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The Fate of Mentally Retarded Criminals: An Examination of the Propriety of Their Execution under the Eighth Amendment

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INTRODUCTION

Capital punishment as an appropriate response to criminal activity has come under increasing attack by those who wish to abolish it. With scientific advances in DNA that could lead to the exoneration of many death row inmates, new concerns regarding the execution of undeserving persons have gained momentum. These concerns have ballooned into a movement to eliminate what some believe to be a barbaric and archaic practice. Proof of the progress made by death penalty opponents is nowhere more evident than in the nationwide movement to eliminate the execution of the mentally retarded.

Eighteen states currently forbid the execution of mentally retarded persons, and many others, including Pennsylvania, are considering such action.[1] Proponents of the death penalty in this situation argue that mental retardation alone should not automatically disqualify one from serving what a jury deems to be an appropriate punishment; rather, the jury should consider impaired intellect as a mitigating circumstance. The following article explores the difficulties in establishing a class of persons that should be protected, as well as the moral concerns surrounding execution of the mentally retarded. Finally, this article will examine the judicial and statutory status of the issue.

I. DEFINITION OF MENTALLY RETARDED

Before participating in a debate on the propriety of the execution of a person who suffers from mental retardation, one must first understand the definition of such a condition. Although no single

1. Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Mexico, North Carolina, New York, South Dakota, Tennessee, and Washington have statutes barring the execution of the mentally retarded. Death Penalty Information Center, *Mental Retardation and the Death Penalty, at* http://www.deathpenaltyinfo.org/dpicmr.html (last visited Aug. 7, 2001). The Pennsylvania Legislature is currently considering two bills that would eliminate the execution of the mentally retarded. S. SB 26, (Pa. 2001) and H.R. HB 1861, (Pa. 2001).

definition exists, the American Association of Mental Retardation's ("AAMR") revised definition of 1992 remains the most widely used and generally accepted.[2] The AAMR describes mental retardation as "substantial limitations in present functioning . . . characterized by significantly subaverage intellectual functioning, existing concurrently with, related to limitations in two or more applicable adaptive skill areas, and manifestation before age eighteen."[3] In addition to these criteria, the AAMR lists four primary assumptions required for proper application of the definition:[4]

(1) Valid assessment considers cultural and linguistic diversity, as well as differences in communications and behavioral factors;
(2) The existence of limitations in adaptive skills occurs within the context of community environments typical of the individual's age peers and is indexed to the person's individualized needs for supports;
(3) Specific adaptive limitations often coexist with strengths in other adaptive skills or other personal capabilities; and
(4) With appropriate supports over a sustained period, the life functioning of the person with mental retardation will generally improve.[5]

Once the aforementioned assumptions are met, the various facets of the definition are examined.

The first facet of the AAMR definition requires that an individual function at an intellectual level significantly below average.[6] Intellectual functioning is determined by means of an Intelligence Quotient ("IQ") test. The test score assesses a person's intellectual functioning as compared to other test takers.[7] According to statistics, most people score between 80-120, with 100 as the

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2. AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (9th ed. 1992) [hereinafter AAMR]. Since 1921, the AAMR has defined mental retardation. *Id.* It should be noted that the AAMR has implemented an Ad hoc Committee for the purpose of updating this definition with changes in the field. AAMR, *Ad hoc Committee on Terminology and Classification, at* http://www.aamr.org/Groups/t&c.shtml (last visited Nov. 3, 2001). This committee plans to propose an updated definition of mental retardation during 2002. *Id.*

3. AAMR, *supra* note 2, at 5.

4. *Id.*

5. *Id.*

6. *Id.*

7. Rosa Ehrenreich and Jamie Fellner, *Beyond Reason: The Death Penalty and Offenders with Mental Retardation* (Malcolm Smart and Cynthia Brown eds., Human Rights Watch) (2001).

average score.[8] To be diagnosed as mentally retarded, an individual must score below 70-75 on the IQ test.[9] Only an estimated two percent of the American population scores below 70 on the IQ test.[10] The diagnosing score has been lowered over the years due to the social stigma associated with being labeled retarded.[11] Currently, the significance of a low IQ score is more easily understood through its reference to mental age.[12] For instance, a person said to have the mental age of a five year-old scored roughly the same as the average five year-old who took the IQ test.[13]

A low IQ score alone does not necessarily indicate mental retardation. As the AAMR definition suggests, this low intellectual functioning must coexist with, and relate to, deficiencies in at least two of the adaptive skill areas necessary for every day life.[14] These skill areas include communication, home living, community use, health and safety, leisure, self-care, social skills, self-direction, functional academics, and work.[15] Adaptive behavior is defined as "significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and standardized scales."[16] In other words, the second element of the definition requires the impaired intellect to have some real impact on the individual's life.[17]

The final element of the AAMR definition mandates a manifestation of mental retardation before the individual reaches the age of eighteen.[18] Because mental retardation develops during childhood, the definition precludes the possibility that a normal adult suddenly becomes mentally retarded.[19] Therefore, an adult

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8. Ehrenreich & Fellner, *supra* note 7, at 9.

9. *Id.*

10. *Id.*

11. *Id.* at 10.

12. Ehrenreich & Fellner, *supra* note 7, at 9. It should be noted that this imprecise mechanism is generally used to enhance the lay person's understanding only. *Id.*

13. *Id.*

14. AAMR, *supra* note 2, at 6.

15. *Id.*

16. James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, GEO. WASH. L. REV. 414, 422 (1985).

17. *Id.*

18. AAMR, *supra* note 2, at 6.

19. Ehrenreich & Fellner, *supra* note 7, at 11.

cannot feign the condition.[20] To assess the validity of a mental retardation diagnosis, examiners, such as psychologists or counselors, study childhood test results and school records to determine if the individual's "intellectual and adaptive problems developed during childhood."[21]

II. Classification of the Mentally Retarded

As described above, the AAMR revised the definition of mental retardation in 1992.[22] The revised definition emphasizes the importance of culture and environment in properly identifying and classifying the conditions under which a person may be diagnosed with mental retardation.[23] The current classifying system continues to use IQ scores as part of the definition. However, the system no longer uses the classifications of mild, moderate, severe, and profound to describe the degree of retardation.[24] Instead, the new AAMR classifications are characterized by the level of support needed by the individual to function in the adaptive skill areas, distinguishing the support levels with terms such as intermittent, limited, extensive, and pervasive.[25]

The classification process consists of three steps.[26] First, the process requires the individual to take standardized intelligence tests given by a qualified professional such as a psychologist.[27] The second step involves discerning the person's strengths and weaknesses across four areas of daily functioning that include: "intellectual and adaptive behavior skills, psychological/emotional considerations, physical/health/etiological considerations and environmental considerations."[28] During the final step of the process, an interdisciplinary team determines the type of support the individual needs in any of the four dimensions of daily living. Once identified, the needed support is assigned one of four levels

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20. *Id.*

21. *Id.*

22. AAMR, *supra* note 2, at 5-8.

23. *Id.* at 9-22. The change in classification schemes helps to explain a person's impairments better than mere IQ test scores. *Id.*

24. *Id.* at 34.

25. *Id.* at 26.

26. *Id.* at 24.

27. AAMR, *supra* note 2, at 24.

28. *Id.* Strengths and weaknesses may be determined by formal testing, observations, interviewing key people in the individual's life, interviewing the individual, interacting with the person in his or her daily life, or a combination of these approaches. *Id.*

of intensity: intermittent, limited, extensive or pervasive.[29]

III. Causes of Mental Retardation

Mental retardation can be caused by almost any syndrome, disease, or genetic abnormality that impairs the brain either before birth, during birth, or until age eighteen.[30] Despite the fact that many causes have been discovered, for roughly one-third of the people affected by this condition, the cause still remains unknown.[31] Down syndrome, fetal alcohol syndrome, and fragile X are the major causes of mental retardation.[32]

The causes of mental retardation can be delineated into categories which include genetic disorders, prenatal complications, neonatal problems, postnatal trauma, and childhood poverty.[33] The genetic causes may result from inheritance of abnormal chromosomes, an erroneous gene combination, or infections during pregnancy.[34] A chromosomal disorder such as Down Syndrome occurs when too many or too few chromosomes exist.[35] Sometimes, though, mental retardation finds its roots in the behavior of the mother during the term of her pregnancy.[36] Maternal smoking, alcohol consumption, and drug use have all been proven to potentially cause the condition.[37] Likewise, problems at birth, such as low birth weight and premature delivery, sometimes cause mental retardation in babies.[38] Similarly, problems after birth such as exposure to, and incubation of, chicken pox, measles, or other childhood diseases can damage the brain and also cause the condition.[39] Finally, poverty may lead to mental retardation, especially whenever malnutrition and disease-producing conditions

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29. *Id.* The four levels can be roughly defined as follows: intermittent — support offered "as needed" but not on a daily basis; limited — support granted during a prescribed length of time (for example, a transition to a new school from an old school); extensive — unlimited support given on a daily basis according to needs; and pervasive — unlimited support constantly administered across all areas of life. *Id.* at 26.

30. The Arc of the United States, *Introduction to Mental Retardation, at* http://www.thearc.org/faqs/mrqa.html (last visited Aug. 7, 2001) [hereinafter ARC].

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. ARC, *supra* note 30.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

are present.[40]

IV. Reasons For Protecting Mentally Retarded Individuals From Execution

Those who advocate prohibiting the execution of the mentally retarded demand the protection of these individuals from capital punishment for several reasons. Citing the definition of mental retardation discussed earlier in this article, advocates emphasize the differences between a "normal" person and one who suffers from this troublesome condition, thereby attempting to strengthen the position of exempting mentally retarded defendants from possible capital punishment.

A. Why the Mentally Retarded Fail to Meet Culpability Standards

Because mentally retarded individuals experience severe limitations in intellect, as well as an inability to participate in everyday activities, the individual is subject to a seemingly endless array of potential problems as a court debates whether or not to deal them the most severe punishment. The problems with holding the mentally impaired to the same standard as the unimpaired become more evident after consideration of the characteristics commonly possessed by the mentally retarded: a lack of effective communication skills, an extremely limited attention span, a tendency for impulsivity, and a deficiency in moral development. Furthermore, other characteristics include a strong desire to hide their disability and a need to please their peers.[41] These characteristics repeatedly emerge to give credence to the claim that we should spare the mentally retarded from the penalty of death.

Although the United States currently allows the death penalty, the laws governing its implementation require only that the most culpable or deserving individuals receive this punishment. In fact, the Supreme Court stated that the decision to impose the death penalty must be "directly related to the personal culpability of the criminal defendant."[42] The moral culpability of a defendant comprises of two ingredients: (1) an individual's level of intellectual function; and (2) the individual's ability to control and understand

40. ARC, *supra* note 30.

41. Shruti S. B. Desai, *Effective Capital Representation of the Mentally Retarded Defendant*, 13 Cap. Def. J. 251 (2001).

42. California v. Brown, 479 U.S. 538, 543 (1987).

the wrongfulness of his behavior.[43] In both areas, a mentally retarded individual is less capable, and therefore, less culpable than an unimpaired person.[44]

To determine the moral culpability of a defendant, the jury should consider the extent of the alleged criminal's intellectual functioning. This criterion, however, precludes a person with mental retardation who, by definition, functions at a significantly sub-average intelligence level. Impairments caused by mental retardation are severe, permanent, and pervasive, and have the potential to negatively affect all aspects of the individual's life.[45] The intellectual impairments of a mentally retarded individual, along with the impaired moral reasoning caused by his condition, constitute a strong argument for him not to be placed in the "most culpable" group for whom the death penalty is supposed to be reserved.

The second component of moral culpability refers to the defendant's capacity to understand and control his wrongful behavior.[46] A person with mental retardation possesses no ability to predict the consequences of his behavior, nor the ability to vicariously learn from the consequences of another wrongdoer's actions.[47] Thus, a mentally retarded individual cannot perceive consequences of another's behavior, such as punishment for a criminal act as a deterring example to discourage similar behavior from him.

Based on the preceding statement, a deterrence justification for executing an individual with mental retardation does not seem logical, especially because such a person often cannot comprehend the relativity of another's punishment to himself.[48] Furthermore, a retribution theory fails to warrant the death penalty because of the individual's impairment to control impulsive behavior or develop moral reasoning.[49] Though a mentally retarded person should be held accountable for his behavior, he should not be subjected to the death penalty for behavior he can neither control nor conceptualize as indecent. Only those most blameworthy should

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43. Texas Defender Service, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, *at* http://justice.policy.net/cjreform/studies/texas_defenders/chap ter5.vtml#N_71_ (last visited Jul. 28, 2001).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Texas Defender Service, *supra* note 43.

49. *Id.*

receive such a penalty; thus the definition of moral culpability, a prerequisite that must be met for capital punishment, does not include mentally retarded individuals.

A person's legal accountability for murder or other serious crimes should not be contingent on the issue of the offender's condition of mental retardation.[50] In other words, a mentally retarded murderer should not receive exoneration from any responsibility for his actions; however, the punishment must be "proportionate to both the seriousness of the crime and the defendant's degree of moral culpability."[51] Although different levels of severity of mental retardation exist, all include severe limitations on the intellect and the ability of an individual to know the wrongfulness in committing an act.[52] Thus, many proponents believe that mentally retarded defendants should never be placed in the "most culpable" category, subject to the death penalty.[53]

B. The Mentally Retardeds' Inability to Participate in the Criminal Justice System

In addition to the claim that mentally retarded defendants have less moral culpability than defendants with average intelligence, one can also easily argue that retarded defendants have a much more limited ability to participate in the criminal justice system.[54] Because of the characteristics of the mentally retarded, a tendency exists for injustices to occur, beginning with the police investigation, continuing through the entire trial process, and, unfortunately, sometimes leading to the execution chamber.[55]

The traits synonymous with those suffering from mental retardation deeply depreciate a retarded individual's chances of receiving fair treatment during a police investigation. In many instances, a mentally retarded person will act extremely upset for being detained or will try to escape the scene of a crime even if he did nothing wrong.[56] Also, a person with mental retardation may respond to coercion more easily than would a person of average intelligence, whether that coercion occurs by way of friendly

50. Ehrenreich & Fellner, *supra* note 7, at 28.
51. *Id.* (quoting Tison v. Arizona, 481 U.S. 137 (1987)).
52. Ehrenreich & Fellner, *supra* note 7, at 28.
53. *Id.*
54. Texas Defender Service, *supra* note 43.
55. *Id.*
56. Leigh Ann Davis, *People with Mental Retardation in the Criminal Justice System, at* http://www.thearc.org/faqs/crimqa.html (last visited Jul. 27, 2001).

suggestions or harsh intimidation.[57] Often, an individual with mental retardation experiences a deep need to be accepted and will respond to questions in a way that he thinks will please the interrogator.[58] This need for acceptance may lead the individual to falsely confess or exaggerate their level of involvement in a crime.[59]

False confessions involving mentally retarded suspects in capital crimes occur much too frequently.[60] Subjected to police questioning and wanting to give the authorities the "right answers," alleged criminals with mental retardation recurrently offer mendacious statements. Because of his impaired thought process, the suspect erroneously accepts guilt, assuming that the police officer's allegation presupposes his responsibility in perpetuating the crime.[61] Therefore, he confesses to a crime that he did not commit, thereby "corroborating" the police officer's belief in his culpability. The problem is exacerbated after considering that police officers often do not have sufficient experience with mentally retarded suspects to form a proper line of questioning to ascertain the true facts of the crime.[62] Often a mentally retarded person will acquiesce to the line of questioning.[63] In this event, the officer instead tells the story of the accused and, thus, a believable but not necessarily true confession emerges. In a society that places enormous emphasis on a confession, even in some cases where no other evidence exists, a mentally retarded suspect faces a great disadvantage because of his intense propensity to please others or hide his impairment.[64]

The potential for false confessions only partially explains the injustice faced by the mentally retarded in the investigation process:

> At various stages in the proceedings against them, criminal suspects face important decisions about whether to waive their constitutional and statutory rights, e.g. the right to refrain

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57. Texas Defender Service, *supra* note 43.

58. Davis, *supra* note 56.

59. Texas Defender Service, *supra* note 43.

60. Ehrenreich & Fellner, *supra* note 7, at 24.

61. *Id.* One other explanation is that the mentally retarded suspect does not truly understand who is responsible for an act and therefore confesses to the crime. Davis, *supra* note 56.

62. Ehrenreich & Fellner, *supra* note 7, at 25. Many times, because mentally retarded people go to great lengths to conceal their disability, a police officer might not even realize that he is dealing with someone suffering from the condition. *Id.*

63. *Id.*

64. *Id.*

> from answering police questions, and the right to a trial by jury. Before giving effect to such waivers, the courts are obliged to determine, based on the totality of the circumstances, whether the waiver was voluntary and made with full awareness of the nature of the right being waived and the consequences of the decision to waive it.[65]

Traditionally, the courts have accepted waivers from the mentally retarded without giving much regard to the individual's condition or the condition's impact on the decision to waive the rights.[66] However, in reality, a strong argument can be made that a mentally retarded individual lacks the intellect necessary to understand the concept of a right, or more importantly, the consequences of waiving that right.

A mentally retarded individual is more likely than an unimpaired person to mistakenly relinquish the right to avoid self-incrimination.[67] To protect people from incriminating themselves in the investigation process, the police must give *Miranda* warnings to any suspect before they confess.[68] To waive this right, a person must do so knowingly, intelligently, and voluntarily.[69] However, a person with mental retardation often can understand neither the seriousness of relinquishing this right nor confessing without the advice of legal counsel. Many mentally retarded individuals do not comprehend that they can choose whether to cooperate with police and answer questions.[70] Furthermore, a mentally retarded suspect may not even understand the language of a *Miranda* warning, but because of the inclination to answer questions affirmatively, he will often say that he understands the *Miranda* rights.[71] As mentioned before, in our society, a confession strongly influences the determination of the guilt or innocence of a suspect; consequently, the idea that many mentally retarded people do not understand their right to remain silent only underscores the notion of the injustice of the criminal system with respect to the mentally

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65. Ehrenreich & Fellner, *supra* note 7, at 22; *see* Colorado v. Connelly, 479 U.S. 157 (1986); Edwards v. Arizona, 451 U.S. 477 (1981).

66. Ehrenreich & Fellner, *supra* note 7, at 22-23.

67. *Id.* The protection from self-incrimination can be found in the Fifth Amendment to the United States Constitution, which declares that "nor shall [any person] be compelled in any criminal case to be a witness against himself; . . ." U.S. CONST. amend. V.

68. Ehrenreich & Fellner, *supra* note 7, at 22. Miranda warnings were established in *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

69. *Id.*

70. Ehrenreich & Fellner, *supra* note 7, at 22.

71. *Id.*

impaired.

A defendant with mental retardation may lack an ability to understand the complexities of the United States legal system. Hence, the defendant may not be able to adequately participate in his or her own defense. In fact, a person's mental retardation may lead to the destruction of one's defense. A person with mental retardation quite often suffers from a very poor memory.[72] This impediment, coupled with the tendency to fall prey to others' suggestions, renders communication of the facts, especially the most mitigating facts, to the defense lawyer next to impossible.[73] Moreover, a mentally retarded person will often attempt to conceal his condition from lawyers, not realizing that his condition could constitute a major part of his defense.[74] Perhaps the most significant disadvantage that the mentally retarded individual faces, though, lies in his courtroom demeanor. A person with mental retardation may not understand the consequences of the proceedings; consequently, he tends to alienate the jury by sleeping, smiling, or staring at nothing while in court.[75] This unavoidable and inappropriate conduct often conveys a false impression of a lack of remorse or compassion for the victim.[76]

In addition to having deficiencies in intellectual capacity or possessing the inability to reason like non-impaired individuals, mentally retarded defendants must also overcome the possibility of ineffective assistance of counsel. On many occasions lawyers do not possess the necessary skill level or education to properly advise a mentally retarded client.[77] Few lawyers have received special training in communicating with a mentally challenged client, and many lawyers simply do not want to spend the time explaining the different stages of a case in unsophisticated language, appropriately simplified for their clients to comprehend.[78] Balancing the probable inadequacy of an average defense lawyer and the vulnerabilities of the mentally retarded defendant, one can vehemently argue that the chances of a fair trial for these defendants are far less than those for defendants with normal intelligence.

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72. *Id.*
73. Texas Defender Service, *supra* note 43.
74. Ehrenreich & Fellner, *supra* note 7, at 4.
75. *Id.*
76. *Id.*
77. Texas Defender Service, *supra* note 43.
78. *Id.*

Through examination of the criteria for moral culpability in individuals with average intelligence, one should recognize that a mentally retarded individual lacks the degree of moral culpability necessary to receive the death penalty. Because of their lesser degree of moral culpability, derived from their sub-average intelligence and poor ability to comprehend the wrongfulness of their actions, mentally retarded individuals confront injustice in police investigations and ensuing trials. Their hope for exemption from execution lies in a consideration of the Eighth Amendment.

V. The Protections of the Eighth Amendment

Perhaps the most compelling legal basis for outlawing the execution of mentally retarded persons lies within the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution.[79] Although the Constitution itself does not provide a clear definition of cruel and usual punishment, the clause's origin as well as the Supreme Court's jurisprudence on related issues have combined to help clarify its meaning and purpose.[80]

The drafters of the Constitution borrowed the "cruel and usual punishment" language from the English Bill of Rights of 1689.[81] The words of the English Bill were directed against punishments not allowed by written law (i.e., those viewed to be beyond the jurisdiction of the sentencing court, and those disproportionate to the crime involved).[82] The Americans adopted this language primarily to prohibit torturing and other "barbarous" methods of punishment.[83] However, U.S. courts soon added that the clause should be interpreted in a "flexible and dynamic manner," rather than strictly applying it to merely prohibit what constituted torture and barbaric methods of punishment in the eighteenth century.[84] In

79. The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

80. Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded From the Death Penalty*, 52 Ala. L. Rev. 911, 923 (2001).

81. *Id.* at 925 (citing Gregg v. Georgia, 428 U.S. 153, 169 (1976));(citing Anthony F. Granucci, *Nor Cruel and Unusual Punishment Inflicted: The Original Meaning*, 57 Cal. L. Rev. 839, 852-53 (1969)). The English Bill of Rights of 1689 was drafted by Parliament at the accession of William and Mary. *Id.*

82. *Id.*

83. *Gregg*, 428 U.S. at 170. The phrase derives mostly from statements made during the various state conventions held during the ratification process of the U.S. Constitution. *Id.*

84. *Id.* at 171.

other words, as society's perception of decency evolved, so too should the boundaries and protections contained within the Eighth Amendment.

In *Weems v. United States*, the Supreme Court began to expand the perimeters of the Cruel and Unusual Punishment Clause.[85] Weems received a punishment of Cadena Temporal for the crime of falsifying an official document.[86] The punishment included spending at least twelve years and one day in jail, wearing chains, performing hard labor, forfeiting many civil rights (such as owning property), and living under surveillance for the remainder of his life.[87] Weems contended that his sentence constituted "prohibited cruel and unusual punishment" under the Eighth Amendment.[88] In reaching its decision, the Court chose not to limit the protection given by the Eighth Amendment to only barbaric torture, but to also forbid any punishment that lacked proportionality to the severity of the crime.[89] The Court declared that, "[t]ime works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth."[90] The Court further explained that the Cruel and Unusual Punishment Clause "may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[91]

In *Trop v. Dulles*, the Court expanded on *Weems*.[92] Trop, a private in the United States Army, received a sentence of three years hard labor, loss of pay, and a dishonorable discharge after being convicted for his one-day desertion of the Army.[93] Moreover, a few years later, Trop applied for a passport only to find that due to his conviction and dishonorable discharge, he had lost his United States citizenship.[94] Trop argued that taking away his

85. 217 U.S. 349 (1910).

86. *Weems*, 217 U.S. at 364. The term Cadena Temporal derives from Spanish law and was used in the Philipines at the time of this case. *Id.*

87. *Id.* at 366.

88. *Id.* at 359. The Court ultimately decided that this punishment violated the Cruel and Unusual Punishment Clause and reversed and remanded the case with directions to dismiss the proceedings. *Id.* at 382.

89. *Id.* at 368.

90. *Weems*, 217 U.S. at 373.

91. *Id.* at 378.

92. 356 U.S. 86 (1958).

93. *Trop*, 356 at 87.

94. *Id* at 88. The opinion cites the grounds for loss of citizenship as Section 401(g) of the Nationality Act of 1940, which states that:

citizenship violated the Eighth Amendment's prohibition against cruel and unusual punishment.[95]

The Court phrased the question before it as "whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment."[96] While the Court acknowledged that the exact scope of the Eighth Amendment had not been defined, it recognized that the basic concept behind the Eighth Amendment emphasizes the dignity of man.[97] The Court confirmed the right of a state to punish; however, the power can only be used in a manner that does not extend beyond the boundaries of civilized standards.[98] The majority emphasized that "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[99] Relying on this interpretation of the Cruel and Unusual Punishment Clause, the majority of the Court believed the Eighth Amendment to bar the punishment of denationalization.[100] Although no physical torture resulted from the punishment, the Court reasoned that Trop's loss of citizenship implicated the Eighth Amendment's protection from cruel and unusual punishment; denationalization punishes a person more primitively than physical torture because it expunges an individual's status in society and leaves him stateless.[101] A punishment that deprives an individual of citizenship — a right that has evolved over many years — is indecent and intolerable to society, especially when imposed for committing the crime of deserting the army for twenty-four hours.

After applying the Amendment to physical and mental torture, in *Gregg v. Georgia* the Supreme Court examined the Eighth Amendment in the context of the death penalty.[102] A plurality of the Court ultimately followed the earlier teachings of *Weems* and *Trop*, agreeing that the Eighth Amendment should be interpreted in a

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[a] person who is a national of the United States whether by birth or naturalization, shall lose his nationality by-(g) Deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged . . . .

Id at 88 (citing 54 Stat. 1168, 1169, as amended, 58 Stat. 4).

95. *Trop*, 356 U.S. at 88.

96. *Id* at 99.

97. *Id* at 100.

98. *Id.*

99. *Id.* at 101. This language continues to characterize our understanding of the Eighth Amendment.

100. *Trop*, 356 U.S. at 101.

101. *Id* at 102.

102. *Gregg*, 428 U.S. at 153.

flexible manner that reflects society's evolving standards of decency.[103] The Court further explained, however, that the standards of decency as perceived by the public are not totally conclusive; a judge must also determine that the penalty is not excessive.[104] The Court defined "excessive" in a two part analysis: "[f]irst, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime."[105]

After discussing the principles and considerations surrounding an Eighth Amendment issue, the Court resolved whether the death penalty for the crime of murder violates the Amendment per se.[106] In dealing with this issue, the plurality discussed the possibility that the evolution of the standards of decency had made the death penalty intolerable.[107] The question renewed an argument presented in the case of *Furman v. Georgia*.[108] Examining the argument, the plurality concluded that within the time frame spanning the two cases, *Furman* and *Gregg*, societal support for the death penalty grew.[109] The Court used the significant amount of legislation permitting the death penalty as the best indicator of society's endorsement, which partially comprised the Court's reasoning for holding that the death penalty does not violate the Eighth Amendment per se.[110]

Despite holding in *Gregg* that capital punishment is not a per se violation of the Eighth Amendment, the Supreme Court has used its protections to render the imposition of the death penalty for certain crimes and offenders unconstitutional.[111] For example, in *Thompson v. Oklahoma*, the Court held that the evolving standards of decency prohibited the execution of a person under the age of sixteen at the time of his crime, after considering the lower level of blameworthiness of a young person as well as the absence of a

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103. *Id.* at 171-73.

104. *Id.* at 173.

105. *Id.*

106. *Id.* at 176.

107. *Gregg*, 428 U.S. at 179.

108. *Id.* (citing Furman v. Georgia, 408 U.S. 238, 258-69 (1972)). The argument in *Furman* was accepted by two justices; however, three justices were unable to accede to that notion. *Id.*

109. *Id.* at 179.

110. *Id.* at 187.

111. Kimberly A. Orem, *Evolution of an Eighth Amendment Dichotomy: Substantive and Procedural Protections Within the Cruel and Unusual Punishment Clause in Capital Cases*, 12 CAP. DEF. J. 345, (2000).

deterring effect by such executions.[112] Similarly, in *Ford v. Wainwright*, the Court could find no reason to allow this punishment by today's standards, or those standards held in colonial times; therefore, the Court held that the Eighth Amendment prohibits any state from executing an insane prisoner.[113] Although using different reasoning, the Supreme Court has also ruled that the protections of the Eighth Amendment extend to groups such as accomplices to murder and criminals convicted of rape without other crimes.[114]

The Eighth Amendment's Cruel and Unusual Punishment Clause has been interpreted as a flexible source of protection that can evolve along with society's standards and sense of decency. Can this protection be extended even further to save another group from execution — namely those suffering from mental retardation?

VI. THE CASE OF *PENRY V. LYNAUGH*

The Supreme Court first visited the issue of the constitutionality of executing the mentally retarded with *Penry v. Lynaugh*, a landmark case in this debate.[115] In *Penry*, the Court directly examined whether these executions violated the Cruel and Unusual Punishment Clause of the Eighth Amendment to the U.S. Constitution.[116]

Penry consisted of the following details. While in her home on an October morning in 1979, Pamela Carpenter was brutally raped, beaten, and stabbed with a pair of scissors.[117] Ms. Carpenter died later that day while receiving emergency treatment.[118] Before she expired, Pamela described her attacker to a police officer and a doctor at the hospital.[119] Her description led the police to suspect Penry, a twenty-two year old male who had previously been convicted of rape and had recently been released on parole.[120]

The police arrived at Penry's father's house where he had been

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112. *Id.*

113. Orem, *supra* note 111, at 352-53 (citing Ford v. Wainwright, 477 U.S. 399, 409-10 (1986)).

114. Orem, *supra* note 111, at 354-55. The case extending protection to accomplices for murder is *Enmund v. Florida*, 458 U.S. 782 (1982) and a similar decision for the criminal convicted of rape without more is found in *Coker v. Georgia*, 433 U.S. 584 (1977).

115. 492 U.S. 302 (1989).

116. *Penry*, 492 U.S. at 328.

117. *Id.* at 307.

118. *Id.*

119. Penry v. Lynaugh, 832 F.2d 915 (1987).

120. *Penry*, 492 U.S. at 307-08.

staying.[121] Penry denied any involvement in the crime; however, he voluntarily agreed to go with the officers to the police station.[122] Upon arriving at the police station, the officers read Penry his *Miranda* rights and questioned him about a wound on his back.[123] After being reminded of his rights by the police officers, Penry agreed to sign a search form to recover the shirt that he wore earlier that day.[124]

After retrieving the shirt from his father's house, Penry and the officers went to the scene of the crime.[125] While at the crime scene, Penry for the first time confessed to committing the crime.[126] Upon hearing this confession, the police immediately placed Penry under arrest and once again read him his rights.[127] Penry was brought before a magistrate, and charged with capital murder.[128] After having been informed about his rights, Penry stated that he understood his rights and signed the warning forms.[129]

On two occasions after his arraignment, Penry gave statements to two different police officers.[130] First, after being questioned and warned of his rights by police Chief Smith, Penry agreed to give a statement.[131] Chief Smith had the statement typed for Penry's review and signature; however, because Penry could not read, the Chief read the statement to Penry, who signed the document.[132] Texas Ranger Cook received the second statement from Penry.[133] This second statement described the crime in even more detail and contained the *Miranda* warnings along with a statement waiving those rights.[134] Once again, due to Penry's inability to read, the statement had to be read to Penry before he signed it.[135] These statements formed the heart of the prosecution's case because no

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121. *Penry*, 832 F.2d at 917.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Penry*, 832 F.2d at 917. Penry had admitted to the police officers that he had "done it." *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Penry*, 832 F.2d at 917. This statement described the crime in detail. *Id.*
132. *Id.* The statement was typed using notes that Chief Smith took during Penry's statement. *Id.* Two non-police officers witnessed the reading of the statement to Penry. *Id.*
133. *Id.*
134. *Id.* The statement also included Penry's confession to previous crimes. *Id.*
135. *Id.* Once again two non-police officers witnessed the reading and signing of the statement. *Id.*

physical evidence such as blood, semen, fingerprints or hair samples linked Penry to the scene of the crime.[136]

Prior to the trial, a hearing took place to determine Penry's competence to stand trial.[137] At this competency hearing, a clinical psychologist, Dr. Brown, testified that Penry suffered from mental retardation.[138] As a child, Penry had been diagnosed as having organic brain damage most likely due to trauma to his brain at birth.[139] Furthermore, Penry could neither read nor write, and had never finished the first grade.[140] Penry had been tested over the years, and his IQ ranged between fifty and sixty-three, which indicated mild to moderate mental retardation.[141] During his examination of the suspect, Dr. Brown gave Penry an IQ test on which he scored fifty-four.[142] Noting that this score indicated that Penry possessed a mental age of six and a half years old, the doctor further concluded that Penry's ability to function in society equaled that of a nine or ten year-old child.[143] Despite these findings, the judge found Penry competent to stand trial.[144]

During his first trial, the court admitted Penry's confessions as evidence.[145] Consequently, Penry raised the defense of insanity and presented the expert testimony of Dr. Jose Garcia.[146] Garcia testified that Penry's brain damage and mental retardation resulted in "poor impulse control and an inability to learn from experience."[147] Concluding that Penry suffered from an organic

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136. *Penry*, 832 F.2d at 917.

137. *Penry*, 492 U.S. at 307.

138. *Id.* In addition to Dr. Brown's testimony, Penry's relatives also testified that he was beaten as a child and had behaved strangely as both a child and a teenager. *Penry*, 832 F.2d at 917. Other writings about this case suggested that Penry's mother would severely mistreat him: she burned him with cigarettes; locked him in his room for long periods of time; caused him to uncontrollably urinate himself; forced him to eat his own feces on occasion; and dipped him in scalding water in the kitchen sink. *Id.*

139. *Penry*, 492 U.S. at 307.

140. *Penry*, 832 F.2d at 917.

141. *Penry*, 492 U.S. at 307-08. The AAMR formerly used a classification system based solely on IQ scores. The four classes consisted of mild retardation — an IQ score of (50-55) to (70); moderate retardation — an IQ score of (35-40) to (50-55); severe retardation — an IQ score of (20-25) to (35-40); and profound retardation — an IQ score of (20-25) or below. *Id* at 308 (citing AAMR, *supra* note 2, at 5).

142. *Penry*, 492 U.S. at 308.

143. *Id.*

144. *Id.*

145. *Penry*, 832 F.2d at 917.

146. *Id.*

147. *Penry*, 492 U.S. at 308. Garcia believed that this brain damage was probably caused at birth, but alternatively, may have been caused by beatings and multiple injuries to the brain during his childhood. *Id.*

brain disorder at the time of the illegal offense, Garcia conveyed the impossibility of Penry appreciating the wrongfulness of his conduct or conforming his conduct to the law.[148] However, the prosecution introduced the testimony of two of its own psychiatrists to rebut Garcia's opinion.[149] The state concluded that Penry did not suffer from insanity although it did concur with Garcia in that Penry possessed "an extremely limited mental ability and that he seemed unable to learn from his mistakes."[150] Consequently, the jury convicted Penry of capital murder.[151]

The jury considered Penry's punishment by answering three special issues:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased or another would result;
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response of the provocation, if any, by the deceased.[152]

If the jury unanimously answered yes to all three of these questions, then Penry would be given the death penalty.[153] Indeed, the jury answered affirmatively to all the questions and sentenced Penry to death.[154]

Penry recurrently appealed the decision, finally reaching the Supreme Court, which granted certiorari to resolve two questions concerning the Eighth Amendment:

> First, was Penry sentenced to death in violation of the Eighth Amendment because the jury was not adequately instructed to take into consideration all of his mitigating evidence and because the terms in the Texas special issues were not defined in such a way that the jury could consider and give effect to

148. *Id.* at 309.
149. *Id.*
150. *Id.* at 310.
151. *Id.* (citing Tex. Penal Code Ann. Section 19.03 (1974 and Supp. 1989)).
152. *Penry*, 492 U.S. at 310 (citing TEX. CODE CRIM. PROC. ANN., art. 37.071 (b) (Vernon 1981 and Supp. 1989). This is the old Texas law. *Id.*
153. *Id.* at 311.
154. *Id.*

> his mitigating evidence in answering them? Second, is it cruel and unusual punishment under the Eighth Amendment to execute a mentally retarded person with Penry's reasoning ability?[155]

The Court's rationale and conclusions for both of these questions remain important in modern jurisprudence. For the purpose of this comment, the Court's holding concerning the second issue is of particular significance to challenging a state's execution of the mentally retarded.

To support his claim that the Eighth Amendment's protection from cruel and unusual punishment extended to him, Penry argued that a national consensus against executing the mentally retarded was emerging, which could justify excluding mentally retarded offenders from capital punishment.[156] However, the state responded by refuting the existence of a national consensus of a blanket exemption from execution; moreover, a jury is best situated to discern whether a defendant suffers from severe mental retardation and possesses the requisite culpability for a death sentence.[157]

In its analysis, the Court revisited prior cases that dealt with the Eighth Amendment's prohibition on cruel and unusual punishment. The opinion, written by Justice O'Connor, recognized that the concept of cruel and unusual punishment implicated "evolving standards of decency that mark the progress of a maturing society."[158] The Court explained that one must examine the objective evidence of society's current feelings about a punishment in order to ascertain the requisite standard of decency.[159] According to Justice O'Connor, the most reliable objective evidence required a review of the legislative action taken throughout the country.[160]

At the time of *Penry*, only Georgia had completely banned the execution of mentally retarded person who had been found guilty of a capital crime.[161] A second state, Maryland, passed a similar statute to become effective on July 1, 1989.[162] In its analysis, the

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155. *Id.* at 313. On the first issue, the Court held that the jury was not adequately instructed and was denied the vehicle by which they could morally respond to Penry's evidence of impairment. *Id.* at 329.

156. *Id.* at 329.

157. *Penry*, 492 U.S. at 329.

158. *Id.* at 331. (citing *Trop*, 356 U.S. at 86).

159. *Id.* (citing *Coker*, 433 U.S. at 593-97; *Enmund*, 485 U.S. at 788-96).

160. *Id.* (citing *Thompson*, 487 U.S. at 815).

161. *Id. See* GA. CODE ANN. § 17-7-131(j) (Supp. 1988).

162. *Penry*, 492 U.S. at 334. The Maryland Statute also prohibits the execution of an individual with mental retardation. MD. CODE ANN., art. 27 § 412(f)(1)(1989). *Id.*

Court compared two other cases where the issue of a national consensus was discussed.[163] In the case of *Ford v. Wainwright*, the Supreme Court held that the Eighth Amendment prohibited the execution of an insane person.[164] Concurrent with *Ford*, the Court observed that twenty-six states had statutes that suspended the execution of a convict who became insane after sentencing, and additional states had adopted the common law prohibition against executing the insane.[165] In *Thompson v. Oklahoma*, the Court found that eighteen states had expressly established a minimum age in death penalty statutes, and also commented that all fifty states required the defendant to be at least sixteen at the time of the offense.[166] Therefore, the Court concluded that a consensus clearly existed that capital punishment was an appropriate punishment under certain circumstances.[167] While the *Penry* Court denied "bean counting," the Court did maintain that including Maryland and Georgia in the sixteen states that completely opposed the death penalty at the time of Penry's appeal still did not constitute sufficient evidence of a national consensus, unlike the factors that existed in *Ford* and *Thompson*.[168]

Additionally, the Court determined that statistical evidence of the general behavior of juries could be considered in defining the existence of a national consensus.[169] Penry offered no evidence of any specific behavioral studies, but instead relied heavily on public opinion polls.[170] According to the Court, these polls could someday find expression through legislation, and thus could be relied upon in the future as more of an objective representation of society's values.[171] However, at the time of the decision, no national consensus against executing the mentally retarded existed for the Court to side with Penry.[172]

Although the Court heavily emphasized the objective evidence of juries or legislatures, it has also considered whether imposing the death penalty on certain groups violates the Eighth Amendment.

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163. *Penry*, 492 U.S. at 334.

164. *Ford*, 477 U.S. at 408. *See supra* notes 113-14 and accompanying text.

165. *Id.*

166. *Penry*, 492 U.S. at 334 (citing *Thompson*, 487 U.S. at 829). See supra notes 112-13 and accompanying text.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Penry*, 492 U.S. at 335.

172. *Id.*

The Court declared that when inflicted upon certain groups, the death penalty "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering" if it is "grossly out of proportion to the severity of the crime."[173] The death penalty must serve two principle social purposes: retribution and deterrence.[174] The retribution analysis has always centered around the culpability of a defendant.[175] Penry argued that mentally retarded individuals do not have the judgment, perspective, and self-control of a person of normal intelligence.[176] These limitations, coupled with an inability to learn from mistakes or to appreciate the long-term consequences of their actions, lower the level of blameworthiness of mentally retarded defendants. Justice O'Connor, however, stated that a mentally retarded person's abilities and experiences can vary, and therefore, not all mentally retarded individuals lack the level of culpability necessary for the death penalty.[177] Until a national consensus is established, such determinations of culpability remain a question for a sentencing jury.

In summary, the *Penry* Court concluded by pronouncing that "while a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society,' there is insufficient evidence of such a consensus today."[178]

VII. The Return of the Issue to the Supreme Court

Twelve years after the *Penry* decision, opponents to executing the mentally retarded long for the day that this indecent practice will halt nationwide. Whether the nation has become intolerant of executing mentally retarded individuals seems to be gaining attention. The resurgence of this debate could culminate in the Supreme Court the fall of 2001. After granting certiorari in *McCarver v. North Carolina*, the Court will revisit and reevaluate

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173. *Id.* (citing *Coker*, 433 U.S. at 592 (plurality opinion); *Thompson*, 487 U.S. at 833 (plurality opinion); *Tison*, 481 U.S. at 137; *Enmund*, 458 U.S. at 798-801).

174. *Id.* at 336. (citing *Gregg*, 428 U.S. at 183).

175. *Id.*

176. *Penry*, 492 U.S. at 336.

177. *Id.* at 339.

178. *Id.* at 340. Penry's case was remanded and eventually retried, and again Penry received a death sentence. Penry v. Johnson, 121 S.Ct. 1910 (2001). In 2001, Penry's once again faced the Supreme Court. His death sentence was once again overturned by the Court. *Penry*, 121 S.Ct. at 1910.

its holding in *Penry* to determine if now there exists a national consensus against executing the mentally retarded, thus rendering the punishment cruel and unusual under the Eighth Amendment.[179]

Ernest McCarver received a death sentence after being convicted for the murder of Woodrow F. Hartley.[180] He faces this punishment despite the fact that he was subsequently diagnosed with mental retardation. McCarver has a full scale IQ of sixty-seven, which places him in the category of mentally retarded.[181] In addition, his score of sixty-nine on the Scales of Independent Behavior Test places him with the independent adaptive ability of a ten year old.[182] Furthermore, McCarver cannot perform everyday activities such as ordering pizza or using a telephone book without assistance.[183]

In his brief to the Supreme Court, McCarver urged the Court to examine the changes in society that have evolved since *Penry*. In doing so, McCarver hopes that the Court will find that a consensus has indeed developed across the nation to bar the execution of the mentally retarded.[184] In support of his argument, McCarver identified state legislatures' transition toward outlawing the death penalty for the mentally retarded.[185] At the time of *Penry*, only two states, in addition to the federal government, banned the mentally retarded from capital punishment. Since that decision, eleven additional states have passed similar legislation.[186] Those thirteen

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179. After the submission deadline for this comment, the Supreme Court of the United States decided to dimiss the writ of certiorari that it previously granted to McCarver. McCarver v. North Carolina, 122 S.Ct. 22 (mem.)(2001). McCarver's case became moot because North Carolina passed legislation that banned the execution of the mentally retarded. 2001 N.C. Sess. Laws 346. Because of the legislation's retroactive effect, McCarver no longer has the requisite standing for his case to be heard by the Supreme Court. Death Penalty Information Center, *Mental Retardation and the Death Penalty, at* http://www.deathpenaltyinfo.org/dpicmr.html (last visited Nov. 7, 2001). Although the Court dismissed McCarver's case, it immediately granted certiorari to a Virginia case involving a mentally retarded death row inmate named Daryl Atkins. Atkins v. Virgina, 122 S.Ct. 24 (mem.)(2001) (amended 122 S.Ct. 29 (mem.)(2001)). In the order, the Court specifically agreed to address the Eighth Amendment issue raised in McCarver. 2001 WL 1149397. Because the legal issue involved in both cases is not fact sensitive, the arguments set forth in McCarver remain germane and therefore warrant discussion.

180. Brief for Petitioner at 3, McCarver v. North Carolina, No. 00-8727 (U.S. filed Feb. 5, 2001).

181. *Id.* at 7. The psychologist conducted a series of tests while making his diagnosis, including the IQ test and tests for impairments in adaptive behavior. *Id.*

182. *Id.*

183. *Id* at 7-8.

184. *Id* at 9.

185. Brief for Petitioner at 11, *McCarver* (No. 00-8727).

186. *Id.* at 10. At the time the brief was submitted, eleven states (Arkansas, Colorado,

states, along with the federal government and twelve states that bar the death penalty completely, comprise a majority of jurisdictions that do not permit the mentally retarded to be executed. McCarver believes that this is objective evidence of society's view, warranting a finding that the national consensus has risen, and, therefore, the execution of the mentally retarded violates the Constitution.[187]

McCarver further advanced his argument by adding that objective evidence of a national consensus extends beyond the state's legislature. At the time of his brief, North Carolina's legislature had not banned the execution of the mentally retarded.[188] However, McCarver contended that plenty of strong evidence of a consensus exists. For instance, a number of local municipal officials and legislators have called for a moratorium on executions, and most specifically mention concern over the mentally retarded.[189] The North Carolina General Assembly has appointed a committee to study the death penalty's application in the state, and its recommendations include the elimination of the mentally retarded as a group subject to capital punishment.[190] Other organizations like the North Carolina Bar Association advocate excluding a person with mental retardation from the death penalty.[191] Finally, results of various public opinion polls add to McCarver's argument.[192] Today, at least the citizens of North Carolina generally disapprove of executing mentally retarded individuals.[193]

Due to the importance of this issue to so many, a variety of organizations submitted to the Supreme Court a brief in Amici Curiae, supporting McCarver.[194] The brief attempts to present

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Indiana, Kansas, Kentucky, Nebraska, New Mexico, New York, South Dakota, Tennessee and Washington) had joined Maryland, Georgia and the Federal Government in banning the execution of the mentally retarded. *Id.*

187. *Id.* at 11-12.

188. *Id.* at 12. North Carolina has become the most recent state to pass legislation protecting the mentally retarded from the death penalty. Death Penalty Information Center, *Mental Retardation and the Death Penalty, at* http://www.deathpenaltyinfo.org/dpicmr.html (visited Aug 7, 2001).

189. Brief for Petitioner at 12, *McCarver* (No. 00-8727).

190. *Id.*

191. *Id.* at 13.

192. *Id.* The brief cites a poll of citizens in the Carolinas finding that 64 percent favored banning the execution of the mentally retarded, while only 21 percent opposed such a ban. *Id.*

193. *Id.*

194. Brief of The American Association on Mental Retardation, et al. as Amici Curie in Support of Petitioner at 13, McCarver v. North Carolina, No. 00-8727 (U.S. filed June 8, 2001) [hereinafter Amici Brief for AAMR et al.]. This brief was filed by The AAMR, The Arc of the United States, The American Orthopsychiatric Association, Physicians for Human Rights, The

compelling clinical, moral, and constitutional reasons why the execution of the mentally retarded violates the Eighth Amendment.[195] Because the writers of the brief recognize that the Court evaluates the existence of a national consensus by looking at objective evidence, the writers tried to provide detailed information concerning public opinion changes over the years since *Penry*.[196]

Although acknowledging the great importance that legislative enactments have in these cases, the brief argues that the Court has never held the state laws to be the consensus.[197] The consensus derives from the American people's views on a particular punishment, not the states'; the Court however, simply recognizes that laws provide important evidence of society's evolution.[198] As stated in the brief, "the States and their legislators are proxies, by which the shared judgment of the American people becomes manifest."[199] Furthermore, the brief explains that the Court's decision will not totally rely on a straight count of laws for and against an issue; instead, to arrive at the public's true sentiment, a decision on a national consensus must account for the best evidence available.[200]

The Amici Curiae strongly believe that a national consensus against executing individuals with mental retardation currently exists in the United States, and present strong evidence that identifies and confirms that national agreement.[201] Moreover, the absence of passed laws does not necessarily undercut the evidence.[202] The various organizations responsible for submitting this brief through one voice state that the evidence of a national consensus is clear:

> [The evidence] shows virtually no support for executing people with mental retardation among legislators, either State or Federal. It shows almost no prosecutors or judges willing to state that they believe individuals with mental retardation should receive the death penalty. It shows governors

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American Network of Community Options and Resources, The Joseph P. Kennedy, Jr. Foundation, The Judge David L. Bazelon Center for Mental Health Law, and the National Association of Protection and Advocacy Systems. *Id.*

195. *Id.*
196. *Id.*
197. *Id.*
198. Amici Brief for AAMR et al. at 16-17.
199. *Id.*
200. *Id.* at 18.
201. *Id.*
202. Amici Brief for AAMR et al. at 14.

> exercising their clemency powers to prevent execution when they come to understand that a defendant has mental retardation. And in an extraordinary array of public opinion surveys, spread across the country, taken by different organizations over a substantial span of time, it shows overwhelming opposition among the American people to the execution of any person who has mental retardation. A clear majority of those Americans who support the death penalty oppose its use for defendants who have mental retardation.[203]

The authors further assert that a shared moral belief exists that individuals with mental retardation do not possess the requisite level of culpability to justify execution.[204] Moreover, the growing public awareness that mental retardation is not a condition caused by the fault of the individual assists in formulating a national consensus.[205] Finally, because a mentally retarded defendant's behavior caused by his condition increases the likelihood that he may be executed despite his factual innocence has strengthened an already morally conscious America.[206]

VIII. Legislative Trends

The plurality's opinion in *Penry* asserted that legislative trends most objectively represent a national consensus.[207] Since *Penry*, significant legislative changes have occurred regarding the execution of the mentally retarded. At the time of the *Penry* decision, only Maryland and Georgia had banned the death penalty for a person with mental retardation.[208] Currently, the number of states whose legislatures have passed similar laws has grown to eighteen.[209] These eighteen states, together with the federal government and the current twelve states that ban the death penalty altogether, constitute a majority of the jurisdictions in the United States.

Although the most apparent objective evidence of changing legislative attitudes remains passed laws, other legislative initiatives indicate a trend towards eliminating individuals with mental

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203. *Id.*
204. *Id.*
205. *Id.* at 38.
206. *Id.* at 39.
207. *Penry*, 492 U.S. at 340.
208. *Id.*
209. *See supra* note 1.

retardation from death penalty consideration. In the year 2001, thirteen states have introduced or voted on legislation prohibiting the execution of the mentally retarded.[210] While the proposed legislation in Nevada, Mississippi, and Texas has not become law, this failure does not indicate a lack of a consensus in those states. In Texas, for example, the proposed law passed both legislative houses before being vetoed on the final day of the vetoing period by Governor Rick Perry.[211] The movement gained enough support to survive committee hearings and pass through both legislative houses in the most infamous death penalty state in America, to only suffer defeat because of one man. The veto does not diminish the fact that a majority of the legislature recognized a consensus against the execution of the mentally retarded. The fact that so many legislative venues are considering the issue indicates movement towards a consensus to ban the execution of the mentally retarded.

Pennsylvania, like its sister states, is also considering the controversial issue of the propriety of executing the mentally retarded in pending legislation. In 2001, both houses introduced bills disallowing a death sentence for a person with mental retardation. State Senator Helfrick introduced Senate Bill number twenty-six that was referred to the judiciary committee on January 22, 2001.[212] A representative from Senator Helfrick's office indicated that Senator Greenleaf, the chairman of the judiciary committee, was asked to schedule the bill for consideration by the Judiciary Committee in fall 2001.[213] Hendrick's office remains optimistic that the bill will pass this year as a result of the great emphasis placed on the issue over the past eighteen months.[214] Concurrently, in the Pennsylvania House of Representatives, Representative Fairchild introduced House Bill number 1861 that was referred to the House Judiciary Committee on July 11, 2001.[215] According to Fairchild's office, the proposal developed from the legislative initiatives identified by a task force, which examined the mental retardation system in Pennsylvania.[216] Representative Fairchild served as

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210. The Justice Project, 2001 *State Legislation on Death Penalty Reform at a Glimpse, at* http://justice.policy.net/relatives/18600.pdf (last visited Jul. 27, 2001).

211. Death Penalty Information Center, *supra* note 1.

212. S. SB 26, (Pa. 2001).

213. Email Interview with Todd Roup, Legislative Assistant with the office of Senator Helfrick (Jul. 27, 2001).

214. *Id.*

215. H.R. HB 1861, (Pa. 2001).

216. Email Interview with Garth Shipman, Legislative Assistant with the office of

chairman of that task force.[217]

While both pieces of legislation purport to address the same problem, the two bills have one major distinction which carries a severe and unfortunate implication. Senator Helfrick's bill defines a person who suffers from mental retardation as "an individual who has significantly sub-average intellectual functioning as evidenced by an intelligence quotient of seventy or below on an individually administered intelligence quotient test and impairment in adaptive behavior, and that the mental retardation is manifested before the individual attains twenty-two years in age."[218] Contrarily, Representative Fairchild's proposed legislation sets the Intelligence Quotient barrier at sixty or below and an age of onset under eighteen.[219] Although the differences may at first seem trivial, a person who studies trends in mental retardation knows the importance of such a variance. Most people with mental retardation have an IQ between sixty and seventy; therefore, Senator Helfrick's bill would protect all of the mentally retarded as defined by the AAMR while Representative Fairchild's bill would only ban the execution of a small portion of these people. The difference in definitions, though important, fails to affect the consistency of the underlying message contained in both bills: Pennsylvania should no longer tolerate the execution of the mentally retarded.

Opponents to banning the execution of mentally retarded persons may suggest that inconsistencies between these state statutes and bills mean that no national consensus exists. For instance, while most states limit the age of onset for mental retardation at eighteen, Indiana's statute places the age at twenty-two.[220] Statutes have also been inconsistent in determining who qualifies as an examiner to present evidence of mental retardation, as well as who hears that evidence. For example, while Florida requires the appointment of two experts in the field of mental retardation to evaluate a defendant, many states do not have any specific guidelines with regard to who can evaluate a person possibly suffering from mental retardation.[221] In addition, some states

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Senator Representative Fairchild (Jul. 30, 2001).

217. *Id.*

218. S. SB 26, (Pa. 2001).

219. H.R. HB 1861, (Pa. 2001).

220. Death Penalty Information Center, *State Statutes Prohibiting the Death Penalty for People with Mental Retardation, at* http://www.deathpenaltyinfo.org/dpicmrstatutes.html (last visited Aug. 7, 2001) (citing IND. CODE § 35-36-9-1 et. seq.).

221. *Id.* (citing FLA STAT. ANN. § 921.137).

require a certain IQ score for a diagnosis of mental retardation, while other states, like Colorado, have no numerical requirement.[222] Opponents of the ban on the execution of the mentally retarded argue that a national consensus against such punishment does not exist because at this point, the nation cannot even agree on defining the class of people to be protected. However the lack of uniformity in the definition or criteria does not diminish the message that legislatures are concerned about the issues surrounding the execution of the mentally retarded.

CONCLUSION

Historically our criminal justice system has advanced a number of purposes for punishment. One can consult almost any text on criminal law and review discussions of retribution, incapacitation, rehabilitation, and deterrence. A truly civil society attempts to strike a balanced application of these theories of punishment. To do so requires a system that permits the court to consider the degree of culpability of any individual sentenced, while at the same time protecting society from repeat predators. Recognition of this balanced approach is evidenced by legislation throughout the country. In recognition of the need to analyze culpability, states have passed laws permitting different types of punishment for those guilty of a crime but mentally ill, and procedures for considering mitigating and aggravating circumstances in sentencing. At the same time, legislatures have set minimum mandatory jail sentences for some crimes and provisions for enhanced punishment for repeat offenders. The same balanced approach should apply when considering the propriety of the death sentence for the mentally retarded.

No argument is made to excuse from punishment one suffering from mental retardation, but instead to hand down the appropriate degree of punishment. Advocates of the death penalty assert that the degree of punishment should be left to the juries hearing the individual cases. The problem is that such an approach subjects the judicial process to the unpredictable prejudices and passions of human beings generated by the circumstances of the crime committed and not by any analysis of individual culpability. An individual who has a documented condition so severe as to affect his ability to function normally in society cannot possess the highest degree of culpability reserved for those deserving the death

222. *Id.* (citing COLO. REV. STAT. § 16-9-401-403).

penalty. Society needs protection from all criminals and some retribution, but these needs can be satisfied with alternative punishment, including life imprisonment without possibility of parole.

The Supreme Court in *Penry* required proof of a national consensus supporting this argument. The existing and proposed legislation, calls for a moratorium on the death penalty generally, and recent public opinion polls should satisfy the Court's request.

Joseph A. Nese, Jr.