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EXECUTION OF THE MENTALLY RETARDED: A PUNISHMENT WITHOUT JUSTIFICATION

PHILIP L. FETZER*

At the age of twenty-eight, Limmie Arthur does not know the alphabet. He has the mental ability of a child ten to twelve years old. After a recent court appearance Arthur was happy. He did not understand that the judge had refused his plea for a new trial or for a reduction of his sentence. He has been sentenced to die in South Carolina's electric chair for the murder of his neighbor. 1 With an IQ of sixty-five, Limmie Arthur is mentally retarded. 2 Between April 1984 and August 1987, at least three people like Limmie Arthur were executed. 3 What purposes are served by executing people of very low intelligence?

Death penalty proponents have offered three reasons for executing those who perpetrate particularly heinous murders: (1) protection of society; (2) deterrence; and (3) retribution. Because none of these traditional justifications reasonably applies in the cases of mentally retarded defendants, imposition of capital

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1. The South Carolina Supreme Court reversed Arthur's death sentence in November 1988. The court did not address any issues raised by imposition of the death penalty against the mentally retarded. Instead, it held that Arthur had not voluntarily waived his right to a jury trial during the sentencing phase of the proceedings against him. See State v. Arthur, --- S.C. ---, 374 S.E.2d 291 (1988). Although Arthur's counsel stated that Arthur had decided to waive his right to jury trial during sentencing, the court held that such statements were insufficient to constitute a knowing and intelligent waiver of the right. See State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987). Before accepting a proffered jury trial waiver in a criminal proceeding, the court said that the trial court must conduct "its own direct and independent interrogation of the defendant" to ensure that the waiver is knowing and voluntary. See Arthur, --- S.C. at ---, 374 S.E.2d at 294. On remand Arthur was sentenced to life.


punishment against them should be prohibited as cruel and unusual within the meaning of the eighth amendment.⁴

Execution affords society no more physical protection than a life sentence without parole. Therefore, any execution based on the first rationale constitutes an excessive punishment and is "nothing more than the pointless infliction of suffering."⁵

Deterrence is based on the argument that potential criminal offenders will weigh the costs and benefits of their crimes and choose not to commit the offenses because of the punishment that could result.⁶ But how strong is the deterrence argument when applied to people of Limmie Arthur's mental ability? Do the mentally retarded weigh the consequences of their actions before committing crimes? More importantly, do they have the ability to foresee the likely consequences of their actions? Of course, execution of the mentally retarded possibly might deter others who suffer from no mental handicap from committing an offense. One must wonder, however, whether society wishes to sacrifice the mentally retarded offender for any increment of deterrence such an execution might bring.

Retribution is another critical justification for the death penalty.⁷ Certain crimes arouse public emotion to such a degree that vengeance seems appropriate. Nevertheless, does the retributive purpose apply equally to people of normal intelligence and to those whose intellectual ability places them in the lowest three percent of the population?⁸

This article is divided into four sections: (1) a brief historical and current review of the treatment of the mentally retarded; (2) an examination of the interaction between mentally retarded offenders and the criminal justice system; (3) an analysis of the leading opinions on the rights of the mentally handicapped; and (4) arguments against execution of the mentally retarded. To appreciate the argument against capital punishment for the mentally handicapped, one must have some knowledge of their past experience in society. One also must understand cur-

⁵ Id. at 279 (Brennan, J., concurring).
⁸ See infra text accompanying notes 30-35.
rent views about the retarded; otherwise, the characteristics that distinguish retarded defendants from others accused of capital crimes, making execution inappropriate in their cases, may be lost.

The criminal justice system currently does not provide procedures specifically designed to protect the retarded. For example, competency hearings, which exist to protect the rights of individuals who may be unable to assist in their own defense, are held almost exclusively for mentally ill defendants. Such hearings do not adequately address the legitimate needs of the mentally retarded. Even so, two recent federal decisions in civil cases support extension of rights for the retarded into the criminal field.9 Furthermore, the Supreme Court has issued opinions on capital punishment that are relevant to the execution of the mentally handicapped.10 With an estimated 250 mentally handicapped convicts on death row,11 now is the time to examine the argument against their prospective executions.

I. MENTAL RETARDATION IN THE UNITED STATES

Before the turn of the century, little effort was made to distinguish between criminals, the mentally ill, and the mentally retarded.12 People with very low intellectual abilities commonly were described as “idiots” or “imbeciles.”13 These labels, which at first were technical references, became terms of derision that are still used today.14


11. See Marcus, supra note 2, at A4, col. 2 (estimates from a survey by the Clearinghouse on Georgia Prisons and Jails).


13. 1 The History of Mental Retardation 13-16 (M. Rosen, G. Clark, & M. Kivitz eds. 1976) [hereinafter History].

14. See Cleburne Living Center, Inc. v. City of Cleburne, 726 F.2d 191, 197 (5th Cir. 1984), aff’d in part and vacated in part, 473 U.S. 432 (1985). Even the court that recognized the mentally handicapped people’s reaction to derisive terminology referred to “mental retardates” in its opinion. See id. at 197; see also Comment, We Have Met
At the beginning of the twentieth century, society viewed the mentally retarded as a menace to be controlled rather than as a class of persons needing special treatment. Between 1907 and 1931 twenty-nine states adopted legislation to prevent mentally retarded people from procreating, and the Supreme Court upheld "eugenic sterilization" laws. During this period the treatment of the mentally retarded was both demeaning and hostile.

Justice Marshall recently described the treatment of mentally handicapped Americans in the first half of the century as a "regime of state-mandated segregation and degradation" that "in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." Pejorative terms such as "feebleminded" and "moron" were still applied to the mentally retarded in the 1920s. Eventually, however, attitudes did shift. By the 1950s most experts agreed that no clear link existed between retardation and criminal behavior. With strong support from both President Kennedy and President Johnson, the mentally handicapped began to receive significant, positive recognition for the first time.

The American Association on Mental Deficiency (AAMD)
defines mental retardation as "[significant] subaverage general intelligence functioning resulting in or associated with concurrent impairments in adaptive behavior and manifested during the developmental period."\textsuperscript{21} The term "retarded" applies to people with a measured IQ below sixty-eight on the Stanford-Binet or below seventy on the Wechsler standardized tests\textsuperscript{22} who do not demonstrate "age appropriate" behavior in a variety of academic, social, interpersonal, and independent settings.\textsuperscript{23} Although there are several conceptual approaches to retardation, the developmental model is becoming more widely accepted.\textsuperscript{24} The consensus is that people who are mentally handicapped are capable of "growth, development and learning."\textsuperscript{25}

The measured scales for intelligence levels of the mentally retarded are as follows:

<table>
<thead>
<tr>
<th>Levels</th>
<th>Stanford-Binet</th>
<th>Wechsler</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mild</td>
<td>52-68</td>
<td>55-69</td>
</tr>
<tr>
<td>Moderate</td>
<td>36-51</td>
<td>40-54</td>
</tr>
<tr>
<td>Severe</td>
<td>20-35</td>
<td>25-39</td>
</tr>
<tr>
<td>Profound</td>
<td>19 and below</td>
<td>24 and below\textsuperscript{26}</td>
</tr>
</tbody>
</table>

Although criticized for bias against members of minority groups, the IQ scale is the most common dividing line between people who are labeled mentally retarded and those who are not.\textsuperscript{27} The

\textsuperscript{21} Williams, The Right to Treatment for Developmentally Disabled Persons: Re-assessment of An Evolving Legal and Scientific Interface, 63 N.D.L. Rev. 7 (1987) (quoting the American Association on Mental Deficiency). The AAMD definition is widely accepted. See Menninger, Mental Retardation and Criminal Responsibility: Some Thoughts on the Idiocy Defense, 8 INT'L J.L. \\& PSYCHIATRY 343, 344 (1986). Some states have adopted variants of the AAMD approach. For example, in Nebraska's community-based mental retardation programs classification depends on ten factors that include self-help skills, physical needs, and negative and positive behavior. See Comment, supra note 14, at 798.

\textsuperscript{22} See N. NEISWORTH \\& R. SMITH, RETARDATION 57 (1978).

\textsuperscript{23} See id. at 27. As an example of the "age appropriate" concept, if the normal twelve-year-old can successfully multiply two three-digit numbers, then the failure of a twelve-year-old to succeed in the task indicates a delay in mathematical competence. \textit{See id.}

\textsuperscript{24} See id. at 8-9. \textit{See} Romeo v. Youngberg, 644 F.2d 147, 165 n.40 (3d Cir. 1980).

\textsuperscript{25} N. NEISWORTH \\& R. SMITH, supra note 22, at 8.

\textsuperscript{26} \textit{Id.} at 57. \textit{Cf.} Ellis \\& Luckasson, \textit{supra} note 15, at 422-23; Menninger, \textit{supra} note 21, at 344.

\textsuperscript{27} See N. NEISWORTH \\& R. SMITH, \textit{supra} note 22, at 29. Members of racial minorities have argued that the tests are biased in favor of white, middle-class children and are
wide acceptance of IQ as a standard for mental handicap has gained credibility because of the close correlations between adaptive behavior and levels of measured intelligence.\textsuperscript{28} Most schools employ the concept of subaverage intelligence and mal-adaptive behavior in their classification schemes.\textsuperscript{29}

Given the normal distribution of intelligence, about three percent of the people in a representative group can be expected to have an IQ of less than seventy.\textsuperscript{30} Under the AAMD definition, about one percent of the national population is mentally retarded.\textsuperscript{31} The "mildly retarded" comprise nearly ninety percent of the total mentally handicapped population.\textsuperscript{32}

Mildly retarded children have the ability to learn academic skills up to a sixth- or seventh-grade level.\textsuperscript{33} As adults, they usually are able to support themselves at a minimal level of subsistence.\textsuperscript{34} The mentally handicapped are disproportionately non-white and from lower social classes and, despite their abilities, suffer disproportionately from high rates of unemployment, inadequate housing conditions, and limited educational experiences.\textsuperscript{35}

II. THE MENTALLY HANDICAPPED AND THE CRIMINAL JUSTICE SYSTEM

Although criminal behavior by mentally handicapped individuals does not appear to be greater than their percentage of the general population,\textsuperscript{36} a disproportionate number of inmates nationally are retarded.\textsuperscript{37} Most of the mentally handicapped who

\textsuperscript{not appropriate for children of other backgrounds. Additionally, the test for mental age is "completely test defined and test-specific." Id. at 35.}
\textsuperscript{28. See id. at 61.}
\textsuperscript{29. See id. at 43.}
\textsuperscript{30. See id. at 65. \textit{See also} Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1298 (E.D. Pa. 1977); Williams, \textit{supra} note 21, at 11.}
\textsuperscript{31. See N. NEISWORTH & R. SMITH, \textit{supra} note 22, at 65.}
\textsuperscript{32. See Williams, \textit{supra} note 21, at 11.}
\textsuperscript{33. See N. NEISWORTH & R. SMITH, \textit{supra} note 22, at 171.}
\textsuperscript{34. See id.}
\textsuperscript{35. See id. at 44.}
\textsuperscript{36. See Ellis & Luckasson, \textit{supra} note 15, at 426 ("The best modern evidence suggests that the incidence of criminal behavior among people with mental retardation does not greatly exceed the incidence of criminal behavior among the population as a whole.").}
\textsuperscript{37. Santamour estimates that between three and five percent of the prison inmate
are arrested fit into the "mildly retarded" category; criminal suspects with IQs below fifty are relatively easy to identify and typically are diverted from the criminal justice system to state facilities for the mentally retarded. Mildly retarded defendants, however, face special difficulties in the criminal system. They may wear a "'cloak of competence' that allows them to 'pass as normal." Consequently, lawyers and judges frequently are unable to identify them as retarded.

The retarded defendant is quite vulnerable to exploitation by professionals. According to one survey, ninety-two percent of mentally handicapped defendants never raised the issue of competence to stand trial during the proceedings against them. Furthermore, the retarded tend to confess more readily and plead guilty more often than their nonhandicapped brethren. They also have greater difficulty in remembering details, locating witnesses, and testifying credibly in their own defenses.

Mentally handicapped defendants have other difficulties in the legal system. Courts have noted that their susceptibility to suggestions during interrogations, to extensive questioning, and to threats and promises interferes with the defendants' free and knowing exercise of their constitutional rights. The mentally retarded defendants' limited abilities to exercise their rights arguably leads to their disproportionate numbers on death row in the United States.

What procedural protections do exist to guard a defendant

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population nationwide is mentally retarded. See Reid, Unknowing Punishment, 15 Student Law., May 1987, at 18.
38. See Santamour & West, supra note 12, at 11.
40. See Ellis and Luckasson, supra note 15, at 493.
41. See Santamour & West, supra note 12, at 12.
42. See Ellis & Luckasson, supra note 15, at 445.
43. See Santamour & West, supra note 12, at 12.
45. See, e.g., United States v. Hull, 441 F.2d 308, 312 (7th Cir. 1971).
47. See Marcus, supra note 2, at A4, col. 2. The estimated 250 individuals who are mentally retarded represent more than thirteen percent of the 1,901 people on death row in the United States. Of the national population, however, the retarded constitute only about one percent. See supra note 31 and accompanying text.
from exploitation may be of dubious value when the defendant is mentally retarded. The usefulness of *Miranda* warnings, for example, may be questioned. *Miranda* itself presupposes that an individual, once apprised of his constitutional rights, will be able to exercise them effectively.48 Yet given the propensity of mentally retarded defendants to confess to crimes or plead guilty,49 one must wonder whether *Miranda* offers them any meaningful protection in the inherently coercive environment of custodial interrogation. A Georgia federal district court recently ruled that a defendant with an IQ of sixty-five who had been charged with capital murder could not knowingly and intelligently waive his right to remain silent without additional precautionary instructions.50 The court began its analysis by noting that "uncontradicted evidence" demonstrated that the defendant had poor reading and verbal comprehension skills and that his memory, reasoning ability, and other skills necessary to make a voluntary and intelligent waiver of his rights were severely impaired.51 Under these circumstances, the court concluded, a mere recitation of the *Miranda* warnings and a statement from the defendant that he understood his rights and wished to waive them was not sufficient to establish the waiver as knowing and voluntary:

The rationale for the *Miranda* decision was to put all criminal defendants on equal (or nearly so) footing when deciding whether to talk to the authorities before getting the advice of a lawyer. Regardless of what one may think of *Miranda*, it is the law and if it is to be read logically, it cannot say that all defendants are equal when deciding whether or not they should talk to a lawyer before confessing. Some defendants are very intelligent and aware of all their rights, others are so lacking in basic intelligence that they cannot possibly waive their constitutional rights without additional precautionary instructions.52

The point, of course, is not that mentally retarded persons have rights that extend beyond those of citizens of average intelligence. Instead, it is that the broad procedural safeguards re-

49. *See* supra text accompanying notes 42.
51. *See id.* at 505.
52. *Id.* at 507.
flected by *Miranda* simply are ineffective unless reasonably tai-
tored to the abilities of the individual suspect. The Supreme
Court itself has noted that mere recitation of warnings is insuffi-
cient to establish the voluntariness of a confession if the defend-
ant has limited mental abilities and is subjected to police
threats. In short, the mentally retarded defendants who enter
the criminal justice system stand in a different position from the
defendant of average intellectual ability. If those differences
have constitutional significance with respect to the fifth amend-
ment privilege against self-incrimination, they also may affect
other constitutional rights, including the eighth amendment pro-
scription of cruel and unusual punishments.

Although the Supreme Court never has ruled on the consti-
tutionality of executing mentally retarded offenders, it recently
held that the eighth amendment prohibits the execution of those
who are insane at the time the sentence is to be carried out. Although there are differences between mental retardation and
mental illnesses such as insanity, the distinctions — if anything — support a blanket prohibition on executions of the mentally
retarded.

While insanity is a form of mental illness that may be tem-
porary and can affect persons of all intellectual abilities, mental retardation is a *permanent* form of disability manifested
by persons of extremely low intelligence. Because of their low

had been physically abused by a doctor who treated him *after* his arrest; the doctor
denied such abuse in his testimony, but was unable to testify that state patrolmen
did not abuse Sims. When he confessed, Sims had been in police custody for over eight
hours, deprived of food, and denied access to family, friends, or legal counsel. "He [was]
an illiterate, with only a third grade education, whose mental capacity [was] decidedly
limited. Under such circumstances the fact that the police may have warned [Sims] of
his right not to speak is of little significance." *Id.* at 407.

54. The Court has before it now the primary question raised by this article: the con-
stitutionality of executing mentally retarded offenders. The Fifth Circuit held that
the eighth amendment does not prohibit execution of the mentally retarded, and the
Court has agreed to review that decision. See *Penry v. Lynaugh*, 832 F.2d 915, 918 (5th
Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988). See also *Bell v. Lynaugh*, 858 F.2d 978,
984 (5th Cir. 1988); *Brodgon v. Butler*, 824 F.2d 338, 341 (5th Cir.), *cert. denied*, 108 S.
Ct. 13 (1987). At least one state court also has considered and rejected the argument that
execution of a mentally retarded defendant violates the eighth amendment. *See State v.


57. *See id.* at 424.
intelligence, mentally retarded people are limited in their ability to learn. On the other hand, mentally ill individuals are not disabled learners. The fundamental distinction is that mental retardation is not an illness subject to cure through counseling, drugs, or therapy. Its outward characteristics may be modified by education and training; nevertheless, the condition itself cannot be eliminated by any means.

The criminal courts, however, have not provided procedural guidelines that distinguish between mentally retarded and mentally ill defendants. The Supreme Court set forth the basic framework for competency evaluations in Dusky v. United States. In a brief, per curiam ruling the Court stated that the "test [for competence] must be whether [the accused] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as a factual understanding of the proceedings against him." Competency hearings typically are held when a judge believes that a defendant "lacks the capacity to understand the proceedings against him or to assist in his own defense." Mentally retarded defendants, however, receive little protection under Dusky. Most competency inquiries generally focus on psychological disabilities associated with mental illness, not retardation. Expert witnesses called during competency proceedings usually are not trained in mental retardation issues and cannot provide reliable testimony about the competency of a retarded defendant. Trial judges themselves are not experts on retardation, and many do not accept the argument that retardation may make a defendant incompetent to stand trial.

Several problems associated with competency hearings also bear on the interaction of mentally handicapped defendants and the criminal justice system in other areas. Even if qualified mental health professionals are available to evaluate mentally retarded defendants in all competency hearings, this does not

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58. See id.
59. See id. & n.54.
61. Id. at 402 (quoting Solicitor General's proposal).
63. See MENTALLY DISORDERED OFFENDERS 3-32 (1983) [hereinafter OFFENDERS].
64. See R. ROESCH & S. GOLDFING, COMPETENCY TO STAND TRIAL 15-19 (1980).
65. See id.
solve the problem. For example, the fact that a person may not be competent to stand trial does not necessarily relieve him of criminal responsibility. The Dusky rule does not even address the issue of responsibility; it is simply a functional rule that applies to the conduct or ability of defendants at their own trials. In Drope v. Missouri the Supreme Court acknowledged the difficulty of providing clear guidelines in competency proceedings. The majority commented that there were "no fixed or immutable signs" that would necessarily require lower courts to conduct competency hearings every time. The logic of Drope applies to the mentally ill since no current legal test assesses competency in relation to retardation.

The M'Naghten rule, which focuses on the ability of the defendant to tell the difference between right and wrong, is triggered only when the question of sanity is raised by the defense. M'Naghten, therefore, addresses the issue of criminal responsibility as opposed to the defendant's ability to function in his own behalf in a legal proceeding. Nevertheless, mental retardation alone generally has been held insufficient to establish a defense under the traditional M'Naghten rule. The problem with this approach is manifest. It equates the ability to distinguish between right and wrong with full comprehension of the reasons that certain conduct is morally and legally wrong. Current scholarship, however, casts doubt on such an equation. One leading authority on mentally retarded offenders, Miles Santamour, suggests that most mentally handicapped defendants will say that it is wrong to steal, without understanding why it is wrong.

Perhaps because a number of mentally retarded defendants

66. See Offenders, supra note 63, at 7.  
68. Id. at 180.  
69. See Santamour & West, supra note 12, at 14.  
70. See M'Naghten's Case, 8 Eng. Rep. 718, 722 (H.L. 1843) ("[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.").  
72. See Reid, supra note 37, at 21.
fall through cracks in the *M'Naghten* rule, some states have abandoned it. In 1978 the California Supreme Court overturned a conviction of a fourteen-year-old with an IQ in the low forties.\textsuperscript{73} The court rejected the *M'Naghten* test and, instead, adopted the American Law Institute (ALI) approach to a defense based upon "idiocy or mental retardation."\textsuperscript{74} The court viewed retardation as a "mental defect."\textsuperscript{75} While the California court acknowledged the difference between mental illness and mental retardation, it recognized certain similarities as well. It found that both conditions "impair the person's capacity to commit crime."\textsuperscript{76} The court ruled that "idiots" could not "entertain general criminal intent" under California law.\textsuperscript{77} Other courts, however, have not viewed retardation in the same light.\textsuperscript{78}

The Supreme Court never has addressed the constitutionality of punishing the mentally retarded for criminal conduct. Matters of criminal culpability are largely concerns of state law. Nevertheless, the types of punishments meted out by the states to those convicted of crimes are of constitutional import, and in this area, the Court has spoken forcefully.

In *Ford v. Wainwright*\textsuperscript{79} the Court held that the eighth amendment prohibits execution of the insane. Speaking for the majority, Justice Marshall noted that English common law had long prohibited execution of the insane.\textsuperscript{80} Furthermore, Marshall stated, this rule has been adopted widely by the individual states. Of the states that imposed capital punishment at the

\textsuperscript{73} See *In re Ramon M.*, 22 Cal. 3d 413, 584 P.2d 524, 149 Cal. Rptr. 387 (1978).

\textsuperscript{74} Id. at 421-22, 584 P.2d at 528, 149 Cal. Rptr. at 389. According to the ALI test, "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." *Id.* (quoting MODEL PENAL CODE § 4.01(C)(1) (Proposed Official Draft 1962)).

\textsuperscript{75} Id. at 422, 584 P.2d at 526, 149 Cal. Rptr. at 389.

\textsuperscript{76} Id. at 422 n.6, 584 P.2d at 528 n.6, 149 Cal. Rptr. at 391 n.6.

\textsuperscript{77} See id. at 422, 584 P.2d at 527, 149 Cal. Rptr. at 390.

\textsuperscript{78} See, e.g., Singleton v. State, 90 Nev. 216, 220, 522 P.2d 1221, 1223 (1974) (mental disorder less than insanity alone not enough to destroy capacity to premeditate or to entertain requisite intent). A recent study indicates a relationship between different levels of intelligence and certain types of crime. After controlling for socioeconomic status and cultural and family background, the research suggested a correlation between offenders of low intelligence and crimes of violence such as murder. See J. WILSON & R. HERRNSTEIN, CRIME AND HUMAN NATURE 165 (1985).

\textsuperscript{79} 477 U.S. 399 (1986).

\textsuperscript{80} See id. at 406-08.
time Ford was decided, twenty-six statutorily required that executions be stayed if the prisoner “meets the legal test for incompetence.”81 At least four others had adopted the English common-law rule by judicial decision.82 Still others used flexible procedures to ensure that insane persons were not executed.83 Under these circumstances, and relying on society’s “evolving standards of decency,”84 the majority concluded that the execution of an insane person would constitute cruel and unusual punishment within the meaning of the eighth amendment.

While a majority of the Court agreed on the fundamental question at issue in Ford, the Court was greatly divided over whether the procedures used by the state of Florida and by the lower federal courts on Ford’s habeas corpus petition were constitutionally permissible. Seven members of the Court agreed that they were not, but no single opinion commanded a majority of the Justices. In fact, the Court was so badly splintered on this issue that two Justices, O’Connor and White, who dissented from the majority’s holding on the eighth amendment issue, nevertheless would have returned the case to the state penal system.85 They reasoned that Florida’s “positive law created a protected liberty interest in avoiding execution while incompetent”86 and that the procedures used under the state scheme did not comport with the requirements of the due process clause.87

Ford did not purport to establish a constitutional standard for insanity. Only Justice Powell offered any comment on what constitutes insanity for eighth amendment purposes.88 He would have held that the dictates of the eighth amendment are met if state law prohibits the execution of those who “are unaware of the punishment they are about to suffer and why they are to suffer it.”89 This is precisely the standard required by the state

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81. Id. at 408 n.2 (emphasis added).
82. See id. at 409 n.2.
83. See id.
84. Id. at 406 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).
85. See id. at 427 (O’Connor, J., concurring in result in part and dissenting in part).
86. Id.
87. See id.
88. See id. at 421-23 (Powell, J., concurring in part and concurring in the judgment).
89. Id. at 422.
law at issue in Ford. This verbal formulation differs little from the standard used in Dusky for competence to stand trial. The problem with such an approach has been outlined above.

Recent history also underscores the inability of state courts to ferret out mentally retarded offenders from the criminal justice system under a standard based on competency. Several mentally retarded individuals have been executed in the last five years. Arthur Goode III was thirty when he was electrocuted in Florida in 1984. Shortly before he died, Goode stated that he was "competent for execution." He had been under medical and psychiatric care from the time he was three; his IQ measured in the low sixties. The next year Virginia executed Morris Mason, who had been diagnosed as both paranoid schizophrenic and mentally retarded with an IQ of sixty-six. The defense attorney stated that Mason did not understand the nature of his punishment. Finally, the day before the Supreme Court handed down its decision in Ford, Jerome Bowden was electrocuted in Georgia. The Georgia Board of Pardons and Paroles allowed the execution to continue, despite the fact that Bowden had an IQ of sixty-five, because Bowden "had known the difference between right and wrong" when he committed his crime. In short, despite state procedures designed to ensure that no incompetent persons are executed, several persons of

90. See Fla. Stat. § 922.07 (1985) (requiring governor to stay executions of those who "[d]o not have the mental capacity to understand the nature of the death penalty and why it is imposed" on them).
92. See supra text accompanying notes 61-69.
93. See Sex Slayer, Lovers' Lane Killer Executed, The Oregonian, April 6, 1984, at A18, col. 1.
94. Id.
96. See supra note 93.
97. See Reid, supra note 37, at 23.
98. Id.
100. See id.
101. When Goode and Bowden were executed, both Florida and Georgia had statutory provisions requiring that executions of persons who were legally incompetent be stayed. See Fla. Stat. § 922.07 (1985); Ga. Code Ann. § 17-10-62(1982). Georgia has since repealed its statute and replaced it with a different procedure. Under the new statute an applicant is entitled to an adversarial hearing when he alleges that he is "mentally
limited intellectual ability have been put to death.

III. RECENT DEVELOPMENTS: THE RIGHTS OF THE RETARDED

Despite the courts’ failure to address the distinctive problems of the mentally retarded in criminal cases, three important Supreme Court decisions in civil cases have affected the rights of mentally handicapped people: (1) *Pennhurst State School & Hospital v. Halderman*;\(^{102}\) (2) *Youngberg v. Romeo*;\(^{103}\) and (3) *City of Cleburne v. Cleburne Living Center, Inc.*\(^{104}\) The first two rulings affected patients in a Pennsylvania institution for the retarded; the third involved a Texas zoning ordinance that restricted development of a group home for the retarded.

A. Pennhurst State School & Hospital v. Halderman

*Pennhurst* began as a class action by retarded residents of the Pennhurst State School and Hospital in 1977.\(^{105}\) The district court found that, in virtually every respect, the facility was of inferior quality. Pennhurst was “grossly understaffed”; its programs were “inadequate”; its record keeping and drug practices did not meet minimum standards; and its physical environment was both physically and psychologically “hazardous.”\(^{106}\)

The court held that the only legitimate purposes for commitment of the retarded was for “habilitation.”\(^{107}\) In the absence of such a purpose, the court concluded, the residents’ due process rights would be violated.\(^{108}\) Since Pennhurst was not providing, and had failed to provide, habilitative treatment and was

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\(^{103}\) 457 U.S. 307 (1982).

\(^{104}\) 473 U.S. 432 (1985).


\(^{106}\) Id. at 1303, 1305-08.

\(^{107}\) Id. at 1315-16. “Habilitation” refers to “that education, training, and care required by retarded individuals to reach their maximum development.” Id. at 1298.

\(^{108}\) Id. at 1315-16.
incapable of doing so in the future, the court ordered it closed.\textsuperscript{109} The court also held that "[o]nce admitted to a state facility, the residents [had] a constitutional right to be provided with minimally adequate habilitation under the least restrictive conditions consistent with the purpose of the commitment."\textsuperscript{110} The Third Circuit affirmed the district court order, with the exception of the school closing.\textsuperscript{111} Instead of relying on constitutional grounds, however, the court of appeals held that the conditions at Pennhurst ran afoul of the rights of the retarded under the Developmentally Disabled Assistance and Bill of Rights Act of 1975.\textsuperscript{112} It did not reach the constitutional issues.

The Supreme Court reversed. The Court held that the Developmentally Disabled Assistance and Bill of Rights Act created no substantive rights for the mentally handicapped;\textsuperscript{113} although Congress intended the legislation to provide better care for the retarded through funding incentives for the states, it did not intend to give the mentally retarded new, judicially enforceable rights.\textsuperscript{114}

B. Youngberg v. Romeo

While Pennhurst was moving through the federal courts, another suit was filed on behalf of a single resident of the same institution.\textsuperscript{115} Ruling in support of the right of a profoundly retarded person to receive treatment and protection, the Third Circuit noted that only three reasons justified involuntary civil confinement of the mentally handicapped: (1) protection of society; (2) protection of individuals unable to care for themselves;

\begin{itemize}
  \item \textsuperscript{109} See id. at 1327-28.
  \item \textsuperscript{110} Id. at 1319.
  \item \textsuperscript{111} See Pennhurst, 612 F.2d 84, 116 (3d Cir. 1979) (en banc). The court noted the novelty of legal rights for retarded individuals. "At a federal judicial level, we are asked to interpret relatively new and innovative legislation and to embark upon uncharted constitutional waters." Id. at 117. (Seitz, C.J., dissenting). See also Romeo v. Youngberg, 644 F.2d 147, 154 (3d Cir. 1980) (en banc) ("The present controversy inhabits the twilight area of constitutional rights of the involuntarily committed mentally retarded.").
  \item \textsuperscript{112} Pub. L. No. 94-103, 89 Stat. 486 (codified as amended 42 U.S.C.A. §§ 6000-6083 (West Supp. 1988)).
  \item \textsuperscript{113} 451 U.S. 1, 18 (1981).
  \item \textsuperscript{114} See id. at 31. Three years later the Court held that the eleventh amendment prohibited the district court from ordering Pennsylvania officials to conform Pennhurst's practices to standards required by state law. See Pennhurst, 456 U.S. 89 (1984).
  \item \textsuperscript{115} See Romeo v. Youngberg, 644 F.2d 147 (3d Cir. 1980) (en banc).
\end{itemize}
and (3) rehabilitation. In dicta the Youngberg court suggested that the mentally retarded might deserve special judicial consideration because of their social isolation and their "minimal impact on the political process." On review the Supreme Court held for the first time that the retarded did have substantive rights recognized by the Constitution. The fourteenth amendment, the Court stated, protects the rights of the involuntarily committed to: (1) safe conditions; (2) freedom from unreasonable bodily restraints; and (3) "minimally adequate or reasonable training to ensure safety and freedom from undue restraint."

C. City of Cleburne v. Cleburne Living Center, Inc.

Two years after the Supreme Court's decision in Youngberg, the Fifth Circuit held that an ordinance that effectively prohibited the establishment of a group home for the retarded in a Texas community violated the equal protection clause. Judge Goldberg, speaking for the court, concluded that mentally retarded persons were members of a "'quasi-suspect' class" and deserved special consideration from the judiciary. That determination impelled the court to apply a heightened level of judicial scrutiny to judge the validity of the law. Because it found that the zoning ordinance did not "substantially further any important governmental interests," the court held that the ordinance violated the fourteenth amendment.

In ruling that the mentally retarded constituted a "quasi-suspect class," the Fifth Circuit commented on their historical

116. See id. at 158.
117. Id. at 163 n.35 ("The mentally retarded may well be a paradigmatic example of a 'discrete and insular minority' . . . ") (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).
119. Id. at 315-16, 319.
120. See Cleburne Living Center, Inc. v. City of Cleburne, 726 F.2d 191, 193 (5th Cir. 1984).
121. Id. at 193; see also City of Cleburne v. Cleburne Living Center, Inc. 473 U.S. 432, 440 (1985). Discrimination based on race, alienage, or national origin is viewed as "suspect" because such "factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy. . . . [T]hese laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." Id.
122. 726 F.2d at 200.
experience in the United States: "They have been subjected to a history of unfair and often grotesque mistreatment. Until the 1970s, they were universally denied admittance into public schools. . . . Once-technical terms for various degrees of retardation — e.g., 'idiots,' 'imbeciles,' 'morons,' — have become popular terms of derision." In addition the court noted a history of widespread discrimination against the mentally retarded: they lack political power because most states do not allow them to vote. Furthermore, like race and gender, retardation is an immutable characteristic.

The Supreme Court agreed that the ordinance was unconstitutional, but did not accept the Fifth Circuit's position that the retarded merited special judicial protection. Instead, the Court concluded that the validity of the ordinance should be judged under the more deferential rational basis standard. While the Court specifically rejected the "quasi-suspect" status assigned to the mentally handicapped by the court of appeals, the majority nevertheless concluded that the group home had not been approved because of "an irrational prejudice against the mentally retarded." Even though the Court recognized the discriminatory nature of the statute, it limited its ruling to the specific application of the ordinance.

Justice Marshall, joined by Justices Brennan and Blackmun, concurred in the judgment but dissented from the application of the rational basis test, arguing that the majority opinion treated the mentally retarded with special regard even if it denied doing so. This argument is quite persuasive. Under the label of rational basis scrutiny, the majority engaged in the searching inquiry into the application of the ordinance usually reserved for ordinances that classify persons on the basis of gender or illegitimacy. More specifically, the majority rejected

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123. Id at 197. See also supra notes 13, 14 and accompanying text.
124. See id. A Texas law applies the historic prejudice to the retarded by denying "idiots" the right to vote. See id at 198 n.10.
125. See City of Cleburne, 473 U.S. 432, 442-47.
126. Id. at 450. Groups subject to irrational prejudice include racial minorities and aliens. These groups receive special judicial recognition. See supra note 121.
128. See id. at 455-60 (Marshall, J., concurring in part and dissenting in part).
as irrational the town's assertions that the location of the home would arouse a negative attitude among nearby property owners.\textsuperscript{131} It also rejected the town's argument that the home's location near a junior high school would subject the retarded residents to harassment from students. The Court found this argument lacking because some residents of the home actually attended the school.\textsuperscript{132} As Justice Marshall noted, this type of searching inquiry was not the same rational basis test applied in the Court's earlier equal protection cases.\textsuperscript{133} Furthermore, in Marshall's view, such heightened scrutiny was warranted. The retarded, according to Marshall, have been subjected to state laws that paralleled the worst excesses of Jim Crow.\textsuperscript{134} The mentally retarded merited special judicial protection, he concluded, because of that long history of discrimination.\textsuperscript{135}

By the mid-1980s, then, the Supreme Court had recognized that the mentally retarded have a limited number of constitutional rights guaranteed to them by the fourteenth amendment. The Court, however, has not yet addressed the question of constitutional rights for the mentally handicapped in the area of criminal law.

IV. EXECUTION OF THE RETARDED AND THE EIGHTH AMENDMENT

The Supreme Court's eighth amendment jurisprudence consistently has recognized deterrence and retribution as the primary justifications for imposing the death penalty.\textsuperscript{136} The following discussion challenges these justifications as applied to cases involving the mentally retarded. Execution of mentally re-

\textsuperscript{131} See City of Cleburne, 473 U.S. at 448.
\textsuperscript{132} See id. at 449.
\textsuperscript{134} See City of Cleburne, 473 U.S. at 462 (Marshall, J., concurring in part and dissenting in part).
\textsuperscript{135} See id. at 467.
tarded offenders fails to serve the purposes ostensibly promoted by capital punishment for three reasons: (1) it has no demonstrable deterrent value; (2) it has minimal retributive benefit; and (3) it is an excessive punishment. As such, execution of the mentally retarded constitutes cruel and unusual punishment within the meaning of the eighth amendment.

A. Deterrence

The Supreme Court has acknowledged that statistical support for the deterrence argument is at best "inconclusive." In former Chief Justice Burger's opinion, there is "an empirical stalemate" on the validity of deterrence. Despite the failure of the states to produce concrete evidence supporting the deterrence rationale, a majority of the Court seems willing to defer to legislative judgment on the matter. Under this view, a rule of constitutional law that shifts the burden to state legislatures to produce statistical evidence in support of the deterrence rationale simply "provide[s] an illusory solution to an enormously complex problem." Deterrence, therefore, must be recognized as a legitimate penal objective of the state in imposing the death penalty. Additionally, any argument positing that the mentally retarded should not be subject to capital punishment clearly cannot proceed as a frontal assault on the deterrence rationale. Instead, one must explain why the deterrence justification has little logical relevance in determining whether execution of the mentally retarded is constitutional.

First, the deterrence argument is weakened by the fact that few criminal homicides result in execution. For example, between 1930 and 1982, no more than two percent of first-degree murder cases have ended with the imposition of the death penalty on the perpetrators. Since the logic of deterrence assumes that potential murderers make rational calculations prior to acting, the remote possibility of being executed likely will receive only minimal consideration in the mind of the rational mur-

137. See id. at 183.
138. Id. at 184.
140. Id. at 396.
141. See W. Bowers, supra note 6, at 273.
derer. The likelihood that a mentally retarded individual will be deterred under the conditions described above is even more remote.

In 1982 the Supreme Court concluded that the deterrent effect of capital punishment was likely to apply "only when murder is the result of premeditation and deliberation." Four years later Justice Powell, in an opinion joined by Chief Justice Burger and Justice Rehnquist stated, "[T]he death penalty has little deterrent force against defendants who have [a] reduced capacity for considered choice." Deterrence, therefore, rests on the assumption that the rational actor will conform his conduct to a socially acceptable standard because the potential costs of unacceptable activities outweigh the potential benefits. This assumption, however, has little validity when applied to mentally retarded offenders. Mentally retarded individuals often have poor impulse control. Furthermore, most mentally retarded individuals have incomplete or underdeveloped concepts of moral blameworthiness and causation. They are, therefore, frequently unable to distinguish between events that result from morally blameworthy behavior and those that do not. This impairs their abilities to understand that certain consequences flow directly from particular acts.

The failure of mentally retarded persons to demonstrate "age appropriate" behavior in a variety of settings also bears on the deterrence justification for the death penalty. In Thompson v. Oklahoma the Supreme Court ruled that the eighth amendment prohibits a state from executing a convicted first-degree murderer who was only fifteen years old at the time he committed the crime. Four members of the Court concluded that deterrence is an "unacceptable" rationale when applied to "such young offender[s]."

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144. See American Ass'n on Mental Deficiency, Classification in Mental Retardation 16 (1983) [hereinafter AAMD].
145. See Boehm, Moral Judgment: Cultural and Subcultural Comparison, 1 Int'l J. Psychology 143, 149-59 (1966).
146. See Ellis & Luckasson, supra note 15, at 430.
147. See supra text accompanying notes 21-33.
149. Id. at 2700 (plurality opinion). Justices Stevens, Blackman, Brennan, and Mar-
Stevens stated, "The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually non-existent." Such reasoning logically cannot be limited only to persons whose biological age is less than sixteen years; it applies equally to persons whose mental age is under sixteen. Justice Stevens arguably included the mentally retarded along with children among "those whose status renders them unable to exercise choice freely and rationally." If mentally retarded offenders are no more able than a teenage offender to "exercise choice freely and rationally," then the deterrence rationale is equally "unacceptable" when applied to them.

B. Retribution

Retribution is perhaps the most consistently stated rationale for capital punishment. While it may not be the "dominant objective of the criminal law," the Supreme Court has made clear that it is neither a "forbidden state objective nor one inconsistent with our respect for the dignity of men." Retribution has two components. First, the death penalty punishes the condemned for conduct that is so egregious, so violative of socially acceptable standards of behavior, that it merits the severest of penalties. In common parlance, convicted murderers "deserve" to die for some particularly heinous crimes. Second, the death penalty expresses "society's moral outrage at particularly offensive conduct." Execution of the mentally retarded, how-

shall comprised the plurality. They would have held the death penalty unconstitutional for all offenders who were under age sixteen when they committed capital offenses. See *id.* at 2696. Justice O'Connor concurred in the judgment. She expressed agreement in principle with the plurality, *id.* at 2706 (O'Connor, J., concurring in the judgment), but determined that such a bright-line rule should not be adopted until a substantial majority of state legislatures had addressed the matter. See *id.* at 2707. Justice Kennedy took no part in consideration of the case.

150. *Id.* at 2700.
151. *Id.* at 2693 n.23 ("Children, the insane, and those who are irreversibly ill with the loss of brain function, . . . , all retain 'rights' . . . , but often such rights are . . . exercised by agents acting with the best interests of their principals in mind.").
154. *Id.* See also Spaziano v. Florida, 468 U.S. 447, 468-69 (1984) (death penalty ultimately understood only as expression of community's outrage). Not all Justices ac-
ever, serves neither of these retributive components.

Retribution rests upon a foundation of moral responsibility. The more one can be held morally responsible for his actions, the greater the strength of the retribution theory. Even so, the converse also would appear to be correct. This fact has not been lost on the Supreme Court. In a number of death penalty decisions, the Court has directed attention to the defendant’s degree of culpability or moral guilt. Nearly a century ago the Court reversed the sentence in a capital case because the accused did not have the mental capacity that would render him criminally responsible for his actions.155 The defendant was not insane, but he was considered to be “weak minded.”156 In 1982 the Court vacated the death sentence of a person who was sixteen years old at the time he committed a capital murder because the trial judge had not taken sufficient notice of the youth’s background.157 The Court noted that the defendant’s “mental and emotional development were at a level several years below his chronological age.”158 It also added that “youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.”159

This is not, of course, to minimize the seriousness of the offense, even when committed by a juvenile or person of diminished intellectual capacity. It is, however, recognition that “‘[c]rimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.’ ”160 Similarly, the mentally retarded deserve less punishment because they have less capacity to control their conduct except the retribution argument. Justice Marshall, who believes the death penalty is unconstitutional in all cases, commented in Furman v. Georgia, 408 U.S. 238 (1972), that “[t]o preserve the integrity of the Eighth Amendment, the Court has consistently denigrated retribution as a permissible goal of punishment.” Id. at 344 (Marshall, J., concurring).

156. See id. at 475.
158. Id. at 116.
159. Id. at 115.
160. Id. at 115 n.11 (quoting Twentieth Century Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978)).
and to think in long-range terms.\textsuperscript{161} Several state supreme courts also have reached this conclusion, recognizing that mentally retarded defendants have a lesser degree of culpability in capital cases than do defendants of normal intelligence.\textsuperscript{162}

The second component of retribution, expression of societal outrage, also fails to provide a justification for execution of the mentally retarded. As a preliminary matter, one must question whether capital punishment in any case actually vents any social anger. Justice Byron White has noted that "when imposition of the [death] penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would measurably satisfied."\textsuperscript{163} Yet since the Supreme Court rejected an argument that the death penalty is unconstitutional in all cases,\textsuperscript{164} thousands of people have been murdered.\textsuperscript{165} Only ninety persons, however, had been executed through September 1987. Clearly, any generalized need to execute those who "deserve" to die is not being met.

That failure to serve a general societal need for retribution also underlies the two most relevant Supreme Court cases affecting the constitutionality of the death penalty for mentally retarded offenders. In \textit{Ford v. Wainwright}\textsuperscript{166} the Supreme Court held that execution of the insane violates the eighth amendment. \textit{Wainwright} is interesting because the defendant was not mentally impaired either when he committed the crime or when he was tried and sentenced. Only after he had been condemned did he begin suffering from mental disorders.\textsuperscript{167} Speaking for the

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\textsuperscript{161} See supra notes 143-145 and accompanying text.
\textsuperscript{162} See, e.g., State v. Thompson, 456 So. 2d 444, 446 (Fla. 1984) (vacating death sentence of defendant with IQ "between 50 and 70"); State v. Behler, 65 Idaho 464, 475, 146 P.2d 338, 343 (1944) (death sentence vacated because person with "a pronounced subnormal mind [should not] be held to the same high degree of accountability" as a person of normal intelligence); State v. Hall, 176 Neb. 295, 310, 125 N.W.2d 918, 927 (1964) (death sentence reduced to life for a "high-grade imbecile" with an IQ of sixty-four); State v. Stokes, 319 N.C. 1, 352 S.E.2d 653 (1987) (vacating death sentence for defendant with IQ of sixty-three).
\textsuperscript{163} Furman v. Georgia, 408 U.S. 238, 311 (1972) (White, J., concurring).
\textsuperscript{165} For example, in 1979 alone, an estimated 20,000 murders were committed in the United States. See H. BEDAU, \textit{THE DEATH PENALTY IN AMERICA} 48 (1982).
\textsuperscript{166} 477 U.S. 399 (1986).
\textsuperscript{167} See id. at 401-02. Cf. \textit{In re Ramon M.}, 22 Cal. 3d 419, 431, 584 P.2d 524, 532, 149 Cal. Rptr. 387, 395 (1978) (reversing misdemeanor conviction of a fourteen-year-old with an IQ between forty and forty-two because his "extremely low intelligence, his in-
majority, Justice Marshall questioned the "retributive value of executing a person who no comprehension of why he has been singled out and stripped of his fundamental right to life."168 He also stated that societal outrage could not justify execution of the insane because of "the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity."169 As noted above, the mentally retarded offender condemned to die has no grasp or appreciation of the causal connection between his actions and his punishment.170 In fact, in another context the Court has recognized that the mentally retarded "have a reduced ability to cope with and function in the everyday world." Following Justice Marshall's logic, then, one reasonably may question the retributive value of capital punishment for the person of extremely low intelligence.

_Thompson v. Oklahoma_172 also supports such a conclusion. In _Thompson_ four members of the Court concluded that a fifteen-year-old "is not capable of acting with the degree of culpability that can justify the ultimate penalty."173 The underlying rationale of the _Thompson_ plurality, that young people have a lesser degree of responsibility for their actions, applies with equal strength to the actions of the mentally retarded:

Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.174

Given the lesser culpability of the juvenile offender, the

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168. 477 U.S. at 409.
169. Id.
170. See supra notes 142-146 and accompanying text.
173. See id. at 2692.
174. Id. at 2699.
Thompson plurality concluded that the death penalty, even as an expression of social outrage at particularly offensive conduct, could not justify the execution of a fifteen-year-old defendant. 176 Because the mentally retarded offender generally has the intellectual ability of a pre-adolescent, the reasoning of the Thompson plurality cannot be limited strictly to juvenile offenders. It also must apply to those persons, no matter what their biological ages, who suffer from impaired intellectual functioning that significantly limits their effectiveness "in meeting standards of maturation, learning, personal independence, and/or social responsibility that are expected for [their] age level[s] and standardized scales." 178

Without a retributive function, capital punishment lacks a broad, concrete legal justification. As Justice Stevens recently stated, "In the context of capital felony cases, therefore the question whether the death sentence is an appropriate, nonexcessive response to the particular facts of the case will depend on the retributive justification." 177 Because the retributive rationale is weaker when applied to the mentally retarded than to the nonhandicapped, capital punishment is more likely to be an excessive response to a murder committed by a mentally retarded individual than to one committed by a person of normal intelligence.

C. Excessive Punishment

Absent any deterrent or retributive justification, execution of the mentally retarded is cruel within the meaning of the eighth amendment because it is excessive. Speaking for four members of the Court in Coker v. Georgia, 178 Justice White included in his interpretation of "excessive" any capital sentence that "makes no measurable contribution to acceptable goals of punishment." 179 Since the mentally retarded do not have the mental capacity to be deterred, it is a "purposeless and needless imposition of pain and suffering" 180 when people of extremely

175. See id.
176. AAMD, supra note 143, at 11.
179. Id. at 592.
180. Id.
low intelligence are involved.

Additionally, the death penalty for the mentally retarded is excessive because it is out of proportion to the crime. Because of the lesser "moral guilt" associated with a crime committed by someone with an IQ less than seventy, applying the same punishment to that person as to one of normal intellectual ability makes the punishment disproportionate. In striking down a Louisiana statute that provided for a mandatory death penalty for certain offenses, Justice Stevens noted that judicial distinctions must be made between offenders with differing backgrounds because society has rejected the belief that "'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.'"181 The past lives and habits of mentally retarded individuals are sufficiently distinct that they deserve a distinctive judicial response in capital cases.

V. CONCLUSION

In a 1986 lecture Justice Brennan remarked that "'[i]t seems fair to say that we simply cannot know exactly or with certitude what punishments the Framers thought were cruel and unusual.'"182 The question of whether execution of the mentally handicapped is cruel within the meaning of the eighth amendment has increased significance for the estimated 250 residents of death row in that category. The unique difficulty for retarded offenders in a capital case can be understood more readily when one recognizes that little is known about them. Because ignorance about the retarded is widespread within the judicial system, they frequently have been victims of inappropriate action.183

183. See Ravenel & Atkinson, Introduction: Why This Text? in THE RETARDED OFFENDER 1 (1982). "Ignorance regarding the nature of handicapping conditions, ignorance of the existence of services, ignorance of the need for special programs for handicapped offenders, and inability to recognize behavior that signals a need for special evaluation of an accused have been found nationwide. The problem exists in every jurisdiction in the United States and in all facets of the criminal justice system from arrest through sentence completion." Id.
Execution of anyone who is mentally retarded is indefensible. It is indefensible because it is applied without discrimination, in the best sense of the word, to a class of offenders who differ in important and identifiable respects from all other offenders. The death penalty must be imposed through a system that "can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." Applying a death sentence to anyone who functions at the mental level of a pre-adolescent child does not rationally distinguish those for whom execution is a legitimate punishment from those for whom it is not. State governments recognize the need for a separate criminal justice system for juveniles. The argument for alternate legal treatment for the mentally handicapped in a capital case is at least as compelling.

Execution of the mentally handicapped also makes no measurable contribution to the accepted goals of capital punishment. The main legal objectives that may make the death penalty legitimate in some circumstances apply with considerably less force when directed toward the mentally retarded. The deterrence argument is, at best, an "empirical stalemate." It has even less validity for defendants who have a reduced sense of responsibility about the seriousness of their actions and the consequences of their choices. Likewise, retribution is less appropriate when a retarded offender is involved. A person with a reduced capacity to understand the implications of his acts should receive a lesser punishment than the individual who is capable of recognizing the full consequences of what he has done.

There are ways of reducing the problem confronting the courts in capital cases with mentally retarded defendants. First, a mental health professional trained to evaluate the mentally retarded should be appointed by the court and be available to testify for the defendant at each preliminary hearing in a capital case about the presence or absence of retardation. The cost of such a procedure would have to be weighed against the fact that more than thirteen percent of the prisoners on death row in the United States are mentally retarded. Second, a finding of

187. See supra note 47.
mental retardation by the mental health professional could be submitted by defense counsel for the trial court's consideration at any competency hearing. This option would allow the retarded defendant significantly greater opportunity to receive appropriate treatment in a capital case. Finally, a finding of mental retardation would result in a conclusive presumption for life rather than execution at the sentencing phase of the trial. More than sixty years ago Benjamin Cardozo wrote, "The final cause of the law is the welfare of society. The rule that misses its aim cannot permanently justify its own existence." Execution of the mentally retarded violates that precept because it does not substantially further social welfare. The rule allowing the death penalty to be applied against the retarded has missed its aim. It can be justified no longer.

188. B. Cardozo, THE NATURE OF THE JUDICIAL PROCESS 66 (1921). "Logic and history have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all." Id.