

The amendment was accepted by the proponents and without further discussion and by voice vote, the House approved the following amended recommendation:

*BE IT RESOLVED*, That the American Bar Association urges that no person with mental retardation, as now defined by the American Association on Mental Retardation, should be sentenced to death or executed; and

*BE IT FURTHER RESOLVED*, That the American Bar Association supports enactment of legislation barring the execution of defendants with mental retardation.

National Conference of Special Court Judges.<sup>31</sup> **Judge Frederic A. Grimm, Jr.** of Michigan, Conference Delegate, moved a revised recommendation concerning judicial leave standards. Judge Grimm said the purpose behind the proposal was to recommend to the various states that they develop standards for judicial leave and in developing those standards, consideration be given to the recommended criteria contained in the recommendation.

By voice vote, the House approved the following recommendation:

*BE IT RESOLVED*, That the American Bar Association urges each State to adopt standards for judicial leave.

*BE IT FURTHER RESOLVED*, That the American Bar Association urges that national minimum standards for evaluating judicial leave policies be in accordance with the "Recommended Criteria for Evaluating Judicial Leave Policies," draft dated December 1, 1988, as revised.

Standing Committee on Judicial Selection, Tenure and Compensation.<sup>32</sup> **Judge Stanley S. Brotman** of New Jersey, Committee Chairman, moved the Committee's recommendation concerning compensation for administrative law judges. Judge Brotman said the recommendation would alleviate the disparity between compensation payable to Senior Executive Service (SES) members and that paid to individuals excluded from the SES.

By voice vote, the House approved the following recommendation:

*BE IT RESOLVED*, That the American Bar Association supports and encourages enactment of special pay legislation designed to provide compensation levels for the federal administrative judiciary that establishes and maintains parity which previously existed with other federal senior executive personnel.

<sup>31</sup> A full report of the Conference can be found at page 554.

REPORT NO. 3 OF THE  
CRIMINAL JUSTICE SECTION  
PRESENTED JOINTLY WITH THE  
SECTION OF INDIVIDUAL RIGHTS AND  
RESPONSIBILITIES

**RECOMMENDATION\***

~~*BE IT RESOLVED*, That the American Bar Association urges that no person with mental retardation, as defined by the American Association on Mental Retardation, should be sentenced to death or executed; and~~

~~*BE IT FURTHER RESOLVED*, That the American Bar Association supports enactment of legislation barring the execution of defendants with mental retardation.~~

**REPORT**

Executing a person with mental retardation violates contemporary standards of decency. It is a practice opposed by professional associations in the field of mental disability and by a majority of supporters of the death penalty. It is disproportionate to the individual's level of personal culpability and serves no valid penological purpose. Regardless of the outcome of constitutional litigation on this issue, it is a practice which the American Bar Association should disapprove.

The ABA's Recommendation would bar the execution of any defendant who is mentally retarded.

It parallels the position that ABA has taken for years in opposition to the execution of individuals for actions committed while they were minors.

The universally accepted definition of mental retardation is that established by the American Association on Mental Retardation (AAMR):

Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.<sup>1</sup>

\*The recommendation was amended and approved. See page 47.

<sup>1</sup>American Association on Mental Retardation [previously "Deficiency"], *Classification in Mental Retardation* 1 (H. Grossman ed. 1983).

"Significantly subaverage general intellectual functioning" is defined as an IQ of 70 or below.<sup>2</sup> This means that to fall within the professionally accepted definition of mental retardation, an individual's intelligence quotient must be 70 or below, the mental disability must exist concurrently with behavioral difficulties, and this disability must have occurred before the age of 18.

(Persons with IQ scores between 70 and 85, who are sometimes described by laypeople as "borderline retarded," are not within the definition of mental retardation. Such individuals have a substantial mental disability that should be considered as a mitigating circumstance in capital cases, but they are not mentally retarded within the AAMR definition, and are not within the scope of the proposed ABA recommendation.)

The burden of persuasion on whether a defendant is mentally retarded should be on the defendant.

In an earlier era in our history, people with mental retardation were thought to be unusually prone to criminal acts and were believed to be responsible for the majority of crimes in our society.<sup>3</sup> These attitudes have long since been proven false.<sup>4</sup> The era of eugenic steriliza-

tion and eugenic segregation are long since past. People with mental retardation are not abnormally prone to criminality or violence.

When people with mental retardation do commit crimes, they should generally be held responsible for their conduct. But, as the Supreme Court has repeatedly observed, "death is different." The specter of a person with mental retardation on Death Row is deeply disturbing to most Americans.

As in the case of capital punishment and minors, there is widespread public sentiment for banning the execution of any person with mental retardation. Scientific polling data indicate that a majority of Americans, even in states that strongly support capital punishment, oppose its imposition on defendants with mental retardation.<sup>5</sup>

The current system of mitigation, (*see ABA Standards for Criminal Justice* 7-9.3), and competence for capital punishment, (*see ABA Standards for Criminal Justice* 7-5.6), are not adequate to assure that people with mental retardation will not be executed. Approximately five of the 101 individuals executed since *Gregg v. Georgia* have been mentally retarded. The only case to achieve substantial local publicity about the defendant's mental disability was the execution of Jerome Bowden in Georgia in 1986. It is significant that the Georgia legis-

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<sup>2</sup>*Id.*

<sup>3</sup>Five Justices of the U.S. Supreme Court have referred to the history of mistreatment of people with mental retardation in this country as "grotesque." *City of Cleburne v. Cleburne Living Center*, 105 S.Ct. 3249, 3262 (1985) (Stevens, J., concurring), 105 S.Ct. at 3266 (Marshall, J., concurring in part and dissenting in part).

<sup>4</sup>Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 *George Washington Law Review* 414, 416-21 (1985); Biklen & Mlinarcik, *Criminal Justice, Mental Retardation and Criminality: A Causal Link?*, 10 *Mental Retardation and Developmental Disabilities* 172 (1978).

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<sup>5</sup>*See, e.g.,* Gamino, "73% in Texas Poll Oppose Executing Retarded Inmates," *Austin American-Statesman*, November 15, 1988; Cambridge Survey Research, Inc., *Attitudes in the State of Florida on the Death Penalty: A Public Opinion Survey* 7, 61 (1986); Blume & Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 *Arkansas Law Review* 725, 759-60 (1988).

lature, at its next session, passed a new statute effectively outlawing the execution of people with mental retardation.<sup>6</sup>

Congress has passed a similar measure in the capital punishment provision of the Anti-Drug Abuse Act of 1988 (Pub. L. 100-690). On September 8, 1988, the House of Representatives considered an amendment by Representative Sander Levin of Michigan, which provided "A sentence of death shall not be carried out upon a person who is mentally retarded." The amendment was supported in floor speeches by Representatives George Gekas of Pennsylvania, Judd Gregg of New Hampshire, Arthur Ravenel of South Carolina, and Steve Bartlett of Texas. This represents the widest possible spectrum of political opinion in the House, from liberal Democrats to conservative Republicans. The amendment passed by a unanimous voice vote.<sup>7</sup> On October 14, an identically worded amendment passed unanimously in the Senate. President Reagan signed the legislation containing the amendment.

Professionals and others with direct interest in people with mental retardation have reached the same conclusion. The American Association on Mental Retardation, the oldest and largest professional organization in the field, opposes the death penalty for persons with mental retardation. AAMR's *amicus*

brief in *Penry v. Lynaugh* (No. 87-6177) has been joined by ten other mental disability groups, including the American Psychological Association, the Association for Retarded Citizens of the United States, the Association for Persons with Severe Handicaps, the American Orthopsychiatric Association, the National Association of Private Residential Resources, and the National Association of Superintendents of Public Residential Facilities for the Mentally Retarded.

There are several persuasive reasons for a ban on executing people with mental retardation. One derives from the Supreme Court's Eighth Amendment doctrine of proportionality. States may execute only those persons whose culpability and moral blameworthiness are proportional to the punishment.<sup>8</sup> The disabilities encountered by all persons who are mentally retarded prevent them from achieving that level of culpability. However moral blameworthiness is measured or estimated, people with mental retardation are never in the top one or two percent of defendants convicted of murder in the level of their personal culpability. This argument is made more fully in AAMR's *amicus* brief in *Penry v. Lynaugh*.

The strength of the proportionality argument is indicated by the fact that *no adult with mental retardation has a mental age higher than 12.*<sup>9</sup>

<sup>6</sup>Ga. Code Ann. § 17-7-131 (j) (1988 Supp.). "Georgia To Bar Executions of Mentally Retarded Killers," *New York Times*, April 12, 1988, at A26, Col. 4.

<sup>7</sup>Congressional Record, September 8, 1988, at H 7282 through H 7283 (daily ed.). See generally Congressional Record, August 11, 1988, at S 11606 through S 11607 (daily ed.) (Statement of Senator Paul Simon).

<sup>8</sup>*Tison v. Arizona*, 107 S. Ct. 1676, 1687 (1987); *Booth v. Maryland*, 107 S.Ct. 2529 (1987); *California v. Brown*, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring); *Enmund v. Florida*, 458 U.S. 782 (1982).

<sup>9</sup>AAMR, *Classification in Mental Retardation* 33 (H. Grossman ed. 1983). Cf. *Thompson v. Oklahoma*, 108 S.Ct. 2687 (1988) (barring the execution of a defendant for an act committed before the chronological age of 16).

In addition, the Court has held that "[t]here must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death."<sup>10</sup> The Court has identified two only such objectives—retribution and deterrence. The Justices have held that retribution must be related to the individual's level of personal responsibility,<sup>11</sup> and thus the analysis parallels the proportionality doctrine. And the likelihood that a mentally retarded individual will be deterred from a criminal act because he knows that persons with his disability may be executed, or the possibility that a mentally typical person will be deterred by the spectacle of the execution of a mentally retarded defendant are hardly sufficiently plausible to justify the punishment.

The U.S. Supreme Court has granted certiorari in the case of *Penry v. Lynaugh* on the issue of whether the Eighth Amendment's ban on cruel and unusual punishment prohibits the execution of a defendant with mental retardation. The *Penry* case also involves the issue of appropriate jury instructions on the issue of mitigation, and there is some likelihood, as a result, that the Court will not reach the Eighth Amendment issue in this case.

Whatever the ultimate resolution of the Eighth Amendment issue, it

is important for the American Bar Association to take a policy position in support of a ban on executing mentally retarded defendants. States with capital punishment will soon face the question of executing mentally retarded individuals. Their legislatures will have before them the resolutions of the other relevant professional organizations, as well as the recent enactments by Congress and the Georgia legislature. The position of the ABA on whether such an execution is consistent with contemporary standards of justice would be most important to their deliberations.

As it did in the case of juveniles, the American Bar Association should make clear that a modern and enlightened system of justice cannot tolerate the execution of an individual with mental retardation.

Respectfully submitted,

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*Chairperson*  
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February, 1989

<sup>10</sup>*Spaziano v. Florida*, 468 U.S. 447, 460 n.7 (1984).

<sup>11</sup>*Enmund v. Florida*, 458 U.S. 782, 800 (1982).