

PUTTING THE MENTALLY RETARDED
CRIMINAL DEFENDANT TO DEATH:
CHARTING THE DEVELOPMENT OF A NATIONAL
CONSENSUS TO EXEMPT THE MENTALLY RETARDED FROM
THE DEATH PENALTY

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I. INTRODUCTION

More than a decade ago, the United States Supreme Court upheld the execution of the mentally retarded under the Eighth Amendment of the United States Constitution.¹ It is estimated that from July of 1976² through February of 1998, the United States executed at least thirty-four mentally retarded people.³ Between twelve and twenty percent of current death row inmates are mentally retarded.⁴ As the pace of executions quickens,⁵ more mentally retarded individuals will be executed.

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1. See *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (plurality opinion) (holding that the Court "cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person . . . simply by virtue of his or her mental retardation alone"). The Eighth Amendment of the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. On July 2, 1976, the Supreme Court reinstated the death penalty as a constitutional form of punishment. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976). For a general discussion of *Gregg* and its companion cases, see Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 7-9 (1996); RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 107-23 (1994).

3. See Death Penalty Information Center, *Defendants with Mental Retardation Executed in the United States Since the Death Penalty Was Reinstated in 1976* (last modified Feb. 25, 2000) <<http://www.essential.org/dpic>>; Jonathan L. Bing, Comment, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Penry and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59 (1996).

4. Death Penalty Information Center (last modified Feb. 25, 2000) <<http://www.essential.org/dpic>>.

5. According to the Death Penalty Information Center, 56 people were executed in 1995, 45 people were executed in 1996, 74 people were executed in 1997, 68 people were executed in 1998, and 98 people were executed in 1999. Within the first two months of the year 2000, 18

Although the Supreme Court has approved the execution of mentally retarded criminals, and several states have executed mentally retarded inmates, this practice is plainly out of step with international conventions,⁶ American Bar Association policy,⁷ and the positions taken by the American Association of Mental Retardation ("AAMR")⁸ as well as other mental health organizations.⁹ A majority of Americans, including those who favor capital punishment, oppose the execution of the mentally retarded.¹⁰ Over the past decade, Congress and a number of states have enacted legislation specifically exempting the mentally retarded from the death penalty. In light of these actions, the propriety of executing the mentally retarded is once again being addressed by courts¹¹ and legal commentators¹² and remains an important and compelling issue that requires close attention. This Article will explore (1) the unique issues surrounding the trials of mentally retarded criminal defendants charged with capital offenses;¹³ (2) *Penry v. Lynaugh*,¹⁴ in which the U.S. Supreme Court approved the execution of the mentally retarded; (3) recent trends in this area of death penalty jurisprudence; and (4) the future direction of the law regarding the execution of the mentally retarded.

people were executed. *See id.*

6. *See generally* Elizabeth Olson, *Good Friends Join Enemies To Criticize U.S. on Human Rights*, N.Y. TIMES, Mar. 28, 1999, at 11; EMILY FABRYCKI REED, *THE PENRY PENALTY: CAPITAL PUNISHMENT AND OFFENDERS WITH MENTAL RETARDATION*, 39 (1993).

7. Coyne & Entzeroth, *supra* note 2, at 49; REED, *supra* note 6, at 38.

8. *American Association on Mental Retardation, Fact Sheet: The Death Penalty* (last updated Jan. 30, 2001) <<http://www.aamr.org/Policies/faqdeathpenalty.html>>; REED, *supra* note 6, at 37.

9. Among the mental health organizations that oppose the execution of the mentally retarded are: the Association for Retarded Citizens of the United States, the American Psychological Association, the Association for Persons with Severe Handicaps, the American Association of University Affiliated Programs for the Developmentally Disabled, the National Association of Private Residential Resources, the New York Association for Retarded Children, Inc., the National Association of Superintendents of Public Residential Facilities for the Mentally Retarded, the Mental Health Law Project, and the National Association of Protection and Advocacy Systems. REED, *supra* note 6, at 37-38.

10. *See* Denis W. Keyes & William J. Edwards, *Mental Retardation and the Death Penalty: Current Status of Exemption Legislation*, 21 MENTAL & PHYSICAL DISABILITY L. REP. 687, 688 n.15 (1997); REED, *supra* note 6, at 30-32.

11. *See, e.g.,* *People v. Smithey*, 978 P.2d 1171 (Cal. 1999); *Lambert v. State*, 984 P.2d 221 (Okla. Crim. App. 1999), *cert. denied*, 528 U.S. 1087 (2000).

12. *See, e.g.,* Carol Steiker & Jordan Steiker, *Defending Categorical Exemptions to the Death Penalty: Reflections on the ABA's Resolutions Concerning the Execution of Juveniles and Persons with Mental Retardation*, 61 LAW & CONTEMP. PROBS. 89 (1998); Keyes & Edwards, *supra* note 10; Bing, *supra* note 3.

13. The leading article on the mentally retarded criminal defendant is James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 422 (1985).

14. 492 U.S. 302 (1989).

II. THE MENTALLY RETARDED CRIMINAL DEFENDANT

A. *Definitions of Mental Retardation*

The *Diagnostic and Statistical Manual of Mental Disorders*¹⁵ ("DSM-IV") defines the mentally retarded individual as someone who has "significantly subaverage general intellectual functioning" accompanied with "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety."¹⁶ To fit within this definition, one's intellectual and adaptive deficits must manifest themselves by the time the individual is eighteen years old.¹⁷

A determination that an individual has sub-average intelligence is based on Intelligence Quotient ("IQ") scores that may be obtained through the administration of one of several standardized intelligence tests, including Wechsler Intelligence Scales for Children--Revised, Stanford-Binet, and Kaufman Assessment Battery for Children.¹⁸ The mean score for intelligence is an IQ of 100. The DSM-IV rates the following IQ scores as indicative of mental retardation:

- IQ 50-55 to approximately 70: mild mental retardation¹⁹
- IQ 35-40 to 50-55: moderate mental retardation
- IQ 20-25 to 35-40: severe mental retardation
- IQ below 20-25: profound mental retardation.²⁰

However, the DSM-IV notes that individuals with IQ scores in the range of seventy-one to seventy-five also may be mentally retarded if they have significant deficits in adaptive functioning.²¹

The DSM-IV defines adaptive functioning skills—the second prong of this definition of mental retardation—as "the presenting symptoms in individuals with Mental Retardation."²² Individuals' adaptive functioning "refers to how effectively individuals cope with common life de-

15. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter DSM-IV]. Put out by the American Psychiatric Association, this treatise is a comprehensive classification and reference manual on mental disorders, their manifestations, and treatment.

16. *Id.* at 39.

17. *Id.*

18. *Id.*

19. *Id.* at 40. The upper limit of IQ scores for those persons with mild mental retardation is two standard deviations below the mean score.

20. DSM-IV, *supra* note 15, at 40.

21. *Id.* at 45.

22. *Id.* at 40.

mands and how well they meet the standards of personal independence expected of someone in their particular age group, socio-cultural background, and community setting.”²³ The DSM-IV notes that “[a]daptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation.”²⁴ Like IQ scores, there are certain standardized tests that measure one’s adaptive functioning skills.²⁵ Medical evaluations and school assessments are also useful in making this determination.²⁶ In addition, “[p]roblems in adaptation are more likely to improve with remedial efforts than is the cognitive IQ, which tends to remain a more stable attribute.”²⁷

Persons classified as mildly retarded, formerly referred to as “educable,” constitute approximately eighty-five percent of the mentally retarded population.²⁸ These mildly retarded individuals have a substantial disability. They can attain academic skills only up to a sixth grade level.²⁹ Such individuals may achieve skills adequate for self-support; however, to achieve independence in living, these individuals may require supervision, guidance, and other support.³⁰ Persons with moderate mental retardation comprise ten percent of the mentally retarded population.³¹ These individuals are unlikely to attain academic skills beyond the second grade level.³² Moderately retarded individuals can attend to their personal care with moderate supervision, may perform unskilled or semi-skilled work under supervision, and may learn to travel to familiar places independently.³³ During adolescence, moderately retarded individuals may have difficulty recognizing social conventions, and this difficulty may interfere with relationships with peers.³⁴ Three to four percent of the mentally retarded population are classified as severely retarded.³⁵ The severely retarded may learn to talk during the school-age period and may be trained in elementary self-care skills.³⁶ The profoundly retarded, which constitute one to two percent of the mentally retarded population, display considerable impairments and require con-

23. *Id.*

24. *Id.*

25. DSM-IV, *supra* note 15, at 40.

26. *Id.*

27. *Id.*

28. *Id.* at 41.

29. *Id.*

30. DSM-IV, *supra* note 15, at 41.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. DSM-IV, *supra* note 15, at 41.

36. *Id.*

stant care in a highly structured setting.³⁷

The AAMR sets forth similar, although not identical, standards for determining mental retardation.³⁸ According to the AAMR, a person is deemed mentally retarded if he or she has: (1) an IQ below 70-75, (2) concurrently existing with limitations in two or more adaptive skill areas, (3) which is manifested by age eighteen.³⁹ In a departure from the definitions employed by the DSM-IV, the AAMR no longer uses the terms "mild," "moderate," "severe," and "profound" to describe an individual's mental retardation.⁴⁰ Instead, the AAMR has developed a "Profile and Intensities of Needed Supports," which sets out levels of support that a mentally retarded person may require.⁴¹ This profile is intended to allow a more functional, service-oriented description of the mentally retarded individual.⁴²

B. *Mental Retardation as Distinguished from Mental Illness*

It is important to recognize that mental retardation is not a form of mental illness.⁴³ This is not to say a mentally retarded individual might not suffer from some form of mental illness. Indeed, between twenty to thirty-five percent of all non-institutionalized mentally retarded persons also have been diagnosed with some form of mental illness.⁴⁴ However, mental retardation is a developmental condition that is different than and quite distinct from mental illness.

The mentally ill experience disturbances in their thoughts that may be cyclical, episodic, or temporary,⁴⁵ and suffer from illnesses such as schizophrenia, bipolar disorder, psychosis, post-traumatic disorder, and the like.⁴⁶ Mental retardation is not a psychological or medical disorder.

37. *Id.* at 41-42.

38. AMERICAN ASS'N OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORT 25 (9th ed. 1992) [hereinafter AAMR DEFINITION].

39. *Id.* at 5, 25.

40. *Id.* at 34.

41. These support levels are described as intermittent, limited, extensive, and pervasive. An individual who requires "intermittent support" is one who requires support on an "as needed basis," such as during a medical crisis or the loss of a job. Such supports, although episodic in nature, may be of high or low intensity when provided. "Limited support" is support that is consistently required over a limited time span, such as during a transitional period involving changing from school to work, or other similar transitions. "Extensive support" involves regular involvement at home or work on a long-term basis. "Pervasive support" refers to constant, high-intensity support across all areas of life and may include life-sustaining measures. *Id.* at 26.

42. *Id.* at 34.

43. See Denis W. Keyes et al., *Mitigating Mental Retardation in Capital Cases: Finding The "Invisible" Defendant*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 529, 530 (1998); Ellis & Luckasson, *supra* note 13, at 423-27.

44. AAMR DEFINITION, *supra* note 38, at 51.

45. Ellis & Luckasson, *supra* note 13, at 424.

46. Keyes et al., *supra* note 43, at 530.

der;⁴⁷ it is a permanent developmental or functional condition.⁴⁸ Often mental illness does not emerge until after the individual is eighteen years old.⁴⁹ In contrast, by its definition, mental retardation manifests itself by the time the mentally retarded individual is eighteen.⁵⁰ Moreover, certain forms of mental illness can be treated with medication or psychotherapy. Mental retardation cannot be ameliorated by drugs or psychotherapy, although the mentally retarded individual may be taught skills and strategies to better function in society and may be aided in his functioning by various support systems and services.⁵¹

Further, unlike mental illness, the risk that a person will be able to feign mental retardation to avoid criminal prosecution or to avoid the death penalty is greatly reduced, particularly in light of the definitions of mental retardation employed by the DSM-IV and AAMR. As noted above, one of the criteria for mental retardation is that the disability manifests itself before the individual is eighteen years old.⁵² To substantiate mental retardation, therefore, will likely require school and health records demonstrating the early manifestation of the disability. In most cases, documentation establishing mental retardation, including the relevant IQ test scores, will exist before a charge of capital murder is filed.

C. *The Mentally Retarded Criminal Defendant*

For centuries, the law has recognized that an individual's mental retardation may affect his or her capacity to face criminal charges and be found criminally liable. At common law, persons who were defined as "idiots," which today would correspond with the DSM-IV's classification of severely or profoundly retarded,⁵³ were not subject to criminal liability.⁵⁴ This rule, with its corollary that "lunatics" were also excluded from criminal liability, was the precursor to the modern insanity defense.⁵⁵ In this context, the term "idiot" usually referred to a person with such a limited reasoning capacity that he could not form the requisite criminal intent or could not distinguish between good and evil.⁵⁶ A few states still use the term "idiot" and provide a corresponding exemption

47. AAMR DEFINITION, *supra* note 38, at 9.

48. *Id.* at 9-10; Keyes et al., *supra* note 43, at 530.

49. Keyes et al., *supra* note 43, at 530.

50. AAMR DEFINITION, *supra* note 38, at 16-19; Keyes et al., *supra* note 43, at 530.

51. DSM-IV, *supra* note 15, at 40 (noting that while IQ is likely to remain stable, adaptive functioning skills are more likely to improve with remedial efforts); AAMR DEFINITION, *supra* note 38, at 145.

52. See *supra* text accompanying note 50.

53. See *Penry v. Lynaugh*, 492 U.S. 302, 331-33 (1989).

54. *Id.* at 331-32.

55. *Id.* at 332-33.

56. *Id.* at 333.

from criminal liability.⁵⁷ However, in general, modern laws subject persons with mental retardation to criminal liability.

In the early twentieth century, the mentally retarded were viewed as threatening, dangerous, and a source of criminal conduct or immoral behavior.⁵⁸ The eugenics movement advocated sterilization and segregation of the mentally retarded,⁵⁹ positions that met with remarkable success in the political and judicial arenas.⁶⁰ By the middle of the century, however, society soundly rejected this view of the mentally retarded.⁶¹ It is now well-accepted that mental retardation rarely, if ever, causes criminal behavior.⁶²

Nonetheless, mental retardation may have a significant impact on an individual who finds himself involved with the criminal justice system, particularly in the context of confessions and interrogations.⁶³ It is well-recognized that mental retardation is not a per se bar to voluntary interrogations and confessions, although it may be a factor to be weighed in evaluating the voluntariness of a confession.⁶⁴ Many mentally retarded people may be less likely to withstand police coercion or pressure due to their limited communication skills, their predisposition to answer questions so as to please the questioner rather than to answer the question accurately, and their tendency to be submissive.⁶⁵ Further, it is not unusual for a mentally retarded individual to have an incomplete or immature concept of blame and/or causation.⁶⁶ This characteristic may cause the mentally retarded defendant to confess to an act he did not commit, or to accept greater blame or responsibility for criminal activity than he realistically should.⁶⁷ Accordingly, the veracity and accuracy of a confession by a person with mental retardation may be suspect.⁶⁸

57. See, e.g., CAL. PENAL CODE § 26(2) (West 1999) (providing that "idiots" are a class of persons not capable of committing crimes); OKLA. STAT. tit. 21, § 152(3) (1990) (providing that "idiots" are not capable of committing crimes). Interestingly, neither California nor Oklahoma provide a legislative death penalty exemption for the mentally retarded capital defendant. See *infra* text accompanying note 175.

58. Ellis & Luckasson, *supra* note 13, at 417.

59. *Id.* at 417-19.

60. See, e.g., *Buck v. Bell*, 274 U.S. 200, 207 (1927). In *Buck*, Justice Holmes upheld a Virginia eugenics statute authorizing the sterilization of the mentally disabled and infamously declared that "[t]hree generations of imbeciles are enough." *Buck*, 274 U.S. at 207.

61. Ellis & Luckasson, *supra* note 13, at 420.

62. *Id.* But see *infra* note 158 and accompanying text.

63. Ellis & Luckasson, *supra* note 13, at 427-30.

64. See *Connelly v. Colorado*, 479 U.S. 157, 164-66 (1986) (mental deficiency alone does not render a confession involuntary, although it may be a factor to be weighed in determining voluntariness); *Reck v. Pate*, 367 U.S. 433, 443 (1961); Ellis & Luckasson, *supra* note 13, at 445-52.

65. Ellis & Luckasson, *supra* note 13, at 428, 446.

66. *Id.* at 445-52.

67. *Id.*

68. See, e.g., *Jurek v. Estelle*, 623 F.2d 929, 938 (5th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 1001 (1981) (granting relief to a mentally deficient, mildly retarded man who gave police two vastly different statements during forty-two hours of uncounseled questioning). See *Coyne & Entzeroth*, *supra* note 2, at 25.

Further, mental retardation, in and of itself, does not render an individual incompetent to stand trial⁶⁹ or incompetent to enter a guilty plea.⁷⁰ However, certain characteristics that are common among people with mental retardation, such as the tendency to be easily led, a poor understanding of the consequences of one's actions, the desire to hide one's mental retardation, and the desire to please authority figures, can affect the quality and ability of a mentally retarded person to make decisions that are in his best interest.⁷¹ Thus, the ability of the mentally retarded defendant to assist counsel in preparing a case and in making critical decisions about the course of a capital murder trial may be compromised.

III. THE SUPREME COURT'S DECISION ALLOWING THE IMPOSITION OF THE DEATH PENALTY ON THE MENTALLY RETARDED

A. Background

The Supreme Court first explicitly sanctioned the execution of the mentally retarded in *Penry v. Lynaugh*,⁷² a plurality opinion authored by Justice O'Connor. At the time of his crime, Johnny Paul Penry, a mentally retarded, African-American man, was twenty-two years old.

69. See *Dusky v. United States*, 362 U.S. 402, 402 (1960) (to be competent to stand trial, defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and must have "a rational as well as factual understanding of the proceedings against him").

70. See *Godinez v. Moran*, 509 U.S. 389, 397-99 (1993) (standard for determining competence to plead guilty is same as standard for determining competence to stand trial); *Parke v. Raley*, 506 U.S. 20, 28-29 (1992) (guilty plea must be knowing and voluntary); *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969) (record must show that defendant knowingly and voluntarily waived his right to trial).

71. *American Association on Mental Retardation, Fact Sheet: The Death Penalty* (last modified June 21, 2000) <<http://www.aamr.org/Policies/faqdeathpenalty.html>>. Moreover, once incarcerated, the mentally retarded prisoner faces increased risks and difficulties. For example, the mentally retarded inmate is more likely to be abused, victimized, exploited, and injured than other prisoners. Ellis & Luckasson, *supra* note 13, at 479-80. The mentally retarded inmate is also more likely to have disciplinary problems. *Id.* at 480-81. As a result, the mental retarded prisoner will often serve a longer prison term. *Id.* Unfortunately, there are only limited support systems available in prison to assist the mentally retarded. *Id.*

72. 492 U.S. 302 (1989). On the other hand, the Court has ruled that a person who is insane at the time of his execution may not be executed. *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986). Nonetheless, on January 24, 1992, Rickey Ray Rector, a man with obvious and profound mental defects, was killed by lethal injection in Arkansas. *Coyne & Entzeroth, supra* note 2, at 43-44. Rector shot and killed a police officer, then shot himself in the forehead; he underwent brain surgery that required removal of three inches of frontal brain tissue. *Id.* There was no question that Rector's mental abilities were significantly impaired. *Id.* In the days leading up to his execution, Rector's behavior included such bizarre acts as barking like a dog, stamping his feet, snapping his fingers, repeatedly calling out the nickname of an old friend, and laughing. *Id.* When his last meal was served, Rector devoured his dinner, but saved his dessert to be eaten later—after his execution. *Id.*

Penry's IQ fell between fifty and sixty-three,⁷³ which placed him in the mild to moderate range of the DSM-IV classification of mental retardation.⁷⁴ A clinical psychologist who examined Penry indicated that Penry had the mental age of a six-and-a-half year old and the social maturity of a nine- to ten-year-old.⁷⁵ As pointed out earlier, mildly retarded individuals may learn skills up to the sixth grade level, and persons with moderate mental retardation are unlikely to achieve academic skills beyond the second grade level.⁷⁶

In addition to his mental retardation, Penry grew up in a home where horrible abuse was regularly inflicted upon him.⁷⁷ Shortly after his birth, Penry's mother suffered a nervous breakdown and was committed to a mental hospital for ten months.⁷⁸ When she returned to her young son, she subjected him to severe beatings, including blows to his head and cigarette burns on his body.⁷⁹ Penry dropped out of school in the first grade and was in and out of state institutions until he was twelve years old, after which he went to live with an aunt.⁸⁰ It took his aunt a year to teach Penry the simple task of printing his name.⁸¹

After being paroled for a rape conviction, Penry moved to Livingston, Texas.⁸² On October 25, 1979, Penry entered the home of Pamela Mosely Carpenter, a twenty-two year old white woman and sister of Mark Mosley, a professional football player.⁸³ Penry attacked and raped Carpenter, who struggled and used a pair of scissors to fend off Penry.⁸⁴ Enraged, Penry stabbed Carpenter with her scissors.⁸⁵ Carpenter died a few hours later during emergency treatment; however, she was able to identify Penry as her attacker before her death.⁸⁶ Penry subsequently gave two confessions to the crime.⁸⁷ He was charged with capital murder.⁸⁸

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

74. *See supra* text accompanying notes 15-21 on DSM-IV classification and skill levels.

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

76. DSM-IV, *supra* note 15, at 41.

77. *Penry*, 492 U.S. at 308-09; REED, *supra* note 6, at 1.

78. REED, *supra* note 6, at 1.

79. *Penry*, 492 U.S. at 308-09; REED, *supra* note 6, at 1-2.

80. *Penry*, 492 U.S. at 309; REED, *supra* note 6, at 2.

81. *Penry*, 492 U.S. at 309; REED, *supra* note 6, at 2.

82. *Penry v. State*, 691 S.W.2d 636, 653 (Tex. Crim. App. 1985).

83. *Penry*, 492 U.S. at 307; *Penry v. Lynaugh*, 832 F.2d 915, 917 (5th Cir. 1987), *aff'd in part and rev'd in part*, *Penry v. Lynaugh*, 492 U.S. 302 (1989); REED, *supra* note 6, at 2. As noted above, Penry was African-American, and Carpenter was Caucasian. Numerous studies have shown that the race of the victim and, to a lesser extent, the race of the defendant play a key role in determining which criminal defendants ultimately will be sentenced to death. *See McCleskey v. Kemp*, 481 U.S. 279 (1987); *Coyne & Entzeroth*, *supra* note 2, at 35-40.

84. *Penry*, 492 U.S. at 307; REED, *supra* note 6, at 2.

85. *Penry*, 492 U.S. at 307; REED, *supra* note 6, at 2.

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

87. *See supra* text accompanying notes 63-68 on confessions by the mentally retarded.

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

A competency hearing was held before Penry's murder trial.⁸⁹ Evidence was presented at the hearing showing that previous testing indicated Penry's IQ fell between fifty and sixty-three.⁹⁰ IQ testing immediately preceding the competency trial revealed an IQ of fifty-four.⁹¹ The psychologist who tested Penry testified that, "there's a point at which anyone with [Penry's] IQ is always incompetent, but, you know, this man is more in the borderline range."⁹² The jury found him competent to stand trial.⁹³

During the guilt/innocence phase of Penry's capital murder trial, Penry's two confessions were found to be voluntary and were admitted into evidence.⁹⁴ Penry raised an insanity defense, presenting evidence that his mental retardation and brain damage resulted in poor impulse control, an inability to learn from his experiences, an inability to appreciate the wrongfulness of his acts, and an inability to conform his conduct to the law.⁹⁵ In rebuttal, the State presented evidence that Penry was sane at the time of his crime although the State conceded that Penry had an extremely limited mental ability and seemed unable to learn from his mistakes.⁹⁶ The jury rejected Penry's insanity defense and found him guilty of capital murder.⁹⁷

The case then proceeded to the capital sentencing phase of trial. Under the Texas death penalty statutory scheme, the jury was required to answer three questions or "special issues" to determine Penry's fate. Under Section 19.03 of the Texas Penal Code, the jury had to determine whether the State had proven beyond a reasonable doubt:

- (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
- (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing

89. Under Texas law, a hearing to determine whether a defendant is competent to stand trial is held prior to trial. *See* TEX. CODE CRIM. P. ANN. art. 46.02 (West 2001). Under Article 46.02, "A person is incompetent to stand trial if the person does not have: (1) sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings against the person." *See Dusky v. United States*, 362 U.S. 402 (1960). Article 46.02 further provides, a "defendant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence."

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

91. *Id.* at 308.

92. *Id.*

93. *Id.*

94. *Id.*; *Penry v. State*, 691 S.W.2d 636, 643-45 (Tex. Crim. App. 1985).

95. *Penry*, 492 U.S. at 308-09.

96. *Id.* at 309.

97. *Id.* at 310.

threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.⁹⁸

If the jury answered "yes" to all three questions, the penalty of death would be imposed.⁹⁹ The jury answered "yes" to all three questions, and accordingly, the trial court sentenced Penry to death.¹⁰⁰

Penry appealed his conviction and death sentence to the Texas Court of Criminal Appeals, which affirmed.¹⁰¹ Penry then petitioned the United States Supreme Court for certiorari, which the Court denied.¹⁰² Penry next sought federal habeas relief. After the federal district court and the Fifth Circuit Court of Appeals denied habeas relief,¹⁰³ Penry again filed a petition for certiorari with the Supreme Court. This time, the Supreme Court granted certiorari¹⁰⁴ to answer two questions: (1) whether the sentencing instructions adequately advised the jury that they were to consider all of Mr. Penry's mitigating evidence, in particular evidence of his mental retardation, in determining whether he should be sentenced to death or life imprisonment; and (2) whether the execution of a mentally retarded person constitutes a per se violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment.¹⁰⁵

Justices Brennan, Marshall, Stevens, and Blackmun joined Justice O'Connor in answering the first question. These five justices concluded that during the sentencing phase of trial, the jury had not been adequately advised that they were to consider Penry's mental retardation and abused childhood as evidence mitigating against the imposition of the death penalty.¹⁰⁶ The Court accordingly ordered the case remanded for resentencing.¹⁰⁷ Justices Scalia, Rehnquist, White, and Kennedy dis-

98. *Id.*

99. For a discussion on the Texas capital sentencing scheme and the constitutionality of the three special issues, see *Jurek v. Texas*, 428 U.S. 262 (1976).

100. *Penry*, 492 U.S. at 311.

101. *Penry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985).

102. *Penry v. Texas*, 474 U.S. 1073 (1986).

103. *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987). For an interesting discussion on *Jurek* and the potential concerns raised by Texas' unique death penalty system, see the concurring opinion of Judge Garwood. *Penry*, 832 F.2d at 926-32.

104. *Penry v. Lynaugh*, 487 U.S. 1233 (1988).

105. *Penry*, 492 U.S. at 313.

106. *Id.* at 313-28. Although an in-depth discussion of this aspect of the *Penry* decision is beyond the scope of this Article, several scholars have analyzed the Court's finding that Texas failed to provide Penry with a meaningful mechanism by which to present and have the jury fully consider his mental retardation as evidence mitigating against the imposition of the death penalty. For further discussion of this aspect of the opinion, see e.g., Peggy M. Tobolowsky, *What Hath Penry Wrought? Mitigating Circumstances and the Texas Death Penalty*, 19 AM. J. CRIM. L. 345 (1992); Note, *A Reasoned Moral Response: Rethinking Texas's Capital Sentencing Statute After Penry v. Lynaugh*, 69 TEX. L. REV. 407 (1990).

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

agreed, finding that the sentencing instructions did not run afoul of the Constitution and that resentencing was not warranted.¹⁰⁸

As to the second question, the configuration of the Court was reversed. This time, Justices Scalia, Rehnquist, White, and Kennedy joined Justice O'Connor to reject the argument that the imposition of the death penalty on the mentally retarded violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.¹⁰⁹ Justices Brennan, Marshall, Stevens, and Blackmun dissented on this issue.¹¹⁰ Pivotal to the justices' reasoning is the meaning of the Cruel and Unusual Punishment Clause of the Eighth Amendment.

B. The Eighth Amendment's Prohibition on Cruel and Unusual Punishment

Although the Eighth Amendment prohibits the imposition of "cruel and unusual punishment," the Constitution does not define or provide further guidance on the meaning of those words. The "cruel and unusual punishment" prohibition first appeared in the English Bill of Rights of 1689, which was drafted by the British Parliament at the accession of William and Mary.¹¹¹ Apparently, the prohibition was aimed at punishments that were not authorized by law, or punishments that were disproportionate to the crime.¹¹² The framers of the United States Constitution drew on that language and incorporated the "cruel and unusual punishment" proscription into the Eighth Amendment of the Bill of Rights.¹¹³ It appears that the drafters intended the provision to prohibit, at a minimum, the forms of punishment banned at the time the Constitution was drafted¹¹⁴ and intended it to proscribe torture and other barbarous forms of punishment.¹¹⁵

During the twentieth century, the Supreme Court began to flesh out the contours of the Cruel and Unusual Punishment Clause. In so doing, the Court construed the Eighth Amendment to go beyond merely prohibiting those forms of punishment that were outlawed in colonial times. Indeed, the Court found that society's evolving standards of decency also should inform and instruct the Court on the parameters of the Eighth Amendment.¹¹⁶

108. *Id.* at 353-60.

109. *Id.* at 328-40, 350-51.

110. *Id.* at 341-50.

111. *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (citing Anthony F. Granucci, "Nor Cruel and Unusual Punishment Inflicted: The Original Meaning," 57 CAL. L. REV. 839, 852-53 (1969)).

112. *Gregg*, 428 U.S. at 169.

113. *Id.* at 169-70.

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

115. *Gregg*, 428 U.S. at 170.

116. For a discussion on the modern interpretation of the Eighth Amendment, see Earl Martin,

This construction of the Eighth Amendment first appeared in 1910 in *Weems v. United States*.¹¹⁷ In *Weems*, the defendant challenged, inter alia, his sentence of fifteen years in chains at hard and painful labor that the Court of First Instance for the City of Manila imposed on him for the crime of false entry on a public document by a public official.¹¹⁸ Although the Supreme Court of the Philippines affirmed the defendant's conviction and sentence, the United States Supreme Court concluded that the punishment violated the Cruel and Unusual Punishment Clause and reversed the defendant's conviction and sentence with instructions to dismiss the proceedings.¹¹⁹ The crime for which Weems was convicted harmed no one and did not benefit Weems.¹²⁰ The Court observed that Weems' punishment for this crime would "amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense."¹²¹ In viewing Weems' punishment in the context of the Cruel and Unusual Punishment Clause, the Court declined to limit the prohibition on cruel and unusual punishment to those forms of punishment outlawed at the time the Constitution was drafted.¹²² Rather, the Court found that

a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.¹²³

The Court observed that the Cruel and Unusual Punishment Clause "may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."¹²⁴

The Court expanded on *Weems* in *Trop v. Dulles*.¹²⁵ In 1944, Trop was serving as a private in the United States Army when he deserted for

Towards an Evolving Debate on the Decency of Capital Punishment, 66 GEO. WASH. L. REV. 84, 88-93 (1997).

117. 217 U.S. 349 (1910).

118. *Weems*, 217 U.S. at 357-58.

119. *Id.* at 382.

120. *Id.* at 365.

121. *Id.* at 366-67.

122. *Id.* at 372-73.

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

124. *Id.* at 378.

125. 356 U.S. 86 (1958).

one day.¹²⁶ Trop was court-martialed for desertion, convicted, and sentenced to three years at hard labor, forfeiture of all pay, and a dishonorable discharge.¹²⁷ Moreover, as a result of his court-martial and conviction, Trop, a native-born American, was stripped of his U.S. citizenship.¹²⁸ Trop asked the Court to consider whether the loss of his American citizenship was a cruel and unusual punishment for his crime.¹²⁹

Writing for a majority of the Court, Chief Justice Earl Warren stated that the question before the Court was "whether this penalty [of denationalization] subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment."¹³⁰ While acknowledging that the exact scope of the Eighth Amendment had not been clearly established, the Court nonetheless stated that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."¹³¹ The Court then concluded, in language that continues to characterize our understanding of the Eighth Amendment, that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹³² Relying on this standard, the Court concluded that stripping Trop of his U.S. citizenship violated the Eighth Amendment.¹³³ The Court observed that the international community was in virtual agreement that stripping a citizen of his citizenship should not be imposed as a form of punishment for the crime of desertion.¹³⁴ This fact, although not determinative, was found to support the Court's application of the Eighth Amendment in *Trop*.¹³⁵

A few years later in *Robinson v. California*,¹³⁶ the Court found that a sentence of ninety days in county jail for the crime of being addicted to narcotics constituted a cruel and unusual punishment in violation of the Eighth Amendment.¹³⁷ The Court reasoned that one who is addicted to narcotics suffers from an illness and imprisonment on the basis of such a disability constitutes a cruel and unusual punishment.¹³⁸ The Court noted, "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot

126. *Trop*, 356 U.S. at 87.

127. *Id.* at 87-88.

128. *Id.*

129. *Id.* at 88.

130. *Id.* at 99.

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

132. *Id.* at 101.

133. *Id.*

134. *Id.* at 102-03.

135. *Id.*

136. 370 U.S. 660 (1962).

137. *Robinson*, 370 U.S. at 667.

138. *Id.* at 667.

be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."¹³⁹

In 1976, the Supreme Court examined the Eighth Amendment in the context of the death penalty. In *Gregg v. Georgia*,¹⁴⁰ the pivotal case in which the modern death penalty jurisprudence has its genesis, a plurality of the Court followed the reasoning of *Weems* and *Trop* and found that the Eighth Amendment is to be interpreted in a flexible and dynamic manner that reflects society's evolving standards of decency.¹⁴¹ The Court stated that in reviewing the constitutionality of a death sentence under the Eighth Amendment, the Court must assess "contemporary values concerning the infliction of a challenged sanction [T]his assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction."¹⁴² However, the Court found that public opinion is not the only or the determinative factor to be considered in deciding whether a sentence constitutes a cruel and unusual punishment.¹⁴³ The Court found that the punishment must also be in "accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment. This means, at least, that the punishment not be 'excessive.'"¹⁴⁴ The Court defined "excessive" as consisting of two elements. First, "the punishment must not involve the unnecessary and wanton infliction of pain[.]"¹⁴⁵ which means that the death penalty as imposed must advance the penological goals of retribution and deterrence.¹⁴⁶ Second, "the punishment must not be grossly out of proportion to the severity of the crime."¹⁴⁷

C. *The Court's Decision in Penry*

Against this backdrop, Justice O'Connor considered the imposition of the death penalty in *Penry v. Lynaugh*.¹⁴⁸ In accord with the Court's modern Eighth Amendment cases, Justice O'Connor found that the Cruel and Unusual Punishment Clause must be viewed in light of "the evolving standards of decency that mark the progress of a maturing so-

139. *Id.*

140. 428 U.S. 153 (1976).

141. *Gregg*, 428 U.S. at 171.

142. *Id.* at 173.

143. *Id.*

144. *Id.* (citation omitted).

145. *Id.*

146. *See Gregg*, 428 U.S. at 173.

147. *Id.* On occasion, the Court has found a punishment disproportionate to the crime. *See, e.g., United States v. Bajakajian*, 524 U.S. 321, 339-40 (1998) (holding fine imposed disproportionate to crime); *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (finding death penalty disproportionate punishment for the crime of rape of an adult woman).

148. 492 U.S. 302 (1989).

ciety.”¹⁴⁹ In making this evaluation, Justice O'Connor applied a two-prong test: (1) whether “objective evidence” demonstrates a national consensus that the execution of the mentally retarded should be barred; and (2) whether the imposition of the death penalty on the mentally retarded makes a measurable contribution to the acceptable goals of punishment and was it proportionate to the crime.¹⁵⁰

In addressing the first prong, Justice O'Connor opined that the most reliable objective evidence of contemporary values was found in the statutes enacted by the country's legislatures.¹⁵¹ She also considered the actions of sentencing juries in imposing certain punishments on particular classes of defendants.¹⁵² In 1989, at the time the Court decided *Penry*, only Georgia and the federal government exempted the mentally retarded from the death penalty.¹⁵³ Maryland had enacted legislation barring the execution of the mentally retarded, but the legislation went into effect a week after the Court handed down *Penry*.¹⁵⁴ Justice O'Connor stated that even when the Georgia and Maryland statutory protections for the mentally retarded were “added to the 14 States that have rejected capital punishment completely, [such legislative actions did] not provide sufficient evidence at present of a national consensus” to exclude the mentally retarded from the punishment of death.¹⁵⁵

Having found that the actions of the state legislatures did not sufficiently demonstrate a “national consensus” exempting the mentally retarded from the death penalty, Justice O'Connor then considered other evidence that might shed light on how the nation viewed the execution of the mentally retarded. Although *Penry* had not presented the Court with evidence regarding the behavior of sentencing juries towards mentally retarded capital defendants, he did offer several public opinion polls indicating that a majority of Americans disfavored the execution of the mentally retarded and presented evidence that the AAMR and other organizations opposed the imposition of the death penalty on the mentally retarded.¹⁵⁶ Justice O'Connor was not persuaded. She stated:

The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which

149. *Penry*, 492 U.S. at 330-31 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

150. *Id.* at 328-40.

151. *Id.* at 331.

152. *Id.*

153. *Id.* at 334.

154. *Penry*, 492 U.S. at 334. *Penry* was handed down on June 26, 1989; the Maryland statute went into effect on July 1, 1989.

155. *Id.* For a criticism of the Court's heavy reliance on state legislation in determining the scope and meaning of the Eighth Amendment, see Matthew E. Albers, Note, *Legislative Deference in Eighth Amendment Capital Sentencing Challenges: The Constitutional Inadequacy of the Current Judicial Approach*, 50 CASE W. RES. L. REV. 467 (1999).

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

is an objective indicator of contemporary values upon which we can rely. But at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment.¹⁵⁷

Having reached this determination, Justice O'Connor turned to the second prong of her analysis. She stated that it was clear that mental retardation was long regarded as a factor that mitigated against the imposition of the death penalty and that all states allowed a defendant to submit evidence of his mental retardation as mitigating evidence.¹⁵⁸ Nonetheless, Justice O'Connor concluded that "[o]n the record before the Court today, however, I cannot conclude that all mentally retarded people of Penry's ability—by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility—inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty."¹⁵⁹ Therefore, and without much further elaboration, Justice O'Connor found that the imposition of the death penalty on the mentally retarded made a measurable contribution to the penological goals of deterrence and retribution and that it was not disproportionate to the crime.

Justice Scalia concurred with Justice O'Connor's ultimate result on this question. However, his analysis of the issue was much simpler.¹⁶⁰ He found that in determining whether a punishment comports with the Eighth Amendment, he would look only at how the state legislatures and the sentencing juries treat the issue.¹⁶¹ Justice Scalia opined that unless

157. *Id.* at 335.

158. *Id.* at 337. However, it has also been observed that an individual's mental retardation may serve as a double-edged sword. See *Allen v. Massie*, No. 98-6340, 2000 WL 16321 (10th Cir. Jan. 11, 2000) (unpublished decision); Michael L. Perlin, *Symposium on Capital Punishment the Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role Of "Mitigating" Mental Disability Evidence*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 239 (1994); Joshua N. Sondheim, Note, *A Continuing Source Of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 HASTINGS L.J. 409 (1990). For example, a local South Carolina newspaper provided the following analysis of a mentally retarded criminal defendant:

Down in Conway, a circuit judge has handed down a no-nonsense decision upholding law and order The case involves convicted killer Limmie Arthur, 28, who has the social intelligence of a 10- to 12-year-old and the mental ability of a 7-year-old. This was enough sense to enable him to kill William "Cripple Jack" Miller in 1984. . . . It appears to us that there is all the more reason to execute a killer if he is also insane or retarded. Killers often kill again; an insane or retarded killer is more to be feared than a sane or normal killer. There is also far less possibility of his ever becoming a useful citizen.

Upholding Law and Order, HARTSVILLE MESSENGER, June 24, 1987, at 5B, col. 1.; Coyne & Entzeroth, *supra* note 2, at 41 n.383

159. *Penry*, 492 U.S. at 338.

160. *Id.* at 350-60.

161. *Id.*

an objective examination of the laws and jury determinations demonstrated that the country had "set its face against" a form of punishment, such punishment was not proscribed by the Eighth Amendment.¹⁶² Without discussing *Weems*, *Trop*, or *Gregg*, Justice Scalia found it unnecessary for the Court to take the next step and determine whether the punishment made a measurable contribution to the goals of punishment and whether it was proportionate to the crime.¹⁶³

Given that only three death penalty jurisdictions exempted the mentally retarded from the death penalty, it is not surprising that in his dissent Justice Brennan sidestepped the "national consensus" issue and focused on (1) whether executing the mentally retarded advanced the goals of deterrence and retribution, and (2) whether the death penalty was disproportionate when imposed on the mentally retarded.¹⁶⁴ Justice Brennan stated that in determining whether a punishment advances legitimate penological goals, one must look not only to the type or form of punishment to be imposed, but also one must consider the blameworthiness of the individual or class of individuals on whom the punishment is to be inflicted.¹⁶⁵ Justice Brennan recognized that although there may be differences among the mentally retarded in their ability to live independently or semi-independently, the clinical definition of mental retardation necessarily narrows this class of individuals to persons who have significant intellectual and adaptive skills deficits.¹⁶⁶ For this reason, Justice Brennan concluded that the mentally retarded lacked sufficient moral culpability to advance the goal of retribution, which requires that a criminal sentence be directly related to the defendant's personal culpability.¹⁶⁷ Further, he reasoned that the goal of deterrence would not be advanced, as "[i]t is highly unlikely that the exclusion of the mentally retarded from the class of those eligible to be sentenced to death will lessen any deterrent effect the death penalty may have for nonretarded potential offenders. . . ."¹⁶⁸ Moreover, because of the impairments in the ability of a mentally retarded person to understand the consequences of his actions and to control his impulses, it is unlikely that the execution of the mentally retarded would deter other mentally retarded criminal defendants from committing capital offenses.¹⁶⁹

As to the proportionality of the punishment, Justice Brennan stated that "[t]he impairment of a mentally retarded offender's reasoning abili-

162. *Id.* at 351.

163. *Id.* Justice Scalia elaborated on his views on Eighth Amendment analysis in *Stanford v. Kentucky*, 492 U.S. 361 (1989), which was decided the same day as *Penry*.

164. *Penry*, 492 U.S. at 343-49.

165. *Id.* at 343.

166. *Id.* at 344-45.

167. *Id.* at 348.

168. *Id.*

169. *Stanford*, 492 U.S. at 348-49.

ties, 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 is therefore unconstitutional."¹⁷⁰ He further found that even if Justice O'Connor's assertion that there were some mentally retarded defendants who were sufficiently "blameworthy" so as to be subject to the death penalty, the capital sentencing process provided an inadequate mechanism by which to distinguish among those mentally retarded persons who should be subject to the death penalty and those who should not.¹⁷¹ Therefore, Justice Brennan concluded that the imposition of the death penalty on the mentally retarded was nothing more than a purposeless and needless infliction of pain and suffering that violated the Cruel and Unusual Punishment Clause.¹⁷²

While Justice Brennan's view did not persuade a majority of his brethren in 1989, the majority's decision is not necessarily the final word on this question. Indeed, in concluding her analysis allowing the execution of mentally retarded defendants, Justice O'Connor noted that "a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society.'"¹⁷³ However, she did not believe that in June of 1989 that day had yet arrived.¹⁷⁴ The question now is whether a national consensus has been reached indicating that indeed society no longer approves of or wishes to sanction the execution of the mentally retarded.

D. Current Legislation

In the eleven years that have passed since *Penry*, the national landscape on this issue has changed dramatically. In 1989, only Georgia, Maryland, and the federal government exempted the mentally retarded from the penalty of death. Now, ten more states ban the execution of the mentally retarded—Arkansas, Colorado, Indiana, Kansas, Kentucky, Nebraska, New Mexico, New York, Tennessee, and Washington.¹⁷⁵ In-

170. *Id.* at 346.

171. *Id.* at 346-47.

172. *Id.* at 349.

173. *Id.* at 340.

174. *Stanford*, 492 U.S. at 340.

175. ARK. CODE ANN. § 5-4-618(b) (Michie 1993) ("No defendant with mental retardation at the time of committing capital murder shall be sentenced to death."); COLO. REV. STAT. § 16-9-403 (Supp. 1994) ("A sentence of death shall not be imposed upon any defendant who is determined to be a mentally retarded defendant pursuant to section 16-9-402. If any person who is determined to be a mentally retarded defendant is found guilty of a class 1 felony, such defendant shall be sentenced to life imprisonment."); GA. CODE ANN. § 17-7-131(j) (1990 & Supp. 1994) ("In the trial of any case in which the death penalty is sought which commences on or after July 1,

terestingly, Kansas and New York only recently re-instated the death penalty, and in so doing each state expressly excluded the mentally retarded. Connecticut, while not explicitly excluding the mentally retarded from the penalty of death, provides that the death penalty shall not be imposed on an individual whose "mental capacity was significantly impaired or his ability to conform his conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution."¹⁷⁶

In states that ban the imposition of the death penalty on the mentally retarded, the state usually requires the mentally retarded defendant to put forth evidence of his mental retardation. For example, section 532.140 of the Kentucky Penal Code prohibits the execution of "a seriously mentally retarded offender." This statute went into effect on July 13, 1990, a little more than a year after the Court handed down *Penry*. To seek an exemption from the death penalty under this statutory provision, defense counsel must file a motion with the trial court within thirty days of trial stating that the defendant is seriously mentally retarded and present evidence of the mental retardation.¹⁷⁷ The Commonwealth may

1988, should the judge find in accepting a plea of guilty but mentally retarded or the jury or court find in its verdict that the defendant is guilty of the crime charged but mentally retarded, the death penalty shall not be imposed and the court shall sentence the defendant to imprisonment for life."); IND. CODE § 35-36-9-6 (1994) ("If the court determines that the defendant is a mentally retarded individual under section 5 of this chapter, the part of the state's charging instrument filed under IC 35-50-2-9(a) that seeks a death sentence against the defendant shall be dismissed."); KAN. STAT. ANN. § 21-4623(d) (Supp. 1994) ("If, at the conclusion of a hearing pursuant to this section, the court determines that the defendant is mentally retarded, the court shall sentence the defendant as otherwise provided by law, and no sentence of death shall be imposed hereunder."); KY. REV. STAT. ANN. § 532.140(1) (Michie 1990) ("no offender who has been determined to be a seriously mentally retarded offender under the provisions of KRS 532.135, shall be subject to execution"); MD. CODE ANN., Crimes and Punishments, § 412(g)(1) (1992) ("If a person found guilty of murder in the first degree was, at the time the murder was committed, less than 18 years old or if the person establishes by a preponderance of the evidence that the person was, at the time the murder was committed, mentally retarded, the person shall be sentenced to imprisonment for life or imprisonment for life without the possibility of parole and may not be sentenced to death."); NEB. REV. STAT. § 28-105.01(2) (1997) ("Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person with mental retardation."); N.M. STAT. ANN. § 31-20A-2.1(B) (Michie 1994) ("The penalty of death shall not be imposed on any person who is mentally retarded."); N.Y. CRIM. PROC. LAW § 400.27(12)(c) (McKinney 1995) ("In the event the defendant is sentenced pursuant to this section to death, the court shall thereupon render a finding with respect to whether the defendant is mentally retarded. If the court finds the defendant is mentally retarded, the court shall set aside the sentence of death and sentence the defendant either to life imprisonment without parole or to a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole."); TENN. CODE ANN. § 39-13-203(b) (1991 & Supp. 1994) ("Notwithstanding any provision of law to the contrary, no defendant with mental retardation at the time of committing first degree murder shall be sentenced to death."); WASH. REV. CODE § 10.95.030(2) (1993) ("In no case, however, shall a person be sentenced to death if the person was mentally retarded at the time the crime was committed").

176. CONN. GEN. STAT. § 53a-46a(h)(2) (1994).

177. KY. REV. STAT. ANN. § 532.135 (Michie 1999). *See id.* §§ 202B.010(9), 210.005. These provisions regulate health and social services for the mentally retarded and provide the same definition for mental retardation.

present evidence in rebuttal. The trial court will make a determination ten days before trial as to whether the defendant is seriously mentally retarded and whether he should be subject to the death penalty.

The definition of "seriously mentally retarded," as used by the Kentucky Legislature, is in accord with the DSM-IV. Section 532.130 of the Kentucky Penal Code defines a "seriously mentally retarded" criminal defendant as one "with significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period."¹⁷⁸ Consistent with the DSM-IV, "significantly subaverage general intellectual functioning" is defined as an IQ below seventy.¹⁷⁹ Thus, had Penry committed his crime in Kentucky, he would not have been eligible for the death penalty.

If the trial court concludes that a criminal defendant is exempt from the death penalty due to his mental retardation, he remains subject to the other penalties that may be imposed on a person who is convicted of a capital offense.¹⁸⁰ These penalties are quite severe and include: (1) life imprisonment without the possibility of parole, (2) life imprisonment without the benefit of probation or parole until the defendant has served a minimum of twenty-five years, (3) life imprisonment, or (4) a term of imprisonment of not less than twenty years or more than fifty years.¹⁸¹ Even if the trial court concludes that a defendant is not mentally retarded, a defendant's mental condition and his limited mental abilities may be considered factors that mitigate against the imposition of the death penalty in accordance with *Penry*.¹⁸²

Nebraska employs a similar statutory scheme to determine whether a criminal defendant should be excluded from the death penalty based on his mental retardation. In exempting the mentally retarded from the death penalty, Nebraska also uses the DSM-IV definition. Section 28-105.01 of Nebraska Revised Statutes defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation." If a court finds by a preponderance of the evidence that a criminal defendant is mentally retarded, he may not be sentenced to death, but may be sentenced to life imprisonment for capital murder.¹⁸³ Thus, it is unlikely Penry would

178. *Id.* § 532.130. This provision does not define "developmental period." As noted earlier, the DSM-IV refers to 18 as the age by which mental retardation must be manifested.

179. *Id.*

180. *Id.* §§ 507.020, 532.030(1).

181. KY. REV. STAT. ANN. § 532.030(1). For a discussion on the mentally retarded inmate see *supra* note 71 and accompanying text.

182. See *Hunter v. Commonwealth*, 869 S.W.2d 719 (Ky. 1994); *Smith v. Commonwealth*, 845 S.W.2d 534 (Ky. 1993).

183. NEB. REV. STAT. § 28.105.01(3) (Supp. 2000).

have been sentenced to death in Nebraska.

Over the past eleven years, legislation to ban the execution of the mentally retarded has surfaced in other states.¹⁸⁴ In the first two months of the year 2000, legislators in seven states introduced bills to ban the execution of the mentally retarded. In January 2000, Arizona state legislators introduced legislation in both the Arizona house and senate to prohibit the imposition of the death penalty on any individual who was found to be mentally retarded.¹⁸⁵ On February 1, 2000, six Alabama state senators introduced several bills that, inter alia, would exempt the mentally retarded from the death penalty.¹⁸⁶ Similarly, Mississippi, Missouri, Oklahoma, and South Dakota legislators introduced legislation seeking to exempt the mentally retarded from the state's death penalty.¹⁸⁷ In late January 2000, Illinois Senate Bill 1488 and Illinois House Bill 4017 were introduced seeking to amend the Illinois Criminal Code by prohibiting the imposition of the death penalty on the mentally retarded.¹⁸⁸ On January 31, 2000, the Governor of Illinois imposed a moratorium on the death penalty in that state until certain grave concerns about the system were addressed.¹⁸⁹ Given these legislative changes, one must wonder whether or not Justice O'Connor's forewarning that this issue someday might require reconsideration has now come to pass.

IV. THE FUTURE DIRECTION OF A NATIONAL AND/OR CONSTITUTIONAL BAN ON THE EXECUTION OF THE MENTALLY RETARDED

Several state appellate judges recently concluded that the execution of the mentally retarded violates the standards of decency that mark a maturing society and have found that *Penry* is no longer valid, particularly in light of the national trend towards exempting the mentally retarded from capital punishment. In his dissenting opinion in *Lambert v. State*,¹⁹⁰ Judge Charles Chapel of the Oklahoma Court of Criminal Appeals¹⁹¹ concluded that the execution of the mentally retarded violated the "cruel or unusual punishment" clause of the Oklahoma Constitution. Judge Chapel described Lambert, the mentally retarded criminal defendant who was seeking relief from his death sentence, as follows:

184. Bing, *supra* note 3, at 114-38.

185. Ariz. S.B. 1455, Ariz. H.B. 2532 (Ariz. 44th Leg. - 2d Reg. Sess. 2000).

186. Ala. S.B. 7, 60 (Ala. Reg. Sess. 2000).

187. Miss. Bill No. 2389 (Reg. Sess. of Miss. Leg. 2000); Mo. H.B. 1225 (Mo. 2d Reg. Sess. of the 90th Gen. Assembly 2000); Okla. H.B. 2713 (2000); South Dakota H.B. 1196 (S. D. 75th Leg. Assembly 2000)

188. Ill. H.B. 4017, Ill. S.B. 1488 (Ill. 91st Gen. Assembly -- 1999-2000 Reg. Sess.).

189. Richard Wolf, *Illinois Will Delay Death Sentences; Executions Face Other Challenges*, USA TODAY, Jan. 31, 2000, at 4A.

190. 984 P.2d 221 (Okla. Crim. App. 1999).

191. The Oklahoma Court of Criminal Appeals is the highest state court in Oklahoma to hear criminal cases.

Although he is a grown man, Lambert cannot make change. He spells no better than a seven year old and reads at a third grade level. When Lambert was seventeen years old, the Oklahoma Juvenile Services Division tested him. The State's testing revealed that Lambert has an IQ of 68 and that he is mentally retarded. Prior to this testing, Lambert struggled through special education classes. Lambert barely managed to get through kindergarten. Finally he dropped out of school when he was in the seventh grade. Lambert was never able to function successfully in a school setting, and after he dropped out of school, his mental retardation limited his ability to work or survive in the outside world. Lambert's entire life has been shaped by his mental retardation. Although he is now thirty years old, he has the mental age of an eight year old. His thinking and reasoning are equivalent to that of a child in the second or third grade. His moral culpability is, of necessity, on the same level.¹⁹²

Judge Chapel focused his discussion on Article II, Section 9 of the Oklahoma Constitution, which bars the imposition of "cruel *or* unusual punishment" and provides arguably broader protection to Oklahoma defendants than the Eighth Amendment's "cruel *and* unusual punishment" proscription.¹⁹³ Judge Chapel concluded:

It is our duty to interpret and enforce the Oklahoma Constitution. Given Oklahoma's traditional protection of the mentally retarded, the growing national ban on the execution of the mentally retarded, and the lack of penological goals advanced by the execution of these individuals, I believe the execution of the mentally retarded is a cruel or unusual punishment prohibited under Oklahoma law. I therefore respectfully dissent to the execution of a mentally retarded man who has the mental age of an eight-year-old boy.¹⁹⁴

This issue also arose before the California Supreme Court. In *People v. Smithey*,¹⁹⁵ Justice Mosk concluded in a concurring opinion that *Penry* is no longer valid under the Eighth Amendment in light of the legislative changes that have taken place since 1989. Justice Mosk stated:

I would hold that the cruel and unusual punishments clause [of the United States Constitution] now prohibits execution of a sen-

192. *Lambert*, 984 P.2d at 240.

193. *Dodd v. State*, 879 P.2d 822, 828-30 (Okla. Crim. App. 1994) (Chapel, J., concurring in part and dissenting in part).

194. *Lambert*, 984 P.2d at 244 (footnote omitted).

195. 978 P.2d 1171 (Cal. 1999) (Mosk, J., concurring).

tence of death against mentally retarded persons. I am able to discern that, since *Penry*, "evolving standards of decency" have indeed evolved sufficiently in this area. Indeed, I cannot do otherwise. For I find that the requisite "national consensus" has, in fact, emerged.¹⁹⁶

In a footnote, Justice Mosk also stated that Article I, Section 17 of the California Constitution precluded the imposition of the death penalty on the mentally retarded.¹⁹⁷ Like the Oklahoma Constitution, the California Constitution prohibits the imposition of cruel *or* unusual punishment and provides greater protection to defendants in California than does the Eighth Amendment.

Although he concluded that the mentally retarded could not be executed under either the California or U.S. Constitution, Justice Mosk determined that the defendant before the court was not mentally retarded and therefore was not exempt from the death penalty. The majority agreed with Justice Mosk that the defendant was not mentally retarded. A majority of the court, however, was unwilling to declare that the execution of the mentally retarded was unconstitutional. The majority simply stated, "[W]e determine that defendant is not mentally retarded within the meaning of other states' laws exempting mentally retarded individuals from the death penalty. Therefore, assuming, for the sake of argument only, that the Eighth Amendment precludes execution of the mentally retarded, it does not render defendant's sentence invalid."¹⁹⁸

In light of the recent legislative changes and the recent state court decisions, advocates seeking a death penalty exemption for the mentally retarded need to determine if it would be effective to press the Supreme Court to reconsider *Penry* at this time. Deciding this question requires an examination of the justices' varying views on "national consensus" and "evolving standards of decency."

A. Justice Stevens

Justice Stevens is the only member of the *Penry* dissent still on the Court. In *Penry*, Justice Stevens simply stated that he found the execution of the mentally retarded unconstitutional. He did not discuss the scope of "national consensus." It is reasonable to assume that he would again conclude that the execution of the mentally retarded violates the Eighth Amendment. Further, in the context of the execution of juveniles, Justice Stevens has found that a national consensus exists to preclude

196. *Smithey*, 978 P.2d at 1224.

197. *Id.* at 1225 n.1.

198. *Id.* at 1222.

the execution of persons who were under the age of sixteen at the time of the commission of the crime based on the eighteen death penalty states that specifically exempt such youthful offenders from the death penalty.¹⁹⁹ He also has found there is a national consensus barring the execution of juveniles who were under the age of eighteen at the time of the commission of the crime based on, among other factors, the twelve death penalty states that bar such executions.²⁰⁰ Thus, Justice Stevens would likely find that the twelve states that currently exempt the mentally retarded from capital punishment are sufficient to constitute a national consensus.

B. Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy

Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy all agreed in *Penry* that in 1989 a national consensus did not exist to exempt the mentally retarded from the punishment of death.²⁰¹ These justices also have indicated that they are unwilling to examine whether a punishment advances the goals of deterrence or retribution, or whether a punishment is proportionate to the crime and the offender.²⁰² It appears that the only argument that will sway these justices is the number of states precluding a particular punishment in general or the infliction of that punishment on a particular class of individuals.

On the same day as the Court decided *Penry*, Justice Scalia announced a plurality opinion in which the Court found that it did not violate the Eighth Amendment for a state to execute a person who was sixteen or seventeen at the time he committed his crime.²⁰³ In determining whether there existed objective criteria reflecting society's view with regard to the execution of sixteen- and seventeen-year-olds, Justice Scalia wrote:

Of the 37 States whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to

199. See *Thompson v. Oklahoma*, 487 U.S. 815 (1988). In a plurality opinion authored by Justice Stevens, the Court concluded that states could not execute anyone who was under the age of sixteen at the time of the crime. *Thompson*, 487 U.S. at 838. The defendant in *Thompson* was William Wayne Thompson, who at the age of fifteen plotted with three companions to kill his brother-in-law. *Id.* at 819. Thompson was tried as an adult, convicted of capital murder, and sentenced to death. *Id.* at 820. Although at the time of Thompson's trial Oklahoma had not established a minimum age for the imposition of the death penalty, eighteen other death penalty states set a minimum age of at least sixteen. *Id.* at 829. Nineteen death penalty states, including Oklahoma, set no age limit on the imposition of the death penalty. *Thompson*, 487 U.S. at 826-27.

200. *Stanford v. Kentucky*, 492 U.S. 361, 382-91 (1989) (Brennan, Marshall, Blackmun, & Stevens, JJ. dissenting).

201. *Penry v. Lynaugh*, 492 U.S. 302, 351 (1989) (Scalia, J., Rehnquist, C.J., White, J., & Kennedy, J., concurring in part and dissenting in part).

202. *Penry*, 492 U.S. at 351.

203. *Stanford*, 492 U.S. 361.

impose it on 17-year-old offenders. This does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual.²⁰⁴

Chief Justice Rehnquist and Justice Kennedy agreed that these numbers were insufficient to form a national consensus. Thus, twelve states were insufficient to convince these justices that a national consensus existed limiting the imposition of the death penalty on a seventeen-year-old. Further, these justices declined to find that eighteen states constitute a sufficient number to form a national consensus barring the infliction of the death penalty on a certain class of defendants.²⁰⁵ It is unlikely that they will be persuaded by the twelve states that now ban the execution of the mentally retarded to find that there is now a national consensus exempting the mentally retarded from the death penalty.

C. Justice O'Connor

In *Penry*, Justice O'Connor left open the possibility that someday the execution of the mentally retarded might violate the Eighth Amendment, provided that more states and/or sentencing juries indicate that such punishment was out of step with the country's evolving standards of decency. However, like Chief Justice Rehnquist and Justices Scalia and Kennedy, it seems unlikely that the legislative changes of the past eleven years will be sufficient to satisfy Justice O'Connor.

Justice O'Connor's views on the execution of juveniles is instructive in determining how she may react to the legislative changes that have occurred with respect to the execution of the mentally retarded. In the year before the Court decided *Penry*, Justice O'Connor stated that evidence showing that eighteen death penalty states exempted juveniles under the age of sixteen from the death penalty was indicative of "a national consensus forbidding the execution" of such persons.²⁰⁶ However, Justice O'Connor was "reluctant to adopt this conclusion as a matter of constitutional law without better evidence than we now possess."²⁰⁷ Rather, Justice O'Connor took the unusual position of concluding that the state legislature had not intended by its silence to include fifteen-year-olds among those criminal defendants who were death eligible. She found that "[the] petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the

204. *Id.* at 370-71 (footnote omitted).

205. *Thompson v. Oklahoma*, 487 U.S. 815, 867-68 (1988) (Scalia, J., Rehnquist, C.J., & White, J. dissenting).

206. *Thompson*, 487 U.S. at 848.

207. *Id.* at 849.

commission of a capital crime can lead to the offender's execution."²⁰⁸ In *Stanford v. Kentucky*, however, Justice O'Connor joined Chief Justice Rehnquist and Justices Scalia and Kennedy in finding that the protection that twelve death penalty states extended to seventeen-year-olds was insufficient to compel the conclusion that such executions violated the Eighth Amendment. Thus, it appears unlikely that Justice O'Connor would view the current mental retardation exemption legislation as sufficient to signal a national consensus.

D. Justice Thomas

Justice Thomas was not on the Supreme Court when *Penry* was decided. However, Justice Thomas has often aligned with Justice Scalia on questions concerning the Eighth Amendment,²⁰⁹ and has taken restrictive views of the protection that the Eighth Amendment provides in capital sentencing proceedings.²¹⁰ It seems reasonable to conclude that Justice Thomas would join in finding no national consensus exempting the mentally retarded from the punishment of death.

E. Justices Ginsburg, Souter, and Breyer

Likewise, Justices Ginsburg, Souter, and Breyer were not on the bench when *Penry* was decided. These justices appear to hold views more closely in keeping with Justice Stevens' positions on the Eighth Amendment and capital sentencing proceedings.²¹¹ However, these justices have not ruled on an issue involving a "national consensus" in the context of the Eighth Amendment or the death penalty, and they do not always align themselves with Justice Stevens on questions involving

208. *Id.* at 857-58.

209. *See, e.g.*, *County of Sacramento v. Lewis*, 523 U.S. 833, 860 (1998) (joining Justice Scalia in a concurring opinion regarding application of Eighth Amendment in a 42 U.S.C. § 1983 excessive force case); *Helling v. McKinney*, 509 U.S. 25, 37-42 (1993) (dissenting with Justice Scalia and finding Eighth Amendment does not protect inmates from risk of harm); *Hudson v. McMillian*, 503 U.S. 1, 17-29 (1992) (dissenting with Justice Scalia and finding that Eighth Amendment is not applicable in cases challenging a prisoner's conditions of confinement or the use of excessive force on a prisoner).

210. *See, e.g.*, *Weeks v. Angelone*, 528 U.S. 225 (2000) (joining Chief Justice Rehnquist in finding capital sentencing jury instruction adequately advised jury of its duty to consider mitigating evidence); *but see* *United States v. Bajakajian*, 524 U.S. 321 (1998) (Thomas delivered the opinion of the Court finding fine was excessive under the Eighth Amendment while Chief Justice Rehnquist and Justices O'Connor and Scalia dissented).

211. *See, e.g.*, *Weeks*, 528 U.S. at 237 (Souter, Ginsburg, Breyer, & Stevens, JJ., dissenting); *Jones v. United States*, 527 U.S. 373, 405 (1999) (Ginsburg, Souter, Stevens, & Breyer, JJ., dissenting); *Riggs v. California*, 525 U.S. 1114 (1999) (Souter, Ginsburg, & Stevens, JJ., dissenting to a denial of certiorari to address whether application of California's three strike rule to a person who commits a misdemeanor violates the Eighth Amendment); *Buchanan v. Angelone*, 522 U.S. 269, 280 (1998) (Breyer, Stevens, & Ginsburg, JJ., dissenting); *O'Dell v. Netherland*, 521 U.S. 151, 168-78 (1997) (Breyer, Ginsburg, Souter, & Stevens, JJ., dissenting and finding fundamental error occurred during capital sentencing proceedings).

capital punishment.²¹² Therefore, it is unclear how they would react to an invitation to overturn *Penry*.

F. The Viability of Raising This Issue Before the Current Supreme Court and Alternative Avenues for Achieving a National Ban on the Execution of the Mentally Retarded

Unlike 1989, no member of the current Court is a death penalty abolitionist. While it is possible that Justices Breyer, Souter, and Ginsburg might join Justice Stevens in finding a national consensus precluding the execution of the mentally retarded, it is not clear that these three justices would take this position. Further, it seems doubtful that a majority of the Court would find the states' present position on this issue sufficient to support a national consensus. Hence, it would appear that raising this issue before the Supreme Court in the hopes of crafting a death penalty exclusion for the mentally retarded is likely to fail.

However, other, more viable avenues exist for seeking a national ban on the execution of the mentally retarded. The most obvious (and to date the most successful) is to seek relief with state legislatures. As mentioned earlier, several states have bills currently pending that would ban the execution of the mentally retarded. Moreover, the Governor of Illinois has imposed a moratorium on the death penalty in his state. Although the Illinois moratorium focuses primarily on the grave risk that an innocent person might be executed under the current death penalty system, the risk of executing an innocent person is heightened in the context of the mentally retarded defendant who is more likely to confess to a crime he did not commit or to accept greater responsibility for a criminal act than he actually deserves.²¹³ Further, given the potential problems that a mentally retarded criminal defendant might have in communicating with his lawyer, there is an increased risk that certain defenses or mitigating evidence might not be explored.²¹⁴ In light of these factors, legislators might be more receptive to the need to protect the mentally retarded defendant. Moreover, this issue resounds not only with groups and individuals who traditionally oppose the death penalty, but also with mental health organizations and the public at large. The broader spectrum of political forces that oppose the execution of the mentally retarded offer a greater chance of success in state legislatures.

212. See, e.g., *Harris v. Alabama*, 513 U.S. 504 (1995). Justice Stevens dissented while Justices Souter, Ginsberg, and Breyer joined the majority's holding that the Eighth Amendment does not require the State to define the weight the sentencing judge must give to an advisory jury verdict.

213. See *supra* text accompanying notes 63-68.

214. See *supra* text accompanying notes 69-71.

In addition to seeking a legislative exemption for the mentally retarded, advocates should also seek to use state constitutions to argue that the execution of the mentally retarded offends the state's Eighth Amendment equivalent. Although a state constitution must afford at least as much protection to its citizens as does the federal constitution, a state constitution may provide greater protection to defendants appearing before its courts.²¹⁵ As Justice Mosk stated in *People v. Smithey*, the California prohibition on cruel *or* unusual punishment²¹⁶ is broader than the federal prohibition on cruel *and* unusual punishment. Justice Mosk would find that the execution of the mentally retarded offends the state constitution.²¹⁷ Other state constitutions also forbid the imposition of cruel *or* unusual punishments,²¹⁸ and it is possible, although clearly not certain, that this distinction could provide greater protection to citizens than the Eighth Amendment.²¹⁹ Other states provide, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted."²²⁰ This language likewise provides arguably broader protection than the Eighth Amendment. Most other states employ the "cruel and unusual punishment" language; however, advocates for mentally retarded criminal defendants should carefully review the state's applicable case law for broader applications of this language.

V. CONCLUSION

Although it appears that the current Supreme Court may not be receptive to finding that a national consensus bars the execution of the mentally retarded at this time, advocates who wish to spare the mentally retarded from the death penalty should not despair. Rather, advocates seeking to exempt the mentally retarded from capital punishment must continue to seek relief in the state legislatures and courts. If these efforts continue to be successful—as they have been thus far in twelve states—

215. James R. Acker & Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 VAND. L. REV. 1299 (1989).

216. Article I, Section 17 of the California Constitution provides that "cruel and unusual punishment may not be inflicted or excessive fines imposed."

217. See *Lambert v. State*, 984 P.2d 221, 240-43 (Okla. Crim. App. 1999) (Chapel, J., dissenting in part and concurring in part).

218. The following states exclude "cruel or unusual" punishments: Alabama (ALA. CONST. art. I, § 15); Arkansas (ARK. CONST. art. 2, § 9); Hawaii (HAWAII CONST. art. 1, § 12); Indiana (IND. CONST. art. 1, § 16); Maine, ME. CONST. art. 1, § 9); Massachusetts (MASS. CONST. pt. 1, art. 26); Michigan (MICH. CONST. art. 1, § 16); Minnesota (MINN. CONST. art. 1, § 5); Mississippi (MISS. CONST. art. 3, § 28); Nevada (NEV. CONST. art. 1, § 6); New Hampshire (N.H. CONST. pt. 1, art. 33); North Carolina (N.C. CONST. art. 1, § 27); North Dakota (N.D. CONST. art. 1, § 11); and Oklahoma (OKLA. CONST. art. I, § 9). Further, Article 1, Section 20 of the Louisiana Constitution provides, "No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment."

219. Acker & Walsh, *supra* note 215, at 1315-31.

220. DEL. CONST. art. I, § 11; KY. CONST. § 17; PA. CONST. art. 1, § 13; R.I. CONST. art. 1, § 8; S.D. CONST. art. 6, § 23; WASH. CONST. art. 1, § 14; and S.C. CONST. art. I, § 15.

then, a majority of the Supreme Court will likely find that a national consensus indeed exists and that the execution of the mentally retarded is a barbaric form of punishment prohibited under the Eighth Amendment.

EPILOGUE ON *PENRY*

The Supreme Court remanded Penry for re-sentencing so that a jury could fully consider his mental retardation as a factor mitigating the imposition of the death penalty. Despite this mitigating evidence, a Texas jury was not persuaded to spare Penry, and Penry again was sentenced to death. The Texas Court of Criminal Appeals affirmed Penry's conviction and sentence,²²¹ and the United States District Court for the Southern District of Texas denied Penry's petition for a writ of habeas corpus. Penry was scheduled for execution on January 13, 2000.²²² The Fifth Circuit Court of Appeals granted a stay of execution pending review of Penry's motion for a certificate of appealability appealing the federal district court's denial of habeas relief. On June 20, 2000, the Circuit Court of Appeals denied Penry's certificate of appealability and upheld the federal district court's denial of habeas relief.²²³

On November 27, 2000, after the writing of this Article, the Supreme Court granted certiorari to consider two questions regarding Penry's second trial. First, the Court will consider whether the jury instructions allowed adequate consideration of Penry's mental retardation as a factor mitigating against the imposition of the death penalty. Second, the Court will examine whether Penry's Fifth Amendment rights were violated during the course of the state court proceedings. The Court did not state that it intended to revisit the question of whether the execution of the mentally retarded violates the Eighth Amendment.²²⁴ Johnny Paul Penry continues to await execution on Texas' death row. However, on March 26, 2001 the Court granted certiorari in *McCarver v. North Carolina*,²²⁵ to address specifically the question of whether the execution of the mentally retarded violates the Eighth Amendment. Since the writing of this Article, South Dakota has joined those death penalty states barring the execution of the mentally retarded so that now

221. Penry v. State, 903 S.W.2d 715 (Tex. Crim. App. 1995).

222. Jamie Fellner, *Mentally Retarded Defendants Don't Belong on Death Row*, S.F. CHRON., Jan. 4, 2000, at A19.

223. Penry v. Johnson, 215 F.3d 504 (5th Cir. 2000). By a vote of two-to-one, the Fifth Circuit Court of Appeals upheld the lower federal court's denial of habeas relief. Circuit Court Judge Dennis dissented on the grounds that the Texas death penalty scheme still did not allow the jury to give effect to Penry's mitigating evidence regarding his mental retardation and history of childhood abuse. *Penry*, 215 F.3d at 514-16.

224. See Penry v. Johnson, 121 S. Ct. 563 (2000).

225. No. 2001 WL 215804 (March 26, 2001).

thirteen states and the federal government exclude the mentally retarded from the punishment of death.

