

6-1-1989

## Challenging the Death Penalty for Mentally Retarded Defendants: Issues Raised by *Penry v. Lynaugh*

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### Recommended Citation

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**CHALLENGING THE DEATH PENALTY FOR  
MENTALLY RETARDED DEFENDANTS:  
ISSUES RAISED BY  
*PENRY V. LYNAUGH***

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I. INTRODUCTION

The Supreme Court has granted certiorari in *Penry v. Lynaugh*<sup>1</sup> to hear the case of Johnny Paul Penry, a mild to moderately retarded young man who has been sentenced to death for first degree murder. By his own admission, Johnny Paul Penry was convicted of the murder of Pamela Carpenter who had been “beaten, raped and stabbed with a pair of scissors in her own home.”<sup>2</sup> In addition to Penry’s admitted guilt to this brutal murder, however, was evidence that Penry, who was twenty-three years old at the time of the offense, has the mind and the emotional development of a six or

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<sup>1</sup> *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988) (No. 87-6177).

<sup>2</sup> 832 F.2d at 917.

seven year-old child.<sup>3</sup> Defense counsel also presented substantial evidence that Penry had been adversely affected by an abnormal childhood.<sup>4</sup> The 258th District Court of Trinity County, Texas summarized the evidence as follows:

As a telling example of his mental deficiency petitioner refers to the fact that working daily with his aunt, it still required a year to teach him how to write his name . . . . There was evidence suggesting he was frequently and severely [sic] beaten by his mother, spent much of his childhood in state schools, and in his teens was victimized by other men who treated him like a slave.<sup>5</sup>

Despite this evidence, the jury imposed the death penalty. The U.S. Court of Appeals for the Fifth Circuit affirmed.<sup>6</sup> The Supreme Court granted certiorari on two constitutional issues.<sup>7</sup> First, the Court will consider whether the execution of any mentally retarded defendant is invariably cruel and unusual under the eighth amendment to the U.S. Constitution. Second, the Court will determine whether the Texas death penalty statute imposes unconstitutional restraints on jury discretion in sentencing, preventing the *Penry* jury from considering Penry's mental retardation as a mitigating factor. This Note suggests that the Court should reverse Johnny Paul Penry's death sentence by holding that the application of the Texas statute in *Penry* was unconstitutional. If the Court finds that the jury was not statutorily constrained from weighing Penry's mental retardation as a mitigating factor, the Court must address the propriety of his death sentence. Current authority suggests that Penry's sentence is not invalid under the eighth amendment.

This Note examines the appropriateness of executing mentally retarded defendants in the context of the *Penry* appeal. Section II summarizes the issues presented on appeal in *Penry v. Lynaugh*. This section evaluates Penry's claims by analyzing the Fifth Circuit's decision and by presenting the arguments on appeal against the background of current law. This section proposes that, when evaluated in terms of recognized social goals of punishment, the execution of mentally retarded defendants is not inherently cruel and unusual. Section II also concludes, however, that the Texas death penalty

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<sup>3</sup> Brief for Petitioner at 6, *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987), cert. granted, 108 S. Ct. 2896 (1988) (No. 87-6177).

<sup>4</sup> Brief for Petitioner, *supra* note 3, at 7; see 832 F.2d at 917.

<sup>5</sup> *Id.* at 6.

<sup>6</sup> 832 F.2d at 926.

<sup>7</sup> 108 S. Ct. at 2896; 57 U.S.L.W. 3014 (U.S. Aug. 12, 1988).

statute effectively denied Johnny Paul Penry a fair sentencing determination, thus invalidating his death sentence. Section III discusses the treatment of mentally retarded defendants in the competency and culpability phases of criminal trials. This section considers whether mentally retarded defendants are given a fair opportunity to raise the issue of their mental disability at trial. Mentally retarded individuals' mental abilities are often not sufficiently impaired to render them legally incompetent and thus incapable of being found guilty. It is therefore essential that the mentally retarded be permitted to introduce their mental disability as a factor mitigating against harsh punishment.

Sections IV and V of the Note examine whether the mentally retarded should receive special consideration based on their disability. These sections refer to the criminal justice system's approach to juveniles and the mentally ill as possible models for prosecuting mentally retarded offenders. Section IV compares and contrasts juveniles and mentally retarded individuals. These groups are similar in intellectual maturity and emotional development. Age and mental ability are factors which courts have consistently recognized as justification for differential treatment of these two groups. Thus, the Court in *Penry* may rely, by analogy, on the criminal justice system's treatment of juveniles to support a reversal of Penry's death sentence. The law does not completely excuse criminal conduct committed by these types of offenders, however, and the Court is unlikely to do so now.

Section V analyzes the application of evaluative standards developed for mentally ill offenders to mentally retarded defendants. Mental illness and mental retardation may be treated similarly because they both involve impaired mental states. The professional community, however, has adamantly claimed that mental retardation should not be treated as a form of mental illness. In addition, laws that allow mentally ill offenders to be removed from criminal proceedings and thus to avoid conviction and punishment have been widely criticized. Thus, the mental illness model is not likely to be expanded in *Penry* to include mental retardation.

## II. THE *PENRY* APPEAL

Johnny Paul Penry, a mentally retarded person with an IQ in the range of 50–63,<sup>8</sup> challenges his death penalty conviction before

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<sup>8</sup> Brief for Petitioner, *supra* note 3, at 46. Various documents examined at the competency

the Supreme Court. His appeal rests on two arguments. First, Penry argues that it is cruel and unusual punishment under the eighth amendment to execute a mentally retarded person. Second, Penry challenges the Texas sentencing statute and the jury instructions at his own trial under the eighth and fourteenth amendments. Penry argues that the application of the statute in his case did not let the jury "in on the secret" that Penry's mental retardation could be considered as a mitigating factor in determining his sentence.<sup>9</sup> Amici curiae<sup>10</sup> filed on behalf of petitioner believe that Penry is entitled to a reversal based on the inadequacy of the Texas statute.<sup>11</sup> The brief, however, is limited to the issue of executing mentally retarded defendants.<sup>12</sup>

### A. *The Propriety of a Death Sentence in Penry*

The most controversial of the two issues presented for review is whether it is cruel and unusual to execute an individual with the reasoning capacity of a seven year-old.<sup>13</sup> The eighth amendment

hearing placed defendant Johnny Paul Penry's IQ at 51, 54, 56 and 63. *Id.* at 42-48. Dr. Jerome Brown, Ph.D., who examined Penry prior to testifying as an expert at trial, diagnosed Penry as having an IQ of 54. *Id.* at 46. The levels of retardation have been classified as "mild," "moderate," "severe" and "profound." AMERICAN ASS'N ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION (H. Grossman ed. 1983) [hereinafter AAMD].

<sup>9</sup> 57 U.S.L.W. 3505 (Feb. 7, 1989).

<sup>10</sup> Amici curiae in support of petitioner consist of eleven professional organizations: American Association on Mental Retardation, American Psychological Association, Association for Retarded Citizens of the United States, Association for Persons with Severe Handicaps, American Association of University Affiliated Programs for the Developmentally Disabled, American Orthopsychiatric Association, New York State Association for Retarded Children, Inc., National Association of Private Residential Resources, National Association of Superintendents of Public Residential Facilities for the Mentally Retarded, Mental Health Law Project, and National Association of Protection and Advocacy Systems.

<sup>11</sup> Amici curiae for Petitioner at 4, *Penry v. Lynaugh*, 832 F.2d 915, *cert. granted*, 108 S. Ct. 2896 (No. 87-6177) [hereinafter Amici].

<sup>12</sup> *Id.*

<sup>13</sup> Brief for Petitioner, *supra* note 3, at i. Assigning a mental age to a retarded individual attempts to describe the severity of the disability by comparing the retarded individual's intelligence with that of a "mentally typical" person. See J. Ellis & R. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 434 n.105 (1985) (Symposium: ABA Criminal Justice Mental Health Standards) [hereinafter Ellis].

Penry argues that he, who has a seven year-old's reasoning ability, should not be executed. In oral arguments before the Supreme Court, counsel for Penry stated that while every degree of mental retardation should not be disqualified from the death penalty, the line should be drawn at a defendant with Penry's abilities. 57 U.S.L.W. at 3505. Evidence offered in support of this argument, however, shows that the execution of any mentally retarded defendant should be prohibited. Brief for Petitioner, *supra* note 3, at 49. This is the position taken by Amici, and is the issue which this Note will analyze.

prohibits imposing cruel and unusual punishments upon criminal defendants.<sup>14</sup> It has fallen to the courts to define what constitutes cruel and unusual punishment.<sup>15</sup> The Supreme Court has held that imposition of a death penalty upon a convicted defendant is not inherently cruel and unusual.<sup>16</sup> The Court has, however, imposed certain restrictions as to which offenses may be punishable by a death sentence.<sup>17</sup> In making this determination, the Supreme Court in *Penry* will likely look at three factors that it recognizes as indicative of the propriety of capital punishment. These factors are societal consensus, retribution and deterrence.<sup>18</sup>

The existence of a societal consensus regarding executing mentally retarded defendants will be most persuasive to the Court.<sup>19</sup> Although public opinion concerning the death penalty has been variously documented over the years, the most objective evidence reflecting society's attitude is provided by legislation and court decisions. These indicia reflect society's recognition that the mentally retarded should be treated as normal adults. If they are to receive the benefits and privileges accorded to people of normal intelligence, mentally retarded people should also be expected to abide by society's rules and reap the consequences of their infractions.

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<sup>14</sup> The text of 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.

<sup>15</sup> *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2698 (1988); *Coker v. Georgia*, 433 U.S. 584, 591-92 (1977).

<sup>16</sup> "It is now well settled that the death penalty is not invariably cruel and unusual within the meaning of the Eighth Amendment; it is not inherently barbaric or an unacceptable mode of punishment for crime." *Coker*, 433 U.S. at 591.

<sup>17</sup> A death sentence imposed on a defendant convicted of rape was held to be excessive punishment because the crime of rape does not involve the death of the victim. *Id.* at 598. The death penalty, when imposed for an offense of murder, was deemed acceptable because the punishment was proportionate to the severity of the crime. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). The emphasis on proportionality is reflected in all state statutes that authorize the death penalty. See e.g., ARK. STAT. ANN. § 5-4-602 (1987) (death penalty authorized for persons charged with capital murder); DEL. CODE ANN. tit. 11, § 4209 (1974 & Supp. 1987) (death penalty authorized for persons convicted of first degree murder); FLA. STAT. ANN. § 775.082 (1976 & Supp. 1989) (death penalty authorized for person convicted of a capital felony); IND. CODE ANN. § 35-50-29-9 (Burns 1985 & Supp. 1988) (state may seek death sentence for murder); cf. *Enmund v. Florida*, 458 U.S. 782 (1982) (defendants convicted of felony murder could not receive the death penalty where they did not participate in the killing). But see *Tison v. Arizona*, 481 U.S. 137 (1987) (defendants convicted of felony murder who did not participate in the killing could receive a death sentence where their criminal activity exhibited a reckless disregard for human life).

<sup>18</sup> *Thompson*, 108 S. Ct. at 2691-92; *Gregg*, 428 U.S. at 179-83.

<sup>19</sup> This conclusion is based on the Court's reasoning in *Thompson*, in which the Court granted a blanket exclusion for all defendants under the age of sixteen based primarily on public opinion reflected in state legislation. 108 S. Ct. at 2692-96.

## 1. Society's Attitude Toward Capital Punishment for Mentally Retarded Defendants

In determining which punishments society deems acceptable, courts look to history and present practices, legislative determinations, and the response of juries.<sup>20</sup> An examination of these factors is the only reliable means of measuring the "evolving standards of decency that mark the progress of a maturing society."<sup>21</sup> Public opinion about the abilities of the mentally retarded does not indicate that a societal consensus against their execution exists.

Society's attitude toward the mentally retarded individual has come full circle, evolving from a policy which segregated the mentally retarded by involuntary institutionalization to a policy that seeks to incorporate the mentally retarded into normal life activities.<sup>22</sup> Legal reactions to this change in social attitude have been inconsistent, but still broadly reflect this attitudinal shift. Legislation, although not altogether discounting mental retardation as a disability, recognizes that some mentally retarded individuals can function normally. A few states have adopted statutes that grant mentally retarded individuals the right to vote under certain conditions.<sup>23</sup> Some states allow motor vehicle driving privileges to mentally retarded individuals.<sup>24</sup> Judicial responses to the special characteristics of mentally retarded individuals have progressed in a similar fashion. Courts recognize that not all mentally retarded people are incapable of entering into valid contracts or conveying property.<sup>25</sup>

<sup>20</sup> *Coker*, 433 U.S. at 592.

<sup>21</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The acceptability of a punishment should be measured by its use, not its availability, for even though it may be available, it nonetheless may be so offensive to public attitudes that it will never be given out. *Furman v. Georgia*, 408 U.S. 238, 279 (1972) (Brennan, J., concurring). See also *Thompson*, 108 S. Ct. at 2692 n.7 (the punishment should be measured by the frequency of its occurrence or the magnitude of its acceptance).

<sup>22</sup> Parry, *Rights and Entitlements in the Community*, in *THE MENTALLY DISABLED AND THE LAW* 607, 616-19 (1985) [hereinafter *THE MENTALLY DISABLED*]. Because mental retardation is not an illness and therefore not "curable," treatment of the disability has focused on "normalization," a model for habilitating a mentally retarded individual that stresses learning and implementing life skills. *Id.* at 617.

<sup>23</sup> See e.g., N.D. CENT. CODE § 16.1-01-04.5 (1981) (to be denied right to vote one must have a guardian appointed); WIS. STAT. ANN. § 6.03(1)(a) (West 1986) (to be denied right to vote one must be under guardianship or adjudicated incapable of understanding the objective of the electoral process).

<sup>24</sup> See e.g., ALA. CODE § 32-6-7(5), (6) (1975) (license to drive withheld if the mental disability would prevent the driver from exercising reasonable and ordinary care over the vehicle); ALASKA STAT. § 28.15.031(b)(4) (1984) (no license if department has determined that the person cannot drive safely because of the mental disability).

<sup>25</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 15 (1979). Regarding a mentally disabled

Some courts even require medical treatment facilities to consult their mentally retarded patients before administering any form of medical care.<sup>26</sup>

Increased societal awareness, however, has hurt rather than helped the mentally retarded in the criminal context. Upon delivering a conviction, a jury is permitted to use a defendant's lower intelligence and mental disability as justification for mitigating a particular defendant's sentence.<sup>27</sup> The ability of juries to consider these mitigating factors is crucial for mentally retarded defendants who seek to use their subaverage intelligence as a defense to full culpability. Nonetheless, in practice, juries have not accepted mental retardation as a significant mitigating factor.<sup>28</sup> The response of juries to mental retardation, particularly those individuals whose lifestyle indicates that they are apparently able to function normally, indicates that mental retardation rarely mitigates in favor of a lesser sentence for these defendants.<sup>29</sup>

Despite the trend toward treating the mentally retarded as normal adults, Penry contends that contemporary standards indicate that there is strong public sentiment against the execution of mentally retarded defendants.<sup>30</sup> As evidence in support of this argument, Penry offers public opinion indicia including a public opinion poll, Supreme Court decisions and state legislation. Penry first cites to a public opinion survey.<sup>31</sup> This survey has limited evidentiary value, however, because it only polled Florida residents.<sup>32</sup> Since the briefs were filed, a new Texas poll indicated that 73% of the people who participated opposed capital punishment for mentally retarded

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person's capacity to make a will, see GA. CODE ANN. § 53-2-21 (1982); MD. EST. & TRUSTS CODE ANN. § 4-101 (1974).

<sup>26</sup> See *e.g.*, *Rogers v. Commission of the Dep't of Mental Health*, 390 Mass. 489, 458 N.E.2d 308 (1983). For development of the treatment rights for the mentally disabled, see Weiner, *Treatment Rights*, in *THE MENTALLY DISABLED*, *supra* note 22, at 327, 340-51.

<sup>27</sup> See statutes listed *infra* note 134.

<sup>28</sup> *Roach v. Martin*, 757 F.2d 1463, 1483 (4th Cir. 1985) (borderline retardate received death penalty where jury had considered defendant's mental condition as mitigation but concluded "circumstances warranted" death); *State v. Middleton*, 368 S.E.2d 457, 461 (S.C. 1988) (borderline retardate with IQ of 68 received death penalty where jury had considered his mental condition "as indicated by the mitigating circumstances in evidence").

<sup>29</sup> See *supra* note 28; *cf. infra* note 123.

<sup>30</sup> Brief for Petitioner, *supra* note 3, at 49.

<sup>31</sup> *Id.* at 38. The survey was conducted by Amnesty International, and showed that 71% of those polled were opposed to executing mentally retarded defendants.

<sup>32</sup> Despite the fact that the poll was conducted in Florida and therefore has limited relevance to public sentiment in Texas, respondent argues that the survey also suffers from methodological flaws and bias. Brief for Respondent at 40-41, *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988) (No. 87-6177).



defendants.<sup>33</sup> These results may be meaningless to the Court due to the polls' challenged methodology.<sup>34</sup>

More importantly, Penry refers the Court to its recent holdings in *Thompson v. Oklahoma*<sup>35</sup> and *Ford v. Wainwright*.<sup>36</sup> In *Thompson*, the Court held that the execution of defendants under the age of sixteen was constitutionally prohibited.<sup>37</sup> *Ford* prohibits the execution of defendants who are presently insane.<sup>38</sup> These decisions may be relevant to the Court's determination in *Penry*. They are by no means conclusive, however, because neither case involved a mentally retarded defendant.

Finally, Penry relies on a Georgia statute that prohibits the execution of mentally retarded individuals by allowing them to use a "guilty but mentally retarded" plea during the sentencing phase.<sup>39</sup> A similar piece of legislation is currently being considered by the Texas legislature.<sup>40</sup> Although the Texas statute, if passed, would probably not apply retroactively to Johnny Paul Penry, it would indicate that citizens do not want the Texas death penalty statute to apply to mentally retarded defendants. The fact that only one relevant piece of legislation exists, however, indicates that society condones, not condemns, the execution of mentally retarded defendants.<sup>41</sup>

## 2. Social Goals Served by Capital Punishment in *Penry*

The Court in *Penry* will likely also consider whether the execution of mentally retarded defendants serves the judicially recognized goals of punishment, retribution and deterrence.<sup>42</sup> If punishment by death does not achieve these goals to a greater extent than a lesser punishment, the death penalty degenerates into the "pointless infliction of suffering" that is the very essence of "cruel and

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<sup>33</sup> Respondent's Supplemental Brief app. A, *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988) (No. 87-6177).

<sup>34</sup> Respondent argues that this survey is "virtually meaningless" because it did not include the degree of retardation or the facts of the offense. Respondent's Supplemental Brief, *supra* note 33, at 2.

<sup>35</sup> 108 S. Ct. 2687.

<sup>36</sup> 477 U.S. 399 (1986).

<sup>37</sup> 108 S. Ct. at 2700.

<sup>38</sup> 477 U.S. at 409-10.

<sup>39</sup> GA. CODE ANN. § 17-7-131(j) (Supp. 1988).

<sup>40</sup> H.R. 55, 71st Texas Leg., 1988 (authored by Rep. Bob Melton).

<sup>41</sup> See Brief for Respondent, *supra* note 32, at 40.

<sup>42</sup> *Gregg*, 428 U.S. at 182-83.

unusual.”<sup>43</sup> To the extent that retribution and deterrence are still valid functions of the death penalty, execution of mentally retarded defendants promotes these goals.

The Supreme Court in *Gregg v. Georgia* validated retribution as a legitimate objective in deciding when the death penalty ought to be imposed.<sup>44</sup> Retribution serves to ensure that justice has been served. Punishment of offenders is an “expression of society’s moral outrage” that its mores have been violated.<sup>45</sup> The rationale behind retribution as a function of punishment is that one who has morally offended society deserves to be punished, and that punishment should proportionately reflect the severity of the offense.<sup>46</sup> Retribution in death penalty cases has often been criticized.<sup>47</sup> The Supreme Court itself admitted that it may be “unappealing to many.”<sup>48</sup> The Court in *Gregg* concluded, however, that retribution is “essential in an ordered society” in order to prevent resort to self-help methods and vigilantism.<sup>49</sup>

Amici claim that the execution of mentally retarded defendants has no retributive value. They reason that any mentally retarded defendant is less blameworthy than a normal offender simply due to impaired cognitive abilities.<sup>50</sup> Although admitting that the level of impairment varies among mentally retarded individuals in the various classifications, amici claim that the impairment will never be so slight as to approach the normal intelligence range.<sup>51</sup> If the Court were to decide that mentally retarded persons could never be executed, however, it would provoke the very moral outrage which the death penalty was intended to redress. Through such a decision, the Court would excuse all defendants who happened to be mentally retarded, regardless of the heinousness of their offenses. This is contrary to the very ideals of an ordered society.<sup>52</sup>

Deterrence is also an issue which the Court will consider in determining whether execution is an appropriate punishment for

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<sup>43</sup> *Furman*, 408 U.S. at 279 (Brennan, J., concurring).

<sup>44</sup> 428 U.S. at 183.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 184.

<sup>47</sup> See e.g., J. BOWERS, LEGAL HOMICIDE 274 (1984).

<sup>48</sup> *Gregg*, 428 U.S. at 183.

<sup>49</sup> *Id.*

<sup>50</sup> Amici, *supra* note 11, at 19.

<sup>51</sup> *Id.* at 15.

<sup>52</sup> “When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve,’ then there are thrown the seeds of anarchy . . . .” *Gregg*, 428 U.S. at 183 (quoting *Furman*, 408 U.S. at 308 (Stewart, J., concurring)).

mentally retarded offenders. The concept of deterrence encompasses two goals. First, a punishment should deter the individual offender from committing crimes in the future. This type of special deterrence is undoubtedly served because death as a form of punishment is "unique in its severity and irrevocability."<sup>53</sup> Second, a punishment should serve as an example to the public at large in order to provide potential offenders with an incentive to keep their conduct within the limits of the law.<sup>54</sup>

Deterrence has been widely criticized. The rationale for deterrence as an acceptable goal of punishment assumes that the individual has weighed the costs and benefits of alternative acts and has exercised rational judgment in choosing to pursue the unlawful one.<sup>55</sup> The individual's awareness that he would be punished by death for the unlawful act would presumably be a cost that would outweigh the benefits of the choice.<sup>56</sup> One critic seems to suggest that where a crime is attributable to a factor such as mental retardation, the claim that these murderers consciously weigh the pros and cons of their illegal acts is untenable.<sup>57</sup> The Supreme Court responded to this argument in *Gregg*, holding that there are instances where death "undoubtedly is a significant deterrent."<sup>58</sup>

Amici contend that capital punishment has no deterrent effect on mentally retarded defendants.<sup>59</sup> Amici explain that mentally retarded individuals generally cannot distinguish right from wrong.<sup>60</sup> A large number of mentally retarded individuals also exhibit an inability to learn from their mistakes.<sup>61</sup> Therefore, the likelihood that mentally retarded defendants would weigh the consequences of their conduct before acting on their impulses is slight. The notion that capital punishment will have no deterrent effect on mentally retarded defendants actually works against such defendants before a jury. Defendants who cannot appreciate the consequences of their conduct represent a continuing threat to society and are thus the very offenders who should theoretically receive the death penalty.<sup>62</sup>

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<sup>53</sup> *Gregg*, 428 U.S. at 187.

<sup>54</sup> *Id.* at 185–86.

<sup>55</sup> J. BOWERS, *supra* note 47, at 272.

<sup>56</sup> *Id.* at 272–73.

<sup>57</sup> *Id.* at 272.

<sup>58</sup> 428 U.S. at 185–86.

<sup>59</sup> Amici, *supra* note 11, at 19.

<sup>60</sup> *Id.* at 8.

<sup>61</sup> *Id.* at 7.

<sup>62</sup> As a result, defense lawyers may be hesitant to bring up their clients' mental retardation

### B. *The Texas Statute and Its Application in Penry*

*Penry* also challenges the constitutionality of the Texas death penalty statute.<sup>63</sup> *Penry* claims that the jury was “effectively precluded” from considering his mental retardation as a mitigating factor in imposing punishment.<sup>64</sup> *Penry* also contends that the jury was inadequately informed as to the weight it could give to mitigating factors, such as mental retardation, due to insufficient jury instructions.<sup>65</sup> Even though counsel for *Penry* claims that a blanket exclusion for this group is “appropriate and necessary,”<sup>66</sup> the *Penry* appeal may be resolved simply by re-examining the validity of the Texas statute or by declaring the jury instructions insufficient. These alternatives would require a retrial of *Penry*’s sentence on remand. Either of these two alternatives are likely to be more appealing to the Court than the radical departure from capital punishment standards advocated by petitioner.

#### 1. The Constitutionality of the Texas Death Penalty Statute

The Texas death penalty statute provides that if the jury affirmatively answers three “special issues,” the court must sentence the defendant to death.<sup>67</sup> In the *Penry* case, two issues were relevant to sentencing: the deliberateness of *Penry*’s conduct and the probability of his future threat to society. *Penry* argues that this type of mandatory sentencing scheme conflicts with the idea that juries must be allowed to act upon any mitigating circumstances that they consider relevant to their determination.<sup>68</sup> The Supreme Court has

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during sentencing out of fear that the jury will hold the disability against the defendant. See Reid, *Unknowing Punishment*, Student Law., May 1987, at 18, 22.

<sup>63</sup> Brief for Petitioner, *supra* note 3, at i.

<sup>64</sup> *Id.* at 35.

<sup>65</sup> *Id.* *Penry*’s claim of inadequate jury instructions is two-fold: the court failed to define specific terms, and the court failed to inform the jury the manner of consideration it could give to mitigating evidence. This Note will concentrate on the latter claim.

<sup>66</sup> *Id.* at 16.

<sup>67</sup> Petitioner in *Penry* was convicted of murder under TEX. PENAL CODE ANN. § 19.03 (Vernon 1974), and was sentenced to death according to TEX. CRIM. PROC. CODE ANN. art. § 37.071(b) (Vernon 1981 & Supp. 1987), which requires the jury to answer three special issues: (1) whether the conduct of the defendant . . . was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) whether the conduct of the defendant in killing the deceased was reasonable in response to the provocation, if any, by the deceased. *Penry*, 832 F.2d at 919.

<sup>68</sup> 832 F.2d at 920.

required the incorporation of mitigating factors in sentencing statutes in order to ensure that death penalties would not be imposed arbitrarily.<sup>69</sup> A death penalty imposed arbitrarily constitutes a cruel and unusual punishment under the eighth amendment.

By failing to provide the jury with the opportunity to grant mercy to Penry, the statute placed an "intolerable burden" on Penry at trial.<sup>70</sup> The jury's response to the special issues, based on the evidence, would be in the affirmative, and thus the death penalty would be mandatory. In order to be spared from capital punishment, Penry argues that his only choice was to ask the jury to violate their sworn duty to apply the law:

Penry could only suggest to the jury that if they did not believe a mentally retarded person should get the death penalty they should pick one special issue and vote 'no' even if the State had proven the answer should be 'yes.' That is, Penry could only suggest jury nullification of the law.<sup>71</sup>

The U.S. Court of Appeals for the Fifth Circuit expressed concern that the "facial narrowness" of the statute may have precluded the jury from fully acting upon Penry's arrested mental and emotional development.<sup>72</sup> The court stated, "Penry's conviction is a good example of mitigating circumstances that pose a problem under the Texas scheme," because despite the abundance of evidence that indicated that Penry was less culpable than the ordinary offender, the death penalty was imposed.<sup>73</sup>

Arguably, Penry's mental retardation would be considered by the jury when determining the deliberateness of the crime and his potential threat to society.<sup>74</sup> Even if Penry's mental retardation and abnormal childhood had been considered, however, these factors probably would have prompted the jury to answer the special issues affirmatively. Thus, the Texas statute does not provide a framework which allowed the jury to depart from its responses to the special issues and grant a lesser sentence to Penry. Instead, the statute

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<sup>69</sup> *E.g.*, *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Gregg*, 428 U.S. at 153; *Profitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

<sup>70</sup> Brief for Petitioner, *supra* note 3, at 25.

<sup>71</sup> *Id.* at 24.

<sup>72</sup> *Penry*, 832 F.2d at 926. Mitigating evidence to be used by the jury included the fact that defendant could not read or write, never advanced beyond the first grade, was diagnosed as mildly to moderately retarded, and had an abused childhood. *Id.* at 925.

<sup>73</sup> *Id.* at 925.

<sup>74</sup> *Id.*; *see also Penry*, 832 F.2d at 927 (Garwood, Circuit Judge, concurring).

increased the likelihood that mentally retarded defendants like Penry would receive the death penalty.

The Fifth Circuit points out how evidence that should have served to mitigate against death "made it more likely, not less likely," that a death sentence would be imposed:<sup>75</sup>

[T]he Penry jury was allowed only to answer two questions. First, was the killing deliberate with reasonable expectation of death. Having just found Penry guilty of an intentional killing, and rejecting his insanity defense, the answer to that issue was likely to be yes . . . . The second question then asked whether Penry would be a continuing threat to society. The mitigating evidence shows that Penry could not learn from his mistakes. That suggests an affirmative answer to the second question.<sup>76</sup>

Although expressing an opinion that the Texas statute may indeed be unconstitutional, the Fifth Circuit did not feel that it had the authority to declare it invalid.<sup>77</sup> The court declared itself bound by the Supreme Court's decision in *Jurek v. Texas*<sup>78</sup> and subsequent Fifth Circuit cases which upheld the constitutionality of the Texas death penalty statute.<sup>79</sup> Although *Jurek* was the Court's response to the same statutory claim presented in Penry's appeal, neither *Jurek* nor any of its upholding cases involved a challenge brought by a mentally retarded defendant sentenced according to the Texas statute.

## 2. The Adequacy of the Jury Instructions

If the Supreme Court reaffirms its *Jurek* holding, Penry's sentence may be reversed on the basis of inadequate jury instructions. In resolving the special issues, the jury was instructed to take into consideration all of the evidence submitted during the full trial of the case.<sup>80</sup> Petitioner claims that this instruction was insufficient, for it failed to tell the jury where and how mitigating circumstances could affect its responses to the two issues.<sup>81</sup> In an objection raised at trial, defense counsel requested that the jury be instructed as follows:

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<sup>75</sup> *Penry*, 832 F.2d at 925.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* The Fifth Circuit arrives at its holding rather abruptly, resulting in an illogical conclusion based on the court's previous analysis of the deficiencies in the Texas statute.

<sup>78</sup> 428 U.S. at 276.

<sup>79</sup> *Penry*, 832 F.2d at 926.

<sup>80</sup> Brief for Petitioner, *supra* note 3, at 21.

<sup>81</sup> *Id.* at 24.

you may take into consideration all of the evidence . . . submitted to you in . . . the trial of the first part of this case wherein you were called up[on] to determine the guilt or innocence of the Defendant and all of the evidence . . . as permitted for you in the second part of the trial wherein you are called upon to determine the special issues hereby submitted to you.<sup>82</sup>

Counsel for petitioner claimed that the jury should have been told not only that it may consider all of the evidence, whether mitigating or aggravating, but that they should also have been instructed how to act upon this evidence.<sup>83</sup>

Should the Supreme Court agree with Penry's argument, there is still a possibility that Penry will receive the death penalty on remand. Although this argument is not the most beneficial for Penry, it is the least controversial means of resolving Penry's appeal. If resolved on this point, it would not be the first time the Court has reversed a death sentence on a procedural deficiency rather than addressing the broader constitutional issue of the limits of the death penalty in general.<sup>84</sup>

### III. THE MENTALLY RETARDED DEFENDANT IN THE CRIMINAL JUSTICE SYSTEM: ISSUES OF COMPETENCY AND CULPABILITY

Two essential issues are raised when mentally retarded individuals are accused of a criminal offense. First, the court must determine if the mentally retarded defendant is competent to stand trial. If so, a defendant's retardation may still be brought up as a defense prior to sentencing, when the court determines whether the defendant possesses the requisite culpability to justify the full imposition of criminal liability. Thus, two sets of issues not presented for the Court's consideration are nonetheless raised by the *Penry* appeal. The risk of mentally retarded defendants receiving the death penalty could be eliminated by either excluding them from trial on competency grounds or by broadly interpreting the insanity plea in

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<sup>82</sup> *Id.* at 5.

<sup>83</sup> *Penry*, 832 F.2d at 920.

<sup>84</sup> The Supreme Court had the opportunity to rule on the constitutionality of executing a juvenile defendant in *Eddings*, but avoided the challenge by deciding the case on less controversial grounds. 455 U.S. at 104. The Court focused on the trial judge's refusal to consider the defendant's young age, immaturity and troubled childhood. *Id.* at 112-17. The Court held that the trial judge's decision contradicted the established guidelines for the consideration of mitigating factors. *Id.* For criticism of the Court's decision, see generally Case Comment, *Eighth Amendment — Minors and the Death Penalty: Decision and Avoidance*, 73 J. CRIM. L. & CRIMINOLOGY 1525 (1973) [hereinafter *Decision and Avoidance*].

order to encompass every mentally retarded defendant. These blanket exclusion issues need to be analyzed according to their impact on the criminal justice system. Although the criminal system may put mentally retarded defendants at a disadvantage, these two alternatives fail to evaluate individual offenders according to existing standards.

Both competency and culpability entail an analysis of the defendant's mental state. The judicial inquiry differs, however, as to when the defendant's state of mind becomes an issue and what standards will be used to justify a release from liability. A competency hearing determines an accused's present ability to understand and assist in the trial proceedings.<sup>85</sup> Where the issue is resolved at the beginning of the proceedings, the accused is removed before the issue of guilt or innocence is even considered. Mentally retarded defendants often do not meet the test for competency because their conduct at trial does not raise a doubt as to their ability to be a participant in the proceedings.<sup>86</sup> Although the defendant's demeanor should not dispose of the issue, it nonetheless influences the court's determination.<sup>87</sup>

A determination of competency has a detrimental effect on mentally retarded defendants, for it effectively precludes defendants from using their mental disability as a defense. Culpability examines the mental state of the defendant at the time of the commission of the crime.<sup>88</sup> The issue of guilt is resolved, but defendants may decrease their culpability by claiming that at the time of the offense they lacked the requisite capacity to appreciate the wrongfulness of their conduct or could not conform their conduct to the law.<sup>89</sup> Mental retardation is certainly a mental state which should be taken into account when determining the issue of culpability. Juries, however, have not reacted by considering retardation as a mitigating factor at sentencing.<sup>90</sup> Where a court has determined that a defendant is competent to stand trial, the court in effect states

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<sup>85</sup> Weiner, *Mental Disability and the Criminal Law*, in *THE MENTALLY DISABLED*, *supra* note 22, at 693, 693.

<sup>86</sup> See *Allard v. Hegemore*, 572 F.2d 1, 5 (1st Cir. 1978); *Bowers v. Battles*, 568 F.2d 1, 4-5 (6th Cir. 1977). There is also evidence that Penry's conduct may have influenced the jury, particularly where testifying experts noted his alertness and ability to carry on a conversation. Brief for Respondent, *supra* note 32, at 8-9.

<sup>87</sup> See *United States v. Masters*, 539 F.2d 721, 728 (D.C. Cir. 1976).

<sup>88</sup> Weiner, *supra* note 85, at 693.

<sup>89</sup> See *infra* notes 258-259 and accompanying text.

<sup>90</sup> See *supra* note 28.



that the defendant's retardation is not substantial enough to warrant a lesser sentence.<sup>91</sup>

### A. Standards to Measure Competency

Three factors which determine if a defendant is competent to stand trial are relevant to mentally retarded defendants. First, defendants should have the mental ability to cooperate fully in the proceedings.<sup>92</sup> This assures that the defendant can be an active participant in the trial, resulting in the disclosure of all relevant facts and a fair trial.<sup>93</sup> Second, defendants should have the mental ability necessary in order to exercise their fundamental rights.<sup>94</sup> The most important right which must be protected is the defendants' ability to waive their right against self-incrimination. Third, defendants should have the ability to comprehend the punishment and the reasons for it.<sup>95</sup> Thus, the mere fact a defendant is mentally retarded does not render him incompetent to stand trial.<sup>96</sup> Mentally disabled individuals must show something in addition to the mere presence of the mental impairment in order to convince the court that they are incompetent.<sup>97</sup>

In *Dusky v. United States*, the Supreme Court defined the test for competency as whether a defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as a factual understanding of the proceedings against him."<sup>98</sup> Competency should not be determined based on whether "the defendant [is] oriented to time and place."<sup>99</sup> Generally, statutes after *Dusky* require that defendants show that they lack the capacity either to assist in their own defense or to understand the nature of the proceedings.<sup>100</sup> The mentally retarded, because of inaccurate application of

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<sup>91</sup> See *People v. Reynolds*, 65 A.D.2d 952, 953, 410 N.Y.S.2d 484, 485 (1978).

<sup>92</sup> *Weiner*, *supra* note 85, at 694.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Mickenberg, *Competency to Stand Trial*, 17 CAL. W.L. REV. 365, 390 (1981). See also *McCune v. Estelle*, 534 F.2d 611, 612 (5th Cir. 1976) (low intelligence cannot be equated with incompetency).

<sup>97</sup> See *Graham v. Lynaugh*, 854 F.2d 715, 721 (5th Cir. 1988); *McCune*, 534 F.2d at 612.

<sup>98</sup> 362 U.S. 402, 402 (1960) (quoting the Solicitor General).

<sup>99</sup> *Id.*

<sup>100</sup> See e.g., CONN. GEN. STAT. ANN. § 54-56(d) (West 1985); IND. CODE ANN. § 35-36-3-1(a) (Burns 1985); ILL. ANN. STAT. ch. 38 para. 104-11(a) (Smith-Hurd 1980).

the *Dusky* standard, often are not declared incompetent to stand trial.

Statutory standards for the determination of competency include three major elements: who can raise the issue of competency, who will determine competency, and what will be required for a finding in favor of the defendant.<sup>101</sup> The issue of a defendant's competence may be raised by the prosecution, defense, and even the judge.<sup>102</sup> The judge's decision will usually depend on whether a reasonable belief exists as to the defendant's capacity to participate.<sup>103</sup> Statutes do not define what types of evidence are sufficient to raise a reasonable belief. Despite the Supreme Court's warning that determinations of competency should not be based on whether the defendant is oriented to time and place, this factor inevitably influences the judge's decision.<sup>104</sup>

Mental retardation does not raise a reasonable doubt as to competency, particularly when the disability is mild or moderate. First, a jury brings its layman's definition of "mild" or "moderate" to the courtroom, and thus may believe that a retarded individual with this "label" has a lesser disability.<sup>105</sup> Second, the jury may find it difficult to match mental ability to a defendant's IQ.<sup>106</sup> Proof in the form of a lower than average IQ is sometimes the only evidence a defendant has. It is usually not sufficient evidence, however, to

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<sup>101</sup> See *supra* note 100; *infra* notes 102–103 and note 114.

<sup>102</sup> State statutes allow counsel for defendant or for the state to raise the issue of competency. See *e.g.*, COLO. REV. STAT. ANN. § 16–8–110(2)(b) (1986); CONN. GEN. STAT. ANN. § 54–56d(c) (West 1985); LA. CODE CRIM. PROC. ANN. art. § 642(a) (West 1981). Some statutes reserve discretion to the trial judge. See *e.g.*, COLO. REV. STAT. § 16–8–110(2)(a) (1986); D.C. CODE ANN. § 24–3–1(a) (1981).

<sup>103</sup> See *e.g.*, ILL. ANN. STAT. ch. 38 para. § 104–11(a) (Smith-Hurd 1980) (bona fide doubt); IND. CODE ANN. § 35–36–3–1(a) (Burns 1985 & Supp. 1988) (reasonable grounds to doubt); KY. REV. STAT. ANN. § 504.100(1) (Michie 1985) (reasonable grounds to doubt).

<sup>104</sup> *Supra* note 87. Failure to apply the correct competency standard may be attributed to the Supreme Court's holding in *Ford v. Wainwright*, which was unclear as to what procedures are necessary to resolve a doubt of sanity. See *Martin*, 686 F. Supp. at 1557 (*Ford* is a "procedural quagmire"). *E.g.*, 106 S. Ct. at 2606 (Marshall, J., concurring) (de novo evidentiary hearing required); *Id.* at 2610 (Powell, J., concurring) ("substantial threshold showing [is necessary] merely to trigger the hearing process"). See *e.g.*, *Lowenfield v. Butler*, 108 S. Ct. 1456, 1457 (1988) (Court denied stay of execution over dissent's strong objection that defendant's evidence constituted reasonable grounds for a hearing).

<sup>105</sup> Labels assigned according to the degree of disability create a problem for the layman, who may interpret "borderline," "mild," or "moderate" as euphemistic terms indicating that the individual's retardation is relatively minor. Ellis, *supra* note 13, at 423.

<sup>106</sup> A jury may be incapable of understanding, without adequate explanation, that an IQ of 70, which marks the upper range of mental retardation, is two standard deviations below the average person's score. See Ellis, *supra* note 13, at 422; *Amici*, *supra* note 11, at 5.

who is a retarded illiterate.<sup>124</sup> The Fifth Circuit, applying *Connelly*, found that Penry had voluntarily waived his rights.<sup>125</sup>

Some commentators claim that mentally retarded individuals respond to police questions in an attempt to please the interrogator.<sup>126</sup> Thus, it is arguable that mentally retarded individuals truly understand the concept of waiver.<sup>127</sup> The mentally retarded defendant is unable, however, to prevent the prosecution from using pre-trial statements as part of the case. Thus, in *Penry*, the jury was allowed to hear Penry's confession.<sup>128</sup> *Connelly* also works against the retarded defendant in a competency hearing. It indicates to the court that the defendant has a rational as well as a factual understanding of the proceedings.

At least two alternatives exist to resolve the competency of mentally retarded offenders. First, the courts or the legislatures could devise a standard designed for mentally retarded defendants. For example, Florida provides for the appointment of an expert experienced in mental retardation when the issue of competence raised at trial is based on a suspicion that the defendant is mentally retarded.<sup>129</sup> This statute at least guarantees that the proper expert is conducting the competency evaluation. Second, courts could find that all mentally retarded defendants are incompetent to stand trial. A blanket finding of incompetency would remove all mentally retarded defendants from criminal proceedings, thus eliminating the risk that a defendant like Penry would ever receive the death penalty. This form of exclusion is inappropriate. Though all mentally retarded persons may have some cognitive impairment, it is inaccurate to declare all mentally retarded defendants incompetent. Their disability may have been ameliorated through education or the "normalization" process of habilitation. Where this type of habilitation is successful and available, it reinforces the need for a case

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with an IQ of 70 voluntarily waived his rights where he was employed, could read and write, and was enrolled in a carpentry course); *People v. Lux*, 328 N.Y.S.2d 587, N.E.2d 923 (1971) (borderline retardate with eighth grade education waived his rights where he was able to hold a job in the armed forces and thus was capable of functioning normally in society). Compare *People v. Bruce*, 62 A.D.2d 1073, 1073, 403 N.Y.S.2d 587, 588 (1978) (defendant with an IQ of 79 did not voluntarily waive his rights where he could not read and was not gainfully employed).

<sup>124</sup> Brief for Petitioner, *supra* note 3, at 4.

<sup>125</sup> *Penry*, 832 F.2d at 918.

<sup>126</sup> Reid, *supra* note 62, at 20.

<sup>127</sup> *Id.*

<sup>128</sup> *Penry*, 832 F.2d at 918.

<sup>129</sup> FLA. STAT. ANN. § 916.11(1)(d) (West Supp. 1989).

by case determination of the competency of mentally retarded offenders.

### B. *Mitigating Factors and Reduced Culpability*

A finding of competency at trial has a detrimental effect on mentally retarded defendants who wish to bring up their mental state during the sentencing proceedings. This result may have occurred in *Penry*. The jury has the ultimate discretion to consider a defendant's retardation in order to justify a reduced sentence. However, when mentally retarded defendants such as *Penry* who are found competent offer evidence of their mental disability to mitigate against a harsh punishment, juries nonetheless impose the death penalty.<sup>130</sup> The behavior of the *Penry* jury suggests its belief that if a mentally retarded defendant "is mentally competent to be held guilty of a capital crime, . . . he is competent to be punished for that crime."<sup>131</sup>

By having the discretion to impose life imprisonment during the sentencing phase, juries have statutory authority to grant mercy to a defendant convicted of a crime punishable by death.<sup>132</sup> Statutes may grant the jury the opportunity to consider any evidence it believes demonstrates a need to reduce the sentence under the circumstances.<sup>133</sup> Some legislatures developed a list of factors which should be considered in mitigation.<sup>134</sup> In these statutes, three factors are particularly relevant to mentally retarded defendants. First, the jury may address whether the defendant committed the felony while under the influence of extreme mental or emotional disturbance. Second, the jury can consider whether the defendant had the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. A third factor affecting a mentally retarded person's sentence is the jury's consideration of the age or mental state of the defendant. Yet even where mitigating factors to be considered are specifically listed by statute, the jury

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<sup>130</sup> See *State v. Brogdon*, 426 So.2d 158, 167-68 (La. 1983) (reduced culpability claim rejected based on evidence presented in competency hearing). Cf. *Bowden v. State*, 250 Ga. at 186-87, 296 S.E.2d at 577 (petition for new trial rejected despite new evidence which could have been relevant to competency and mitigation).

<sup>131</sup> *Brogdon*, 824 F.2d at 341.

<sup>132</sup> See statutes listed *supra* note 17.

<sup>133</sup> See e.g., DEL. CODE ANN. tit. 11, § 4209(c) (1974); GA. CODE ANN. § 17-10-30(b) (1982); IDAHO CODE § 19-2515(c) (1987).

<sup>134</sup> See e.g., ALA. CODE § 13A-5-51 (1975); ARIZ. REV. STAT. ANN. § 13-703(g) (1978 & Supp. 1988); CAL. PENAL CODE § 190.3 (1988).

remains free to consider any evidence that has been presented throughout the proceedings in determining appropriate punishment.<sup>135</sup>

Essential to a fair sentence is the opportunity for the jury to hear and act upon the evidence presented.<sup>136</sup> Preservation of this opportunity requires proper jury instruction as to the "nature and function of mitigating circumstances."<sup>137</sup> Jurors need to be reminded that they have absolute discretion to consider all evidence they have heard.<sup>138</sup> Some states ensure the jury's consideration by requiring that the jury put in writing the aggravating and mitigating circumstances which it found relevant to its determination.<sup>139</sup>

Culpability is relevant to *Penry* because *Penry* raises an issue as to what weight mitigating factors should be given. *Penry's* challenge asserts, in effect, that all defendants who can demonstrate that one or more of the statutory mitigating factors is applicable should never receive the death penalty.<sup>140</sup> No court, however, has interpreted sentencing statutes in the manner that *Penry* proposes. Such an interpretation equates the jury's consideration with a "quantitative or tallying process," where defendants whose total number of mitigating factors exceed the number of aggravating factors would be excused from the death penalty.<sup>141</sup> Weighing aggravating and mitigating factors is a discretionary process, not an absolute "predicate" for a life sentence reduction.<sup>142</sup>

Respondent in *Penry* argues that *Penry's* sentence did result from a consideration of the mitigating factors in evidence.<sup>143</sup> The

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<sup>135</sup> Statutes may allow juries to consider any mitigating factors authorized by law in addition to the listed provisions. See e.g., CONN. GEN. STAT. ANN. § 53(a)-46a(g) (1985); S.C. CODE ANN. § 16-3-20(c) (Law. Coop. 1976 & Supp. 1988). Case law interpreting the statutory provisions has also found no limit on what the jury may consider as mitigating evidence as to the particular defendant. See e.g., *Eddings*, 455 U.S. at 113-14; *Redd v. State*, 242 Ga. 876, 882, 252 S.E.2d 383, 388 (1979). The jury is restricted, however, to the aggravating circumstances which are enumerated. See e.g., FLA. STAT. ANN. § 921.141(5) (1985 & Supp. 1989); OKL. STAT. ANN. tit. 21, § 701.10 (1983 & Supp. 1989).

<sup>136</sup> *Penry*, 832 F.2d at 923-24.

<sup>137</sup> *High v. Kemp*, 819 F.2d 998, 990 (11th Cir. 1987), cert. granted sub nom. *High v. Zant*, 108 S. Ct. 2896 (1988). In this case, even though the judge did not "belabor instructions on mitigation," there was no need to because defendant had offered no mitigating evidence on his own behalf. 819 F.2d at 992.

<sup>138</sup> *Id.* at 991.

<sup>139</sup> See e.g., S.C. CODE ANN. § 16-3-20(c) (Law. Coop. 1976 & Supp. 1988).

<sup>140</sup> For a similar argument, see Brief of Appellant at 30, *State v. Roach*, 273 S.C. 194, 255 S.E.2d 799 (1979), cert. denied, 100 S. Ct. 437 (1980) (No. 79-5247).

<sup>141</sup> *Wilkins*, 736 S.W.2d at 415-16.

<sup>142</sup> *Thomas v. State*, 240 Ga. 393, 401, 242 S.E.2d 1, 7 (1977).

<sup>143</sup> Brief for Respondent, *supra* note 32, at 23-24.

fact that Penry received the death penalty thus reflects "the extent that the jury believed that Penry's crime was attributable to" his mental retardation and abusive childhood.<sup>144</sup> While respondent's argument may be valid in terms of the jury's answers to the special issues, it leaves open the possibility that the jury was not properly instructed.

#### IV. A JUVENILE MODEL FOR MENTALLY RETARDED DEFENDANTS

By designing a criminal justice system sensitive to the unique characteristics of mentally retarded defendants, doctrines of competency and culpability could be used to protect these defendants from injustice. One potential model for dealing with mentally retarded individuals is the criminal justice system's treatment of juveniles. Historically, society has paternalistically protected juveniles from the full consequences of their actions. Recent convictions of juvenile defendants, however, indicate that society is taking a less lenient attitude toward youthful offenders.<sup>145</sup> The Supreme Court, however, has resisted this recent trend toward treating juveniles as adults. In *Thompson v. Oklahoma*, the Court held that execution of a fifteen year-old defendant is cruel and unusual punishment.<sup>146</sup> The holding in *Thompson* is particularly significant in determining how the criminal justice system should treat mentally retarded defendants such as Penry. If the Court accepts the proposition that mentally retarded individuals are similar to juveniles, it may reverse Penry's sentence under *Thompson*. Still, it is likely that the Court will apply *Thompson* narrowly, to juveniles only.

##### A. Age and Mental Retardation

The similarity of mentally retarded individuals to juveniles is illustrated by the definition of mental retardation adopted by the American Association on Mental Deficiency (AAMD). This characterization has been universally accepted by other professional communities, and by legislation and court opinions.<sup>147</sup> The AAMD classifies mental retardation as a deficit in intellectual functioning and

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<sup>144</sup> *Id.*

<sup>145</sup> The increasing number of juvenile offenders has led to a "get tough" stance in the courts, allowing juveniles to be prosecuted as adults. See Note, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 IND. L.J. 757, 757-59 (1986) [hereinafter *Capital Punishment for Minors*].

<sup>146</sup> 108 S. Ct. at 2700.

<sup>147</sup> Amici, *supra* note 11, at 5.

adaptive behavior, which exhibits itself as a “significant limitation 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.”<sup>148</sup> This deficit becomes more apparent when a mental age is assigned to the retarded individual’s disability.

When classifying an individual’s degree of retardation, the extent of the mentally retarded person’s intellectual functioning is compared to the level of cognitive ability found in a person of normal development.<sup>149</sup> Because mentally retarded persons have a significant impairment, their intellectual ability corresponds to that of a very young child. For example, Johnny Paul Penry, who has a mental age of six and one-half years, has the same ability to learn as a six and one-half year-old child.<sup>150</sup> Thus, his conduct should be evaluated in terms of his mental age, for he is drawing upon the knowledge that one would ordinarily expect a six and one-half year-old child to have accumulated and retained.<sup>151</sup> Penry argues that, like children, mentally retarded individuals have an impaired ability to control impulse and to think in terms of cause and effect.<sup>152</sup> Without the ability to think rationally, mentally retarded defendants lack an “essential ingredient” of culpability.<sup>153</sup>

This intellectual impairment, in turn, affects the social maturity of the retarded individual.<sup>154</sup> For example, the court-appointed psychiatrist in *Penry* determined that Johnny Paul Penry has a social maturity at the nine or ten year-old level.<sup>155</sup> Thus, he knows how to get around the world about as well as the average nine or ten year-old child. Therefore, he should be held accountable only for the experiences one might expect a nine or ten year-old child to have had. Yet despite the similarity in intelligence and maturity in mentally retarded and juvenile individuals, courts have generally not been convinced that a mentally retarded person represents the “full equivalent” of a juvenile.<sup>156</sup> The behavior of juries, in punishing mentally retarded defendants to the same extent as normal

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<sup>148</sup> AAMD, *supra* note 8, at 11, quoted in Ellis, *supra* note 13, at 422.

<sup>149</sup> See *supra* note 13.

<sup>150</sup> Brief for Petitioner, *supra* note 3, at 46.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 49.

<sup>153</sup> Amici, *supra* note 11, at 7.

<sup>154</sup> *Id.* at 6.

<sup>155</sup> Brief for Petitioner, *supra* note 3, at 46.

<sup>156</sup> Ellis, *supra* note 13, at 435.

offenders, indicates the difficulty in adopting a juvenile analogy. Juries must be reacting to the appearance of mentally retarded defendants, specifically their physical age, rather than their mental age, because mentally retarded defendants are receiving the death penalty.<sup>157</sup> Juries are not directing their inquiry to the "character and development of [the mentally retarded person's] mind."<sup>158</sup>

The failure to treat the mentally retarded and juveniles as parallel classes of defendants in the criminal context is not consistent with the law's treatment of these two groups generally. The law fosters a "caring, nurturing parent" role with respect to juveniles.<sup>159</sup> This paternalism is evident in the legislature's denial of the rights, privileges and duties of citizenship to juveniles because they involve decisions that youths are not yet qualified to undertake because of their lack of knowledge and experience.<sup>160</sup> The restrictions encompass voting eligibility, driving and alcohol privileges, and marriage.<sup>161</sup> Similarly, the law also takes a protective stance in its failure to extend citizenship privileges to those who are mentally retarded or mentally ill.<sup>162</sup> One commentator contends that the purpose of these laws is to protect the mentally retarded from themselves who, because of their inability to make rational decisions, may be hurt by a wrong decision.<sup>163</sup>

Some courts, however, do not altogether deny to mentally retarded individuals privileges available to citizens of average intelligence. The legal community has recognized that "mentally disabled" persons, which term encompasses the mentally retarded, have the capacity to contract and to convey property.<sup>164</sup> Yet even in these

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<sup>157</sup> See *Penry*, 832 F.2d at 917-18; *Roach*, 757 F.2d at 1483; *Middleton*, 368 S.E.2d at 461. See also *Bowden v. State*, 250 Ga. at 186-87, 296 S.E.2d at 577 (new evidence of defendant's retardation did not convince the court that a new trial was necessary).

<sup>158</sup> *Ellis*, *supra* note 13, at 435 n.111 (quoting *State v. Schilling*, 95 N.J.L. 145, 148, 112 A. 400, 402 (1920)).

<sup>159</sup> *Thompson*, 108 S. Ct. at 2693 n.23.

<sup>160</sup> *Id.*

<sup>161</sup> State statutes reflect a unanimous view that these activities should be restricted as to children, but disagree at what age the restriction should be lifted. See *Thompson*, 108 S. Ct. at 2701-06.

<sup>162</sup> For example, the law may place restrictions on the right to vote for mentally retarded and mentally ill individuals. See *e.g.*, ALA. CONST. Art. VIII § 182 (1975) (all idiots and insane persons shall be disqualified); ARIZ. CONST. Art. 7 § 2 (1984) (persons non compos mentis or insane shall not be qualified); CAL. CONST. Art. 2 § 4 (1983) (mentally incompetent electors will be disqualified).

<sup>163</sup> *Parry*, *Decision-Making Rights Over Persons and Property*, in *THE MENTALLY DISABLED*, *supra* note 22, 435, 446 [hereinafter *Decision-Making Rights*].

<sup>164</sup> *Id.* at 439. Capacity to contract also includes the capacity to enter into a valid marriage



instances the law will retain a watchful eye over the transaction.<sup>165</sup> Again, the law seeks to protect “disabled” individuals from doing something they would not otherwise have done if they had a full understanding of their actions and the resulting consequences.<sup>166</sup>

### B. *Mental Retardation and Thompson v. Oklahoma*

The Supreme Court held in *Thompson v. Oklahoma* that it is unconstitutional to impose capital punishment on a defendant who is fifteen years old at the time of the crime.<sup>167</sup> The defendant, William Wayne Thompson, was convicted of the murder of his brother-in-law and sentenced to death.<sup>168</sup> The facts of the case showed that “the victim had been shot twice, and that his throat, chest and abdomen had been cut. He also had multiple bruises and a broken leg. His body had been chained to a concrete block and thrown into a river where it remained for almost four weeks.”<sup>169</sup> Despite the fact that Thompson was a “child” under state law, the lower court concluded that he should be held accountable for his acts to the same extent as an adult.<sup>170</sup> The trial court certified Thompson as an adult for purposes of the proceeding because there were no “reasonable prospects for rehabilitation” within the juvenile system.<sup>171</sup> At trial, Thompson was found guilty and sentenced to death. The Court of Criminal Appeals of Oklahoma affirmed the conviction.<sup>172</sup> The appellate court rejected Thompson’s eighth amendment challenge, stating that imposition of the death penalty on a minor certified to stand trial as an adult does not constitute cruel and unusual punishment.<sup>173</sup>

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contract. See generally Brakel, *Family Law*, in THE MENTALLY DISABLED, *supra* note 22, 507, 507.

<sup>165</sup> According to the Second Restatement of Contracts, a person’s capacity to contract is measured by his ability to understand the nature and consequences of the transaction. RESTATEMENT (SECOND) OF CONTRACTS § 15(1)(a) (1981). Similarly, the affected individual’s capacity to marry depends upon his understanding of the nature of the marital relationship. Brakel, *supra* note 164, at 507. A will on behalf of a mentally disabled person is valid only upon a showing that the individual was of sound mind and memory and was aware of his possessions and of the persons to whom he wished to bequeath them. *Decision-Making Rights*, *supra* note 163, at 440.

<sup>166</sup> *Decision-Making Rights*, *supra* note 163, at 440.

<sup>167</sup> 108 S. Ct. at 2700.

<sup>168</sup> *Id.* at 2690.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* (Court’s emphasis).

<sup>172</sup> *Thompson v. State*, 724 P.2d 780 (Okla. Crim. App. 1986).

<sup>173</sup> *Id.* at 784.

The Supreme Court vacated the sentence and remanded the case to the lower court to determine the appropriate punishment.<sup>174</sup> In reaching this decision, the Court focused on legislative determinations, the behavior of juries and the promotion of deterrence and retribution. In finding a societal consensus against the execution of fifteen year-old minors, the Court cited to a nationwide adoption of statutes that set a minimum age for voting, driving, marrying and buying alcohol.<sup>175</sup> Even more persuasive to the Court was the existence of a juvenile court in each of the fifty states, none of which designated a maximum age for jurisdiction below the age of sixteen years.<sup>176</sup> This evidence, in addition to statutes that set the minimum age for death penalty eligibility at sixteen years, indicated to the Court that evolving standards of decency prohibited execution of defendants who were fifteen years old or younger at the time of their offense.<sup>177</sup> Statistics used by the Court revealed that only five defendants slated for execution between 1982 and 1986 were under the age of sixteen.<sup>178</sup> This emphasized to the Court that society, as exhibited in the behavior of juries, regarded the imposition of the death penalty on a fifteen year-old defendant as "abhorrent to the conscience of the community."<sup>179</sup>

The Court also reasoned that imposing capital punishment on defendants below the age of sixteen does not further the deterrent and retributive goals of punishment.<sup>180</sup> The Court stated that youths deserve a lesser punishment because they have less capacity to control their conduct and to think in long range terms than adults have.<sup>181</sup> Because juveniles are not capable of understanding the consequences of their conduct as a fully rational adult would, the Court reasoned that they will not be able to learn from their mistakes and reform their conduct accordingly.<sup>182</sup> Similarly, the Court concluded that no retributive function is served by executing fifteen year-old defendants because they are not as culpable as adults who commit the same crimes. Punishment of fifteen year-olds, who lack the maturity and knowledge of adults, should reflect this reduced

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<sup>174</sup> *Thompson*, 108 S. Ct. at 2700.

<sup>175</sup> *Id.* at 2693.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 2696.

<sup>178</sup> *Id.* at 2697.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 2699.

<sup>181</sup> *Id.* at 2698 (quoting *Eddings*, 455 U.S. at 115).

<sup>182</sup> *Id.* at 2700.

blameworthiness.<sup>183</sup> The death penalty, when imposed on this class of defendants, thus amounts to no more than the “purposeless and needless imposition of pain and suffering.”<sup>184</sup>

Dissenting, Justice Scalia stated that in some cases a juvenile defendant may not be mature and responsible enough to be punished as an adult.<sup>185</sup> However, he would not allow an automatic exclusion to any defendant “so much as one day under sixteen.”<sup>186</sup> The dissent rejects the premise that every defendant under the age of sixteen is insufficiently developed as “sociological[ly] and moral[ly] . . . implausible.”<sup>187</sup> Justice O’Connor agrees with the dissent here, stating in her concurring opinion that the characteristics that justify treating juveniles differently than adults will vary widely among different individuals of the same age.<sup>188</sup> The majority appeared to have overlooked that Thompson was not an ordinary fifteen year-old. The murder he committed was particularly brutal, and was committed with deliberate premeditation.<sup>189</sup> Witnesses testifying at trial stated that Thompson told people of his plan to kill his brother-in-law so that his sister would “not have to worry about him anymore.”<sup>190</sup> Justice Scalia adopts the premise that regardless of physical age, some minors are so “fully ‘streetwise,’ hardened criminals [that they deserve] no greater consideration than that properly accorded all persons suspected of crime.”<sup>191</sup> The dissenting opinion is, in essence, a reaffirmation of the merits of a system which utilizes mitigating factors in sentence determinations on a case by case basis.<sup>192</sup>

<sup>183</sup> *Id.* at 2699.

<sup>184</sup> *Coker*, 433 U.S. at 592.

<sup>185</sup> The dissent treats a juvenile’s age as a “rebuttable presumption” of relative immaturity. *Thompson*, 108 S. Ct. at 2712 (Scalia, J., dissenting).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 2714. *See also High*, 819 F.2d at 993 (“Constitution does not prohibit imposing the death penalty on a defendant who, while seventeen years old, intentionally and viciously took a life in cold blood”). *But see Capital Punishment for Minors, supra* note 145, at 761 (“death penalty is always inappropriate for minors”).

<sup>188</sup> *Thompson*, 108 S. Ct. at 2709 (O’Connor, J., concurring). O’Connor states that although drawing the line may falsely assume that individuals of the same age have the same maturity, failure to do so would be inconsistent with the way society’s laws have distinguished adults from children.

<sup>189</sup> 108 S. Ct. at 2712 (Scalia, J., dissenting).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 2719 (quoting *Fare v. Michael C.*, 442 U.S. 707, 734 n.4 (1979) (Powell, J., dissenting)).

<sup>192</sup> Public opinion that youth should always be a factor bearing upon the jury’s determination of punishment is reflected in statutory provisions. *See* statutes listed *supra* note 134. *See also High*, 819 F.2d at 993 (quoting *Prejean v. Blackburn*, 743 F.2d 1091, 1098 (5th Cir.

### 1. Will the *Penry* Court Expand *Thompson*?

The Supreme Court has been presented the opportunity in *High v. Kemp* and *State v. Wilkins* to hold that the execution of a defendant under the age of eighteen should be prohibited.<sup>193</sup> Reaction of the individual members of the Court to the facts in *Thompson* indicates that the Court will rule in favor of executing juvenile defendants over the age of fifteen. Although the Court generally agreed that there must be some age below which the death penalty may be inappropriate, the justices disagreed on the interpretation of the evidence as to where that line may be drawn.<sup>194</sup> This type of disagreement is not present in either *High* or *Wilkins*. In *Thompson*, the evidence used by the plurality to indicate society's repugnance toward the execution of fifteen year-old minors consisted of statutes which set the minimum age for imposition of the death penalty at sixteen or seventeen years.<sup>195</sup> Because the defendants in *Wilkins* and *High* are sixteen and seventeen years old, respectively, the Court implies that there is a societal consensus for executing these defendants.

Of equal significance to the Court's opinion in *Thompson* was that the defendant should never have been tried as an adult because the Oklahoma legislature chose to set the minimum age for criminal proceedings at sixteen years.<sup>196</sup> Again, neither the *High* or the *Wilkins* appeal present these facts. The statutes involved in these two cases allow individuals of the defendants' ages to be properly tried and convicted as adults.<sup>197</sup> Therefore, these cases do not represent a ripe opportunity for the Supreme Court to expand the *Thompson* holding.

The facts in *High* and *Wilkins* support the dissenting opinion in *Thompson* that age alone cannot dispose of the eighth amendment

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1984)) ("Nothing in society's standards of decency compels more than the consideration of youth as a mitigating factor"). *But see Capital Punishment for Minors, supra* note 145, at 760-61 (consideration of youth as a mitigating factor is insufficient).

<sup>193</sup> 108 S. Ct. at 2896.

<sup>194</sup> Justice O'Connor stated that the fact that nineteen states have not set a minimum age for the death penalty has the legal effect of rendering juveniles death-eligible and thus presents a "real obstacle" to finding a consensus. *Thompson*, 108 S. Ct. at 2708 (O'Connor, J., concurring). The dissent, focusing on recent legislation which lowered, not raised, the age at which juveniles could be tried as adults, claimed that society was adopting a tougher attitude with respect to juvenile offenders. *Id.* at 2715-16 (Scalia, J., dissenting).

<sup>195</sup> *Supra* note 176 and accompanying text.

<sup>196</sup> *Thompson*, 108 S. Ct. at 2690 n.2.

<sup>197</sup> Georgia has set 17 years of age as the minimum age for the death penalty. GA. CODE ANN. § 17-9-3 (1982). The Missouri death penalty statute, however, does not explicitly state a minimum age for capital punishment. MO. ANN. STAT. § 565.030 (Vernon Supp. 1989).

issue. Both Heath Wilkins, who was sixteen at the time of his crime, and Jose High, who was seventeen, exhibited the type of heinous, anti-social behavior which the death penalty seeks to remedy. Wilkins was convicted of the murder of Nancy Allen, who was stabbed eight times during the course of a robbery committed by defendant.<sup>198</sup> The evidence showed that Wilkins had deliberately planned the strategy of the robbery, stating to others that “he would kill whoever was behind the counter because he wanted no witnesses.”<sup>199</sup> High also was convicted of a murder committed in the course of a robbery.<sup>200</sup> High’s victim was an eleven year-old boy, whom High repeatedly taunted before finally shooting him.<sup>201</sup> These two defendants do not represent the type of “child” whose age should be an excuse for their criminal conduct. Their relative maturity, as in their streetwiseness and intent, renders, if not requires, them to be tried and punished as adults. Their age should be considered only as mitigating evidence during the sentencing phase.

If the Supreme Court refuses to accept a blanket exclusion based on a defendant’s age, the Court will likewise deny Penry a reprieve from death row simply because of his mental retardation. As with juveniles, whose age is not a conclusive indication of maturity, the degree of retardation and therefore the extent of personal responsibility will vary with the individual. The fact that some mentally retarded persons can learn, live and work normally<sup>202</sup> emphasizes the validity of individual determinations of defendants’ culpability. Therefore retardation, like age, should remain as mitigating evidence only, not a complete release from punishment as advocated by petitioner in *Penry*.

## 2. Will the *Penry* Court Adopt a Juvenile Analogy?

Penry may not even have to rely on the outcome of *High* and *Wilkins* if he can convince the Court to adopt the juvenile comparison. Because Penry has a mental age of six and a half years, *Thompson*, which prohibits the execution of any offender under the age of sixteen years, would be directly applicable. A decision in favor of the defendants in *High* and *Wilkins*, however, would indi-

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<sup>198</sup> *Wilkins*, 736 S.W.2d at 412.

<sup>199</sup> *Id.* at 411.

<sup>200</sup> *High*, 819 F.2d at 990.

<sup>201</sup> *Id.*

<sup>202</sup> Amici, *supra* note 11, at 6.

cate that mental ability, like age, can operate as a fixed standard in death penalty cases.

In order to prove that a similarity exists between juveniles and mentally retarded individuals, Penry will need to convince the Court that he has lived a life of comparable quality to that of a six and one-half year-old child. This would require a factual investigation of Penry's own experiences and mental maturity. In order for a blanket exclusion based on a defendant's mental age to work, courts would need to look at the facts in each case where a mentally retarded defendant's mental age was below the fifteen year-old level. This type of inquiry, however, is already provided for in statutory mitigation requirements.

There is some indication in *Thompson* that the Court would be hesitant to make this analogy. In Justice O'Connor's concurring opinion in *Thompson*, she emphasizes that her holding "does not imply that [she] would reach a similar conclusion in cases involving 'those of extremely low intelligence, or those over 75 [sic], or any number of other appealing groups as to which the existence of a national consensus regarding capital punishment may be in doubt . . .'"<sup>203</sup> In deciding that the execution of defendant in *Thompson* was unconstitutional, Justice O'Connor based her opinion not on the nature of the defendant, but on the nature of the sentencing statute. The statute, she reasoned, lacked the "earmarks of careful consideration" because it was not clear whether the legislature intended to include minors as eligible for the death penalty.<sup>204</sup> Any future opinion she would render in favor of a similarly "appealing" group would require "similarly persuasive evidence."<sup>205</sup> Because the constitutionality of the Texas death penalty statute is being challenged on the grounds that its provisions are vague, the Court could use O'Connor's rationale in *Thompson* to decide *Penry*. By doing so, the Court would be finding in favor of the individual defendant, and not in favor of the group defendant represents, as it did in *Eddings v. Oklahoma*.<sup>206</sup>

#### V. THE MENTALLY ILL AND THE MENTALLY RETARDED

In deciding *Penry*, the Supreme Court may feel more secure in drawing upon an established field of law, the criminal treatment of

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<sup>203</sup> 108 S. Ct. at 2711 n.\* (O'Connor, J., concurring).

<sup>204</sup> *Id.* at 2711.

<sup>205</sup> *Id.* at 2711 n.\*.

<sup>206</sup> *Supra* note 84.

the mentally insane. Not only has the law reflected a more compassionate treatment of the mentally ill, the Supreme Court itself held that the execution of a defendant who is insane because afflicted with a mental illness is cruel and unusual punishment prohibited by the eighth amendment. No court, however, has applied the *Ford* holding to mentally retarded defendants.<sup>207</sup> In fact, the professional community claims that the problems faced by mentally retarded offenders in the criminal justice system are the result of society trying to treat retardation as a mental illness.<sup>208</sup> Penry himself argues that although mentally ill and mentally retarded individuals should be treated the same in that neither group should be death penalty eligible, the reasons for making such a rule are different because the disabilities are not alike.<sup>209</sup> It is therefore unlikely that the Court will see the need to broadly interpret *Ford* so as to include Penry's appeal.

#### A. Summary of *Ford v. Wainwright*

The Supreme Court in *Ford v. Wainwright* held that the execution of a defendant who is presently insane constitutes cruel and unusual punishment under the eighth amendment.<sup>210</sup> Alvin Ford was convicted of murder and sentenced to death.<sup>211</sup> At the time of trial, Ford showed no signs of incompetency, nor did he claim that at the time of the offense he was suffering from any impaired mental state.<sup>212</sup> However, while awaiting his execution, Ford began to exhibit "paranoid schizophrenic" behavior which gradually worsened.<sup>213</sup> He developed an obsession with the Ku Klux Klan and believed that the prison guards were conspiring to take the inmates and others hostage.<sup>214</sup> He referred to himself as "Pope John Paul, III."<sup>215</sup> His conduct ultimately degenerated to the point where he would only communicate in a "code characterized by intermittent

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<sup>207</sup> Mentally retarded defendants who have used *Ford* as authority for their own capital punishment challenges have been summarily dismissed as stating a claim which has no legal merit. *Martin v. Dugger*, 686 F. Supp. 1523, 1573 (S.D. Fla. 1988). See *Penry*, 832 F.2d at 918; *Middleton*, 368 S.E.2d at 461. Cf. *Brogdon*, 824 F.2d at 341 (mentally retarded defendant had no authority for claiming that his execution was cruel and unusual).

<sup>208</sup> See *supra* notes 112-15 and accompanying text.

<sup>209</sup> Brief for Petitioner, *supra* note 3, at 36-37.

<sup>210</sup> 477 U.S. at 399.

<sup>211</sup> *Id.* at 401.

<sup>212</sup> *Id.* at 401-02.

<sup>213</sup> *Id.* at 402.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

use of the word one."<sup>216</sup> At a hearing to determine Ford's competency to be executed, three psychiatrists agreed that Ford had a significant mental illness, but yet could fully comprehend that he was being sentenced to death.<sup>217</sup> Based on these findings, the trial court upheld the sentence.<sup>218</sup>

The Supreme Court held that defendants may not be executed while they are insane.<sup>219</sup> To support its holding, the Court relied on common law principles and an analysis of the deterrent and retributive value of executing defendants who presently suffer from a substantial mental illness. In examining common law, the Court found no "unanimity" of rationale why mentally ill defendants should not be executed, but found no authority that countenanced the punishment.<sup>220</sup> Particularly persuasive to the Court was the following passage from Blackstone's Commentaries:

If, after [a man] be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed . . . [for] he might have alleged something in stay of judgment or execution.<sup>221</sup>

The Court concluded that mentally ill defendants, because of disturbances in their thought processes, are not capable of comprehending why they are being "singled out and stripped of [their] fundamental right to life."<sup>222</sup> Execution of a defendant who cannot "come to grips with his own conscience," therefore, does not contribute to the community's need to offset a crime with a punishment of similar "moral quality."<sup>223</sup> Without this retributive element, the execution of insane defendants amounts to the "barbarity of exacting mindless vengeance" that is constitutionally prohibited.<sup>224</sup>

### *B. Application of Ford to Mentally Retarded Defendants*

Interpretation of *Ford* has led courts to conclude that the inquiry into competence to be executed should not be limited to a

<sup>216</sup> *Id.* at 403.

<sup>217</sup> *Id.* at 404.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 410.

<sup>220</sup> *Id.* at 408.

<sup>221</sup> *Id.* at 407 (quoting 4 W. BLACKSTONE, COMMENTARIES 24-25 (1769)).

<sup>222</sup> *Id.* at 409.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 409-10.



diagnosis of mental illness.<sup>225</sup> “A condemned prisoner need not have all mental faculties; the prisoner need only appreciate the connection between the crime and its punishment.”<sup>226</sup> While the *Ford* standard does not encompass all mentally ill defendants, its use in the courts results in the exclusion of mentally retarded defendants.<sup>227</sup> Under the present system, mentally retarded defendants can only be excused from the full extent of punishment available at law if the sentence they receive reflects that the jury has considered their lower intelligence. This will be reflected in the jurors’ response to the defendant’s inability to appreciate the criminality of his acts or to conform his conduct to the requirements of the law.<sup>228</sup> A reduced sentence will result only if the jury has found these to be sufficient circumstances to mitigate against the imposition of the death penalty.

Application of the common law principles cited in *Ford* indicates that the *Ford* holding should include mentally retarded defendants. Blackstone’s Commentaries state that “idiots and lunatics are not chargeable for their own acts, if committed when under these capacities.”<sup>229</sup> “Idiot” here refers to a label once used for the mentally retarded. Although Penry classifies as an “idiot” according to Blackstone, he seeks a different holding than *Ford*. *Ford* addresses a defendant’s competency to be executed. Penry, however, wants the Court to declare that his mental retardation rendered him incapable of acting with the requisite culpability to justify a death sentence.<sup>230</sup>

If *Ford* were to apply to culpability issues, the mentally ill and the mentally retarded should not be conveniently grouped. Mental retardation is not a form of mental illness, as petitioner in *Penry* points out.<sup>231</sup> Although Penry agrees that neither insane nor mentally retarded defendants should be executed, the reasons for this claim are different because the two are “different phenomena.”<sup>232</sup> An insane person should not be executed because “[he] is so out of touch with reality that he is not aware of why he is being exe-

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<sup>225</sup> *Martin*, 686 F. Supp. at 1572–73. See *State v. Rice*, 757 P.2d 889, 913 (Wash. 1988). Cf. *U.S. v. Hearst*, 412 F. Supp. 858, 859 (N.D. Cal. 1975) (“severe mental illness, even if sufficient to exculpate the defendant if found to exist at the time of the offense, would not necessarily render the defendant incompetent to stand trial”).

<sup>226</sup> *Martin*, 686 F. Supp. at 1572–73.

<sup>227</sup> See *supra* note 207.

<sup>228</sup> See *supra* note 134 and accompanying text.

<sup>229</sup> *Ford*, 477 U.S. at 406 (quoting 4 W. BLACKSTONE, COMMENTARIES at 24–25 (1769)).

<sup>230</sup> Brief for Respondent, *supra* note 32, at 38–39.

<sup>231</sup> Brief for Petitioner, *supra* note 3, at 36.

<sup>232</sup> *Id.* at 37.

cuted.”<sup>233</sup> A mentally retarded person, on the other hand, is aware of the circumstances, yet should not be held fully accountable for his crime because of a deficit in adaptive behavior.<sup>234</sup> Although mentally retarded individuals, particularly those in the less severe range of disability, are generally not so out of touch with reality that they do not know what is going on around them, their deficit in adaptive behavior reduces their ability to understand the implications of their functioning in the real world to a simpler level than an average adult.<sup>235</sup>

Amici contend that because of their impaired ability to understand causation and consequences, mentally retarded defendants lack the culpability that is an essential element of retribution.<sup>236</sup> Without this element of moral culpability, imposition of the death penalty does not reflect the necessary relationship between a defendant's punishment and his blameworthiness.<sup>237</sup> Despite the fact that the level of retardation and therefore the effects of the disability will vary among individuals, Amici contend that every mentally retarded defendant is incapable of acting with the degree of culpability which justifies imposition of the death penalty.<sup>238</sup> Amici claim that even the mentally retarded individual at the lowest level of disability still has a substantial deficit in adaptive behavior compared to a person of average intelligence.<sup>239</sup>

This is particularly difficult for a jury to comprehend, particularly when the defendant is classified as mildly retarded. It may be difficult for the untrained observer to distinguish between “borderline” individuals and mildly retarded persons.<sup>240</sup> Borderline individuals are not formally classified as retarded, although they do have lower than average intelligences that should be used in mitigation.<sup>241</sup> However, if an exclusion for all mentally retarded defendants, even the mildly retarded, is granted, it would appear unfair to a jury to deny a *Ford* application to borderline individuals.

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<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 44.

<sup>236</sup> Amici, *supra* note 11, at 7.

<sup>237</sup> *Id.* at 12.

<sup>238</sup> *Id.* at 13.

<sup>239</sup> *Id.* at 15.

<sup>240</sup> The category of borderline retardation had been used to describe individuals whose IQs fell in the 68–83 range, but the profession has since abandoned the classification. See Ellis, *supra* note 13, at 422 n.44.

<sup>241</sup> Amici, *supra* note 11, at 5–6 n.2.

The most compelling reason for not extending the *Ford* rule to encompass mentally retarded defendants is the fact that mental illness and mental retardation are not the same type of defect.<sup>242</sup> The mentally ill suffer from an illness that temporarily disturbs thought processes.<sup>243</sup> Mentally retarded individuals, however, have a permanently impaired ability to learn.<sup>244</sup> Mental retardation is defined as a “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.”<sup>245</sup>

Whereas mentally retarded defendants are not so readily identifiable,<sup>246</sup> mentally ill defendants, due to the nature of their illness, are often removed from the proceedings on the basis of incompetence. Yet even if found competent to stand trial, mentally ill defendants have access to the insanity defense.<sup>247</sup> This defense reduces their culpability by removing mentally ill offenders from the sentencing proceedings altogether.<sup>248</sup> The insanity defense has generally not been available to mentally retarded defendants because retardation has not met the legal requirements for “insanity” despite its effect on the mental state of the defendant.<sup>249</sup>

Some states have defined insanity on the basis of the offender’s ability to distinguish right from wrong, which is referred to as the *M’Naghten* rule.<sup>250</sup> The *M’Naghten* rule limits use of the insanity defense to those defendants who, at the time the crime was committed, did not know that what they were doing was wrong.<sup>251</sup> This standard, as interpreted by the courts, effectively bars the mentally retarded defendant from invoking the insanity defense. In *Brogdon v. Butler*, the court held that “mental retardation does not constitute insanity or the incapacity to know the difference between right and

<sup>242</sup> *Supra* notes 112–15 and accompanying text.

<sup>243</sup> Ellis, *supra* note 13, at 423–24.

<sup>244</sup> *Id.* at 424.

<sup>245</sup> AAMD, cited in Ellis, *supra* note 13, at 421.

<sup>246</sup> *Supra* notes 112–15 and accompanying text.

<sup>247</sup> Under the insanity defense, the defendant admits the commission of the crime but shifts responsibility for it from himself to the disease or defect which prevents him from being classified as a criminal acting with the full extent of punishable culpability. Weiner, *supra* note 85, at 707.

<sup>248</sup> A judgment of incompetency to stand trial results in the institutionalization of the defendant until sane. See statutes listed *supra* notes 102–03.

<sup>249</sup> This is a result of the failure to distinguish between legal and medical sanity. See *infra* notes 114–15 and accompanying text.

<sup>250</sup> Daniel M’Naghten’s Case, 8 Eng. Rep. 718 (H.L. 1843), discussed in Weiner, *supra* note 85, at 709.

<sup>251</sup> *Id.*

wrong. It is only the latter disability, not the former, that serves as a defense to conviction and also to punishment."<sup>252</sup>

In refusing to extend the holding in *Ford* to mentally retarded defendants, courts may be assuming that since the "irrationality, paranoia, and delusions that can indicate mental illness and are related to criminality are not indicators of mental retardation,"<sup>253</sup> a mentally retarded person would know the difference between right and wrong. Amici reject this rationale. According to Amici, mentally retarded offenders have a limited ability to reach the full moral reasoning ability of the average adult because of impaired intellectual functioning and adaptive behavior.<sup>254</sup> This impaired moral development would almost certainly manifest itself in a limited ability to distinguish between right and wrong,<sup>255</sup> and may even result in an inability to learn from past mistakes.<sup>256</sup>

The *M'Naghten* rule has been criticized for being too narrow, thereby denying access to the defense to those, like the mentally retarded, who should be eligible.<sup>257</sup> In an attempt to remedy this inequity, more than half the states have adopted the test for culpability proposed by the American Law Institute.<sup>258</sup> Under the ALI standard, defendants can use their mental state as a defense if, "as a result of mental disease or defect [they] lack substantial capacity either to appreciate the criminality [wrongfulness] of [their] conduct or conform [their] conduct to the requirements of law."<sup>259</sup>

This standard is better suited to serve the mentally retarded defendant, for "mental defect" encompasses mental retardation.<sup>260</sup> However, application of the standard to mentally retarded defendants illustrates the benefits of a case by case determination of culpability rather than a blanket exclusion for all disabled offenders. The ALI's use of the word "appreciate" instead of "know"<sup>261</sup> allows the factfinder to evaluate the extent and effect of the disability on the offender, which brings up the problem of degree of retardation

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<sup>252</sup> 824 F.2d at 341.

<sup>253</sup> Ellis, *supra* note 13, at 427.

<sup>254</sup> Amici, *supra* note 11, at 8.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 7. Penry suggests that the inability to learn from past mistakes is a better test to determine whether the defendant should be held culpable. Brief for Petitioner, *supra* note 3, at 37.

<sup>257</sup> Weiner, *supra* note 85, at 710.

<sup>258</sup> *Supra* note 134 and accompanying text.

<sup>259</sup> Model Penal Code § 4.01 (1985).

<sup>260</sup> Ellis, *supra* note 13, at 437.

<sup>261</sup> Weiner, *supra* note 85, at 711-12.

and how it differs from the average adult. If this lack of appreciation does not manifest itself in some physically identifiable handicap, the jury in most instances will not consider it.<sup>262</sup>

Only one state<sup>263</sup> has recognized that mental retardation, like mental illness, diminishes a defendant's responsibility for criminal conduct. Georgia has recently amended its insanity statute to encompass a defendant who pleads or is found guilty by jury verdict but who is also mentally retarded.<sup>264</sup> The statute thereby denies imposition of the death penalty on a mentally retarded defendant. Although it indicates recognition of the decreased culpability of mentally retarded defendants, it is unlikely that this factor alone will indicate to the Supreme Court in *Penry* that there is a societal consensus against executing mentally retarded defendants.

Public sentiment, particularly amongst the legal community, indicates some reluctance to expand the exclusion. First, lawyers do not want to be "burdened with an alternative set of rules" for mentally retarded defendants.<sup>265</sup> Some lawyers, particularly prosecutors, find no flaws in the current laws.<sup>266</sup> Others believe that making low intelligence and an inability to adapt to society's rules an exception would signal a complete breakdown of the criminal justice system, giving "license [to] every illiterate moron to violate the law with impunity."<sup>267</sup> Second, opposition should be expected due to society's suspicion that mental illness can be easily feigned, and its reluctance to allow any excuse that would subvert commonly held social values, such as punishment of those who commit wrongs.<sup>268</sup> There may be more convincing evidence that society condones the fact that mentally retarded defendants do receive punishment as a jury sees fit under the consideration of mitigating factors.

## VI. CONCLUSION

The Supreme Court will decide this term if execution of a mentally retarded defendant is cruel and unusual punishment un-

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<sup>262</sup> See *supra* note 108 and accompanying text.

<sup>263</sup> However, the Texas legislature is currently considering an amendment to its insanity statute. At the time of this writing, the bill has been sent to Committee. H.R. 55, 71st Texas Leg., 1988 (authored by Rep. Bob Melton).

<sup>264</sup> GA. CODE ANN. § 17-7-131(j) (Supp. 1988).

<sup>265</sup> Manna, *Crimes of Innocence*, Student Law., Oct. 1980, at 24, 27.

<sup>266</sup> Reid, *supra* note 62, at 21-22.

<sup>267</sup> Manna, *supra* note 265, at 26.

<sup>268</sup> Perlin, *The Supreme Court and the Mentally Disabled Criminal Defendant: Recent Developments*, 15 BULL. AM. ACAD. PSYCHIATRY L. 391, 401 (1987).

der the eighth amendment of the Constitution. Petitioner contends that such a holding is necessary and appropriate. Penry argues that the procedural safeguards within the criminal justice system are not operating to shield the less culpable mentally retarded individual from the full extent of criminal liability. Yet, such a rule would be contrary to the longstanding history of the criminal procedures used in our justice system. Although execution of this appealing group of defendants may raise dissent in the community, it is equally true that exclusion of this group of defendants would create inefficiency within the system and would work against the individualized administration of justice.

The Supreme Court could elect to decide *Penry* on other grounds, a tactic it has already used in deciding the constitutionality of executing juveniles presented in *Eddings v. Oklahoma*. Penry contends that the sentencing procedure in his case did not allow the jury to act upon the mitigating evidence presented as to diminish defendant's culpability. If the Court agrees, it will have no need to determine the broader eighth amendment issue. If the Court does find that the jury was given adequate opportunity to grant mercy to this defendant and chose not to despite the ample evidence of mitigating circumstances, it will be necessary to determine if this is a punishment that is constitutionally prohibited.

To assist in their determination, the Supreme Court could look to its past decisions. Their recent decision in *Thompson v. Oklahoma* will be helpful because of the similarities that have been recognized between mentally retarded individuals and juveniles. However, the Court's holding in *Thompson* did not reflect an attitude that all juveniles, regardless of age or relative maturity, should be ineligible for death penalty imposition. The Court, in tandem with *Penry*, will hear cases involving sixteen and seventeen year-old defendants. If the Court finds in favor of the defendants in *State v. Wilkins* and *High v. Zant* on the basis of their age, the Court may extend the exemption to mentally retarded defendants because of their mental age. However, the Court did not indicate a willingness either to expand the *Thompson* holding or to accept a juvenile comparison. In fact, through Justice O'Connor's opinion, there is some indication that the Court would be hesitant to rule in favor of any other appealing group, even those defendants with lower than average intelligence.

The Court could likewise decide to expand its *Ford v. Wainwright* decision to encompass mentally retarded defendants. However, despite the fact that the professional community deems these two

disabilities as comparable in a capital punishment sense, no court has applied the *Ford* holding to anyone but a mentally ill defendant. Based on public opinion which shows a mistrust of the use of mental illness as a defense, it is unlikely that the Court would make an unpopular rule even more controversial by expanding its application to accommodate other mental disabilities, including mental retardation.

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