Walking the Edge of Death: An Annotated Bibliography on Juveniles, the Mentally Ill, and the Death Penalty

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Walking the Edge of Death: An Annotated Bibliography on Juveniles, the Mentally Ill, the Mentally Retarded and the Death Penalty

SUSAN M. BOLAND

The death penalty is not so monolithic as it seems at first glance. A storm of debate has centered around the application of this, the harshest criminal penalty of all, to the mentally ill, mentally retarded, and juveniles. They are our most vulnerable and least culpable citizens.

This bibliography consists of annotated references to periodical articles, books, Web sites, and Supreme Court cases that examine the application of the death penalty to juveniles, the mentally ill, and the mentally retarded. It does not include newspaper articles, popular magazines, Web sites that offer no substantive content, or materials that are unobtainable from major research libraries. Due to the vast quantity of material on the death penalty, this bibliography is not comprehensive. Omissions do not necessarily reflect a qualitative judgment about the material omitted. The bibliography has been organized under three subject headings: I. Juveniles, II. Mentally Ill, and III. Mentally Retarded. The three subject headings are further subdivided into A. Supreme Court Cases and B. Books, Articles, and Web Sites.

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I. JUVENILES

A. UNITED STATES SUPREME COURT CASES

This case involves a defendant who was sixteen-years-old at the time of the crime and who was labeled as mentally deficient, emotionally unstable, and immature for his age. The Ohio death penalty statute strictly limited the mitigating factors which could be considered. Certiorari was granted to determine whether the Ohio statute violated the defendant’s rights under the Eighth and Fourteenth Amendments because it prevented the sentencer from considering the particular circumstances of his crime and his character as mitigating factors. The Court vacated and remanded the case because the Ohio statute did not permit the individualized consideration of mitigating factors required by the Eighth and Fourteenth Amendments, as held in Lockett v. Ohio, 438 U.S. 586 (1978). Justices Blackmun and Marshall concurred.

This case involved a defendant who was sixteen-years-old at the time of the crime. On petition to the Supreme Court, the defendant argued that the death sentence, under the particular circumstances of this case, was excessive punishment under the Eighth Amendment. The defendant also argued that the Eighth and Fourteenth Amendments prohibited the death penalty for sixteen-year-olds. The Supreme Court vacated the death sentence and remanded the case because the trial court refused to consider the defendant’s unhappy upbringing and emotional disturbance as mitigating evidence. This meant the death sentence was imposed without the individualized consideration of mitigating factors required by the Eighth and Fourteenth Amendments as held by Lockett v. Ohio, 438 U.S. 586 (1978). The Court saw this mitigating evidence as particularly relevant due to the defendant’s youth. Justice O’Connor wrote a concurring opinion. Chief Justice Burger and Justices White, Blackmun, and Rehnquist dissented. They criticized the majority for addressing the mitigation issue which was raised for the first time in the brief to the Supreme Court. They also criticized the majority for trying to dictate the weight that state courts must attach to mitigating circumstances.

Two cases were consolidated for this decision, Stanford v. Kentucky and Wilkins v. Missouri. One defendant was seventeen and the other was
sixteen. The question on appeal was the constitutionality of executing offenders under eighteen. The Supreme Court rejected the petitioners' Eighth Amendment arguments and affirmed the state court decisions. The plurality, made up of Chief Justice Rehnquist, Justices Scalia, White, and Kennedy, looked first at the evolving standards of decency. The plurality declined to look at legislative enactments that did not deal with capital punishment and at those states without capital punishment. The plurality also rejected public opinion polls, interest groups, and the views of the international community. Furthermore, the plurality rejected the second part of the traditional Eighth Amendment analysis, the proportionality test. The plurality held there was no national consensus that sixteen-and-seventeen-year-olds should not be executed and thus such executions do not violate the Eighth Amendment. Justice O'Connor wrote a concurring opinion, where she found no national consensus prohibiting imposition of the death penalty on sixteen-or-seventeen-year-olds but did state the Court needed to conduct a proportionality analysis. The dissent, made up of Justices Brennan, Marshall, Blackmun, and Stevens, applied the evolving standards of decency test and came to the opposite conclusion of the plurality. They also applied a proportionality analysis and found juveniles sufficiently less culpable than adults so that the death penalty was disproportionate. They stated that executing offenders for a crime committed when below eighteen was cruel and unusual punishment.


In this case, for the first time, the Supreme Court tackled head-on the issue of whether the Eighth Amendment prohibited the execution of juveniles. The defendant, William Wayne Thompson, was fifteen-years-old when the crime was committed. The plurality, made up of Justices Stevens, Brennan, Marshall, and Blackmun, employed an evolving standards of decency test for the first part of its analysis. The plurality looked at legislative enactments, jury determinations, and views of the international community and religious and political leaders. For the second part of its analysis, the plurality looked at the proportionality of the punishment to the personal culpability of the defendant. The plurality held that the Eighth Amendment prohibits the execution of a person under sixteen at the time of the offense. Justice O'Connor concurred in the opinion. She stated that although a national consensus prohibiting the execution of persons under sixteen probably existed, better evidence was needed. However, she found that due to the nature of the death penalty, defendants under sixteen may not be executed pursuant to a death penalty statute that gives no minimum age. Justices
Scalia, Rehnquist, and White dissented. They applied the evolving standards of decency test but came to the opposite conclusion. They rejected the proportionality test.

B. ARTICLES, BOOKS, AND WEB SITES


This web page reports on the execution of Alexander Williams, a juvenile on Georgia’s death row. The report discusses the growing number of juveniles on death row and the circumstances surrounding Alexander Williams’ case.


After an overview of the juvenile justice system and death penalty jurisprudence, the author critiques the evolving standards of decency analysis in Thompson v. Oklahoma, 487 U.S. 815 (1988). The author argues the evolving standards of decency analysis is too uncertain and susceptible to different interpretations. The article suggests a more consistent approach would be the disproportionality analysis. The author concludes that under a disproportionality analysis, the juvenile death penalty is always disproportionate because minors are always less responsible for their crimes than adults. The author also looks at the goals of capital punishment and concludes neither retribution nor deterrence supports juvenile executions.

AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT (James R. Acker et al. eds., 1998).

This book looks at the experiment of capital punishment post-Furman v. Georgia, 408 U.S. 238 (1972), and discusses its failures. The chapters, which are written by different authors, examine: public opinion, law, politics, deterrence, incapacitation and future dangerousness, women, children, the mentally retarded, the innocent, incompetent counsel, death-qualified juries, mitigation, discrimination, habeas corpus, cost of the death penalty, physician involvement, families of victims and offenders, life on death row, clemency, and executions. Chapters relevant to this bibliography have been individually cited.

This site contains extensive substantive information concerning the death penalty. Amnesty International reports on the death penalty are available in their Web site library going back to 1996. These reports cover many death penalty issues, including those concerning the mentally ill, mentally retarded, and juveniles.


This Amnesty International report discusses human rights violations concerning juveniles. Part V specifically discusses juveniles and the death penalty. It asserts that the execution of juveniles violates their human rights. The report argues the United States is violating the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. It also discusses the Supreme Court decision of Thompson v. Oklahoma, 487 U.S. 815 (1988). The report condemns the use of the death penalty and reports that capital juries do not always consider the defendant’s youth and background. The report ends with a recommendation that the United States withdraw its reservation to the International Covenant on Civil and Political Rights, ratify the Convention on the Rights of the Child, and ensure states comply with the international standards concerning the execution of juveniles.


This book gives an overview of the death penalty in America. It contains a chapter on juvenile death sentences, that discusses United States domestic standards, the Roach case, and international practice. It also contains a chapter on the execution of the mentally ill, covering five cases. The appendices contain summaries of important United States Supreme Court rulings and death penalty statistics.


This anti-death penalty report reviews the history, laws, and practice of executing juvenile offenders. It summarizes Amnesty International’s findings regarding the cases of twenty-three juveniles sentenced to death.

This anti-capital punishment site contains links to Department of Justice Capital Punishment Statistics, and a page of links on information about juveniles and the death penalty. These links contain information on juveniles executed, juveniles on death row, and treaties against executing juveniles.

James C. Anders, Punish the Guilty, 72 A.B.A. J., June 1, 1986, at 32.

In this article the author argues age should be a factor in sentencing, not an absolute bar to capital punishment for juveniles.


After a discussion of the history of the juvenile death penalty and an examination of current death penalty statutes, the author looks at Thompson v. Oklahoma, 487 U.S. 815 (1988), and Stanford v. Kentucky, 492 U.S. 361 (1989). She concludes the divisive nature of the decisions leaves the question of juvenile executions open and speculates it might best be answered by sentencing juries and judges in light of individual case circumstances rather than having the politically motivated legislators and judiciary set an arbitrary age.


This note discusses the recent abandonment of the traditional proportionality analysis by Supreme Court conservatives. After a background on Eighth Amendment jurisprudence, the author looks at the dissent in Thompson v. Oklahoma, 487 U.S. 815 (1988), and the plurality in Stanford v. Kentucky, 492 U.S. 361 (1989), and Penry v. Lynaugh, 492 U.S. 392 (1989). He argues Justice Scalia’s Eighth Amendment interpretation departs from controlling precedent. He addresses Scalia’s arguments for abandoning the proportionality analysis and refutes the textualist argument and the majoritarian argument. He defends the traditional Eighth Amendment analysis and then applies the analysis to the juvenile death penalty. He argues the juvenile death penalty is arbitrary and capricious, and that juveniles possess less culpability than adult offenders. He concludes the execution of juveniles fifteen or
younger violates the Eighth Amendment, and that the emerging Eighth Amendment jurisprudence should be rejected.


This thesis analyzes literature, statutes, Supreme Court decisions, and statistics pertaining to the juvenile death penalty. The author looks at the issue of the juvenile death penalty from both the retentionist and abolitionist perspectives. The author suggests further research is needed to explore attitudes toward juveniles who commit murder, and to identify and prevent the problem of juvenile violence.


This article reviews Penry v. Lynaugh, 492 U.S. 392 (1989), and Stanford v. Kentucky, 492 U.S. 361 (1989). The author asserts that critics of the decisions have an incomplete understanding of the Supreme Court’s holdings. He asserts the debate in Penry and Stanford is not focused on the culpability of juvenile and mentally retarded offenders but is on federalism and the role of the Court. He argues a case-by-case analysis is appropriate and that principles of federalism dictate this analysis is a state role. He concludes this federalism is more appropriate than a bright line federal rule prohibiting executions of juveniles and the mentally retarded.


This note looks at Thompson v. Oklahoma, 487 U.S. 815 (1988), and Stanford v. Kentucky, 492 U.S. 361 (1989), and concludes the juvenile death penalty is cruel and unusual punishment. He examines the juvenile offender’s reduced culpability, looking at the state’s duty as parens patriae, waiver into adult court, and “time of life” aspects of adolescence. He analyzes the Court’s definition of Eighth Amendment consensus and concludes the fate of the juvenile death penalty depends on the Justices’ definitions of consensus.

This case note analyzes Stanford v. Kentucky, 492 U.S. 361 (1989). The author argues the plurality failed to properly examine whether a national consensus on capital punishment exists and failed to conduct a proportionality analysis as required by precedent. The author concludes the plurality destroyed any opportunity for future Eighth Amendment challenges to the death penalty.


This book presents a historical examination of the death penalty. It also contains studies of post-Furman v. Georgia, 408 U.S. 238 (1972), cases. The book argues the death penalty is still racially discriminatory, does not deter, and is arbitrary in its application. The appendix lists state-imposed executions and the offender's age at execution.

Richard J. Brody, Don't Kill Children, 72 A.B.A. J., June 1, 1986, at 32.

In this opposing view to James C. Ander's article Punish the Guilty, the author argues juveniles should not be executed. He asserts their moral, emotional, and intellectual development differs from adults; juveniles are not deterred by the death penalty; juveniles are more likely than adults to be rehabilitated; and the death penalty is imposed disproportionately on African-American juveniles.


In this article, the author argues imposing the death penalty on a juvenile violates Article 1, Section 14 of the Washington Constitution. After examining the Supreme Court cases of Thompson v. Oklahoma, 487 U.S. 815 (1988), and Stanford v. Kentucky, 492 U.S. 361 (1989), the author looks at Washington's death penalty statute and analyzes it under the Washington Constitution. First, the author determines that Washington's protections against cruel punishment are broader than the Eighth Amendment. Next, he looks at a four part test the Washington Supreme Court has set out for analyzing Article 1, Section 14. He concludes that three of the four factors support the fact that juvenile executions are a cruel punishment under the Washington Constitution.

This chapter discusses the case of the youngest person to be executed during this century. It details the lack of a psychiatric evaluation of the defendant, the prejudicial venue, and the fact that the defendant's family had no resources or understanding of the legal system. The author uses this case to illustrate the problems with the juvenile death penalty.


This article is taken from a death penalty symposium reflecting on the death penalty twenty-five years after Furman v. Georgia, 408 U.S. 238 (1972). The authors point out the international and human rights communities condemn the juvenile death penalty. They note that problems such as mental illness, histories of child abuse, and race discrimination, seen in the adult death penalty, are also found with the juvenile condemned. They discuss Thompson v. Oklahoma, 487 U.S. 815 (1988), and Stanford v. Kentucky, 492 U.S. 361 (1989). They argue juries do not give full consideration to youth as a mitigating factor but rather often view youth as an aggravating factor concerning future dangerousness. They see the juvenile death penalty as evidence that the United States is abdicating its responsibility toward children. They urge a call against juvenile executions.


This is an anthology of law review articles dealing with the death penalty. The majority of articles in the anthology oppose capital punishment. The anthology includes two articles that deal specifically with the issue of juvenile executions, one for and one against. Those articles are included separately in this bibliography.


Part of the Information Series on Current Topics, this book gives an overview of the capital punishment debate. It includes summaries of landmark Supreme Court rulings, including those dealing with juveniles, psychiatric testimony, the insane, and the mentally retarded. It also reviews death penalty statutes, looking at the minimum age for execution, and at the treatment of mental retardation. The book also gives statistical information on executions, including breakdowns by age and education, and an overview of capital punishment around the world.

The author of this note looks at Penry v. Lynaugh, 492 U.S. 392 (1989), and Stanford v. Kentucky, 492 U.S. 361 (1989), and concludes these cases were correctly decided in light of Eighth Amendment jurisprudence and the retributive theory of jurisprudence. After analyzing the cases, she sets forth the general arguments against the death penalty and rebuts them. She discusses the deterrence and retributive punishment theories and applies these theories to the circumstances in Penry and Stanford. She asserts both defendants were capable of distinguishing right from wrong and evaluating various courses of action because they both killed to escape detection. She argues in both cases the sentencer is always free to reject the death penalty if the juvenile or mentally retarded offender is not sufficiently culpable.


After a background of the Supreme Court’s Eighth Amendment interpretations, the author analyzes Thompson v. Oklahoma, 487 U.S. 815 (1988). He concludes the Court correctly interpreted the cruel and unusual punishments clause as it pertains to juvenile executions. He argues the plurality is not limited to finding a national consensus but acted properly in drawing the line. He asserts there exists a trend toward consensus in prohibiting juveniles younger than sixteen from being executed. He also argues children differ from adults and are less culpable. He asserts that this lesser culpability makes retribution an improper justification for executing minors. He states executing minors has no deterrent effect on adult offenders or other minors so that justification also does not support executing juveniles.


This note looks at Stanford v. Kentucky, 492 U.S. 361 (1989), and concludes the Court erred in rejecting the relevance of international law in an Eighth Amendment analysis. The author examines international human rights treaties and concludes the United States is free from any binding international agreements. She also looks at the incorporation of international law into federal common law. She finds barriers in this
application, due to the uncertainty that eighteen is the appropriate age to draw the line and to the isolationism of the United States. She examines whether the prohibition on juvenile executions has reached the status of customary international law and concludes it has not. Furthermore, she finds the United States is a persistent dissenter in the area of juvenile executions. She does find, however, that the United States courts must consult, although not necessarily follow, international law when dealing with domestic cases involving human rights. Thus, she concludes, the Stanford plurality erred in rejecting the use of these norms.


The authors argue international law and opinion prohibit the execution of juveniles. They look at the arguments surrounding juvenile culpability, mitigating factors, racism, ineffective assistance of counsel, prosecutorial misconduct, and the death row phenomenon. They examine the Geneva Convention, American Convention of Human Rights, International Covenant on Civil and Political Rights, and other international agreements. They see any reservation by the United States to these agreements as void because such a reservation is incompatible with the object and purpose of such treaties, violates customary international law, and would conflict with jus cogens. The authors see the prohibition on the execution of juveniles as customary international law due to the wide spread state practice prohibiting it. They see the treaties discussed as evidence of opinio juris. They argue the United States is not a persistent objector since there was a defacto ban on juvenile executions while these agreements were being made. The authors also assert the almost worldwide prohibition of the juvenile death penalty rises to the level of jus cogens. The authors conclude with the hope that international scrutiny and condemnation will shame the United States into finally abolishing the juvenile death penalty.


This article summarizes arguments made in an Amicus Curiae brief on behalf of Michael Domingues. The authors discuss the juvenile death penalty in light of international law and argue United States courts are prohibited from executing juveniles due to international law and international agreements of the United States.

This Web site is by an anti-death penalty organization. They publish educational materials and fact sheets on their Web site. The site has an article on human rights and the execution of juveniles.


This anthology on capital punishment, edited by noted abolitionist Hugo Bedau, collects works presenting information about the history and implementation of the death penalty, arguments for and against the death penalty, social science research on death penalty issues, and case histories. This particular edition contains a section on juveniles and the death penalty that is omitted in later editions.


This later edition of Hugo Bedau's anthology on capital punishment includes chapters on deterrence, public attitudes towards the death penalty, error, constitutionality under the Eighth Amendment, and arguments for and against the death penalty. In the beginning chapters, Bedau discusses statutory mitigating circumstances such as diminished capacity, mental disturbance, and the age of the offender.


This anti-death penalty site contains extensive information on the death penalty. It addresses special topics, among which are juveniles and the mentally retarded. The pages include statistics on juveniles on death row and juveniles executed. It also looks at recent developments and minimum execution ages by jurisdictions.


This is an anti-death penalty Web site maintained by an intern of the ACLU Capital Punishment Project. The site contains facts and figures on the juvenile death penalty. The site also links to other Web sites with information on juveniles sentenced to death.

This Web site is an anti-death penalty site maintained by an Amnesty International member. It contains lists of juveniles on death row and juveniles executed. It breaks these lists down by year and by state.


The article examines Stanford v. Kentucky, 492 U.S. 361 (1989), and explores whether there is a national consensus against the juvenile death penalty. The author asserts the plurality erred in its analysis because it ignored the states that prohibited capital punishment, disregarded public opinion polls, and failed to recognize that retribution and deterrence are not furthered by the execution of juveniles.

Shirley Dicks, Gary Graham: Juvenile On Death Row, in YOUNG BLOOD 181 (Shirley Dicks ed., 1995).

This chapter discusses the case of Gary Graham, a seventeen year old African-American who was convicted on the basis of questionable identification by a single witness. Several crime scene witnesses were never called upon to testify. No one interviewed alibi witnesses. No information was given concerning childhood abuse. The chapter uses the case to highlight problems with the juvenile death penalty and the Texas clemency review process.

Shirley Dicks, Juveniles On Death Row: Case Profiles, in YOUNG BLOOD 117 (Shirley Dicks ed., 1995).

This chapter discusses eight cases of juvenile offenders sentenced to death. The cases note evidence of child abuse, drug or alcohol abuse, mental illness, and poor representation by the offender's attorney.


This report discusses the international trend toward the abolition of the death penalty and the United States' position as a violator of human rights. Among the issues discussed are juvenile executions. The report discusses several human rights treaties that the United States has signed but not ratified. It also discusses the costs of the United States' failure to abide by international law regarding capital cases.
Clifford K. Dome and Kenneth E. Gewerth, *Imposing the Death Penalty on Juvenile Murderers: A Constitutional Assessment*, 75 JUDICATURE 6 (1991). This piece gives a review of the standards and methods used to determine if a punishment is cruel and unusual and discusses judicial application of these standards to juvenile executions. The authors conclude the Supreme Court has no clear method for determining if a national consensus on the juvenile death penalty exists and that there is a fundamental disagreement about how the constitutionality of any punishment is to be judged.


The author asserts the Supreme Court failed to define or provide substantive guidelines for establishing the moral culpability of juvenile murderers in *Lockett v. Ohio*, 438 U.S. 586 (1978). This leaves the sentencer with unguided discretion to interpret and define youth as a mitigating factor. He concludes future death penalty statutes must specifically define and address youth as a mitigating factor.


After a brief historical look at the death penalty and its application to minors, the author examines the international prohibition on juvenile executions. He concludes that even before *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the United States was bound by this international prohibition. He comments on the Fourth Geneva Convention of 1949, Article Six of the International Covenant on Civil and Political Rights, and the American Convention on Civil and Human Rights. He concludes by applauding the Court’s decision in *Thompson v. Oklahoma*, which placed the United States in line with international law prohibiting juvenile executions.


(1989), and Penry v. Lynaugh, 492 U.S. 392 (1989). She concludes none of the Court's approaches adequately addresses the problems of juveniles and the mentally retarded. She argues the Court should adopt a compelling state interest/least restrictive means approach to determine the constitutionality of juvenile and mentally retarded offender's death sentences.

This note analyzes Stanford v. Kentucky, 492 U.S. 361 (1989), and concludes the Court correctly held that imposing the death penalty on sixteen-and-seventeen-year-olds is not unconstitutional. The author finds the Court is correct because deference to legislative judgment is a necessity, and an examination of death penalty statutes reveals no national consensus against executing juveniles. The author finds the Court appropriately rejected other age-statutes and views of special interest groups and foreign countries. She asserts the Court correctly found juvenile executions can serve the penological goal of deterrence and retribution. The author finds two flaws in the Court's decision: that the Court ruled on a statistical fallacy when looking at jury decisions, and that it failed to conduct a proportionality analysis.

The author discusses the juvenile death penalty, looking to international law and the examples of other countries in an attempt to urge the prohibition of juvenile executions.

Katherine Hunt Federle, Emancipation and Execution: Transferring Children to Criminal Court in Capital Cases, 1996 WIS. L. REV. 447.
The author discusses the role of juvenile waiver into adult court in juvenile death penalty cases. She argues the Court erred in Thompson v. Oklahoma, 487 U.S. 815 (1988), and Stanford v. Kentucky, 492 U.S. 361 (1989), when it failed to analyze the underlying waiver decisions. She looks at Kent v. United States, 383 U.S. 541 (1966), the Supreme Court case addressing the constitutionality of juvenile waiver. She then examines the use of Kent criteria in the waivers of Thompson, Stanford, and Wilkins. She finds that in Thompson and Stanford, at least four justices viewed waiver provisions as evidence of legislative intent to execute minors. She notes courts weigh certain factors more heavily than others when waiving juveniles. She argues transfer to adult court does
not ensure only the most culpable minors are tried as adults. She asserts the decision to transfer may be based on bureaucratic reasons rather than an individualistic determination of blameworthiness. She also argues that unquestioned acceptance of transfer authority masks discrimination against minority juveniles, since they are more likely to be transferred than white juveniles. She suggests that if waiver is to continue, courts should have a presumption that a minor is not mature enough to be criminally culpable for the death penalty.


The authors present the results of two controlled experiments with death-qualified subjects. In the first experiment, they found significant case variables: as the heinousness of the crime increased, the age effect became less significant. The second experiment used the most heinous case from the first experiment and varied the type of defendant. The ages of the defendant ranged from thirteen to twenty-five. The results showed two discriminable breaks between the younger group and the combined middle and older group.


This article examines the Supreme Court's analysis of objective indicia in *Stanford v. Kentucky*, 492 U.S. 361 (1989). The author reviews both the plurality and the dissent's social science analysis of legislative enactments. He finds fatal flaws in both. He asserts the appropriate denominator is fifty-two, the number of states and jurisdictions. He asserts juveniles are the group in question and adults are the control group. He defines the question as whether legislative treatment of juveniles and adults show significant differences. His results indicate a significant difference that deepens the younger the offender. The author rejects jury decision data because of the missing denominators such as the number of cases brought to trial or the number of cases with convictions. He looks at Justice Scalia's framing of the question, and concludes it contradicts precedent and presents an impossible burden.


After exploring the background of the Eighth Amendment, the author distills three elastic principles that define cruel and unusual: standards of
decency, dignity of man, and sentence by individualized consideration. He applies the issue of the juvenile death penalty to these principles. He argues contemporary indicators show that reasonable minds differ as to whether juvenile executions should be prohibited. He concludes this demonstrates a legal and social environment where a bright line age limit is premature.


The author examines international law and capital punishment. She notes United States' courts have largely ignored international law arguments. She hypothesizes three possible reasons: theories of customary law and the death penalty are flawed; advocacy of these theories is flawed; or capital punishment is so political that courts have ignored international law. The author then looks at some of the difficulties in determining whether customary law prohibits juvenile executions. She asserts that without proof that the prohibition on juvenile executions in the international scene is legally binding on the United States, there is no reason for United States' courts to use international law in Eighth Amendment interpretation. She argues, however, that there are good reasons to interpret unclear constitutional provisions, such as the Eighth Amendment, so as to be consistent with international law. She concludes that even assuming a strong theory of international customary law and intense advocacy, the death penalty is too political and the courts will be too reluctant to look at the issue through international law.


This study looks at defendants indicted for first degree murder in Florida between 1972 and 1978. The data gathered included demographic information consisting of age, race, sex, education, and prior convictions. The author found age and the number of additional offenses to be two predictors that influenced trial outcomes at a statistically significant level. She found younger people were more likely to be adjudicated guilty than older people. She theorizes that younger defendants might appear more threatening to middle-aged or older jurors. The study also found the sex of the offender and the race of the victim influenced the
conviction and imposition of the death penalty. She concludes Florida’s post-*Furman v. Georgia*, 408 U.S. 238 (1972), statute has failed to eliminate discrimination in the death penalty’s imposition.


This article reports on the decision of the Inter-American Commission on Human Rights’ finding that the United States had violated two provisions of the American Declaration of the Rights and Duties of Man. The case involved two persons sentenced to death for crimes committed before they were eighteen. The Commission held that the rule prohibiting juvenile executions was *jus cogens*, and thus no derogation was permitted. The author asserts the Commission did not elaborate sufficiently on this holding. He argues that although the United States is not bound by the decision, it should be persuasive in an Eighth Amendment analysis of the evolving standards of decency. He raises the issue of foreign intervention in United States domestic policy, but notes the United States may have acquired limitations on human rights issues due to its membership in the OAS (Organization of American States).


After a short historical review of juvenile capital punishment, the author analyzes *Stanford v. Kentucky*, 492 U.S. 361 (1989). He finds the plurality’s analysis of legislative and jury/prosecutor statistics is appropriate, however, he asserts the plurality erred when it failed to conduct a proportionality analysis. He argues this failure was harmless, due to the heinous nature of the crimes and the closeness of the defendants to their majority age. He criticizes Justice O’Connor’s opinion for her requirement that state legislatures include a minimum age in their death penalty statutes. He also criticizes the dissent for its expansion of the national consensus analysis beyond the plurality’s criteria, and for its decision that the punishment was excessive.


This article analyzes *Stanford v. Kentucky* 492 U.S. 361 (1989). The author asserts the constitutionality of the death penalty for minors is dubious. He views *Stanford* as unreliable due to the split in reasoning and the departure of Justice White from the Court. He sees *Thompson v. Oklahoma*, 487 U.S. 815 (1988), as even more precarious due to the current make up of the Court.

This note discusses a South Carolina juvenile death penalty case. The author argues that the constantly shifting legislation regarding the juvenile death penalty should not be the sole indicator of the evolving standards of decency. She asserts the national consensus standards of decency then becomes a majoritarian rule and a battle of statistical interpretation. The author criticizes Stanford v. Kentucky, 492 U.S. 361 (1989), for ignoring international opinion. She argues international norms prohibit the execution of juveniles. She also criticizes the Stanford plurality for rejecting the proportionality test. She argues retribution and deterrence are not served by executing juveniles. She finds that the role of executioner conflicts with the state’s role of parens patriae.


The author considers the juvenile death penalty and concludes the execution of juveniles should be prohibited. He first looks at the history of juvenile executions and the juvenile justice system. He examines the process of waiver into adult court and finds it flawed. He argues the legislative trend prohibiting execution of juveniles, the reluctance of juries to sentence juveniles to death, and public opinion polls show the contemporary standards of society do not support the juvenile death penalty. He finds further support for this when he looks at international law, the Pope’s declaration, the Model Penal Code, and the American Bar Association’s position. He additionally finds the penological goals of retribution and deterrence are not supported by juvenile executions. He argues children deserve special treatment, analogizes juveniles to the insane, and asserts today’s children are less mature than children at the turn of the century.


The author discusses Penry v. Lynaugh, 492 U.S. 392 (1989), and Stanford v. Kentucky, 492 U.S. 361 (1989), and asserts both cases were wrongly decided by the Supreme Court. He argues the plurality erroneously relied on the fact that a majority of states permitting capital punishment do not expressly exempt juveniles or the mentally retarded, and that the plurality failed to take into account the world community’s stance on these issues.

In this comment, the author discusses the historical treatment of minors at common law, the development of the juvenile justice system, and the present trend of transferring juveniles to criminal court. The author argues sentencing minors to death violates the excessiveness strand of the Cruel and Unusual Punishment Clause. She asserts the death penalty is always disproportionate when applied to minors, and that it fails to make a contribution to the acceptable goals of punishment.


This note discusses *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and chastises the Court for its improper use of judicial restraint. The author asserts *Eddings* adds nothing to death penalty jurisprudence, but merely applies established rules and guidelines. She argues an analysis of *Eddings* reveals the Court's abandonment of well-established procedures for certiorari in order to avoid the issue of juveniles and the death penalty.


The author argues that the same considerations protecting juveniles from execution should apply to those who are functionally juveniles because of their mental impairment. He proposes a model statute, concluding there is a need for state statutes to take the issue of mental impairment out of aggravating-mitigating circumstances balancing and removing the entire class of mentally impaired from execution.


The article looks at the two prongs of the cruel and unusual punishments test and concludes the juvenile death penalty violates the Eighth Amendment because it is unacceptable to contemporary society and it is excessive.


This book discusses the anti-death penalty movement in America from 1972 to 1994. The author examines the efforts to develop a multi organizational network to attack the death penalty. He discusses the
involvement and contributions of Amnesty International. Amnesty International pushed for incremental attacks on the death penalty and pursued studies revealing the lack of public support for executions of those under eighteen, those with a history of mental illness, and the mentally retarded. The book reports the success of legislation prohibiting the execution of the mentally retarded.

This study lists 330 juveniles executed in the United States. The study takes a functional and conflict approach and looks at how various characteristics of juveniles have contributed to the administration of the death penalty for this class. It also examines five different periods of American history where juveniles were death eligible. The author performs a historical analysis, looking at the social attitudes of the period regarding age, race, and gender of the defendant.

This note looks at the Supreme Court decisions discussing the juvenile death penalty. The author concludes the Court's unwillingness to find a national consensus against the juvenile death penalty creates a need for the individual states to determine their own sentences. She argues the United States must preserve individual state sovereignty and reserve disagreement to the United Nations Convention on the Rights of the Child. She urges the Court to give the states clear guidelines concerning the juvenile death penalty in order to contain the international community's attempts to dictate United State's laws.

This is an article looking at international norms on the execution of juveniles and their effect on the imposition of the juvenile death penalty in the United States. The author examines the theory that international human rights norms are a part of the federal common law. He also looks at the position of the United States as a dissenter to the norm. Additionally, he examines the theory of international norms on juvenile executions as incorporated into the Eighth Amendment analysis. He
predicts that using these theories to invalidate state statutes authorizing juvenile executions will encounter stiff resistance.


The author examines *Stanford v. Kentucky*, 492 U.S. 361 (1989), and criticizes the decision for its departure from earlier death penalty cases and international norms concerning human rights. She argues the issue of executing juveniles should be looked at in the framework of the world community. She points to the international community’s prohibition on the execution of juveniles and its movement toward total abolition of the death penalty. She looks at the International Covenant on Civil and Political Rights, American Convention on Human Rights, and the Geneva Convention. She compares the United States’ policy on juvenile executions with the Soviet Union’s, and finds the Soviet restrictions to be more enlightened than the current policies of the United States.


This comment looks at how international law and the Eighth Amendment interrelate. The author looks at Eighth Amendment jurisprudence in general and then specifically at death penalty cases. He compares these interpretations to the international standard, and finds there is a broader scope of protection under the international standard. He examines the juvenile death penalty, and concludes the United States’ reservation to the International Covenant on Civil and Political Rights conflicts with the non-derogability clause. Thus, he finds it violates an international norm. He concludes that the Supreme Court’s narrowing of the Eighth Amendment means there is now little symmetry between the Eighth Amendment and the international standard.


This is an excerpt from Heft’s brief on behalf of Kevin Stanford in *Stanford v. Kentucky*, 492 U.S. 361 (1989). He argues the death penalty for juveniles is unconstitutional.

This dissertation looks at Thompson v. Oklahoma, 487 U.S. 815 (1988); Stanford v. Kentucky, 492 U.S. 361 (1989); and at the perspectives of ten state legislatures. Based on survey responses, the author constructs three models. Model One looks at which variables predict legislator's attitudes toward juvenile capital punishment. Model Two looks at which variables predict legislator's attitudes toward Supreme Court decisions. Model Three looks at variables to determine which legislators are more likely to know their state laws. In Model One, the state, gender, political ideology, and attitude toward adult capital punishment were significant variables. In Model Two, race was a significant variable. In Model Three, a majority of legislators were not aware of their own state laws. Significant variables for Model Three included state, criminal justice experience, and general attitude toward capital punishment.

Christopher M. Hill, Can the Death Penalty Be Imposed on Juveniles: The Unanswered Question in Eddings v. Oklahoma, 20 CRIM. L. BULL. 5 (1984). This article discusses the juvenile death penalty in light of Eddings v. Oklahoma, 455 U.S. 104 (1982), and other Eighth Amendment cases. The author examines public, legislative, judicial, and international attitudes toward juvenile executions. He concludes these attitudes do not rise to the level of widespread rejection. He discusses death penalty jurisprudence and the Eighth Amendment tests, and then analyzes the treatment of the juvenile offender in general. He asserts the judicial waiver system is unreliable and should not be considered proof that a juvenile should be treated as an adult for sentencing purposes. He concludes the time is not ripe for a judicial ruling prohibiting the juvenile death penalty.

Shannon Hill, United States: A World Leader in Executing Juveniles, HUMAN RIGHTS WATCH CHILDREN'S RIGHTS PROJECT, Mar. 1995, at 1. Human Rights Watch is an organization which opposes the death penalty on all grounds. This report condemns the juvenile death penalty. The report examines Eighth Amendment jurisprudence and the current status of death penalty statutes. The report asserts the United States is bound as a signatory not to act in a manner defeating the purpose of the American Convention on Human Rights, Convention on the Rights of the Child, and the International Covenant on Civil and Political Rights, and thus should not execute juveniles. The report also concludes the United
States violates customary international law when it executes juveniles. The report examines the characteristics of juveniles sentenced to death and finds many of them suffer from inadequate legal representation and come from abusive backgrounds. The report looks at eight individual cases. It summarizes professional and legal views on the juvenile death penalty.


This article focuses exclusively on the juvenile death penalty and the principles of retributive justice. The author argues modern retributive theory demands both cardinal and ordinal proportionality, and compels the Supreme Court to reject a bright line ban on the juvenile death penalty.


The author discusses research on juvenile homicides and why juveniles kill. She identifies these juveniles as having suffered from intense emotional and physical abuse, neurological impairment, and drug abuse. She argues these studies on juvenile murderers can assist defense counsel in understanding juvenile clients and developing mitigation arguments. She asserts these studies demonstrate the death penalty is disproportionate punishment. She urges defense counsel in juvenile death penalty cases to investigate family history, neurological impairment, and drug abuse. She uses the case of James Terry Roach to illustrate the failure of defense counsel to present mitigating evidence.


This report to the United Nations Committee on Crime Prevention and Control is based on a study of the death penalty. The report addresses the observation of standards and safeguards guaranteeing the rights of those facing the death penalty. The report finds twenty-six states had minimum death penalty ages from twelve to seventeen or no minimum age at all, thus violating standards for juveniles. The report examines *Thompson v. Oklahoma*, 487 U.S. 815 (1988), and *Stanford v. Kentucky*, 492 U.S. 361 (1989). In addition to juvenile safeguards, the report addresses the mentally incapacitated. It finds the federal government and some states have modified the insanity defense, although three states abolished it. Twelve states have adopted a guilty but mentally ill verdict, which the author believes precludes a death sentence. The report notes
the problem of death row inmates becoming mentally ill after trial and the execution of mentally retarded offenders in the United States.


After a review of Thompson v. Oklahoma, 487 U.S. 815 (1988), and Stanford v. Kentucky, 492 U.S. 361 (1989), this article discusses the international law argument against the juvenile death penalty. First, the author looks at treaty law, specifically the International Covenant on Civil and Political Rights, American Convention on Human Rights, Convention on the Rights of the Child, and the Fourth Geneva Convention. She concludes the United States is in violation of these treaties and that any reservations are invalid because they are incompatible with the object and purpose of the treaties. She also argues the United States has violated the customary rule of international law prohibiting juvenile executions. She asserts the widespread prohibition has evolved into an extensive and almost uniform practice, thus satisfying the elements of generality, consistency, and duration. She finds opinio juris satisfied because very few states execute juveniles. Lastly, she examines whether the prohibition has become jus cogens and concludes it has not.


This is the report of a fact finding mission of the International Commission of Jurists. The primary purpose of the mission was to look at practices and procedures in capital sentencing and examine whether these conformed to the international obligations of the United States. The report discusses several landmark decisions of the Supreme Court, sets out two official studies on racial disparity in capital sentencing, analyzes the United States ratification of several treaties, traces the historical background of the death penalty in the United States, and looks at statistical information. The appendices contain statistics and the text of the relevant international instruments. The Commission finds that capital sentencing as currently applied is inconsistent with the international obligations undertaken by the United States. Among other things, the report discusses the issue of the juvenile death penalty.

This article looks at Stanford v. Kentucky, 492 U.S. 361 (1989), and concludes contemporary standards permit the death penalty for aggravated murder, regardless of whether the offender is a juvenile. The author argues chronological age cannot excuse the defendants in Stanford v. Kentucky.


After an overview of the history of the juvenile death penalty and the role of international norms in death penalty cases, the author looks at Thompson v. Oklahoma, 487 U.S. 815 (1988). She discusses the way the plurality, dissent, and concurrence, treat the idea of international law in domestic litigation. She finds that although the plurality and the dissent did not accept that international law was binding on the United States, the fact that international norms were discussed marks an awareness and possible willingness to accept the validity of international norms in human rights issues such as the juvenile death penalty.


This note analyzes Thompson v. Oklahoma, 487 U.S. 815 (1988). The author asserts that the forty year base the Supreme Court chose to examine for capital punishment statistics was not a long enough span of history to discover public attitudes toward capital punishment. He also argues that by picking and choosing its statistics, the Court can force a definition of cruel and unusual punishment that bears no relationship to a national consensus on the death penalty. He states the Thompson Court redrafted what the original framers had in mind. He foresees that as the Court’s membership changes, the states may be given greater latitude in delivering death sentences.


This note argues the juvenile death penalty is cruel and unusual punishment and that there are better alternatives to dealing with violent juvenile offenders than execution. The author first explores the juvenile justice system and the history of the juvenile death penalty. She then
performs an Eighth Amendment analysis. She finds capital punishment of juveniles was not considered cruel and unusual by the framers. She does find juvenile executions unacceptable to today's society, and comes to this conclusion after looking at: other legislative restrictions on juveniles, the rarity of death sentences, opinion polls, opinions of professional organizations, and views of the international community. She finds the punishment disproportionate to the crime because juveniles lack the culpability and maturity of adult offenders. She suggests alternatives to execution such as long term incarceration and creative rehabilitation programs. She proposes that the long term solution is to promote programs of youth empowerment.

This book on capital punishment contains chapters on legal representation, public opinion, costs, deterrence, erroneous convictions, discrimination, women, juveniles, sentence review, international opinion, the federal death penalty, and the history of the death penalty. The chapter on juveniles gives statistical information on current juveniles under a death sentence. It also briefly discusses the international status of the juvenile death penalty.

The author looks at the juvenile death penalty and concludes it should be prohibited. She first looks at the theories of punishment. She finds the juvenile status of the offender makes punishment based on these theories ineffective. She then looks at the development of the juvenile court system and the special status afforded juveniles in our society. She examines death penalty jurisprudence and the rights of juveniles. After looking at current death penalty statutes and appellate decisions on the juvenile death penalty, she recommends a model amendment to death penalty statutes that prohibits the execution of juveniles.

After a brief history of the death penalty in the United States, the author examines the juvenile death penalty in light of international treaties and customary international law. The author argues customary international law does not obligate the United States to prohibit juvenile executions because the existence of a state practice proscribing execution of minors
cannot be established. She also argues that opinio juris does not apply because there has been no real evidence offered to demonstrate it exists as to the prohibition of juvenile executions. She also points out that the United States' protests against a rule prohibiting the execution of minors can be seen in the debates surrounding human rights treaties. She concludes that although the Supreme Court is unwilling to enforce international standards concerning the execution of juveniles, it is not blind to their relevance.


This note looks at the issue of the juvenile death penalty and concludes that establishing a bright line prohibition on the execution of juveniles would offend the dignity of man and undermine Eighth Amendment jurisprudence. The author criticizes the plurality in *Stanford v. Kentucky*, 492 U.S. 361 (1989), for failing to conduct a proportionality test. He finds a generalized concept that juveniles are less blameworthy than adults who commit similar crimes, but argues a bright line exclusion conflicts with traditional Eighth Amendment values because it fails to individually examine the proportionality of the death penalty to the defendant's culpability and the goals of retribution and deterrence. He argues age should mitigate but not exempt juveniles from the death penalty.


After an overview of recent capital punishment decisions pertinent to the juvenile death penalty, the case note examines *Wilkins v. Missouri* (consolidated with *Stanford v. Kentucky*). The author finds the Supreme Court split three ways in its interpretation of the Cruel and Unusual Punishments Clause. He asserts the plurality erred when it failed to apply a proportionality analysis and rejected ethicoscientific data. He argues the dissent erred when it disregarded evidence of legislative enactments and jury determinations. He concludes Justice O'Connor's opinion to be the correct approach, looking to the individual jurisdictions permitting or prohibiting the juvenile death penalty.

The author begins with a history of the juvenile death penalty. He analyzes *Thompson v. Oklahoma*, 487 U.S. 815 (1988), and concludes the Court erred in drawing a bright line rule prohibiting the execution of juveniles younger than fifteen. He criticizes the plurality’s examination of irrelevant age-based statutes. He asserts the plurality failed to give proper weight to state certification statutes. He finds the plurality’s analysis of legislative enactments flawed because they exclude those states which authorized the death penalty but did not list a minimum age. He concludes the plurality placed too much emphasis on an international consensus. He examines the plurality’s determination that juveniles as a class are less culpable than adults and finds this conclusion too broad. He concludes the plurality’s analysis of retribution and deterrence was based on the subjective feelings of the justices not on objective analysis. He analyzes the current make up of the Court and argues *Thompson* would be overruled if another case like it came before the Court.


In this note, the author looks at *Trimble v. Maryland*, 478 A.2d 1143 (Md. 1984), a case in which the Supreme Court denied certiorari, and examines the constitutionality of the juvenile death penalty. He begins with a discussion of the legislative waiver process in Maryland and the Federal Youth Corrections Act. Next he addresses the death penalty in Maryland and its application in Trimble’s case. He concludes the Maryland statute is flawed but constitutional. He further asserts an equal protection argument based on Trimble’s status as a juvenile would be denied. Finally, he examines the Maryland court’s Eighth Amendment analysis. He concludes the Supreme Court’s denial of certiorari in *Trimble* implies the death penalty for juveniles is not per se unconstitutional.


The author examines the common belief that children in the eighteenth and nineteenth century were frequently executed. He concludes this belief is erroneous and that juveniles were very rarely executed. For example, he finds 103 death sentenced juveniles between the years 1801
and 1836, but notes that none of them were actually executed. He concludes more empirical research is needed, but argues judicial execution of children in the eighteenth and nineteenth century was never common.


After setting forth a brief history of the juvenile death penalty, the author examines Stanford v. Kentucky, 492 U.S. 361 (1989). He concludes the plurality erroneously decided the case and was inconsistent with Supreme Court precedent. He asserts the plurality’s sole reliance on state death penalty statutes ignores precedent, as does the refusal to consider international norms, jury sentencing patterns, opinion polls, and views of professional organizations. He finds the plurality further abandoned precedent when it failed to perform a proportionality analysis.


After analyzing Thompson v. Oklahoma, 487 U.S. 815 (1988), the author of this comment concludes the decision provides necessary guidance for state legislatures and courts. She recognizes the broad scope of the decision but asserts prior case law and societal norms support the prohibition on executing juveniles under sixteen.


The authors argue behavioral science data does not support the abolition of the juvenile death penalty. They assert it shows that the cognitive and moral development of adolescents is comparable to adults, and that the neuropsychiatric symptoms in condemned juveniles cannot be sufficiently distinguished from those in condemned adults.

After a look at the historical application of the death penalty to juveniles, the author argues the Supreme Court should review its decision that prohibits the execution of juveniles under sixteen. She asserts crimes committed by juveniles are increasingly violent and sophisticated. She argues *Thompson v. Oklahoma*, 487 U.S. 815 (1988), and *Stanford v. Kentucky*, 492 U.S. 361 (1989), have limited the power of state legislators to pass laws in the best interests of their citizens, and that the position assumed by the Court is improper. She concludes the age of the offender should be a mitigating factor rather than an absolute ban on executions.


This comment argues the juvenile death penalty is a constitutional and effective means for protecting society from hard-core juvenile offenders. The author asserts the juvenile justice system fails when confronted with juveniles who are experienced, sophisticated, and rehabilitative failures. He argues the solution to the problem is the transfer of juveniles to adult court where they may be subjected to the death penalty. He asserts that the fact that juvenile offenders have been sentenced to death in the past proves the execution of juveniles is not repugnant to the evolving standards of decency. He argues age is not conclusive of a person's maturity or criminal intent.


The author of this note examines the problems inherent in the current methods for transferring juvenile offenders to adult courts and the constitutionality of subjecting juveniles to the death penalty. She argues that because juveniles transferred to adult courts are subjected to adult penalties, but lack procedural due process protections, it is unconstitutional to execute them. She asserts it is contrary to the philosophy behind the juvenile court system. She proposes that the due process requirement of a hearing, an attorney, and a right to counsel be applied to all juvenile transfer methods. She further argues the death penalty as applied to juveniles is unconstitutional because: there is a national consensus against juvenile executions, minors are in need of special consideration and protection, and the juvenile death penalty fails to serve the penological goals of deterrence and retribution.

This note looks at Stanford v. Kentucky, 492 U.S. 361 (1989), and Penry v. Lynaugh, 492 U.S. 392 (1989), and concludes the Supreme Court erred in its assessment of the deterrent and retributive values of sentencing to death juveniles and the mentally retarded. The author gives a background of Eighth Amendment jurisprudence, focusing on the evolution of the deterrent and retributive analysis. He criticizes Justices O'Connor and Scalia for abandoning the penological purpose test in Stanford v. Kentucky, 492 U.S. 361 (1989). He looks at Penry v. Lynaugh, 492 U.S. 392 (1989), and argues Justice O'Connor distorts the penological purpose test. The author then performs his own analysis and finds that the characteristics of juveniles and the mentally retarded preclude the required level of culpability necessary for the death penalty. He argues this lesser culpability does not fulfill the goal of retribution. He also argues that the poor impulse control, lack of strategic thinking, and difficulty seeing their mortality means it is unlikely the goal of deterrence is served by executing juveniles and the mentally retarded.


The author examines the New York death penalty statute requirement that the defendant be “more than eighteen years old” and concludes the language means it applies to defendants as of the date of their eighteenth birthday. In the course of his analysis, the author concludes the phrase is ambiguous and the legislative intent cannot be read on the plain face of the statute. By looking at previous New York death penalty statutes, statutes with similar age based language, and at New York case law, he concludes the legislative intent was to include defendants eighteen and older at the time the crime was committed.


This note looks at Stanford v. Kentucky, 492 U.S. 361 (1989), and concludes juveniles should not be executed because they are not as culpable as adults. After an overview of juvenile justice and the juvenile death penalty, the author analyzes Stanford. She argues the evolving standards of decency analysis is too difficult to define. She asserts statistics can be manipulated to come to different conclusions and that legislative trends and public opinion are too uncertain. She proposes the
better approach is the proportionality analysis. She argues the juvenile
death penalty is always disproportionate because juvenile offenders are
always less culpable than adults.

The NAACP Legal Defense and Educational Defense Fund publishes a
quarterly report on death row statistics and cases. The statistics
compiled include the number and percentage of juveniles on death row.
The report includes summaries of significant criminal, habeas, and
constitutional cases. The report also compiles statistics on those
executed and contains state lists of prisoners on death row. The state
lists identify juveniles.

Gino J. Naldi, The U.S. Supreme Court, the Execution of Juveniles and
This article examines Stanford v. Kentucky, 492 U.S. 361 (1989), and
concludes the decision was incompatible with human rights standards.
The author looks at international instruments such as the Geneva
Convention, International Covenant on Civil and Political Rights, and the
American Convention on Human Rights. He concludes the United States
is not per se bound by these treaties, but he argues a norm of customary
international law prohibiting juvenile executions exists and is binding on
the United States He also argues the prohibition of juvenile executions
may be jus cogens.

Ved P. Nanda, The United States Reservation to the Ban on the Death Penalty
For Juvenile Offenders: An Appraisal Under the International Covenant on
After an overview of United States death penalty jurisprudence, the
author examines the emerging international standards on the execution
of juveniles. The author looks at the International Covenant on Civil and
Political Rights, Geneva Convention, Convention on the Rights of the
Child, and U.N. resolutions. The article argues that at the time many of
these treaties were adopted, the United States had discontinued juvenile
executions and therefore any reservation to these agreements is
ineffective. The author also looks at the number of countries that have
abolished the juvenile death penalty and finds a consensus that
international law prohibits juvenile executions. She urges the United
States Senate to withdraw its reservation or alternatively that the
Supreme Court hold the juvenile death penalty violates the Eighth
Amendment.

This Web site is by a coalition of organizations and individuals trying to abolish the death penalty. The Stop Killing Kids is a smaller site within the larger more general anti-death penalty site. The National Coalition to Abolish the Death Penalty (NCADP) states our national failure to nurture and protect our children can be seen in every child on death row. It decries the political reaction of lowering the age for the death penalty instead of trying to remedy youth violence. It also points out the pattern of racial discrimination in choosing which juveniles are sentenced to death row. It asserts the United States commits human rights violations each time it sentences a child to death. The site seeks to build an alliance of groups and individuals to oppose the execution of juveniles. It highlights particular cases.


The author argues capital punishment of juveniles violates a norm of international law. The author first discusses the capital punishment of juveniles by examining Thompson v. Oklahoma, 487 U.S. 815 (1988), and Stanford v. Kentucky, 492 U.S. 361 (1989). The author next defines jus cogens. The author analyzes the law and practice of other nations, international agreements, and decisions of international judicial bodies, and concludes the exclusion of juveniles from capital punishment is a jus cogens norm. The author concludes it is unlikely United States courts would enforce a jus cogens norm but sees it being incorporated into the Eighth Amendment jurisprudence as part of the “evolving standards of decency” analysis and as part of the proportionality strand.


After an examination of death penalty jurisprudence and the juvenile death penalty’s history, the author looks at international practice and opinion. The author argues the international protests against the United States juvenile death penalty, the fact that most countries ban the execution of juveniles, human rights treaties, and U.N. resolutions, demonstrate an international consensus against the juvenile death penalty. The author sees the above as evidence of a norm of customary
international law and argues that because the United States has failed to dissent from the ban on the execution of juveniles from the beginning, it does not qualify as a persistent dissenter. The author also argues the prohibition on juvenile executions is *jus cogens* and binding on the United States.

This case note examines *Thompson v. Oklahoma*, 487 U.S. 815 (1988). The author concludes the case sets a bright line rule that executing fifteen-year-olds violates the Eighth Amendment’s cruel and unusual punishments clause. He predicts that the constitutionality of the death penalty for sixteen-and-seventeen-year-olds, will turn on whether the state statute authorizing the death penalty includes a specific minimum age.

Teresa L. Norris, Juvenile Executions: The United States’ Violation of International Law (1990) (unpublished manuscript, on file with the University of South Carolina Law Library).
This manuscript examines the juvenile death penalty in light of international law and concludes the United States violates the human rights of juvenile offenders by imposing capital sentences. After a background on the juvenile death penalty in the United States, the author looks at the major human rights treaties abolishing juvenile executions. Although she finds the United States has not ratified any agreement expressly prohibiting the juvenile death penalty, such a prohibition may be enforced domestically because it is a customary international norm. The author examines the proposition that the prohibition on juvenile executions rises to the level of *jus cogens*, and concludes it does not. She does, however, find it is a customary international norm. In addition to treaty evidence, she notes evidence that the majority of states do not execute juveniles. She concludes the United States did not protest the norm during its formation and is thus not exempt.

This report is designed to give background information on juvenile capital punishment and was compiled for the Council of State Governments. It briefly summarizes the arguments on both sides of the issues. It sets forth the state minimum ages for imposition of the death penalty and gives statistics on the number of juveniles on death row and executed.

This author looks at the juvenile death penalty and concludes it serves very little logical purpose. He looks at juveniles currently on death row and notes that in the majority of cases, the murder occurred during a felony. He urges that empirical research is needed to specifically evaluate a juvenile's decision making ability during the commission of a felony in order to help determine their legal responsibility. He questions the logic of executing a juvenile for a murder he or she may not have intended. The author considers the various theories of punishment and concludes less extreme methods of punishment would satisfy those goals. He questions how the felony-murder ratio affects deterrence and retribution.


This book on the death penalty is divided into five parts. Part I gives an overview of capital punishment. Part II discusses the legal challenges to the death penalty pre-*Gregg v. Georgia*, 428 U.S. 153 (1976), and discusses legal challenges and reform of the death penalty after *Gregg v. Georgia*. This part addresses mitigation evidence such as youth or mental illness. This part also examines the execution of special groups such as the mentally ill, mentally retarded, and juveniles. The Supreme Court cases of *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); and *Stanford v. Kentucky*, 492 U.S. 361 (1989), are discussed. Part III deals with racial discrimination and arbitrariness. Part IV discusses arguments for and against the death penalty. Part V looks at alternatives to capital punishment.


This note looks at *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Enmund v. Florida*, 458 U.S. 782 (1982), tracing the principles developed in those two cases in order to gain insight into the Court's decision in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), and the prohibition on executing minors under sixteen.


After giving a very brief historical overview of the treatment of juvenile offenders in the justice system, the author analyzes *Thompson v.*
Oklahoma, 487 U.S. 815 (1988). He concludes by summarizing the Court’s findings.


This note examines Stanford v. Kentucky, 492 U.S. 361 (1989). The author asserts the plurality erred in failing to apply an excessiveness analysis. The note discusses the two-prong test developed in Gregg v. Georgia, 428 U.S. 153 (1976), and its application to juveniles. She argues the Stanford plurality also improperly rejected consideration of jury sentences and international norms when it examined the evolving standards of decency.


The author looks at Thompson v. Oklahoma, 487 U.S. 815 (1988), and concludes the Court should allow the states to establish procedures where youth is a mitigating factor. He argues objective indicators of a national consensus are inconclusive. He asserts the Thompson plurality failed to address the collective victim when it determined the evolving standards of decency. He argues establishing a minimum age for capital punishment runs counter to Supreme Court policy towards minors. He finds an age-based death penalty statute arbitrary and unjust, and asserts the sentencer must focus on the juvenile’s thought process. He urges states to refine their death penalty statutes and sentencing procedures.


This article discusses the juvenile court system and the transfer of juveniles to adult criminal courts where they are subject to the death penalty. The author asserts the juvenile justice system fails in rehabilitating hard-core juvenile offenders, so transfer to adult courts is necessary. He cautions, however, that transfer should not be done lightly and that the waiving body should be given specific criteria to consider when making that decision. He notes few death penalty statutes exempt juveniles from execution, and he looks at the trend in state courts toward allowing juvenile executions. He asserts that while age must be considered a mitigating factor, it can be easily overcome by aggravating circumstances. He looks at the justifications for capital punishment and
concludes that retribution may apply to juvenile cases, but finds other justifications questionable.

This book is an account of six death penalty cases that went before the Supreme Court. One of the cases discussed is that of Willie Francis, an African-American juvenile sentenced to death for a crime that took place when he was fifteen. Louisiana’s first attempt at electrocution failed and his case eventually reached the Supreme Court. He was seventeen when his death sentence was finally carried out.

Carol Daugherty Rasnic, The U.S. Constitution, the Supreme Court and Capital Punishment: Should the U.S.A. Put the Death Penalty to Death?, 50 N. Ir. LEGAL Q. 50 (1999).


The article summarizes the facts and arguments in Thompson v. Oklahoma, 487 U.S. 815 (1988), compares it to Eddings v. Oklahoma, 455 U.S. 104 (1982), and analyzes the Supreme Court Justices’ voting records on death penalty cases for the year.

This case note analyzes Thompson v. Oklahoma, 487 U.S. 815 (1988), and concludes it was a positive development in juvenile justice. The author comes to the conclusion that the Court needs to focus more on
capacity, proportionality, and justice in its Eighth Amendment analysis than on standards of justice.


After looking at the juvenile court system and Eighth Amendment jurisprudence, the author examines Stanford v. Kentucky, 492 U.S. 361 (1989). He argues the plurality interpreted objective data in a subjective manner and so failed to reflect contemporary society's values. He asserts Justice O'Connor's opinion was inconsistent with her holding in Thompson v. Oklahoma, 487 U.S. 815 (1988), and that had she been consistent, the Stanford decision would have been reversed.


This article looks at mitigating factors present in juvenile death penalty cases. The authors studied ninety-one juvenile death penalty cases. Some of the factors identified were: troubled family history and social background, psychological disturbance, mental retardation, indigence, and substance abuse. The authors argue the legal process did not ensure adequate consideration of mitigating factors. They assert the Eighth Amendment requires more than deference to legislative majorities. They find no convincing rationale to assert the Eighth Amendment allows the execution of sixteen-and-seventeen-year-olds.


The author begins by discussing the two prong test for determining the constitutionality of the death penalty under the Eighth Amendment and then moves on to the facts of Thompson v. Oklahoma, 487 U.S. 815 (1988). She concludes by offering three alternative possible rulings: prohibition of executing those under eighteen, prohibition of executing those under sixteen, or a sentence of death but a re-evaluation of juveniles when they reach eighteen to decide if the death sentence is appropriate under the individual circumstances.

This study analyzes the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, international humanitarian law, the European Convention of Human Rights, the Geneva Convention, and other international law instruments. The author discusses the emergence of customary norms prohibiting the death penalty. He traces the development of the exclusion of certain categories of persons from the death penalty. In particular, he looks at the exclusion of juveniles and the insane. He predicts the prohibition of the death penalty per se will be a customary international norm and *jus cogens* in the future.


The author examines *Stanford v. Kentucky*, 492 U.S. 361 (1989), and concludes the plurality erred when it determined there is no national consensus against the juvenile death penalty. He begins with a background on juvenile executions and the juvenile justice system. He then analyzes *Stanford*, taking issue with the plurality’s exclusion of the fifteen jurisdictions banning the death penalty. He argues the Court must include all laws, not just those fitting a personal formula. After looking at the states banning juvenile executions, states not actively executing juveniles, the legislative trend toward prohibiting juvenile executions, and jury reluctance to sentence juveniles to death, the author finds a national consensus exists against the juvenile death penalty. He criticizes the plurality for failing to discuss the Equal Protection Clause and argues executing juveniles serves neither deterrence nor retribution.


This note looks at the United States’ reservation to the prohibition on executing juveniles in the International Covenant on Civil and Political Rights (ICCPR). The author looks at the compatibility principle of treaty ratification in the context of the United States’ reservation. He notes the Vienna Convention prohibits reservations incompatible with the object and purpose of the treaty and thus, he finds the United States’ reservation unacceptable. He examines the flexible system of treaty formation and
notes the ability of powerful signatories to make excessively broad reservations. He also looks at customary international law. He asserts there is arguably a customary international law prohibition on executing juveniles, but concedes the United States qualifies as a persistent objector. However, he concludes the United States' reservation to the treaty is void because it is incompatible with the object and purpose of the ICCPR. He proposes several changes to the Vienna Convention in an effort to end excessively broad reservations and to clarify when reservations are incompatible.

This case note outlines the history of recent judicial decisions concerning capital punishment, analyzes Thompson v. Oklahoma, 487 U.S. 815 (1988), and examines its future impact on juvenile executions. The author concludes that future execution of juveniles under sixteen is inevitable.

The authors report findings from surveys of Cincinnati and Columbus, Ohio that concern the juvenile death penalty. Three hundred adults from each city were surveyed. In Cincinnati, 69% opposed legislation allowing juveniles over fourteen to be executed, and in Columbus, 65.3%. The authors analyzed the survey respondents' demographic and attitudinal characteristics. Respondents who believed in the effectiveness of rehabilitation programs were less likely to support the juvenile death penalty. Men were more likely than women to support it. The authors conclude legislators overestimate the support for harsh penalties.

This is an excerpt from Smith's brief on behalf of the state of Kentucky in Stanford v. Kentucky, 492 U.S. 361 (1989). He argues that imposition of the death penalty on juveniles does not violate the cruel and unusual punishments clause.
This is an annual report issued by the Bureau of Justice Statistics. The report covers characteristics of persons executed and persons under a sentence of death. In particular, the report covers the minimum age in death penalty statutes, ages of defendants at the time of arrest, and ages of defendants under a sentence of death.

After reviewing the history of juvenile executions, the author analyzes the juvenile death penalty in light of the Eighth Amendment, Equal Protection Clause, substantive due process, and customary international law. He concludes executing minors violates the Eighth Amendment because the juvenile death penalty does not fit within the evolving standards of decency. He concludes the juvenile death penalty violates the Equal Protection Clause because the execution of sixteen-and-seventeen-year-olds is not rationally related to a legitimate government purpose of deterrence or retribution. He concludes the juvenile death penalty violates substantive due process because the type of offenders selected for execution, combined with the methods of execution, shock the conscience and are offensive to a sense of justice. He argues the general practice of most nations prohibits the execution of juveniles, the practice is accepted as required by law, and the United States has not persistently or unambiguously objected to a ban on juvenile executions. Thus, he concludes, the prohibition against executing juveniles is customary international law and binding on the states. Furthermore, he concludes the ban on executing juveniles is jus cogens and so basic that no state is permitted to deviate from that principle.

Carol Steiker and Jordan Steiker, Defending Categorical Exemptions to the Death Penalty: Reflections on the ABA's Resolutions Concerning the Execution of Juveniles and Persons With Mental Retardation, 61 LAW & CONTEMP. PROBS., Autumn 1998 at 89.
In this article the authors argue juveniles and the mentally retarded should be exempted from the death penalty. They discuss Eighth Amendment jurisprudence and the weaknesses of the proportionality analysis. They argue the American Bar Association and others seeking to ban executions of juveniles and the mentally retarded, should focus their arguments on the following doctrinal requirements: narrowing the
class eligible, channeling the discretion of capital sentencers, ensuring the consideration of mitigating factors, and securing heightened reliability.


After giving an overview of the history of the juvenile death penalty and the legal background of its constitutionality battles, the author discusses traditional criticisms of the juvenile death penalty. She then focuses on the state’s duty to protect children. She identifies three absolutes distilled from non-capital areas of juvenile law, and concludes the state’s role as *parens patriae* conflicts with any imposition of the juvenile death penalty. She proposes the states and the Supreme Court use the best interests of the child standard in juvenile capital cases.


This article is by Victor Streib, an expert in the area of the juvenile death penalty. He begins with an overview of the evolution of capital punishment and the development of the juvenile justice system. He then focuses on Ohio’s history of juvenile executions, looking at each of the nineteen cases individually. He compares the Ohio cases with nationwide cases and applauds Ohio’s decision to prohibit juvenile executions. He concludes by urging other states to prohibit juvenile executions.

**VICTOR L. STREIB, DEATH PENALTY FOR JUVENILES (1987).**

This book is an in-depth study of the juvenile death penalty. The author begins by looking at the juvenile justice system, the waiver of juveniles into adult criminal court, and the constitutionality of juvenile executions. He concludes the Eighth Amendment prohibits the death penalty for juveniles and that eighteen should be the cut-off. He explores state laws, focusing on those statutes in death penalty jurisdictions. He discusses actual executions and then looks at the characteristics of the crimes, offenders, and victims. He examines a number of cases in depth. He then analyzes the evolution of juvenile executions in Ohio. In the last section of the book, the author addresses the future of the juvenile death penalty. He suggests criteria for future decisions concerning the juvenile death penalty.

This report gives the characteristics of juvenile offenders who have been executed or are on death row. The author cautions that juvenile execution data is complete; however, the juvenile sentencing data and data for juvenile offenders currently on death row may be incomplete. The tables and appendix offer such information as name, execution, race, crime, place, minimum death penalty ages by jurisdiction, state by state breakdowns of juvenile death sentences, death sentences imposed, characteristics of offenders and victims, and case summaries. The author also comments on the historical background of the juvenile death penalty, legal context, juvenile death penalty in other countries, and rationales for and against the juvenile death penalty. This report is available only on the Internet and the author updates it regularly.


The author looks at juveniles on death row and discusses their abusive backgrounds and poor representation by counsel. He examines the case of Charles Rumbaugh. He points to the trend toward excluding juveniles from the death penalty. He asserts alternative solutions to juvenile violence are needed, such as long-term prison sentences.


The author looks at the national history of the death penalty and provides tables of information on the executions of juvenile offenders. He examines New York's history of using the death penalty and looks at five New York juvenile executions. He asserts capital punishment for juveniles has been historically rare in the United States and argues the majority of states prohibit them. He discusses jury sentencing patterns and points out their rarity. He notes that leaders of legal, criminological, and social policy are opposed to the juvenile death penalty. He argues executing juveniles does not support the penological goals of retribution and deterrence. After analyzing *Thompson v. Oklahoma*, 487 U.S. 815 (1988), and *Stanford v. Kentucky*, 492 U.S. 361 (1989), he critiques their analytical schemes. He suggests that New York consider alternatives to execution and concludes that if New York is going to impose the death penalty, it should establish a minimum age of eighteen.

The authors focus on female juveniles and capital punishment, and conclude that ending the death penalty for all juveniles is the only rational response to the phenomenon of society's extreme reluctance to execute female juveniles. They look at Uniform Crime Report studies and find that over 99% of the juvenile females exposed to the possibility of death were not sentenced to death. They provide information on the ten executed female juveniles and look at the individual cases of each of these girls. The authors argue there is a gender bias against men, not women, and that a more effective constitutional challenge to the death penalty for women is their status as juveniles. The authors attribute gender bias to the fact that mitigating factors tend to match the female juvenile's crime, while aggravating factors work against male juvenile offenders. They also acknowledge the ingrained cultural tendency to be more lenient with female offenders. They conclude the death penalty for female juveniles has been effectively prohibited due to the reluctance to impose death on female juveniles.


This chapter looks at three frequently excluded classes from capital punishment: women, children, and the mentally retarded. The author examines the social policies and realities behind the reluctance to execute people in these groups. As part of his analysis, the author gives statistics on members of each group on death row or executed. He also gives historical backgrounds. The policies he looks at are culpability, legislative enactments, jury sentences, public opinion polls, and the penological goals of incapacitation, deterrence, and retribution. He concludes that the reasons for screening out juveniles and the mentally retarded are more justifiable than those for women.


penalty statutes and their minimum ages. He argues the punishment justifications of deterrence, retribution, incapacitation, and rehabilitation are not applicable for juveniles in death penalty situations due to the characteristics of juveniles. He asserts a bright line must be drawn and urges that line to be set at age eighteen. He gives a historical and present day analysis of juveniles under a sentence of death or executed. He concludes by suggesting alternative solutions to the problem of juvenile violence.


In this chapter, the author examines juvenile responses to death sentences. He begins with a history of the juvenile death penalty in the United States and a summary of recent juvenile death sentences. Thirty-four juvenile death penalty cases were studied and six categories of responses were distilled from these cases: indifference, resignation, fear and abandonment, religious conversion, pride and defiance, and penitence and acceptance. He uses individual cases to illustrate these categories.


This article looks at the American Bar Association’s proposed moratorium on the death penalty and considers the appropriateness of a moratorium on the juvenile death penalty. The author offers a history of the juvenile death penalty and looks at death penalty statutes. He provides tables with information concerning death penalty age limits, juvenile executions, and characteristics of offenders. He suggests a better alternative to the juvenile death penalty would be incarceration for twenty-five years with possibility of parole, or working with communities to prevent juvenile crime. The author’s appendix includes juvenile death sentences imposed from Jan. 1, 1973 to June 1, 1989, and case summaries for current juvenile death row inmates.


This article is an edited version of the 1995 Juvenile Law Symposium lecture given by Victor L. Streib. The article begins with a discussion of juvenile crime and the American fascination with violence. The speaker then discusses nonrational reactions to juvenile homicide, such as the juvenile death penalty, the tough on crime approach, and the focus on
retribution. He asserts rational reactions and solutions should come from careful research and an increase in resources to fight the problem. He argues the juvenile death penalty and other draconian punishments should be rejected. He points to youthfulness and immaturity as mitigating factors. He suggests the focus be on reform and rehabilitation. The article concludes with a question and answer session.

Michael D. Strugatz, Comment, 24 SUFFOLK U. L. REV. 237 (1990). This note looks at Stanford v. Kentucky, 492 U.S. 361 (1989), and concludes the Court correctly refused to prohibit executions of sixteen-and-seventeen-year-olds. The author asserts the Court correctly relied on only objective indicia when looking at the evolving standards of decency. He argues the defendants could only offer speculative and incalculable data.


This report provides the findings of a sample of over 900 Georgia residents. Forty-one questions were asked concerning: the crime rate and judicial system; imprisonment and the death penalty; judicial process, imprisonment, and the death penalty for juvenile offenders; fairness of the death penalty; and alternatives to the death penalty. The relevant responses were as follows: 75% of the respondents believe there was an increase in juvenile crime; 75% are in favor of the death penalty, however, respondents split when asked whether juveniles and adults should get the same punishment; 48% think juveniles should not get the death penalty; 27% stated it depended on the situation; 66% believe the mentally retarded should not receive the death penalty.

University of Alaska Anchorage Justice Center, Focus On the Death Penalty, at http://www.uaa.alaska.edu/just/death/issues.html (last visited Oct. 1, 2000). This Web site attempts to provide links to resources from both sides of the death penalty debate. This particular area of the site addresses specific issues. In addition to information on deterrence; retribution and justice for murder victims; the innocent; limiting appeals and habeas corpus reform; costs of the death penalty; alternative sentencing; fairness; moratorium; cruel and unusual punishment; and women, the site provides links to statistical information and cases concerning juveniles, the mentally retarded, and the mentally ill.

This note contains an Eighth Amendment analysis of the juvenile death penalty. The author concludes that treating age as a mitigating factor is insufficient to guarantee the constitutionality of the juvenile death penalty, and that the death penalty is always inappropriate for juveniles.


This note offers a review of juvenile executions and Eighth Amendment jurisprudence before analyzing *Thompson v. Oklahoma*, 487 U.S. 815 (1988). After examining the case, the author concludes the application and conclusion of the three-part Eighth Amendment test was flawed. She argues the dissent's analysis should have prevailed. She criticizes the plurality for ignoring the possibility that the federal government and nine states, which had no minimum age for execution, had intended juveniles transferred to adult court to be eligible for the death penalty. The author also asserts the plurality erred when it assumed a jury's reluctance to impose the death penalty on juveniles was an indication of the evolving standards of decency. She argues the plurality should have treated age as a mitigating factor rather than drawing a bright line.


This case comment examines *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The author views the case as clarifying the mitigation language in *Lockett v. Ohio*, 438 U.S. 586 (1978), but failing to address the issue of whether juveniles should be put to death. The author looks at the issue through such considerations as suspect classification, right to life, due process, the juvenile justice system, retribution, and rehabilitation. The comment concludes juveniles should not be executed under any circumstances.


This note examines the constitutionality of juvenile executions. The author begins by discussing juvenile waiver mechanisms. He asserts the procedural safeguards invoked in judicial waiver, along with the
criticism of the lack of safeguards in legislative and prosecutorial waiver, demonstrate societal rejection of adult punishment for juveniles. He performs an Eighth Amendment analysis and concludes that public opinion, as evinced through the establishment of the juvenile justice system, jury reluctance to impose death sentences on juveniles, and state statutes, rejects the execution of juveniles. He also looks at judicial attitudes and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), finding both imply a rejection of capital punishment for minors. Finally, the author looks to the deterrent effect and retributive value of juvenile executions and concludes neither justifies the juvenile death penalty.


In this article, the author uses *State v. Shaw*, 255 S.E.2d 799 (S.C. 1979), to illustrate how juvenile murderers are processed through adult courts. She notes the only time James Terry Roach’s age came up was during the penalty phase of his trial. She examines the constitutionality of juvenile capital punishment. She reports both sides of the arguments on the juvenile death penalty. She concludes juveniles should not be executed until the Supreme Court makes a final determination on the constitutionality of juvenile executions.


This thesis looks at the purpose, theories, and application of the death penalty to juveniles. The author explores arguments for and against executing juveniles. She closely examines United States Supreme Court death penalty decisions and the history of juvenile executions. She looks at the juvenile justice system and waiver into adult criminal court. She argues that juveniles in death eligible cases should be given individual consideration but should not be given a blanket exemption from the death penalty.

**YOUNG BLOOD: JUVENILE JUSTICE AND THE DEATH PENALTY (SHIRLEY DICKS ED., 1995).**

Shirley Dicks, editor of this book, has a son on death row. She, death-row inmates, families of victims and offenders, religious and political leaders, journalists, criminologists and legal experts present arguments against juvenile executions and offer alternative methods of dealing with
juvenile violence. Relevant chapters of this book are individually listed in this bibliography.

II. MENTALLY ILL

A. UNITED STATES SUPREME COURT CASES AND LOUISIANA SUPREME COURT CASE


In this death penalty case, the indigent defendant planned to raise the insanity defense and requested a psychiatric evaluation at state expense. The trial court denied his motion. The Court held that when an indigent defendant has made a preliminary showing that sanity at the time of the offense may be a significant factor at trial, the state must provide a mental health professional's assistance. Chief Justice Burger concurred, limiting the holding to the facts of the case. Justice Rehnquist dissented, preferring to limit the rule to capital cases and to an independent psychiatric evaluation, rather than have the psychiatrist act as an assistant to the defense.


This pre-Ford v. Wainwright, 477 U.S. 399 (1986), case affirmed the adequacy of the California procedures to determine sanity for execution, which were vested in the warden. Justices Frankfurter, Douglas, and Brennan dissented, questioning Solesbee v. Balcom, 339 U.S. 9 (1950), and finding the California procedures violated the Due Process Clause of the Fourteenth Amendment.


The defendant in this death penalty case was determined competent to stand trial after a court ordered psychiatric examination. The defendant was found guilty, and at the penalty phase, the doctor who conducted the pretrial examination testified as to the defendant's future dangerousness. The defendant was then sentenced to death. The Court held the admission of the doctor's testimony during the penalty phase violated the defendant's Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel because he was not advised of his rights before the pretrial psychiatric examination.


A habeas corpus petition was filed on behalf of defendant Alvin Ford after a competency hearing failed to stay his execution. After looking to
the evolving standards of decency, the Court held the Eighth Amendment prohibits the execution of the insane. The Court also found that Florida’s procedures for determining sanity were inadequate because they precluded an opportunity to be heard. The Justices split, however, in their suggestions of what type of procedure might be adequate. Justices Powell and O’Connor wrote separate concurring opinions. Justice Rehnquist and Chief Justice Burger dissented. The dissent found there was no Eighth Amendment right for insane persons to be exempt from execution. They also found Florida’s procedures for determining sanity adequate in light of previous precedent and the common law.

The defendant, a convicted murderer who had been sentenced to death, waived all appeals. His mother filed a petition for a stay of execution on his behalf. The Court found nothing in the record to indicate Gilmore was incompetent and found that he knowingly and intelligently waived his rights to seek an appeal of his death sentence. Thus, the Court held his mother had no standing to seek relief on his behalf. Justices White, Brennan and Marshall dissented, finding there were serious questions about the constitutionality of the Utah death penalty statute and about Gilmore’s competency. Gilmore’s life was the subject of Norman Mailer’s Pulitzer prize winning novel, *The Executioner’s Song*.

The condemned inmate challenged an order to medicate him against his will with antipsychotic drugs in order to execute him. The United States Supreme Court granted certiorari and vacated the order and remanded for further consideration in light of *Washington v. Harper*, 494 U.S. 210 (1990). The trial court reinstated the order and the inmate appealed. The Louisiana Supreme Court held that an order to forcibly medicate a prisoner with antipsychotic drugs violated his right to privacy or personhood and constituted cruel and unusual punishment under the state constitution.

This pre-*Ford v. Wainwright*, 477 U.S. 399 (1986), case held that a suggestion of post-conviction insanity did not give a condemned prisoner the right to have the sanity resolved by a full trial. The Court found Georgia’s procedures did not violate the Due Process Clause of the Fourteenth Amendment.
The Supreme Court granted certiorari to hear a case concerning a Louisiana court order to forcibly medicate a condemned inmate in order to induce competency so that he could be executed. The Court vacated the judgment and remanded the decision for further consideration in light of Washington v. Harper, 494 U.S. 210 (1990).

This pre-Ford v. Wainwright, 477 U.S. 399 (1986), case addresses the issue of the adequacies of procedures in determining restoration of competency for execution. The Court held that reasonable discretion must be granted to the state tribunal in determining whether a full inquiry and hearing on the sanity of a condemned inmate is necessary. Justices Frankfurter, Douglas, Murphy, and Rutledge concurred.

This pre-Ford v. Wainwright, 477 U.S. 399 (1986), case dealt with procedures necessary for a competency to be executed hearing. The Court held that the Georgia statute, giving its governor the power to decide questions of sanity for execution purposes, was adequate due process.

This Supreme Court case deals with a noncapital case, however, it has implications for competency for execution. A mentally ill prisoner challenged prison policy which involuntarily medicated him with antipsychotic drugs, claiming it violated his due process rights. The Court held involuntary medication did not violate due process if the inmate is dangerous to himself or others and the treatment is in his medical interest. The Court also held that due process does not demand a judicial hearing before involuntarily medicating an inmate. Justice Blackmun concurred. Justices Stevens, Brennan, and Marshall concurred in part and dissented in part.

B. ARTICLES, BOOKS, AND WEB SITES

The American Bar Association Criminal Justice Standards Committee developed ninety-six standards for dealing with the mentally
disadvantaged in the criminal justice system. The standards address post-arrest obligations, pretrial evaluations, expert testimony, disclosures from pretrial mental evaluations, competence to stand trial, post-conviction determinations of competency, stays of execution, and restoration of competency. The standards also discuss competency and confessions and nonresponsibility for crime. The standards look at the sentencing of mentally ill and mentally retarded offenders. They discuss treatment, admissibility of pretrial assessments, and the right to refuse treatment.


This article addresses the issue of claims of incompetency by condemned prisoners. The authors look at existing standards for determining competency and rationales for prohibiting the execution of the insane. They suggest the prisoner's custodian should have a duty to raise incompetency and other parties should also be able to raise this issue. They argue the courts should determine whether a hearing is needed to decide competency. They assert independent experts should be used to evaluate the prisoners and that court appointed experts for prisoners should be required. The authors suggest that judges should be the fact finders for resolving incompetency claims. They argue the prisoner should be given advance notice of a hearing and prisoners should have the assistance of counsel while on death row. They also assert cross examination should be allowed. They place the burden of proof on the prisoner to establish incompetency by a preponderance of the evidence, and assert that expedited appeals should be allowed. The authors suggest incompetent prisoners should have their sentences commuted for life, and they discuss the issue surrounding forced medication to establish competency for execution.


This site contains extensive substantive information concerning the death penalty. Amnesty International reports on the death penalty are available in their Web site library going back to 1996. These reports cover many death penalty issues, including those concerning the mentally ill, mentally retarded, and juveniles.

This report by The American College of Physicians, Human Rights Watch, The National Coalition to Abolish the Death Penalty, and Physicians for Human Rights looks at the nature and extent of physician participation in capital punishment. The report begins with a brief history of physician involvement in executions. Following this is a summary of medical professional organization responses to physician participation in executions. The report looks at state statutes and regulations concerning the death penalty and physicians. The organizations interviewed witnesses to recent executions and conclude current execution procedures require physicians to violate professional ethics standards. The report notes institution employed physicians suffer when they refuse to participate. The report contains an ethical analysis of the participation problem, paying special attention to psychiatric evaluation and treatment of the condemned. The report concludes state law and regulations directly conflict with ethical standards. It recommends changes in the laws to accommodate professional ethics.

AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT (James R. Acker et al. eds., 1998).

This book looks at the experiment of capital punishment post- Furman v. Georgia, 408 U.S. 238 (1972), and discusses its failures. The chapters, which are written by different authors, examine public opinion, law, politics, deterrence, incapacitation and future dangerousness, women, children, the mentally retarded, the innocent, incompetent counsel, death-qualified juries, mitigation, discrimination, habeas corpus, cost of the death penalty, physician involvement, families of victims and offenders, life on death row, clemency, and executions. Chapters relevant to this bibliography have been individually cited.


This book gives an overview of the death penalty in America. It contains a chapter on juvenile death sentences, discussing United States domestic standards, the Roach case, and International practice. It also contains a chapter on the execution of the mentally ill, covering five cases. The appendices contain summaries of important United States Supreme Court rulings and death penalty statistics.

Dr. Applebaum discusses the dilemmas facing mental health professionals who evaluate or treat incompetent condemned inmates. He looks at the three different positions professionals might take on the issues. He offers two possible resolutions: commuting the sentences of the incompetent condemned, and abolishing the requirement that prisoners be competent for execution. He concludes by urging the profession to try to come to a consensus on an acceptable system.


This article examines the issue of forced medication of condemned inmates through the lens of discourse analysis. The authors assert all language is method and hidden assumptions and implicit values within text can be deciphered through an analysis of the words used. They provide a detailed overview of two methods of discourse analysis: structural semiotics and deconstructionism. They apply these methods and conclude "mental illness," "incompetence," and "execution" are words with complex and nuanced meanings that reveal contradictions, ambiguities and inconsistencies. They suggest reevaluating the assumptions behind law’s selection of language before considering changes in the law.


This article discusses the roles psychiatrists can play in capital defense cases. He argues the psychiatrist’s primary function when doing capital defense work is to gather data for mitigation purposes. He uses individual cases to illustrate the importance of psychiatric defense in the early stages of the trial.


This case comment examines *Ford v. Wainwright*, 477 U.S. 399 (1986). In the background discussion, the author looks at the due process safeguards developed in *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gardner v. Florida*, 430 U.S. 349 (1977); and *Ake v. Oklahoma*, 470 U.S.
He ends by suggesting what due process most likely requires when a condemned inmate claims insanity.


This note explores the problem of mental illness being presented as a mitigating factor but being considered an aggravating factor. The author first looks at statutory schemes involving the death penalty and aggravating-mitigating circumstances. She posits that one reason so many inmates on death row are mentally ill is that the defendant's mitigating evidence of mental illness was considered as an aggravating factor. She argues the Supreme Court has indicated that a capital-sentencing statute cannot term mental illness an aggravating factor, and this leads to the conclusion that the factors resulting from mental illness cannot be used as aggravating circumstances. She proposes a statutory scheme where the defendant would bear the burden of producing evidence of mental illness and of a causal relationship between aggravating factors and the defendant's mental illness. The state would have to show that the circumstances it relies on for a death sentence are unrelated to the defendant's mental illness.


This comment examines *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Johnson v. Cabana*, 481 U.S. 1061 (1987) in an effort to determine what *Ford* did concerning condemned inmates claiming insanity. First, the author distinguishes *Ford* from *Cabana*. Then, he discusses the history of the prohibition on executing the insane. He looks at statutory provisions concerning the procedures for insanity determinations and at *Ford*’s effects on such procedures. He concludes that *Ford* gives the condemned inmate the right to present evidence and witnesses, the right to be represented by counsel, and the opportunity to cross-examine witnesses. The author does not believe *Ford* provided more protection than the common law prohibition on executing the insane.


The author discusses the ethical dilemmas confronting psychiatrists in capital cases. He first looks at the history of psychiatric involvement in capital cases. He places this involvement within the larger phenomenon of medical discretion as social gatekeeping. He identifies the various
forms of psychiatric involvement and then discusses the resulting ethical harm. He examines the forensic psychiatrists’ ethic of truth guideline and finds a tension between truthfulness and the commitment to helping people. He asserts medical ethics must protect against the undermining of social confidence in the profession. The author examines forensic psychiatric practice in capital cases and argues capital punishment risks moral integrity and professional credibility to such a degree that psychiatrists should not participate. He proposes tentative ethical guidelines.


The author looks at a Nevada case involving a mentally ill woman and concludes imposing the death penalty was disproportionate and excessive. He argues the mentally ill defendant found legally sane for trial, sentencing, and execution, deserves special protection because the death penalty does not serve a retributive or deterrent purpose and the punishment is disproportionate and excessive. The author compares this case with another Nevada case where a similarly mentally ill defendant’s sentence was commuted. He finds the two cases too similar to warrant such different results. He finds the punishment of death disproportionate and excessive because the defendant’s level of intent did not rise to the level of requiring the death penalty due to her psychiatric problems.


This essay is based on a paper presented to the annual meeting of the American Psychological Law Society. The author argues that the ethical argument against mental health professionals participating in capital cases should be carefully examined. He asserts participation in death penalty cases is no different than participation in other criminal cases. While he recognizes personal moral scruples may cause the mental health professional to abstain, he sees no ethical problem in their participation in capital cases. He refutes arguments by other commentators who view participation in capital cases as unethical. He finds some problems with both the always treat and never treat capital prisoners positions and finds them ethically flawed. He advocates the sometimes treat position. He also addresses the question of why insane prisoners are not just executed and concludes the justification for this prohibition must be in the dignity of the condemned. He looks at the costs of mental health professional abstention from capital cases and finds it too high.

In this Forward to the Twenty-Fourth Annual Survey of Developments in Virginia Law, Professor Bonnie examines the background of capital sentencing, Virginia’s capital punishment procedures, and the uses of psychiatric testimony in capital cases. He also makes recommendations in order to reduce the risks of unfairness and inconsistency.


This note asserts that previously approved state procedures for dealing with the competency of condemned prisoners are inadequate in light of recent Supreme Court decisions expanding procedural due process protection. The author proposes a procedural framework for dealing with the incompetency claims of condemned prisoners.

**EDMUND G. (PAT) BROWN with DICK ADLER, PUBLIC JUSTICE, PRIVATE MERCY** (1989).

This book by former California governor Edmund “Pat” Brown, discusses some of the fifty-nine death penalty cases that came before him for clemency. Several of the cases involve insanity and mental illness. The author discusses the nature of legal insanity and the problems with psychiatric judgments.


This article examines the issue of forced medication of condemned inmates for the purposes of inducing competency to be executed. The author notes the difficulty in defining competency and the varying standards currently in use. He also looks at the phenomenon of post-conviction insanity. He examines the rationales behind the prohibition on executing the insane. He then looks at the use of antipsychotic drugs to treat incompetency. After a discussion of their uses and side-effects, he examines *Washington v. Harper*, 494 U.S. 210 (1990), and its holding concerning forcible medication of inmates. He applies this holding to the insane condemned. He also looks at the ethical dilemma facing psychiatrists involved in competency for execution decisions. He discusses *Perry v. Louisiana*, 498 U.S. 38 (1991), and concludes it is difficult to argue forced medication is in the medical interest of an incompetent condemned inmate. He urges the Supreme Court to resolve this issue.

Part of the Information Series on Current Topics, this book gives an overview of the capital punishment debate. It includes summaries of landmark Supreme Court rulings, including those dealing with juveniles, psychiatric testimony, the insane, and the mentally retarded. It also reviews death penalty statutes, looking at the minimum age for execution, and at the treatment of mental retardation. The book also gives statistical information on executions, including breakdowns by age and education, and an overview of capital punishment around the world.

CAPITAL PUNISHMENT IN THE UNITED STATES (Hugo Adam Bedau and Chester M. Pierce eds., 1976).

This work by noted abolitionist Hugo Bedau and Chester Pierce brings together post- Furman v. Georgia, 408 U.S. 238 (1972), social science research on the death penalty in the United States. The book covers research concerning the use of social science research in judicial decisions, the administration of the death penalty in murder and rape cases, public opinion, moral attitudes, deterrence, psychiatry, juries, and death row. Chapters relevant to this bibliography are individually cited.

Christina B. Casals-Ariet and Harvey Bluestone, Competency to Be Executed, in CORRECTIONAL PSYCHIATRY 121 (Richard Rosner and Ronnie B. Harmon eds., 1989).

This chapter surveys the literature on competency for execution, looks at death row stresses, and examines ethical dilemmas for psychiatric professionals. The authors note that the effects of death row stresses will lead to an increasing number of inmates who become insane on death row, and thus raise the specter of competency to be executed issues. They look briefly at Ford v. Wainwright, 477 U.S. 399 (1986), and at the ethical questions raised by this case. The views of several commentators concerning competency to be executed problems are discussed. The authors conclude by raising additional ethical questions and stating their own position that psychiatrists should not participate in competency to be executed evaluations or treatment. The chapter’s appendix summarizes some of the literature on this issue.


This note examines the Louisiana case of State v. Perry, 610 So.2d 746 (La. 1992). In the course of the article, the author provides legal
background on exempting the insane from execution and the involuntary medication of inmates. After analyzing the Perry opinion, he concludes the Louisiana Supreme Court erred by: failing to conduct a complete legal analysis, failing to articulate a clear standard of competence for execution, mistakenly accepting the artificial sanity rationale rejected in the Supreme Court case of Washington v. Harper, 494 U.S. 210 (1990), failing to adequately explore the state’s police power interest, and over expanding privacy rights. He concludes by offering a proposed analysis and statute for future Perry cases.


This article discusses Perry v. Louisiana, 498 U.S. 38 (1991), and the issue of involuntarily medicating insane inmates in order to execute them. The author concludes the Supreme Court is retreating from its Ford v. Wainwright, 477 U.S. 399 (1986), decision by denying certiorari to inmates making insanity claims. She also concludes the order to forcibly medicate Perry does not comply with the two recognized justifications for forced medication of civilly committed patients. She reviews federal cases on the forced medication of inmates and argues these cases do not support forcible medication for the purposes of execution. She also looks at Louisiana statutes dealing with the medication of inmates and argues these do not support forcible medication for the purposes of execution. She further argues neither deterrence nor retribution is served by executing an artificially sane defendant. She concludes forcibly medicating an inmate in order to execute is unethical and undermines Ford.


After a brief historical overview on the execution of the insane and a review of Eighth Amendment jurisprudence, the author analyzes Ford v. Wainwright, 477 U.S. 399 (1986). He concludes Ford merely affirms the current state law but predicts the Supreme Court’s due process analysis of the Florida statute in the case will cause other states to reassess their statutes.

The author of this comment criticizes the *State v. Perry*, 610 So.2d 746 (La. 1992) decision for not adequately addressing the issues of forced medication of incompetent inmates for execution purposes and the appropriateness of artificial competence for execution. She begins by looking at Supreme Court cases dealing with insanity and antipsychotic drugs in prison settings. She then analyzes *State v. Perry* and criticizes it for failing to address whether chemical competency is enough for execution and for forcing inmates to choose between suffering insanity and possibly facing execution if treated. The author argues chemical competency is not sufficient for execution because it is temporary and unpredictable. It masks symptoms but does not cure. Thus, she argues, chemical competency cannot meet the reliability required for capital cases.


After setting out a background of the reasons behind the prohibition against executing the insane condemned, the authors analyze *Ford v. Wainwright*, 477 U.S. 399 (1986). They also raise a number of future issues but do not attempt to address them.


This anthology on capital punishment, edited by noted abolitionist Hugo Bedau, collects works presenting information about the history and implementation of the death penalty, arguments for and against the death penalty, social science research on death penalty issues, and case histories. This particular edition contains a section on juveniles and the death penalty that is omitted in later editions.


This later edition of Hugo Bedau's anthology on capital punishment includes chapters on deterrence, public attitudes towards the death penalty, error, constitutionality under the Eighth Amendment, and arguments for and against the death penalty. In the beginning chapters, Bedau discusses statutory mitigating circumstances such as diminished capacity, mental disturbance, and the age of the offender.

In this chapter, the author examines the phenomenon wherein murderers commit heinous crimes in order to invoke the death penalty in a state assisted suicide. He discusses a California death penalty case to illustrate this phenomenon. The prisoner had a history of psychiatric problems and had attempted to obtain treatment. His treatment attempts were unsuccessful so he committed several rape-murders in order to be executed. The author asserts this phenomenon raises questions as to the deterrent value of the death penalty.


This report discusses the international trend toward the abolition of the death penalty and the United States’ position as a violator of human rights. Among the issues discussed is the execution of the mentally ill. The report discusses several individual cases to illustrate how difficult a standard incompetency for execution is. It also discusses the costs of the United States’ failure to abide by international law regarding capital cases.


The author discusses psychiatric testimony in capital sentencing procedures in Texas, Ohio, and Arizona. The author finds that a study of the Texas experience reveals use of psychiatric testimony in the aggravating rather than mitigating factors. In Ohio, he finds an uncertainty regarding the significance of psychiatric testimony. In Arizona, the author finds a tendency to view certain potentially mitigating circumstances as irrelevant due to the labels psychiatrists use.


This article looks at the concept of diminished responsibility in capital sentencing and the role of psychiatric testimony. The author looks at state statutes which incorporate diminished responsibility as mitigating factors, and the administration of those statutes. After looking at case law, he concludes diminished responsibility findings are given little
weight in deciding between life and death, and in some cases increase the pressure to impose death.


The author examines *Solesbee v. Balcom* and concludes the Supreme Court erroneously decided that a condemned person's sanity was adequately addressed by the Georgia procedure. He agrees with Justice Frankfurter's dissent that the issue of a condemned man's sanity must be judicially protected.


The author looks at the problem of insanity and capital punishment. He asserts the definition of insanity depends on its specific purpose, and the problem of legal insanity is unresolved in regards to legal insanity as a defense and the execution of the insane. He explores the purposes behind punishment and concludes insanity cannot be uniformly defined because punishment serves so many conflicting aims. He argues exempting the insane from execution cannot be explained under the reform and deterrence rationales. He finds the retributive purpose of punishment to be made up of different facets, and each facet results in a different attitude toward insane offenders. He suggests society should either be truthful enough to abolish the insanity defense and execute sane and insane alike, or abolish the death penalty.


After examining the proportionality and penological justifications of the Eighth Amendment, the author argues the death penalty's application must be limited to defendants possessing sufficient culpability. He looks at the tie between volitional impairment, culpability, and the death penalty in juvenile and mentally retarded cases. He compares this to the guilty but mentally ill and concludes that based on a culpability analysis, those who are guilty but mentally ill should not be executed.

This article presents the results of a study examining the tendency of death-qualified jurors to convict defendants pleading insanity. The subjects of the study consisted of thirty-five adults eligible for jury duty in California. Subjects were placed in death-qualified and excludable categories. Subjects who would have been excluded from juries in capital cases were more likely than death-qualified subjects to vote for a verdict of not guilty by reason of insanity. There was no significant difference between subject groups, however, where the insanity defense was based on a physical disorder versus a mental disorder. Death-qualified jurors were more suspicious of the insanity defense. The authors argue attitudes toward criminal justice are more important than general attitudes toward the mentally ill. They assert insane defendants may suffer discrimination in capital cases because death-qualified jurors are more skeptical of the insanity defense than those excluded because of their opposition to the death penalty.


The article begins with a history of the guilty but mentally ill verdict. The author argues that a verdict of guilty but mentally ill contains a jury finding of diminished responsibility. She then performs a proportionality analysis pursuant to the Eighth Amendment. She asserts that because of the jury's finding of diminished responsibility, the defendant is less culpable than other adult offenders. She concludes that this lesser culpability means the penological goals of retribution and deterrence are not served by executing the guilty but mentally ill.


The article discusses the difficulty of implementing *Ford v. Wainwright*, 477 U.S. 399 (1986). The author addresses the lack of a legal definition of insanity, the ethical dilemmas facing psychiatrists involved in cases relating to the insane condemned, the types of proceedings that might be used in *Ford* cases, the burden the different types of proceedings might impose, and the difficulty in justifying and explaining a rule against executing the insane.

In this article the authors look at due process and Eighth Amendment protections for competency procedures for condemned inmates. The authors see the prisoner’s life and liberty interests as outweighing the state’s interest in efficiency and flexibility for these proceedings. They assert that vague competency standards, failure to provide adequate examinations, or refusal to allow inmates to present testimony of their own experts may render competency determinations unreliable under the Eighth Amendment. They propose a comprehensive system of mental health care for the condemned prisoners. Under their system, if a prisoner met a heightened standard of incompetency, an adversarial hearing would take place. The authors argue the hearing should be held by a judge or jury and that condemned prisoners should be represented by counsel. They assert states need to set substantive standards regulating the psychiatric examinations.


This article looks at the issue of forcibly medicating insane inmates on death row in order to make them competent for execution. The author begins with a discussion of *Perry v. Louisiana*, 498 U.S. 38 (1991), and the legal history of the insane and the death penalty. Additionally, the author examines *Washington v. Harper*, 494 U.S. 210 (1990). The author then applies the principles of *Harper* to *Perry*. The author argues that without evidence Perry was a threat to himself or others, Louisiana’s police power interest does not qualify as a legitimate interest for forcible medication. The author asserts that furthermore, there is no *parens patriae* justification for facilitating an incompetent’s death. The note concludes that forcibly medicating Perry in order to execute him is a violation of *Harper*. The author also argues *Perry* should have been decided under the Eighth Amendment. The note ends by proposing three solutions to the ethical dilemma posed for psychiatrists in these cases.
Charles Patrick Ewing, "Above All Do No Harm": The Role of Health and Mental Health Professionals in the Capital Punishment Process, in America's Experiment with Capital Punishment 461 (James R. Acker et al. eds., 1998).

This chapter examines the ethical dilemmas health care professionals face when they become involved in capital cases. The author focuses on three areas: capital sentencing, competency to stand trial, and assessment and restoration of competency for execution. He concludes participation in competency to stand trial evaluations and treatment is ethically permissible, provided the action is narrowly drawn to avoid potential harm to the defendant. He finds testimony as to mitigating and aggravating factors arguably unethical, and asserts that professionals must take precautions to minimize the possibility of a death sentence. He concludes participation in assessment and restoration of competency for execution is unethical, as is any involvement in the actual execution.

Charles Patrick Ewing, Diagnosing and Treating "Insanity" On Death Row: Legal and Ethical Perspectives, 5 Behav. Sci. & L. 175 (1987).

The author looks at the ethical dilemma in evaluating and treating death row inmates. He examines the history and justifications behind the prohibition on executing the insane. He finds mental health professionals cannot fulfill both the legal and ethical demands in these cases. He argues the evaluation and treatment of the insane condemned has the practical effect of authorizing the execution, which conflicts with the ethical requirements to heal and relieve suffering. He concludes psychiatric input is not essential to legal decisions concerning competency to be executed. He suggests that if professionals refuse to treat the insane condemned until their sentences are commuted to life, it might push legislatures to exempt those inmates found insane from execution. He urges a boycott and suggests professional organizations prohibit their members from participating in these situations.


This article concerns itself with English common law and the case of The Queen v. Tait, (1962) 108 CLR 620. The author argues the common law rules giving the courts the power to grant a judicial inquiry into the sanity of a condemned prisoner and to reprieve him if he is insane are still operative.
This comment discusses *Phyle v. Duffy*, 334 U.S. 431 (1948). The author debates whether due process or equal protection prohibit an ex parte determination of return to sanity by an administrative officer. He concludes the newly amended California statute, which provides a judicial hearing for the finding of the hospital administrator, is appropriate. He suggests additional amendment to the statute in order to restore discretion to the warden and to provide a standard for determining sanity.

This book discusses the anti-death penalty movement in America from 1972 to 1994. The author examines the efforts to develop a multiorganizational network to attack the death penalty. He discusses the involvement and contributions of Amnesty International. Amnesty International pushed for incremental attacks on the death penalty and pursued studies revealing the lack of public support for executions of those under eighteen, those with a history of mental illness, and the mentally retarded. The book reports the success of legislation prohibiting the execution of the mentally retarded.

A report on the Louisiana Supreme Court decision in *State v. Penry*, 610 So.2d 746 (La. 1992). The Louisiana decision was the first to hold that an incompetent condemned inmate could not be involuntarily medicated in order to be put to death.

After reviewing the history and justifications behind the prohibition on executing the insane, the author explores the current typical competency to execute statute. She criticizes this model, labeling it too simplistic and asserting the lack of uniformity violates *Ford v. Wainwright*, 477 U.S. 399 (1986), and the Eighth Amendment. She also asserts it does not properly address the restoration of competency issue. She proposes an alternative competency to execute plan. This plan finds a new term, "severe mental impairment" to replace the inadequate terms of "incompetence" and "insanity." She defines the term as, at a minimum,
including organically caused losses of mental acuity, psychiatric based losses, and mental retardation. She proposes requiring an examination and assessment of the inmate's functional capability. She also addresses the restoration of competency issue, arguing the prevailing position is that mental impairment cannot be cured, therefore, a death sentence for an inmate meeting her requirement of severe mental impairment should be commuted to a life sentence. She concludes by rebutting perceived problems with her proposed competency to execute plan.


The authors review the scope and purpose of the rule prohibiting the execution of the insane and assert the most acceptable justification for the rule is that it is unnecessary to execute an insane person. They then explore the procedures for evaluating the claim of incompetence both at common law and by the states. They discuss the test of insanity and argue the appropriate test is whether the defendant's condition is such that he or she would be subject to involuntary commitment under ordinary circumstances. The authors examine the constitutional requirements for a hearing and conclude by proposing a statute on the issue.


This article examines some of the problems with evaluating an inmate's competency to be executed. The author looks at the justifications behind the competency for execution requirement. He discusses the nature of competency for execution and finds little consensus among the states. He concludes that a standard for competency to be executed cannot be developed until society clarifies what the justification is behind this competency. He addresses the process for determining competency and determines a hearing, representation by counsel, and the opportunity to present evidence is required. He suggests unbiased examiners with clinical-legal and clinical experience make the evaluation. He asserts multiple contact with the patient is required, and looks at the problems of informed consent and environment. He recommends a written report, comprehensive enough to allow others to understand what the examiner did and how he/she arrived at that conclusion. He notes the ethical issues raised but does not attempt to resolve them.

This article discusses the issues of whether mental health professionals should assess competency for execution and how such assessment should be done. In discussing whether mental health professionals should participate, the authors look at the arguments for and against participation. They conclude individuals should reflect on their own personal beliefs and consult with colleagues who have experienced these assessments. As to the procedure, they assert professionals need to inform the inmate of the purpose, procedures, and possible consequences of an evaluation. They assert the setting must be private and distraction free. They recommend looking at independent information on functionality and history. They suggest meeting the patient several times on different days. They urge full documentation in a written report. They conclude by noting areas where further research would be helpful.

Kirk Heilbrun et al., The Debate on Treating Individuals Incompetent For Execution, 149 AM. J. PSYCHIATRY 596 (1992).

The authors address the ethical dilemma posed by treating insane condemned inmates. They consider the three positions mental health professionals take on treating the condemned incompetent, and find none of the positions specific as to definition of treatment, the nature of the disorders, and goals of treatment. They find three classes of disorders that might render an inmate incompetent for execution. They identify possible goals of treatment beyond the recovery of competence. The authors discuss the arguments for and against treating the incompetent condemned. They conclude a decision to treat should depend on the nature of the treatment, goals of the treatment, standards of competency, and determination of the inmate’s ability to consent to treatment. They find that where treatment involves things like psychotropic medicine there is a compelling need for fully informed consent. They argue there is an ethical demand, even if no legal one, for abstaining from involuntary treatment of an incompetent condemned inmate.


This report to the United Nations Committee on Crime Prevention and Control is based on a study of the death penalty. The report addresses the observation of standards and safeguards guaranteeing the rights of those facing the death penalty. The report finds twenty-six states had minimum death penalty ages from twelve to seventeen or no minimum
The report examines *Thompson v. Oklahoma*, 487 U.S. 815 (1988), and *Stanford v. Kentucky*, 492 U.S. 361 (1989). In addition to juvenile safeguards, the report addresses the mentally incapacitated. It finds the federal government and some states have modified the insanity defense, and three states have abolished it. Twelve states have adopted a guilty but mentally ill verdict, which the author believes precludes a death sentence. The report notes the problem of death row inmates becoming mentally ill after trial and the execution of mentally retarded offenders in the United States.


This comment addresses the issue of forcible medication of an incompetent condemned and concludes restoration of competency violates the Eighth and Fourteenth Amendments. The author examines the Eighth and Fourteenth Amendments in death penalty cases and also looks at the history of the restoration of competency. She examines the ethical and constitutional problems of restoring competency for execution. She recommends states commute the death sentence of incompetent prisoners on death row.


The author begins by briefly considering the history of insanity and execution and *Ford v. Wainwright*, 477 U.S. 399 (1986). He asserts some states' existing procedures for determining the competency of the condemned are no longer valid. He points out three areas that those states need to address: the right to a hearing on sanity, the test of insanity, and due process in the hearing. He proposes a threshold hearing using three disinterested psychiatrists. The proposed test for insanity would look at whether the inmate comprehends the physical finality of death; understands the causal link between his crime and his execution; and knows and understands his property, the nature of his acts, and his family and friends. He proposes that counsel for the defense be able to present any relevant evidence and be able to cross-examine and impeach state psychiatrists. In his suggested procedure, the insanity issue would be decided by a judge and not be open to appeal. The author then analyzes the Ohio statute and proposes amendments.

This note looks at *Ford v. Wainwright*, 477 U.S. 399 (1986), and the procedures necessary to satisfy due process for a competency to be executed hearing. The author concludes the Court correctly decided it was unconstitutional to execute the insane. He discusses the requirements of due process and applies these requirements to the question of competency to be executed. He argues the mentally incompetent prisoner must be appointed counsel near the execution date in order for notice to be properly served and to give the inmate an opportunity to be heard. He asserts the first hearing should be a judicial inquiry. Subsequent claims should be handled by a panel of psychiatrists who interview the prisoner and submit written findings. Judicial review should be available but substantial deference would be given to the initial determination.


This article examines the issue of forcibly medicating insane inmates in order to execute them. The author begins by looking at the justifications for prohibiting execution of the insane and then looks at substantive and procedural due process problems with this issue. She argues using psychoactive drugs does not cure mental illness but only temporarily relieves the symptoms and that artificial sanity is not sufficient for execution. She asserts forced medication in a death penalty case constitutes punishment not treatment and so falls under the Eighth Amendment. She examines *Perry v. Louisiana*, 610 So.2d 746 (La. 1992), and concludes it was correctly decided. She argues the state must commute a condemned inmate’s sentence to life imprisonment in order to remove the threat of execution and allow them to obtain needed treatment.


This chapter discusses the dual agency ethical dilemma psychiatrists working in the criminal justice system face. The author discusses the psychiatrist-patient contract, the autonomy and prisoner-patient model, and the multiple agency dilemmas involved in the evaluation and treatment of prisoners. He examines the competency to be executed issue and summarizes the various options psychiatrists in that position
have. He asserts the goal of psychiatry to restore autonomy can be consistent with inducing competency. He explores the rationales of punishment to support this statement.


This note examines the issue of forced medication in order to induce competency for execution. After a brief discussion of the justifications behind the exemption of the insane from execution, the author looks at Perry v. Louisiana, 498 U.S. 38 (1991). He examines the ethical codes for physicians and looks at how the courts have used these ethical codes. He finds treatment applied solely for execution is a fundamental violation of medical ethics, and concludes psychiatrists must never prescribe treatment. He argues the Louisiana court in Perry was ordering physicians to violate their professional ethics, and he looks at whether the Supreme Court should have given judicial support to medical ethics. He asserts that the deference given to widely-recognized medical principles, the recognition courts have given to these principles, and a national and international consensus against physician participation in executions, all indicate the Supreme Court should have expressly prohibited forced medication by physicians to induce competency for executions.


In this article the author compares the competency to be executed issue with the competency to stand trial issue. He asserts that mental health professionals can avoid entanglement with judging how insane an inmate needs to be to avoid execution by giving the court a functional diagnosis of the condemned inmate.

Ebrhim J. Kermani and Jay E. Kantor, Psychiatry and the Death Penalty: The Landmark Supreme Court Cases and Their Ethical Implications For the Profession, 22 BULL. AM. ACAD. PSYCmATRY L. 95 (1994).

it is difficult to justify forced restoration of competency in cases of prisoners incompetent to be executed because there can be no inference that the defendant would consent to therapy so he/she could be executed, and such treatment cannot be thought of in the best interests of the patient. They assert these arguments can only be overcome if one can be convinced the defendant would have consented to treatment if competent or if a compelling state interest overrides the patient’s refusal. The authors discuss the ongoing debate concerning mental maturity in juveniles and the mentally retarded. They also discuss cases involving psychiatric testimony on mitigating and aggravating factors, and victim impact testimony. They conclude psychiatrists should be guided by their personal beliefs on punishment, moral obligations, civic duty, and patient rights when dealing with any of these issues.


This article examines *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Perry v. Louisiana*, 498 U.S. 38 (1991). The author looks at the issues that have arisen from these two cases, particularly the issue of forcibly medicating incompetent inmates in order to execute them. He proposes three separate solutions to the problem of an inmate who has regained sanity: commute the sentence to life without parole, have mandatory counseling, or abolish the death penalty.


The author looks at the intersection between law and mental health science and concludes the question of insanity has suffered as a result. The author explores the evolution of the insanity defense. The author argues the criminal justice system is based on theories of free will, while the mental health professions are based on the theory of determinism. The author asserts the result of trying to interface the two has expanded the definition of insanity and led to a backlash against the defense due to the release of dangerous criminals. The author finds the test of insanity became the test for future dangerousness, thus the same test can lead to freedom or to death.

The author argues the Eighth Amendment forbids the execution of the presently incompetent. He surveys the Supreme Court’s treatment of *Gilmore*-type cases and describes the Court’s approach to capital punishment under the Eighth Amendment. He concludes that in light of Anglo-American common law history, contemporary statutes, and the Court’s own doctrines, execution of the incompetent would be cruel and unusual punishment. He proposes a standard for present incompetency and procedures for raising and resolving the issue.


This book contains excerpts of the Supreme Court cases on the death penalty. It also contains a brief overview of the history of the Eighth Amendment, capital laws and procedures, and the capital punishment debate. The appendix contains facts and figures on murder and the death penalty. Cases discussed that are relevant to this bibliography include *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Ford v. Wainwright*, 477 U.S. 399 (1986); and *Penry v. Lynaugh*, 492 U.S. 392 (1989).


This article examines five Supreme Court decisions handed down on July 2, 1976: *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); and *Roberts v. Louisiana*, 431 U.S. 633 (1976). The authors distill from these cases a doctrinal framework of the Eighth Amendment. They assert a statute attempting to enumerate exclusive mitigatory factors is unconstitutional and that a defendant has a right to jury instructions on guided individualization. The authors apply their doctrinal framework to the treatment of mental illness as a mitigation and conclude a mentally disordered offender should receive mitigatory consideration. In order to determine the degree of mitigation, they propose a four-factor analysis. They apply this analysis to the mentally retarded and the sociopath and conclude there is a compelling case for reducing a death sentence for a mentally retarded offender.
Dana Lowy, Note, Perry v. Louisiana: To Execute or Not to Execute a Mentally Incompetent Convicted Criminal ... That Remains the Question, 21 Sw. U. L. Rev. 205 (1992).

This note examines Perry v. Louisiana, 498 U.S. 38 (1991), and argues that on remand, the Louisiana Supreme Court must vacate the death sentence in order to properly apply the principles expressed in Ford v. Wainwright, 477 U.S. 399 (1986), and Washington v. Harper, 494 U.S. 210 (1990). The author asserts Michael Perry has never been a threat to himself or others, thus involuntarily medicating him in order to execute him does not pass the Harper test. She argues Perry's interests outweigh the state's interest in seeing its criminal penalties enforced. She also argues involuntarily medicating him to force competency for execution would undermine the Ford v. Wainwright prohibition against executing the insane. Furthermore, she finds it would violate medical ethics.


This note discusses Perry v. Louisiana, 498 U.S. 38 (1991), and concludes the Louisiana Supreme Court violated the Eighth and Fourteenth Amendments when it issued an order forcibly medicating an insane condemned inmate so that he could be executed. The author argues that involuntarily injecting Perry with psychotropic medication that has potentially serious side effects violates the dignity of man principle underlying the Eighth Amendment. The author asserts this involuntary medication is not treatment, but rather punishment, and could allow Louisiana to execute an insane man. The author argues Louisiana's law concerning forced medication creates a liberty interest protected by the Due Process clause.


This article addresses the procedures for the determination of competency and treatment of incompetent death row inmates. The author conducted a national survey of attorney generals of states with capital punishment. He concludes very few states have procedures to determine competency that would pass the Ford v. Wainwright, 477 U.S. 399 (1986), test. He found few states were aware of specific procedures addressing the rights of incompetent inmates to refuse treatment. None of the participants in the survey were sure whether state mental health
professionals would be required to forcibly medicate incompetent inmates. The author finds the preferred policy of mental health professionals is commutation of death sentences, but since few states provide for this, the author proposes the states permit treatment solely to render the patient competent to make treatment decisions. Then the competent inmate can decide whether or not to continue treatment.


The author analyzes Ford v. Wainwright, 477 U.S. 399 (1986), and proposes possible standards that the states should follow when dealing with the issue of competency for execution. He finds Ford to be imprecise and troubling for states because the Court gave little guidance on what procedures for a competency hearing comply with due process requirements. He proposes a solution where the fact finder is given a single opinion based on a long-term, comprehensive examination by a team of impartial psychiatrists. He suggests this examination should be granted on an initial showing by the inmate governed by a sufficient doubt standard. The results of the examination would be presented in a court administered hearing.


The author argues the evaluation and treatment of the insane condemned does not violate ethical standards. He examines objections to psychiatric participation in evaluating competency for execution and asserts they over-extend the psychiatrist's role in the competency assessment. He points out that psychiatrists can avoid the stigma of having imposed a death sentence by their evaluation by insisting on procedural safeguards and pronouncing findings that leave the ultimate determination to execute to legal authorities. He argues the state's interest in carrying out sentences and the loss of liberty that inmates experience may relieve the usual requirements of informed consent. He also asserts that a finding of incompetency to give consent may allow for an assessment of competency to be executed. He examines traditional objections to psychiatric treatment of the incompetent condemned and argues the oath to preserve life has exceptions and that treatment of the condemned has other purposes than just execution. He argues patient autonomy and the right to refuse treatment may be less important where the state's interests must also be considered. He asserts psychiatrists have a duty to return patients to a condition where they can be punished and that these patients
have implicitly consented to treatment by their choice to commit the original crime.


This lengthy article looks at the ethical dilemmas facing psychiatrists who evaluate and treat the incompetent condemned. The author examines four types of arguments used by critics of psychiatric involvement with the incompetent condemned and asserts those arguments are internally inconsistent. He argues that if one assumes capital punishment is just and administrated fairly, psychiatrists no longer face an ethical dilemma and may evaluate and treat the insane condemned. He concludes this leaves psychiatry with two alternatives: officially opposing the death penalty on moral grounds, or supporting efforts to develop procedures for evaluating and treating the incompetent condemned.


The author examines Ford v. Wainwright, 477 U.S. 399 (1986), and concludes that although the decision is a logical extension of Eighth Amendment jurisprudence, the Court erred in not providing minimal due process guidelines and in not specifying the rationale for exempting the insane from execution. He suggests that for raising a claim to insanity, the state should allow a prisoner at least one hearing as a matter of right. A full trial and a jury are not necessary, however, the prisoner must be given an opportunity to be heard. He asserts an impartial authority should hear the evidence. He suggests a high threshold requirement for a hearing is necessary to avoid repeated claims of insanity. He argues procedures determining restoration of competency must be more stringent than those determining competency. He asserts the test for insanity must be tailored to the purposes of the rule banning execution of the insane. He finds the rule can only be justified by the belief that the execution of an insane person has less retributive value than that of a normal person.


This book on the death penalty is divided into five parts. Part I gives an overview of capital punishment. Part II discusses the legal challenges to the death penalty pre-Gregg v. Georgia, 428 U.S. 153 (1976), and discusses legal challenges and reform of the death penalty after Gregg v.
Georgia. This part addresses mitigation evidence such as youth or mental illness. This part also examines the execution of special groups such as the mentally ill, mentally retarded, and juveniles. The Supreme Court cases of *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); and *Stanford v. Kentucky*, 492 U.S. 361 (1989), are discussed.

Part III deals with racial discrimination and arbitrariness. Part IV discusses arguments for and against the death penalty. Part V looks at alternatives to capital punishment.


The authors assert the rules prohibiting the execution of the mentally ill are too vague, and this vagueness exacerbates the ethical dilemma of physicians participating in the process. They urge change is needed and conclude that until definitions and procedures are changed, a psychiatric evaluation finding a person competent to be executed must be clearer, more certain, and more comprehensive than a finding of incompetence.


This article addresses the ethical principles and dilemmas raised in treating the insane condemned. The authors look at the dilemmas in the context of the Gary Alvord case and report staff reactions to his treatment. They conclude the ethical dilemma can only be resolved by commuting the death sentences of the incompetent condemned to long-term imprisonment.


This article by an author on death row urges new verdict forms to protect the mentally ill from execution. He argues that although mental disorders are to be considered mitigating factors, too many mentally ill offenders are on death row. He asserts defendants face two problems trying to prove diminished capacity: the skepticism of jurors and the heinous nature of capital crimes. He argues the death penalty should be limited to vicious, premeditated crimes, and that mentally ill defendants do not perform such acts. He urges the introduction of "guilty but mentally ill" and "guilty but mentally retarded" verdict forms and prohibiting the death penalty for such verdicts. He advocates a sentence of life without parole in those circumstances.

**ROYAL COMMISSION ON CAPITAL PUNISHMENT, ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953 REPORT (1953).**

This report looks at capital punishment in Great Britain and whether it should be changed or limited. In the course of answering this question, the report looks at insanity and mental abnormality. The Commission examines the law and practice in foreign countries, including the United States. Great Britain later abolished the death penalty.

Rochelle Graff Salguero, *Note, Medical Ethics and Competency to be Executed*, 96 *Yale L.J.* 167 (1986).

The author focuses on the ethical dilemma that exists when physicians are called upon to treat the incompetent condemned. She analyzes the state interests involved in using medical professionals to implement competency to be executed statutes and proposes possible resolutions to the ethical dilemma created by the state.


This article addresses the dilemma facing psychiatrists when they deal with condemned inmates. He argues psychiatrists betray the patient's trust when they treat inmates so they can be executed. He asserts to do so violates professional ethics. He finds the American Psychiatric Association Council on Psychiatry's proposal to insulate therapists to be "least-restrictive self-deception." He argues it is unethical to diagnose competency to be executed and compares such state directed ethical violations to Josef Mengele, the Nazi Angel of Death.

This study analyzes the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, international humanitarian law, the European Convention of Human Rights, the Geneva Convention, and other international law instruments. The author discusses the emergence of customary norms prohibiting the death penalty. He traces the development of the exclusion of certain categories of persons from the death penalty. In particular, he looks at the exclusion of juveniles and the insane. He predicts the prohibition of the death penalty per se will be a customary international norm and jurs cogens in the future.


This article addresses the question of whether there is an international norm prohibiting the execution of the insane and mentally retarded. The author traces the history of this norm, from its beginnings in English common law to the United Nation's list of safeguards concerning implementation of the death penalty. He finds there is no evidence that any state actually executes the insane, and thus concludes state practice supports an international norm prohibiting execution of the insane. He regards the U.N. safeguards as indicating the opinio juris of its member states. He cautions that procedural guarantees in capital cases dealing with the insane must be rigorously applied. He concludes he cannot affirmatively assert an international norm prohibiting execution of the mentally ill as distinguished from the insane.


This article discusses the role of psychiatrists in capital cases. The author argues legal and judicial opinions cannot be used as ethical guidelines for forensic psychiatrists. He examines the ethical problem of informed consent and asserts that where jurisdictions do not insulate clinical evaluation evidence from use against the defendant, the psychiatrist should give adequate warning before any evaluation. He also looks at the problem of improper interpretations of psychiatric testimony and cites a Virginia law as a possible solution to this problem: creating an explicit prohibition on using the defendant's statements in a psychiatric evaluation as evidence of aggravation. He sees the need for ethical guidelines and standards for forensic psychiatrists and asserts
these guidelines should come from recognized theories and standards in psychiatry.


This article discusses psychiatric evaluation and testimony in capital sentencing situations. The authors look at mitigating mental abnormality and future dangerousness. They warn psychiatrists must be sensitive to the limits of their experience and appropriately qualify their opinions.


After discussing the history of death penalty jurisprudence, the author examines *Ford v. Wainwright*, 477 U.S. 399 (1986), and concludes the Court erred in deciding the Eighth Amendment prohibits the execution of the insane. She argues the purposes of deterrence and retribution are not served by banning execution of the insane. She asserts offenders will claim insanity in order to escape execution. She looks at the facts of *Ford* and asserts Ford never claimed to be insane until ten days before his execution and that Ford had ample time to understand the nature and purpose of his punishment. She argues offenders should not be allowed an unlimited right to postpone executions. She concludes the Court should have focused on the character of the offender and whether the offender understood the nature of his punishment.


This article looks at the legal, clinical, and ethical aspects of a competency to be executed evaluation. The authors summarize the substantive and procedural requirements for competency evaluations pursuant to *Ford v. Wainwright*, 477 U.S. 399 (1986). They find no clear ethical guidelines for mental health professionals evaluating the competency of condemned inmates and assert the professional must make his/her own decision. They provide basic guidelines regarding disclosure and evaluation techniques. They caution mental health professionals to avoid giving legal opinions as to the inmate's competency to be executed.

The author of this comment examines Ford v. Wainwright, 477 U.S. 399 (1986), and looks at evaluation and treatment issues raised by the decision. He argues that when states revise their statutes to comply with Ford, they should take into account the administration of psychological assessments of competency. Specifically, he asserts the need to examine sources of bias, limits of confidentiality, competency to consent, Fifth Amendment rights, and the reported findings. He also briefly looks at treatment issues. He analyzes the Nebraska statute and finds it is unconstitutional in light of Ford. To revise the Nebraska statute, he suggests adopting language from mental health commitment statutes and insanity defense statutes.


This study looks at the individual characteristics of thirty-four death row inmates. The study looks at demographic information, offense information, mental status, interpersonal relationships, and inmate defenses.

George F. Soloman, Capital Punishment as Suicide and as Murder, in CAPITAL PUNISHMENT IN THE UNITED STATES 432 (Hugo Adam Bedau and Chester M. Pierce eds., 1976).

The author discusses the phenomenon of capital punishment and death-seeking behavior. He first discusses learned violence and the process wherein society adopts murder as a problem-solving mechanism, thereby encouraging some murderers to do likewise. He relates the case histories of two murderers who killed in a conscious attempt to invoke the death penalty and commit state-assisted suicide. He argues both society and individuals must learn better problem-solving methods.


The author examines the phenomenon of sentencers improperly considering mitigating factors, such as mental illness, as aggravating factors. He looks at death penalty cases and distills two principles that are required in death penalty schemes: individualization and guidance. He argues Zant v. Stephens, 456 U.S. 410 (1982), provides means to
challenge death penalty schemes that allow mislabeling of mitigating factors. He finds modern death penalty statutes unconstitutional because they fail to guide the jury in understanding and applying mitigating factors; permit and encourage improper aggravating circumstances to be considered; permit the use of nonstatutory aggravating factors; and violate Lockett v. Ohio, 438 U.S. 586 (1978), by allowing mitigating factors to be weighed as aggravating factors rather than independent mitigating weight. He proposes solutions to this problem, suggesting mandatory jury instructions that: (1) inform the jury of the penological justifications for capital punishment; (2) define aggravating and mitigating circumstances; and (3) address each mitigating factor offered by the defendant.


The author criticizes the courts for their cursory response to condemned inmates who waive appeals to execution. He explores several cases and argues that individuals who volunteer for execution suffer from suicidal impulses and suffer from the brutal and dehumanizing conditions on death row. He asserts there must be a comprehensive inquiry into the voluntariness of the waiver, and the inquiry must take into account the nature of the death decision and the coercive conditions of death row. He addresses arguments about the inmate’s “right to die” and discusses the rights of third parties to intervene in such situations.


The author examines Ford v. Wainwright, 477 U.S. 399 (1986), and concludes the Court correctly decided that the Eighth Amendment prohibited the execution of the insane and that the Florida procedures to determine competency were inadequate. The author criticizes the Court for not providing minimum due process standards for competency determinations. She asserts the Court should have defined the threshold showing of insanity and foresees disparate treatment of insane prisoners as a result. She argues the Court should have held that a neutral party must appoint a panel of psychiatrists to examine the defendant, and concludes states will interpret this silence as allowing biased examiners. Finally, she argues the Court should have held that the prisoner has a right to raise the initial insanity claim.
The Supreme Court, 1985 Term, Leading Case, 100 Harv. L. Rev. 100 (1986).

As part of this review of Supreme Court decisions, the ruling of Ford v. Wainwright, 477 U.S. 399 (1986), is discussed. The article finds the Supreme Court’s divisiveness and vagueness concerning adequate procedures for determining the sanity of a condemned prisoner will lead to more litigation and greater disparity in state policies.

William Tallack, Humanity and Humanitarianism (1871).

This book looks at the prison systems of Great Britain and the United States. While much of the information and ideas are dated, the section on insanity and capital punishment discusses issues that are still problematic today. For example, the author examines the process for determining insanity and what kinds of experts should be involved. He also states it is unjust to execute the insane and looks at the connection between executions and increased murders.


This report looks at psychiatric participation in the sentencing process. The report notes the increasing role of psychiatrists in this process due to the individualization requirement of capital sentences. The task force states psychiatrists can participate in capital trials and should make a good faith effort to conduct thorough examinations while adhering to an individual-centered orientation. The task force asserts psychiatrists should rely on the doctrine of informed consent and suggests guidelines concerning what form the examination should take, the scope of the examination, what should be done with inmates incompetent to give consent, the form a report on an evaluation should take, statements on limitations of expertise, testimony on ultimate issues, and legal issues that might come up.


This note discusses the historic ban on executing the insane and looks at death penalty jurisprudence. The author examines Ford v. Wainwright, 477 U.S. 399 (1986), and finds the decision significant because it creates a new constitutional right. He notes Ford v. Wainwright is part of a movement by the Court to restrict the death penalty.

The author addresses the issue of forced medication of condemned insane inmates in order to execute them. After looking at Eighth Amendment jurisprudence, the author states Ford v. Wainwright's failure to define competency makes it unclear if drug-induced competency is sufficient or if any conditions of reliability or predictability of competency are required. He looks at Perry v. Louisiana, 498 U.S. 38 (1991) and Washington v. Harper, 494 U.S. 210 (1990), and concludes that under the Due Process Clause, the state arguably must be allowed to forcibly medicate against an incompetent prisoner's will because it cannot otherwise carry out the sentence of death. He also concludes that forcibly medicating death row inmates to induce competency is an attempt to circumvent the Eighth Amendment prohibition against executing the insane.


This Web site attempts to provide links to resources from both sides of the death penalty debate. This particular area of the site addresses specific issues. In addition to information on deterrence, retribution and justice for murder victims, the innocent, limiting appeals and habeas corpus reform, costs of the death penalty, alternative sentencing, fairness, moratorium, cruel and unusual punishment, and women, the site provides links to statistical information and cases concerning juveniles, the mentally retarded, and the mentally ill.

Donald H. Wallace, Incompetency for Execution: The Supreme Court Challenges the Ethical Standards of the Mental Health Professions, 8 J. Legal Med. 265 (1987).

The author identifies and discusses ethical issues raised by Ford v. Wainwright, 477 U.S. 399 (1986). He finds a conflict with the healing ethic when an opinion of competency may enable the state to take a life. He analogizes the treatment of a condemned incompetent inmate to lethal injection. He compares a condemned inmate's right to refuse treatment to civil commitment and competency to stand trial. He looks at arguments supporting professional involvement in evaluating and treating incompetence for execution purposes and concludes they inject hypocrisy into the debate because participation by evaluation and treatment creates the impression of moral sanction for capital punishment. He suggests that professional organizations should
explicitly label involvement in evaluation and treatment of the incompetent condemned as unethical and subject to disciplinary action. He proposes several solutions to the ethical dilemma, including refusal of treatment and the appointment of adversary mental health professionals.


The author looks at post-*Ford v. Wainwright*, 477 U.S. 399 (1986), decisions of courts and explores the guidance these decisions give mental health professionals involved in assessing and treating insane condemned inmates. The article looks at the gaps and ambiguities left by *Ford* and at attempts by lower courts to clarify and fill those gaps. The author then looks to ethical issues involving the treatment of incompetent condemned inmates. He finds the actions of the Supreme Court in *Johnson v. Cabana*, 481 U.S. 1061 (1987), and *Lowenfield v. Butler*, 485 U.S. 995 (1988), undermine *Ford v. Wainwright*, 477 U.S. 399 (1986). He proposes two solutions to the ethical dilemmas posed by the insane condemned. One solution is to amend ethical standards. The other is to commute the sentence of the incompetent insane to life.


The author discusses psychiatric participation in determining competency and treating incompetent condemned patients. She examines the ethical dilemma facing psychiatrists who have a duty to treat the mentally ill but whose treatment may lead to an execution.


The author asserts the death penalty should be abolished because capital punishment is outdated, immoral, wasteful, cruel, brutal, unfair, irrevocable, obstructive, and dangerous. She discusses the ethical dilemmas with which the death penalty confronts psychiatrists. She finds physicians, sworn to preserve life, are placed in a position where inmates are executed based on their testimony. She discusses the problem of death row conditions causing psychiatric deterioration and the resulting problem of the mentally ill condemned inmate. She argues capital punishment breeds violence, particularly in those with suicidal urges.
She illustrates her argument with cases of death row inmates who murdered so that the state would put them to death. She urges the medical profession to declare any physician participation in an execution unethical.


The author reports the results of an exploratory study conducted to examine the death penalty decision process and to assess the effectiveness of several defense strategies. The defense strategies tested were: anti-capital punishment defense, social history defense, mental illness defense, and no defense. The study finds jurors exposed to the anti-capital punishment defense were the least punitive while jurors exposed to the mental illness defense were the most punitive. The other defense results were not significantly different from each other. The author hypothesizes the mental illness defense was ineffective due to juror feelings that mental illness is no excuse, that the defendant is faking, and that the defendant should have gotten help for his problems. The author finds these results consistent with other studies.


This article looks at the effectiveness of the mental illness defense in capital trials. The author looks at three studies and finds that in all of them the mentally ill defense was ineffective. One study even found the mentally ill defense was less effective than no defense at all. The author looks at studies of insanity defense acquittals in an attempt to determine what factors are associated with a successful mentally ill defense. He finds the defense is more likely to be successful if psychiatrists recommend it, if the defendant is diagnosed with a psychosis, if the defendant has a history of psychiatric treatment or hospitalization, and if there is objective evidence of psychopathology. He also finds the defense more likely to succeed if the defendant is female or if the jury contains mostly women. He finds jurors more likely to impose a death sentence if they feel the defendant is going to be dangerous in the future. The author points out that death-qualified jurors tend to be crime control oriented and suspicious of psychological excuses for criminal acts.


In this book, the author explores plea bargaining, the penalty trial, discrimination, defendants who choose execution, and death-qualified
juries. In his discussion of the penalty trial, the author looks at the role of mental health professionals and mitigating evidence. In his discussion on defendants who choose to waive appeals and be executed, he looks at the issues of patient autonomy and competency. He argues that the issue of competency should focus on whether the defendant has the ability to knowingly and voluntarily choose between life and death. He explores the reasons defendants might choose execution and notes the conditions on death row and the urge for self-destruction. He links this phenomenon to the role of deterrence and suggests that the death penalty may be a less effective deterrent than life imprisonment.


This book looks at procedural issues involved in death penalty cases. The author looks at voir dire and death-qualified jurors. He discusses disproportionality and the death penalty. He examines police trickery in inducing confessions and Fifth Amendment concerns with psychiatric evaluations. In his discussion of Fifth Amendment concerns and psychiatric evaluations, he examines Estelle v. Smith, 451 U.S. 454 (1981). There the Supreme Court held that under the circumstances, the defendant was entitled to Miranda warnings before a psychiatric evaluation and that the defendant's Sixth Amendment right to counsel was also violated. The author discusses the implication of this holding to mentally ill defendants in capital cases. He analyzes the waiver by offer of psychiatric evidence doctrine and asserts safeguards are needed to limit the doctrine's effects. He suggests prohibiting the examiner from testifying for the government, bifurcating the issues of insanity and guilt, providing an attorney during examination, and restricting the scope of the examination or postponing the examination until after the guilt phase is over.


The article analyzes the "waiver by offer of psychiatric testimony" doctrine and examines its application. The author closes by suggesting safeguards to minimize the possibility the prosecution will use evidence derived from a psychiatric examination in an unauthorized manner.
This article addresses waiver and Sixth Amendment issues involved in psychiatric examinations in light of *Estelle v. Smith*, 451 U.S. 454 (1981). The author argues that the Supreme Court in *Estelle* equated the psychiatric examination of the defendant with a custodial police interrogation. He speculates familiar *Miranda* warnings before a psychiatric examination may not be enough in a capital case, and that the state may need to specifically warn the defendant that a jury could use statements made in the psychiatric examination to sentence a defendant to death. He also asserts *Estelle* redefined the right to an attorney when it recognized a defendant’s right to an attorney in deciding whether to submit to a psychiatric exam.

### III. MENTALLY RETARDED

**A. SUPREME COURT CASE**


The defendant, Johnny Paul Penry, was mildly retarded, with the mental age of a six-and-a-half-year-old. He filed for habeas corpus relief. After dealing with a retroactivity issue, the Court addressed whether the sentence violated the Eighth Amendment because the jury could not adequately consider all of the mitigating evidence, and whether it was cruel and unusual punishment to execute a mentally retarded offender. The majority, made up of Justices O’Connor, Brennan, Marshall, Blackmun, and Stevens, found the jury was not able to adequately consider all of the mitigating evidence presented due to the nature of the Texas death penalty statute and the lack of curing instructions to the jury. The majority, made up of Justices O’Connor, Scalia, Rehnquist, White, and Kennedy, applied the evolving standards of decency test and found there was no national consensus that executing the mentally retarded offended the evolving standards of decency. Justice O’Connor further held executing the mentally retarded does not violate the proportionality requirement.
B. BOOKS, ARTICLES, AND WEB SITES


The American Bar Association Criminal Justice Standards Committee developed ninety-six standards for dealing with the mentally disadvantaged in the criminal justice system. The standards address post-arrest obligations, pretrial evaluations, expert testimony, disclosures from pretrial mental evaluations, competence to stand trial, post-conviction determinations of competency, stays of execution, and restoration of competency. The standards also discuss competency and confessions and nonresponsibility for crime. The standards look at the sentencing of mentally ill and mentally retarded offenders. They discuss treatment, admissibility of pretrial assessments, and the right to refuse treatment.

AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT (James R. Acker et al. eds., 1998).

This book looks at the experiment of capital punishment post-*Furman v. Georgia*, 408 U.S. 238 (1972), and discusses its failures. The chapters, which are written by different authors, examine public opinion, law, politics, deterrence, incapacitation and future dangerousness, women, children, the mentally retarded, the innocent, incompetent counsel, death-qualified juries, mitigation, discrimination, habeas corpus, cost of the death penalty, physician involvement, families of victims and offenders, life on death row, clemency, and executions. Chapters relevant to this bibliography have been individually cited.


This site contains extensive substantive information concerning the death penalty. Amnesty International reports on the death penalty are available in their Web site library going back to 1996. These reports cover many death penalty issues, including those concerning the mentally ill, mentally retarded, and juveniles.

This report discusses Penry v. Lynaugh, 492 U.S. 392 (1989), and the results of the second trial on remand. The report condemns the execution of the mentally retarded and urges Governor Bush to stop the execution.


J. Vincent Aprile II, Executing the Mentally Retarded, CRIM. J., Spring 1994, at 38. This article looks at post-Penry v. Lynaugh, 492 U.S. 392 (1989), legislation. The author notes that since Penry, eight states have enacted a prohibition against executing the mentally retarded. He argues this dramatic increase in the number of states prohibiting execution of the mentally retarded provides ammunition to mount another constitutional challenge. He urges each state to take a new look at whether the death penalty is appropriate for the mentally retarded.

Philip C. Berg, Recent Developments, 13 HARV. J.L. & PUB. POL’Y 415 (1990). This article reviews Penry v. Lynaugh, 492 U.S. 392 (1989), and Stanford v. Kentucky, 492 U.S. 361 (1989). The author asserts that critics of the decisions have an incomplete understanding of the Supreme Court’s holdings. He asserts the debate in Penry and Stanford is not focused on the culpability of juvenile and mentally retarded offenders but is on federalism and the role of the Court. He argues a case-by-case analysis is appropriate and that principles of federalism dictate this analysis is a state role. He concludes this federalism is more appropriate than a bright line federal rule prohibiting executions of juveniles and the mentally retarded.


The author begins her note by discussing the definition and classification of mental retardation, the problems of the mentally retarded in the defense process, and prior significant Eighth Amendment case law. The main focus of the note is the examination of Penry v. Lynaugh, 492 U.S.
392 (1989). As part of her analysis, she argues the Supreme Court does not properly understand the defect of retardation. She urges state legislatures to follow the Penry dissent and restrict the imposition of the death penalty on the mentally retarded. She suggests the states incorporate an instruction listing mental retardation as a mitigating factor, or establish a bright line rule prohibiting the execution of those with certain low I.Q. levels.


The author examines the six standard purposes of punishment and discusses their application to the execution of the mentally retarded. She argues four of the six purposes cannot justify capital punishment at all, let alone for the mentally retarded. She rejects the remaining two purposes of deterrence and retribution because the mentally retarded do not have the same mental, emotional, and moral culpability as other adult offenders do. She finds the execution of the mentally retarded to be unacceptable.


After giving background information on characteristics and definitions of the mentally retarded, the author looks at the rationales for executing the mentally retarded and concludes neither retribution nor deterrence justifies their execution. He points out the barriers facing the mentally retarded in the criminal justice system and concludes these barriers increase the likelihood a mentally retarded defendant will be found guilty. He rebuts the arguments that a ban on the execution of the mentally retarded would lead to false claims or that such protection would undercut their independence. He examines Penry v. Lynaugh, 492 U.S. 392 (1989); Thompson v. Oklahoma, 487 U.S. 815 (1988); and Stanford v. Kentucky, 492 U.S. 361 (1989); and argues their national consensus methodology is flawed. After analyzing the effect of new Supreme Court members he concludes the Penry decision would likely be affirmed. After examining successful and unsuccessful state legislation banning the execution of the mentally retarded, he proposes a model law.

In this article, the authors contend mentally retarded offenders may never constitutionally be put to death because death in these cases is an excessive punishment serving no penological goal. The authors suggest a legal presumption in favor of life once mental retardation has been established.


This dissertation looks at post-*Penry* legislation and its impact on Texas cases. The author first examines death penalty jurisprudence, *Penry v. Lynaugh*, 492 U.S. 392 (1989), and the resulting Texas statute. The author conducted a study of post-*Penry* cases. He finds the new legislation has had no impact on consideration of mitigating evidence. Defendants abused as children or mentally ill were more likely to receive the death penalty.

**CAPITAL PUNISHMENT: CRUEL AND UNUSUAL?** (Carol D. Foster et al. eds., 1992).

Part of the Information Series on Current Topics, this book gives an overview of the capital punishment debate. It includes summaries of landmark Supreme Court rulings, including those dealing with juveniles, psychiatric testimony, the insane, and the mentally retarded. It also reviews death penalty statutes, looking at the minimum age for execution, and at the treatment of mental retardation. The book also gives statistical information on executions, including breakdowns by age and education, and an overview of capital punishment around the world.


After giving a background on Supreme Court capital punishment rulings, the author examines the holding in *Penry v. Lynaugh*, 492 U.S. 392 (1989), and looks at its effect on the Texas death penalty. He concludes the present statute is too flawed to be properly applied and asserts Texas must amend or replace the statute. He recommends either adding a fourth special issue addressing mitigating circumstances or replacing the statute with one instructing the sentencer to weigh mitigating and aggravating factors.

The author of this note looks at *Penry v. Lynaugh*, 492 U.S. 392 (1989), and *Stanford v. Kentucky*, 492 U.S. 361 (1989), and concludes these cases were correctly decided in light of Eighth Amendment jurisprudence and the retributive theory of jurisprudence. After analyzing the cases, she sets forth the general arguments against the death penalty and rebuts them. She discusses the deterrence and retributive punishment theories and applies these theories to the circumstances in *Penry* and *Stanford*. She asserts both defendants were capable of distinguishing right from wrong and evaluating various courses of action because they both killed to escape detection. She argues in both cases the sentencer is always free to reject the death penalty if the juvenile or mentally retarded offender is not sufficiently culpable.


This note examines *Penry v. Lynaugh*, 492 U.S. 392 (1989). The author concludes the Court correctly held the Texas statute was not per se unconstitutional but that the Texas special issues did not allow the jury to consider and give effect to all the relevant mitigating evidence. He argues the Court erred in holding that capital punishment for a mentally retarded offender is not cruel and unusual punishment. He asserts it violates the proportionality test.


The author discusses Florida’s attempt to pass legislation banning the execution of mentally retarded offenders. He begins with a discussion of the history and treatment of the mentally retarded. He then gives an overview of death penalty jurisprudence. He traces the legislative response to *Penry v. Lynaugh*, 492 U.S. 392 (1989), and urges Florida to pass legislation prohibiting the execution of mentally retarded offenders. He argues public opinion polls show Florida citizens oppose the execution of the mentally retarded. He asserts neither retribution nor deterrence support the death penalty for the mentally retarded due to the debilitating characteristics of their condition. Finally, he points out the
particular problems the mentally retarded face in the criminal justice system and why they need special protection in capital cases.


After a discussion of mental retardation and of *Penry v. Lynaugh*, 492 U.S. 392 (1989), the author concludes treating mental retardation as a mitigating factor does not protect the mentally retarded defendant. He argues mentally retarded defendants are unable to form the necessary culpability to justify the death penalty. He compares the mentally retarded to the mentally ill. He argues the execution of the mentally retarded is not supported by the penological goals of deterrence or retribution. He asserts instructions directing juries to consider mental retardation as a mitigating factor do not protect mentally retarded offenders because juries often treat it as an aggravating factor. He proposes a presumption of life imprisonment rather than the death penalty. He also proposes a presumption that a mentally retarded offender is not competent to understand the nature of the charges against him/her or able to adequately assist in his/her defense.


This note examines the Texas Court of Criminal Appeals decision in *Rios v. Texas*, 846 S.W.2d 310 (Tex. Crim. App. 1992). The author finds the *Rios* opinion requires more weight to be given to mitigating evidence of mental retardation than is required under *Penry v. Lynaugh*, 492 U.S. 392 (1989), but criticizes the court for its confusing opinion. He argues the *Rios* court should have explicitly stated that a separate question concerning the defendant's mental retardation must be given to a jury. After looking at how other states deal with mental retardation and the death penalty, he concludes there is a growing movement to ban the execution of the mentally retarded. He predicts the Supreme Court will have a new opportunity to re-determine the evolving standards of decency and prohibit the execution of the mentally retarded.


In this examination of *Penry v. Lynaugh*, 492 U.S. 392 (1989), the author concludes the Supreme Court expanded the discretion of the sentencer in such a way as to re-establish the arbitrary and capricious imposition
of the death penalty. The author predicts this will lead to further litigation.


This article takes a look at the Florida approach to sentencing the mentally retarded in capital cases. The author begins by looking at the characteristics of mental retardation and at the Supreme Court’s treatment of the mentally retarded in *Penry v. Lynaugh*, 492 U.S. 392 (1989). After examining Florida’s approach, he concludes that Florida is increasingly willing to consider the mentally retarded defendant as different than a normal adult defendant. He proposes that the state erect significant hurdles to the execution of the mentally retarded instead of a flat prohibition on such executions, and provides an example of how such a scheme could work.


This anthology on capital punishment, edited by noted abolitionist Hugo Bedau, collects works presenting information about the history and implementation of the death penalty, arguments for and against the death penalty, social science research on death penalty issues, and case histories.


This later edition of Hugo Bedau’s anthology on capital punishment includes chapters on deterrence, public attitudes towards the death penalty, error, constitutionality under the Eighth Amendment, and arguments for and against the death penalty. In the beginning chapters, Bedau discusses statutory mitigating circumstances such as diminished capacity, mental disturbance, and the age of the offender.


This anti-death penalty site contains extensive information on the death penalty. It addresses special topics, among which are juveniles and the mentally retarded. The pages include statistics on the mentally retarded on death row and the mentally retarded executed.

This article looks at post-Penry litigation in Texas. The author argues there is no support for the Texas Court’s restrictive interpretation of the kind of mitigating evidence that can provide Penry relief. She also argues Penry’s concept of mitigation and aggravation rests upon false assumptions on the relationship between crime and future dangerousness. She uses the Biosocial Study to support her arguments. She asserts assumptions favoring internal mitigating factors, such as mental retardation, over external factors, such as lead poisoning, are inappropriate.


In this comment, the author examines Penry v. Lynaugh, 492 U.S. 392 (1989), and concludes the Supreme Court erred in not prohibiting the execution of mentally retarded defendants. In reaching this conclusion, she gives an overview of death penalty jurisprudence and then analyzes Penry. She criticizes the Court for failing to understand mental retardation. She argues the Court confused mental retardation and insanity and inaccurately assessed the national consensus against executing the mentally retarded. She also argues the Court erred when it unnecessarily discounted the reliability of defining retardation, failed to accept testimony on mental age, and mistakenly believed sentencers will consider mental retardation a mitigating factor.


This report discusses the international trend toward the abolition of the death penalty and the United States’ position as a violator of human rights. Among the issues discussed is the execution of the mentally retarded. The report also discusses the costs of the United States’ failure to abide by international law regarding capital cases.


The author examines the evolution of the Supreme Court’s definition of the Cruel and Unusual Punishment Clause; looks at Thompson v.
Oklahoma, 487 U.S. 815 (1988); Stanford v. Kentucky, 492 U.S. 361 (1989); and Penry v. Lynaugh, 492 U.S. 392 (1989); and concludes none of the Court’s approaches adequately addresses the problems of juveniles and the mentally retarded. She argues the Court should adopt a compelling state interest/least restrictive means approach to determine the constitutionality of juvenile and mentally retarded offender’s death sentences.


After a discussion on the treatment of the mentally retarded, the author looks at the application of the Eighth Amendment to retarded offenders. Throughout the article, the author compares the mentally retarded to juveniles and the mentally ill. He argues executing the mentally retarded has no deterrent value because they have poor impulse control and underdeveloped concepts of causation and moral blameworthiness. He asserts social outrage cannot justify their execution because they cannot appreciate the causal connection between their actions and their death sentence. Thus, he concludes, retribution does not justify the execution of the mentally retarded. He argues the death penalty is excessive and out of proportion to the crime for mentally retarded offenders because of their lesser moral guilt. He proposes methods to reduce the numbers of mentally retarded offenders subject to capital punishment, one being that a finding of mental retardation creates a conclusive presumption of life during the sentencing phase.


This article is a review of Fifth Circuit death penalty cases decided between June 1, 1989 and May 31, 1990. The review discusses the Supreme Court’s death penalty jurisprudence, with special emphasis on the Court’s decision in Penry v. Lynaugh, 492 U.S. 392 (1989). The review then examines post-Penry claims before the Fifth Circuit and the Circuit’s attempts to decide how much and what kind of mitigating evidence is required for a valid Penry claim.


This comment looks at the Supreme Court’s approach to the death penalty in light of Penry v. Lynaugh, 492 U.S. 392 (1989); Stanford v. Kentucky, 492 U.S. 361 (1989); and South Carolina v. Gathers, 490 U.S.
805 (1989). The author gives a brief analysis of the three cases. In Penry, he concludes the Court should have employed a heightened scrutiny test to determine the applicability of the death penalty in light of the varying degrees of retardation. He further concludes that pursuant to common law and judicial economy, the appropriate minimum age for capital punishment should be fifteen. He finds deterrence is not served by executing juveniles and the mentally retarded because neither performs a cost-benefit analysis before acting. He finds retribution is served only if society has placed an increased value on vengeance and lowered the threshold for the acceptability of retribution.

Patricia Hagenah, Note, *Imposing the Death Sentence On Mentally Retarded Defendants: The Case of Penry v. Lynaugh*, 59 UMKC L. REv. 135 (1990). This note examines *Penry v. Lynaugh*, 492 U.S. 392 (1989), and concludes the Court erred in failing to protect mentally retarded offenders from the death penalty. The author argues the dissent's rejection of a proportionality review is improper because limiting the proportionality review to punishments condemned in 1789 leaves the interpretation of the Eighth Amendment static, and by focusing solely on legislation to determine the evolving standards of decency means political majorities define the Eighth Amendment. She asserts Justice O'Connor erred in advocating an approach where mental retardation is a mitigating factor. She argues the sentencer may not properly weigh mental retardation as a mitigating factor because it may offer greater weight as an aggravating factor.

**HERBERT H. HAINES, AGAINST CAPITAL PUNISHMENT (1996).** This book discusses the anti-death penalty movement in America from 1972 to 1994. The author examines the efforts to develop a multiorganizational network to attack the death penalty. He discusses the involvement and contributions of Amnesty International. Amnesty International pushed for incremental attacks on the death penalty and pursued studies revealing the lack of public support for executions of those under eighteen, those with a history of mental illness, and the mentally retarded. The book reports the success of legislation prohibiting the execution of the mentally retarded.

Robert L. Hayman, Jr., *Beyond Penry: The Remedial Use of the Mentally Retarded Label in Death Penalty Sentencing*, 59 UMKC L. REv. 17 (1990). The author argues a class-wide prohibition on the execution of mentally retarded offenders is necessary to ensure fair and equitable treatment in
the criminal justice system. He argues that in Penry v. Lynaugh, 492 U.S. 392 (1989), the Court ignores the nature and consequences of mental retardation. He looks at the damage that the label of mental retardation causes. He argues proportionality demands diminished culpability for mentally retarded offenders, and he finds that the traditional justifications of deterrence, incapacitation, and retribution fail when applied to the mentally retarded. He finds Penry's individualized mitigation to be inadequate because the mentally retarded are unable to utilize the full range of procedural protections offered by the legal system due to their diminished capabilities, and thus are punished disproportionately. He further asserts jurors stereotype and cannot properly give weight to mental retardation as a mitigating factor.


This is a case note that analyzes Penry v. Lynaugh, 492 U.S. 392 (1989). The author concludes that any expansion of the Eighth Amendment protection to any one class of persons is doubtful.


This article looks at post-Penry v. Lynaugh, 492 U.S. 392 (1989), legislation prohibiting the execution of the mentally retarded. The authors examine the Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, New Mexico, New York, Tennessee, Washington, and federal government statutes. They conclude that with these new statutes prohibiting the execution of mentally retarded offenders, the Supreme Court should reverse its decision in Penry v. Lynaugh, 492 U.S. 392 (1989).


The authors look at the nature and extent of the problem of the mentally retarded in capital cases. They define mental retardation and provide a guide for defense attorneys to use. They conclude that mental retardation is often not explored as a mitigating factor and that the culpability of a mentally retarded defendant is such that the death penalty should not be imposed.

This book contains excerpts of the Supreme Court cases on the death penalty. It also contains a brief overview of the history of the Eighth Amendment, capital laws and procedures, and the capital punishment debate. The appendix contains facts and figures on murder and the death penalty. Cases discussed that are relevant to this bibliography include Stanford v. Kentucky, 492 U.S. 361 (1989); Ford v. Wainwright, 477 U.S. 399 (1986); and Penry v. Lynaugh, 492 U.S. 392 (1989).

James S. Liebman and Michael J. Shepard, Guiding Capital Sentencing Discretion Beyond the “Boiler Plate”: Mental Disorder as a Mitigating Factor, 66 GEO. L.J. 757 (1978).

This article examines five Supreme Court decisions handed down on July 2, 1976: Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); and Roberts v. Louisiana, 431 U.S. 633 (1976). The authors distill from these cases a doctrinal framework of the Eighth Amendment. They assert a statute attempting to enumerate exclusive mitigatory factors is unconstitutional and that a defendant has a right to jury instructions on guided individualization. The authors apply their doctrinal framework to the treatment of mental illness as a mitigation and conclude a mentally disordered offender should receive mitigatory consideration. In order to determine the degree of mitigation, they propose a four-factor analysis. They apply this analysis to the mentally retarded and the sociopath and conclude there is a compelling case for reducing a death sentence for a mentally retarded offender.


This note looks at Stanford v. Kentucky, 492 U.S. 361 (1989), and Penry v. Lynaugh, 492 U.S. 392 (1989), and concludes the Supreme Court erred in its assessment of the deterrence and retributive values of sentencing juveniles and the mentally retarded to death. The author gives a background of Eighth Amendment jurisprudence, focusing on the evolution of the deterrence and retributive analysis. He criticizes Justices O'Connor and Scalia for abandoning the penological purpose test in Stanford v. Kentucky, 492 U.S. 361 (1989). He looks at Penry v. Lynaugh, 492 U.S. 392 (1989), and argues Justice O'Connor distorts the penological purpose test. The author then performs his own analysis and finds the characteristics of juveniles and the mentally retarded preclude
the required level of culpability necessary for the death penalty. He argues this lesser culpability does not fulfill the goal of retribution. He also argues that the poor impulse control, lack of strategic thinking, and difficulty seeing their mortality means it is unlikely the goal of deterrence is served by executing juveniles and the mentally retarded.

This Web site is by a nonprofit, nonpolitical organization dedicated to establishing a moratorium on the death penalty. This site contains reports on the execution of the mentally retarded.

This Web site is by a coalition of organizations and individuals who are committed to abolishing the death penalty. The site contains several fact sheets concerning various aspects of the death penalty. One such fact sheet discusses the execution of the mentally retarded. The fact sheet gives facts and figures on the mentally retarded on death row and the numbers of executions.

This article takes a look at Penry v. Lynaugh, 492 U.S. 392 (1989), and the dualism reflected in the majority opinion. The author asserts that although there was narrow consensus in the decision, there was no consensus in the Court's reasoning. He finds Justice Scalia's reasoning to be the weakest and Justice O'Connor's middle of the road opinion to be the best reasoned, although weak in that it does not discuss what is an incapacity to be executed. He believes Justice Brennan's dissent errs in not requiring an individualized assessment of mental status.

This book on the death penalty is divided into five parts. Part I gives an overview of capital punishment. Part II discusses the legal challenges to the death penalty pre-Gregg v. Georgia, 428 U.S. 153 (1976), and discusses legal challenges and reform of the death penalty after Gregg v. Georgia. This part addresses mitigation evidence such as youth or mental illness. This part also examines the execution of special groups such as the mentally ill, mentally retarded, and juveniles. The Supreme


The author discusses whether there is any doctrinal consistency in cases dealing with mentally disabled defendants. He discusses eight cases: *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Jones v. United States*, 463 U.S. 354 (1983); *Ake v. Oklahoma*, 470 U.S. 68 (1985); *Estelle v. Smith*, 451 U.S. 454 (1981); *Wainwright v. Greenfield*, 474 U.S. 284 (1986); *Smith v. Murray*, 477 U.S. 527 (1986); *Illinois v. Allen*, 478 U.S. 364 (1986); and *Ford v. Wainwright*, 477 U.S. 399 (1986). He examines how the Court has dealt with common elements involving the type of penalty and crime and type of psychiatric diagnosis. He looks at whether the justices' positions reflect any themes. He identifies extra-legal principles that might be guiding the Court. He also examines symbols in the cases. He concludes there are some doctrinal threads that concern the Court's fear of executing a truly insane prisoner and shocking the public's conscience. However, he finds no real doctrinal consistency at this time.


The author relates the story of Joe Arridy, a mentally retarded man executed January 6, 1939. Perske believes Arridy's confession was a false one and he details the justice system's prejudices and failings toward the mentally retarded. The book is a strong statement against executing the mentally retarded.


This chapter looks at the characteristics of the mentally retarded that lead to their victimization in the criminal justice system. The authors note the large number of mentally retarded offenders on death row. They look specifically at two cases.


After discussing the historical foundations and justifications for the death penalty and the Eighth Amendment, the author considers the similarities between insanity, youth, and mental retardation. She argues the mentally retarded should receive the same special treatment as juveniles and the mentally ill because they too possess a lesser criminal and moral culpability. Drawing heavily on the American Bar Association’s Mental Health Standards, she proposes guidelines for determining competency to stand trial and competency for execution for the mentally retarded.


This chapter discusses why mentally retarded offenders should never be sentenced to death. The author begins with a definition of mental retardation. She follows with an explanation of the characteristics of the mentally retarded. She finds these characteristics prevent the mentally retarded from being fully culpable for their criminal actions, and thus they should be ineligible for the death penalty. She argues the Court erred in its assessment of a national consensus in *Penry v. Lynaugh*, 492 U.S. 392 (1989). She finds society does not want the mentally retarded executed. She argues individualized sentencing is inadequate to protect the mentally retarded since evidence of mental retardation for mitigation purposes is also used for aggravating purposes. She rebuts arguments about multiple claims overwhelming the justice system and arguments concerning main streaming.
This article looks at the problems mentally retarded offenders possess that may lead to large numbers of them residing on death row. The article notes the mentally retarded often confess to crimes they did not commit and that they do not understand their civil rights. Another problem the article recognizes, is that the courts, psychologists, psychiatrists, and defense attorneys often do not recognize mental retardation. Experts quoted in the article assert mental retardation can interfere with the ability to make appropriate judgments, resist negative influences, and understanding the nature and consequences of an action. The author argues most state laws regarding competency address insanity and not mental retardation. Additionally, the article notes, the mentally retarded have poor communications skills, poor recall, and do not understand the implications of a guilty plea. Furthermore, raising the issue of mental retardation may result in its being used against the defendant. The article provides the case summaries of five mentally retarded offenders on death row.

This article looks at the national consensus condemning the execution of mentally retarded criminal defendants. The author points out society, courts, and the legislatures have recognized the difference, mistreatment, and discrimination associated with the mentally retarded. He argues that in *Penry v. Lynaugh*, 492 U.S. 392 (1989), there was ample objective evidence to show a national consensus against executing the mentally retarded. He asserts that because of *Penry*'s mental retardation and low level of culpability, killing him made no contribution to the penological goals of deterrence and retribution. The author concludes the execution of the mentally retarded violates the Eighth Amendment and that the Court has abandoned its role in our constitutional system.

This note looks at *Penry v. Lynaugh*, 492 U.S. 392 (1989), and concludes that allowing consideration of mental retardation as a mitigating factor may not adequately protect mentally retarded offenders. The author argues the *Penry* decision was foreseeable from past decisions and that regardless of the type of mitigating evidence, capital sentencing juries must be given a method of considering all legitimate mitigating evidence.
In examining the issue of a blanket prohibition on executing the mentally retarded, the author argues it is difficult to show a national consensus against executing the mentally retarded. She finds Justice O'Connor's belief in the proportionality doctrine significant, but notes O'Connor has never found the punishment excessive under that doctrine. The author argues the rise of prejudice and fear among jury members may mean juries are incapable of giving mental retardation its proper mitigating effect.


After looking at the historical treatment of mental deficiencies, the characteristics of persons with mental retardation, and I.Q. tests, the author concludes a person's I.Q. should not be proof of mental retardation. He argues mental retardation does not mean an individual is less culpable. He suggests the following guidelines when dealing with a mentally retarded defendant: the defendant must be found mentally culpable at the time of the offense, the defendant must be competent to stand trial, the trier-of-fact must find beyond a reasonable doubt every element of the crime, the sentencer must find beyond a reasonable doubt one statutorily defined aggravating circumstance, and the defendant must understand the impending execution.


This case comment discusses Penry v. Lynaugh, 492 U.S. 392 (1989). After discussing the facts and opinions of the case, the author argues the Court erred in applying the framers' intent doctrine. He asserts that a close reading of the historical record from the sixteenth through the eighteenth century would find Penry would likely have been considered an "idiot" and thus incapable of being executed. He criticizes the Court's reliance on nineteenth and twentieth century classifications of "idiocy." He further argues that the penological goals of retribution and deterrence are not served by executing the mentally retarded.

In this article the authors argue juveniles and the mentally retarded should be exempted from the death penalty. They discuss Eighth Amendment jurisprudence and the weaknesses of the proportionality analysis. They argue the American Bar Association and others seeking to ban executions of juveniles and the mentally retarded should focus their arguments on the following doctrinal requirements: narrowing the class eligible, channeling the discretion of capital sentencers, ensuring the consideration of mitigating factors, and securing heightened reliability.


This chapter looks at three frequently excluded classes from capital punishment: women, children, and the mentally retarded. The author examines the social policies and realities behind the reluctance to execute people in these groups. As part of his analysis, the author gives statistics on members of each group on death row or executed. He also gives historical backgrounds. The policies he looks at are culpability; legislative enactments; jury sentences; public opinion polls; and the penological goals of incapacitation, deterrence, and retribution. He concludes that the reasons for screening out juveniles and the mentally retarded are more justifiable than those for women.


This article looks at Eighth Amendment jurisprudence and the Texas response. The author focuses primarily on Penry v. Lynaugh, 492 U.S. 392 (1989). In addressing Penry claims, the author notes the Texas court has only given relief for factual circumstances presenting mitigating evidence of mental retardation and childhood abuse. The author reviews the new Texas death penalty scheme and concludes it passes constitutional muster by allowing individualized consideration of the defendant's character, background, and circumstance of the offense, and specifically by addressing Penry concerns.


This report provides the findings of a sample of over 900 Georgia residents. Forty-one questions were asked concerning: the crime rate and
judicial system; imprisonment and the death penalty; judicial process, imprisonment, and the death penalty for juvenile offenders; fairness of the death penalty; and alternatives to the death penalty. The survey found 66% of Georgia residents believe the mentally retarded should not receive the death penalty.

University of Alaska Anchorage Justice Center, Focus On the Death Penalty, at http://www.uaa.alaska.edu/just/death/issues.html (last visited Oct. 1, 2000). This Web site attempts to provide links to resources from both sides of the death penalty debate. This particular area of the site addresses specific issues. In addition to information on deterrence; retribution and justice for murder victims; the innocent; limiting appeals and habeas corpus reform; costs of the death penalty; alternative sentencing; fairness; moratorium; cruel and unusual punishment; and women, the site provides links to statistical information and cases concerning juveniles, the mentally retarded, and the mentally ill.


The author examines Penry v. Lynaugh, 492 U.S. 392 (1989), and concludes the Supreme Court did not properly understand the nature and effects of mental retardation. The note first looks at the definition of mental retardation and then at the Penry Court’s treatment of mitigation. The author next examines the Eighth Amendment analysis in the decision. He argues the Court incorrectly confused mental illness with mental retardation and erroneously concluded the insanity defense statutes would protect the mentally retarded. He discusses why diminished capacity as it currently stands does not protect the mentally retarded defendant and proposes a diminished intent statute that will protect the mentally retarded from execution.

William K. Wetzonis, Capital Punishment for Mentally Retarded Defendants: A Boundary For the Eighth Amendment Is Drawn, 34 HOW. L.J. 651 (1991). This article begins with an analysis of Penry v. Lynaugh, 492 U.S. 392 (1989), and concludes the death penalty should not be applied to mentally retarded defendants. The author points to the problems identifying the mentally retarded offender and the mentally retarded defendant’s lack of mens rea. He compares treatment of the mentally retarded to juveniles and the mentally ill and finds the Supreme Court’s conflicting views to be misdirected. Finally, he argues the penological
goals of deterrence and retribution are not served by executing the mentally retarded.


After discussing mental retardation and death penalty jurisprudence, the author examines Penry v. Lynaugh, 492 U.S. 392 (1989). She concludes the Court correctly held the Eighth Amendment does not prohibit execution of the mentally retarded. She argues legislation and court decisions show a trend toward treating the mentally retarded as ordinary adults. She believes a blanket prohibition would violate the penological justification of retribution. She finds that since the mentally retarded may possess cognitive disabilities, they may be less culpable, and thus should have their condition considered as a mitigating factor.