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Brief for The American Association on Mental Retardation, The ARC of the United States, The American Orthopsychiatric Association, Physicians for Human Rights, The American Network of Community Options and Resources, The Joseph P. Kennedy, Jr. Foundation, The Judge David L. Bazelon Center for Mental Health Law, and The National Association of Protection and Advocacy Systems as Amici Curiae

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No. 00-8727

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IN THE

SUPREME COURT OF THE UNITED STATES

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ERNEST PAUL McCARVER,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

_____

On Writ of Certiorari to the Supreme Court of North Carolina

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BRIEF OF

THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE ARC OF THE UNITED STATES, THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, PHYSICIANS FOR HUMAN RIGHTS, THE AMERICAN NETWORK OF COMMUNITY OPTIONS AND RESOURCES, THE JOSEPH P. KENNEDY, JR. FOUNDATION, THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, AND THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici curiae are national and international disability and medical-human rights organizations (more fully described in Appendix A) with particular interest in the field of mental retardation. A number of these organizations have appeared as *amici curiae* in this Court in cases involving mental retardation and the criminal justice system, including *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry*), and *Penry v. Johnson*, No. 00-6677 *(Penry II*).

SUMMARY OF ARGUMENT

The American people first became aware of the issue of mental retardation and the death penalty around the time of this Court's decision in *Penry*. In the intervening years, all available forms of evidence demonstrate an unmistakable national consensus that people with mental retardation should not be executed.

Petitioner, as well as other supporting *amici*, will present this Court with the compelling clinical, moral, and constitutional reasons why such executions violate the Eighth Amendment. *Amici* American Association on Mental Retardation (AAMR) *et al.* offer a somewhat different perspective. Since the Court's evaluation of whether a national consensus exists is essentially an evidentiary question, this brief will provide detailed information concerning the emergence of that consensus over the last decade and a half.

The evidence is clear. It shows virtually no support for executing people with mental retardation among legislators, either State or Federal. It shows almost no prosecutors

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[1] This brief was written entirely by counsel for *amici*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. Blanket consent to *amici* by the parties has been received by the Court.

or judges willing to state that they believe individuals with mental retardation should receive the death penalty. It shows governors exercising their clemency powers to prevent execution when they come to understand that a defendant has mental retardation. And in an extraordinary array of public opinion surveys, spread across the country, taken by different organizations over a substantial span of time, it shows overwhelming opposition among the American people to the execution of any person who has mental retardation. A clear majority of those Americans who support the death penalty oppose its use for defendants who have mental retardation.

The principal reason for this remarkable level of agreement is our shared moral judgment as a Nation that individuals with mental retardation do not have the requisite level of culpability to warrant execution. This moral sentiment has been expressed by legislators and others in various ways, but the clarity of the message is unmistakable.

Opposition to the execution of people with mental retardation has been reinforced by awareness of the fact that a defendant's disability increases the likelihood that a factually innocent defendant may be executed. The specter of such an intolerable injustice has strengthened the resolve of a Nation that already opposed capital punishment for these defendants on moral grounds.

This Court has applied the Punishments Clause of the Eighth Amendment sparingly. Where, as here, there is no identifiable support for a punishment in the country, but the system proves itself incapable of reflecting the national consensus, the Court should prohibit the practice as the cruel and unusual punishment that it is.

ARGUMENT

I. THERE IS A CLEAR AND UNMISTAKABLE NATIONAL CONSENSUS AGAINST THE IMPOSI-

TION OF THE DEATH PENALTY ON PERSONS WITH MENTAL RETARDATION.

The American people oppose executing individuals with mental retardation. The emergence of this consensus, while distinctive in its political manifestations, is fully consistent with this Court's teachings about the Punishments Clause of the Eighth Amendment.

The Punishments Clause prohibits not only those penalties that were unacceptable at common law, but also those that offend contemporary standards. By interpreting the Eighth Amendment in this fashion, the Court assures that its protections are not limited to practices that were deemed barbarous in the eighteenth century, *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989), but are also reflective of the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (opinion of Warren, C.J.).

The Court has not exercised this function of monitoring and reflecting the evolution of societal values lightly. Judicially imposed limitations derived from the Punishments Clause are the exception to the general rule that issues of criminal sanctions are normally determined by legislative bodies. But the Eighth Amendment's function has never been limited to merely ratifying legislative judgments. Rather, it is to assure that a national consensus about punishment, where one exists, is reflected in judicial sentencing.

Pursuant to this Eighth Amendment mandate, the Court has been particularly careful not to identify a national consensus under circumstances where the evidence of the public's sentiment is ambiguous or potentially untrustworthy. Thus in *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989), the majority declined to ground an Eighth Amendment holding on then-existing evidence of a national consensus against the execution of people with mental retardation that included

only two enactments by state legislatures.[2] Likewise, in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), a majority refused to approve the execution of defendants younger than 16 years old in the face of ambiguity about how many States tolerated the practice, or had directly considered the issue. *See Id.* at 851 (O'Connor, J., concurring in the judgment).

A principal component of that exercise of caution has been the focus on legislative enactments around the country. The Court has placed emphasis on such enactments as "an objective indicator of contemporary values upon which we can rely." *Penry*, 492 U.S. at 335. The Court has frequently adverted to the pattern of relevant statutes in determining whether a national consensus exists. *See, e.g., Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion by White, J.); *Enmund v. Florida*, 458 U.S. 782 (1982); *Ford v. Wainwright*, 477 U.S. 399 (1986). The focus on enacted legislation has been explained as deriving both from general principles of Federalism and from the Eighth Amendment's textual reference to the characteristic of a prohibited punishment as "unusual." *Stanford*, 492 U.S. at 369-70.

But the Court has never indicated that state laws *were* the consensus. Rather, it has emphasized that such laws constitute important *evidence* relevant to the question of whether such a consensus exists.

This distinction is crucial. The consensus envisioned by the Eighth Amendment is a consensus of the American *people*, not a consensus of the States.[3] The States and their leg-

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[2] When the Court announced its judgment, it identified Georgia as the only State that had enacted such a statutory prohibition. During the pendancy of the case, Maryland enacted a statute, and the Court's opinion was modified to reflect laws in both States.

[3] Thus, analysis of the weight to give States that have rejected the death penalty altogether, *see generally Stanford*, 492 U.S. at 370 n. 2, must turn

islators are proxies, by which the shared judgment of the American people becomes manifest.

The Court's explanation for its reliance on the enactments of legislatures is consistent with this analysis. Statutes provide "objective evidence of the country's present judgment concerning the acceptability" of punishment in a particular circumstance. *Coker*, 433 U.S. at 593. The Court has described legislative activity as "the clearest and most reliable objective evidence of contemporary values," *Penry*, 492 U.S. at 331, and "an objective indicator …upon which we can rely." *Id.* at 335. The attributes of legislation that commend it to the Court as a measuring device for public opinion are the political accountability of the legislators who are charged with the task of reflecting and codifying public sentiment, and their "considered judgment," *Thompson*, 487 U.S. at 852 (O'Connor, J., concurring in the judgment). Thus, the *process* as much as the product gives legislation its unique value for Eighth Amendment purposes. How legislative bodies have considered and approached the issue of the potential execution of people with mental retardation is as illuminating of the national consensus as the number of States that have enacted statutes.

Issues implicating the Punishments Clause arise in different procedural and political contexts. For example, some issues, such as the adoption of a novel method of execution, arise only when a legislature affirmatively addresses them *de novo*. *See generally In re Kemmler*, 136 U.S. 436 (1890). Other questions, like the continued acceptability of an old method of execution, can arise either from a legislature's conscious choice to retain it or from legislative inattention. *See generally Provenzano v. Moore*, 744 So.2d 413, 418

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on their evidentiary value in the issue of national sentiment, rather than simply excluding their citizens from that evaluation.

(Fla. 1999) (Harding, C.J., specially concurring), *cert. denied*, 530 U.S. 1255 (2000).

Similarly, the reasons for a legislature's action or inaction may vary, even on the same issue. For example, a State that abandoned the electric chair because the people were disturbed by reports of an execution that resulted in protracted pain to the condemned inmate might be viewed differently from a facially identical statute in another State that abandoned it because a different means of execution was less expensive. These and other contextual differences appropriately influence the Court's interpretation both of legislative enactments and of the absence of enactments in other legislatures.

This Court has never suggested that its evaluation of statutory enactments involved mere arithmetical calculation. In the vernacular, the Court's function is not a simple matter of "bean-counting."[4] Rather, it is a cautious and sober judicial exercise of ascertaining the Nation's sentiment on moral questions of the utmost gravity. As such, it cannot be reduced to a simplistic mechanical formula.

Claims for a national consensus must be evaluated on the basis of the available evidence, and that evaluation has been undertaken cautiously. The Court's wariness concerning such claims reflects both its deference to the judgments of legislative bodies, and a concern to avoid mistaking a transitory or ephemeral sentiment for a true national consensus. *See generally Thompson*, 487 U.S. at 854-55 (O'Connor, J., concurring in the judgment).

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[4] The fact that the Court serves as more than just a tally sheet for state laws is reflected in the fact that the degree of unanimity among the States sufficient to satisfy the Punishment Clause's requirements has not been reduced to a simple number. *Compare Enmund v. Florida*, 458 U.S. 782, 789 (1982) *with Coker v. Georgia*, 433 U.S. 584, 596 (1977).

There is a strong and unmistakable consensus in the United States today against executing individuals with mental retardation. This brief presents the evidence that both reveals and confirms that national agreement. In doing so, *amici* will explore the distinctive features of the development and manifestations of this particular consensus.

A. The American People Only Became Aware Of Mental Retardation As A Death Penalty Issue In Recent Years.

Certain issues involving capital punishment are obvious to any legislature contemplating the enactment of a death penalty statute, while others are not. For example, it is clear that any State adopting the penalty will know that it must specify the crimes for which the penalty may be imposed and select a method of execution. Somewhat less obvious would be whether it is necessary for the legislature to set a minimum age below which the penalty cannot be imposed. With regard to the potential execution of very young persons, a legislature might not envision that a jury would impose such a sentence, but, on the other hand, the issue might be within legislators' anticipation because it was a topic that other States had addressed. And in recent years, the topic of age was more likely to have come to legislators' attention because of this Court's rulings in *Thompson* and *Stanford*.

The relevance of mental retardation to the death penalty was not a matter of public or legislative awareness or concern prior to fifteen years ago and, as a result, it was difficult to speak of a national consensus on the issue at that time. No legislative body had addressed the question. There were virtually no public debates on the topic.[5] Professional and

[5] The only earlier examples were editorials a year earlier involving Morris Mason. *See, e.g.*, Editorial, St. Paul Pioneer Press-Dispatch, July 5, 1985.

disability advocacy organizations had taken no positions on the topic. The matter was not on the radar screen, at either the national or state level, until the dispute that arose in Georgia surrounding the imminent execution of Jerome Bowden in 1986.

Bowden was identified as having mental retardation when he was 14 years old.[6] Following protests against his impending execution, the Board of Pardons and Paroles granted a stay of his execution.[7] Bowden was then evaluated by a single psychologist selected by the state Board of Pardons and Paroles.[8] Despite the fact that the testing produced an IQ within the range of mental retardation, the Board of Pardons and Paroles lifted the stay of execution. Jerome Bowden was executed the following day.[9]

The dispute engendered by the Bowden case in Georgia began to enter the national consciousness shortly thereafter. The American Association on Mental Retardation, the nation's oldest and largest professional organization in the field of mental retardation, formulated and adopted a position in January, 1988. The Arc, the largest volunteer and advocacy organization in the field, adopted a position statement in the same year. The American Bar Association adopted a position statement opposing the death penalty for individuals with mental retardation in February, 1989. When Congress reinstated the Federal death penalty in 1988, it included a provision barring the execution of any individual with mental retardation, and, in 1989, Maryland became only the second state to legislate on the topic. Therefore, it was not surpris-

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[6] Dan Baum, *Parole Board Grants Stay of Execution, Tests for Bowden*, Atlanta Const., June 18, 1986, at A10.

[7] Bill Montgomery, *Bowden's Execution Stirs Protest*, Atlanta Journal, Oct. 13, 1986, at A1.

[8] Jim Galloway and Tracy Thompson, *Bowden Executed Day After 'Mildly Retarded' Ruling*, Atlanta Const., June 25, 1986, at A1.

[9] *Id.*

ing that when this Court considered *Penry* in the 1988 Term, it discovered only a modest amount of legislative activity on the subject.[10]

B. The National Consensus Against Executing Individuals With Mental Retardation Is Now Revealed In Legislative Enactments

Each State's legislative process has its own unique features, but the commonalities of how the mental retardation death penalty statutes were enacted provide important insights into the relationship between the consideration of these laws and public sentiment. *Amici* offer these observations to assist the Court's interpretation of the degree of consensus on this subject.

On many topics, the legislature's consideration of concrete proposals is preceded by efforts by interest groups to influence public opinion in the hopes of then mobilizing that

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[10] As the *Penry* decision noted, a number of other statutes made defendants' mental status potentially mitigating. 492 U.S. at 337 n.3. But, with one exception, these statutes do not give evidence of the legislature's consciousness of mental retardation as an issue in capital cases. A number of States recognized defendants acting under "extreme mental or emotional disturbance," *e.g.*, Laws of April 8, 1977, ch. 338, § 4, 1977 Mont. Laws 1041, 1043 (current version at MONT. CODE ANN. § 46-18-304 (b) (1992)), or defendants who "because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of conduct or to conform to the requirements of law," *e.g.* Laws of July 1, 1981, S.B. No. 1 §1-2929.04(B)(3), 1981 Ohio Laws 1, 16 (current version at OHIO REV. CODE ANN. § 2929.04(B)(3) (Anderson, 1996 & Supp. 1998). In each instance, these statutes merely recited provisions from the Model Penal Code, § 210(4)(b) and (g), which, in turn, reflected factors related to the defense of insanity but insufficient to warrant acquittal. The exception occurred in 1987 when the Maryland legislature, after the Bowden case, modified "mental disease or defect" to the explicit "mental disorder or mental retardation." Laws of May 14, 1987, ch. 418, S.B. 973, 1987, Md. Laws 2107 (current version at MD. ANN. CODE OF 1957, Art. 27, § 75A (a)(2) (Michie 1996)).

sentiment to influence legislators. On other subjects, no such public relations effort is undertaken and the process begins with the legislature's consideration of a proposed bill. Alan Rosenthal, *The Third House: Lobbyists and Lobbying in the States* 171-77 (2d ed. 2001).

In none of the States where mental retardation death penalty legislation has been considered was there a public information effort preceding the introduction of the bill. Public opinion polling had indicated such strong and consistent agreement with the proposition, that it was clear that none was needed.[11] The "public sentiment" expressed in polls and resolutions, which the Court noted in *Penry*, 492 U.S. at 335, was readily apparent at the state level.[12]

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[11] Appendix B contains a review of all polls known to *amici* that have been taken on this subject, both at the state and national levels.

This Court has declined to base an Eighth Amendment hol ding on the results of public opinion polling, particularly if it has not led to substantial codification. *Penry*, 492 U.S. at 335. This caution is understandable, given that measurement of opinions may be transitory and the results of polling may be influenced by the sampling techniques employed or the phraseology of the questions. But this does not mean that professional public opinion surveys are factually irrelevant to the question of whether a consensus exists on a particular punishment. For example, if a substantial number of States outlawed a practice, but consistent public opinion polling indicated widespread indifference on the subject, it might undermine the presumption that the enactments reflected strong public sentiment. By contrast, where scientific polling by a wide variety of political scientists and other professional surveyors, employing a range of formulations of the issue and surveying a number of jurisdictions over a substantial period of time, produce uniform results, it is surely relevant to any inquiry about public sentiment. The results included in Appendix B are remarkably consistent over time, geography, and particulars of polling techniques.

[12] For example, Maryland's legislation was preceded by polling that indicated that 82% of its citizens opposed the death penalty for persons with mental retardation. *See* Appendix B.

Only two States had addressed the topic by 1989. Following the *Penry* decision, however, interest among legislators and disability advocates increased dramatically. Kentucky and Tennessee enacted statutes the following year. In the decade following this Court's decision, there was an average of one new State enactment per year.[13] In 2001, so far, five more legislatures—Arizona, Florida, Texas, Missouri, and Connecticut—have passed laws protecting these individuals from the death penalty.[14] *Amici* know of no other topic on which so many legislatures have acted to limit any criminal penalty in such a short time.[15]

As a result, the proposition that people with mental retardation should not face the death penalty met with widespread acceptance among legislators. The only real opposition to the proposed legislation came from some prosecutors, but their argument was almost never to oppose the general prin-

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[13] When Congress expanded the Federal death penalty in 1994, it again included a provision that prohibited any individual with mental retardation from being sentenced to death or executed. Federal Death Penalty Act of 1994, 18 U.S.C. § 3596 (c) (1994).

[14] In Texas, as of this writing, both houses of the legislature have passed a bill prohibiting the execution of defendants with mental retardation. The bill has not yet been signed by Governor Perry, whose spokesperson stated that the Governor believed that "this issue should wait until the United States Supreme Court rules in the *Penry* case and a similar North Carolina case." Armando Villafranca, *Historic Execution Bill Passes; Mentally Retarded to Get Protection*, Houston Chron., May 27, 2001, at A1. Governor Perry has since stated, "[o]ne of the clear messages I'm not sure is getting out of our state is that we do not execute the mentally retarded in Texas." Janet Elliott, *Governor Accused of Ducking Moral Issue; Perry Says State Doesn't Execute Retarded*, Houston Chron., June 1, 2001, at A31.

[15] By comparison, since this Court's decision in *Stanford*, decided the same day as *Penry*, only one state legislature has raised the threshold age for the death penalty. MONT. CODE ANN. § 45-5-102 (1999).

ciple. Rather, the objection most frequently heard by legislators, and echoed by some, was not that people with mental retardation were appropriate subjects for the death penalty, but rather that legislation was not needed in that particular State to prevent such executions. In State after State, a frequent objection to the proposed law was that it was unnecessary because prosecutors would never seek the death penalty for an individual whom they viewed as having mental retardation. [16]

Secondary concerns in the legislative process involved practical considerations about the proposed law's implementation. Legislators sought assurances that the definition specified in the bill would encompass only people who actually had mental retardation, as it is commonly understood.[17] In response to that concern, all the States adopted, almost without variation, the AAMR definition of mental retardation to which this Court adverted in *Penry*.[18] Lawmakers were

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[16] "No mentally retarded person ever has been executed in Colorado, said Representative Pat Sullivan, R-Greeley, who contended the measure was unnecessary." Steve Lipsher, *House OKs Ban on Execution of Mentally Retarded Murderers*, Denver Post, Apr. 6, 1993, at 4B; "'We haven't executed any mentally retarded people in Nebraska—nobody's showed me we have—so whatever we're doing, it's working,' said Sen. Kate Witek of Omaha." Robynn Tysver, *Ban of Executions of Retarded Passes First Round*, Omaha World-Herald, Apr. 7, 1998, at News 17.

[17] "'I think members of the Texas Legislature and the citizens of Texas agree that we should not execute the mentally retarded,' said Sen. Todd Staples, R-Palestine. 'But I do believe there is a legitimate difference on how we measure that and how we gauge a person's mental culpable state.'" Kathryn A. Wolfe, *Senate OKs Death Penalty Bill; Would Ban Execution of Mentally Retarded*, Houston Chron., May 16, 2001, at A1.

[18] "Persons who are mentally retarded are described as having 'significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period," 492 U.S. at 308 n. 1, quoting American Association on

already familiar with this definition; they had employed it in numerous statutes outside the criminal justice system in a wide range of contexts. Indeed, the same definition is found in statutes enacted in most States. *See* Appendix C. Additionally, legislators frequently inquired about the diagnostic process, and sought assurances that legislation would not create contentious "battles of the experts." As this Court has concluded, diagnosis of mental retardation does not involve

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Mental Deficiency (now Retardation) (AAMR), *Classification in Mental Retardation* 1 (H. Grossman ed. 1983).

AAMR has since reformulated the definition for clinical dia gnostic purposes, modifying the language somewhat in ways that do not alter the scope of coverage of statutes involving people with mental retardation:

> Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992); *accord* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. text revision 2000). No substantive change in scope resulted from the greater specificity in requiring onset by the age of 18 rather than during the developmental period (which had been interpreted as age 18 in some States and 21 in some others). Similarly, the increased specificity of "limitations in adaptive skill areas" simply made more concrete the concept of "deficits in adaptive behavior." The other principal change in AAMR's new classification manual is the abandonment of the previously recognized taxonomy within mental retardation of subcategories of "mild," "moderate," "severe," and "profound" mental retardation. AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 34 (9th ed. 1992); James W. Ellis, *Decisions By and For People with Mental Retardation: Balancing Considerations of Autonomy and Protection*, 37 Vill. L. Rev. 1779, 1781-82, 1784 n.10 (1992).

Missouri is the only State whose statute is based on the 1992 version of the AAMR definition; all other States employ the 1983 version.

the kind of subjective clinical judgments that are frequently encountered in litigation involving mental illness.[19]

Finally, legislators sought reassurance that the statute they were considering would not be vulnerable to unmeritorious claims based on feigned disability or malingering. Several solicited expert testimony in legislative committees on the likelihood of malingering mental retardation. *See generally* Brief of *Amici Curiae* American Association on Mental Retardation et al., *Cooper v. Oklahoma*, 517 U.S. 348 (1996) (No. 95-5207) at 17-18.[20] As a result of these con-

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[19] "[M]ental retardation is easier to diagnose than is mental illness. That general proposition should cause little surprise, for mental retardation is a developmental disability that becomes apparent before adulthood. By the time the person reaches 18 years of age the documentation and other evidence of the condition have been accumulated for years." *Heller v. Doe*, 509 U.S. 312, 321-22 (1993) (citations omitted).

[20] "Rep. Matt Boatright, a Sedalia Republican, said [about Missouri legislation] he was concerned that new classes of defendants would argue they were mentally retarded to escape execution." Tim Hoover, *Bill on Capital Punishment Advances to Senate*, Kansas City Star, Mar. 9, 2001, at B2. *Compare* "Backers of the [Washington State] bill disagreed, saying that mental retardation is virtually impossible to fake and that without the law, a retarded person could be executed if the crime were heinous enough." *Disabled Kept Off Death Row*, Seattle Times, Apr. 19, 1993, at B4.

When the United States Senate discussed an omnibus crime bill in 1990, Senators Joseph Biden and Alan Simpson debated the potential for malingering mental retardation. Senator Simpson stated, "As the language currently stands, the most heinous, devious, clever and deceptive butchers on death row will be able to fake mental retardation to avoid the only penalty which is appropriate for their acts of butchery." 136 Cong. Rec. S6873 (May 23, 1990) (Senator Simpson). Senator Biden responded, "[F]aking mental retardation is a lifetime's work…You do not fake mental retardation. You either are or you are not." 136 Cong. Rec. S6881 (May 23, 1990) (Senator Biden). The Senate voted to retain the mental retardation protection, although the bill to which that provision was attached did not pass. 136 Cong. Rec. S6910, (May 24, 1990).

cerns, all the States have chosen to place the burden of persuasion on the issue of mental retardation on the defendant, *cf. Medina v. California*, 505 U.S. 437, 455 (1992) (O'Connor, J., concurring in the judgment), and a few did so by an elevated evidentiary standard.[21] Some of the States also provided that the statute would only have prospective effect, but generally that accompanied a shared belief that no one under sentence of death at that time met the definition. Thus the retroactivity issue did not involve a choice to preserve the State's opportunity to execute anyone with mental retardation then on death row, but rather a concern not to invite unmeritorious postconviction challenges from current inmates for whom there had been no previous indication of mental retardation.[22]

The breadth and depth of the national consensus against executing individuals with mental retardation is evidenced by the consistency of enactments in different States,[23] and by the level of agreement in individual legislatures**.**[24]

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[21] *See, e.g.*, IND. CODE ANN. § 35-36-9-4 (b) (1998).

[22] For example, New Mexico adopted a prospective-only provision in 1991 with the understanding that the one individual then under sentence of death did not have any colorable claim to have mental retardation. By comparison, Nebraska in 1999 adopted a bill with no limitation on retrospective effect, and it was anticipated that two inmates might have such a claim, which proved to be correct. Angie Brunkow, *Clarence Victor No Longer Faces Death Penalty*, Omaha World-Herald, June 30, 1999, at News 1.

[23] Other differences among the statutes are primarily a matter of adapting the bills to the contours of criminal procedures in the individual States. (The only State in which this produced dramatically different procedures was Georgia, which grafted the mental retardation provision onto its existing "guilty but mentally ill" statute.) States also differed in whether they included an IQ score in the text of the legislation. But these apparent differences only addressed evidentiary presumptions, not the scope of the definition of mental retardation. *Compare* ARK. CODE ANN. § 5-4-618 (1993) (Intelligence quotient test score of 65 or below creates

C. States That Do Not Have Mental Retardation Statutes Do Not Undercut The Evidence Of The National Consensus.

The States that have enacted mental retardation statutes provide a remarkably consistent portrait of the consensus among their citizens on this subject. But there are also a substantial number of jurisdictions that have the death penalty but have not legislated in the area of mental retardation. It might be contended that the non-enacting States acquiesced in the execution of individuals with mental retardation, or were indifferent to the possibility.

However, evidence from those States that have not yet enacted a mental retardation provision is fully consistent with the consensus found in the States that have passed such statutes. The Court has previously been confronted with the dilemma of how to interpret state silence on the execution of young teenagers in *Thompson.* Here, the reasons for inaction

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rebuttable presumption of mental retardation) *with* S.D. CODIFIED LAWS § 23A-27A-26.2 (2000 Supp.) (Intelligence quotient test score above 70 is presumptive evidence that a defendant does not have mental retardation). The only other issue of major contention in a few States has been whether the determination of mental retardation should occur prior to the trial or following the verdict. Most States have opted for a pretrial determination, the more economical approach. Florida has recently chosen to make the determination after the trial, acquiescing in prosecutors' arguments that they should be able to death-qualify potential jurors. The Texas legislature recently approved somewhat similar procedures, albeit with opportunities to present the issue both to the jury and in a post-trial bench hearing. H.B. 236, 77th Leg., Reg. Sess. (Tex. 2001).

[24] Indeed, legislators have voted overwhelmingly in favor of provisions barring the execution of persons with mental retardation. *See* Appendix D.

by States have been somewhat different, but the evidence about their motivation is considerably clearer.[25]

Legislators in some of these States explicitly stated that they were persuaded that the potential for execution of an individual with mental retardation was not a practical problem in their State because prosecutors offered assurances that such a penalty would not be sought. For example, in Oregon, Clatsop County District Attorney Josh Marquis argued against a bill banning the execution of defendants with mental retardation: "[T]hat's a moot issue in Oregon because no prosecutor in the state has ever sought the execution of a mentally retarded person." Brad Cain, *Ban on Executing Retarded People Considered*, McMinnville (Ore.) News Register, Apr. 17, 2001 (internet edition).[26] In other instances, legislators were persuaded by prosecutorial assurances that since the State's law prohibited trying individuals who were incompetent to stand trial, *cf. Dusky v. United*

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[25] Discussion will focus on States that have given serious consideration to a mental retardation proposal. In a few other States, there have been no proposals, or perhaps a single legislator may have introduced a bill, but it was not pursued vigorously and did not receive serious attention in committees or on the floor of legislative bodies. These perfunctory introductions, which are commonplace in legislative bodies, reveal little about either legislative or public sentiment in those States.

Particular legal and political considerations also play a part in the decision about whether to pursue legislation seriously in a particular State. For example, California, a State with among the most favorable polling numbers in the nation, *see* Appendix B, presents a peculiar situation in that any amendment to its death penalty statute requires ratification in a statewide referendum, an exceedingly costly enterprise. In other States, such as New Hampshire, the legislative focus has been on retention of the death penalty itself rather than its scope.

[26] " 'We don't execute mentally retarded people,' [Harris County District Attorney Chuck] Rosenthal said." Mike Tolson, *A Deadly Distinction: Part IV; Death Penalty Reforms Sought; Life Without Parole Has Chance to Pass in this Legislature*, Houston Chron., Feb. 7, 2001, at A1.

States, 362 U.S. 402 (1960), and provided an insanity defense, an adequate safety net already existed that would assure that no one with mental retardation would ever face the potential of capital sentencing.[27] Whether these assurances were true or not is not relevant in this case. What matters here is that the legislators accepting these arguments were not supporting the execution of individuals with mental retardation.

Even States that did not have the death penalty when *Penry* was decided, but which have given it serious legislative consideration in the years since *Penry*, provide evidence of the breadth of the consensus on this issue. In Iowa, Minnesota, and Massachusetts, major legislative efforts were undertaken to adopt the death penalty. Each failed to win final approval, but it is noteworthy that each proposal had included a provision protecting people with mental retardation from capital sentencing.[28] (This is consistent with the fact that both of the States that have enacted the death penalty since *Penry*, Kansas and New York, have included mental retardation provisions in those statutes.) Taken together, these proposals indicate that legislators viewed protection of people with mental retardation as an essential part of an acceptable modern proposal regarding the death penalty.

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[27] "District attorneys said [North Carolina] state law already requires judges and juries to consider defendants' mental competence and mental problems in murder trials." Matthew Eisley, *Retarded Convicts at Core of Debate on Death Penalty*, News and Observer (Raleigh, N. C.), Apr. 12, 2001, at A3; "But Sen. Walter Dudycz (R-Chicago), a Chicago police detective and an assistant majority leader questioned the merits of the bill. 'They can't be sentenced to death if they don't possess the mental capacity to understand the crime.…That's how the judicial system works. To try to circumvent it doesn't make sense.'" Teresa Puente and Christi Parsons, *House Approves Limits on Death Penalty: Bill Bans Capital Punishment for Mentally Retarded*, Chi. Trib., Mar. 3, 2000, at Metro Chicago 1.

[28] H.F. 2, 76th Gen. Assem. (Iowa 1995); H.F. 4136, 81st Leg. Sess. (Minn. 2000); S.B. 1983, 1997 Gen. Court, Reg. Sess. (Mass. 1997).

This concerted legislative activity confirms the mounting evidence in public opinion surveys and other indicators that the American people oppose the execution of persons with mental retardation. It is not a new consensus; rather, it is abundant evidence of a consensus that has existed ever since the possibility of executing individuals with mental retardation first manifested itself roughly at the time of the *Penry* litigation. It is "public sentiment…find[ing] expression" in "objective indicator[s] of contemporary values." *Penry*, 492 U.S. at 335.[29]

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[29] Legislation, of course, is not the only possible evidence of agreement on a principle. Other indicators also reflect the consensus. Missouri Governor Mel Carnahan issued a commutation for death row inmate Bobby Lewis Shaw on the basis of his mental retardation in 1993. Gov. Mel Carnahan, Statement from the Governor on Johnny Wilson, Sept. 29, 1995, *cited in Wilson v. Lawrence County*, 154 F.3d 757, 759 (8th Cir. 1998). *See also At End of Term, Ohio Governor Commutes Death Sentences for Eight*, N.Y. Times, Jan. 12, 1991, § 1, at 12; Bill Miller, *DNA Test Could Lead to Man's Release: Death Row Inmate May Be Innocent of '82 Murder, Va. Officials Say*, Wash. Post, Oct. 26, 1993, at A1. Other governors have indicated they would grant clemency in mental retardation cases. "'I would never sign a death warrant for an individual who is mentally retarded.' [Florida Governor Jeb] Bush said." Orlando Sentinel, March 30, 2001 at C3.

In addition, while actions by individual prosecutors and by juries are difficult to quantify with precision, anecdotal evidence from around the country suggests that prosecutors often refrain from seeking the death penalty once a defendant's mental retardation has been ascertained. Evidence of mental retardation was not presented at the sentencing hearing of Arizona defendant Luis Mata, causing the prosecutor to comment, "Quite frankly, after reviewing these materials, I am shocked and upset that this information had not been presented.…Had I known this information, I would not have requested or pursued a death sentence." E.J. Montini, *The Lunacy of Killing The Retarded*, Ariz. Republic, Feb. 1, 2001, B1; *see also*, Dennis Byrne, *Commute Davis' Death Sentence*, Chi. Sun-Times, May 14, 1995, at 33 (two jurors would not have supported the death penalty for Girvies Davis if they had heard evidence during the trial about his mental retardation and illness). As to juries, while quantification in actual cases is difficult, both anecdotal evidence and social science studies point to mental retardation as among the strongest of mitigators. *See generally* Stephen P. Garvey, *Aggravation and Mitiga-*

The emergence of this political consensus has few, if any, parallels in the recent history of public attitudes toward crime and punishment. It is the product of a broadly shared *moral* consensus.

II. THE AMERICAN PEOPLE OPPOSE THE EXECUTION OF INDIVIDUALS WITH MENTAL RETARDATION BECAUSE THE PRACTICE OFFENDS OUR SHARED MORAL VALUES.

In reaching the conclusion that people with mental retardation should not be subjected to the death penalty, legislators, jurors, mental disability professionals, and ordinary citizens are making a moral judgment. That judgment, in turn, reflects their understanding of the condition of people with mental retardation, and their beliefs about how capital punishment should be implemented.

A. It Is Widely Recognized That The Culpability Of Defendants With Mental Retardation Is Reduced By The Effects Of Their Intellectual Disability.

Societal attitudes toward people with mental disabilities are undergoing substantial transformation. It is increasingly accepted that people with mental retardation can be productive, contributing citizens of their communities, and that their integration into those communities should be a goal of governmental policies. Longstanding patterns of "historic mistreatment, indifference, and hostility," *Olmstead v. L.C. ex rel. Zimring,* 527 U.S. 581, 608 (1999) (Kennedy, J., concurring in the judgment), are being confronted. But the hard realities of the limitations imposed by mental retardation, and the incomplete success of our society's attempts to provide necessary supports to all people with that disability, remain.

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tion in Capital Cases: What Do Jurors Think?, 98 Colum. L. Rev. 1538 (1998).

The recognition of those realities is the centerpiece of the consensus involved in this case.

This Court, too, has recognized that all people with mental retardation "have a reduced ability to cope with and function in the everyday world." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442 (1985). As *amici* wrote in *Penry*, "[t]his reduced ability is found in every dimension of the individual's functioning, including his language, communication, memory, attention, ability to control impulsivity, moral development, self-concept, self-perception, suggestibility, knowledge of basic information, and general motivation."[30] While there are variations among people with mental

[30] Brief *Amici Curiae* of American Association on Mental Retardation, et al., *Penry*, 492 U.S. 302 (1989) (No. 87-6177), and sources cited therein. Clinical literature published since *Penry* has confirmed those conclusions. *See, e.g.*, AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* (9th ed. 1992); *Manual of Diagnosis and Professional Practice in Mental Retardation* (John W. Jacobson & James A. Mulick eds., 1996); Robert M. Hodapp, Jacob A. Burack, & Edward Zigler, *Developmental Approaches to Mental Retardation: A Short Introduction*, in *Handbook of Mental Retardation and Development* 3 (Jacob A. Burack, et al. eds., 1998); Katherine A. Loveland & Belgin Tunali-Kotoski, *Development of Adaptive Behavior in Persons with Mental Retardation*, in *Handbook of Mental Retardation and Development* 521 (Jacob A. Burack, et al. eds., 1998)(adaptive behavior); Thomas L. Whitman, *Self-Regulation and Mental Retardation*, 94 A.J.M.R. 347 (1990)(impulse control); Johnny L. Matson & Virginia E. Fee, *Social Skills Difficulties Among Persons with Mental Retardation, Handbook of Mental Retardation* 468 (Johnny Matson & James Mulick eds., 1991)(same); L.W. Heal & C.L. Sigelman, *Response Biases in Interviews of Individuals with Limited Mental Ability*, 39 Intell. Disability Research 331 (1995)(acquiescence); Edward Zigler & Robert M. Hodapp, *Behavioral Functioning in Individuals with Mental Retardation*, 42 Ann. Rev. Psychol. 29, 43 (1991)(outer-directedness); Harvey N. Switzky, *Mental Retardation and the Neglected Construct of Motivation*, 32 Educ. and Training in Mental Retardation and Developmental Disability 194 (1997)(extrinsic versus intrinsic motivation and relationship to social deprivation); Josephine C. Jenkinson, *Factors Affecting Decision-Making by Young Adults with Intellectual Disabilities*, 104 A.J.M.R. 320 (1999)(learned helplessness); Judith Cockram, Robert Jackson & Rod Underwood, *People with an Intellectual and Developmental Disability*

retardation, all share these basic disabilities from childhood and throughout their lives.

Few legislators considering proposals on this topic had immersed themselves in the details of the clinical literature before making their decisions,[31] nor had many voters whose opinions were being reflected. But what they understood both instinctively and from their life's experiences pointed to the same conclusion; the execution of an individual with mental retardation is morally unacceptable.[32]

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and the Criminal Justice System: The Family Perspective, 23 J. Intell. & Developmental Disability 41 (1998)(propensity to hide disability); S.E. Szivos & E. Griffiths, *Group Processes Involved in Coming to Terms with a Mentally Retarded Identity*, 28 Mental Retardation 333 (1990)(same); *The Criminal Justice System and Mental Retardation: Defendants and Victims* (Ronald W. Conley, Ruth Luckasson & George N. Bouthilet eds., 1992); James R. Dudley, *Confronting the Stigma in Their Lives: Helping People With A Mental Retardation Label* (1997).

[31] As is typical in the legislative process, sponsors of bills are the ones who most fully immerse themselves in the subject matter, while members of the committees of referral (most frequently Judiciary or Criminal Justice committees) heard testimony, including expert testimony from mental disability professionals. Legislators who did not serve on those committees relied on committee members and often asked them questions, most frequently regarding the definition of mental retardation, in floor debate.

[32] This inescapable conclusion is evidenced by the following small sample of statements by governmental officials and editorial writers:

- "[Georgia] Sen. Harrill L. Dawkins (D-Conyers), a supporter of the legislation, called it 'historically brutal' to execute the mentally retarded, …" A.L. May, *Proposal to Ban Death Sentences for Retarded Fails*, Atlanta Journal & Const., Feb. 2, 1988, at A14.

- "The Georgia Attorney General, Michael Bowers, who opposed an earlier version of the legislation, said the final product was 'progressive and a step forward in explicitly recognizing we are not going to impose the death penalty on persons who are men-

tally retarded.'…The Fulton County District Attorney, Lewis Slaton, said his concern during the debate over the law was not about banning the execution of mentally retarded people. 'What we've always been concerned about is that we are leery of changing the law because it means that every person on death row can now raise another ground,' he said." Associated Press, *Georgia to Bar Executions of Retarded Killers*, N.Y. Times, Apr. 12, 1988, at A26.

· "State Sen. Howard A. Denis (R-Montgomery) said that there is now a retarded inmate on Maryland's death row and there have been cases of retarded people being put to death. It is 'barbaric' and 'uncivilized,' Denis said." Jo-Ann Armao, *Md. Panel Revives Death Penalty Bill; Measure Would Bar the Retarded From State's Gas Chamber*, Wash. Post, Mar. 4, 1989, at B3.

· "'I think people are willing to examine the ethical considerations of executing mentally retarded people,' said [Illinois State Senator John] Cullerton. 'I think taking the ultimate punishment when someone is mentally retarded is just not right. Or necessary.'" Ken Armstrong and Steve Mills, *Death Penalty in State Faces New Challenge; Ban Urged for Mentally Retarded Defendants*, Chi. Trib., Feb. 6, 2000, at News 1.

· "'I am an ardent supporter of capital punishment,' said [Nevada Assembly Speaker Richard] Perkins, the deputy chief of the Henderson Police Department. 'This is not an anti-death penalty bill. It is a procedure for the death penalty when it is appropriate.' Perkins added he has met with many families of murder victims and none of them wants to go forward with the death penalty against a mentally retarded person….The bill was introduced by Assemblywoman Sheila Leslie, D-Reno, who questioned the morality and ethics of executing mentally retarded people." Ed Vogel, *Capital Punishment: Bill to Protect Mentally Retarded Passes*, Las Vegas Review-Journal, Apr. 25, 2001, at B4.

· "By passing legislation to ban the execution of the mentally retarded, the Texas Legislature proved that there can be compassionate justice…. If the defendant is found to be mentally retarded by either the jury or the judge, life imprisonment is the maximum penalty. This is a strong, morally responsible plan that the overwhelming majority of Texans support. Since the death penalty was ruled constitutionally permissible in 1976, 35

offenders with mental retardation have been executed nationwide. Texas leads the way, having executed six. Around the globe this makes Texas look barbaric and concerned with revenge, not justice." Texas State Senator Rodney Ellis, *The Hard-Line Punishment Texans Don't Support*, N.Y. Times, June 2, 2001, at A13.

- "And [Virginia] Del. Frank Hargrove, R-Hanover, who heads the Joint Republican Caucus, has submitted a bill to abolish capital punishment. Hargrove, a lawmaker since 1982, says he is a longtime supporter of the death penalty but 'I've never really been satisfied I was doing the right thing.' He says he has now decided that the risk of executing an innocent man is too great, and that life without parole is sufficient punishment for even the most heinous crimes. The [Earl] Washington case, he says, 'points up the possibility of awful mistakes.'" Bill Sizemore, *Fixing the Flaws; Virginia Came So Close to Executing an Innocent Man*, Virginian-Pilot, Jan. 23, 2001, at A1.

- "Almost every Georgian understands that it is wrong to kill people who may not be fully responsible for their actions." Editorial, *Executing the Retarded Still Wrong*, Atlanta Journal & Const., Feb. 6, 1988, at A16.

- "Yet even Texans who strongly support the death penalty must see the moral offense in killing the retarded." Editorial, *Texas Should Reform Services, Sentences for Mentally Retarded*, Dallas Morning News, Nov. 15, 2000, at 4J.

- "Executing those who are mentally retarded—even if they have committed horrendous murders—strikes many people, ourselves included, as repugnant, as an act of purposeless inhumanity." Editorial, *Don't Execute the Retarded*, Rocky Mountain News, Mar. 28, 2001, at 40A.

- "The state legislatures that condone these executions ought to take a second look, too. Even if the practice can pass as constitutional, it raises serious questions about the kind of society we are and should aim to be." Editorial, *Killing the Retarded*, Commercial Appeal (Memphis, Tenn.), Mar. 28, 2001, at A8.

- "Executing the mentally retarded is an act of unalloyed barbarism, totally devoid of human compassion." Editorial, *Executing Retarded Is Cruel*, Denver Post, Apr. 1, 2001, at G4.

Part of this understanding is that mental retardation is a substantial disability for every individual who has it. This disability circumscribes intellectual functioning and learning in ways that directly limit culpability. Legislators understood, or came to understand, that no one claimed that mental retardation categorically meant that the defendant was entitled to acquittal on the basis of his disability.[33] But since the death penalty is reserved for the most culpable individuals, the limitations imposed by the disability are, as this Court found in *Penry*, quintessentially mitigating.[34]

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[33] "'The bottom line is, if you believe people who are mentally retarded should be punished, but shouldn't get the death penalty, you'll vote for this bill,' said [Colorado Rep. Shirleen Tucker (R-Lakewood)]." Steve Lipsher, *House OKs Ban on Execution of Mentally Retarded Murderers*, Denver Post, April 6, 1993, at 4B; "'It doesn't mean you are going to get out free. You are going to be locked up for life,' [Texas House sponsor Rep. Juan Hinojosa] said." *Nation in Brief*, Wash. Post, May 24, 2001, at A09; "Execution of these pitiful souls does nothing for society that life imprisonment could not accomplish." *Not a Reason to Execute*, Denv. Post, Aug. 8, 2000, at B8.

[34] "Rep. Mike Wilson, D-Rapid City, said it makes no sense to execute mentally retarded people because they are incapable of the premeditated intent, cold-blooded ruthlessness and depravity that justify the death penalty. 'Let's make sure the punishment fits the criminal.'" Chet Brokaw, *House Committee Endorses Ban on Executing Mentally Retarded*, Press & Dakotan on the Web (Yankton, S.D.), Feb. 1, 2000, at ¶ 4 (internet edition); Florida legislator Richard Mitchell remarked, "'I am not saying that they are not responsible for their actions. It's just that they don't have that level of understanding' that is necessary for the death penalty to either avenge a crime or serve as a deterrent." *Don't Execute the Retarded*, The Ledger (Lakeland, Fla.), Mar. 30, 2001, at A16; "'You don't execute people who don't know what they are doing,' said Rep. Gloria Tanner, D-Denver." Steve Lipsher, *House OKs Ban on Execution of Mentally Retarded Murderers*, Denver Post, Apr. 6, 1993, at 4B; "[T]he ultimate penalty can hardly be called justice when it is inflicted on someone who is no more able to understand his actions and control his behavior than a young child." Stephen Chapman, *The Moral Equivalent of Executing Children*, Chi. Trib., Jan. 14, 1996, at C19; "[T]he ultimate

B. It Is Widely Recognized That The Disability Of Mental Retardation Is Not A Condition That Is, In Any Sense, The Defendant's Fault, Or Something For Which He Is Responsible.

Some conditions may appropriately be considered as mitigating evidence in capital trials even though they involve some voluntary act by the defendant. For example, intoxication at the time of the offense or drug addiction may reduce culpability despite the fact that they involved defendant's own choice. By contrast, mental retardation is never the result of an individual's voluntary choice, and thus is a condition for which he does not bear personal responsibility.[35]

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penalty should be reserved for those who can comprehend why they are going to die." *Questionable Execution*, Fort Worth Star-Telegram, Nov. 16, 2000, at Metro 10. *See also* Gene R. Nichol, *There's No Case for Executing the Retarded*, News and Observer (Raleigh, N.C.), Feb. 25, 2001, at A29

[35] In *Penry*, the Court noted that some individuals with mental retardation have had access to extraordinary special education and habilitation. *Penry*, 492 U.S. at 338. In the experience of *amici*, that does not describe any of the individuals who have been tried on capital charges. The fact that these are individuals whom the system has failed, and in a sense we as a society have failed, is not their fault either. *See, e.g., Letters from the People*, St. Louis Post-Dispatch, July 17, 1993, at 7B. One of the facts common to people with mental retardation is that they are, particularly in the developmental period, more dependent on others, and especially schools and other public and private agencies, for the achievement of their full abilities. Likewise, whether an individual child receives that assistance is not a matter of the individual's choice. *See* Jim Yardly, *Bush to Decide on Stay of an Inmate's Execution*, N.Y. Times, Aug. 17, 1999 at A10 (quoting a lead editorial in the Dallas Morning News). Additionally, the clinical literature indicates that there is a vastly higher incidence of violent abuse against persons with developmental disabilities than against nondisabled individuals. Harvey Wallace, Family Violence: Legal, Medical, and Social Perspectives (2d ed. 1999); D. Aiello and L. Capkin, *Services for Disabled Victims: Elements and Standards*, 7 Response to Violence in the Family and Sexual Assault 14 (1984). Where,

Just as jurors tend to be most sympathetic to mitigation claims that involve conditions beyond an individual's control, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1565 (1998), so too legislators took note of the fact that mental retardation is not a chosen condition.[36]

C. It Has Come To Be Recognized, Particularly In Recent Years, That A Defendant's Mental Retardation Greatly Increases The Likelihood Of The Conviction And Execution Of A Factually Innocent Individual, And That This Risk Is Intolerable.

The potential for convicting and even executing an individual with mental retardation who was innocent of the crime was part of the discussion of proposed legislation, dating back to the earliest enactment in the late 1980s.[37] But in recent years, this chilling possibility has received renewed attention with the discovery that a number of defendants with mental retardation who had faced capital charges, and in some cases had been sent to Death Row, were incontrovertibly innocent. Although the facts of these cases are relatively

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as is true in essentially all the decided cases, an individual's mental retardation is exacerbated by being born and raised in conditions of poverty, the deck is further stacked against the person. *See, e.g.* Dan Baum, *Lawyers Argue for Bowden's Life Before Parole Board*, Atlanta Const., June 17, 1986**,** at 5A.**;** *see also*, *Penry*, 492 U.S. at 309. Again, this does not mean that people with mental retardation cannot be held accountable for their actions, including criminal accountability. But when conditions that led to the crime are "not exclusively the offender's fault," *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11 (1982), death becomes an inappropriate penalty.

[36] *See, e.g.*, Ed Vogel, *Capital Punishment: Bill to Protect Mentally Retarded Passes*, Las-Vegas Review Journal, Apr. 25, 2001, at B4.

[37] Editorial, *Humanity Wins in Georgia*, St. Petersburg Times, Apr. 18, 1988, at 10A; Jennifer Gavin, *Death-Penalty Ban For Retarded OK'd*, Denver Post, Feb. 18, 1993, at 5B; Editorial, *Letters From The People*, St. Louis Post-Dispatch, July 17, 1993, at 7B.

familiar, *amici* would call the Court's attention to two of them.

Earl Washington, a man with mental retardation, was sentenced to death in Virginia for murder on the basis of a false confession. After being incarcerated for 18 years (and coming within days of execution), Washington was later proven by DNA evidence to be innocent of the crime, and was ultimately released.[38]

Anthony Porter, another man with mental retardation, was convicted and sentenced to death in Illinois. Within days of his scheduled execution, Porter was granted a stay of execution by the Illinois Supreme Court to allow time to explore whether he was competent to be executed, *see generally Ford v. Wainwright*, 477 U.S. 399 (1986), and whether the execution of a person with mental retardation violated the Illinois state constitution. A few weeks later, while that stay of execution was in effect, journalism students at Northwestern University conclusively demonstrated that Porter had not committed the crime, and he was released from custody.[39]

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[38] Bill Miller and Steve Bates, *DNA Test Could Lead To Man's Release; Death Row Inmate May Be Innocent of '82 Murder, VA. Officials Say*, Wash. Post, Oct. 26, 1993, at A1; Peter Baker, *Death-Row Inmate Gets Clemency; Agreement Ends Day of Suspense*, Wash. Post, Jan. 15, 1994, at A1; Francis X. Clines, *New DNA Tests Are Seen As Key To Virginia Case*, N.Y. Times, Sept. 7, 2000, at A18.

[39] Christi Parsons, *Court Stalls Execution, Asks If Killer Is Smart Enough To Die*, Chi. Trib., Sept. 22, 1998, at N1; Pam Belluck, *Class Of Slueths To Rescue On Death Row; Journalism Students Track Down Suspect After Re-enacting Killing*, N.Y. Times, Feb. 5, 1999, at A14; Mark LeBien and Charlie Meyerson, *Porter Freed From Prison*, Chi. Trib., Feb. 5, 1999, at C1; Douglas Holt and Flynn McRoberts, *Porter Fully Savors First Taste Of Freedom; Judge Releases Man Once Set For Execution*, Chi. Trib., Feb. 6, 1999, at N1.

Cases like Washington's and Porter's, in addition to others,[40] became part of the public debate about whether people with mental retardation should be subject to the death penalty, and increased support for state legislation.[41]

These notorious cases have focused national attention on the plight of individuals with mental retardation who may face capital punishment. The potential for such a Kafkaesque miscarriage of justice has accentuated the moral consensus already in place, and heightened the sense of urgency about enacting protective legislation. As a society, we have become painfully aware of the situation facing all capital defendants with mental retardation; their intellectual limitations create inherent vulnerability. Americans fully understand the impact of an individual's mental retardation on the level of his culpability. As the reality of this problem has become clearer in the Nation's consciousness, our sense of moral repugnance has produced a renewed commitment to oppose the execution of any individual with mental retardation.

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[40] Other innocent individuals with mental retardation were imprisoned following guilty pleas entered to avoid the death penalty. The most notable example was Johnny Lee Wilson, a man with mental retardation, who was sentenced to life in prison following a confession and guilty plea. Terry Ganey, *Pardoned Man Wants 'To Pick Up My Life,'* St. Louis Post-Dispatch, Sept. 30, 1995, at 1A; Editorial, *Johnny Lee Wilson, Free At Last*, St. Louis Post-Dispatch, Oct. 1, 1995, at 2B. In pardoning Wilson, Governor Carnahan conceded "we have locked up an innocent, retarded man who is not guilty of the crime of which he is accused" and he concluded, "It's really pretty unbelievable that this case could get through the court system." Robert P. Sigman, *Revisiting Johnny Lee Wilson*, Kansas City Star, Sept. 15, 1996, at K2.

[41] Cornelia Grumman and Christi Parsons, *Pressure To Review Death Penalty Grows*, Chi. Trib., Feb. 7, 1999 (internet edition); Editorial, *Suspend Death Penalty*, Kansas City Star, Apr. 29, 2000, at B6; Editorial, *Don't Execute The Mentally Retarded,* Chi. Trib., Aug. 10, 2000, at N22; Editorial, *Judgment Call In Death Penalty; Even Supporters Of Capital Punishment Can Create An Exception For People Who Are Mentally Retarded*, Oregonian, Aug. 9, 2000, at B10.

CONCLUSION

For these reasons, *amici* respectfully urge reversal of the judgment of the Supreme Court of North Carolina.

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