

LEGAL FICTIONS AND MORAL REASONING:
CAPITAL PUNISHMENT AND THE MENTALLY
RETARDED DEFENDANT AFTER *PENRY V.*
JOHNSON

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I. INTRODUCTION

The relationship between mental health law and criminal law is disturbing in both its substance and its scope. If it is true that the task of lawyering is that of enabling the client to have his story told,¹ it is certainly true that nowhere are clients' stories more complex than in the intersection between criminal law and mental health law. This Article involves one such intersection: the relationship between mental retardation and capital punishment. Staggering numbers of inmates suffer from often debilitating mental disabilities. Estimates of the incidence of mental retardation in American's death row population range from 4%² to as high as 20%.³ There are no definitive statistics on this, however. Although the Department of Justice keeps track of death row inmates according to their race, sex, education, marital status and criminal history,

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1. See, e.g., Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992) (analyzing the lawyer's role as translator of the defendant's story in the legal system).

2. Joan Petersilia, *Justice for All?, Offenders with Mental Retardation and the California Corrections System*, 12/1/97 PRISON J. 358380 (1997).

3. Cf. Bruce A. Robinson, *Facts About Capital Punishment – The Death Penalty* (June 8, 1995) at <http://www.religioustolerance.org/execut3.htm>. (last modified Oct. 24, 2001) (fifteen percent); Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 40 (1996) (between twelve and twenty percent).

among other characteristics,⁴ no such data are available on the mental health status of those whom the government proposes to execute.⁵ One commentator has stated that approximately 24 mentally retarded individuals have been executed in the years since the Supreme Court expressly allowed the states to apply the death penalty to the mentally retarded;⁶ no one knows how many mentally retarded individuals have been executed over the years.⁷

One of the most compelling stories to arise at the intersection of criminal and mental health law is that of Johnny Paul Penry. Penry is a convicted rapist and murderer who since 1986 has lived on death row in Texas. He is also a survivor of brutal, long-term child abuse and organic brain damage, who exhibits the intellectual functioning of a seven-year-old child.⁸ Penry is a central character in one of the great legal/ethical debates of the late 20th century — the debate over the justifiability of executing the mentally retarded. The Supreme Court has twice heard Penry's appeal from his death sentence, and has twice found the procedures used by the State of Texas in imposing that sentence to be incompatible with the protections offered by the federal Constitution. This Article will focus on Penry's case after the first Supreme Court decision in 1989 ("*Penry I*"). We will examine Texas' attempt to comply with the mandate of *Penry I* in re-trying and re-sentencing Penry, and the Court's rejection of that attempt in 2001. We will see that Texas tried to use a legal fiction to comply with the demands of *Penry I*, rather than enact changes in its statutory capital sentencing scheme. This fiction was the linchpin of the Supreme Court's rejection of Penry's death sentence in 2001 ("*Penry II*.")

Part II of this Article sketches the outlines of the relationship between mental disability and criminal law, considering historic and modern justifications for special consideration of the mentally disabled in the criminal justice system and the relationship between insanity, incompetence and mental retardation in modern American jurisprudence. Part III traces the ongoing fifteen-year saga of Johnny Paul Penry's case through

4. Bureau of Justice Statistics, *Capital Punishment 2000*, available at <http://www.ojp.usdoj.gov/bjs/abstract/cp00.htm> (last modified Dec. 11, 2001) (including legal status, age, execution method).

5. Petersilia, *supra* note 2.

6. Bryan L. Duplar, *Another Look at Evolving Standards: Will Decency Prevail Against Executing the Mentally Retarded?*, 52 Okla. L. Rev. 593, 609 (1999).

7. For examples of mentally retarded individuals who have been executed, see Coyne & Entzeroth, *supra* note 3, at 41-43.

8. For explanation and criticism of the "mental age" concept as applied to legal determinations of competency, see *infra* notes 111 and accompanying text.

the courts. Part IV examines the relationship between legal fictions and capital punishment historically and in Penry's case in particular, and articulates reasons why the use of legal fictions to implement change has been criticized in the past, and was rejected by the Supreme Court in this setting. Part V outlines the contours of a constitutionally sufficient death penalty sentencing scheme after *Penry II*, and raises further questions which may be settled by the Court in the near future.

II. A BRIEF OUTLINE OF MENTAL DISABILITY AND CAPITAL PUNISHMENT

A. *Doctrines of Mental Disability and Criminal Law*

The death penalty has been imposed with more or less frequency throughout the history of Anglo-American jurisprudence, but one constant feature of death penalty jurisprudence has been the idea that the mental status of the defendant affects the suitability or justifiability of the death penalty; that is, that trial, punishment and execution of the mentally disabled may not be desirable. Under current law, there are essentially three doctrines under which the mental status of a mentally disabled⁹ capital defendant will enter into the trial and sentencing process: insanity, incompetence and mental retardation.¹⁰

1. Insanity

The first criminal law doctrine related to mental disability, and the most familiar, is the insanity defense. Unlike incompetence and mental retardation, insanity is an exculpatory doctrine — the defendant who successfully asserts insanity at his¹¹ trial has traditionally been acquitted,¹² with no further responsibility to the correctional system.¹³ The in-

9. For the purposes of this discussion, I will use the term "mentally disabled" to encompass those defendants who are either legally insane, legally incompetent to either stand trial or be executed, or mentally retarded.

10. While complete expositions of the doctrines of insanity and incompetence are beyond the scope of this Article this section will provide a brief description of each.

11. Although these doctrines theoretically apply both to men and women, men are in fact the vast majority of capital convicts. In 2000, of 3,593 prisoners on death row, only 54 were women. Bureau of Justice Statistics, *supra* note 4. This Article will thus use the male pronoun when referring to capital defendants generally.

12. CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 105, at 33 (15th ed. 1994). However, recent years have seen a proliferation of "guilty but mentally ill" verdicts, which allow punishment of those who might otherwise have been acquitted under traditional "insanity" doctrines.

13. The insanity acquittee is, of course, subject to incarceration in a mental hospital, but gen-

sanity defense has always been difficult to plead and prove successfully. Sir Edward Coke held that the defense should be limited to those who “wholly loseth their memory and understanding,”¹⁴ and in 1723, Justice Tracy wrote that in order to invoke the defense, “a man must be totally deprived of his understanding and memory so as not to know what he is doing, no more than an infant, brute or wild beast.”¹⁵ The insanity defense was famously considered and articulated after the celebrated case of *M’Naghten*,¹⁶ in which the assassin of British Prime Minister Robert Peel’s private secretary was acquitted of the charge of murder by reason of insanity. In the popular and royal outrage¹⁷ over this verdict, popularly believed to have been a miscarriage of justice, the Queen requested the House of Lords to clarify the proper scope of the insanity defense.¹⁸ In response, the Lords articulated the rule that:

To establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.¹⁹

This definition of insanity has captured the imagination of the legal system ever since, and proposals for reform, whether restrictive or expansive, are measured by it. A common criticism of the *M’Naghten* test is that it focuses solely on defects of reason; whereas according to modern views of mental health professionals, the mentally ill may intellectually understand their behavior but for other reasons having to do with their illness, be unable to control or conform their conduct to the requirements of the law.²⁰ In response to this and other criticisms, various

erally only until he no longer meets the statutory standards for involuntary hospitalization, generally focusing on whether the patient presents an imminent danger of harm to himself or others. *See, e.g.*, KY. REV. STAT. ANN. § 202A.026 (LEXIS through 2001 Legis. Sess.). The U.S. Supreme Court has held that states may not “warehouse” the mentally ill solely by reason of their illness, or for reasons of past violent acts, except as those past acts bear on future dangerousness. *See O’Connor v. Donaldson*, 422 U.S. 563 (1975) (holding a state cannot constitutionally confine without more, a nondangerous individual who is capable of surviving safely in freedom).

14. GARY B. MENTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 190 (2d ed. 1997).

15. *Id.*

16. *M’Naghten’s Case*, 8 Eng. Rep. 718 (1843), *reprinted in* All E.R. Rep. 229.

17. *United States v. Freeman*, 357 F.2d 606, 617 (2d Cir. 1966) (outlining a brief history of *M’Naghten’s Case* and Queen Victoria’s response).

18. *Id.*

19. *M’Naghten’s Case*, 8 Eng. Rep. 718 (1843) *reprinted in* All E.R. Rep. 229.

20. *Freeman*, 357 F.2d at 618-19 (arguing the test permits the jury to identify those persons who cannot control their behavior which results in a prison sentence instead of confinement to a

reformulations of the insanity defense have been proposed and adopted by various courts. The “irresistible impulse” test,²¹ the *Durham* test,²² the Model Penal Code test²³ and the Federal Insanity Defense Reform Act test²⁴ have all been adopted in one or more jurisdictions, at least temporarily.²⁵ Although the various tests for insanity differ, there is broad agreement on the basic principle that if the defendant, at the time of committing the crime, was sufficiently mentally disordered, criminal responsibility for the act does not attach, and punishment is improper. Punishment is generally regarded as improper because punishment of a defendant who is sufficiently mentally disordered to satisfy the appropriate insanity test cannot produce a desirable deterrent effect; the severely mentally disordered being essentially undeterrable and the mentally disordered defendant having little or no moral culpability for his actions.²⁶

2. Competence

If the mentally disabled defendant chooses not to assert an insanity defense, or is unable to successfully prove insanity, his competence may nonetheless be raised as a legal issue.²⁷ A criminal defendant must be

mental institution).

21. Torcia, *supra* note 12, § 102 at 18.

22. *Durham v. United States*, 214 F.2d 862, 874-75 (1954) (was the criminal act the “product” of defendant’s mental disease?).

23. *United States v. Massa*, 804 F.2d 1020, 1022-23 (1986). The test is:

A defendant is insane * * * if at the time of the alleged criminal conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

As used in this Article, the terms “mental disease or defect” do not include any abnormality manifested only by repeated criminal behavior or otherwise antisocial conduct.

Id. (quoting MODEL PENAL CODE § 4.01 (Final Draft 1962)).

24.

It is an affirmative defense to a prosecution under any federal statute that, at the time of the commission of acts constituting the offense, the defendant, as a result of severe mental disease or defect, as unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

Insanity Defense Reform Act of 1984, Public Law 98-473, Sec. 401-06 (1984).

25. The “product of mental disease” test of *Durham* was only adopted in the District of Columbia, and was overruled by *United States v. Brawner*, 471 F.2d 969 (1972).

26. *Cf.* *United States v. Austin*, 533 F.2d 879, 889 (3d Cir. 1976). (Adams, J., dissenting) (suggesting the goals of the insanity defense include “punishing only those who act with criminal intent” and “avoidin g punishment for . . . those who are not morally blameworthy for their acts or those who are not deterrable”).

27. Typical competence statutes require the court to hold a hearing into the defendant’s competence sua sponte if the court has reason to doubt the defendant’s competence. *Cf.* KY REV. STAT. ANN. § 504.100(1) (Baldwin’s WESTLAW through 2001 Legis. Sess.).

competent at the time of his trial, or trial must be continued until competence is established. If the defendant never regains competence, he may not be tried.²⁸

The doctrine of competence arises out of the Constitutional doctrines of due process and effective assistance of counsel. If a criminal defendant is so mentally disabled that he cannot effectively aid his counsel at trial, then the risk of a miscarriage of justice—of convicting an innocent man—is unacceptably high. The United States Supreme Court has clarified the requirement of competence under the Constitution:²⁹

[T]he test must be whether [the defendant] has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him.³⁰

Thus, there is a two-prong test for competency: ability to understand the proceedings and ability to assist counsel in his defense.

The competency requirement is more directly related to the imposition of capital punishment than is the insanity defense. While the insanity defense looks to the time of commission of the offense in order to decide whether the defendant should be exculpated of criminal responsibility for his acts,³¹ the competency requirement looks to the defendant's mental status at the time of his interaction with the legal system. This inquiry into the defendant's present mental status has at least three justifications. First, if the defendant cannot cooperate with counsel, potentially exculpatory evidence will be unavailable to the court. Second, if the defendant cannot understand the proceedings against him, the punishment imposed loses much of its moral force — it does not further social policy to impose suffering needlessly; or where there is no understanding of its purpose. Finally, some argue that the execution of an incompetent convict carries no deterrent effect.³² These justifications

28. KY REV. STAT. ANN. § 504.090 (Baldwin's WESTLAW through 2001 Legis. Sess.). The issue of competence need not be specifically pleaded by the defendant - the court may, indeed must, raise the issue sua sponte if appropriate. See, e.g., KY. REV. STAT. ANN. § 504.100 (Baldwin's WESTLAW through 2001 Legis. Sess.) ("If .. during any stage of the proceedings, the court has reasonable grounds to believe the defendant is incompetent to stand trial, the court *shall* [order an evaluation and hold a hearing]") (emphasis added).

29. *Dusky v. United States*, 362 U.S. 402 (1960); *Drope v. Missouri*, 420 US 162, 179 (1975).

30. *Dusky*, 362 US at 402.

31. See *supra* sec. II. A. 1.

32. Kacie McCoy Daugherty, Comment, *Synthetic Sanity: The Ethics and Legality of Using Psychotropic Medications to Render Death Row Inmates Competent for Execution*, 17 J. CONTEMP. HEALTH L. & POL'Y 715, 718-19 (2001) (arguing that executing an incompetent person will not deter others). *But see*, Richard J. Bonnie, *Dilemmas in Administering the Death Penalty: Conscien-*

give rise to the relationship between capital punishment and competence: the Supreme Court has held unequivocally that competence is a prerequisite to execution.³³ The finality of a death sentence makes it particularly compelling that the defendant have had every opportunity to present exculpatory evidence. If he is executed while incompetent, the possibility exists that he might have revealed new evidence at death's door, had he understood the consequences of remaining silent.³⁴ Further, the incompetent defendant does not understand the nature of the punishment, nor why it is being inflicted upon him.³⁵ Execution of a convict in such circumstances violates our standards of humane conduct,³⁶ and constitutes cruel and unusual punishment proscribed by the Eighth Amendment.³⁷

3. Mental Retardation

Finally, criminal courts may consider the defendant's mental retardation. Unlike insanity, mental retardation has traditionally not been seen as exculpatory. Nor does mental retardation alone prevent the State from conducting a trial and imposing punishment. Estimates of the incidence of mental retardation in American prisons and jails reach as high as 20%.³⁸ Clearly, mental retardation does not preclude at least some

tious Abstention, Professional Ethics and the Needs of the Legal System, 14 LAW & HUM. BEHAV. 67 (1990) ("The traditional arguments for the prohibition against executing the incompetent are amazingly weak," yet finding support for the rule in the human dignity of the condemned, which is deprived if the incompetent are executed.)

33. *Ford v. Wainwright*, 477 U.S. 399 (1986). The second justification for the competency requirement is not interpreted to mean that a sentence of incarceration, fine or other punishment may not be imposed if the convict is incompetent at the time of the sentence; presumably, in cases of punishment less than death, the social policy favoring certainty of punishment overrides the policy requiring an understanding of that punishment by the convict.

34. WILLIAM BLACKSTONE, 4 LAWS OF ENGLAND 395 (Callaghan & Cockcroft 1871). "[T]hough a man be *compos* when he commits a capital crime, yet if he becomes *non compos* after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution: for . . . the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings." *Id.*

35. *Ford*, 477 U.S. at 421.

36. *See Id.* at 409 (Marshall, J.) ("[E]xecution of an insane person quite simply offends humanity"); *Id.* at 421 (Powell, J., concurring) ("[M]ost men and women value the opportunity to prepare, mentally and spiritually, for their death.").

37. *Id.* at 409-10.

38. *See supra* notes 2-3 and accompanying text. The landmark U.S. Supreme Court case striking down the discretionary death penalty, *Furman v. Georgia*, 408 U.S. 238 (1972), exhibited a degree of concern with the possible mental retardation of two of the three defendants in the cases at bar. *Id.* at 251 (Douglas, J., concurring). *Furman*, convicted of murdering a homeowner in the course of a robbery, was diagnosed as having mild to moderate mental deficiency with psychotic

types of punishment, and the incapacities associated with mental retardation³⁹ do not, unless they rise to the level of incompetence, necessarily prevent a fair and just trial.⁴⁰ However, most developed countries,⁴¹ as well as several states and the federal government,⁴² have chosen to bar the execution of the mentally retarded convicted of otherwise capital crimes. At least two reasons for this blanket ban have been articulated. First, it is argued that execution of the mentally retarded serves no deterrent effect.⁴³ Second, all mentally retarded individuals, by definition, suffer from “significantly subaverage intellectual functioning” as well as “significant limitations in adaptive functioning.”⁴⁴ Thus, despite the wide variability in severity of mental retardation,⁴⁵ all individuals with mental retardation are sufficiently impaired to justify exempting them from the death penalty.⁴⁶

Interestingly, while insanity and incompetence are purely legal constructs, corresponding to no specific mental health diagnoses,⁴⁷ legal treatment of mental retardation in the capital sentencing field is different. Drafters of statutes exempting individuals with mental retardation from the death penalty have borrowed heavily from modern definitions

episodes. *Id.* at 252-53. Branch, a convict sentenced to death in Texas for rape, had been “found to be a borderline mental deficient and well below the average IQ of Texas prison inmates. *Id.* at 253. He had the equivalent of five and a half years of grade school education. *Id.* He had a “dull intelligence” and “was in the lowest fourth percentile of his class.”

39. Although by definition, mentally retarded individuals suffer from intellectual impairment, the extent of that impairment varies greatly. *See Penry v. Lynaugh*, 492 U.S. 302, 307-10 (1989) [hereinafter *Penry I*]; AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 40-42 (4th ed. 1994) [hereinafter *DSM-IV*] (defining degrees of severity of mental retardation).

40. However, personality traits associated with the mentally retarded, including the desire to please authority figures and suggestibility, may produce questionable results in criminal investigations under circumstances which ordinarily would not raise doubts about, for example, the validity of an apparently uncoerced confession. *See generally* ROBERT PERSKE, UNEQUAL JUSTICE?: WHAT CAN HAPPEN WHEN PERSONS WITH RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES ENCOUNTER THE CRIMINAL JUSTICE SYSTEM (1991) (discussing misunderstood responses and the judicial system’s response to persons with mental illness).

41. *See supra* sec. II. C.

42. For the limited purposes of the Federal Drug Abuse Act, *see Penry I*, 492 U.S. at 344.

43. *Id.* at 348 (Brennan, J., dissenting) (arguing that executing mentally retarded offenders does not measurably further the penal goals of retribution or deterrence).

44. *DSM-IV, supra* note 39, at 39 (describing the diagnosis of mental retardation).

45. *Id.* at 40-41.

46. *Penry I*, 492 U.S. at 341 (Brennan, J., dissenting) (contending the mentally retarded lack the full degree of responsibility for their crimes which is a predicate for the death penalty).

47. *DSM-IV, supra* note 39, at xxiii (“[D]iagnoses arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. . . . assignment of a particular diagnosis does not imply a specific level of impairment or disability”).

of mental retardation in defining the category of exemption.

According to the DSM-IV, an individual is mentally retarded when, prior to attaining the age of 18, he exhibits:

- A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test; [and]
- B. Concurrent deficits or impairments in present adaptive functioning . . . in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.⁴⁸

Mental retardation is further classified into degrees of severity, depending on the “level of intellectual impairment”⁴⁹ demonstrated by an individual. These are Mild Mental Retardation, consisting of individuals with IQ of approximately 50-55 to 70, and constituting 85% of the population of mentally retarded individuals; Moderate Mental Retardation, consisting of individuals with IQ of approximately 35-40 to 50-55, and constituting 10% of the population of mentally retarded individuals; Severe Mental Retardation, consisting of individuals with IQ of approximately 20-25 to 35-40 and constituting 3-4% of the population of mentally retarded individuals, and Profound Mental Retardation, consisting of individuals with IQ lower than 20-25 and constituting 1-2% of the population of mentally retarded individuals.⁵⁰

Modern sentencing laws, to the extent they take mental retardation into account, closely reflect these diagnostic standards in language drawn almost word-for-word from the DSM-IV. Thus, Kentucky exempts from the death penalty the “seriously mentally retarded,”⁵¹ defined as those “defendant[s] with significantly subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period[.]”⁵² Similarly, North Carolina exempts from the death penalty the “mentally re-

48. *Id.* at 46.

49. *Id.* at 40.

50. *Id.* at 41-42.

51. KY. REV. STAT. ANN. § 532.140 (LEXSTAT, LEXIS through 2001 Legis. Sess.).

52. KY. REV. STAT. ANN. § 532.130(2) (LEXSTAT, LEXIS through 2001 Legis. Sess.). It is not clear why the Kentucky legislature felt the need to define these individuals as “seriously” mentally retarded, as this is not a diagnostic category, but might lead to confusion with the “moderate” and “severe” diagnostic classifications. To avoid such confusion, Kentucky specifies that “seriously mentally retarded” applies to those individuals with an IQ of 70 or lower. KY. REV. STAT. ANN. § 532.130(2) (LEXSTAT, LEXIS through 2001 Legis. Sess.).

tarded," defined in almost identical wording as the DSM-IV.⁵³

B. Recent Eighth Amendment jurisprudence

The death penalty has been the subject of intense scrutiny by the courts and commentators. A full discussion of the Supreme Court's death penalty jurisprudence is beyond the scope of this or any law review article,⁵⁴ and indeed has filled many articles and books.⁵⁵ However, a brief review of the Court-mandated requirements for jury deliberations in death penalty cases will be useful as we examine the jury's decisions in the *Penry* cases.

1. Basic Constitutional Requirements

June 29, 1972 is the pivotal date in American death penalty jurisprudence. On that day, the Supreme Court decided the case of *Furman v. Georgia*.⁵⁶ In *Furman*, the Court found that the death penalty was administered in an arbitrary and capricious manner in violation of the Eighth and Fourteenth Amendments, effectively putting a stop to all capital sentencing and executions in the United States. Although the Court found that current laws provided inadequate safeguards against improper use of jury discretion to impose the death penalty, it did not hold that a Constitutionally adequate death penalty statute was impossible. As a result, many states set about revising their death penalty laws after *Furman v. Georgia*, in an attempt to satisfy the Court's concerns about unfettered and arbitrary discretion in capital cases.⁵⁷

53. N.C. GEN. STAT. ANN. § 15A-2005 (West, WESTLAW through S.L. 2001-450) provides that:

(a) (1) The following definitions apply in this section:

a. Mentally retarded. - Significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning, both of which were manifested before the age of 18.

b. Significant limitations in adaptive functioning. - Significant limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills and work skills.

c. Significantly subaverage general intellectual functioning. - An intelligence quotient of 70 or below.

54. For an excellent overview of the cases briefly discussed herein, see Coyne & Entzeroth, *supra* note 3, at 7-10.

55. For a review of such publications, see Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911 (2001).

56. *Furman v. Georgia*, 408 U.S. 238 (1972).

57. Coyne & Entzeroth, *supra* note 3, at 7.

In 1976, the Court heard arguments in five consolidated cases arising out of the revised death penalty statutes of Georgia,⁵⁸ Florida,⁵⁹ Louisiana,⁶⁰ North Carolina⁶¹ and Texas.⁶² The Court held that, although the statutes of North Carolina and Florida, which attempted to minimize jury discretion by imposing mandatory death sentences, were unconstitutional, the statutes of Georgia, Florida and Texas appropriately “guided and channeled”⁶³ the jury’s discretion in capital cases, “eliminating total arbitrariness and capriciousness in . . . imposition” of the death penalty.⁶⁴ The Court also demanded that constitutionally adequate capital sentencing schemes permit “particularized consideration of relevant aspects of the character and record of each convicted defendant”⁶⁵ The tension faced by the drafters of capital sentencing procedures, then, is to provide sufficient guidance and restraint on unfettered jury discretion to meet the demands of Furman, while retaining sufficient discretion to impose a sentence less than death in response to mitigating evidence offered by the defendant.⁶⁶ This individualized determination requires that the jury remain free to express its “reasoned moral response” to the defendant’s character.⁶⁷

2. Application of the Death Penalty to the Mentally Incompetent: *Ford v. Wainwright*

*Ford v. Wainwright*⁶⁸ involved a defendant convicted of murder and sentenced to death in 1974. Although not claimed to have been insane at the time he committed the offense,⁶⁹ Ford developed behavioral peculiarities during his tenure on death row, including a paranoid obsession centered on the Ku Klux Klan,⁷⁰ and delusions of power and control.⁷¹

58. *Gregg v. Georgia*, 428 U.S. 153 (1976).

59. *Proffitt v. Florida*, 428 U.S. 242 (1976).

60. *Roberts v. Louisiana*, 428 U.S. 325 (1976).

61. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

62. *Jurek v. Texas*, 428 U.S. 262 (1976).

63. *Proffitt*, 428 US at 258.

64. *Id.*

65. *Woodson*, 428 U.S. at 303.

66. *Lockett v. Ohio*, 438 U.S. 586 (1978).

67. *California v. Brown*, 479 U.S. 538, 545 (1987)(O’Connor, J., concurring)

68. *Ford*, 477 U.S. 399 (1986).

69. The insanity defense, which is an exculpatory doctrine, depends on the defendant’s mental state at the time the crime was committed. *See infra* notes 11-27 and accompanying text.

70. *Ford*, 477 U.S. at 402.

71. Ford reported that he had appointed nine justices to the Florida Supreme Court, and referred to himself as “Pope.” *Id.* Ironically, one of Ford’s delusions, and one that carried some weight with the Court, was that he could not be executed “because of the landmark case I won.

Ford's treating psychiatrist concluded that Ford suffered from a mental disorder "severe enough to substantially affect Mr. Ford's present ability to assist in the defense of his life."⁷² After ordering a review of Ford's mental condition by three psychiatrists,⁷³ the Governor refused to grant clemency without explanation, simply issuing a death warrant by way of decision.⁷⁴

Ford appealed his death warrant to the Supreme Court, which granted certiorari.⁷⁵ The Supreme Court's decision in *Ford* consists of two parts. First, by a 5-4 majority, the Court determined that the Eighth Amendment forbids the execution of an inmate who is incompetent⁷⁶ at the time of execution.⁷⁷ Second, the Court considered the procedures in place in Florida for determining the competency of an inmate, and found these procedures wanting by a plurality opinion.⁷⁸

In determining that the Eighth Amendment's prohibition against "cruel and unusual punishment" bars the execution of incompetents, Jus-

Ford v. State will prevent executions all over." *Id.* at 403 (1986) (quoting remark by Ford to his evaluating psychiatrist, Dr. Harold Kaufman). Ford's delusion, at least in part, turned out to be one of the grounds for the Court's finding that he could not understand the nature of the punishment. *Id.* at 422-23 (Powell, J., concurring) ("According to petitioner's proffered psychiatric examination, petitioner does not know that he is to be executed, but rather believes that the death penalty has been invalidated. . . . petitioner cannot connect his execution to the crime for which he was convicted.").

72. *Id.* at 403.

73. Pursuant to Florida statute, FLA. STAT. ANN. § 922.07 (West 2001). In fact, the three psychiatrists examined Ford for a combined total of half an hour before writing their separate opinions to the Governor. Ford was not allowed to present his own evidence, under the Governor's policy that prohibited advocacy on the part of the condemned. *Ford*, 477 U.S. at 412-13. For a discussion of the ethics of physician participation in competency evaluations when capital punishment is at stake, see Rochelle G. Salguero, Note, *Medical Ethics and Competency to be Executed*, 96 YALE L. J. 167 (1986).

74. *Ford*, 477 U.S. at 404.

75. *Ford v. Wainright*, 474 U.S. 1019 (1985).

76. Although Justice Marshall's opinion speaks in terms of Ford's "insanity," the analysis adopted by the Court is that of competency; i.e., does the inmate, at the time of evaluation, understand the nature of the death penalty and the reasons for its imposition. *Cf. Ford*, 477 U.S. at 420-27 (Powell, J., concurring); compare *supra* notes 28-39 and accompanying text (test for competence to stand trial). The Court also uses the terms insanity and incompetence imprecisely. *Cf. Ford* 477 U.S. at 420-21. While an "insane" defendant may also be incompetent, there is no necessary link between the two doctrines. In fact, "insanity" itself is an imprecise legal construct capable of many definitions. See *supra* notes 11-27 and accompanying text. In an attempt to clarify the doctrines, this Article will speak of Ford and its requirements in terms of "competence" to be executed, analogous to the "competency" to stand trial discussed *infra*. *Cf. Ford*, 477 U.S. at 421 (Powell, J., concurring). See FL. STAT. ANN. § 922.07 (West 2001) (requiring a stay of execution for those "who do not have the mental capacity to understand the nature of the death penalty and why it was imposed," cited in *Ford*, 477 U.S. at 421).

77. *Ford*, 477 U.S. at 401-10.

78. *Id.* at 410-18.

tice Marshall articulated a two-part test. First, the Court inquires whether the practice in question was considered cruel and unusual under English law at the time of the adoption of the Bill of Rights.⁷⁹ Second, the Court inquires whether, even if not proscribed at the time of adoption, the practice in question has become cruel and unusual under the “evolving standards of decency that mark the progress of a maturing society.”⁸⁰ Execution of the incompetent passes both tests handily; the Court found that the ban on such executions “bears impressive historical credentials,”⁸¹ and that such executions are approved by “virtually no authority . . . [in] English common law.”⁸²

The unanimity of condemnation of the execution of the incompetent is not matched by “unanimity of rationale”⁸³ for the ban. Between them, Marshall’s majority opinion and Powell’s concurring opinion offer no fewer than six distinct rationales for the ban. First and most broadly, the practice is said to “offend[] humanity,”⁸⁴ presumably meaning that it is simply considered uncivilized for society to so avenge itself on the person of one patently disabled by mental illness. Second, it is said that execution of an incompetent fails to provide the deterrence sought to be achieved by the death penalty.⁸⁵ Ordinary citizens would presumably not see anything of themselves in one so disabled; and would not derive any moral lesson from such an execution.⁸⁶ Third, the incompetent’s lack of understanding about the finality of the death penalty robs him of any opportunity to prepare himself for death in a religious or spiritual sense.⁸⁷ Fourth, the incompetence of the condemned is seen to be its own punishment, making the imposition of the death penalty a meaningless redundancy.⁸⁸ Fifth, the retributionist nature of the death penalty is not served by taking the “lesser value[d]” life of the condemned in exchange for the life of his victim.⁸⁹ Finally, the execution of the incompetent robs him of the opportunity to offer exculpatory evidence, should he

79. *Id.* at 405 (“The Eighth Amendment’s ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.”)

80. *Id.* at 406 (quoting *Trop v Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

81. *Ford*, 477 U.S. at 406.

82. *Id.* at 408.

83. *Id.*

84. SIR EDWARD COKE, 3 INSTITUTES 6 (6th ed. 1680), cited in *Ford*, 477 U.S. at 407.

85. *Ford*, 477 U.S. at 407.

86. *Id.* at 419 (Powell, J., concurring)

87. *Id.* at 407.

88. *Id.* at 408.

89. *Id.* (quoting Geoffrey C. Hazard, Jr. & David W. Louisell, *Death, the State and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 387 (1962)).

recover lucidity.⁹⁰ The incompetent by definition cannot understand the consequences of his silence.

C. International Treatment of the Mentally Retarded Capital Defendant

The United States is the only Western democracy that allows execution of the mentally disabled.⁹¹ While the nations of the European Union have eliminated the death penalty altogether,⁹² and thus do not distinguish mentally retarded defendants from other defendants for this purpose, the execution of the mentally retarded in the United States does raise concerns internationally. On April 6, 1995, the European Parliament passed a resolution expressing its “deep shock at the number of executions due to take place in the USA” and particularly, its “distress[] that . . . the State of Pennsylvania plans to [put] three men to death although two of them are believed to be mentally ill.” Although the resolution concluded broadly that “to keep human beings for many years under sentence of death constitutes cruel and inhuman punishment,” the potential execution of the mentally disabled clearly has particular resonance for the parliament.⁹³

In 1999, the UN Commission on Human Rights passed a resolution⁹⁴ calling for the abolition of the death penalty, but particularly urging countries which still use the death penalty, among other conditions,

90. *Id.* at 419-20 (Powell, J., concurring). Interestingly, Powell states that this justification is of “slight merit” due to the extensive appellate review offered to death row inmates today, and concludes that “[i]t is thus unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free.” *Id.* at 420.

91. Human Rights Watch, *Beyond Reason: The Death Penalty and Offenders with Mental Retardation*, at <http://www.hrw.org/reports/2001/ustat/ustat0301.htm> (last visited Jan. 28, 2002). (“The United States may be the only constitutional democracy whose law expressly permits the execution of persons whose cognitive development has been limited by mental retardation and that carries out such executions.”); Robinson, *supra* note 3, at <http://www.religioustolerance.org/execut3.htm> (last modified Oct. 24, 2001) (“Japan and South Korea are the only established democracies in the world, other than the U.S., which still conduct executions.”); HERBERT H. HAINES, *AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972-94* at 3 (1996) (Among industrialized democracies, Only Japan, parts of the former Soviet Union and the United States still carry out death sentences for “ordinary” crimes of violence.).

92. See *Countries that Have Abolished and Retained the Death Penalty*, at <http://www.deathpenaltyinfo.org/internationalreport.html> (last visited October 11, 2001). Indeed, more than half of all the countries in the world have now abolished the death penalty, either de jure, by legislative or judicial act, or de facto, in that they have not carried out an execution in at least ten years. See Amnesty International, *Website Against the Death Penalty: Abolitionist and Retentionist Countries* at <http://www.web.amnesty.org> (last modified June 1, 2001).

93. Resolution on the Impending Executions in the USA, 1995 OJ C 109 (April 6, 1995).

94. U.N. ESCOR, 55th Sess., 58th Mtg., U.N. Doc. E/SR. 61 (1999) available at <http://www.unhchr.ch>.

“[n]ot to impose the death penalty on a person suffering from *any form* of mental disorder or to execute any such person.”⁹⁵ Once again, the mental status of the defendant has particular resonance for the Commission.⁹⁶

It is not clear whether, in addition to those countries which have totally abolished the death penalty, most retentionist countries prohibit the application of the death penalty to the mentally retarded. Although at least one commentator reports that “most states of the world prohibit the execution of the mentally retarded,”⁹⁷ the 1985 Capital Punishment Report of the Secretary General of the United Nations only speaks of “mental illness”⁹⁸ and does not clearly distinguish mental retardation from mental illnesses.⁹⁹ Clearly, though, in permitting the execution of mentally retarded capital offenders, the United States is in the distinct minority of countries.¹⁰⁰

III. THE *PENRY* CASE IN THE COURTS

A. *First trial and appeals*

In 1979, Johnny Paul Penry raped and stabbed Pamela Carpenter.¹⁰¹ Although Mrs. Carpenter died from her injuries, she was able to provide a description of her assailant to the police.¹⁰² Local police, believing the description to fit Penry, who had recently been paroled on another rape conviction,¹⁰³ asked Penry to accompany them to the police station to speak to the investigators in charge of the Carpenter killing. Penry initially denied involvement in the killing, but after the police noticed a

95. *Id.* at 3(e) (emphasis added).

96. Other categories of defendants singled out for mention in the Resolution are juveniles and pregnant women *Id.* at 3(a).

97. John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant and Political Rights*, 6 HARV. HUM. RTS. J. 59, n.111 and accompanying text (1993).

98. U.N. Doc. E 1985/43 (April 26, 1985) (“With regard to mental illness, the majority of countries reported that this precludes the possible sentencing or execution of capital offenders.”) The Report is ambiguous, and may intend to say only that legal “insanity” constitutes a defense to criminal responsibility.

99. Although a mentally retarded individual may suffer from mental illness, mental retardation itself is not considered a mental illness. “DSM-IV, *supra* note 4, at 39-46.”

100. Robinson, *supra* note 3, at <http://www.religioustolerance.org/execut3.htm> (last modified Oct. 24, 2001) (“[The U.S. is] the only democratic jurisdiction in the world to allow [execution of the mentally retarded.] A very few other countries, all dictatorships, allow this practice.”).

101. *Penry I*, 492 U.S. 302 (1989).

102. *Penry v. Lynaugh*, 832 F.2d 915, 917 (5th Cir. 1987).

103. *Penry v. Texas*, 691 S.W.2d 636, 644 (Tex. Crim. App. 1985).

wound on his back consistent with the scissors used to kill the victim, Penry told the police officers "I want to get it off my conscience," and "I done it."¹⁰⁴ Penry later signed more detailed confessions to the crime,¹⁰⁵ and was convicted of first degree murder and sentenced to death.¹⁰⁶

Johnny Paul Penry's personal history is as disturbing as the crime for which he was convicted and sentenced to death. Penry's mother suffered from paranoid schizophrenia,¹⁰⁷ and during birth, Penry sustained injuries due to breech positioning which left him with organic brain damage.¹⁰⁸ Penry was repeatedly beaten and abused as a child, and dropped out of first grade.¹⁰⁹ His IQ has been variously estimated at between 50-60,¹¹⁰ and he has been described as having the "mental age"¹¹¹ of a six (6) to seven (7) year old child.¹¹² At the time of his trial and sentencing, Penry "could not read or write,¹¹³ name the days of the week or months of the year, count to one hundred, say how many nickels are in a dime, or name the President of the United States."¹¹⁴

Although Penry introduced evidence in the guilt phase of his trial tending to show his insanity at the time of the crime, the jury rejected

104. *Id.* at 645.

105. *Id.* at 641

106. *Id.*

107. Human Rights Watch, *supra* note 93, at <http://www.hrw.org/reports/2001/ustat/ustat0301-07.htm>.

108. Human Rights Watch, *supra* note 93, available at <http://www.hrw.org/reports/2001/ustat/ustat0301-07.htm>.

109. Human Rights Watch, *supra* note 93, available at <http://www.hrw.org/reports/2001/ustat/ustat0301-0.htm>.

110. On a standardized scale which defines 100 as the "Average" IQ. Human Rights Watch, *supra* note 93, available at <http://www.hrw.org/reports/2001/ustat/ustat0301-01.htm>.

111. "Mental Age" is a concept that attempts to give context to adults' mental impairment by stating it in the context of childhood developmental stages and capabilities. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 726 (10th ed. 1993). This construct, while providing a convenient way to think about adult mental impairment, has been criticized for underestimating the life experiences of retarded adults, and underestimating the logical and reasoning capabilities of unimpaired children. *Penry I*, 492 U.S. at 308, 339 (citing amici brief for American Association on Mental Retardation). *But see* Richard C. Dieter, *The U.S. Death Penalty and International Law: US Compliance with the Torture and Race Conventions*, (Nov. 12, 1998) at <http://www.deathpenaltyinfo.org/DPICstatements.html#torture> ("If it is wrong to execute those under age 18 at the time of their crime, it would also be wrong to execute someone whose mental age was considerably under 18."); Coyne & Entzeroth, *supra* note 3, at 46 ("If a child of ten or eleven should not be executed under any circumstances, then surely a person who may have a chronological age of twenty, but a mental and emotional age of ten or eleven, should not be put to death.") (citation omitted).

112. *Penry I*, 492 U.S. at 308.

113. Penry's aunt once spent an entire year trying to teach Penry to write his name. *Id.* at 309.

114. Human Rights Watch, *supra* note 93, available at <http://www.hrw.org/reports/2001/ustat/ustat0301-07.htm>.

that defense and convicted Penry.¹¹⁵ Under Texas law at the time of Penry's first trial, capital cases were conducted in two phases.¹¹⁶ After completion of the guilt/innocence phase, the jury reconvened to determine the sentence to be imposed. After presentation of evidence relevant to sentencing, the jury was given a set of "special issues" mandated by Texas law.¹¹⁷ These "special issues" asked the jury to determine:

- (1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
- (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
- (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.¹¹⁸

Although Penry introduced evidence at the sentencing phase tending to show that he was mentally retarded, and thus, bore diminished personal culpability for the murder,¹¹⁹ the jury was never instructed that it could take this mitigating evidence into account in formulating its response to the special issues.¹²⁰ The special issues themselves contain no provision for consideration of mitigating evidence or personal moral culpability in determining whether to impose the death penalty, being essentially factual inquiries.¹²¹ After deliberation, the jury returned answers of "yes" to all the special issue questions, and the court accordingly¹²² sentenced Penry to death.¹²³ The Texas Criminal Court of Ap

115. *Penry v. Lynaugh*, 832 F.2d at 917.

116. *Penry I*, 492 U.S. at 307-08.

117. TEX. CRIM. PROC. CODE ANN. art. 37.071 (Vernon, WESTLAW through Reg. Sess. 2001).

118. TEX. CRIM. PROC. CODE ANN. art. 37.071(b) (Vernon, WESTLAW through Reg. Sess. 2001).

119. *Penry I*, 492 U.S. at 308-09.

120. *Id.* at 311.

121. See *infra* note 72 and accompanying text.

122. The death sentence was mandated by Texas state statute if the jury's answers to the three special issues were affirmative. See TEXAS CODE OF CRIMINAL PROC. art. 37.071 (pre-1999) This formal requirement became a basis for the decisions in *Penry I* and *II* regarding the need for a mechanism by which the jury could express its moral response to the facts of the case. See note 72 and accompanying text.

123. *Penry I*, 492 U.S. at 310-11.

peals affirmed the sentence,¹²⁴ and Penry appealed to the Fifth Circuit.¹²⁵

On appeal to the Fifth Circuit, Penry alleged¹²⁶ that the Texas capital sentencing procedure violated his Eighth Amendment right to avoid cruel and unusual punishment, since the jury was unable to give effect to the evidence regarding Penry's diminished mental capacity (and diminished moral responsibility) under the restrictive Texas statutory sentencing scheme.¹²⁷ The Fifth Circuit affirmed his conviction, but only after expressing doubts about the tension between the Supreme Court's approval of the Texas state sentencing statute in *Jurek v. Texas*¹²⁸ and the demands of the Court's post-*Furman* death penalty jurisprudence for consideration of the individual circumstances of each case.¹²⁹ The Fifth Circuit concluded that "Penry's conviction is a good example of mitigating circumstances that pose a problem under the Texas scheme" and that "perhaps it is time to reconsider *Jurek* in light of [] developing law,"¹³⁰ but ultimately held that, under *Jurek* and past Fifth Circuit decisions rejecting claims similar to Penry's,¹³¹ it had no choice but to affirm Penry's conviction and sentence.¹³²

B. *Penry I*

Penry appealed his conviction and sentence to the United States Supreme Court, and certiorari was granted.¹³³ On appeal, Penry argued that the Eighth Amendment's ban on "cruel and unusual" punishment¹³⁴ prohibited Texas' attempts to execute a mentally retarded person. In making this argument, Penry relied on *Ford v. Wainwright*¹³⁵ to argue that the Eighth Amendment prohibited his execution. The Court applied the familiar two-part Eighth Amendment analysis to Penry's Eighth

124. *Penry v. State*, 691 S.W.2d 636 (1985).

125. *Penry v. Lynaugh*, 832 F.2d at 915.

126. Penry actually raised two additional grounds for reversal of the Court of Criminal Appeals, which do not concern us here: 1) Defendant's confession should have been excluded under Miranda rules; 2) One jury member should have been excluded for cause. Both were resolved against Penry. *Id.*

127. *Id.* at 916-17 & 919-26.

128. *Jurek v. Texas*, 428 U.S. 262 (1976).

129. *Penry v. Lynaugh*, 832 F.2d at 920-21.

130. *Id.* at 925.

131. *Id.* at 926 (citing *Riles v. McCotter*, 799 F.2d 947 (5th Cir. 1986), and *Granviel v. Estelle*, 655 F.2d 673 (5th Cir. 1981), *cert denied*, 455 U.S. 1003 (1982)).

132. *Penry v. Lynaugh*, 832 F.2d at 926.

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

134. U.S. CONST., amend. VIII.

135. *Ford v. Wainwright*, 477 U.S. 399 (1986); *see also supra* notes 70-92 and accompanying text.

Amendment claim, as it had to Ford's claim in 1986.¹³⁶ First, was the punishment considered cruel and unusual in England or the United States at the time the Amendment was drafted and ratified for inclusion in the Constitution?¹³⁷ Second, even if the punishment was not considered cruel and unusual at the time of drafting, have the "evolving standards of decency" in our society reached the point at which we should hold that the punishment has become cruel and unusual?¹³⁸ However, Penry's case was clearly distinguishable from Ford's. Penry's claim was not that he was incompetent to be executed, as that term was defined in *Ford*.¹³⁹ Penry claimed that the rule in *Ford* should be extended to the mentally retarded as well as the incompetent.¹⁴⁰

The first prong, the historic inquiry, is the basis on which execution of the incompetent was prohibited in *Ford v. Wainwright*.¹⁴¹ In *Ford*, after reviewing the evidence of cases and treatises that civilized society has never considered it appropriate to execute the incompetent,¹⁴² the Court concluded that where a convict does not understand the nature of the punishment or the reasons why it is being inflicted on him, the Constitution prohibits proceeding with the execution.¹⁴³ In *Penry I*, in contrast, the Court found insufficient evidence that the execution of the mentally retarded was considered inappropriate in 18th century English or American law and society.¹⁴⁴ The Court recognized evidence that "idiots" were not subject to conviction and punishment; however, while conceding that the label of idiocy bears some resemblance to our modern label of mental retardation, the Court limited that label to those whose

136. *Penry I*, 492 U.S. 302, 313 & 329-40 (1989).

137. *Ford*, 477 U.S. at 406.

138. *Trop v. Dulles*, 356 U.S. 86, 101 (1958), cited in *Ford*, 477 U.S. at 406.

139. In *Ford*, the Court defined incompetence to be executed as a mental state in which the defendant could not understand the nature of the punishment to be inflicted, or why it was to be imposed on him. *Ford*, 477 U.S. at 417. Penry was found competent to stand trial, and his insanity defense was rejected; events that the Court found dispositive of the issue of whether Penry was "unaware of the punishment [he was] about to suffer and why [he was] to suffer it." *Penry I*, 492 U.S. at 333, quoting *Ford*, 477 U.S. at 422 (Powell, J., concurring). Presumably, there were no indications, as in *Ford*, that Penry's mental state had deteriorated while in prison, which would have mandated a pre-execution hearing as to Penry's mental capacity to be executed.

140. *Penry I*, 492 U.S. at 328-29 (arguing mentally retarded people do not possess the level of moral culpability to justify imposing death).

141. *Ford*, 477 U.S. at 406-08 (holding ancient limitations still apply to restrict imposing the death penalty on an incompetent prisoner).

142. *Id.* at 408-410.

143. *Id.* at 409-410 (concluding the Eighth Amendment does not allow a death sentence to be carried out on an incompetent prisoner).

144. *Penry I*, 492 U.S. at 332-34 (holding "the two statutes prohibiting execution of the mentally retarded . . . do[es] not provide sufficient evidence . . . of a national consensus.")

retardation is so profound that they “had a total lack of reason or understanding, or an inability to distinguish between good and evil.”¹⁴⁵ Such defendants would, as the Court notes, already be protected from execution by *Ford v. Wainwright*,¹⁴⁶ if not from trial and conviction by doctrines governing competence to stand trial¹⁴⁷ and the insanity defense.¹⁴⁸

Since the Framers arguably did not have the mentally retarded in mind when drafting the Eighth Amendment, then, the focus shifts to the current state of society; i.e., whether “evolving standards of decency” prohibit today what was permissible more than 200 years ago.¹⁴⁹ Here, also, the Court in *Penry I* found insufficient evidence of the sort of societal consensus present in *Ford v. Wainwright*. The Court in *Penry I* looked primarily to two forms of evidence in seeking this societal consensus: laws passed by the states’ legislatures and data on the behavior of juries in the capital sentencing phase of trials.¹⁵⁰ The Court found, in contrast to the execution of the mentally incompetent addressed in *Ford*,¹⁵¹ that there were insufficient objective indicia of a societal consensus against executing the mentally retarded.¹⁵² Specifically, only one State¹⁵³ which otherwise allowed executions expressly forbade execution of the mentally retarded.¹⁵⁴ In addition, the federal Anti-Drug Abuse Act of 1988¹⁵⁵ expressly prohibited the execution of the mentally retarded for violation of its provisions.¹⁵⁶ Although the Court does not provide an explicit threshold of what constitutes a “national consensus,” the

145. *Id.* at 332. The diagnostic categories of mental retardation do not help us answer the question of whether a defendant could distinguish right from wrong. See *supra* note 47 and accompanying text.

146. *Ford*, 477 U.S. 399 (1986).

147. *Penry I*, 492 U.S. at 333 (holding that there is a common law prohibition on punishing the incompetent). See *supra* notes 28-39.

148. *Id.* at 332-33. See *supra* notes 11-26.

149. *Id.* at 333-34.

150. *Id.* at 331 (“The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures. We have also looked to data concerning the actions of sentencing juries.”) *Contra* Dupler, *supra* note 6, at 595 & 599-611 (arguing the Supreme Court excluded other reliable evidence when it focused on state legislature outcomes in determining whether the death penalty applied to the mentally retarded).

151. *Ford*, 477 U.S. at 405-09 (objective evidence of societal consensus that executing the insane is wrong).

152. *Penry I*, 492 U.S. at 335.

153. The Court noted that Maryland had passed such a statute, but that it had not become effective at the time of the hearing in *Penry I*. *Id.* at 334.

154. See GA. CODE ANN. §17-7-131(j) (West, WESTLAW through 2001 Gen. Assem.), *cited in Penry I*, 492 U.S. at 334.

155. 102 Stat. 4390 (1988).

156. *Id.* at §7000(1).

Court compared the data in *Penry I* to that in *Ford*¹⁵⁷ and *Thompson v. Oklahoma*.¹⁵⁸ The Court concluded that one Federal statute, two express state laws, and fourteen states prohibiting capital punishment entirely, did not amount to a national consensus as required under the Eighth Amendment.¹⁵⁹ According to the Court, “the single state statute prohibiting execution of the mentally retarded, even when added to the fourteen states that have rejected capital punishment completely, does not provide sufficient evidence at present of a national consensus.”¹⁶⁰

If the punishment challenged is not “cruel and unusual” by reference to either the standards of the date of enactment of the Eighth Amendment or according to the dictates of a national consensus, the Court may still determine that the punishment is unconstitutional if it “makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering”¹⁶¹ or if it is “grossly out of proportion to the severity of the crime.”¹⁶² Although recognizing that “mental retardation is a factor that may well lessen a defendant’s culpability for a capital offense,”¹⁶³ the Court refused to go further and find that mental retardation in and of itself necessarily diminishes personal culpability to the degree that capital punishment would be impermissibly disproportionate to the “personal culpability of the offender.”¹⁶⁴ Because of the vast array of mental deficiencies that constitute the category of “mental retardation,” the Court stated, the better rule is to require consideration of mental retardation as a mitigating factor,¹⁶⁵ than to prohibit imposition of capital

157. *Penry I*, 492 U.S. at 334 (“No State permitting the execution of the insane, and 26 states requiring a stay of execution if a convict became insane.”)

158. *Thompson v. Oklahoma*, 487 U.S. 815 (1988). (National consensus against execution of individuals under 16 years of age existed where 18 states expressly established a minimum age of 16 for death penalty.)

159. *Penry I*, 492 U.S. at 334.

160. *Id.*

161. *Gregg v. Georgia*, 428 U.S. 153, 171 (1976).

162. *Coker v. Georgia*, 433 U.S. 584, 592, *cited in Penry I*, 492 U.S. at 335.

163. *Penry I*, 492 U.S. at 340.

164. *Tison v. Arizona*, 481 U.S. 137 (“a criminal sentence must be directly related to the personal culpability of the criminal offender.”).

165. *But see* Michael Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of “Mitigating” Mental Disability Evidence*, 8 NOTRE DAME J.L. ETHICS & PUB POL’Y 239 (1994) (arguing that the mitigating evidence causes jurors to distrust mental disability evidence and they are treated more harshly), *Upholding Law and Order*, HARTSVILLE MESSENGER, June 24, 1997 at 5B col. 1, *cited in Entzeroth*, *supra* note 57 at n.158 (“[t]here is all the more reason to execute a killer if he is also insane or retarded an insane or retarded killer is more to be feared than a sane or normal killer.”). This prejudice against the mentally ill and retarded is not a new phenomenon, having been used by Jeremy Bentham as evidence of the illogic of the death penalty and its deterrence justification. 1 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 449-56 (photo

punishment upon the mentally retarded altogether.¹⁶⁶ Thus, the Court, noting that “virtually all” of the states which impose the death penalty provide for introduction of evidence of diminished mental capacity as a mitigating factor in sentencing,¹⁶⁷ held that such a consideration is a Constitutional mandate.¹⁶⁸ Penry’s case was remanded to the courts of Texas for retrial consistent with this mandate.

C. *Second Trial*

On retrial, Penry was again convicted of the murder of Pamela Carpenter, and again sentenced to death.¹⁶⁹ Because Texas’ statutes governing the imposition of the death penalty had not changed,¹⁷⁰ the sentencing jury was given the same three special issues the first jury had considered. However, this jury was also provided with supplemental instructions designed to comply with the mandate of *Penry I* that the jury be given a vehicle to express its “reasoned moral response” to the crime.¹⁷¹ According to the Fifth Circuit, the trial judge directed “the jury to consider any other relevant mitigating evidence and explained how to give effect to that evidence.”¹⁷² The jury was given a “supplemental instruction” which stated in relevant part:

reprint 1971) (Edinburgh, Tait 1843) (since an insane criminal is more dangerous than a sane one, the exemption from execution of the insane is illogical). See also George Bernard Shaw, Letter, THE TIMES, Dec. 5, 1947, at 5 (“Dangerous insanity, instead of exempting [a person] from “liquidation,” should be one of the strongest grounds for it.”), cited in ELIZABETH O. TUTTLE, THE CRUSADE AGAINST CAPITAL PUNISHMENT IN GREAT BRITAIN 58 (1961).

166. *Id.* at 336-39 (“In light of the diverse capacities and life experiences of mentally retarded persons, it cannot be said on the record before is that all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty.”); *Contra, Penry I*, 492 U.S. at 344-45 (Brennan, J., dissenting) (“[T]here are characteristics as to which there is no danger of spurious generalization because they are a part of the clinical definition of mental retardation,” and those characteristics justify exempting the mentally retarded from the death penalty without need of an individualized inquiry).

167. *Penry I*, 472 U.S. at 337 (finding most states list evidence of a defendant’s capacity “to appreciate the criminality of his conduct” for mitigating circumstance evidence).

168. *Id.* (concluding jury must be provided with “a “vehicle for expressing its ‘reasoned moral response’ to [the mitigating evidence of Penry’s mental retardation] in rendering its sentencing decision.”). *Id.* at 321, 328 (citation omitted).

169. *Penry v. Johnson*, 215 F.3d 504, 507 (5th Cir. 2000).

170. Texas did not amend its capital sentencing scheme until 1999, after Penry’s second trial. An Act Relating to Jury Instructions and Charges in Capital Cases, 1999 Tex. Sess. Law Serv. ch.140 (Vernon) (effective Sept. 1, 1999) (codified at TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon 2001)).

171. *Supra* note 168 and accompanying text.

172. *Penry v. Johnson*, 215 F.3d at 507.

When you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances A mitigating circumstance may include . . . any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. [Y]ou must decide how much weight they deserve, if any, and give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. *If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.*¹⁷³

This supplemental instruction was approved by the Fifth Circuit, and Penry again appealed to the Supreme Court, which granted certiorari.¹⁷⁴

D. *Penry II*

Justice O'Connor once again wrote the majority opinion in *Penry II*. With respect to the supplemental jury instruction, O'Connor clarified that the critical question was not whether the jury instructions made "mere mention of 'mitigating circumstances[,]'"¹⁷⁵ but that the jury must have an opportunity to "consider and give effect to a defendant's mitigating evidence in imposing sentence."¹⁷⁶ O'Connor recognized that although the instruction does instruct the jury to consider the mitigating evidence introduced at the sentencing phase by Penry, it does not allow the jury to respond to that evidence in any way other than through the existing set of special issues. The jury is instructed that if it finds Penry's mental retardation evidence persuasive that he does not deserve the death penalty, that it is to respond negatively to one of the special issues. But which one? What if the state's evidence is persuasive on each of the facts identified by the special issues: that Penry intended death to

173. *Id.* at 508 (emphasis added). Perhaps the Texas court and Fifth Circuit were persuaded that the Supreme Court had backed off of the *Penry I* suggestion that the jury must be able to consider all relevant mitigating evidence because the Supreme Court, in several post-*Penry I* cases, had distinguished other types of mitigating evidence. *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (recognizing youth as mitigating evidence); *Graham v. Collins*, 506 U.S. 461, 478 (1993) (allowing youth, unstable family background, and positive character traits), *cited in Penry*, 215 F.3d at 515 (Scalia, J., dissenting).

174. *Penry v. Johnson*, 531 U.S. 1010 (2000).

175. *Penry v. Johnson*, 532 U.S. 782 (2001) [hereinafter *Penry II*].

176. *Id.*, quoting *Penry I*, 429 U.S. at 319 (1989).

result from his actions, that he is likely to be dangerous in the future if released, and that his actions were not a reasonable response to any provocation offered by the victim? The jury must question whether it is being expected to falsify its responses to the special issues, and may still justifiably believe that it has no legal and moral option other than to answer the factual questions posed in a truthful manner. Indeed, this dilemma is exacerbated by the highlighted portion of the jury instruction beginning “as reflected by.” This clause, when read in light of the entire instruction, appears to suggest that the only mitigating evidence which is relevant to the jury’s determination is evidence which sheds light on the proper response to the factual questions asked by the special issues.¹⁷⁷ In order to spare a capital defendant, then, the jury must overcome the implied limitation of the “as reflected by” clause and agree to falsify one or more of the special issues in response to mental status evidence introduced by the defendant at the sentencing phase. Thus, the jury may be forced into a knowing lie if it believes that, notwithstanding Penry’s likely future dangerousness, the lack of provocation and his expectation that death would result from his crime, his mental disability makes the death penalty undesirable.¹⁷⁸

Assuming, arguendo, that the three questions mandated by then-Texas law should, according to a reasonable view of the evidence, be answered in the affirmative, the Texas response to *Penry I* was thus to invite the jurors to commit to a knowing falsehood, if they wished to spare Penry’s life due to a lack of moral blameworthiness generated by his mental retardation. The next Section will examine the historic use of such knowing falsehoods, referred to as “legal fictions,” in capital punishment law, and the relevance of this history for Penry and the Supreme Court in 2001.

IV. LEGAL FICTIONS AND CAPITAL PUNISHMENT

In English law, fiction is a syphilis, which runs in every vein, and carries into every part of the system the principle of rottenness.¹⁷⁹

177. Cf. *Penry v. Johnson*, 215 F.3d at 514 (Dennis, Circuit Justice, dissenting). In this, Justice Thomas’ dissenting remark in *Penry II* that he does not see how the jury instruction could be made confusing is disingenuous at best, since the instruction cited is patently inconsistent with the instruction to consider “any aspect of . . . the crime which . . . could make a death sentence inappropriate.”

178. See *Penry II*, 532 U.S. 782. (“The mechanism created by the supplemental instruction thus inserted ‘an element of capriciousness’ into the sentencing decision, ‘making the jurors’ power to avoid the death penalty dependent on their willingness’ to elevate the supplemental instruction over the verdict form instructions.”) (citations omitted).

179. JEREMY BENTHAM, *THE ELEMENTS OF THE ART OF PACKING AS APPLIED TO SPECIAL JURIES, PARTICULARLY IN CASES OF LIBEL LAW* (photo. reprint 1978) (London, Effingham Wilson

A frequent and pervasive resort to fiction marks, then, those subjects where the urge toward systematic structure is strong and insistent.¹⁸⁰

A. *Legal Fictions and the Death Penalty*

Although there has been substantial debate about the proper definition of the term “legal fiction,” and many definitions propounded,¹⁸¹ we shall use a definition proposed by Lon Fuller in 1930-31.¹⁸² Fuller defined a legal fiction as “[e]ither (1) a statement propounded with a complete or partial awareness of its falsity, or (2) a false statement recognized as having utility.”¹⁸³ Fuller distinguished a fiction from a lie by the fact that the fiction is not intended to deceive,¹⁸⁴ and from a simple erroneous conclusion by the fact that the speaker of the fiction, unlike the speaker of an erroneous conclusion, is conscious of the falsity of his utterance.¹⁸⁵ The consciously false utterance of the legal fiction has utility because it enables the law to do which previously could not be done, without requiring changes to the positive black-letter law.¹⁸⁶

Jury resort to legal fictions to avoid the harsh effects of overly formalistic death penalty laws is not a new phenomenon.¹⁸⁷ English juries, during the period in English history when death sentences were mandatory for many crimes (mandatory sentencing being the most dramatic form of restricted jury discretion), were nonetheless able to avoid application of the death penalty through fact-finding fictions designed to take crimes out of the mandatory classifications.¹⁸⁸

1821).

180. LON FULLER, *LEGAL FICTIONS* xi (1967).

181. See generally Louise Harmon, *Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 *YALE LJ.* 1, 2-16 (1990) (reviewing the history of uses of legal fictions).

182. FULLER, *supra* note 180. (This book is a reprint of three articles on legal fictions published in 1930-31 in the *Illinois Law Review*.) First published in 1931, Fuller’s treatment of the legal fiction stands at the end of the “second wave” of scholarly interest in the legal fiction described by Professor Harmon in *Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*. Harmon, *supra* note 181 at 11-16. It is perhaps the most significant extended work on this topic.

183. FULLER, *supra* note 180, at 9.

184. *Id.* at 6.

185. *Id.* at 7.

186. *Id.* at 62-63.

187. *Id.* at 53 (“Generally, a fiction is intended to escape the consequences of an existing, specific rule of law.”) For a discussion of the conservative nature of legal fictions in insulating the positive law from forces of change, see Harmon, *supra* note 181, at 7-8 (1990). See also Henry S. Maine, *Ancient Works*, in *THE PROBLEMS OF JURISPRUDENCE* 356, 371 (L. Fuller ed., 1949) (“The fact is . . . that the law has been wholly changed; the fiction is that it remains what it always was.”).

188. WALTER BERNIS, *FOR CAPITAL PUNISHMENT* 33 (1979) (noting that “all felonies except petty larceny and mayhem carried the death penalty”).

Although the death penalty was increasingly limited and circumscribed in England throughout the late nineteenth and twentieth centuries,¹⁸⁹ and finally eliminated entirely in 1969,¹⁹⁰ much of English legal history is characterized by an inflexible black letter approach to the death penalty. Beginning in the thirteenth century, death was the fixed punishment for murder and virtually all felony crimes, regardless of their severity or frequency.¹⁹¹ Because of this “excessive uniformity,”¹⁹² and the lack of proportionality between crime and sentence at common law, the legal culture of the time developed means of mitigating the severity of the common law. Baker¹⁹³ describes four devices for such mitigation,¹⁹⁴ two of which deserve consideration here.

1. Benefit of Clergy

The Benefit of Clergy rule arose from the historic division in English law between royal and ecclesiastical court systems. Under the rule developed at the Council of Clarendon in 1164, clergy accused of crimes were to be tried by canon law, rather than common law, courts.¹⁹⁵ If convicted in the ecclesiastical court, the clergyman would be stripped of his clerical rank and returned to the common law courts for punishment.¹⁹⁶ After the death of Thomas Becket, who had argued that this rule constituted unacceptable double punishment,¹⁹⁷ in 1170, the Church argued for and won an expansion of the privilege to the extent that capital charges against clergymen would be handled exclusively by the ecclesiastical court system,¹⁹⁸ in which the punishment of death was not available.¹⁹⁹ During the thirteenth century, this rule was applied relatively strictly, and a defendant’s claim of benefit of clergy in a capital case would be denied if he did not meet prevailing standards of clerical

189. See generally TUTTLE, *supra* note 165.

190. HAINES, *supra* note 91, at 13.

191. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 584 (3d. ed. 1990) (noting that in the thirteenth century the King’s discretion over the person for felony convicts gave way to fixed death sentences).

192. *Id.*

193. BAKER, *supra* note 191.

194. *Id.* at 584-86 (sanctuary, benefit of clergy, pardons and jury mitigation).

195. *Id.* at 148.

196. *Id.*

197. Steven L. Kessler, *Crime and Punishment . . . and Punishment: Civil Forfeiture and the Double Jeopardy Clause* (May 25, 1996) at <http://www.kessleronforfeiture.com/crime.html> (last visited Feb. 2, 2001) (discussing the history of the double jeopardy clause and its current applications).

198. BAKER, *supra* note 194, at 148.

199. BERNS, *supra* note 191, at 33.

dress, appearance or education (literacy).²⁰⁰ However, during the fourteenth and fifteenth centuries, the benefit of clergy rule was greatly expanded into a device for routinely mitigating the mandatory death sentences of the common law. Literacy supplanted dress or appearance as the test of clerical status,²⁰¹ and often the text given to prisoners to read was standardized and generally known in advance,²⁰² so that “with a little preparation anyone of intelligence could save his life.”²⁰³ This practice was thus expanded, by means of a convenient fiction, to laymen²⁰⁴ as well as clerics, in order to “moderate the common law’s excessively sanguinary schedule of punishments.”²⁰⁵

2. Jury mitigation

Ever since a jury of one’s peers has been the means for adjudicating guilt or innocence,²⁰⁶ there has existed the theoretical possibility that a jury might ignore the black letter law (as articulated by the court), and acquit in cases where the jury members believe conviction to be immoral, regardless of the facts adduced at trial. In the eighteenth century, the death penalty was applied to more than two hundred crimes²⁰⁷ ranging from murder and treason to theft of property valued at more than forty shillings.²⁰⁸ In order to avoid the death penalty, juries would often use their fact-finding power to remove the crime in question from the class punishable by death to a lesser classification. For example, many

200. BAKER, *supra* note 194, at 586-87.

201. Stephen Greenblatt, *Benefit of Clergy, Benefit of Literature*, 6.1 Stanford Humanities Review (1995), available at <http://www.stanford.edu/group/SHR/6-1/html/greenblatt.html>.

202. BAKER, *supra* note 191, at 587. Eventually, even the pretense of literacy testing was abandoned, allowing defendants to claim benefit of clergy without the need to demonstrate literacy in even a summary fashion. *Id.* at 588.

203. *Id.* at 587.

204. BERNES, *supra* note 188, at 33. See also JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (London MacMillan 1883)(outlining a history of capital punishment and the benefit of clergy expanded to laymen). Although women, who could not be ordained as priests, could not claim benefit of clergy in capital cases, the fiction not extending so far, women could claim pregnancy to escape capital punishment. BAKER, *supra* note 191, at 587. By one account, more than a third of women convicts used pregnancy as a means to avoid the death penalty; leading to some question whether pregnancy was not used in a fictional sense as well. *Id.* at 587 n.68.

205. BERNES, *supra* note 188, at 33, citing Stephen, *supra* note 204 at 458-78.

206. In *Bushell’s Case*, the House of Lords held that a juror may not be punished for a verdict in the face of the evidence, thus establishing the jury’s power, if not right, to nullify the law. *Bushell’s Case*, 124 Eng. Rep. 1006 (C.P. 1670).

207. TUTTLE, *supra* note 165.

208. 1 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 95 (1948). Stealing 40s from a residence was made nonclergiable in 1713. BAKER, *supra* note 191, at 591 n.84, citing RADZINOWICZ, *supra*.

juries found property stolen to be valued at thirty-nine shillings, just short of the amount which would have condemned the defendant to death.²⁰⁹ That it was the perceived injustice of the death penalty in such cases, rather than the precise valuation involved, is shown by the allegation made in Parliament that when the valuation deserving of the death penalty was raised from forty shillings to five pounds, the juries raised their verdicts from thirty-nine shillings to four pounds, nineteen shillings; again, just less than the amount needed to convict of the capital crime.²¹⁰

The results of jurors' use of this legal fiction to avoid the death penalty was predictable. Since the law of the time provided no criminal sanction for these actions other than death, it became nearly impossible to obtain convictions on charges of theft. In 1808, a group of merchants in England and Ireland signed a petition demanding the abolition of the death penalty for theft from their premises, on the grounds that, since it was impossible to obtain convictions due to the perceived harshness of the death penalty in such circumstances, theft had increased intolerably.²¹¹ Savvy criminals demanded to be tried under the capital statute because they knew that, due to jurors' reluctance to convict, they stood a greater chance of acquittal.²¹²

Other legal fictions to avoid the death penalty were also used, not always by juries. For example, in 1922, the English Infanticide Act defined the death of a "newly born" child as manslaughter rather than murder, so as to avoid the application of the death penalty. In 1938, the term "newly born" was expanded further to include all children under twelve (12) months of age, greatly diminishing the applicability of the death penalty for infanticide.²¹³

209. BERNES, *supra* note 188, at 33 ("many a jury solemnly and shamelessly set a value of thirty-nine shillings on property worth much more.").

210. 20 PARL. DEB. (3d ser.) (1833) 277-82, *cited in* TUTTLE, *supra* note 165, at 9.

211. TUTTLE, *supra* note 165, at 4.

212. *Id.* at 11. *See also* 234 PARL. DEB. (3d ser.) (1877) 1671-73, 1676. (death penalty often leads to the guilty escaping punishment for murder or being judged insane contrary to the facts of the case). *See also* North Carolina Commission Report of the Special Commission for the Improvement of the Administration of Justice, North Carolina Popular Government 13 (1949), *cited in* Woodson v. North Carolina, 428 U.S. 280, 302 (1976) NORTH CAROLINA COMMISSION FOR THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE, REPORT OF THE COMMISSION FOR THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE (1948).

213. TUTTLE, *supra* note 165 at 28.

B. Justice Thomas and the Analogy to Jury Nullification

The Texas courts' legal fiction response to *Penry I* is not the only legal fiction prevalent in American criminal law. In recent years, legal commentators have paid much attention to the role of "jury nullification" in criminal cases.²¹⁴ Put simply, jury nullification exists whenever a jury, presented with evidence sufficient to sustain a conviction, nonetheless returns a "Not Guilty" verdict. Jury nullification is a necessary feature of any criminal justice system with a commitment to non-appealability of acquittals and a strong jury system, and as such has been a feature of Anglo-American criminal law for centuries. From early English cases to the Fugitive Slave Act cases of the American Reconstruction period and the Volstead Act cases of Prohibition,²¹⁵ to the relatively recent acquittal of football player O.J. Simpson of the murder of his ex-wife and her companion,²¹⁶ instances of jury nullification run through the entire history of Anglo-American criminal law.²¹⁷ Although jury nullification has often been decried by commentators as an evil, if perhaps a necessary evil, in the criminal justice system,²¹⁸ a few recent commentators have embraced the reality of jury nullification, arguing that the possibility of jury nullification plays an essential part in the jury's role as moral arbiters of the community,²¹⁹ and in one case actu-

214. David A. Pepper, *Nullifying History: Modern -Day Misuse of the Right to Decide the Law*, 50 CASE W. RES. L. REV. 599 (2000) (discussing jury's right to nullify).

215. *National Prohibition Cases*, 253 U.S. 350 (1920) (holding the Eighteenth Amendment was lawfully proposed and ratified and therefore must be respected).

216. For an overview of the history of prominent instances of jury nullification, see Aaron T. Oliver, *Jury Nullification: Should the Type of Case Matter?*, 6 KANSAS J. L. & PUB. POL'Y 49 (1997) (discussing jury nullification on historical and current through 1996 cases).

217. It should be noted here that any allegations of jury nullification must remain mere allegations as long as the actual deliberations of juries are not available for dissection by academics and other commentators. Although the cases mentioned are among those often cited as examples of jury nullification, and are often so perceived in the public mind, there is really no way of knowing what prompted a jury's acquittal in any given specific circumstances.

218. See, e.g., Robert E. Korrach & Michael J. Davidson, *Jury Nullification: A Call for Justice or an Invitation to Anarchy*, 139 MIL. L. REV. 131 (1993) (arguing that a court should inform the jury "of its power to acquit the accused when the members cannot in good conscience support a guilty verdict), *United States v. Dougherty*, 473 F.2d 1113, 1130 (D.C. Cir. 1972) (noting that "the pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and the instructions of the judge," while refusing to give a nullification instruction in the trial of the "D.C. Nine").

219. See, e.g., David N. Dorfman & Chris K Iijima, *Fictions, Fault and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861 (1995) (arguing jury nullification is correctly used to stop application of a law that would be unjust to a particular defendant); Oliver, *supra* note 216, at 49 (1997) (arguing jury nullification is "a mechanism by which a jury refuses to apply the law in situations where strict application of the law could lead to an unjust or inequitable result."); Gerard N. Magliocca, *The Philosopher's Stone: Dualist Democracy and the Jury*, 69 U.

ally calling for education of jurors in minority communities about their potential role in resisting, through active jury nullification, the increasing trends toward disproportionate incarceration of African-American men in the United States.²²⁰ Other voices calling for a more active role for jury nullification in criminal law come from the opposite end of the political spectrum, including the right-wing militia movement.²²¹

Jury nullification exists when juries ignore evidence presented to them and reach a verdict contrary to that evidence, which verdict cannot then be set aside due to the Constitutional prohibition on double jeopardy.²²² The Texas Court of Criminal Appeals in Texas, in reviewing Penry's second death sentence in 1995, referred to the trial judge's instruction that if the jury found,

when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant²²³

that the jury should then answer one of the special issues in the negative,²²⁴ as a "nullification instruction."²²⁵ In so describing the trial court's instruction, the appellate court appears to be recognizing that, in order to give effect to the mitigating evidence of Penry's mental retardation, organic brain damage and child abuse, the jury would have to dis-

COLO. L. REV. 175, 179 (1998) (believing juries act as "signalers" of constitutional changes); Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury about Mandatory Sentencing Consequences*, 96 COLUM. L. REV. 1232, 1233 (1995) ("[The] criminal jury, through its nullification power, is intended to function . . . as a political check on the government's power to promulgate unpopular laws and overly harsh punishments.")

220. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L. J. 677 (1995) (arguing that the doctrine of jury nullification allows African-Americans to decide what kind of conduct by African-Americans should be punished under the white-controlled criminal justice system); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 305-06 (1996) (arguing some juries use nullification to acquit based on improper considerations such as race); W. William Hodes, *Reform: The Lawyers: Lord Brougham, The Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1975 (1996) (arguing that coaxing a jury nullification can be a tactical defense weapon).

221. Jury nullification also played a role in the civil rights movement, when all-white Southern juries systematically refused to convict white defendants of the crime of murdering Black victims. Butler, *supra* note 226, at 705.

222. Leipold, *supra* note 220, at 1 ("The crucial feature of nullification is the jurors' decision to acquit even though they believe the defendant committed acts that met the statutory definition of the crime."). Most civil cases cannot be the subject of effective jury nullification, then, because of the court's power to order a judgment as a matter of law. FED. R. CIV. P. 50.

223. Penry v. State, 903 S.W.2d 715, 765 (1995).

224. *Id.*

225. *Id.*

regard the objectively “true” answer to one of the three special questions, and willfully give a false answer to that question.²²⁶

Justice Thomas’ dissent in *Penry II*²²⁷ indicates that Thomas is satisfied with the constitutionality of the jury instruction given in the second trial.²²⁸ Thomas believes that this instruction is adequate because it meets the mandate of *Penry I* that jurors be given an opportunity to give mitigating effect to Penry’s evidence of mental retardation and organic brain damage.²²⁹ Thomas argues that the applicable standard under *Penry I* is “whether a reasonable juror could have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence.”²³⁰ Thomas, quoting the appellate court’s opinion, refers to the jury instruction in Penry’s second trial as a “nullification instruction,”²³¹ apparently conceding that, in order to give effect to a juror’s “view that Penry did not deserve” a death sentence, that juror would have to “nullify” the answer to at least one of the three Texas statutory special issues.²³² Thomas’ reasoning is surprising given the fact that the Supreme Court has never expressly approved of a jury instruction that instructed a juror that she possessed the power to return a verdict contrary to her objective view of the facts of the case.²³³ Nullification instructions are in fact routinely denied in state and federal courts²³⁴ despite the best efforts of some activists to intro-

226. Assuming, arguendo, that the “true” answer to all three special questions is in the affirmative; that is, that Penry acted deliberately with the reasonable expectation of killing his victim; that does pose a continuing threat to society, and that his actions were not a reasonable response to any provocation offered by the victim.

227. See *Penry II* (joined by Justices Scalia and Rehnquist).

228. *Penry II*, 532 U.S. 782, 121 S. Ct. 1910, 1924 (2001).

229. *Id.* at 1925 (Thomas, J., dissenting).

230. *Id.*, quoting *Penry I*, 492 U.S. 30, 326 (1989).

231. *Penry II*, 532 U.S. 782, 121 S. Ct. at 1931.

232. That is, the juror would have to answer one of the question “no,” despite a reasonable and objective belief that the answer was, in fact, “yes.”

233. Cf. *Sparf v. United States*, 156 U.S. 51, (1895) (although criminal juries have the power to nullify the law, there is not positive right to nullify) (generally cited as the basis for the virtually universal rule that jury nullification instructions are not to be given in criminal cases.)

234. See *United States v. Gonzalez*, 110 F.3d 936, 947-48 (1997) (refusal of instruction requiring jury to decide stipulated elements of offense; “jury nullification, while it is available to a defendant, is only a power that the jury has and not a ‘right’ belonging to the defendant[.]”); *Thomas v. Clark*, 2000 U.S. Dist. LEXIS 3983, *10 (N. D. Calif. 2000)(rejection of a “constitutional right to have the jury informed of the penal consequences of its verdict or its prerogative to exercise jury nullification.”; jury nullification “is by no means a right or something that a judge should encourage[.]”); *United States v. Edwards*, 101 F.3d 17 (2d Cir. 1996) (holding defendant did not have a right to a jury nullification instruction); *United States v. Powell*, 955 F.2d 1206 (9th Cir. 1992) (holding federal defendants are not entitled to a jury nullification instruction); *United States v. Simpson*, 460 F.2d 515 (9th Cir. 1972) (holding the trial court did not err in refusing to instruct the jury that it had the power to acquit the defendant regardless of the evidence of his guilt); *United*

duce legislation that would mandate jury instructions informing jurors of this power.²³⁵ Indeed, courts have removed jurors on the grounds that the juror intended to engage in nullification.²³⁶

Mirroring the near-universal rejection of jury nullification instructions by courts is an attitude by commentators and scholars which is, at best, highly skeptical of jury nullification instructions. Commentators frequently decry the “anarchy” that would result if jurors were expressly authorized to disregard the black letter law in rendering their verdicts,²³⁷ even while expressing admiration for those jurors in the past who have defied the positive law in cases of conscience. In fact, the holdout juror is a staple of popular mythology and imagery of the judicial process.²³⁸ Thomas’ opinion, joined by Scalia and Rehnquist, does not explicitly address the inconsistencies between the “nullification instruction” in *Penry II* and the rejection of nullification instructions in other contexts, raised by his offhand approval of the Texas appellate court’s characterization of the jury instruction as a “nullification instruction,” but the issues remain. Does this mean that three Justices are ready to allow nulli-

States v. Lucero, 895 F. Supp. 1421, 1426 (D. Kan. 1995) (“the court should not encourage the jurors to violate their oath by refusing to apply the law”); United States v. Dougherty, 473 F.2d 1113, 1132 (D.C. Cir. 1972) (“The existence of an unreviewable and unreversible power in the jury to acquit . . . has for many years co-existed with the legal practice . . . upholding instructions to the jury that they are required to follow the instructions of the court on all matters of law.”); *contra Id.* at 114, (Bazelon, J., dissenting) (“On remand the trial judge should grant defendants’ request for a nullification instruction.”); United States v. Edwards, 1996 U.S. App. LEXIS 38757, *7 (1996) (“While juries have the power to ignore the law in their verdicts, courts have no obligation to tell them they may do so.”); United States v. Hardy, 46 M.J. 67 (C.A.A.F. 1997) (“holding the fact that a jury has the power to nullify does not equate to a legal right.”); People v. Cline, 60 Cal. App. 4th 1327, 1335 (1998) (“Because juries have no right to disregard the court’s instructions, it is inappropriate to instruct juries on their power to nullify.”); State v. Willis, 218 N.W.2d 921, 924 (Iowa 1974) (“It is one thing to recognize jurors have the power not to do their duty and quite another to tell them they have a right not to do their duty.”); State v. Bjerkaas, 472 N.W.2d 615 (Wis. 1991) (holding juries have the power of nullification but nullification is not a defendant’s right); State v. Ragland, 519 A.2d 1361, 1373 (N.J. 1986) ([W]e believe that the last thing a jury needs is a reminder of its ability to let the guilty go free); State v. Maloney, 490 A.2d 772, 775 (N.H. 1985) (holding that jury nullification is not a right of the defendant).

235. Compare grassroots, generally right-wing efforts to pass informed jury acts requiring such notification. *Contra* Indiana and Maryland, whose state constitutions permit the jury to decide the law as well as the facts. Even in those states, however, explicit jury nullification instructions are not given. Ronald J. Bacigal, *Putting the People Back Into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359 (1994).

236. Elizabeth Haynes, Note, *United States v. Thomas: Pulling the Jury Apart*, 30 CONN. L. REV. 73 (1998) (noting the Court held “that a juror may be removed only where the juror was engaged in deliberate misconduct”).

237. Korrach & Davidson, *supra* note 224 (arguing without proper instruction, the court is open to anarchy); Leipold, *supra* note 220 (costs of jury nullification outweigh benefits.)

238. TWELVE ANGRY MEN (1957); MARK SALZMAN, THE SOLOIST (1994).

fication instructions in criminal trials? This literal reading of the dissenting opinion is highly unlikely. What, therefore, was the intent of the dissenting Justices in explicitly approving of an instruction requiring the use of a form of nullification of the positive law?

Jury nullification is a form of legal fiction, although it is a fiction engaged in on a case—by-case basis by jurors rather than on a systematic basis by courts. Jury nullification can take the form of general verdicts of “not guilty” in the teeth of the evidence.²³⁹ In cases where special verdicts are required of juries, a jury may nonetheless nullify the law by arriving at answers to those special issues which are apparently not supported by the objective facts. This is the sort of jury nullification Thomas apparently argues for in his dissent. It is enough, the argument goes, that the jury has a safety valve for its distaste at application of the death penalty to a mentally retarded offender. This approach is flawed because it does not provide the juror with a legitimate avenue for exercise of her moral voice, as required by Supreme Court precedent. The exercise of jury nullification is generally seen as an extraordinary remedy for police or prosecutorial misconduct or for unjust application of the law.

C. *The Argument Against Legal Fiction in Capital Sentencing*

O'Connor's majority opinion in *Penry II* focuses on the clash between the jury instructions mandated by Texas state law, which required the jury to determine as a matter of fact whether the defendant (1) acted deliberately; (2) remains a threat to society; and (3) acted unreasonably in response to any provocation from the victim,²⁴⁰ and the jury instructions arguably mandated by *Penry I*, which require the jury to take into account the mitigating evidence offered by the defense (here, evidence of Penry's profound mental retardation) which does not fit into any of the three statutorily-mandated categories. The argument is that a juror could reasonably find that Penry does not deserve to die (i.e., does not bear moral responsibility for the crime, for any of the reasons articulated in the history section), while still finding as a matter of fact that the answers to all three of the special issue questions are “yes.” The juror then suffers from a dilemma: Does she answer the special issues truthfully, and apply the death penalty in a manner in which society has for centu-

239. In the case of the general verdict, of course, it is impossible to look into the “black box” and know what truly motivated the jury to acquit; that is, to draw the line between honest reasonable doubt and intent to nullify the law.

240. See *supra* notes 120-26 and accompanying text.

ries agreed is meaningless or worse; or does she give effect to her moral judgment by answering a specific factual question untruthfully, thus arguably subverting the purpose of the jury system. O'Connor's opinion refuses to allow Texas to force the jury into an inconvenient fiction (of nondangerousness, or of reasonable provocation) in order to give effect to the societal distaste for execution of the mentally retarded.²⁴¹ O'Connor's opinion requires a certain level of legal realism; that is, a concern for what juries are actually thinking, to be expressed in the jury verdict. In Fuller's terms, O'Connor has rejected²⁴² the legal fiction that the mentally retarded capital defendant is not dangerous, or not likely to commit crimes in the future, or acted with reasonable provocation.

V. CONSTITUTIONAL SUFFICIENCY POST-*PENRY II*

A. *Requirements of Penry II*

Post-*Penry II*, is there anything more in the substantive law than after *Penry I*? Given that Texas had amended its death penalty statute even before *Penry II* was decided,²⁴³ the new Texas statute would probably pass muster before a Supreme Court that is unwilling to draw a bright line against execution of the mentally retarded. The requirements under current death penalty jurisprudence post-*Penry II*, then, seem to be that:

(1) Juries must be given guidance and objective standards about how to apply the law to death penalty defendants, in order to reduce the level of irrational bias and prejudice in death penalty cases. A jury cannot be, as juries historically were, a "black box" with no guidance or predictability.

(2) Juries cannot be denied the opportunity to express their reasoned moral response to the case as a whole, apart from the statutory criteria set forth in state-mandated jury instructions and special issues. A

241. As further evidence of this societal distaste, note that even in Texas, when Gov. Rick Perry refused to sign a bill which would have allowed judges to determine mental retardation, and thus ineligibility for the death penalty, he did so not on the grounds that execution of the mentally retarded is justifiable, but on the grounds that the determination of mental retardation is the proper purview of the jury under Texas' current statutory scheme (for explication of that scheme, see notes 117-32 and accompanying text).

242. Fuller distinguished between rejection of a legal fiction, which occurs when the fictional statement is eliminated from the legal process; and redefinition, which occurs when the meaning of the words used in the formulation of the fiction is changed to remove the element of falsity from the statement. LON FULLER, LEGAL FICTION 20-21 (1967).

243. An Act Relating to Jury Instructions and Changes in Capital Cases, 1999 Tex. Sess. Law Serv. ch.140 (Vernon) (effective Sept. 1, 1999) (codified at TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon 2001)).

jury must have the opportunity to assess the case in a holistic manner, and may not be circumscribed with blinders that allow it to focus only on a fixed set of objectively determinable issues.

(3) Juries cannot be required to falsify their judgment as to objectively determinable issues in order to express their reasoned moral response to the case and to the defendant. The Texas system's failure in *Penry II* was that, in order to allow the defendant to escape the death penalty, the jurors would have had to answer one of the special issues untruthfully. It is not sufficient that the jurors receive what Thomas called a "nullification instruction" - that they know that falsification of one or more of the special issues will result in the defendant's being sentenced to prison rather than death.

The issue then becomes how a state balances the holistic, reasoned moral response required by *Penry II* with the guided discretion required by *Furman* and its progeny. Clearly, a statute which left the imposition of the death penalty to the unfettered discretion of the jurors would not be acceptable to the Court. The Court does seem to be saying, however, that as to the defendant's mitigating circumstances, the jury's fetters must be significantly loosened, if not cast off altogether. The jury must have the opportunity to find that the mitigating circumstances offered by the defendant justify the rejection of the death penalty, regardless of the fact that the special issue questions must, as a matter of fact and evidence, be answered in a way that points to the death penalty. This is a rejection of formalism in death penalty jurisprudence, and it is a rejection of the legal fiction that is the refuge of formalism (i.e., the legal fiction is a convenient device to allow just results in particular cases without the appearance of change in the law).

B. Texas response to Penry

Texas law has changed since *Penry*'s second trial. Current Texas law has dispensed with the three statutory "special issues"²⁴⁴ in favor of a two-tier jury determination system. Under this system, a jury in the sentencing phase of a capital trial must first, after submission of all evidence, including mitigating evidence,²⁴⁵ determine:

244. See supra notes 120-21 and accompanying text.

245. Evidence "as to any matter that the court deems relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty" may be admitted at the sentencing phase. TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(a) (Vernon, WESTLAW through Reg. Sess. 2001).

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(2) in cases in which [the defendant is found guilty as an “accomplice”], whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.²⁴⁶

A jury may return an answer of “yes” only if unanimous, and may return an answer of “no” only if ten (10) or more jurors agree.²⁴⁷ If the jury answers both issues “yes,” the jury must then proceed to consider “whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.”²⁴⁸ In making this determination, the jury may only return an answer of “yes” if ten or more jurors agree.²⁴⁹ If the jury returns a verdict of “yes” on the first two issues, and “no” on the third, the court must sentence the defendant to death.²⁵⁰ Any other jury determination results in a sentence of life imprisonment.²⁵¹

Under current Texas law, then, jurors have at least two post-conviction chances to take into account the mental state of an offender in determining whether to impose the death penalty. They might determine that, due to an offender’s diminished mental capacity, he will in all probability not constitute a danger to society in the future, and answer the first issue “no.” This possibility is left open by the fact that the stat-

246. TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(b) (Vernon, WESTLAW through Reg. Sess. 2001). A jury must be charged that in determining the answers to these questions, it “shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant’s background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.” TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(d)(1) (Vernon, WESTLAW through Reg. Sess. 2001)

247. TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(d)(2) (Vernon, WESTLAW through Reg. Sess. 2001)

248. TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(e)(1) (Vernon, WESTLAW through Reg. Sess. 2001)

249. TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(f) (Vernon, WESTLAW through Reg. Sess. 2001)

250. TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(g) (Vernon, WESTLAW through Reg. Sess. 2001)

251. TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(g) (Vernon, WESTLAW through Reg. Sess. 2001)

ute expressly requires the court to charge the jury to take into account all evidence, including evidence as to the background and character of the defendant.²⁵² Notwithstanding the instruction to take account of the defendant's background and character,²⁵³ this remains a factual question, and surely would not alone pass Constitutional muster under *Penry II*. The jury has not yet had an opportunity to express its "reasoned moral response" to the defendant.²⁵⁴

If the jury finds that the defendant is likely to be a threat to the community in the future, the jury nonetheless has a second opportunity to spare the defendant's life. The jury must now determine whether there are sufficient mitigating circumstances to warrant the imposition of a life sentence rather than the death penalty. In making this determination, the jury is to consider not only "the circumstances of the offense, [and] the defendant's character and background"²⁵⁵ but also the "personal moral culpability" of the defendant.²⁵⁶ Strengthening the emphasis on moral culpability, the court must instruct the jury that for purposes of this question, "mitigating evidence [shall] be evidence that a juror might regard as reducing the defendant's moral blameworthiness."²⁵⁷ Further, as with the first issue, jurors need not agree on the particular evidence justifying a "yes" answer to the moral culpability question.

Taken as a whole, Texas' most recent revision of its death penalty procedures seems to pass muster under a reasonable reading of *Penry II*. Although jurors still might choose to express their moral response to Penry's mental disability by answering "no" to the question regarding his future dangerousness, thus engaging in "nullification" of an objective question,²⁵⁸ this is not the only vehicle for the jurors' moral judgment. Jurors can acknowledge Penry's likely future dangerousness as well as

252. TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(d)(1) (Vernon, WESTLAW through Reg. Sess. 2001)

253. That jurors might use this question as an opportunity to decide that the defendant is not morally blameworthy is bolstered by the statutory language which provides that "members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under Subsection (b)[.]" TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(d)(3) (Vernon, WESTLAW through Reg. Sess. 2001)

254. *Penry II*, 532 U.S. 782, 121 S. Ct. 1910, 1920 (2001).

255. TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(e)(1) (Vernon, WESTLAW through Reg. Sess. 2001)

256. TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(e)(1) (Vernon, WESTLAW through Reg. Sess. 2001)

257. TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(f)(4) (Vernon, WESTLAW through Reg. Sess. 2001)

258. Assuming, arguendo, the fact of Penry's future dangerousness. Indeed, there is no way to prevent this possibility, just like the possibility of nullification acquittals. See *supra* notes 220-46 and accompanying text.

his (arguendo) diminished moral blameworthiness due to his mental condition, which seems to satisfy O'Connor's concerns.²⁵⁹

C. Do "Evolving Standards of Decency" Mandate Reversal of Penry I?

1. McCarver/Atkins

In the near future, the Court may reconsider its earlier determination²⁶⁰ that the "cruel and unusual punishment" prohibition of the Eighth Amendment does not categorically prohibit the execution of the mentally retarded. On March 26, 2001, the day before hearing oral arguments in *Penry II*, the Court granted certiorari in the case of Ernest McCarver, a North Carolina man sentenced to death for a 1987 killing.²⁶¹ McCarver's appeal, unlike *Penry II*, placed the Eighth Amendment issue squarely before the Court by asking whether "national standards have evolved such that executing a mentally retarded man would violate" the Constitution.²⁶²

On August 4, 2001, North Carolina Governor Michael F. Easley signed into law Session Law 2001-346: An Act to Provide That a Mentally Retarded Person Convicted of First Degree Murder Shall Not Be Sentenced To Death.²⁶³ That bill provides in substance that "[n]otwithstanding any provision of law to the contrary, no defendant who is mentally retarded shall be sentenced to death."²⁶⁴ Mental Retardation is defined by the statute as "[s]ignificantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning, both of which were manifested before the age of eighteen (18)."²⁶⁵ Consistent with modern behavioral sciences' understanding of mental retardation, this definition involves three prongs: 1) impaired intellectual function; 2) impaired adaptive function; and 3) manifestation during the developmental period, before the age of major-

259. There is some question raised by the provision in the Texas law that the 1999 amendment only applies to crimes committed after its effective date. What procedure will the Penry court apply on remand for re-sentencing?

260. *Penry I*, 492 U.S. at 302, 340 (1989).

261. *McCarver v. North Carolina*, 121 S. Ct. 1401 (2001).

262. Laurie Asseo, *U.S. Supreme Court to Review Death Penalty for Retarded* (March 26, 2001), at <http://www.law.com>.

263. An Act to Provide that a Mentally Retarded Person Shall Not Be Sentenced to Death, 2001 N.C. SESS. LAWS S. L. 2001-346 (WESTLAW 2001).

264. N.C. GEN. STAT. § 15A-2005(b) (WESTLAW through S. L. 2001-346).

265. N.C. GEN. STAT. § 15A-2005(a)(1)(a) (WESTLAW through S. L. 2001-346).

ity.²⁶⁶ Although absolute bans on the execution of the mentally retarded have been criticized on the grounds of difficulty of applying the label “Mental Retardation” to a wide spectrum of human developmental impairments,²⁶⁷ the North Carolina law attempts to mitigate this difficulty by defining the component parts of its definition of mental retardation. “Significantly subaverage general intellectual functioning” is defined as “[a]n intelligence quotient of seventy (70) or below,”²⁶⁸ and “[s]ignificant limitations in adaptive functioning” is defined as “[s]ignificant limitations in two or more of the following adaptive skill areas:” communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills an work skills.” Thus, substituting the definitions for their operative terms in the statutory definition of mental retardation, North Carolina deems to be mentally retarded an individual with an IQ of seventy (70) or below and significant limitations in two or more adaptive skill areas, both of which manifested before the age of eighteen (18).

Under the new North Carolina law, a capital defendant who wants to raise mental retardation as a defense to the imposition of the death penalty has three chances to do so. First, the defendant may by motion request the court to hold a pretrial hearing for the purpose of determining the defendant’s mental condition.²⁶⁹ The statutory language is unclear whether this hearing is mandatory or discretionary with the trial judge; the statute provides that, upon motion by the defendant, “the court *may* order a pretrial hearing to determine if the defendant is mentally retarded.”²⁷⁰ However, the statute adds that “The court *shall* order such a hearing with the consent of the State.”²⁷¹ This may mean that the court has discretion to order the hearing, unless the State and defendant concur that a hearing is appropriate, in which case the hearing becomes mandatory. At this hearing, the defendant has the burden of proving mental retardation by clear and convincing evidence.²⁷² If the defendant carries this burden, the State is barred from seeking the death penalty against the defendant.²⁷³ If the defendant does not carry his burden of proof, the case may continue as a capital case.

266. DSM-IV, *supra* note 39, at 40-46.

267. See *supra* notes 40-55 and accompanying text.

268. N.C. GEN. STAT. § 15A-2005(a)(1)(c) (WESTLAW through S. L. 2001-346).

269. N.C. GEN. STAT. § 15A-2005(c) (WESTLAW through S. L. 2001-346). Such a motion must be supported by “appropriate” affidavits.

270. § 15A-2005(c) (emphasis added).

271. § 15A-2005(c) (emphasis added).

272. § 15A-2005(c).

273. *Id.* § 15A-2005(c).

The next opportunity for the defendant to raise the issue of his mental capacity²⁷⁴ arises after the guilt phase of the trial, at the sentencing hearing. If the defendant chooses to introduce evidence of his mental retardation, the court must submit a special issue to the jury prior to the jury's consideration of aggravating and mitigating evidence.²⁷⁵ Presumably, this is meant to insulate the jury's determination of mental capacity from potentially prejudicial evidence of the aggravating or mitigating factors present in the case. At this stage, the defendant has the burden of proving his mental retardation by a preponderance of the evidence.²⁷⁶ If the defendant carries his lessened burden at this stage of the proceedings, the defendant is sentenced to life imprisonment without further consideration of aggravating or mitigating factors.²⁷⁷

If the defendant fails to convince either judge or jury of his mental retardation at either stage of the proceedings discussed to this point, his final chance comes in the sentencing phase of the trial, with the introduction of mitigating evidence.²⁷⁸ Consistent with Supreme Court guidance requiring unfettered jury consideration of mitigating circumstances, a negative finding as to mental retardation on the jury's special issue²⁷⁹ does not preclude the jury from considering the defendant's evidence as to his mental condition as mitigating evidence, or from the defendant arguing that, even if the jury does not agree that his mental condition rises to the level of mental retardation as defined in the statute, his mental condition should still be the grounds for a sentence of life imprisonment rather than death.²⁸⁰ As with other types of mitigating or aggravating evidence that might be presented as part of a sentencing determination, there is no formal burden of proof at this stage; rather, the jury is to express its "reasoned moral response" to the totality of the evidence placed before it.

The pretrial and sentencing formalities of the new North Carolina law apply to trials beginning on or after October 1, 2001.²⁸¹ However, North Carolina included a provision in its statute by which those tried and/or convicted before October 1, 2001 can obtain the benefit of this limitation retroactively. New Section 51A-2006 of the N.C Code provides that a defendant convicted of capital murder and sentenced to

274. Assuming failure of the defendant's pretrial motion.

275. N.C. GEN. STAT. § 15A-2005(e) (WESTLAW through S. L. 2001-346).

276. N.C. GEN. STAT. § 15A-2005(f) (WESTLAW through S. L. 2001-346).

277. § 15A-2005(e).

278. N.C. GEN. STAT. § 15A-2005(g) (WESTLAW through S. L. 2001-346).

279. § 15A-2005(e).

280. § 15A-2005(g).

281. 2001 N.C. SESS. LAWS S. L. 2001-346 § 4 (WESTLAW 2001).

death may seek “appropriate relief from the defendant’s death sentence”²⁸² by filing a motion with the court on or before January 31, 2002, or within 120 days of the termination of the defendant’s trial (for cases pending on October 1, 2001).²⁸³ At a hearing on such a motion, the defendant has the burden of proving beyond a reasonable doubt²⁸⁴ that the defendant was mentally retarded at the time of the crime for which the death penalty was imposed.²⁸⁵

Upon being informed of the passage and implementation of the North Carolina law, the Supreme Court dismissed the writ of certiorari in the case of *McCarver v. North Carolina*²⁸⁶ as moot. At the same time, however, the Court granted certiorari in the case of *Atkins v. Virginia*.²⁸⁷

On August 16, 1996, Daryl Renard Atkins kidnapped and murdered Eric Nesbitt during the course of a robbery.²⁸⁸ Atkins was convicted of the murder²⁸⁹ and sentenced to death.²⁹⁰ During the penalty phase of the trial, Atkins introduced evidence to show that he had an IQ of 59 and was “mildly mentally retarded.”²⁹¹

The jury was instructed, consistent with Virginia law, that the prosecution bore the burden of proving beyond a reasonable doubt that either Atkins would likely commit future violent crimes “that would constitute a continuing serious threat to society”²⁹² or that Atkins’ conduct in committing the offense for which he was convicted was “outrageously or wantonly vile, horrible or inhuman.”²⁹³ The jury was not instructed that if it found neither of the statutory aggravating factors to be proven beyond a reasonable doubt, it was required to return a sentence of life imprisonment.²⁹⁴ The jury found that both aggravating factors had been proven, and imposed a sentence of death.²⁹⁵

282. Appropriate relief would presumably be an order commuting the defendant’s sentence to life imprisonment rather than death.

283. N.C. GEN. STAT. § 15A-2006(2) (WESTLAW through S. L. 2001-346).

284. N.C. GEN. STAT. ANN. § 15A-1420 (WEST through S. L. 2001-450).

285. N.C. GEN. STAT. § 15A-2006(1) (WESTLAW through S. L. 2001-346).

286. *McCarver v. North Carolina*, 122 S. Ct. 22 (2001).

287. *Atkins v. Commonwealth*, 534 S.E.2d 312 (V. 2000), *cert. granted*, 122 S. Ct. 24 (2001).

288. *Atkins v. Commonwealth*, 510 S.E.2d 445, 449-450.

289. *Id.* at 453.

290. *Id.*

291. *Id.* at 451 (according to the testimony of Dr. Evan Stuart Nelson, a forensic psychologist).

Dr. Evans conceded that neither competency nor insanity were issues in Atkins’ case. *Id.*

292. VA. CODE ANN. § 19.2-264.4(C) (LEXIS through 2001 Legis. Sess.).

293. VA. CODE ANN. § 19.2-264.4(C) (LEXIS through 2001 Legis. Sess.).

294. *Atkins*, 510 S.E.2d at 453.

295. Although Atkins’ first death sentence was remanded due to an error in the jury instructions, the second jury on remand imposed a death sentence based on its finding that the prosecution had carried its burden of proof with respect to both statutory aggravating factors. *Atkins v. Com-*

On appeal to the Virginia Supreme Court, Atkins argued that his low IQ score and mild mental retardation prohibited his execution, on the grounds that the punishment would be disproportionate to the crime. According to Atkins, the Commonwealth of Virginia had never before imposed a death sentence on a defendant with such a low IQ score.²⁹⁶ The Supreme Court of Virginia affirmed the sentence on Sept 15, 2000, noting that under *Penry I*, mental retardation alone does not justify commutation of a death sentence; that the evidence presented to the jury was in conflict regarding Atkins' mental retardation, and that "the jury was instructed to consider any evidence in mitigation of the offense, and the jury obviously found that Atkins' IQ score did not mitigate his culpability for the murder."²⁹⁷ Accordingly, the court concluded, "considering 'both the crime and the defendant,' we cannot say that Atkins' sentence of death is excessive or disproportionate to sentences generally imposed" in comparable cases.²⁹⁸ Two Justices, dissenting, wrote that "it is indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. . . . [T]he execution of a mentally retarded individual rather than the imposition of a sentence of life without the possibility of parole is excessive."²⁹⁹

Should the Court decide that developments since *Penry I* justify a reversal of its opinion in that case that insufficient national standards exist to prohibit such executions, the issues raised by *Penry II* will be supplemented by new issues and difficulties, such as the difficulty of drawing a line at the point where mental disability justifies exemption from capital punishment.

2. Evolving Standards of Decency

In the twelve years since *Penry I*, other courts have had occasion to consider whether, as *Penry I* anticipated, the evolving standards of decency³⁰⁰ have progressed to the point where the Eighth Amendment should bar execution of the mentally retarded, and other state legislatures have had the opportunity to respond to *Penry I*'s implicit invitation to consider the issue.³⁰¹

monwealth, 534 S.E.2d 312, 314 (Va. 2000).

296. *Id.* at 318.

297. *Id.* at 320.

298. *Id.* at 321.

299. *Id.* at 325 (Koontz and Hassell, J., dissenting).

300. *Trop v. Dulles*, 356 US 86, 101 (1958).

301. For discussion of the evolving standards of decency on this issue, see generally Entzeroth,

As discussed above,³⁰² the United States is the only western democracy which allows the execution of the mentally retarded. In 1989, only Georgia, Maryland and the federal Anti-Drug Abuse Act of 1988³⁰³ prohibited the execution of the mentally retarded. Today, at least thirteen (13) states³⁰⁴ and the federal government³⁰⁵ specifically prohibit the execution of mentally retarded criminal defendants.³⁰⁶ Further, public opinion polls consistently show that, even when there is strong support for the death penalty in general, that support does not extend to the execution of the mentally retarded.³⁰⁷ At least one state Supreme Court justice has concluded that there is a post-*Penry I* consensus against execution of the mentally retarded.³⁰⁸

There is certainly evidence that the national consensus is not unanimous. The Court of Criminal Appeals of Oklahoma, in *Lambert v. State*,³⁰⁹ affirmed a death sentence imposed on a mentally retarded man, on the ground that Oklahoma statutes only prohibit execution for insane, as opposed to mentally retarded, convicts.³¹⁰ On June 17, 2001, the Governor of Texas vetoed a bill which would have prohibited execution of the mentally ill by making a determination of mental illness a matter for the court, not the jury.³¹¹ However, the Governor justified that veto

supra note 55 (concluding that the current Court is unlikely to find a national consensus to exist), Duplar, *supra* note 6 (suggesting that the Court's methodology of looking primarily to state legislatures for "objective" evidence of a national consensus is flawed, and that other methodologies, including public opinion polling, show a clear national consensus against execution of the mentally retarded).

302. *Supra* sec. II., C.

303. 102 Stat. 4390 (1988).

304. Maryland, Georgia, Arkansas, Colorado, Indiana, Kansas, Kentucky, Nebraska, New Mexico, New York, Tennessee, Washington

305. In addition to the Federal Anti-Drug Abuse Act of 1988, the Violent Crime Control and Law Enforcement Act of 1994 now provides that "A sentence of death shall not be carried out upon a person who is mentally retarded." 18 U.S.C.A. § 3596(c) (West, WESTLAW through S. L. 2001-346).

306. *See supra* note 36. In addition, as of the end of 2000, thirteen jurisdictions have abolished the death penalty. Bureau of Justice Statistics, *supra* note 4.

307. Duplar, *supra* note 6. *See also* Haynes, *supra* note 243 at 93 (1986 survey in Florida revealed only 28% favored execution of those with a history of mental illness, and only 12% favored execution in cases of mentally retarded inmates.)

308. *People v. Smithy*, 978 P.2d 1171, 1224 (Cal. 1999) (Mosk, J., concurring) (Today, . . . I would hold that the cruel and unusual punishments clause now prohibits execution of a sentence of death against mentally retarded persons."), *But see* Entzeroth, *supra* note 55, at 934-38 (current Court unlikely to find a consensus based on *Penry I* methodology.)

309. 984 P.2d 221 (1999).

310. *Id.* at 246 (Lumpkin, J., concurring).

311. Proclamation by the Governor of the State of Texas regarding HB236 (June 17, 2001) (*at* http://www.governor.state.tx.us/current_events/veto.htm). *See also* Jane Elliott and Matt Schwartz, *Penry Vetoes Execution Exemption, Says Decision on Retarded Should Remain With Jury*, HOUS.

by claiming that “this bill is not about whether to execute the mentally retarded. We do not now execute the mentally retarded.”³¹² Governor Perry claimed that the existing Texas statutory scheme,³¹³ which asks jurors to determine whether any mitigating evidence, including evidence of mental retardation or capacity, justifies the imposition of a sentence of life imprisonment rather than death, amounted to a de facto ban on the execution of the mentally retarded. Although other observers of the history of Texas’ death penalty jurisprudence might disagree with the Governor, it is worthy of comment that the Governor of arguably the most pro-death penalty state in the country felt the need to justify his veto and make clear that he was not expressing support for the execution of the mentally retarded. Even in light of the veto, this may be additional evidence of the emergence of a national consensus.

VI. CONCLUSION

Perry marks a partial rejection of the formalism of the legal fiction in capital sentencing cases, and a step toward realization of the promise of individualized consideration and “rational moral response” to capital crimes. Ultimately, a legal fiction is merely a bridge to real reform of unjust laws or unjust applications of the laws. It remains to be seen whether the Supreme Court will act to bring about real reform in the near future and bring the United States into parity with the rest of the developed world in humane treatment of its mentally ill offenders.

CHRON., June 18, 2001 at 1, available at 2001 WL 23608508; Jane Elliott, *More Heat Hits Gov. Perry on Retarded-Execution Bill*, HOUS. CHRON., June 16, 2001, at 1, available at 2001 WL 3028486; Jane Elliott, *Prosecutors Urge Perry to Veto Bill to Ban Execution of Retarded*, HOUS. CHRON. June 7, 2001 at 35, available at 2001 WL 3026514; John Williams, *Perry Threatens Veto of Execution Bill, Protections for Mentally Retarded Already in Place, Governor Says*, HOUS. CHRON., May 31, 2001 at 25, available at 2001 WL 3024705.

312. Proclamation by the Governor of the State of Texas regarding HB236 (June 17, 2001) ([at http://www.governor.state.tx.us/current_events/veto.htm](http://www.governor.state.tx.us/current_events/veto.htm)). See also Jane Elliott and Matt Schwartz, *Perry Vetoes Execution Exemption, Says Decision on Retarded Should Remain With Jury*, HOUS. CHRON., June 18, 2001 at 1, available at 2001 WL 23608508; Jane Elliott, *More Heat Hits Gov. Perry on Retarded-Execution Bill*, HOUS. CHRON., June 16, 2001, at 1, available at 2001 WL 3028486; Jane Elliott, *Prosecutors Urge Perry to Veto Bill to Ban Execution of Retarded*, HOUS. CHRON. June 7, 2001 at 35, available at 2001 WL 3026514; John Williams, *Perry Threatens Veto of Execution Bill, Protections for Mentally Retarded Already in Place, Governor Says*, HOUS. CHRON., May 31, 2001 at 25, available at 2001 WL 3024705.

313. See *supra* notes 170 and 242 and accompanying text.