



February 2014

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### Recommended Citation

Jamie M. Billotte, *Is It Justified - The Death Penalty and Mental Retardation*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 333 (1994).  
Available at: <http://scholarship.law.nd.edu/ndjlepp/vol8/iss1/7>

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## IS IT JUSTIFIED? - THE DEATH PENALTY AND MENTAL RETARDATION

JAMIE MARIE BILLOTTE\*

### I. INTRODUCTION

The fact that a defendant is mentally retarded has played a disturbingly insignificant role in the American system of capital punishment. For mental retardation to constitute a defense to a crime, the mental retardation must be almost totally disabling.<sup>1</sup> Nevertheless, 89% of mentally retarded people are mildly retarded<sup>2</sup> and thus not totally disabled by their disease. Yet, this does not make them equal to the rest of society in reference to criminal culpability, especially with reference to capital punishment. This essay will not suggest that mentally retarded people cannot be held criminally liable in any case. Rather, this paper will suggest that capital punishment as imposed on mentally retarded persons is not morally justified.

To exempt mentally retarded defendants from capital punishment would be my recommendation for resolving the moral dilemma associated with the execution of mentally retarded defendants. Nevertheless, such an option has not been widely accepted. Of the thirty-six states that have a death penalty statute,<sup>3</sup> only two, Georgia and Kentucky, have completely exempted

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1. James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 432 (1985). Ellis and Luckasson are considered experts in the area of mental retardation.

2. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 40 (3rd. ed. 1980).

3. AMNESTY INTERNATIONAL, *WHEN THE STATE KILLS . . . THE DEATH PENALTY: A HUMAN RIGHTS ISSUE* 227 (1989).

mentally retarded defendants from the death penalty.<sup>4</sup> The other states have determined that mental retardation is only a mitigating factor rather than a defense. The presence of a complete defense would exclude this group of people from the death penalty.<sup>5</sup> They would not be exempt, however, from other forms of punishment such as life imprisonment. There is, however, no such defense in the majority of the states and thus whether the execution of mentally retarded defendants is morally justified must be addressed.

Over the years, there have been many debates about the role that insanity plays in a defendant's actions, but there has been limited discussion regarding the significance of mental retardation upon the culpability of a criminal defendant. While insanity may be a temporary mental illness, mental retardation is predominantly a permanent mental disability. The key difference between mental illness and mental retardation is that "mentally ill people encounter disturbances in their thought processes and emotions; mentally retarded people have limited abilities to learn."<sup>6</sup> Consequently people with average or high intelligence can be mentally ill, while most mentally retarded people are not mentally ill.<sup>7</sup>

Such a distinction is significant. Mental retardation affects the very tool necessary to obtain knowledge — the ability to learn. With a limited learning ability, the mentally retarded defendant has difficulty synthesizing all of the information presented to him in his lifetime. A mentally retarded person can learn and comprehend information. It is more difficult, however, than if he was not retarded. This learning process may take years longer for a retarded person than a non-retarded person. In this article I will argue that this feature of retardation leads inevitably to the conclusion that mentally retarded people should not be considered culpable of a capital offense.

In light of *Enmund v. Florida*<sup>8</sup> and *Tison v. Arizona*,<sup>9</sup> the mental state required to deserve death is intent to kill or reckless

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4. See GA. CODE ANN. § 17-7-131 (Michie 1993) (the Georgia Legislature passed this statute in response to a public uproar over the execution of Jerome Borden, a mentally retarded defendant, as noted in the Amicus Brief in *Penry v. Lynaugh*, 492 U.S. 302 (1987)); KY. REV. STAT. ANN. § 504.150 (Michie 1989).

5. Donald H.J. Hermann et al., *Sentencing of the Mentally Retarded Criminal Defendant*, 41 ARK. L. REV. 765 (1988). See e.g., *Roach v. Martin*, 757 F.2d 1463, 1467 (4th Cir. 1985), *Trimble v. Maryland*, 478 A.2d 1143, 1145-47 (Md. 1984), *Berryhill v. State*, 221 S.E.2d 185, 186 (Ga. 1975).

6. Ellis & Luckasson *supra* note 1, at 424.

7. *Id.* at n.53. See also FRANK MENOLASCINO, CHALLENGES IN MENTAL RETARDATION: PROGRESSIVE IDEOLOGY AND SERVICES 126-27 (1977).

8. 458 U.S. 782 (1986).

indifference towards the possibility of death. Both states of mind require knowledge of the probable consequence of one's actions.<sup>10</sup> Understanding what may happen as a result of one's action or inaction is achieved through learning. If the ability to learn is impaired then so is the ability to understand the consequences of any given action. Mentally retarded people should not be as easily or readily subject to a punishment which requires knowledge of the consequences of one's actions as the foundation for guilt.<sup>11</sup>

The previous statement assumes that our present legal system seeks to punish only those that are truly culpable and in proportion to their culpability. Those who commit the criminal act *with* a culpable mental state<sup>12</sup> will be punished. If a system punished the criminal only because of his act and not also because of his state of mind, then whether executing mentally retarded persons is morally justified would be a moot debate. Our system, however, does attempt to punish the guilty mind as well as the guilty act and thus the moral questions surrounding the death penalty and mental retardation are necessary.

In this essay, I will argue that the execution of mildly or moderately mentally retarded defendants is morally unacceptable.<sup>13</sup> To determine whether some action is morally acceptable, one must examine the purposes behind the action and then

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9. 481 U.S. 137 (1987).

10. BLACK'S LAW DICTIONARY 809, 1270 (6th ed. 1990). (Intent is a state of mind in which a person seeks to accomplish a given result through a course of action. Recklessness is the state of mind accompanying an act, which either pays no regard to its probably or possibly injurious consequences, or which though foreseeing such consequences, persists in spite of such knowledge.)

11. In *Enmund*, 458 U.S. 782 (1986), the Supreme Court suggested the requisite state of mind to deserve death was intent. "Enmund did not kill or intend to kill and thus his culpability differs from that of the robbers who killed." *Id.* at 798. The defendant must have intended, contemplated or anticipated that lethal force would or might be used. In *Tison*, 481 U.S. 137 (1987), however, reckless indifference was held to be a sufficient state of mind for a capital defendant. Although *Tison* weakened the holding of *Enmund* in that the state of mind necessary for the death penalty was lessened, in reference to mentally retarded defendants, *Tison* supports the contention that mentally retarded defendants may not be deserving of death. Recklessness requires that the defendant be aware of the consequences of his actions but disregard or be indifferent to them. Retarded persons may not be as able as nonretarded persons to contemplate the consequences of their actions and subsequently disregard them and thus may not be deserving of death.

12. *Morrisette v. U.S.*, 342 U.S. 246 (1952).

13. Of course this presupposes that capital punishment is an acceptable means of punishment. Since that is an entirely separate issue, it will not be discussed here. Furthermore, this essay will not address the issue of capital punishment and severe mental retardation because it is in the areas of mild and

assess the moral justifiability of achieving that end by the means at issue. Consequently, each of the purposes for punishment will be discussed briefly with emphasis on the role that each purpose plays in capital sentencing. Additionally, each purpose will be discussed with reference to the execution of mentally retarded defendants. The bulk of this essay, however, will focus on the two penological interests that are thought to be best served by the death penalty; general deterrence and retribution.<sup>14</sup> Although capital punishment may be justified for some non-retarded defendants, this essay will argue that there is no justification for the execution of a mentally retarded defendant.

## II. WHY IS THIS AN ISSUE?

In 1989, the United States Supreme Court held that the execution of mentally retarded criminals is constitutionally allowed.<sup>15</sup> The court opined that as long as the jury is aware of mitigating factors such as the defendant's mental retardation, a jury's finding of guilt sufficient to warrant death is allowed. In *Penry* the defendant raped and fatally stabbed a woman. Before her death the woman described her assailant to the police. The police suspected Penry had committed the crime while on parole from a conviction on a previous rape charge. Penry confessed to the crime.

Penry was diagnosed with an I.Q. of between 50 and 63 (moderate to mild retardation) and a mental age of a six and one half years old. Penry was found to be competent to stand trial. Penry's defense was a claim of insanity. The state was able to present evidence that showed that Penry was sane at the time of the crime. The defense, by using the insanity defense, risked a finding that Penry was sane although mentally retarded. Insanity and mental retardation are two distinct phenomena and a person can be sane and mentally retarded, insane and not mentally retarded, etc. During the sentencing phase of the trial, the jury instructions were such that Penry's mental retardation did not play a significant role in the decision process. Because of that and not because of the debate surrounding the execution of mentally retarded defendants, the Supreme Court remanded the

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moderate mental retardation where the mental capabilities of the retarded mind are greatly misunderstood.

14. The Supreme Court has stated that the only two penological interest furthered by capital punishment are deterrence and retribution. See *Enmund*, 458 U.S. 782, 798 (1982) (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

15. *Penry v. Lynaugh*, 492 U.S. 302 (1989). See generally EMILY FABRYCKI REED, *THE PENRY PENALTY: CAPITAL PUNISHMENT AND OFFENDERS WITH MENTAL RETARDATION* (1993) (book was published as this article went to print).

case. Nevertheless, the Supreme Court did not attack the constitutionality of the execution of mentally retarded people.

As roughly estimated in 1988, 250 of the 2,000 persons then on death row were mentally retarded.<sup>16</sup> Furthermore, it is believed that five of the seventy executions between 1976 and 1990 were performed on mentally retarded defendants.<sup>17</sup> Based on these numbers, approximately twelve percent of current death row inmates are retarded, and approximately seven percent of those who have been executed in the past fifteen years have been retarded. Such numbers are significant due to the fact that less than five percent of the American population is mentally retarded.<sup>18</sup>

### III. ELEMENTS OF CAPITAL HOMICIDE

In the thirty-six states that permit defendants to be sentenced to death, the trier of fact must determine whether the elements of capital homicide have been met. The trier of fact may consider such mitigating factors as allowed for in the criminal code of that state. If the trier of fact determines that all the elements of a capital homicide are present and there are no mitigating factors that would dissuade the trier of fact from imposing a sentence of death, a defendant, both retarded and non-retarded, will be sentenced to die.<sup>19</sup>

In *Perry*, the jury was instructed that if the answers to all of the following questions were yes, then the defendant could be sentenced to death. The jury was asked, "(1) whether [the defendant's] conduct was committed deliberately and with the reasonable expectation that death would result, (2) whether there was a probability that he would be a continuing threat to society, and (3) whether the killing was unreasonable in response to any provocation by the victim."<sup>20</sup> Many state statutes are worded similarly.<sup>21</sup> A defendant may be sentenced to death if

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16. John Blume, *Representing the Mentally Retarded Defendant*, THE CHAMPION 32 (Nov. 1987).

17. Juliet L. Ream, *Capital Punishment for Mentally Retarded Offenders: Is It Morally and Constitutionally Impermissible?*, 19 SW. U. L. REV. 89, 103 (1990).

18. In 1979-80 several states reported that less than one percent of the school age population was mentally retarded. Five states reported that the percentage was between three and four. GENERAL ACCOUNTING OFFICE, DISPARITIES STILL EXIST IN WHO GETS SPECIAL EDUCATION 72 (1981).

19. Except in Georgia and Kentucky were mentally retarded defendants are exempt from the death penalty.

20. 492 U.S. at 302.

21. See MASS. ANN. LAWS ch. 265, § 2 (Law. Co-op. 1993); MISS. CODE ANN. § 97-3-21 (1993); N.Y. PENAL LAW § 60.06 (Consol. 1993); OHIO REV. CODE ANN. § 2929.3 (Baldwin 1993).

the defendant acted deliberately and unreasonably and would continue to be a threat to society. Acting deliberately, however, is not the only way that a defendant may be sentenced to death.

In *Tison v. Arizona*<sup>22</sup> the Supreme Court held that reckless indifference to human life is a culpable mental state sufficient to deserve death. In *Tison*, the defendant, after helping his father escape from prison, watched his father murder a family of four. The defendant did not participate in the murder but also did not help the victims. The defendant drove away from the scene of the crime with his father in the victims' car. Although the defendant did not kill anyone, he was convicted of felony-murder due to his reckless disregard for the victims' lives.

For a defendant to be sentenced to death, the sentencer must conclude at least that the defendant intended to kill the victim and knew that the victim could die, or was reckless and acted without justification, excuse, or in the heat of passion. This essay will not suggest that mental retardation presents an excuse or justification for a mentally retarded defendant's actions. Mentally retarded people can commit criminal acts and be deserving of punishment. I will argue, however, that mentally retarded people do not have the abilities necessary to act with the degree of culpability sufficient to deserve death. Thus, capital punishment, as imposed on mentally retarded defendants, is unacceptable.

#### IV. MENTAL RETARDATION

Mental retardation is characterized by significantly low intelligence and by difficulty with such adaption skills as cognition, communication and impulse control.<sup>23</sup> Intellectual ability is defined with reference to intelligence quotient (IQ) scores. The ability of IQ tests to determine correctly a person's intelligence is hotly debated.<sup>24</sup> Many believe that the tests are culturally and socioeconomically biased. A standard IQ test is divided into various subsections designed to test particular abilities. The "Performance" subset is made up of picture completion, object assembly, block design and mazes. The "Verbal Scale" subset is made up of similarities tests, digit span tests, and vocabulary.<sup>25</sup>

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22. 481 U.S. 137 (1987).

23. The American Association on Mental Retardation defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION I (H. Grossman ed., 1983).

24. See ROGERS ELLIOT, LITIGATING INTELLIGENCE (1987).

25. *Id.* at 80-81.

The greater part of an IQ test does not cover materials taught in a basic school curriculum.<sup>26</sup> Rather, the questions are open-ended and susceptible to multiple answers. Example questions are "Give two reasons why most people would prefer an automobile to a bicycle" and "In what way are a snake, cow and a sparrow alike?"<sup>27</sup> For lack of a better measure of one's intelligence, however, IQ tests are still taken and used to compare people's intelligence.

The average IQ is 100 and those that are substantially below the average are declared mentally retarded. The upper boundary of mental retardation is 70.<sup>28</sup> Those below an IQ of 70 are further divided into four categories. An individual with an IQ of 50-55 to 70 is considered mildly retarded. Someone with an IQ of 35-40 to 50-55 is moderately retarded. Severely retarded persons have an IQ between 20-25 and 35-40. Those with an IQ below 20-25 are profoundly retarded.<sup>29</sup>

Although most mentally retarded people are mildly retarded it is important to remember that "mild" retardation is still retardation and should not be considered just a mild mental disorder. As James Ellis and Ruth Luckasson point out, "[j]udges and other criminal justice personnel unfamiliar with this classification scheme may find the labels of 'mild' and 'moderate' to be euphemistic descriptions of individuals at those levels of disability."<sup>30</sup> Nevertheless, the term 'mild' as used to modify retardation is in reference to other levels of retardation not to average mentality. Consequently, a mildly retarded person has substantially deficient mental capabilities as compared to the average person. Mental retardation is not determined solely by an intelligence quotient. In order for a person to be declared mentally retarded, his lower intellectual functioning ability must be accompanied by "significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized scales."<sup>31</sup> Consequently, by its very definition, *mental retardation demonstrates a lack of ability to perform as most people are expected to perform*. This is an important factor when dealing with mentally retarded people and the criminal justice system.

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26. *Id.*

27. *Id.* at 144.

28. Ellis & Luckasson, *supra* note 1, at 422.

29. *Penry*, 492 U.S. 302, 308 (1989).

30. Ellis & Luckasson, *supra* note 1, at 423.

31. *Id.* at 422.



## V. PURPOSES FOR PUNISHMENT

Before discussing the morality of executing mentally retarded defendants, we must examine the purposes for punishment in our legal system. Whether or not an action is morally justified depends on the reasons and motivations behind such action. The purposes behind the American system of punishment have changed through the years. Based on the purpose espoused by our courts and legislatures at any particular time, the acceptance of the death penalty as a form of punishment has varied. If the dominant purpose for punishment is rehabilitation then the death penalty, which has no rehabilitative effect, cannot be an appropriate means of punishment. Nevertheless, if retribution is the dominant purpose, capital punishment serves such a purpose. Consequently, it is helpful to know what purposes are given for punishing convicted defendants so that the appropriateness of capital punishment with respect to the mentally retarded can be fully analyzed.

There are six standard purposes for punishment; general deterrence, specific deterrence, retribution, rehabilitation, incapacitation, and denunciation. Often a particular punishment satisfies more than one purpose. Whether a punishment is morally acceptable, however, depends on more than just whether it achieves one of these purposes. For example, children are considered incapable of possessing the moral culpability required to justify death. Such a determination considers not only the purpose for punishment but whether such punishment can be justified. If only the purpose was considered, then under the general deterrent and denunciatory theories, children could be sentenced to death. Nevertheless, the United States Supreme Court has determined that the execution of children is not acceptable,<sup>32</sup> and that decision is itself morally sound. Whether a purpose is achieved is different from its being justified. For example, denunciation is *achieved* by executing a child criminal; society expresses its disgust with the criminal's actions. The execution of a child, however, is not *justified* by denunciation because the child may not deserve to die and the need for society to denounce the child's actions is not sufficient justification to warrant his death.

Of the six purposes for punishment, four cannot contribute to the justification of capital punishment. Although capital punishment does specifically deter a criminal, it is too severe a punishment to inflict on a criminal in order to stop him from

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32. *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (holding that execution of those under the age of 16 is unconstitutional).

committing a crime again. Capital punishment is incapacitating but incapacitation envisions that the criminal will return to society after a period of incarceration. An execution does denounce a criminal but death is too severe a punishment just to reassure law abiding citizens that law breakers are punished. Furthermore, rehabilitation must have a living criminal to rehabilitate.

Only general deterrence and retribution can truly contribute to the justification of the death of a criminal defendant. General deterrence occurs when the punishment of one person discourages others from criminality. Retribution occurs when a culpable person is punished as he deserves. Retribution places a ceiling on any form of punishment; only those that truly deserve to be punished will be punished and only those that deserve to be punished severely will be punished severely. Retribution may also put a floor under punishment by allowing for all who have done wrong to get the punishment that they deserve.

#### A. *Purposes Which Cannot Justify Capital Punishment*

##### 1. Specific Deterrence

The need to protect society from repeat offenders can be achieved by capital punishment. Specific deterrence is achieved if a punishment deters offenders from committing their crimes again. Specific deterrence may be justified if the criminal deserves to be punished and such punishment will deter that criminal from committing his wrong again. Specific deterrence, however, is not justified to the extent it over-deters a wrongdoer.

##### a. *Specific Deterrence and Capital Punishment*

Insofar as specific deterrence is a purpose for punishment, then the type of punishment and the severity of that punishment must be determined with reference to specifically deterring a specific criminal from acting in a criminal manner again. If a punishment will deter a criminal from acting criminally again then with reference to specific deterrence the use of punishment might be justified. How severe the punishment is, however, is the factor that determines whether it is justified. If it is found that only at a certain level or higher the criminal will be deterred, then the use of that punishment will achieve specific deterrence. If it is found that the criminal deserves the severity of the punishment then it is justified. This serves as a retributive cap on specific deterrence. Even if specific deterrence helps justify punishment in some instances, specific deterrence cannot contribute to the justification of capital punishment. There is no room for a criminal to be deterred due to his punishment once

he is dead. Capital punishment does achieve the deterrent effect of specific deterrence; an executed individual will not commit his offense again. The severity issue, however, is not served. We cannot have a justification that focuses on the after-the-punishment behavior of the criminal if the criminal is not living. Specific deterrence is based on the assumption that once the criminal is punished he will not commit another wrong because of his fear of punishment. Without the criminal, however, there can be no specific deterrence. Although specific deterrence, understood as preventing a criminal from committing a crime again, may be achieved through capital punishment, it cannot justify capital punishment.

Besides the fact that specific deterrence cannot apply to an executed criminal, the research in the area of murderers and repeat offenses demonstrates that this group of criminals is significantly less likely to repeat their offense than are several other classes of criminals. The threat of repeat offenses by those deemed to deserve death is low. Researchers have found that among offenders released on parole, convicted murderers are one of the least likely groups to repeat their offenses.<sup>33</sup> Hugo Adam Bedau found that over a 76 year period in twelve states only twelve of 2,646 murderers were convicted of committing murder again after being released.<sup>34</sup> Similarly, Thorsten Sellin reported a study in which 56,265 inmates were released on parole and participated in a three year follow up. Of the 56,265 released, 6,835 had been convicted of willful homicide. Of these parolees, 310 committed a new offense but only twenty-one had committed murder. In fact, Sellin found that those who committed armed robbery, aggravated assault and rape were more likely to commit murder when released than were convicted murderers.<sup>35</sup>

Such a low recidivism rate suggests that capital punishment is not the only form of punishment that would serve to prevent most repeat murders by released murderers. Longer jail terms could serve to prevent repeat offenses also. The Bedau and Sellin studies do show that some convicted murderers did repeat their crimes and thus long jail terms may not prevent all possible repeat offenses if convicted murderers are released on parole. We would, however, have to execute all murderers or incarcerate

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33. See HUGO A. BEDAU, *THE DEATH PENALTY IN AMERICA* (1982); THORSTEN SELLIN, *THE DEATH PENALTY* (1982).

34. BEDAU, *supra* note 33, at 175-76.

35. See generally SELLIN, *supra* note 33.

them for life in order to guarantee that no one murderer would repeat her crime.

Intolerable as a single incident of murder is, murder after murder, each committed by the same malefactor is exponentially more intolerable. Specific deterrence can, therefore, in principle play a role in the justification of severe punishment for first offense murderers and desert based considerations would set a very high ceiling on how severe that punishment might be. How severe that punishment should be is the difficult question. If it could definitely be shown that only execution will deter murderers from murdering again, the case for capital punishment would be substantially strengthened. Other forms of punishment, however, effectively reduce recidivism among murderers. Capital punishment is not the only means to that end. Life imprisonment can reach the same ends as capital punishment; barring an escape, the convicted criminal will not be able to commit his crime again against society. Although there is the risk that the offender may kill in prison, research has shown that most murders committed in the prison system are not committed by convicted murderers.<sup>36</sup>

Thorsten Sellin's research on homicides committed in prison is insightful. Sellin compiled information from forty-one of the fifty states plus the District of Columbia and the Federal Bureau of Prisons for 1967. In total thirty-one homicides were reported in the year studied. Five of the thirty-one homicides were committed by former murderers while sixteen (over 50%) were committed by those in jail for property crimes.<sup>37</sup> Thus there is a dilemma. We should not execute those who commit property crimes just because they might be likely to murder once they are out of jail. Furthermore, we should not execute convicted murderers in order to deter them from murdering again if there is proof that such a repeat offense is rare. Our society will not kill all property-related criminal defendants even though they are more likely to murder after released than are convicted murderers. Yet, our society will allow the execution of murderers, who are less likely to repeat their crime, based on the belief that they may murder again.

Similarly, those who are caught committing check fraud are more likely to repeat their offense than murderers yet the death penalty would not be an appropriate punishment for such

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36. See SELLIN, *supra* note 33; James E. Marquart & Jonathan R. Sorenson, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 *LOV. L.A. L. REV.* 5 (1989).

37. See SELLIN, *supra* note 33.

offenders. A sentence of death for those that commit check fraud would be considered cruel and unusual punishment under the Eighth Amendment, and monumental debate has raged for over a decade regarding the appropriateness of a life sentence for non-violent recidivists.<sup>38</sup> Although recidivism rates are very high with those that commit check fraud, and it appears that it takes a large punishment to deter them, the idea that execution would be an appropriate punishment is against sound moral judgment. Check fraud criminals do not deserve to die for their crime and thus even if only capital punishment could keep check-writers from check-writing, it cannot be justified under the retributive cap. Specific deterrence functions in the justification of a particular form of punishment where, and only where, the one being punished deserves that form of punishment. In the next section of this essay, I will show why a mentally retarded defendant may not deserve a particular punishment although it may specifically deter him.

*b. Specific Deterrence and Mental Retardation*

Because mentally retarded offenders do not deserve capital punishment, specific deterrence based considerations cannot function defensibly in its justification for them. Mental retardation may in fact aggravate the circumstances of a crime, rather than mitigate them, in capital sentencing because of the incomplete knowledge that the American legal system has about mental retardation. Since mental retardation affects the defendant's ability to learn and to control his impulses, a sentencer may conclude that a mentally retarded defendant will not be deterred from future action by any finite punishment. Consequently, the defendant would be perceived as a greater risk to society and thus death would be appropriate. "It appears to us that there is all the more reason to execute a killer if he is also . . . retarded. Killers often kill again; [a] retarded killer is more to be feared than a . . . normal killer. There is also far less possibility of his ever becoming a useful citizen."<sup>39</sup> But this understandable perception is in fact mistaken. Research has shown, however, that "recidivism rates for the retarded offender are not unlike those

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38. *Rummel v. Estelle*, 445 U.S. 263 (1980). See *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991) and *Solem v. Helm*, 463 U.S. 277 (1983) for more on the *Rummel* debate.

39. *Upholding Law and Order*, HARTSVILLE MESSENGER, June 24, 1987, at 5B. This comment was made in support of a South Carolina court's death sentence imposed on a mentally retarded defendant.

of the so-called normal offender."<sup>40</sup> Consequently, retarded offenders show no greater risk of recidivism than other offenders; and as shown above, non-retarded murderers are not likely to commit murder again.

One could also argue that a mental retardate's lack of impulse control could cause him to be more dangerous to society. Nevertheless, there is modern evidence that "the incidence of criminal behavior among people with mental retardation does not greatly exceed the incidence of criminal behavior among the population as a whole."<sup>41</sup> As early as the 1950's, authorities agreed that "no significant link existed between mental retardation and criminality."<sup>42</sup>

Individuals with mental retardation have "rigid thought processes that lead to a difficulty or failure to learn from mistakes, resulting in counterproductive behaviors."<sup>43</sup> Although this might appear to support the contention that mentally retarded defendants would be likely to repeat their crimes, what it really demonstrates is the fact that mentally retarded people are different from other offenders. Specific deterrence should be used to prevent those that have chosen to act anti-socially from choosing to act anti-socially again. Most mentally retarded people have difficulty, however, understanding that what they have done is not acceptable behavior. That a mentally retarded offender may not be deterred in a manner similar to a non-retarded offender is not evidence of the retarded offender's malice or bad character. Specific deterrence is not an appropriate purpose for punishment with reference to mentally retarded defendants.

## 2. Incapacitation

Incapacitation is intended to make it impossible for a criminal to hurt society during the time of the defendant's incapacitation. It is defined as "the effect of isolating an identified offender from the larger society, thereby preventing him or her

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40. Ravenel & Bush, *A Legal Framework: An Outsider's Perspective*, in REHABILITATION AND THE RETARDED OFFENDER 73 (1976). See also Biklen & Minarcik, *Criminal Justice, Mental Retardation and Criminality, A Causal Link?*, 10 MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES 172 (1978).

41. Biklen & Minarcik, *supra* note 40, at 172.

42. HENRY WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 385 (1954).

43. John J. McGee & Frank J. Menolascino, *The Evaluation of Defendants with Mental Retardation in the Criminal Justice System*, in RONALD W. CONLEY ET AL., THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION 58 (1992).

from committing crimes in that society.”<sup>44</sup> By taking a criminal out of the community, we are preventing him from harming society during the time that he is incarcerated. By “isolating” the criminal, incapacitation contemplates that the criminal will someday return to society but for a time being he is absent from society. The length of one’s absence from his community is dependent on the crime he has committed and the likelihood that he might commit that crime again.

*a. Incapacitation and Capital Punishment*

Although capital punishment is an obvious method of incapacitating a person, a better means of incapacitating an offender is to incarcerate him. Incarceration is a much better form of incapacitation than the death penalty in part because it allows for the correction of the injustices that are possible in any system of punishment. Although the American legal system is founded on the belief that an individual is innocent until proven guilty, not every person ‘found’ guilty is guilty. The case of Roger Coleman is a good example.<sup>45</sup>

Coleman was found guilty of rape and capital murder. The Virginia Supreme Court affirmed his conviction and the United States Supreme Court denied certiorari. On his state habeas corpus claim, the Circuit Court ruled against him. The filing of an appeal thirty-three days instead of thirty days after the Circuit Court ruling, gave the Virginia Supreme Court grounds for denying his petition. Again the United States Supreme Court denied certiorari. It was not until after his federal habeas corpus petition was denied by the federal district and the Court of Appeals levels that the Supreme Court granted certiorari and heard his federal habeas claim. Through out the eight years that it took to conclude Coleman’s case, evidence supporting his innocence grew.<sup>46</sup> The possibility that he committed the rape and murder was tenuous. The Supreme Court, however, addressed the issue of federal habeas review rather than Coleman’s innocence. Coleman may have been innocent but he has already been executed and thus the issue is moot. If an innocent person is found guilty and executed, an innocent life is taken.

A further problem with capital punishment as a means of incapacitating a criminal is that there are many ways that the

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44. National Academy of Sciences Panel on Research on Deterrent and Incapacitative Effects, *Measuring Deterrence and Incapacitation*, in HYMAN GROSS & ANDREW VON HIRSCH, SENTENCING 228 (1981).

45. *Coleman v. Thompson*, 111 S. Ct. 2546 (1991).

46. John Tucker, *Dead End*, THE NEW REPUBLIC, May 4, 1992, at 21-25.

criminal justice system can be manipulated. Plea bargains in co-defendant cases, although helpful to a prosecutor, may cause one defendant to get a lighter sentence while the other may get a more severe sentence.<sup>47</sup> In a capital crime in which two or more persons are involved, one may be used against the other. In return for helping the prosecution, the one with the plea bargain lives and the other dies. Such a manipulation of the system does incapacitate both persons but one dies while the other gets a reduced jail term (and his life). Although I do not suggest that we should stop using plea bargains, I do suggest that because we do use and need them we should be careful with the punishment we inflict on those who do not benefit from the prosecution's deals.

The case of Charlie Brooks, Jr. demonstrates the need for caution when dealing with co-defendants and plea bargains. Brooks and his accomplice were charged with murder in the commission of a felony, they were thus eligible for the death penalty.<sup>48</sup> Neither one would admit to pulling the trigger and the state was unable to prove which of them was the triggerman. Brooks' accomplice received forty years in jail due to a plea bargain while Brooks was executed in 1982. A few months after Brooks' execution, the Supreme Court ruled that the death penalty was disproportionately severe for a non-triggerman accomplice in such felony murders and was thus cruel and unusual punishment under the Eighth Amendment.<sup>49</sup> Unfortunately for Brooks, this ruling was too late. Although capital punishment is incapacitating, it is also irrevocable. In an imperfect system such permanency is dangerous. A better alternative is life imprisonment without parole.

Incarceration, although a much better punishment than capital punishment, is not a punishment that should be inflicted without discretion. "The loss of liberty is itself a great deprivation. And confinement works a dramatic change in the quality of the person's existence . . ." <sup>50</sup> It remains true, however, that given our fallibility, incarceration is a better form of incapacitation. But even if capital punishment does incapacitate effectively in most cases, in the case of mentally retarded defendants, only imprisonment can be a justified form of incapacitation.

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47. *U.S. v. Mazzaferro*, 865 F.2d 450, 457-60 (1st Cir. 1989) (the defendant, who refused to plea bargain, was sentenced to three concurrent 20 year sentences while the more culpable co-defendants were sentenced to one 10 year term).

48. MICHAEL E. ENDRES, *MORALITY OF CAPITAL PUNISHMENT* 20 (1985).

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

50. ANDREW VON HIRSCH, *DOING JUSTICE* 109 (1986).



*b. Incapacitation and Mental Retardation*

As weak as the incapacitative rationale is with respect to the death penalty generally, it is weaker still with respect to the execution of a mentally retarded person. In that case, incarceration is a better form of incapacitation than execution because of the possibility of errors in our criminal justice system. Our criminal justice system is not perfect. There is room for error in any criminal prosecution and sentencing. That combined with the limited knowledge of mental retardation and the possible prejudices toward mental retardates, supports the assertion that incarceration is better than execution for such people. In fact, incarceration may actually benefit the retarded defendant. Due to the difficulty that mentally retarded defendants may have with their learning abilities, incarcerating a mentally retarded criminal may serve to help educate the criminal. A mentally retarded defendant may grow to understand why he has been taken away from his home or school and placed in a prison and thus may appreciate the consequences of his actions.

Although a benefit may result from the incarceration of mentally retarded defendants, it should not be imposed lightly on them even if it were to be the severest punishment allowed.<sup>51</sup> Mentally retarded defendants have a more difficult time in prison than non-retarded defendants. "Mentally retarded persons meet with unremitting hardships in prison."<sup>52</sup> Furthermore, mentally retarded inmates are more likely to be victimized, exploited<sup>53</sup> or injured<sup>54</sup> than other inmates.

For both retarded and non-retarded defendants, incarceration is a better form of incapacitation than capital punishment. The likelihood that a mentally retarded person will be victimized in the prison system, however, suggests that incarcerating a mentally retarded defendant requires particular attention. Important factors such as prison type (maximum vs. minimum security) and population (repeat offenders vs. first time offenders) must be considered in the sentencing process. Because juries and judges are more likely to punish mentally retarded defendants in excess

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51. If, for example, mentally retarded people were exempt from capital punishment.

52. *Ruiz v. Estelle*, 503 F. Supp. 1265, 1344 (S.D. Tex. 1980).

53. "Inmates with low intelligence levels are prime targets for exploitation. Consequently, they are peculiarly in need of special protection from physical, emotional, sexual, and financial abuse at the hand of others." *Id.*

54. "Mentally retarded prisoners are markedly and abnormally prone to receive more injuries than the average inmate. Some of their injuries occur on the job; others are suffered at the hands of other inmates or security officers." *Id.*

of their desert, we need to be especially careful to police the retributive ceiling in these cases.

### 3. Denunciation

Another purpose for punishment is denunciation. Denunciation is achieved when punishment serves as a "conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part of either the punishing authority himself or of those 'in whose name' the punishment is inflicted."<sup>55</sup> A crime is "conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community."<sup>56</sup> Punishment serves as an expression of the community's disgust for certain action. The greater the disgust the harsher the punishment.

To understand denunciation based approaches to the justification of punishment, it is important to recall that we customarily think of the state — and not the private individuals — as the inflictor of justified punishment.<sup>57</sup> Social contract theorists provide us with a way of thinking through the importance of this "fact." The social contract symbolizes the human's transition from nature into a society in which each member agrees to the rules set forth in the social contract.<sup>58</sup> Thus, each member has a duty to obey the rules, when they are not obeyed, society has a right to denounce such actions through punishment. The social contract is important to denunciation because if the community does not denounce those who flagrantly breach the contract, then the commitments made by others in the social contract have no contractual force. If one could violate the contract without notice, then others would have no contract-based incentive to comply with it.

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55. JOEL FEINBERG, *DOING AND DESERVING* 98 (1970).

56. Henry M. Hart, *The Aims of the Criminal Law*, *LAW AND CONTEMPORARY PROBLEMS* 23 (1958).

57. "Society is the proper entity to inflict the punishment because it was the victim of the crime." Ronald R. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 *TUL. L. REV.* 299, 301 (1990).

58. "[T]he social contract . . . is reducible to the following terms: Each of us puts in common his person and his whole power under the supreme direction of the general will; and in return we receive every member as an indivisible part of the whole." J.J. Rousseau, *The Social Contract* (1792) *reprinted in* J.J. ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSE ON THE ORIGIN OF INEQUALITY* 18-19 (L. Crocker ed., 1967).

a. *Denunciation and Capital Punishment*

There is no greater way to denounce one's actions than to execute him. Inflicting severe pain without killing might be viewed as a better form of denunciation because the criminal would have to live through and after the pain. Public condemnation, however, is as much a part of punishment as is pain. "Indeed the condemnation plus the added [unpleasant physical] consequences may well be considered, compendiously, as constituting the punishment."<sup>59</sup> Thus public condemnation is central to punishment. Executing a criminal is the severest form of public condemnation that we now allow ourselves. Taking the life of one who breaks the law says to society that such action is not acceptable and will not be tolerated.

Walter Berns advocates a denunciatory justification for punishment. Berns justifies punishment through the concept of community. Every member of a community is required to obey the law and those who do not do so injure not only their victim but the entire community.<sup>60</sup> Denunciation is a moral justification because the anger and indignation that a community feels when someone is a victim of a crime is part of what makes it a moral community. Capital punishment, Berns argues, is necessary to punish murderers in order to express the anger and indignation of the community and restore its moral integrity. Thus,

[t]he criminal law must be made awful, by which I mean, awe-inspiring, or commanding profound respect or reverential fear. It must remind us of the moral order by which alone we can live as *human* beings, and in our day the only punishment that can do this is capital punishment.<sup>61</sup>

Denunciation could be achieved through capital punishment. Denunciatory punishment serves as a way for those who obey the laws to express anger at those who do not obey the laws. Whether we are justified in taking the life of the criminal in order to give us — the noncriminal members of society — an avenue for expressing our indignation is doubtful. The criminal, although breaking the law, does not deserve to lose his life just to make the other members of society feel better. There are other forms of punishment that can sufficiently express condemnation

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59. Rychlak, *supra* note 57, at 337-38.

60. "[The criminal] has called into question the very possibility of that community by suggesting that men cannot be trusted freely to respect the property, the person, and the dignity of those with whom they are associated." WALTER BERNS, FOR CAPITAL PUNISHMENT 155 (1982).

61. *Id.* at 173 (Emphasis in original).

without taking the life of the criminal. Without any other purpose, such as general deterrence or retribution, the denunciation theory is not sufficient to justify death.

Some have argued that denunciation is similar to retribution;<sup>62</sup> both look to the moral culpability of the offender and punish accordingly. Nevertheless, advocates of denunciation suggest that, unlike retribution (and the other purposes for punishment), denunciation focuses on the law abiding citizen rather than the law breaker. Denunciation serves to confirm law abiders in their inclination to obey the law and to regard law breaking as reprehensible. Denunciation does not, however, focus on the criminal himself and thus is not justified with reference to either non-retarded people or retarded people because capital punishment is too severe of a punishment just to provide society with a means to express its anger. Even if a denunciation-based justification of capital punishment is sometimes successful, it will fail in the case of the mentally retarded defendant for the reasons that I will develop presently.

*b. Denunciation and Mental Retardation*

There is always a possibility that people could be mistakenly or excessively punished. Denunciation-based accounts of punishment present it as allowing society to condemn those who flagrantly breach the social contract and to reassure society that the contract will be enforced. Such a purpose can be achieved by punishment on any wrongdoer. With such a result based justification, the fact that a defendant is mentally retarded may play an insignificant role. Punishment expresses disgust with criminal action. The criminal act is the focus. There is no denying that some mentally retarded people commit criminal acts. Such acts are repudiated by society and thus will be denounced. Some of those who commit these acts, however, may not be as culpable as some others.

Where denunciation is not capped by retribution, mentally retarded people may be executed for their criminal conduct although they do not deserve to be punished as severely as non-retarded criminals. Denunciation cannot justify capital punishment for retarded defendants because it is unjust to take a human's life so that society may express its anger at him when the person being executed lacks the capacity for full culpability. There must be more than society's need to express itself to justify execution.

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62. SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES* 178-91 (4th ed. 1983).

#### 4. Rehabilitation

Rehabilitation is often considered a purpose for punishment when it is really a benefit (if achieved) of punishment. The other purposes presented in this essay gain support by the benefit they produce for society. Although a rehabilitated criminal will be a benefit for society, a rehabilitated criminal has also gained something from his punishment; the ability to function legally in society.

Rehabilitation has been a part of the American legal system for over a century; this is evident through the use of "correction" to modify many parts of our punishment system.<sup>63</sup> Rehabilitation gained much of its influence in the criminal system due to the belief that criminal activity was caused by antecedent socio-economic factors more than by rational choice. Researchers like Cesare Lombroso<sup>64</sup> and Enrico Ferri<sup>65</sup> suggested that the correlation between crime and socioeconomic, psychological and physiological preconditions was too significant to ignore. Ferri argued that factors such as poverty, inequality, injustice, lack of education, poor nutrition, broken homes, etc. caused criminal behavior. Such factors are greatly influenced by forces that the individual has no control over. The criminal, on this account, is to some extent a victim of a disease of society. Consequently, what criminals need is treatment not punishment; if the system can identify the cause of deviant behavior, then the system can also counteract it or so the theory says.

Rehabilitation is intended to help convicted criminals become better people; to restore them to law-abiding, functioning status. Such hope has diminished in priority, however, as it has become evident that the American prison system cannot house all convicted criminals or provide the environment necessary for rehabilitation.<sup>66</sup> At first glance, statistics suggest that the only area where the prison system is rehabilitating is with mur-

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63. For example, the California Department of Corrections is part of the Youth and Adult Correctional Agency. JOHN C. CULVER & JOHN H. SYER, *POWER AND POLITICS IN CALIFORNIA* 277 (4th ed. 1992); also consider the Central Correctional Institution in Columbia, North Carolina. John Blume & David Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 *ARK. L. REV.* 725, 726 (1988).

64. CESARE LOMBROSO, *CRIME: ITS CAUSES AND REMEDIES* (1911) (H. Horton trans. 1968).

65. ENRICO FERRI, *CRIMINAL SOCIOLOGY* (1917).

66. ENDRES, *supra* note 48, at 68. See also Ramsey Clark, *Summary Report on New York Parole*, CITIZENS' INQUIRY ON PAROLE AND CRIMINAL JUSTICE, INC. 5 (March 1974); HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 55 (1968) ("[w]e do not know how to rehabilitate offenders").

derers.<sup>67</sup> This apparent rehabilitation could be attributable to many factors other than an organized rehabilitation program and thus it is far from certain that the prison system is rehabilitating. Imprisonment for rehabilitative purposes may be just a way of preventing the criminal from committing criminal activity again.

*a. Rehabilitation and the Death Penalty*

The death penalty prevents any rehabilitation. An executed person cannot be rehabilitated. "Death is irrevocable; life imprisonment is not. Death, of course, makes rehabilitation impossible; life imprisonment does not."<sup>68</sup> The death penalty is unique in its "rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique . . . in its absolute renunciation of all that is embodied in our concept of humanity."<sup>69</sup> It is important to note that there are many defendants that may be sentenced to death although they are first time offenders. If there is any rehabilitation possible in our penal system it is with first time offenders. Such rehabilitation is impossible if the criminal is executed. Similarly, rehabilitation may be a likely benefit of punishing a mentally retarded defendant. As with non-retarded defendants, capital punishment prevents any rehabilitation for mentally retarded defendants.

*b. Rehabilitation and Metal Retardation*

Because no one can be rehabilitated by death, it follows trivially that, mentally retarded people cannot be rehabilitated by capital punishment. Out of the capital punishment context, however, rehabilitation appears to be a desirable side-effect of punishment. Punishing mentally retarded people through confinement would be a better form of punishment if it could help mentally retarded offenders function in society.<sup>70</sup> Rather than executing retarded murderers, we should incarcerate them and

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67. *Furman v. Georgia*, 408 U.S. 238 (1971) (Marshall, J., concurring) ("There is also a substantial body of data showing that the existence of the death penalty has virtually no effect on the homicide rate in prisons. Most of the persons sentenced to death are murderers, and murderers tend to be model prisoners.") *Id.* at 352.

68. *Id.* at 346.

69. *Id.* at 306 (Stewart, J. concurring).

70. Habilitation, rather than rehabilitation, is the most desirable result of punishment. This is not to suggest that habilitation will correct all of the problems facing a mentally retarded person. Habilitation, however, will help mentally retarded offenders to understand what they have done and why such actions are criminal. Habilitation will result in a functioning, mentally retarded person not a functioning, non-retarded person.

help them to function in society as law abiding citizens. To date, however, rehabilitation has not been effective for mentally retarded people in the penal system. In order to function in society after being released, that person must have experienced adequate and appropriate training, rehabilitation, and work programs. Those who have done extensive research on the education provided in correctional facilities have concluded that it is less than adequate.<sup>71</sup> Education, however, is important for mentally retarded people. Many of the factors that make mentally retarded people different with reference to criminal culpability could be improved with proper education.<sup>72</sup>

Mental retardation professionals have determined that "habilitation" (rather than rehabilitation) is the appropriate correctional scheme. Habilitation is designed to *prepare* a mentally retarded individual to function in society. Rehabilitation attempts to *restore* a person back to a functioning member in society. Thus, the emphasis is different; habilitation starts at the most basic concepts and expands as those concepts are understood. Rehabilitation presupposes that everyone knows the basics and thus they will not be taught. Since habilitation is a vital concept to the punishment of mentally retarded people, its meaning should be clearly articulated:

Habilitation is the process by which the staff [of an institution] assists individuals to acquire and maintain those life skills that enable them to cope more effectively with the demands of their own persons and environments and to raise the levels of their physical, mental, and social functioning. Habilitation includes, but is not limited to, programs of formal, structured education and treatment.<sup>73</sup>

Habilitation would provide the mentally retarded person with the skills that he did not have before he was convicted.<sup>74</sup> If the mentally retarded person were to acquire these skills then he would be more likely to function as a law-abiding citizen.

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71. See generally John Noble & Ronald W. Conley, *Toward and Epidemiology and Relevant Attributes*, in RONALD W. CONLEY ET AL. *THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION* 42-45 (1992).

72. This does not mean, however, that mentally retarded people can be executed once they are educated. Rather, a good education in prison may help to ameliorate certain deficiencies but cannot totally correct them.

73. ACCREDITATION COUNCIL FOR SERVICES FOR MENTALLY RETARDED AND OTHER DEVELOPMENTALLY DISABLED PERSONS, *STANDARDS FOR SERVICES FOR DEVELOPMENTALLY DISABLED INDIVIDUALS* 21-22 (1984).

74. It would be unfortunate if the education system in the correctional centers was better than in the pure educational centers. Hopefully the habilitative approach will become the dominant theory in educating mentally retarded people at all levels.

Neither rehabilitation nor habilitation is a justification for punishment. It is, however, easy to use rehabilitation and habilitation as justifications when one has difficulty justifying punishment on other grounds. If the criminal will benefit from the punishment then the punishment begins to look more acceptable. Since our present penal system cannot rehabilitate criminals, however, punishing someone so that he may be rehabilitated is unjustified. Our penal system does not have the resources necessary for total rehabilitation, and the resources are even more limited with reference to habilitation of mentally retarded criminals. Although rehabilitation and habilitation are desirable results of punishment, the likelihood that they will occur is minimal.

Of the six purposes for punishment, four cannot justify the use of capital punishment on non-retarded defendants. Even if such purposes could be found to be justified with non-retarded offenders, they could not be justified with mentally retarded criminals. Specific deterrence is unjustified because a mentally retarded person may not be able to understand that her actions resulted in her punishment and that if she wanted to avoid punishment she must not act in that manner again. Incapacitation cannot justify capital punishment because incarceration is a much better form of incapacitation taking into account the problems with our criminal justice system and the retributive cap that must be placed on all punishment. Denunciation does not justify capital punishment because death is not an appropriate means of allowing law abiders to express their disgust with criminals. Finally, capital punishment has no rehabilitative effect. Only general deterrence and retribution could possibly justify capital punishment.

#### B. *Purposes Which Can Justify Capital Punishment*

General deterrence and retribution, as purposes for punishment, do not consider the criminal after he is punished. Rather, general deterrence focuses on a punishment's effect on society and retribution focuses on what the criminal deserves once he commits a crime. Neither justification considers what happens to the criminal once he is punished. Advocates of punishment often seek to justify it by reference to these two considerations together.<sup>75</sup> We have punishment they say, to deter others, and we inflict punishment on the criminal because he deserves it. If culpability was not present, punishing an individual to help the rest of society would not be acceptable. "While deterrence

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



accounts for why punishment is socially useful, desert is necessary to explain why that utility may justly be pursued at the offender's expense."<sup>76</sup>

With general deterrence the severity of punishment is determined by many factors including desert and the need to deter others from committing particular crimes. The more heinous the crime, the greater the need for deterrence; hence the more severe the punishment can be. With retribution, the more heinous the crime, the more the criminal deserves to be punished; hence the more severe the punishment can be. With thinking such as this, capital punishment would appear to be a natural consequence of committing the most awful of crimes. General deterrence, with a retributive cap, has the greatest appeal to those who support capital punishment. All of society benefit from the punishment of the criminal and the criminal deserved to be punished because of his culpability. The two justifications together should prevent an unjust punishment because society's need for the punishment is constrained by the need for the criminal to be culpable. Thus, capital punishment could be justified when these two factors — general deterrent efficacy and desert — are present. Such justification is limited, though, to non-retarded offenders. Even if capital punishment can be justified by general deterrence and retribution, capital punishment of mentally retarded defendants cannot be justified by these purposes.

### 1. General Deterrence

Punishment is justified in part by a need to protect society from criminal activity. General deterrence is the effect on *y* and *z* of punishing *x* for an offense that *y* and *z*, like *x*, are inclined to commit, where the effect is that *y* and *z* refrain from criminality because of their desire to avoid the punishment that *x* has suffered. The fear that one's actions will result in punishment is the driving force behind the general deterrent justification.

It is important to distinguish general deterrence from specific deterrence. General deterrence is concerned with deterring *others* from committing a criminal act by punishing a particular wrongdoer. Specific deterrence focuses on the criminal actor and whether *he* will commit his criminal act again. Thus, general deterrence is not concerned with the criminal once he has been punished. What is important is whether his punishment will deter the rest of society from acting criminally. Although repeat offenses are future criminal activity which society wishes to pre-

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76. ANDREW VON HIRSCH, *supra* note 50, at 51.

vent, the general deterrent justification does not address whether a punishment prevents repeat offenses. General deterrence looks to potential offenders to determine if a form of punishment is a deterrent.<sup>77</sup>

*a. General Deterrence and Capital Punishment*

Insofar as capital punishment has deterrent efficacy, it serves to protect society from the worst forms of violent criminal activity.<sup>78</sup> By executing convicted criminals, it is argued, some others who may be tempted to commit a violent crime in the future will be deterred. The fear that one's actions may or will, if one is convicted, result in death is the general deterrent argument for the death penalty.

Isaac Ehrlich is quoted often for his studies on the deterrent effect of capital punishment. Ehrlich found that every execution prevented eight additional murders.<sup>79</sup> Ehrlich studied data from over 37 years taking into account various socioeconomic factors such as the percentage of non-whites in the population, the percentage of families with income less than one half the median family income for the state, the percentage of the population between the ages of fifteen and twenty-four, and the percentage of urban population compared with rural population.<sup>80</sup> Ehrlich also took into account the probability of arrest, conviction and execution.<sup>81</sup> Ehrlich used a two-state multiple regression procedure in order to determine the effect that capital punishment had on the murder rate.<sup>82</sup>

Ehrlich's research, however, was widely contested because he did not consider such crucial variables as private gun ownership,<sup>83</sup> rural to urban migration,<sup>84</sup> and length or prison sentences for convicted murderers.<sup>85</sup> Without such variables, Ehrlich's study only showed the deterrent effect of execution on

77. *Id.* at 38-39 (1986).

78. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA - THE DEATH PENALTY 162 (1987).

79. Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 414 (1975).

80. *Id.*

81. *Id.*

82. WILLIAM J. BOWERS, LEGAL HOMICIDE 308 (1984).

83. Gary Kleck, *Capital Punishment, Gun Ownership and Homicide*, 84 AM. J. OF SOC. 882 (1979).

84. David C. Baldus & James W.L. Cole, *Statistical Evidence on the Deterrent Effect of Capital Punishment: A Comparison of the Works of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170. (1975).

85. Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177 (1981).

the homicide rate. Ehrlich's study could not be used to show the difference between the deterrent effect of capital punishment and the deterrent effect of longer jail terms or life imprisonment. Consequently with Ehrlich's findings called into question,<sup>86</sup> the incremental deterrent effect of capital punishment over life imprisonment remains highly suspect. There is very little proof that general deterrence is better served through the implementation of capital punishment as opposed to life without parole. Many studies on capital punishment and its relation to the homicide rate have been unable to show an incremental deterrent effect on crime due to the use of executions as punishment. Researchers have found that although certainty of punishment has a deterrent effect, capital punishment itself does not,<sup>87</sup> at least not one significantly greater than life imprisonment.

Two such researchers are Charles Title and Alan Rowe. Title and Rowe concluded that in areas with the greatest likelihood of arrest, the crime rate is lower than in areas where arrest is not likely.<sup>88</sup> Most researchers, however, who have found a similar relationship between certainty of arrest and the crime rate emphasize that the certainty of arrest must be at a minimum of 30% for there to be a deterrent effect on the crime rate.<sup>89</sup> Furthermore, and most important for our purposes, the severity of the punishment seems to have little effect in those areas with less than a 30% arrest rate and only a slight effect in those areas with a greater than 30% arrest rate.<sup>90</sup> Finally, research has shown that probability of arrest and promptness of punishment are greater deterrents than severity of punishment.<sup>91</sup>

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86. There was so much debate surrounding Ehrlich's work that the National Academy of Sciences Panel on Deterrence and Incapacitation conducted a thorough study of Ehrlich's findings. The Panel concluded "we see too many plausible explanations for his finding a deterrent effect other than the theory that capital punishment deters murder. . . [his] results cannot be used at this time to pass judgment on the use of the death penalty." Klein et al., *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates*, in ALFRED BLUMSTEIN ET AL., *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES* 358 (1978).

87. ENDRES, *supra* note 48, at 81.

88. Charles Title & Alan Rowe, *Certainty of Arrest and Crime Rates: A Further Test of the Deterrence Hypothesis*, 52 SOC. FORCES 455 (1974).

89. Charles Logan, *On Punishment and Crime: Some Methodological Commentary*, 19 SOC. PROBS. 280 (1971).

90. RALPH D. ELLIS & CAROL S. ELLIS, *THEORIES OF CRIMINAL JUSTICE: A CRITICAL REAPPRAISAL* 20 (1989).

91. Lee McPheters, *Criminal Behavior and the Gains from Crime*, 14 CRIMINOLOGY 137 (1976).

It is important to note that the key to these studies is what the possible criminal perceives.<sup>92</sup> If a particular potential offender believes that she will be arrested and punished promptly if she commits a particular crime, then, other things being equal, she will be deterred by the prospect of punishment. Consequently, perception rather than certainty is what deters future criminality. Nevertheless, this is not to suggest that there can be no actual punishment and still be deterrence. Rather, some imposition of punishment is practically necessary if the threat of punishment is to remain credible. Some believe that actual certainty is impossible.

Actual certainty of punishment, even if possible, would surely be far too burdensome and expensive to accomplish. Aside from the monetary costs, constitutionally provided civil rights would have to be forfeited. Accordingly, if deterrence is dependent on both factors (certainty and severity), increasing the penalty is the cost-efficient way to deter crime.<sup>93</sup>

What all of the views above demonstrate is that there needs to be both certainty and severity. Although certainty is more likely to deter crime, if the punishment is a slap on the wrist the fact that it will definitely be imposed is irrelevant because the punishment is so minimal. There must be the perception both that one will be punished and that the punishment will be appropriately severe.

Here is the problem with capital punishment when its general deterrent efficacy is at issue. A potential criminal in America today would not perceive that a significant percentage of offenders are executed.<sup>94</sup> If severity was all that was needed then the fact that one could even remotely be executed would be a deterrent. Since the certainty of punishment is low in our present penal system, however, the severity of the possible punishment is not enough of a deterrent. There is not a perception that capital punishment is inflicted with any certainty. Rather, what is perceived is short jail sentences and early parole. For there to be a greater deterrent effect to capital punishment, there must be not only probability of arrest and prompt punishment but the perceived use of capital punishment on a regular basis and this is

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92. ELLIS & ELLIS, *supra* note 90, at 20.

93. Ronald R. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 310 (1990).

94. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2697 (1988) (although discussing the execution of defendants who committed a capital offense while under the age of 16, the court said that only 1.7% of those arrested for willful criminal homicide received a sentence of death).

what, for example, Texas is trying to achieve.<sup>95</sup> Without such a perception, capital punishment will not be a deterrent.

Whether capital punishment is a general deterrent is highly questionable. Some researchers have not found a significant relationship between capital punishment itself and low homicide rates, but other theories have surfaced which argue that capital punishment may actually encourage homicide.<sup>96</sup> If that is so then the death penalty could never serve as a deterrent. Some researchers argue that a positive correlation between executions and the homicide rate is due to a "lack of respect for human life."<sup>97</sup> These researchers suggest that the legalization of executions devalues life and thus does not serve to deter people from killing others. Still others see executions as having a "brutalizing" effect and thus encouraging homicide similar to the effects of public executions or mass murders.<sup>98</sup> Cesare Beccaria, an early student of the death penalty and its deterrent effect, opined that society had a duty to keep people rational and not let them revert to their brutish nature. He stated

In proportion as torments become more cruel, the spirits of men, which are like fluids that always rise to the level of surrounding objects, become callous, and the ever lively force of the passions brings it to pass that after a hundred years of cruel torments the wheel inspires no greater fear that imprisonment once did . . . The countries and times most notorious for severity of penalties have always been those in which the bloodiest and most inhumane of deeds were committed, for the same spirit of ferocity that guided the hand of legislators also rules that of the parricide and assassin.<sup>99</sup>

Although these views have not been widely accepted,<sup>100</sup> they do provide an explanation for the reality that in some states, homicide rates have increased after executions.<sup>101</sup>

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95. *Herrera v. Collins*, 113 S. Ct 852 (1993).

96. William J. Bowers & Glen L. Pierce, *Deterrence or Brutalization: What is the Effect of Executions?*, 26 CRIME AND DELINQ. 563 (1980); David R. King, *The Brutalization Effect: Execution Publicity and the Incidence of Homicide in South Carolina*, 57 SOC. FORCES 683 (1978); Daniel Glaser & Max S. Ziegler, *Use of the Death Penalty v. Outrage at Murder*, CRIME AND DELINQ. 20 (1974).

97. Glaser & Ziegler, *Use of the Death Penalty v. Outrage at Murder*, CRIME AND DELINQ. 20 (1974).

98. See *supra* note 96.

99. CESARE BECCARIA, ON CRIMES AND PUNISHMENT 11 (Henry Peolucci trans., 1963).

100. ENDRES, *supra* note 48, at 85.

101. For example, Florida and Georgia. See AMNESTY INTERNATIONAL, *supra* note 3, at 167.

b. *General Deterrence and Mental Retardation*

Deterrence assumes that an individual can both predict and appreciate the consequences of his actions. As the plurality stated in *Gregg v. Georgia*,<sup>102</sup> whether capital punishment is a deterrent depends on whether the possibility of execution will enter "into the cold calculus that precedes the decision to act."<sup>103</sup> Thus, one must premeditate in order to be deterred. Nevertheless, mentally retarded people may not be able to premeditate their actions as fully as can people of average intelligence or better. Mentally retarded people also have limited impulse control.<sup>104</sup> A mentally retarded person may not refrain from actions that he does not realize will result in death. Thus, a retarded person who has difficulty weighing the consequences of his actions may not, in some instances, weigh such consequences at all.<sup>105</sup> If premeditation requires that a person know and understand the consequences of his actions, then a mentally retarded person may not be able to premeditate. The *Penry* decision, however, holds that a mentally retarded person may be able to premeditate. I, however, argue that since it is not *certain* that a mentally retarded person can premeditated, the death penalty is an unjustified punishment for mentally retarded people.

Mental retardation also has a great effect on information processing, reactions to events and the planning of alternative actions.<sup>106</sup> A mentally retarded person may not be able to analyze a particular course of action and determine that one choice will lead to a particular result while the other will lead to another result. As Spritz and Borys have found, when a task requires planning, mentally retarded people are more likely to fail than non-retarded persons.<sup>107</sup> Planning is crucial to acting deliberately and acting deliberately is crucial to a capital case. Insofar as a mentally retarded person has enormous difficulty in planning

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102. 428 U.S. 153 (1976) (holding that the death penalty is not *per se* cruel and unusual punishment).

103. *Id.* at 185-86.

104. AMERICAN ASSOCIATION ON MENTAL DEFICIENCY [now the American Association on Mental Retardation], CLASSIFICATION IN MENTAL RETARDATION 16 (H. Grossman ed., 1983).

105. Ellis & Luckasson, *supra* note 1, at 429. See also Blume & Bruck, *supra* note 63, at 733.

106. See Joseph C. Campione & Ann L. Brown, *Memory and Metamemory Development in Educable Retarded Children*, in PERSPECTIVES ON THE DEVELOPMENT OF MEMORY AND COGNITION (Robert V. Kail & John W. Hagen eds., 1977).

107. H.H. Spritz & S.V. Borys, *Depth of Search: How Far Can the Retarded Search Through an Internally Represented Problem Space?*, in P.N. BROOKS ET AL., LEARNING AND COGNITION IN THE MENTALLY RETARDED (1984).

then a key element of the prosecution of a capital case is reduced.

The preceding argument takes into account the retributive cap that should be placed on all forms of punishment if it is to be justified. Although on retributive grounds, mentally retarded people cannot be executed, under general deterrence their execution may achieve general deterrence. If it can be shown that the execution of any offender, retarded or non-retarded, does have an incremental general deterrence efficacy over life imprisonment, then mentally retarded people along with non-retarded people can be executed to achieve general deterrence. Thus, those that are mentally retarded, but are determined to be competent to stand trial, could be executed if "found" to deserve death. For the majority of mentally retarded defendants such executions will never be justified by general deterrence if retribution is considered. The criminal must actually deserve to die in order for his death to be justified. As argued throughout this essay, most mentally retarded people do not deserve to die because they may not have the mental, emotional and psychological abilities necessary to act with criminal intent or recklessness.

Advocates of punishment often seek to justify punishment by both the deterrent and retributive arguments. When the two are combined, then the deterrent effect of punishment does not have to be overwhelming. As long as punishment has some deterrent effect and those that are punished deserve it, it does not matter that a punishment's deterrent effect is very low. Consequently, if it is determined that a form of punishment can be even the slightest of a deterrent, then the retributive justification takes over and all criminals are then punished according to what they deserve. When this happens, capital punishment can easily be justified with respect to any killer because of a slight possibility of general deterrence and because punishment is deserved. Capital punishment of mentally retarded defendants could even be justified if only the slightest chance of deterrence is found and society determines that mentally retarded defendants can deserve to be executed. Nevertheless, most mentally retarded defendants do not *deserve* to be punished. It is to the justification of that claim that I now turn.

## 2. Retribution/Deserts

Some argue that punishment is "just" if and only if the criminal deserves it.<sup>108</sup> Retribution is designed to treat culpable per-

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108. WALTER BERNS, *FOR CAPITAL PUNISHMENT* (1979) and ERNEST VAN DEN HAAG & JOHN P. CONRAD, *THE DEATH PENALTY: A DEBATE* (1983).

sons as they deserve. Retribution is a unique justification in that it focuses on the past behavior of the criminal rather than the future effect of his punishment. A criminal is punished based on what he did and what he deserves. A criminal is not punished based on what society wants or does not want to occur in the future or what is the best way for society to prevent crimes from happening again.

Our society, outside of the penal system, attempts to reward and punish people in a manner quite similar to retribution. We structure reward and punishment systems in the hope that only those that deserve rewards will receive them while only those that deserve to be punished will be punished. When we perceive these systems as functioning properly, we feel comforted by the fact that no one gets more or less than they deserve. Retribution, as applied to our penal system, is a natural human instinct. This instinct

is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy — of self-help, vigilant justice, and lynch law.<sup>109</sup>

#### a. *Retribution and Capital Punishment*

Those who advocate the retributive justification do not espouse "an eye for an eye" theory. An "eye for an eye" is retaliatory thinking which is quite distinct from retribution. Retaliation involves punishing the criminal for the *actus reus* alone. Culpability is irrelevant to retaliatory thought. Retribution involves punishing the criminal because he deserves to be punished. Culpability is crucial to retributive thought. Although retribution does not require, and the penal system most likely cannot punish criminals in a similar manner to their crime, i.e., raping a rapist or killing a multiple murderer more than once,<sup>110</sup> some retributivists argue that murderers can be punished by being killed. Ernest van den Haag, for example, suggests that murder-

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109. *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J. concurring).

110. ERNEST VAN DEN HAAG, *PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION* 193 (1975).



ers should be executed because death is the only appropriate moral response for those who murder.<sup>111</sup>

To some, the retributive theory produces some counter-intuitive outcomes. For example, if two people, with the same state of mind, attempt to kill another person and only one of the victims dies, then one person would be convicted of murder while the other can only be convicted of attempted murder. The one whose victim died will receive a greater penalty although the two had the same intent and criminal state of mind.<sup>112</sup> Here the state of mind is the same but the result is different and thus so is the punishment. The opposite is true with the self-defense defense. Although the end result is the same as in a murder, the culpability of the killer in self defense is different from the non-self-defense murderer. One who kills in self defense is not deserving of any punishment, while one who intentionally kills without justification or excuse deserves severe punishment. Here the result is the same but the state of mind is different so the punishment is different. With retribution, the result of a person's actions does not determine the punishment; culpability must be factored in as well.

Some who oppose capital punishment and the retributive justification for it assert that by deliberately killing a convicted murderer the state itself is just committing another killing.<sup>113</sup> A better punishment would be life imprisonment; the state does not kill and the murderer receives a severe punishment. One abolitionist suggests that what is important for punishment is that it be severe enough not to trivialize the crime or to do injustice to the victim.<sup>114</sup> Those who oppose this contention claim that no amount of jail time would equal the loss of the life of the victim. Jeffrey Reiman suggests, however, that our system presently modifies the type of punishment given to convicted criminals. Rapists are sent to jail although no amount of time in jail could ever equal the injury caused to the victim by rape.<sup>115</sup>

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111. "If the crime is great enough, [the criminal] may be deprived of his right to life. . . . The rights that we grant one another, on whatsoever basis, are forfeited if we commit crimes." VAN DEN HAAG & CONRAD, *supra* note 108, at 261.

112. Stephen J. Schulhofer, *Harm and Punishment*, 122 U. PA. L. REV. 1497 (1974).

113. ERNEST VAN DEN HAAG & JOHN P. CONRAD, *THE DEATH PENALTY: A DEBATE* (1983).

114. Jeffrey H. Reiman, *Justice, Civilization, and the Death Penalty: Answering van den Haag*, 14 PHIL. AND PUB. AFF. 115 (1985).

115. *Id.* at 130-31.

Jeffrey Reiman and Stephen Nathanson, another believer that life imprisonment is a severe enough punishment for murderers, suggest that most murderers could never deserve death. Both argue that the state does not have the right to inflict the full punishment upon most murderers because most murders are a result of impoverished conditions that the state has the power to control.<sup>116</sup> Consequently, life imprisonment is the severest punishment that the state can inflict. Whether retribution justifies capital punishment with non-retarded offenders is not an issue that I need to resolve here. With mentally retarded offenders, however, retribution cannot justify capital punishment.

*b. Retribution and Mental Retardation*

The retributive justification is especially disturbing when it is used to justify the execution of mentally retarded defendants. With retribution, the main concern is the culpability of a person. The Supreme Court has stated that the inquiry into the appropriateness of the death penalty is a question of "personal responsibility and moral guilt."<sup>117</sup> Furthermore, a critical aspect to determining personal responsibility and moral guilt is the mental state of the defendant.<sup>118</sup> The relationship between mental capacity and moral guilt is evident in the fact that moral development is influenced by intelligence, opportunity for interaction with others, living in an enriching environment, chronological age, and mental age.<sup>119</sup> The importance of these factors is demonstrated by the fact that, as a general rule, children are not considered *fully* morally responsible until the age of eighteen.<sup>120</sup> In the case of children, each one of the factors influencing moral development is limited due to the child's age and lack of experience. Similarly, these factors are limited with reference to a mentally retarded person.<sup>121</sup>

This is not to say that a mentally retarded person cannot tell what is "right" from what is "wrong." Mentally retarded people

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116. *Id.* at 131-32. See also STEPHEN NATHANSON, AN EYE FOR AN EYE? THE MORALITY OF PUNISHING BY DEATH (1987).

117. *Booth v. Maryland*, 482 U.S. 496, 502 (1987) (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

118. *Tison v. Arizona*, 481 U.S. 137 (1987).

119. Leonore Boehm, *Moral Judgment: Cultural and Subcultural Comparison with Some Piaget's Research Conclusions*, 1 INT'L J. PSYCHOL. 143 (1966).

120. See *Thompson v. Oklahoma*, 487 U.S. 815 (1988). But see Victor L. Streib, *Death Penalty for Juveniles*, 36 OKLA. L. REV. 613, 614-15 (1983) (281 offenders under the age of 18 have been executed).

121. This is not to suggest, however, that we must treat retarded people like children. Rather this analogy was made to show how our legal system recognizes these factors in assessing moral blameworthiness.

know that certain actions are wrong but they are not adept at figuring out why they are wrong.<sup>122</sup> One researcher has likened this to punishing a child two weeks after she has done something wrong. The child does not have the cognitive capacity to appreciate or recognize the link between her prior action and the punishment.<sup>123</sup>

Moral reasoning develops over the years; it is not something that we all know from our beginnings. The ability to make moral judgments "flows from the ability to transcend the self and to see the impact of behaviors and interactions as they relate to 'the other.'"<sup>124</sup> Such an ability is a complex process. Researchers have found that a mentally retarded person's moral judgment is comparable to that of a non-retarded person of the same mental age<sup>125</sup> as determined by the intelligence quotient. Most mentally retarded defendants have the mental age of a child much younger than sixteen<sup>126</sup> and, as stated above, most children are not considered fully morally responsible for criminal action.

Mentally retarded people also have a diminished capacity to distinguish between blameworthy behavior and accidental behavior.<sup>127</sup> As a result, it is difficult for a mentally retarded person to determine which of his actions are not acceptable. In a world where violence is routinely displayed on television and in the streets,<sup>128</sup> it may be difficult for someone with a limited ability at making moral judgments to determine which killings are bad and which are not. A system should not hold a person to a moral test that he does not understand.

Finally, retribution punishes people for what a court decides are intentional actions or reckless actions evincing gross disre-

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122. Reid, *Unknowing Punishment*, STUDENT LAW. 21 (May 1987).

123. See generally STANLEY S. HERR, RIGHTS AND ADVOCACY FOR RETARDED PEOPLE (1983).

124. JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD (Marjorie Gabain trans., 1965) (1932).

125. J.E. Perry & D. Krebs, *Role-Taking, Moral Development, and Mental Retardation*, 136 J. GENETIC PSYCHOL. 95 (1980).

126. For example, in *Penry v. Lynaugh*, the case which held that mentally retarded defendants could be executed under the Eighth Amendment, the defendant had the mental age of a 6 1/2 year old.

127. Ellis & Luckasson, *supra* note 1, at 430.

128. With the presence of video cameras and news stations at scenes of crime and in international warfare, the chance that a mentally retarded person could confuse those two different types of killings is highly possible. Both non-retarded and retarded people may have difficulty understanding how killing in war is different than killing on the streets. However, with their mental capabilities and life experiences, non-retarded people can learn to at least distinguish between the two even if they do not find them justified. Retarded people, however, may not be able to make such a distinction.

gard for the value of human life.<sup>129</sup> Mental state is a question of fact decided by the fact finder.<sup>130</sup> Due to all the variables involved in mental retardation, it is difficult to determine that a mentally retarded person is truly culpable of a capital offense. Intending to kill someone or being reckless with regards to the life of another person involves abilities that may be underdeveloped in mentally retarded people.

For a person to act intentionally or recklessly he must know the probable consequences of a given action. If such knowledge is lacking, then a person cannot expect a given result because he is not aware that such a result will occur. This is a key factor in the criminal culpability of a mentally retarded person. Mentally retarded people have difficulty generalizing from what they have learned. So even if a mentally retarded person understands right from wrong in his limited environment, he has difficulty applying what he has learned to new situations. Thus, a mentally retarded person can expect a given result only when the rest of the surrounding circumstances are as he had learned. When those circumstances are changed, a mentally retarded person has more difficulty than others in transferring the effects of his actions to his new environment.

Even those who argue that mentally retarded people can distinguish right from wrong in the abstract, do believe that mentally retarded people have trouble applying the abstract concepts to specific factual settings.<sup>131</sup> Consequently, it is difficult to form an intent to produce a specific result. With such uncertainty, the retributive justification is not acceptable with mentally retarded people. We should not punish someone because "he deserves it" if we do not know if he truly deserves it.

Even a confession from a mentally retarded person is not a true representation of his mental state or culpability. A mentally retarded person might say that he intended to kill even though he did not. Mentally retarded people are prone to biased responding; if a mentally retarded defendant thinks that an officer or prosecutor wants to hear that she committed the crime she is more likely than a non-retarded person to say that she did.<sup>132</sup> Although confessions are not the only factors considered

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129. *Tison v. Arizona*, 481 U.S. 137 (1987).

130. *Morissette v. U.S.*, 342 U.S. 246 (1952).

131. *Empirical Study: The Mentally Retarded Offender in Omaha Douglas County*, 8 CREIGHTON L. REV. 622, 646 (1975).

132. See generally Sigelman et. al., *The Responsiveness of Mentally Retarded Persons to Questions*, 17 EDUC. & TRAINING MENTALLY RETARDED 120 (1982); Sigelman et. al., *When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded Persons*, 19 MENTAL RETARDATION 53 (1980).

by the finder of fact in capital cases, the presence of a confession is highly influential in pretrial plea bargaining and in the trial itself.

The only true justification for capital punishment can be retribution. One must deserve to die before one can be sentenced to death. No other purpose, regardless of its efficacy, can morally justify the taking of a human's life. Whether one deserves to die is a difficult question to answer. There are many factors besides the circumstances surrounding the crime that make the determination of culpability difficult at best. One's emotional, psychological and mental histories are crucial to the determination of a culpable mental state. Mental retardation, both what we understand about it and what we do not, creates great difficulty for the determination of what one deserves. Until we can fully comprehend the working of the retarded mind, determining what a mentally retarded person deserves is a task that should not be taken lightly. Since the possibility of executing a less than fully culpable person is so great with mentally retarded people, the death penalty is not a justified form of punishment as imposed on that group of society.

## VI. CONCLUSION

Punishment is a significant part of the American legal system. Whether it is justified is crucial to its acceptance. The purposes for punishment influence whether a particular punishment will be tolerated by the American public. Of the purposes for punishment, only retribution, and possibly general deterrence if combined with retribution, could justify capital punishment.

Whether these purposes truly justify capital punishment is debatable. Whether someone truly deserves to die is difficult to answer and thus calls into question the retributive justification. Also, there is evidence that executions do not deter homicides within the community and thus the general deterrence argument is questionable too.

The focus of this essay, however, was the acceptability of the execution of mentally retarded people. Even if capital punishment can be justified through retribution or general deterrence or by way of the two linked together, it cannot be justified when imposed on mentally retarded defendants. The elements necessary to be found guilty of a capital crime require a high degree of knowledge on the part of the criminal. This knowledge requires an understanding of the relationship between cause and effect and an understanding of unacceptable behavior. Many mentally

retarded people may not have this knowledge or the ability to acquire this knowledge. Consequently, many mentally retarded people could be found guilty of the criminal act but not be capital punishable.

Of the thirty-six states that allow capital punishment only two exempt mentally retarded people from execution.<sup>133</sup> The Supreme Court of the United States has held that the execution of mentally retarded defendants is constitutional.<sup>134</sup> This is astonishing. The acceptance of the death penalty as imposed on the mentally retarded may be attributable to the misunderstandings surrounding mental retardation. Additional understanding of the mentally retarded may contribute to a reversal of this thinking. That the courts are aware that mental retardation diminishes a criminal's culpability is evident by the fact that mental retardation may be considered a mitigating factor in sentencing. Equating mental retardation, however, to a mitigating factor is not sufficient.

Until the legal system truly understands people who are mentally retarded, a punishment that is barely justifiable as imposed on non-retarded people cannot be justified with respect to retarded defendants. If death can be justified at all, it must be reserved for only the most deserving of criminals. Mentally retarded defendants are not the most deserving of criminals. Mental retardation is a disability that affects one's learning and impulse control. A mentally retarded person may not appreciate the consequences of his actions or understand that his actions are criminal. To punish an individual who does not understand that his actions are wrong and to punish that individual because he did them anyway, is to punish a person for being mentally retarded. Such punishment is unacceptable.

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133. These states are Georgia and Kentucky. *See supra* note 3.

134. *Penry v. Lynaugh*, 492 U.S. 302 (1987).

