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FLORIDA STATE UNIVERSITY LAW REVIEW

EXEMPTING THE MENTALLY RETARDED FROM THE DEATH PENALTY:
A COMMENT ON FLORIDA'S PROPOSED LEGISLATION

V. Stephen Cohen

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I. Introduction

In 1989, in *Penry v. Lynaugh,* the United States Supreme Court held that the eighth amendment's cruel and unusual punishment clause does not prohibit the execution of a mentally retarded person convicted of a capital felony. Recognizing the unique plight faced by the mentally retarded, four states reacted to the Court's decision by passing legislation explicitly exempting these individuals from the death penalty. In 1990 and 1991, similar legislation was proposed in Florida, but died before being considered by the full House and Senate. The legislation will be proposed again in 1992.

The purpose of this Comment is to discuss legislation prohibiting the imposition of the death penalty on the mentally retarded and to provide reasons for this type of legislation in Florida. The Comment begins by defining mental retardation, giving a brief history of the treatment of the mentally retarded, and discussing certain characteristics exhibited by the mentally retarded that have important implications for the criminal justice system. Next, the Comment gives an overview of Supreme Court decisions relevant to the issues of mental retardation and the death penalty and the legislative reactions to *Penry.* Finally, the Comment analyzes Florida's proposed legislation and explains why the Florida Legislature should pass the bill.

2. U.S. CONST. amend. VIII.
5. *See infra* note 129. The bills' legislative sponsors were Representative Dixie N. Sansom, Republican, Satellite Beach, and Senator Bob Johnson, Republican, Sarasota.
II. BACKGROUND

A. Mental Retardation Defined

In order to grasp the unique issues facing the courts and legislatures concerning the mentally retarded, one must understand what mental retardation means. The American Association on Mental Deficiency (AAMD), the principal professional organization in the field of mental retardation research, defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." Intellectual functioning is measured by Intelligence Quotient (IQ) testing. A person with an IQ of seventy or below functions at a significantly subaverage intellectual level. Adaptive behavior refers to one's ability to meet the accepted standards of learning, maturation, personal independence, social responsibility and communication, and daily living skills expected of one's age level and cultural group. Individuals must exhibit an IQ of seventy or below and display significant limitations in adaptive behavior before their eighteenth birthday to be considered mentally retarded. The AAMD’s definition has been adopted by American courts, legislatures, and other professional organizations.

The effects of mental retardation on an individual’s ability to function in the everyday world depends, to a great extent, upon intellectual deficits. Four categories of mental retardation are recognized based on cognitive ability. The categories are mild (IQ 50-55 to 70),

7. AM. ASS’N ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 1 (H. Grossman ed. 1983) [hereinafter AAMD]. There are numerous causes of mental retardation, including biological and environmental factors. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 29 (3d ed. 1987) [hereinafter DSM III].

8. AAMD, supra note 7, at 1. IQ tests include the Wechsler Intelligence Scale for Children—Revised, Stanford Binet, and Kaufman Assessment Battery for Children. DSM III, supra note 7, at 28.

9. AAMD, supra note 7, at 1.

10. DSM III, supra note 7, at 28-29. The devices used to measure adaptive behavior include the Vineland Adaptive Behavior Scales and the American Association of Mental Deficiency Adaptive Behavior Scales. Id. at 29.

11. The period of time between conception and the eighteenth birthday defines "the developmental period." AAMD, supra note 7, at 1.


14. See, e.g., DSM III, supra note 7, at 32-33.

15. AAMD, supra note 7, at 13.
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moderate (IQ 35-40 to 50-55), severe (IQ 20-25 to 35-40), and profound (IQ below 20-25).16

"Borderline" mental retardation refers to an IQ between 70 and 85.17 People within this range are no longer considered mentally retarded.18 These classifications can be misleading, however. For example, people with "mild" mental retardation are commonly confused with those who were previously labeled "borderline" retarded.19 Attorneys and judges, who are unfamiliar with mental retardation, often share the same confusion and "incorrectly believe an individual who is mildly mentally retarded is not seriously disabled and requires no special attention from the criminal justice system."20

It is important to remember that the terms "mild," "moderate," "severe," and "profound" are simply comparative words used by mental health professionals to distinguish between different categories of the mentally retarded.21 Whether a mentally retarded individual is classified as mild or as profound, the substantial limitations in cognitive ability and adaptive behavior produced by mental retardation severely reduce the ability of every mentally retarded person to perform in the everyday world.22

B. History of Treatment of the Mentally Retarded in the United States

In the past, mental retardation and the problems associated with it were largely misunderstood. This ignorance led to stereotyping, discrimination, and mistreatment of retarded people in America that has been described by the United States Supreme Court as "grotesque."23

In the early part of this century, the mentally retarded were viewed as the "principal source of criminal and immoral behavior" in society.24 To deal with this perceived threat, sterilization and permanent

16. Id. Mild, moderate, severe, and profound mental retardation account for 85%, 10%, 3%-4%, and 1%-2%, respectively, of the total population of mentally retarded individuals. DSM III, supra note 7, at 32-33.
18. Id. at 732.
19. Id.
20. Id. at 731 n.23.
21. Id. at 731.
22. See infra notes 33-56 and accompanying text.
segregation from society were proposed to contain mental retardation and to protect the "normal" population. Between 1907 and 1931, twenty-nine states enacted mandatory eugenic sterilization laws aimed at curbing mental retardation.

By the 1950s, attitudes toward the mentally retarded in the United States began to change. There was common agreement that no significant link existed between mental retardation and criminality. The 1960s and 1970s saw a great deal of progress toward recognizing the rights of mentally retarded citizens. President Kennedy's Panel on Mental Retardation began to focus the public's attention on the unique needs of the mentally retarded. The Education of the Handicapped Act mandated public education for mentally retarded children that "emphasizes special education and related services designed to meet their unique needs." Other legislation "outlawed discrimination against the mentally retarded in federally funded programs" and "provided the retarded with the right to receive 'appropriate treatment, services, and habilitation' in a setting that is 'least restrictive of [their] personal liberty.'"

III. THE MENTALLY RETARDED AND THE CRIMINAL JUSTICE SYSTEM

Although it is clear that great strides have been made toward understanding mental retardation and the special needs associated with it, America's criminal justice system is still struggling with the unique issues presented by mentally retarded defendants. The safeguards implemented to protect defendants with "normal" intelligence from unfair treatment within the criminal justice system are not adequate to protect the mentally retarded. In addition, it is important to remember that mental retardation involves more than subaverage intelligence. Professors James W. Ellis and Ruth A. Luckasson have

25. Id. at 419 (citing P. TYOR & L. BELL, CARING FOR THE RETARDED IN AMERICA: A HISTORY 105-22 (1984)).
26. Blume & Bruck, supra note 17, at 751-52 (citing J. LANDMAN, HUMAN STERILIZATION 303 (1932)); Ellis & Luckasson, supra note 24, at 419 n.25.
27. Ellis & Luckasson, supra note 24, at 420.
28. Id. (citing President's Panel on Mental Retardation, Report of the Task Force on Law 31-41 (1963)).
30. Id. § 1400(c).
32. Id. (citing Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6010(1), (2)).
33. For an in-depth discussion of the mentally retarded in the criminal justice system, see Ellis & Luckasson, supra note 24.
identified several traits, common among people with mental retardation, that have “important implications for the criminal justice system.”34

First, mental retardation impairs communication skills and memory.35 The communication ability of the mentally retarded ranges from no expressive or receptive skills to communication skills that appear normal.36 However, even retarded individuals whose communication skills appear normal may not be reliable participants in court proceedings.37 The reduced intellectual ability of the mentally retarded makes understanding simple questions difficult for them. Further, the mentally retarded are “predisposed to ‘biased responding’ or answering in the affirmative questions regarding behaviors they believe are desirable, and answering in the negative questions concerning behaviors they believe are prohibited.”38 Thus, the way a question is posed by a police officer, lawyer, or judge can inadvertently—or intentionally—cause an accused mentally retarded person to provide an inaccurate answer.39 Also, many mentally retarded people have limited memory recall,40 making it difficult for those mentally retarded persons charged with a crime to aid in their own defense.41

Second, many mentally retarded people have poor impulse control, which appears to be related to problems in attention.42 Often they have difficulty weighing the consequences of their actions, and they act without considering those consequences.43 The limited attention spans exhibited by many mentally retarded people impede their ability to focus on specific events and impede their ability to understand the gravity of certain situations.44

Third, people with mental retardation often “have incomplete or immature concepts of blameworthiness and causation.”45 Many mentally retarded people place blame where it is not deserved and are una-

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34. Ellis & Luckasson, supra note 24, at 427-32.
35. Id. at 428-29.
36. Id. at 428.
37. See id.
38. Id.
39. Id.
40. Id. “This is particularly true of events which the individual had not identified as important.” Id.
41. Id. at 428-29.
42. Id. at 429. These problems involve impaired attention span, focus, and selectivity in the attention process. Id.
43. Blume & Bruck, supra note 17, at 733.
44. Ellis & Luckasson, supra note 24, at 429.
45. Id.
ble to understand the link between an action and its consequences.46 People with mental retardation can tell "right" from "wrong."47 They cannot, however, apply these abstract concepts to specific factual settings.48

Fourth, mental retardation affects self-concept and self-perception.49 The mentally retarded often overrate their own skills, "either out of a genuine misreading of their own abilities or out of defensive-ness about their handicap."50 Also, mentally retarded individuals commonly deny their disability.51 Many individuals with mental retardation are effective at hiding their condition, making detection difficult.52

Finally, most mentally retarded people do not have the same general knowledge as people with "normal" intelligence.53 The limited cognitive ability of the mentally retarded and the special education programs designed for them do not allow people with mental retardation to gain a broad, general understanding about the world.54

In summary, mental retardation is a severe and permanent mental impairment that affects almost every aspect of a mentally retarded person's life. . . . [T]o be mentally retarded is to be forced to live in a "nonretarded" world which neither understands nor allows for such a crippling mental handicap. And that means the life of a mentally retarded person, left to his own devices, is filled with confusion, frustration, shame, and fear. The difference in the cognitive abilities of a mentally retarded person, as opposed to one of "normal intelligence," is sufficient to make the difference one of kind, not of degree.55

When one considers these characteristics, it is easy to see why the criminal justice system, created for people with "normal" intelligence, "is often an inhospitable place for the mentally retarded defendant."56

46. Id. at 429-30. Similarly, many mentally retarded people will "cheat to lose," accepting blame for a crime they did not commit just to gain the favor of their accuser. Id. at 430.

47. Id. at 441 n.137 (citing Empirical Study, The Mentally Retarded Offender in Omaha-Douglas County, 8 CREIGHTON L. REV. 622, 646 (1975)).

48. Id.

49. Id. at 430-31.

50. Id. at 430.

51. Id. This denial works against retarded people, particularly in a courtroom setting. Id.

52. See id. at 431.

53. Id.

54. Id.

55. Blume & Bruck, supra note 17, at 734 (emphasis added).

56. Id. at 735.
IV. THE DEATH PENALTY

In 1972, in *Furman v. Georgia*, the United States Supreme Court struck down Georgia's death penalty statute. The Court found that the sentencing procedures provided by the statute created a substantial risk that the death penalty would be inflicted in an arbitrary, capricious, and possibly discriminatory manner. Thus, the statute, as applied, violated the eighth amendment's prohibition against cruel and unusual punishment. *Furman* effectively invalidated every death penalty statute in existence at the time.

In 1976, the Court revisited the capital punishment issue. In *Gregg v. Georgia*, the Court upheld a modified version of Georgia's death penalty statute. The modified statute provides a "bifurcated proceeding" in capital punishment cases. During the first phase, the trier of fact determines guilt or innocence. Upon a verdict or plea of guilty of one of the enumerated capital offenses, the same trier of fact, in a separate proceeding, considers the imposition of the death penalty. This second phase is commonly referred to as the "sentencing phase." To impose the death penalty, at least one of ten aggravating factors must be present. These factors are weighed against mitigating factors to determine the propriety of the death penalty for a specific defendant. The statute provides an automatic appeal to the Georgia Supreme Court.

57. 408 U.S. 238 (1972).
58. *Id.* at 239-40.
59. *See id.* at 255-57 (Douglas, J., concurring). The statute gave the sentencer virtually unbridled discretion in sentencing decisions. *Id.*
60. *Id.* at 239-40.
61. The Court reexamined the issue in five companion cases: *Gregg v. Georgia*, 428 U.S. 153 (1976); *Profitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); and *Roberts v. Louisiana*, 428 U.S. 325 (1976). The statutes in *Gregg, Profitt,* and *Jurek* provided bifurcated capital punishment proceedings and were upheld by the Court. The statutes in *Woodson* and *Roberts*, however, were struck down because they provided for a mandatory death sentence for certain crimes.
63. *Gregg*, 428 U.S. at 163.
64. *Id.* at 163-64.
65. *Id.* at 164-66. The aggravating factors include: prior convictions, a murder committed during the commission of a capital felony, a high level of danger to the public, whether the act was committed for monetary gain, whether the victim was involved in law enforcement, whether the offender caused another to commit the crime, whether the act involved torture, whether the victim was a peace officer or firefighter, whether the defendant was an escaped convict, or whether the murder was committed to avoid arrest. *Ga. Code Ann.* § 27-2534.1(b) (Supp. 1975).
67. *Id.* at 166.
Gregg made it clear that the death penalty is not *per se* unconstitutional. Imposition of the death penalty in specific instances does not violate society’s “evolving standards of decency,” the standard used by the Court to test the validity of a punishment under the eighth amendment. The Court looks primarily to existing state legislation to define these “evolving standards,” and the decision in Gregg emphasizes that, when considering capital punishment, great deference will be given to state legislatures.

The Supreme Court’s decisions after Gregg have narrowed the class of defendants upon which the death penalty may be imposed. The Court has held that the execution of youths under the age of sixteen, and of the insane, violates the eighth amendment. The Court, however, has refused to extend this same protection to the mentally retarded.

A. Capital Punishment and Youth

In *Eddings v. Oklahoma,* the Supreme Court recognized a defendant’s youth as an important mitigating factor in a death penalty proceeding. The Court found that “youth is more than a chronological

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68. *Id.* at 169.
69. *Id.* at 173 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
70. *Id.* at 174-76.
71. *Id.* at 186-92. The Court stated:

In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

*Id.* at 186-87.

74. In *Ford,* Justice Powell offered what has become the accepted definition of insane people: “those who are unaware of the punishment they are about to suffer and why they are to suffer it.” *Id.* at 422 (Powell, J., concurring).

“Insanity” is a common law term. Today the insane are commonly referred to as “mentally ill.” Mental illness and mental retardation are often confused. They are, however, different disorders. Mental illness has nothing to do with intellectual capacity. The mentally retarded are, by definition, individuals with low intelligence levels. Mental illness can be sporadic and, with proper treatment, can often be cured. Mental retardation is permanent. While the mentally retarded can usually be trained to live and function in society without constant supervision, a person with mental retardation can never be cured of the condition. See Ellis & Luckasson, *supra* note 24, at 423-24.

76. 455 U.S. 104 (1982).
77. *Id.* at 115.
fact. It is a time and a condition of life when a person may be most susceptible to influence and to psychological damage.\textsuperscript{778}

Six years later, the Court again considered the special circumstances of youth. In \textit{Thompson v. Oklahoma},\textsuperscript{79} the Court held that the eighth amendment's ban against cruel and unusual punishment prohibits the execution of children under the age of sixteen.\textsuperscript{80} In reaching its conclusion, the Court looked to society's evolving standards of decency,\textsuperscript{81} the diminished culpability of minors,\textsuperscript{82} and the recognized goals of capital punishment.\textsuperscript{83}

Regarding the evolving standards of decency, the Court looked at legislative treatment of children, at the behavior of juries when dealing with children, and at "societal values" to determine that a national consensus exists against executing this class of citizens.\textsuperscript{84} The Court next found that adolescents lack the culpability necessary to warrant society's ultimate punishment.\textsuperscript{85} "[A]dolescents as a class are less mature \ldots than adults."\textsuperscript{86} Adolescents are also less blameworthy.\textsuperscript{87} Because of inexperience, less education, and less intelligence, children are unable to evaluate consequences and are more easily motivated by emotion and by peer pressure.\textsuperscript{88}

Finally, the Court considered the two principal social purposes of the death penalty and concluded that they were not furthered by the execution of this class of persons.\textsuperscript{89} The Court found that "[g]iven the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children," the goal of retribution is not served by executing children under the age of sixteen.\textsuperscript{90} The deterrence rationale is equally unacceptable, as most children under the age of sixteen, when weighing the consequences of an act, cannot make the type of cost-benefit analysis necessary to be deterred.\textsuperscript{91} Accordingly, the Court exempted children under the age of

\begin{itemize}
\item[78.] \textit{Id.}
\item[79.] 487 U.S. 815 (1988).
\item[80.] \textit{Id.} at 838. While the Court has shown leniency to children under the age of 16, it has refused to exempt children over the age of 16. \textit{Stanford v. Kentucky}, 492 U.S. 361 (1989).
\item[81.] \textit{Thompson}, 487 U.S. at 821.
\item[82.] \textit{Id.} at 833-38.
\item[83.] \textit{Id.} The principal goals of capital punishment are retribution and deterrence. \textit{See also} \textit{Gregg v. Georgia}, 428 U.S. 153, 183 (1976).
\item[84.] \textit{Thompson}, 487 U.S. at 821-33.
\item[85.] \textit{Id.} at 834-38.
\item[86.] \textit{Id.} at 834.
\item[87.] \textit{Id.} at 835.
\item[88.] \textit{Id.}
\item[89.] \textit{Id.} at 836-38.
\item[90.] \textit{Id.} at 836-37.
\item[91.] \textit{Id.} at 837-38.
\end{itemize}
sixteen from the death penalty. The Court reached the same result when considering the execution of insane people.

B. Capital Punishment and the Insane

In *Ford v. Wainwright*, the Court held that the execution of an insane individual constitutes cruel and unusual punishment. However, there was no consensus regarding the rationale behind the holding. The plurality noted that common law prohibited execution of the insane and that most state legislatures exempt the insane from the death penalty. The Court also noted that imposition of the death penalty could have no retributive or deterrent effect on people who can neither comprehend why they are being executed nor participate in their own defense. Finally, the Court found that executing an insane individual simply offends humanity.

Although the Supreme Court has interpreted the eighth amendment to ban the execution of the insane and of children under the age of sixteen, it has declined to extend the same protections to the mentally retarded, a similar class of defendants.

C. Capital Punishment and Mental Retardation: Penry v. Lynaugh

In *Penry v. Lynaugh*, the Court held that executing a mentally retarded individual is not a *per se* violation of the eighth amendment. John Paul Penry was convicted in Texas of brutally murdering his

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93. *Id.* at 409-10.
94. *Id.* at 407. The Court stated: "the reasons for the rule are less sure and less uniform than the rule itself." *Id.*
95. *Id.* at 406-07.
96. *Id.* at 408-09 n.2.
97. *Id.* at 409.
98. *Id.*
99. Many scholars argue that the same justifications for exempting youth and the insane from capital punishment are applicable to the mentally retarded. Like youth and the insane, people with mental retardation exhibit lesser culpability and are often unable to understand the consequences of an action. Further, it is doubtful whether the goals of retribution and deterrence can legitimately be applied to the mentally retarded. Finally, the concept of "mental age" is currently being debated in the literature. This theory proposes that an adult with the intellectual development of a child "cannot function in terms of reasoning and understanding beyond the level of an average child of the age at which the adult's mental development is assessed." Blume & Bruck, *supra* note 17, at 747; see also Ellis & Luckasson, *supra* note 24, at 432-44. Thus, just as children are exempted, the mentally retarded who function at the level of children should also be exempted.
neither intellectual or moral, and was sentenced to death. At various times in his life, measurements of Penry's IQ had yielded scores between fifty and sixty-three. He had the mental age of a child of six and one-half years and the social maturity of a child of nine or ten years.

In reaching its conclusion, the Court again noted that cruel and unusual punishment recognizes the "evolving standards of decency that mark the progress of a maturing society." To define those evolving standards, the Court examined both capital punishment statutes dealing with the mentally retarded and public opinion polls. The Court noted that, at the time of the Penry decision, only Georgia's Legislature had exempted the mentally retarded from capital punishment. The Court also noted that public opinion polls conducted in Texas, Florida, and Georgia showed that the majority of people oppose executing the mentally retarded. After considering these facts, the Court stated that "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."

The Court in Penry also discussed the accepted goals of punishment. For retribution to be a valid goal, a nexus between the punishment and the defendant's blameworthiness must exist. The Court recognized that mental retardation does diminish an individual's culpability and that most states recognize mental retardation as a mitigating factor in criminal prosecutions. However, the abilities of people with mental retardation vary widely. Although the Court admitted that it would be cruel and unusual to execute an individual who is

101. Id. at 310. While the Court found that it is not unconstitutional to execute a mentally retarded defendant, the case was remanded because the Court determined that the jury, due to faulty jury instructions, had been unable to give full effect and consideration to the mitigating evidence brought forth by Penry. Id. at 328.
102. Id. at 307.
103. Id. at 308. Penry was 22 years old at the time of the crime.
104. Id. at 330-31 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
105. Penry, 492 U.S. at 331-35. The Court considered state legislation and data regarding jury sentencing behavior to be the best and most objective evidence of societal values. Id. at 331.
108. Id. at 335.
109. Id. at 335-36.
110. Id. at 336.
111. Id. at 337-38.
112. Id. at 338.
severely or profoundly retarded, it refused to hold that no mentally retarded person could have the requisite culpability to be sentenced to death.

Thus, the Supreme Court refused to provide a blanket exemption from the death penalty for the mentally retarded. Although *Penry* does offer hope for people exhibiting severe and profound retardation, the decision does nothing to protect people with mild or moderate retardation.

In *Penry*, the Court stood by its "long-standing belief that most aspects of capital punishment are properly questions for the states." After *Penry*, the issue of imposing the death penalty on the mentally retarded was raised in state legislatures across the country.

V. LEGISLATIVE RESPONSES TO *PENRY*

In reaction to *Penry*, Kentucky, Maryland, New Mexico, and Tennessee passed legislation exempting mentally retarded people from the death penalty. As previously noted, Georgia passed similar legislation in 1988.

The statutes' chief provisions are similar. They expressly adopt the AAMD's definition of mental retardation and prohibit the execution of people who come within that definition. It is important to note that none of these statutes preclude punishing the mentally retarded for capital offenses. In fact, every version except Tennessee's provides a mandatory sentence of life in prison for mentally retarded indivi-

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113. *Id.* at 333. The Court stated:

The common law prohibition against punishing "idiots" [people who cannot form the requisite intent to commit a crime or who cannot understand the difference between good and evil] for their crimes suggests that it may indeed be "cruel and unusual" punishment to execute persons who are profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions.

*Id.*

114. *Id.* at 340.


117. See GA. CODE ANN. § 17-7-131(j) (Supp. 1988). The Georgia statute was a response to public outrage over the 1986 execution of Jerome Bowden, a mentally retarded man with an IQ of 59.

118. See GA. CODE ANN. § 17-7-131(a)(3) (Supp. 1991); KY. REV. STAT. ANN. § 532.130(2) (Michie/Bobbs-Merrill 1990); MD. ANN. CODE art. 27, § 412(e)(3) (Supp. 1990) (Maryland's statute extends the developmental period to the age of 22); N.M. STAT. ANN. § 31-20A-2.1(A) (1991); TENN. CODE ANN. § 39-13-203.
duals convicted of capital crimes. The statutes simply recognize the manifest unfairness that results from subjecting individuals with limited culpability and limited moral blameworthiness to society's ultimate penalty.

A. Mental Retardation and the Death Penalty in Florida

Florida's death penalty statute is similar to the statute that was challenged and upheld in Gregg v. Georgia. It provides a bifurcated procedure with the initial step determining guilt or innocence and the second, separate step determining the sentence. During the sentencing phase, the same trier of fact is to take into consideration the aggravating and mitigating circumstances presented by the parties and determine the appropriateness of the death penalty. In Florida's scheme, mental retardation is not an explicit mitigating factor.

The Florida Supreme Court has not decided whether executing the mentally retarded constitutes cruel and unusual punishment under the Florida Constitution. Thus far, the court has avoided ruling on the issue. However, the cases dealing with the mentally retarded and the death penalty that have been decided "indicate that the [court] views mental retardation as merely one aspect of the defendant's character. It has not yet come to grips with the reality that this learning disorder defines the person."'

B. Florida's Proposed Legislation

In 1990 and in 1991, legislation was introduced in both the Florida House of Representatives and the Florida Senate that would have prohibited the execution of the mentally retarded. The language in the original versions of the proposed bills was similar to the language of legislation in the five states that have already exempted the mentally retarded from capital punishment. Senate Bill 2226 (1991) would have

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120. See FLA. STAT. § 921.141 (Supp. 1990).
121. Id. § 921.141(1).
122. Id. § 921.141(3), (5), (6).
124. Id. at 14.
125. Fla. SB 2226 (1991); Fla. HB 657 (1991); Fla. CS for HB 657 (1991); Fla. HB 3029 (1990); Fla. SB 1242 (1990). The bills' legislative sponsors were Representative Dixie N. Sansom, Republican, Satellite Beach, and Senator Bob Johnson, Republican, Sarasota.
amended section 921.141(1)(a), Florida Statutes, to read in pertinent part:

Upon conviction or adjudication of guilt of a defendant of a capital felony, the court, upon motion of the defendant, shall conduct a separate . . . proceeding to determine whether the defendant should be sentenced to death or life imprisonment without consideration of a sentence of death due to the defendant’s allegation that he suffers from retardation, as defined in s. 393.063. A defendant who establishes by a preponderance of evidence that he meets the definition in s. 393.063 shall be sentenced to life imprisonment without the possibility of parole for a minimum of 25 years. . . . A determination of retardation made pursuant to this paragraph does not act as an adjudication of incompetence or dismissal of any criminal charge or conviction.126

Section 393.063, Florida Statutes, cited in the Senate bill, deals with public health and adopts the AAMD’s definition of mental retardation.127

In both 1990 and 1991, the proposed legislation met strong opposition from Florida prosecutors128 and was killed before it reached the full House and Senate.129 The prosecutors believed that the bill, if passed, would provide anti-death penalty activists a means of further delaying an already overburdened and slow-moving system.130 State prosecutors also fear that individuals who are not mentally retarded will claim to have the condition to avoid the death penalty.131 This

126. Fla. SB 2226 § (1)(a) (1991). House Bill 657 (1991), the companion legislation to Senate Bill 2226, was similar to the Senate bill in all relevant respects. The House bill, however, reached the Committee on Criminal Justice before it died on the calendar on May 2, 1991. FLA. LEGIS., HISTORY OF LEGISLATION, 1991 REGULAR SESSION, HISTORY OF HOUSE BILLS at 62, HB 657. The Senate bill died in the Committee on Criminal Justice on the same day. Id., HISTORY OF SENATE BILLS at 266, SB 2226. The Committee amended the House bill by redefining mental retardation to include only those individuals with IQs of 65 or less. Fla. CS for HB 657 (1991). The revised definition contained no requirement for limitations in adaptive behavior. The basis for this revised definition is unclear. As discussed in section II(A) of this Comment, the AAMD’s definition of mental retardation, included in the Senate bill and the original House bill, is regarded as the accepted definition of mental retardation.
127. See supra text accompanying note 7.
129. See FLA. LEGIS., HISTORY OF LEGISLATION, 1991 REGULAR SESSION, HISTORY OF HOUSE BILLS at 62, HB 657; id., HISTORY OF SENATE BILLS at 266, SB 2226; FLA. LEGIS., HISTORY OF LEGISLATION, 1990 REGULAR SESSION, HISTORY OF HOUSE BILLS at 453, HB 3029; id., HISTORY OF SENATE BILLS at 117, SB 1242.
131. Id.
could confuse issues and make it more difficult to impose the death penalty on deserving defendants. Finally, Florida prosecutors argue that the safeguards built into the current system are adequate to protect the mentally retarded from the death penalty. Despite the prosecutors' fears, similar legislation will be proposed in 1992.

Florida should follow the lead of the five states that have already passed this progressive legislation and adopt the bill. As discussed below, public opinion in Florida disfavors imposition of capital punishment on the mentally retarded. Neither the goal of deterrence nor the goal of retribution is furthered by the execution of a retarded person. Further, Florida's criminal justice system is ill-equipped to deal with the special issues presented by mentally retarded defendants. The system cannot ensure that a mentally retarded individual will receive the fair trial that is an absolute requirement when any defendant faces society's most severe penalty.

1. Public Opinion

The majority of Floridians oppose execution of mentally retarded defendants. While polls show that eighty-four percent of Florida's population favor capital punishment, the same polls show that seventy-one percent oppose the death penalty for the mentally retarded. Further, Florida's treatment of its retarded citizens over the years has become increasingly understanding and compassionate. The Florida Legislature has created special regulations to govern the treatment of the mentally retarded, and "within the last five years the legislature has enacted a 'bill of rights' for the mentally ill or mentally retarded, which seeks to maintain the dignity and assure treatment for such persons." This evidence shows an evolving trend in Florida toward recognizing the unique circumstances of the mentally retarded and toward providing the special protection they require.

2. Deterrence and Retribution

Imposition of the death penalty on a mentally retarded defendant does not further the legitimate penal goals of capital punishment—

132. Id.
133. Id.
134. See supra note 6. Senate Bill 42, proposed for 1992, is the same as 1991's Senate Bill 2226 in all relevant respects.
136. Davis, supra note 123, at 15.
137. Id. (quoting Fla. Stat. § 916.107 (1990)).
deterrence and retribution.\textsuperscript{138} The threat of execution cannot deter a mentally retarded defendant. To be deterred by execution, one must be able to premeditate the crime and be capable of understanding the penalty. The limited intelligence and impulsive behavior exhibited by mentally retarded persons renders them incapable of the degree of planning necessary for the imposition of the death penalty.\textsuperscript{139} In addition, mentally retarded persons cannot appreciate the finality of death.\textsuperscript{140} Thus, applying the deterrence rationale to the mentally retarded is dubious.

The other accepted goal of capital punishment is retribution.\textsuperscript{141} Inherent in the idea of punishment as retribution is that the community accepts the punishment as fair and that "the punishment is the just deserts of the offense."\textsuperscript{142} As previously discussed, a majority of Floridians oppose the imposition of the death penalty on the mentally retarded. To determine whether execution is a fair punishment for a person, however, requires an examination of "personal responsibility and moral guilt."\textsuperscript{143} The debilitating characteristics of mental retardation severely reduce the level of personal responsibility for certain acts that can be attributed to a mentally retarded individual.\textsuperscript{144} The mentally retarded display lower intelligence, limited communication and memory skills, and less worldly knowledge than people with "normal" IQs.\textsuperscript{145} Further, the mentally retarded are easily manipulated and vulnerable to suggestion.\textsuperscript{146} Finally, the incomplete moral development caused by mental retardation reduces their culpability.\textsuperscript{147} For these reasons, the goal of retribution cannot validly be achieved by their execution.

3. \textit{Problems Within the Criminal Justice System}

Florida's criminal justice system, designed for people with "normal" intelligence, is ill-equipped to deal with mentally retarded defen-
dants. The current procedures cannot ensure that the rights of the mentally retarded will be properly protected.

Few police officers, lawyers, or judges have any training in dealing with the mentally retarded. Thus, mental retardation often goes undetected throughout the entire criminal justice process. Even when mental retardation is recognized, the characteristics unique to the mentally retarded place them at a severe disadvantage in the criminal justice system.

Mentally retarded defendants often waive their constitutional rights without understanding the implications of their statements. Also, the mentally retarded often confess more quickly. They tend to be eager to please authority figures and can often be easily manipulated. The incomplete concepts of causation and of culpability exhibited by a person with mental retardation always places a cloud over the validity of a confession.

Mental retardation hampers a defendant's ability to communicate with police officers, lawyers, and the court. Commonly, such defendants cannot understand the questions put to them, and their vague, unresponsive answers often lead judges and juries to view a mentally retarded defendant as simply recalcitrant and uncooperative.

Finally, mentally retarded defendants often are unable to comprehend why they were thrown into the system in the first place. Once in, their condition renders them unable to understand the proceedings that will determine their fate. Their impaired intellectual ability and limited memory deny them the ability to participate in their own defense and severely hamper an attorney's efforts on their behalf. "Thus, there is a substantial possibility that a mentally retarded person may be convicted of a criminal offense, or even sentenced to death, in a proceeding in which he is a virtual non-participant." To sentence a mentally retarded person to death under these circumstances is simply not acceptable in a society that values human life and the integrity of its legal system so greatly.

148. Blume & Bruck, supra note 17, at 733-34.
149. Id. at 735.
150. See supra text accompanying notes 33-56.
151. See Ellis & Luckasson, supra note 24, at 446.
152. See id. at 445-52.
153. Id. at 446.
154. Id. at 445-52.
155. See supra text accompanying notes 35-41.
156. Blume & Bruck, supra note 17, at 735.
157. Id.
VI. CONCLUSION

Treatment of the mentally retarded in our society is becoming increasingly compassionate and understanding. Despite this trend, the criminal justice system remains in the Dark Ages, imposing society's severest punishment on individuals with limited intelligence and culpability—and imposing it without providing any special protection. The United States Supreme Court has made it clear that the job of protecting the mentally retarded from the death penalty lies with the state legislatures.

Five states have exempted the mentally retarded from the death penalty. Florida should join them. Florida's proposed legislation would not exempt the mentally retarded from punishment, nor would it weaken Florida's death penalty statute. The legislation simply recognizes that it is unduly harsh to execute a mentally retarded person instead of applying other penalties that will both punish the guilty and protect society.