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Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis

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"I had to listen real close, . . . I had to catch on one word, and the next word, I have to try and catch on that, and I get lost very quick . . . . It's not good though. It's bad. It's bad to be retarded."
Limmie Arthur[1]

"Three generations of imbeciles are enough."
Oliver Wendell Holmes[2]

"No justification can be had for the execution of a child of ten or eleven in any society that calls itself civilized. If a child of ten or eleven should not be executed under any circumstances, then surely a person who may have a chronological age of twenty, but a mental age of ten or eleven, should not be put to death."
Judge Fitzpatrick[3]

I. INTRODUCTION

Today, on death rows across the United States, sit a number of men with the minds of children. These people are mentally retarded.[4] Typical of these individuals is Limmie

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1. *Retarded Killer's Sentence Fuels Death Penalty Debate*, The Washington Post, June 22, 1987, at A5, col. 1.
2. Buck v. Bell, 274 U.S. 200, 207 (1927).
3. Smith v. Kemp, 664 F. Supp. 500, 507 (M.D. Ga. 1987).
4. It is estimated that possibly as many as 250 of the approximately 2,000 persons

Arthur, who currently is imprisoned at Central Correctional Institution in Columbia, South Carolina.[5] Although Arthur is twenty-eight years old, all the mental health professionals who have evaluated him, including employees of the South Carolina Department of Corrections, agree he has the mental capacity of approximately a 10-year-old child. He is the seventeenth of eighteen children of sharecroppers in rural South Carolina. His mental retardation manifested itself at an early age. When he was socially promoted from the third grade at the age of twelve, he could not even write his own name, despite having applied his best efforts to learn this rudimentary task.

Arthur was convicted and sentenced to death for the murder of a neighbor.[6] At his first trial, his court appointed

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on death row in the United States are mentally retarded. *See* Blume, REPRESENTING THE MENTALLY RETARDED DEFENDANT, THE CHAMPION, November 1987, at 32. However, this is a very rough estimate. Due to problems in identification of persons with mental retardation, it is impossible to state with precision exactly how many people with mental retardation have been sentenced to death. *Id.*

5. We represented Arthur at his second sentencing trial, conducted in May, 1987 in Conway, South Carolina. Professor Ruth Luckasson, one of the leading experts in the country in the area of mental retardation offenders, suggests Arthur in typical of mentally retarded offenders on death row. Professor Luckasson evaluated Arthur and testified at a hearing held on a motion for reduction of sentence after he was sentenced to death. *See generally Retarded Killer's Sentence Fuels Death Penalty Debate, supra* note 1. His case is currently pending on direct appeal to the South Carolina Supreme Court. The Association for Retarded Citizens of the United States, joined by the Association for Retarded Citizens of South Carolina and South Carolina Protection and Advocacy for the Handicapped filed a brief as *amici curiae* on Arthur's behalf.

6. The facts of the case, as summarized by the South Carolina Supreme Court in its original opinion affirming Arthur's convictions for murder and armed robbery but vacating his sentence of death, are as follows:

> Cripple Jack Miller, the sixty-five year old victim in this case, lived near appellant's family. On the day of the murder, appellant's sister, Marilyn, agreed to drive Cripple Jack and his wife to a nearby town to pay some bills. Appellant went along for the ride. Cripple Jack first cashed a government check at a local drugstore. After making several more stops, Marilyn drove to Cripple Jack's home where appellant got out with Cripple Jack for the stated purpose of getting some firewood. Cripple Jack was not seen alive again.
>
> The victim's wife found his body upon her return home later that day. He had been killed by a blow to the head with an axe. His pockets were turned inside out. A blood-stained axe and two shirts soaking in a tub of water were found at the scene. One shirt, later identified as appellant's, was stained with blood of the victim's type.
>
> Appellant was arrested at his father's home a short time later. One of the boots he was wearing was stained with human blood. His wallet contained

attorneys did not present any evidence regarding Mr. Arthur's mental retardation. Even though they later stated they were aware that there was something "not quite right" about their client, they never requested funds for a psychological evaluation. Thus, neither the first jury that sentenced Limmie Arthur to death nor the attorneys who represented him in that proceeding knew he was mentally disabled. After his death sentence was reversed by the South Carolina Supreme Court on other grounds,[7] we became involved in the case. A routine psychological assessment revealed Limmie Arthur was mentally retarded. Our review of his school records and several intelligence tests previously administered to him throughout his life corroborated our expert's findings.

At his second trial, conducted before a judge sitting without a jury, extensive evidence regarding Arthur's mental retardation was presented.[8] After deliberating for approximately one hour, the trial judge sentenced Arthur to death. We suspected that the evidence regarding Arthur's mental retardation may have been misunderstood and that our client may have been sentenced to die not in spite of the fact he was mentally disabled but rather *because* he was mentally retarded. One local newspaper certainly adopted this view:

> Down in Conway, a circuit judge has handed down a no-nonsense decision upholding law and order. . . . The case

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approximately one hundred dollars. Upon questioning by police officers, appellant said he had stolen the money from his father. His father, however, denied that appellant could have stolen any money from him. Appellant then changed his statement to say that he had stolen some of the money from his father and some from Cripple Jack when they were driving around together in Marilyn's car. Appellant denied that he had killed Cripple Jack.

State v. Arthur [sic], 290 S.C. 291, —, 350 S.E.2d 187, 188-89 (1986).

7. His convictions were affirmed but the sentence of death was reversed and the case was remanded for a new trial as to the issue of punishment only. *See id.* (death sentence reversed due to improper admission of evidence and improper closing argument).

8. Three different I.Q. tests administered over a twenty year period indicated Arthur's I.Q. was 65, thus clearly identifying him as mentally retarded. Several expert witnesses testified at trial that an individual with Arthur's level of retardation would demonstrate poor judgment due to an impaired ability to reason, poor comprehension of cause-and-effect relationships, and impulsive behavior. The testimony indicated that Arthur presently functions at the level of a ten to twelve year old child with no capacity to develop significantly beyond that. Several of his former teachers testified regarding Arthur's mental difficulties and the abject poverty in which he was raised.

> involves convicted killer Limmie Arthur, 28, who has the social intelligence of a 10- to 12-year-old and the mental ability of a 7-year-old. This was enough sense to enable him to kill William "Cripple Jack" Miller in 1984. . . . It appears to us that there is all the more reason to execute a killer if he is also insane or retarded. Killers often kill again; an insane or retarded killer is more to be feared than a sane or normal killer. There is also far less possibility of his ever becoming a useful citizen.[9]

We immediately filed a motion for reconsideration and reduction of sentence. A hearing was conducted in conjunction with this motion several weeks later to determine whether the execution of any mentally retarded person is inconsistent with the eighth amendment to the United States Constitution.[10] The court, however, refused to modify its prior ruling. Immediately following the ruling, delivered orally from the bench, Arthur indicated that he thought the judge had granted him a new trial.[11] Today, he lives in a small cell in Cell Block II in the heart of South Carolina's oldest prison, along with approximately forty-five other death row inmates. He works diligently at his studies, because he believes that if he can obtain his high school equivalency degree—his GED—the state cannot execute him.[12]

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9. *See Upholding Law and Order*, Hartsville Messenger, June 24, 1987. As will be set forth in more detail later, this view is consistent with the lack of worth historically placed on the lives of mentally retarded persons. Even in this century, persons with mental retardation were thought to be a separate and inferior race of people who need to be "extinguished." S. HERR, RIGHTS AND ADVOCACY FOR RETARDED PEOPLE 23 (1983). Similarly, thousands of mentally retarded persons were "exterminated" in Nazi concentration camps. *Id.* at 37.

10. U.S. CONST. amend. VIII states that no "cruel and unusual punishments" may be inflicted. Several leading experts in mental retardation and the criminal justice system in the United States testified regarding not only the severity and crippling effects of Arthur's mental disability but also the severe consequences mental retardation can have in all aspects of a person's life. Other witnesses, including the executive director of the Association of Retarded Citizens, the director of Protection and Advocacy for the Handicapped, a former member of the state legislature, and employees of the Department of Corrections testified to society's past and present failure to recognize and accept its responsibility to this group of individuals.

11. *See Retarded Killer's Sentence Fuels Death-Penalty Debate, supra* note 1, at A-1; *Arthur's Sentence Upheld*, The [Myrtle Beach, S.C.] Sun News, June 20, 1987 at 1-A.

12. Professor Ruth Luckasson testified at the reconsideration hearing that Arthur believes the fact he cannot read is what earned him the death sentence. When asked by

The above narrative is intended to be more than a sensational human interest story. Rather, Limmie Arthur's case demonstrates in dramatic fashion the current failure of the American criminal justice system to adequately weigh mental retardation in the capital sentencing process. As noted previously, there are currently a significant number of persons with mental retardation on death row in the United States. Unfortunately, in most of these cases, as was true in Arthur's first trial, the retarded person's attorneys do not even know their client is mentally disabled—as opposed to being "dumb," "a little slow," or merely "uncooperative"—and thus the individual's retardation is not offered into evidence to help reduce the defendant's sentence.[13] In other cases, a defendant's mental retardation is presented either in passing or in a manner that does not communicate to the sentencer the severity of the disability under which the mentally retarded labor.[14] It is the extremely rare case in which a sentence of death is imposed upon a mentally retarded defendant when mental retardation is presented in a coherent manner and the sentencer understands what it means to be mentally retarded. Although, as may have occurred in Limmie Arthur's case, a jury or judge may conclude that a person's mental retardation is an aggravating circumstance, i.e., a reason to impose the death penalty, rather than a mitigating one, and thus sentence a person to death because he is mentally retarded.

Whether a mentally retarded person such as Limmie Arthur should be sentenced to death is not a proper issue to be resolved by juries and judges on a case-by-case basis. After first describing what it means to be a person with mental retardation, this article will demonstrate that mental retardation

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a reporter during the resentencing hearing what it would mean if he were executed, Arthur responded:

> What happens? That's a tough one. . . . For one thing, that learning what I learned in [the penitentiary] that wouldn't amount to nothing. . . . And my GED, I wouldn't see no GED. I wouldn't get my GED.

See Retarded Killer's Sentence Fuels Death Penalty Debate, supra note 1, at A-5.

13. *See* Blume, *supra* note 5, at 32.

14. As will be developed *infra*, this is largely due to the fact that many mental health professionals, or persons involved in the criminal justice system, have little or no expertise in identifying persons with mental retardation. Furthermore, many mentally retarded persons are quite adept at hiding their disability from other persons.

is a significant and devastating mental impairment which reduces a mentally retarded person's moral blameworthiness to a level different in kind from other nonretarded persons accused of murder. Thus, the current procedures governing the imposition of the death penalty are inadequate to ensure mental retardation is given the weight it deserves in the sentencing process. Furthermore, this article will attempt to articulate the reasons the death penalty is never an appropriate sentence when imposed upon a person with mental retardation and, thus, constitutes cruel and unusual punishment in violation of the eighth amendment.[15] Finally, this article will set forth the reasons why mental retardation is a mitigating factor that deserves great weight in the capital sentencing process, and therefore, unique procedural protections are necessary in a case involving a mentally retarded defendant.

II. WHAT IT MEANS TO BE MENTALLY RETARDED

A. Mental Retardation Defined

The American Association on Mental Retardation (AAMR), the principal professional organization in the field of mental retardation in the United States, has adopted the following definition of mental retardation: "Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period."[16] Courts, legislatures, and other professional organizations have accepted this definition.[17]

General intellectual functioning is measured by intelli-

15. As will be discussed in detail *infra*, the determination of whether the death penalty is an appropriate punishment—whether for an individual offender, or for a particular category of offenders—is essentially an inquiry into moral blameworthiness. *See, e.g.*, Booth v. Maryland, 107 S. Ct. 2529 (1987); Enmund v. Florida, 458 U.S. 782 (1982).

16. AMERICAN ASSOCIATION ON MENTAL DEFICIENCY [now the American Association on Mental Retardation], CLASSIFICATION IN MENTAL RETARDATION 1 (H. Grossman ed. 1983) [hereinafter AAMD].

17. *See, e.g.*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 n.9 (1985); FLA. STAT. ANN. § 393.063(23) (West Supp. 1985); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 36 (3d ed. 1980).

gence tests, and thus quantifiable as an intelligence quotient (IQ) score. The AAMR's definition sets the upper boundary of mental retardation at an IQ level of 70, which is approximately two standard deviations below the mean score of 100.[18] In order to be classified as mentally retarded, a person's deficit in intellectual functioning must be accompanied by impairments in adaptive behavior defined as "significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized scales."[19] The inclusion of adaptive behavior in the definition of mental retardation requires that intellectual impairment, measured by an intelligence test, have some practical impact on the individual's life.[20]

Mentally retarded people are classified in four categories: mild, moderate, severe, and profound, with approximately eighty-nine percent of the people falling within the "mildly retarded" category.[21] The term "mild" mental retardation, however, is very easily misunderstood. Mildly mentally retarded people have IQ scores in the approximate range of 50 to 70, and thus are substantially disabled.[22] The term "mild" is a comparative word used to distinguish between the different levels of the mentally retarded mentioned above.[23] Mild mental retardation should not be confused with "borderline" mental retardation. Those who were previously labeled "borderline retarded," persons with I.Q.'s between 70 and 85, are

18. AAMD, *supra* note 16, at 23. The 70 cutoff, however is intended only as a guideline. The upper limit may be extended to 75, depending on the reliability of the test used and the tester's clinical observations. *Id.* at 11.

19. *Id.*

20. *Id.* at 203-16. The final requirement of the definition of mental retardation is that the disability must become manifest before the age of eighteen, the end of an individual's developmental period.

21. *Id.* at 13.

22. An I.Q. of 70 places an individual two standard deviations below the mean. *Id.* at 23.

23. Unfortunately, attorneys and judges unfamiliar with mental retardation often incorrectly believe an individual who is mildly mentally retarded is not seriously disabled and requires no special attention from the criminal justice system. Ellis & Luckasson, *If Your Client is Mentally Retarded*, CRIM. JUSTICE, 12, 14 (Winter 1988) [hereinafter Ellis & Luckasson].

no longer considered to be mentally retarded.[24]

B. Characteristics of People with Mental Retardation

To simply define mental retardation, however, does not necessarily help one understand what it means to be a person with mental retardation. Thus it is necessary to examine characteristics of mentally retarded individuals. Although any attempt to describe mentally retarded individuals as a group poses the risk of false stereotyping, some characteristics do occur with sufficient frequency to warrant certain limited generalizations.[25]

First, most mentally retarded people have limited communication skills.[26] The most seriously disabled persons have no expressive language and limited or no receptive language. Even when the mentally retarded person's language and communication abilities are less impaired or possibly even appear to be normal, his responses to questions for example may be unreliable. Many people with mental retardation are predisposed to "biased responding," or answering in the affirmative to questions regarding behaviors they believe are desirable, and answering in the negative to questions concerning behaviors they believe are prohibited.[27] The form of a question can also directly affect the likelihood of receiving an unreliable response.[28]

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24. Additionally, mental retardation should not be confused with mental illness, which is "an illness with psychologic or behavioral manifestations and/or impairment in functioning due to a social, psychologic, genetic, physical/chemical, or biologic disturbance." AMERICAN PSYCHIATRIC ASSOCIATION, PSYCHIATRIC GLOSSARY, 89 (5th ed. 1980). Mental retardation is not an illness. Mentally ill people encounter disturbances in their thought processes and emotions; mentally retarded people have limited mental capacities. Additionally, unlike forms of mental illness which may be temporary, cyclical, or episodic, mental retardation is a permanent mental impairment.

25. Many of the following descriptions are borrowed—rather freely and shamelessly—from Ruth Luckasson's and James Ellis' seminal article, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414 (1985) [hereinafter Ellis & Luckasson, *Mentally Retarded Defendants*].

26. *Id.* at 428.

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

28. The mode of questioning can also affect the reliability of a mentally retarded

Second, people with mental retardation may have impaired impulse control.[29] This characteristic is related to deficits in attention and involves attention span, focus, and selectivity in the attention process. Thus, a mentally retarded person may have difficulty, or under some circumstances, totally fail to weigh the consequences of the act.[30]

Third, a mentally retarded individual frequently has incomplete or immature concepts of moral blameworthiness and causation.[31] Thus, he may be unable to distinguish between an incident which is the result of blameworthy behavior and one which is not, and unable to understand that certain results or consequences flow from particular acts.[32]

Fourth, self-concept and self-perception are also affected by mental retardation. Individuals with mental retardation may tend to overrate their own skills, generally out of defensiveness about their handicap. This tendency is evident when retarded persons estimate their academic achievement, physical skill, and intellectual level. They seldom admit they do not comprehend or understand what is going on around them.[33] Thus, retarded individuals charged with criminal offenses are frequently not discovered to be mentally retarded during the adjudication process.[34] Not only are retarded indi-

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person's answers. Thus, for example, persons with mental retardation will, and do, find it difficult to give reliable and accurate answers during intense cross-examination. This is so because, during cross-examination, not only are the nuances of questions often very important, but also the pace at which questions are asked and answers required confuses many mentally retarded individuals.

29. AAMD, *supra* note 16, at 16.

30. Ellis & Luckasson, MENTALLY RETARDED DEFENDANTS, *supra* note 25, at 429.

31. Boehm, *Moral Judgment: Cultural and Subcultural Comparison*, 1 INT'L J. PSYCHOLOGY 143, 149-50 (1966).

32. Ellis & Luckasson, *Mentally Retarded Defendants*, *supra* note 25, at 430. The factors generally thought relevant to a person's moral development are: intelligence; chronological age; mental age; environment; and ability to interact with others. Boehm, *supra* note 32. Because of the impact mental retardation has on intelligence, mental age, and ability to interact with others, it is, of course, not surprising that persons with mental retardation may have an immature or incomplete moral development.

33. Ellis & Luckasson, *Mentally Retarded Defendants*, *supra* note 25, at 430.

34. Santamour & West, *Retarded Offenders: Habilitative Program Development* [hereinafter Santamour & West, *Retarded Offenders*], *in* M. SANTAMOUR & P. WATSON, THE RETARDED OFFENDER 272, 273 (1982).

viduals often skilled at masking their limitations,[35] but few of the participants in the criminal justice system—police officers, attorneys, judges, and in some cases even mental health professionals—are trained to recognize mental retardation. Thus, the mentally retarded individual is too often thought to be "stupid," "a little slow," "dumb," or "uncooperative," rather than mentally retarded.

Fifth, most individuals with mental retardation will know less than most people without mental retardation about even the most basic aspects of life.[36] This knowledge deficit, which results from a retarded individual's limited cognitive abilities, is generally aggravated by the special education curriculum for mentally retarded children which is less informative than the regular curriculum. Special education students, for example, are often excluded from certain classes and activities that teach general knowledge about the world in order to focus more time and attention on learning basic skills or participating in vocational training.[37]

In summary, mental retardation is a severe and permanent mental impairment that affects almost every aspect of a mentally retarded person's life. It does not simply mean being not quite as smart as the average person. Rather, to be mentally retarded is to be forced to live in a "nonretarded" world which neither understands nor allows for such a crippling mental handicap. And that means the life of a mentally retarded person, left to his own devices, is filled with confusion, frustration, shame, and fear. The difference in the cognitive abilities of a mentally retarded person, as opposed to a person of "normal intelligence," is sufficient to make the difference one of kind, not of degree.

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35. This is often referred to in the literature as "passing." Passing is the process that allows the individual to conceal his limitations from others. *See* R. EDGERTON, THE CLOAK OF COMPETENCE 145 (1967); Santamour & West, *Retarded Offenders*, *supra* note 34, at 282.

36. Ellis & Luckasson, *Mentally Retarded Defendants*, *supra* note 25, at 431.

37. *Id.*

C. The Problems Encountered by the Mentally Retarded Defendant in the Criminal Justice System

The criminal justice system is often an inhospitable place for the mentally retarded defendant.[38] His disability unrecognized or poorly understood, he is shuffled through a series of proceedings that he cannot or does not comprehend. Usually, a retarded defendant fails to understand the proceedings and to participate in his own defense because his disability deprives him of the capacity to understand, thereby rendering him legally incompetent. It can also occur simply because no one takes the time to explain the different stages of the trial in a manner he can comprehend. Thus, there is a substantial possibility that a mentally retarded person may be convicted of a criminal offense, or even sentenced to death, in a proceeding in which he is a virtual non-participant. This all too typical pattern is not merely procedurally unfair, but also presents a serious risk of factually inaccurate and unjust results.[39]

Empirical research reveals, in the large majority of cases involving mentally retarded criminal defendants, no psychological or psychiatric evaluation was performed prior to trial and sentencing, and thus the person is not found to be mentally retarded until incarceration.[40] Frequently this failure occurs because defense counsel fail to identify the possibility of the clients' retardation, and dismiss the manifestations of disability as mere "slowness" or uncooperativeness.[41] There is reason to believe this failure to identify mental retardation prior to or at trial, and thus to recognize the need for a proper evaluation of competency, occurs more frequently in cases involving minority defendants, since attorneys and judges may attribute the defendant's lack of intelligence to the presumed

38. *See generally* M. SANTAMOUR & D. WATSON, THE RETARDED OFFENDER (1982).

39. James Ellis and Ruth Luckasson believe many mentally retarded defendants are convicted of crimes they did not commit. Reid, *Unknowing Punishment*, STUDENT LAWYER 18, 20 (May 1987).

40. Santamour & West, *The Mentally Retarded Offender: Presentation of the Facts and a Discussion of the Issues, in* M. SANTAMOUR & P. WATSON, *supra* note 38, at 7, 12 [hereinafter Santamour & West, *Presentation of Facts*].

41. *Id.*

effects of cultural deprivation rather than to mental retardation.[42]

Other evidence suggests mentally retarded persons accused of crimes confess much more readily than do other defendants.[43] This is in all likelihood due to the fact that mentally retarded persons react readily to both friendly suggestions and intimidation, and thus are particularly susceptible to coercive police techniques.[44] Any confession given by a mentally retarded individual also presents especially difficult questions concerning whether he had the mental capacity to understand and validly waive his constitutional rights under *Miranda* and the fifth and sixth amendments.[45] Many mentally retarded people simply cannot understand the Miranda warnings, especially in the form and in the manner that they are likely to be given by police or prosecutors. This determination involves inquiry of not only whether the individual understands the concepts contained in the warnings, what a "right" is, but also whether he understands the language used to convey the concepts.[46] Even a defendant functioning in the mildly retarded range will often be unable to understand the

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42. For example, this apparently happened at Limmie Arthur's first trial, since no evaluation was ever performed. At his re-sentencing trial, the assistant solicitor appeared to have held such a mistaken belief regarding Arthur. She repeatedly referred to appellant as a "country boy," and argued that if he had tried harder in school he might not have been retarded. Furthermore, the trial judge in Arthur's case, after viewing the residences of both Limmie Arthur's parents and the victim stated that "they would have been 'better off under slavery' because someone would have been responsible for their care." *Retarded Killer's Sentence Fuels Death Penalty Debate*, *supra* note 1, at A-4.

43. Santamour & West, *Presentation of Facts*, *supra* note 40, at 12.

44. *Id.*; Ellis & Luckasson, *Mentally Retarded Defendants*, *supra* note 25, at 446. This characteristic also renders mentally retarded persons more likely than other defendants to confess to crimes which they did not commit, or to exaggerate their role in the offense in an attempt to gain favor with the interrogator or to hide their disability. *See* PRESIDENT'S PANEL ON MENTAL RETARDATION, *Report of the Task Force on Law* 33 (1963); *see also* Ellis & Luckasson, *Mentally Retarded Defendants*, *supra* note 25, at 451-52.

45. Miranda v. Arizona, 384 U.S. 436 (1966). *See, e.g.*, Smith v. Kemp, 664 F. Supp. 500 (M.D. Ga. 1987) (invalidating confession of mentally retarded defendant in capital case because he did not understand *Miranda* warnings); Cooper v. Griffin, 455 F.2d 1142, 1145 (5th Cir. 1972) (same).

46. *See* People v. Bruce, 403 N.Y.S.2d 587, 589 (N.Y. App. Div. 1978) (retarded defendant could not have understood *Miranda* warnings unless they were read slowly and carefully explained).

concept of legal terms such as "waiver" or even the elements of the offense with which he is charged unless special efforts are made to explain them.[47]

Like questions concurring the voluntariness of confessions, issues involving competency to stand trial are infrequently raised in cases involving mentally retarded persons. This results not only from the failure of counsel to request evaluations, but also from the fact that forensic competency evaluations are too often carried out by mental health professionals who have little or no training in mental retardation.[48] Also, the testing instruments used to determine competency are generally designed for mentally ill defendants, not the mentally retarded, and thus may be unreliable in determining whether a mentally retarded person is competent to stand trial.[49]

Finally, more mentally retarded persons plead guilty than do other defendants, and when they do exercise their right to go to trial, they are often severely hampered by memory and knowledge deficits.[50] Mentally retarded persons are less likely to appeal their convictions or pursue collateral remedies, and on average serve substantially longer sentences than do nonretarded offenders for similar crimes.[51]

III. AN EIGHTH AMENDMENT ANALYSIS OF THE IMPOSITION OF THE DEATH PENALTY UPON THE MENTALLY RETARDED

A. The Relevant Eighth Amendment Principles

In construing the eighth amendment's prohibition against cruel and unusual punishment, the Supreme Court has determined that a punishment is "cruel and unusual" if it is excessive.[52] An excessive punishment is one which is

47. Ellis & Luckasson, *Mentally Retarded Defendants*, *supra* note 24, at 456; *see also* United States v. Glover, 596 F.2d 857 (9th Cir. 1979), *cert. denied*, 444 U.S. 857 (1979).

48. *See* Ellis & Luckasson, *supra* note 23, at 14.

49. *Id.*

50. Santamour & West, *Presentation of Facts*, *supra* note 40, at 12.

51. *Id.*

52. Weems v. United States, 217 U.S. 349 (1910).

disproportionate to the crime, or which makes no measurable contribution to any acceptable goal of criminal punishment.[53] A punishment is also constitutionally impermissible if it offends the "evolving standards of decency that mark the progress of a maturing society."[54] Although the Supreme Court has determined that the death penalty is not cruel and unusual punishment *per se*,[55] it has consistently recognized that the extraordinary severity and irrevocability of capital punishment create a need for special safeguards to ensure death is justified in a particular case.[56] Also, in a series of cases which have special relevance here, the Supreme Court has held that the death penalty cannot constitutionally be imposed under any circumstances upon certain categories of offenders,[57] or for certain categories of offenses.[58]

When the principles of these eighth amendment proportionality decisions are applied to a mentally retarded individual found guilty of murder, it becomes clear that mentally retarded offenders constitute a category of defendants who may never constitutionally be put to death. The reason for this, as will be set forth in detail, is that the crippling attributes of mental retardation necessarily affect an offender's moral blameworthiness to such an extent as to render death a constitutionally excessive punishment serving no legitimate penological goal. Additionally, due to the mentally retarded person's diminished ability to make responsible decisions, to appreciate the full consequences of his acts, and to relate competently and independently to the world around him the im-

53. Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 173 (1976).

54. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion); Ford v. Wainwright, 106 S. Ct. 2595, 2600 (1986); Enmund v. Florida, 458 U.S. 782 (1982).

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

56. Booth v. Maryland, 107 S. Ct. 2529 (1987); Caldwell v. Mississippi, 472 U.S. 320 (1985); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

57. Ford v. Wainwright, 106 S. Ct. 2595 (1986) (eighth amendment prohibits the execution of the currently insane).

58. Enmund v. Florida, 458 U.S. 792 (1982) (felony murder where offender did not personally kill or intend that lethal force be used); Coker v. Georgia, 433 U.S. 584 (1977) (rape of an adult woman).

position of the death penalty upon such a person is simply incompatible with contemporary standards of decency.

B. An Overview of Capital Sentencing Procedures in the United States

Under current practice, every state with a valid death penalty statute bifurcates the proceedings.[59] In the first phase,

59. In Furman v. Georgia, 408 U.S. 238 (1972), five members of the Court, in five separate opinions and for a variety of reasons, determined that the manner in which the death penalty was imposed in America violated the eighth amendment's ban against cruel and unusual punishment. The court's opinions essentially invalidated every existing death penalty statute in the United States. However, as five members of the Court did not hold that the death penalty was unconstitutional *per se*, thirty-seven jurisdictions re-enacted laws authorizing capital punishment. In an attempt to respond to the central thrust of the court's opinions in *Furman*—that the unbridled discretion permitted the sentencer in determining whether a particular defendant should live or die rendered the imposition of the death penalty arbitrary and capricious—the new statutes fell into two general categories. The first group contains the mandatory death penalty statutes. These laws required that the defendant be sentenced to death if he were found guilty of certain offenses, most commonly murder and rape. The second included a variety of statutes, the guided discretion statutes. These sought to curb jury discretion by providing for a bifurcated trial. The first phase was the determination of guilt or innocence. The second related to punishment. In the second phase, the sentencing authority was to look at certain statutory aggravating and mitigating circumstances to determine whether the death penalty was warranted.

These various state responses to the Court's decision in *Furman* reached the Supreme Court in 1976 in five companion cases: Gregg v. Georgia, 428 U.S. 153 (1976), 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), and Roberts v. Louisiana, 428 U.S. 325 (1976). The mandatory statutes adopted by North Carolina and Louisiana were held to be unconstitutional. The Court in a plurality opinion, in both cases, reasoned that juries under mandatory statutes would continue to consider the grave consequences of a conviction in reaching a verdict and would be deterred from "rendering verdicts of first degree murder because of the enormity of the sentence automatically imposed." *Woodson*, 428 U.S. at 302; *Roberts*, 428 U.S. at 334. Therefore, the Court concluded that the statutes did not fulfill *Furman*'s requirement of "replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make nationally reviewable the process for imposing a death sentence." *Woodson*, 428 U.S. at 303. The other three statutes were upheld. The same three justice plurality wrote for the Court. First, they stated that the death penalty does not under all circumstances violate the Constitution, and concluded the concerns of *Furman* could be met by a carefully drafted statute that ensures the sentencing authority is given adequate information and guidance to assist in its determination of penalty. *Gregg*, 428 U.S. at 187. Additionally, the statutes' requirements of appellate review of the jury's decision in a court with statewide jurisdiction is a means of promoting the "evenhanded, rational and consistent imposition" of death sentences. *Jurek*, 428 U.S. at 276. Thus, in all three cases, the Court determined that the statutory systems in question assured the death penalty would not be wantonly

generally referred to as the guilt-or-innocence phase of the proceedings, the jury—or a judge if the jury is waived—determines whether the defendant is guilty or innocent of the charged homicide. If the defendant is found guilty, then the trial proceeds to the sentencing phase where the sentencer determines whether the defendant should receive a sentence of death or life imprisonment.[60] Although the proceedings vary from state to state, generally the prosecution has to prove the existence of at least one statutory aggravating circumstance before the defendant is "death eligible."[61] The state can generally introduce evidence of a defendant's prior criminal record to show that the death penalty should be imposed. The defendant is then permitted to introduce any relevant evidence in mitigation of punishment. The Court has stated that "the sentencer . . . [cannot] be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[62]

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or freakishly imposed in violation of the Constitution. *Jurek*, 428 U.S. at 276; *Profitt*, 428 U.S. at 260; *Gregg*, 428 U.S. at 207.

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

61. The Supreme Court has stated that the function of aggravating circumstances is to circumscribe the class of persons eligible for the death penalty and to do so in a manner that punishes with the penalty of death only those murders that are truly more morally blameworthy than other killings. *See* Lowenfield v. Phelps, 108 S. Ct. 546 (1988); Zant v. Stephens, 462 U.S. 862 (1983). The most common statutory aggravating circumstances are: murder in the commission of kidnapping, rape, armed robbery, or another dangerous felony, *see, e.g.*, GA. CODE ANN. § 17-10-30 (1987); murder for hire, *see, e.g.*, S.C. CODE ANN. § 16-3-20(c)(a)(4) (Law. Co-op 1970); murder for pecuniary gain, ARK. CODE ANN. § 5-4-604(b) (1987); murder of a corrections officer or of a police officer in the line of duty, *see, e.g.*, N.M. STAT. ANN. § 31-20A-5 (1978); multiple murder, *see, e.g.*, CAL. PENAL CODE § 190.2(3) (West 1988); murder by a person with a prior conviction for murder, *see, e.g.*, CAL. PENAL CODE § 190.2(a)(2) (West 1988). In addition a number of states have a "catch-all" aggravating circumstance. For example, in Georgia it is an aggravating circumstance if the murder was "outrageously or wantonly vile, horrible or inhuman. . . ." GA. CODE ANN. § 17-10-30(b)(7) (1987). In Arkansas, it is an aggravating circumstance if the murder was heinous, atrocious, and cruel. ARK. CODE ANN. § 5-4-604(8) (1987). These vaguely worded aggravating circumstances have been criticized by courts, and on more than one occasion have been found to be unconstitutionally overbroad as applied. *See* Godfrey v. Georgia, 446 U.S. 420 (1980) (Georgia aggravating circumstance held to be unconstitutionally broad and vague); Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987) (en banc), *cert. granted*, 108 S. Ct. 693 (1988) (similar holding as to Oklahoma aggravating circumstance).

62. Lockett v. Ohio, 438 U.S. 586, 604 (1978); Skipper v. South Carolina, 476 U.S.

The sentencer is then required to determine whether in light of the aggravating and mitigating factors, the death penalty should be imposed.[63]

Thus, pursuant to current practice, evidence of mental retardation, if discovered, would be presented at the penalty phase of a capital case, assuming the defendant is found competent to stand trial and convicted of murder.[64] In most jurisdictions, evidence of mental retardation is offered both generally in mitigation of punishment as well as to prove the existence of one or more statutory mitigating factors, e.g., "the capacity of the defendant to appreciate the criminality of his conduct was substantially impaired" or that the defendant suffered from a "mental disease or defect."[65] In other jurisdictions, such as Georgia, which does not have statutory mitigating circumstances, the evidence would be presented in mitigation and counsel is then permitted to argue that, due to the defendant's mental retardation, he should not be executed.

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1 (1986) (defendant must be permitted to introduce evidence of his adaptability to prison). The Court has stated that any exclusion of the "compassionate or mitigating factors stemming from the diverse frailties of humankind" relevant to the sentencer's decision would fail to treat all persons as "uniquely individual human beings." Woodson v. North Carolina, 428 U.S. at 304.

63. This is an extremely simplified approach to the manner in which capital sentencing is conducted in the various states. Some jurisdictions, for example, require the sentencer to weigh the aggravating circumstances against the mitigating circumstances. *See* N.M. STAT. ANN. § 31-20A-2 (1988); ARK. CODE ANN. § 5-4-603(a)(2) (1987). Other do not. GA. CODE ANN. § 17-10-30 (1987). In some states the judge has the power to "override" a jury's determination of either the death penalty or life imprisonment in favor of the alternative sentence. *See, e.g.,* FLA. STAT. ANN. § 921.141(3) (West 1985). And in others, the jury's sentence is binding. *See* State v. Bellamy, 293 S.C. 103, 359 S.E.2d 63 (1987). Additionally, in some jurisdictions the failure of the jury to unanimously agree as to the sentence to be imposed results in a sentence of life imprisonment (*see* S.C. CODE ANN. § 16-3-10 (Law Co-op 1976)), while in others a majority of the jurors in favor of the death penalty will suffice (*see* FLA. STAT. ANN. § 921.141(3) (West 1985)).

64. However, it may also be relevant to a number of issues at the guilt-or-innocence phase as well; i.e., whether the defendant is competent to stand trial and whether he understood the *Miranda* warnings before giving an incriminating statement. *See* Ellis & Luckasson, *Mentally Retarded Defendants*, *supra* note 25; Blume, *supra* note 4, at 37-38.

65. *See, e.g.,* ARK. CODE ANN. § 5-4-605(3) (1987); CAL. PENAL CODE § 190.3(d) & (h) (West 1988); FLA. STAT. ANN. § 921.141(6)(b)(b) & (f) (West 1985); N.M. STAT. ANN. § 31-20A-6(c) (1988).

C. Mental Retardation and Moral Blameworthiness: Are Legitimate Penological Goals Furthered by Sentencing a Mentally Retarded Person to Death?

As the Supreme Court has repeatedly stated, the legitimate penological interests arguably furthered by capital punishment are deterrence and retribution.[66] Thus, the execution of a mentally retarded person can be said to be constitutional if, and only if, the state can prove the act has a genuine deterrent and retributive effect.

1. Deterrence and Mentally Retarded Offenders

Deterrence, of course, is premised upon the assumption that an individual considers the consequences of his actions.[67] In essence, one must premeditate in order to be deterred.[68] It is extremely difficult to persuasively maintain that a mentally retarded offender has the capacity to "premeditate" a crime in any real sense of the word. As has been previously noted, one of the most common attributes of mentally retarded persons is impulsiveness. Additionally, because of their limited cognitive abilities, retarded persons simply do not have the same ability to plan and calculate a criminal offense, or to understand its consequences, as do persons of normal intelligence. Because capital punishment serves as a deterrent only when the murder is a result of at least some premeditation and deliberation, the execution of the mentally retarded can be said to serve as a deterrent only in the most strained fashion.[69]

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

67. In Gregg v. Georgia, the Court noted that the proper inquiry is whether the possible penalty of death will enter "into the cold calculus that precedes the decision to act." 428 U.S. at 185-86 (plurality opinion).

68. *Id.*

69. The manner in which many mentally retarded persons commit crimes evidences this fact. The offense committed by Limmie Arthur provides a very clear example of the impulsiveness and lack of premeditation which typify the crimes of retarded persons. Limmie Arthur's sister had dropped the victim and Mr. Arthur off at the victim's residence while she took the victim's wife to the store. While they were gone, Arthur apparently killed Mr. Miller and took his money. He left his blood-stained shirt soaking in a bucket of water at the victim's house. Arthur then returned to his parent's house, which was the closest house to the victim's but was still several hundred yards away in this rural areas. The victim's wife returned, found the body and notified the

An additional reason the death penalty does not deter mentally retarded persons is that they do not appreciate the finality of death.[70] The idea that one might cease to exist, difficult enough even for a person of sound mind, is lost upon a retarded person. However, unless an individual understands that by committing a certain act he may forfeit his right to live, there can be no deterrent effect from the prospect of execution. In short, if the threat is meaningless, it has no power.

2. Retribution and the Mentally Retarded

As a general matter, retribution is a permissible goal of capital punishment.[71] There are two aspects to the idea of punishment as retribution. The first is that the punishment is the just deserts of the offense, and the second is that through certain forms of punishment, the community manifests and vents its outrage at the criminal act. In cases involving a mentally retarded offender, neither of these aspects of the retributive dimension of capital punishment is furthered.

a. *The Legitimacy of Just Deserts in Cases Involving Mentally Retarded Persons*

As has been previously noted, the Supreme Court has consistently recognized that the inquiry into the appropriateness of the death penalty is essentially a question of " 'personal responsibility and moral guilt.' "[72] A critical aspect of determining personal responsibility and moral guilt is the

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authorities. Of course, the police went directly to Mr. Arthur's parents' house where he was found clumsily attempting to conceal himself in the attic of his parent's shack with his feet sticking out in plain view. He was then searched and questioned. He told several readily transparent lies regarding the money that was found in his billfold. When confronted with reasons why his explanations were false, he admitted robbing the victim but said he did not kill him.

70. There is much debate in the literature whether the death penalty acts as a deterrent at all. *See, e.g.*, Bailey, *The Deterrent Effect of the Death Penalty for Murder in California*, 52 S. CAL. L. REV. 743 (1979); Glaser, *Capital Punishment—Deterrent or Stimulus to Murder? Our Unexamined Deaths and Penalties*, 10 U. TOL. L. REV. 317 (1979). Regardless of whether the threat of the death penalty deters persons of normal intelligence, it has no deterrent effect upon persons with mental retardation.

71. Gregg v. Georgia, 428 U.S. 153, 183-184 (1976) (opinion of Stewart, Powell and Stevens, JJ.).

72. Booth v. Maryland, 107 S. Ct. 2529, 2533 (1987) (quoting Enmund v. Florida, 458 U.S. 782 (1982)).

mental state of the defendant.[73] As the Supreme Court has further recognized, "it is undeniable . . . that those who are mentally retarded have a reduced ability to cope with and function in the everyday world."[74] As noted above, the mentally retarded person simply does not have the same sense of moral understanding and responsibility as does a nonretarded person. The abilities to communicate, remember, understand, and control one's impulses are substantially impaired. The severity of the disability reduces the mentally retarded person's ability to both cope with and function in the world.[75] It is this reduced ability to function and the impaired mental state which changes in kind, not degree, the mentally retarded person's moral culpability. In fact, due to the severity of the disability from which the mentally retarded person suffers, such a person cannot be said to be sufficiently blameworthy to justify the imposition of the death penalty.

Although a mentally retarded person may recognize that an act is "right" or "wrong," his mental capacity is frequently diminished to a point where he has only the most simplistic understanding of these concepts, and little ability to discern how personal behaviors are linked to the events which produce "right" or "wrong" results.[76] Capital punishment thus becomes a cruel and excessive response, much like spanking a six-year-old for an infraction committed two years earlier. The child has insufficient cognitive capacity to appreciate the

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73. Tison v. Arizona, 107 S. Ct. 1676 (1987).

74. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). *See also* 106 S. Ct. 2595 (1986), wherein the Court stated:

> [T]oday, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he had been singled out and stripped of his fundamental right to life. Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation.

106 S. Ct. at 2602 (citation omitted).

75. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) ("those who are mentally retarded have a reduced ability to cope with and function in the everyday world").

76. Miles Santamour, a leading expert in the area of mental retardation, has said, for example, that many mentally retarded persons will say it is wrong to steal, but not have any idea *why* it is wrong. Reid, *supra* note 39, at 21.

link between his prior action and the corporal punishment that is much later imposed. The same is true for the mentally retarded offender.[77]

b. *The Legitimacy of Vengeance in Determining the Appropriate Punishment for Mentally Retarded Persons*

As will be set forth in the next section of this article, our society has been slow to recognize its moral obligation and responsibility to the mentally handicapped, and especially to the mentally retarded. The shameful history of discrimination and ill treatment to which the retarded have been subjected is well documented.[78] However, in the last few decades, American society has begun to realize and appreciate both the severity of the handicap from which mentally retarded individuals suffer and also their needs for, and right to, special treatment. Many of the educational and habilitation programs for retarded individuals stem from the recognition that inappropriate behavior on the part of a mentally retarded individual is not the result of an intent to do wrong, but rather is frequently the product of either a misunderstanding or inability to comprehend basic facts about the world the nonretarded individual takes for granted.[79]

Most adult mentally retarded offenders have never had the advantage of any programs that are now routinely available for the retarded. Such services, as well as the special programs now developed in prison systems across the country, are based on the recognition that the majority of mentally retarded inmates have relatively good prognoses for education and reform. This is so because most retarded inmates lacked awareness of socially appropriate behavior in the first instance.[80] Their criminal conduct thus does not reveal a need for rehabilitation, but rather the need to be taught appropriate behavior in the first instance, or "habilitation."[81] As a general

77. S. HERR, *supra* note 9.
78. *Id.*
79. *See* Santamour & West, *Retarded Offenders*, *supra* note 34, at 272-73.
80. *Id.*
81. *Id.* at 272-73, 455.

rule, because of retarded persons' willingness to please authority figures, the habilitation of such offenders is frequently an easier task than is the rehabilitation of nonretarded inmates.[82]

In summary, because a mentally retarded defendant's culpability is qualitatively less than that of a nonretarded murderer, the state's legitimate penological interests in deterrence and retribution are not served by executing a mentally retarded individual, even one found guilty of murder. Thus, the death penalty is cruel and unusual because it is excessive when imposed upon a mentally retarded individual.

IV. A BRIEF DIGRESSION: THE ANALOGY BETWEEN AGE AND MENTAL RETARDATION

Another issue currently debated in the literature and in the courts is whether it violates the eighth amendment to execute a person who was a juvenile at the time of the offense.[83] In many respects the constitutional questions presented by sentencing juveniles to death is similar to that addressed in this article because, in virtually every morally relevant way, there is no meaningful distinction between a child of ten and a mentally retarded person with the mental age of ten.[84]

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82. However, mentally retarded inmates often do have trouble following minor prison regulations regarding work assignments, scheduling etc. This is not due to any hostility but rather results from their cognitive deficits. Stephens, *Criminal Justice in America: An Overview*, in M. SANTAMOUR & P. WATSON, *supra* note 38, at 94, 127 [hereinafter *Stephens*].

83. *See* Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613 (1983); V. STREIB, DEATH PENALTY FOR JUVENILES (1987). The constitutional issue presented in sentencing minors to death is currently pending before the Supreme Court in Thompson v. Oklahoma, 724 P.2d 780 (Okla. Crim. App. 1986), *cert. granted*, 107 S. Ct. 1284 (1987); *see also* Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987). Many states have, by statute, exempted juveniles from the death penalty. For example, California, Colorado, Connecticut, Illinois, Nebraska, New Jersey, New Mexico, Ohio, Oregon and Tennessee prohibit the execution of anyone eighteen or under. Georgia, New Hampshire and Texas have a minimum age of seventeen. Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nevada, North Carolina, Utah and Nevada have minimum ages less than seventeen. V. STREIB, DEATH PENALTY FOR JUVENILES, *supra*, at 43-44.

84. It should be noted, however, that persons in the field of mental retardation are sensitive to the description of persons with mental retardation as "perpetual children." This is in large part due to past abuses. For example, many mentally retarded persons who, with proper support services could have lived in the community, were institution-

"Mental age," a concept first developed by Alfred Binet, the creator of standardized intelligence tests,[85] refers to the idea that, despite his chronological age, an adult with certain types of mental deficiencies cannot function in terms of reasoning and understanding beyond the level of an average child of the age at which the adult's mental development is assessed. Thus a 28-year-old criminal defendant, such as Limmie Arthur, with a mental age of 10, could not be expected to appreciate the consequences of his own actions beyond the level expected from a child 18 years his junior.

"Mental age," however, remains a subjective undertaking, and courts have been reluctant to utilize the mental age concept, particularly absent any evidence the defendant is incompetent to stand trial. For example, in 1978, the California Supreme Court was faced with the case of a mentally retarded 14-year-old boy who had been convicted of assault.[86] Extensive psychiatric and psychological evidence was presented to show that the defendant had a mental age of approximately 6 years old, with an IQ of 42.[87]

Obviously, if the defendant had been treated as a 6-year-old, he could not have been prosecuted as an adult. However, the court, due to conflicting testimony over the accuracy of "mental age" testing, determined that the defendant would be treated as any other 14-year-old, regardless of the evidence of his mental impairment.[88] The court presumed, for purposes of determining the defendant's ability to distinguish right from wrong, that he was competent to stand trial.[89]

The California court's reasoning has been repeated in numerous cases from various jurisdictions.[90] In fact, little has

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alized, some for all of their adult lives. *See generally* S. HERR, *supra* note 9. And in recent years, laudable efforts have been made to have persons with mental retardation placed in the lease restrictive environment.

85. Ellis & Luckasson, *Mentally Retarded Defendants*, *supra* note 25, at 435 n.105.

86. In re Ramon M., 22 Cal. 3d 417, 584 P.2d 524, 149 Cal. Rptr. 387 (1978).

87. *Id.* 584 P.2d at 527. In addition to organic brain damage, the defendant was unable to read, unable to tell time, and was characterized by expert witnesses as "incapable of abstract thought."

88. *Id.* at 531.

89. *Id.*

90. Where such holdings have not been based on the defendant's capacity to distinguish "right from wrong," the courts generally have turned to an argument based on

changed since the 1920 New Jersey Supreme Court decision of *State v. Schilling*.[91] *Schilling* involved a 28-year-old man who shot and killed a police officer. Psychological testing revealed the defendant had the mental capacity of a 12-year-old. The court, however, rejected the evidence as irrelevant, regardless of its validity, stating, "[t]he responsibility of an adult charged with a commission of a crime is not to be measured by a comparison of his mental ability with that of an infant of 12 years or in any other way" and the appropriate test was whether "he appreciate[s] the nature and quality of his act, and that it is wrong?"[92]

Despite efforts by such organizations as the American Law Institute and the American Bar Association to reform the standards by which mental capacity is judged, the reasoning of the *Schilling* court persists.[93] However, regardless of judicial reluctance, the underlying moral factors which led to the creation of different treatment for juvenile offenders are virtually identical. Aside from a strict focus on the idea of a retarded person's "mental age,"[94] it is beyond dispute that the intellectual capacity to form a rational understanding of the link between criminal actions and the resulting consequences—and therefore to comprehend the nature and justification of any punishment that might be imposed—is lower to a degree that warrants differential treatment both in juveniles and in mentally retarded persons.

Jean Piaget labeled the difference between adult and juvenile capacity to form moral judgments as the difference be-

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legislative intent, *i.e.*, that the statutes prescribing differing punishments for adult and juvenile offenders were based exclusively on chronological age. *See, e.g.*, Couch v. State, 325 S.E.2d 366 (Ga. 1985) (murder conviction and life sentence upheld where the trial court excluded evidence that the defendant had a mental age of 10).

91. 112 A. 400 (N.J. 1920).

92. *Id.* at 405.

93. *See* Ellis & Luckasson, *Mentally Retarded Defendants*, *supra* note 25, at 434-93.

94. However, current psychological research reveals almost without exception that mental age is the best predictor of a person's ability to form rational understandings of the links between deviant behavior and resulting punishments, and the ability therefore to refrain from those behaviors which cause punishment to be imposed. Disagreement among researchers in this area focuses mainly on the accuracy of the various methods used to access mental age in any given case.

tween "the morality of constraint" and the "morality of cooperation."[95] Numerous studies repeatedly have confirmed Piaget's findings that a young child's "morality of constraint" makes it difficult to perceive the cause and effect relationship between actions and the resulting impact on the external world.[96] Furthermore, there is little understanding of the concept of morality, or the need to conform to accepted social norms, beyond the constraints of rote behaviors acquired through repetitive experience or externally imposed training.[97]

It is not until later in the developmental period that Piaget found evidence of an understanding of the linkage between self and society, and the resulting moral obligation to foresee and refrain from behavior that causes injury to others.[98] This "morality of cooperation" allows the child to form independent rational judgments about the propriety and responsibility attaching to certain conducts.[99]

There is a consensus among researchers that adults whose mental development has been affected by mental retardation do not have the same capacity to recognize moral issues and develop an appropriate response as do their adult peers. Although many, if not most, courts facing this issue are enamored of the idea that the sheer fact of longevity contributes tangible learning experiences which place a mentally retarded person at a level of moral development beyond that of a child with whom the adult is compared,[100] current research indicates experiential learning among mentally retarded adults is irrelevant to the question of whether the individual has the

95. *See* Boehm, *supra* note 31, at 143.

96. *Id.* at 144.

97. *Id.* Researchers building on Piaget's earlier studies have found, for example, that young children understand punishment only in the limited terms of ritual. A person at this level of mental development is seeking to be rid of the feeling of anxiety for having done something upsetting to others, but does not understand the deterrent or retributive goals of the punishment imposed.

98. *Id.* at 143-44.

99. *Id.*

100. *See, e.g.*, Stebbing v. State, 473 A.2d 903 (Md. 1984). In *Stebbing*, the court upheld the death sentence of a 19-year-old woman with an I.Q. of 77 who helped her husband rape, sodomize, and murder a 16-year-old girl. The Court's decision was based in part upon the fact that the defendant had left home as a runaway at age 16 and thus demonstrated the ability to care for herself on an adult level.

mental capacity to form criminal intent. The distinction, therefore, is not whether the mentally retarded person can perform acts which have been learned over time, but rather how well that person can evaluate and respond to situations, particularly those involving stress or provocation.[101]

Courts must realize juveniles are treated differently than adults by the criminal justice system because society recognizes "the defendant's inexperience and lack of knowledge due to his age," not because of some sentimental notion of youth, and it is this inexperience and lack of knowledge which makes the use of capital punishment inappropriate.[102] Similarly, an adult with mental retardation is inexperienced and lacks knowledge regarding the types of behavior that would make capital punishment an appropriate societal response. Thus, capital punishment is inappropriate not because of the defendant's mental age but because of the cognitive disabilities that leave the defendant at a level of mental development parallel if not equivalent to juveniles. Although the causes of the impairment differ, the crucial determinant relative to responsibility remains the same: these people have failed to develop a cognitive capacity that justifies a retributive or deterrent response.

V. AN ASSESSMENT OF THE EVOLVING STANDARDS OF DECENCY IN RELATION TO THE IMPOSITION OF THE DEATH PENALTY UPON MENTALLY RETARDED OFFENDERS

In addition to the eighth amendment's prohibition against punishments that are excessive, the cruel and unusual punishment clause also forbids the imposition of any punishment which violates the "evolving standards of decency that mark the progress of a maturing society."[103] Pursuant to this standard, one must consider "objective evidence of contempo-

101. *Id.*

102. Note, *Executing Youthful Offenders: The Unanswered Questions in Eddings v. Oklahoma*, 13 FORDHAM URB. L.J. 471, 498 (1985).

103. Ford v. Wainwright, 106 S. Ct. 2595 (1986); Trop v. Dulles, 356 U.S. 86 (1958).

rary values before determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects."[104] Finally, after weighing the objective evidence revealed by public attitudes, legislative enactments and sentencing practices of judges and juries, a court must bring to bear its own judgment regarding the acceptability of the challenged punishment.[105] An examination of the development of our society's attitudes towards the mentally retarded in general, and the mentally retarded offender in particular, makes clear that the execution of persons with mental retardation is no longer an acceptable punishment.

A. Historical Overview of Society's Treatment of Mentally Retarded Persons

As the Supreme Court has itself recognized, the history of the treatment of mentally retarded individuals in the United States can only be described as shameful.[106] Even into the early decades of this century, mentally retarded people were erroneously thought to be the source of most criminality and immorality in society.[107] In fact, the mentally retarded were thought to have a congenital deficit in moral sensibility analogous to color blindness, and were often compared with animals.[108] Because procreation by mentally retarded people was thought (again erroneously) to be the major source of mental retardation and of other types of genetical "inferiority" in children, most American jurisdictions abridged the right of retarded persons to marry and have children. Twenty-nine states even went so far as to enact mandatory

104. Ford v. Wainwright, 106 S. Ct. at 2600.

105. Coker v. Georgia, 433 U.S. 584, 594 (1977).

106. City of Cleburne v. Cleburne Living Center, 473 U.S. 105 (1985).

107. *See, e.g.*, Fernald, *The Burden of Feeblemindedness*, 17 J. PSYCHOASTHENICS 87, 90 (1912). For years, the mentally retarded had been deemed to be the cause of "the majority of cases of chronic and semi-chronic pauperism, and for most of our alcoholism, prostitution and venereal disease." Terman, *Feeble-Minded Children in the Public Schools of California*, 5 SCHOOLS & SOCIETY 161 (1917).

108. *See, e.g.*, Karlin, *Moral Imbecility*, in PROCEEDINGS OF THE ASSOCIATION OF MEDICAL OFFICERS OF AMERICAN INSTITUTE OF IDIOTIC AND FEEBLE MINDED PERSONS 32-37 (1899). *See also* R. SCHEENENBERGER A HISTORY OF MENTAL RETARDATION (1983).

eugenic sterilization laws.[109] Additionally, various "eugenic segregation" laws were also passed. These statutes were designed to institutionalize the mentally retarded in order to prevent the "transmission" of incompetence. Similarly, mentally retarded children were excluded from public schools for the primary reason of "protecting" nonretarded children. Even as late as 1962, only eighteen states made retarded children—even those classified by the state as educable—subject to compulsory school attendance laws.[110]

B. The Slow Progress of Society's Response to the Problem of Mental Retardation

Although mentally retarded citizens continue to be subject to irrational fears, prejudices, and unwarranted discrimination,[111] it is clear that enormous progress has been made in American society's treatment and understanding of the mentally retarded in the decades since the height of the eugenics movement earlier in this century. The most significant changes began after the passage of the Education for all Handicapped Children Act in 1975, which guaranteed the right to an adequate public education to all children.[112] In order to

109. J. LANDMAN, HUMAN STERILIZATION, 303 (1932). The South Carolina statute, for example, still remains in effect as S.C. CODE ANN. § 44-47-50-(a) (1976). It was not until 1942 that the United States Supreme Court declared unconstitutional eugenic marriage and sterilization laws that extinguished these most basic and fundamental rights of the mentally retarded. *Compare* Buck v. Bell, 274 U.S. 200 (1927), *with* Skinner v. Oklahoma, 316 U.S. 535 (1942).

110. Roos, *Trends and Issues in Special Education for the Mentally Retarded*, 5 EDUC. AND TRAINING OF THE MENTALLY RETARDED 51 (1970). *See, e.g.*, Act of April 3, 1920, Ch. 210 § 17, Miss. Laws 288, 294. For a more detailed treatment of the history of the ill treatment of the mentally retarded, see S. HERR, *supra* note 9.

111. *See* Keating, *The War Against the Mentally Retarded*, NEW YORK 87, Sept. 17, 1979 (describing various efforts to exclude group homes for retarded persons from neighborhoods).

112. 20 U.S.C. §§ 1400-1461 (1982). However, the beginning of changes in attitudes began in the 1950's and 1960's. President Kennedy, for example, had a sister who was mentally retarded. Thus he was naturally aware of the problems of the mentally retarded and formed a panel on mental retardation. He on one occasion stated, "[w]e must provide for the retarded the same opportunity for full social development that is the birthright of every American." *See* PRESIDENT'S PANEL ON MENTAL RETARDATION, A PROPOSED PROGRAM FOR NATIONAL ACTION TO COMBAT MENTAL RETARDATION (1962) (Oct. 11, 1961 statement of the president regarding the need for a national plan in mental retardation). In 1971 the United Nations Declaration on the

comply with the mandate of the Act, school systems developed programs of special education for mentally retarded children. Additionally, most states and many local communities have started and continue to develop and improve community services for their retarded citizens. Sheltered workshops and group homes are examples of the programs for the mentally retarded currently in place around the country. The common underpinning of all such programs is the recognition that: (1) the mentally retarded person has a severe disability that limits his ability to function without support and care; (2) society has a corresponding responsibility to these individuals, who, through no fault of their own, are mentally impaired; and, (3) with society's active aid and support, so lacking in the past, many mentally retarded persons can become productive and useful citizens.[113]

2. Changes in the Criminal Justice System

The criminal justice system has also made great strides in its treatment of mentally retarded offenders. Until the 1970's, courts and correctional systems made few if any attempts to identify and treat mentally retarded offenders.[114] Although the identification of mentally retarded defendants and prison inmates still presents considerable difficulties,[115] in recent years special programs to accommodate and assist the mentally retarded within state correctional systems have been developed and implemented.[116] Such programs recognize that not only are retarded inmates frequently abused, exploited,

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Rights of Mentally Retarded Persons was issued which, *inter alia*, called for proper legal safeguards and protection from exploitation, abuse and degrading treatment. Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856, 26 U.N. GAOR, Supp. (No. 29) 93-94, U.N. Doc. A/8429 (1971).

113. S. HERR, *supra* note 9, at 41-47.

114. Even inmates determined to be mentally retarded were placed either in the general population or in units with habitual and/or sex offenders. Santamour & West, *Presentation of Facts*, *supra* note 40, at 22.

115. *See* Stephens, *supra* note 82, at 98.

116. *See* McAfee & Gural, *Individuals with Mental Retardation and the Criminal Justice System: The View from the State Attorneys General*, MENTAL RETARDATION 6 (1988) (fourteen states have programs for the mentally retarded offender within the department of corrections); Berkowitz, *Mental Retardation: A Broad Overview*, in M. SANTAMOUR & P. WATSON, *supra* note 38, at 46.

and manipulated by "brighter" inmates, but also that, due to their disability, many have difficulty comprehending regulations and procedures.[117] As a response to this problem, many prison systems have developed special units for mentally retarded inmates. Such units are designed to "habilitate" mentally retarded inmates by teaching socially acceptable behaviors and values.[118]

These changes in the laws and practices governing the education, treatment and habilitation of mentally retarded citizens reflect a fundamental change in the attitudes of American society toward retardation. Without minimizing the ignorance and neglect that continues to hamper the retarded in many areas of our national life, it is obvious the irrational prejudices and pervasive fear which constituted so much of America's response to the retarded in past decades have largely dissipated. Throughout the nation, the overriding goal of public policy in this area is to recognize both the rights of retarded citizens to appropriate education, support, and training and their potential for purposeful lives as contributing members of society.

C. The Death Penalty and the Mentally Retarded Offender

1. Sentencing Practices

In the modern era of capital punishment, no American jurisdiction has squarely addressed and decided whether the eighth amendment permits the mentally retarded to be sentenced to death.[119] The lack of judicial decisions is undoubtedly due to the extreme rarity of death sentences involving mentally retarded offenders. James Ellis, one of the leading experts in the area of mentally retarded persons and the criminal justice system, maintains that no state has carried out an execution of a defendant who was identified at the time of sentencing as mentally retarded since the Supreme Court's decision in *Furman v. Georgia*.[120] The rarity of such executions is,

117. Stephens, *supra* note 82, at 127.

118. *See* Santamour & West, *Retarded Offenders*, *supra* note 34, at 273.

119. *See infra* text accompanying notes 122-34.

120. 408 U.S. 238 (1972). However, several persons who were mentally retarded

in and of itself, indicative that the practice of executing such offenders has been rejected by contemporary American society.[121]

2. Appellate Decisions

Although no appellate court has squarely resolved the eighth amendment issue addressed in this article pursuant to contemporary constitutional standards, reported appellate decisions, for the most part, mirror the aversion sentencing authorities have toward death sentences for retarded offenders.[122] Illustrative is *Smith v. Kemp*,[123] in which the court, reversing a capital murder conviction on the related ground that the mentally retarded defendant did not understand his Miranda warnings, had this to say about the constitutionality of a death sentence for such offenders:

> The Supreme Court of the United States has ruled that the death penalty is constitutionally permissible provided certain prerequisites are met. . . . There is great debate as to whether or not it serves as a deterrent to others similarly inclined, but there seems to be general acceptance for the proposition that one upon whom the death penalty is imposed have an awareness of the severity of the sentence

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have been executed in recent years. The case most publicized was that of Jerome Bowden in Georgia. In each case, the individual was not identified as mentally retarded at the time of trial. Rather, this retardation was only discovered during collateral proceedings. *See* Reid, *supra* note 39, at 18.

121. Enmund v. Florida, 458 U.S. 782, 794-796 (1982); Coker v. Georgia, 433 U.S. 584, 596-597 (1977).

122. In State v. Middleton, No. 22839 slip op. (S.C. S. Ct. Feb. 22, 1988), the South Carolina Supreme Court recently affirmed a death sentence imposed upon an individual who may have been mentally retarded. The evidence regarding his I.Q. was disputed, with the state's expert estimating his I.Q. to be 78. The court's opinion reflects the ambiguity in the testimony, on the one hand stating Middleton's I.Q. was 68 and then referring to him as a "borderline mental retardate." In *Middleton*, the Court rejected his claim that his sentence of death violated Ford v. Wainwright, 106 S. Ct. 2595 (1986), in which the United States Supreme Court held that an individual who is currently in competent cannot be executed. The South Carolina Supreme Court, relying on Middleton's statement to the jury at the close of the case, held, "appellant understands the significance of a death sentence and the reason it would be imposed." The state court did not, however, address the questions of whether the execution of the mentally retarded furthered any legitimate penological goal or whether it violated society's evolving standards of decency.

123. 664 F. Supp. 500 (M.D. Ga. 1987).

> and be able to ponder upon his fate. No justification can be had for the execution of a child of ten or eleven years of age in any society that considers itself civilized. If a child of ten or eleven should not be executed under any circumstances, then surely a person who may have a chronological age of twenty, but a mental and emotional age of ten or eleven, should not be put to death because he was not "street wise" enough to remain silent until he had conferred with a lawyer . . . .
>
> Petitioner urges that this court also reverse the death sentence on the grounds that a mentally retarded person with an IQ of 65 and the intelligence of a ten-year-old child could not possibly understand the punishment that was being meted out. . . . The court does not address this issue . . . [but] does note, however, that if the state should not execute a mere child then, quite possibly, the state should not execute one who is so mentally retarded that they have the judgment, emotions and intelligence of a ten-year-old. That decision, however, will be left for another day.[124]

The Supreme Court's decision in *Ford v. Wainwright*[125] is also informative. In *Ford*, the Court held that the execution of an individual who is currently insane violates the eighth amendment.[126] The majority concluded it is abhorrent to exe-

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124. *Id.* at 507. *See also* Holloway v. State, 257 Ga. 620, 361 S.E.2d 794 (1987) (mentally retarded defendant's conviction and death sentence reversed due to judge's failure to order a competency hearing); State v. Stokes, 319 N.C. 1, 352 S.E.2d 653, 657, 663-668 (1987) (finding death sentence imposed upon mentally retarded offender disproportionate); State v. Hall, 176 Neb. 295, 309-310, 125 N.W.2d 918, 926-927 (1964) (death sentence held to be excessive in light of evidence that defendant had an I.Q. of 64); Thompson v. State, 456 So. 2d 444, 448 (Fla. 1984) (trial judge erred in overriding jury recommendation of life imprisonment on the grounds that no mitigating circumstances existed, where "appellant's mental retardation could have been considered by the jury as a basis for recommending life imprisonment"); State v. Behler, 65 Idaho 464, 474-475, 146 P.2d 338, 343 (1944) ("Undoubtedly, one possessing a normal mind should be held to a full, strict accountability for his conduct, but, should a person with a pronounced subnormal mind be held to the same high degree of accountability?"); Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959) (vacating death sentence where sentencer had failed to consider mitigating factors, including defendant's youth and subnormal intelligence).

125. 106 S. Ct. 2595 (1986).

126. *Id.* The Court held that it is constitutionally impermissible to execute "one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." *Id.*

cute a person who, due to his mental illness, has no capacity to "come to grips with his own conscience," and that the execution of such a person serves no legitimate societal interest and transgresses society's evolving standards of decency.[127] A similar, though not identical, argument can be made regarding any truly mentally retarded individual.[128] As has been set forth previously, a mentally retarded person's ability to come to grips with his conscience is certainly impaired and thus the same constitutional principles articulated in *Ford* are arguably relevant in cases involving persons with mental retardation.

Ford, of course, does not specifically refer to mental retardation. However, the newly formulated Mental Health Standards promulgated by the American Bar Association state that an individual should not be executed if:

> as a result of mental illness or *mental retardation*, . . . [the individual] cannot understand the nature of the proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment [or who] lacks sufficient competence to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or the court.[129]

These Standards flow logically from the Court's decision and serve as additional evidence that the execution of the mentally retarded is no longer an acceptable punishment.[130]

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127. *Id.*

128. One problem in the reported appellate decisions is that courts often describe as mentally retarded individuals who are actually in the dull-normal range of intelligence. *See, e.g.*, Brogdon v. Butler, 824 F.2d 338 (5th Cir. 1987). In *Brogdon*, the court found it did not violate the eighth amendment to execute an individual who was "mentally retarded" because there was no dispute he was competent to stand trial. *Id.* at 341. However, earlier appellate decisions reveal that Brogdon's I.Q. may have been as high as 80, and on direct appeal the Louisiana Supreme Court determined that he possessed "dull normal intelligence." State v. Brogdon, 457 So. 2d 616 (La. 1984). Some of this confusion has to do with the fact that persons with I.Q.'s between 70 and 85 were previously referred to as "borderline mentally retarded." These persons, however, are no longer considered by professionals to be retarded.

129. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-5.6(b) (1983) (emphasis added).

130. Although not a judicial decision, the outgoing Governor of Louisiana recently commuted the death sentence of Herbert Welcome, a mentally retarded person on death row in that state, to life imprisonment. As Governor Edwards action was one of only several commutations in the entire county in the post-*Furman* era, the reduction of

3. Legislative Judgments

As noted earlier, the very lack of appellate decisions dealing with the issue of mental retardation and capital punishment is itself substantial evidence the death penalty is seldom sought and very rarely imposed upon a person with mental retardation. An additional factor relevant to the differential treatment of retarded persons in the capital sentencing process is that most state legislatures have either explicitly or implicitly recognized that the mentally retarded are less deserving of the death penalty than other individuals. Very recently, the Georgia legislature overwhelmingly passed a bill which prevents a mentally retarded person from being sentenced to death.[131] A similar bill was also passed by the Kentucky House of Representatives.[132]

Many, if not most, current death penalty statutes require that mental retardation be considered as a statutory mitigating factor as a "mental disease or defect," reflecting a greater awareness among lawmakers that the mentally retarded should not be sentenced to death.[133] However, the fact that many state statutes permit consideration of mental retardation as a mitigating circumstance in no way suggests such consideration is an adequate constitutional safeguard under the

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Welcome's sentence serves as additional evidence that the death penalty is no longer an appropriate punishment for persons with mental retardation.

131. The legislation, House Bill 878, was passed by both houses of the Georgia legislature on March 7, 1988. The bill also enacts a verdict of guilty but mentally retarded and provides that if any person is found to be guilty but mentally retarded "the death sentence shall not be imposed and the court shall sentence the defendant to imprisonment for life." The bill also adopts the AAMR definition of mental retardation, i.e., "significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period." *See supra* text accompanying note 16.

132. The Kentucky bill, House Bill 392, provides that: "[n]otwithstanding any other provision of law, no person who is mentally retarded, as defined above, shall be sentenced to death." The Kentucky legislation also utilizes the AAMR definition of mental retardation. *Id.*

Similar legislation is also pending in other states. *See* Ellis & Luckasson, *supra* note 23, at 46. This legislative effort is strongly supported by the Association for Retarded Citizens of the United States and the American Association on Mental Retardation. All legislation that of which we are aware adopts the AAMR definition of mental retardation referred to above. *See supra* text accompanying note 16.

133. *See, e.g.*, S.C. CODE ANN. § 16-3-20(C)(b)(6) (Law Co-op 1976).

eighth amendment. For example, all capital punishment jurisdictions permit consideration of age as a mitigating circumstance, but this does not authorize a sentencing judge or jury to sentence a ten-year-old child to death after merely "considering" his age as a mitigating factor. Even in those states which have no statutory minimum age for imposition of the death penalty,[134] it is obviously inconceivable that any prosecutor would seek the death penalty for a ten or twelve-year-old or that any jury would impose it. And, were such a sentence imposed, no court would uphold it simply because the condemned child's age was considered in mitigation of punishment. There exists, in short, an absolute prohibition against the execution of young children, and this prohibition is not one which may be ignored or thwarted by the case-by-case sentencing determinations of individual juries or judges. As has been set forth earlier, in every morally relevant way a mentally retarded person is like a child of ten or twelve. Thus, society's undeniable rejection of the death penalty for children of such tender years must mean *a fortiori* that the death penalty is not an acceptable punishment for a person with the mental age of a child of ten or twelve.

4. Public Opinion Evidence

The attitudes of the nation, as evidenced by public opinion polling data, also reflect a clear consensus that the death penalty should not be imposed upon the mentally disabled. This national consensus holds true even in states that most frequently impose the death penalty, such as Florida and Georgia. In Florida, for example, a 1986 statewide survey by the nationally-known Cambridge Survey Research polling organization revealed Floridians oppose use of the death penalty for mentally retarded offenders by an extraordinary 71% to 12% margin. This figure is all the more noteworthy in view of the fact that fully 84% of the same Florida respondents favored capital punishment, while only 13% opposed it.[135] A 1986 statewide poll in Georgia conducted by Georgia State

134. V. STREIB, *supra* note 83, at 46.

135. Cambridge Survey Research, Inc., *Attitudes in the State of Florida on the Death Penalty: A Public Opinion Survey* 7, 61 (1986).

University arrived at very similar findings: although Georgia residents were found to favor capital punishment by a margin of 75% to 25%, they categorically rejected its use for retarded offenders by a 2-1 margin.[136]

The objective evidence of American judicial and public attitudes reveals clearly that our society has recognized and is making amends for its past mistreatment of the mentally retarded. This progress is reflective of a realization of the severity of the disability borne by retarded citizens and society's heightened responsibility for their welfare and protection. The growing appreciation of the seriousness of the disability which the mentally retarded live is reflected in sentencing patterns, appellate decisions and public opinion polls relating to the appropriateness of the death penalty for this group of persons. The conclusion to be derived from all of these sources is that the execution of retarded citizens is, under any and all circumstances, a practice whose time has passed.

VI. MENTAL RETARDATION AS A MITIGATING FACTOR WHICH DESERVES SPECIAL WEIGHT IN THE SENTENCING PROCESS

The preceding sections of this article have set forth the reasons why the execution of mentally retarded offenders is under all circumstances forbidden by the eighth amendment. In the real world of capital litigation, the state frequently asserts that the constitution does not impose a categorical prohibition on such executions, but merely requires that mental retardation be considered as a mitigating factor prior to imposition of sentence in a capital case. For the reasons stated pre-

136. Thompson, *Georgians Oppose Death Penalty Involving Retarded, Poll Shows*, ATLANTA CONSTITUTION January 7, 1987 at 10-A. The same is true in South Carolina. An August, 1987 statewide poll conducted by MarketSearch, Inc, of Columbia, revealed that fully 56% of those South Carolinians surveyed believed mentally retarded murderers should not be executed, while only 29% favored executions of such persons. As in Florida and Georgia, South Carolinians' opposition to the use of the death penalty for retarded offenders contrasts sharply with public support for capital punishment in general: in the same MarketSearch poll, 72% of the respondents described themselves as favoring the death penalty, while only 20% opposed it. O'Shea, *South Carolinians Support Death Penalty, Telephone Poll Finds*, The State, August 29, 1987, at 8-D.

viously, a case-by-case approach is not a constitutionally adequate response to the difficult problems presented in cases involving persons with mental retardation. It may be, however, that courts and legislatures are not willing at this time to accept the notion of a categorical ban upon the execution of mentally retarded persons. Regardless, it is clear the current procedures utilized in most jurisdictions in capital cases do not ensure mental retardation will be given great weight in the sentencing process. Thus, at a constitutional minimum, due to the special impact mental retardation has upon a person's moral culpability, unique procedural protections are necessary when a defendant presents evidence of his mental retardation.

The Supreme Court has recognized that the sentencer in a capital case is "called upon to make a highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves."[137] The decision, although subjective, cannot be standardless; the sentencer's discretion must be guided.[138] Thus, the Supreme Court has concluded that juries and judges must give full and fair consideration to all mitigating factors.[139] Similarly, the Court has recognized that some types of mitigating factors, such as a defendant's youth, are entitled to greater consideration in the sentencing process than others.[140] The Supreme Court's opinion in *Eddings* indicates that a sixteen-year-old defendant's age must not merely be available for consideration by the sentencing authority, but rather it must actually be given great weight as a reason to impose life rather than death. In other words, the sentencer may not "consider" the fact that a defendant is only sixteen years old, but then hold that his age is not actually mitigating. Even if the eighth amendment does not prohibit the execution of such juveniles under any and all circumstances,[141] it unquestionably does require the sentencing au-

137. Turner v. Murray, 476 U.S. 28, 33-34 (1986).

138. Gregg v. Georgia, 428 U.S. at 189-195; McCleskey v. Kemp, 107 S. Ct. 1756 (1987).

139. Lockett v. Ohio, 438 U.S. 586 (1978); Skipper v. South Carolina, 476 U.S. 1 (1986).

140. *See* Eddings v. Oklahoma, 455 U.S. 104, 116 (1982) (fact the defendant was only sixteen at time of offense is a "mitigating factor of great weight").

141. *See* State v. Thompson, 724 P.2d 780 (Okla. 1986), *cert. granted*, 107 S. Ct.

thority to accord considerable weight to youth as a mitigating factor.

It logically follows that mental retardation, like the fact a defendant is a minor, is a mitigating factor constitutionally required to be given great weight in the sentencing process.[142] As has been set forth previously in detail, the mentally retarded person, through no fault of his own, simply does not have the same ability to reason, understand the consequences of his actions, or control his impulses that the nonretarded offender has. It is not sufficient that a capital sentencing authority be instructed to consider retardation as mitigating: it is essential the sentencer actually do so, and that such consideration appear from the record.

This requirement implies, where sufficient evidence of mental retardation is introduced, capital sentencing procedures must both ensure and reflect that this evidence is given great weight as a reason to impose a life sentence rather than death.[143] This could be accomplished by the simple evidentiary device of imposing upon the sentencing decision a legal presumption in favor of life once the defendant establishes that he is mentally retarded.[144] In the rare case involving dis-

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1284 (1987) (question presented is whether it violates the eighth amendment to execute an individual who was fifteen years old at the time of the offense).

142. Mental retardation has much in common with youthfulness as a mitigating factor. Both are wholly beyond the defendant's control, and each has enormous impact on the defendant's ability to reason and control his behavior—considerations directly relevant to moral culpability. Additionally, both mental retardation and age are mitigating factors which are clearly defined and easily verifiable. Just as a person is either a minor or not, so too may his mental retardation be established by testing and measured by generally accepted standards. Mental retardation, in short, is marked by little of the definitional and doctrinal controversy that envelopes most issues involving mental illness in criminal cases: anyone with an IQ of less than seventy who manifested this deficit during childhood is mentally retarded, and anyone who is mentally retarded suffers from a severe lifelong handicap which bears heavily on his moral culpability.

143. The Supreme Court has generally been more concerned with the procedures utilized in capital cases than more substantive matters. *See, e.g.*, McClesky v. Kemp, 107 S. Ct. 1756, 1773 (1987) ("our constitutional inquiry has centered on the procedures by which a death sentence is imposed."). Furthermore, the Court has acknowledged that there is a "heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life. . . ." Ford v. Wainwright, 106 S. Ct. at 2604; *see also* Booth v. Maryland, 107 S. Ct. 2529 (1986); Caldwell v. Mississippi, 472 U.S. 320 (1985).

144. *See generally* Note, *The Presumption of Life: A Starting Point for a Due Pro-*

puted evidence as to whether a defendant is mentally retarded, the jury (or judge) would first be required to determine whether the defendant was in fact mentally retarded.[145] The suggested presumption would come into effect only if the sentencer determined the individual to be mentally retarded. At that stage, the presumption of life would require that the sentencer impose the death penalty only if, after receiving proper instructions, it specifically found: (1) the defendant is as morally culpable and criminally responsible for the charged offense as a nonretarded individual; (2) the defendant cannot be habilitated; and, (3) the defendant poses a continuing threat to society if not executed.

Such a presumption against infliction of the death penalty would ensure that a defendant's mental retardation is given the "great weight" it deserves in the sentencing process. At the same time, such a presumption would safeguard against two closely related risks peculiar to cases involving mentally retarded offenders. The first of these is the danger the sentencing process will be affected, in individual cases, by the burden of discrimination, neglect and ignorance which has too long characterized our nation's treatment of retarded citizens in general.[146] The second danger is that the sentencing authority, in weighing the potential future dangerousness of a retarded murderer, may actually view the immutable nature of the defendant's mental disability as weighing in favor of death rather than life.[147]

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cess Analysis of Capital Sentencing, 94 YALE L.J. 351 (1984). Thus, the jury would be instructed in the following manner:

> Ladies and Gentlemen of the jury, this case involves a mentally retarded defendant. In such a case, it is the law of this state that life imprisonment is presumed to be the correct sentence.

145. Thus, the jury could be instructed:

> Ladies and Gentlemen of the jury, the evidence in this case is disputed as to whether the defendant is mentally retarded. You must first determine whether he is mentally retarded. If you determine the defendant is mentally retarded then the presumption in favor of a life sentence, which I previously explained to you, would apply.

146. *See* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985); *cf.* Turner v. Murray, 106 S. Ct. 1683 (1986) (recognizing peculiar susceptibility of capital sentencing process to effects of invidious racial discrimination).

147. *See* Zant v. Stephens, 462 U.S. 862, 885 (1983) (suggesting that capital sentencer may not attach "aggravating" label to factors such as mental illness which are

VII. CONCLUSION

In this article we have attempted to demonstrate that the imposition of the death penalty upon a mentally retarded person serves no legitimate penological interest and that sentencing retarded persons to death violates our evolving standards of decency. To execute a mentally retarded individual thus becomes merely expiatory; a seeking of some sort of tit-for-tat balance rather than producing a just response to a person who is mentally incapable of weighing the moral consequences of his acts.[148] Alternatively, we have argued that mental retardation is a type of mitigating factor entitled to great weight in the sentencing process.

We must end this piece, however, as it began. For behind the debate and the analysis regarding the *issue* of whether it is appropriate to execute mentally retarded persons, there are real people such as Limmie Arthur, and that must never be forgotten. Today as we write the conclusion of this article, he is in all likelihood working in his elementary school workbooks, studying for a GED he is not and never will be capable of obtaining. As we learned the hard way, whether or not our society permits individuals with the minds of children to be executed is not a question to be addressed by judges and juries on a case-by-case basis. Rather the mentally retarded should be a category of persons exempt from the death penalty. We are not of course suggesting that a mentally retarded person found guilty of murder should not be punished: certainly he should. However, the death penalty is too severe a punishment for a person, like Limmie Arthur, whose mental capacity is so impaired, he believes if he can only get a high school equivalency degree, the state cannot execute him.

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actually mitigating). *See also* Franklin v. Lynaugh, 823 F.2d 98 (5th Cir.), *cert. granted*, 108 S. Ct. (raising question of whether Texas "future dangerousness" instructions adequately safeguarded capital defendant's constitutional right to have mental disability considered as a mitigating factor); *Upholding Law and Order*, *supra* note 9.

148. *See generally* J. PIAGET, THE MORAL JUDGMENT OF THE CHILD (1965).