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Another Look at Evolving Standards: Will Decency Prevail Against Executing the Mentally Retarded?

Bryan Lester Dupler*

But the enemy I see, wears a cloak of decency


I. Introduction

In Penry v. Lynaugh,1 four members of the Supreme Court agreed that the execution of a mentally retarded2 prisoner was inconsistent with "evolving standards of decency" and therefore violated the "cruel and unusual punishments" clause of the Eighth Amendment. Justice O'Connor, whose fifth vote led to reversal of the death sentence on other grounds, found the evidence of a national consensus against such executions "insufficient" to conclude that executing the mentally retarded would violate the Eighth Amendment.3 Justice O'Connor's critical vote in Penry reversed the death sentence, but it also provided a federal constitutional basis for the States' continued use of capital punishment against mentally retarded prisoners.

The ultimate fate of the dissenting opinions in Penry — and a constitutional rule prohibiting execution of the mentally retarded capital offender — seems even more unclear today. Three of the four Justices who found mental retardation a bar to execution are no longer on the Court, and of the four, Justices Brennan and

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2. "Mental retardation" is defined as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." HERBERT J. GROSSMAN, CLASSIFICATION IN MENTAL RETARDATION 1 (1983). Mental retardation generally requires an Intelligence Quotient (IQ) of 75 or below. IQ scores between 50-55 and 75 are considered to indicate "mild" retardation. IQ scores between 35-40 and 55 are classified in the "moderate" range. People with IQ scores of 20-25 to 40 are "severely" retarded, while scores below 20 or 25 are usually classified as "profound" retardation. AMERICAN ASS'N ON MENTAL RETARDATION (AAMR), MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 14 (5th ed. 1992). Unless another sense is clearly indicated, the discussion of retardation in this article deals with prisoners in the mild to moderate range of retardation. Persons with severe or profound levels of retardation would almost certainly be incompetent to stand trial for any offense under the prevailing constitutional and statutory definitions. See 22 OKLA. STAT. § 1175 (Supp. 1986) (defining competency as "the present ability of a person arrested for or charged with a crime to understand the nature of the charges and proceedings brought against him and to effectively and rationally assist in his defense").

3. See Penry, 492 U.S. at 335.

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Marshall were of the view that the death penalty is always unconstitutional. No Justice on the Court today expresses doubts about the constitutionality of capital punishment per se. For a decade, the Court has declined to accept another case presenting the issue turned aside in *Penry*.4

*Penry* was yet another application of the Court's "evolving standards of decency" analysis to determine whether a category of capital offenders should be considered ineligible for the ultimate punishment. The Court previously used this analysis in *Thompson v. Oklahoma*,5 where a plurality concluded that execution of offenders who committed their capital offenses before age sixteen violated contemporary standards of decency,6 and in *Ford v. Wainwright*,7 where a majority concluded that the execution of insane persons also violated standards of decency.*8

In Oklahoma, Judge Charles Chapel recently added his voice to those calling for an end to executions of the mentally retarded. Dissenting in *Lambert v. State*,9 Judge Chapel found evidence that both Oklahomans and Oklahoma law "disfavor executing the mentally retarded," and that the national landscape "has changed dramatically" since *Penry'*s assessment of evolving societal standards.10 Judge Chapel argued that evidence of public opinion and the "growing national ban" on executions of the mentally retarded invalidated the punishment as cruel or unusual under the Oklahoma Constitution.11 A recent public opinion survey shows a

6. See id. at 838.
8. See id. at 427.
9. 984 P.2d 221 (Okla. Crim. App. 1999). Lambert and a co-defendant, Scott Hain, were convicted of the 1987 robbery, kidnapping, and murder of Laura Lee Sanders and Michael Houghton. The victims were taken by force from a Tulsa restaurant, forced into the trunk of a car, and burned to death in rural Creek County. Lambert's conviction and sentence were previously reversed in a controversial and highly publicized 1994 opinion which met organized opposition from prosecutors and victim's rights advocates. See Lambert v. State, 888 P.2d 494 (Okla. Crim. App. 1994). Lambert was re-tried and again sentenced to die. Lambert was the first Oklahoma death penalty case since the state resumed capital punishment in 1990 to squarely present the court of criminal appeals with a constitutional challenge to the death sentence based on the prisoner's documented mental retardation. With its grisly facts and the controversial prior reversal, this case was an unlikely vehicle for any courageous pronouncement by the Court of Criminal Appeals. The per curiam opinion, with Judges Lane, Strubhar, and Johnson comprising the majority, treated the occasion as anything but momentous, disposing of the claim in two terse sentences. "Lambert asks this Court to find the execution of the mentally retarded violates the state and federal constitutions. In light of Penry v. Lynaugh, we decline to grant relief." Lambert, 984 P.2d at 238.
10. Lambert, 984 P.2d at 242, 243 (Chapel, J., concurring in part, dissenting in part). Judge Chapel cited the results of a 1988 public opinion survey by Professors Harold Gramsick and Robert Bursik of the University of Oklahoma's Center for the Study of Crime, Delinquency, and Social Control. Their study, *Attitudes of Oklahomans Toward the Death Penalty* (the Gramsick/Bursik Study), concluded, from a random sampling of 333 Oklahomans, that 60% of the state's population were opposed to executing the mentally retarded capital offender.
11. See OKLA. CONST. art. 2, § 9. The Oklahoma Constitution provides greater protection than the U.S. Constitution, prohibiting punishments which are either cruel or unusual. See id.
significant increase in opposition to such executions among mostly pro-death penalty Oklahomans. 12

This article examines the Supreme Court's "evolving standards of decency" decisions in death penalty cases, concluding that the Supreme Court has incorrectly focused on state legislative outcomes to the exclusion of other reliable evidence which suggests that executing mentally retarded prisoners violates contemporary values. This legislative outcome methodology effectively forestalls a judicial finding that any punishment violates "evolving standards of decency" until that conclusion has already been codified in most, if not all, state laws. This focus on legislative outcomes results in a belated judicial response to punishments which most people already regard as cruel and unusual.

Rather than ignore legislative outcomes altogether, courts applying the evolving standards analysis should acknowledge that legislative outcomes are not the exclusive measure of standards of decency. Instead, the courts should consider other reliable evidence of contemporary standards, including scientific public opinion polling. In most cases, this will yield the conclusion that execution of the mentally retarded is a cruel and unusual punishment which violates the prevailing sense of decency in contemporary society. The discussion begins with an examination of Penry v. Lynaugh.

II. Penry v. Lynaugh: The Cloak of Decency

A. The Facts

Johnny Paul Penry raped, beat, and stabbed Pamela Carpenter in her home in Livingston, Texas. Before she died, Pamela gave a description of her attacker which led police to suspect Penry, a convicted rapist on parole. Penry twice confessed to the crime and Texas prosecutors charged him with capital murder. At a pretrial competency hearing, a psychologist testified that Penry was mentally retarded, probably as a result of birth trauma. Previous tests had placed Penry's Intelligence Quotient (IQ) between fifty and sixty-three. A defense psychologist tested Penry before trial and placed Penry's IQ at fifty-four. The defense psychologist described Penry's "mental age" as six-and-a-half years old and stated that Penry's social maturity — his functional ability — compared to a nine-year-old child. The defense psychologist testified that "there's a point at which anyone with [Penry's] IQ is always incompetent but, you know, this man is in the borderline range." Still, a jury found Penry competent to stand trial. 13

Penry's confessions were admitted into evidence at his trial. Penry pled insanity to the crime, presenting the testimony of a psychiatrist, Dr. Jose Garcia. Dr. Garcia reiterated that Penry was mildly to moderately retarded, either as a result of birth trauma or multiple beatings and head trauma suffered by Penry at an early age. Dr.


Garcia asserted that Penry was insane under Texas law, in that an organic brain
disorder prevented Penry from appreciating the wrongfulness of the crime or
conforming his conduct to law.\textsuperscript{14}

Two experts called by the State disputed Penry's claim of insanity. Dr. Kenneth
Vogtsberger agreed Penry was a person of limited mental ability but also opined
that Penry was not suffering any mental illness or defect, that he knew the
difference between right and wrong, and that he could follow the law. He labeled
Penry an antisocial personality: impulsive, unable to learn from experience, and
likely to violate society's norms. Dr. Vogtsberger found that Penry's low IQ scores
failed to measure Penry's higher levels of alertness and understanding. Even the
State's psychiatrists conceded that Penry was a person of extremely limited mental
ability and that he seemed unable to learn from his mistakes.\textsuperscript{15}

\textbf{B. The Death Sentence and the Road To Certiorari}

After the jury convicted Penry of capital murder, the court's instructions required
jurors to answer the following three "special issues" to determine the sentence:

(1) whether the conduct of the defendant that caused the death of the
deceased was committed deliberately and with the reasonable expec-
tation 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.\textsuperscript{16}

Under Texas law, if the jury unanimously answers "yes" to all of the special
issues, the trial court must sentence the defendant to death.\textsuperscript{17} Otherwise, the
sentence is life imprisonment.\textsuperscript{18} The jury answered "yes" to all three special issues,
and Penry was sentenced to death. The Texas Court of Criminal Appeals affirmed
his conviction and sentence on direct appeal, and the Supreme Court denied his
petition for a writ of certiorari.\textsuperscript{19}

In his petition for federal habeas corpus, Penry renewed his challenge to the death
sentence based on the trial court's failure to instruct the jury how to weigh
mitigating factors in answering the special issues and failure to define the term
"deliberately."\textsuperscript{20} Penry also argued that it was cruel and unusual punishment to
execute a mentally retarded person.\textsuperscript{21} After his habeas petition was denied in the

\textsuperscript{14} See \textit{id.} at 309-10.
\textsuperscript{15} See \textit{id.} at 309.
\textsuperscript{17} \textit{Id.} art. 37.071(c). (e); see also \textit{Penry,} 492 U.S. at 310.
\textsuperscript{18} See \textit{id.}
\textsuperscript{20} \textit{Penry,} 492 U.S. at 312.
\textsuperscript{21} See \textit{id.}
District Court and the Fifth Circuit Court of Appeals, the Supreme Court granted certiorari to determine two questions:

First, was Penry sentenced to death in violation of the Eighth Amendment because the jury was not adequately instructed to take into consideration all of his mitigating evidence and because the terms in the Texas special issues were not defined in such a way that the jury could consider and give effect to his mitigating evidence in answering them? Second, is it cruel and unusual punishment under the Eighth Amendment to execute a mentally retarded person with Penry's reasoning ability?  

Justice O'Connor, in an opinion joined by Justices Brennan, Marshall, Stevens, and Blackmun, held that Penry successfully stated a claim for relief based on the Court's prior decisions in *Lockett v. Ohio* and *Eddings v. Oklahoma*. Justice O'Connor wrote:

[I]n the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision. Our reasoning in *Lockett* and *Eddings* thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."  

23. 438 U.S. 586 (1978). In *Lockett*, a plurality opinion, the Court held that the Eighth and Fourteenth Amendments require that the sentencer in capital cases "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604. Thus, the Court held unconstitutional the Ohio death penalty statute which mandated capital punishment upon a finding of one aggravating circumstance unless one of three statutory mitigating factors were present.  
24. 455 U.S. 104 (1982). Monty Eddings was an emotionally disturbed 16-year-old runaway who killed an Oklahoma Highway Patrolman. He pled no contest to a charge of capital murder and was sentenced to death by the trial judge. After finding three aggravating circumstances, the trial court gave great weight to Eddings' youth but refused to consider his turbulent and abusive upbringing as a mitigating circumstance. Granting the writ of certiorari and vacating the death sentence, the Supreme Court relied on its plurality opinion in *Lockett*, finding that "the limitations placed by [the Oklahoma courts] upon the mitigating evidence they would consider violated the rule in *Lockett*. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." *Id.* at 105-07, 113-14.  
C. The Mental Retardation Claim

After a majority of the Court agreed that Penry's death sentence violated the holdings of Lockett and Eddings, the Court turned to the various issues surrounding Penry's claim for habeas relief from the sentence based on his mental retardation. The Court first determined that relief on this claim in habeas corpus would require the Court to announce a new rule of constitutional law as defined by Teague v. Lane. In Teague, the Supreme Court sought to uphold the finality of state criminal judgments by holding that the federal courts will not announce or apply a "new rule" of constitutional law in habeas corpus proceedings, except in two limited circumstances.

Joined by Justices Marshall, Brennan, Blackmun, and Stevens, Justice O'Connor held in the Penry opinion that the new rule sought by Penry would be fully retroactive under Teague's first exception for those rules which place "certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe." The Court reasoned that

a new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all. In both cases, the Constitution itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying Justice Harlan's view of retroactivity have little force. As Justice Harlan wrote: "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."

In a portion of the opinion that attracted a different majority from the Court's conservative wing, Justice O'Connor, now joined by Justices Rehnquist, White, Scalia, and Kennedy, went on to conclude that execution of a mentally retarded offender does not violate the Eighth Amendment's ban on cruel and unusual punishments.

1. The Historical Component of the Eighth Amendment Guarantee

Justice O'Connor began with the historical observation that the Eighth Amendment prohibits all punishments considered cruel and unusual when the Bill of Rights was adopted. The common law prohibited the punishment of "idiots" (those born with a mental defect) and "lunatics" (those who acquired a defect of reason after birth). These prohibitions were the beginnings of the modern insanity

27. Teague variously defined a "new rule" of constitutional law as a rule which was not "dictated by precedent . . . at the time the defendant's conviction became final" or one which "breaks new ground or imposes a new obligation on the States or the federal government." Penry, 492 U.S. at 313-14 (citing Teague, 489 U.S. at 301, 311-13).
30. Penry, 492 U.S. at 331-33 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *24-25 and I W,
defense, which exculpates those who cannot distinguish right from wrong as a result of mental disease.

But the concepts of idiocy and lunacy referred to persons almost wholly devoid of reason, describing only those who would, in modern terms, be considered severely to profoundly retarded. The common law did not extend its prohibition to prisoners like Penry, who have low functional intelligence. Penry was adjudicated competent to stand trial. A jury rejected his claim of insanity, thus finding him able to distinguish right from wrong. Justice O'Connor therefore found that the Eighth Amendment's historical, common law component does not categorically forbid an execution under these circumstances.31

2. Meaning Acquired From "Evolving Standards of Decency"

Justice O'Connor's opinion also recognized that the "prohibitions of the Eighth Amendment are not limited, however, to those practices condemned by the common law in 1789."32 The amendment also draws meaning from what Chief Justice Earl Warren termed "the evolving standards of decency that mark the progress of a maturing society."33 These "evolving standards of decency" may require the prohibition of a practice either not in existence or not believed cruel and unusual in earlier times. To analyze a challenged punishment under this Eighth Amendment protection, the Court looks at "objective evidence" of contemporary moral standards, and holds that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."34

The Court noted that it had "also looked to data concerning the actions of sentencing juries."35 Surveying the legislative outcomes of the time, Justice O'Connor found Penry's "evidence" of an "emerging national consensus" against execution of the mildly mentally retarded insufficient to render the practice unconstitutional. Only the federal government and two states (Maryland and Georgia) had banned such executions. By contrast, in Ford — where the Court scrutinized execution of the insane — the fact that no state at that time permitted such executions, and that twenty-six state laws required suspension of the execution of the insane, warranted the conclusion that execution of the insane would violate contemporary standards of decency.36

The Court also mentioned its findings in Thompson, where the plurality noted that eighteen states enforced a minimum age for executions and all states required the

HAWKINS, PLEAS OF THE CROWN 1-2 (7th ed. 1795)).

31. This part of the Penry opinion epitomizes what some have called the "historical method" of Eighth Amendment Analysis. See Licia A. Esposito, Note, The Constitutionality of Executing Juvenile and Mentally Retarded Offenders: A Precedent Analysis and Proposal for Reconsideration, 31 B.C. L. REV. 901, 903 (1990).

32. Penry, 492 U.S. at 330.

33. Id. at 330-31 (quoting Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion)).

34. Penry, 492 U.S. at 331 (emphasis added).

35. Id. at 331 (citing Enmund v. Florida, 458 U.S. 782, 794-96 (1982); Thompson v. Oklahoma, 487 U.S. 815, 831 (1988)).

capital prisoner to be at least sixteen years old at the time of the offense.\textsuperscript{37} The Thompson plurality voted to ban executions of persons under the age of sixteen as cruel and unusual based on the "evolving standards of decency" component of the Eighth Amendment.\textsuperscript{38} In view of these apparently weightier bodies of legislative opinion, the Court in Penry found the two state laws and one federal law banning execution of the retarded, when added to the fourteen states which had no death penalty at all, "do not provide sufficient evidence at present of a national consensus."\textsuperscript{39} The Court also noted that "Penry does not offer any evidence of the general behavior of juries" or the "decisions of prosecutors" with respect to sentencing mentally retarded defendants.\textsuperscript{40}

The Court concluded its "evolving standards of decency" analysis with a discussion of evidence of public opinion. The Court first acknowledged that "several public opinion surveys" presented by Penry indicated "strong public opposition to execution of the retarded."\textsuperscript{41} With no explanation, Justice O'Connor rejected this evidence simply by noting the Court's preference for more "objective" indicia of contemporary standards found in popular legislation.

The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely. But at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment.\textsuperscript{42}

Johnny Paul Penry, a man with the mind of a six-and-a-half-year-old boy, was resentenced to death in 1990 and awaits lethal injection in Huntsville, Texas.\textsuperscript{43}

\textsuperscript{37} See Thompson, 487 U.S. at 826.
\textsuperscript{38} In Thompson, Justice O'Connor's vote again proved critical. While conceding that the legislative outcomes examined showed that a national consensus against executing capital offenders under sixteen "very likely does exist," she was "reluctant to adopt this conclusion as a matter of constitutional law." Id. at 847. She instead voted to reverse the judgment on the narrower ground that "petitioner . . . may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution." Id. at 858.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 335. The underlying validity of the polling data offered by Penry was not questioned by the majority opinion.
\textsuperscript{43} In a separate opinion of her own, Part IV-C of the Court's opinion, Justice O'Connor discussed Penry's claim in light of a third and fourth component of the Eighth Amendment's prohibition against cruel and unusual punishment. She asked whether infliction of capital punishment for particular classes of crimes or on specific categories of offenders "makes no measurable contribution to acceptable goals of punishment"—i.e., has no social utility— or is "grossly out of proportion to the severity of the crime." Despite the broad agreement among national experts on mental retardation that "all mentally retarded people, regardless of their degree of retardation, have substantial cognitive and behavioral disabilities that reduced their level of blameworthiness for a capital offense," Justice O'Connor found current state court procedures adequate to ensure that due consideration would be given to retarded...
III. Are Courts Ignoring An Already Evolved Standard?

A. Opposition in the Polls

The very morning that the Supreme Court heard oral arguments in Penry, a public opinion poll commissioned by Time/CNN indicated that approximately two-thirds of the American public opposed executions of the mentally retarded.44 Penry himself presented the Court with the results of several polls indicating "strong opposition" to this practice.

For example, a poll taken in Texas found that 86% of those polled supported the death penalty, but 73% opposed its application to the mentally retarded. A Florida poll found 71% of those surveyed were opposed to the execution of mentally retarded capital defendants, while only 12% were in favor. A Georgia poll found 66% of those polled opposed to the death penalty for the retarded, 17% in favor, with 16% responding that it depends how retarded the person is.45

A large number of polls on this issue reveal a striking consistency in opposition to executing the mentally retarded. According to polling data retrieved from the Odom Institute for Research in Social Science (OIRSS) at the University of North Carolina at Chapel Hill,46 a 1988 Harris poll measured opposition to this practice among three ethnic subsamples, including 2008 Caucasians (70.10% opposed); 1005 African-Americans (81.60% opposed), and 110 Asian-Americans (78.10% opposed).47

Polls from other states taken before and after the Penry decision also demonstrate public rejection of the practice. In the 1987 Nebraska Annual Social Indicators capital offenders. Because "mental retardation has long been regarded as a factor that may diminish an individual's culpability," and the Lockett/Eddings line of cases already prohibit any state action limiting the sentence's consideration of mitigating evidence, Justice O'Connor rejected the assertion that "all mentally retarded people of Penry's ability — by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility — inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty." Justice O'Connor also concluded, ironically, that reliance on the concept of mental age "to measure the capabilities of a retarded person for purposes of the Eighth Amendment could have a disempowering effect if applied in other areas of the law." This cruel rationalization suggests that executions are a means of empowering the mentally disabled. See Penry, 492 U.S. at 335 (O'Connor, J.).

45. Penry, 492 U.S. at 334-35 (citations omitted).
46. The IRSS website is <http://www.irs.unc.edu/data_archive/>. Polling data at the OIRSS archive is stored by polling question and searchable by keyword. The polling data used here was obtained by searching with the keywords "retarded" and "retardation." A number of polls asking questions about "death penalty" and "capital punishment" were also consulted. According to the website, <http://www.irs.unc.edu/data_archive/accessing_files_frame.html>, the studies cited in this article are retrievable by their study number at the archive's search page, <http://www.irs.unc.edu/data_archive/pollsearch.html>.
47. See Harris Study No. 883006. The study is retrievable by its study number at <http://www.irs.unc.edu/data_archive/pollsearch.html>.
Survey conducted by the University of Nebraska's Bureau of Sociological Research, 67.5% of 428 respondents opposed the death penalty in cases where the defendant was mentally retarded. In an October 1988 poll of 463 Alabama residents eighteen years or older, 71.30% of respondents opposed the death penalty in cases involving the mentally retarded.\textsuperscript{46} A December 1989 poll of California residents eighteen years or older found 71.60% of the 448 respondents agreed that it was "not all right" to inflict capital punishment on the mentally retarded.\textsuperscript{47} A recent article collecting polling data from several other states also demonstrated substantial, if not absolute, public opposition to executing mentally retarded prisoners in Connecticut (84%), Georgia (66%), Indiana (74%), Kentucky (57%), Louisiana (78%), Maryland (82%), New York (82%), Oklahoma (61%), South Carolina (56%), Texas (73/45.4%), and Virginia (39%).\textsuperscript{48}

B. Legislation as an "Objective Indicator" of Evolving Standards

Why did the Penry Court choose legislative outcomes, and perhaps to a lesser degree, jury behavior and "decisions of prosecutors" as superior indicators of contemporary standards of decency? If public attitudes can be measured with a reasonable degree of accuracy and according to accepted principles of the scientific method, why should a Court faced with an important constitutional question turning on contemporary standards of decency look instead to the work product of state legislatures, fraught as it is with the vagaries of electoral politics and the inscrutable give-and-take in which legislative enactments are forged and the votes upon them are cast?

Whatever the reasons for this choice, the Supreme Court in Penry kept them to itself, baldly asserting that legislation in the several states possesses an "objective" message about prevailing societal standards which no other empirical proof can provide. The remainder of this article is devoted to a criticism of that viewpoint, arguing that Penry's focus on legislative outcomes, to the exclusion of other probative evidence, has no justification in the Eighth Amendment itself or the prior decisions concerning "evolving standards of decency." This undue focus on legislative outcomes invites judicial abdication of the duty to declare a punishment cruel and unusual whenever probative evidence — including social science research — shows that a substantial majority of society rejects it.

Justice O'Connor's argument that legislation is virtually the only "objective indicator" of evolving standards is flawed for a number of reasons. First, the correlation between American public opinion and the sum of legislative outcomes is not nearly as symbiotic as Justice O'Connor suggests. There is little reason to suppose that the legislative agenda is solely, or even predominantly, a creature of

\textsuperscript{46} See Capstone Poll, Institute For Social Science Research at the University of Alabama, IRSS Study NNSP-AL-017. The study is retrievable by its study number at <http://www.irss.unc.edu/data_archive/pollsearch.html>.

\textsuperscript{47} The California Poll, Field Institute, IRSS Study No. NNSP-CA-58. The study is retrievable by its study number at <http://www.irss.unc.edu/data_archive/pollsearch.html>.

\textsuperscript{48} See Keyes & Edwards, supra note 44, at tbl. 1.
prevailing public opinion on every given subject of legislative action. The Supreme Court's own past decisions reflect an awareness of how special interests can exert substantial anti-democratic influence on the legislatures.51

Experience in the States confirms that economic and social special interests are often a dominant force in directing the state's legislative priorities among popularly elected bodies and through ballot initiatives.52 The Supreme Court has also recognized that resort to legislative process is wholly unavailable to groups who are disenfranchised from political action.53 Scholarly commentators agree that the political process frequently aggrandizes the powers of the state at the expense of important personal liberties.54 It is not difficult, in light of these realities, to understand why overwhelming moral opposition to executing the mentally retarded capital offender — a politically disenfranchised group if ever there was one — might have difficulty finding corresponding expression in legislative enactments.

Second, Justice O'Connor's "objective factor" argument places too much emphasis on the ability of legislative outcomes to express an underlying current of prevailing moral opinion upon which the legislation is based. Legislative outcomes emerge from the political process not as received moral wisdom or the "considered judgment" of contemporary standards envisioned by Justice O'Connor in Penry and Thompson.55 More realistic assessments of legislation are not difficult to find. "[B]road consensus on noble objectives represents only the beginning of the legislative process . . . ",56 legislation itself often contains "calculated ambiguities

51. See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976) (finding statutory limitations on political contributions to candidates or committees can further legitimate governmental interests in protecting against corrupting effect of special interests).

52. See, e.g., Nick Brestoff, Note, The California Initiative Process: A Suggestion for Reform, 48 S. CAL L. REV. 922, 923 (1975) ("The primary motivation for the initiative process in California was the public's desire to counter the lobbyist, the conduit of legislative influence exercised by and for economic and other special interests."). A study of three Colorado ballot initiatives found that the pro-initiative side began with a commanding lead which diminished during the progress of the process. In each case, corporate backed opposition forces heavily outspent their counterparts. Each initiative was defeated. See Randy M. Mastro et al., Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to Do About It, 32 FED. COMM. L.J. 315 (1980). In a 1981 study of 19 campaigns, the side with corporate financial backing outspent their opponents by better than two-to-one in 15 campaigns and won 12 of those. See generally STEVEN D. LYDENBERG, BANKROLLING BALLOTS: Update 1980 (1981), cited in Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 308 (1981).


54. See David Cole, Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship, 87 GEO. L.J. 1059, 1060 (1999) (noting that the whole modern field of "constitutional criminal procedure has an even more specific genesis in the need to protect those whom the political process will not protect" and reflects "a heightened concern for those unlikely to find protection through the political process").


or political compromises essential to secure a majority; and legislative outcomes are "often the product of compromises that are not readily apparent to the public or even consistent in their relation to other contemporaneous enactments from the same body."

For example, while the rejection of the death penalty in thirteen states certainly means that no legal executions will occur in those states, each state's decision to reject the death penalty may rest on a plethora of pragmatic considerations, including but not limited to contemporary rejection of capital punishment on grounds of "decency." Some legislators may conclude that the death penalty — while not morally repugnant — is too expensive and diverts public money from meaningful anti-crime measures. Other legislators may vote to abolish the death penalty because it fails to deter criminals from violence, and its specific deterrent effect on the executed offender is purchased at too high a price given the option of life without parole. Still, others may vote to abolish capital punishment based on their personal moral opinion regardless of contemporary values. Yet others forming the majority may vote a particular way for purely political reasons, including desire for re-election, as a quid pro quo to obtain reciprocal support for another measure then pending, or a host of other reasons.

And so goes legislation in general. Perry's legislative outcome methodology fails to acknowledge these realities of the legislative process when it posits that legislative results are the best evidence of "evolving standards of decency." While any legal theory of representative government must accept legislation as some indication of contemporary public values, it is at best an incomplete indication, and for purposes of measuring "evolving standards of decency," it is an inferior one.

C. Another Measure of Evolving Standards: "Enlightened Public Opinion"

In footnote four to the plurality opinion in Thompson, Justice Stevens traced the verbal lineage of "evolving standards of decency" to the majority opinion in Weems v. United States. In Weems, a majority of the Supreme Court held that fifteen years of imprisonment at hard labor and attached punishments for falsifying public documents were cruel and unusual under the Eighth Amendment. There, the Court stated that the "cruel and unusual punishments clause in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."

Modern methods of measuring opinion on matters of public concern produce reliable studies based on probability sampling — a scientific principle which holds

58. McNutt v. Board of Trustees, 141 F.3d 706, 709 (7th Cir. 1998); see also Cole, supra note 54, at 1065 (noting that recent legislative approaches to criminal sentencing are often "driven by 'tough-on-crime' politics" and individual legislators are "insulated from the hard task and moderating influence of passing judgment on individual human beings").
59. See Thompson, 487 U.S. at 821 (citing Weems v. United States, 217 U.S. 349 (1910)).
60. id. at 378 (emphasis added).
that the responses of a randomly selected sample of a small percentage of the population can be representative of opinion among the populace as a whole. The ideal representative sample creates an equal probability of selection among the sample group, so that every member of the population to be studied has an equal chance of being chosen as a survey respondent. Most polls by the Gallup organization, for example, target a sample group of "national adults." Members of this population group are eighteen years or older, living in a telephone household within the continental United States.\textsuperscript{61}

Although Gallup routinely uses sample groups of 1000 to 1500 national adults, a highly accurate survey can be achieved with smaller samples. Even Gallup recognizes that once the sample reaches 500 randomly chosen individuals from the studied population, accuracy gained from increasing the sample size is minimal. It is generally accepted in the social science community that a survey of 400-500 randomly selected respondents produces a result with plus or minus 4.5 to 5% accuracy, with a 95% confidence level.\textsuperscript{62}

In other words, assuming that 50% of the random sample would answer a particular question "yes," between 45 and 55% of the population would answer the question "yes" in ninety-five out of one hundred random samples, a respectably high level of reliability. Given these levels of reliability, the empirical justification to continue executions of the mentally retarded until a given number of state legislatures pass statutes which supply the "national consensus" required by \textit{Penry} seems questionable at best. Instead, courts confronted with constitutional challenges based on "evolving standards of decency" should admit evidence of scientific opinion polling as they would admit other forms of scientific evidence, whether it be fingerprinting, ballistics, DNA testing, blood typing, or forensic pathology. Experts in opinion polling are competent witnesses to state the underlying scientific principles involved, and the persuasive weight to be given to the evidence should be a decision for the tribunal.

Like all forms of specialized knowledge which possess the foundational indicia of scientific reliability, public opinion evidence should be admitted because it is helpful to the tribunal faced with the difficult question of determining whether a challenged punishment violates "evolving standards of decency." Under Federal Rules of Evidence 702, "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."\textsuperscript{63}


\textsuperscript{62} See id.; see also Robert Grasmick & Harold Bursik, Center for the Study of Crime, Delinquency and Social Control, \textit{Attitudes of Oklahomans Toward the Death Penalty 13} (unpublished manuscript, Univ. of Okla. 1988); Interview with Ronald K. Gaddie, Ph. D. (June 1999).

\textsuperscript{63} \textit{Fed. R. Evid.} 702; see also \textit{12 Okla. Stat.} § 2702 (1993) (identical to federal rule 702).
In Daubert v. Merrill Dow Pharmaceuticals, Inc., the Supreme Court clarified the "liberal thrust" of the Federal Rules of Evidence and their "general approach of relaxing the traditional barriers to 'opinion' testimony." Interpreting the language of Rule 702, the Court said:

The subject of an expert's testimony must be "scientific . . . knowledge." The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds." Webster's Third New International Dictionary 1252 (1986). Of course, it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science. See, e.g., Brief for Nicolaas Bloembergen et al. as Amici Curiae 9 ("Indeed, scientists do not assert that they know what is immutably 'true'--they are committed to searching for new, temporary, theories to explain, as best they can, phenomena"); Brief for American Association for the Advancement of Science et al. as Amici Curiae 7-8 ("Science is not an encyclopedic body of knowledge about the universe. Instead, it represents a process for proposing and refining theoretical explanations about the world that are subject to further testing and refinement" (emphasis in original)). But, in order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

Like all other forms of relevant evidence, public opinion measurements are not perfect. And no particular measure of public sentiment concerning a challenged punishment is necessarily entitled to conclusive weight. However, it does not follow that social science research is of no benefit at all to a court grappling with the question of "evolving standards of decency." Courts faced with such a constitutional challenge should admit, at minimum, evidence concerning public opinion polls on the subject and determine the weight to be afforded to that evidence in a given case, assuming that a properly qualified expert witness establishes scientific foundation for the proffered evidence. The Supreme Court's thoroughly misguided disregard of such evidence in Penry was a mistake which should not be repeated.

64. 509 U.S. 579 (1993).
65. Id. at 589.
66. Id. at 591.
D. The Gaddie Survey: Current Oklahoma Opposition

Over ten years have passed since Professors Gramsick and Bursik of the University of Oklahoma's Center for the Study of Crime, Delinquency, and Social Control finished their study *Attitudes of Oklahomans Toward the Death Penalty* (the Gramsick/Bursik Study). That study, cited in Judge Chapel's dissenting opinion in *Lambert*, concluded from a random sampling of 353 Oklahomans that 60% of the state's population was opposed to executing mentally retarded capital offenders.67

In late July 1999, in connection with representing a mentally retarded death row prisoner, I retained Dr. Ronald K. Gaddie, a University of Oklahoma political scientist, to design and implement a survey to provide a current measure of Oklahoma attitudes toward executing the mentally retarded. The result was the Gaddie Survey. Professor Gaddie designed a survey instrument asking three questions concerning capital punishment. The first question asked about public support for the death penalty in general; the second, about the death penalty for convicted offenders under the age of eighteen; and the third, about the execution of mentally retarded offenders (defined in the survey as persons with a mental age of between five and ten years of age).68

An independent telephone survey company interviewed 484 randomly selected respondents in the Oklahoma City metropolitan area using the Gaddie Survey instrument.69 Based on the methodology and the size of the survey sample, the survey yields a margin of error of +/-4.45% with a 95% confidence level for the population studied.70 The interviews were concluded on Saturday, July 10, 1999.

The Gaddie Survey confirmed widespread support for the death penalty found earlier in the Gramsick/Bursik study, with fully 76.4% of the survey respondents supporting capital punishment in general.71 Only 12% of those surveyed opposed the death penalty in general. Gramsick and Bursik's 1988 study fixed Oklahoma public support for the death penalty in general at 80.2%.72

Respondents in the Gaddie Survey were more ambivalent toward capital punishment for younger offenders. While only 42.1% opposed the death penalty for juveniles, 38.6% indicated support for capital punishment in such cases, with 17.5% of respondents volunteering that their answer would depend on the particular case.73

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68. See *Grasmick & Bursik*, supra note 62, at 47.
69. The mental age parameters for the survey question correspond to mentally retarded offenders such as Johnny Peny (mental age six-and-a-half years), see *Peny* v. Lynaugh, 492 U.S. 302 (1989), Robert Lambert (mental age 8 years), see *Lambert*, 984 U.S. at 221, and William Alvin Francis (mental age 10 years), see *Smith* v. Francis, 474 U.S. 925 (1985) (Marshall, J., dissenting). See Gaddie Survey, supra note 12, at app. A.
70. The independent survey firm made 2259 phone calls, obtaining a total of 794 answers at the called residences. Of those, 484 adult persons agreed to answer the survey, while 310 refused.
71. See Gaddie Survey, supra note 12, at 1.
72. See id. at 3.
74. See Gaddie Survey, supra note 12, at 4. The survey instrument did not list "depends" as a
The most significant finding of the Gaddie Survey is the increasing widespread opposition to capital punishment for the mentally retarded when compared to the Gramsick/Bursik Study findings of a decade ago. Of the Gaddie Survey's 484 respondents, 390, a staggering 80.6%, agreed that mentally retarded persons should not be executed. Only 10.5% of those surveyed supported capital punishment for the mentally retarded, with an even smaller number, 5.4%, stating that it depends on the facts of the case.

Professor Gaddie's figures also demonstrate that of the 370 respondents who generally favored capital punishment, only 13% favored executing the mentally retarded, and another 6.2% would support it depending on the circumstances. Thus, among those favoring the death penalty in general, 77.6% expressed opposition to executing the mentally retarded. Even among those favoring the death penalty for juveniles, an astonishing 69% remained opposed to executing the mentally retarded.\(^{75}\)

Opposition to executing the mentally retarded was so rigorous in the studied population that the oversampling of women in the survey was deemed statistically insignificant on this issue.\(^{76}\) As Professor Gaddie explained:

\[\text{[In the survey], [m]en were more likely to want to apply the death penalty than women, and the association between sex and support for the death penalty is statistically significant . . . . The difference in the levels of support are least pronounced when applying the penalty to the mentally retarded. Opposition to the application of the death penalty to the mentally retarded ran nearly as high among men as among women, and the difference is not statistically significant. Where women and men were most differentiated in the application of the death penalty was in its application to juvenile offenders . . . . Women are overrepresented in our sample by about 10 points, which skews our results when sex is a significant indicator of preferences. However, the result for the application of the death penalty in cases of mentally retarded offenders is likely more correct and accurately reflects the opinions of Oklahomans regardless of sex, because of the lack of any meaningful difference between the sexes in applying the death penalty to the mentally retarded.}^{77}\]

The Gaddie Survey is not a statewide survey, but its results are generally applicable to the entire Oklahoma City metropolitan area's adult population, the

\(^{75}\) See Gaddie Survey, supra note 12, at 6.

\(^{76}\) See id. at 6-7. The results of the Gaddie Survey also corroborate the observation of Gramsick and Bursik that "[t]he mental health of the offender has an even greater impact on support for the death penalty than does the offender's age." Gramsick & Bursik, supra note 62, at 47.

\(^{77}\) Id. at 6-7.
state's largest population center. Although not all respondents stated their ethnic origin, the known ethnic makeup of the sample resembles the ethnic makeup of the population statewide. Thus, there is little reason to suspect that a statewide survey would yield a significantly different measure of contemporary moral opinion.

Coupled with the results of the Gramsick/Bursik Study of 1988, the Gaddie Survey indicates sustained and widespread rejection of the execution of the mentally retarded among Oklahomans. If the Eighth Amendment and article 2, section 9 of the Oklahoma Constitution "may acquire meaning as public opinion becomes enlightened by a humane justice," then a judicial declaration that such executions are cruel and unusual is long overdue.

IV. A Decade After Penry: The New Consensus

Since Justice O'Connor cast her critical swing vote in Penry, American states have executed approximately twenty-four mentally retarded prisoners. In the same time, state legislatures in ten more states have outlawed the practice of executing the mentally retarded. This brings the number of death penalty states which have outlawed the practice to twelve, along with the federal government. When added to the thirteen states which have no death penalty, over half of the sovereign jurisdictions in the American Republic have formalized their rejection of this practice in codified laws.

The constitutional foundation for such executions — the analytical framework of "evolving standards of decency" applied by the Supreme Court in Penry — is seriously flawed. Penry's arbitrary disregard of probative evidence on the question of current standards of decency renders the protections of the Eighth Amendment almost superfluous to the state legislative process. Ford was just such a case, where the Supreme Court could bring itself to declare executions of the insane "cruel and unusual" only because most states either had never practiced them or had long abolished them. The Eighth Amendment question posed in Ford was almost academic (except to Mr. Ford), and thus easy for the Court to answer. But the Penry approach is antithetical to a vital and progressive constitutional provision

78. See id. at 1.
80. See Dennis W. Keyes et al., People with Mental Retardation Are Dying. Legally, MENTAL RETARDATION, Feb. 1997, at 59 (updated by the Death Penalty Information Center). For a table of all inmates believed to be mentally retarded who were executed in the modern era of capital punishment (since 1976), see Mental Retardation and the Death Penalty (visited Feb. 8, 2000) <http://www.essential.org/dpic/dpicr.html>.
81. Interestingly, the fact that Oklahoma apparently has not executed a mentally retarded offender in the modern death penalty era and in nine years of active executions would suggest that the punishment is "unusual" and thus forbidden under the state constitution, whether it is considered "cruel" or not. Article 2, section 9 of the Oklahoma Constitution protects prisoners from cruel or unusual punishments and thus provides greater protection than the federal constitutional prohibition against cruel and unusual punishments. OKLA. CONST. art. 2, § 9; see Lambert v. State, 984 P.2d 221, 230 n.30 (1999) (Chapel, J., concurring in part and dissenting in part).
"which acquires meaning as public opinion becomes enlightened by a humane justice." Under the Court's current "evolving standards of decency" jurisprudence, until at least a substantial majority of states have abolished a cruel and unusual practice, its infliction will continue with judicial sanction even though it offends contemporary standards of decency.

The hamstrung interpretation of the phrase "evolving standards of decency" given by the Penry majority invites a total abdication of the judicial duty to fully address constitutional issues properly before the courts.

Judges given stewardship of a constitutional provision . . . whose core is known but whose outer reach and contours are ill-defined, face the never-ending task of discerning the meaning of the provision from one case to the next . . . . A judge who refuses to see new threats to an established constitutional value, and hence provides a cramped interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty.84

Modern advances in the understanding of mental retardation present American courts with a constitutional problem that simply was not recognized at the adoption of the Eighth Amendment. The cruelty of executing the mildly or moderately mentally retarded prisoner has become clear only in this century and perhaps only in the last thirty years.85 Lawyers defending the mentally retarded in capital cases should present, and courts in such cases should consider, public opinion research evidence on the question of contemporary standards of decency. The recent survey data showing widespread moral opposition to such executions also indicates that mental retardation evidence should be vigorously developed and presented to capital sentencing juries as mitigating evidence, where it has the best chance of saving the defendant's life. Evidence of jury sentencing behavior, alluded to but not presented in either Penry or Lambert, should also be developed in future cases.

83. Weens, 217 U.S. at 373-74 (emphasis added).
85. Justice Holmes' infamous opinion in Buck v. Bell, 274 U.S. 200 (1927), embraced the zeitgeist of eugenics and social Darwinism that rationalized repressive and cruel treatment of the mentally retarded in the late 19th and early 20th century. In Buck, the Supreme Court upheld a state involuntary sterilization law with Justice Holmes' memorable observation that "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . . Three generations of imbeciles are enough." Id. at 207 (emphasis added). See also City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (Marshall, Brennan, and Blackmun, JJ., concurring in part and dissenting in part). Marshall noted that in the late 19th and early 20th century:

[a] regime of state-mandated segregation and degradation [of the retarded] soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and "nearly extinguish their race." Retarded children were categorically excluded from public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them. State laws deemed the retarded "unfit for citizenship."

Id. at 462-63 (emphasis added).
Continued use of legislative outcomes as the sole measure of evolving standards of decency renders the Eighth Amendment and its state constitutional counterparts nothing more than moral advice which the States are free to impose upon themselves or reject. Contemporary standards of decency can be persuasively measured with a reasonable degree of reliability using accepted methods of social science research. Judges are therefore duty bound to consider that evidence and give it appropriate weight. When they do, the nation's fundamental law will at last recognize the execution of the mentally retarded offender for the cruel and unusual punishment that most people already know it to be.