

# PROTECTING THE MENTALLY RETARDED FROM CAPITAL PUNISHMENT: STATE EFFORTS SINCE *PENRY* AND RECOMMENDATIONS FOR THE FUTURE

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## INTRODUCTION

### *Why should we care that the mentally retarded are being executed?*

\* Jerome Holloway, with an IQ of 49, was convicted of murder in 1987.<sup>1</sup> He was never given a competency hearing and was denied public funding for a psychiatric evaluation.<sup>2</sup> To demonstrate his client's limitations, Holloway's trial defense lawyer asked Holloway if he murdered Presidents Lincoln and Kennedy. Holloway replied in the affirmative.<sup>3</sup> His death

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1. In recent years, mental retardation is deemed to exist when a person's IQ is 70 or below. *See infra* note 34 and accompanying text.

2. EMILY FABRYCKI REED, *THE PENRY PENALTY: CAPITAL PUNISHMENT AND OFFENDERS WITH MENTAL RETARDATION* 120 (1993).

3. ROBERT PERSKE, *UNEQUAL JUSTICE?: WHAT CAN HAPPEN WHEN PERSONS WITH RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES ENCOUNTER THE CRIMINAL JUSTICE SYSTEM* 17-18 (1991).

sentence was later commuted to life in prison only hours before his scheduled execution.<sup>4</sup>

\* On the afternoon of June 25, 1985, Morris Mason, a schizophrenic death row inmate with an IQ of 66, declared that he would come back and defeat a fellow inmate in basketball after he returned from wherever the prison guards were taking him. They were there to take him to the electric chair. The sentence was carried out that evening after the warden decided that Mason was competent enough to die.<sup>5</sup>

\* On September 29, 1995, Missouri Governor Mel Carnahan pardoned Johnny Lee Wilson and released him from death row.<sup>6</sup> Wilson, whose IQ is in the sixties or seventies, was interrogated by police for four hours without an attorney present.<sup>7</sup> After a yearlong review, Governor Carnahan determined that Wilson had simply given police answers he thought would keep him out of trouble; the confession was manipulated by police, false, and inaccurate; and the state of Missouri had "locked up an innocent retarded man who is not guilty" for the past eight and a half years.<sup>8</sup> Wilson would not have been released had not another person voluntarily come forth and confessed to the murder.<sup>9</sup>

\* In South Carolina, Horace Butler, a third grade dropout with an IQ of 61, sits on death row. Told that mentally retarded people find it harder than others to learn, he said "So if I finish high school, I wouldn't be mentally retarded?"<sup>10</sup>

\* When Limmie Arther, with an IQ of 65, was asked how he felt after he had been denied a new trial or a sentence reduction, he said, "I ain't too sure . . . I feel good anyway . . . I got a new trial." He was executed in 1985.<sup>11</sup>

\* A mentally retarded Arkansas death row inmate left the dessert from his last meal before his Friday night execution on the window sill to cool. The prisoner believed he would have the chance to eat it on Saturday morning.<sup>12</sup>

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4. REED, *supra* note 2, at 120.

5. PERSKE, *supra* note 3, at 101.

6. Associated Press, *Retarded Man Freed from Mo. Prison*, BALTIMORE SUN, Sept. 30, 1995, at 3A.

7. Robert P. Sigman, *Victim of 'a Horrible Injustice'*, K.C. STAR, Jun. 4, 1995, at K1, K5.

8. Joseph P. Shapiro, *Innocent, and Free at Last*, U.S. NEWS, Oct. 9, 1995, at 41; Associated Press, *Retarded Man Freed from Mo. Prison*, BALTIMORE SUN, Sept. 30, 1995, at 3A.

9. Shapiro, *supra* note 8, at 41.

10. Christopher E. Smith & Avis A. Jones, *The Rehnquist Court's Activism and the Risk of Injustice*, 26 CONN. L. REV. 53, 69 n.84 (1993).

11. Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 551 (1988).

12. MICHAEL KRONENWETTER, CAPITAL PUNISHMENT 58 (1993); see Jonathan Freedland, *New Right Tackles Social Wrongs Under Guise of Cultural Warriors*, EDMONTON J., Feb. 5, 1995, at A7 (discussing 1995 execution of a mentally retarded man in Texas named

\* Another mentally retarded death row prisoner in Arkansas, with an IQ of 70, saw 1992 Democratic presidential candidate Bill Clinton campaigning on television and mentioned to his fellow inmates that he might vote for his governor.<sup>13</sup> Before that election day ever occurred, then-Governor Clinton took a break from the campaign trail to supervise this individual's execution.<sup>14</sup>

\* Horace Dunkins was executed in 1989 after two jolts of electricity, because the chair had been wired incorrectly the first time. Although his IQ was between 65 and 69, his lawyer did not mention to the jury that his client was mentally retarded. At least one juror, who learned of Dunkins's lack of mental capacity after the trial, announced that she would not have voted for a death sentence had she been informed earlier.<sup>15</sup>

\* Jerome Bowden was executed in 1986 in Georgia after one psychological test measured his IQ at 65. The outcry over the senselessness of the execution prompted the Georgia legislature to be the first in the country to ban the execution of the mentally retarded.<sup>16</sup>

These stories demonstrate that the American criminal justice system sanctions the execution of people who do not understand why they are being executed. Of the first 157 convicted murderers executed since capital punishment was reinstituted in 1976, at least eleven of them (seven percent) were known to be mentally retarded, although the incidence of mental retardation among the population at large is estimated at only one to three percent.<sup>17</sup> Amnesty International believes that mentally retarded individuals have accounted for as high as thirteen percent of those executed in modern times.<sup>18</sup> Of the approximately 2,500 people on death row throughout the nation today, it is estimated that twelve to twenty percent

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Mario Marquez who could not understand that he would not be able to eat the slice of apple pie he set aside from his last meal).

13. See Greg Lucas, *Bill Would End Execution of Retarded*, S.F. CHRON., Mar. 5, 1993, at A22.

14. See Derrick Z. Jackson, *Playing Politics with the Men on Death Row*, BOSTON GLOBE, Jan. 29, 1992, at 11.

15. PERSKE, *supra* note 3, at 82; Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1837 (1994).

16. See REED, *supra* note 2, at 84-86.

17. The seven percent figure is likely to be unrealistically low since only three states require an evaluation of prisoners for incidence of mental retardation. *Id.* at 39-40; see Ruth Luckasson, *The Death Penalty and Those with Mental Retardation*, in AMNESTY INTERNATIONAL USA, *THE MACHINERY OF DEATH: A SHOCKING INDICTMENT OF CAPITAL PUNISHMENT IN THE UNITED STATES* 91, 93 (1994) (number of capital defendants who have been mentally retarded cannot be accurately determined because they do not go through evaluations when arrested); Sandra A. Garcia & Holly V. Steele, *Mentally Retarded Offenders in the Criminal Justice and Mental Retardation Services Systems in Florida: Philosophical, Placement, and Treatment Issues*, 41 ARK. L. REV. 809, 833 (1988) (reporting that no pretrial psychological evaluation was given to 78% of mentally retarded prisoners); see also *infra* notes 49, 57, and accompanying text (estimating the percentage of Americans who are mentally retarded).

18. Shapiro, *supra* note 8, at 43.



of them are mentally retarded;<sup>19</sup> of the national prison population, it is estimated that three-and-one-half to five percent, or 17,000 to 24,000 inmates, are mentally retarded.<sup>20</sup> While in prison, mentally retarded persons are more likely to be victimized, exploited, and injured than other inmates. They are also unlikely to receive individualized rehabilitation addressing problems stemming from their mental retardation.<sup>21</sup>

In 1989, the Supreme Court declared in *Penry v. Lynaugh* that the execution of the mentally retarded<sup>22</sup> was not cruel and unusual punishment per se because a national consensus against imposing the death penalty in these cases did not exist.<sup>23</sup> John Paul Penry, the defendant, had organic brain damage caused by trauma at birth, an IQ level scored between 50 and 63, and a mental age of six and a half.<sup>24</sup> The jury found Penry competent to stand trial and convicted him for capital murder.<sup>25</sup> The Supreme Court declared that Penry's sentence was invalid because the jury was not given the opportunity to consider the defendant's retardation as a mitigating factor at sentencing.<sup>26</sup> But more importantly, the Court, by a five-to-four vote, held that the execution of the mentally retarded was not prohibited

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19. REED, *supra* note 2, at 39 (12% to 20%); Mello, *supra* note 11, at 550 (13.2%) (quoting Clearinghouse on Georgia Prisons and Jails' survey of 1986); see Jackson, *supra* note 14, at 11 (statement of Karina Wicks, research director on capital punishment for the National Association for the Advancement of Colored People) ("[U]p to 50 percent of those on death row have a major psychological or emotional disturbance that makes them unable to comprehend the death penalty.").

20. Mello, *supra* note 11, at 550. The East South Central region, comprised of the states of Kentucky, Tennessee, Alabama, and Mississippi, has the highest percentage of mentally retarded prisoners (24.3%), followed by the West South Central region, which consists of Arkansas, Texas, Louisiana, and Oklahoma (20.6%). The Mountain and Pacific regions have the lowest percentage of mentally retarded prisoners. See Garcia & Steele, *supra* note 17, at 813. The high percentage of mentally retarded prisoners is not due to any predisposition of mentally retarded persons to commit crimes, despite common jury prejudices to the contrary. See *infra* note 162 and accompanying text.

21. Douglas P. Biklen & Sandra Mlinarcik, *Criminal Justice: Mental Retardation and Criminality, a Causal Link?*, in 10 MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES 172, 179 (1978); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 479-80 (1985); see PERSKE, *supra* note 3, at 17 (relating prison guard's story of how inmates liked to "play" with retarded prisoner by making him cry); Garcia & Steele, *supra* note 17, at 810-11 ("[T]he retarded offender has some special problems that make prison potentially even more devastating for him than for other offenders.").

22. I will be using the terms *mentally retarded* or *mental retardation* to refer to this group throughout the Article. The use of these words follows the American Association on Mental Retardation's determination, after much deliberation, of acceptable terminology. See American Ass'n on Mental Retardation, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS xi (9th ed. 1992) [hereinafter AAMR].

23. 492 U.S. 302, 335 (1989).

24. *Id.* at 307-08. Penry's mental age figure was described by the psychologist at trial as "the ability to learn and the learning or the knowledge of the average 6 1/2 year old kid." *Id.* at 308.

25. *Id.* at 308-09.

26. *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989).

by the Eighth Amendment.<sup>27</sup>

Lower courts have followed the letter of *Penry*, foreclosing arguments that subjecting even severely mentally retarded defendants<sup>28</sup> to capital punishment violates the Eighth Amendment.<sup>29</sup> However, in response to *Penry*, eleven states have banned execution of the mentally retarded within their own jurisdictions.<sup>30</sup>

This Article will demonstrate that in order to stop the practice of executing the retarded, state legislatures, and not the courts, must be the focus of advocates' efforts. The lower courts have been no refuge for the mentally retarded, and the Supreme Court is unlikely to overrule *Penry*. Listing mental retardation as a mitigating factor in capital sentencing has failed to prevent the execution of those of greatly below-average intelligence. Although there is little culpability or deterrent effect to justify execution of the mentally retarded, this practice will continue until a large number of state legislatures specifically ban it.

In the first part of this Article, I will discuss the current and past definitions of mental retardation. Mental retardation is a confusing and often intangible affliction that many do not fully understand. In order to decide if the criminal justice system should allow this group to be executed, we must know the parameters of mental retardation. I will discuss the recent change in the definition of mental retardation that was made in part to provide a more workable definition for those outside the mental health professions.

Next, I shall offer arguments against executing the mentally retarded.<sup>31</sup>

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27. *Id.* at 338-39.

28. *Pruett v. Thompson*, 771 F. Supp. 1428, 1457 (E.D. Va. 1991) ("Thus, assuming for the sake of argument that [the defendant] is as severely mentally retarded as the defendant in *Penry*, this alone is insufficient to hold his death sentence unconstitutional, as long as the jury was not precluded from considering evidence of mental defect as a mitigating factor."), *aff'd*, 996 F.2d 1560 (4th Cir. 1993).

29. *See Williams v. Dixon*, 961 F.2d 448, 450 (4th Cir.), *cert. denied*, 113 S. Ct. 510 (1992); *see also Mathenia v. Delo*, 975 F.2d 444, 453 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1609 (1993); *Daniel v. Thigpen*, 742 F. Supp. 1535, 1564 (M.D. Ala. 1990); *Rector v. Lockhart*, 727 F. Supp. 1285, 1293 (E.D. Ark. 1990), *aff'd*, 923 F.2d 570 (8th Cir.), *cert. denied*, 501 U.S. 1239 (1991).

30. The states which prevent the execution of the mentally retarded are Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, New Mexico, New York, Tennessee, and Washington. *See infra* note 533. There are also twelve states which do not employ the death penalty in any respect. *See infra* note 301.

31. This Article, however, will not focus on the validity of the death penalty in general. As the reader will see, there are issues surrounding the mentally retarded which makes their execution pointless for criminal justice purposes. I have stressed those aspects, rather than attack the death penalty itself, to show that preventing the execution of the retarded is less a criminal justice issue than a humanitarian issue. Of course, arguments against the capital punishment of the retarded are a subset of those against the practice of state-sponsored executions in general. Sometimes, the subset and the general issues will intertwine, as with racial bias and capital sentencing. Other times, I shall point out how the retarded are different from non-retarded members of society, thus making their execution less appropriate given the supposed goals of capital punishment.

I will discuss the common rationales used by supporters of the death penalty—deterrence and retribution—and I will demonstrate that neither theory justifies the execution of the mentally retarded. I will also discuss the various procedural problems that mentally retarded defendants encounter within the criminal justice system. These procedural disadvantages increase the probability of erroneous convictions, making irrevocable punishment inappropriate. Opponents of death penalty exceptions for the mentally retarded often argue that such a rule will be abused by those faking retardation. Yet requirements of proof of diagnosis prior to adulthood make feigning retardation very difficult. The continued racial prejudice in application of the death penalty places the mentally retarded black or Latino defendant in an almost no-win situation. Finally, some advocates for the mentally retarded believe that the issue of capital punishment should be decided for each individual case, rather than creating a blanket exception for all who are classified as retarded. They feel that such categorizations ignore the wide variation among people with mental retardation. Until individualized treatment is the standard for civil rights, however, it should not be the standard for the death penalty.

The third section of this Article will analyze the Supreme Court's 1989 decision in *Penry v. Lynaugh*, in which a five-to-four majority of the Court declared that the execution of the mentally retarded did not violate the Eighth Amendment's proscription of cruel and unusual punishment. I will then discuss how the Court determines whether or not a national consensus against a particular application of the death penalty exists. In the fourth section, I will analyze the Court's new composition since the *Penry* decision and discuss what effect, if any, the new justices will have on this issue. These sections will demonstrate that the catalyst for change in this area of the law must come from the state legislatures. The Supreme Court will not alter its position unless enough states to represent a consensus declare their opposition to the use of capital punishment against the mentally retarded.

The fifth section of this Article explores how states may pass legislation to end the execution of the mentally retarded. In order to determine which strategies would be effective in achieving these reforms, I interviewed a number of legislators and their aides in states where these measures have either succeeded or failed. I will also compare various enacted laws to determine whether any consensus has been reached on important issues such as the burden of proof needed to demonstrate retardation, the timing of the hearing on the defendant's alleged mental retardation, or the court appointment of mental health experts.

Finally, I will recommend model legislation banning the execution of the mentally retarded and strategies for its passage in a state legislature. This model legislation is based on the American Association on Mental Retardation's 1992 revised definition of mental retardation as the basis of

the bill. I will also propose that the IQ test be used as flexible, not dispositive, evidence of mental retardation; that the hearing on the defendant's alleged mental retardation take place before the trial on guilt or innocence; that the court provide for two psychiatrists or psychologists, or one of each, to help determine the defendant's mental status; that the burden of proof for mental retardation be a preponderance of the evidence, not a clear and convincing standard; and that the legislation not apply retroactively to defendants who have already been sentenced to death.

The successful passage of legislation banning the execution of the mentally retarded requires a comprehensive effort. A coalition must be formed between those who oppose the death penalty under any circumstances and those who support capital punishment but would exclude mentally retarded defendants from its application. This coalition must build a consensus that the execution of the mentally retarded, which serves no deterrent or retributive function, has no place in a civilized society. Success of this legislation may depend on a popular sponsor, well-versed in the art of compromise; an inclusive lobbying effort uniting church groups, advocates for the mentally retarded, and state prosecutors inclined toward resistance, and persuasive documentation reflecting a clear agenda.

## I.

### WHAT IS MENTAL RETARDATION?

Before discussing the problems with capital punishment for the mentally retarded, it is important to clarify what mental retardation is for a number of reasons. First, the author of a proposal to ban the execution of the mentally retarded must have a clear understanding of which people would be affected. Second, knowledge of retardation issues is important in order to deflect criticism of proposed measures. For instance, if an advocate of this legislation knows that the definition of mental retardation requires that the person must have documented specific deficiencies in his<sup>32</sup> ability to function in daily life prior to the age of eighteen, the advocate will be better equipped to deflect claims that criminal defendants will be able to fake mental retardation in order to be spared the death penalty. Finally, the definition of mental retardation is not static, but has developed over the years and has even changed since the *Penry* decision. I suggest in the final section that state legislators who propose laws on this subject should employ the most recent revision in the definition of mental retardation.

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32. The *Review of Law and Social Change* uses feminine pronouns for the generic third-person singular. Throughout this Article, however, I will be using masculine pronouns to reflect the fact that the vast majority of individuals on death row, as well as a majority of mentally retarded individuals in general, are men. Keith A. Byers, *Incompetency, Execution, and the Use of Antipsychotic Drugs*, 47 ARK. L. REV. 361, 362 n.2 (1994) (stating that 2,760 (98.5%) of the 2,802 prisoners on death row in January of 1994, were men); *infra* note 49 and accompanying text (a mentally retarded individual is twice as likely to be male than female).

### A. *The Definition of Mental Retardation in Psychological Literature*

Both courts and legislatures have generally accepted the definition of retardation put forth by the American Association on Mental Retardation (AAMR). The AAMR standard had been, until recently, as follows:

Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.<sup>33</sup>

"General intellectual functioning" was measured by one or more of the individually administered standardized general intelligence tests and a "significantly subaverage" score was quantified as an IQ of 70 or below.<sup>34</sup> Deficits in adaptive behavior were "significant limitations" on the ability of the retarded individual to behave as a normal member of his age group.<sup>35</sup> The developmental period was defined as between conception and the person's eighteenth birthday. Development deficiencies may arise from brain damage, a degenerative process in the nervous system, or regression from previously normal functioning due to disease or environmental factors.<sup>36</sup>

The upper limit of an IQ of 70 was decided after much deliberation by experts in the field. The AAMR stressed that IQ of 70 was not to be taken as an absolute which strictly demarcated retarded from non-retarded.<sup>37</sup> Although many states have taken the AAMR's definition literally in determining eligibility for state programs for disabled persons, the AAMR intended a more flexible determination.<sup>38</sup> The flexible standard was designed to allow individuals with IQs higher than 70 who had special needs to be included within the definition of retardation while excluding those with IQs lower than 70 if the complete psychological judgment demonstrated that they were not mentally retarded.<sup>39</sup> Raising the IQ level to 75, according to the AAMR, would have increased the number of false

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33. AMERICAN ASS'N ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 11 (Herbert J. Grossman ed. 1983) [hereinafter AAMD]. After this edition was published, this organization changed the word "Deficiency" in its title to "Retardation" and became the American Association on Mental Retardation.

34. *Id.* The upper limit of retardation may be extended to IQ 75 or more depending on the reliability of the test. *Id.*

35. *Id.* ("Deficits in adaptive behavior are 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 . . ."); see also Ellis & Luckasson, *supra* note 21, at 422 ("The inclusion of adaptive behavior in the definition of mental retardation requires that intellectual impairment have some practical impact on the individual's life").

36. Environmental factors include "deprivation of nurturance and of social, linguistic, and other stimulation, and severe mental disorders (e.g. autistic disorder)." AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF PSYCHOLOGICAL DISORDERS 43 (4th ed. 1994) [hereinafter DSM-IV].

37. AAMD, *supra* note 33, at 22-23.

38. *Id.*

39. *Id.* at 23-24.

positives,<sup>40</sup> while reducing the number to 65 may have denied services to those who needed them. Early definitions of mental retardation which set the IQ cutoff as high as 85 were jettisoned because too great a percentage of the population would have been included in the group.<sup>41</sup> There was also concern that those in the IQ 70-84 category would be stigmatized with the classification of mental retardation even though they had been functioning adequately in society.<sup>42</sup>

The American Psychiatric Association (APA), whose handbook, the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), serves as the standard for mental health professionals, defined mental retardation similarly to the AAMR.<sup>43</sup> The APA also employs the flexible IQ of 70 criterion of the AAMR.<sup>44</sup> The authors of the DSM added that in thirty to forty percent of the cases, no clear cause of retardation could be discovered.<sup>45</sup> Where a causative factor could be determined, the prevailing reason was an early alteration of embryonic development such as a chromosomal change or prenatal damage due to toxins such as alcohol.<sup>46</sup> Other common causes of retardation included environmental influences and mental disorders.<sup>47</sup> Hereditary factors such as Down's Syndrome, complications in pregnancy such as fetal malnutrition, and childhood physical disorders were also recognized as less common reasons for an individual's mental retardation.<sup>48</sup>

The APA surmised that the prevalence of mental retardation in society at any one point in time is approximately one percent, with a prevalence in males about fifty percent higher than in females.<sup>49</sup> The mentally retarded were divided into four descending classes of disability from "mild," with an approximate IQ range from 50 to 70, to "profound," with IQs beneath 25.<sup>50</sup> The APA editors also estimated that eighty-five percent of those labelled retarded were members of the mild category, who could achieve a sixth-grade level of education by their late teens and who have the ability to

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40. *Id.* at 24 (stating that these are individuals who are not, in fact, retarded and for whom special-class placement and other services might be inappropriate).

41. ROBERT J. GREGORY, *ADULT INTELLECTUAL ASSESSMENT* 113-14 (1987).

42. *Id.* at 114.

43. AMERICAN PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 28 (3d rev. ed. 1987) [hereinafter *DSM-III-R*].

44. *Id.*

45. *Id.* at 30.

46. This includes everything from alterations in normal chromosome development to damage caused by the mother's consumption of alcohol while pregnant. *Id.*

47. *DSM-III-R*, *supra* note 43, at 30. The reasons for retardation under this category range from a deprivation of a nurturing and socially stimulating childhood environment to a complication due to a severe mental disorder such as schizophrenia.

48. *Id.*

49. *Id.* at 31.

50. *Id.* at 32. About 10% of people with mental retardation are in the moderate group (IQ 35-40 to 50-55), three to four percent in the severe classification (IQ 20-25 to 35-40), and one to two percent in the profound group (below 20-25). *DSM-IV*, *supra* note 36, at 41-42, 46.

provide minimum self-support with assistance from professionals.<sup>51</sup> Only four to six percent of retarded individuals were placed in the severe or profound categories. The Supreme Court in *Penry* would have labelled this group as "idiots" and would have automatically absolved of them of penal incarceration.<sup>52</sup>

### B. The 1992 Revision of the Definition of Mental Retardation

In 1992, the AAMR announced a "more precise and behavior-oriented" definition of retardation which focuses on improving functioning in specific behaviors.<sup>53</sup> Under this definition, mental retardation is no longer seen as an absolute, but as a condition that can be improved in a supportive environment.<sup>54</sup> Diagnosis of mental retardation will be a result of both IQ test results and an analysis of functioning in ten sets of behavior skills.<sup>55</sup> Environmental factors and mental health support structures play a greater role in the new definition.<sup>56</sup> The AAMR also added that the incidence of mental retardation in society is approximately two to three percent, higher than the APA's assumption six years earlier.<sup>57</sup>

Of the three parts of the 1983 definition of mental retardation, two remain intact: the mentally retarded individual must still possess significantly subaverage intellectual functioning, and mental retardation must manifest before age eighteen.<sup>58</sup> The flexible IQ of 70 standard, while de-

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51. DSM-III-R, *supra* note 43, at 32.

52. *Id.* at 33. "Idiots"—those who would be classified as severely or profoundly retarded today—could not be executed under common law because they did not have the necessary mental capacity to make their execution serve the goals of the penal system. See *infra* notes 227-232 and accompanying text.

53. PRESS RELEASE OF THE AMERICAN ASS'N ON MENTAL RETARDATION, 1, 4 (May 7, 1993) [hereinafter PRESS RELEASE]. The new recommended definition is: "Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." AAMR, *supra* note 22, at 1.

54. PRESS RELEASE, *supra* note 53, at 2.

55. *Id.*

56. *Id.*

57. *Id.* at 1; see *supra* note 49 and accompanying text. Even before the estimate of the percentage of mentally retarded people in the nation was increased by the AAMR, a number of experts had previously stated that the one percent figure was too low; see, e.g., EDWARD ZIGLER & ROBERT M. HODAPP, UNDERSTANDING MENTAL RETARDATION 99-102 (1986) (between two and two-and-a-half percent). But see DAVID L. WESTLING, INTRODUCTION TO MENTAL RETARDATION 35 (1986) (overall prevalence of mental retardation is no more than one percent). The APA has stuck to its one percent figure in the most recent version of the DSM, but qualified it with the statement that "different studies have reported different rates depending on definitions used, methods of ascertainment, and population studied." DSM-IV, *supra* note 36, at 44.

58. PRESS RELEASE, *supra* note 53, at 4.

emphasized after renewed attention from the AAMR, remains the objective gauge of retardation.<sup>59</sup>

However, the criteria for adaptive behavior from the 1983 version have been greatly expanded.<sup>60</sup> The previous view of adaptive behavior was too general and too easily misinterpreted by judges and juries, according to the chair of the committee that formulated the new definition.<sup>61</sup> The AAMR had found that the old, adaptive behavior standard was too difficult to conceive and to measure.<sup>62</sup> By clarifying the definition into ten skill areas, the concept of mental retardation would be more firmly grounded and better understood by lay people and legal professionals.<sup>63</sup> The authors of the revision do not expect a change in the incidence of mental retardation as a result of these changes because the 1983 definition has only been clarified, not substantially altered.<sup>64</sup> The APA has already incorporated the AAMR's change in the definition of mental retardation in its 1994 edition of the *Diagnostic and Statistical Manual*.<sup>65</sup> Since many states quickly adopted the 1983 definition of mental retardation by the AAMR, it is likely those states will amend their statutes to conform to the 1992 directive.<sup>66</sup>

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59. Telephone Interview with Ruth Luckasson, Attorney at Law and Professor of Special Education, University of New Mexico (Feb. 18, 1994). Professor Luckasson was the chairperson of the committee of the AAMR which changed the definition of mental retardation. See AAMR, *supra* note 22, at 5 (significantly subaverage intellectual functioning is classified as an IQ score of approximately 70 to 75 or below).

60. See AAMR, *supra* note 22, at 15 (importance of including adaptive skill limitations in the definition of mental retardation), 40-41 (descriptions of the ten adaptive skill areas). The new definition has been criticized for having a weakly conceptualized basis for choosing the ten adaptive skill areas and that certain skill areas, such as leisure skills, are "not necessarily part of a diagnosis of mental retardation." MARY BEIRNE-SMITH, JAMES PATTON & RICHARD ITTENBACH, *MENTAL RETARDATION* 136 (4th ed. 1994). The AAMR also recommended that the traditional levels of severity (mild, moderate, severe, and profound) be discontinued in favor of a system based on the intensity of needed support which would be subclassified into four levels (intermittent, limited, extensive, and pervasive) and applied to the adaptive skill areas. *Id.* at 71, 77.

61. BEIRNE-SMITH, PATTON & ITTENBACH, *supra* note 60, at 71, 77; see, e.g., *State v. Smith*, 893 S.W.2d 908, 918 (Tenn. 1994) (confusion over the definition of adaptive behavior because the legislature, while banning the execution of the retarded provided no definition of the term), *cert. denied*, 1995 WL 315281 (U.S. Oct. 2, 1995); *id.* at 930 (Reid, J., concurring in part and dissenting in part) ("Evidence of the defendant's inability to live independently, remain gainfully employed, or abide by community standards of acceptable behavior is sufficient to establish that he suffered from 'deficits in adaptive behavior' . . ."); see AAMR, *supra* note 22, at 149 (diagnoses of mental retardation have been challenged in criminal cases because the concept of adaptive behavior under the old definition could not be precisely defined). Some writers have criticized the use of adaptive behavior as factor in the clinical determination of mental retardation. See, e.g., WESTLING, *supra* note 57, at 11-12.

62. AAMR, *supra* note 22, at 38.

63. See *id.* at 39. Traditionally, however, less importance has been given to adaptive behavior than to IQ score. BEIRNE-SMITH, PATTON & ITTENBACH, *supra* note 60, at 86.

64. Telephone Interview with Ruth Luckasson, *supra* note 59.

65. DSM-IV, *supra* note 36, at 39.

66. See, e.g. Mass. Gen. Laws Ann. ch. 233, § 23E (West Supp. 1995) (establishing a procedure to determine the competency and take the testimony of a retarded witness which used the new AAMR definition of retardation); N.M. STAT. ANN. § 38-6-8(A)(2) (Michie



### C. Differences Between Mental Illness and Mental Retardation

Mental retardation is not the same thing as mental illness, although the two have often been lumped together by courts.<sup>67</sup> First, mental retardation is a developmental disorder that is usually permanent, while mental illness does not affect a person's ability to learn and often occurs in a temporary or cyclical fashion.<sup>68</sup> Thus, while an insane person may, with the proper treatment, be cured, the mentally retarded person can never be stripped of his retardation, though his abilities can be improved.<sup>69</sup> Second, mental illness and mental retardation call for very different treatments. The mentally retarded receive training on how to cope with daily challenges in order to improve adaptive behavior and self-sufficiency, while the mentally ill instead receive psychotherapy, psychotropic drugs, or a combination of the two.<sup>70</sup> The importance of this difference is highlighted by the criminal justice system's failure to understand that treatment for the mentally ill will do nothing to help a mentally retarded individual unless he also suffers from some form of mental illness.<sup>71</sup> Third, mental illness arises from biological disturbances that impair thought processes, but that do not necessarily cause low-level intelligence.<sup>72</sup> Mental retardation, on the other hand, does reflect the individual's low intelligence, and may result in his inability to ever control properly his thoughts and actions, regardless of treatment.<sup>73</sup> Although the conditions are dissimilar, the incidence of mental illness among retarded people is estimated to be quite high, between twenty and

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Supp. 1994) (same); Telephone Interview with Paula Hirt, Director of Programs and Services, American Ass'n on Mental Retardation (Jan. 24, 1995) (the ratification of the revised AAMR definition is traditionally a slow process). A 1987 study showed that 61% of states directly cited the AAMR definition. BEIRNE-SMITH, PATTON & ITTENBACH, *supra* note 60, at 83; *see also id.* at 77 (expecting some time delay for implementation of revised definition); AAMR, *supra* note 22, at 150 (stating same).

67. *See* Donald H.J. Hermann, Howard Singer & Mary Roberts, *Sentencing of the Mentally Retarded Criminal Defendant*, 41 ARK. L. REV. 765, 767-68 (1988) (noting society has traditionally included the mentally retarded with the insane in the one general community of the mentally unfit).

68. Salvador C. Uy, *From the Ashes of Penry v. Lynaugh: The Diminished Intent Approach to the Trial and Sentencing of the Mentally Retarded Offender*, 21 COLUM. HUM. RTS. L. REV. 565, 578 (1990).

69. Juliet L. Ream, *Capital Punishment for Mentally Retarded Offenders: Is It Morally and Constitutionally Impermissible?*, 19 SW. U. L. REV. 89, 122 (1990).

70. Uy, *supra* note 68, at 579; *see* Hermann, Singer & Roberts, *supra* note 67, at 773 ("Mental retardation is not a disease, but a permanent deficiency state which is not properly classified as mental illness and not responsive to psychotherapy or other psychiatric therapies including drug interventions.").

71. Ellis & Luckasson, *supra* note 21, at 424.

72. Mary D. Bicknell, *Constitutional Law: The Eighth Amendment Does Not Prohibit the Execution of Mentally Retarded Convicts*, 43 OKLA. L. REV. 357, 361 (1990).

73. *Id.* at 362.

sixty-four percent.<sup>74</sup> Unfortunately, the criminal law often ignores the differences between mental illness and mental retardation.<sup>75</sup>

#### D. Characteristics of Mental Retardation

Mental retardation is "a condition in which there are limits in conceptual, practical, and social intelligence."<sup>76</sup> The mentally retarded individual faces a host of problems in his everyday life that a non-retarded person does not. His intellectual limitations affect his ability to cope with ordinary challenges of day-to-day living in the community.<sup>77</sup> Many retarded persons have limited communication skills, poor impulse control, an underdeveloped conception of blameworthiness, a denial of their disability, a lack of knowledge of basic facts, and increased susceptibility to the influence of authority figures.<sup>78</sup> The most serious intellectual impairments resulting from mental retardation are deficiencies in logical reasoning, strategic thinking, and foresight.<sup>79</sup> The mentally retarded are often unable to grasp the relationship between cause and effect and to understand the consequences of future actions.<sup>80</sup> Overall, the mentally retarded have problems with attention, memory, intellectual rigidity, and moral development and understanding.<sup>81</sup> The entirety of these characteristics may result in some mentally retarded individuals becoming dangerous without malice intended.

#### E. The Validity of IQ Testing

The IQ test is essential to the criminal justice system's assessment of mental retardation.<sup>82</sup> With many defining mental retardation for capital

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74. Anton Dosen, *Mental Health and Mental Illness in Persons with Retardation: What Are We Talking About?* in MENTAL HEALTH ASPECTS OF MENTAL RETARDATION 3, 6 (Robert J. Fletcher & Anton Dosen eds., 1993).

75. See *Heller v. Doe*, 113 S. Ct. 2637, 2643-48 (1993) (holding that the difference in standards of proof between the mentally retarded and the mentally ill in involuntary commitment proceedings did not violate the Equal Protection Clause); *Zant v. Foster*, 406 S.E.2d 74, 76-77 (1991) (Smith, J., dissenting) ("mental retardation is a lesser debilitation than mental illness or insanity"), *overruled on other grounds by State v. Patillo*, 417 S.E.2d 139 (1992).

76. AAMR, *supra* note 22, at 12.

77. *Id.* at 13.

78. Ellis & Luckasson, *supra* note 21, at 427-32; see John Blume & David Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 ARK. L. REV. 725, 732-34 (1988) (recapitulating Ellis and Luckasson).

79. Brief for Petitioner by the American Ass'n on Mental Retardation et. al. at 6, *Penry v. Lynaugh*, 492 U.S. 302 (1989) [hereinafter Brief by AAMR] ("This reduced ability [to cope with and function in the everyday world] is found in every dimension of the [mentally retarded] individual's functioning, including his language, communication, memory, attention, ability to control impulsivity, moral development, self-concept, self-perception, suggestibility, knowledge of basic information, and general motivation.").

80. REED, *supra* note 2, at 15.

81. Luckasson, *supra* note 17, at 92.

82. See *infra* notes 533-540 and accompanying text.

sentencing purposes to be below an IQ of 70,<sup>83</sup> it is crucial to examine the fairness and accuracy of the IQ test. Some researchers have found the IQ test to be ineffective as the sole determinant of a classification of mental retardation.<sup>84</sup>

One of the most popularly used tests is the Wechsler Memory Scale-Revised [WAIS-R].<sup>85</sup> The test is made up of two parts, logical memory and visual reproduction, each of which is administered twice with a half-hour interval in between.<sup>86</sup> There are guidelines and criteria for scoring the test.<sup>87</sup> The test is designed to measure informational knowledge, auditory recall, concentration and distractibility, comprehension, the ability to see relationships between events, and other factors.<sup>88</sup>

The testing procedure and the identity of the tester play a role in the determination of IQ. Since the testing requires the subject to recount what he has seen, it is up to the tester to determine if the subject's variation of vocabulary from the right answer is acceptable.<sup>89</sup> Any bias the tester may have against the subject can play a large part in scoring.<sup>90</sup> Those tested by a cold, austere professional are likely to score a few points lower than those who experienced a test with a friendlier examiner.<sup>91</sup> There is also the possibility that the tester may make a gross scoring error.<sup>92</sup>

One issue which has received much discussion by experts in the field is whether the environment in which a child is raised affects the future likelihood of being classified as mentally retarded. Retarded individuals are "heavily concentrated in the lowest socioeconomic segments of society."<sup>93</sup> Many psychiatric experts believe that an underprivileged environment may

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83. See *infra* note 536 and accompanying text (setting out of the five states that have established an IQ 70 limit).

84. See David L. Rumley, *A License to Kill: The Categorical Exemption of the Mentally Retarded from the Death Penalty*, 24 ST. MARY'S L.J. 1299, 1329-40 (1993) (discussing the unreliability of IQ tests as sole factor in retardation determination); see also WESTLING, *supra* note 57, at 254-55 (studies demonstrate that most people classified as retarded were able to hold a job).

85. GREGORY, *supra* note 41, at 38.

86. *Id.*

87. *Id.* at 39-40.

88. See *id.* at 60-63 (describing the task demands of each subtest involved).

89. See GREGORY, *supra* note 41 at 39 (noting that intended meaning, rather than literal content, is what counts in scoring on memory tests); see also BRIAN EVANS & BERNARD WAITES, *IQ AND MENTAL TESTING: AN UNNATURAL SCIENCE AND ITS SOCIAL HISTORY* 131 (1981) (discussing the inherent cultural biases in IQ tests).

90. See *id.* at 149 (discussing a 1981 study where black college students with a high-mistrust of whites tested by a white examiner scored an average of ten points lower than those in the same mindset who were tested by a black examiner).

91. *Id.* at 154; see EVANS & WAITES, *supra* note 89, at 135 (citing study in which children's IQ scores increased eight to ten points after the interviewer engaged in play therapy).

92. *Id.* at 154-56.

93. BEIRNE-SMITH, PATTON & ITTENBACH, *supra* note 60, at 92 ("Children who are born and reared in deprived, lower socioeconomic groups are fifteen more times likely to be labeled mentally retarded than children from the suburbs"); see AAMR, *supra* note 22, at 12-13.

have a negative effect on IQ, though they disagree on the degree of the impact.<sup>94</sup> This conclusion was reaffirmed in the recent revision of the definition of mental retardation.<sup>95</sup>

A number of experts have criticized IQ tests because of a perceived bias against minority groups.<sup>96</sup> Reasons for this bias include the differing experiences and vocabulary among ethnic groups.<sup>97</sup> Others blame the placement of many minority children into special education classes which stigmatize them.<sup>98</sup> There are also the more general problems which the poor must face, such as under-funded schools, inferior nutrition, and violent neighborhoods.<sup>99</sup> As one would expect, testing persons whose native language is not English can lead to misleading IQ scores.<sup>100</sup> In essence, the WAIS-R "reflects the values of the majority American culture, and persons reared within that culture, all other things being equal, will excel on that test."<sup>101</sup> It is unlikely that any test which cuts across cultural barriers can be truly, culturally fair.<sup>102</sup> In response to this problem, researchers have developed the System of Multicultural Pluralistic Assessment (SOMPA). SOMPA posits that tests should compare tested individuals only against those of the same culture.<sup>103</sup>

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94. See, e.g., WESTLING, *supra* note 57, at 40 (stating that there is a historical tendency for more mildly mentally retarded people to come from poor, minority families, but the prevalence will depend on the tests used); ZIGLER & HODAPP, *supra* note 57, at 86 ("Thus, while most environments do not depress IQ, bettering the environment can have some impact on IQ and can certainly improve adaptability.").

95. AAMR, *supra* note 22, at 6 ("The existence of limitations in adaptive skills occurs within the context of community environments typical of the individual's age peers . . .").

96. See, e.g., *Larry P. v. Riles*, 495 F. Supp. 926, 954 (N.D. Cal. 1979) ("Black children score, on the average, one standard deviation below white children."), *aff'd in part and rev'd in part*, 793 F.2d 969 (9th Cir. 1984); BEIRNE-SMITH, PATTON & ITTENBACH, *supra* note 60, at 211 (citing a United States Department of Education survey which showed that while youth in general were 70% white and 12% Black, children with mental retardation were 61% white and 31% Black); WESTLING, *supra* note 57, at 12-13 (discussing the view of mental retardation as a socially assigned condition which should be evaluated differently in disparate socio-economic communities).

97. See, e.g., *Larry P.*, 495 F. Supp. at 958 (finding that the vocabulary of Black children may differ from that employed on standardized intelligence tests); DISSEMINATION AND ASSESSMENT CTR. FOR BILINGUAL EDUC., I.Q. TESTS AND MINORITY CHILDREN 5-9 (1974) (discussing classification of IQ test items that are particularly influenced by cultural factors).

98. See *Larry P.*, 495 F. Supp. at 956 (noting socio-economic status by itself cannot explain fully the disparities in IQ test scores and mild retardation between blacks and whites). Mentally retarded children are more likely to live in single parent families, come from families characterized by lower socioeconomic status, and live in a family with a low household income. BEIRNE-SMITH, PATTON & ITTENBACH, *supra* note 60, at 211.

99. See Jason DeParle, *Daring Research or 'Social Science Pornography'*, N.Y. Times, Oct. 9, 1994, § 6, at 78.

100. GREGORY, *supra* note 41, at 150.

101. *Id.* at 148.

102. See EVANS & WAITES, *supra* note 89, at 134.

103. GREGORY, *supra* note 41, at 148-49; see AAMR, *supra* note 22, at 46 (stating that SOMPA focuses attention on the importance of cultural and linguistic diversity issues in assessment, but creates the problem of declassifying individuals as mentally retarded who

Others familiar with intelligence testing uphold the validity of examinations such as the WAIS-R.<sup>104</sup> Yet, the test does have some limitations for use in the determination of mental retardation. First, the WAIS-R has a minimum score of 45, and so is almost useless for the determination of moderate, severe, and profound retardation.<sup>105</sup> Second, too many of the WAIS-R subtests have an "inadequate number of simple items" suitable for more severely mentally retarded individuals.<sup>106</sup>

Given the above problems with IQ testing, it is reasonable to ask why we use this method to determine a defendant's alleged mental retardation. The obvious answer is that the alternative of having no standard is much worse. While having a flexible standard of an IQ of 70 would be better than an inflexible one, having no standard would remove any means of comparison between one patient and another. Those who deserve lenient sentencing because of their mental retardation would not receive the benefits to which they are entitled. Necessary social services might be denied because the most needy could not be distinguished.<sup>107</sup> Having an IQ figure provides the practical benefit of a consistent standard generally accepted by mental health professionals.<sup>108</sup> In addition, professionals are continuing to study these tests, and frequent criticism has led to better testing methods. The IQ score should continue to be questioned as an absolute measure of intelligence, but since there is no adequate replacement, it should not be ignored.

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would have been otherwise eligible for services); BEIRNE-SMITH, PATTON & ITTENBACH, *supra* note 60, at 131-32 (describing SOMPA component for testing children).

104. *See, e.g.*, GREGORY, *supra* note 41, at 63 (citing studies that established the validity of the original WAIS and its correlation with school performance).

105. *Id.* at 109. This problem occurs because the IQ ranges for moderate, severe, and profound retardation are below a score of 45. *See* DSM-IV, *supra* note 36, at 40. If someone's IQ cannot be measured by traditional tests, the intellectual determination should reflect a level of performance that is lower than that observed in approximately 97% of persons of comparable backgrounds. AAMR, *supra* note 22, at 25.

106. GREGORY, *supra* note 41, at 110 ("By failing to add a few easy items at the beginning of most subtests, Wechsler foreclosed the possibility that the WAIS-R would be useful with adults functioning at lower than the mild retardation level").

107. IQ testing is used in a variety of social service, education, and workers' compensation contexts. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-482.D (1994) (funding for schools with low-achieving pupils); ARIZ. REV. STAT. ANN. § 15-715.A (1994) (school curriculum); GA. CODE ANN. § 34-9-361(12) (1994) (workers' compensation); ILL. ANN. STAT. ch. 405, para. 80/2-3(2)(D) (Smith-Hurd 1994) (home-based support services for mentally disabled adults); ILL. ANN. STAT. ch. 405, para. 80/3-3(2)(D) (Smith-Hurd 1994) (assistance for mentally disabled children); LA. REV. STAT. ANN. § 23:1378.F(30) (West 1994) (workers' compensation); S.C. CODE ANN. § 42-9-400(d)(33) (Law Co-op. 1994) (workers' compensation).

108. AAMR, *supra* note 22, at 36.

## II.

AN ANALYSIS OF RATIONALES FOR THE EXECUTION OF THE  
MENTALLY RETARDED

Capital punishment of the mentally retarded serves no valid penal purpose. While the Supreme Court has not yet found that a national consensus against this use of the death penalty exists, sentencing the mentally retarded to death should not continue.<sup>109</sup> The following sections rebut the major arguments against a mental retardation exemption. The first subsection confronts the deterrence rationale and argues that the already unproven deterrent value of the death penalty is even more suspect when applied to the mentally retarded. The second subsection shows that the mentally retarded lack the adequate level of culpability to make the retributive rationale of capital punishment applicable.<sup>110</sup> The third subsection argues that the mentally retarded are subject to a plethora of difficulties within the criminal justice system, including vulnerability to coercion and juror bias. These problems make the guilt-determination process less accurate, and the death penalty therefore less appropriate.

The final subsections demonstrate that fears of a death penalty exemption for the retarded are unfounded. Despite arguments to the contrary, mental retardation cannot be faked in order to avoid the death penalty. Those who are both black and mentally retarded will face severe problems as capital defendants. Likewise, the argument that a death penalty exemption treats the mentally retarded as an undifferentiated class, deprived of individual consideration, is not persuasive. The mentally retarded are considered a class—often to their disadvantage—in numerous civil contexts, and should not be individualized solely when recognition as individuals works to their disadvantage, as in the sphere of capital punishment.

Life in prison is a more appropriate alternative than death for the mentally retarded. Life imprisonment conserves financial resources, even if the badly-needed funding for rehabilitation programs for the mentally retarded is made available.<sup>111</sup> Incarceration better comports with the

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109. See 57 U.S.L.W. 2481 (Feb. 21, 1989) (adopting recommendation by American Bar Association's House of Delegates that persons who are mentally retarded not be sentenced to death or executed); see also *infra* notes 263-300 and accompanying text (discussing the Supreme Court's national consensus jurisprudence).

110. Brief by AAMR, *supra* note 79, at 4 ("The effects of their [the mentally retarded's] disability in the areas of cognitive impairment, moral reasoning, control of impulsivity, and the ability to understand basic relationships between cause and effect make it impossible for them to possess that level of culpability essential in capital cases.").

111. See *Furman v. Georgia*, 408 U.S. 238, 358 (1972) (Marshall, J., concurring) ("When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life."); *State v. Marshall*, 613 A.2d 1059, 1144-1148 (199) (Handler, J., dissenting) (discussing the cost of executions, including estimates that each execution costs approximately \$7.3 million dollars while the price of housing an inmate for 40 years (life) is less than \$1 million dollars); RAYMOND PATERNOSTER, *CAPITAL PUNISHMENT IN AMERICA* 191-213 (1991) (arguing that due to high pretrial costs, including investigation and motion practice, trial costs, including jury selection and separate penalty-phase adjudication,

growing international repudiation of capital punishment.<sup>112</sup> Moreover, unlike the death penalty, imprisonment allows the correction of mistaken convictions, often discovered through the use of advanced technology.<sup>113</sup>

### A. Deterrence

Capital punishment seeks to deter would-be murderers from attempting their crimes because they are afraid of the consequences.<sup>114</sup> Yet even the Supreme Court has stated that the evidence as to the death penalty's

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and overwhelming appeals costs, the state spends less money on life imprisonment than capital sentencing); PERSKE, *supra* note 3, at 105 (stating that when New York considered reinstating the death penalty in 1982, a cost analysis revealed that the average capital trial and first stage of appeals would cost the state \$1.8 million, which was more than twice the cost of keeping an inmate locked up for life); Alan I. Bigel, *Justices William J. Brennan, Jr. and Thurgood Marshall on Capital Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the Court*, 8 NOTRE DAME J.L. ETHICS & PUB POL'Y 13, 49-52 (1994) (estimating that the cost of a 40 year incarceration is \$1 to \$1.25 million, while elaborate trial procedures, including bifurcation and assembling a jury, and attorneys fees have led states to budget over \$4 million dollars for the defense side of a capital trial); Anne Cronin, *Murder and the Death Penalty: A State by State Review*, N.Y. TIMES, Dec. 4, 1994, at E3 (graph) (citing a Duke University study of 77 murder cases in North Carolina during 1991 and 1992 which measured the cost of trial and imprisonment at \$166,000 and the cost of trying, convicting, and executing a murderer at \$329,000); see generally David Gottlieb in CONGREGATION OF THE CONDEMNED: VOICES AGAINST THE DEATH PENALTY 214-18 (1991).

112. No other developed Western society uses the death penalty close to the same extent as the United States. This includes Canada and the United Kingdom, both of which abolished the death penalty in the 1960s. Today, only China uses capital punishment to the extent the United States does. Former Communist states of Eastern and Central Europe, as well as the states which made up the former Soviet Union, repudiated the death penalty in their move towards democratic societies. MARK V. TUSHNET, CONSTITUTIONAL ISSUES: THE DEATH PENALTY 131-32 (1994). South Africa executed more than 1,100 people during the 1980s, but its new, post-apartheid Constitutional Court unanimously ruled the death penalty unconstitutional. Jack Greenberg, *Perspective on the Death Penalty: Apartheid Lives on Our Death Row*, L.A. TIMES, Jun. 26, 1995, at 5; Bob Drogin, *Death Penalty Abolished in South Africa*, L.A. TIMES, Jun. 7, 1995, at 9.

113. See Barry Pollack, *Deserts and Death: Limits on Maximum Punishment*, 44 RUTGERS L. REV. 985, 1006 (1992) (citing a study of 350 defendants wrongfully convicted of crimes with the possibility of a death sentence, which found that the relevant error discovered before sentencing in only one to two percent of the cases); David O. Stewart, *Dealing with Death*, A.B.A. J., Nov. 1994, at 50 (stating that nearly 10% of those sentenced to die between 1973 and 1992 had their underlying convictions overturned on appeal and 39% during this time period had their death sentences lifted through judicial review or executive clemency); Bob Herbert, *Ban the Death Penalty Until Human Judgment is Perfect*, DETROIT FREE PRESS, Apr. 5, 1994, at 9A (quoting New York University Law School Professor Anthony Amsterdam); Stephanie Saul, *Death Penalty Push: The Public Supports It, but Does It Work as Deterrent*, NEWSDAY, Oct. 24, 1994, at A7 (statement of James Dempsey, United States House of Representatives attorney) (reporting that at least 48 people had been released from death row nationwide after doubt was cast on their guilt). See generally MICHAEL L. RADELET, HUGO A. BEDAU & CONSTANCE E. PUTNAM, IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992).

114. See *infra* note 238 and accompanying text (citing Justice O'Connor's opinion in Penry that deterrence is one of the reasons for the death penalty).

deterrent effect is inconclusive.<sup>115</sup> Some commentators and jurists have indicated that the lack of deterrent effect results from the time which elapses between sentencing and execution.<sup>116</sup> However, this element cannot be altered because of the many limits the Constitution places on speedy executions.<sup>117</sup> More importantly, those inclined to murder are unlikely to be concerned with whether the state in which they plan to commit the crime imposes the death penalty or life imprisonment.<sup>118</sup>

Statistics show that almost twenty years of the renewed death penalty have done little to reduce murder rates in states that have capital punishment statutes.<sup>119</sup> Even chiefs of police in the United States have come to a consensus that the death penalty does little to deter crime.<sup>120</sup> Twenty-one

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115. *Gregg v. Georgia*, 428 U.S. 153, 185 (1976) (plurality opinion); see *Paternoster*, *supra* note 111, at 218-43 (arguing that capital punishment has not been shown to be a serious general deterrent); William J. Brennan, Jr., *Neither Victims nor Executioners*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 9 & n.44 ("[T]here is no reliable evidence that the death penalty deters homicide better than life imprisonment.") (citing multiple studies); *A Firing Line Debate, Resolved: The Death Penalty is a Good Thing* (PBS telecast, May 24, 1994), at 4 (transcript on file with the author) [hereinafter *Firing Line*] (statement of Ira Glasser, executive director, American Civil Liberties Union) ("The fact is that there is no credible evidence—none—that having the death penalty deters homicide, lowers the homicide rate, or makes any of us safer."); *infra* note 258 and accompanying text (discussing Brennan and Marshall's opinion in *Penry*).

116. See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972) (White, J., concurring) ("[T]he death penalty could so seldom be imposed that it would cease to be a credible deterrent."); Sherri A. Carver, *Retribution - A Justification for the Execution of Mentally Retarded and Juvenile Murderers*, 16 OKLA. CITY U. L. REV. 155, 199 (1991).

117. See Carver, *supra* note 116, at 199. For instance, in North Carolina, there are nine steps in the appeals process after a death penalty conviction and some of the steps may be repeated. Cronin, *supra* note 111, at E3.

118. See Carver, *supra* note 116, at 202 ("A person who is not deterred from murdering by virtue of the socialization process is unlikely to be deterred by laws."); *id.* at 203-09 (arguing deterrence theory is not persuasive because it allows the vicarious punishment of innocent people and requires no proportionality between punishment and culpability); Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1193 (1980) (claiming that many homicides occur where rational calculation by the murderer was unlikely). Capital punishment provisions can be applied only in homicide cases and only to those participants who actually killed or at least contemplated the killing. WAYNE R. LAFAYE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 26.1(b) at 1088 (2d ed. 1992). People who do not actually do the killing can receive a death sentence if they were major participants in the felony and had "the culpable mental state of reckless indifference to human life." *Tison v. Arizona*, 481 U.S. 137, 137-38 (1987).

119. In the twelve states where executions took place between 1976 and 1985, the murder rate was 106 per million which was twice the murder rate, 53 per million, of the thirteen states without capital punishment laws. Ronald Hampton, *The Death Penalty: Racial Bias, Cost, and the Risk of Executing the Innocent*, in AMNESTY INTERNATIONAL USA, *THE MACHINERY OF DEATH: A SHOCKING INDICTMENT OF CAPITAL PUNISHMENT IN THE UNITED STATES* 101, 103 (1994).

120. *Around the Nation, Death Penalty Questioned*, WASH. POST, Feb. 24, 1995, at A4 (discussing poll, taken in January, 1995, of 386 randomly selected police chiefs which found that only one percent of them saw "the death penalty as a primary focus for stopping violent crime"); Sam V. Meddis, *Poll Details Areas Where Cops Differ with GOP*, USA TODAY, Feb. 23, 1995, at 3A (citing same poll which found the death penalty the least effective



of the twenty-five states with the highest murder rates in 1993 claimed to use the death penalty as a deterrent.<sup>121</sup> While the national homicide rate for states with the death penalty that year was 9.9 murders per 100,000 people, the rate in the states without the death penalty was only 8.1 murders per 100,000.<sup>122</sup> Only two states which did not employ the death penalty and the District of Columbia had murder rates higher than the national average in 1993, as compared to fifteen states *with* the death penalty.<sup>123</sup> Thus, general deterrence has not been demonstrated since the Supreme Court, in their 1976 *Gregg v. Georgia*<sup>124</sup> decision, again permitted states to reinstitute the death penalty. If capital punishment is to be used in the American criminal justice system, its deterrent effect should be substantial, not inconclusive.<sup>125</sup>

The deterrence rationale is even more suspect when the defendant is mentally retarded.<sup>126</sup> Deterrence assumes that the individual prospectively deterred will consider the applicable criminal sanction before he commits the crime. However, the mentally retarded suffer from an "impairment in

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means of curbing crime as compared to six other proposals, including community policing and longer prison sentences); Patrick V. Murphy, *Death Penalty Useless*, USA TODAY, Feb. 23, 1995, at 11A (discussing same poll which found that 58% of police chiefs sampled said that the death penalty was an ineffective law enforcement tool and 67% believed that it did not significantly reduce the number of homicides).

121. See FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1991 60-66 (1994) (New York, Michigan, Alaska, and the District of Columbia are the four states which did not have the death penalty but fell within the top twenty-five).

122. *Id.* The District of Columbia (78.5 per 100,000) was omitted from my calculations because it would be a statistical outlier in the averaging of state homicide rates. See Bigel, *supra* note 111, at 41-42 (summarizing studies by Thorsten Sellin finding no statistically significant difference in the number of murders committed between neighboring states which punish by death and life imprisonment); *id.* at 43 citing Ruth D. Peterson & William C. Bailey, *Murder and Capital Punishment in the Evolving Context of the Post-Furman Era*, 66 SOC. FORCES 774 (1988) (finding a higher homicide rate in states with death penalty than states without); *Firing Line*, *supra* note 115, at 4 (statement of Ira Glasser) (contiguous states where one does not have the death penalty, such as Michigan, and the other state does, such as Indiana, do not show a lower homicide rate in the state with the death penalty).

123. See FEDERAL BUREAU OF INVESTIGATION, *supra* note 121, at 60-66.

124. See *Gregg v. Georgia*, 428 U.S. 153, 186-87 (1976) (plurality opinion) (holding that the death penalty did not violate Eighth and Fourteenth Amendments under all circumstances and that legislature could weigh various factors in determining whether the death penalty should be imposed).

125. See Hugo A. Bedau & Michael L. Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161, 168 (1988) (concluding that no econometrically oriented study has found that the death penalty creates a greater deterrent effect on persons capable of committing murder than alternative punishment).

126. See Dian S. Rubanoff, *Sentencing the Mentally Retarded to Die: Mercy in the Hands of the Jury*, 11 WHITTIER L. REV. 845, 880-81 (1990) (citing transcript of *Penry* trial that demonstrated that the death penalty was not a factor in the defendant's decision to commit murder); *infra* notes 237-244 and accompanying text; see also Murphy, *supra* note 120 at 11A (citing poll in which 82% of police chiefs believed that murderers did not weigh possible criminal penalties before they commit the crime).

the ability to control impulsivity,"<sup>127</sup> a deterrent that depends on rational decision-making will fail to control these impulsive acts. In addition, the retarded often cannot contemplate the consequences of their actions or adequately comprehend the parallels between the imposition of a penalty on another person and the result that would occur if they committed a similar crime.<sup>128</sup> Since it is questionable as to whether the death penalty has any deterrent effect on even mentally competent adults, individuals with "significantly subaverage intellectual functioning," coupled with deficits in at least two areas of adaptive behavior,<sup>129</sup> have little chance of being deterred. Thus, the execution of a mentally retarded person cannot be justified under the deterrence rationale.<sup>130</sup>

### B. Culpability and Retribution

Retribution, or giving the individual wrongdoer his "just deserts," is one proposed purpose of the death penalty.<sup>131</sup> But retribution assumes that the person punished had full culpability for his actions. The argument that the mentally retarded do not possess the requisite level of culpability has been rejected by some elected officials for allegedly practical reasons or because of a lack of political courage.<sup>132</sup> However, the accepted definition of mental retardation alone demonstrates the absence of culpability which may be assigned to the retarded person convicted of murder.<sup>133</sup> A mentally retarded person's ability to control impulsive behavior and to develop moral values is impaired.<sup>134</sup> Thus, such people may commit crimes on impulse without the ability to weigh the consequences of the act<sup>135</sup> or to correct behaviors that have proven counterproductive in the past.<sup>136</sup> The

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127. Brief by AAMR, *supra* note 79, at 7.

128. Ream, *supra* note 69, at 108; see Blume & Bruck, *supra* note 78, at 742 (stating that the mentally retarded do not have capacity to premeditate murder in the true sense of the word).

129. See PRESS RELEASE, *supra* note 53 at 5 (defining mental retardation).

130. See BEIRNE-SMITH, PATTON & ITTENBACH, *supra* note 60, at 490 (reprint of DIVISION ON MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES OF THE COUNCIL FOR EXCEPTIONAL CHILDREN'S POSITION STATEMENT) (October 3, 1992) ("If the fact that the commission of a certain act may forfeit life cannot be understood, the death penalty as a deterrent loses meaning.").

131. See *infra* note 238 and accompanying text (citing Justice O'Connor's opinion in *Penry*, in which she stated that retribution was one of the rationales for capital punishment).

132. Robert L. Hayman, Jr., *Beyond Penry: The Remedial Use of the Mentally Retarded Label in Death Penalty Sentencing*, 59 UMKC L. REV. 17, 40 (1990).

133. See *infra* notes 250-254 and accompanying text (citing Justices Brennan and Marshall's view in *Penry* that mentally retarded people do not have the culpability necessary to justify the use of capital punishment against them).

134. Patricia Hagenah, *Imposing the Death Sentence on Mentally Retarded Defendants: The Case of Penry v. Lynaugh*, 59 UMKC L. REV. 135, 150 (1990).

135. Ellis & Luckasson, *supra* note 21, at 429; see Blume & Bruck, *supra* note 78, at 729-30 ("[M]ental retardation is a significant and devastating mental impairment which reduces a mentally retarded person's moral blameworthiness to a level different in kind from other non-retarded persons accused of murder.").

136. Brief by AAMR, *supra* note 79, at 7.

mentally retarded are often unable to distinguish between incidents that are their fault and situations beyond their control.<sup>137</sup> A mentally retarded defendant may confess to a crime because he believes blame must be attributed to someone, and he is unable to understand his role, or lack thereof, in causing the crime.<sup>138</sup> Some mentally retarded individuals whom the Supreme Court has permitted to be executed, such as Penry himself, do not even know the number of days in a year or in a week.<sup>139</sup>

It is ironic that the Supreme Court, four years before their holding in *Penry*, came to some understanding about the plight of the mentally retarded. In *Cleburne v. Cleburne Living Center*<sup>140</sup> the Court held that legislation concerning the mentally retarded should not be subject to a quasi-suspect classification, which would necessitate a higher standard of review than is normally used for economic and social legislation.<sup>141</sup> However, it prevented the city from using a special permit process to deny the placement of a home for the mentally retarded within city limits.<sup>142</sup> Justice White, who wrote the opinion in *Cleburne* but voted against a per se ban on executing the retarded in *Penry*, declared that the mentally retarded have a "reduced ability to cope with the everyday world."<sup>143</sup> He also cited the volume of legislation in the 1970s and 1980s that protected the right of the retarded to receive appropriate treatment and services in the face of discrimination.<sup>144</sup>

As *Cleburne* acknowledged, many areas of law discriminate against the mentally retarded. Their rights are restricted in areas of citizenship, education, and personal decision-making.<sup>145</sup> If the mentally retarded are treated differently in most other aspects of the law because they have a

137. See Ellis & Luckasson, *supra* note 21, at 429-30 (arguing that some mentally retarded persons have incomplete or immature concepts of blameworthiness and causation).

138. *Id.* at 430; Shapiro, *supra* note 8, at 41 ("[P]eople with retardation often are quick to 'confess' to crimes they did not commit"); see Jamie M. Billotte, *Is It Justified? - The Death Penalty and Mental Retardation*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 333, 367 (1994) (arguing that it is difficult for a mentally retarded person to apply what he has learned to new situations).

139. See Ellis & Luckasson, *supra* note 21, at 430 (arguing that many mentally retarded persons overrate their own physical skills and intellectual capabilities to avoid being stigmatized).

140. 473 U.S. 432 (1985).

141. *Id.* at 442.

142. *Id.* at 450.

143. *Id.* at 442 ("They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one.").

144. *Id.* at 443-45.

145. Rebecca Dick-Hurwitz, *Penry v. Lynaugh: The Supreme Court Deals a Fatal Blow to Mentally Retarded Capital Defendants*, 51 U. PITT. L. REV. 699, 719-20 (1990) (stating that 35 states disqualify voters because of mental disability, most deny retarded people the right to serve on a jury and enter into contracts, and seven states allow for the involuntary or compulsory sterilization of retarded people living in state institutions); Hayman, *supra* note 132, at 27 (noting that the retarded have also been denied the right to vote, marry, choose their residences, and have children); Nancy L. Woodhouse, *Challenging the Death Penalty for Mentally Retarded Defendants: Issues Raised by Penry v. Lynaugh*, 9 B.C. THIRD WORLD

specific and potent disability,<sup>146</sup> they should not be treated the same as mentally competent individuals solely within the criminal law. A majority of the Supreme Court recognizes that "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."<sup>147</sup> The mentally retarded individual's lack of moral blameworthiness, inability to appreciate the consequences of his acts, and problems with relating to the world surrounding him, renders the death penalty devoid of any legitimate penal purpose.<sup>148</sup>

### C. Barriers Facing the Mentally Retarded in the Criminal Justice System

The mentally retarded are not afforded the full range of procedural protections normally inherent to the adjudicative process.<sup>149</sup> For instance, courts are more likely to decide erroneously that retarded defendants have waived procedural rights that, in fact, the defendants never understood.<sup>150</sup>

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L.J. 323, 347 (1989) (describing paternalism of laws which do not extend all citizenship privileges to mentally retarded individuals).

146. See *infra* notes 208-212 and accompanying text.

147. Woodhouse, *supra* note 145, at 340. See also *Russell v. Collins*, 998 F.2d 1287, 1291 (5th Cir. 1993) (holding that defendants with disadvantaged backgrounds and mental impairments may be less culpable for crimes they commit than others without those problems, but that the mentally retarded may still be executed for murder).

148. See BEIRNE-SMITH, PATTON & ITTENBACH, *supra* note 60, at 490 (reprint of DIVISION ON MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES OF THE COUNCIL FOR EXCEPTIONAL CHILDREN POSITION STATEMENT) ("The mental and behavioral capacities of persons with mental retardation are likely to preclude the level of culpability necessary to inflict the death penalty since they are challenged in their abilities to discriminate, communicate, control impulsivity, and recall. While these individuals may recognize an act as right or wrong, they often may not possess a full understanding of this concept and may not link prior action to later punishment."); UNITED STATES BISHOPS' STATEMENT ON CAPITAL PUNISHMENT, in CONGREGATION OF THE CONDEMNED: VOICES AGAINST THE DEATH PENALTY 246, 248 (statement opposing capital punishment under all circumstances) ("[T]his need [for retribution] does not require nor does it justify taking the life of the criminal, even in cases of murder."); Blume & Bruck, *supra* note 78, at 738-39 ("[T]he 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 penological goal."); see also Ledger Wood, *Responsibility and Punishment*, 28 J. CRIM. L. & CRIMINOLOGY 630, 636 (1938) (Retribution "is a form of retaliation, and as such, is morally indefensible.").

149. Hayman, *supra* note 132, at 13; see V. Stephen Cohen, *Exempting the Mentally Retarded from the Death Penalty: A Comment on Florida's Proposed Legislation*, 19 FLA. ST. U. L. REV. 457, 472-73 (1991) (arguing that Florida courts are ill-equipped to handle the circumstances surrounding mentally retarded defendants).

150. See *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) (holding that defendant must prove police coercion to establish that the waiver of his Miranda rights was invalid); *Starr v. Lockhart*, 23 F.3d 1280, 1294 (8th Cir.) (holding that retarded defendant's waiver of *Miranda* rights was valid), *cert. denied*, 115 S. Ct. 499 (1994); *Dobyne v. State*, 1994 WL 128476, \*15 (Ala. Crim. App. 1994) (stating that mental retardation is merely one factor in the determination of whether *Miranda* rights have been waived and that waiver by defendant with IQ of 73 was valid), *aff'd*, 1995 WL 459121 (Ala. 1995); *Livingston v. State*, 444 S.E.2d 748, 754 (Ga. 1994) (finding a retarded defendant's confession valid because there was no police coercion); *State v. McCollum*, 433 S.E.2d 144, 160 (Ga. 1993) (holding that mental

The retarded are also more susceptible to police coercion and, therefore, are more likely to confess to crimes than are non-retarded persons, whether they are guilty or not.<sup>151</sup> Mentally retarded defendants more readily plead guilty and are more likely to be convicted of the arrested offense,

retardation in North Carolina is not a bar to a knowing and intelligent waiver of *Miranda* rights where the defendant appears to have no problem understanding instructions and signs a waiver form, even when defendant had mental age of eight to ten years and an IQ scored between 61 and 69), *cert. denied*, 114 S. Ct. 2784 (1994); *State v. Green*, 655 So.2d 272 (La. 1995) (holding that retarded defendant's waiver of *Miranda* rights was adequate even though psychologist testified that defendant was unable to comprehend rights because the police officer thought the defendant knew what he was doing); *State v. Stewart*, 633 So. 2d 925, 929-30 (La. Ct. App.) (finding that evidence supported conclusion that defendant's confession was voluntary, even though he had brain damage, an IQ of 63, and the educational performance level of a third grader, and that the defendant has initial burden of proving a mental defect which would interfere with his ability to voluntarily waive *Miranda* warnings), *writ denied*, 642 So. 2d 189 (La. 1994); *Penry v. State*, 903 S.W.2d 715 (Tex. Crim. 1995) (holding that defendant's mental retardation did not prevent him from voluntarily waiving his *Miranda* rights); PERSKE, *supra* note 3, at 21 (citing example where defendant thought *Miranda* warning was a type of routine speech and did not attach any significance to it); Biklen & Mlinarcik, *supra* note 21, at 178-79 ("For most retarded offenders, the recitation of the 'Miranda card' by the law officer is a meaningless exercise"); Garcia & Steele, *supra* note 17, at 833 (finding that 66% of mentally retarded arrestees made confessions or incriminating statements); Hayman, *supra* note 132, at 45-48 (stating that mentally retarded persons are unusually willing to waive both procedural rights and to accept a lower level of advocacy on their behalf); Suzanne Lustig, *Searching for Equal Justice: Criminal Defendants with Mental Retardation*, N.J. LAW., Jul. 1995, at 32 ("[defendants with mental retardation] may not understand the implications of the *Miranda* Rights being read to them"); *see also* *State v. McCollum*, 114 S. Ct. 2784, 2785 (1994) (Blackmun, J., dissenting in denial of certiorari) ("That our system of capital punishment would single out Buddy McCollum to die for this brutal crime only confirms my conclusion that the death penalty experiment has failed.").

151. Bicknell, *supra* note 72, at 362; Biklen & Mlinarcik, *supra* note 21, at 179; Blume & Bruck, *supra* note 78, at 736; Ellis & Luckasson, *supra* note 21, at 451 ("The retarded are particularly vulnerable to an atmosphere of threats and coercion, as well as to one of friendliness designed to induce confidence and cooperation.") (quoting President's Panel on Mental Retardation (1963)); Garcia & Steele, *supra* note 17, at 823 ("[I]t is often too much to expect the retarded offender to carry out an act of voluntary non-compliance with the request of such an authoritarian figure as a police officer if s/he has been taught to follow directions and has severe deficits in intellectual and adaptive functioning."); Lustig, *supra* note 150, at 34 ("By virtue of their cognitive limitations, individuals with mental retardation tend to be more 'suggestible' and therefore more vulnerable to the pressures that interrogating police officers can be expected to exert in their efforts to obtain confessions. . . [S]uspects with mental retardation may actually confess to crimes that they did not commit."); Jill Smolowe, *Untrue Confessions: Mentally Impaired Suspects Sometimes Make False Admissions*, TIME, May 22, 1995, at 51, 51 (statement of Richard Ofshe, sociologist specializing in interrogation techniques) ("Eliciting a confession from [the mentally retarded] 'is like taking candy from a baby.'"); Telephone Interview with Sally Gibson, Director of Governmental Affairs, ARC of Indiana (Jan. 26, 1995) (stating that there are documented cases of mentally retarded persons confessing to crimes which they did not commit in order to please their accusers); *see* PERSKE, *supra* note 3, at 16 (discussing a retarded defendant who had no knowledge of the crime but confessed after continuous police questioning, who was later released five years later after police found actual murderer); Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN L. REV. 21, 173 n.40 (relating story of mentally retarded man, later acquitted, who pleaded guilty to crime because of fear of being sentenced to death), 168 (relating account of mentally retarded man who was coerced into confessing to five counts of murder

rather than a reduced charge, than people without developmental disabilities.<sup>152</sup>

At trial, the inability of the retarded person to control his demeanor or to recall important events in regard to the crime are likely to bias the sentence against him.<sup>153</sup> He may appear to be lying when he is actually telling the truth. The responses that a mentally retarded person gives to questions during police interrogation and lawyer examination are likely to be biased by his predisposition to answering questions in the affirmative and the likelihood of his responding inaccurately, depending on the form of the question.<sup>154</sup> The mentally retarded person is also not able to recognize or to supply his own counsel with the most relevant mitigating information.<sup>155</sup> While the law recognizes these limitations in other contexts, the mentally retarded receive death sentences in a similar fashion to non-retarded adults.<sup>156</sup>

The attorneys assigned to help mentally retarded defendants may not be equipped to handle death penalty cases. Mentally retarded clients often accuse their trial counsel of ineffective assistance in later appeals.<sup>157</sup> Many

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by police who was later freed), 173 n.40 (discussing case of mentally retarded man who confessed to crime merely because his mental status caused him to agree to what others told him) (1987); Editorial, *Will Johnny Lee Wilson Get Justice?*, ST. LOUIS POST-DISPATCH, Apr. 1, 1995, at 14B (supporting clemency for inmate with IQ of 71 who pleaded guilty to murder after the police questioned him on three occasions during which they brought up the subject of the death penalty sixteen times in order to scare him into taking the plea).

In 1995, a borderline retarded Illinois man was put to death. He was convicted largely due to a signed confession given to police. However, at the time he signed the statement, the man was functionally illiterate and unable to read his own confession. Mike Robinson, *Davis Execution Brings Edgar Fire*, PEORIA JOURNAL STAR, May 18, 1995, at A5; Don Terry, *Diverse Group Tries to Stop Illinois Inmate's Execution*, N.Y. TIMES, May 11, 1995, at A14.

152. Lustig, *supra* note 150, at 32.

153. Billotte, *supra* note 138, at 344; Hayman, *supra* note 132, at 46.

154. Ellis & Luckasson, *supra* note 21, at 428; *see also* Mello, *supra* note 11, at 550 (arguing that mentally retarded defendants will attempt to avoid confrontation and please their prosecutorial challengers).

155. *See* AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE 7-5.6(b) (2d ed. 1989), available in Westlaw, ABA-SCJ Database ("A convict is also incompetent if, as a result of mental illness of [sic] mental retardation, the convict lacks sufficient capacity 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 to the court."); Mello, *supra* note 11, at 550 (stating that mentally retarded inmates are often unable to recall details and unable to communicate a complex chain of events).

156. *See infra* notes 208-213 and accompanying text (describing legal and physical limitations of the mentally retarded).

157. These claims, however, often fail. *See, e.g.,* *Andrews v. Collins*, 21 F.3d 612, 623 (5th Cir. 1994) (rejecting the ineffective assistance of counsel claim of a defendant whose experts estimated his IQ to be 68, because he was claiming complete innocence rather than using his mental deficiency as his defense), *cert. denied*, 115 S.Ct. 908 (1995); *Motley v. Collins*, 18 F.3d 1223, 1227-28 (5th Cir.) (holding that counsel's failure to present evidence of defendant's organic brain disorder was not ineffective), *cert. denied*, 115 S.Ct. 418 (1994); *King v. Puckett*, 1 F.3d 280, 284 (5th Cir. 1993) (finding that failure to offer mitigating evidence of diminished mental capacity not ineffective assistance); *Smith v. Black*, 904 F.2d

lawyers have no grasp of issues particular to the mentally retarded,<sup>158</sup> neither have they received any formal training on the effects of mental retardation.<sup>159</sup> These lawyers face serious communication problems with their clients and are consequently unable to present relevant information

950, 977 (5th Cir. 1990) (holding that counsel was not ineffective, even though he did not introduce fact that defendant's IQ was 70); Kevin Cullen, *The New Freedom Riders*, Boston Globe, Jun. 25, 1995, at 16 (discussing case where Georgia appeals court held that defendant's trial counsel was not ineffective, though his attorney did not raise the fact that his client's IQ was 63 nor cite the Georgia law which bans the execution of the retarded). *But see* Parkus v. Delo, 33 F.3d 933, 939 (8th Cir. 1994) (granting an evidentiary hearing on the defendant's procedurally defaulted ineffective assistance of counsel claim, due to his counsel's alleged inadequate investigation into petitioner's mental health history where the petitioner had a history of mental illness and borderline mental retardation); Goodwin v. Balkcom, 684 F.2d 794, 820 (11th Cir. 1982) (reversing death sentence because trial attorney was unaware of defendant's retardation), *cert. denied*, 460 U.S. 1098 (1983); United States v. Gramley, 883 F.Supp. 225 (N.D.Ill. 1995) (finding that borderline retarded defendant's counsel was ineffective because he did not conduct any investigation into possible mitigation evidence); Zant v. Pitts, 436 S.E.2d 4, 5 (Ga. 1993) (finding trial counsel ineffective because he failed to ask for a guilty but mentally retarded charge though his client had been diagnosed as mentally retarded); Bell v. State, 1995 WL 113420, \*23-24 (Tenn. Crim. App. 1995) (finding counsel ineffective for not presenting evidence that defendant had IQ of 70).

158. Middleton v. Evatt, 855 F. Supp. 837, 842 (D.S.C. 1994) (holding that counsel's reference to the mentally retarded defendant as "dumb" during closing argument did not constitute ineffective assistance of counsel); Blume & Bruck, *supra* note 78, at 729 ("In most of these cases . . . the retarded person's attorneys do not even know their client is mentally disabled . . ."); Smith & Jones, *supra* note 10, at 68 (trial attorney did not test his client with an IQ of 61, or present any evidence to the jury regarding defendant's mental capacity). These problems are exacerbated by the small amount of time and resources attorneys are able to devote to these cases. Most mentally retarded defendants have court-appointed attorneys, who are overworked and underpaid. *See* Bright, *supra* note 15, at 1841 ("[T]he inadequacy and inadequate compensation of counsel at trial" is one of the "principal failings of the capital punishment systems in the states today.") (citing 1990 American Bar Association study); Harvey Berkman, *The Budget for Indigent Defense Gets Cut Yet Again*, NAT'L L.J., Oct. 10, 1994, at A13 (reporting that the 1994 Crime Bill, while paying for 100,000 new police officers and many more prisons, cut the budget for lawyers representing indigent federal inmates by 10%); Lis Wiehl, *Program for Death-Row Appeals Facing Its Own Demise*, N.Y. TIMES, Aug. 11, 1995, at B16 (discussing Republican Congress' threats to end federally financed capital defender programs and the federal judiciary's opposition to these possible cutbacks); Ronald Smothers, *Court-Appointed Defense Offers the Poor a Lawyer, but the Cost May Be High*, N.Y. TIMES, Feb. 14, 1994, at A12 (reporting that while a private lawyer receives \$125 an hour, court appointed lawyers in Alabama receive only \$20 an hour and cannot receive more than \$1000 in total for the trial); Sam H. Verhovek, *Texas Opens Door for Death-Row Appeals*, N.Y. TIMES, Apr. 21, 1994, at A12 ("[B]ecause the state pays public defenders minimally and because many of Texas's leading law firms are disinclined to handle death penalty cases on a pro-bono basis, advocates for the inmates say that in many cases the legal representation they receive is atrocious."). The more money a state allocates to attorneys who defend indigents accused of capital crimes, the less chance that the death penalty will be imposed. Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES, Jul. 16, 1995, at § 6, 50 (after Indiana improved resources for lawyers for the indigent in 1992, the number of death penalties given out by Indiana juries dropped from five or six a year to one in three years).

159. *See* Garcia & Steele, *supra* note 17, at 820 (citing a survey of New York judges, lawyers, and police officers in which 91% of the respondents replied that they had received no formal training on the subject of mental retardation); *see also* Luckasson, *supra* note 17, at 93 ("Police officers, judges, prosecutors, and even the clients' own defense lawyers fail to pick up on the mental retardation."); Shapiro, *supra* note 8, at 41 ("Police and defense

to the jury.<sup>160</sup> A defense attorney's lack of knowledge of retardation leads to factually inaccurate and unjust results.<sup>161</sup>

There are also substantial problems with jury perceptions of the mentally retarded. Juries may actually interpret mental retardation as an aggravating, rather than a mitigating, factor in the decision of whether to impose capital punishment.<sup>162</sup> The stereotype that the mentally retarded are more likely to commit crimes remains despite extensive evidence to the contrary.<sup>163</sup> Even if mental retardation is classified as a mitigating factor,

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lawyers are rarely trained to spot mild retardation or the behavior that can produce false confessions.”).

160. See PERSKE, *supra* note 3, at 59-60 (attorney had problem communicating with client with IQ 68 and made no attempt to research mental retardation; defendant later convicted of capital murder in a four-hour trial); Dick-Hurwitz, *supra* note 145, at 724 (many retarded defendants may not even understand what type of information their attorney needs, let alone how to provide it); Smothers, *supra* note 158, at A12 (defense lawyers did not put forth experts on mental retardation though the defendant was of low IQ).

161. Bicknell, *supra* note 72, at 362; see Bright, *supra* note 15, at 1865 (relating stories of how, in a 1985 case, lawyers for mentally retarded capital defendants have told the jury that their “nigger” client had an IQ of 80 when the defendant’s IQ was actually 68, and another instance where an attorney had not begun to prepare a brief on direct appeal for his mentally retarded client as of the Friday before the Monday due date).

162. See BEIRNE-SMITH, PATTON & ITTENBACH, *supra* note 60, at 461 (“Many of the general public associate this condition [mental retardation] with sickness. All too often, individuals who are mentally retarded are perceived in negative ways . . . .”); Blume & Bruck, *supra* note 78, at 728 & n.9 (quoting the local newspaper, “It appears to us that there is all the more reason to execute a killer if he is also insane or retarded. . . . [A]n 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.”); David Stout, *Texas Who Killed Ex-Wife and Her Niece is Executed*, N.Y. TIMES, Jan. 18, 1995, at A16 (quoting prosecutor saying that the person executed was not mentally retarded enough to excuse him from execution). Capital punishment is decided by a sentencing jury in most, but not all, states. See *infra* note 557.

163. REED, *supra* note 2, at 39; Biklen & Mlinarcik, *supra* note 21, at 190 (“To date, extensive research—literally hundreds of studies—has revealed no unequivocal evidence to suggest a causal relationship between mental retardation and criminality.”); Ellis & Luckasson, *supra* note 21, at 426 (finding that the incidence of criminal behavior among people with mental retardation does not greatly exceed incidence of this behavior among entire population); Hermann, Singer & Roberts, *supra* note 67, at 771 (stating that since the 1950s there has been common agreement that “there is neither a causal connection nor any significant link between retardation and criminality” and that disparity probably occurs because the mentally retarded are more easily caught and convicted and receive longer sentences than non-retarded individuals); Rubanoff, *supra* note 126, at 881; see also Biklen & Mlinarcik, *supra* note 21, at 176 (postulating that the high proportion of mentally retarded prisoners is a result of their propensity to be influenced by peers with criminal tendencies, their lack of employment opportunities, and their ability to use delinquency as a means of lashing out against a society which discriminates against them), 180 (mentally retarded prisoners experience longer criminal sentences and are more frequently denied parole than non-retarded persons); Garcia & Steele, *supra* note 17, at 834 (stating that mentally retarded inmates are sentenced to longer periods of incarceration than non-retarded prisoners).



the jury, as well as the judge, often chooses to ignore it.<sup>164</sup> Jurors are unlikely to have a full grasp of mental retardation,<sup>165</sup> including the difference between this condition and mental illness.<sup>166</sup>

Including mental deficiencies generally,<sup>167</sup> or mental retardation specifically,<sup>168</sup> as statutory mitigating factors against a capital sentence has not been enough to stop the execution of the mentally retarded.<sup>169</sup> Courts allow capital punishment of the mentally retarded if the sentencing jury

164. See *Hall v. State*, 614 So. 2d 473, 481 (Fla. 1993) (Barkett, C.J., dissenting) (trial judge did not understand issues surrounding mentally retarded criminal defendants); *Right v. Singletary*, 50 F.3d 1539, 1549 (11th Cir.) (upholding trial judge's determination that defendant's borderline mental retardation was not a mitigating factor against the imposition of the death penalty), *reh'g denied*, 58 F.3d 642 (11th Cir. 1995); Woodhouse, *supra* note 145, at 329.

165. WESTLING, *supra* note 57, at 17 (1986) ("[M]ost people think of mental retardation in very stereotypical terms . . . [and] do not have a clearly defined concept of mental retardation."); Dosen, *supra* note 74, at 13 ("Mental retardation is still generally seen as a negative, painful, and even frightening phenomenon. There are different sort of taboos, prejudices, and projections among the general population leading to inappropriate attitudes, reactions, and interactions."); Virginia G. Wilson, *Penry v. Lynaugh: Mentally Retarded Defendants and the Death Penalty*, 34 ST. LOUIS U. L.J. 345, 350 (1990).

166. See *supra* notes 67-75 and accompanying text.

167. See ALA. CODE § 13A-5-51(2) (1994) ("defendant was under the influence of extreme mental or emotional disturbance"); CONN. GEN. STAT. ANN. § 53a-46a(g)(2) (West 1994) ("mental capacity was significantly impaired or his ability to conform his conduct to the requirements of law was significantly impaired"); FLA. STAT. ANN. § 921.0016(4)(c) (West Supp. 1995) ("capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired"); N.H. REV. STAT. ANN. § 630:5(vi)(a) (Supp. 1994) ("capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired"); N.J. STAT. ANN. § 2C:11-3(c)(5)(d) (West 1982 & Supp. 1994) ("capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired as the result of mental disease or defect or intoxication"); N.C. GEN. STAT. § 15A-1340.16(e)(3) (Supp. 1994) ("suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense"); OHIO REV. CODE ANN. § 2929.04(B)(3) (Anderson 1993) ("because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law").

168. ILL. ANN. STAT. ch. 730, para. 5/5-5-3.1(13) (Smith-Hurd 1993) (mental retardation as mitigating factor); S.C. CODE ANN. § 16-3-20(C)(b)(10) (Law. Co-op. Supp. 1994) (same); VA. CODE ANN. § 19.2-264.4(B)(vi) (Michie 1990) (same). See ILL. ANN. STAT. ch. 730, para. 5/5-1-13 (Smith-Hurd 1993) ("Mentally retarded and mental retardation mean sub-average general intellectual functioning generally originating during the developmental period and associated with impairment in adaptive behavior reflected in delayed maturation or reduced learning ability or inadequate social adjustment."); S.C. CODE ANN. § 16-3-20(b)(10) (Law. Co-op. 1994) (using 1983 AAMR definition of mental retardation).

169. See, e.g., *Sullivan v. State*, 636 A.2d 931 (Del.) (holding that failure to give jury specific instruction on defendant's alleged mental retardation as a mitigating circumstance was not plain error), *cert. denied*, 115 S.Ct. 110 (1994); *State v. Artis*, 384 S.E.2d 470, 489-90 (N.C. 1989) (stating that mental retardation does not have to be offered as a statutory mitigating circumstance), *vacated*, 494 U.S. 1023 (1990); *State v. Gumm*, 653 N.E.2d 253, 270 (Ohio 1995) (finding that the defendant's brain dysfunction and mental retardation do not qualify as a "mental disease or defect" for the purposes of Ohio's statutory mitigating factors against a sentence of death). But see *infra* note 239 and accompanying text (citing Justice O'Connor's view in *Penry* that listing deficient mental capacity as a statutory mitigating factor protects the mentally retarded).

deems the aggravating factors more substantial than the mitigating information.<sup>170</sup> As long as the court follows the Supreme Court's directive that the jury receive all mitigating information, including that the defendant is mentally retarded, the death penalty is deemed to be a fair punishment.<sup>171</sup>

Jurors may also confuse the fact that the defendant is competent to stand trial with the possibility that his retardation did not allow him to form the necessary intent for capital murder.<sup>172</sup> A defendant's substantially-below-average IQ, even when supplemented with expert testimony, does not prevent a court from declaring a retarded defendant mentally competent.<sup>173</sup> Once the defendant is declared competent, he is effectively

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170. See, e.g. *State v. Hill*, 595 N.E.2d 884, 902 (Ohio 1992) (finding that mitigating factors of defendant's poor childhood and mild retardation were outweighed by the brutality of the crime), *cert. denied*, 113 S. Ct. 1651 (1993); *People v. Johnson*, 585 N.E.2d 78, 94 (Ill. 1991) (holding that the fact that the defendant was retarded and a drug abuser was outweighed by brutality of crime and his committing of a second murder), *cert. denied*, 113 S. Ct. 106 (1992); *State v. Powell*, 552 N.E.2d 191, 200 (Ohio) (finding that the defendant's retardation was outweighed by the aggravating factors of other crimes), *cert. denied*, 498 U.S. 882 (1990).

171. *Prejean v. Smith*, 889 F.2d 1391, 1402 (5th Cir. 1989) (upholding the jury's decision to impose death penalty since jury was aware of defendant's mental capacity), *cert. denied*, 494 U.S. 1090 (1990); *Jones v. State*, 602 So. 2d 1170, 1175 (Miss. 1992) (holding that the jury was able to consider and give effect to mitigating evidence, including the fact that the defendants mental age at the time of the offense was seven and his IQ was between 61 and 66); *Yeats v. Commonwealth*, 410 S.E.2d 254, 268 (Va. 1991) (finding defendant with an IQ of 70 who claims mental retardation is entitled to a charge instructing the jury to consider defendant's condition as a mitigating factor in its sentencing deliberations, and a reviewing court must assume the jury properly considered such mitigating evidence), *cert. denied*, 503 U.S. 546 (1992); *Ramirez v. State*, 815 S.W.2d 636, 655 (Tex. Crim. App. 1991) (finding that the execution of a person with IQ of 57 is not cruel and unusual, but the defendant was entitled to a charge instructing the jury that it could consider and give mitigating effect to appellant's evidence); see also *Ex parte McGee*, 817 S.W.2d 77, 86 (Tex. Crim. App. 1991) (vacating death sentence because jury was not allowed to consider defendant's mental retardation); *Ex parte Goodman*, 816 S.W.2d 383, 386 (Tex. Crim. App. 1991) (vacating death sentence because jury was not allowed to consider defendant's mental retardation even though his mental ability was not directly related to the questions of deliberateness of the crime or the future dangerousness of the criminal).

172. A defendant is competent when he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960).

173. Woodhouse, *supra* note 145, at 339-40; see *State v. Williamson*, 1994 WL 381004, \*13 (Del. Super. Ct. 1994) ("That [the defendant is retarded] is not usually sufficient to support a finding of incompetence. To find the defendant incompetent based upon mental retardation, the retardation usually has been accompanied by some form of extreme psychological or psychiatric disorder."); *Graham v. Gathright*, 345 F. Supp. 1148, 1151 (W.D. Va. 1972) (declaring defendant with IQ judged as low as 50 competent to stand trial); *Lewis v. State*, 380 So.2d 970, 973 (Ala. Crim. App. 1979) (declaring defendant with IQ 45 competent to stand trial); *People v. Murphy*, 381 N.E.2d 677, 684 (Ill. 1978) (upholding trial court's conclusion that defendant was competent despite testimony that defendant's IQ ranged from 37 to 60); *Dick-Hurwitz*, *supra* note 145, at 722-23; *Deborah B. Dove, Competency to Stand Trial of Criminal Defendant Diagnosed as Mentally Retarded*, 23 A.L.R.4th 493, 498 ("few of the actually or allegedly mentally retarded defendants [were found] incompetent to stand trial").

precluded from using his disability as a defense.<sup>174</sup>

Consequently, the deck is stacked against the mentally retarded defendant. He does not have the full range of procedural protections, is more vulnerable to police coercion, and cannot fully supply his attorney with relevant information that might prevent a capital sentence. Furthermore, the legal system does not equip attorneys who are defending the mentally retarded with enough training to provide the client with adequate representation in a capital proceeding. Finally, listing mental retardation in a group of statutory mitigating factors is not enough to protect the retarded defendant. Jurors neither have a full understanding of the problems that a mentally retarded person must face, nor are they required to take these problems into account. Jurors may deem the defendant's retardation irrelevant if he is declared competent to stand trial. These barriers unfairly increase the likelihood that a mentally retarded defendant will be found guilty. Because capital punishment is irrevocable, any heightened risk of mistaken conviction should weigh heavily against the practice.

#### D. *The Risk of Feigned Mental Retardation*

In response to the movement to halt the execution of the mentally retarded, opponents claim that an exemption would prompt every death row inmate to claim to be retarded in order to avoid execution.<sup>175</sup> This argument highlights how mental retardation is misunderstood in the area of criminal law.

First, studies and first-hand reports demonstrate that mentally retarded individuals do not accentuate their disability, but try to overcompensate for their limited cognitive abilities.<sup>176</sup> This fact may directly affect their defense in a criminal trial, for the mentally retarded defendant may pretend as if he outsmarted his murder victim when perhaps he was not involved in the crime at all.<sup>177</sup> The mentally retarded are unlikely to refuse to answer questions that are beyond their ability<sup>178</sup> and overrate their skills

174. Woodhouse, *supra* note 145, at 337; see *Andrews v. Collins*, 21 F.3d 612, 619 n.10 (5th Cir. 1994) (finding that the court's declaration of the defendant's competence rendered the retardation issue moot, even though the defense presented testimony that the defendant was mildly mentally retarded), *cert. denied*, 115 S.Ct. 908 (1995); *State v. Card*, 825 P.2d 1081, 1085 (Idaho 1991) (holding that the standards of competence to stand trial and of the requisite mens rea for capital murder are adequate in lieu of a blanket restriction on the execution of mentally retarded people), *cert. denied*, 113 S. Ct. 321 (1992).

175. See *Zant v. Foster*, 406 S.E.2d 74, 77 (Ga. 1991), *cert. denied*, 112 S. Ct. 1297 (1992) (Smith, J., dissenting) ("Mental retardation . . . may be readily feigned.")

176. See, e.g. *WESTLING*, *supra* note 57, at 19-20 (1986) ("Mentally retarded people do not want to be mentally retarded or considered mentally retarded. They want to be normal . . ."); *Lustig*, *supra* note 150, at 32 ("defendants with mental retardation attempt to mask their disability (often even from their attorneys)"); *Shapiro*, *supra* note 8, at 41 ("To be labeled retarded is so stigmatizing that retarded people go to great lengths to 'pass' for normal.")

177. Mello, *supra* note 11, at 550.

178. Ellis & Luckasson, *supra* note 21, at 428.

in order to resist the stigma that accompanies the label of retardation.<sup>179</sup> Often, the mentally retarded criminal defendant is able to hide his disability from the untrained individuals around him who simply think that the defendant is being uncooperative.<sup>180</sup> Even within hours of being executed, one mentally retarded inmate regretted that he could not score better on his IQ test.<sup>181</sup>

Second, there are a number of procedural safeguards built into the death penalty exemption laws that have been passed in order to prevent defendants who are not mentally retarded from benefitting from these provisions. For instance, the retardation has to have manifested within the "developmental period," commonly accepted as ending at age eighteen.<sup>182</sup> Thus, a defendant who has reached the age of majority without being diagnosed as mentally retarded could not retroactively claim the exemption. If states accept the AAMR's revised definition of retardation, as they are likely to do,<sup>183</sup> an added safeguard would exist because the defendant would have to prove that he is limited in his performance of two of the daily activities contained in a specific list.

The defendant must prove that he is mentally retarded by at least a preponderance of the evidence.<sup>184</sup> Some states even call for a clear and convincing or reasonable doubt evidentiary standard.<sup>185</sup> States can also require that their own, independent psychiatrists perform evaluations on the defendant who is claiming to be mentally retarded.<sup>186</sup> Clearly, a number of roadblocks may be used to prevent those who are not mentally retarded from claiming the exemption.

#### *E. The Risk of "False Positives" Because of Racially Biased IQ Testing*

As mentioned in the discussion of the characteristics of mental retardation, there is evidence that members of minority groups score lower on IQ tests due to an inherent cultural bias in the test.<sup>187</sup> A proponent of

179. *Id.* at 430.

180. Wilson, *supra* note 165, at 348.

181. See PERSKE, *supra* note 3, at 33 (reporting that Jerome Bowden, the man whose execution prompted Georgia into banning the capital punishment of the mentally retarded, told his lawyers a few hours before his death that "I tried real hard. I did the best that I could." in reference to his IQ examination).

182. See *supra* note 36 and accompanying text; see also *infra* notes 541-547 (age standard in states where bans against the execution of the retarded have become law).

183. See *supra* note 66 (likelihood of states following AAMR's lead).

184. See *infra* notes 548-550 and accompanying text. Proof by the preponderance of the evidence requires the burdened party to convince the jury that the claim he asserts is more likely than not to be true. 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 5(c)(2) (1984).

185. See *infra* notes 550-554 and accompanying text.

186. See *infra* notes 568-571 and accompanying text.

187. See *supra* notes 96-102 and accompanying text. Approximately 60% of mentally retarded offenders are members of minority groups. See Garcia & Steele, *supra* note 17, at 817-18.

capital punishment might claim that some minority defendants would be falsely exempted from the death penalty due to biased IQ testing and thus would be disproportionately favored. This argument seems disingenuous at best, because the tremendous amount of racial bias in capital sentencing dwarfs any negligible relief for the mentally retarded. In addition, both the old and new definitions of mental retardation go beyond the IQ test in order to make determinations of the defendant's mental capacity.

In *McCleskey v. Kemp*, the Supreme Court held, in a five-to-four opinion, that the imposition of the death penalty in Georgia upon a black man for the murder of a white man did not violate either the Eighth or Fourteenth Amendments to the Constitution.<sup>188</sup> A statistical report offered by the defendant was found to be insufficient to prove that Georgia's system was arbitrary and capricious in its application of capital punishment, despite the study's findings that a defendant who killed a white person was 139% more likely to receive a death sentence in Georgia than a defendant who killed a black person in the same circumstances.<sup>189</sup> In essence, the majority believed that disparities in capital sentencing are "an inevitable part of our criminal justice system."<sup>190</sup>

Statistics demonstrating race bias in the use of the death penalty have continued to surface since the reemergence of the death penalty in 1976.<sup>191</sup> One of the first studies showed that while fifty-four percent of murder victims were African-American, only thirteen percent of the people on death row had been convicted of killing blacks.<sup>192</sup> Since that time, many more reports have strengthened the argument that blacks face greater obstacles than whites if they are accused of a capital crime.<sup>193</sup> For example, prosecutors are more likely to seek capital punishment if the defendant is African-American.<sup>194</sup> The defendant is also much more likely to receive a death

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188. 481 U.S. 279 (1987).

189. *Id.* at 325 (Brennan, Marshall, Blackmun, and Stevens, JJ., dissenting).

190. *Id.* at 312; see *Firing Line*, *supra* note 115, at 33 (statement of Bryan Stevenson, director, Alabama Capital Representation Resource Center) (lower courts will not challenge racial bias in capital sentencing due to the Supreme Court's *McCleskey* decision).

191. The Supreme Court allowed states to reimpose the death penalty in *Gregg v. Georgia*, 428 U.S. 153 (1976).

192. HUGO A. BEDAU, *THE CASE AGAINST THE DEATH PENALTY* 12-14 (1977); see NATIONAL CONFERENCE ON SENTENCING ADVOCACY 1991, *RACE, SENTENCING & CRIMINAL JUSTICE* (1991) (noting that because white category in Bedau survey included Hispanics leads to conclusion that disparity is even greater than figures show).

193. See 136 CONG. REC. S6889 (daily ed. May 24, 1990) (United States General Accounting Office, Report to Senate and House Committees on the Judiciary, Feb. 1990) (reporting that 82% of studies on racial disparities in death sentencing found that the race of the victim influenced the likelihood of being charged with capital murder or receiving the death penalty).

194. See *id.* at S6890 (reporting that the race of the victim influences earlier stages of judicial process such as prosecutorial discretion to charge the defendant with a capital offense); Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 767 (1983) (reporting a 36.5% probability that prosecutor in South Carolina will ask for death penalty if

sentence if his victim were white.<sup>195</sup> Generally, the defendant in the worst position is a black defendant accused of killing a white person.<sup>196</sup>

In April 1994, the House of Representatives passed an amendment to

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black kills white, compared to 13% possibility if white kills black); Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1117-18 & n.38 (1990) (reporting that while 84% of all black defendants indicted for murdering white victims were prosecuted under felony murder statutes, (which allow capital punishment), only 29% of single-race defendant/victim homicides were prosecuted under those statutes); Bigel, *supra* note 111, at 55-56 (finding that prosecutors recommended death penalty in 70% of cases involving black defendants and white victims but only in 32% of cases where both individuals were white); Jackson, *supra* note 14, at 11 (stating that 40% of prisoners on death row are black); see also Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 466 (1981) (stating that a prosecutor has great discretion in formulating the charge and offering a life sentence). Of the eleven known mentally retarded persons put to death since 1976, seven were black. REED, *supra* note 2, at 97.

195. See, e.g., 136 CONG. REC. S6889 (daily ed. May 24, 1990) (noting survey of 28 studies that demonstrated that the victim's race was an influence in receipt of the death penalty); Catherine Bender, *Defendants' Wrongs and Victims' Rights: Payne v. Tennessee*, 27 HARV. C.R.-C.L. L. REV. 219, 239 n.109 (1992) (noting that between January 1973 and August 1991, 128 people were executed for murdering whites while 17 were executed for murdering blacks); Elizabeth L. Murphy, *Application of the Death Penalty in Cook County*, 78 ILL. B.J. 90, 92 (1984) (stating that 61% of offenders in study were sentenced to death for killing whites, compared to 39% where the victim was black and 0% where victim was Hispanic); Paternoster, *supra* note 194, at 766 (noting that black defendants who kill whites are 40 times more likely to have the death penalty requested than blacks who kill blacks); Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing*, 18 N.Y.U. REV. L. & SOC. CHANGE 777, 780-81 n.10 (1991) (citing study encompassing 11,425 capital murders which revealed that the killer of a white is three times more likely to be sentenced to death than the killer of a black overall, eight times more likely in Maryland, six times more likely in Arkansas, and five times more likely in Texas); Zeisel, *supra* note 194, at 460 (noting that a Florida offender is 31 times more likely to receive death sentence if victim was white instead of black); Joe Davidson, *Crime Bill's Fate May Hinge on Effort to Allow Racial-Bias Defense in Death Penalty Cases*, WALL ST. J., July 13, 1994, at A16 (citing NAACP survey that showed 85% of victims in all capital cases were white, 11% black, two percent Hispanic, and one percent Asian); *Firing Line*, *supra* note 115, at 14 (statement of Stephen Bright, director, Southern Center for Human Rights in Atlanta) (stating that 16 of 18 executions carried out in Georgia involved white victims though 65% of crime victims were black); *id.* at 12 (statement of Bryan Stevenson, executive director, Alabama Capital Representation Resource Center) (27% of Georgia's population is black yet 75% of the people that have been executed in the state are African American). All eleven known mentally retarded individuals put to death since 1976 had been convicted of murdering a white person. REED, *supra* note 2, at 97.

196. Brennan, *supra* note 115, at 2 (stating that of the first 228 persons executed since the reestablishment of capital punishment in 1976, 80 black defendants were executed for the murders of whites, compared to only one white defendant executed for murdering an African-American); Samuel R. Cross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities of Capital Sentencing and Homicide Victimization*, 37 STAN L. REV. 27, 61 (1984) (noting that a black person convicted of multiple homicides of white victims had a 41.2% chance of receiving the death penalty in Illinois while a white defendant convicted of multiple homicides of African-American victims received the death penalty in only four and one half percent of cases); Murphy, *supra* note 195, at 93 (reporting that in Cook County, Illinois, there is a 40% chance that state would move for death sentence if victim was white and defendant was black, compared to 18% of white-on-white murders and 20% of black-on-black homicides); Rose M. Ochi, *Race Discrimination in Criminal Sentencing*, THE

the 1994 Crime Bill which would have allowed inmates the opportunity to establish a presumption that their death sentences were tainted by racial bias if they can show a statistically significant pattern of bias in similar cases tried in the court in question.<sup>197</sup> The amendment was sponsored by members of the Congressional Black Caucus, wishing to overturn the decision in *McCleskey* through legislation.<sup>198</sup> The promise of justice for African-American capital defendants was short-lived, because the White House and the former Democratic majority in the Senate were forced to drop the directive in conference committee because there were not enough votes to prevent a filibuster in the Senate.<sup>199</sup> However, Attorney General Janet Reno has declared that she will implement steps to ensure that federal prosecutors seek the death penalty in a manner free of racial bias.<sup>200</sup> Nonetheless, the racial bias in both the capital-sentencing system and in IQ testing makes it unlikely that a non-retarded African-American criminal defendant will be able to play one off against the other.

Moreover, the determination of mental retardation takes into account more than just the defendant's IQ score. Under the 1992 revised AAMR definition of mental retardation, specific and documented deficiencies in at least two or more adaptive skill areas, such as communication skills and the ability to take care of oneself, are necessary conditions for a diagnosis of mental retardation.<sup>201</sup> Even under the 1983 definition, one claiming to be mentally retarded must possess deficits in adaptive behavior that manifested before the age of eighteen.<sup>202</sup> The AAMR and leading mental health professionals are deemphasizing the use of the IQ test.<sup>203</sup>

Thus, no one of any race or ethnicity can walk into a courtroom and legitimately claim he is mentally retarded without exhaustive and documented proof. As mental health professionals become increasingly aware of the problems with IQ testing, racial bias in the determination of mental retardation will continue to decline, although it is unlikely to be completely eliminated. Any perceived advantage for racial minorities in the passage of

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JUDGES JOURNAL, Winter 1985, reprinted in NATIONAL CONFERENCE ON SENTENCING ADVOCACY 1991 45, 53 (explaining that in Florida, a black person who murdered a white victim is five times as likely to receive the death penalty as a white person who committed the same crime); Zeisel, *supra* note 194, at 460 (noting that 47% of black defendants arrested for murdering a white person were sent to Florida's death row, compared to 24% of white defendants accused of murdering whites, one percent of black defendants for black homicides and zero percent of white defendants for white murders); Davidson, *supra* note 195, at A16 (stating that since 1976, 63 blacks have been executed for murdering whites, compared to only one execution of a white person convicted of homicide against a black person).

197. Michael Wines, *House Votes to Allow Death-Row Appeals Using Race-Bias Data*, N.Y. TIMES, Apr. 21, 1994, at A13.

198. *Id.*

199. Joe Davidson, *Clinton Pushes for Passage of Crime Bill, Minus Provision on Death Penalty Bias*, WALL ST. J., July 21, 1994, at A16.

200. *Agency Watch*, NAT'L L.J., Aug. 29, 1994, at A14.

201. See *supra* note 53.

202. See *supra* notes 33 and 36 and accompanying text.

203. See *supra* note 59 and accompanying text.

bills to exempt the mentally retarded from the death penalty is greatly outweighed by the bias against blacks in the imposition of capital punishment.

### F. *The Need for Individualized Justice*

While most commentators have disagreed with the *Penry* holding, a few believe it was the correct outcome.<sup>204</sup> One argument put forth against death penalty exemption laws is that by placing blanket protection over the retarded as a group, they undercut the retarded individual's independence and self-determination.<sup>205</sup>

The argument against *Penry* does require advocates for the mentally retarded to defend the treatment of the mentally retarded as a monolithic group in the criminal law, while promoting their rights as individuals in other aspects of the legal system.<sup>206</sup> This contradiction is not irrational, however. Although the word *paternalism* evokes negative connotations, laws that protect those who cannot rationally make decisions for themselves are necessary, as long as they are carefully written so as not to include those who can make their own decisions. As Justice Stevens wrote in the *Thompson* decision which banned the execution of those under sixteen, "[i]t is in this way that paternalism bears a beneficent face."<sup>207</sup>

American history has witnessed widespread, discrimination against the mentally retarded. Neighborhoods resist the placement of group homes for the mentally retarded.<sup>208</sup> The courts regularly take children away from mentally retarded parents.<sup>209</sup> Thirty-six states currently have legislation

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204. See, e.g., Donald N. Bersoff, *Autonomy for Vulnerable Populations: The Supreme Court's Reckless Disregard for Self-Determination and Social Science*, 37 VILL. L. REV. 1569, 1585-86 (1992) (agreeing that if the death penalty is constitutional, the Cruel and Unusual Punishment Clause of the Eighth Amendment should not act as an absolute bar to the death penalty as applied to mentally retarded defendants); Carver, *supra* note 116, at 157 (arguing *Penry* was "consonant with traditional Eighth Amendment jurisprudence and, furthermore, [was] fully supported by the retributive theory of punishment."); Rumley, *supra* note 84, at 1304 (contending that "there is no merit to argument that the Eighth Amendment categorically prohibits the imposition of capital punishment on a person considered to be mentally retarded."); Wilson, *supra* note 165, at 345-46 (concluding that although mental retardation should be considered a mitigating factor during sentencing in instances when the death penalty is sought, mental retardation should not be a categorical exemption from the death penalty).

205. Bersoff, *supra* note 204, at 1586-87.

206. Telephone Interview with Sally Gibson, *supra* note 151. Compare *infra* notes 395 (Tennessee), 416 (Colorado), and 520 (federal government) and accompanying text (advocates of the mentally retarded support death penalty exemptions).

207. *Thompson v. Oklahoma*, 487 U.S. 815, 825 n.23 (1988) (plurality opinion) ("[I]t is likely cruel, and certainly unusual, to impose upon a child a punishment that takes as its predicate the existence of a fully rational, choosing agent, who may be deterred by the harshest of sanctions and toward whom society may legitimately take a retributive stance.").

208. See James T. Hogan, *Community Housing Rights for the Mentally Retarded*, 1987 DET. C.L. REV. 869, 893 (1987) (noting that legal battles often have pitted state agencies attempting to establish group homes against the communities fighting to keep them out).

209. See generally Patricia Werner, *Terminating the Rights of Mentally Retarded Parents: Severing the Ties that Bind*, 22 J. MARSHALL L. REV. 133 (1988) (describing how Illinois



that denies retarded people the right to marry and thirty-five states automatically disqualify voters on the basis of mental ability.<sup>210</sup> The mentally retarded are ineligible to receive visas and immigrate to the United States.<sup>211</sup> At one point, twenty-nine states had enacted mandatory eugenic sterilization laws to prevent the procreation of mentally retarded individuals.<sup>212</sup> These laws were upheld in the infamous *Buck v. Bell* decision, where Justice Oliver Wendell Holmes declared that:

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.<sup>213</sup>

In response to this widespread discrimination, advocates for the mentally retarded have argued for increased individual rights. As a result, limited change has taken place and the attitude of Americans toward the mentally retarded may be improving.<sup>214</sup> But it does not make sense to have the criminal law be the one place where the retarded person is treated most like an individual and, therefore, receives a sentence as if he were not retarded. Even though some mentally retarded individuals are, with assistance from non-retarded individuals, able to accomplish many tasks, there is no justification for ignoring the many differences in culpability that do exist.<sup>215</sup> The mentally retarded should not be executed to prove a point. They deserve our respect for their disability, our support for their effort to overcome it, and our protection from disproportionate criminal sentencing.

### G. Conclusion

Despite the Supreme Court's decision upholding the death penalty for the mentally retarded,<sup>216</sup> the execution of the retarded serves no purpose in American society. To summarize, the most frequently-used rationales for capital punishment, deterrence and retribution, do not apply to the retarded to an extent that would make their execution appropriate. The retarded defendant faces numerous procedural obstacles to mounting an

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law fails to provide equivalent standards for mentally retarded parents and non-mentally retarded parents in parental termination cases).

210. Dick-Hurwitz, *supra* note 145, at 719-20.

211. BEIRNE-SMITH, PATTON & ITTENBACH, *supra* note 60, at 467.

212. Blume & Bruck, *supra* note 78, at 751-52. As of 1990, seven states allowed the involuntary or compulsory sterilization of mentally retarded people living in state institutions. Dick-Hurwitz, *supra* note 145, at 719-20.

213. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

214. Blume & Bruck, *supra* note 78, at 754.

215. See *State v. Smith*, 893 S.W.2d 908, 917-18 (Tenn. 1994) (holding that because the defendant achieved a general equivalency high school diploma and worked in the prison cafeteria, he was not mentally retarded), *cert. denied*, 1995 WL 315201 (U.S. Oct. 2, 1995).

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

adequate defense in a criminal trial, thereby increasing the risk of a mistaken determination of guilt. Mental retardation cannot be feigned in order to avoid the death penalty due to the extensive proof requirements. Any bias in IQ testing that would operate in favor of minority defendants is far outweighed by the racial discrimination in death penalty application.<sup>217</sup> Finally, capital punishment jurisprudence should not be the one place where mentally retarded people are treated as equals to non-retarded citizens. For all these reasons, there can be no justification for the capital punishment of people who are mentally retarded.

### III.

#### THE SUPREME COURT'S DECISION IN *PENRY V. LYNAUGH*

##### A. *The Majority Opinion*

The Supreme Court proclaimed its views on the issue of capital punishment for the mentally retarded in 1989.<sup>218</sup> Most of the decision centered on the Texas death-sentencing statute, which was found to be unconstitutional because it gave the jury no adequate opportunity to consider the defendant's mental retardation and abusive childhood as mitigating circumstances.<sup>219</sup> On this issue, a majority of the Court, including the four more liberal justices and Justice O'Connor, held that the jury must be allowed to consider evidence of mental retardation.<sup>220</sup> However, on the general issue of the permissibility of capital punishment for the mentally retarded, Justice O'Connor switched sides. That majority held that execution of the retarded did not categorically violate the Eighth Amendment.<sup>221</sup>

The Eighth Amendment "categorically prohibits the infliction of cruel and unusual punishments."<sup>222</sup> While the minimum requirement of the Eighth Amendment only forbids punishment considered cruel and unusual at the time of the adoption of the Bill of Rights in 1789, the Supreme Court in modern times has expanded the definition.<sup>223</sup> The cruel and unusual

217. See *supra* note 194.

218. *Penry*, 492 U.S. 302 (1989).

219. *Id.*

220. Justices Blackmun, Brennan, Marshall, O'Connor, and Stevens comprised the majority on this issue, while Chief Justice Rehnquist and Justices Kennedy, Scalia, and White voted in opposition. *Id.* at 306.

221. Chief Justice Rehnquist and Justices O'Connor, Kennedy, Scalia, and White voted that the execution of the mentally retarded did not violate the Eighth Amendment. Justices Blackmun, Brennan, Marshall, and Stevens dissented.

The confusing nature of the *Penry* opinion is demonstrated by the fact that at least one United States District Court judge believed that *Penry* prevents the execution of the mentally retarded. *United States v. Tayman*, 885 F.Supp 832, 843 (E.D.Va. 1995) ("There [in *Penry*], the Supreme Court held that the Eighth Amendment prohibits execution of a mentally-retarded person.").

222. *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989).

223. *Id.*; see also *Ford v. Wainwright*, 477 U.S. 399 (1985) (holding death penalty not permitted for the insane).

punishment standard has taken into account "evolving standards of decency that mark the progress of a maturing society."<sup>224</sup>

To determine those evolving standards, the *Penry* Court held that it must look to "objective evidence of how our society views a particular punishment today."<sup>225</sup> The majority found that the most reliable indicator of evolving standards is legislation enacted by the states, though the actions of sentencing juries are also relevant factors.<sup>226</sup>

In the Court's opinion, Justice O'Connor noted that "idiots" could not be executed under the common law.<sup>227</sup> This prohibition extended to those of such severe disability that they lacked the reasoning capacity to form criminal intent or to understand the difference between good and evil.<sup>228</sup> Justice O'Connor held that this category enveloped only those who are profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions.<sup>229</sup> She believed that these people would be protected by the insanity defense and previous Court decisions.<sup>230</sup> Though his IQ measured between 50 and 63, *Penry* did not fall under this common-law protection.<sup>231</sup> In coming to this conclusion, the majority relied on the facts that the defendant had been found competent to stand trial and that his insanity defense had been rejected.<sup>232</sup>

In *Penry* five members of the Court believed that there was no emerging national consensus against the execution of the mentally retarded.<sup>233</sup> This issue will be discussed at length below. After that point, the Court splintered in four different directions. Justice Scalia, joined by the Chief Justice and Justices White and Kennedy, made up the plurality opinion holding that the execution of the mentally retarded was not cruel and unusual punishment.<sup>234</sup> Justice O'Connor agreed with the four on the issue,

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224. *Penry*, 492 U.S. at 330-31 citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

225. *Penry*, 492 U.S. at 331; see *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (holding that punishments which are incompatible with "evolving standards of decency" violate the Eighth Amendment).

226. *Woodson v. North Carolina*, 428 U.S. 280, 292-93 (1976) (holding that mandatory death sentences, though acceptable at the time of the adoption of the Bill of Rights, violate today's standards of decency and should, therefore, be repudiated); *Furman v. Georgia*, 408 U.S. 238, 329 (1972) (Marshall, J., concurring) ("Thus, a penalty that was permissible at one time in our Nation's history is not necessarily permissible today.").

227. *Penry*, 492 U.S. at 331.

228. *Id.* at 331-32.

229. *Id.* at 332; see AAMD, *supra* note 33, at 13 (stating that the recommended IQ level for "severe" mental retardation is 20-25 to 35-40, and for "profound" retardation is below 20-25).

230. *Penry*, 492 U.S. at 333; see also *Ford v. Wainwright*, 477 U.S. 399, 422 (1985) (holding that the Eighth Amendment prevents sentencing an insane person to death).

231. *Id.* at 333.

232. *Id.* But see *supra* notes 172-174 and accompanying text (listing cases which demonstrate that a finding of competency effectively renders the defendant's retardation irrelevant for the purposes of a criminal trial).

233. *Penry*, 492 U.S. at 334-35.

234. *Id.* at 351.

but filed her own opinion.<sup>235</sup> Justices Brennan and Marshall joined in one opinion in dissent, while Justices Stevens and Blackmun put forth a separate dissent.<sup>236</sup> The end result is a plurality, not a majority, statement on whether the mentally retarded should be allowed to receive a death sentence.

### B. Justice O'Connor's Concurrence

In her concurring opinion, Justice O'Connor stated that in the past, when considering whether a particular use of the death penalty violated the Eighth Amendment, the Court considered whether a death sentence served the goals of the criminal justice system.<sup>237</sup> Justice O'Connor states that the death penalty is said to serve two purposes: retribution directly related to the culpability of the offender, and deterrence of future capital crimes.<sup>238</sup> While Penry argued that executing someone with the reasoning capacity of a seven-year-old would be cruel and unusual because the punishment would be disproportionate to his personal culpability, O'Connor opined that the inclusion of the defendant's capacity to appreciate his conduct as a statutory mitigating circumstance was enough consideration of his retardation by the sentencer.<sup>239</sup> O'Connor added that even the AAMR believed that there were varying degrees of retardation impairment, and that a retarded person might be able to improve his adaptive behavior through education.<sup>240</sup> Thus, because some retarded persons may be able to attain the level of culpability needed to inflict the death penalty, a general exemption is unjustified.<sup>241</sup> O'Connor also dismissed the concept of mental age, "calculated as the chronological age of non-retarded children whose average IQ test performance is equivalent to that of the individual with mental retardation,"<sup>242</sup> because it is imprecise, does not accurately reflect the intelligence of people beyond the chronological age of fifteen or sixteen, has been rejected by the lower courts, and would have a negative

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235. *Id.*

236. *Id.* at 341-50.

237. The Court determined that the death penalty is inappropriate when it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering or because it is 'grossly out of proportion to the severity of the crime.'" *Penry*, 492 U.S. at 335.

238. *Id.* at 335-36.

239. *Id.* at 337-38; *see* *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (sentencing judge cannot decline to consider the possibly mitigating circumstances of a defendant's mental state). *But see supra* notes 167-171 and accompanying text (having mental defects or mental retardation as mitigating factors is not enough to protect mentally retarded defendants).

240. *Id.* at 338.

241. *Id.* at 338-39.

242. *Id.* at 339; *see also* *State v. Gibbs*, 436 S.E.2d 321, 353-54 (N.C. 1993) (finding that it was not prejudicial error to give a mitigation instruction limited to defendant's chronological age of 26 rather than also his mental age), *cert. denied*, 114 S. Ct. 2767 (1994).

effect on the retarded if applied in other areas of the law.<sup>243</sup> Justice O'Connor concluded that as long as a jury can consider the defendant's mental retardation, the constitutional minimum is satisfied.<sup>244</sup>

### C. Justice Scalia's Concurrence

Justice Scalia, writing for four justices, believed that Justice O'Connor's discussion of whether the punishment is suitable relative to the goals of criminal justice was irrelevant.<sup>245</sup> For Scalia, "the punishment is either 'cruel and unusual' (i.e., society has set its face against it) or it is not."<sup>246</sup> The punishment is not unusual or unconstitutional "if an objective examination of laws and jury determinations fails to demonstrate society's disapproval of it."<sup>247</sup> Scalia's concurrence would simply decide the issue on the basis that the execution of all but the profoundly mentally retarded was not banned at the time of the Bill of Rights, and has not yet become part of today's evolving standards of decency.<sup>248</sup> He rested his opinion on the belief that the Texas jury was able to adequately consider the defendant's retardation.<sup>249</sup>

### D. The Dissents

Justices Brennan and Marshall dissented from the majority's holding that the Eighth Amendment permits the execution of the mentally retarded.<sup>250</sup> First, they believed that the determination of a disproportionate punishment is accomplished by comparing "'the gravity of the offense,' understood to include not only the injury caused but also the defendant's moral culpability, with 'the harshness of the penalty.'"<sup>251</sup> Unlike Justice O'Connor, Justices Brennan and Marshall did not believe that the diversity of retarded people's life experiences should be a factor in Eighth Amendment proportionality analysis.<sup>252</sup> The dissent followed the AAMR statement that all retarded individuals have "a substantial disability in cognitive behavior" and "reduced ability . . . in every dimension of the individual's

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243. *Penry*, 492 U.S. at 339-40; see *In re Ramon M.*, 584 P.2d 524, 531 (Cal. 1978) (holding that statute referred to chronological age, not mental age).

244. *Penry*, 492 U.S. at 340.

245. *Id.* at 351 (Scalia, J., joined by Rehnquist, C.J., and White and Kennedy, JJ., concurring in part and dissenting in part).

246. *Id.*

247. *Id.*

248. *Id.* At the time of the *Penry* decision, only two states, Georgia and Maryland, had passed laws to ban the execution of the mentally retarded. Now, there are eleven states which have these preventions in place. See *infra* note 533.

249. *Penry*, 492 U.S. at 354.

250. *Id.* at 341 (Brennan, J., joined by Marshall, J., concurring in part and dissenting in part).

251. *Id.* at 343.

252. *Id.* at 346.

functioning.”<sup>253</sup> Thus, the retarded person cannot have the culpability required to permit their execution.<sup>254</sup>

Second, the dissent stated that mentioning mental retardation as a mitigating factor in the sentencing phase of a bifurcated trial was not enough to guarantee that only those fully blameworthy would be executed.<sup>255</sup> In fact, they feared that the jury would interpret the defendant’s mental retardation as an aggravating, rather than mitigating, factor. In support of this proposition, Justice Brennan quoted a local South Carolina newspaper which claimed that retarded killers are to be more feared than “normal” killers.<sup>256</sup> Mitigating factors do not make the death penalty comply with the Eighth Amendment, because sentencing juries may ignore or misunderstand the defendant’s retardation.<sup>257</sup>

Third, Brennan and Marshall found that the execution of mentally retarded defendants did not “measurably further the penal goals of either retribution or deterrence.”<sup>258</sup> Since the retarded defendant cannot have the culpability necessary to qualify for a proportionate use of the death penalty, an execution cannot serve an adequate retributive function.<sup>259</sup> It have no deterrent effect on either non-retarded defendants, since they still will be subject to the death penalty, or other retarded individuals, because they are unlikely to have the cognitive ability to understand the consequences of their actions or the results of the imposition of the death penalty on someone else.<sup>260</sup> They concluded, therefore, that the Eighth Amendment should prevent the execution of the mentally retarded.

Justices Stevens and Blackmun’s dissent in the *Penry* case was only one sentence.<sup>261</sup> They failed to clarify which of Justice Brennan’s and Marshall’s arguments they found most convincing.<sup>262</sup>

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253. *Penry*, 492 U.S. at 345.

254. *Id.* at 346 (“The impairment of a mentally retarded offender’s reasoning abilities, control over impulsive behavior, and moral development in my view limits his or her culpability so that, whatever other punishment might be appropriate, the ultimate penalty of death is always and necessarily disproportionate to his or her blameworthiness and hence is unconstitutional.”).

255. See *supra* notes 167-171 and accompanying text.

256. *Penry*, 492 U.S. at 347; see Blume & Bruck, *supra* note 78, at 728 & n.9 (quoting the same newspaper that Brennan cited which said, “It appears to us that there is all the more reason to execute a killer if he is also insane or retarded. . . . [A]n 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.”).

257. *Penry*, 492 U.S. at 347-48.

258. *Id.* at 348.

259. See *supra* notes 131-148 and accompanying text.

260. *Penry*, 492 U.S. at 348.

261. *Id.* at 349-50.

262. *Id.* at 350 (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part) (only a summary of arguments in the amicus curiae brief of the AAMR was cited as significant in the claim that the execution of the mentally retarded is unconstitutional).

### E. *The Emerging National Consensus Argument*

In order for the *Penry* decision to be changed and for capital punishment of the mentally retarded to end, the Court must find an emerging national consensus against this punishment through objective evidence, such as legislation and court decisions.<sup>263</sup> Because this standard is unlikely to disappear, it is important to determine the point at which the Supreme Court will declare that a national consensus exists. Given the Court's current makeup, a repudiation of the *Penry* decision is unlikely.<sup>264</sup>

The Court has discussed the national consensus issue in a number of well-known death penalty decisions. In 1986, the Court held in *Ford v. Wainwright* that the insane could not be subject to capital punishment.<sup>265</sup> Research demonstrated that no state permitted the execution of the insane: twenty-six states had specifically ended that practice and the other states accepted the common law prohibition of this penalty.<sup>266</sup> Interestingly, the Court made this outright declaration against the execution of the insane in a case where the defendant was found competent to stand trial and had developed a mental disorder after the homicide took place.<sup>267</sup> Like the individuals whose stories were told in the beginning of this Article, the defendant in *Ford* had "no understanding of why he was being executed."<sup>268</sup> Justice Marshall's opinion stressed that the defendant's ability to comprehend his punishment should be weighed heavily in determining whether to levy a capital sentence.<sup>269</sup> However, unlike mild forms of mental retardation, insanity had been found to be a bar to executions in the common law since the time of Blackstone.<sup>270</sup>

Justice O'Connor, joined by Justice White, concurred in the judgment but did not join Justice Marshall's opinion.<sup>271</sup> She wrote that while the Eighth Amendment created no substantive right against the execution of the insane, the state law in question had "created a protected liberty interest in avoiding execution while incompetent."<sup>272</sup> Justice O'Connor also believed that the federal courts should not "have any role whatever in the

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263. *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) ("The two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society [are] jury determinations and legislative enactments . . .").

264. See *infra* notes 313-369 and accompanying text.

265. 477 U.S. 399 (1986).

266. *Penry*, 492 U.S. at 334; see *Ford*, 477 U.S. at 408 n.2.

267. *Ford*, 477 U.S. at 401-02.

268. *Id.* at 403.

269. *Id.* at 409 ("For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.").

270. *Id.* at 406-08.

271. *Ford*, 477 U.S. at 427.

272. *Id.* (O'Connor, J., concurring in the result in part and dissenting in part) (stating that insane should not be presently executed in Florida because Florida did not provide minimal procedural protections required by due process).

substantive determination of a defendant's competency to be executed."<sup>273</sup>

In *Thompson v. Oklahoma*, four justices held that children under sixteen years of age could not be executed.<sup>274</sup> The plurality reported that eighteen states had established a minimum age at time of offense of at least sixteen in their death penalty statutes.<sup>275</sup> The plurality decided in determining the "evolving standard of decency" that it was acceptable to take into account the views of professional organizations and the practices of developed foreign nations.<sup>276</sup> Jury behavior was also considered as the Court took into account that only five of the 1,393 persons sentenced to death between 1982 and 1986 were less than sixteen years old at the time of the murder.<sup>277</sup> Finally, the plurality held that the culpability of the under-sixteen-year-old did not rise to the level necessary to permit capital punishment against this group to have a valid purpose.<sup>278</sup> Juveniles are more susceptible to the influence of others, more impulsive and vulnerable, less capable of controlling their conduct and thinking in long-range terms, and extremely unlikely to make the cost-benefit analysis necessary to make capital punishment a deterrent to this class of murderers.<sup>279</sup> All of these circumstances apply equally to mentally retarded murderers.<sup>280</sup> In her concurring opinion, Justice O'Connor stated that a national consensus against the execution of those under the age of sixteen very likely did exist, but desired better information on this issue.<sup>281</sup> She concluded that those under sixteen at the time of the offense cannot be executed under a state capital punishment statute which specifies no minimum age for a capital crime. Justice O'Connor was wary, however, of declaring an absolute ban on this practice, which would overturn state laws that set a *lower* minimum age for the acceptable use of the death penalty.<sup>282</sup>

While these two decisions benefitted the capital defendant, the Supreme Court generally has favored the prosecution. *Stanford v. Kentucky*, a five-four decision decided the same day as *Penry*, substantiates this tendency.<sup>283</sup> There, the Court held that the Cruel and Unusual Punishment Clause of the Eighth Amendment did not prevent the execution of minors who were sixteen or seventeen at the time of their offenses.<sup>284</sup> The Court reached this decision having found that fifteen states specifically declined

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273. *Id.* at 427-28.

274. 487 U.S. 815 (1988) (plurality opinion). Justice O'Connor concurred in the judgment but did not join the plurality opinion at any time.

275. *Penry*, 492 U.S. at 334 (citing *Thompson*, 487 U.S. at 829 n.30).

276. *Thompson*, 487 U.S. at 830.

277. *Id.* at 832-33.

278. *Id.* at 836.

279. *Id.* at 834-38.

280. See *supra* notes 76-80, 131-148 and accompanying text.

281. *Thompson*, 487 U.S. at 848-49 (O'Connor, J., concurring in the judgment).

282. *Id.* at 857-58.

283. 492 U.S. 361 (1989).

284. *Id.*



to impose the death penalty on sixteen-year-olds and twelve states would not perform capital punishment on seventeen-year-olds.<sup>285</sup> Justice Scalia, writing for the majority, declared that those numbers were not enough to reach a national consensus.<sup>286</sup> Scalia pointed out that the Court had previously found a national consensus existed when forty-two or more states prohibited a practice,<sup>287</sup> but not when only eleven states prohibited the practice.<sup>288</sup> According to the majority's decision, neither the jurisdictions which do not impose capital punishment, nor the criminal law practices of the federal government, should be taken into account in the figuring of a national consensus.<sup>289</sup> The majority also discounted the use of jury determinations as a factor in consensus determination.<sup>290</sup> The fact that sentencing juries were reluctant to impose capital punishment on the retarded was irrelevant to the question of a national consensus.<sup>291</sup> In essence, the petitioner did not meet the heavy burden needed to prove that a state's practice violated a national consensus.<sup>292</sup> With three of the *Stanford* dissenters now replaced by more conservative justices, the Scalia opinion should be the law of the land for the distant future.<sup>293</sup>

Justice Scalia, in *Stanford*, also rejected the idea that the any "socioscientific, ethnoscientific, or even purely scientific evidence," should be a factor in the determination of a societal consensus.<sup>294</sup> This idea, however, did not gain majority support, for he was joined at this point by only Justices White and Kennedy and Chief Justice Rehnquist.<sup>295</sup> Justice O'Connor did not accept Scalia's view on that statement,<sup>296</sup> and, as in all the aforementioned societal consensus cases, penned her own opinion. She disagreed with the Scalia opinion because it did not allow other laws regarding the treatment of sixteen and seventeen-year-olds, such as driving

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285. *Id.* at 370-73.

286. *Id.*

287. *Stanford*, 492 U.S. at 371. The cases cited besides *Ford v. Wainwright*, 477 U.S. 399 (1986), included *Enmund v. Florida*, 458 U.S. 782, 789 (1982) (striking down of death sentence for participation in a robbery where an accomplice takes a life, when only eight jurisdictions permitted this use of the death penalty) and *Coker v. Georgia*, 433 U.S. 584, 595-96 (1977) (invalidating death penalty for rape where only one state permitted this practice). See *Fierro v. Gomez*, 865 F. Supp. 1387, 1413-15 (N.D. Cal. 1994) (declaring execution by gas chamber unconstitutional and discussing Supreme Court's national consensus jurisprudence).

288. *Stanford*, 492 U.S. at 371. The Court discussed *Tison v. Arizona*, 481 U.S. 137, 154-158 (1987) (holding that the eleven states with capital punishment that forbid imposition of the death penalty for felony-murder even when the defendant's participation constitutes extreme recklessness is a small minority).

289. *Id.* at 371 n.2 & 372-73.

290. *Id.* at 373-74.

291. *Stanford*, 492 U.S. at 373-74.

292. *Id.* at 373.

293. See *infra* note 313 and accompanying text.

294. *Stanford*, 492 U.S. at 377-78.

295. *Id.* at 364.

296. *Id.* at 381.

licenses and drinking ages, to be taken into account in determining the culpability of this age group for death penalty sentencing purposes.<sup>297</sup>

Scalia's view in *Stanford* can be criticized in two ways. First, states that have no death penalty should be considered in assessing a national consensus. Kansas, which recently passed legislation to reimpose capital punishment but carved out an exception for the mentally retarded, serves as a good example. Before 1994, the Supreme Court would not have counted Kansas in determining a national consensus. Now, Kansas would fall within that category due to its 1994 passage of death penalty legislation that exempts the retarded from a death sentence.<sup>298</sup> However, the possibility of a mentally retarded person receiving a death sentence in Kansas is, theoretically, no different now than it was before the acceptance of capital punishment by the legislature. Thus, Scalia's position—that the number of states is the only important factor—can be easily influenced by technicalities.

The omission of states which do not have a death penalty also cuts against the definition of a national consensus. States which do not have a death penalty are no less a part of the nation than states which have it on their books. The people of Massachusetts and Michigan, for example, should not be told that they are not considered part of the United States for the purposes of Constitutional matters as determined by the Supreme Court. Although thirteen states cannot pass laws to prevent the execution of the mentally retarded because they have no death penalty at all, their actions are no less part of a national consensus.

Second, it is too restrictive to claim, as does Justice Scalia, that scientific evidence should not be taken into account in the determination of cruel and unusual punishment. By this measure, Scalia seems to suggest that we can only use the scientific tools which the United States possessed at the time of the Founding Fathers.<sup>299</sup> Yet modern scientific, medical, and psychological evidence has become incorporated into our lives and into the law.<sup>300</sup> Societies develop by learning from their mistakes, and standards of decency do evolve.

#### F. *Import of Penry*

The movement to end the execution of the mentally retarded has not reached the plateau necessary to represent a national consensus in the eyes of the Supreme Court. Only eleven states ban such executions which, even when combined with the twelve states that do not use the death penalty at

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297. *Id.*

298. See *infra* notes 439-442 and accompanying text.

299. See *Morrison v. Olson*, 487 U.S. 654, 734 (1988) (Scalia, J., dissenting) ("I prefer to rely upon the judgment of the wise men who constructed our system, and of the people who approved it, and of two centuries of history that have shown it to be sound.") (referring to view that control of executive powers should lie solely with the President).

300. SPECIAL COMM. OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK ON THE MEDICAL EXPERT TESTIMONY PROJECT, IMPARTIAL MEDICAL TESTIMONY 3 (1956).

all, represents less than half the country.<sup>301</sup> Obviously, the fact that eleven states now specifically prohibit death sentences for the mentally retarded sends out a stronger message of national consensus than existed with *Penry* was decided, when only two states had passed similar bills. But while the Supreme Court has not set a minimum number of states needed to represent a consensus, eleven is not enough. In addition, as of the end of 1994, these eleven states accounted for only thirteen percent of executions since the death penalty was reimposed.<sup>302</sup> Until one of the states well-known for its frequent use of the death penalty—such as Texas, Florida, California, or Louisiana—passes a law banning the execution of the retarded, other states may feel no pressure to follow suit.

While the federal government has stated its opposition to the execution of the mentally retarded both before and after the *Penry* decision, the Supreme Court declared in *Stanford* that the criminal law practices of the federal government should not be considered in determining a national consensus.<sup>303</sup> In 1988, Congress overwhelmingly passed a law which, while broadening the death penalty in general, prevented the execution of the mentally retarded.<sup>304</sup> After the Supreme Court handed down its decision in *Penry*, the Senate killed a Republican-sponsored initiative to weaken the federal ban against executing the mentally retarded.<sup>305</sup> But the federal government's actions do not represent the nation, at least for the purpose of its national consensus jurisprudence.

Polls indicate that although approximately seventy-eight percent of the country favors the death penalty, only twenty-one percent approves of capital punishment for the mentally retarded.<sup>306</sup> The Supreme Court, however, has rightly rejected polls as indicators of a national consensus.<sup>307</sup> First, polls capture Americans' constantly changing views which, unlike the use of the ballot box, should not be used to permanently settle an important national issue. Second, polls vary in the quality of information gathered, and suffer from a natural statistical margin of error as well as possible

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301. The states without the death penalty today are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. Kansas did not reinstate the death penalty until 1994. New York recently adopted capital punishment. It should also be noted that six states which possess the right to carry out a death sentence, and do not protect the mentally retarded from receiving capital punishment sentences, have not executed anyone since the reimposition of the death penalty in 1976. See Cronin, *supra* note 111, at E3 (Connecticut, Montana, New Hampshire, New Jersey, Oregon, and South Dakota). Pennsylvania executed two inmates during 1995. Amy Westfeldt, *Moser Executed after High Court Ruling*, PITTSBURGH POST-GAZETTE, Aug. 17, 1995, at A1.

302. See *infra* note 462 and accompanying text.

303. See *supra* note 289 and accompanying text.

304. 21 U.S.C. § 848(l); REED, *supra* note 2, at 207-209; *infra* notes 507-510 and accompanying text.

305. See *infra* notes 511-528 and accompanying text.

306. REED, *supra* note 2, at 32.

307. *Penry*, 492 U.S. at 335; see also *infra* notes 643-644 and accompanying text.

human error.<sup>308</sup> Finally, answers to poll questions may be unfairly biased depending on the order or the wording of the pollster's questions.<sup>309</sup>

The national consensus methodology employed in *Ford*, *Thompson*, *Stanford*, and *Penry* may be flawed. First, legislators often wrongly perceive the views of their constituents. It may be a bad idea to use popular opinion, as expressed through legislation, as a basis Constitutional death penalty jurisprudence.<sup>310</sup> Second, people generally have no opportunity to vote directly on the issue of capital punishment for the mentally retarded. While American citizens may oppose the execution of the mentally retarded, their votes for a particular state House or Senate candidate generally have nothing to do with this issue. Third, there is legitimate fear that political majorities operating through state legislatures should not determine the outcome of Supreme Court Constitutional decisions.<sup>311</sup> Legislators are influenced by outside factors that do not necessarily produce good law, such as political party partisanship, fundraising needs for future elections, and the temptation to do what is politically advantageous rather than what is best for society.<sup>312</sup> Yet, in the eyes of a majority of justices, the state legislatures' actions determine the national consensus. Thus, under the existing *Penry* standard, currently no national consensus prohibits the execution of the mentally retarded.

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308. See John M. Church, *A Market Solution to Green Marketing: Some Lessons from the Economics of Information*, 79 MINN. L. REV. 245, 253 n.16 (1994) ("Reliability of survey responses is conditioned upon a variety of factors, including the experience of a research organization, its managers, and its particular company; sample size and composition; question format (leading, open-ended, or pre-coded questions); question content (subject matter of the survey); the location where the survey is administered (pre- or post-litigation); and the length of the survey."); Thomas R. Marshall, *The Supreme Court and the Grass Roots: Whom Does the Court Represent Best?*, 76 JUDICATURE 22, 24 (1992) ("In other instances pollsters do not separately identify minorities, for example, homosexuals, or noncitizens. Modern polling techniques usually under count some minorities—such as the poor, transients, prisoners, or non-English speakers. Even for relatively numerous minority groups—such as blacks, Hispanics, or Jews—measurement errors may be relatively high.").

309. See Susan J. Becker, *Public Opinion Polls and Surveys as Evidence: Suggestions for Resolving Confusing and Conflicting Standards Governing Weight and Admissibility*, 70 OR. L. REV. 463, 481 (1991) (arguing that polls are only valid if the individual questions and their order of presentation do not produce biased responses); Elizabeth A. McNellie, *The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation*, 89 COLUM. L. REV. 157, 176 (1989) (stating that poll results can be altered by the wording of the questions and polls cannot ask every question that may become relevant).

310. Dick-Hurwitz, *supra* note 145, at 712.

311. Hagenah, *supra* note 134, at 148.

312. See generally JEFFERY C. GOLDFARB, *THE CYNICAL SOCIETY* (1991) (describing how party cohesion shapes policy decisions); ROBERT E. MUTCH, *CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW* (1988) (describing how fundraising needs may shape the way politicians vote).

## IV.

THE EFFECT OF CHANGES IN THE SUPREME COURT'S  
COMPOSITION

Since *Penry* was decided, Justices Brennan, Marshall, White, and Blackmun have retired and been replaced by Justices Souter, Thomas, Ginsburg, and Breyer, respectively. Thus, assuming that no members of the *Penry* Court have changed their minds, and that Justice O'Connor would still not believe that a national consensus had emerged, the task of overturning *Penry* is daunting. Of the five *Penry* justices who remain on the bench, four voted that the capital punishment of the mentally retarded was not cruel and unusual punishment.<sup>313</sup> If *Penry* came before the Court today, the outcome likely would be the same. Predicting the future votes of Supreme Court justices is a very inexact science, but past decisions by Justices Souter, Thomas, Ginsburg, and Breyer may indicate their future persuasion on this issue.

## A. Justice Souter

True to his reputation on other issues, Justice Souter has followed a middle course on the death penalty. He often has been the swing vote in the past and very well may be if a *Penry*-type case were to arise in the future.

Justice Souter has shown more restraint than other members of the Court in death penalty sentencing, and often has voted for the defendant. For instance, he did not join the part of an opinion which declared that a presumption of innocence instruction was not required in capital cases.<sup>314</sup> He sided with the dissenters in *Herrera v. Collins*,<sup>315</sup> stating that a person who can prove his innocence with newly-discovered evidence should not be executed.<sup>316</sup> Justice Souter dissented in a case where the majority held that a future dangerousness question allowed adequate consideration of the defendant's youth.<sup>317</sup> He dissented from the majority's refusal to allow a defendant to benefit from a ruling that the Texas sentencing scheme denied the defendant's jury adequate opportunity to consider mitigating circumstances.<sup>318</sup> He also sided with the defendant in majority opinions which held that the trial judge's weighing of an aggravating coldness factor violated the Eighth Amendment,<sup>319</sup> and which declared that a capital defendant cannot be forcibly administered anti-psychotic drugs unless there are

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313. Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy. *Penry*, 492 U.S. at 306.

314. *Delo v. Lashley*, 113 S. Ct. 1222, 1227, *reh'g denied*, 113 S. Ct. 1962 (1993).

315. 113 S. Ct. 853, 876, *reh'g denied*, 113 S. Ct. 1628 (1993).

316. *Id.* at 876-84.

317. *Johnson v. Texas*, 113 S. Ct. 2658, 2672, *reh'g denied*, 114 S. Ct. 15 (1993).

318. *Graham v. Collins*, 113 S. Ct. 892, 917 (Souter, J., dissenting), *reh'g denied*, 113 S. Ct. 1406 (1993).

319. *Sochor v. Florida*, 112 S. Ct. 2114, 2117 (1992).

no less intrusive alternatives.<sup>320</sup>

However, in a number of cases during his Supreme Court tenure, Justice Souter has voted to uphold convictions in which the death penalty was imposed. He approved placing the burden of proof on the defendant in capital cases to prove his own incompetency, and to rebut the state's presumption of competency.<sup>321</sup> He also agreed that the jury need not unanimously agree on one particular theory of the murder in order to sentence the defendant to death.<sup>322</sup> He has ruled that the admission of an involuntary confession can be harmless error.<sup>323</sup> Justice Souter also dissented when the majority of the Court felt that due process had been violated when a defendant received a sentence of death without being adequately notified that the judge would levy that sentence.<sup>324</sup>

Justice Souter's votes in death penalty cases during the 1994 term signal an interest in protecting the rights of the capital defendant.<sup>325</sup> He joined in an opinion authored by Justice Blackmun which bucked the current trend of weakening federal habeas corpus relief.<sup>326</sup> The opinion held that the right to counsel for a post-conviction proceeding attaches before the filing of a formal habeas petition, and includes the right to legal assistance to prepare such petition.<sup>327</sup> He also joined a Blackmun-authored plurality opinion which declared that due process requires that the sentencing jury be informed that a defendant will be ineligible for parole if he is given a sentence of life imprisonment rather than one of death.<sup>328</sup> Justice Souter added in a separate concurring opinion that if a juror is reasonably likely to misunderstand a sentencing term, the defendant may demand an instruction on its meaning, and that a death sentence imposed where the instruction was refused would be invalid.<sup>329</sup> He was alone among his colleagues in adhering to a partial dissent by Justice Blackmun which stated that the term "substantial doubt," as used in a jury instruction, overstated the degree of doubt needed to find the defendant innocent.<sup>330</sup> Justice Souter also dissented in a five-to-four decision which held that the jury's knowledge

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320. *Riggins v. Nevada*, 112 S. Ct. 1810, 1815 (1992).

321. *Medina v. California*, 112 S. Ct. 2572, 2582, *reh'g denied*, 113 S. Ct. 19 (1992).

322. *Schad v. Arizona*, 501 U.S. 624, *reh'g denied*, 501 U.S. 1227 (1991).

323. *Arizona v. Fulminante*, 499 U.S. 279, *reh'g denied*, 500 U.S. 938 (1991).

324. *Lankford v. Idaho*, 500 U.S. 110 (1991) (Scalia, J., dissenting).

325. See Linda Greenhouse, *High Court Overturns a Death Sentence, Signaling a Turn Away from Conservatives*, N.Y. TIMES, June 18, 1994, at A13 ("Justice Souter . . . has also been voting in favor of criminal defendants as of late, including in some death penalty cases.").

326. *McFarland v. Scott*, 114 S. Ct. 2568, 2569 (1994).

327. *Id.* at 2574.

328. *Simmons v. South Carolina*, 114 S. Ct. 2187, 2189 (1994).

329. *Id.* at 2198 (Souter, J., concurring).

330. *Victor v. Nebraska*, 114 S. Ct. 1239, 1257 (1994) (Blackmun, J., concurring in part and dissenting in part) ("[T]he instruction is geared toward assuring jurors that although they may be mistaken . . . only a 'substantial doubt' of a defendant's guilt should deter them from convicting.").

that the defendant had been convicted of capital murder in an earlier trial did not amount to constitutional error.<sup>331</sup>

Justice Souter's strong dissent in *Heller v. Doe* suggests how he might vote in a case like *Penry*.<sup>332</sup> He would have struck down a Kentucky statute that required a lower standard of proof to commit the mentally retarded than was required for the mentally ill.<sup>333</sup> Justice Souter recognized that retarded people and mentally-ill people have comparable liberty interests,<sup>334</sup> and that they often experience equally intrusive treatment regimens.<sup>335</sup> He also found fault with Kentucky's method of appointing, as parties in the institutionalization proceeding, relatives or guardians of the retarded person to be committed who had "the right to appeal as adverse a decision not to institutionalize the individual who is subject to the proceedings" and, thus, act as a second prosecutor.<sup>336</sup>

If *Penry* were to arise again before the Supreme Court, Justice Souter would need less convincing than some of his colleagues that the execution of the mentally retarded served no valid penal purposes. First, Justice Souter has shown more willingness to side with the defendant in recent terms than when he was originally appointed. Second, Justice Souter, as evidenced in his *Heller* dissent, seems to have a good grasp on the effects of retardation and its interference with a person's ability to function normally. Third, he often sides with the defendant when a mitigating factor, like retardation, is withheld in any way from the sentencer. Finally, Justice Souter may be affected by the recent repudiation of the death penalty in all circumstances by Justice Blackmun.<sup>337</sup> It is true that Justice Souter voted to deny the certiorari petitions of mentally retarded death row inmates during 1994,<sup>338</sup> but he may be more easily convinced than his fellow Justices that the execution of the retarded is unacceptable.

### B. Justice Thomas

It is easier to read Justice Thomas's future vote if *Penry* were to arise again before the Court. Justice Thomas would almost certainly hold that the mentally retarded should be permitted to be executed. During his time on the Court, Justice Thomas has already declared that *Penry* was wrongly

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331. *Romano v. Oklahoma*, 114 S. Ct. 2004, 2013-14 (1994) (Ginsburg, J., dissenting).

332. *Heller v. Doe*, 113 S. Ct. 2637 (1993) (Souter, J., dissenting).

333. *Id.* at 2650-51.

334. *Id.* at 2654 ("Even if the individuals subject to involuntary commitment proceedings previously had been shown to be mentally retarded, they would thus still retain their strong, legally cognizable interest in their liberty.").

335. *Id.* at 2655.

336. *Id.* at 2657.

337. *Callins v. Collins*, 114 S. Ct. 1127, 1138 (1994) (Blackmun, J., dissenting); see also Stewart, *supra* note 113, at 50 (retired Supreme Court Justice Lewis Powell announced after leaving the Court his conclusion that the death penalty is unconstitutional).

338. *Wills v. Texas*, 114 S. Ct. 1867 (1994); *McCullum v. North Carolina*, 115 S. Ct. 26 (1994); *Hance v. Zant*, 114 S. Ct. 1392 (1994).

decided on the issue of the constitutionality of the Texas death penalty statute<sup>339</sup> and has derided the attempt of defendants to introduce new classes of mitigating evidence.<sup>340</sup> Unlike Justice Souter, Justice Thomas has approved disparate commitment standards for the mentally retarded and the mentally ill.<sup>341</sup> Thomas also has held that it is not reversible error for a defendant to be forcibly administered anti-psychotic drugs against his will, even if it is not the least intrusive alternative.<sup>342</sup> He believes that proof of actual innocence after conviction should not affect a defendant's death sentence.<sup>343</sup>

On non-capital criminal matters, Justice Thomas has written that the Cruel and Unusual Punishment Clause of the Eighth Amendment should not protect inmates from the infliction of minor injuries or the risk of injury caused by prison guards.<sup>344</sup> On involuntary commitment, Justice Thomas dissented when the Court struck down a Louisiana statute which allowed the confinement of an individual based on his antisocial personality, even when the person is not mentally ill.<sup>345</sup>

Justice Thomas' recent votes on death penalty cases are more than enough evidence that he is very unlikely to vote in favor of a per se ban against the execution of the mentally retarded. He has proclaimed that a District Court can neither appoint counsel nor stay an execution under the federal habeas corpus provisions, despite the fact that both would be valuable to the petitioner in order to meet the requirements of a habeas petition.<sup>346</sup> Justice Thomas also joined Justice Scalia in a dissent against the Court's decision to require jury notification of parole ineligibility for a life sentence.<sup>347</sup> This dissent concluded that "[t]he heavily outnumbered opponents of capital punishment have successfully opened yet another front in

339. *Johnson v. Texas*, 113 S. Ct. 2658, 2672 (Thomas, J., concurring), *reh'g denied*, 114 S. Ct. 15 (1993); *see Graham v. Collins*, 113 S. Ct. 892, 903 (Thomas, J., concurring), *reh'g denied*, 113 S. Ct. 1406 (1993).

340. *Graham*, 113 S. Ct. at 910 (Thomas, J., concurring) ("By requiring that sentencers be allowed to 'consider' all 'relevant' circumstances, we cannot mean that the decision whether to impose the death penalty must be based upon all the defendant's evidence. . . . Nor can we mean to say that circumstances are necessarily relevant for constitutional purposes if they have any conceivable mitigating value.").

341. *Heller v. Doe*, 113 S. Ct. 2637, 2644 (1993) (joining in the majority opinion of Kennedy, J.).

342. *Riggins v. Nevada*, 112 S. Ct. 1810, 1826 (1992) (Thomas, J., dissenting).

343. *Herrera v. Collins*, 113 S. Ct. 853, 874-75 (1993) (Scalia, J., joined by Thomas, J., concurring) ("There is no basis in text, tradition, or even in contemporary practice . . . for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction.").

344. *Helling v. McKinney*, 113 S. Ct. 2475, 2482 (1993) (Thomas, J., dissenting).

345. *See Foucha v. Louisiana*, 112 S. Ct. 1780, 1797 (1992) (Thomas, J., dissenting).

346. *McFarland v. Scott*, 114 S. Ct. 2568, 2576 (1994) (Thomas, J., dissenting); *id.* at 2578 ("[L]egal assistance prior to the filing of a federal habeas petition can be very valuable to a petitioner . . . That such assistance is valuable, however, does not compel the conclusion that Congress intended the Federal Government to pay for it . . .").

347. *Simmons v. South Carolina*, 114 S. Ct. 2187, 2201 (1994).



their guerilla war to make this unquestionably constitutional sentence [the death penalty] a practical impossibility."<sup>348</sup>

In essence, Justice Thomas has declared that "[t]o withhold the death penalty out of sympathy for a defendant who is a member of a favored group is no different from a decision to impose the penalty on a negative bias . . . ." <sup>349</sup> The mentally retarded, a presumably favored group, will not find any solace in Justice Thomas' view of capital punishment.

### C. Justice Ginsburg

Discovering Justice Ginsburg's view on capital punishment before her arrival on the Supreme Court was "like reading tea leaves,"<sup>350</sup> because she did not handle this issue while on the District of Columbia Court of Appeals. While it is unlikely that Justice Ginsburg will accept the former Brennan-Marshall, and newly announced Blackmun, view that capital punishment is wrong under all circumstances, she may be more understanding than her predecessor, Justice White, of the limited value of executing the mentally retarded.<sup>351</sup> Legal commentators believe she may employ a wider definition of "evolving standards of decency" than conservative Justices Scalia and Thomas.<sup>352</sup>

In her first decision on the Supreme Court, Justice Ginsburg dissented where the majority denied a stay of execution for an inmate who claimed that the jury was not able to take into account his drunkenness when he committed the crime.<sup>353</sup> Since that time, she has indicated an uneasiness with the death penalty and often sided with the defendant in capital punishment decisions during 1994.<sup>354</sup> She voted in tandem with former Justice Blackmun in a number of the aforementioned cases, in which Justice Souter also voted against the state.<sup>355</sup> Justice Ginsburg authored the four-justice dissent which declared that allowing the jury to know that the defendant was already under a death sentence "minimize[d] the jury's sense of responsibility for determining the appropriateness of death," and demanded a new sentencing hearing.<sup>356</sup> Additionally, Justice Ginsburg has questioned the validity of jury instructions that confuse the jury on the

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348. *Id.* at 2205 (Scalia, J., joined by Thomas, J., dissenting).

349. *Graham*, 113 S. Ct. at 912 (Thomas, J., dissenting).

350. James H. Andrews, *Viewing Ginsburg from Death Row*, CHRISTIAN SCI. MONITOR, Aug. 2, 1993, at 13 (quoting George Kendall, assistant director of the NAACP's Capital Punishment Project).

351. *Id.*; see *Callins*, 114 S. Ct. 1127, 1138 (Blackmun, J., dissenting).

352. Andrews, *supra* note 350, at 13.

353. Linda Greenhouse, *In Her First Case, Ginsburg Dissents*, N. Y. TIMES, Sept. 2, 1993, at A16.

354. See Linda Greenhouse, *High Court Overturns a Death Sentence, Signaling a Turn Away From Conservatives*, N.Y. TIMES, June 18, 1994, at 13 ("It is now clear that she [Justice Ginsburg] is uneasy about the death penalty and willing to overturn death sentences.").

355. *Id.*

356. *Romano v. Oklahoma*, 114 S. Ct. 2004, 2018 (1994) (Ginsburg, J., dissenting).

meaning of reasonable doubt in criminal trials.<sup>357</sup> She also joined Justices Blackmun and Stevens in voting for a stay of execution where the defendant was mentally retarded and there was evidence of racial prejudice in the trial and sentencing.<sup>358</sup> Most recently, Justice Ginsburg voted to stay the execution for a man whose prosecutors had publicly admitted, in a subsequent trial, that he had not done the actual killing.<sup>359</sup> She also joined a Stevens-written majority opinion which lowered the standard of evidence needed in a habeas corpus proceeding from "clear and convincing evidence" to "more likely than not" that no reasonable juror would have voted to convict if supplied with the new information about the defendant's innocence.<sup>360</sup>

The replacement of Justice White, who authored the plurality opinion allowing execution of the mentally retarded, with Justice Ginsburg, is beneficial to those who want to see this practice ended. Ginsburg appears not to be intimidated by more senior members of the Court on death penalty issues, and could become an important vote if a *Penry*-type case were to arise again.

#### D. Justice Breyer

Like Justice Ginsburg, Justice Breyer had no opportunity to vote on a death penalty case while on the First Circuit Court of Appeals.<sup>361</sup> However, he played a major role in ensuring that the federal sentencing guidelines promulgated during the 1980s did not include the death penalty among the sentencing possibilities.<sup>362</sup>

During his confirmation hearings, Justice Breyer stated that capital punishment, in general, is constitutional.<sup>363</sup> Justice Breyer identified no specific uses of the death penalty that violated the Eighth Amendment.<sup>364</sup> While it is clear Justice Breyer will not accept the view of his predecessor,

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357. *Victor v. Nebraska*, 114 S. Ct. 1239, 1252-54 (1994) (Ginsburg, J., concurring in part and concurring in the judgment).

358. *Hance v. Zant*, 114 S. Ct. 1392 (1994) (Blackmun, Stevens, and Ginsburg, JJ., dissenting).

359. *Jacobs v. Scott*, 115 S. Ct. 711 (1995) (denying stay of execution by 6-3 margin); see Sue Anne Pressley, *Texas Prisoner Executed Despite Questions of Guilt; Texans Seemed Unmoved by Controversy in Case*, WASH. POST, Jan. 5, 1995, at A3.

360. *Schlup v. Delo*, 115 S. Ct. 851, 867 (1995); Linda Greenhouse, *Death Row Inmate Allowed New Appeal*, N.Y. TIMES, Jan. 24, 1995, at A12.

361. Ann Devroy, *Boston Judge Breyer Nominated to High Court After Long Process, Clinton's Choice of Centrist Likely to Avoid Confirmation Controversy on Hill*, WASH. POST, May 14, 1994, at A1, A4.

362. *Id.*

363. Joan Biskupic, *Breyer Presents Moderate Image; Panel Offers Few Obstacles to Court Nominee*, WASH. POST, July 13, 1994, at A4 (quoting Justice Breyer during his confirmation hearing) ("At this point it [the constitutionality of the death penalty] is settled.").

364. See Glen Elsasser, *Breyer: Legislators' Outside Actions Can Be Prosecuted*, CHI. TRIB., July 14, 1994, at 4 (quoting Justice Breyer during his confirmation hearing) ([T]here are "a cluster of less firmly settled matters [regarding the death penalty], such as the cutoff age for young defendants and the types of crimes covered."); David Hess, *Nominee Sails*

Justice Blackmun, that the death penalty cannot be fairly administered under any circumstances, legal scholars believe that he "will be skeptical about the administration of the death penalty in many instances."<sup>365</sup> Advocates of a ban on the execution of the mentally retarded may be encouraged by the fact that Justice Breyer, early in his tenure, sided with Justices Stevens and Ginsburg in voting to grant a stay of execution for a person who, prosecutors now believe, did not actually kill the victim.<sup>366</sup> More recently, Justice Breyer joined Justices Stevens, Souter, and Ginsburg in voting to deny an application to vacate the stay of execution for a death row inmate with a history of mental illness.<sup>367</sup>

### E. Conclusion

Even if Justices Souter, Ginsburg, and Breyer believed that the execution of the mentally retarded is unconstitutional, Justice Thomas's probable vote with the *Penry* majority would affirm the *Penry* decision. Though President Clinton may have the chance to appoint another Supreme Court justice before he leaves office, the pressure to pick a moderate like Justice Breyer will be great.<sup>368</sup> Furthermore, the nominee's view on capital punishment of the mentally retarded is unlikely to be a litmus test for a future court appointment, as President Clinton supervised the execution of a mentally retarded prisoner while he was governor of Arkansas.<sup>369</sup> One must conclude that to succeed in banning the practice of executing the mentally retarded, the impetus should come from the state legislatures and not the

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*Through 1st Day Before Senators; Breyer Wins Over Some Earlier Critics*, DETROIT FREE PRESS, July 13, 1994, at 5A.

365. James H. Andrews, *Breyer Would Join Court's Swing Center*, CHRISTIAN SCI. MONITOR, July 18, 1994, at 6 (quoting Georgetown University Law Center Professor Mark Tushnet).

366. *Schlup v. Delo*, 115 S. Ct. 851, 867 (1995); *Jacobs v. Scott*, 115 S. Ct. 711, 713 (1995) (Stevens, Ginsburg, and Breyer, JJ., would grant stay of execution).

367. *Moser v. Horn*, 64 U.S.L.W. 3143, 1995 WL 490270 (U.S. Aug. 16, 1995). Leon Moser had "spent time in psychiatric hospitals since his imprisonment" and a United States District Court judge had planned to have hearing on Moser's competency to be executed the morning after what was his execution day. Westfeldt, *supra* note 301, at A1. The Supreme Court, which had previously indicated it would not lift the stay before the hearing, reversed course and lifted the stay before the hearing by a five-to-four margin. *Id.* Moser was executed just 27 minutes after the Supreme Court announced its lifting of the stay. *Id.* Pennsylvania officials have been criticized with the blistering speed it used to carry out the execution. Dennis B. Roddy, *Whirlwind Execution Controversial*, PITTSBURGH POST-GAZETTE, Aug. 18, 1995, at A1.

Justice Breyer also recently joined Justice Stevens in declaring that whether the Eighth Amendment was violated when a prisoner has been kept on death row for seventeen years was an "important undecided" issue. *Lackey v. Texas*, 115 S.Ct. 1421 (1995).

368. By choosing a moderate nominee for the Supreme Court, the President may be able to avoid a noxious confirmation battle. See Joan Biskupic, *A Gentler Court Confirmation Process Emerges: Low Key Hearings for Clinton Nominee Could Change Public Attitudes, Scholars Suggest*, WASH. POST, July 18, 1994, at A7; Jeffrey Rosen, *Prosecuting the Nominees*, WASH. POST, June 19, 1994, (Book World), at 11.

369. See *supra* notes 13-14 and accompanying text (relating story of mentally retarded Arkansas man whose execution was allowed by then-Governor Clinton).

highest court of the land. It will be a long time before new judicial appointments can overtake the majority view that the capital punishment of the mentally retarded does not violate the Eighth Amendment's Cruel and Unusual Punishment Clause.

## V.

### LEGISLATIVE ATTEMPTS TO PROHIBIT THE EXECUTION OF THE MENTALLY RETARDED

Since *Penry*, almost every state that has the death penalty has considered banning the execution of the mentally retarded. Of these, eleven states have passed laws prohibiting the use of the death penalty on the mentally retarded.<sup>370</sup> Two states, Georgia and Maryland, passed their laws before the *Penry* decision. In the nine states that have passed their statutes since *Penry*, the legislatures' actions can be seen as a direct rejection of the Supreme Court's view that the execution of the mentally retarded is not cruel and unusual punishment per se.

#### A. Successful State Legislation

In 1988, Georgia became the first state to ban the execution of the mentally retarded.<sup>371</sup> The legislation was inspired by a public outcry over the execution of a mentally retarded man who had not been able to adequately present his retardation as a mitigating factor in his capital sentencing.<sup>372</sup> This legislative decision was reinforced by the Georgia Supreme Court in *Fleming v. Zant*,<sup>373</sup> in which the court held that capital punishment for the mentally retarded violated the Georgia Constitution.<sup>374</sup> The *Fleming* decision applied the prohibition to mentally retarded defendants who

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370. In chronological order by date of statute, these states are Georgia, Maryland, Tennessee, Kentucky, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, and New York. See *infra* note 533 (list of statutes).

371. GA. CODE ANN § 17-7-131(j) (1990 & Supp. 1994).

372. The ban was prompted by the execution of Jerome Bowden, IQ 65. See *supra* note 16 and accompanying text. He had been executed after only one psychological test had been conducted because the state parole board claimed that his IQ needed to be lower than 45 in order to be spared. PERSKE, *supra* note 3, at 32. Newspapers in the state decried the execution and polls demonstrated that two-thirds of the state did not support the execution of the retarded. *Id.* at 35-36. Less than ten months after Bowden's execution, Governor Joe Frank Harris signed the nation's first ban of the death penalty for the mentally retarded. *Id.* at 37.

373. 386 S.E.2d 339, 342 (Ga. 1989). But see *Jones v. State*, 602 So. 2d 1170, 1175 (Miss. 1992) (execution of mentally retarded does not violate state constitution).

374. See GA. CONST. art. I, § 1, para. 17; *Mathis v. Zant*, 851 F. Supp. 1572, 1575 (N.D. Ga. 1994) (holding that while *Fleming* was intended to operate prospectively, an individual convicted before the decision can raise a new claim of mental retardation within the auspices of a state habeas corpus proceeding). But see *Stripling v. State*, 401 S.E.2d 500, 504 (Ga.) (finding that defendant could be convicted of capital murder though his IQ was below 70 because he had no significant impairments in adaptive behavior, was competent to stand trial, could remember and discuss the facts of the crime, and was found to be not mentally retarded by the state's expert witness), *cert. denied*, 112 S. Ct. 593 (1991).

were sentenced to death before the protective legislation was enacted.<sup>375</sup> The Georgia court did not dismiss the relevance of polls as indicators of public sentiment as easily as did the United States Supreme Court in *Penry*.<sup>376</sup> However, the Georgia court believed that legislative enactments provided the "clearest and most objective evidence of how contemporary society views a particular punishment."<sup>377</sup> While the *Fleming* court cited Justice O'Connor's finding in *Penry* that there was no national consensus against the execution of the mentally retarded, it found that there was a consensus among Georgians.<sup>378</sup> In his majority opinion, Chief Justice Clarke concluded that the state legislature's declaration that the death penalty should not be imposed on the mentally retarded reflected "a decision by the people of Georgia that the execution of mentally retarded offenders makes no measurable contribution to acceptable goals of punishment."<sup>379</sup> Notably, the Georgia court held that the standards of decency of the people of the state, not those of the nation, determined the acceptability of punishments under the Georgia Constitution.<sup>380</sup> If every state in the country passed laws permitting the execution of the mentally retarded, the Georgia Constitution would still forbid such punishment so long as the societal consensus in Georgia remained as it was in 1989.<sup>381</sup> However, the Georgia Supreme Court declared not that the state constitution prohibited the execution of the mentally retarded per se, but that the current societal consensus in the state, subject to future alteration, indicated that capital punishment of the retarded was cruel and unusual.<sup>382</sup>

In the time since Georgia enacted the ban on executing the retarded, legislators made one attempt to eliminate the ban and overturn the opinion of the Georgia Supreme Court.<sup>383</sup> In 1990, legislation was introduced in the Georgia Senate that would have "permitted a jury to condemn a mentally retarded person to death if it found that he knew what he did was wrong and could have resisted peer pressure to commit the act."<sup>384</sup> A number of legislators who generally supported capital punishment argued

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375. *Fleming*, 386 S.E.2d at 342-43.

376. *Id.* at 342 n.3 ("Because opinion polls may produce widely varying results, we do not rely on polls to establish a societal consensus. We note, however, that a Georgia poll found that while 75% of Georgians favor capital punishment, 66% oppose the death penalty for the retarded, 17% favor the death penalty for the retarded, and 16% feel their answer would depend on how retarded the person is."). Cf. *Penry*, 492 U.S. at 335 (arguing that polls are "insufficient evidence of a national consensus against executing mentally retarded people . . ."). See *supra* notes 307-309 and accompanying text (giving the author's view on the utility of polls).

377. *Fleming*, 386 S.E.2d at 341.

378. *Id.* at 341-42.

379. *Id.* at 342.

380. *Id.*

381. *Id.*

382. *Fleming*, 386 S.E. 2d at 342.

383. Jeanne Cummings, *Ban on Execution of Retarded Kept Intact, Bill to Let Juries Decide Dies 34-22 in the Senate*, ATLANTA CONST., Feb. 27, 1990, at B3.

384. Editorial, *Georgia Stays Progressive*, ATLANTA CONST., Mar. 2, 1990, at A14.

for the continued protection of the retarded. To do otherwise, one such legislator urged, would reduce the Georgia Senate to "a mob at night . . . dragging out those who don't know better and hanging them."<sup>385</sup> The proposal failed by a vote of thirty-four to twenty-two, and Georgia's ban on the death penalty for retarded defendants remains in effect today.<sup>386</sup>

One month and one day before the Supreme Court decided *Penry*, Maryland became the second state to prohibit the execution of the mentally retarded.<sup>387</sup> As in Georgia, legislative action was spurred by one well-publicized case of a retarded person on death row.<sup>388</sup> The movement to prohibit execution of the retarded also received the support of Senator Margaret Schweinhaut, a popular octogenarian state legislator with thirty-four years of public service experience.<sup>389</sup> Opponents of the proposal argued that the bill was a sneak attack by adversaries of capital punishment attempting to chip away at the death penalty.<sup>390</sup> They also argued that the mentally retarded were already protected by existing state law, which permitted a jury to consider a defendant's diminished mental capacity as a mitigating factor.<sup>391</sup> These criticisms failed to convince the legislators and the bill was soon signed by the governor.<sup>392</sup>

After the *Penry* decision in 1990, Tennessee and Kentucky were the next states to conclude that the execution of the mentally retarded served no valid penological purpose.<sup>393</sup> The sponsor of the bill in Tennessee, Representative Greg Jackson, generally supports capital punishment.<sup>394</sup> With assistance from advocates for the mentally retarded in the state, Representative Jackson had little difficulty persuading other legislators that those

385. Cummings, *supra* note 383, at B3 (quoting Georgia state Senator Wayne Garner).

386. *Id.* But see *infra* notes 553-555 and accompanying text (discussing recent Georgia Supreme Court case severely limiting protection of mentally retarded from capital punishment).

387. MD. ANN. CODE art. 27, § 412(f) (Michie Supp. 1992).

388. REED, *supra* note 2, at 210 (discussing case of James Trimble, a juvenile with an IQ of 64).

389. *Id.* at 210 n.183.

390. *Id.* at 211.

391. *Id.*

392. *Id.*

393. Ky. S.B. 172 (1990); Tenn. H.B. 2107 (1990).

394. Telephone Interview with Greg Jackson, Tennessee State Representative and author of the 1990 legislation which banned the future execution of the mentally retarded in that state (Jan. 27, 1995). Representative Jackson became interested in the issue after reading accounts of mentally retarded people being executed. *Id.*

The state legislators and aides with whom I spoke were chosen, for the most part, because they were the principal sponsors of the legislation which banned the execution of the mentally retarded within their state. Also contacted were the ARCs of the states which have passed laws to prevent the execution of the mentally retarded. The ARC, known until 1991 as the Association for Retarded Citizens, is "the largest volunteer organization solely devoted to improving the lives of all children and adults with mental retardation and their families." The ARC, Q&A, Dec. 1993, at 1 (on file with the author). Each state has an ARC chapter, and ARC officers have been active in the effort to ban the execution of the mentally retarded in the state legislatures.

with serious developmental disabilities could not form the requisite intent to justify their execution.<sup>395</sup> The bill on this subject sailed through the Tennessee legislature, passing in the state House by eighty-one to three and in the Senate by twenty-eight to three.<sup>396</sup>

Kentucky's bill, passed by the state senate by a thirty-four to one vote, was signed into law during the same month as Tennessee's.<sup>397</sup> The bill was sponsored by a strong opponent of the death penalty, and was backed by advocates for the mentally retarded within Kentucky.<sup>398</sup> These advocates were able to speak personally to almost all of the Kentucky legislators, and quietly brought in outside death penalty experts to craft the measure's passage.<sup>399</sup> The bill encountered no concerted opposition, as legislators quickly accepted that the mentally retarded lacked the intellectual capacity to justify the use of capital punishment against them. This was partially due to the good relationship between advocates for the mentally retarded and state legislators.<sup>400</sup> In addition, the sponsors of the legislation revised the measure to preclude its retroactive application to offenders already sentenced to death, in order to defuse claims that the Kentucky justice system would grind to a halt under the weight of retroactive claims.<sup>401</sup> Since the bill became law in 1990, there has been no effort to weaken or overturn the legislation.<sup>402</sup>

New Mexico, the fifth state to outlaw executions of the mentally retarded, saw its statute introduced, passed, and signed into law in only two months during early 1991.<sup>403</sup>

Between March and May 1993, three more states joined the growing movement against the execution of the mentally retarded. The first was Arkansas, the third Southern state to create the exclusion for the mentally retarded.<sup>404</sup> Only one and a half months after the introduction of the legislation in the Arkansas Senate, it was signed by the governor.<sup>405</sup> The author of the bill, Senator William Hardin, had been involved in criminal justice

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395. *Id.*

396. REED, *supra* note 2, at 14.

397. See Valerie Honeycutt, *Senate Passes Mandatory Trash Collection*, LEXINGTON HERALD-LEADER, Mar. 30, 1990, at A8.

398. Telephone Interview with Joseph Meyer, Kentucky State Senator (Jan. 27, 1995). Joseph Meyer was the first co-sponsor of the bill and does support capital punishment in some circumstances. *Id.* The original sponsor of the legislation and death penalty opponent, Danny Meyer, is no longer a member of the Kentucky Senate. *Id.*

399. Telephone Interview with Pat Delahanty, Chair of the Coalition to Abolish the Death Penalty in Kentucky (Jan. 30, 1995).

400. *Id.*

401. *Id.*

402. *Id.* Kentucky has not executed anyone since 1963. *Id.*

403. N.M. STAT. ANN. § 31-2A-2.1 (Michie 1994).

404. ARK. CODE ANN. § 5-4-618 (Michie 1993).

405. Ark. S.B. 231, 79th Gen. Assembly, Reg. Sess. (1993), available in Westlaw, Bills Database (bill tracking).

for many years before election to the Arkansas Senate, and reluctantly supported the death penalty.<sup>406</sup> However, he had always had concerns about the disproportionate imposition of the death penalty on poor and minority citizens.<sup>407</sup> Senator Hardin believed that restricting consideration of mental retardation to a mitigating circumstance in the penalty phase of a bifurcated capital trial provided inadequate protection for people who were unlikely to have developed the mens rea necessary to commit capital murder.<sup>408</sup> According to the measure's sponsor, a compromise bill included changes to ensure that the limited prohibition on capital punishment would not be extended too far.<sup>409</sup> For example, the IQ standard was lowered to sixty-five to gather the votes of strong capital punishment supporters.<sup>410</sup> An extremely well-organized lobbying effort by religious organizations, such as the Interfaith Council, also contributed to the passage of the legislation.<sup>411</sup> Finally, the bill's sponsors minimized potential opposition by inviting state prosecutors to help craft an acceptable proposal, rather than by treating the prosecutors as adversaries.<sup>412</sup> While prosecutors ultimately did not endorse the bill, the decision to include them in the legislative process muted their dissent.<sup>413</sup> Since the bill's enactment in March 1993, the reaction to the legislation within Arkansas has been primarily positive, according to Senator Hardin.<sup>414</sup> Since the measure was signed into law, the Arkansas Supreme Court refused to allow a defendant, found not mentally retarded prior to the law's passage, to have his mental status reexamined under the new law in order to stay a death sentence.<sup>415</sup>

In Colorado, it took the state legislature four years to get a bill on this subject passed.<sup>416</sup> Church groups, including the Catholic Archdiocese and

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406. Telephone Interview with William "Lu" Hardin, Arkansas State Senator and sponsor of S. B. 231, the bill to prevent the execution of the mentally retarded (Feb. 15, 1994).

407. *Id.*

408. *Id.*

409. *Id.*; Telephone Interview with Cynthia Stone, Director, Arkansas ARC (Jan. 30, 1995).

410. See *infra* notes 539, 581, and 633 and accompanying text (suggesting that legislators may have to lower the IQ threshold in order to get bills passed which would prevent some mentally retarded people from receiving the death penalty).

411. Telephone Interview with Senator Hardin, *supra* note 406.

412. *Id.*; Telephone Interview with Cynthia Stone, *supra* note 409.

413. Telephone Interview with Cynthia Stone, *supra* note 409.

414. Telephone Interview with Senator Hardin, *supra* note 406.

415. *Fairchild v. Norris*, 876 S.W.2d 588, 591 (Ark. 1994), *cert. denied*, 115 S. Ct. 448 (1994). But see *id.* at 592-94 (Newbern and Hays, JJ., dissenting) (explaining that the change in Arkansas law may have made a profound effect on the court's interpretation of the cruel and unusual punishment clause of the state's constitution, thus dictating a reexamination of the petitioner's claimed retardation).

416. Telephone Interview with Aileen McGinley, Advocate, ARC of Colorado (Jan. 25, 1995).



local Lutheran organizations, conducted a concerted lobbying effort supporting the bill protecting the retarded from execution.<sup>417</sup> The bill was largely drafted by an organization that helps the mentally retarded, and it was brought to the floor of the Colorado Senate by Senator Dottie Wham.<sup>418</sup> Although Senator Wham generally supported capital punishment, she believed that the death penalty would rarely, if ever, be appropriate for the mentally retarded.<sup>419</sup> Supporters of the bill convinced capital punishment advocates that individuals would be exempted only if they were able to demonstrate specific disabilities.<sup>420</sup> Already, one person has been exempted from execution in Colorado due to his mental retardation.<sup>421</sup>

The catalyst for legislation in Washington state, Senator Marguerite Prentice, was a death penalty opponent.<sup>422</sup> She had previously sponsored legislation to ban the death penalty completely.<sup>423</sup> Senator Prentice was also personally sensitive to the concerns of advocates for the mentally retarded; her twenty-nine-year-old son was autistic, although employed and self-sufficient.<sup>424</sup> Senator Prentice was personally aware of both the special needs of those with mental disabilities, and their ability to lead fulfilling and productive lives.<sup>425</sup>

Senator Prentice believed that state legislators must "be willing to take a cause on when [they] believe deeply in something," especially when representing people, such as the mentally retarded, who "cannot speak for themselves."<sup>426</sup> The bill's sponsors pointed out that the mentally retarded often cannot understand the causal relationship between their acts and the consequences of those acts, and that they are unable to control their impulses, as a non-retarded person can.<sup>427</sup> Senator Prentice's advocacy helped bring the bill to victory in the Washington House of Representatives by a seventy to twenty-eight margin, and in the Senate by thirty-eight to three.<sup>428</sup>

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417. Telephone Interview with Dorothy Hilbrand, Aide to Senator Wham, sponsor of S.B. 138, a bill to prevent the death penalty for the mentally retarded (Feb. 16, 1994).

418. *Id.*

419. *Id.*

420. Telephone Interview with Aileen McGinley, *supra* note 416. In fact, legislators were surprised to hear that mentally retarded people in Colorado could still be executed. *Id.*

421. Kathryn Sosbe, *Murder Plea Raises Mental Retardation Questions*, COLO. SPRINGS GAZETTE TELEGRAPH, Feb. 7, 1995, at B1, B3.

422. Telephone Interview with Marguerite Prentice, Washington State Senator and sponsor of S.B. 5625, a bill to prohibit the death penalty for the mentally retarded (Feb. 9, 1994).

423. *Id.*

424. While autism is not the same as mental retardation, autism may be a predisposing factor for mental retardation. See DSM-IV, *supra* note 36, at 43.

425. Telephone Interview with Marguerite Prentice, *supra* note 422.

426. *Id.*

427. *Id.*

428. Associated Press, *Panel OKs Bill Barring Execution of Retarded*, SEATTLE POST-

Indiana was the ninth state to reject the imposition of the death penalty on the mentally retarded.<sup>429</sup> Like Senator Prentice in Washington, Representative William Crawford, the force behind this legislation was a long-time death penalty opponent and, like Senator Hardin in Arkansas, was very concerned about "the inequity of discretion of capital punishment towards racial minorities and the mentally retarded."<sup>430</sup> When Indiana raised the minimum age for imposition of the death penalty to sixteen, Representative Crawford found it inconsistent that those with the mental capacity of an eight- or nine-year-old could still be sentenced to die.<sup>431</sup> A task force, whose members included legal experts and advocates for the mentally retarded, assembled to press for the passage of legislation to exempt the retarded from capital punishment.<sup>432</sup> Representative Crawford employed a number of arguments to support the passage of the proposed legislation. He contended that executing the retarded was immoral, that capital cases presented an unjustified cost to the taxpayers, and that a recent poll had demonstrated that seventy-four percent of Indiana residents opposed capital punishment for the mentally retarded.<sup>433</sup> Eventually, Representative Crawford's legislation was absorbed, intact, into a larger anti-crime bill that was signed by Governor Evan Bayh in March 1994.<sup>434</sup> The Indiana courts will soon grapple with the issue of whether this exemption should be retroactive.<sup>435</sup>

Kansas, one of the most recent states to reinstitute the death penalty, exempted the mentally retarded as part of its new law.<sup>436</sup> In April 1994,

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INTELLIGENCER, Feb. 26, 1993, at B4. The American Civil Liberties Union lobbied for the bill and the Washington Association of Prosecuting Attorneys lobbied against it. *Id.* The supporters of the bill rejected the notion that mental retardation can be faked, due the paper trail necessary for the defendant to prove a history of retardation. *Id.*

429. IND. CODE ANN. § 35-36-9-6 (West Supp. 1994).

430. Telephone Interview with Representative William Crawford (Feb. 15, 1994); *see also supra* notes 187-203 and accompanying text (discussing racial bias in capital sentencing).

431. *Id.*

432. Telephone Interview with Sally Gibson, *supra* note 151. State prosecutors were invited to attend the meetings of the task force, but they declined. *Id.* The prosecutors expressed no public opinion on the law, and one member of the task force surmises that they failed to oppose the legislation in order to avoid public disfavor. Telephone Interview with Monica Foster, a task force member (Jan. 26, 1995).

433. Telephone Interview with Rep. William Crawford, *supra* note 430. A poll of Indiana legislators showed that they also convincingly disfavored the execution of the mentally retarded, even more than the Indiana citizenry. Telephone Interview with Sally Gibson, *supra* note 151.

434. Telephone Interview with Dana Daniels, Indiana Majority Leader's Office, Indiana House of Representatives (Aug. 15, 1994). The bill, while preventing the future execution of the mentally retarded, expanded the number of crimes for which the death penalty was applicable in Indiana. Telephone Interview with Sally Gibson, *supra* note 151.

435. Telephone Interview with Sally Gibson, *supra* note 151. One lawyer is trying to set precedent that the recent legislative intent against the execution of the mentally retarded should require that Indiana apply the law retroactively. *Id.* This issue is only in the deposition stage as of January of 1995. *Id.*

436. KAN. STAT. ANN. § 21-4623 (1994).

the Kansas legislature passed a bill reinstating the death penalty for that state.<sup>437</sup> The measure became law without Governor Joan Finney's signature, because she believed the measure was supported by the majority of Kansans.<sup>438</sup> Despite the avid support for the death penalty, the bill exempted mentally retarded people from executions.<sup>439</sup> The exemption for the retarded was urged by advocates for the mentally retarded, who had for many years enjoyed a good relationship with the Kansas legislature. The exemption found little opposition.<sup>440</sup> The legislative sponsor of the bill reinstating capital punishment, Representative Greg Packer, suggested that staff members of the Kansas legislative service played a large role in protecting the mentally retarded.<sup>441</sup> The legislative service claimed that subjecting the mentally retarded persons to capital punishment violated the tenets of the Kansas Constitution.<sup>442</sup>

New York became the thirty-eighth state in the nation with capital punishment on March 7, 1995.<sup>443</sup> Republican state senator George Pataki's defeat of three-term Governor Mario Cuomo set the stage for the return of the death penalty.<sup>444</sup> Even at the outset of the battle to restore capital punishment in the state, prominent lawyers, including some who generally supported the death penalty, called for an exemption for the mentally retarded.<sup>445</sup> By the middle of February, the Governor, the Democratic-controlled Assembly, and the Republican-controlled Senate had agreed

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437. See Julie Wright, *House Gives Final Push to Death Bill: Governor Expected to Let Penalty Become Law*, WICHITA EAGLE, Apr. 9, 1994, at 1A (stating that a bill to reinstate the death penalty in Kansas passed the state house of representatives by 67-58 and the state senate by 22-18).

438. Julie Wright, *Death Penalty Comes to Kansas: Finney Stands Firm, Doesn't Sign, Veto Bill*, WICHITA EAGLE, Apr. 23, 1994, at 1A, 8A. A bill becomes a law in Kansas without the Governor's signature if the Governor fails to return the bill within ten calendar days of having been presented with the bill for signing.

439. Julie Wright, *Death Penalty Takes Big Step: Final House OK is Likely Today; Fate Uncertain in the Senate*, WICHITA EAGLE, Feb. 11, 1994, at 1A, 6A ("mentally retarded people could not be executed").

440. Telephone Interview with Bob Geers, Administrative Coordinator, The ARC of Kansas (Jan. 27, 1995).

441. Telephone Interview with Greg Packer, Kansas State Representative and chief sponsor of House Bill 2578 which reinstated the death penalty in Kansas (Jun. 1, 1994).

442. *Id.* See generally KAN. CONST. § 9 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.").

443. James Dao, *Death Penalty in New York Reinstated After 18 Years; Pataki Sees Justice Served*, N.Y. TIMES, Mar. 8, 1995, at A1.

444. Governor Cuomo had vetoed death penalty legislation in each of his twelve years in office while his predecessor, Hugh Carey, had blocked the death penalty six times during his tenure. James Dao, *New York Leaders Offer Limited Bill on Death Penalty*, N.Y. TIMES, Mar. 4, 1995, at A1.

445. Kevin Sack, *Strict Rules on Death Penalty Urged by Lawyers' Group*, N.Y. TIMES, Dec. 31, 1994, at 28. The group, which called itself New Yorkers for Fairness in Capital Punishment, included death penalty opponents such as Arthur Liman, the counsel to the Senate Iran-Contra committee, and capital punishment supporters such as John Dunne, the former head of the Civil Rights Division of the Justice Department. *Id.*

that the mentally retarded would not be executed.<sup>446</sup> Both sides wrangled, however, over whether the hearing on mental retardation would be held before trial, or after the defendant was sentenced to death.<sup>447</sup> Eventually, the Assembly-backed pre-trial hearing was agreed to by Republicans.<sup>448</sup> The death penalty legislation, with an exemption for the mentally retarded, passed by thirty-eight to nineteen in the state Senate and by ninety-four to fifty-two in the Assembly, and was quickly signed by Governor Pataki.<sup>449</sup>

While the effort to bring the death penalty to Iowa failed in 1995, the process surrounding the bill's defeat should be noted, as the issue of the mentally retarded received much discussion. An exemption for the mentally retarded originally met stiff opposition from the backers of the legislation, who claimed that the decision whether to levy a death sentence should be left up to the prosecutor and the jury.<sup>450</sup> Eventually, Republicans supporting the bill accepted a prohibition against executing the mentally retarded as a means of compromise to secure what they hoped to be the eventual passage of the bill.<sup>451</sup> The death penalty bill, including the exemption for the mentally retarded, passed the Iowa House by fifty-four to

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446. Kevin Sack, *Leaders Are Near Accord On Death Penalty Measure*, N.Y. TIMES, Mar. 2, 1995, at B6.

447. *Id.*

448. *Id.* Democratic Assembly Speaker Sheldon Silver promoted his position by stating that "it would be wasteful and expensive to fully try capital cases for defendants who might later be deemed ineligible for execution." *Id.* Advocates for the mentally retarded also claimed that there would be great pressure to rule against a defendant in a hearing on alleged mental retardation after a long and costly trial and sentencing. Jon R. Sorensen, *Pataki May Lobby Across State for Death Penalty Bill*, BUFFALO NEWS, Mar. 2, 1995, at B1.

449. Dao, *supra* note 443, at A1. All but one of 86 Republican members of New York state government voted for the bill while 70 out of 117 Democrats opposed the death penalty legislation. *Id.* Mentally retarded individuals *can* be executed, but only in the cases in which they kill a prison guard. *Id.* This rarely happens. Stephanie Saul, *Ripe for a Challenge; Complexity of Law Raises Vulnerability*, NEWSDAY, Mar. 10, 1995, at A27; *Larry King Live*, (CNN television broadcast, Mar. 14, 1995) (transcript at 3-4, on file with author) (statement of Ronald Tabak that no prison guard has been murdered since the 1970s), and is likely to be challenged in the courts, Dao, *supra* note 444, at A24 (statement of Steven Mosenson, general counsel for the United Cerebral Palsy Association of New York State) ("If you are going to say people lack a certain degree of moral culpability because they are mentally retarded, that should apply no matter where you commit the crime."). Given the narrowness of this exception, New York can be legitimately referred to as the eleventh state to ban the execution of the mentally retarded.

450. Associated Press, *Executions of Retarded Still in Bill*, OMAHA WORLD-HERALD, Feb. 9, 1995, at 17.

451. Mike Glover, *Panel Reverses Field on Retarded Executions*, ASSOCIATED PRESS POL. SERV., Feb. 14, 1995, 1995 WL 6708486. The bill contained many of the provisions which I promote as beneficial later in this Article, *infra* Part VI: the hearing on the defendant's mental retardation would have taken place before the trial; the burden of proof on the defendant would have been a preponderance of the evidence; there would have been a rebuttable presumption of mental retardation if the defendant's IQ was 70 or below; mental retardation could still have been presented as mitigating evidence in the penalty phase if the defendant did not win the motion; and, the jury would not be informed during the penalty phase of the defendant's loss on a motion to be declared mentally retarded. Iowa H.F. 2, 76th Gen. Assem., 1st Sess., § 7 (1995). The bill also provided, for the purposes of determining an inmate's sanity prior to execution but not for the hearing on the defendant's

forty-four in February of 1995.<sup>452</sup> The state Senate, however, rejected the bill by in a March vote by thirty-nine to eleven.<sup>453</sup>

The resurgence of the death penalty in general has encountered at least one electoral defeat since *Penry*, perhaps in part because the defeated legislation did not exempt the retarded. In November 1992, voters in the District of Columbia defeated a measure which would have authorized capital punishment as a sentence for violent crimes in the nation's capital.<sup>454</sup> The District of Columbia had repealed the death penalty in 1981, and the campaign for restoration took place against the backdrop of Washington's record violence rates.<sup>455</sup> Voters rejected the measure by a ratio of two to one.<sup>456</sup> The proposal would not have exempted the mentally retarded from the death penalty.<sup>457</sup> African-American voters rejected the initiative by three-to-one ratios in some districts, while predominately-white precincts also voted against the measure, but by a closer margin.<sup>458</sup> Proposals to reinstate the death penalty in other states may also fail if they do not exempt the mentally retarded.<sup>459</sup>

### B. Unsuccessful Attempts to Pass Legislation

While the effort to stop capital punishment of mentally retarded defendants has succeeded in eleven states, legislators have tried and failed in

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mental retardation, the appointment of two licensed psychiatrists or psychologists. *Id.* at § 4.

452. Jonathan Roos, *House Passes Penalty*, DES MOINES REGISTER, Feb. 24, 1995, at 1. Fifty-three of sixty-four Republicans supported the measure, while only one of thirty-four Democrats voted yes. *Id.*

453. Associated Press, *Vote Rejects Iowa Death Sentence; Revival in Senate Faces Long Odds*, OMAHA WORLD-HERALD, Mar. 3, 1995, at 1. The reasons cited for the senate's opposition to the bill were varied. Senator Maggie Tinsman summed up her feelings by stating on the senate floor that "I cannot support escalating the cycle of violence by using violence as a solution to violence." *Id.* Again, the bill was supported primarily by Republicans, with ten out of eleven supporters of the bill being members of the GOP. However, thirteen Republicans, along with twenty-six Democrats voted against the proposal. Thomas A. Fogerty, *Death Penalty Fails*, DES MOINES REGISTER, Mar. 3, 1995, at 1.

454. Rene Sanchez, *District Rejects Death Penalty Measure*, WASH. POST, Nov. 4, 1992, at A33.

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.*

459. See H.R. 4285, 179th Gen. Ct., Reg. Session, 1994 Mass. (bill that would have reinstated the death penalty in Massachusetts, but not exempted the mentally retarded failed in committee); Anthony R. Nanula, *Why Nanula Couldn't Support Death Penalty*, BUFFALO NEWS, Mar. 25, 1994, at C2 (quoting New York State Senator as saying that one reason for voting against the measure was because it would allow the execution of the mentally retarded); see also S. 6350, 215th Gen. Assembly, 2d Sess., 1994 N.Y. (bill would have reinstated the death penalty in New York, without exempting the mentally retarded from execution, approved by legislature but vetoed by Governor Mario Cuomo and not overridden); S. 200, 215th Gen. Assembly, 1st Sess., 1993 N.Y. (same). Note that the death penalty bill which eventually became law in New York after Governor Cuomo's defeat exempted the mentally retarded. See *supra* notes 443-449.

at least eighteen states.<sup>460</sup> Furthermore, the successful attempts in states with low execution rates have a weaker impact on any national consensus. Of the eleven states that now prohibit execution of the mentally retarded, only half have actually executed someone since the death penalty was restored in 1976.<sup>461</sup> Altogether, the eleven states account for only thirty-two of the first 254 executions since the reimposition of capital punishment, eighteen of which occurred in Georgia.<sup>462</sup> Before the Supreme Court will find a national consensus, another state with a high rate of execution must exempt the mentally retarded.

Perhaps the most high-profile defeat for the prevention of execution of the mentally retarded occurred in California. The battle consumed the legislature from the bill's introduction in March 1993 until its final failure in January 1994. The prospects for a measure protecting the mentally retarded were initially promising, as a Democrat opposed to capital punishment joined with a pro-death penalty Republican to support the legislation.<sup>463</sup> The sponsors proposed the bill because they believed that the death penalty could not deter people who could not appreciate the consequences of their actions.<sup>464</sup> In addition, the sponsors felt that the death penalty should only apply to the most culpable criminals, a group that would not include the mentally retarded.<sup>465</sup> In its original form, the bill merely would have required the defendant to prove mental retardation by an unspecified burden of proof.<sup>466</sup> Its final version would have allowed the defendant to move for a hearing before his trial on the subject of his alleged retardation before three "qualified professionals" selected by the prosecution.<sup>467</sup> The members of this panel would have been required to concur unanimously in a diagnosis of mental retardation in order to exempt the defendant from the death penalty.<sup>468</sup> The panel's decision would not

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460. REED, *supra* note 2, at 217-49.

461. See Cronin, *supra* note 111, at E3.

462. See *id.* Georgia has executed eighteen, Arkansas nine, Indiana two, Washington state two, and Maryland one. During 1994, Arkansas executed five people, and Georgia, Washington, and Maryland one each. Cf. David Margolick, *As Texas Death Row Grows, Fewer Lawyers Help Inmates*, N.Y. TIMES, Dec. 31, 1993, at A1, A23; Pressley, *supra* note 359, at A3 (Arkansas executed more murderers during 1994 than any other state except for Texas).

463. Kathleen Z. McKenna, *Bill Would Ban Execution of Mentally Disabled Killers*, SACRAMENTO BEE, Mar. 5, 1993, at A4.

464. Telephone Interview with Gene Urban, aide to California Assemblyman Phillip Isenberg, sponsor of the 1993 bill in the state which would have exempted the mentally retarded from the death penalty (Feb. 14, 1994).

465. Frank Hill, *Death Penalty for the Retarded: Spare Those with IQs Under 70*, SAN DIEGO UNION-TRIBUNE, Mar. 28, 1993, at G-3 (opinion piece by the author of the bill in the Senate); Telephone Interview with Gene Urban, *supra* note 464.

466. Cal. A.B. 1455, Reg. Sess. (version of March 4, 1993), available in Westlaw, Bills Database. The provision would have only become law if a majority of California voters approved of it. See *id.* at § 3.

467. Cal. A.B. 1455, Reg. Sess. (version of April 27, 1993), available in Westlaw, Bills Database.

468. *Id.*

have been reviewable.<sup>469</sup>

Yet, despite these compromises and support from many major daily newspapers in the state,<sup>470</sup> the measure failed. An aide to one of the bill's authors attributed the defeat to "the partisan politics and ideology."<sup>471</sup> The bill also met resistance from the state attorney general and from district attorneys around California.<sup>472</sup> The bill failed to pass the California assembly in June 1993 and in January 1994, when it was removed from consideration pursuant to the California Constitution.<sup>473</sup>

In Oregon, a bill that was initially supposed to prevent the execution of the retarded passed through the legislature but was vetoed by Governor Barbara Roberts.<sup>474</sup> Due to a convoluted turn of events, the author of the bill and advocates for mentally retarded citizens actually requested that the governor *not* sign the bill.<sup>475</sup> The original bill was similar to legislation that had passed in other states since the *Penry* decision, and advocates for the mentally retarded supported and lobbied for it.<sup>476</sup> However, the House of Representatives and the joint conference committee altered the original bill that passed the Oregon Senate.<sup>477</sup> The resulting legislation, if signed into law, would have made it nearly impossible for a defendant to prove his mental retardation.<sup>478</sup> The final bill would have made the exception dependent on whether the judge believed the defendant did "not understand and appreciate the nature of the death penalty and the reasons why it was imposed."<sup>479</sup> Governor Roberts stated that this test was appropriate for a determination of competency to stand trial, but not as a measure of

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469. *Id.*

470. *E.g.*, Editorial, *Mercy for the Mentally Retarded*, SACRAMENTO BEE, Apr. 9, 1993, at B8; Editorial, *Too Young to Die: Modest Bill to End Execution of the Retarded is Compelling*, SAN JOSE MERCURY NEWS, Mar. 31, 1993, at 10B; Editorial, *An Obligation of Humanity: California Should Exempt the Mentally Retarded from the Death Penalty*, L. A. TIMES, Mar. 25, 1993, at B6; Editorial, *Mercy for the Retarded; Legislation that Would Spare the Mentally Retarded from the Death Penalty in California Deserves Support*, FRESNO BEE, Mar. 23, 1993, at B6.

471. Telephone Interview with Gene Urban, *supra* note 464; *see also* Kevin Roderick, *67% Favor Life Term over Gas Chamber*, L.A. TIMES, March 1, 1990 at A3, A31 (a poll showed almost 65% of Californians were opposed to executing the mentally retarded).

472. Telephone Interview with Gene Urban, *supra* note 464.

473. *See* CAL. CONST. art. IV, § 10(c) (requiring that any bill introduced in the first year of the legislative session and not acted upon by the legislature by January 31 of the second calendar year be withdrawn from consideration).

474. *Roberts Vetoes Bill to Block Death Penalty for Retarded*, OREGONIAN, Sept. 15, 1993, at B2.

475. Telephone Interview with James Hill, Aide to Oregon State Senator Jeannette Hamby, sponsor of Or. S.B. 640, which began as an attempt to end capital punishment for the mentally retarded, but was altered by the time it reached the governor's desk (Feb. 11, 1994).

476. *Id.*

477. *Id.*

478. Telephone Interview with James Hill, *supra* note 475; *Roberts Vetoes Bill to Block Death Penalty for Retarded*, *supra* note 474, at B2.

479. *Roberts Vetoes Bill to Block Death Penalty for Retarded*, *supra* note 474, at B2.

whether the defendant is retarded.<sup>480</sup> The supporters of the legislation were forced to abandon the measure and start from scratch.<sup>481</sup> To date, no new bill has been introduced in Oregon.<sup>482</sup>

In North Carolina, a bill that provided that a mentally retarded person convicted of first-degree murder could not be sentenced to death passed both House and Senate during the last legislative session, but in different forms.<sup>483</sup> The author of the bill was a death penalty opponent.<sup>484</sup> The legislation nearly succeeded, partially because it was sponsored by the majority leader of the North Carolina House of Representatives, and partially because similar bills have been introduced in previous years, allowing legislators to warm up to this proposition.<sup>485</sup> This proposal will be brought up in the next session, when the author of the bill hopes a compromise can be reached.<sup>486</sup> Ending executions of the mentally retarded will have to come from the legislature, for the state's supreme court has repeatedly upheld death sentences imposed upon those who meet the definition of retardation.<sup>487</sup>

In Missouri during 1994, a bill that would have prevented the execution of the mentally retarded was approved by the State Senate's judiciary committee but never reached a full vote.<sup>488</sup> The sponsor of the measure, Senator Wayne Goode opposed capital punishment, but was not particularly active in the movement against the death penalty.<sup>489</sup> Senator Goode acquired the help of religious agencies and advocates for the poor, but state

480. *Id.*

481. *Id.*

482. As of December 15, 1995, no new bills on this subject had been reported in the Westlaw database.

483. See *infra* note 539 (one house of North Carolina legislature wanted an IQ cutoff at 65 while another passed the measure with an IQ 70 standard); see also *Death Penalty Exception Wins Approval*, CHARLOTTE OBSERVER, May 6, 1993, at 4C (original House bill passed the body by a 102-8 vote); Dennis Patterson, *Bill Proposes Halting Execution of Killers with IQs under 70*, NORFOLK VIRGINIAN-PILOT, May 1, 1993, at D4 (House committee passed bill despite opposition from state Attorney General).

484. Telephone Interview with Milton F. "Toby" Fitch, Majority Leader, North Carolina House of Representatives (Feb. 18, 1994).

485. *Id.*

486. *Id.*

487. *E.g.*, *State v. Williams*, 452 S.E.2d 245, 273 (N.C. 1994) (holding that failure to submit to the jury the statutory mitigating factor on mental deficiency in regard to a defendant with an IQ of 70 was not error), *cert. denied*, 1995 WL 335332 (U.S. Oct. 2, 1995); *State v. Skipper*, 446 S.E.2d 252, 261 (N.C. 1994) (holding that sustaining objections to questions regarding how prospective jurors would be affected by evidence of mental impairment with respect to the imposition of the death penalty was not an error), *cert. denied*, 115 S.Ct. 953 (1995). But see *State v. Holden*, 450 S.E.2d 878, 882 (N.C. 1994) (finding that failure to grant peremptory instruction on statutory mitigating circumstance that defendant, with an IQ of 56, suffered from mental or emotional disturbance was not harmless error).

488. Telephone Interview with Senator Wayne Goode (Aug. 5, 1994). Senator Goode sponsored Missouri Senate Bill 447 in 1994, which would have reduced the sentence of a mentally retarded murderer to life imprisonment. *Id.*

489. *Id.*



prosecutors resisted his efforts.<sup>490</sup> The prosecutors refrained from opposing new mechanisms to present a defendant's mental retardation as a mitigating factor, but refused to accept an absolute bar on execution of retarded defendants.<sup>491</sup> Although the session ended before further action could be taken, the author of the bill has expressed hope that similar legislation can be passed in the future.<sup>492</sup>

All proposed legislation in other states has been defeated before reaching the governor. Texas, the state that has executed more individuals than any other in recent times,<sup>493</sup> has not even been able to pass a requirement that mental retardation be specifically considered as a mitigating factor.<sup>494</sup> This is despite the fact that seventy-three percent of Texans oppose capital punishment for retarded individuals.<sup>495</sup> Florida, which ranks second in the number of people executed since 1976,<sup>496</sup> has seen bills exempting the mentally retarded introduced in both its House of Representatives and Senate, but the bills have failed to get out of committee<sup>497</sup> due in part to

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490. *Id.*

491. *Id.*

492. *Id.* Senator Goode has reintroduced a bill to prevent the execution of the mentally retarded in 1995. See Mo. S.B. 61, 88th Gen. Assembly, Reg. Sess. (1995), available in Westlaw, Bills Database (introduced on January 11, 1995 to the Senate Committee of the Judiciary and prohibiting the imposition of the death penalty on a person diagnosed as having an IQ of 75 or less prior to the commission of first degree murder).

493. Margolick, *supra* note 462, at A23. See Pressley, *supra* note 359, at A3 (of the 31 executions performed in the United States during 1994, 14 took place in Texas).

494. REED, *supra* note 2, at 244. As long as the sentencing jury has the opportunity to consider all the possible mitigating circumstances behind the defendant's crime, the Supreme Court believes that justice is being served. *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989). In Texas, mental retardation is not highlighted as a mitigating factor, though the defendant must have the opportunity to present this, as well as any other, mitigating evidence. The sentencing jury, of course, can ignore the mitigating evidence if it so desires.

495. Shelley Clarke, *A Reasoned Moral Response: Rethinking Texas' Capital Sentencing Statute after Penry v. Lynaugh*, 69 TEX. L. REV. 407, 412 n.33 (1990) (citing 1990 poll by Texas A&M University). Texas recently executed an individual with IQ 65, the inability to distinguish right from wrong, and a history of being beaten with a horse whip by his father. Stout, *supra* note 162, at A16; see also Jerry Urban, *Execution Cleared; No Stay Given Retarded Child-Killer*, HOUS. CHRON., Jan. 17, 1995, at 13 (statement of Ward Tisdale, spokesman for the Texas Attorney General) ("It is not relevant [to obtain a capital murder conviction today] whether a person is mentally retarded or not in Texas.").

In January of 1995, State Representative Elliott Naishtat introduced a bill which would prevent the executions of the mentally retarded in Texas. He proposed the legislation because this use of capital punishment "doesn't make sense and it violates the basic standards of fairness and human decency to impose the death penalty on any person who because of a disability, including mental retardation, cannot fully appreciate the nature and consequences of his actions." Mike Tolson, *Death Sentence Heightens Debate Over Executing Retarded*, HOUS. CHRON., Feb. 12, 1995, at 33.

496. See Cronin, *supra* note 111, at E3.

497. See Fla. H.B. 641, 13th Leg., 2d Reg. Sess. (1994), available in Westlaw, Bills-Old Database (describing measure that allowed defendant who could prove mental retardation by preponderance of the evidence to be spared, was reported out of House Judiciary Committee but was withdrawn from consideration in Appropriations Committee); Fla. H.B. 615, 12th Leg., Reg. Sess. (1992), available in Westlaw, Bills-Old Database (same); Fla. H.B. 665, 12th Leg., Reg. Sess. (1992), available in Westlaw, Bills-Old Database (measure allowing

the opposition of Florida prosecutors.<sup>498</sup> Similarly, the movement to stop the execution of the retarded in Louisiana has not reached the floor of either legislative chamber.<sup>499</sup> In Pennsylvania, the sponsor of similar legislation, Senator Edward Helfrick, a conservative Republican, had the ability to deliver bipartisan support for the measure.<sup>500</sup> However, while the proposed legislation passed in the Senate, it has not come to a vote in the Pennsylvania House.<sup>501</sup> Companion Senate and House bills in Delaware, which would have followed Georgia's example by creating a "guilty, but mentally retarded" jury charge, have failed to make it out of committee.<sup>502</sup>

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post-trial determination of defendant's mental retardation with the burden on the defendant by a preponderance of the evidence and allowing appeal by the state); Fla. S.B. 872, 12th Leg., Reg. Session (1992), available in Westlaw, Bills-Old Database (companion bill); REED, *supra* note 2, at 223-226; see also United Press Int'l, *Bill: Ban Execution of Retarded, Four Other States Considering It*, MIAMI HERALD, Mar. 17, 1990, at 1B (describing proposed ban aimed at people with IQs below 70 and adaptive behavior problems).

498. Telephone Interview with Chris Hughes, Association of Retarded Citizens of Florida (Aug. 23, 1994) (state's attorneys blocked measure in Senate and would only accept mental retardation as a mitigating factor, not an absolute ban, against retardation); see also Cohen, *supra* note 149, at 470 (prosecutors claimed that justice system would be slowed and that defendants who were not retarded would claim exemption). As in Texas, polls indicated a high percentage (71%) of Floridians opposed the death penalty for mentally retarded defendants, though 84% favored capital punishment in general. *Id.* at 471.

499. See La. H.B. 1858, Reg. Sess. (1993), available in Westlaw, Bills-Old Database (proposing prohibition of capital punishment of the mentally retarded); La. S.B. 714, Reg. Sess. (1993), available in Westlaw, Bills-Old Database (proposing prohibition of capital punishment of the mentally retarded); see also State v. Brooks, 648 So. 2d 366, 373 (La. 1995) (upholding death sentence for defendant whose IQ score had been tested as low as 44).

500. As a conservative Republican, Senator Helfrick was more likely to gain the support of death penalty proponents, who traditionally have been Republicans. Tom Baxter, *Southerners Back Death Penalty, But Are Split on Retardation*, ATLANTA CONST., July 28, 1989, at A6 (citing that Southern Republicans support the death penalty in greater numbers than Southern Democrats); George Gallup, Jr., *Death Penalty Has High Level of Support*, SAN JOSE MERCURY-NEWS, Mar. 2, 1986, at 18A (national poll found that Republicans supported death penalty by a seven-to-one margin (83% to 11%), compared to two-to-one support among Democrats (62% to 30%)); John Milne, *Poll Results Reflect Recession's Effects, Bipartisan Accord on Some Key Issues*, BOSTON GLOBE, Dec. 15, 1991, New Hampshire Weekly, at 1 (stating that support for the death penalty among New Hampshire Republicans is twelve percentage points higher than for the state's Democrats); Dan Oberdorfer, *2 out of 3 Minnesotans Support the Death Penalty*, MINNEAPOLIS STAR-TRIBUNE, Feb. 26, 1989, at 1A, 10A (Minnesota Republicans support capital punishment more than the state's Democrats); George Skelton, *Death Penalty Support Still Strong in State*, L.A. TIMES, Apr. 29, 1992, at A1, A18 ("The strongest support for the death penalty [in California] comes from Republicans . . .").

501. Telephone Interview with Todd Koups, Aide to Senator Edward Helfrick (Aug. 15, 1994) (sponsor of 1991 Pennsylvania Senate Bill 331, providing that those with IQs under 70 could not be executed). Senator Helfrick connects his anti-death penalty stance with his pro-life view in the abortion debate. *Id.* He reintroduced legislation to prevent the execution of the mentally retarded in January of 1995. See Pa. S.B. 179, 179th Gen. Assembly, Reg. Sess. (1995) (proposing that no person be sentenced to death who was mentally retarded at the time the offense was committed).

502. Del. H.B. 192, 136th Gen. Assembly, 1st Reg. Sess. (1991), available in Westlaw, Bills-Old Database (bill tracking and bill text); Del. S.B. 101, 136th Gen. Assembly, 1st Reg. Sess. (1991), available in Westlaw, Bills-Old Database (bill tracking and bill text); see *infra* note 567 and accompanying text (Georgia's procedures).

Generally, attempts to prevent the execution of the mentally retarded have either lost in a full vote of a legislative chamber, or failed to receive a vote at all;<sup>503</sup> the proposed laws have collapsed within a House or Senate committee, either through a failure to take action upon the bill or because of a losing vote;<sup>504</sup> or the bills have been enacted in a diluted form, making mental retardation a mitigating factor but not banning executions of retarded defendants.<sup>505</sup>

### C. Federal Legislation

While states disagree on whether the retarded should be exempted from capital punishment, the United States Congress has unequivocally decided that the mentally retarded should not be executed under federal law.<sup>506</sup> Congress had protected the mentally retarded even before the *Penry* decision. In 1988, Congress passed the Anti-Drug-Abuse Amendments Act.<sup>507</sup> The legislation contained a provision which simply stated that "a sentence of death shall not be carried out upon a person who is mentally retarded."<sup>508</sup> Congress later accepted an amendment to clarify the definition of retarded.<sup>509</sup> The full bill passed the Senate and the House

503. Miss. S.B. 2926, 162nd Leg., Reg. Sess. (1993), *available in* Westlaw, Bills-Old Database (bill tracking) (passed Senate but not voted upon in House of Representatives); Okla. S.B. 812, 43d Leg., 2d Reg. Sess. (1992), *available in* Westlaw, Bills-Old Database (bill tracking) (failed in committee); Pa. S.B. 331, 175th Gen. Assembly, Reg. Sess. (1991), *available in* Westlaw, Bills-Old Database (bill that would have prevented execution of defendants with IQ scores below 70 passed Senate but was not voted upon in House of Representatives); REED, *supra* note 2, at 218, 229-30, 235-41 (describing efforts in Arizona, Indiana, New Jersey, Ohio, Oklahoma, and Pennsylvania); *Legislature in Brief*, ARIZONA REPUBLIC, Apr. 21, 1992, at B3 (Arizona Senate, by a vote of 17-11, rejected measure which would have repealed the death penalty for the mentally retarded).

504. Ariz. H.B. 2307, 41st Leg., Reg. Sess. (1994), *available in* Westlaw, Bills-Old Database (bill tracking) (introduced with no further action); Miss. H.B. 1130, 162d Leg., Reg. Sess. (1994), *available in* Westlaw, Bills-Old Database (bill tracking) (introduced with no further action); Ohio H.B. 253, 120th Gen. Assembly, Reg. Sess. (1993), *available in* Westlaw, Bills Database (bill, which would have allowed defendant to make a pre-trial motion to exempt himself from the death penalty and have a hearing in which he would have to prove his mental retardation by clear and convincing evidence, was introduced with no further action); Ill. S.B. 287, 87th Gen. Assembly, Reg. Sess. (1991), *available in* Westlaw, Bills-Old Database (bill tracking) (introduced with no further action); Pa. H.B. 660, H.B. 660, 176th Gen. Assembly, Reg. Sess. (1993), *available in* Westlaw, Bills-Old Database (bill tracking) (same); REED, *supra* note 2, at 220-23, 226-28, 230-37, 244-46 (describing efforts in Connecticut, Delaware, Idaho, Louisiana, Mississippi, Missouri, Nebraska, North Carolina, Utah, and Virginia); Sandra Evans, John F. Harris, John Ward Anderson, Donald P. Baker, *House Approves Stricter Crime Bills*, THE WASHINGTON POST, Feb. 8, 1990, at D7 (Virginia bill failed in committee by an eight to seven vote).

505. REED, *supra* note 2, at 228-29, 241-43 (describing efforts in Illinois and South Carolina).

506. 18 U.S.C. § 3596 (1994).

507. 21 U.S.C. §§ 801-971 (1988).

508. 21 U.S.C. § 848(l) (1988).

509. *Id.* ("A sentence of death shall not be carried out upon a person who, as a result of mental disability— (1) cannot understand the nature of the pending proceedings, what such person was tried for, the reason for the punishment or the nature of the punishment; or

by wide margins.<sup>510</sup>

However, the issue returned to the forefront in a Senate debate on the 1990 Omnibus Crime Bill.<sup>511</sup> This legislation sought to "reinstate and expand the federal death penalty for 30 offenses, primarily involving murder, espionage, and treason."<sup>512</sup> Republican Senator Strom Thurmond proposed an amendment which required the defendant to prove not only his mental retardation, but also that he did "not know the difference between right and wrong."<sup>513</sup> He used the Supreme Court's decision in *Penry* as the basis for his argument.<sup>514</sup> Senator Thurmond also used an argument commonly employed by opponents of protecting the mentally retarded, stating that "[e]very Senator here today knows that all death row inmates will claim they are mentally retarded and will be able to hire unlimited psychologists who will agree with them."<sup>515</sup> Senator Thurmond argued that sentencing decisions should remain in the hands of juries.<sup>516</sup> The amendment was opposed strongly by Democrat and Judiciary Committee Chairman Joseph Biden.<sup>517</sup> Biden believed that the nation would not benefit by allowing the execution of the retarded, who are unable to "achieve the socialization, the maturity, [and] the intellectual capability of anyone over the age of 12."<sup>518</sup> He also noted the irony of a situation in which those who frequently criticized the Supreme Court for being out of touch with the people were now expressing admiration for the Court's reasoning in *Penry*.<sup>519</sup> Biden supports the death penalty, and sponsored the general legislation to increase the number of federal crimes for which the death penalty was available.<sup>520</sup> In this case, however, he believed the definition of retardation sufficiently clear to forestall wasteful litigation.<sup>521</sup>

Republican Utah Senator Orrin Hatch argued that the opposition to

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(2) lacks the capacity to recognize or understand facts which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.").

510. *Id.*

511. S. 1970, 101st Cong., 2d Sess. (1990).

512. Helen Dewar, *Senate Votes to Protect Retarded from Execution*, WASH. POST, May 25, 1990, at A7.

513. 136 CONG. REC. S6873-83 (daily ed. May 24, 1990).

514. *Id.* at S6873-74 ("The [Supreme] Court concluded [in *Penry v. Lynaugh*] that it cannot be said that all mentally retarded people, by virtue of their mental retardation alone, inevitably lack the ability to understand the difference between right and wrong and conduct themselves accordingly.").

515. *Id.* at S6874.

516. *Id.*

517. *Id.* at S6874-76.

518. *Id.* at S6875.

519. *Id.*; see also Dewar, *supra* note 512, at A7 (statement of Senator Biden that "just because the Supreme Court says we can do it [execute the mentally retarded] doesn't mean we should").

520. 136 CONG. REC. S6875 (daily ed. May 24, 1990).

521. *Id.*

the Thurmond amendment was a "soft, artsy, liberal approach" to surreptitiously eliminating capital punishment altogether.<sup>522</sup> In response, Democratic Senator Edward Kennedy, whose sister is mentally retarded,<sup>523</sup> argued that a non-retarded person would be unlikely to meet the standard of retardation articulated in *Penry*, because it would be impossible to feign retardation over the course of a lifetime.<sup>524</sup>

In the end, the Senate rejected the Thurmond amendment by a vote of fifty-nine to thirty-eight.<sup>525</sup> The vote split primarily along party lines, with Republicans voting with Thurmond and Democrats with Biden.<sup>526</sup> The full crime bill, with the exemption of the retarded from the death penalty, eventually passed the Senate by a vote of ninety-four to six.<sup>527</sup> The Violent Crime Control and Law Enforcement Act of 1994, though increasing the number of crimes for which conviction may result in a death sentence, continued to exempt the mentally retarded from potential capital punishment.<sup>528</sup>

The executive branch of the federal government also addressed this issue in 1992. The President's Committee on Mental Retardation<sup>529</sup> recommended the abolition of the death penalty for mentally retarded defendants.<sup>530</sup> The 1992 report stated that retarded defendants faced disadvantages in arranging adequate legal representation, and were therefore less likely to win a fair disposition.<sup>531</sup> President Clinton has taken no action on this recommendation, and is unlikely to do so. Because federal law already prohibits the execution of the mentally retarded, he has no reason to urge Congress to take further action. The President has no the authority to end the states' execution of the mentally retarded. Finally, President Clinton is a death penalty supporter who, while governor of Arkansas, allowed a mentally retarded defendant to be executed.<sup>532</sup>

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522. *Id.* at S6876.

523. *Id.* at S6877 (statement of Senator Edward Kennedy).

524. *Id.* at S6878.

525. *Id.* at S6883.

526. *See id.* (Republicans voted 30-14 in favor, while Democrats voted 45-8 against).

527. David Hess, *Crime Bill Approved by Senate*, ARIZONA REPUBLIC, July 12, 1990, at A1.

528. 18 U.S.C. § 3596(c) (1994) ("A sentence of death shall not be carried out upon a person who is mentally retarded."); *see* Michael Ross, *Vote on Crime Bill Is Blocked; Major Setback for Clinton*, L.A. TIMES, Aug. 12, 1994 at A1, A12 (noting that legislation would expand the death penalty to cover more than 50 federal offenses, including car-jacking slayings, drive-by shooting murders, and major drug trafficking).

529. The group was created in 1966 as a standing committee of the United States Department of Health and Human Services. Scripps Howard, *Panel Urges Abolishing Death Penalty for Retarded*, CLEVELAND PLAIN DEALER, Feb. 4, 1993, at 7C.

530. John Bennett, *Panel Fights Death Penalty for Retarded; Recommendation Among 50 Aimed at Protecting 26,500 U.S. Inmates*, ROCKY MOUNTAIN NEWS (Bulldog ed.), Feb. 14, 1993, at 105.

531. *Id.*; *see supra* notes 149-161 and accompanying text (describing procedural disadvantages that face the retarded).

532. *See supra* notes 13-14 and accompanying text; *see also* Rector v. Lockhart, 727 F.

#### D. Standards and Procedures in Successful Legislative Attempts

As of this time, eleven states that permit the death penalty have forbidden the execution of those found to be mentally retarded.<sup>533</sup> There is no geographical pattern as to which states have banned the execution of the retarded; the eleven are scattered from the Pacific Northwest to the Deep South. These states primarily followed the 1983 American Association on the Mentally Retarded (AAMR) treatise on mental retardation in defining mental retardation.<sup>534</sup> All eleven statutes require that the defendant found to be retarded have significantly subaverage general intellectual functioning and some type of deficit or impairment in adaptive behavior.<sup>535</sup> There are four important differences among the statutes: the IQ limit; the age by which mental retardation must have manifested itself; the weight of the evidence needed for the defendant to prove his mental retardation, and the procedures used to determine whether a defendant is mentally retarded.

Five states specifically mention the IQ of 70 as a controlling or suggested standard for the determination of retardation.<sup>536</sup> Five states do not specify a particular IQ threshold for a finding of retardation.<sup>537</sup> Arkansas

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Supp. 1285 (E.D. Ark. 1990), *aff'd sub nom.* Rector v. Clark, 923 F.2d 570 (8th Cir.), *cert. denied*, 501 U.S. 1239 (1991) (possibly mentally retarded individual whose sentence was never commuted). The trial had occurred the law which bans the execution of the mentally retarded was applicable. See ARK. CODE ANN. § 5-4-618 (Michie 1993).

533. ARK. CODE ANN. § 5-4-618(b) (Michie 1993); COLO. REV. STAT. § 16-9-403 (Supp. 1994); GA. CODE ANN. § 17-7-131(j) (1990 & Supp. 1994); IND. CODE ANN. § 35-36-9-6 (West Supp. 1994); KAN. STAT. ANN. § 21-4623(d) (Supp. 1994); KY. REV. STAT. ANN. § 532.140 (Michie 1990); MD. CODE ANN. art. 27, § 412(f) (1992); N.M. STAT. ANN. § 31-20A-2.1(B) (Michie 1994); N.Y. CRIM. PROC. LAW § 400.27(12) (1995); TENN. CODE ANN. § 39-13-203(b) (1991 & Supp. 1994); WASH. REV. CODE ANN. § 10.95.030(2) (West Supp. 1995).

534. That the Supreme Court referred to the AAMR definition in the *Penry* decision as the standard indicates that the AAMR's opinion carries much weight and is the likely default for the resolution of unclear issues on the subject of mental retardation. See *Penry v. Lynaugh*, 492 U.S. 302, 308 n.1 (1989).

535. ARK. CODE ANN. § 5-4-618(a)(1)(A), (B) (Michie 1993); COLO. REV. STAT. § 16-9-401(2) (Supp. 1994); GA. CODE ANN. § 17-7-131(a)(3) (1990 & Supp. 1994); IND. CODE ANN. § 35-36-9-2 (West Supp. 1994); KAN. STAT. ANN. § 76-12b01(d) (1989); KY. REV. STAT. ANN. § 532.130(2) (Michie 1990); MD. CODE ANN. art. 27, § 412(e)(3) (1992); N.M. STAT. ANN. § 31-20A-2.1(A) (Michie 1994); N.Y. CRIM. PROC. LAW § 400.27(12)(e) (1995); TENN. CODE ANN. § 39-13-203 (a)(1), (2) (1991 & Supp. 1994); WASH. REV. CODE ANN. § 10.95.030(2)(a) (West Supp. 1995).

536. KY. REV. STAT. ANN. § 532.130(2) (Michie 1990); MD. CODE ANN. art. 27, § 412(e)(3) (1992); N.M. STAT. ANN. § 31-20A-2.1(A) (Michie 1994); TENN. CODE ANN. § 39-13-203(a)(1) (1991 & Supp. 1994); WASH. REV. CODE ANN. § 10.95.030(2)(c) (West Supp. 1995); see also N.C. H.B. 362, Reg. Sess. (1995) (bill that would exempt the mentally retarded from execution which sets the IQ cutoff at 70); Pa. S.B. 179, 179th Gen. Assembly (1995) (same).

537. COLO. REV. STAT. § 16-9-401(2) (Supp. 1994); GA. CODE ANN. § 37-4-2(12) (1990); IND. CODE ANN. § 35-36-9-2 (West Supp. 1994); KAN. STAT. ANN. § 76-12b01(d) (1989); N.Y. CRIM. PROC. LAW § 400.27(12)(e) (1995).

has placed the threshold at an IQ of 65,<sup>538</sup> reducing the proportion of people who might be eligible for the exemption as compared with other states. It seems likely that Arkansas's reduction in the IQ level was the result of a political compromise which allowed legislators to support a death penalty exemption without being perceived as soft on crime. Arkansas's action may also reflect a trend in Southern states considering similar legislation, suggesting that concessions on threshold IQ levels may be the price of passage in the current "get-tough-on-crime" climate.<sup>539</sup> Regardless of the IQ limit, an IQ test should not be the only criterion of mental retardation articulated in the state legislation.<sup>540</sup>

Five states specify that a defendant's mental retardation must have manifested itself by age eighteen for the defendant to qualify for a death penalty exemption.<sup>541</sup> The execution exemption for the mentally retarded in Maryland and Indiana requires evidence of retardation by age twenty-two.<sup>542</sup> The rationale for raising the age limit to twenty-two related partially to the difficulty of acquiring accurate school and birth records for retarded children, many of whom are frequently transferred in and out of special programs during their childhoods.<sup>543</sup> A maximum age of twenty-two would bring the definition of retardation in the criminal law into conformity with the criteria for defining retardation in other areas of the law, such as social services and education.<sup>544</sup> Yet, in the 1992 revision of the

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538. ARK. CODE ANN. § 5-4-618(a)(2) (Michie 1993); *see also* Mo. S.B. 61, 88th Gen. Assembly (1995) (bill introduced which would exempt the mentally retarded from execution in Missouri that places the IQ limit at 75).

539. *See* N.C. H.B. 1062, 140th Gen. Assembly (1993), *available in* Westlaw, Bills Database (bill tracking); Cohen, *supra* note 149, at 470 n.126 (1991) (Florida bill amended in committee to change IQ standard from 70 to 65); Telephone Interview with Milton F. "Toby" Fitch, Jr., *supra* note 484 (bill to stop the execution of the mentally retarded passed the North Carolina House of Representatives with IQ 70 as the benchmark, but was delayed in the North Carolina Senate due to Senators who want the IQ level to be reduced to 60 or 65).

540. *See* EVANS & WAITES, *supra* note 89, at 123.

541. ARK. CODE ANN. § 5-4-618(a)(1)(A) (Michie 1993); KAN. STAT. ANN. § 76-12B01 (1989); N.Y. CRIM. PROC. LAW § 400.27(12)(e) (1995); TENN. CODE ANN. § 39-13-203(a)(3) (1991 & Supp. 1994); WASH. REV. CODE § 10.95.030(2)(e) (West Supp. 1995); *see* N.C. H.B. 362, 1st Sess., § 1 (1995); *see also* DSM-IV, *supra* note 36, at 46 (definition of mental retardation includes factor that onset has occurred before age eighteen).

542. IND. CODE ANN. § 35-36-9-2 (West Supp. 1994); MD. CODE ANN. art. 27, § 412(e)(3) (1992); *see also* Pa. S.B. 331, 175th Gen. Assembly, Reg. Sess., 1991 Pa. Laws (version of Jan. 29, 1991) (bill which passed Senate but did not reach House of Representatives floor required mental retardation to be present before age of 22); PA. S.B. 179, 179th Gen. Assembly, Reg. Sess., 1995 (bill by same author who again placed the age maximum at 22).

543. Telephone Interview with Representative William Crawford, *supra* note 430 (Crawford sponsored the legislation signed into law in 1994, which will prevent future execution of the mentally retarded in Indiana).

544. Telephone Interview with Ruth Luckasson, *supra* note 59; *see* Telephone Interview with Sally Gibson, *supra* note 151 (Indiana used cutoff at age twenty-two in order to fall in line with state definition of mental retardation); *see also* AAMR, *supra* note 22, at 17 (cutoff of eighteen for definitional purposes for a diagnosis of mental retardation should not

definition of mental retardation, the AAMR kept the maximum at eighteen, because that figure approximated the age when individuals in American society typically assume adult roles.<sup>545</sup> Professionals in mental disability law believe that the difference between a maximum age of eighteen and twenty-two is minimal, and would not substantially increase the number of persons defined as mentally retarded.<sup>546</sup> Four state statutes do not mention a particular age,<sup>547</sup> however the state courts are likely to follow the recommendations of the leading organization in the field, the AAMR.

The weight of the evidence needed to declare a defendant mentally retarded varies among the states that have passed death penalty exemptions. Six states—Arkansas, Maryland, New Mexico, New York, Tennessee, and Washington—require that mental retardation be proven by a preponderance of the evidence.<sup>548</sup> New Mexico's statute also states that an IQ of 70 or below on a reliably administered test is presumptive evidence of mental retardation, giving the state's courts the power to classify more defendants as retarded.<sup>549</sup> Colorado and Indiana demand a higher standard of proof of the defendant's retardation—clear and convincing evidence—to qualify for a death penalty exemption.<sup>550</sup> The preponderance standard acknowledges the procedural difficulties mentally retarded people

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cause confusion in relation to the cutoff age of twenty-two for services under the federal Developmental Disabilities Act).

545. See AAMR, *supra* note 22, at 6.

546. *Id.*; see Ellis and Luckasson, *supra* note 21, at 422 (stating that origin of the age-eighteen requirement is obscure, and its relevance to criminal justice is limited).

547. COLO. REV. STAT. § 16-9-401(2) (Supp. 1994); GA. CODE ANN. § 17-7-131 (1990 & Supp. 1994); KY. REV. STAT. ANN. § 532.130 (Michie 1990); N.M. STAT. ANN. § 31-20A-2.1 (Michie 1994).

548. ARK. CODE ANN. § 5-4-618(a)(2)(c) (Michie 1993); N.M. STAT. ANN. § 31-20A-2.1(C) (Michie 1994); N.Y. CRIM. PROC. LAW § 400.27(12)(a) (1995); TENN. CODE ANN. § 39-13-203(c) (1991 & Supp. 1994); WASH. REV. CODE ANN. § 10.95.030(2) (West Supp. 1995); *Richardson v. State*, 598 A.2d 1, 3 (Md. App. 1991); see *Iowa H.B. 2*, 76th Gen. Assem., 1st Sess., § 7 (1995) (proposing that defendant must prove mental retardation by a preponderance of the evidence); La. S.B. 635, Reg. Sess., 1995, § 1 (1995)(same); Tex. H.B. 527, 74th Reg. Sess., § 1 (1995) (same); Tex. H.B. 573, 74th Reg. Sess. (1995) (same). New York, however, also allows the state to appeal a finding that the defendant is mentally retarded. The standard of review on appeal is unclear, as the drafters of state's death penalty legislation left the New York Court of Appeals with the task of adopting rules so that these appeals would be "expeditiously perfected, reviewed and determined" within six months of the bill's effective date of September 1, 1995. N.Y. CRIM. PROC. LAW § 400.27(12)(f) (1995).

549. See REED, *supra* note 2, at 216 (citing New Mexico statute requiring preponderance of the evidence in the determination of mental retardation).

550. COLO. REV. STAT. § 16-9-402(2) (Supp. 1994); IND. CODE ANN. § 35-36-9-4(b) (West Supp. 1994). The heightening of the standard needed to prove one's mental retardation in Indiana did not receive much discussion. Telephone Interview with Monica Foster, *supra* note 432. The clear and convincing evidence standard was placed in the Colorado and Indiana bills, for the most part, to appease legislators who wrongly believed that all criminal defendants could be relieved of a death sentencing by merely claiming that they were mentally retarded. *Id.*; Telephone Interview with Aileen McGinley, *supra* note 416.



face when they encounter the criminal justice system.<sup>551</sup>

For the first few years of its existence, Georgia's guilty but mentally retarded charge only required the defendant to prove his mental retardation by a preponderance of the evidence.<sup>552</sup> In December 1994, however, the Georgia Supreme Court held that the preponderance standard only applied to defendants tried prior to the enactment of Georgia's law preventing the execution of the mentally retarded.<sup>553</sup> Defendants who present the circumstances of their mental retardation during trial must now prove their mental deficiency beyond a reasonable doubt.<sup>554</sup> If the trial jury finds the defendant guilty and rejects a "guilty but mentally retarded" verdict, the defendant's mental retardation becomes only a mitigating circumstance, which can be ignored by the sentencing jury.<sup>555</sup>

The Georgia Supreme Court's interpretation of the state law requiring proof beyond a reasonable doubt seems perverse. The court's conclusion is completely at odds with the policies of every other state that has passed a law on this subject.<sup>556</sup> In addition, those convicted before the ban was put into effect have to prove their mental retardation by a much lower standard, a preponderance of the evidence, than those convicted today, who must demonstrate their mental retardation beyond a reasonable doubt. In effect, the court stated that by passing an exemption of the death penalty for the mentally retarded, the legislature meant to make it harder for a mentally retarded defendant to prove his retardation. This interpretation of the legislature's intent is questionable at best.

It is unclear whether future bills exempting the mentally retarded from execution will impose a preponderance of the evidence, a clear and convincing evidence, or a beyond a reasonable doubt standard upon defendants. However, because of the pressure on legislatures to be tough on crime, a higher standard than preponderance, such as clear and convincing, may be necessary to secure enough votes for this type of bill.

The eleven states differ in the procedures used to determine retardation in a capital proceeding.<sup>557</sup> In Arkansas, Colorado, Indiana, Kentucky,

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551. See *infra* notes 612-615 and accompanying text.

552. *Zant v. Foster*, 406 S.E.2d 74, 76 (Ga. 1991), *cert. denied*, 112 S. Ct. 1297 (1992).

553. *Burgess v. State*, 450 S.E.2d 680, 694 (Ga. 1994), *cert. denied*, 115 S.Ct. 2559 (1995). The court held that the preponderance standard applied to the previous admissibility of mental retardation as a mitigating factor, not as a complete exemption from capital punishment. *Id.*

554. *Id.* See also Ga. H.B. 206, 143rd Gen. Assembly, 1995-96 Reg. Sess. (introducing bill which would require the defendant to prove not only the traditional definition of mental retardation, but also that his subaverage intellectual functioning impairs his ability to understand the wrongfulness of the conduct and its consequences).

555. *Id.* at 695.

556. See *supra* notes 548-550 and accompanying text.

557. In thirty out of thirty-seven states with a death penalty, the jury imposes the sentence. Four states—Arizona, Idaho, Montana, and Nebraska—leave the imposition of capital punishment entirely to the judge. TUSHNET, *supra* note 112, at 68. In three other states, Alabama, Florida, and Indiana, "juries make an initial recommendation, but even if a jury

and New York, the court makes a determination of whether the defendant is mentally retarded before the trial.<sup>558</sup> In Arkansas, if the court accepts the defendant's retardation, the defendant will be sentenced to life imprisonment if convicted, and the jury will not have to be "death qualified."<sup>559</sup>

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recommends a life sentence, the judge can override that recommendation and sentence the defendant to death" if he or she believes that no reasonable person could impose a sentence other than the death penalty. *Id.* All states with capital punishment statutes have adopted a bifurcated system. Robert Alan Kelly, *Applicability of the Rules of Evidence to the Capital Sentencing Proceeding: Theoretical and Practical Support for Open Admissibility of Mitigating Information*, 60 UMKC L. REV. 411, 411 (1992). In the first part of a bifurcated system, the jury finds the defendant guilty or not guilty. If the defendant is found guilty, the court holds a second proceeding to sentence the defendant. In this penalty phase, the sentencer will look at the aggravating and mitigating circumstances to determine if the death penalty is warranted. See Deborah J. Gander, *Innocence of Death: A Habeas Petitioner's Last Chance*, 48 U. MIAMI L. REV. 229, 231 n.8 (1993) (discussing premise that typical state death penalty case bifurcates the guilt determination and sentencing proceedings). Usually, it is the same judge or jury which pronounced the defendant guilty which will be making the determination of whether the defendant should receive capital punishment. See, e.g., ARIZ. REV. STAT. ANN. § 13-703(B) (1989 & Supp. 1994) (judge as sentencer); COLO. REV. STAT. § 16-11-103(1)(a) (1986 & Supp. 1994) (jury as sentencer); CONN. GEN. STAT. ANN. § 53a-46a(b) (West 1994) (jury as sentencer); DEL. CODE ANN. tit. 11, § 4209(b)(1) (1987) (jury as sentencer); FLA. STAT. ANN. § 921.141(1) (West 1985) (jury as sentencer); ILL. ANN. STAT. ch. 720, § 5/9-1(d)(1) (Smith-Hurd 1993 & Supp. 1994) (jury as sentencer); LA. CODE CRIM. PROC. ANN. art. 905.6 (Supp. 1995) (jury as sentencer); N.J. STAT. ANN. § 2C:11-3(c)(1) (West Supp. 1994) (jury as sentencer); OHIO REV. CODE ANN. § 2929.03(C)(2)(b) (Anderson 1993) (jury as sentencer). If the defendant plead guilty to capital murder, a jury will be impeached for the sentencing proceeding if the jury is the usual sentencer. See, e.g., CONN. GEN. STAT. ANN. § 53a-46a(b) (West 1994) (sentencing hearing before new jury if defendant was convicted by pleading guilty, had been convicted by a three-judge court, or if jury had been discharged for good cause); DEL. CODE ANN. tit. 11, § 4209(b)(2) (1987) (hearing before jury empaneled specifically for purpose of sentencing); ILL. ANN. STAT. ch. 720, § 5/9-1(d)(2) (Smith-Hurd Supp. 1994) (hearing before new jury if defendant plead guilty to capital murder, had been convicted in trial without a jury, or was tried by a jury which has been discharged for good cause); N.J. STAT. ANN. § 2C:11-3(c)(1) (West Supp. 1994) (hearing before new jury if trial jury dismissed for good cause or defendant had plead guilty). The jury may be waived in favor of sentencing by a judge if both the State and the defendant consent. See, e.g., CONN. GEN. STAT. ANN. § 53a-46a(b)(3) (West 1994); DEL. CODE ANN. tit. 11, § 4209(b)(1) (1987); ILL. ANN. STAT. ch. 720, § 5/9-1(d)(3) (Smith-Hurd Supp. 1994); N.J. STAT. ANN. § 2C:11-3 (West Supp. 1994). The purpose of a bifurcated procedure is to allow otherwise inadmissible information from affecting the determination between guilt or innocence, but making sure that the sentencer makes a capital punishment decision on the basis of all the relevant evidence. See DAVID C. BALDUS, *EQUAL JUSTICE AND THE DEATH PENALTY* 23 (1990).

558. ARK. CODE ANN. § 5-4-618(d)(2) (Michie 1993); COLO. REV. STAT. § 16-9-402 (Supp. 1994); IND. CODE ANN. § 35-36-9-5 (West Supp. 1994); KY. REV. STAT. ANN. § 532.135(1) (Michie 1990); N.Y. CRIM. PROC. LAW § 400.27(12)(e) (1995); see Iowa H.B. 2, 76th Gen. Assembly, 1st Sess., § 7 (1995) (requiring court to hold pre-trial hearing on mental retardation or illness on defendant's motion); La. S.B. 635, Reg. Sess., § 1 (1995) (requiring trial court to hold hearing on motion by defendant to determine mental retardation); N.C. H.B. 362, Reg. Sess., § 1 (1995) (requiring court to hold pre-trial hearing on mental retardation on defendant's motion); Tex. H.B. 527, 74th Reg. Sess., § 1 (1995) (requiring court to hold pre-trial hearing on mental retardation or illness on defendant's motion).

559. ARK. CODE ANN. § 5-4-618(d)(2)(B) (Michie 1993). A death-qualified jury is one from which prospective jurors who have made it clear during *voir dire* that they would automatically vote against the imposition of the death penalty, or that their opposition to the death penalty would bias their decision as to the defendant's guilt or innocence, have

If the court finds the defendant not retarded, the issue of retardation can be raised *de novo* during the trial.<sup>560</sup> The jury members receive a special verdict form on mental retardation when they retire to discuss aggravating and mitigating circumstances.<sup>561</sup> In Tennessee, a motion to demonstrate the defendant's mental retardation can be made during the trial.<sup>562</sup> In New Mexico and Kansas, the hearing on the defendant's retardation takes place after he has been convicted but before he is sentenced.<sup>563</sup> In New Mexico, the jury deliberating on the sentence will not be notified that a defendant has lost on the motion to be declared mentally retarded, so as not to prejudice the jury in determining whether the alleged retardation should be a mitigating factor.<sup>564</sup> The issue of mental retardation is determined in Maryland during the sentencing phase.<sup>565</sup> As discussed earlier, for the defendant's mental deficiencies to have their full mitigating effect, it is better for the defendant to be able to place the issue of mental retardation before the court early in the proceedings.<sup>566</sup>

Alternate procedural models are also available. Georgia, the first state to prohibit the execution of the mentally retarded, provides the jury with the option of finding the defendant "guilty but mentally retarded" in addition to guilty, not guilty, not guilty by reason of insanity, or guilty but mentally ill.<sup>567</sup> Thus, the finding of retardation is combined with the determination of guilt or innocence.

Washington state specifies that if the defendant makes a motion to declare mental retardation for the purpose of a capital punishment proceeding, the court will designate a licensed psychiatrist or psychologist "who is an expert in the diagnosis and evaluation of mental retardation."<sup>568</sup> Kansas requires two psychiatrists or physicians "qualified by training or

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been removed. See Michael W. Peters, *Constitutional Law: Does Death Qualification Spell Death for the Capital Defendant's Constitutional Right to an Impartial Jury?*, 26 WASHBURN L.J. 382, 382 (1987); see also *Witherspoon v. Illinois*, 391 U.S. 510, 512-13 (1968) (stating definition of a death-qualified jury); Jan Hoffman, *Lawyers Scrambling to Prepare for Capital Cases*, N.Y. TIMES, Mar. 12, 1995, at 42 ("To assemble a panel of 'death qualified' jurors, lawyers have to question candidates extensively about execution, their knowledge of highly publicized cases, their attitudes about race . . .").

560. ARK. CODE ANN. § 5-4-618(d)(2)(A) (Michie 1993).

561. *Id.*

562. TENN. CODE ANN. § 39-13-203 (1991 & Supp. 1994).

563. KAN. STAT. ANN. § 21-4623(a) (Supp. 1994); N.M. STAT. ANN. § 31-20A-2.1(c) (Michie 1994).

564. N.M. STAT. ANN. § 31-20A-2.1(c) (Michie 1994).

565. *Richardson v. State*, 598 A.2d 1, 4 (Md. 1991).

566. See also *infra* notes 596-600 and accompanying text.

567. GA. CODE ANN. § 17-7-131(b) (1990 & Supp. 1994); see *Mack v. State*, 425 S.E.2d 671, 673 (Ga. Ct. App. 1992) (granting new trial where defendant produced expert testimony on his alleged retardation but court failed to give a "guilty but mentally retarded" instruction to the jury).

568. WASH. REV. CODE ANN. § 10.95.030(2) (West Supp. 1995); see *Tex. H.B. 527*, 74th Reg. Sess., § 1 (1995) (requiring court to designate a licensed psychiatrist or psychologist who is an expert in diagnosing and evaluating mental retardation to examine defendant). New York turned this provision into a prosecutor's tool, giving the district attorney the

practice" to determine whether an individual is mentally retarded or not.<sup>569</sup> The Washington and Kansas courts designate their own mental health professionals to examine the defendant and provide a report which the defendant may use in trying to prove his mental retardation.<sup>570</sup> Having independent, court-appointed mental health experts provides for less-biased interpretation of the defendant's mental capacity and may reduce the likelihood of the hearing on the defendant's mental retardation becoming a "battle of the experts."<sup>571</sup>

## VI.

### MODEL LEGISLATION PROTECTING THE MENTALLY RETARDED FROM EXECUTION AND STRATEGIES FOR ITS SUCCESS

This Article has sought to demonstrate that state legislators must lead the effort to prohibit the execution of mentally retarded people.<sup>572</sup> As the introduction illustrated, states frequently execute mentally retarded individuals who have little comprehension of why they are being punished. Traditional rationales used to justify capital punishment—deterrence and retribution—make little sense when applied to the mentally retarded. The mentally retarded confront a host of procedural difficulties as defendants in capital murder proceedings. Yet the new composition of the Supreme Court is unlikely to change the rule of *Penry*—that the execution of the mentally retarded is not cruel and unusual punishment per se. The mentally retarded will be afforded Constitutional protection from capital punishment only when enough state legislatures ban their execution. This section recommends model legislation and offers strategies to ensure its successful passage in a state legislature.

#### A. *The Model Law*

A measure prohibiting execution of the mentally retarded should contain the following provisions:

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power to require the defendant to submit to a mental health examination if he moves to be declared mentally retarded. N.Y. CRIM. PROC. LAW § 400.27(13)(c) (1995).

569. KAN. STAT. ANN. § 21-4623(2) (1989). The procedure for the court's appointment of mental health experts was not specified and has not been tested as of January 1995. Telephone Interview with Bob Geers, *supra* note 440. Presumably, a defendant still has the right to bring an expert of his own, if he can afford it, to counter the determination by court-appointed psychologists or psychiatrists that he is not mentally retarded. *Id.* Indiana also requires an evaluation but does not specify who must perform the evaluation. IND. CODE ANN. § 35-36-9-3(c) (West Supp. 1994).

570. KAN. STAT. ANN. § 21-4623(2) (Supp. 1994); WASH. REV. CODE ANN. §10.95.030(2) (West Supp. 1995).

571. *See infra* notes 596-600 and accompanying text.

572. *See* Rubanoff, *supra* note 126, at 871 (stating that the *Penry* court shifted responsibility of continuing the practice of executing mentally retarded persons to the states).

### 1. *The Revised AAMR Definition of Mental Retardation*

In contrast to the old definition's vague standard, the revised definition requires that the subject be deficient in at least two specifically listed adaptive skills to be declared mentally retarded. As noted above,<sup>573</sup> the new, more specific standard is clearer to both lawyers and lay people. The revised definition requires manifestation of particular deficiencies before the age of eighteen, making it difficult for a defendant to feign retardation as a means of avoiding a death sentence. States quick to adopt the 1983 AAMR definition of mental retardation will likely include the revised 1992 definition in their legislation prohibiting the execution of the retarded.<sup>574</sup>

### 2. *A Rebuttable Presumption of Mental Retardation from an IQ of 70*

The purpose of the IQ test should be clarified in proposals to end the execution of the mentally retarded. The IQ test is a significant factor in a diagnosis of clinical mental retardation, and can therefore determine whether a defendant will be exempted from execution. The IQ test, however, is a flawed indicator of intelligence. The relationship between tester and subject,<sup>575</sup> and the subject's living environment and background affect IQ scores, though experts disagree on the extent of the impact.<sup>576</sup>

IQ tests must be utilized correctly and efficiently. First, a standard IQ test should be used in determining a defendant's mental capacity.<sup>577</sup> Second, a rebuttable presumption of mental retardation should apply if the subject scores below 70 on the test.<sup>578</sup> An IQ of 70 represents the standard

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573. See *supra* notes 509-66 and accompanying text (describing Senate discussions relating to the definition of mental retardation and comparing statutes from eleven states that forbid the execution of mentally retarded defendants).

574. See *supra* note 66 and accompanying text (describing Massachusetts and New Mexico statutes which include the revised 1992 definition, noting that some time delay should be expected in the adoption of this definition by other states).

575. See *supra* notes 89-92 and accompanying text (discussing the possible effects of cultural biases between the tester and subject and the influence of the personality of the tester on a subject's IQ scores).

576. See *supra* notes 93-103 and accompanying text (discussing whether the increased likelihood of minority students from lower socioeconomic groups being labelled retarded is related to their environment, culture, or linguistic differences).

577. While some litigation could arise on the definition of a standard test, no state which has passed legislation on this subject has experienced a problem, and the mental health profession clearly states which tests, such as the Wechsler Memory Scale-Revised, are proper for the determination of mental retardation. See AAMR, *supra* note 22, at 36 (existence of standards for intelligence tests).

578. See, e.g., N.M. STAT. ANN. § 31-20A-2.1(A) (Michie 1994) ("An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation."); Iowa H.B. 2, 76th Gen. Assembly, 1st Sess., § 7 (1995) ("[A] rebuttable presumption of mental retardation arises if a defendant has an intelligence quotient of 70 or below."); La. S.B. 635, Reg. Sess., § 1 (1995) ("An intelligence quotient of seventy or below on a reliably administered intelligence test shall be presumptive evidence that a person is mentally retarded.").

for a diagnosis of mental retardation, and forms the basis of current legislation protecting the mentally retarded from capital punishment.<sup>579</sup> The presumption is not determinative, however, since the defendant is still required to prove his retardation by a preponderance of the evidence.<sup>580</sup> In practical terms, a rebuttable presumption makes a finding of mental retardation automatic unless compelling evidence exists to counter that determination. States, with great popular resistance to a capital punishment exemption, may have to create the presumption at an IQ level of 65, affording protection only to severely retarded defendants.<sup>581</sup>

But legislation should not allow the reverse presumption. Defendants who score above of 70 on an IQ test should not be automatically considered mentally capable—as they are in some states currently<sup>582</sup>—for the purposes of capital punishment, particularly since data suggests variations in testing procedures can produce scoring inconsistencies.<sup>583</sup> The AAMR, which advocates a more flexible IQ standard,<sup>584</sup> points out that the standard error of measurement on IQ tests is generally three to five points.<sup>585</sup> Mentally retarded individuals often try to hide their disability and, thus, may artificially inflate their score above the level exempted from execution.<sup>586</sup> Rather than restricting determination of mental retardation to IQ scores, court-appointed professionals should also examine the defendant's history of limitations in adaptive skill areas in making a diagnosis.

I suggest that states follow the AAMR's recommendation and require manifestation of mental retardation by age eighteen.<sup>587</sup> Two states have placed the age at twenty-two, citing the difficulty of obtaining accurate age records and a desire for consistency in the application of state laws.<sup>588</sup> Still, the difference between eighteen and twenty-two has only minor import for criminal law purposes,<sup>589</sup> and eighteen represents a more accepted dividing

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579. See *supra* notes 536-540 and accompanying text.

580. ARK. CODE ANN. § 5-4-618(a)(2) (Michie 1993).

581. See *supra* note 410 and accompanying text.

582. See, e.g., *State v. Thomas*, 559 A.2d 1171, 1180 (Md. 1992) (finding that defendant with an IQ of 73 did not fall within the statutory definition of mental retardation, which required an IQ of 70 or below); see also *State v. Greenway*, 823 P.2d 22, 36 (Ariz. 1991) (holding that when IQ of defendant is, even if just slightly, above 70, the defendant's clinically low intelligence is neither significant enough to qualify as a mitigating factor, nor sufficiently substantial to call for leniency).

583. See AAMR, *supra* note 22, at 5 (significantly subaverage intellectual functioning is classified flexibly, as an IQ score of approximately 70 to 75 or below); *supra* notes 89-92.

584. AAMR, *supra* note 22, at ix, 14 ("This upper boundary of IQs for use in classification of mental retardation is flexible to reflect the statistical variance inherent in all intelligence tests and the need for clinical judgment by a qualified psychological examiner.").

585. *Id.* at 37.

586. See *supra* notes 176-181 and accompanying text.

587. See AAMR, *supra* note 22, at 1 (defining mental retardation and the application of the definition).

588. See *supra* notes 542-544 and accompanying text (describing decisions on age limits in Indiana and Maryland).

589. See *supra* notes 545-546 and accompanying text.

point: the American Psychiatric Association, AAMR, and mental health professionals all use age eighteen as a standard.<sup>590</sup> Legislation proposing to end the execution of the mentally retarded should adhere to the same standard.

### 3. A Pre-Trial Hearing

A pre-trial hearing to determine the defendant's mental retardation should precede the trial.<sup>591</sup> There are three reasons for this recommendation. First, if the pre-trial hearing determines that the defendant merits a death penalty exemption, a death-qualified jury will not be necessary.<sup>592</sup> Thus, those who are opposed to the death penalty in general, and who may be more sympathetic to disadvantaged defendants generally, will be allowed to serve on the jury.<sup>593</sup> Second, even if the defendant loses his claim

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590. DSM-IV, *supra* note 36, at 39.

591. Five states follow this procedure. ARK. CODE ANN. § 5-4-618(d)(2) (Michie 1993); COLO. REV. STAT. § 16-9-402 (Supp. 1994); IND. CODE ANN. § 35-36-9-6 (West Supp. 1994); KY. REV. STAT. ANN. § 531.135(1) (Michie 1990); N.Y. CRIM. PROC. LAW § 400.27(12)(e) (1995).

592. See *supra* note 559 (defining death-qualified juries).

593. Some have argued that death-qualified jurors are more likely to vote for conviction on the guilt or innocence issue. See Stephen Gillers, *Proving the Prejudice of Death-Qualified Juries After Adams v. Texas*, 47 U. PITT. L. REV. 219, 224-28 (1985) (review essay). In *Lockhart v. McCree*, 476 U.S. 162 (1986), the Supreme Court held that the Constitution does not prohibit the removal for cause of prospective jurors whose opposition to the death penalty is so strong that they could not adequately perform their duties as jurors during the sentencing phase of the trial. The Court found fault with the fifteen studies the defendant used to claim that death qualification produces conviction-prone juries. *Id.* at 168-73. However, even if the studies had been methodologically valid in the Court's opinion, the case would not have been decided differently. *Id.* at 173. Justices Marshall, Brennan, and Stevens dissented on the grounds that "[t]he State's mere announcement that it intends to seek the death penalty if the defendant is found guilty of a capital offense will, under today's decision, give the prosecution license to empanel a jury especially likely to return that very verdict." *Id.* at 185 (Marshall, J., dissenting). Despite the Court's holding, there is a "near unanimous opinion among legal researchers that death qualification produces a conviction-prone jury." Jane Byrne, *Lockhart v. McCree: Conviction Proneness and the Constitutionality of Death-Qualified Juries*, 36 CATH. U. L. REV. 287, 291 (1986); see also Grigsby v. Mabry, 569 F. Supp. 1273, 1291-1305 (E.D. Ark. 1983) (discussing studies which convinced court that death qualified juries were conviction prone and denied the defendant the right to be tried by a jury comprised of a fair cross section of the community), *aff'd*, 758 F.2d 226 (8th Cir. 1985), *rev'd sub nom*, *Lockhart v. McCree*, 476 U.S. 162 (1986); Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 89 (1987) ("several studies have found that the exclusion from capital juries of citizens who stand opposed to the death penalty makes such juries more conviction-prone and sympathetic to the prosecution."); Claudia L. Cowan, William C. Thompson & Phoebe C. Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUMAN BEHAVIOR 53, 67-69 (1984); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUMAN BEHAVIOR 31, 41-48 (1984).

Minorities and the poor are more likely than whites and the wealthy to be excluded from a jury which may be called on to provide a capital sentence. Fitzgerald & Ellsworth, *supra*, at 46; see Grigsby, 569 F. Supp. at 1294 (citing study that found that 29% of blacks would never vote to impose the death penalty compared to nine percent of whites); George Gallup, Jr., *Death Penalty Has High Level of Support*, SAN JOSE MERCURY NEWS, Mar. 2,

in a pre-trial hearing, he can still present evidence of his mental retardation at trial.<sup>594</sup> This safeguard would be lost if the hearing took place after the accused had been convicted. Finally, if the trial precedes a determination of mental retardation, the sentencing body may incorrectly assume that the defendant's mental retardation was considered and rejected by the trial jury. A judge, not a jury, should make the pre-trial determination of the defendant's mental capacity in order to reduce the chance of that the fact-finder will be prejudiced against the defendant.<sup>595</sup>

#### 4. Court-Appointed Psychologists

Legislation, as in Washington state and Kansas, should require the court to appoint independent psychologists trained in issues surrounding the mentally retarded.<sup>596</sup> Court-appointed psychologists will reduce the occurrence of a battle of the experts, where the quantity and personalities of the professionals become as important as the facts of the case.<sup>597</sup> An independent evaluator, who would not be paid by either side, might also make

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1986, at 18A (discussing 1986 national poll which found that 73% of whites supported the death penalty compared to 47% of blacks); *see also supra* note 458 and accompanying text (discussing vote in which District of Columbia residents rejected the reimposition of the death penalty, blacks voted against the reinstatement substantially more than whites). Women are also more likely to be excluded than men. Fitzgerald & Ellsworth, *supra*, at 46. While no study has been done to determine if jurors excludable due to their death penalty stance are more likely to believe that a defendant is mentally retarded, such jurors have been found more likely to accept a defendant's insanity defense than death-qualified potential jurors. Phoebe C. Ellsworth, Raymond M. Bukaty, Claudia L. Cowan & William C. Thompson, *The Death-Qualified Jury and the Defense of Insanity*, 8 LAW & HUMAN BEHAVIOR 81, 88-92 (1984).

594. *But see infra* note 622 and accompanying text.

595. *See supra* notes 156-162 and accompanying text (discussing attorney's inability to understand or communicate with retarded defendants), and notes 208-213 and accompanying text (discussing history of social prejudice against the retarded).

596. *See supra* notes 568-571 and accompanying text (describing state provisions for court-appointed psychologists).

597. In a case where the related, though not identical, issue of insanity is a factor, "most jurisdictions have enacted statutes providing for examination of the defendant by a court-appointed psychiatrist" in order to eliminate the possibility of a battle of the experts. WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 4.5(c) (1986). Upon completion of the examination, a report is prepared and copies are furnished to the court, the prosecutor, and defense counsel. *Id.* Most of these statutes set forth neither what kind of examination is to be given, nor what the report to the court must contain. *Id.* Where an indigent defendant demonstrates that his sanity will be a significant factor, he is entitled to access to a psychiatrist who will conduct an appropriate evaluation. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). A defendant in a capital murder proceeding, however, is not automatically entitled to psychiatric assistance. *Compare Weeks v. Jones*, 26 F.3d 1030, 1041-42 (11th Cir. 1994) (denying petitioner psychiatric expert because he had not exhibited compelling evidence of incompetency or insanity), *cert. denied*, 115 S.Ct. 1258 (1995) and *Clisby v. Jones*, 960 F.2d 925, 934 (11th Cir. 1992) (denying claim that petitioner's due process rights were violated since petitioner did not claim during trial that his examination was incomplete though he had numerous opportunities to do so) *with Starr v. Lockhart*, 23 F.3d 1280, 2382 (8th Cir.) (approving of court-ordered competency examination by expert because mental retardation was defendant's only viable defense), *cert. denied*, 115 S.Ct. 499 (1994) and *Liles v. Saffie*, 945 F.2d 333, 340 (10th Cir. 1991) (holding that defendant was denied due process



a more objective determination.<sup>598</sup> New legislation should include the Kansas procedure which requires evaluations from two mental health professionals.<sup>599</sup> This rule provides some safeguard against an erroneous test result or interpretation, and alleviates the pressure a single mental health professional would face in making a determination with life or death consequences for a defendant.<sup>600</sup> The cost of appointing mental health experts will be defrayed by the reduction in habeas corpus appeals based on inaccurate determinations of mental retardation.<sup>601</sup>

However, one interpretation of the Supreme Court's decision in *Ake v. Oklahoma* would allow indigent defendants to receive the assistance of a partisan mental health expert.<sup>602</sup> The *Ake* Court held that an indigent defendant must have access to the psychiatric examination and assistance necessary to prepare an effective defense, when the alleged mental condition is an issue to consider in relation to the offense.<sup>603</sup> Yet, the relatively broad language of *Ake* has spawned the question whether the state is merely required "to provide access to one impartial psychiatric evaluation" or is also required "to appoint a partisan psychiatric assistant to aid the defense

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by court's refusal to grant funding for psychiatrist because of his history of mental problems). By requiring that the court appoint mental health experts, my statute attempts to make sure that the defendant with below-average intelligence has a full opportunity to present the issue of his mental retardation.

598. Samuel Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1194 (1991) ("Appointed experts may be more influential than adversarial experts, but that is as it should be. Other things being equal, the evidence of appointed experts *ought* to be given more weight for the very reason that they are not partisans of one side or another."). Court-appointed psychiatrists and psychologists are, in fact, the only experts who have been specifically criticized for having hidden biases. *Id.* This vulnerability is largely due to the highly controversial nature of expert psychological testimony and the procedures used to appoint mental health experts. *Id.* at 1195.

599. KAN. STAT. ANN. § 21-4623(2) (Supp. 1994).

600. AAMR, *supra* note 22, at 43 ("The use of at least two raters to score an individual on the same scale and derivation of an average of the results will increase the validity of the results because they will reflect the opinions of two persons and provide a check on the accuracy of an informant's response . . . [and] enable more accurate assessment of an individual's adaptive skills.").

601. David A. Harris, *Ake Revisited: Expert Psychiatric Witnesses Remain Beyond Reach for the Indigent*, 68 N.C. L. REV. 763, 782 (1990) ("The government's interest in accurate verdicts and the grave consequences of inaccurate determinations when human life and liberty are concerned justify the extra cost [of psychiatric expert assistance]."); Kerrin M. McCormick, *The Constitutional Right to Psychiatric Assistance: Cause for Reexamination of Ake*, 30 AM. CRIM. L. REV. 1329, 1365-66 (1993) ("... it does appear that supplying such [psychiatric] expert services would not be cost prohibitive, given the limited number of defendants who might seek such assistance."), 1366 (stating that professional pressures and ethical considerations will keep lawyers from raising frivolous defenses based on mental illness); John M. West, *Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma*, 84 MICH. L. REV. 1326, 1339 n.93 (1986) (citing figures which counsel for *Ake* presented to the Supreme Court which demonstrated that the cost of expert assistance would not be great); see Carver, *supra* note 116 (extensive death penalty appeal process required by the Constitution); see *supra* note 111 (high cost of appeals processes).

602. 470 U.S. 68 (1985).

603. *Id.*

alone."<sup>604</sup> Many courts have accepted the former approach, to the detriment of the defendant.<sup>605</sup> The indigent defendant may need a proponent to counteract the prosecutor's distinct advantages in the criminal adjudication process. Providing psychiatrists or psychologists to the limited number of defendants with valid *Ake* claims will not be cost-prohibitive.<sup>606</sup> A criminal defendant may be denied due process if he has no opportunity to challenge the expert's testimony as part of an adversarial system.<sup>607</sup> And without the means for challenging a neutral expert, the defendant will not be able adequately to prepare a record for appellate review.<sup>608</sup>

No statement made by the defendant in the course of any psychological examination should be admissible against him at trial.<sup>609</sup> Otherwise, the defendant may withhold pertinent, but incriminating, information from the court.<sup>610</sup> In addition to ensuring a greater degree of equity, this provision will eliminate post-conviction attacks on the adequacy of protections at the hearing.

##### 5. *A Preponderance of the Evidence Standard of Proof*

The burden of proof for mental retardation claims should be on the defendant. While mentally retarded defendants are at a serious disadvantage in planning and executing defense strategies, they are not entitled to shift the burden of proving an affirmative defense to the prosecution.<sup>611</sup>

However, the standard should be a preponderance of the evidence, and not clear and convincing evidence. Six states with bans on the execution of the mentally retarded use the preponderance standard.<sup>612</sup> Generally, a defendant who has the burden of proof for an element of a defense

604. McCormick, *supra* note 601, at 1357.

605. *Id.* at 1358. See, e.g., *Harris v. Vasquez*, 949 F.2d 1497, 1516 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 1275 (1991); *Henderson v. Dugger*, 925 F.2d 1309, 1316 (11th Cir. 1991), *cert. denied sub nom Henderson v. Singletary*, 113 S.Ct. 621 (1992); *Martin v. Wainwright*, 770 F.2d 918, 935 (11th Cir. 1985), *modified on other grounds, en banc*, 781 F.2d 185 (1986), and *cert. denied*, 479 U.S. 909 (1986).

606. McCormick, *supra* note 601, at 1363-68.

607. West, *supra* note 601, at 1349, 1353-54.

608. *Id.* at 1355.

609. See KAN. STAT. ANN. § 21-4623(2) (Supp. 1994); N.Y. CRIM. PROC. LAW § 400.27(13)(c) (1995).

610. See generally Daniel R. McCabe, *From the Land of Lincoln a Healing Rule: Proposed Texas Rule of Civil Procedure Prohibiting Ex Parte Contact Between Defense Counsel and a Plaintiff's Treating Physician*, 25 TEX. TECH L. REV. 1081 (1994) (discussing doctrine of doctor-patient confidentiality). The mentally retarded individual has difficulty anticipating the consequences of his actions, see *supra* note 128 and accompanying text, and as a result, is put at a disadvantage compared to non-retarded defendants, because he cannot identify incriminating information or avoid telling it to an examining psychiatrist.

611. LAFAYE & SCOTT, *supra* note 597, at § 5.2(f)(4).

612. ARK. CODE ANN. § 5-4-618(a)(2)(c) (Michie 1993); N.M. STAT. ANN. § 31-20A-2.1(C) (Michie 1993); N.Y. CRIM. PROC. LAW § 400.27(12)(e) (1995); TENN. CODE ANN. § 39-13-203(c) (1991 & Supp. 1994); WASH. REV. CODE ANN. § 10.95.030(2) (West Supp. 1995); *Richardson v. State*, 598 A.2d 1 (Md. App. 1991), *aff'd*, 630 A.2d 238 (Md. 1993). But see COLO. REV. STAT. § 16-9-402(2) (Supp. 1994) (clear and convincing evidence); IND.

need only prove the facts supporting the claim by a preponderance of the evidence.<sup>613</sup> The prosecution, on the other hand, must prove beyond a reasonable doubt any element for which it has the burden of persuasion.<sup>614</sup> The prosecution's higher standard is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."<sup>615</sup> Affording the defendant the benefit of the doubt is even more important when his life is at stake.

It is difficult for the mentally retarded defendant to contribute adequately to his defense, regardless of whether he has been declared competent by the court.<sup>616</sup> The mentally retarded criminal defendant is more susceptible to police coercion and to forced waiver of procedural rights.<sup>617</sup> Lawyers have difficulty communicating effectively with their mentally retarded clients, and judges and juries, who do not fully understand the implications of mental retardation, are frequently biased against retarded defendants.<sup>618</sup> Imposing a degree of proof for an affirmative defense which is higher than the civil law standard places a further burden on the mentally retarded defendant.<sup>619</sup> As the United States subscribes to the idea of innocent until proven guilty, the retarded accused should have the opportunity to defend himself on a relatively level playing field.<sup>620</sup>

A defendant who loses a pre-trial hearing on the claim of mental retardation should still be able to present evidence of a lower-than-average IQ score or limitations in adaptive skill areas as a defense to the element of *mens rea*, and as a mitigating factor in determining the appropriateness of

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CODE ANN. § 35-36-9-4(b) (West Supp. 1994) (same). Some experts in this field of criminal law do not believe that there is much difference in the burden between clear and convincing and preponderance standards. See, e.g., Telephone Interview with Monica Foster, *supra* note 432; Telephone Interview with James Ellis, Professor of Law, University of New Mexico (Jan. 25, 1995) (participated in the effort to pass laws to prevent the execution of the mentally retarded in seven of the ten states which have been successful).

613. ROBINSON, *supra* note 184, at § 5(c); see LAFAVE & SCOTT, *supra* note 597, at § 5.2(f)(4) (stating that the burden of persuasion for a defendant to prove that he was entrapped by the government is, at most, preponderance of the evidence). It would not be equitable to allow a defendant accused of a white-collar crime an easier chance at being acquitted, than that afforded to a defendant accused of capital murder who only desires a reduction of sentence.

614. ROBINSON, *supra* note 184, at § 5(c).

615. *Id.*; *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

616. See *supra* note 155 and accompanying text.

617. See *supra* notes 151-154 and accompanying text.

618. See *supra* notes 155 & 160 (communication problems with lawyers), 153, 162-166 (misconceptions of judges and juries) and accompanying text.

619. LAFAVE & SCOTT, *supra* note 597, at § 4.5(e) ("but only by the civil standard of a preponderance of the evidence").

620. See *Mauricio v. Duckworth*, 840 F.2d 454, 458 (7th Cir. 1988) ("The State's argument, in our view, misperceives the essential nature of the [criminal] discovery process inasmuch as it portrays discovery as sort of contest rather than as a level playing field where rules are in place to ensure equal access to material information instead of to encourage deftly worded motions in an attempt to outmaneuver the other side.").

capital punishment.<sup>621</sup> To avoid improperly influencing the jury, the court's denial of a defendant's claim of mental retardation should be inadmissible at trial and at sentencing.<sup>622</sup> However, no provision would be made for a special verdict regarding the defendant's mental retardation.<sup>623</sup>

A defendant should not be permitted an interlocutory appeal of the pre-trial determination of mental retardation; instead, that decision could serve as the basis of a post-conviction appeal.<sup>624</sup> The issue of retardation would be preserved, but not at the expense of slowing down trials.

## 6. *No Retroactivity*

As a preemptive strike against opponents' warnings of overburdened

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621. See ARK. CODE ANN. § 5-4-618(d) (Michie 1993)(if found not to be retarded, defendant may, nonetheless, argue retardation as a mitigating factor); N.M. STAT. ANN. § 31-20A-2.1(C) (Michie 1994)(if not found retarded, court may instruct jurors to that effect, but defendant may still argue retardation as a mitigating factor); N.Y. CRIM. PROC. LAW § 400.27(12)(e) (1995)(if found not to be retarded at pre-trial hearing, defendant may, nonetheless, argue retardation as a mitigating factor); TENN. CODE ANN. § 39-13-203(e) (1991 & Supp. 1994)(if found not to be retarded, defendant may still argue retardation as a mitigating factor). See Iowa H.B. 2, 76th Gen. Assembly, 1st Sess., § 7 (1995)(if not found retarded, court may not instruct jurors to that effect, but defendant may still argue retardation as a mitigating factor); La. S.B. 635, Reg. Sess., § 1 (1995)(if not found retarded, court may not instruct jurors to that effect, but defendant may still argue retardation as a mitigating factor); N.C. H.B. 362, Reg. Sess., § 1 (1995)(a finding that defendant is not mentally retarded shall not foreclose defendant's right to raise any legal defense); Tex. H.B. 527, 74th Reg. Sess., § 1 (1995)(if defendant is found not retarded, court may not inform jurors, but defendant may present evidence of retardation notwithstanding court's determination). The defendant can, of course, still present any habeas corpus petitions in the future, such as a claim that his counsel was ineffective.

622. See N.M. STAT. ANN. § 31-20A-2.1(C) (Michie 1994) (if defendant found not mentally retarded, jury will not be informed of court's ruling); Iowa H.B. 2, 76th Gen. Assembly, 1st Sess., § 7 (1995) (same); La. S.B. 635, Reg. Sess., § 1 (1995) (same); Tex. H.B. 527, 74th Reg. Sess., § 1 (1995) (same).

623. Providing for a special verdict on the subject of the defendant's alleged mental retardation is not necessarily beneficial and may, in fact, be harmful. Special verdicts are "responses by the jury to a series of questions submitted by the court, and are generally accepted in the civil arena." Debra L. Weber, *Reversal of a RICO Predicate Offense on Appeal: Should the RICO Count Be Vacated*, 27 SAN DIEGO L. REV. 183, 200-01 (1990). The use of special verdicts in capital cases has been upheld by the Supreme Court. *Franklin v. Lynaugh*, 487 U.S. 164 (1988). However, special verdicts are generally discouraged in criminal cases. See, e.g., *United States v. Shelton*, 588 F.2d 1242, 1250 (9th Cir. 1978) (upholding lower court's denial of a special verdict); *United States v. O'Looney*, 544 F.2d 385, 392 (9th Cir.) (explaining that special verdicts are generally looked upon unfavorably), *cert. denied*, 429 U.S. 1023 (1976); *United States v. Spock*, 416 F.2d 165, 179 (1st Cir. 1969) (stating that in criminal cases, there is a formidable array of objections to special verdicts). The two principal reasons for discouraging special verdicts in criminal law are that they restrict the jury from tempering logic with common sense and fairness, and represent a partial usurpation of the jury's role by the judge. *Spock*, 416 F.2d at 181-82. A special verdict in a criminal proceeding would also block the traditional function of the jury to apply the law to the facts at hand. 1 CHARLES A. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 512 (1982) (rule 31).

624. See TENN. CODE ANN. § 39-13-203(f) (1991 & Supp. 1994)(explaining that the determination that defendant is not mentally retarded is not appealable by interlocutory appeal, but may be appealed after the sentencing stage of the trial).

courts, I propose that legislation prohibiting the execution of the mentally retarded not apply retroactively.<sup>625</sup> Capital punishment advocates will argue that if all death row prisoners could claim mental retardation as an exemption, the system would grind to a halt and new cases would not be processed.<sup>626</sup> Admittedly, it would be difficult to determine years later the IQ of the defendant at the time of the crime.<sup>627</sup> While political realities motivate the recommendation that legislation not apply retroactively, state supreme courts need not be bound by this provision. A more independent judiciary can override the decision of the legislature and provide more protection to mentally retarded defendants under the Eighth Amendment.<sup>628</sup>

### B. *Strategies for Passing this Legislation*

Legislation to prohibit capital punishment for the mentally retarded should focus more on protecting a vulnerable group, and less on restricting application of the death penalty. Discussion, otherwise, will deteriorate into accusations by death penalty proponents that legislation supporters are soft on crime and unconcerned about preserving public safety.<sup>629</sup> Our task is to help legislators recognize that executing people who do not understand what they did wrong, or why they are being punished, cannot possibly serve a deterrent or retributive function in our criminal justice system. Preservation of respect for the system, and for the humanitarian ideals upon which it is based, demands that legislators reject easy answers in favor of right answers.

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625. See KY. REV. STAT. ANN. § 532.140(3) (Michie 1990) (stating that statute applies only to trials occurring after July 13, 1990); Tex. H.B. 527, 74th Reg. Sess., § 3 (1995) (stating that the change in law is effective as of Sept. 1, 1995, and that a defendant charged with an offense committed before the effective date is subject to the law in effect at the time the offense was committed).

626. 136 CONG. REC. S6874 (daily ed. May 24, 1990) (statement of Senator Thurmond).

627. An IQ test taken many years later may not be relevant for the time period of the crime. Subsequent rehabilitation and education might distort the true effects of the mental retardation at that time.

628. See *Fleming v. Zant*, 386 S.E.2d 339, 340, 342 (Ga. 1989) (Georgia Supreme Court affirmed decision of legislature to stop the execution of the mentally retarded and held that the restriction applies retroactively to prisoners who received their penalties before the legislature passed this law).

629. That legislators have a justified fear of being depicted as soft on crime was evidenced in the 1994 elections. See, e.g., Dan Balz, *California Campaigns Leaving Voters with a Bitter Aftertaste*, WASH. POST, Nov. 4, 1994, at A10 (re-elected California Governor Pete Wilson's comeback from twenty points down in the polls attributed, in part, to charging that his opponent was soft on crime); David S. Broder, *Naked Punditry*, WASH. POST, Nov. 6, 1994, at C1, C2 ("In races for all offices . . . the favorite tactic is to suggest that the other candidate is soft on crime."); Thomas Hardy, *Candidate's Integrity Can Sweep All Other Election Issues Aside*, CHI. TRIB., Nov. 6, 1994, at C6 (re-elected Illinois Governor Jim Edgar severely damaged campaign of opponent by defining her opposition to the death penalty as evidence of her being soft on crime issues); Steve Twomey, *Holstering a Promise on Handguns*, WASH. POST, Dec. 19, 1994, at B1 (defeated Maryland gubernatorial candidate Ellen Sauerbrey partially blaming narrow defeat on opponent's advertisements depicting her as being soft on crime).

The debate about the execution of the mentally retarded is about more than capital punishment. Even proponents of the death penalty—such as Senator Hardin in Arkansas, Senator Wham in Colorado, and Senator Biden in Congress—acknowledge the humanitarian and moral implications of the issue, and have spearheaded efforts to exempt the mentally retarded from capital punishment.<sup>630</sup> Still, while the discussion has broadened, certain particular factors are common to legislation passed in eleven states and Congress limiting the reach of the death penalty.

First, legislative efforts should be spearheaded by a particularly popular or powerful figure, as in Maryland and the federal government, or by a legislator with a personal or moral stake in the passage of the bill, as in Washington and Indiana.<sup>631</sup> While a popular sponsor is advantageous for any political endeavor, it is especially critical where the issue sparks such divisive and uninformed debate. Popularity also somewhat insulates a legislator from any disapproval of her constituents and allows her to support riskier legislation.<sup>632</sup>

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630. See *supra* notes 389 (describing the efforts of state Senator Margaret Schweinhaut in Maryland) and 516 (relating the opposition of Judiciary Committee Chairman Senator Joseph Biden) and accompanying text.

631. See *supra* text accompanying notes 404-415 (State Senator William Hardin of Arkansas), 424 (State Senator Marguerite Prentice of Washington), 430-431 (State Senator William Crawford of Indiana), and 523 (U.S. Senator Edward Kennedy of Massachusetts). I am assuming that the passage of state laws to benefit the mentally retarded will continue to occur by the proposal and ratification of bills within a state legislature, and not by a voter initiative. An initiative is "a proposal initiated by citizens, usually registered voters, for a popular vote at the next special or general election." John J. Delaney, *1991 Update on Initiative and Referenda: A Survey of Court Decisions Since 1986*, C629 A.L.I.-A.B.A. 893, 895 (1991). This differs from a referendum, which is a mechanism by which a measure already approved by a governing body that is submitted to the electorate for approval. *Id.* The initiative attempts to provide "the people with the ability to compel legislative enactment when the state legislature has failed to pursue such a course, thereby making the law-making power of the state legislature subject to the will of the people." Richard A. Chesley, *The Current Use of the Initiative and Referendum in Ohio and Other States*, 53 U. CIN. L. REV. 541, 542 (1984). See generally David L. Callies, Nancy C. Neuffer & Carlito P. Caliboso, *Ballot Box Zoning: Initiative, Referendum, and the Law*, 39 WASH U. J. URB. & CONTEMP. L. 53, 55-63 (1991) (history of initiatives and referenda). The initiative appears, at first glance, to be a good method of passing laws to prevent the execution of the mentally retarded, since the people are generally opposed to this practice once informed that it can occur in their state. See *infra* note 632 and accompanying text. Yet, I have some concern with turning this important legal and moral issue into a political campaign, where the side with the better television commercials will probably win. Since prosecutors, who most pointedly oppose provisions to exempt the mentally retarded from capital punishment, are likely to be better financed and organized than the grassroots advocates for the mentally retarded and church organizations, placing this issue into the initiative context might backfire. See *Let's Help Florida v. McCrary*, 621 F.2d 195, 197 (5th Cir. 1980) (striking down Florida law which restricted the size of financial contributions in referenda elections).

632. Theoretically this legislation should not even be very risky, since the public claims to support protecting the retarded from capital punishment. See *supra* notes 306 (United States), 372 & 376 (Georgia), 433 (Indiana), 471 (California), 495 (Texas), 498 (Florida) and accompanying text.

Second, compromise plays a significant role in the passage of successful legislation in this area. The IQ standard that determines mental retardation can be negotiable—lowering the score from 70 to 65 proved necessary to pass legislation in Arkansas, and may be necessary in North Carolina as well.<sup>633</sup> Without compromise, the legislation is almost surely doomed to failure. In California, state legislators, fearful of being labelled “soft on crime” and hampered by partisan loyalties, resisted all efforts to negotiate acceptable legislation.<sup>634</sup> Still, excessive concessions can undercut the original goals of the legislation. In Oregon, after a series of negotiations between legislators and sponsors distorted the original intention of the 1993 bills, advocates for the mentally retarded were forced into the unlikely position of requesting that the governor veto the bill.<sup>635</sup>

Third, a lobbying effort should be organized on behalf of the proposal, as in Arkansas and Colorado.<sup>636</sup> The base of support should include organizations which work for the benefit of the mentally retarded.<sup>637</sup> The lobbying base, though, must be expanded to include advocates from varied backgrounds who have greater access to the media and to voter support.<sup>638</sup> Church groups are more likely to have a stronger base of support as well as a broader range of members who could bring this issue on the forefront of the public’s consciousness. A demonstration of public advocacy by community leaders would reassure legislators concerned about constituent support.

Fourth, sponsors of legislation protecting the mentally retarded should seek input from state prosecutors.<sup>639</sup> The California, Missouri, and Florida defeats illustrate the damage that can be wrought by prosecutors resistant to the legislation.<sup>640</sup> Discussions with prosecutors, a group naturally disinclined to support limitations on capital punishment, should emphasize the low deterrent value of executing mentally retarded offenders, the procedural roadblocks they face as defendants, and the enormous expense of imposing the death penalty.<sup>641</sup> Sponsors of the legislation may have more

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633. See *supra* notes 410 (Arkansas) and 483 (North Carolina) and accompanying text.

634. See *supra* notes 465-473 and accompanying text (citing examples of efforts to pass California bill ending the execution of the mentally retarded).

635. See *supra* notes 474-480 and accompanying text (showing that Oregon legislators blocked bill offered to protect the rights of the mentally retarded charged with violent crimes because bill was drastically altered).

636. See *supra* notes 411 (Arkansas) and 417 (Colorado) and accompanying text.

637. Telephone Interview with James Ellis, *supra* note 612.

638. In most areas mentally retarded people face much discrimination and are prevented from voting. See *supra* notes 208-212 and accompanying text (citing examples of the termination of rights of the mentally retarded).

639. See *supra* notes 411-413 and accompanying text (discussing telephone interviews with supporters of legislation to prevent the execution of mentally retarded defendants).

640. See *supra* notes 472 (California), 490-491 (Missouri), and 498 (Florida) and accompanying text.

641. See *supra* note 111 and accompanying text (comparing the cost of executions with the cost of life imprisonment).

success in courting prosecutors in smaller states like Arkansas, where the two groups have more frequent social interaction and may have a greater interest in political compromise.<sup>642</sup>

Fifth, the sponsors of the legislation must have articulated arguments which specifically address the concerns of a public both frustrated with current crime prevention strategies, and under-informed about mentally retarded offenders. The agenda should focus on the immorality of executing people who cannot fully understand the nature of consequences of their acts, the financial drain imposed by capital trials, the procedural safeguards of mental retardation determinations that weed out impersonators, and the low deterrent value of a death sentence for this particular group.

Finally, polls should record and analyze citizens' views regarding the death penalty generally and its specific application to the mentally retarded.<sup>643</sup> Previously, I stated that for a number of reasons, polls should not be used for the purpose of determining a national consensus.<sup>644</sup> Yet the political value of polls, especially for officials insecure about reelection, cannot be denied. A poll showing that a vast majority of citizens support an exemption from capital punishment for the mentally retarded can shield politicians afraid of being attacked as weak on crime.

#### CONCLUSION

The use of capital punishment against the mentally retarded is a penalty without justification. Individuals who possess severe deficits in intellectual functioning and adaptive skills, and who cannot understand the nature of their crime or punishment, do not deserve the state's ultimate penalty. Capital punishment cannot be a law enforcement experiment that uses one of this country's most vulnerable groups as its guinea pigs.

As America turns more conservative and support for capital punishment remains high, the efforts necessary to pass legislation protecting mentally retarded offenders cannot be underestimated. It will take much time and effort to build such a political compromise and to convince citizens that the practice of executing the retarded is morally reprehensible. These efforts must be motivated by more than political gain—mentally retarded individuals and their advocates do not wield much power in this country. Legislators who join this movement will be motivated by a commitment to justice for the least powerful.

The protection of the mentally retarded from the death penalty is not an issue of crime, but an issue of humanity. We must realize that a society

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642. *See supra* note 413 and accompanying text (indicating that the inclusion of prosecutors in the legislative process muted their dissent).

643. *See supra* notes 372 & 433 (discussing polls indicating a lack of public support for the execution of mentally retarded defendants).

644. *See supra* notes 307-309 and accompanying text (arguing that polls fail to indicate a national consensus in either a reliable or unbiased way).



which does not protect its less fortunate is a flawed society. Executing those who may not even understand why they are being executed is a practice that must be ended. It is time for those whom we elect to have the courage to prevent the execution of the mentally retarded.”

