St. Mary's Law Journal

Volume 24 | Number 4 Article 12

1-1-1993

A License to Kill: The Categorical Exemption of the Mentally Retarded from the Death Penalty.

David L. Rumley

A License To Kill: The Categorical Exemption of the Mentally Retarded from the Death Penalty

David L. Rumley

I. INTRODUCTION

Although Amnesty International contends that the death penalty is in all cases "a violation of the right to life and the right not to be subjected to cruel and inhumane or degrading punishment,"[1] the crime of murder is equally

1. Mick Thurston, *Amnesty Attacks U.S. Death Sentencing*, UPI, Dec. 11, 1992, *available in* LEXIS, Nexis Library, UPI File; *see* Thompson v. Oklahoma, 487 U.S. 815, 831 (1988) (noting that death penalty has been abolished in many foreign countries and death penalty offends civilized standards of decency and should, therefore, be abolished in United States); Burger v. Kemp, 483 U.S. 776, 823-24 n.5 (1987) (Powell, J., dissenting) (noting Amnesty International's claim that "[a]ll European countries forbid imposition of the death penalty on those under 18"); Tison v. Arizona, 481 U.S. 137, 177 n.15 (1987) (Brennan, J., dissenting) (citing Amnesty International contention that Netherlands and Australia have abolished death penalty).

cruel, inhumane, degrading, and a violation of the right to life. Consider the facts of two cases:

> (1) George Elder Dungee[2] was convicted and sentenced to death[3] on six counts of murder for the deaths of the members of the Alday family.[4] The defendant and three others entered an unoccupied mobile home for the purpose of burglary.[5] When Mr. Alday and his son arrived at their home, they were escorted at gunpoint into the trailer, and killed.[6] Mr. Alday was shot four times in the head, and his son was shot seven times in the head.[7] Shortly thereafter, Mr. Alday's brother arrived at the trailer, and he too was escorted into the trailer at gunpoint and shot in the head.[8] A few moments later, Mr. Alday's wife arrived at the trailer, and she was forced into the trailer's kitchen.[9] Two other family members arrived at the trailer and were taken into the bedrooms where each was shot in the head.[10] The defendant and his cohorts proceeded to rape Mrs. Alday.[11] She was taken, bound and blindfolded, to a wooded area and repeatedly raped.[12] In Response to Mrs. Alday's refusal to commit oral sodomy, the defendants mutilated her breasts[13] and then killed her.[14]
>
> (2) Eddie Spraggins was found guilty of rape and murder and sentenced to death.[15] The evidence showed that on the afternoon of January 31, 1977, the semi-nude body of Frances Coe, approximately 55 years old, was found in her home.[16] The defendant had repeatedly stabbed, slashed, and cut the victim.[17] Several stab wounds to the body

---

2. Dungee v. State, 227 S.E.2d 746, 746 (Ga. 1976), *cert. denied*, 429 U.S. 986 (1976). The facts of this case are set forth in a companion case reported in Coleman v. State, 226 S.E.2d 911 (Ga. 1976), *cert. denied*, 431 U.S. 909 (1977).

3. *Dungee*, 227 S.E.2d at 747. The defendant was sentenced on January 9, 1974 for six counts of murder. *Id.*

4. *Coleman*, 226 S.E.2d at 913-14.

5. *Id.* at 913.

6. *Id.* Evidence showed that they were both shot in the head at close range. *Id.*

7. *Id.*

8. *Coleman*, 226 S.E.2d at 913. Before Alday was killed, the defendants made him empty his pockets. *Id.*

9. *Id.* The defendants emptied Mrs. Alday's purse, finding her car keys and a dollar bill. *Id.*

10. *Id.*

11. *Id.*

12. *Coleman*, 226 S.E.2d at 913.

13. *Id.*

14. *Id.*

15. Spraggins v. State, 243 S.E.2d 20, 21 (Ga. 1978).

16. *Id.*

17. *Id.*

caused the victim to bleed heavily.[18] The most severe stab wounds were located in the victim's upper abdomen and lower chest, including two stab wounds in the upper abdomen which penetrated the victim's heart.[19] The victim was found lying on her bed with her sweater open and her pantyhose and panties pulled to her ankles.[20] Expert testimony at the trial concluded that, based on the existence of bruises found on the victim's thigh and near her vaginal opening, the defendant had manipulated the victim's sexual organs.[21] Evidence also showed that the victim had been partially disembowelled.[22] She ultimately bled to death.[23]

Each of these defendants was convicted of murder and sentenced to death in Georgia. Today, however, these cases have been remanded to their respective trial courts for the determination of the intelligence quotient (I.Q.) of each defendant. In Georgia, Tennessee, Kentucky, Maryland, and New Mexico, a defendant who obtains an I.Q. score of seventy or less is excused from the death penalty, even when the defendant's subaverage intelligence did not prevent the defendant from discerning the difference between right and wrong.[24]

---

18. *Id.*

19. *Spraggins*, 243 S.E.2d at 21.

20. *Id.*

21. *Id.* No sperm cells were found on the victim. *Id.* at 21-22. However, Dr. Dawson testified that during the victim's autopsy he found "hemorrhaging around the victim's urethra and a small tear in the vaginal orifice." *Id.* at 21.

22. *Id.*

23. *Spraggins*, 243 S.E.2d at 21.

24. *See* N.M. STAT. ANN. § 31-20A-2.1 (Michie Supp. 1992) (describing presumption of mental retardation). The statute reads in pertinent part: "If the court finds, by a preponderance of the evidence, that the defendant is mentally retarded, it shall sentence the defendant to life imprisonment. . . . An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation." *Id*; *see* GA. CODE ANN. § 17-7-131(j) (Michie 1990 & Supp. 1992) (stating requirements for imposing death penalty). The statute states that if a defendant who is adjudged guilty is mentally retarded, "the death penalty shall not be imposed and the court shall sentence the defendant to imprisonment for life." *Id.* This statute is effective for any trial "in which the death penalty is sought which commences on or after July 1, 1988." *Id*; *see also* KY. REV. STAT. § 532.140 (Michie 1990) (providing no person determined to be severely mentally retarded shall be subject to death penalty); MD. ANN. CODE art. 27, § 412(f) (1991) (stating penalty for mentally retarded defendants may not be death); TENN. CODE ANN. § 39-13-203(3)(b) (1991) (providing mentally retarded defendants shall not be sentenced to death); Fleming v. Zant, 386 S.E.2d 339, 340 (Ga. 1989) (applying Georgia's amended statute exempting mentally retarded from death penalty). *But see* Levy v. Pennsylvania Dep't of Educ., 399 A.2d 159, 162 (Pa. Commw. Ct. 1979) (holding I.Q. scores do not constitute substantial evidence of mental retardation). *See* Mary D. Bicknell, Note, *Constitutional Law: The Eighth Amendment Does Not Prohibit the Execution of Mentally Retarded Convicts*, 43 OKLA. L. REV. 357, 371 (1990) (supporting Maryland and Georgia's "bright line" rule that sets I.Q. of 70 as dividing line between those

Throughout the United States, a debate is being waged[25] that has specific significance for the mentally retarded, especially for the more than 250 mentally retarded defendants sitting on death row.[26] The United States Supreme Court has held that it is not cruel and unusual punishment to execute a mentally retarded person convicted of a capital crime.[27] In so holding, the

---

who can be executed and those who cannot). *See generally* CLASSIFICATION IN MENTAL RETARDATION 13 (Herbert J. Grossman, M.D. ed., 1983) (placing I.Q. of 70 as upper limit for mental retardation).

25. For a general discussion on both the skewed results that can arise from using I.Q.s alone to classify persons as mentally retarded and the use of such scores in the capital sentencing of the mentally retarded, respectively, see generally Bruce Cushna, *The Psychological Definition of Mental Retardation: A Historical Overview, in* EMOTIONAL DISORDERS OF MENTALLY RETARDED PERSONS 31 (Ludwik S. Szymanski, M.D. & Peter E. Tanguay, M.D. eds., 1980); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414 (1985).

26. *See* Juliet L. Ream, Comment, *Capital Punishment for Mentally Retarded Offenders: Is It Morally and Constitutionally Impermissible?*, 19 SW. U. L. REV. 89, 112-13 (1990) (stating that as of 1989, 250 of 2,000 inmates on death row in United States were mentally retarded). Although the exact number of inmates on death row varies according to the source, the number is large enough to warrant a serious inquiry into determining what proportion of these inmates are mentally retarded. *See* Walton v. Arizona, 497 U.S. 639, 669 (1990) (Scalia, J., concurring) (finding 2,327 convicted murderers on death row as of May 1990); Daniels v. Zant, 494 F. Supp. 720, 721 (M.D. Ga. 1980) (noting Georgia has 96 individuals on death row); PAUL R. FRIEDMAN, THE RIGHTS OF MENTALLY RETARDED PERSONS 15 (ACLU Handbook 1976) (finding 10% of total prison population mentally retarded, which equals approximately 21,000 inmates); Marianne Lavelle, *Strong Law Thwarts Lone Star Counsel*, NAT'L L.J., June 11, 1990, at 31 (finding 320 prisoners on death row in Texas); *cf.* Rector v. Bryant, __ U.S. __, __, 111 S. Ct. 2872, 2875, 115 L. Ed. 2d 1038, 1041 (1991) (Marshall, J. dissenting) (dissenting from denying certiorari and noting many death row inmates suffer serious mental impairments).

27. *See* Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (giving death sentence to mentally retarded defendant found competent to stand trial not within Eighth Amendment prohibition of cruel and unusual punishments); Mathenia v. Delo, 975 F.2d 444, 453 (8th Cir. 1992) (holding mental retardation insufficient to support diminished capacity defense to capital murder), *cert. denied*, 61 U.S.L.W. 3652 (U.S. Mar. 22, 1993) (No. 92-7457); Williams v. Dixon, 961 F.2d 448, 451 (4th Cir. 1992) (noting that imposition of death penalty on mildly mentally retarded defendant does not violate Eighth Amendment), *cert. denied*, __ U.S. __, 113 S. Ct. 510, 121 L. Ed. 2d 445 (1992); Washington v. Murray, 952 F.2d 1472, 1481-82 (4th Cir. 1991) (finding sentence of death for defendant who suffered from organic brain damage did not violate Eighth Amendment); Prejean v. Smith, 889 F.2d 1391, 1402 (5th Cir. 1989) (holding mental retardation alone not bar to death penalty), *cert. denied*, 494 U.S. 1090 (1990); Brogdon v. Butler, 824 F.2d 338, 341 (5th Cir. 1987) (holding imposition of death penalty on mentally retarded not cruel and unusual punishment). In *Brogdon*, the court distinguished mental retardation from insanity, asserting that mental retardation does not, by itself, constitute an incapacity to know the difference between wrong and right. *Id.*; *see* Melton v. Hendrick, 330 F.2d 263, 266 (3d Cir. 1964) (holding imposition of death penalty on mentally retarded not cruel and unusual punishment per se if court fully considers defendant's mental condition). *Contra Fleming*, 386 S.E.2d at 343 (holding execution of mentally retarded constitutes cruel and unusual punishment). *See generally* Mary D. Bicknell, Note, *Constitutional*

Court argued that because only one state explicitly banned this punishment, a national consensus opposing the execution of the mentally retarded did not exist.[28] Sympathizing with the mentally retarded, states have since enacted, and are now proposing, legislation exempting the mentally retarded from the death penalty based solely on these persons' I.Q.'s.[29] Consequently, over

---

Law: The Eighth Amendment Does Not Prohibit the Execution of Mentally Retarded Convicts, 43 OKLA. L. REV. 357, 364-70 (1990) (discussing constitutionality of executing mentally retarded capital offenders); Patricia Hagenah, Note, *Imposing the Death Sentence on Mentally Retarded Defendants: The Case of* Penry v. Lynaugh, 59 UMKC L. REV. 135, 139-42 (1990) (discussing *Penry*'s holding that it is not cruel and unusual punishment to impose death penalty on mentally retarded individuals).

28. *See Penry*, 492 U.S. at 335 (finding insufficient evidence of national consensus against executing mentally retarded defendants to establish categorical exemption); *cf.* Stanford v. Kentucky, 492 U.S. 361, 370-371 (1989) (finding 15 states prohibit execution of 16-year-old offenders and 12 states prohibit execution of 17-year-old offenders). In *Stanford*, the Court contended that a national consensus against capital sentencing of criminal offenders below age sixteen did not exist. *Id*; *see Thompson*, 487 U.S. at 823-29 (examining state legislation). In *Thompson*, the Court found a national consensus against the imposition of the death penalty on fifteen-year-old defendants. *Id.* Accordingly, the Court suggested that it is cruel and unusual to execute defendants who are fifteen years old and younger. *Id.* at 833; *see also Tison*, 481 U.S. at 154 (finding recent state legislation authorizing imposition of death penalty on felony murder "powerfully suggests" that society condones this punishment); Ford v. Wainwright, 477 U.S. 399, 408 (1986) (finding "no state in the Union" permitting execution of insane defendants proving lack of sufficient national consensus to prohibit their execution); Coker v. Georgia, 433 U.S. 584, 595-96 (1977) (finding national consensus against imposition of death penalty for rape of adult women); Gregg v. Georgia, 428 U.S. 153, 179-80 (1976) (finding that 35 states reenacting capital-sentencing statutes after *Furman* signifies societal consensus in executing capital murderers); *see also* Robert P. Gritton, Comment, *Capital Punishment: New Weapons in the Sentencing Process*, 24 GA. L. REV. 423, 431-35 (1990) (arguing national consensus against execution of juveniles and mentally retarded capital offenders exist); Andrew H. Friedman, Note, Tison v. Arizona: *The Death Penalty and the Non-Triggerman: The Scales of Justice Are Broken*, 75 CORNELL L. REV. 123, 127 (1989) (discussing Supreme Court's national consensus analysis in determining constitutionality of particular punishment); Robert Woll, Note, *The Death Penalty and Federalism: Eighth Amendment Constraints on the Allocation of State Decision Making*, 35 STAN. L. REV. 787, 803-04 (1983) (arguing that evolving standards of decency demand national consensus against that particular punishment before Court can find it cruel and unusual); *The Supreme Court, 1988 Term — Leading Cases*, 103 HARV. L. REV. 137, 151 (1989) (discussing Supreme Court's national consensus analysis in *Penry*).

29. *See* N.M. STAT. ANN. § 31-20A-2.1 (Michie Supp. 1992) (prohibiting death penalty for mentally retarded persons). The statute reads in pertinent part: "An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation. . . . If the court finds, by a preponderance of the evidence, that the defendant is mentally retarded, it shall sentence the defendant to life imprisonment." *Id.*; *see also* GA. CODE ANN. § 17-7-131(j) (Michie 1990 & Supp. 1992) (prohibiting death penalty for mentally retarded persons). The statute reads in pertinent part: "the death penalty shall not be imposed and the court shall not sentence the defendant to imprisonment for life." *Id.* This statute is effective for any trial in which the death penalty is sought that commences on or after July 1, 1988. *Id.*; *see also Fleming*, 386 S.E.2d at 340 (applying Georgia's amended

250 mentally retarded death-row inmates' lives are in limbo, as they wait for either the enactment of a statute in their respective states exempting the mentally retarded from the death penalty, or the United States Supreme Court's reconsideration of its national consensus analysis in light of the newly enacted exculpation statutes.[30]

This Comment will show that there is no merit to the argument that the Eighth Amendment categorically prohibits the imposition of capital punishment on all persons considered to be mentally retarded, regardless of their degree of retardation.[31] This Comment begins with an overview of the historical treatment of mental disabilities, articulating the levels of mental deficiency required for exculpation of criminal responsibility. Next, this Comment discusses the characteristics of persons with mental retardation, demonstrating the misconception the public has about these individuals. This Comment will also discuss the recently enacted statutes' use of I.Q. tests for determinations of mental retardation. In analyzing these statutes, it becomes apparent that a person's I.Q. should not be prima-facie proof of mental retardation, although state legislatures are suggesting otherwise. Additionally, this Comment will discuss the constitutionality of imposing the death penalty on mentally retarded capital murderers, setting forth the sentencing guidelines as well as the Supreme Court's reasoning. Finally, this comment will propose an alternative to the state legislatures' I.Q.-exemption statutes, suggesting hurdles that courts must overcome before imposing the death penalty on mentally retarded capital murderers. The proposed guide-

---

statute exempting mentally retarded persons from death penalty); Mary D. Bicknell, Note, *Constitutional Law: The Eighth Amendment Does Not Prohibit the Execution of Mentally Retarded Convicts*, 43 OKLA. L. REV. 357, 371 (1990) (supporting Maryland and Georgia's "bright line" rule setting I.Q. of 70 as dividing line determining persons who can be executed). *See generally* CLASSIFICATION IN MENTAL RETARDATION 13 (Herbert J. Grossman, M.D. ed., 1983) (placing I.Q. of 70 as upper limit for mental retardation).

30. *Cf.* State v. Patillo, 417 S.E.2d 139, 140-41 (Ga. 1992) (vacating defendant's death sentence based on Georgia statute); *Fleming*, 386 S.E.2d at 340-43 (vacating defendant's death sentence for killing police officer based on Georgia statute); Tennessee v. Middlebrooks, 840 S.W.2d 317, 351 (Tenn. 1992) (Reid, C.J., concurring and dissenting) (noting majority opinion vacating defendant's death sentence for felony murder and kidnapping based on TENN. CODE ANN. § 39-13-203 (1990)); State v. Black, 815 S.W.2d 166, 189 n.15 (Tenn. 1991) (acknowledging statute's prohibition against executing defendants who are mentally retarded). *See generally* Kathryn S. Berthot, Comment, *Bifurcation in Insanity Trials: A Change in Maryland's Criminal Procedure*, 48 MD. L. REV. 1045, 1052-62 (1989) (discussing newly enacted Maryland statute exonerating mentally retarded as group from criminal responsibility).

31. U.S. CONST. amend. VIII. The Eighth Amendment of the United States Constitution reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." *Id.* The Eighth Amendment was held applicable to the states by the Due Process Clause of the Fourteenth Amendment. *See* Robinson v. California, 370 U.S. 660, 666-67 (1962) (applying cruel-and-unusual-punishments analysis to state law through Fourteenth Amendment).

lines will continue punishing culpable mentally retarded defendants, while exonerating incompetent mentally retarded defendants.

II. THE HISTORICAL TREATMENT OF MENTAL DISABILITIES

The exculpation of "idiots" from the death penalty has long been recognized and is now firmly ingrained in English and American common-law jurisprudence.[32] The inherent point of disagreement, however, arises in the determination of what level of mental disability constitutes "idiocy" sufficient for exoneration from criminal responsibility.[33] Presently, a majority of states recognize that mental retardation is different from what the common law considered "idiocy" in that mental retardation does not provide a complete defense to a criminal act.[34] However, Georgia, Tennessee, Kentucky,

---

32. *See* Penry v. Lynaugh, 492 U.S. 302, 331-33 (1989) (noting well-settled common law that both "idiots" and "lunatics" are exonerated from criminal responsibility); *see also* Ford v. Wainwright, 477 U.S. 399, 407 (1986) (arguing that executing individuals who are "mad" is extreme inhumanity and cruelty, and citing common-law philosophy that if defendant becomes insane, execution is inhumane). *See generally* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 432 (1985) (finding well-established authorities accepting proposition that idiots are exculpated from criminal responsibility); Ptolemy H. Taylor, Comment, *Execution of the "Artificially Competent": Cruel and Unusual?*, 66 TUL. L. REV. 1045, 1049-52 (1992) (discussing long-standing, common-law prohibition against executing insane defendants).

33. *Compare Penry*, 492 U.S. at 333 (contending that "severe" or "profoundly" mentally retarded person may be sufficiently mentally deficient to be exonerated from death penalty) *and* Mathenia v. Delo, 975 F.2d 444, 448 (8th Cir. 1992) (contending that mental retardation alone is insufficient to support exoneration from death penalty) *with* Fleming v. Zant, 386 S.E.2d 339, 342-43 (Ga. 1989) (finding mental retardation sufficient mental disability for exoneration from death penalty). While distinguishing mental disabilities that were sufficient to exonerate criminal responsibility, early distinctions were made between "idiots" who were mentally deficient, and "lunatics," who were congenitally insane. *See* Patricia Hagenah, Note, *Imposing the Death Sentence on Mentally Retarded Defendants: The Case of* Penry v. Lynaugh, 59 UMKC L. REV. 135, 149-52 (1990) (arguing that mentally retarded defendants should be exonerated from death penalty because mental retardation eliminates amount of culpability required for death penalty); Comment, *Lunacy and Idiocy—The Old Law and its Incubus*, 18 U. CHI. L. REV. 361, 362 (1951) (discussing difference between "idiots" and "lunatics").

34. *See, e.g., Penry*, 492 U.S. at 339-40 (conceding that mental retardation may lessen defendant's culpability but does not, by itself, exonerate criminal responsibility); State v. Jones, 378 S.E.2d 594, 597 (S.C. 1989) (holding mental retardation does not bar imposition of death penalty), *cert. denied*, 494 U.S. 1060 (1990); *Ex parte* Goodman, 816 S.W.2d 383, 386 (Tex. Crim. App. 1991) (en banc) (granting writ of habeas corpus because jury not instructed to consider fully mitigating evidence of defendant's mental retardation); *contra Fleming*, 386 S.E.2d at 340 (providing mentally retarded defendants with complete defense to due process). *See generally* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 432-40 (1985) (discussing history of mental non-responsibility for criminal conduct); Kathryn S. Berthot, Comment, *Bifurcation in Insanity Trials: A Change in Maryland's Criminal Procedure*, 48 MD. L. REV. 1045, 1052-62 (1989) (discussing judicial

Maryland, and New Mexico contend that mentally retarded individuals having an I.Q. of seventy or less can never act with the degree of blameworthiness that is associated with the death penalty.[35]

A. *Exculpation of Criminal Responsibility*

Historically, the first attempt to define the level of mental disability required for exculpation from criminal responsibility appears in legal doctrines of the thirteenth and fourteenth centuries.[36] Texts of these centuries distinguish a "lunatic" or a violently insane person, from an "idiot" or a mentally deficient or disturbed person, finding that both categories of mental deficiency could be used as a defense to criminal prosecution.[37] Beginning in the

---

interpretations of Maryland statute categorically exonerating mentally retarded persons from criminal responsibility); Joshua N. Sondheimer, Note, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing,* 41 HASTINGS L.J. 409, 417-19 (1990) (acknowledging long-standing debate over what level of mental capacity vitiates criminal responsibility); Comment, Johnson v. State — *Diminished Capacity Rejected as a Criminal Defense,* 42 MD. L. REV. 522, 527 (1983) (discussing Maryland statute exoneration of mentally retarded individuals from criminal responsibility).

35. *See, e.g.*, GA. CODE ANN. § 17-7-131(j) (Michie 1990 & Supp. 1992) (stating death penalty shall not be imposed on mentally retarded defendant); N.M. STAT. ANN. § 31-20A-2.1 (Michie Supp. 1992) (exempting mentally retarded defendants from death penalty based on I.Q. of 70 or below). I.Q. tests should not be used as a unitary measures of whether or not a defendant will be executed. *See* Diggs v. Welch, 148 F.2d 665, 666 (D.C. Cir. 1945) (arguing against using objective standards in determining judgments of abnormal offenders). In *Diggs*, the court opined that the decision to exonerate from criminal responsibility must be based on the instinctive sense of justice of ordinary men, by deciding whether the defendant could distinguish between right and wrong, and not on objective standard. *Id. See generally* Mary D. Bicknell, Note, *Constitutional Law: The Eighth Amendment Does Not Prohibit the Execution of Mentally Retarded Convicts,* 43 OKLA. L. REV. 357, 371 (1990) (supporting Georgia and Maryland's "bright line" rule). The "bright line" rule is a label the author adopts to describe Georgia and Maryland's statutes exculpating mentally retarded individuals from the death penalty. *Id.* Bicknell argues that individuals who have an I.Q. of seventy or below cannot act with the necessary degree of blameworthiness that is associated with death penalty. *Id.*; *see* Kathryn S. Berthot, Comment, *Bifurcation in Insanity Trials: A Change in Maryland's Criminal Procedure,* 48 MD. L. REV. 1045, 1052-62 (1989) (discussing Maryland statute that states mentally retarded lack degree of culpability required for criminal responsibility).

36. *See* Penry v. Lynaugh, 492 U.S. 302, 331-33 (1989) (discussing historical development of criminal responsibility); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants,* 53 GEO. WASH. L. REV. 414, 416-17 (1985) (discussing origins of legal distinction between "idiots" and "lunatics"). The first legal distinction made between "idiots" and "lunatics" is said to have most likely occurred in the thirteenth and fourteenth centuries. *See* Comment, *Lunacy and Idiocy—The Old Law and its Incubus,* 18 U. CHI. L. REV. 361, 362-33 (1951) (discussing origins of legal distinction in terminology regarding "insane" and "idiot"). Statutes made in the fourteenth century made distinctions, which provided that the land of "natural fools" would be given to the king to manage and for profit, whereas the lands of the "non compos mentis" would be given to the King temporarily, and not for profit. *Id.* at 362.

37. *See Penry,* 492 U.S. at 331-32 (discussing common-law standards of exculpation from

1500s, the "counting twenty pence" test was used to determine whether a person was an idiot.[38] Another test eventually developed, and in the early eighteenth-century case of *Rex v. Arnold*,[39] the court devised the "wild beast" test to determine whether a mentally disabled person was exonerated from the death penalty.[40] According to this test, an individual who "doth not know what [he or she was] doing, no more than an infant, than a brute, or a wild beast," was exonerated of the death penalty.[41]

---

criminal responsibility). In *Penry*, the Court identified that at common law, both "idiot" and "lunatics" were free from criminal responsibility. *Id.* at 331. The common-law terms of "idiot" and "lunatics" were defined as individuals under a natural disability, who are unable to discern right from wrong at the time the criminal act occurred. *See* Sanders v. State, 585 A.2d 117, 123-24 (Del. 1990) (noting differences between insanity and mental illness); State v. Searcy, 798 P.2d 914, 934 (Idaho 1990) (acknowledging common-law prohibition against holding "idiots" responsible for crimes); State v. Wilson, 413 S.E.2d 19, 25 (S.C. 1992) (noting that ancient common law forbade execution of individuals who were "idiots," "lunatics," or both), *cert. denied*, __ U.S. __, 113 S. Ct. 137, 121 L. Ed. 2d 90 (1992); *see also* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 417 n.15 (1985) (citing early scholarly works finding "idiocy" protected from punishment, but "lunacy" protected only from punishments for acts done during prevalence of individual's lunacy). *See generally* Comment, *Lunacy and Idiocy—The Old Law and its Incubus*, 18 U. CHI. L. REV. 361, 361-63 (1951) (discussing difference at common law between "lunatics" and "idiots").

38. *See Searcy*, 798 P.2d at 929 (discussing "twenty pence" test). Under this test, a defendant is exonerated from criminal responsibility when he "cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is etc., so as it may appear he hath no understanding of reason what shall be for his profit, or what for his loss." *See* S. SHELDON GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 128 (1925) (discussing role of "twenty pence" test in historical origins of insanity) (citing A. FITZHERBERT, NATURA BREVIUM (1534)); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 416-17 (1985) (discussing "twenty pence" test); Eric L. Shwartz, Comment, Penry v. Lynaugh: *"Idiocy" and the Framers' Intent Doctrine*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 315, 329-30 (1990) (describing "twenty pence" test). In his Comment, Shwartz argues that individuals who are only mildly retarded would be considered idiots under this twenty-pence test. *Id.*

39. 16 How. St. Tr. 695, 765 (Eng. 1724), *cited in* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 433 (1985).

40. *See Penry*, 492 U.S. at 332 (discussing "wild beast" test); United States v. Brawner, 471 F.2d 969, 1024 (D.C. Cir. 1972) (discussing "wild beast" test to determine whether defendant can distinguish good from evil); United States v. Smith, 404 F.2d 720, 725 (6th Cir. 1968) (discussing "wild beast" test in determining defendant's sanity); Washington v. United States, 390 F.2d 444, 445 (D.C. Cir. 1967) (noting test for criminal responsibility in early eighteenth century was "wild beast" test); Durham v. United States, 214 F.2d 862, 869 (D.C. Cir. 1954) (noting right-wrong test has its origin in "wild beast" test of eighteenth century). *See generally* Michael Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. 599, 631-32 (1990) (discussing development of insanity defense by way of "wild beast" test); Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1375 (1986) (discussing "wild beast" test of insanity).

41. *See Penry*, 492 U.S. at 332 (discussing early common-law definitions of insanity); *see*

B. *The* M'Naghten *Test*

In 1843, the House of Lords decided *Daniel M'Naghten's Case*,[42] creating the most widely accepted test for deciding which mentally disabled persons should be exonerated from criminal responsibility.[43] Under the *M'Naghten* test, a court must consider whether the defendant suffers from a defect of reason or from a disease of the mind that either prevents him from knowing the nature and quality of his acts or that clouds his judgment to such a degree that he is unaware that his act is wrong.[44]

---

also People v. Skinner, 704 P.2d 752, 759 (Cal. 1985) (discussing "wild beast" test); *Sanders*, 585 A.2d at 137 (discussing definition of insanity). *See generally* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 432-33 (1985) (discussing role of "wild best" test in development of requirements for mental responsibility); Judith A. Northrup, Comment, *Guilty But Mentally Ill: Broadening the Scope of Criminal Responsibility*, 44 OHIO ST. L.J. 797, 802 (1983) (discussing historical approaches to determining insanity).

42. 8 Eng. Rep. 718 (H.L. 1843).

43. *See* Davis v. United States, 165 U.S. 373, 378 (1897) (defining insanity as "perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong"). In fashioning a definition of insanity, American courts have followed the English case of *M'Naghten*. *Id.* The Supreme Court argued that to be excused from criminal responsibility, the governing power of the defendant's mind must be beyond his control when deciding whether to do the criminal act. *Id.* The definition of insanity as set forth in *Davis* firmly established the law of insanity in the United States. *See, e.g.*, Blocker v. United States, 288 F.2d 853, 872 (D.C. Cir. 1961) (Fahay, J., concurring) (acknowledging criminal-responsibility test of *M'Naghten*); Howard v. United States, 232 F.2d 274, 277 (5th Cir. 1956) (accepting right-wrong test of *Davis*); Holloway v. United States, 148 F.2d 665, 666 (D.C. Cir. 1945) (noting ordinary test used in determination of criminal responsibility is whether defendant could tell right from wrong), *cert. denied*, 334 U.S. 852 (1948); Smith v. United States, 36 F.2d 548, 549 (D.C. Cir. 1929) (discussing adoption of English rule in determination of insanity). In *Smith*, the court held that one must possess, at the time the crime was committed, a degree of insanity to "override the reason and judgment and obliterate the sense of right and wrong to the extent that the accused is deprived of the power to choose between right and wrong," in order to be exonerated from punishment. *Id.*; *cf.* Leland v. Oregon, 343 U.S. 790, 796 (1951) (noting Oregon's adoption of *M'Naghten* test). *See generally* Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: A Historical Survey*, 54 CAL. L. REV. 1227, 1228-31 (1966) (discussing antecedents of *M'Naghten's* right-from-wrong distinction); Margaret C. McHugh, Comment, Greenfield v. Wainwright: *The Use of Post-Miranda Silence To Rebut the Insanity Defense*, 35 AM. U. L. REV. 221, 227-28 (1985) (arguing for expansion of *M'Naghten* in current determination of insanity).

44. *See Blocker*, 288 F.2d at 877 (acknowledging right-wrong test in determining exoneration of criminal responsibility); *Howard*, 232 F.2d at 275 (acknowledging criminal-responsibility test as incapacity resulting from some mental disability to distinguish between right and wrong); *accord Davis*, 165 U.S. at 378 (recognizing right-wrong test of *M'Naghten*). In *Davis*, the Court opined that an accused who is incapable of distinguishing between right and wrong with respect to the criminal act because of some mental disability is unable to refrain from doing wrong. *Id. But see* Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954) (holding criminal not responsible for unlawful act if act "a product of mental disease or mental

Although the *M'Naghten* test came to be well accepted in the United States throughout the nineteenth and twentieth centuries, it was not until 1986 that the United States Supreme Court, in *Ford v. Wainwright*,[45] explicitly held that the execution of insane persons is cruel and unusual punishment.[46] The Court based its decision upon the common-law prohibition on executing persons who do not have the mental capacity to appreciate the wrongfulness of their actions or the reasons why they are being punished.[47]

---

defect"). *See* Anne S. Emanuel, *Guilty But Mentally Ill Verdicts and the Death Penalty: An Eighth Amendment Analysis*, 68 N.C. L. REV. 37, 42-44 (1989) (discussing traditional legal definitions of insanity); Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 262-63 (1987) (discussing *M'Naghten*'s reliance on mental disease making defendant unable to know nature of his act).

45. 477 U.S. 399, 408-10 (1986). Ford was found competent both at the time of the murder and at his trial. *Id.* at 401-02. Instead, after he was convicted, Ford began to manifest changes in his behavior to the point where he had no idea of his sentence, nor the reasoning behind the sentence. *Id.* at 402-03. *See generally* Gordon L. Moore III, Comment, Ford v. Wainwright: *A Coda in the Executioner's Song*, 72 IOWA L. REV. 1461, 1462-65 (1987) (discussing facts and procedural background of *Ford*); Rachelle Deckert Dick, Note, Ford v. Wainwright: *Warning—Sanity on Death Row May Be Hazardous to Your Health*, 47 LA. L. REV. 1351, 1352-53 (1987) (discussing prohibition of death penalty on individuals who are insane).

46. *Ford*, 477 U.S. at 409-10. In *Ford*, the Court found the execution of insane defendants cruel and unusual punishment because it was inconsistent with the evolving standards of decency. *Id.* at 408-10. Even prior to this holding, numerous American courts had recognized the prohibition against the execution of defendants who are incapable of discerning right from wrong. *See, e.g.*, State v. Helm, 61 S.W. 915, 916-17 (Ark. 1901) (noting that history of English common law disfavored execution of mentally incompetent persons); People v. Geary, 131 N.E. 652, 655-56 (Ill. 1921) (interpreting Illinois death-penalty statute as prohibiting execution of insane persons); Barker v. State, 106 N.W. 450, 451 (Neb. 1905) (noting Nebraska law does not punish by death those found mentally incompetent); *In re* Smith, 176 P. 819, 822 (N.M. 1918) (noting common law prohibited execution of insane persons). *See generally* Rachelle Deckert Dick, Note, Ford v. Wainwright: *Warning—Sanity on Death Row May Be Hazardous To Your Health*, 47 LA. L. REV. 1351, 1351-53 (1987) (discussing Court's recognition of Eighth Amendment prohibition against executing insane); Dana Lowy, Note, Perry v. Louisiana: *To Execute Or Not To Execute a Mentally Incompetent Convicted Criminal . . . That Remains the Question*, 21 SW. U. L. REV. 205, 209-210 (1992) (discussing insanity and death penalty).

47. *Ford*, 477 U.S. at 417-18 (holding that individual "unaware of the punishment they are about to suffer and why they are to suffer it" cannot be punished). The Supreme Court reasoned that to execute a defendant who has no capacity to understand his actions was abhorrent and offended humanity. *Id.* at 409. Additionally, the Court reasoned that to execute individuals who were insane contributes nothing to the deterrent value of the death penalty. *Id.* at 407. Furthermore, the execution of individuals who were insane served no useful purpose because those individuals were already being punished by their madness. *Id.* at 407-08. Prior to *Ford*, courts had recognized Eighth Amendment rights for the insane. *See* Pate v. Robinson, 383 U.S. 375, 378 (1966) (holding unconstitutional convicting accused individual while insane); *Blocker*, 288 F.2d at 857-62 (Burger, J., concurring) (discussing weaknesses in disease-defect-product test used in determining whether to exonerate defendant from criminal responsibility); State v. Bradley, 433 P.2d 273, 277 (Ark. 1967) (noting long-standing principle

The Court contended that a national consensus opposing the imposition of capital punishment on the insane existed, which compelled the Court to conclude that the Eighth Amendment prohibits the execution of such individuals.[48]

Even though *Wainwright* involved an insane individual, it is well settled in common law that the competency test of *M'Naghten* is applicable not only to those defendants who are insane, but to mentally retarded individuals as

---

that insane person cannot be tried, convicted, or punished for public offense while insane); State v. Saxon, 190 N.W.2d 854, 856 (Neb. 1971) (stating individual lacking capacity to understand proceedings against him is exonerated from criminal responsibility). In *Blocker*, the concurring opinion asserted that the standard for exoneration was whether the defendant's unlawful act was the product of mental disease or mental defect. *Blocker*, 288 F.2d at 857. Criticizing this test, the concurring opinion found that the disease-product test totally ignored the free will of the defendant. *Id.* at 858. Accordingly, the concurring opinion argued that a defendant should be excused of criminal responsibility only when the mental disease affected him so substantially that he could not comprehend the wrongfulness of the act. *Id.* at 862; *see also* Carter v. United States, 252 F.2d 608, 616 (D.C. Cir. 1957) (discussing degree of criminal intent needed to exonerate defendant from criminal responsibility). In *Carter*, the court opined that "[t]he basic import of criminal law is punishment for a 'vicious will' which motivates a criminal act." *Id.* Those defendants who are "confronted with a choice between doing right or wrong and freely choose to do wrong" should be responsible for their criminal activity. *Id.* However, if a defendant is unable to freely choose between right and wrong, or cannot distinguish between the two, he is "outside the postulate of the law of punishment" and, thus, is unable to form the intent required of the crime. *Id*; *see* V. Stephen Cohen, Comment, *Exempting the Mentally Retarded from the Death Penalty: A Comment on Florida's Proposed Legislation*, 19 FLA. ST. U. L. REV. 457, 466 (1991) (arguing *Ford* extended exoneration of insane defendants from death penalty to mentally retarded); *see also The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 100 (1986) (discussing Court's recognition of common law in prohibiting execution of insane persons); William A. Aniskovish, Note, *In Defense of the Framers' Intent: Civic Virtue, the Bill of Rights, and the Framers' Science of Politics*, 75 VA. L. REV. 1311, 1320-21 (1989) (discussing Court's exculpation of insane from death penalty).

48. *Ford*, 477 U.S. at 408-10 (finding no states permitting execution of insane defendants). The Supreme Court noted that "41 states have a death penalty or statutes governing execution procedures" and "26 states have statutes explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence." *Id.* at 408 n.2. From this statistic, the Court concluded "that the ancient and humane limitation upon the State's ability to execute its sentences has a firm hold upon the jurisprudence of today." *Id.* at 409; *see Penry*, 492 U.S. at 334 (arguing no state permits execution of insane defendants). *Compare* Stanford v. Kentucky, 492 U.S. 361, 373 (1989) (declaring majority of states permitting execution of 16-year-old individuals demonstrates absence of national consensus against such punishment) *and* Tison v. Arizona, 481 U.S. 137, 154 (1987) (finding several states permitting execution of felony murderers regardless of intent "powerfully suggests" no national consensus against such punishment) *with Ford*, 477 U.S. at 408 (finding no authority condoning execution of insane defendants) *and* Coker v. Georgia, 433 U.S. 584, 594 (1977) (finding no state authorizes death penalty for rape). *See generally* Ptolemy H. Taylor, Comment, *Execution of the "Artificially Competent": Cruel and Unusual?*, 66 TUL. L. REV. 1045 (1992) (arguing against execution of mentally retarded defendants).

well.[49] Consequently, it may be a cruel and unusual punishment to execute a severely or profoundly retarded defendant who lacks the amount of mental capacity sufficient for competency under *M'Naghten*.[50] However, mental retardation in itself should not excuse a defendant of criminal responsibility when there is evidence that the defendant is capable of discerning the difference between right and wrong.[51]

---

49. *See Penry*, 492 U.S. at 332-33 (finding that common-law prohibition against executing "idiots" applies to those persons who lack reasoning capacity to discern difference between wrong and right); Wartena v. State, 5 N.E. 20, 23 (Ind. 1886) (holding that "[i]mbecility of mind may be of such degree as to constitute insanity"); State v. Pinski, 163 S.W.2d 785, 787-88 (Mo. 1942) (recognizing mental incapacity includes not only insanity but also any mental incapacity that makes defendant unable to distinguish wrong from right); State v. Johnson, 290 N.W. 159, 162 (Wis. 1940) (finding both insane and feeble-minded persons can be exonerated from criminal responsibility if unable to distinguish difference from right and wrong). *See generally* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 432-42 (1985) (discussing development of *M'Naghten* test).

50. *See Penry*, 492 U.S. at 333 (suggesting that it may be cruel and unusual to execute profoundly or severely retarded defendants). In *Penry*, the Court opined that the common-law prohibition against executing "idiots" may suggest that it is cruel and unusual punishment to sentence to death severely or profoundly retarded defendants who lack the mental capacity to appreciate the wrongfulness of their criminal conduct. *Id. See generally* V. Stephen Cohen, Comment, *Exempting the Mentally Retarded from the Death Penalty: A Comment On Florida's Proposed Legislation*, 19 FLA. ST. U. L. REV. 457, 468 (1991) (arguing that *Penry* offers hope for only severe and profoundly retarded persons and not for moderately retarded persons); Rebecca Dick-Hurwitz, Comment, Penry v. Lynaugh: *The Supreme Court Deals a Fatal Blow to Mentally Retarded Capital Defendants*, 51 U. PITT. L. REV. 699, 707 (1990) (discussing *Penry*'s assertion that execution of severely and profoundly retarded defendants may be cruel and unusual punishment).

51. *See Penry*, 492 U.S. at 332-33 (finding exculpation of criminal responsibility only when defendant is incapable of conforming his conduct to requirements of law); Drope v. Missouri, 420 U.S. 162, 171 (1975) (recognizing defendant must have "capacity to understand nature and object of proceedings against him, to consult with counsel, and to assist in preparing his defense" to be competent to stand trial); Mathenia v. Delo, 975 F.2d 444, 448 (8th Cir. 1992) (finding mental retardation alone is insufficient to support diminished-capacity defense), *cert. denied*, 61 U.S.L.W. 3652 (U.S. Mar. 22, 1993) (No. 92-7457); Woods v. Dugger, 923 F.2d 1454, 1455 (11th Cir. 1991) (finding mentally retarded murderer had the mental capacity to appreciate criminality of his conduct), *cert. denied sub nom.* Singletary v. Woods, __ U.S. __ , 112 S. Ct. 407, 116 L. Ed. 2d 355 (1991); McDonald v. United States, 312 F.2d 847, 859 (D.C. Cir. 1962) (Miller, J., dissenting) (arguing that limited mental capacity exempts no one from criminal responsibility unless mental disability makes it impossible from knowing act was wrong). In *McDonald*, the court argued that a person who deliberately chooses to do a known criminal act, although the individual's mental capacity is impaired, should not be excused from criminal responsibility from the criminal act. *McDonald*, 312 F.2d at 854. Furthermore, if the defendant is able to understand the criminality of his actions, then he is sane in the legal sense, even though he may have some mental disability. *Id.*; *see also Pinski*, 163 S.W.2d at 787-88 (finding requisite "mental capacity" sufficient to excuse commission of crime is defendant's inability to distinguish right from wrong and not subnormal mental ability); *Johnson*, 290 N.W. at 162 (finding feeble-minded defendant understood nature of criminal act and knew

III. UNDERSTANDING THE MENTALLY RETARDED

A. *"Mental Retardation" Defined*

Before determining whether a mentally retarded individual should be exempt from the death penalty, it is imperative to understand the precise definition of mental retardation. The early definitions of mental retardation were quite similar to the definitions of the twentieth century.[52] In 1895, one of the first widely-accepted definitions of mental retardation defined mental retardation as a "[m]ental deficiency, depending upon imperfect development, or disease of the nervous system, dating from birth or from early infancy, previous to the evolution of the mental facilities."[53] However, as the rudiments of standardized testing were being formulated, as well as popularized, definitions of mental retardation became vague, imprecise, and based solely on intelligence-test scores.[54] Noting the fallibility of the I.Q. as a diagnostic instrument, experts in the field of psychology began to be concerned

---

difference between right and wrong); *Wartena*, 5 N.E. at 23 (holding weakness of mind does not excuse commission of crime).

52. Before standardized testing, early definition of mental retardation focused on visible defects such as how the person functions in society. The visible defects requirement is contained in the present definition of mental as "deficits in adaptive behavior." R.C. SCHEERENBERGER, A HISTORY OF MENTAL RETARDATION 110 (1983). The first definition in 1877 of mental retardation adopted by the American Association on Mental Deficiency was the following:

> Idiocy and imbecility are conditions in which there is want of natural or harmonious development of mental, active, and moral powers of the individual affected, usually associated with some visible defect or infirmity of the physical organization and functional anomalies, expressed in various forms and degrees of disordered vital action, in defect or absence of one or more of the special sense, in irregular or uncertain volition, in dullness, or absence of sensibility and perception.

Id. But see AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 28 (3d ed. rev. 1987) (defining mental retardation as condition of "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the early developmental period").

53. *See* R.C. SCHEERENBERGER, A HISTORY OF MENTAL RETARDATION 110 (1983) (stating late nineteenth-century definition of mental retardation).

54. *See* ALA. CODE § 15-24-2(3) (Supp. 1992) (defining mental retardation based on behavior and intellectual functioning as determined by standardized intelligence tests); N.M. STAT. ANN. § 31-20A-2.1 (Michie Supp. 1992) (stating I.Q. of 70 or below shall be presumptive evidence of retardation for capital-sentencing purposes); Snow v. State, 469 N.Y.S.2d 959, 962 (N.Y. App. Div. 1983) (interpreting I.Q. scores as "crude barometers" of intelligence); ROBERT M. ALLEN & ARNOLD D. CORTAZZO, PSYCHOSOCIAL AND EDUCATIONAL ASPECTS AND PROBLEMS OF MENTAL RETARDATION 19 (1970) (asserting that early classification of mental retardation emphasized intellectual ability); RITA WICKS-NELSON & ALLEN C. ISRAEL, BEHAVIOR DISORDERS OF CHILDHOOD 239 (2d ed. 1991) (discussing origins of I.Q. tests). I.Q. testing originated in the early 1900s when school children were tested for special education purposes. *Id.* At that time, intelligence was considered to be an "individual, inherent, and stable characteristic." *Id.*

about the use of I.Q. scores as a unitary measure of mental retardation.[55] In response to this predicament, the American Association on Mental Deficiency (AAMD)[56] proposed a definition of mental retardation in hopes of alleviating the problems that had developed with the use of I.Q. scores as a

---

55. *Cf.* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 n.9 (1985) (arguing that mental retardation not defined by I.Q. alone); *Snow*, 469 N.Y.S.2d at 962 (interpreting I.Q. scores as "crude barometers" of intelligence); Green v. State, 839 S.W.2d 935, 940 (Tex. App.— Waco 1992, n.w.h.) (finding mentally retarded defendant's "street smarts" exceeded his I.Q. of 54); *Ex parte* Williams, 833 S.W.2d 150, 151 (Tex. Crim. App. 1992) (finding individual with I.Q. score of 67 was not mentally retarded). Despite the recognized fallibility of I.Q. scores as a unitary measure of mental retardation, five states have enacted statutes making an I.Q. presumptive of mental retardation. *See* N.M. STAT. ANN. § 31-20A-2.1 (Michie Supp. 1992) (finding I.Q. of 70 or below presumptive evidence of mental retardation). *See generally* RITA WICKS-NELSON & ALLEN C. ISRAEL, BEHAVIOR DISORDERS OF CHILDHOOD 211 (2d ed. 1991) (asserting that abuse of I.Q. tests resulted in adoption of greater emphasis on adaptive behavior). *See also* M. Honzik et al., *The Stability of Mental Test Performance Between Two and Eighteen Years*, 17 J. EXPERIMENTAL EDUC. 309, 315 (1948) (emphasizing that observed fluctuations in children's I.Q. scores indicate need for utmost caution in predicative use of a single score). In this study, a group of 252 children were given intelligence tests at specified ages between 21 months and 18 years. *Id.* at 315. The results of the study indicated that a prediction of mental retardation based on a six-year I.Q. test would be inaccurate to the extent of twenty I.Q. points for one out of three children. *Id.* Consequently, the authors of the study assert that the findings of this study are of particular importance because "many plans for individual children are made by schools, juvenile courts, and mental hygiene clinics on the basis of a single mental test score." *Id.*; *see also* Edgar A. Doll, *The Essentials of an Inclusive Concept of Mental Deficiency*, 46 AMER. J. MENTAL DEFICIENCY 214, 216 (1941) (noting erroneous use of I.Q. as unitary measure of mental retardation). Dr. Doll proposed a new definition for mental retardation so as to ameliorate the erroneous use of the I.Q. as the sole criterion for mental retardation. *Id.* He contended that there were six criteria essential to a definition of mental retardation: "(1) social incompetence, (2) due to mental subnormality, (3) which has been developmentally arrested, (4) which obtains at maturity, (5) is of constitutional origin, and (6) is essentially incurable." *Id.* at 215; *see also* Lloyd N. Yepsen, *Defining Mental Deficiency*, 46 AMER. J. MENTAL DEFICIENCY 200, 203 (1941) (arguing that many people fail to recognize fallibility of I.Q. as diagnostic instrument). In this article, Dr. Yepsen states that an I.Q. is a concept that is readily understood by even the most uninformed layman. *Id.* He recognizes that the determination of mental retardation is very dangerous when based solely on a person's I.Q. *Id.* He further argues that the test used, the user of the test, the conditions under which it is used, the age of the person examined, the chances of error in the calculation of life age, test age, and the quotient itself, are often misunderstood by the individuals using the I.Q. method of diagnosis. *Id.*

56. American courts have widely accepted the AAMD as an authority in mental retardation. *E.g.*, Penry v. Lynaugh, 492 U.S. 302, 308 n.1 (1989); *Cleburne Living Ctr., Inc.*, 473 U.S. at 442 n.9; United States v. Masthers, 539 F.2d 721, 724 n.16 (D.C. Cir. 1976); Crosby v. Sultz, 592 A.2d 1337, 1341 (Pa. Super. Ct. 1991). The AAMD was originally founded in 1876 as the Association of Medical Officers of American Institutions of Idiotic and Feeble-minded Children. Today, the AAMD has approximately 10,000 members that serve in various capacities to help the mentally retarded. *See generally* CLASSIFICATION IN MENTAL RETARDATION 5-10 (Herbert J. Grossman, M.D. ed., 1983) (discussing origin of AAMD).

unitary measure of intelligence.[57] In 1959, the AAMD's proposed definition was nationally accepted: "Mental retardation refers to the subaverage general intellectual functioning, which originates in the developmental period and is associated with impairment in adaptive behavior."[58] Accordingly, an individual is mentally retarded only when there is evidence of:

(1) subaverage general intellectual functioning;

(2) concurrent deficits in adaptive behavior; and

(3) onset during the early developmental period.[59]

Today, virtually every state has enacted legislation adopting this three-part definition of mental retardation.[60]

---

57. *See* ALAN S. KAUFMAN, INTELLIGENT TESTING WITH THE WISC-R 1 (1979) (arguing that intelligence does not define whole person); RITA WICKS-NELSON & ALLEN C. ISRAEL, BEHAVIOR DISORDERS OF CHILDHOOD 211 (2d ed. 1991) (asserting that abuse of I.Q. tests led to greater emphasis on adaptive behavior analysis in determination of mental retardation). In Kaufman's discussion of the use of intelligence testing, he argues for a middle-ground approach to the use of I.Q. scores. *Id.* at 2. He contends, "[c]urrent court cases and pending legislation . . . may ultimately lead to a moratorium on intelligence testing. *Id.* at 1-2; *see also* Lloyd L. Yepsen, *Defining Mental Deficiency,* 46 AMER. J. MENTAL DEFICIENCY 200, 205 (1941) (discussing AAMD formulation of proposed definition of mental retardation).

58. *See* CLASSIFICATION IN MENTAL RETARDATION 1 (Herbert J. Grossman, M.D. ed., 1983). American courts have overwhelmingly adopted the AAMD's definition verbatim of mental retardation. *E.g., Penry,* 492 U.S. at 308 n.1; *Cleburne Living Center, Inc.,* 473 U.S. at 442 n.9; Markosyan v. Sullivan, 933 F.2d 1014 (9th Cir. 1991) (text in WESTLAW); Brown v. Secretary of Health & Human Servs., 948 F.2d 268, 270 (6th Cir. 1991); Paloulian v. Sullivan, 919 F.2d 145 (9th Cir. 1990) (text in WESTLAW); Abbott v. Sullivan, 905 F.2d 918, 924 n.3 (6th Cir. 1990); *see also* AMA HANDBOOK ON MENTAL RETARDATION 7 (Herbert J. Grossman, M.D. & George Tarjan, M.D. eds., 1987) (defining mental retardation); David A. Davis, *Executing the Mentally Retarded: The Status of Florida Law,* 65 FLA. BAR J. 12, 13 (1991) (recognizing AAMD's definition of mental retardation).

59. CLASSIFICATION IN MENTAL RETARDATION 1 (Herbert J. Grossman, M.D. ed., 1983); *see* Stripling v. State, 401 S.E.2d 500, 504 (Ga. 1991) (enumerating three crucial elements of mental retardation); Fleming v. Zant, 386 S.E.2d 339, 346 (Ga. 1989) (enumerating elements of mental retardation); *see also* ROBERT W. CONLEY, THE ECONOMICS OF MENTAL RETARDATION 7 (1973) (discussing three crucial elements of AAMD's definition of mental retardation as: (1) subaverage intelligence (2) originating from birth or childhood (3) social incompetence); GUNNAR DYBWAD, CHALLENGES IN MENTAL RETARDATION 29-40 (1964) (discussing AAMD's required elements in development retardation throughout formative years of children).

60. *See, e.g.,* ARIZ. REV. STAT. ANN. § 36-551(26) (Supp. 1992) (defining "mental retardation" as "condition involving subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior manifested before age eighteen"); CAL. PENAL CODE § 1001.20(a) (Deering 1983) (defining mentally retarded as "condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period"); CONN. GEN. STAT. ANN. § 1-1g (West 1983) (defining mental retardation as significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during developmental period); DEL. CODE ANN. tit. 16, § 5530 (Michie Supp. 1992) (defining "mentally retarded person" as "person with significantly subaverage general intellectual functioning, existing con-

Subaverage intellectual functioning is measured by an individual's score

---

currently with deficits in adaptive behavior"); FLA. STAT. ANN. § 393.063(41) (West Supp. 1993) (defining "retardation" as "significantly subaverage general intelligence functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18"); GA. CODE ANN. § 17-7-131(a)(3) (Michie 1992) (defining "mentally retarded" as having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during developmental period); HAW. REV. STAT. § 333F-1 (Supp. 1991) (defining "mental retardation" as "significantly subaverage general intellectual functioning resulting in or associated with concurrent moderate, severe, or profound impairments in adaptive behavior and manifested during the developmental period"); KY. REV. STAT. ANN. § 532.130(2) (Michie 1990) (defining "seriously mentally retarded defendant" as person with "significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during developmental period"); LA. REV. STAT. ANN. § 28-381(28) (West 1989) (defining "mental retardation" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during developmental period"); ME. REV. STAT. ANN. tit. 34-B, § 5001(3) (West Supp. 1992) (defining "mental retardation" as a "condition of significantly subaverage intellectual functioning resulting in or associated with concurrent impairments in adaptive behavior and manifested during developmental period"); MD. ANN. CODE art. 27, § 412 (1990) (defining "mentally retarded" as "a developmental disability that is evidenced by significantly subaverage intellectual functioning and impairment in the adaptive behavior of an individual"); MISS. CODE ANN. § 41-21-61 (1985) (defining "mentally retarded person" as any person (i) who has been diagnosed as having significantly subaverage intellectual functioning existing concurrently with demonstrated deficits in adaptive behavior); MO. REV. STAT. § 630.005(22) (Vernon Supp. 1992) (defining "mental retardation" as "significantly subaverage general intellectual functioning which: (a) originates before age eighteen; and (b) is associated with a significant impairment in adaptive behavior"); NEV. REV. STAT. § 433.174 (1991) (defining "mental retardation" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period"); N.H. REV. STAT. ANN. § 171-A:2(XIV) (1991) (defining "mental retardation" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period"); N.J. REV. STAT. § 39:4-207.2 (1990) (defining mental retardation in context of motor vehicle statute as a "person in a state of significant subnormal intellectual development with reduction of social competence which state shall have existed prior to adolescence and is expected to be of lifelong duration"); S.D. CODIFIED LAWS § 27B-1-1 (Michie 1992) (defining "mentally retarded" as including "any person with significant subaverage general intellectual functioning and deficits in adaptive behavior"); TENN. CODE ANN. § 33-1-101(15) (Michie 1984) (defining "mentally retarded individual or mentally deficient individual" as "an individual who has significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period"); TEX. HEALTH & SAFETY CODE ANN. § 591.003(13) (Vernon 1992) (defining "mental retardation" as "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period"); UTAH CODE ANN. § 62A-5-101(6) (1992) (defining "mental retardation" as "significant, subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior, and manifested during the developmental period as defined in the current edition of the Diagnostic and Statistical Manual of Mental Disorders, published by American Psychiatric Association"); VT. STAT. ANN. tit. 18, § 9302(1) (Supp. 1992) (defining "mentally retarded person" as "any person who has been diagnosed as having significantly subaverage intellectual functioning which

has been manifested prior to the age of 19 and which exists concurrently with deficits in adaptive behavior"); VA. CODE ANN. § 37.1-1 (Michie 1992) (defining "mental retardation" as substantial subaverage general intellectual functioning which originates during development period and is associated with impairment in adaptive behavior); W. VA. CODE § 27-1-3 (1992) (defining "mental retardation" as significantly subaverage intellectual functioning which manifests itself in a person during his developmental period and which is characterized by his inadequacy in adaptive behavior"); *see also* COLO. REV. STAT. § 27-10.5-102(11) (Supp. 1992) (defining "developmental disability" as "a disability that is manifested before the person reaches twenty-two years of age, which constitutes a substantial handicap to the affected individual . . . result[ing] in impairment of general intellectual functioning or adaptive behavior"); D.C. CODE ANN. § 6-1902(2) (1981) (defining "at least moderately mentally retarded" as person who is "impaired in adaptive behavior to a moderate, severe or profound degree and functioning at the moderate, severe, or profound intellectual level in accordance with standard measurements"); ILL. ANN. STAT. ch. 91 1/2, para. 1-116 (Smith-Hurd 1991) (defining "mental retardation" as "significantly subaverage general intellectual functioning which exists concurrently with impairment in adaptive behavior and which originates before the age of 18 years"); IOWA CODE ANN. § 222.2 (5) (West 1985) (defining "mental retardation" as a term to describe "children and adults who as a result of inadequately developed intelligence are significantly impaired in ability to learn or to adapt to the demands of society"); KAN. STAT. ANN. § 21-4623(5) (Supp. 1992) (defining "mentally retarded" as "having significantly subaverage general intellectual functioning . . . to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law"); NEB. REV. STAT. § 83-1205 (Supp. 1992) (defining developmental disability). The Nebraska statute's definition is rather lengthy; it defines developmental disability as meaning mental retardation which

> (a) is attributable to mental or physical impairment other than a mental or physical impairment caused solely by mental illness; (b) [i]s manifested before the age of twenty-two years; (c) [i]s likely to continue indefinitely; and (d) [r]esults in: (i) [i]n the case of a person under three years of age, at least one developmental delay; or (ii) [i]n the case of person three years of age or older, a substantial limitation in three or more of the following areas of major life activity, as appropriate for the person's age: (A) [s]elf-care; (B) [r]eceptive and expressive language development and use; (C) [l]earning; (D) [m]obility; (E) [s]elf-direction; (F) [c]apacity for independent living; and (G) [e]conomic self-sufficiency.

Id.; *see also* OHIO REV. CODE ANN. § 5119.50(g) (Baldwin 1991) (defining "mental retardation" to mean "mental retardation so defined by appropriate clinical authorities to such extent that a person so afflicted is incapable of managing himself and his affairs, but shall not include mental illness"); OKLA. STAT. ANN. tit. 10 § 1408(A) (West Supp. 1993) (defining mentally retarded person). The Oklahoma statute's definition is very detailed and defines mentally retarded person as

> a person afflicted with mental defectiveness from birth or from an early age to such extent that he is incapable of managing himself or his affairs, who, for his own welfare or welfare of others or of the community, requires supervision, control, or care and who is not mentally ill or of unsound mind to such an extent as to require his certification to an institution for the mentally ill.

Id.; *see also* S.C. CODE § 44-23-10(25) (1987) (defining mentally retarded person). The South Carolina provides an equally detailed definition of a mentally retarded person and defines such person as follows:

> any person, other than a mentally ill person primarily in need of mental health services, whose inadequately developed or impaired intelligence and adaptive level of behavior require for his benefit, or that of the public, special training, education, supervision, treat-

on an intelligence test.[61] For an individual to be considered subaverage in intellectual functioning, the obtained I.Q. score must be greater than two standard deviations below mean performance for the chronological age involved or, in simpler terms, the individual must obtain an I.Q. of seventy or below.[62]

The second part of the definition of mental retardation, deficits in adaptive behavior, is the unique and essential feature of this definition.[63] Deficits in

---

ment, care or control in his home or in a service facility or program under the control and management of the South Carolina Mental Retardation Department.

Id.

61. CLASSIFICATION IN MENTAL RETARDATION 11 (Herbert J. Grossman, M.D. ed., 1983); *see* CONN. GEN. STAT. Ann. § 1-1g(b) (1988) (defining "intellectual functioning" as results obtained by "assessment with one or more of a individually administered general intelligence tests"). American courts have overwhelmingly acknowledged that intelligence tests can determine intellectual functioning. *See, e.g.*, State v. Shields, 593 A.2d 986, 1008 (Del. Super. 1990) (finding I.Q. score as indicative of "intellectual functioning"); *Stripling*, 401 S.E.2d at 504 (finding I.Q. score indicative of "intellectual functioning"); Wilson v. State, 813 S.W.2d 833, 844 (Mo. 1991) (finding I.Q. score indicative of "intellectual functioning"). *See generally* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 422 (1985) (recognizing AAMD's upper boundary of mental retardation at I.Q. of 70).

62. *See* ILL. REV. STAT. ch. 405, § 80-2-3(l)(1)(A) (1991) (defining "mental retardation" as general intellectual functioning that is two or more standard deviations below mean, concurrent with impairment of adaptive behavior that is two or more standard deviations below mean). *See, e.g.*, State v. Kinner, 398 So. 2d 1360, 1363 n.2 (Fla. 1981) (acknowledging "significantly subaverage general intellectual functioning" as two or more standard deviations from mean score on standardized intelligence test); State v. Grandy, 623 P.2d 666, 670 (Or. Ct. App. 1981) (acknowledging "significantly subaverage" as intelligence test score that is two or more standard deviations below mean for test); Williams v. State, 667 S.W.2d 783, 790 (Tx. App.— Amarillo 1982), *rev'd on other grounds*, 663 S.W.2d 832 (Tex. Crim. App. 1984) (acknowledging "subaverage general intellectual functioning" as standardized test score of two or more standard deviations below age-group mean for test used); ROBERT M. ALLEN & ARNOLD D. CORTAZZO, PSYCHOSOCIAL AND EDUCATIONAL ASPECTS AND PROBLEMS OF MENTAL RETARDATION 26-27 (1970) (discussing behavioral classifications of intelligence). *See generally* AMA HANDBOOK ON MENTAL RETARDATION 8 (Herbert J. Grossman, M.D. & George Tarjan, M.D. eds., 1987) (defining "significantly subaverage" as I.Q. of 70 or lower); David A. Davis, *Executing the Mentally Retarded: The Status of Florida Law*, 65 FLA. BAR J. 12, 13 (1991) (defining significant subaverage general intellectual functioning as I.Q. of 70 or below).

63. CLASSIFICATION IN MENTAL RETARDATION 11 (Herbert J. Grossman, M.D. ed., 1983); *see, e.g.*, Money v. Krall, 180 Cal. Rptr. 376, 382 (Cal. Ct. App. 1982) (arguing that uncertainty of I.Q. scores requires multi-factor diagnostic approach when defining mentally retarded individuals); *Stripling*, 401 S.E.2d at 504 (acknowledging impairments in adaptive behavior as essential); Grandy, 623 P.2d at 670 (finding defendant's adaptive behavior was significantly impaired); *see also* AMA HANDBOOK ON MENTAL RETARDATION 8 (Herbert J. Grossman, M.D. & George Tarjan, M.D. eds., 1987) (defining "impairments in adaptive behavior"). The AMA definition reads "significant limitation in individual's ability to meet standards of maturation, learning, personal independence, and/or social responsibility expected of persons of same age level and cultural group, as determined by clinical assessment and stan-

adaptive behavior are exhibited in an individual's ability to function properly in society, namely, meeting the normal standards of learning, showing personal independence, and demonstrating communication and daily-living skills expected from his or her age group.[64] Unlike intellectual functioning, adaptive behavior is not quantifiable, but is discretionary and subject to manipulation.[65] The inclusion of this criterion in the definition of "mentally retarded" requires the individual's obtained I.Q. score to correlate with the

---

dardized tests. *Id.* Before I.Q. tests were created, mental retardation was based on individual's behavior in society. *See* JANE R. MERCER, LABELING THE MENTALLY RETARDED, CLINICAL AND SOCIAL SYSTEM PERSPECTIVES ON MENTAL RETARDATION 131 (1973) (arguing that individual's adaptive behavior is most ancient and durable basis for classifying persons as mentally retarded); David A. Davis, *Executing the Mentally Retarded: The Status of Florida Law*, 65 FLA. BAR J. 12, 13 (1991) (arguing I.Q. is not by itself determinative of mental retardation).

64. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 28-29 (3d ed. 1987). Numerous state statutes have defined "deficits in adaptive behavior." *See, e.g.*, CONN. GEN. STAT. Ann. § 1-1g(b) (West 1988) (defining "adaptive behavior" as "effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected for the individual's age and cultural group"); KAN. STAT. ANN. § 76-12b01(a) (1984) (defining "adaptive behavior" as "effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of that person's age, cultural group and community"); LA. REV. STAT. ANN. § 28-381(1) (West 1983) (defining "adaptive behavior" as "effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected for age and cultural group"); TEX. HEALTH & SAFETY CODE ANN. § 591.003(1) (Vernon 1992) (defining "adaptive behavior" as "effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group"); *see Cleburne Living Ctr., Inc.*, 473 U.S. at 442 n.9 (citing definition of "deficits in adaptive behavior" as "limitations on general ability to meet the standards of maturation, learning, personal independence, and social responsibility expected for an individual's age level and cultural group"); *see also* CLASSIFICATION IN MENTAL RETARDATION 12 (Herbert J. Grossman, M.D. ed., 1983) (defining adaptive behavior as "significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group as determined by clinical assessment and usually standardized scales"). *See generally* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 422 (1985) (discussing AAMD's definition of adaptive behavior); David A. Davis, *Executing the Mentally Retarded: The Status of Florida Law*, 65 FLA. BAR J. 12, 13 (1991) (defining adaptive behavior as inability to cope with demands of society).

65. *See Money*, 180 Cal. Rptr. at 383 n.3 (noting that scales have been designed to quantify adaptive behavior, but none is valid); People v. Ward, 338 N.E.2d 171, 174 (Ill. 1975) (conceding that I.Q. scores vary depending on subjective determination of party administering test); *Fleming*, 386 S.E.2d at 346 (quoting that adaptive behavior is term of art); LARRY HARDY ET AL., OBJECTIVE BEHAVIORAL ASSESSMENT OF THE SEVERELY AND MODERATELY MENTALLY HANDICAPPED: THE OBA v (1981) (asserting that assessment in adaptive behavior needs to be objective). The authors of this article propose a behavioral checklist to assess individuals' adaptive behavior. *Id.* The proposed checklist provides an objective assessment of severely and moderately retarded individual's self-care, prevocational skills, and sheltered work performance. *Id.*; *see also* James W. Ellis & Ruth A. Luckasson, *Mentally*

practical impairments that this individual experiences in life.[66] Last, an individual must exhibit both subaverage intellectual functioning and deficits in adaptive behavior during the developmental period,[67] which extends from birth to approximately eighteen years of age.[68] In sum, it is imperative that

---

Retarded Criminal Defendants, 53 GEO. WASH. L. REV. 414, 422 (1985) (describing adaptive behavior as "term of art").

66. *See Fleming*, 386 S.E.2d at 346 (arguing "adaptive behavior" requirement is included in determination of mental retardation to give definition of mental retardation's practical impact); *cf.* Levy v. Pennsylvania Dep't of Educ., 399 A.2d 159, 162 (Pa. Commw. Ct. 1979) (holding that without adaptive behavior, I.Q. does not constitute substantial evidence of mental retardation); *Williams*, 833 S.W.2d at 151 (finding mental retardation cannot be determined solely from I.Q. tests); *see* JANE R. MERCER, LABELING THE MENTALLY RETARDED, CLINICAL AND SOCIAL SYSTEM PERSPECTIVES ON MENTAL RETARDATION 133 (1973) (arguing that criteria of impaired adaptive behavior must be included in definition of mentally retarded so as to supplement standardized test score with information of self-help and social behavior); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 422 (1985) (noting inclusion of adaptive behavior in definition of mental retardation so that individual's I.Q. has some practical meaning).

67. CLASSIFICATION IN MENTAL RETARDATION 12 (Herbert J. Grossman, M.D. ed., 1983); *cf.* Williams v. Sullivan, 970 F.2d 1178, 1185 (3d Cir. 1992) (finding no evidence of mental retardation in defendant because disability did not develop before age 22), *cert. denied sub nom.* Williams v. Shalala, 61 U.S.L.W. 3582 (U.S. Feb. 22, 1993) (No. 92-6620); *Brown*, 948 F.2d at 270 (remanding case to determine whether claimant's subaverage intellectual development and deficits in adaptive behavior occurred prior to his eighteenth birthday). *See generally* AMA HANDBOOK ON MENTAL RETARDATION 8 (Herbert J. Grossman, M.D. & George Tarjan, M.D. eds., 1987) (defining "developmental period" as period between conception and 18th birthday). The handbook also notes that deficits in development may be manifested by "slow, arrested, or incomplete development resulting from brain damage, degenerative processes in the central nervous system, or regression from previously normal states due to psychological factors." *Id.*; *see also* RITA WICKS-NELSON & ALLEN C. ISRAEL, BEHAVIOR DISORDERS OF CHILDHOOD 211 (2d ed. 1991) (requiring subaverage intelligence and deficits in adaptive behavior before eighteenth birthday).

68. CLASSIFICATION IN MENTAL RETARDATION 13 (Herbert J. Grossman, M.D. ed., 1983). Numerous state legislatures and courts have accepted that both subaverage intellect and deficits in adaptive behavior must occur during the individual's developmental period. However, states have disagreed on the definition of developmental period. *See* ARIZ. REV. STAT. ANN. § 36-551(22) (West 1991) (requiring conditions of mental retardation to have manifested before age 18); CONN. GEN. STAT. ANN. § 1-1g(b) (West 1988) (requiring characteristics of mental retardation be displayed during time between birth and 18th birthday); FLA. STAT. ANN. § 393.063(41) (West Supp. 1993) (requiring "retardation" to have manifested during period from conception to age 18); MO. REV. STAT. § 630.005(22)(a) (Vernon Supp. 1992) (requiring conditions of mental retardation to have originated before age 18). *But see* COLO. REV. STAT. § 27-10.5-102(10)(a) (Bradford 1992) (requiring "developmental disability" to manifest before person reaches 22 years of age); MD. ANN. CODE art. 27, § 412 (Michie 1992) (requiring conditions of mental retardation to have manifested before individual attains age of 22); NEB. REV. STAT. § 83-1205(2)(b) (R.S. Supp. 1992) (requiring "developmental disability" be manifested before age of 22 years); VT. STAT. ANN. tit. 18, § 9302(1) (Supp. 1989) (requiring conditions of mental retardation to have manifested prior to age of 19); *Williams*, 970 F.2d at 1185 (finding that mental retardation did not exist in defendant because his disability did

an individual meet all three criteria before being considered mentally retarded.[69] Thus, a person with an I.Q. as low as fifty-five who displays no deficits in adaptive behavior should not be considered mentally retarded.[70]

B. *Classifications*

Mentally retarded individuals are not a homogenous group.[71] Mentally

---

not develop before age 22). *See generally* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants,* 53 GEO. WASH. L. REV. 414, 422-23 (1985) (arguing that if individual is both subaverage in intellect and deficient in adaptive behavior, it should matter little whether onset occurred before age 18).

69. *Cf. Cleburne Living Ctr., Inc.*, 473 U.S. at 442 n.9 (noting that mental retardation is not defined by individual's I.Q. alone); *Williams*, 970 F.2d at 1185 (holding that manifestations of mental retardation must exists before age 22 to receive disability benefits for mental retardation); *Brown*, 948 F.2d at 271 (remanding case to determine whether claimant's subaverage intellectual development and deficits in adaptive behavior occurred prior to his 18th birthday); *Williams*, 833 S.W.2d at 151 (finding mental retardation cannot be determined solely from I.Q. tests). *See generally* LEWIS R. AIKEN, PSYCHOLOGICAL TESTING AND ASSESSMENT 165 (4th ed. 1982) (arguing I.Q. score not determinative of mental retardation). Aiken argues that the diagnosis of a mentally retarded individual requires the assessment of such factors as "motor skills, academic and vocational achievement and social and emotional maturity." *Id.* These factors are assessed by an informal analysis of the individual's child history. *Id.*; *see also* RONALD W. CONLEY, THE ECONOMICS OF MENTAL RETARDATION 7 (1973) (arguing that individual must manifest subaverage intelligence and deficits in adaptive behavior during their childhood to be considered mentally retarded).

70. *Cf. Money*, 180 Cal. Rptr. at 382 (requiring multifactor-diagnostic approach when defining mentally retarded individuals); Stripling, 401 S.E.2d at 504 (requiring impairments in adaptive behavior); *Grandy*, 623 P.2d at 670 (requiring impairments in adaptive behavior); *see* JANE R. MERCER, LABELING THE MENTALLY RETARDED, CLINICAL AND SOCIAL SYSTEM PERSPECTIVES ON MENTAL RETARDATION 133 (1973) (arguing that adaptive behavior is mandatory for valid diagnosis of mental retardation); David A. Davis, *Executing the Mentally Retarded: The Status of Florida Law,* 65 FLA. BAR J. 12, 13 (1991) (concluding I.Q. is not determinative of mental retardation).

71. *See* Penry v. Lynaugh, 492 U.S. 302, 338 (1989) (holding mentally retarded defendants should not be categorically excluded from death penalty because such individuals are not homogeneous but instead have "diverse capacities and life experiences"); Fleming v. Zant, 386 S.E.2d 339, 346 (Ga. 1989) (Smith, J., dissenting) (arguing mentally retarded individuals are not homogeneous). *Contra Penry*, 492 U.S. at 344 (Brennan, J., dissenting) (arguing mentally retarded individuals are homogeneous group because every mentally retarded individual must have substantial disability in cognitive ability and adaptive behavior, regardless of degree of retardation). *See* AMA HANDBOOK ON MENTAL RETARDATION 12 (Herbert J. Grossman, M.D. & George Tarjan, M.D. eds., 1987) (stating mentally retarded individuals do not fall neatly into categories but instead "vary widely in degree of intellectual capacity and social adaptability"); THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED AND THE LAW 215-16 (Michael Kindred et al. eds., 1976) (stating common misconception that mentally retarded persons form homogeneous group). Kane argues that the mentally retarded are a diverse group in that the profoundly retarded are at one end of the spectrum, requiring almost constant care and supervision, while the mildly mentally retarded are at the other end of the spectrum, requiring virtually no care or supervision and are capable

retarded persons, like any other group of individuals, vary enormously in talent, aptitude, personality, achievement, and temperament.[72] Given the variance in abilities, mentally retarded persons are generally classified according to severity or degree of mental retardation.[73] The most widely used classification system is the one suggested by the AAMD,[74] a system that classifies mental retardation as mild, moderate, severe, or profound, based on an individual's score on an intelligence test.[75] Current intelligent tests

---

of a normal life. *Id. See generally* John Blume & David Brook, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 ARK. L. REV. 725, 732-34 (1988) (finding mentally retarded as homogenous group will lead to stereotyping and discrimination).

72. *See Penry*, 492 U.S. at 338 (arguing that although mentally retarded individuals share some common characteristics, they exhibit varying degrees of mental deficiency). *Compare* Masonite Corp. v. Mitchell, 699 S.W.2d 409, 411 (Ark. Ct. App. 1985) (finding claimant's I.Q. of 50 was neither impairment nor disability) *and* Roby v. Tarlton Corp., 728 S.W.2d 586, 589 (Mo. Ct. App. 1987) (finding mildly mentally retarded claimant held regular job, working 40 hours per week) *with* Person v. Department of Social Servs., 453 N.W.2d 390, 392 (Neb. 1990) (finding mentally retarded person incapable of dressing, bathing, toileting, and eating by himself) *and* Rine v. Irisari, 420 S.E.2d 541, 543 (W. Va. 1992) (finding mentally retarded person suffered from cerebral palsy, left hemiplegia, grand mal and petit mal seizures, and no ability to speak meaningfully). *See also* Michael S. Sorgen, *The Classification Process and Its Consequences*, *in* THE MENTALLY RETARDED CITIZEN AND THE LAW 215, 215-16 (Michael Kindred et al. eds., 1973) (arguing that mentally retarded individuals are diverse); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 427 (1985) (arguing that any attempt to categorize mentally retarded risks false stereotyping and, therefore, demands great caution).

73. *See* Edmunds v. Edwards, 287 N.W.2d 420, 422-23 (Neb. 1980) (classifying mental retardation by degree); *cf. Penry*, 492 U.S. at 338 (acknowledging varying degrees of mental retardation); Conservatorship of Valerie N. v. Valerie N., 707 P.2d 760, 762 n.3 (Cal. 1985) (classifying mental retardation into four categories); State v. Bricker, 581 A.2d 9, 16 (Md. 1990) (noting mentally retarded individuals are classified into four categories); *see also* AMA HANDBOOK ON MENTAL RETARDATION 12-13 (Herbert J. Grossman, M.D. & George Tarjan, M.D. eds., 1987) (finding mentally retarded individuals vary in degree of intellectual capacity and social adaptability); RITA WICKS-NELSON & ALLEN C. ISRAEL, BEHAVIOR DISORDERS OF CHILDHOOD 218-19 (2d ed. 1991) (discussing AAMD's classification system regarding degrees of mental retardation).

74. Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 n.9 (1985) (acknowledging AAMD's classification of mentally retarded into four distinct categories); United States v. Masthers, 539 F.2d 721, 724 n.16 (D.C. Cir. 1976) (acknowledging AAMD classifications of mentally retarded); Crosby v. Sultz, 592 A.2d 1337, 1341 (Pa. Super. Ct. 1991) (recognizing AAMD classifications of mentally retarded). *But see* AMA HANDBOOK ON MENTAL RETARDATION 12-13 (Herbert J. Grossman, M.D. & George Tarjan, M.D. eds., 1987). The AMA breaks the mentally retarded population into two basic groups. The first group usually suffer from a central nervous-system disease, and have I.Q.s in the moderately retarded range and below. *Id.* The second group, comprising of 75% of the mentally retarded population, usually have no detectable physical signs or laboratory evidence of mental retardation. *Id.* at 13. This group usually scores on intelligence tests in the mildly retarded range. *Id.*

75. CLASSIFICATION IN MENTAL RETARDATION 13 (Herbert J. Grossman, M.D. ed., 1983); *see Cleburne Living Ctr., Inc.*, 473 U.S. at 442 n.9 (recognizing AAMD's four classifications of mental retardation); Brown v. Secretary of Health & Human Servs., 948 F.2d 268, 270

are designed so that two-thirds of the population will obtain an I.Q. of 85 to 115, the highest 1% will obtain a score of 135 or above, and the lowest 1% will obtain an I.Q. of 65 or below.[76]

The first classification of mental retardation is "mild." An individual who falls within this level has an I.Q. score between fifty and seventy.[77] In this category, a person's intellect is not the same as that of the average person, but the person is not forever bound to a nonfunctional status.[78] To the cas-

---

(6th Cir. 1991) (listing four classifications for mental retardation); *see also* LEWIS R. AIKEN, PSYCHOLOGICAL TESTING AND ASSESSMENT 165 (4th ed. 1982) (illustrating four classifications of mental retardation); ROBERT M. ALLEN & ARNOLD D. CORTAZZO, PSYCHOSOCIAL AND EDUCATIONAL ASPECTS AND PROBLEMS OF MENTAL RETARDATION 26 (1970) (discussing levels of measured intelligence).

76. *See* DAVID WECHSLER, MANUAL FOR THE WECHSLER INTELLIGENCE SCALE FOR CHILDREN — REVISED 4 (1974) (discussing quantitative interpretation of I.Q. scores of children). The WISC-R is designed such that 50% of the population will obtain an I.Q. of 85 to 115. *Id.*; *see also* DAVID WECHSLER, WECHSLER ADULT INTELLIGENCE SCALE — REVISED 27 (1981) (discussing quantitative interpretation of WAIS-R for adults). *See generally* ISSAM B. AMARYM, THE RIGHTS OF THE MENTALLY RETARDED — DEVELOPMENTALLY DISABLED TO TREATMENT AND EDUCATION 13 (1980) (discussing I.Q. and way in which tests designed).

77. CLASSIFICATION IN MENTAL RETARDATION 13 (Herbert J. Grossman M.D. ed., 1983). Courts have consistently categorized individuals with I.Q. scores between 50 and 60 "mildly" mentally retarded according to the AAMD's classification. *See, e.g.*, Spruiell v. Robinson, 582 So. 2d 508, 510 (Ala. 1991) (classifying I.Q. of 67 as "mild" mental retardation); State v. Austin, 596 So. 2d 598, 602 (Ala. Crim. App. 1991) (finding I.Q. of 65 "mild" retardation); O.M. v. State, 595 So. 2d 514, 522 (Ala. Crim. App. 1991) (categorizing I.Q. of 70 as "mild" mental retardation); People v. Lara, 432 P.2d 202, 211 (Cal. 1967) (classifying I.Q. of 65 to 71 as mild mental retardation), *cert denied sub nom.* Lara v. California, 392 U.S. 945 (1968); State v. Moore, 364 S.E.2d 648, 653 (N.C. 1988) (recognizing I.Q. of 51 as lowest level of mild retardation); *but see* Duhamel v. Collins, 955 F.2d 962, 966 (5th Cir. 1992) (categorizing I.Q. of 56 as "moderate" mental retardation). *See generally* HERBERT C. GUNZBURG, SOCIAL COMPETENCE AND MENTAL HANDICAP: AN INTRODUCTION TO SOCIAL EDUCATION 26 (1973) (classifying I.Q. scores ranging from 55 to 69 on Wechsler intelligence test or between 68 and 83 on Stanford-Binet type of test as "mild" mental retardation).

78. *See e.g.*, Mathenia v. Delo, 975 F.2d 444, 448 (8th Cir. 1992) (finding defendant with I.Q. of approximately 70 had requisite level of comprehension to adequately waive his Miranda rights), *cert denied*, 61 U.S.L.W. 3652 (U.S. Mar. 22, 1993) (No. 92-7457); Markosyan v. Sullivan, 933 F.2d 1014 (9th Cir. 1991) (text in WESTLAW) (finding I.Q. of 52 failed to meet impairment requirements for permanent-disability benefits); Washington v. Murray, 952 F.2d 1472, 1481-82 (4th Cir. 1991) (finding "mildly" mentally retarded defendant competent to stand trial); Kharmandaryan v. Sullivan, 947 F.2d 950 (9th Cir. 1991) (text in WESTLAW) (finding claimant with I.Q. of 68 not permanently disabled and not deserving of disability benefits); Ellison v. Sullivan, 929 F.2d 534, 536 (10th Cir. 1990) (finding claimant with I.Q. between 60 and 69 not entitled to social security disability benefits); *Masonite Corp.*, 699 S.W.2d at 411 (finding claimant's I.Q. of 50 was not impairment or disability giving rise to benefits under Second Injury Fund Liability); Stripling v. State, 401 S.E.2d 500, 503 (Ga. 1991) (finding mildly retarded defendant had capacity to distinguish between right and wrong); *Roby*, 728 S.W.2d at 589 (finding claimant with I.Q. between 59 and 67 not able to receive disability benefits); State v. Stokes, 352 S.E.2d 653, 657 (N.C. 1987) (finding mildly

ual observer, these people are often not noticed as being mentally retarded.[79] At the present time, virtually all individuals with mild mental retardation can live successfully in the community.[80] An individual with an I.Q. ranging from thirty-five to forty-nine falls into the second classification of "moderate."[81] Virtually all mildly and moderately retarded persons have the

---

retarded defendant able to control his behavior); Green v. State, 839 S.W.2d 935, 940 (Tex. Crim. App. 1992, pet. ref'd) (finding mentally retarded criminal's "street smarts" exceeded his I.Q. of 54). *See generally* ROBERT M. ALLEN & ARNOLD D. CORTAZZO, PSYCHOSOCIAL AND EDUCATIONAL ASPECTS AND PROBLEMS OF MENTAL RETARDATION 29 (1970) (discussing classifications of behavioral expectations of mentally retarded individuals at three age levels: preschool, school age, and adult).

79. *See Brown*, 948 F.2d at 270 (finding mildly mental retarded individuals have minimal impairment in sensorimotor areas, and not distinguishable from normal children); *Stokes*, 352 S.E.2d at 657 (finding that mildly retarded defendant showed no visible signs of disability in controlling his behavior); State v. DeLeonardo, 340 S.E.2d 350, 353 (N.C. 1986) (finding mildly retarded person with I.Q. of 55 competent to testify against sexual offender). In *DeLeonardo*, the evidence indicated that although the witness was mentally retarded, he did not show visible signs of mental retardation. *Id.* The court found he was able to write in cursive, read, knew his home address, and knew his principal's name. *Id.* Additionally, he knew that it was wrong to lie. *Id.*; *see* SPENCER A. RATHUS, UNDERSTANDING CHILD DEVELOPMENT 374 (1988)) (noting difficulty distinguishing mildly mentally retarded individuals). *See generally* RITA WICKS-NELSON & ALLEN C. ISRAEL, BEHAVIOR DISORDERS OF CHILDHOOD 219 (2d ed. 1991) (describing mildly retarded as educable).

80. *See* State v. Lapia, 522 A.2d 272, 274 (Conn. 1987) (finding mildly retarded defendant able to recollect details and facts, differentiate difference between truth and lie); *Stripling*, 401 S.E.2d at 503 (finding mildly retarded defendant had capacity to distinguish between right and wrong); *Roby*, 728 S.W.2d at 589 (rejecting claimant's request for disability benefits); Righter v. State, 752 P.2d 416, 420 (Wyo. 1988) (finding both mild mentally retarded defendants able to understand difference between having sexual intercourse with woman, as opposed to man). In *Roby*, the court denied disability benefits to claimant who had an I.Q. between 59 and 67 based on evidence that claimant held regular job. *Roby*, 728 S.W.2d at 587-89; *see also Masonite Corp.*, 699 S.W.2d at 411 (finding claimant's I.Q. of 50 was not impairment or disability). *But see* Warren v. Dep't of Health & Rehabilitative Servs., 501 So. 2d 706, 708 (Fla. Dist. Ct. App. 1987) (finding mildly retarded mother incapable of providing her children with stable, long-term environment). In *Warren*, a psychologist testified that the mother was unable "to provide effective management of her children's behavior, to meet their basic safety and physical needs, and to provide for their need for mastery, stimulation, self-esteem, belongingness and security." *Id. See generally* ROBERT M. ALLEN & ARNOLD D. CORTAZZO, PSYCHOSOCIAL AND EDUCATIONAL ASPECTS AND PROBLEMS OF MENTAL RETARDATION 29 (1970) (discussing behavioral expectations of mentally retarded individuals at three age levels).

81. CLASSIFICATION IN MENTAL RETARDATION 13 (Herbert J. Grossman, M.D. ed., 1983). Courts have recognized the classification of I.Q. scores ranging from thirty-five to forty-nine as "moderate" mental retardation. *See, e.g.*, Sharkey v. Sterling Drug, Inc., 600 So.2d 701, 716 (La. Ct. App. 1992, writ denied) (classifying I.Q. ranging in forties as "moderate" mental retardation); *In re* Devone, 356 S.E.2d 389, 390 (N.C. Ct. App. 1987) (categorizing I.Q. of 41 in AAMD's "moderate" degree of mental retardation); *Ex parte* Goodman, 816 S.W.2d 383, 385 (Tex. Crim. App. 1991) (granting writ of habeas corpus and classifying applicant as "mildly" retarded from I.Q. of 56); Wootton v. State, 799 S.W.2d 499, 500 (Tex. App.— Corpus Christi 1990, writ denied) (classifying I.Q. of 45 as "moderate" mental retarda-

ability to conform to the customs, habits, and standards of behavior in society and to do so independently of direction and guidance.[82] The third classification is "severe" mental retardation, which applies to individuals who have I.Q. scores ranging from twenty to thirty-four.[83] These individuals can conform to daily routines and repetitive activities.[84] Although they have the capability to learn simple work skills, they are usually incapable of self-maintenance.[85] The last level of retardation is "profound," and describes

---

tion); Jenkins v. Winchester Dep't of Social Servs., 409 S.E.2d 16, 18 (Va. Ct. App. 1991) (categorizing I.Q. of 49 as "moderate" mental retardation); *see* AMA HANDBOOK ON MENTAL RETARDATION 15 (Herbert J. Grossman, M.D. & George Tarjan, M.D. eds., 1987) (finding that "moderately" retarded individuals can live satisfying and productive lives with proper education). *But see* HERBERT C. GUNZBURG, SOCIAL COMPETENCE AND MENTAL HANDICAP: AN INTRODUCTION TO SOCIAL EDUCATION 26 (1973) (classifying I.Q. scores between 40 and 54 on Wechsler scale and 36 to 51 on Stanford-Binet test as "moderate" mental retardation).

82. *Cf.* Peters v. Whitley, 942 F.2d 937, 942 (5th Cir. 1991) (finding "moderately" retarded rape victim competent to testify at trial), *cert. denied*, __ U.S. __, 112 S. Ct. 1220, 117 L. Ed. 2d 457 (1992); State v. Barnes, 740 S.W.2d 340, 342 (Mo. Ct. App. 1987) (finding mildly retarded defendant competent to stand trial and sane at time of criminal offense); SPENCER A. RATHUS & JEFFREY S. NEYID, ABNORMAL PSYCHOLOGY 491 (1991) (finding moderately retarded children capable of caring for themselves). *See generally* HERBERT C. GUNZBURG, SOCIAL COMPETENCE AND MENTAL HANDICAP: AN INTRODUCTION TO SOCIAL EDUCATION 15-17 (1973) (discussing social competence of individuals classified as moderately mentally retarded).

83. CLASSIFICATION IN MENTAL RETARDATION 13 (Herbert J. Grossman, M.D. ed., 1983). Courts have recognized AAMD's classification of I.Q. scores ranging from twenty to thirty-four as "severe" mental retardation. *See, e.g.*, McDonald's Sherwood Forest, Inc. v. Dep't of Employment Security, 540 So. 2d 412, 413 (La. Ct. App. 1989) (classifying I.Q. of 30 as "severely" retarded); State v. Milbradt, 756 P.2d 620, 622 (Or. 1988) (classifying I.Q. of 25 as "severely" retarded); Barnett v. Bromwell, Inc. 366 S.E.2d 271, 273 (Va. Ct. App. 1988) (categorizing I.Q. ranging from 20-49 as "severe" mental retardation); *see* AMA HANDBOOK ON MENTAL RETARDATION 15 (Herbert J. Grossman, M.D. & George Tarjan, M.D. eds., 1987) (finding "severe" mentally retarded individuals show most pronounced developmental problems); HERBERT C. GUNZBURG, SOCIAL COMPETENCE AND MENTAL HANDICAP: AN INTRODUCTION TO SOCIAL EDUCATION 27 (1973) (classifying Wechsler I.Q. score between 25 and 39 and Stanford-Binet's score between 29 and 35 as indicating severe mental retardation).

84. *See In re* Grady, 405 A.2d 851, 855 (N.J. Super. Ct. Ch. Div. 1979) (noting ability of severely retarded individual to attend education classes and benefit from sheltered workshop training); *In re* Weberlist, 360 N.Y.S.2d 783, 785 (N.Y. App. Div. 1974) (finding severely retarded individual able to understand simple commands and function in his apartment within institution); *see also* ROBERT M. ALLEN & ARNOLD D. CORTAZZO, PSYCHOSOCIAL AND EDUCATIONAL ASPECTS AND PROBLEMS OF MENTAL RETARDATION 29 (1970) (observing that severely retarded individual can conform to daily routines and repetitive activities); SPENCER A. RATHUS, UNDERSTANDING CHILD DEVELOPMENT 374 (1988)) (finding severely retarded individuals are able to conform to daily routines).

85. *See* Fagerquist v. Western Sun Aviation, 236 Cal. Rptr. 633, 643 (Cal. Ct. App. 1987) (finding "severely" mentally retarded individual unable to eat properly, had constant diarrhea, and could not walk normally); Cramer v. Gillermina R., 178 Cal. Rptr. 69, 71 (Cal. Ct. App. 1982) (noting all appellants were "severely" retarded individuals and institutionalized);

individuals who have an I.Q. below twenty.[86] These individuals will usually benefit from physical activity, but are incapable of self-maintenance.[87]

C. *Misconceptions*

In today's society, a misconception exists that all mentally retarded persons are "profoundly" retarded.[88] However, 89% of all mentally retarded persons fall in the "mildly" retarded range.[89] In fact, only 1% of all men-

---

Tartaglia v. Dep't of Pub. Welfare, 416 A.2d 608, 610 (Pa. Commw. Ct. 1980) (noting "severely" retarded woman was institutionalized for majority of her life); *see also* ISSAM B. AMARY, THE RIGHTS OF THE MENTALLY RETARDED - DEVELOPMENTALLY DISABLED TO TREATMENT AND EDUCATION 14 (1980) (discussing institutionalization of some "severely" retarded persons). *See generally* ROBERT M. ALLEN & ARNOLD D. CORTAZZO, PSYCHOSOCIAL AND EDUCATIONAL ASPECTS AND PROBLEMS OF MENTAL RETARDATION 29 (1970) (finding severely retarded individuals in need of continuing supervision).

86. CLASSIFICATION IN MENTAL RETARDATION 13 (Herbert J. Grossman, M.D. ed., 1983). Courts have recognized the AAMD's classification of I.Q. scores below twenty as "profound" mental retardation. *See, e.g.*, Williams v. Macomber, 276 Cal. Rptr. 267, 268 n.2 (Cal. Ct. App. 1990) (classifying I.Q. below 20 as "profoundly" retarded); American Fed'n of State & County Mun. Employees, AFL-CIO v. State, 529 N.E.2d 534, 536 (Ill. 1988) (classifying I.Q. below 10 as "profound" mental retardation); Barnett v. Bromwell, Inc., 358 S.E.2d 767, 770 (Va. Ct. App. 1987) (classifying I.Q. of 0 to 19 as "idiot"); *see also* HERBERT C. GUNZBURG, SOCIAL COMPETENCE AND MENTAL HANDICAP: AN INTRODUCTION TO SOCIAL EDUCATION 27 (1973) (finding that profoundly retarded score below 25 on Wechsler test and below 20 on Stanford-Binet test).

87. *See* Youngberg v. Romeo, 457 U.S. 307, 309 (1982) (finding "profoundly" retarded person could not talk nor could he care for himself); *Williams*, 276 Cal. Rptr. at 268 n.2 (discussing "profoundly" retarded individuals possess minimal capacity for sensorimotor functioning and need constant aid and supervision); *American Fed'n of State & County Mun. Employees, AFL-CIO*, 529 N.E.2d at 536 (stating "profoundly" retarded person required assistance in performing basic daily-living functions). *See generally* ROBERT M. ALLEN & ARNOLD D. CORTAZZO, PSYCHOSOCIAL AND EDUCATIONAL ASPECTS AND PROBLEMS OF MENTAL RETARDATION 29 (1970) (evaluating profoundly retarded individuals as incapable of self-sustaining life); SPENCER A. RATHUS & JEFFREY S. NEVID, ABNORMAL PSYCHOLOGY 492 (1991) (citing SPENCER A. RATHUS, UNDERSTANDING CHILD DEVELOPMENT 374 (1988)) (finding profoundly retarded individuals benefit from regular physical activity, but incapable of self-maintenance).

88. *See* PAUL R. FRIEDMAN, THE RIGHTS OF MENTALLY RETARDED PERSONS 23-26 (ACLU Handbook 1976) (discussing 1969 study of American attitudes toward mentally retarded revealing that more than half of people polled believed that institutionalization is best for mentally retarded); THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW 215-216 (Michael Kindred et al. eds., 1976) (noting common misconception in belief that almost all mentally retarded persons are profoundly retarded and nonfunctional).

89. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 40 (3d. ed. 1980); *see* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 443 n.9 (1985) (finding "mild mental retardation" accounts for 89% of all mentally retarded persons); *cf.* Brown v. Secretary of Health & Human Servs., 948 F.2d 268, 270 (6th Cir. 1991) (finding approximately 85% of all mentally retarded are "mildly mentally retarded");

tally retarded persons in the United States fall into the combined levels of "severe" and "profound" retardation.[90] Numerous studies show that approximately 95% of all mentally retarded persons have the potential to be economically productive members of society.[91] Moreover, experts in the field of mental retardation argue that all mentally retarded persons are capable of growth and learning regardless of their level of retardation.[92]

Society's misconception that all mentally retarded individuals are profoundly retarded has led to the presumption in five states that all mentally retarded criminal defendants are incapable of acting with the degree of cul-

---

Richard v. State, 842 S.W.2d 279, 281 (Tex. Crim. App. 1992) (en banc) (finding I.Q. below 69 or 70 obtained by approximately 3% of population); *see also* SPENCER A. RATHUS & JEFFREY S. NEVID, ABNORMAL PSYCHOLOGY 491 (1991) (stating approximately 85% of mentally retarded children in mildly retarded range). *See generally* RONALD W. CONLEY, THE ECONOMICS OF MENTAL RETARDATION 34-39 (1973) (discussing prevalence of mild mental retardation in society); LAWRENCE A. KANE, JR., THE MENTALLY RETARDED CITIZEN AND THE LAW 216 (1973) (finding 90% of all mentally retarded persons have I.Q. scores over 50, placing them in mildly retarded category); David A. Davis, *Executing the Mentally Retarded: The Status of Florida Law*, 65 FLA. BAR J. 12, 16 n.5 (1991) (stating 89% of all mentally retarded persons as "mildly" retarded).

90. ISSAM B. AMARY, THE RIGHTS OF THE MENTALLY RETARDED - DEVELOPMENTALLY DISABLED TO TREATMENT AND EDUCATION 15 (1980); *cf.* Conservatorship of Valerie N. v. Valerie N., 707 P.2d 760, 762 (Cal. 1985) (recognizing only 1% of all mentally retarded individuals are "profoundly" retarded); *see* RONALD W. CONLEY, THE ECONOMICS OF MENTAL RETARDATION 26-34 (1973) (discussing prevalence of "severe" mental retardation in society); PAUL R. FRIEDMAN, THE RIGHTS OF MENTALLY RETARDED PERSONS 16 (ACLU Handbook 1976) (asserting that only 5% of mentally retarded persons are classified as "severe" and "profound").

91. *Cf.* Williams v. Sullivan, 970 F.2d 1178, 1185 (3d Cir. 1992) (finding claimant's I.Q. of 66 did not establish disability deserving of governmental benefits), *cert. denied sub nom.* Williams v. Shalala, 61 U.S.L.W. 3582 (U.S. Feb. 22, 1993) (No. 92-6620); Kharmandaryan v. Sullivan, 947 F.2d 950 (9th Cir. 1991) (text in WESTLAW) (finding claimant's I.Q. of 67 insufficient evidence of permanent impairment to receive disability benefits); Masonite Corp. v. Mitchell, 699 S.W.2d 409, 411 (Ark. Ct. App. 1985) (finding claimant's I.Q. of 50 was not impairment or disability to receive benefits under Second Injury Fund Liability); Roby v. Tarlton Corp., 728 S.W.2d 586, 589 (Mo. Ct. App. 1987) (recognizing claimant with I.Q. from 59 to 67 able to work 40 hours per week). *See generally* Philip Roos, *Basic Facts About Mental Retardation*, *in* 1 LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 17, 20-21 (Bruce J. Ennis & Paul R. Friedman eds., 1973) (discussing quantity of mentally retarded persons who are able to be economically self-sufficient).

92. *Cf.* State v. Lapia, 522 A.2d 272, 274 (Conn. 1987) (stating mild mentally retarded competent to testify); *In re* Grady, 405 A.2d 851, 855 (N.J. Super. Ct. Ch. Div. 1979) (discussing severely retarded individual's ability to attend education classes and benefit from sheltered workshop training); Smith v. State, 742 S.W.2d 847, 851 (Tex. App. — Austin 1987, no writ) (finding mild mentally retarded defendant "knew what was going on" during his confession); SPENCER A. RATHUS & JEFFREY S. NEVID, ABNORMAL PSYCHOLOGY 496 (1991) (finding many moderately and severely retarded individuals capable of living outside institutions). *See generally* PAUL R. FRIEDMAN, THE RIGHTS OF MENTALLY RETARDED PERSONS 17 (ACLU Handbook 1976) (arguing that all mentally retarded individuals have some ability to learn).

pability required for imposing the death penalty.[93] Mentally retarded persons should not be viewed as subhuman or diseased objects.[94] This type of

93. *See* GA. CODE ANN. § 17-7-131(j) (Michie 1990 & Supp. 1992) (providing that death penalty shall not be imposed on mentally retarded defendant); KY. REV. STAT. § 532.140 (Michie 1990) (exonerating severely mentally retarded offenders from death penalty); MD. ANN. CODE art. 27, § 412 (1989) (exempting mentally retarded defendants from death penalty); N.M. STAT. ANN. § 31-20A-2.1 (Michie 1991) (providing that penalty of death shall not be imposed on any person who is mentally retarded); TENN. CODE ANN. § 39-13-203 (1990) (providing mentally retarded defendant shall not be sentenced to death); *but see* Woods v. Dugger, 923 F.2d 1454, 1455 (11th Cir. 1991) (finding individual with I.Q. of 69 had mental capacity to appreciate criminality of his conduct); Hobbs v. Heck, 919 F.2d 738 (6th Cir. 1990) (text in WESTLAW) (denying appellant's claim that mental retardation equals insanity); United States v. Macklin, 900 F.2d 950, 953 (6th Cir. 1990) (holding all mentally retarded citizens to same standards as all other citizens), *cert denied*, __ U.S. __, 111 S. Ct. 116, 112 L. Ed. 2d 86 (1990); Stripling v. State, 401 S.E.2d 500, 502-03 (Ga. 1991) (finding mildly retarded defendant had mental capacity associated with murder, armed robbery, and aggravated assault); State v. Holden, 365 S.E.2d 626, 630 (N.C. 1988) (finding mildly retarded defendant culpable of murder); State v. Stokes, 352 S.E.2d 653, 657 (N.C. 1987) (finding mildly retarded defendant able to control his behavior). *See generally* PAUL R. FRIEDMAN, THE RIGHTS OF MENTALLY RETARDED PERSONS 15-16 (ACLU Handbook 1976) (discussing misconception public has toward mentally retarded); RITA WICKS-NELSON & ALLEN C. ISRAEL, BEHAVIOR DISORDERS OF CHILDHOOD 218-19 (2d ed. 1991) (discussing mentally retarded person's ability to function in society).

94. *See* Youngberg v. Romeo, 457 U.S. 307, 309 n.1 (1982) (noting explanation of American Psychiatric Association that mental retardation is learning disability and training impairment, rather than illness); McDonald v. United States, 312 F.2d 847, 859 (D.C. Cir. 1962) (arguing limited mental capacity exempts no one from criminal responsibility unless mental disability makes it impossible from knowing act was wrong); *Lapia*, 522 A.2d at 274 (finding mildly retarded defendant able to recollect details and facts); *Smith*, 742 S.W.2d at 851 (finding mildly retarded defendant "knew what was going on" during his confession). In *McDonald*, the court argued that a person who deliberately chooses to perform a known criminal act, though his or her mental capacity is impaired, should not be excused from criminal responsibility from that criminal act. *McDonald*, 312 F.2d at 859. Furthermore, the court argues that if a defendant is able to understand the criminality of her actions, then she is sane in a legal sense, even though she may have some mental disability. *Id*; *see also* RITA WICKS-NELSON & ALLEN C. ISRAEL, BEHAVIOR DISORDERS OF CHILDHOOD 210 (2d ed. 1991) (exhibiting behavior that is less than civilized is not subhuman). *See generally* ROBERT M. ALLEN & ARNOLD D. CORTAZZO, PSYCHOSOCIAL AND EDUCATIONAL ASPECTS AND PROBLEMS OF MENTAL RETARDATION 11 (1970) (discussing "aliene" attitudes of deficiency regarding mentally retarded persons). In the early twentieth century, misconceptions of mentally retarded individuals resulted in a list of actual "multiple indictments" of retardation by the social community:

(1) The mentally deficient are prolific.
(2) Their progeny, illegitimate as well as legitimate, are mentally deficient, neuropathic, or dysgenic.
(3) This group has strong criminalistic propensities.
(4) They are a prime source of sex irregularities, promiscuity, prostitution, and perversion.
(5) There is a close association between mental defectiveness and alcoholism with respect to genesis and consequences.

belief, combined with pity towards the mentally retarded, has isolated them from the norm and denied them opportunities of a normal human existence.[95] Virtually all mentally retarded persons are capable of functioning on their own in society and are required to conform their conduct within the confines of law.[96] Mentally retarded persons enjoy the same rights under the Constitution as do all citizens in the United States.[97] Consequently, they

---

(6) Occupational incompetence, destitution, pauperism, and vagrancy are frequent among this group.

Id.

95. *Cf.* KY CONST. § 145(3) (denying right to vote to "idiots" and insane persons); GA. CODE ANN. § 19-3-2(1) (Michie 1991) (denying anyone who not of sound mind opportunity to marry); KY. REV. STAT. ANN. § 30A-145 (Michie 1992) (providing for circuit clerk to submit names of persons determined to be incompetent to State Board of Elections); MISS. CODE ANN. § 41-45-1 (Supp. 1989) (providing involuntary sterilization of institutionalized women afflicted with "idiocy" and "feeble-mindedness"); *see* THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW 219-20 (Michael Kindred et al. eds., 1976) (arguing label of mentally retarded denies opportunities to participate in social activities); Elizabeth A. Steinbeck et al., *Civil Penalties of the Mentally Retarded: An Overview*, 1 L. & PSYCHOL. 153, 154-56 (1975) (discussing social implications resulting from being labelled mentally retarded).

96. *See Woods*, 923 F.2d at 1455 (finding mentally retarded murderer had mental capacity to appreciate criminality of his conduct and to conform his actions to requirements of law), *cert. denied sub nom.* Singletary v. Woods, __ U.S. __, 112 S. Ct. 407, 116 L. Ed. 2d 355 (1991); Hobbs v. Heck, 919 F.2d 738 (6th Cir. 1990) (text in WESTLAW) (asserting mental retardation, by itself, did not relieve defendant of criminal responsibility); Evans v. State, 467 S.W.2d 920, 922 (Mo. 1971) (holding mental retardation did not impair defendant from discerning right from wrong). The majority of mentally retarded defendants are able to form the necessary intent to commit a criminal act. *See* SPENCER A. RATHUS & JEFFREY S. NEVID, ABNORMAL PSYCHOLOGY 491 (1991) (contending that even moderately and severely handicapped individuals are capable of self-sustaining life outside of institutions); David A. Davis, *Executing the Mentally Retarded: The Status of Florida Law*, 65 FLA. BAR J. 12, 13-16 (1991) (arguing that mental retardation does not relieve defendant from criminal responsibility).

97. *See* Rehabilitation Act of 1973, 29 U.S.C. § 701 (1988) (granting statutory right of equal opportunity to handicapped persons); Education of the Handicapped Act, 20 U.S.C. § 1401(c) (1988) (mandating provision of appropriate special-education services to handicapped children receiving free public education); *see also* Loving v. Virginia, 388 U.S. 1, 12 (1967) (finding fundamental right to marry under Equal Protection Clause); Mills v. Board of Educ., 348 F. Supp. 866, 874-75 (D.D.C. 1972) (finding child has Fifth Amendment right to education); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1266 (E.D. Pa. 1971) (holding no child may be denied admission to public-school program, nor his educational status changed, without opportunity of hearing); Boyd v. Board of Registrars of Voters, 334 N.E.2d 629, 630 (Mass. 1975) (striking down town's attempt to declare mentally retarded persons ineligible to vote). *See generally* PAUL R. FRIEDMAN, THE RIGHTS OF MENTALLY RETARDED PERSONS 18-20 (ACLU Handbook 1976) (arguing mentally retarded individuals are afforded right to education, to enter into a contract, to be married, to obtain a driver's license, to vote, to be free from discrimination, and to obtain suitable employment and housing).

should be subject to punishment when they invade or violate the rights of other persons.

IV. THE UNRELIABILITY OF I.Q. TESTS

Although the judiciary,[98] state legislatures,[99] and the disciplines of psychology and psychiatry[100] all accept the fact that the I.Q. should not be used as a unitary measure of mental retardation, five states continue to use the I.Q. in this manner, failing to recognize the fallibility of the I.Q. as a diagnostic instrument.[101] Recently, Georgia,[102] Tennessee,[103] Kentucky,[104]

---

98. *See, e.g.*, Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985) (recognizing wide range of behavior under classification of mentally retarded); Brown v. Secretary of Health & Human Servs., 948 F.2d 268, 269 (6th Cir. 1991) (noting need for other behavior to be considered in addition to I.Q.); United States v. Masthers, 539 F.2d 721, 724 n.16 (D.C. Cir. 1976) (noting I.Q. alone not determinative of mental retardation); Stripling v. State, 401 S.E.2d 500, 503 (Ga. 1991) (observing margin of error in I.Q. and other factors affecting I.Q.); Snow v. State, 469 N.Y.S.2d 959, 962 (N.Y. App. Div. 1983) (describing I.Q. as crude barometer of intelligence), *appeal granted*, 475 N.Y.S.2d 1026 (N.Y. 1984); *Ex parte* Williams, 833 S.W.2d 150, 152 (Tex. Crim. App. 1992) (asserting many factors besides I.Q. to determine mental retardation). *See generally* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 421-22 (1985) (recognizing widespread acceptance of this definition by courts).

99. *E.g.*, ARIZ. REV. STAT. ANN. § 36-551(26) (Supp. 1992); CAL. PENAL CODE § 1001.20(a) (Deering 1983); CONN. GEN. STAT. ANN. § 1-1g (1983); DEL. CODE ANN. tit. 16, § 5530 (Supp. 1992). *See generally* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 421-22 (1985) (recognizing widespread acceptance of this definition by legislatures).

100. *E.g.*, AMA HANDBOOK ON MENTAL RETARDATION 20-33 (Herbert J. Grossman, M.D. & George Tarjan, M.D. eds., 1987); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 28 (3d ed. 1980). The AMA places a greater emphasis on behavior, social adaption, and developmental functioning in determining whether an individual is mentally retarded, than does the AAMD. *See* AMA HANDBOOK ON MENTAL RETARDATION 17 (Herbert J. Grossman, M.D. & George Tarjan, M.D. eds., 1987) (describing AMA definition). *See generally* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 421 (1985) (recognizing widespread acceptance of this definition by professional organizations).

101. *See* N.M. STAT. ANN. § 31-20A-2.1 (Michie Supp. 1992) (stating that in capital-sentencing context "an intelligence quotient of seventy or below shall be presumptive evidence of mental retardation"); Fleming v. Zant, 386 S.E.2d 339, 346 (Ga. 1989) (admitting all Georgia requires to relieve defendant from death penalty is I.Q. of 70 or lower). *But see Snow*, 469 N.Y.S.2d at 962 (disputing validity of I.Q. because it acts as "crude barometers" of intelligence); Levy v. Pennsylvania Dep't of Educ., 399 A.2d 159, 162 (Pa. Commw. Ct. 1979) (rejecting I.Q. as only means of determining classification of mental retardation); *but see also Stripling*, 401 S.E.2d at 503 (conceding I.Q. subject to wide margin of error). *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 28-29 (3d ed. rev. 1987) (requiring adaptive behavior analysis in determination of mental retardation); Mary D. Bicknell, Note, *Constitutional Law: The Eighth Amendment Does Not Prohibit the Execution of Mentally Retarded Convicts*, 43 OKLA. L. REV. 357, 371 (1990) (sup-

Maryland,[105] and New Mexico[106] enacted statutes prohibiting the execution of mentally retarded individuals who have an I.Q. below seventy.[107] Therefore, these states presume that no mentally retarded criminal defendant, regardless of the degree of retardation, could ever act with the degree of blameworthiness associated with the death penalty.[108]

Ironically, Georgia, Tennessee, Kentucky, and Maryland all have statutes adopting the three-part definition of mental retardation.[109] To reconcile

---

porting Georgia and Maryland's exoneration of mentally retarded from death penalty based on I.Q. of 70 or below).

102. GA. CODE ANN. § 17-7-131(j) (Michie 1990 & Supp. 1992) (providing that defendant found guilty of crime but mentally retarded shall not be executed); *see Fleming*, 386 S.E.2d at 346 (describing Georgia's statute of determining defendant's sentence based on expert testimony of defendant's I.Q.); Mary D. Bicknell, Note, *Constitutional Law: The Eighth Amendment Does Not Prohibit the Execution of Mentally Retarded Convicts*, 43 OKLA. L. REV. 357, 371 (1990) (supporting state's setting I.Q. of 70 as dividing line between those who can be executed and those who cannot).

103. TENN. CODE ANN. § 39-13-203(3)(d) (1991) (providing that mentally retarded defendants shall be sentenced to life imprisonment without separate sentencing hearing).

104. KY. REV. STAT. § 532.140 (Michie 1990) (providing that no severely mentally retarded offender shall be subject to death penalty).

105. MD. ANN. CODE art. 27, § 412(f)(1) (1992) (providing death may not be imposed on mentally retarded defendants); *see* Mary D. Bicknell, Note, *Constitutional Law: The Eighth Amendment Does Not Prohibit the Execution of Mentally Retarded Convicts*, 43 OKLA. L. REV. 357, 371 (1990) (supporting Maryland's setting I.Q. of 70 as dividing line between those who can be executed and those who cannot).

106. N.M. STAT. ANN. § 31-20A-2.1(A), (B) (Michie Supp. 1992) (providing penalty of death shall not be imposed on any person who is mentally retarded, and I.Q. below 70 is presumptive evidence of mental retardation).

107. *Cf.* Hobson v. Hansen, 269 F. Supp. 401, 514 (D.D.C. 1967) (arguing I.Q. tests produce inaccurate and misleading test scores), *aff'd sub nom.* Smuck v. Hobsen, 408 F.2d 175 (D.C. Cir. 1969); *Levy*, 399 A.2d at 162 (holding I.Q. scores as unreliable when not considered with other factors). In *Levy*, the court held that the results of I.Q. tests, in and of themselves, do not constitute substantial evidence of mental retardation. *Id*; *see also Williams*, 833 S.W.2d at 151 (finding mental retardation cannot be determined solely from I.Q. tests). *But see* Mary D. Bicknell, Note, *Constitutional Law: The Eighth Amendment Does Not Prohibit the Execution of Mentally Retarded Convicts*, 43 OKLA. L. REV. 357, 371 (1990) (supporting Georgia and Maryland statutes exonerating mentally retarded defendants from death penalty).

108. *But see* Hobbs v. Heck, 919 F.2d 738 (6th Cir. 1990) (text in WESTLAW) (finding mentally retarded defendant can act with requisite degree of blameworthiness associated with crime); Brogdon v. Butler, 824 F.2d 338, 341 (5th Cir. 1987) (holding mental retardation does not necessarily constitute insanity or determine capability of distinguishing right and wrong), *cert. denied*, 483 U.S. 1040 (1987); *Stripling*, 401 S.E.2d at 502-03 (finding mildly retarded defendant had requisite degree of blameworthiness associated with murder, armed robbery, and aggravated assault).

109. *See* GA. CODE ANN. § 17-7-131(a)(3) (Michie 1990 & Supp. 1992) (defining "mentally retarded" as "having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period"); KY. REV. STAT. § 532.130(2) (Michie 1990) (defining "seriously mentally retarded defendant" as person with "significant subaverage intellectual functioning existing

these states' contradictory statutes, it appears that an individual is mentally retarded when there is evidence of (1) subaverage general intellect, (2) deficits in adaptive behavior, and (3) onset during the early developmental period; *except* when the individual is a capital murderer, in which case his or her I.Q. is the sole determinate of mental retardation.[110] Thus, all that is needed to exonerate a capital murderer from the death penalty is expert testimony that the defendant has obtained an I.Q. of seventy or less.[111] Fur-

---

concurrently with substantial deficits in adaptive behavior and manifested during the developmental period"); MD. ANN. CODE art. 27, § 412 (1990) (defining "mentally retarded" as "a developmental disability that is evidenced by significantly subaverage intellectual functioning and impairment in the adaptive behavior of an individual"); N.M. STAT. ANN. § 31-20A-2.1(A) (Michie 1991) (defining "mentally retarded" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior"); TENN. CODE ANN. § 33-1-101(15) (Michie 1984) (defining "mentally retarded individual or mentally deficient individual" as "an individual who has significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period").

110. *See* GA. CODE ANN. § 17-7-131(a)(3) (Michie 1990 & Supp. 1992) (defining mentally retarded). The Georgia Code defines "mentally retarded" as "having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period." *Id. But see Fleming*, 386 S.E.2d at 346 (Smith, J., dissenting) (interpreting GA. CODE ANN. § 17-7-131(j) as exempting defendant's with I.Q. of 70 or below from death penalty). All that is needed in Georgia to relieve a defendant from the death penalty is expert testimony that the defendant has an I.Q. of seventy or lower. *Id.*; *see* N.M. STAT. ANN. § 31-20A-2.1 (Michie Supp. 1992) (providing that penalty of death shall not be imposed on any person with intelligence quotient of 70 or below); *cf. Snow*, 469 N.Y.S.2d at 962 (interpreting I.Q. scores as "crude barometers" of intelligence); *see also* Mary D. Bicknell, Note, *Constitutional Law: The Eighth Amendment Does Not Prohibit the Execution of Mentally Retarded Convicts*, 43 OKLA. L. REV. 357, 371 (1990) (supporting statutes that establish I.Q. of 70 as division between those who can be executed and those who cannot).

111. *See Fleming*, 386 S.E.2d at 346 (Smith, J., dissenting) (arguing against exoneration from death penalty based on I.Q. score). In *Fleming*, the court found the statute does not require the defendant to be so severely or profoundly retarded as to be unable to understand the nature and quality or the wrongfulness of his conduct before exempting the defendant from the death penalty. *Id.* at 345. Instead, the statute exonerates defendant based solely on defendant's I.Q. *Id.* at 346. Furthermore, the statute provides no guidance for the courts to give proper weight to the defendant's adaptive behavior as required in the state's codified definition of mental retardation. *Id.*; *see also* GA. CODE ANN. § 17-7-131(a)(3) (Michie 1990 & Supp. 1992) (adopting three-part definition of mental retardation). All that is needed in Georgia to relieve a defendant from the death penalty is that he or she have an I.Q. of seventy or lower. *See Fleming*, 386 S.E.2d at 346 (interpreting Georgia statute); *but see Snow*, 469 N.Y.S.2d at 962 (interpreting I.Q. scores as "extremely crude barometers" of intelligence); *Levy*, 399 A.2d at 162 (rejecting I.Q. scores as substantial evidence of mental retardation); *Williams*, 833 S.W.2d at 152 (finding mental retardation cannot be determined solely from I.Q. tests). *See generally* JEROME M. SATTLER, ASSESSMENT OF CHILDREN 647 (2d ed. 1988) (finding that only when individual falls into mentally retarded category with respect to both intellectual functioning and adaptive behavior is diagnosis of mental retardation appropriate); Rick Heber, *Modifications in the Manual on Terminology and Classification in Mental Retardation*, 65

thermore, there is no requirement that the defendant's mental retardation prevent him from appreciating the nature and quality, or the wrongfulness, of his conduct.[112]

Without the application of the three-part definition of mental retardation, there is no investigation into the individual's adaptive behavior. Therefore, there is no weight attached to the individual's ability to function and maintain himself or herself independently, to be engaged in gainful employment, and to meet and conform to other personal and social responsibilities.[113]

Since an individual must demonstrate deficiencies in both adaptive behavior and measured intelligence in order to meet the criteria of mental retardation, Georgia, Tennessee, Kentucky, Maryland, and New Mexico have eliminated, in the capital-sentencing context, the necessary and mandatory criterion for a valid diagnosis of mental retardation.[114]

AMER. J. MENTAL DEFICIENCY 499-500 (1961) (requiring measure of individual's adaptive behavior before considering him or her mentally retarded).

112. *Fleming*, 386 S.E.2d at 346 (noting fallibility of exoneration statute for failing to allow for determination of defendant's ability to appreciate wrongfulness of his conduct). The statute does not require the defendant to be so severely or profoundly retarded so as to be unable to understand the nature and quality or the wrongfulness of his conduct before exempting the defendant from the death penalty. *Id.* at 345. The Supreme Court has held that removing the "adaptive behavior" criterion from the definition of mental retardation invalidates the entire determination process. *See Cleburne Living Ctr., Inc.*, 473 U.S. at 443 n.9 (holding mental retardation is not defined by I.Q. alone); *Williams*, 833 S.W.2d at 151 (finding mental retardation cannot be determined solely from I.Q. tests); *see also* JANE R. MERCER, LABELING THE MENTALLY RETARDED, CLINICAL AND SOCIAL SYSTEM PERSPECTIVES ON MENTAL RETARDATION 133 (1973) (requiring measure of individual's adaptive behavior before considering him or her mentally retarded); David A. Davis, *Executing the Mentally Retarded: The Status of Florida Law*, 65 FLA. BAR J. 12, 13 (1991) (asserting I.Q. is not determinative of mental retardation).

113. *See* Penry v. Lynaugh, 409 U.S. 302, 338-39 (1989) (refusing to consider I.Q. as determinative of retardation because it underestimates life experiences and ability to use logic in solving problems in day-to-day living); *Levy*, 399 A.2d at 162 (asserting I.Q. does not constitute substantial evidence of mental retardation). In *Levy*, the court asserted that without a correlation between an individual's intelligence and ability to adapt to society, mental retardation cannot be determined. *Id.*; *see also* AMA HANDBOOK ON MENTAL RETARDATION 8 (Herbert J. Grossman, M.D. & George Tarjan, M.D. eds., 1987) (defining "impairments in adaptive behavior"). The editors cite as the definition of an impairment in adaptive behavior, a "significant limitation in an individual's ability to meet the standards of maturation, learning, personal independence, and/or social responsibility expected of persons of the same age level and cultural group, as determined by clinical assessment and (usually) standardized scales". *Id.*

114. *See Cleburne Living Ctr., Inc.*, 473 U.S. at 443 n.9 (1985) (noting that mental retardation is not defined by I.Q. alone); *Levy*, 399 A.2d at 162 (finding I.Q. scores by themselves do not constitute substantial evidence of mental retardation); *Williams*, 833 S.W.2d at 152 (finding mental retardation cannot be determined solely from I.Q. tests). *See generally* JEROME M. SATTLER, ASSESSMENT OF CHILDREN'S INTELLIGENCE AND SPECIAL ABILITIES 647 (2d ed. 1988) (requiring both low I.Q. and inability to function properly in society for

The use of the I.Q. as a unitary measurement of mental retardation by Georgia, Kentucky, Maryland, and Tennessee scorns the conclusions of experts in the fields of mental retardation for three basic reasons. First, a person's I.Q. score is not dispositive of mental retardation. Second, the score does not remain constant. Third, a court's adoption of I.Q. scores as prima-facie proof of mental retardation will potentially deprive all mentally retarded individual of certain rights and privileges.

A. *An I.Q. Is Not Dispositive of Mental Retardation Issue*

Since each test incorporates a standard error of measurement, which demonstrates the existence of a variation between the obtained score and the true score,[115] a score on an I.Q. test should not be dispositive of the issue of mental retardation.[116] Furthermore, numerous studies show that intelli-

---

mental retardation); Rick Heber, *Modifications in the Manual on Terminology and Classification in Mental Retardation*, 65 AMER. J. MENTAL DEFICIENCY 499, 499-500 (1961) (requiring measure of individual's adaptive behavior before considering him or her as mentally retarded). This manual for classifying the mentally retarded asserts that an individual must demonstrate deficiencies in both adaptive behavior and "Measured Intelligence" in order to meet the criteria of mental retardation. *Id.* at 499. Furthermore, "Measured Intelligence" cannot be used as the sole criterion of mental retardation because intelligence test performances do not always correspond to level of deficiency in total adaptation. *See id.* at 500 (modifying levels of adaptive behavior to correspond with levels of Measured Intelligence).

115. *See* Stripling v. State, 401 S.E.2d 500, 503 (Ga. 1991) (conceding I.Q. scores are subject to margin of error). The court noted that an I.Q. is not a truly accurate score; instead, it is only accurate within a range of scores. *Id.* at 504.; Snow v. State, 469 N.Y.S.2d 959, 962 (N.Y. App. Div. 1983) (arguing against I.Q. scores as "crude barometers" of intelligence), *appeal granted*, 475 N.Y.S.2d 1026 (N.Y. 1984); *see also* ALAN AGRESTI & BARBARA FINLAY, STATISTICAL METHODS FOR THE SOCIAL SCIENCES 79 (2d ed. 1986) (defining standard error as "a measure of the dispersion of the sampling distribution, and, thus, it can be used to describe how much variability there tends to be in the value of [the sample mean] from sample to sample"); DAVID WECHSLER, MANUAL FOR THE WECHSLER INTELLIGENCE SCALE FOR CHILDREN - REVISED 29 (1974) (noting I.Q. test's standard error of measurement). The manual asserts that "[t]he standard error of measurement . . . is a function of the reliability coefficient" and provides the administrator of the test with confidence when making judgments about an individual's true score on the test. *Id.*

116. *Compare* Lowery v. Sullivan, 979 F.2d 835, 837 (11th Cir. 1992) (finding claimant's I.Q. of 69 inconsistent with mental retardation) *with* Popp v. Heckler, 779 F.2d 1497, 1499-1500 (11th Cir. 1986) (finding claimant's claim of retardation based on I.Q. of 69 inconsistent with evidence of two-year college associate degree). *Cf.* Ellison v. Sullivan, 929 F.2d 534, 536 (10th Cir. 1990) (finding claimant's I.Q. of 72 and social functioning did not satisfy disability requirements of I.Q. of 60-69 and social limitations); *Stripling*, 401 S.E.2d at 504 (holding I.Q. score of 70 or below is not conclusive of mental retardation). *See generally* ISSAM B. AMARY, THE RIGHTS OF THE MENTALLY RETARDED - DEVELOPMENTALLY DISABLED TO TREATMENT AND EDUCATION 13 (1980) (arguing I.Q. scores alone should not be used to label persons, but that consideration should be given to all known behaviors before finding that person mentally retarded); RONALD W. CONLEY, THE ECONOMICS OF MENTAL RETARDATION 8-9 (1973) (discussing advantages and disadvantages of using I.Q. tests for determination of

gence tests are imperfect measures of intelligence.[117] Because of measurement error, these scores only represent approximations of a "true" score.[118] Consequently, the obtained score is only one of a number of possible scores that may be achieved with different sample questions or with the same questions at a different time.[119]

---

mental retardation). *But see* Ludwik S. Szymanski, M.D., *Psychiatric Diagnosis of Retarded Persons, in* EMOTIONAL DISORDERS OF MENTALLY RETARDED PERSONS 61, 61 (Ludwik S. Szymanski, M.D. & Peter E. Tanguay, M.D. eds., 1980) (finding researchers who have relied solely on I.Q. tests disregard degree of individual's adaption).

117. *See* Muse v. Sullivan, 925 F.2d 785, 788 (5th Cir. 1991) (contrasting differing psychiatric evaluations of claimant's mental state); People v. Ward, 338 N.E.2d 171, 174 (Ill. 1975) (noting expert opinion that I.Q. varies depending on subjective determination of party administering test and atmosphere of testing conditions); *Ex parte* Williams, 833 S.W.2d 150, 151 (Tex. Crim. App. 1992) (noting expert's testimony that individual's emotional state invalidated his I.Q.). *See generally* AMA HANDBOOK ON MENTAL RETARDATION 67 (Herbert J. Grossman, M.D. & George Tarjan, M.D. eds., 1987) (noting limitations of I.Q. tests). The results of an I.Q. test can be affected by choice of examiner or testing situation. *Id.* Variations are also attributable to "differences in the standardization norms of different test instruments or to changes between editions of the same scale" and can lead to misinterpretation. *Id.* "[T]ests results are not equally applicable to all children; racial or cultural biases often are built into" the tests. *Id.* "For these reasons the results of one I.Q. test do not constitute a diagnosis. Scores are merely a record of one individual's performance on a given test." AMA HANDBOOK ON MENTAL RETARDATION 67 (Herbert J. Grossman, M.D. & George Tarjan, M.D. eds., 1987); *see also* RONALD W. CONLEY, THE ECONOMICS OF MENTAL RETARDATION 8 (1973) (arguing that I.Q. tests fail to properly measure person's intelligence); PAUL R. FRIEDMAN, THE RIGHTS OF MENTALLY RETARDED PERSONS 25 (ACLU Handbook 1976) (arguing that I.Q. tests are notoriously inaccurate because test is only one of many factors that are required to make accurate diagnosis); Bruce Cushna, *The Psychological Definition of Mental Retardation: A Historical Overview, in* EMOTIONAL DISORDERS OF MENTALLY RETARDED PERSONS, 31, 43 (Ludwick S. Syzmanski, M.D. & Peter E. Tanguay, M.D. eds., 1980).

118. *Cf. Stripling*, 401 S.E.2d at 503 (correlating defendant's I.Q. score with his adaptive behavior led to conclusion that defendant had cheated on the intelligence test); Dickenson v. Baltimore & Ohio Chic. Terminal, 220 N.E.2d 43, 50 (Ill. App. Ct. 1965) (conceding that appellee may have purposely given wrong answers to score low on I.Q. test); *Snow*, 469 N.Y.S.2d at 962 (interpreting I.Q. scores are ineffective measures of intelligence), *appeal granted*, 475 N.Y.S.2d 1026 (N.Y. 1984); *Williams*, 833 S.W.2d at 151 (finding defendant's emotional state invalidated I.Q. score); *see also* DAVID WECHSLER, MANUAL FOR THE WECHSLER INTELLIGENCE SCALE FOR CHILDREN - REVISED 29 (1979) (defining "true score" as "average score a child would obtain if he were tested a large number of times, and if the effects of practice, fatigue, etc., could be ruled out").

119. *See Lowery*, 979 F.2d at 838 (finding inconsistent I.Q. testing scores); Markosyan v. Sullivan, 933 F.2d 1014 (9th Cir. 1991) (text in WESTLAW) (noting inconsistencies between claimant's I.Q. scores on two different intelligence tests); Abbott v. Sullivan, 905 F.2d 918, 925 (6th Cir. 1990) (stating that "[i]dentical I.Q. scores obtained from different intelligence tests do not always reflect a similar degree of intellectual functioning"); Fairchild v. Lockhart, 900 F.2d 1292, 1298 (8th Cir. 1990) (finding petitioner had "as many different intelligence scores as there are tests that have been administered to him"); *Ward*, 338 N.E.2d at 174 (conceding that I.Q. score varies depending on subjective determination of party administering test and atmosphere of testing conditions); *Williams*, 833 S.W.2d at 152 (finding defendant may score differ-

Courts in the United States have consistently held that a low score on an intelligence test does not provide a justifiable basis for classifying a child as "mentally retarded."[120] Intrinsic interest in the test's content, rapport with the examiner, drive to excel on the test, and past habits of problem-solving are all factors that distort the results of intelligence tests.[121] Moreover,

---

ently with change in emotional state). *See generally* AMA HANDBOOK ON MENTAL RETARDATION 63-66 (Herbert J. Grossman, M.D. & George Tarjan, M.D. eds., 1987) (describing numerous standardized tests available to determine mental retardation). The handbook reveals a nonexhaustive list of such tests and includes the following: Denver Prescreening Developmental Screening Test (PDQ), Denver Developmental Screening Test (DDST), Gesell Developmental Schedules, Preschool Language Scale, Alpern-Boll Developmental Profile, Goodenough-Harris Drawing Test, Stanford-Binet Intelligence Scale, Bayley Scales of Infant Development, Cattell Infant Intelligence Scale, Wechsler Intelligence Scale for Children-Revised (WISC-R), Wechsler Preschool and Primary Scale of Intelligence (WPPSI). *Id.*; *see also* RONALD W. CONLEY, THE ECONOMICS OF MENTAL RETARDATION 8 (1973) (pointing out substantial errors of measurement in I.Q. tests due to physical conditions during test, and attitudes and physical alertness of person taking test).

120. *See* Larry P. v. Riles, 502 F.2d 963, 965 (9th Cir. 1974) (enjoining future placement of children in schools for mentally retarded based on I.Q. tests); *see also* Serna v. Portales Mun. Schs., 351 F. Supp. 1279, 1281 (D. N.M. 1972) (finding I.Q. tests discriminatory against Spanish surnamed children), *aff'd*, 499 F.2d 1147 (10th Cir. 1974); Hobson v. Hansen, 269 F. Supp. 401, 514 (D.D.C. 1967) (arguing that standardized aptitude tests produce inaccurate and misleading scores), *aff'd sub nom.* Smuck v. Hobsen, 408 F.2d 175 (D.C. Cir. 1969). The court held that standardized aptitude tests revealed misleading results when administered to the lower class and African-American students. *Hobson*, 269 F. Supp. at 514. Consequently, these students are being incorrectly classified not by their ability to learn, but by their socio-economic status or racial status. *Id.* The court contended that the intelligent tests results are classifying students "according to environmental and psychological factors which have nothing to do with innate ability." *Id. But see* Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691, 743-44 (1968) (advocating adaptive-behavior analysis because it provides objectivity in standardized testing to provide check against personal prejudices of tests).

121. *See Ward*, 338 N.E.2d at 174 (noting expert statements conceding that I.Q. score varies depending on subjective determination of party administering test and atmosphere of testing conditions); *Dickenson*, 220 N.E.2d at 50 (recognizing uncertainty of I.Q. tests). In *Dickenson*, the court noted that particular factors effect the resulting score of an I.Q., such as accepted cultural biases, examinees' goal to perform poorly, or examiners ineffective testing procedure. *Dickenson*, 220 N.E.2d at 50; *see also Williams*, 833 S.W.2d at 151-52 (finding defendant's emotional state may have affected his I.Q. score and, thus, created a fact issue); RITA WICKS-NELSON & ALLEN C. ISRAEL, BEHAVIOR DISORDERS OF CHILDHOOD 215 (2d ed. 1991) (contending that caution must be observed when using I.Q. as label). The authors discourage the use of I.Q. tests for identifying retardation and making decisions about education and placement. *Id.*; *see also* ALVIN ENIS HOUSE & MARJORIE L. LEWIS, *Weschler Adult Intelligence Scale — Revised*, *in* MAJOR PSYCHOLOGICAL ASSESSMENT INSTRUMENTS 323, 365-69 (Charles S. Newmark ed., 1985) (discussing factors that effect individuals performance on intelligence tests). The authors above indicate that excessive tension, anxiety, sensory limitations, motor limitation, and communication limitations all can affect an individual's I.Q. score. *Id.* at 365-68. Another factor that adversely affects an I.Q. score is client faking. *Id.* at 368-69. Many individuals fake performance on I.Q. test so as to obtain disability benefits. *Id.*

courts argue that evidence of a defendant's I.Q. results in the jury's focus of attention on "a red herring that has absolutely no connection with the defendant's guilt or innocence."[122] Thus, the use of an I.Q. score as the sole means of determining whether the death penalty will be imposed may lead to a misdiagnosis of mental retardation, resulting in the admission of invalid evidence.[123]

B. *The Inconsistent I.Q. Score*

Mentally retarded persons' I.Q. scores do not remain constant.[124] Studies

---

at 369. When sophisticated and intelligent persons fake their I.Q. score, it is usually difficult to notice the deception. ALVIN ENIS HOUST & MARJORIE L. LEWIS, *Weschler Adult Intelligence Scale — Revised, in* MAJOR PSYCHOLOGICAL ASSESSMENT INSTRUMENTS 323, 369. Consequently, the authors argue that in order to detect effectively deliberate underachievement, the administrator of the test must compare the individual's I.Q. score with his or her adaptive behavior. *Id.*; *see also* ALAN S. KAUFMAN, INTELLIGENT TESTING WITH THE WISC-R 13 (1979) (finding actual I.Q. score as gross underestimate of real intelligence).

122. *Levy*, 616 A.2d at 976 (discrediting I.Q. scores). The defense sought to introduce evidence of the defendant's mental retardation to show that he lacked the intelligence necessary to conduct drug sales of such magnitude necessary to dispose of 65 grams of cocaine. *Id.* The court argued that to allow evidence of his intelligence level would lead to the arguments of an individual with a high I.Q. that "he was too smart to have engaged in the foolish and risky business of selling drugs." *Id.* I.Q. scores underestimate person's life experiences as well as his ability to use logic in solving everyday problems. *See* Penry v. Lynaugh, 492 U.S. 302, 338-39 (1989) (finding Penry's "mental age" as based on I.Q. scores imprecise); *cf. Snow*, 469 N.Y.S.2d at 962 (arguing that I.Q. scores are inaccurate indicators of intelligence).

123. *Cf. Ward*, 338 N.E.2d at 174 (conceding that I.Q. score varies depending on subjective determination of party administering test and atmosphere of testing conditions); *Levy*, 399 A.2d at 162 (holding I.Q. scores do not constitute substantial evidence of mental retardation); *Williams*, 833 S.W.2d at 152 (finding mental retardation cannot be determined solely from I.Q. tests); *see* Renée A. Forinash, Comment, *Analyzing Scientific Evidence: From Validity to Reliability with a Two-Step Approach*, 24 ST. MARY'S L.J. 223, 255-56 (1992) (discussing misinterpretation and abuse of scientific evidence and proposing two-part test). Under this test, the court would first determine the validity of a person's I.Q. score and second, ascertain whether the psychiatrist's conclusion is probable enough to be reliable, before allowing the admission of defendant's I.Q. results. *See id.* at 255-56 (describing appropriate test to establish and admit scientific evidence). The second part to this test would allow the judge to correlate the individual's I.Q. with the individual's adaptive behaviors. *See id.* (noting need to test scientific evidence before allowing wholesale admission into evidence). As a graphic example of the kind of widespread unreliability existing in the use of the I.Q. to classify students, in a Boston study, school systems labeled nearly 4,000 children as mentally retarded when the Department of Mental Health there found only 1,500 of the children to be mentally retarded. Bruce Cushna, *The Psychological Definition of Mental Retardation: A Historical Overview, in* EMOTIONAL DISORDERS OF MENTALLY RETARDED PERSONS 31, 42 (Ludwik S. Szymanski, M.D. & Peter E Tanguay, M.D., eds., 1980). *See generally* RONALD W. CONLEY, THE ECONOMICS OF MENTAL RETARDATION 9 (1973) (contending that best-known I.Q. tests misrepresent abilities of nonwhites, the poor, and persons with physical and mental handicaps).

124. *Cf.* Duhamel v. Collins, 955 F.2d 962, 966 n.3 (5th Cir. 1992) (finding defendant scored 56 on I.Q. test administered prior to capital sentencing and 86 when he was 10 years

show great fluctuation in I.Q. scores for reasons such as fatigue and illness.[125] Moreover, numerous studies demonstrate that a lack of motivation can result in a low I.Q. score.[126]

A 1981 study showed this high degree of fluctuation by administering an I.Q. test to five individuals under normal testing conditions.[127] The resulting scores of four of the individuals labeled each as "moderately" retarded, and the fifth individual's score labeled him as "profoundly" retarded.[128] However, when these individuals were tested using a positive reinforcement, three individuals were not labeled mentally retarded at all, and two individuals

---

old); Fairchild v. Lockhart, 900 F.2d 1292, 1298 n.5 (8th Cir. 1990) (finding petitioner had scored I.Q. as high as 87 and as low as 60), *cert. denied*, 497 U.S. 1052 (1990). *But see* Ramos v. Ramos, 232 S.W.2d 188, 193 (Mo. Ct. App. 1950) (noting opinion by expert witness that I.Q. scores remains constant until individual grows older); Rios v. State, 846 S.W.2d 310, 315 (Tex. Crim. App. 1992) (noting expert witness testimony that I.Q. tends to remain relatively constant over time); DAVID WECHSLER, MANUAL FOR THE WECHSLER INTELLIGENCE SCALE FOR CHILDREN - REVISED 31 (1974) (describing expected standard deviation in test scores).

125. *Cf.* Stripling v. State, 401 S.E.2d 500, 503 (Ga. 1991) (noting expert witness would not administer I.Q. test to defendant because defendant was severely depressed); Snow v. State, 469 N.Y.S.2d 959, 962 (N.Y. App. Div. 1983) (noting expert witness opinion that I.Q. scores as "crude barometers" of intelligence), *appeal granted*, 475 N.Y.S.2d 1026 (N.Y. 1984); *Ex parte* Williams, 833 S.W.2d 150, 152 (Tex. Crim. App. 1992) (describing expert's conclusion that examinee's mild depression affected I.Q.); CLASSIFICATION IN MENTAL RETARDATION 26-27 (Herbert J. Grossman, M.D. ed., 1983) (finding both fatigue and illness affect I.Q. score).

126. *See* Gibson v. Secretary of Health & Human Servs., 882 F.2d 329, 330 (8th Cir. 1989) (finding lack of motivation during testing resulted in score 15 points lower than true score); Boatwright v. Dep't of Health & Human Servs., 879 F.2d 862, 862 (5th Cir. 1989) (invalidating claimant's I.Q. score for lack of motivation); *cf.* Ambers v. Heckler, 736 F.2d 1467, 1468-69 (11th Cir. 1984) (invalidating claimant's I.Q. score for "faking" lower score to obtain disability benefits); *Stripling*, 401 S.E.2d at 503 (invalidating defendant's I.Q. score for cheating); *see also* Joy M. Clingman & Robert L. Flowler, *The Effects of Primary Reward on the I.Q. Performance of Grade-School Children as a Function of Initial I.Q. Level*, 9 J. APPLIED BEHAV. ANALYSIS 19, 22 (1976) (finding reward increased I.Q. scores); Alan E. Kazdin, *The Effect of Vicarious Reinforcement on Attentive Behavior in the Classroom*, 6 J. APPLIED BEHAV. ANALYSIS 71, 74 (1973) (stating "motivative" reinforcement increased I.Q. scores); Larry Maheady et al., *A Comparison of Tangible Reinforcement and Feedback Effects on the WPPSI I.Q. Scores of Nursery School Children*, 6 EDUC. & TREATMENT OF CHILDREN 37, 43 (1978) (finding extrinsic rewards for correct responses significantly increase test performance); Robin Miller Young, et al., *Immediate and Delayed Reinforcement on WISC-R Performance for Mentally Retarded Students*, 3 APPLIED RES. IN MENTAL RETARDATION 13, 18-19 (1982) (discussing reinforcement affecting I.Q. results).

127. *See* Stephen E. Breuning & Vicky J. Davis, *Reinforcement Effects on the Intelligence Test Performance of Institutionalized Retarded Adults: Behavioral Analysis, Directional Control, and Implications for Habilitation*, 2 APPLIED RES. IN MENTAL RETARDATION 307, 318-20 (1981) (examining increases and decreases in I.Q. scores).

128. *Id.* at 320.

were labeled as only "mildly" mentally retarded.[129] In other words, the results of the study indicated that the use of a reward to increase the individuals' desire to do well resulted in the escalation of their I.Q. scores by approximately fifteen points.[130] Accordingly, lack of motivation and desire can decrease an individual's I.Q. score, and when the end result of a test score determines life or death, an individual may purposefully aim to achieve a lower I.Q. score as a means of escaping the death penalty.[131]

C. *An I.Q. as Prima-Facie Proof of Mental Retardation*

The use of I.Q. tests as unitary measures of mental retardation in the determination of capital punishment will ultimately harm all mentally retarded individuals.[132] In a Boston study, school systems had labeled nearly 4,000 children as mentally retarded based on individual I.Q. scores, whereas the

---

129. *Id.* The study indicated an increase of 20.3 points when a positive reinforcement was administered. *Id.* at 311.

130. *Id.* The results of this study replicated "the results of precious studies showing that the I.Q. of institutionalized mentally retarded individuals can be increased when reinforcement is delivered contingent upon correct responding." *Id.* at 318; *cf. Stripling*, 401 S.E.2d at 503 (invalidating defendant's I.Q. score because of his "faking" his intellectual ability).

131. *See Duhamel*, 955 F.2d at 966-67 (manipulating I.Q. score). In *Duhamel*, the court found that the defendant had scored an 86 on an I.Q. test administered to him at the age of ten. *Id.* at 966 n.3. However, when given an I.Q test prior to capital sentencing, the defendant scored only a 56. *Id.* at 966; *see also* Markosyan v. Sullivan, 933 F.2d 1014 (9th Cir. 1991) (text in WESTLAW) (denying claimant's request for disability benefits based on claim of mental retardation). In *Markosyan*, the court found that the claimant, who scored a 59 on an I.Q. test, attempted to "convince the examiner of an innate lack of ability." *Id.* at *7; *see also Stripling*, 401 S.E.2d at 503 (invalidating defendant's I.Q. score because of cheating).

132. *Cf.* Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (arguing mental age to measure capabilities of mentally retarded person could have disempowering effect in other areas of law). The Court argued that "a mildly mentally retarded person could be denied the opportunity to enter into contracts or to marry." *Id.*; *cf.* Snow v. State, 469 N.Y.S.2d 959, 962 (N.Y. App. Div. 1983) (asserting I.Q. scores are inaccurate measurer of intelligence), *appeal granted*, 475 N.Y.S.2d 1026 (N.Y. 1984); *see* THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW 218 (Michael Kindred et al. eds., 1976) (discussing detrimental effect that labeling has on mentally retarded). The detrimental effect of such labeling occurs because a child, who is excluded from school based on the label of mental retardation, is "sentenced to a lifetime of illiteracy and public dependence," resulting from the failure to learn the essential skills of society. *Id.* Furthermore, the classification of an individual as mentally retarded will tend to limit the individual's opportunities for employment to "semiskilled, service, and unskilled" occupations. *Id.* at 220. The label of mentally retarded may be good for severely or profoundly retarded persons; however, for the mildly retarded, the label will be both a burden and a stigma, hindering them their entire life. *See generally* JANE MERCER, LABELING THE MENTALLY RETARDED, CLINICAL AND SOCIAL SYSTEM PERSPECTIVES ON MENTAL RETARDATION 197 (1973) (arguing against "labeling" of mentally retarded individuals); Elizabeth A. Steinbock et al., *Civil Rights of the Mentally Retarded: An Overview*, 1 L. & PSYCHOLOGY REV. 151, 154 (1975) (discussing social implications of label "mentally retarded").

Department of Mental Health found only 1,500 of the children to be truly mentally retarded.[133] A person labeled as mentally retarded may be relieved of the death penalty, but the use of this type of labeling scheme in the legal arena may lead to the deprivation of liberty and other rights and privileges of the mentally retarded.[134] For example, in most jurisdictions, involuntary commitment of mentally retarded individuals into institutions is allowed based on clear and convincing evidence.[135] With the courts' adoption of the I.Q. as the sole measure of mental retardation, a person's I.Q. score would be

---

133. *See* Bruce Cushna, *The Psychological Definition of Mental Retardation: A Historical Overview*, *in* EMOTIONAL DISORDERS OF MENTALLY RETARDED PERSONS 31, 42-43 (Ludwik S. Szymanski, M.D. & Peter E. Tanguay, M.D. eds., 1980) (discussing misuse of I.Q. tests in Boston study). The study dismissed the simplistic use of an I.Q. score to exclude children based on their resulting classification of being mentally retarded. *Id.* at 43. During the 1969-1970 academic year, an estimated 7,000 and 15,000 children, respectively, were excluded from school. *Id.* at 42.

134. The state legislatures' "bright-line" rule for mental retardation will create a legal presumption of retardation for those individuals with I.Q. scores of seventy or below. *See* N.M. STAT. ANN. § 31-20A-2.1 (Michie 1992) (finding I.Q. of 70 or below as presumptive evidence of mental retardation). Consequently, in complying with this type of statute, courts may potentially begin applying the "seventy or below" rule to other areas law. *See, e.g,* TEX. CONST. art. 6, § 1 (disqualifying mentally disabled individuals from voting); ARK. CODE ANN. § 20-49-302 (Michie 1991) (providing involuntary sterilization of institutionalized mentally retarded individuals); GA. CODE ANN. § 19-3-2 (Michie 1991) (denying mentally retarded individuals from marrying); KY. REV. STAT. ANN. § 117.075 (Michie 1993) (disqualifying mentally disabled individuals from voting); MICH. COMP. LAWS ANN. § 551-6 (West 1988) (denying mentally retarded individuals from marrying); MISS. CODE ANN. § 41-45-1 (Supp. 1989) (providing involuntary sterilization of institutionalized mentally retarded individuals). *See generally* PAUL R. FRIEDMAN, THE RIGHTS OF MENTALLY RETARDED PERSONS 23-24 (ACLU Handbook 1976) (discussing negative consequences of being labeled "mentally retarded" in legal context); JANE R. MERCER, LABELING THE MENTALLY RETARDED, CLINICAL AND SOCIAL SYSTEM PERSPECTIVES ON MENTAL RETARDATION 197 (1973) (arguing that label of mentally retarded will be good for those who need to be nurtured and supervised, but for those who don't, label will be a burden and a stigma, depriving them of normal education and plaguing them as they try to live normal lives); THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW, 219-20 (Michael Kindred et al. eds., 1976) (arguing that label of mentally retarded will deny opportunities to participate in social activities).

135. *See* Addington v. Texas, 441 U.S. 418, 425 (1979) (establishing due process requirements for involuntarily commitment). Before being involuntarily committed, due process requires the person (1) be mentally ill, and (2) dangerous to himself or others. *Id.* at 420-21. In order to satisfy these requirements, evidence must establish "clearly, unequivocally and convincingly" that the individual requires commitment. *See* Dixon v. Attorney General, 325 F. Supp. 966, 974 (M.D. Pa. 1971) (discussing burden of proof required for involuntarily commitment); *cf.* Youngberg v. Romeo, 457 U.S. 307, 321-22 (1982) (requiring reasonable-doubt standard of proof to involuntarily commit mental retarded adults); Tyars v. Finner, 709 F.2d 1274, 1282 (9th Cir. 1983) (citing precedent for proposition that establishing proper standard for involuntary commitment requires balancing liberty of mentally retarded individual against demands of organized society).

considered clear and convincing evidence as to mental retardation, even though the person may be perfectly capable of a self-sustaining life.[136]

V. CAPITAL SENTENCING OF THE MENTALLY RETARDED

The death penalty has been an acceptable mode of punishment in the United States for as long as the nation has existed.[137] Indeed, the United States Constitution specifically mentions capital punishment.[138] Accordingly, a state may take a person's life so long as it does not violate a defendant's right to due process.[139]

---

136. *Cf.* Thornblad v. Olson, 952 F.2d 1037, 1039 (8th Cir. 1992) (recognizing clear and convincing evidence standard for involuntary commitment); Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968) (denying mentally retarded individual due process of law). In reaching its decision in *Heryford*, the court stated the following:

> [I]t matters not whether the proceeding be labeled civil or criminal or whether the subject matter be mental instability or juvenile delinquency for it is the likelihood of involuntary incarceration whether for punishment, rehabilitation, or treatment and training as a feeble-minded or mental incompetent, which commands observance of due process.

Id.; *see* Bruce Cushna, *The Psychological Definition of Mental Retardation: A Historical Overview*, *in* EMOTIONAL DISORDERS OF MENTALLY RETARDED PERSONS 40-43 (Ludwik S. Szymanski, M.D. & Peter E. Tanguay, M.D. eds., 1980) (discussing misuse of I.Q. tests with example of Boston study when schools labeled 4,000 children mentally retarded and state agency found only 1,500 to be so labeled).

137. *See* Gregg v. Georgia, 428 U.S. 153, 176-77 (asserting that the death penalty has been widely accepted throughout common law of England and the United States). In *Gregg*, the Court acknowledged that at the time of the adoption of the Eighth Amendment, every state had the death penalty. *Id.* at 177. Additionally, the First Congress of the United States enacted the death penalty as punishment for certain crime. *Id.* Since the First Congress's adoption of the death penalty, American courts have repeatedly found the imposition of the death penalty constitutional. *E.g.*, Roberts v. Louisiana, 428 U.S. 325, 331 (1976); Woodson v. North Carolina, 428 U.S. 280, 285 (1976); Jurek v. Texas, 428 U.S. 262, 268 (1976); Proffitt v. Florida, 428 U.S. 242, 247 (1976); *see* Juliet L. Ream, Comment, *Capital Punishment for Mentally Retarded Offenders: Is It Morally and Constitutionally Impermissible?*, 19 SW. U. L. REV. 89, 95-96 (1990) (discussing history of capital punishment in United States).

138. *See* U.S. CONST. amend. V (stating "[n]o person shall be held to answer for a Capital, or otherwise infamous crime"); U.S. CONST. amend. XIV (stating "[n]o state shall deprive any person of life, liberty, or property without due process of law").

139. *See* Presnell v. Georgia, 439 U.S. 14, 15-16 (1978) (recognizing that due process requires notice to defendant of specific aggravating factors State intends to rely on during sentencing); *Woodson*, 428 U.S. at 303 (recognizing that due process requires highly particularized individual sentencing); *Gregg*, 428 U.S. at 175 (recognizing that due process prohibits disproportionate sentencing); *see* Lisa Gayle Bradley, *Proportionality in Capital and Non-Capital Sentencing: An Eighth Amendment Enigma*, 23 IDAHO L. REV. 195, 195-96 (1986) (asserting that Eighth Amendment permits capital sentencing only when done with regularity and reliability); Randy Hertz & Robert Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CAL. L. REV. 317, 322 (1981) (arguing Constitution requires individualized capital-sentencing).

A. *The Cruel and Unusual Punishments Clause*

In the modern era, debate on the death penalty has centered largely around the Eighth Amendment's Cruel and Unusual Punishments Clause.[140] The Cruel and Unusual Punishments Clause, originating from the English Bill of Rights,[141] was adopted by the United States to protect individuals from barbarous and torturous punishments.[142] The United States Supreme Court began to outline standards under which this clause would be interpreted in *Weems v. United States*,[143] asserting that a punish-

---

140. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (deciding whether it is cruel and unusual to execute juveniles); Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (deciding whether it is cruel and unusual to execute mentally retarded persons); Ford v. Wainwright, 477 U.S. 399, 409-10 (1986) (deciding whether it is cruel and unusual to execute insane person); Coker v. Georgia, 433 U.S. 584, 592 (1977) (deciding whether it is cruel and unusual to execute a rapist); Wilkerson v. Utah, 99 U.S. 130, 134-35 (1878) (finding death by public shooting not cruel and unusual punishment); *see* Miriam Berkman, *Perspectives on the Death Penalty: Judicial Behavior and the Eighth Amendment*, 1 YALE L. & POL'Y REV. 41, 44 (1982) (discussing historical interpretation of Cruel and Unusual Punishment Clause); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969) (tracing roots of Eighth Amendment to colonial Virginia).

141. *See* Furman v. Georgia, 408 U.S. 238, 243 (1972) (citing English Bill of Rights). "The English Bill of Rights, enacted December 16, 1689, stated that 'excessive bail ought not be required, nor excessive fines imposed, not cruel and unusual punishments inflicted.' " *Id.*; *see also Ford*, 477 U.S. at 406 (arguing that Framers of Eighth Amendment intended to provide same protection as guaranteed in English Bill of Rights); Trop v. Dulles, 356 U.S. 86, 100 (1958) (noting origin of phrase "cruel and unusual"); *In re* Kemmler, 136 U.S. 436, 446 (1890) (noting that Cruel and Unusual Punishments Clause taken from act of 1688 English Parliament); *Wilkerson*, 99 U.S. at 135-36 (1879) (discussing Cruel and Unusual Punishments Clause in accordance with early legislation); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 843 (1969) (comparing English version of Cruel and Unusual Punishments Clause with intent of American draftsmen); Eric L. Shwartz, Comment, Penry v. Lynaugh: *"Idiocy" and the Framers' Intent Doctrine*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 315, 336 (1990) (noting that Framers of Constitution borrowed Cruel and Unusual Punishments Clause from English Bill of Rights of 1689).

142. *See Furman*, 408 U.S. at 260-64 (Brennan, J., concurring) (discussing meaning of phrase "cruel and unusual"); Downey v. Perini, 518 F.2d 1288, 1290 (6th Cir. 1975) (recognizing Eighth Amendment's prohibition of inhuman, barbarous, or torturous punishments); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 860-61 (1969) (discussing early construction of phrase "cruel and unusual" in United States); *see also* Anthony A. Avey, Note, 24 ST. MARY'S L.J. 539, 541-44 (1993) (debating precise meaning of Cruel and Unusual Punishments Clause); Maria A. Luise, Note, *Solitary Confinement: Legal and Psychological Considerations*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301, 305-06 (1989) (maintaining that purpose of English Bill of Rights was prohibition of prevalent forms of barbarous and torturous punishments).

143. 217 U.S. 349 (1910). In *Weems*, the Court confronted the issue of determining the constitutionality of a Philippine law which provided as punishment for the crime of falsifying an official document, "twelve years and one day, a chain at the ankle and wrist . . . , hard and painful labor, . . . no marital authority or parental rights or rights of property. . . ." *Id.* at 366.

ment is cruel and unusual if it is excessive in relation to the offense committed[144] or if it is an unnecessary and wanton infliction of pain.[145] The Court, in later cases, contended that the clause must be interpreted in a flexible manner so as to conform with the "evolving standards of decency that mark the progress of a maturing society."[146] In these later cases, the Court argued

---

The Court found the punishment to be cruel and unusual based on the lack of proportionality between the crime and the offense. *See id.* at 380-82 (discussing historical basis for finding lack of proportionality); *see* Lisa Gayle Bradley, *Proportionality in Capital and Non-Capital Sentencing: An Eighth Amendment Enigma*, 23 IDAHO L. REV. 195, 197-200 (1986) (discussing Court's movement in *Weems* towards view that punishments must be proportionate to crime); Deborah A. Schwartz & Jay Wishingrad, Comment, *The Eight Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 790 (1975) (discussing Framers' intent to prohibit only those punishments that were "barbarous" and "torturous").

144. *See Weems*, 217 U.S. at 380 (noting great disparity in crime committed and its punishment); *see also* Tison v. Arizona, 481 U.S. 137, 149 (1987) (holding that criminal sentence must be directly related to personal culpability); California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (noting importance of culpability concept in sentencing decisions); *cf.* Enmund v. Florida, 458 U.S. 782, 798 (1982) (finding punishment that fails to further penological justifications of retribution or deterrence amounts to unnecessary and wanton infliction of pain); Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (recognizing Court precedent prohibiting punishments that involve "unnecessary and wanton infliction of pain"); *see also* Coker v. Georgia, 433 U.S. 584, 592 (1977) (defining excessive punishment as one that makes no measurable contribution to any acceptable goal of criminal punishment); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (recognizing public's perceptions of standards of decency requires punishment not be excessive). To say that a punishment must not be excessive means that the punishment must not involve the unnecessary and wanton infliction of pain and must not be grossly out of proportion to the severity of the crime. *Id. See generally* Lisa Gayle Bradley, *Proportionality in Capital and Non-Capital Sentencing: An Eighth Amendment Enigma*, 23 IDAHO L. REV. 195, 196-99 (1986) (discussing proportionality requirement of Eighth Amendment).

145. *Weems*, 217 U.S. at 381; *see also Coker*, 433 U.S. at 592 (finding punishment excessive when it involves unnecessary infliction of pain). In *Coker*, the Court determined whether it was cruel and unusual punishment under the Eighth Amendment to sentence a defendant to death for rape. *Id.* at 593. In its analysis, the Court asserted that the sentence of death was grossly disproportionate and excessive for the crime of rape. *Id.* at 592. However, despite the Court's finding that making some crimes subject to the death penalty does violate the Eighth Amendment, American courts have continued to find the various methods of execution within the Eighth Amendment. *See, e.g., Kemmler*, 136 U.S. at 444-45 (upholding constitutionality of execution by electrocution); O'Bryan v. McKaskle, 729 F.2d 991, 993-94 (5th Cir. 1984) (upholding execution by lethal injection by drugs not approved by Federal Drug Administration); Gray v. Lucas, 710 F.2d 1048, 1061 (5th Cir. 1983) (upholding execution by cyanide gas poisoning), *cert. denied*, 463 U.S. 1237 (1983). *See generally* Lisa Gayle Bradley, *Proportionality in Capital and Non-Capital Sentencing: An Eighth Amendment Enigma*, 23 IDAHO L. REV. 195, 196-99 (1986) (discussing historical underpinnings of proportionality requirement of Eighth Amendment); Dora Nevares-Muniz, *The Eighth Amendment Revisited: A Model of Weighted Punishments*, 75 J. CRIM. L. & CRIMINOLOGY 272, 273-78 (1984) (discussing evolution of punishments prohibited by Eighth Amendment).

146. *See, e.g., Gregg*, 428 U.S. at 173 (observing dynamic nature of Eighth Amendment

that the best representation of the "evolving standards of decency" is how the country's legislatures view a particular punishment.[147]

B. *Sentencing Guidelines*

In 1972, it appeared that society's evolving standards of decency had begun to change when the Court, in *Furman v. Georgia*,[148] found unconstitutional the capital-sentencing statutes before it.[149] However, to ensure greater reliability in the imposition of the death penalty,[150] instead of focus-

---

which "draw[s] its meaning" from evolving standards of decency); *Stanford*, 492 U.S. at 369-70 (stating proper framework for Eighth Amendment analysis as assessing evolving standards of decency); *Penry*, 492 U.S. at 330-31 (tracing development of society's perspective on punishing "idiots" and "lunatics" to determine evolving standards of decency); *Ford*, 477 U.S. at 406-08 (interpreting common law of England and America prohibiting the execution of insane persons); *see also* Miriam Berkman, *Perspectives on the Death Penalty: Judicial Behavior and the Eighth Amendment*, 1 YALE L. & POL'Y REV. 41, 48-50 (1982) (discussing constitutional analysis of "evolving standards of decency"); William A. McDaniel, Jr., Note, Gardner v. Florida: *The Application of Due Process To Sentencing Procedures*, 63 VA. L. REV. 1281, 1287 (1990) (discussing importance of constitutional safeguards in imposing death penalty due its finality).

147. *See Penry*, 492 U.S. at 331 (arguing that clearest and most reliable source to discern "evolving standards of decency" is legislation); Thompson v. Oklahoma, 487 U.S. 815, 823-29 (1988) (identifying most reliable objective sign of "evolving standards of decency" is legislation that society has enacted). In order to challenge effectively a punishment as cruel and unusual, the Supreme Court has required the demonstration of a national consensus against such punishment. *See Stanford*, 492 U.S. at 373 (holding legislative judgments and jury sentencing as most reliable source of society's evolving standards of decency towards certain punishments). The Court in *Stanford* explained that "a revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts that the people have approved." *Id.* at 377. *See generally* John J. Gruttadaurio, Editorial Note, *Consistency in the Application of the Death Penalty to Juveniles and the Mentally Impaired: A Suggested Legislative Approach*, 58 U. CIN. L. REV. 211, 222 (1989) (discussing Court's long-standing tendency to defer capital-sentencing questions to legislatures).

148. 408 U.S. 238 (1972).

149. *Furman*, 408 U.S. at 239-40. The Court held that the application of capital sentencing, without judicial guidance, represented an unconstitutional infringement of the Eighth and Fourteenth Amendments. *Id.*; *see* William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 314 (1986) (noting that before *Furman* was decided, no American court had ever struck down any death-penalty statute); *see also* Richard E. Wirick, Comment, *Dark Years on Death Row: Guiding Sentencer Discretion After* Zant, Barclay, *and* Harris 17 U.C. DAVIS L. REV. 689, 689-90 (1984) (discussing significant effects of *Furman* on state capital-punishment statutes).

150. *See* Lowenfield v. Phelps, 484 U.S. 231, 238-39 (1988) (citing *Lockett* for proposition that greater degree of reliability required when death penalty imposed due to qualitative difference between death and other punishments); Spaziano v. Florida, 468 U.S. 447, 468-69 (1984) (contending that irrevocability of death penalty requires heightened procedural safeguards); *Lockett*, 438 U.S. at 604 (recognizing call for greater degree of reliability for sentence of death, because of penalty's qualitative difference). *See generally* Miriam Berkman, *Perspectives on the*

ing on the "evolving standards of decency," the Court focused on the procedures whereby defendants were selected for the death penalty.[151] The Court's purpose in *Furman* was two-fold: first, to hold that a sentencing procedure that did not include both aggravating and mitigating factors could be considered cruel and unusual punishment;[152] and second, to guarantee that a sentencing procedure will not be inflicted in an arbitrary and capricious manner.[153] After *Furman*, thirty-seven states enacted new death-pen-

---

Death Penalty: Judicial Behavior and the Eighth Amendment, 1 YALE L. & POL'Y REV. 41, 42 (1982) (discussing constitutional analysis of examining regularity aspect of inflicted punishment); Robert Woll, Note, *The Death Penalty and Federalism: Eighth Amendment Constraints on the Allocation of State Decision making Power*, 35 STAN. L. REV. 787, 818 (1983) (discussing Eighth Amendment's procedural safeguards to justify death sentence).

151. The application of the Cruel and Unusual Punishment clause was an extremely onerous task as evidenced by the fact that all nine Justices wrote separate opinions. *See Furman*, 408 U.S. at 310 (Stewart, J., concurring) (finding sentencing procedures "wantonly" and "freakishly" imposed); *see also id.* at 313 (White, J., concurring) (arguing that sentencing procedures provided no exactness from when death penalty was imposed and when it is not); *see also id.* at 279-280 (Brennan, J., concurring) (arguing that death penalty served no greater penal purpose than did less severe punishment); *see also id.* at 257-58 (Douglas, J., concurring) (acknowledging authority finding capital-sentencing procedures unconstitutional); *cf.* Lockett v. Ohio, 438 U.S. 586, 598 (1986) (finding the change in discretionary sentencing after *Furman*). *See generally* Daniel Ross Harris, Note, *Capital Sentencing After* Walton v. Arizona: *A Retreat From the "Death Is Different" Doctrine*, 40 AM. U. L. REV. 1389, 1389-90, 1394-98 (1991) (discussing Eighth Amendment's development and refinement after *Furman* decision); Richard E. Wirick, Comment, *Dark Years on Death Row: Guiding Sentencer Discretion After* Zant, Barclay, and Harris, 17 U.C. DAVIS L. REV. 689, 689-90 (1984) (discussing significant impact *Furman* had on state capital-sentencing statutes).

152. *See Furman*, 408 U.S. at 255-56 (finding capital-sentencing statutes unconstitutional when not discretionary); *see also* Proffitt v. Florida, 428 U.S. 242, 248-49 (1976) (asserting that sentencer was required to weigh eight specified aggravating factors against seven specified mitigating factors). In *Proffitt*, the Court reasoned that this requirement forced the sentencer to "focus on the circumstances of the crime and the character of the individual defendant." *Id.* at 251. Consequently, the Florida statute endeavors to assure "that the death penalty will not be imposed in an arbitrary or capricious manner." *Id.* at 253. In addition to aggravating circumstances, a capital-sentencing statute must allow the sentencer to consider mitigating circumstances. *See* Jurek v. Texas, 428 U.S. 262, 271 (1976) (requiring that state's capital-sentencing statutes allow sentencer to consider mitigating circumstances); *see also Lockett*, 438 U.S. at 608 (finding Ohio capital-sentencing statute unconstitutional because it listed three specific mitigating circumstances). The Court reasoned that the Constitution requires individualized consideration of mitigating factors. *Id.* at 606. *See generally* RAOUL BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE 140 (1982) (discussing elimination of arbitrary imposition of death penalty); Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1942-44 (1988) (discussing discretionary guidelines in capital-sentencing context).

153. *See Furman*, 408 U.S. at 274 (Brennan, J., concurring) (arguing that valid capital-sentencing statute must impose death penalty with respect for human dignity); *see also id.* at 309-10 (Stewart, J., concurring) (arguing that imposition of death penalty in arbitrary fashion is unconstitutional). *See generally* Franklin E. Zimring & Gordon Hawkins, *Capital Punishment and the Eighth Amendment:* Furman *and* Gregg *in Retrospect*, 18 U.C. DAVIS L. REV.

alty statutes in accordance with the Court's guidelines.[154]

In 1976, the Court, in *Gregg v. Georgia*,[155] had its first opportunity to review the states' newly enacted capital-sentencing statutes.[156] In upholding Georgia's death-penalty statute,[157] the *Gregg* Court explicitly held that the imposition of the death penalty does not necessarily amount to cruel and unusual punishment and is, therefore, constitutional.[158] Thus, the capital-sentencing statutes of Florida, Georgia, and Texas were constitutional be-

---

927, 932 (1985) (discussing Justice Brennan's analysis in *Furman* that Eighth Amendment prohibits inflicting severe punishment); Richard E. Wirick, Comment, *Dark Years on Death Row: Guiding Sentencer Discretion After* Zant, Barclay, *and* Harris, 17 U.C. DAVIS L. REV. 689, 693 (1984) (recognizing impact of *Furman* on development of mitigating factors).

154. *E.g.*, FLA. STAT. ANN. § 782.04 (West 1992); *see also* Roberts v. Louisiana, 428 U.S. 325, 328-29 (1976) (holding that mandatory death penalty for first-degree murder unconstitutional); Woodson v. North Carolina, 428 U.S. 280, 286 (1976) (making death penalty mandatory for persons convicted of first-degree murder, although subsequently declared unconstitutional); Gregg v. Georgia, 428 U.S. 153, 179-80 (1976) (discussing enactment of numerous post-*Furman* statutes). *See generally* Daniel Ross Harris, Note, *Capital Sentencing After* Walton v. Arizona: *A Retreat from the "Death Is Different" Doctrine*, 40 AM. U. L. REV. 1389, 1396-1405 (1991) (discussing newly enacted death-penalty statutes after the *Furman* decision); Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1699-1712 (1974) (discussing death-penalty statutes enacted immediately after *Furman*).

155. 428 U.S. 153 (1976).

156. The Court then applied its holding in *Gregg* to companion cases. *See Roberts*, 428 U.S. at 333 (invalidating mandatory capital-sentencing provision that narrowed definition of first-degree murder); *Woodson*, 428 U.S. at 302 (noting, among deficiencies in statute, failure to guide jury's discretion); *Jurek*, 428 U.S. at 276 (upholding Texas sentencing statute for safeguards narrowing definition of capital murder); *Proffitt*, 428 U.S. at 253 (approving Florida's capital-sentencing statute because of specific guidance given judge and jury providing consistency of judgments); *see also* Jane C. England, *Capital Punishment in the Light of Constitutional Evolution: An Analysis of Distinctions Between* Furman *and* Gregg, 52 NOTRE DAME L. REV. 596, 602-07 (1977) (discussing distinctions between *Furman* and *Gregg*); Linda K. Richey, Comment, *Death Penalty Statutes: A Post-*Gregg v. Georgia *Survey and Discussion of Eighth Amendment Safeguards*, 16 WASHBURN L.J. 497, 497-99 (1977) (discussing distinctions between *Furman* and *Gregg*).

157. *Gregg*, 428 U.S. at 154. The Georgia capital-sentencing statute was found constitutional because it provided additional safeguards, such as a mandatory appellate review, that further protected against the capricious imposition of the death penalty. *Id.* at 204.

158. *See id.* at 169 (contending death penalty does not invariably violate Constitution). The Court applied a two-part test to measure what is "cruel and unusual." First, the punishment would be considered cruel and unusual if it was a barbarous or torturous penalty outlawed in the eighteenth century. *Id.* at 170-71. Second, the punishment is considered cruel and unusual if it violates the "evolving standards of decency that mark the progress of a maturing society." *Id.* at 173; *see also* Tropp v. Dulles, 356 U.S. 86, 101 (1958) (arguing that Eighth Amendment must draw its meaning from "evolving standards of decency that mark the progress of a maturing society"); Jane C. England, Note, *Capital Punishment in the Light of Constitutional Evolution: An Analysis of Distinctions Between* Furman *and* Gregg, 52 NOTRE DAME L. REV. 596, 596 (1977) (finding death penalty not unconstitutional per se).

cause the statutes ensured that the death penalty would not be imposed in an arbitrary or capricious manner.[159] Consequently, these three states' statutes became models for other states to enact constitutional capital-sentencing statutes.[160]

To provide for the individualized consideration required for imposing the death penalty, each of these statutes provides for a bifurcated proceeding.[161]

---

159. *See Jurek*, 428 U.S. at 276 (holding Texas capital sentencing scheme constitutional because it guided jury's discretion by "narrowing the class of death eligible crimes and by requiring the jury to answer additional special issues regarding deliberateness, future dangerousness and provocation"); *Proffitt*, 428 U.S. at 252-53 (finding Florida capital-sentencing statute to be constitutional because it required trial judges to consider both aggravating and mitigating circumstances during sentencing phase of trial); *Gregg*, 428 U.S. at 154 (concluding that Georgia capital-sentencing statute was not in violation of Eighth Amendment). *But see* Penry v. Lynaugh, 492 U.S. 302, 322 (1989) (finding Texas sentencing scheme unconstitutional because it did not allow jury to express its reasoned, moral response to Penry's evidence of mental retardation). Current versions of the Florida, Georgia, and Texas capital sentencing statutes are as follows: FLA. STAT. ANN. §§ 921.141(5)-(6) (West Supp. 1992), GA. CODE ANN. § 17-10-30 (Michie Supp. 1992), TEX. PENAL CODE ANN. § 19.03 (Vernon Supp. 1992). *See also* Maria M. Homan, Note, *The Juvenile Death Penalty: Counsel's Role in the Development of a Mitigating Defense*, 53 BROOK. L. REV. 767, 784-86 (1987) (discussing Georgia, Florida, and Texas capital-sentencing statutes after *Furman*); Linda K. Richey, Comment, *Death Penalty Statutes: A Post-*Gregg v. Georgia *Survey and Discussion of Eighth Amendment Safeguards*, 16 WASHBURN L.J. 497, 497-98 91977) (discussing Georgia's capital-sentencing statute); Eric L. Shwartz, Comment, Penry v. Lynaugh: *"Idiocy" and the Framers' Intent Doctrine*, 16 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 315, 321-24 (1990) (discussing Texas capital-sentencing statute).

160. The Florida, Georgia, and Texas capital-sentencing statutes have four common elements. *See* Linda E. Carter, *A Beyond a Reasonable Doubt Standard in Death Penalty Proceedings: A Neglected Element of Fairness*, 52 OHIO ST. L.J. 195, 197 (1991) (describing capital-sentencing statutes from Georgia, Texas, and Florida as foundation for current death-penalty statutes). The author gleans four basic requirements from the three death-penalty statues: first, a bifurcated proceeding determining guilt or innocence separately from penalty; second, a statute defining narrowly the class of persons who are subject to the death penalty; third, admission of all relevant mitigating circumstances during the penalty phase; fourth, a meaningful appellate review. *Id.*; *see also* Maria M. Homan, Note, *The Juvenile Death Penalty: Counsel's Role in the Development of a Mitigating Defense*, 53 BROOK. L. REV. 767, 786 (1987) (arguing that Georgia, Florida, and Texas cases mandated "consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death").

161. *See Gregg*, 428 U.S. at 190-91 (asserting bifurcated systems are more likely to protect against arbitrary and capricious imposition of death penalty). In *Gregg*, the Court did not mandate that all capital-sentencing statutes must have bifurcated proceedings to be constitutional. *Id.* Instead, the Court recognized that capital-sentencing statutes should have bifurcated proceedings so as to allow sentencer the ability to consider all evidence relevant of the sentence of death. *Id.*; *see Jurek*, 428 U.S. at 269 (discussing Texas capital-sentencing bifurcated proceeding and mandatory appellate review); *Proffitt*, 428 U.S. at 248 (discussing Florida's provision for bifurcated proceeding). After *Gregg*, states throughout the country have enacted bifurcated proceedings into their capital-punishment statutes. *See* Marshall v. Lonberger, 459 U.S. 422, 456 n.8 (1983) (listing all codified bifurcated proceedings); *see also*

The first phase of the proceeding determines the guilt or innocence of the defendant.[162] If the defendant is found guilty of a capital offense, the sentencer,[163] in a separate sentencing proceeding, then determines whether the death penalty should be imposed.[164] In order to impose the death penalty, the sentencer is required to find at least one aggravating circumstance[165]

Stanton D. Krauss, *The* Witherspoon *Doctrine at* Witt's *End: Death-Qualification Reexamined*, 24 AM. CRIM. L. REV. 1, 3-4 n.14 (1987) (discussing practice of bifurcated proceedings); Robert L. Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A. L. REV. 45, 52 (1989) (asserting virtually all states with death penalty employ bifurcated proceedings).

162. *Gregg*, 428 U.S. at 190-92 (separating guilt-innocence phase from sentencing phase). The Court reasoned that "much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question." *Id.* at 190. Furthermore, the bifurcated proceedings guarantee that procedural rules do not bar the admission of relevant mitigating evidence during the sentencing phase. *Id.*; *see* Estelle v. Smith, 451 U.S. 454, 457 (1981) (noting that bifurcated proceedings include separate guilt and penalty phases); *see also* Jonathan R. Sorensen & James W. Marquart, *Prosecutorial and Jury Decision-Making In Post-*Furman *Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 743, 747-49 (1991) (discussing Texas bifurcation proceeding to determine guilt and punishment). *See generally* F. Patrick Hubbard, *"Reasonable Levels of Arbitrariness" in Death Sentencing Patterns: A Tragic Perspective on Capital Punishment*, 18 U.C. DAVIS L. REV. 1113, 1116-18 (1985) (discussing constitutional models of capital-sentencing schemes in United States).

163. A judge or jury can act as the sentencer during the penalty phase. *See* Clemons v. Mississippi, 494 U.S. 738, 745-46 (1990) (finding no constitutional right to have jury impose death sentence); *cf.* Hildwin v. Florida, 490 U.S. 638, 640-41 (1989) (holding judge may override jury's sentencing recommendation); Baldwin v. Alabama, 472 U.S. 372, 389 (1985) (finding constitutional judge's power to override jury's sentencing recommendation); *Spaziano*, 468 U.S. at 460 (holding neither Sixth nor Eighth Amendment provide defendant with right to jury during sentencing).

164. *Gregg*, 428 U.S. at 190-92 (separating guilt-innocence phase from sentencing phase). The Court reasoned that this provides the sentencer with information relevant to the imposition of sentence. *Id.* at 195; *see* McCleskey v. Kemp, 481 U.S. 279, 313 n.37 (1987) (contending that separate sentencing phase is required to ensure necessary degree of care in imposing death penalty); Bullington v. Missouri, 451 U.S. 430, 432 (1981) (discussing Missouri's bifurcated proceeding); *see also* F. Patrick Hubbard, *"Reasonable Levels of Arbitrariness" in Death Sentencing Patterns: A Tragic Perspective on Capital Punishment*, 18 U.C. DAVIS L. REV. 1113, 1116-17 (1985) (discussing four-stage "winnowing" process identifying persons to be executed); Jonathan R. Sorensen & James W. Marquart, *Prosecutorial and Jury Decision-Making In Post-*Furman *Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 743, 747-49 (1991) (arguing that in Texas, capital sentencing leaning is almost mandatory).

165. *See, e.g.*, Walton v. Arizona, 497 U.S. 639, 648 (1990) (explaining role of aggravated circumstances in capital-sentencing scheme); *Clemons*, 494 U.S. at 751 (remanding because uncertain appellate court reviewed sufficiently aggravating circumstances when affirming death penalty); *McKoy*, 494 U.S. at 443-44 (vacating death sentence because state statute unconstitutionally limited jury's consideration of mitigating factors in conjunction with aggravating factors); *Hildwin*, 490 U.S. at 639 (finding aggravating factor to be sentencing factor allowing judge to impose death penalty); *Lowenfield*, 484 U.S. at 244-45 (acknowledging that finding

during the sentencing phase.[166] The defendant is then given the opportunity to introduce any relevant mitigating factors.[167] Accordingly, the defendant may introduce any aspect of his character, background, or circumstance of the offense, that may lead to a sentence less than death.[168] By allowing the

---

aggravating factors is constitutional means of channelling jury's discretion in imposing death penalty).

166. *See* Blystone v. Pennsylvania, 494 U.S. 299, 306-07 (1990) (finding the presence of aggravating circumstances serves purpose of limiting number of death-eligible defendants); Zant v. Stephens, 462 U.S. 862, 878 (1983) (finding that aggravating circumstances of crime distinguishes gravity of offense so as to narrow class of death-eligible defendants); *Gregg*, 428 U.S. at 196-98 (describing how statutes requiring finding of aggravating circumstances provide for controlled discretion in imposition of death penalty). States are required to define aggravating circumstances so as to distinguish the people most deserving of the death penalty. *See id.* (describing kinds of specific circumstances of individual defendant's crime that single out defendant for death penalty); *cf. Lowenfield*, 484 U.S. at 246 (finding death sentence that duplicates aggravating circumstances with underlying elements of offense not unconstitutional). The Court in *Lowenfield* held that as long as aggravating circumstances narrow the class of death penalty-eligible defendants at the guilt phase, then all that is constitutionally required at the sentencing phase is the introduction of mitigating factors. *Id.*; *see also* Maria M. Homan, Note, *The Juvenile Death Penalty: Counsel's Role in the Development of a Mitigation Defense*, 53 BROOK. L. REV. 767, 784-86 (1987) (discussing aggravating factors in constitutionally valid capital-sentencing statutes of Georgia, Florida, and Texas). *See generally* Bruce S. Ledewitz, *The New Role of Statutory Aggravating Circumstances in American Death Penalty Law*, 22 DUQ. L. REV. 317, 351 (1984) (discussing purpose of aggravating factors in bifurcated proceedings).

167. *See Penry*, 492 U.S. at 327-28 (stating that sentencer must be able to consider and give effect to all mitigating evidence presented by defendant during sentencing); Skipper v. South Carolina, 476 U.S. 1, 8 (1986) (holding that state cannot withhold defendant's mitigating evidence of pretrial good behavior); *Eddings*, 455 U.S. at 113-15 (finding unconstitutional withholding evidence of defendant's emotional disturbance and troubled-family background); *Lockett*, 438 U.S. at 606-07 (finding Ohio capital-sentencing statute unconstitutional because it limited its mitigating factors to three specific circumstances); *cf.* Coleman v. Saffle, 912 F.2d 1217, 1221 (10th Cir. 1990) (finding convicted first-degree murderer's I.Q. relevant and admissible as mitigating evidence at penalty stage), *cert. denied*, 497 U.S. 1053 (1990). *See generally* Jonathan R. Sorensen & James W. Marquart, *Prosecutorial and Jury Decision-Making In Post-*Furman *Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 743, 748-50 (1991) (discussing purpose of mitigating factors in bifurcation proceedings); Eric L. Shwartz, Comment, Penry v. Linaugh: *"Idiocy" and the Framers' Intent Doctrine*, 16 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 315, 321-24 (1990) (discussing Texas capital-sentencing statute's inclusion of mitigating circumstances).

168. *See Walton*, 497 U.S. at 663 (stating Constitution prohibits states from barring from sentencing proceedings "any aspect of a defendant's character or record, or any circumstance surrounding the crime"); *Penry*, 492 U.S. at 319 (holding any relevant evidence of defendant's character and background must be given effect in sentencing defendant); Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987) (holding advisory jury improperly instructed to consider only statutory mitigating factors); *Woodson*, 428 U.S. at 304 (requiring jury to give effect to any mitigating evidence relevant to defendant's background, character, or circumstances of crime). *But see Lockett*, 438 U.S. 586, 631 (1978) (Rehnquist, J., concurring in part & dissenting in part) (arguing that to encourage jury to consider "anything under the sun" as mitigating cir-

introduction of mitigating factors and allowing the sentencer to give effect to these mitigating factors in any manner it pleases, the sentencing phase provides the sentencer with a vehicle for conveying its "reasoned moral response" to the mitigating factors in rendering its decision.[169] Consequently, the sentencer has the controlled discretion to impose the death penalty on those persons for whom the death sentence is appropriate.[170]

C. *Mental Retardation as a Mitigating Factor*

Unlike a defendant who is insane, a defendant who is mentally retarded is not automatically excused from the crime.[171] Instead, one's mental retarda-

---

cumstance will not "guide sentencing discretion but will totally unleash it"); *cf.* Bell v. Lynaugh, 858 F.2d 978, 985 (5th Cir. 1988) (holding defendant does not have constitutional right to jury instruction regarding mental retardation as mitigating circumstance), *cert. denied*, 492 U.S. 925 (1989); *see also* Stanton D. Krauss, *The* Witherspoon *Doctrine at* Witt's *End: Death-Qualification Reexamined*, 24 AM. CRIM. L. REV. 1, 3-4 n.14 (1987) (discussing adoption of bifurcated proceedings as opposed to single-verdict procedure); Eric L. Shwartz, Comment, Penry v. Lynaugh: *"Idiocy" and the Framers' Intent Doctrine*, 16 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 315, 321-24 (1990) (discussing mitigating evidence and Texas's three special issues).

169. *See Penry*, 492 U.S. at 327-28 (stating any sentencing statute must allow jury vehicle for expressing its "reasoned moral response"). In *Penry*, the Court held that the Texas death-penalty statute unconstitutionally restricted the jury's consideration of the defendant's mental retardation as mitigating evidence. *Id.*; *see also McKoy*, 494 U.S. at 443 (holding that sentencer must give effect to mitigating evidence in whatever manner it pleases); Franklin v. Lynaugh, 487 U.S. 164, 184 (1988) (O'Connor, J. concurring) (stating any sentencing body must consider all mitigating evidence); Mills v. Maryland, 486 U.S. 367, 384 (1988) (stating sentencer must consider all mitigating evidence); *Eddings*, 455 U.S. at 116-17 (overturning capital sentence because sentencer refused to consider certain mitigating evidence); *see also* Bruce S. Ledewitz, *The New Role of Statutory Aggravating Circumstances in American Death Penalty Law*, 22 DUQ. L. REV. 317, 351-52 (1984) (discussing purpose of mitigating circumstances in bifurcated proceedings); Juliet L. Ream, Comment, *Capital Punishment for Mentally Retarded Offenders: Is It Morally and Constitutionally Impermissible?*, 19 SW. U. L. REV. 89, 109 (discussing mental retardation as mitigating factor).

170. *See* Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (asserting state's right to provide for death penalty so long as law is not arbitrary or capricious). In *Godfrey*, the Court relied on that precedent to argue that every capital-sentencing statute must provide "clear and objective" standards, "specific and detailed" guidance, and an opportunity for rational review of the process in imposing the death penalty. *See id.* (citing *Gregg*, 428 U.S. at 198); *see also Zant*, 462 U.S. at 877 (declaring that state must channel sentencer's discretion in order to adequately narrow number of persons eligible for death penalty); Rupert v. Barry, Note, Furman *to* Gregg: *The Judicial and Legislative History*, 22 HOW. L.J. 53, 86-87 (1979) (finding capital-sentencing statutes after *Furman* limited sentencer's discretion).

171. *See* Hall v. Florida, 1993 WL 5050, *4 (Fla.) (holding that mental retardation does not provide for pretense of moral or legal justification); Hobbs v. Heck, 919 F.2d 738 (6th Cir. 1990) (text in WESTLAW) (finding that appellant's claim that mentally retarded is equivalent to being insane "lacked an arguable basis in law"); Brogdon v. Butler, 824 F.2d 338, 341 (5th Cir. 1987) (holding mental retardation does not constitute insanity or incapacity to know difference between right or wrong), *cert. denied*, 483 U.S. 1040 (1987); *see also* Stripling v. State,

tion is introduced as mitigating evidence to attempt to show that there is less culpability than with other capital criminals and that the defendant is, thus, deserving of a sentence less than death.[172]

The Supreme Court first addressed mental retardation in the context of capital punishment in the 1978 case of *Lockett v. Ohio*,[173] in which the Court determined that retardation may be a significant mitigating factor at sentencing, especially when the defendant lacks specific intent to commit a capital offense.[174] Following *Lockett*, numerous state legislatures concluded that mental retardation is an appropriate mitigating factor and, thus, amended their statutes to allow as a mitigating circumstance the impairment of one's capacity to appreciate the criminality of one's conduct as a result of mental

---

401 S.E.2d 500, 502-03 (Ga. 1991) (finding mildly retarded defendant had mental capacity associated with murder, armed robbery, and aggravated assault); Evans v. State, 467 S.W.2d 920, 922 (Mo. 1971) (asserting that although I.Q. tests indicate mental retardation, defendant's impairment was not so substantial as to prevent him from distinguishing right from wrong). *See generally* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants,* 53 GEO. WASH. L. REV. 414, 432-44 (1985) (discussing mentally retarded defendants nonresponsibility argument); Juliet L. Ream, Comment, *Capital Punishment for Mentally Retarded Offenders: Is It Morally and Constitutionally Impermissible?*, 19 SW. U. L. REV. 89, 92-94 (1990) (discussing courts differentiating mentally retarded from insane).

172. *See* McKoy v. North Carolina, 494 U.S. 433, 436 (1990) (finding defendant's capacity "to appreciate criminality of his conduct or to conform his conduct to requirements of law" mitigating circumstance); Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (finding that defendant's disadvantaged background, and emotional or mental problems may make her less culpable than defendants who have no such excuses); Franklin v. Lynaugh, 487 U.S. 164, 164 (1988) (permitting good prison disciplinary record as mitigating evidence); Hitchcock v. Dugger, 481 U.S. 393, 397-99 (1987) (finding petitioner's habit of inhaling gasoline fumes as mitigating circumstance); Bell v. Ohio, 438 U.S. 637, 640 (1978) (finding defendant's background, intelligence, prior offenses, character, and habits as mitigating circumstances); Cuevas v. Collins, 932 F.2d 1078, 1081-82 (5th Cir. 1991) (approving trial court's rejecting defendant's I.Q. of 70 as sole mitigating evidence); *see also* Donald H.J. Hermann et al., *Sentencing of the Mentally Retarded Criminal Defendant*, 41 ARK. L. REV. 765, 803-04 (1988) (discussing effect of mental retardation on culpability); Juliet L. Ream, Comment, *Capital Punishment for Mentally Retarded Offenders: Is It Morally and Constitutionally Impermissible?*, 19 SW. U. L. REV. 89, 138 (1990) (finding mental retardation could result in lack of moral culpability).

173. 438 U.S. 586 (1978).

174. *See Lockett,* 438 U.S. at 608 (holding that sentencer in capital cases must be able to consider any independent, relevant mitigating factors for sentencing phase to be constitutional). The Court asserted that the sentences must consider as mitigating factors the defendant's lack of specific intent and minor role in the offense. *Id.* at 597; *see* Eddings v. Oklahoma, 455 U.S. 104, 117 (1982) (holding that state courts must consider all relevant mitigating evidence); *cf.* Jones v. Thigpen, 788 F.2d 1101, 1103 (5th Cir. 1986) (finding ineffective assistance of counsel when attorney failed to present mitigating evidence of defendant's mental retardation and lack of intent); *see also* Joe P. Tupin & Harold A. Goolishian, *Mental Retardation and Legal Responsibility*, 18 DE PAUL L. REV. 673, 675 (1969) (discussing mentally retarded person's ability to discern wrong from right); Juliet L. Ream, Comment, *Capital Punishment for Mentally Retarded Offenders: Is It Morally and Constitutionally Impermissible?*, 19 SW. U. L. REV. 89, 92-93 (1990) (discussing mental retardation as mitigating factor).

defect or disease.[175]

D. Penry v. Lynaugh

In *Penry v. Lynaugh*,[176] the Court, for the first time, addressed the issue of whether a mentally retarded person convicted of capital murder could be sentenced to death.[177] The Court, finding only one state that explicitly banned the execution of the mentally retarded, concluded that there was insufficient evidence of a national consensus against executing mentally retarded individuals to conclude that it is categorically prohibited by the Eighth Amendment.[178] Acknowledging that it may be cruel and unusual to

---

175. *E.g.*, ALA. CODE § 13A-5-51(6) (1982); ARIZ. REV. STAT. ANN. § 13-702(E)(2) (1989); COLO. REV. STAT. ANN. § 16-11-103(1)(b), (4) (West Supp. 1992); CONN. GEN. STAT. ANN. § 53a-46a(g) (West 1985); FLA. STAT. ANN. § 921.141(6) (West 1985); MISS. CODE ANN. § 99-19-101(6)(f) (1992); MO. REV. STAT. § 565.032(3) (Vernon Supp. 1992); MONT. CODE ANN. § 46-18-304(4) (1989); N.H. REV. STAT. ANN. § 630:5(VI)(a) (Supp. 1992); N.M. STAT. ANN. § 31-20A-6(C) (Michie Supp. 1992); N.C. GEN. STAT. § 15A-2000(f)(6) (1988); VA. CODE ANN. § 19.2-264.4(B)(iv) (Michie 1990); WYO. STAT. § 6-2-102(j)(vi) (1988 & Supp. 1992).

176. 492 U.S. 302 (1989). In this case, Penry, a twenty-two year-old mentally retarded male, was convicted of capital murder and sentenced to death. *Id.* at 307. On October 25, 1979, Penry entered the home of Pamela Carpenter, where he raped, beat, and stabbed her with a pair of scissors. *Id.* Despite finding evidence of Penry's mental retardation, namely, an I.Q. of approximately sixty-three, the jury found him guilty of capital murder. *Id.*

177. *Id.* at 334-35. In a separate opinion in which Chief Justice Rehnquist and Justices White, Kennedy, and Scalia concurred in part and dissented in part, the Justices rejected the claim that a "mildly" mentally retarded defendant lacked the necessary culpability to justify the imposition of the death penalty. *Id.* at 351; *see* Juliet L. Ream, Comment, *Capital Punishment for Mentally Retarded Offenders: Is It Morally and Constitutionally Impermissible?*, 19 SW. U. L. REV. 89, 93-94 (1990) (discussing imposition of death on mentally retarded).

178. *See Penry*, 492 U.S. at 334 (not finding similar national consensus as found with prohibition of executing insane individuals); Ford v. Wainwright, 477 U.S. 399, 408 & n.2 (1985) (finding no states permit execution of insane defendants). The Court in *Ford* noted that of the forty-one states that have a death penalty or statutes governing execution procedures, twenty-six states have statutes explicitly requiring the suspension of the execution of a prisoner who meets the legal definition for incompetence. *Ford*, 477 U.S. at 408 n.2. From this statistic, the Court concluded that the "ancient and humane limitation upon the State's ability to execute its sentences has a firm hold upon the jurisprudence of today." *Id.* at 409; *cf.* Williams v. Dixon, 961 F.2d 448, 451 (4th Cir. 1992) (holding imposition of death penalty on mildly mentally retarded defendant did not violate Eighth Amendment), *cert. denied*, __ U.S. __, 113 S. Ct. 510, 121 L. Ed. 2d 445 (1992); Washington v. Murray, 952 F.2d 1472, 1481-82 (4th Cir. 1991) (holding defendant with mild mental retardation cannot be categorically excluded from death penalty). The Court has clearly stated that a national consensus is best represented through legislation. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 370-73 (1989) (concluding that number of states permitting execution of 16-year-old defendants does not sufficiently demonstrate national consensus against such punishment); Tison v. Arizona, 481 U.S. 137, 154 (1987) (finding several states permitting execution of felony murderers regardless of intent "powerfully suggests" national consensus in favor of such punishment); *Ford*, 477 U.S. at 408 (finding no state authorizes execution of insane defendants); Coker v. Georgia, 433 U.S. 584,

execute a profoundly retarded defendant,[179] the Court opined that the sentence of death was constitutional because the jury found Penry competent to stand trial and able to appreciate the wrongfulness of his actions.[180] Today, four years since the rendering of the *Penry* decision, only five states have categorically exempted the mentally retarded from the death penalty.[181] Therefore, the number of states continuing to permit the execution of mentally retarded capital offenders strongly indicates that society continues to condone the execution of mentally retarded capital murderers.[182]

In contrast, when the Court found a national consensus against executing the insane, no state permitted the execution of an insane person, and twenty-six states had statutes explicitly requiring suspension of the execution of a capital defendant who became insane.[183] In regard to the mentally retarded,

---

594 (1977) (finding no state authorizes death penalty for rape). *See generally* Rebecca Dick-Hurwitz, Comment, Penry v. Lynaugh: *The Supreme Court Deals a Fatal Blow to Mentally Retarded Capital Defendants*, 51 U. PITT. L. REV. 699, 711-714 (1990) (arguing Court is flawed in its national consensus analysis); Eric L. Shwartz, Comment, Penry v. Lynaugh: *"Idiocy" and the Framers' Intent Doctrine*, 16 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 315, 326 (1990) (discussing national consensus analysis in *Penry*).

179. *See Penry*, 492 U.S. at 331 (determining evolving standards of decency required Court to look to objective evidence of how society views particular punishments); Enmund v. Florida, 458 U.S. 782, 788-96 (1982) (comparing state legislation addressing death penalty to determine "evolving standards of decency"); *Coker*, 433 U.S. at 593-97 (discussing "evolving standards of decency" in context of determining proportionate penalty for crime of rape); *see also* V. Stephen Cohen, Comment, *Exempting the Mentally Retarded from the Death Penalty: A Comment on Florida's Proposed Legislation*, 19 FLA. ST. U.L. REV. 457, 467-68 (1991) (describing Supreme Court's finding no cruel and unusual punishment in executing mildly retarded criminal defendant); Juliet L. Ream, Comment, *Capital Punishment for Mentally Retarded Offenders: Is It Morally and Constitutionally Impermissible?*, 19 SW. U. L. REV. 89, 109 (1990) (noting lenient attitudes towards "profoundly" retarded defendants).

180. *See Penry*, 492 U.S. at 333 (finding defendant competent to stand trial); White v. Estelle, 669 F.2d 972, 977-78 (5th Cir. 1982) (finding mentally retarded defendant able to appreciate wrongfulness of criminal conduct), *cert. denied*, 459 U.S. 1118 (1983); Stripling v. State, 401 S.E.2d 500, 503 (Ga. 1991) (finding mildly retarded defendant had capacity to distinguish between right and wrong); *see also* Patricia Hagenah, Note, *Imposing the Death Sentence on Mentally Retarded Defendants: The Case of* Penry v. Lynaugh, 59 UMKC L. REV. 135, 139-42 (discussing *Penry*'s holding that it is not cruel and unusual to impose the death penalty on mentally retarded individuals); Juliet L. Ream, Comment, *Capital Punishment for Mentally Retarded Offenders: Is It Morally and Constitutionally Impermissible?*, 19 SW. U. L. REV. 89, 92 (1990) (noting Court's finding that Penry was competent to stand trial).

181. *E.g.*, GA. CODE ANN. § 17-7-131(j) (Michie 1990 & Supp. 1992); KY. REV. STAT. Ann. § 532.140 (Michie 1990); MD. ANN. CODE art. 27, § 412 (1989); N.M. STAT. ANN. § 31-20A-2.1 (Michie 1991); TENN. CODE ANN. § 39-13-203 (1990).

182. *Cf. Penry*, 492 U.S. at 334 (finding that only one state explicitly prohibits execution of mentally retarded defendants, and this does not indicate sufficient national consensus to exempt categorically all mentally retarded defendants).

183. *See Ford*, 477 U.S. at 408 (finding no states allow execution of insane defendant); People v. Burson, 143 N.E.2d 239, 244 (Ill. 1957) (asserting that "trial, adjudication, sentence or execution" of insane individuals violates due process).

twenty-eight states continue to permit the execution of mentally retarded defendants.[184] Consequently, five states prohibiting the execution of the mentally retarded is insufficient evidence to conclude that a national consensus exists to support the exculpation of mentally retarded persons from the death penalty.[185]

Critics of the *Penry* decision argue that public opinion polls evidence a national consensus against the imposition of the death penalty on the mentally retarded.[186] Emphasizing public opinion polls as wholly unpersuasive,[187] the Court reasoned that surveys fall short of establishing a national

---

184. *Cf. Penry*, 492 U.S. at 334 (holding that two states prohibiting execution of mentally retarded persons and 14 states prohibiting death penalty does not constitute of national consensus against such punishment for mentally retarded capital offenders). Since *Penry*, only four states have exonerated the mentally retarded from the death penalty. *See* GA. CODE ANN. § 17-7-131(j) (Michie 1990 & Supp. 1992) (providing that death penalty shall not be imposed on a mentally retarded defendant); KY. REV. STAT. Ann. § 532.140 (Michie 1990) (providing that no severely mentally retarded offender shall be subject to death penalty); MD. ANN. CODE art. 27, § 412 (1989) (providing that penalty for defendants who are mentally retarded may not be death); N.M. STAT. ANN. § 31-20A-2.1 (Michie 1991 & Supp. 1992) (providing that penalty of death shall not be imposed on any person who is mentally retarded); TENN. CODE ANN. § 39-13-203 (1990) (providing that mentally retarded defendant shall not be sentenced to death).

185. A careful inquiry into the Supreme Court's national consensus analysis seems to indicate that a national consensus against the imposition of the death penalty on mentally retarded capital murderers still does not exist. *Cf. Stanford*, 492 U.S. at 370-71 (finding national consensus against imposition of death penalty on criminal offenders below age of 16); *Penry*, 492 U.S. at 333-34 (finding insufficient evidence of national consensus against execution of mentally retarded defendants convicted of capital offenses to establish categorical exemption). In *Stanford*, the Court found fifteen states prohibited execution of sixteen-year-old offenders and twelve states prohibited execution of seventeen-year-old offenders. *Id.* at 370; *see also* Thompson v. Oklahoma, 487 U.S. 815, 823-29 (1988) (examining state legislation authorizing capital punishment and relationship between age of defendant and unusual punishment); Tison v. Arizona, 481 U.S. 137, 154 (1987) (finding wave of state legislation authorizing imposition of death penalty for felony murder "powerfully suggests" society's condoning this punishment); *Ford*, 477 U.S. at 408 (finding "no state in the union" allows execution of insane persons); *Coker*, 433 U.S. at 594-96 (finding national consensus against imposition of death penalty for rape of adult women). In *Coker*, the Court found that only one state authorized a sentence of death for rape. *Id.*

186. *See* John Blume & David Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 ARK. L. REV. 725, 759-60 (1988) (citing public opinion surveys finding 71% of Floridians oppose death penalty for mentally retarded capital murderers). The authors note a Georgia State University poll, which found that Georgia residents categorically reject the death penalty for mentally retarded capital murderers. *Id.* The authors also found that a South Carolina poll resulted in finding 56% of those surveyed believed that mentally retarded murderers should not be executed. *Id. See generally* Patricia Hagenah, Note, *Imposing the Death Sentence on Mentally Retarded Defendants: The Case of* Penry v. Lynaugh, 59 UMKC L. REV. 135, 141-42 (1990) (discussing role of public-opinion polls in national consensus analysis on execution of mentally retarded).

187. *See Penry*, 492 U.S. at 335 (finding public-opinion polls not indicative of national

consensus because of inherent methodological flaws and the lack of a standard definition of mental retardation.[188] The Court opined that no one has a "better sense of the evolution in the views of the American people than do their elected representatives."[189] Accordingly, the Court continues to rely on legislative enactments in its interpretation of the Cruel and Unusual Punishments Clause.[190]

VI. SUGGESTED GUIDELINES IN THE CAPITAL SENTENCING OF THE MENTALLY RETARDED

Mental retardation alone does not mean that an individual lacks the cognitive, volitional, and moral capacity to act with the degree of culpability

---

consensus); *see also Stanford*, 492 U.S. at 377 (finding public-opinion polls not determinative of national consensus). In *Stanford*, the Court stated its reliance on national consensus by saying, "a revised national consensus so broad, so clear and so unenduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts laws and the application of laws that the people have approved." *Id.* The Court interpreted "operative facts" as being the laws and the application of laws of the state legislatures. *Id.*; *see also* Licia A. Esposito, Note, *The Constitutionality of Executing Juvenile and Mentally Retarded Offenders: A Precedential Analysis and Proposal for Reconsideration*, 31 B.C. L. REV. 901, 910-12 (1990) (discussing Court's means of determining evolving standards of decency); Tanya M. Perfecky, Note, *Children, the Death Penalty and the Eighth Amendment: An Analysis of* Stanford v. Kentucky, 35 VILL. L. REV. 641, 657 (1990) (discussing use of "evolving standards of decency" rationale as indicative of national consensus).

188. *Cf. Penry*, 492 U.S. at 335 (arguing that public sentiment expressed in public-opinion polls, if true, will ultimately find its way into legislation); Weight Watchers Int'l v. Stouffer Corp., 744 F. Supp. 1259, 1272 (S.D.N.Y. 1990) (giving no weight to defendant's survey because survey contained serious "methodological flaws").

189. *See Penry*, 492 U.S. at 334-35 (noting number of states adopting such statutes). In *Penry*, the Court opined that "[t]he public sentiment expressed in . . . polls . . . may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely." *Id.* at 335; *see also Thompson*, 487 U.S. at 858-59 (Scalia, J., dissenting) (leaving questions of "evolving standards of decency" to elected representatives). *See generally* John J. Gruttadaurio, Editorial Note, *Consistency in the Application of the Death Penalty to Juveniles and the Mentally Impaired: A Suggested Legislative Approach*, 58 U. CIN. L. REV. 211, 222 (1989) (discussing Court's long-standing tendency to defer capital-sentencing questions to state legislatures).

190. *See Stanford*, 492 U.S. at 370 (discussing deference given to state legislatures); *Penry*, 492 U.S. at 331 (noting Court's reliance on state legislatures as evidence of contemporary values); McClesky v. Kemp, 481 U.S. 279, 300 (1987) (noting importance of states' legislatures in determining public's attitude); *cf.* Gregg v. Georgia, 428 U.S. 153, 174-75 (1976) (finding that legislative enactments weigh heavy in analysis, but are not dispositive of society's standards because courts must still analyze constitutionality). *See generally* John J. Gruttadaurio, Editorial Comment, *Consistency in the Application of the Death Penalty to Juveniles and the Mentally Impaired: A Suggested Legislative Approach*, 58 U. CIN. L. REV. 211, 222 (1989) (discussing Court's preference for letting individual states decide protection for defendants under sentencing statutes).

associated with the death penalty.[191] However, those mentally retarded individuals who are so profoundly retarded that they lack the necessary capacity to appreciate the wrongfulness of their criminal conduct deserve exoneration from the death penalty.[192] This exoneration should not be determined based on a fallacious I.Q. score. Instead, state legislatures and courts should adhere to the following guidelines when a capital defendant is mentally retarded.

First, the mentally retarded defendant must be found mentally culpable at the time the offense was committed.[193] For instance, if the mentally re-

---

191. *See* Penry v. Lynaugh, 492 U.S. 302, 338 (1989) (recognizing diverse capabilities of mentally retarded person requires individualized consideration and not exoneration of all responsibility); Mathenia v. Delo, 975 F.2d 444, 453 (8th Cir. 1992) (affirming lower court's finding defendant's mental retardation did not preclude him from having necessary level of culpability needed for imposing death penalty), *cert. denied*, 61 U.S.L.W. 3652 (U.S. Mar. 29, 1993) (No. 92-7457); Woods v. Dugger, 923 F.2d 1454, 1455 (11th Cir. 1991) (finding individual with I.Q. of 69 had mental capacity to appreciate criminality of his conduct), *cert. denied sub nom.* Singletary v. Woods, __ U.S. __, 112 S. Ct. 407, 116 L. Ed. 2d 355 (1991); Hobbs v. Heck, 919 F.2d 738 (6th Cir. 1990) (text on WESTLAW) (finding appellant's claim that mentally retarded is equivalent to being insane "lacked an arguable basis in law"); Brogdon v. Butler, 824 F.2d 338, 341 (5th Cir. 1987) (holding mental retardation does not constitute insanity nor incapacity to know difference between right or wrong), *cert. denied*, 483 U.S. 1040 (1987); Stripling v. State, 401 S.E.2d 500, 503 (Ga. 1991) (finding mildly retarded defendant had capacity to distinguish between right and wrong); Evans v. State, 467 S.W.2d 920, 922 (Mo. 1971) (accepting that although I.Q. tests indicate mental retardation, defendant's impairment was not sufficient to prevent him from distinguishing right from wrong); State v. Stokes, 352 S.E.2d 653, 657 (N.C. 1987) (finding mildly retarded defendant able to control his behavior). *See generally* David A. Davis, *Executing the Mentally Retarded: The Status of Florida Law*, 65 FLA. BAR J. 12, 13 (1991) (stating that mentally retarded individuals are not completely exempt from criminal responsibility because they can formulate necessary intent). *But see* V. Stephen Cohen, Comment, *Exempting the Mentally Retarded from the Death Penalty: A Comment on Florida's Proposed Legislation*, 19 FLA. ST. U. L. REV. 457, 467-68 (1991) (describing Court's statement that it is cruel and unusual to execute profoundly or severely retarded defendant).

192. *See Penry*, 492 U.S. at 330-31 (finding that it may be cruel and unusual to execute profoundly retarded defendants according to "evolving standards of decency"); *cf.* Enmund v. Florida, 458 U.S. 782, 789-96 (1982) (discussing Court's analysis of society's acceptance of death penalty in certain circumstances); Coker v. Georgia, 433 U.S. 584, 593-97 (1977) (stating Court's reliance on history and legislative enactments to determine standards of decency). *See generally* V. Stephen Cohen, Comment, *Exempting the Mentally Retarded from the Death Penalty: A Comment on Florida's Proposed Legislation*, 19 FLA. ST. U. L. REV. 457, 467-68 (1991) (noting Court's observation that it would be cruel and unusual to execute profoundly or severely retarded defendant); Juliet L. Ream, Comment, *Capital Punishment for Mentally Retarded Offenders: Is It Morally and Constitutionally Impermissible?*, 19 SW. U. L. REV. 89, 109 (1990) (noting lenient attitude towards profoundly retarded defendants).

193. Watkins v. State, 620 P.2d 792, 794 (Idaho 1980); State v. Korell, 690 P.2d 992, 998 (Mont. 1984); *see* Durham v. United States, 214 F.2d 862, 875 (D.C. Cir. 1954) (holding that defendants who suffer from defective mental condition at time of criminal act must be found not guilty).

tarded defendant was so severely retarded as not to know that the criminal conduct was wrong, or to be incapable of conforming his or her conduct to the requirements of the law, then the defendant should not be executed.[194] Second, the mentally retarded defendant must be found competent to stand trial.[195] In other words, the defendant must have the ability to consult with a lawyer with a reasonable degree of rational understanding, and the defendant must have a rational and factual understanding of the proceedings.[196]

---

194. *See* United States v. Velasco, 471 F.2d 112, 114-15 (7th Cir. 1972) (recognizing possibility of acquittal when defendant is "incapable of conforming her conduct to the law"). Courts have consistently held that a defendant who is incapable, as a result of mental disease or defect, to conform his conduct to the requirements of law deserves exoneration from criminal responsibility. *See, e.g.*, United States v. Holt, 450 F.2d 868, 869 (5th Cir. 1971) (acknowledging exoneration of criminal responsibility for defendant who was "incapable of conforming his conduct to law"); United States v. Smith, 437 F.2d 538, 539 (6th Cir. 1970) (finding defendant's claim that his mental retardation made him "incapable of conforming his conduct to law" sufficient to establish mental incompetency); United States v. Barfield, 405 F.2d 1209, 1209 (6th Cir. 1969) (asserting that defendant is not responsible for his crime if his mental defect rendered him substantially "incapable of conforming his conduct with requirements of law"); *see* Sherri Ann Carver, Note, *Retribution — A Justification for the Execution of Mentally Retarded and Juvenile Murderers*, 16 OKLA. CITY U. L. REV. 155, 178 (1991) (discussing Penry's claim that his mental retardation made him "incapable of conforming his conduct to the law"); Laura E. Reece, Comment, *Mothers Who Kill: Postpartum Disorders and Criminal Infanticide*, 38 UCLA L. REV. 699, 743-44 (1991) (discussing exoneration from criminal responsibility for being "incapable of conforming her conduct to the requirements of law" due to emotional illness).

195. Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam) (reversing lower court and creating test for competency to stand trial). In *Dusky*, the Court declared that a defendant is competent to stand trial if he has the "ability to consult with his lawyer with a reasonable degree of rational understanding" and has a "rational as well as factual understanding of the proceedings against him." *Id.* Courts have continued to follow the *Dusky* test in deciding whether a defendant is competent to stand trial. *See, e.g.*, *Penry*, 492 U.S. at 333 (finding defendant competent to stand trial according to test set out in *Dusky*); White v. Estelle, 459 U.S. 1118, 1119 (1983) (describing lower court's empaneling jury for competency hearing in which expert testimony showed "borderline mental retardation"); Drope v. Missouri, 420 U.S. 162, 171 (1975) (recognizing long-standing acceptance that defendant lacking capacity to understand proceedings against him should not be subject to trial); Pate v. Robinson, 383 U.S. 375, 388 (1966) (stating *Dusky* test for competence to stand trial as ability of defendant to "consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him"); *see* CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 290 (ABA Criminal Justice Standards Committee Projects ed., 1989) (asserting that mentally retarded defendant is incompetent to be executed when he or she cannot understand impending proceedings); Sandra Anderson Garcia & Holly Villareal Steele, *Mentally Retarded Offenders in the Criminal Justice and Mental Retardation Services Systems in Florida: Philosophical, Placement, and Treatment Issues*, 41 ARK. L. REV. 809, 826 (1988) (discussing *Dusky* test for competency to stand trial); Juliet L. Ream, Comment, *Capital Punishment for Mentally Retarded Offenders: Is It Morally and Constitutionally Impermissible?*, 19 S.W. U. L. REV. 89, 113 (1990) (discussing *Dusky* test for competency to stand trial and its ineffectiveness for mentally retarded individuals).

196. *White*, 459 U.S. at 1119-20; *see* People v. Burson, 143 N.E.2d 239, 244-45 (Ill. 1957)

Third, before a mentally retarded defendant can be convicted, the trier-of-fact must find, beyond a reasonable doubt, every element of the crime alleged, including culpable mental state.[197] Thus, a profoundly mentally retarded defendant can show that the severity of retardation raises a reasonable doubt concerning the mens rea required for the crime.[198] For example, a mentally retarded individual charged with a capital murder can introduce evidence of mental retardation to attempt to raise a reasonable doubt concerning intent. Consequently, when the capital murderer is severely or profoundly retarded, the state will have an onerous task to prove beyond a reasonable doubt the defendant's ability to form the necessary intent associated with the death penalty.[199] Fourth, before a mentally re-

---

(stating requisite understanding for establishing competency). In *Burson*, the court opined that the defendant must be capable of understanding the "nature and object of the proceedings against him, his own condition in reference to such proceedings, and have sufficient mind to conduct his defense in rational and reasonable manner." *Id.*; *see also* Benjamin James Bernia, Note, *The Burden of Proving Competence To Stand Trial: Due Process at the Limits of Adversarial Justice*, 45 VAND. L. REV. 199, 203 (1992) (discussing test for competency to stand trial); Ann L. Hester, Note, State v. Gravette: *Is There Justice for Incompetent Defendants in North Carolina?*, 69 N.C. L. REV. 1484, 1489-90 (1991) (discussing United States Supreme Court's rule of competency to stand trial).

197. *In re* Winship, 397 U.S. 358, 364 (1970). In *Winship*, the Court rejected the trial court's "preponderance of the evidence" standard and required the defendant's guilt be proven beyond a reasonable doubt. *Id.* The state's failure to prove every element of the defendant's crime results in an acquittal. *Id.* at 363.

198. Since a defendant's mental state is an element of capital murder, the state is required to prove beyond a reasonable doubt that the defendant acted with the requisite mental state associated with the crime. *See* Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975) (holding defendant is not required to prove facts that negate elements of crime); *cf.* Leland v. Oregon, 343 U.S. 790, 798-99 (1952) (stating it is appropriate to place burden on defendant to prove insanity). Therefore, a mentally retarded defendant is not required to prove his mental retardation, but instead the state must prove beyond a reasonable doubt the intent. *Cf.* Cooper v. North Carolina, 702 F.2d 481, 484-85 (4th Cir. 1983) (asserting that state must prove defendant's intent beyond reasonable doubt because mental illness negates element of intent); Stacy v. Love, 679 F.2d 1209, 1213 (6th Cir. 1982) (requiring state to prove defendant's sanity beyond a reasonable doubt), *cert. denied*, 459 U.S. 1009 (1982); Barber v. State, 757 S.W.2d 359, 363 (Tex. Crim. App. 1988) (holding it is permissible to place burden on defendant or proving incompetency to stand trial), *cert. denied*, 489 U.S. 1091 (1989); Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 830-31 (1977) (discussing "strict" mens rea approach as admitting evidence showing defendant did not have requisite level of mens rea for charged offense).

199. *Cf.* Youngberg v. Romeo, 457 U.S. 307, 309 (1982) (finding profoundly retarded person could not talk or care for himself); *but cf.* Mathenia v. Delo, 975 F.2d 444, 453 (8th Cir. 1992) (finding harmless error defendant's failure to assert in state court that mild mental retardation precluded him from having level of culpability needed to impose death penalty), *cert. denied*, 61 U.S.L.W. 3652 (U.S. Mar. 22, 1993) (No. 92-7457); *see* Donald H.J. Hermann et al., *Sentencing of the Mentally Retarded Criminal Defendant*, 41 ARK. L. REV. 765, 803-04 (1988) (discussing effect mental retardation has on culpability); Juliet L. Ream, Comment, *Capital Punishment for Mentally Retarded Offenders: Is It Morally and Constitutionally Im-*

tarded defendant can be sentenced to death, the sentencer must find, beyond a reasonable doubt, one statutorily defined aggravating circumstance,[200] while the defendant may introduce any relevant mitigating circumstance, such as the severity of mental retardation, that may justify a sentence less than death.[201] Subsequently, the sentencer must weigh the aggravating factors against the mitigating factors before sentencing the defendant to

---

permissible?, 19 SW. U. L. REV. 89, 138 (1990) (finding mental retardation could result in lack of moral culpability).

200. *See* Jurek v. Texas, 428 U.S. 262, 276 (1976) (requiring at least one aggravating circumstance before sentence of death can be imposed). In *Jurek*, the Texas capital-sentencing statute was found constitutional because it properly narrowed the class of defendants eligible for the death penalty. *Id.* Subsequently, states throughout the country modeled the Texas capital-sentencing statute, requiring the sentencer find at least one aggravating circumstance before the death penalty can be imposed. *See, e.g.*, Clemons v. Mississippi, 494 U.S. 738, 751 (1990) (requiring one valid aggravating circumstance before imposing death penalty); McKoy v. North Carolina, 494 U.S. 433, 458 (1990) (Scalia, J., dissenting) (requiring at least one aggravating circumstance before imposing death penalty); Hildwin v. Florida, 490 U.S. 638, 639 (1989) (imposing death penalty requires finding at least one aggravating circumstance); Lowenfield v. Phelps, 484 U.S. 231, 242 (1988) (requiring jury to find beyond reasonable doubt at least one aggravating circumstance before imposing capital punishment); Sumner v. Shuman, 483 U.S. 66, 67 n.1 (1987) (requiring sentencing authority to find at least one aggravating circumstance before imposing death penalty); McClesky v. Kemp, 481 U.S. 279, 302 (1987) (requiring jury to find at least one aggravating circumstance beyond reasonable doubt before imposing death penalty); Poland v. Arizona, 476 U.S. 147, 154 (1986) (asserting that death can not be imposed unless there is evidence of aggravating circumstance); Caldwell v. Mississippi, 472 U.S. 320, 344 (1985) (instructing jury that they must find at least one aggravating circumstance before imposing death penalty); *Coker*, 433 U.S. at 587 n.3 (asserting that jury must find at least one aggravating circumstance before imposing death penalty); Gregg v. Georgia, 428 U.S. 153, 161 (1976) (instructing jury that they must find at least one aggravating circumstance before imposing death penalty); *see also* Maria M. Homan, Note, *The Juvenile Death Penalty: Counsel's Role in the Development of a Mitigation Defense*, 53 BROOK. L. REV. 767, 785-87 (1987) (discussing aggravating factors in capital-sentencing statutes of Georgia, Florida, and Texas). *See generally* Bruce S. Ledewitz, *The New Role of Statutory Aggravating Circumstances in American Death Penalty Law*, 22 DUQ. L. REV. 317, 351 (1984) (discussing purpose of aggravating factors in bifurcated proceedings).

201. *See* Hitchock v. Dugger, 481 U.S. 393, 398-99 (1987) (holding that defendant must be able to present mitigating evidence to jury); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (holding that jury must be able to give effect to any mitigating evidence relevant to defendant's background, her character, or circumstances of crime); Goodwin v. Balkcom, 684 F.2d 794, 802 (11th Cir. 1982) (finding sentencing statutes not clearly guiding jury in understanding purpose of mitigating factors violates Eighth and Fourteenth Amendments); *see also* CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 290 (ABA Criminal Justice Standards Committee Project ed., 1989) (asserting that mentally retarded defendant is incompetent to be executed when he or she cannot convey pertinent information to counsel or judge); *see also* Stanton D. Krauss, *The* Witherspoon *Doctrine at* Witt's *End: Death-Qualification Reexamined*, 24 AM. CRIM. L. REV. 1, 3 n.14 (1986) (discussing bifurcation proceedings); Eric L. Shwartz, Comment, Penry v. Lynaugh: *"Idiocy" and the Framers' Intent Doctrine*, 16 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 315, 321-24 (1990) (discussing role and purpose of mitigating evidence).

death.[202] Fifth, the defendant must understand the impending fate of the execution.[203] In other words, the mentally retarded defendant must be aware of the impending execution and the reason for its imposition.[204] All of these safeguards must be overcome before the state can subject a mentally retarded defendant to the death penalty.

Ultimately, these guidelines will ensure that all mentally retarded capital defendants receive the required individualized consideration that the Constitution guarantees. If state legislatures opt for the alternative chosen by the legislatures of Georgia, Kentucky, Tennessee, Maryland, and New Mexico,

---

202. *See* Walton v. Arizona, 497 U.S. 639, 662-63 (1990) (finding Constitution prohibits states from barring from sentencing proceedings "*any* aspect of a defendant's character or record, or *any* circumstance surrounding the crime"); *Penry*, 492 U.S. at 340 (holding that in order to make individualized assessment of appropriateness of death penalty, evidence of mental retardation must be given effect in sentencing of the defendant); *Hitchcock*, 481 U.S. at 398-99 (finding as harmful error jury instruction mandating permissible scope of mitigating evidence); Eric L. Shwartz, Comment, Penry v. Linaugh: *"Idiocy" and the Framers' Intent Doctrine*, 16 NEW. ENG. J. ON CRIM & CIV. CONFINEMENT 315, 321-24 (1990) (discussing Texas capital-sentencing statute inclusion of mitigating circumstances). *See generally* Jonathan R. Sorensen & James W. Marquart, *Prosecutorial and Jury Decision-Making in Post-*Furman *Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 743, 748-50 (1991) (discussing role and use of mitigating factors in Texas sentencing scheme).

203. *See* Ford v. Wainwright, 477 U.S. 399, 409-10 (1986) (stating executing incompetent defendant who does not comprehend circumstances of fate is cruel and unusual). In *Ford*, the Court held that the Eighth Amendment prohibits the execution of a convicted capital offender who becomes insane while awaiting execution. *See id.* at 417-18 (holding defendant entitled to separate evidentiary hearing on competency issue to permit execution). The Court reasoned that executing individuals who are unaware of their impending execution was incompatible with the evolving standards of decency and "simply offends humanity." *Id.* at 409; *see also* Penry v. Lynaugh, 492 U.S. 302, 333 (1989) (finding constitutional sentence of death on mildly retarded defendant who was competent to stand trial); CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 290 (ABA Criminal Justice Standards Committee Project ed., 1989) (asserting that mentally retarded defendant is incompetent to be executed when he or she cannot understand reason for death sentence or nature of punishment); V. Stephen Cohen, Comment, *Exempting the Mentally Retarded from the Death Penalty: A Comment on Florida's Proposed Legislation*, 19 FLA. ST. U. L. REV. 457, 466 (1991) (describing *Penry*'s observation that incompetent defendant must not be executed); *Leading Cases — Constitutional Law*, 100 HARV. L. REV. 100, 100 (1986) (discussing Court's adoption of common-law prohibition of executing incompetent defendants).

204. *See* State v. Pinski, 163 S.W.2d 785, 787-88 (Mo. 1942) (recognizing mental capacity includes not only insanity but also any mental incapacity that makes defendant unable to distinguish wrong from right); State v. Johnson, 290 N.W. 159, 162 (Wis. 1940) (finding both insane and feeble-minded persons can be exonerated from criminal responsibility if unable to distinguish difference from right and wrong). *See generally* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 432-42 (1985) (discussing criminal responsibility of mentally retarded defendants); Joshua N. Sondheimer, Note, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 HASTINGS L.J. 409, 417-19 (1990) (acknowledging long-standing debate over what level of mental capacity vitiates criminal responsibility).

then even when a mentally retarded capital murderer knows the crime is wrong, understands the judicial proceedings, has the necessary mens rea, has aggravating factors that far outweigh the mitigating factors, and understands why the punishment is being imposed, the capital murderer will *always* escape the death penalty. Rather, state legislators and courts should rely on the guidelines suggested above in order to provide the individualized consideration demanded by the Constitution.

VII. CONCLUSION

Capital murder is a uniquely heinous and atrocious crime because of its final and irreparable nature. The murderer consciously inflicts cruel, inhumane, and degrading pain on the victim, often in a torturous and barbarous manner. For this reason, the crime of capital murder deserves the death penalty.

Legislatures and courts throughout the United States should adhere to the common-law understanding of mental deficiency when considering capital punishment. Courts should not determine the "evolving standards of decency" by using unreliable I.Q. tests of the mental-health profession as a unitary measure of mental retardation. Instead, the courts should look to the mores, concepts, and common law applied throughout the centuries. Because the common law prohibited the punishment of those who were totally lacking in reason or the ability to distinguish between right and wrong, it may, indeed, be cruel and unusual punishment to execute persons who are profoundly retarded and wholly lacking in the capacity to appreciate the wrongfulness of their actions. However, a finding that the mentally retarded are categorically exempted from the death penalty, regardless of the degree of retardation, would in essence mean that no matter how heinous the crime, and no matter how cognitively functional the mentally retarded offender, he or she could never be executed, and would then be licensed to kill.