17. See *1991 Survey*, *supra* note 2, at 191.

Florida's role in the movement; discusses other states' death penalty cases that are based on state constitutional provisions; explores the history and application of article I, section 17; and recommends that the Florida Supreme Court use the prohibition against cruel or unusual punishment to develop death penalty jurisprudence different from that created by the United States Supreme Court.

II. NEW FEDERALISM

Before the *United States Constitution* existed, most of the American colonies had constitutions containing specific fundamental rights limiting the power of state governments. Drafters of the Bill of Rights relied heavily on these state constitutions. The first ten amendments to the *United States Constitution*, in fact, were intended as a simplified version of similar state constitutional provisions, and their purpose was to extend corresponding protections to the federal government.¹⁸ Further, framers of constitutions in states admitted to the Union after the *United States Constitution* was adopted—such as Florida—used other state constitutions, not the federal Constitution, as their models.¹⁹

The amendments in the federal Bill of Rights were rarely invoked until after the Civil War and the adoption of the Fourteenth Amendment, and even then, many more years passed before they were applied to state action.²⁰ State constitutions thus served as the primary protectors of individual liberties. The Warren Court in the 1960s dramatically changed federal constitutional law by extending to the states most of the protections of the Bill of Rights. This "incorporation doctrine" deeply involved state courts in construing federal constitutional law, but it overshadowed state constitutional interpretation.²¹ The profound changes in the relationship between the state and federal courts created by the incorporation doctrine resulted in such a de-emphasis of state constitutional interpretation that law schools offered few classes in state constitutional law and casebooks rarely mentioned state constitutions.²² Consequently, many lawyers today—trained to

18. Shirley Abrahamson, *Reincarnation & Reawakening*, HUMAN RIGHTS, Winter 1992, at 27; Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1485-86 (1990).

19. Abrahamson, *supra* note 18, at 27.

20. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 493 (1977).

21. Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1147 (1985); Herasimchuk, *supra* note 18, at 1487-89.

22. James R. Acker & Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 VAND. L. REV. 1299, 1312 n.74 (1989).

think in terms of federal constitutional law—do not think of raising state constitutional issues in their claims.²³

In the 1970s and 1980s, as the Burger and Rehnquist Courts began reducing protections provided by the Bill of Rights, some state court judges began looking to their own constitutions.²⁴ Justice Brennan is often credited with providing impetus to the New Federalism movement by writing in 1977 that state courts should look to state constitutions to protect individual liberties.²⁵ Brennan wrote: “[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.”²⁶ Influential state court judges, such as Hans Linde of Oregon and Shirley S. Abrahamson of Wisconsin, also began touting the use of state constitutions to expand protections.²⁷ Although the image of New Federalism is that of a completely “liberal” movement, some studies show that the adoption of Burger and Rehnquist Court doctrines by state courts far exceeds their rejection.²⁸ The important point is that state courts are increasingly looking to their own constitutions—rather than to the federal Constitution—to develop their own jurisprudence, be it “liberal” or “conservative.”²⁹

23. Robin Sher, *How To Fight for Civil Liberties*, HUMAN RIGHTS, Winter 1992, at 12 (noting the lack of a vigorous and sustained effort by the practicing bar to promote and develop state constitutional law). See also *Traylor v. State*, 596 So. 2d 957 (Fla. 1992) (Kogan, J., concurring in part and dissenting in part) (noting that both bench and bar often fail to consider the possibility that some principle of the *Florida Constitution* may be dispositive of a particular issue).

24. Acker & Walsh, *supra* note 22, at 1312-13; Brennan, *supra* note 20, at 495.

25. Brennan, *supra* note 20, at 491.

26. *Id.*

27. See, e.g., Abrahamson, *supra* notes 18 & 21; Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 178 (1984) (“My own view has long been that a state court always is responsible for the law of its state before deciding whether the state falls short of a national standard, so that no federal issue is properly reached when the state’s law protects the claimed right.”).

28. Barry Latzer, *The Hidden Conservatism of the State Court “Revolution,”* 74 JUDICATURE 190 (1991) (a study of state court criminal justice rulings).

29. Numerous studies have shown the rise in state constitutional interpretation in the past two decades. One survey shows that state supreme courts recognized rights under state constitutions in only three cases from 1950-59, and in only seven cases from 1960-69. In the 1970s, however, those courts recognized state constitutional rights in 124 cases, and they did so in 177 cases from 1980 to 1986. Acker & Walsh, *supra* note 22, at 1312 n.74 (citing Ronald K.L. Collins et. al., *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 HASTINGS CONST. L.Q. 599, 600-01 & table 1 (1986)). Another study shows that since 1970, state supreme courts have issued more than 450 opinions concluding that individuals have greater rights under the state constitution than under the federal Constitution. John C. Cooper, *Beyond the Federal Constitution: The Status of State Constitutional Law in Florida*,

A. *How State Courts Insulate Their Decisions*

The Supremacy Clause of the *United States Constitution*³⁰ prohibits state courts from interpreting their constitutions less stringently than the federal Constitution. However, as the United States Supreme Court has repeatedly recognized, nothing prevents state courts from granting greater protections than are provided by the federal Constitution.³¹ In *Michigan v. Long*,³² the Supreme Court spelled out the guidelines that state courts must follow to insulate their decisions from federal review. The case stands for the proposition that a state court must make a "plain statement" that it is relying on adequate and independent state law grounds in its decision. Otherwise, a presumption is created that federal law has been applied and federal courts will consider the state court's decision as fair game for review.³³ The *Long* decision has been credited with increasing the trend toward reliance on state constitutions in state court decisions.³⁴

Although state constitutional provisions can be interpreted differently from those in the federal Constitution even when the provisions are worded identically,³⁵ textual differences often serve as a starting point for an alternate interpretation. The difference in wording often prompts research into the history of a state constitutional provision, an exercise that sometimes uncovers drafters' intentions that are different from those of the federal Constitution's drafters.³⁶ Perhaps more importantly, the legitimacy of state courts premising decisions on state constitutions is most apparent and least often questioned when the wording of the provisions is different.³⁷ A state court taking a state constitutional provision that is phrased identically to a federal provision and suddenly exchanging decades of jurisprudence by the United States Supreme Court for its own interpretation almost assur-

18 STETSON L. REV. 241, 242-43 (1989) (citing Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 217 (1988)). Still another report notes that state high courts have rendered more than 600 opinions since 1970 that go beyond the federal Constitution on individual rights issues. Mary Hladky, *Privacy Puts Florida on the Map*, MIAMI REV., Feb. 26, 1990, at 5C.

30. U.S. CONST. art. VI, para. 2.

31. See, e.g., *Herb v. Pitcairn*, 324 U.S. 117 (1945).

32. 463 U.S. 1032 (1983).

33. *Id.* at 1041-42.

34. Acker & Walsh, *supra* note 22, at 1311.

35. Linde, *supra* note 27, at 181-82 ("The first step is to overcome the sense that divergence from Supreme Court doctrines is more legitimate when the state's text differs from its federal counterpart than when they are the same. In truth, the state court is equally responsible for reaching its own conclusion in either case.").

36. Linde, *supra* note 27, at 182-84.

37. Acker & Walsh, *supra* note 22, at 1320-21.

edly will be accused of judicial activism. Even Justice Brennan, writing in his famous law review article about the increased reliance on state constitutions by state courts, indicated some surprise at such interpretations when the state and federal provisions were identically phrased, though he did not question the state courts' authority to differ with the federal interpretation.³⁸

In the context of constitutional provisions governing imposition of the death penalty, fifteen of the thirty-six states that impose capital punishment have provisions in their state constitutions virtually identical to the Eighth Amendment's prohibition against "cruel and unusual punishments."³⁹ Fourteen states, including Florida, prohibit cruel "or" unusual punishments; five states prohibit "cruel" punishments; and two states have no analogous provision.⁴⁰ Courts and scholars disagree as to whether the differences in the wording of these provisions are significant.⁴¹

B. Florida's Role in the New Federalism

The Florida Supreme Court currently is perceived as a leader of the New Federalism movement, largely because of recent decisions based on the state constitution's privacy provision that Florida voters approved in 1980.⁴² In its annual review of the Florida Supreme Court, the *Miami Review* wrote in 1990: "Striking the parental consent requirement for abortions in last fall's *T. W.* gave Florida instant standing within The New Federalism, the movement to use state law to expand civil rights."⁴³ The *National Law Journal* also took notice:

During the past several years, the Florida court has climbed aboard the New Federalism bandwagon, deploying the state Constitution's right-to-privacy clause to catapult civil rights far beyond federal

38. Brennan, *supra* note 20, at 495 ("[M]ore and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, *even those identically phrased.*") (emphasis added).

39. Acker & Walsh, *supra* note 22, at 1321 n.112-15.

40. Acker & Walsh, *supra* note 22, at 1321 n. 112-15.

41. Acker & Walsh, *supra* note 22, at 1321-22 & n.116. Cases interpreting some of these state constitutional provisions are discussed in Part III, *infra*.

42. FLA. CONST. art. I, § 23. See *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (holding that Florida statute requiring parental consent for abortion of unmarried minor is unconstitutional under provisions of article I, § 23 guaranteeing right to privacy). See also *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990) (holding that right to privacy protects decision of individual in certain circumstances to forgo life-sustaining treatment).

43. *Contents*, MIAMI REV., Feb. 26, 1990, at 3C (statement in the table of contents previewing an article by Mary Hladky).

constitutional limits. As a result, Florida has become the first southern state to join activist courts like Oregon, California and New Jersey as a guiding light for courts throughout the nation.⁴⁴

Although the Florida Supreme Court has interpreted other state constitutional provisions differently from the federal Constitution, most of those interpretations have not attracted the national attention of the privacy rulings.⁴⁵

The Florida Supreme Court's interpretation of the *Florida Constitution's* prohibition against unreasonable searches and seizures,⁴⁶ however, drew considerable attention in the 1980s. The Florida court, drawing the ire of law enforcement officials and legislators who would have preferred adherence to increasingly conservative United States Supreme Court decisions, construed the state constitutional provision as providing more protections than the Fourth Amendment.⁴⁷ Consequently, Florida courts now are limited when dealing with search and seizure issues by a 1983 amendment to the state constitution that commands adherence to the United States Supreme Court doctrine in the Fourth Amendment area. The amendment, proposed by the Legislature and approved by voters in 1982, has been explained by some as a reaction to a court that was too activist in its interpretation of the

44. Rosalind Resnick, *This Court's a Backwater No More: The Florida Supreme Court Is Expanding the Right of Privacy Beyond Federal Limits*, NAT'L L.J., May 28, 1990, at 1.

45. See generally *Ten-Year Retrospective*, *supra* note 2, at 702 (discussing interpretation of the state constitution's Declaration of Rights); Cooper, *supra* note 29 (citing several examples of Florida Supreme Court's interpretation of state constitutional provisions in a manner different from federal constitutional provisions).

One example of the Florida Supreme Court's reliance on the *Florida Constitution* can be found in *State v. Neil*, 457 So. 2d 481 (Fla. 1984), which held that the right to trial by an impartial jury requires retrial if the prosecutor exercises peremptory challenges to remove a prospective juror solely on account of race. The *Neil* decision predates *Batson v. Kentucky*, 476 U.S. 79 (1986), which held that a prosecutor cannot use peremptory strikes in a racially discriminatory manner. *Neil*, therefore, is a good example of a state court relying on its own constitution to reach a conclusion that is later also reached by the United States Supreme Court under the federal Constitution. Proponents of New Federalism argue that state court experimentation—the "laboratories of democracy" function—is one of the key advantages of judicial reliance on state constitutions. Abrahamson, *supra* note 18, at 29 ("New federalism serves as a reminder to state courts that they should experiment with new approaches that, if successful, may later be applied nationwide by the United States Supreme Court.').

46. FLA. CONST. art. I, § 12.

47. For a summary of the cases construing article I, § 12, see *Ten-Year Retrospective*, *supra* note 2, at 773-75. The most controversial case was *State v. Sarmiento*, 397 So. 2d 643 (Fla. 1981), in which the court held that the warrantless interception of a conversation in the defendant's home by an undercover detective wearing a "body bug" violated the state constitutional provision. Article I, § 12 is worded considerably differently from the Fourth Amendment. For example, the text includes the exclusionary rule ("[a]rticles or information obtained in violation of this right shall not be admissible in evidence"), which under the Fourth Amendment is found only in case law.

state constitution's search and seizure provision.⁴⁸ Others have argued that the amendment is ill-conceived and should be repealed because it is contrary to state court independence.⁴⁹ The strength of the 1983 amendment is demonstrated by a study of state court reliance on state constitutions in the criminal justice area between the late 1960s and 1989.⁵⁰ The study found that Florida was the fourth most active court in the country before the 1983 amendment became effective.⁵¹ An analysis of decisions following the effective date of the amendment placed Florida as one of the least active courts.⁵²

The Florida Supreme Court's recent opinions in *Traylor v. State*⁵³ and *Department of Law Enforcement v. Real Property*⁵⁴ best illustrate the court's current thinking about New Federalism. Both decisions have drawn the attention of commentators who predict that the opinions will serve as precedents for increased reliance on the state constitution.⁵⁵

Traylor preserves the protections afforded by *Miranda v. Arizona*⁵⁶ and its progeny under the *Florida Constitution*, which means that any further retreat by the United States Supreme Court on the self-incrimination and right-to-counsel issues covered by those opinions will not apply in Florida.⁵⁷ In *Traylor's* majority opinion, a lengthy

48. See Cooper, *supra* note 29, at 277 & n.220 (stating that the amendment served as a classic illustration of participatory democracy in action).

49. Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. FLA. L. REV. 653 (1987).

50. Latzer, *supra* note 28, at 192-93.

51. Latzer, *supra* note 28, at 192-93.

52. Latzer, *supra* note 28, at 192-93.

53. 596 So. 2d 957 (Fla. 1992).

54. 588 So. 2d 957 (Fla. 1991).

55. Pendleton, *supra* note 7. Writing about the *Traylor* decision, Pendleton noted: "By calling for the Florida Constitution, rather than the U.S. Constitution, to prevail on these questions, the Florida Supreme Court set itself up as the final arbiter. . . . Whether that is good or bad depends on one's point of view, but there is no denying it is an important development." See also 1991 Survey, *supra* note 2, at 191. ("*Real Property* is a fountainhead of state constitutional decision making. The decision illustrates the court's willingness to dispose of far-reaching constitutional questions entirely on the strength of the Florida Constitution"). Both *Traylor* and *Real Property* are discussed in Part I, *supra*.

56. 384 U.S. 436 (1966).

57. The *Traylor* court stated:

Based on the foregoing analysis of our Florida law and the experience under *Miranda* and its progeny, we hold that to ensure the voluntariness of confessions, the Self-Incrimination Clause of Article I, Section 9, Florida Constitution, requires that prior to custodial interrogation in Florida suspects must be told that they have a right to remain silent, that anything they say will be used against them in court, that they have a right to a lawyer's help, and that if they cannot pay for a lawyer one will be appointed to help them.

596 So. 2d at 965-66 (footnotes omitted). *Traylor* also established standards under article I, § 16

discussion⁵⁸ of federalism and the *Florida Constitution's* Declaration of Rights reads like a "how to" guide for relying on the state constitution. Further, Justice Kogan's separate opinion in *Traylor* clearly indicates that he wishes both lawyers and judges would look to the *Florida Constitution* more frequently.⁵⁹

The *Real Property* opinion relies exclusively on article I of the *Florida Constitution* and describes state substantive due process as a broad concept that protects all individual rights from unwarranted governmental encroachment.⁶⁰ The *Real Property* decision, therefore, could be relevant to a variety of claims based on the Declaration of Rights.

*Tillman v. State*⁶¹ is much shorter and less explicit in its meaning than either *Traylor* or *Real Property*, but it may indicate that the court intends to shift its focus in at least some types of death penalty cases from the Eighth Amendment to article I, section 17. *Tillman* represents the first time the court has indicated that the "cruel or unusual punishment" provision in article I, section 17 is different from the Eighth Amendment "cruel and unusual punishment" provision and could be subject to different interpretation. The court's intimation of this difference is relegated to a two-sentence footnote that focuses on the use of "or" rather than "and" in the phrase "cruel or unusual punishment."⁶² The sole citation used to support a different interpretation of the word "or" is to *Cherry Lake Farms, Inc. v. Love*,⁶³ a 1937 opinion discussing how the word "or" should be interpreted when construing a statute. The *Cherry Lake* case, cited without elaboration, states that "or" generally is construed in the disjunctive unless the intent of the Legislature requires that it be construed in the conjunctive.⁶⁴

(counsel clause) of the state constitution regarding a person's ability to choose a manner of representation against criminal charges. *Id.* at 966-68. The court found that the right to counsel must apply at each crucial stage of the prosecution, defined as "any stage that may significantly affect the outcome of the proceedings." *Id.* at 968. The court also held that the right of indigent defendants to assistance of court-appointed counsel is protected by the *Florida Constitution's* equal protection clause (article I, § 2). *Id.* at 969-70.

58. 596 So. 2d at 961-64.

59. *Id.* at 982 (Kogan, J., concurring in part and dissenting in part).

60. 588 So. 2d 957, 960 (Fla. 1991).

61. 591 So. 2d 167 (Fla. 1991). *Tillman* is discussed in Part I, *supra*.

62. *Id.* at 169 n.2 ("The Florida Constitution prohibits 'cruel or unusual punishment.' . . . The use of the word 'or' indicates that alternatives were intended.") (emphasis added).

63. 176 So. 486 (Fla. 1937).

64. *Id.* at 488 ("Employed between two terms which describe different subjects of a power, the word 'or' usually implies a discretion when it occurs in a directory provision, and a choice between two alternatives when it occurs in a permissive provision.").

The *Tillman* case involved a man convicted of first-degree murder in the stabbing death of a woman. As the result of a plea agreement, the facts of the murder available for review by the Florida Supreme Court stated only that the woman was discovered shortly after she was stabbed fifty-nine times, that she later bled to death in the hospital, and that Tillman was on parole for burglary at the time of the murder.⁶⁵ Because of the scant record available for review, the court could not determine whether the murder was more like the multiple stabbing murders in which defendants had received the death penalty or more like those murders in which death was not considered a proportionate penalty.⁶⁶ The point of focusing on cruel *or* unusual punishment in *Tillman* was to find that it is "unusual" to impose death based on facts similar to those in cases where death was not considered proper.⁶⁷

III. OTHER STATES' DEATH PENALTY JURISPRUDENCE

A. *Per Se* Challenges

Just two state supreme courts, California⁶⁸ and Massachusetts,⁶⁹ have declared the death penalty invalid on state constitutional grounds. Both decisions were quickly reversed by the voters through constitutional amendments.⁷⁰ In *People v. Anderson*, the California Supreme Court relied on the *California Constitution's* "cruel or unusual" punishment clause, using the disjunctive "or" to distinguish the state clause from the Eighth Amendment provision.⁷¹ The court found that the death penalty was both cruel⁷² and unusual.⁷³ Because *Ander-*

65. *Tillman*, 591 So. 2d at 168.

66. *Id.* at 169.

67. *Id.* The court conducts a "proportionality review" in death cases that involves a comparison of cases in which the death penalty was imposed. Justice Kogan, writing for the majority in *Tillman*, stated that the requirement that death be administered proportionately has a variety of sources in Florida law, including article I, § 17 of the *Florida Constitution*. Justice Kogan also cites the state constitution's due process clause (article I, § 9) as a source for the proportionality requirement and notes that because death is a uniquely irrevocable penalty, a more intensive level of judicial scrutiny is required. See also *supra* text accompanying notes 8-11.

68. *People v. Anderson*, 493 P.2d 880 (Cal.), *cert. denied sub nom. California v. Anderson*, 406 U.S. 958 (1972).

69. *District Attorney v. Watson*, 411 N.E.2d 1274 (Mass. 1980).

70. CAL. CONST. art. I, § 27; MASS. CONST. pt. 1, art. 26.

71. 493 P.2d at 883-91.

72. *Id.* at 891-97. The court found that the death penalty was cruel on the basis of the total impact of capital punishment, from the pronouncement of the judgment of death through the execution itself, which it described as a "lingering death." The court cited the "dehumanizing effects" of lengthy imprisonment during the appeal process.

73. *Id.* at 897-99. The court noted that few "civilized" nations impose capital punishment and that the trend is toward abolition.

son was decided while *Furman v. Georgia*⁷⁴ was pending before the United States Supreme Court, the California case was quickly overshadowed when the Court invalidated virtually all death sentences in the country.⁷⁵ In *District Attorney v. Watson*, the Supreme Judicial Court of Massachusetts found that the death penalty was unconstitutionally cruel under the state constitution's prohibition against cruel or unusual punishments,⁷⁶ but Massachusetts voters quickly disposed of that decision with a constitutional amendment.⁷⁷

Individual justices in several states, including Indiana,⁷⁸ Tennessee,⁷⁹ Utah,⁸⁰ Washington,⁸¹ and Wyoming⁸² have argued that the death penalty is per se violative of state constitutional provisions, but their opinions have not prevailed. Numerous state courts, including Florida in *Raulerson v. State*, have rejected per se challenges to the death penalty on state constitutional grounds.⁸³

74. 408 U.S. 238 (1972).

75. Acker & Walsh, *supra* note 22, at 1305. For an interesting view of how the California decision was viewed by the U.S. Supreme Court, see BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 212 (1979) (Chief Justice Burger was upset because the California decision deprived the Court of the most brutal of pending death penalty decisions, and he was concerned that the decision gave weight to the argument that contemporary values were evolving toward abolition of the death penalty.).

76. 411 N.E.2d at 1283-87. The court cited the "full panoply of concomitant physical and mental tortures" in the operation of the death penalty. The court also found that the death penalty was unconstitutional because it was applied arbitrarily.

77. MASS. CONST. pt. 1, art. 26 (amended 1982) (specifying that "No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death.").

78. *Adams v. State*, 271 N.E.2d 425, 431-42 (Ind. 1971) (DeBruler, J., concurring and dissenting) (arguing that the death penalty violates the *Indiana Constitution*), *rev'd in part on reh'g and death penalty vacated*, 284 N.E.2d 757 (Ind. 1972).

79. *State v. Dicks*, 615 S.W.2d 126, 132-42 (Tenn.) (Brock, C.J., dissenting) (arguing that the death penalty violates the *Tennessee Constitution* provision against cruel and unusual punishment), *cert. denied*, 454 U.S. 933 (1981).

80. *State v. Pierre*, 572 P.2d 1338, 1357-59 (Utah 1977) (Maughan, J., concurring and dissenting) (arguing that the death penalty violates substantive due process rights), *cert. denied*, 439 U.S. 882 (1978).

81. *State v. Rupe*, 683 P.2d 571, 598-99 (Wash. 1984) (Dolliver, J., concurring) (arguing that death penalty constitutes cruel punishment and therefore violates the *Washington Constitution*).

82. *Hopkinson v. State*, 632 P.2d 79, 199-216 (Wyo. 1981) (Rose, C.J., dissenting) (arguing that the death penalty violates *Wyoming Constitution's* provision against cruel or unusual punishment), *cert. denied*, 455 U.S. 922 (1982).

83. *Raulerson v. State*, 358 So. 2d 826, 828-29 (Fla.), *cert. denied*, 439 U.S. 959 (1978). See Acker & Walsh, *supra* note 22, at 1331-32 n.151 for a list of state court decisions rejecting arguments that capital punishment is per se unconstitutional. The authors note that most of these decisions include little, if any, discussion of the state constitutional provision on which they rely. Because the decisions do not include reasoned analysis or consideration of specific state historical or attitudinal factors, the authors argue that they could be overturned by a comprehensive, well-reasoned state constitutional challenge to capital punishment. Acker & Walsh,

Given the reaction to the California and Massachusetts decisions by voters, some state judges probably recognize that a per se declaration that the death penalty violates the state constitution is politically impossible, even though such a decision is legally supportable. The 1986 retention election in California rejecting Supreme Court Chief Justice Rose Bird and two of her colleagues—partly because of their voting records in death penalty cases⁸⁴—no doubt bolsters such a belief.

A more serious concern about per se challenges to the death penalty relates to the integrity of the court rather than the political fortunes of individual justices. What does it say about a state court's credibility when it declares that the death penalty no longer comports with modern standards of decency⁸⁵ and the electorate responds by promptly declaring the court to be wrong?⁸⁶ One state court judge, Justice Shirley S. Abrahamson of the Wisconsin Supreme Court, insists that elected state judges will resist public opinion, if necessary, in constitutional interpretation.⁸⁷ "Judges are not to rule on the basis of the passions of the times. Judges must interpret the law exercising integrity, intellect, and wisdom—even in the face of community hostility," Abrahamson wrote in 1985.⁸⁸ In an ideal society, Justice Abrahamson is correct. Justice Brennan, however, probably is more accurate when he notes: "It cannot be denied that state court judges are often more immediately 'subject to majoritarian pressures than federal courts, and are correspondingly less independent than their federal counterparts.'"⁸⁹

supra note 22, at 1321-22 n.151. The Florida decision makes the authors' point: *Raulerson* includes no discussion of article I, § 17 or any other Florida constitutional provision (the death penalty was challenged on federal constitutional grounds as well as on grounds that it violated article I, §§ 2 (basic rights), 9 (due process), and 17 (excessive punishments)). *Raulerson*, 358 So. 2d at 828-29.

84. Acker & Walsh, *supra* note 22, at 1330 n.145 (Before the election, the California Supreme Court had vacated death sentences in all but three of the 56 capital cases it had decided.).

85. "Evolving standards of decency" are relevant in all decisions concerning imposition of the death penalty. The U.S. Supreme Court has repeatedly cited a statement from *Trop v. Dulles*, 356 U.S. 86, 101 (1958) that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." In *Penry v. Lynaugh*, 492 U.S. 302, 330-35 (1989), for example, the Court noted the relevancy of evolving standards of decency, but suggested that the two state statutes prohibiting the execution of the mentally retarded did not provide sufficient evidence that decency had evolved enough to justify finding such executions unconstitutional.

86. Linde, *supra* note 27, at 192.

87. Abrahamson, *supra* note 21, at 1155.

88. Abrahamson, *supra* note 21, at 1155.

89. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 551 (quoting Note, Michigan v. Long: *Presumptive Federal Appellate Review over State Cases Containing Ambiguous Grounds of Decision*, 69 IOWA L. REV. 1081, 1096-97 (1984)).

The Florida Supreme Court is unlikely to declare the death penalty unconstitutional per se based on article I, section 17. Even if a majority of the court was inclined to do so, which is unlikely, such a decision would necessarily involve overruling *Raulerson v. State*,⁹⁰ a case holding that capital punishment is not per se violative of either the Eighth Amendment or article I, section 17. Additionally, the court already has experienced one constitutional amendment designed to limit its ability to interpret the state constitution;⁹¹ a decision as controversial as declaring the death penalty unconstitutional would likely spark another.⁹² The court could, however, use the state constitution's cruel or unusual punishment clause to develop its own approach to a variety of capital punishment issues, including the execution of the mentally retarded and juveniles. Several such "as applied" challenges to the death penalty in other states are discussed in the following subsection. Areas of the law this author considers particularly appropriate for death penalty jurisprudence based on the *Florida Constitution* are discussed in Part IV.

B. "As Applied" Challenges

A variety of "as applied" challenges to the death penalty may be viable because of general dissatisfaction with the United States Supreme Court's death penalty jurisprudence.⁹³ A specific point of frustration is the tension between the requirement for consistency in sentencing schemes⁹⁴ and the requirement of individualized sentencing.⁹⁵ Even if state courts find the logic of United States Supreme

90. 358 So. 2d 826 (Fla.), cert. denied, 439 U.S. 959 (1978).

91. See *supra* notes 46-52 and accompanying text.

92. Prosecutors miss few opportunities to grumble about the Florida Supreme Court. In January 1990, Attorney General Bob Butterworth blasted the court's decisions in three search and seizure cases in a speech to the Florida Sheriff's Association and urged citizens to consider constitutional amendments that would further confine the court to following federal precedent: "A pattern appears to be developing, a pattern that should be discouraging to every law-abiding Floridian. . . . During the past two or three years, the Florida Supreme Court has begun to show itself substantially more liberal on crime issues than the U.S. Supreme Court." Hladky, *supra* note 29, at 7C. After the decision in *Traylor v. State*, 596 So. 2d 957 (Fla. 1992) (mandating *Miranda*-type protections based on the state constitution), Deputy Attorney General Peter Antonacci was quoted as saying: "The message that our court is sending out is treat these criminals gingerly—be nice to them." Pendleton, *supra* note 7, at B2.

93. Acker & Walsh, *supra* note 22, at 1338-45 (discussing the development of U.S. Supreme Court jurisprudence in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972)).

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

95. See generally *Lockett v. Ohio*, 438 U.S. 586 (1978). For an example of one state judge's frustration, see *State v. Ramseur*, 524 A.2d 188, 302 (N.J. 1987) (Handler, J., dissenting) ("Because I believe that the federal decisional law has lost coherence and pursues fundamentally contradictory—perhaps unattainable—goals, I have no confidence in federal precedent as a guide in interpreting [the New Jersey] Constitution.").

Court decisions generally persuasive, they may depart from that logic and base a decision on state constitutional grounds if the evidence in an "as applied" challenge is sufficiently persuasive.⁹⁶ Additionally, state courts that generally adhere to Eighth Amendment capital punishment doctrine may choose to rely on their state constitutions when certain issues arise.⁹⁷

For example, in *State v. Smith*,⁹⁸ a plurality of the Louisiana Supreme Court held that the open courts provision of the *Louisiana Constitution* requires review of all possible errors in a death penalty case, even if the errors are not properly raised by the defendant. The United States Supreme Court, in the context of federal habeas corpus review, has taken a much more stringent view of procedural errors.⁹⁹ The Louisiana Supreme Court reasoned:

In a case involving capital punishment anything less than this court's careful consideration of the entire record for possible prejudicial error would not afford "an adequate remedy by due process of law and justice." Further, this court's refusal to consider such an error, simply because appellant's lawyer did not properly raise it, as more able counsel might have, would either defer the problem, adding to the burgeoning delays of postconviction proceedings in state and federal courts, or create the risk of allowing appellant to be executed without a judicial determination of whether the error had prejudicially affected the procedural fairness or accuracy of factfinding in his case.¹⁰⁰

The Georgia Supreme Court in 1989 relied on its state constitution in *Fleming v. Zant*¹⁰¹ to find that execution of the mentally retarded constitutes cruel and unusual punishment. The court, relying primarily on a prospective legislative enactment that was passed after the *Fleming* defendant's trial, found a state consensus against execution

96. Acker & Walsh, *supra* note 22, at 1339.

97. An array of possible "as applied" challenges is discussed in Acker & Walsh, *supra* note 22, at 1337-45. Among the suggested issues state courts may want to explore are the procedures that ought to be required for administration of the death penalty to avoid arbitrariness and regulation of prosecutorial decision making in capital cases.

98. 554 So. 2d 676 (La. 1989).

99. *Wainwright v. Sykes*, 433 U.S. 72 (1977) (petitioners seeking federal habeas relief on constitutional claims defaulted in state court must show reason why the claim was not raised and that failure to raise the claim resulted in prejudice). See also *Murray v. Carrier*, 477 U.S. 478 (1986) (existence of cause for a procedural default must turn on whether the prisoner can show that an objective factor external to the defense harmed counsel's efforts to comply with the state procedural rule).

100. 554 So. 2d at 678 (quoting LA. CONST. art. I, § 22) (citation omitted).

101. 386 S.E.2d 339 (Ga. 1989).

of the mentally retarded.¹⁰² The *Fleming* case was decided just a few months after *Penry v. Lynaugh*,¹⁰³ a United States Supreme Court case holding that the Eighth Amendment does not prohibit execution of the mentally retarded. Noting that the *Penry* Court discussed evolving standards of decency, the Georgia Supreme Court stated in *Fleming* that the standards of the citizens of Georgia, not those of the rest of the country, should be considered in deciding the case.¹⁰⁴ The majority opinion in *Fleming* was sharply criticized in a dissent arguing that the Georgia Legislature intended its prohibition against execution of the mentally retarded to be prospective only.¹⁰⁵ The *Fleming* dissent also charged that the legislation was passed "in an emotional response to the execution of a mildly retarded defendant" and that the court, by relying on the state constitution, had prohibited the Legislature from amending the statute at a calmer moment.¹⁰⁶

State courts also can use proportionality grounds to limit the range of offenses or the class of offenders that may be subject to capital punishment.¹⁰⁷ Under the federal Constitution, proportionality principles prohibit imposing the death penalty for certain offenses, such as rape,¹⁰⁸ kidnapping,¹⁰⁹ and felony murder in some situations.¹¹⁰ Additionally, the Supreme Court has held that the death penalty generally may not be imposed on fifteen-year-olds,¹¹¹ although the Eighth Amendment does not prohibit execution of sixteen- or seventeen-year-olds.¹¹²

In *Tillman v. State*,¹¹³ the Florida Supreme Court stated that Florida's proportionality requirement is mandated, at least in part, by article I, section 17. The court therefore could use the cruel or unusual punishment clause's proportionality requirement—perhaps in conjunction with the *Florida Constitution's* due process clause,¹¹⁴ also

102. *Id.* at 342.

103. 492 U.S. 302 (1989).

104. 386 S.E.2d at 341-42. The court wrote: "Federal constitutional standards represent the minimum, not the maximum, protection that this state must afford its citizens. Thus, although the rest of the nation might not agree, under the Georgia Constitution, the execution of the mentally retarded constitutes cruel and unusual punishment." *Id.* at 342 (citation omitted).

105. *Id.* at 343 (Smith, J., dissenting).

106. *Id.* at 345.

107. See Acker & Walsh, *supra* note 22, at 1354-56.

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

109. *Eberhart v. Georgia*, 433 U.S. 917 (1977).

110. *Tison v. Arizona*, 481 U.S. 137 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982).

111. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

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

113. 591 So. 2d 167 (Fla. 1991).

114. See *Department of Law Enforcement v. Real Property*, 588 So. 2d 957 (Fla. 1991) (discussing the *Florida Constitution's* due process requirements). *Real Property* is discussed in Parts I and IIB, *supra*.

identified in *Tillman* as a source for proportionality—to find that execution of certain classes of defendants violates proportionality principles.

IV. HISTORY OF ARTICLE I, SECTION 17 AND ITS USE IN DEATH CASES

A. *The Language of Section 17*

The *Florida Constitution's* prohibition against cruel “or” unusual punishment has been part of every *Florida Constitution* since 1838.¹¹⁵ Minutes of the first constitutional convention in 1838 and 1839 do not indicate why the framers chose those particular words, nor does a written account of the convention discuss the phrase.¹¹⁶ The phrase has changed in subsequent constitutions only in that “punishment” is singular in the constitutions of 1885, 1861, and 1868, and it is plural in the constitutions of 1838 and 1865.¹¹⁷

Drafters of the first *Florida Constitution* used the constitutions of other southern frontier states, particularly Alabama, as models.¹¹⁸ While there is no evidence that the framers discussed what they meant by the prohibition against cruel or unusual punishment, it is unlikely that they intended to prohibit the death penalty. Florida's territorial government at the time had passed statutes providing the death penalty for certain crimes.¹¹⁹ Among the crimes punishable by death was the concealing on shipboard and carrying away of a slave owned by a Floridian.¹²⁰

By the time of the 1968 revision to the *Florida Constitution* of 1885, some drafters of the revision thought that standards of decency had evolved sufficiently to outlaw the death penalty in the state constitution. Tallahassee lawyer Joseph C. Jacobs, a member of the Constitu-

115. FLA. CONST. art. I, § 12 (1838); FLA. CONST. art. I, § 12 (1861); FLA. CONST. art. I, § 12 (1865); FLA. CONST. Declaration of Rights, § 6 (1868); FLA. CONST. Declaration of Rights, § 8 (1885). The current constitution is a revision of the 1885 constitution and was approved by voters in 1968. The cruel or unusual punishment clause was placed in article I, § 17 at the time of that revision.

116. CHARLTON W. TEBEAU, A HISTORY OF FLORIDA 126-31 (1971) (discussing the convention that met from December 3, 1838, until January 4, 1839). Minutes of the constitutional convention are on file at the Florida Department of State, Division of Archives, Tallahassee, Florida.

117. See generally FLA. STAT. Volume III, Helpful and Useful Matters (1941) (all of Florida's constitutions printed in full).

118. TEBEAU, *supra* note 116, at 126. The author notes that “[c]onstitution making was actually a rather simple process.” The framers did not depart significantly from the constitutions of other southern states except on the issue of banking. *Id.* Florida was admitted to the Union in 1845.

119. TEBEAU, *supra* note 116, at 129.

120. TEBEAU, *supra* note 116, at 129.

tion Revision Commission, proposed an amendment at a commission meeting in 1966 to include in the constitution a prohibition against the death penalty.¹²¹ Jacobs, in arguing for his amendment, cited a poll showing that most citizens opposed capital punishment and stated his belief that future generations would view the commission's vote against his amendment as ridiculous.¹²² He stated:

Well, now, I'm not going to strip to the waist, and I'm not going to thrash my breast, and I'm not going to talk about what the legislature ought to do by statute. I'm simply going to say that I, and I think a bunch of people in this room, do not believe that capital punishment has any place in our society at this time. And this is one opportunity that I have to say so, and I am saying so, and will say so at every opportunity that I have. Now, to say that this has no place in the declaration of basic rights that are guaranteed to all people in Florida, and to say that they have got the right to trial by jury, got the right to religious freedom, they have the right to habeas corpus, they have protection against excessive fines, they have protection against cruel and unhuman punishment, et cetera, they have the right of bail, due process, equal protection and so forth, and to say at the same time the State of Florida can legally take a life, is absolutely foreign to what I think the constitution today should state.¹²³

Jacobs' proposed amendment failed.¹²⁴

The Florida Supreme Court assumed in *Tillman v. State*¹²⁵ that the use of the disjunctive in the phrase cruel or unusual punishment was intentional.¹²⁶ Given the lack of information regarding the mindset of the drafters of the *Florida Constitution*, Florida courts probably cannot point to specific reasons why "cruel or unusual" was chosen. Clearly, the drafters had several different phrases from which to choose. The *Alabama Constitution*, which drafters of the *Florida Constitution* reportedly relied on most heavily,¹²⁷ prohibited "cruel punishments."¹²⁸ Some model constitutions that the drafters may have looked to prohibited cruel *or* unusual punishments, some prohibited

121. Constitution Revision Commission Records, Vol. 7 Declaration of Rights, Amendment No. 81 (Dec. 5, 1966) (available at Fla. Dep't of State, Div. of Archives, ser. 722, carton 2, Tallahassee, Fla.).

122. *Id.*

123. *Id.*

124. *Id.*

125. 591 So. 2d 167 (Fla. 1991). *Tillman* is discussed in Parts I and IIB, *supra*.

126. See *Cherry Lake Farms, Inc. v. Love*, 176 So. 486 (Fla. 1937) (use of the word "or" indicates a choice between two alternatives).

127. TEBEAU, *supra* note 116, at 126.

128. ALA. CONST. art. I, § 16 (1819).

cruel *and* unusual punishments, and still others had provisions requiring that punishment be proportioned to the offense.¹²⁹ Florida courts should assume that the drafters intentionally selected the particular phrase "cruel or unusual" from several possible models and that they intended the word "or" to be given its ordinary, disjunctive meaning.¹³⁰

B. *The Application of Section 17*

With the recent exception of *Tillman*,¹³¹ the Florida Supreme Court has given little indication that article I, section 17 should be interpreted independently from the Eighth Amendment.¹³² Few cases have addressed the nature of Florida's constitutional protection against cruel or unusual punishment and, except for *Tillman*, none has suggested that the section creates protections in capital punishment cases that may be different from those derived from federal constitutional law. As noted earlier, the Florida Supreme Court held in *Raulerson v. State*¹³³ that capital punishment is not per se violative of either the Eighth Amendment or article I, section 17; the court, however, did not separately discuss the state constitutional provision in that opinion.

In *LeCroy v. State*,¹³⁴ Justice Barkett argued in dissent that imposing the death penalty on someone who was a juvenile at the time of the crime violates both the Eighth Amendment and article I, section 17.¹³⁵ She asserted her belief that capital punishment is "totally inappropriate when applied to persons who, because of their youth, have not fully developed the ability to judge or consider the consequences of their behavior. This conclusion particularly is strong in light of the legal disabilities imposed upon minors because of their lack of mature judgment."¹³⁶ Justice Barkett also stated her belief that most reasonable people would agree that the death penalty should not be imposed on children below a certain age.¹³⁷ She suggested that the line should

129. See *People v. Anderson*, 493 P.2d 880, 883-886 (Cal. 1972) (discussion of several early state constitutions and whether they prohibited cruel *or* unusual punishment, cruel punishment, cruel *and* unusual punishment, or other variations), *cert. denied sub. nom. California v. Anderson*, 406 U.S. 958 (1972).

130. See *id.* at 886 (California Supreme Court refused to presume that framers of the *California Constitution* chose the disjunctive form haphazardly).

131. 591 So. 2d 167 (Fla. 1991).

132. 1991 Survey, *supra* note 2, at 218-29; *Ten-Year Retrospective*, *supra* note 2, at 803.

133. 358 So. 2d 826 (Fla.), *cert. denied*, 439 U.S. 959 (1978).

134. 533 So. 2d 750 (Fla. 1988), *cert. denied*, 492 U.S. 925 (1989).

135. *Id.* at 758-60 (Barkett, J., dissenting).

136. *Id.* at 758.

137. *Id.* at 759.

be drawn at the age of majority. Justice Barkett did not discuss the requirements of article I, section 17 as separate from those of the Eighth Amendment.

The majority in *LeCroy* held that there is no constitutional bar to imposing the death penalty on a defendant who was seventeen at the time of the crime, but emphasized that it did not consider the case to be a definitive resolution of whether there is a minimum age below which the death penalty may not be imposed.¹³⁸ Instead, the decision was limited to the facts of that case, which involved a seventeen-year-old youth who was convicted in the shooting death of a husband and wife while they were on a camping trip in Palm Beach County.¹³⁹

The Florida Supreme Court has not determined whether execution of the mentally retarded is cruel or unusual punishment.¹⁴⁰ Three dissenting judges in *Woods v. State*, however, indicated their belief that imposing the death penalty in such situations violates article I, section 17.¹⁴¹ In *Woods*, Justices Shaw and Barkett dissented from a decision upholding the death penalty in a case involving an eighteen-year-old man with a mental age of twelve and an IQ of between sixty and sixty-nine.¹⁴² The majority did not address the constitutional issue of executing the mentally retarded because it had not been raised on direct appeal.¹⁴³ In *Woods*, which was decided before *Penry*,¹⁴⁴ Justice Barkett noted her belief that imposing the death penalty on a mentally retarded person constitutes cruel and unusual punishment under both the Eighth Amendment and article I, section 17.¹⁴⁵ Neither her dissent nor Justice Shaw's discussed the requirements of article I, section 17 or distinguished them in any way from those of the Eighth Amendment.

The issues of executing juveniles and the mentally retarded are particularly appropriate for exploration using article I, section 17. Because the court has not decided whether execution of the mentally retarded constitutes cruel or unusual punishment and because the court has left open the question of whether there is a minimum age below which the death penalty should not be imposed, the justices are

138. 533 So. 2d at 758.

139. *Id.*

140. See generally David A. Davis, *Executing the Mentally Retarded*, FLA. B.J., Feb. 1991, at 13; V. Stephen Cohen, Comment, *Exempting the Mentally Retarded from the Death Penalty: A Comment on Florida's Proposed Legislation*, 19 FLA. ST. U. L. REV. 457 (1991).

141. *Woods v. State*, 531 So. 2d 79, 83-84 (Fla. 1989) (Shaw, J., dissenting) & (Barkett, J., dissenting). Justice Kogan joined both dissents.

142. *Id.*

143. 531 So. 2d at 82.

144. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

145. 531 So. 2d at 84 (Barkett, J., dissenting).

not constrained by precedent. Additionally, both issues present opportunities to discuss the meaning of "cruel" and the meaning of "unusual" in the *Florida Constitution*.

In *Tillman*,¹⁴⁶ the court began to explore the meaning of "unusual" in the context of proportionality review. That discussion logically could continue with an analysis of whether execution of juveniles and of mentally retarded persons is proportional. In other words, the court could consider—using article I, section 17—whether execution of juveniles and the mentally retarded is a proper punishment given the "unusual" characteristics of the defendants. The dissents of Justices Barkett and Shaw in *Woods*¹⁴⁷ and Justice Barkett in *Le-Croy*¹⁴⁸ begin the discussions of the particular characteristics of juveniles and mentally retarded persons that should be considered in such a review.

Some guidance for defining the meaning of "cruel" in article I, section 17 can be found in Justice Brennan's concurring opinion in *Furman v. Georgia*.¹⁴⁹ One of the principles that Justice Brennan found inherent in the Eighth Amendment's cruel and unusual punishments clause is that a severe punishment must not be excessive; a punishment is excessive when it is unnecessary.¹⁵⁰ He wrote:

The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted . . . the punishment inflicted is unnecessary and therefore excessive.¹⁵¹

The execution of juveniles and of the mentally retarded is arguably unnecessary. The court should consider what goals are served by executing an individual with an IQ of sixty.¹⁵² Other mentally impaired individuals unlikely would be deterred by the execution from committing similar crimes. Is retribution a legitimate goal when the individual who committed the crime has the mental ability of a twelve-year-old?

146. *Tillman v. State*, 591 So. 2d 167 (Fla. 1991).

147. 531 So. 2d 79, 83 (Fla. 1988) (Shaw, J., dissenting) & (Barkett, J., dissenting).

148. *LeCroy v. State*, 533 So. 2d 750, 758 (Fla. 1988) (Barkett, J., dissenting), *cert. denied*, 492 U.S. 925 (1989).

149. 408 U.S. 238, 257 (1972).

150. *Id.* at 279.

151. *Id.* (citations omitted).

152. In *Gregg v. Georgia*, 428 U.S. 153 (1976) and numerous other cases, the Supreme Court noted that imposition of the death penalty serves two legitimate goals: deterrence and retribution.

Surely society would consider the execution of a twelve-year-old to be "cruel." The goals of deterrence and retribution could be adequately served by ensuring that the mentally retarded individual no longer has unfettered contact with society. Similarly, what goals are served by executing youths who have not yet developed the ability to grasp the consequences of their behavior? Other immature youths are unlikely to be deterred by the execution, and retribution is not likely to be justified when the person executed could not fully appreciate the consequences of his or her actions. Could not the goals of the punishment be better served by ensuring that these juveniles have no further contact with society? Juveniles and the mentally retarded, for reasons of their immaturity or their low mental development, simply do not have the same degree of culpability as do some other criminal defendants. Executing them, therefore, is cruel because it is unnecessary.

V. CONCLUSION

The Florida Supreme Court should use article I, section 17 to develop death penalty jurisprudence independent of the Eighth Amendment. The *Tillman* case begins the process by noting that cruel "or" unusual punishment is different from cruel "and" unusual punishment. While a textual difference is not necessary in order for the court to base decisions solely on the state constitutional provision, the difference in wording lends legitimacy to the court's independent review. The court need not declare that the state constitutional provision categorically prohibits the death penalty; such a ruling would be extremely controversial and could lead to a constitutional amendment. Instead, the court should focus on areas of death penalty law that the court has not yet fully developed, such as execution of juveniles and of the mentally retarded.

The court in *Tillman* found that the requirement for proportionality review is found in article I, section 17 and in article I, section 9. The court, then, could use the cruel or unusual punishment clause in conjunction with the due process provision to find that execution of the mentally retarded and of people below a certain age constitutes "unusual" punishment. Additionally, the court could rely on article I, section 17 to find that executing juveniles and the mentally retarded constitutes "cruel" punishment because the death penalty is unnecessary given the lessened culpability of defendants in those classes.

The Florida Supreme Court recently reaffirmed its commitment to the primacy of the *Florida Constitution* in *Traylor* and found in *Real Property* that the state constitution's due process clause protects all individual rights from governmental encroachment. Those decisions strongly indicate the court's intention to focus more frequently on the

Florida Constitution, and they should provide support for arguments based on state constitutional grounds in a variety of areas, including article I, section 17.

