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NOT GUILTY AS CHARGED: THE MYTH OF MENS REA FOR DEFENDANTS WITH MENTAL RETARDATION

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NOT GUILTY AS CHARGED: THE MYTH OF MENS REA FOR DEFENDANTS WITH MENTAL RETARDATION

Elizabeth Nevins-Saunders

The notion that mens rea is an indicia of culpability runs deep in the American criminal law psyche. For most defendants, a finding that they had the requisite legal intent may be all we need to know to pronounce them morally culpable. This is because most defendants – those of average intelligence – enjoy a level of socialization, rationality, and agency sufficient to be aware of social norms, make a choice to violate them or not, and to control their own impulses in doing so. But for defendants with mental retardation, the state-of-mind element fails to accurately signify a "guilty mind." Social science research makes clear (and existing neuroscience research seems to support) that these presumptions of consciousness, choice, and control do not apply to people with mental retardation. In essence, then, for this population, all offenses become strict liability offenses, where an intent inquiry is all but meaningless.

While the criminal law does make some allowances for differences in cognitive capacity, it does so only in very limited circumstances, through the doctrines of competency, insanity, and diminished capacity. As a result, litigants must resort to crude perversions of justice to introduce evidence of mental retardation. Finding no valid policy or theoretical justification (apart from incapacitation) for this failure to adequately address the disjuncture between actual culpability and criminal liability, this article offers a new approach to cases charging defendants with mental retardation. Specifically, it proposes a new default rule, where non-violent cases against them would be presumptively dismissed. More serious cases charging violent crimes could proceed to trial with the standard mens rea requirements, but would require that any sentence imposed be the least restrictive alternative necessary to accomplish an articulable sentencing goal. This proposal redresses a major flaw in current criminal law doctrine, one which unjustly permits a finding of guilty minds among defendants whose true culpability may not be presumed.

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NOT GUILTY AS CHARGED: THE MYTH OF MENS REA FOR DEFENDANTS WITH MENTAL RETARDATION

Elizabeth Nevins-Saunders[*]

INTRODUCTION

It is no longer news that there is a significant and troubling overlap in the population of criminal defendants and those with mental health issues.[1] The recent proliferation of mental health courts, judicial panels, and ongoing media coverage speaks to fact that, after decades of ignoring the issue, the criminal justice system – if not the criminal law – is finally beginning to address the particular concerns that this population poses to law enforcement, courts, and corrections.[2] But people with mental retardation[3] have largely been overlooked in this wave of attention.[4]

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[*] Acting Assistant Professor of Lawyering, New York University School of Law. I am very grateful for insightful comments from Doug Husak, Austin Sarat, Rachel Barkow, David Garland, Jim Jacobs, Randy Hertz, Robert Dinerstein, Tony Thompson, Erin Murphy, Adam Zimmerman, and the participants in the NYU Lawyering Scholarship Colloquium. Thanks are also due to NYU's Center for Research in Crime and Justice, which supported me during much of this project. As always, Andrew T. Meyer provided truly phenomenal research assistance.

[1] Approximately five percent of the US population has a serious mental illness. R. C. Kessler et al., *The 12-Month Prevalence and Correlates of Serious Mental Illness (SMI), in* MENTAL HEALTH, UNITED STATES, 1996 (R. W. Manderscheid, ed. 1996). Among jail and prison populations, however, the figure is sixteen percent. Paula M. Ditton, U.S. Dep't of Justice, Bureau of Justice Statistics, Special Report: Mental Health and Treatment of Inmates and Probationers 3 (1999), *available at* http://bjs.ojp.usdoj.gov/pub/pdf/mhtip.pdf..

[2] A decade ago, only a handful of mental health courts were in operation in the United States; by 2007, there were more than 175. COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT, MENTAL HEALTH COURTS: A PRIMER FOR POLICYMAKERS AND PRACTITIONERS (2008).

[3] While the definition of mental retardation is the subject of much debate, it is typically considered an intellectual disability that (1) originates before age 18, (2) is characterized by significant limitations in intellectual functioning, and 3) is accompanied by significant adaptive functioning limitations in a range of every day social and practical skills. *See* AM. PSYCHIATRIC ASS'N, STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed., rev. vol. 2000) [hereinafter DSM-IV-TR]; AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 37 (10th ed. 2002) [hereinafter 2002 AAMR Manual].

[4] For instance, in a survey of 150 mental health courts, only two indicated that they would even accept defendants with mental retardation. *See* Consensus Project Local Programs Database spreadsheet (on file with author). (Raw data available at http://consensusproject.org/programs?issue=Courts). More generally, a significant shortage of programs targeting this population persists despite the concerns of advocates.

Nonetheless, our prisons and jails are full of people with mental retardation.[5] Definitions of mental retardation vary and are controversial, although experts generally agree that it is a lifelong condition[6] that is manifest before age 18, and is characerized by significant limitations in intellectual[7] and adaptive functioning.[8] While there is some dispute as to the precise rate at which this population is involved in the criminal justice system,[9] there is no question that this group is heavily represented or even overrepresented.[10] And a defendant with mental retardation tends to be

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See James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 479-80 (1985); Jessica Jones, *Persons with Intellectual Disabilities in the Criminal Justice System: Review of Issues*, 51 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 723, 729 (2007).

[5] Most progressive advocates use the term "intellectual disabilities" instead of "mental retardation" because of the stigma, datedness, and general disfavor with which the term is viewed. *See* Robert L. Schalock et al., *Perspectives: The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 INTELL. & DEVELOPMENTAL DISABILITIES 116 (2007). *Id.* Because the criminal law typically uses "mental retardation," however, this is the nomenclature I generally employ in this article.

[6] Cynthia J. Curry et. al., *Evaluation of Mental Retardation: Recommendations of a Consensus Conference*, 72 AM. J. OF MED. GENETICS, 468, 468 (1997).

[7] Although the assessment of IQ is one of the most controversial aspects of the definition of mental retardation, *see* 2002 AAMR Manual, *supra* note 3, at 25-27, its use persists, particularly as a necessary, but not sufficient, way to differentiate among levels of retardation. According to the DSM-IV-TR, Mild Mental Retardation reflects an IQ level of 50-55 to approximately 70; Moderate Mental Retardation reflects an IQ level of 35-40 to 50-55; Severe Mental Retardation reflects an IQ level of 20-25 to 35-40, and Profound Retardation reflects an IQ level below 20-25. DSM-IV-TR, *supra* note 3, at 41-42

[8] Adaptive functioning "refers to how effectively indviduals cope with common life demands and how well they meet standards of personal independence" relative to their peers. *See* DSM-IV-TR, *supra* note 3 at 42.

[9] There is no consensus as to the number of individuals in the criminal justice system who have some degree of mental retardation. One estimate suggests that least two percent and as many as forty percent of offenders may have intellectual disabilities. Jones, *supra* note 4, at 724. There is not even consensus as to the proportion of people with intellectual disabilities among incarcerated populations, although a 1996 survey of state and federal prison administrators reported that approximately 4.2 percent of inmates were mentally retarded and an additional 10.7 percent had learning disabilities. Lewis Veneziano & Carol Veneziano, *Disabled Inmates*, *in* ENCYCLOPEDIA OF AMERICAN PRISONS 255, 257 tbl.2 (Marilyn D. McShane & Frank P. Williams III eds., 1996). *See also* Robert Dinerstein, *The Criminal Justice System and Mental Retardation: Defendants and Victims*, 97 AM. J. ON MENTAL RETARDATION 715, 716 (1993) (book review) ("[T]here are virtually no reliable data on the number of inmates with mental retardation in local jails, where arrestees and those convicted of misdemeanors would normally be housed, let alone data on all arrestees . . . .").

[10] Dorothy M. Griffiths, Peggy Taillon-Wasmund & Debra Smith, *Offenders Who Have a Developmental Disability*, *in* DUAL DIAGNOSIS: AN INTRODUCTION TO THE MENTAL HEALTH NEEDS OF PERSONS WITH DEVELOPMENTAL DISABILITIES 387, 390 (Dorothy M. Griffiths, Chrissoula Stavraski & Jane Summers eds. 2002) (citing William I. Gardner,

subject to harsher treatment than one without such a condition at virtually every step of the criminal process: he or she is more likely to be arrested, more likely to be held pending trial, more likely to be convicted, more likely to receive longer sentences, and more likely to be abused during incarceration.[11] This, despite the fact that social science and neuroscience research[12] has demonstrated – and the Supreme Court has acknowledged – that defendants with mental retardation are categorically less culpable than their peers of average intelligence.[13] Far from a life preserver, keeping this less blameworthy population above the swells of the criminal law, mental retardation seems to be more of an anchor.

This article challenges the disjuncture between actual culpability and criminal liability for defendants with mental retardation. Rejecting the premise that mens rea is a fair indicator of culpability for defendants with mental retardation, I propose a new approach, which flips the assumption of blameworthiness for this population.[14] In my proposal, non-violent offenses would be presumptively dismissed, and violent offenses would be limited to the least restrictive sentencing alternative that could satisfy specific goals of punishment.

Defendants with mental retardation become enmeshed in the criminal justice system in part because there are so few ways that the law lets them out, notwithstanding their disability. The primary way the criminal law acknowledges mental retardation or other differences in cognition is through the competency and insanity doctrines. Because these

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Janice L. Graeber & Susan J. Machkovitz, *Treatment of Offenders with Mental Retardation*, *in* TREATMENT OF OFFENDERS WITH MENTAL DISORDERS 329 (Robert M. Wettstein ed. 1998) ("[P]eople with developmental disabilities are overrepresented in the criminal justice system, despite the fact that their crimes are of much less severity.")).

[11] Salvador C. Uy, *From the Ashes of* Penry v. Lynaugh*: The Diminished Intent Approach to the Trial and Sentencing of the Mentally Retarded Offender*, 21 COLUM. HUM. RTS. L. REV. 565, 570 (1990); C. L. Reichard et al., *The Law School Curriculum: Does It Address the Needs of the Mentally Retarded Offender?*, *in* THE RETARDED OFFENDER 226, 227 (M. B. Santamour & P. S. Watson eds. 1982); Kenneth L. Appelbaum & Paul S. Appelbaum, *Criminal-Justice-Related Competencies in Defendants with Mental Retardation*, 22 J. PSYCHIATRY & L. 483, 486 (1994).

[12] While the psychological and other social science research on people with mental retardation is extensive, the neuroscience research is significantly more limited and much less conclusive. *See* Part II, *infra*.

[13] Atkins v. Virginia, 536 U.S. 304, 316 (2002). *See also* Uy, *supra* note 11.

[14] By "mens rea" (also called scienter, state-of-mind, mental state, or criminal intent), I mean what Dressler calls "narrow" or "elemental" mens rea: the state of mind description that is included as an element in the definition of a criminal offense. What I refer to interchangeably as "culpability" or "blameworthiness" is akin to Dressler's "broad" mens rea, a concept of moral responsibility or blameworthiness. *See* JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 148 (West, 4th ed. 1999) (2007).

are exit ramps from the criminal system (albeit onramps to the public mental health system), these routes are deliberately narrow, allowing only the most extreme cases through. The only categorical rule addressing defendants with mental retardation is that, since the *Atkins* decision in 2002, they cannot be executed.[15] More typically, the issue of a person's mental retardation is acknowledged, if at all, in isolated pockets of substantive or procedural doctrine.[16]

With few formal doctrinal tools available, players within the system – prosecutors, defense counsel, and judges – have two choices. They can resort to an array of stopgap measures designed to prevent injustices from occurring. Among these is the use of discretion, primarily in sentencing.[17] Alternatively, they can turn a collective blind eye to the issue, pretending there is no difference between an average twenty year-old defendant and one who functions more like an eight year-old.[18]

Both routes can pervert just outcomes. The failure to meaningfully and systematically address differences in cognitive capacity (apart from competence or sanity) therefore has repercussions not only for people within the population, but also for the integrity of the system itself. We cannot rely on the discretion of gatekeepers to determine which cases against defendants with mental retardation merit prosecution. It is inappropriate to mitigate sentencing as a remedy for missing doctrinal tools to address mental retardation. Novel defense strategies that encourage juror nullification should not be the only vehicle through which fact-finders can hear evidence of a defendant's mental retardation.

While much has been written in other disciplines on the challenges that defendants with mental illnesses encounter in and pose to the criminal

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[15] See Part III.B, *infra*.

[16] For example, mental retardation may be a factor in assessing a waiver of rights, Colorado v. Connelly, 479 U.S. 157, 165 (1986) or the voluntariness of consent, Schneckloth v. Bustamonte, 412 U.S. 218, 226–27 (1973). It may also be part of a so-called diminished capacity "defense," a legal doctrine most notable for its very limited applicability. *See* Part III.A.3, *infra*.

[17] *See, e.g.*, Sandra Anderson Garcia & Holly Villareal Steele, *Mentally Retarded Offenders in the Criminal Justice and Mental Retardation Services Systems in Florida: Philosophical, Placement, and Treatment Issues*, 41 ARK. L. REV. 809, 832-33 (1988) (citing studies supporting claim that courts use discretion to consider mental retardation at sentencing "even when a mental defense to a charge is not available"). See also Ballou v. Booker, 777 F.2d 910, 917 (4th Cir. 1985) (Sprouse, J., dissenting).

[18] *See* Reichard et al., *supra* note 11, at 226, 227 ("'[A]ttorneys continue to defend and prosecute retarded persons and judges continue to sentence them with little or no recognition of the role of retardation in a defendant's case.'") (quoting R. C. Allen, *Toward an Exceptional Offenders' Court*, 4 MENTAL RETARDATION 1, 3-7 (1966)). *See also* Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. CRIM. L. & CRIMINOLOGY 419, 429 (1990).

justice system, few legal scholars have addressed concerns specific to defendants with mental retardation outside the death penalty context. Those that have tend to approach these concerns much like the criminal law itself does, by addressing one aspect of the issue: waiver of rights, competency, sentencing, and so on. Virtually none, however, offers a comprehensive proposal specific to this population, much less one which addresses the issue of culpability at the outset of a case. Because the problems relating to defendants with mental retardation are so systemic and because a piecemeal solution – even one which has more "pieces" than our current approach – is ultimately insufficient, we need a broad response which applies to virtually all criminal cases.

This article proceeds in five parts. Part I analyzes the meaning and locus of culpability in criminal law. Scholars and courts typically agree that, in our system of justice, people should only be punished or held accountable to the extent that they are blameworthy. Mens rea is the initial signifier of moral blameworthiness, and it is critical to the difference between addressing wrongs through criminal law and addressing them through civil law.[19] But what do we mean when we describe a person as culpable? At a minimum, culpability requires a level of socialization, rationality, and agency sufficient to be aware of social norms, to make a choice to violate them, and to control one's actions in so doing. To say that a person has criminal intent, then, implies that he has these capacities.

Part II makes clear that mens rea fails to capture the moral culpability of most people with mental retardation. In particular, the psychosocial and existing neuroscience literature reveals that people with mental retardation do not typically demonstrate the consciousness, choice, and control that underlie notions of blameworthiness and make a finding of mens rea meaningful for most people without mental retardation. In essence, then, for many people with mental retardation, all offenses become strict liability offenses; the exception swallows the rule. A real investigation into the state of mind and conduct of these defendants would be forced to reckon with features common to this population, such as social isolation, low intellectual sophistication, high vulnerability to manipulation, and significantly impaired impulse control.

In Part III I consider, and reject as insufficient, ways in which substantive criminal law doctrine currently seeks to account for the diminished culpability of defendants with mental retardation, including the very restricted doctrines of competency, insanity, and diminished capacity. The law's inattentiveness to adults' mental retardation in determining guilt

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[19] Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1527 (1992).

or innocence not only skews outcomes for particular individuals with mental retardation, but also distorts and undermines the integrity of the criminal law itself. Thus, in order to introduce what is clearly information relevant to the offense, if not the law, counsel may put on an improper insanity, duress, entrapment or other defense aimed at juror nullification. Alternatively, the parties may rely on sentencing to ameliorate the harms of prosecution, even as many of those harms – including collateral consequences – may be irreparable.

There are a number of potential justifications for limiting our response to this culpability gap and forgoing a more meaningful intent analysis, such as administrative efficiency and public safety. I find these concerns insufficient to outweigh the problem of implying – and punishing – moral responsibility where none exists, particularly for nonviolent offenses.

Accordingly, in Part V, I propose a bifurcated approach to the prosecution of these defendants with mental retardation. Where an offense is non-violent, a presumption of dismissal would apply. For more serious cases, a normal prosecution could proceed, but any sentence would be limited to the least restrictive alternative. This proposal addresses the problem at its core, at the outset of the criminal process, while still accommodating legitimate safety concerns.

It is worth noting at the outset what this article will *not* address. That is, while people with other cognitive disorders, mental illnesses, or substance abuse issues may face many of the same issues as defendants with mental retardation, they are not the subject of this article. These are not groups that the criminal law has recognized in the same way that it has already recognized defendants with mental retardation. Moreover, the diagnoses, symptoms, treatments,[20] and possibly even blameworthiness[21] of these other classes of defendants are too varied to presume that they could be addressed under the same theoretical framework.

Ultimately, I leave to others the task of finding commonalities – or even differences – which might suggest others also lack the culpability that the criminal law may attribute to them. A wider movement toward a more

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[20] For instance, while many individuals with mental illnesses can take anti-psychotic or other medication to minimize or fully address their symptoms, there is no medication that people with mental retardation can take to ameliorate their disability. *See also* Part IV.E, *infra* for more on the distinction between defendants with mental retardation and others groups.

[21] Some might argue that a culpable choice – to reject available pharmacological treatment for people with mental illnesses or to imbibe drugs or alcohol for people with substance addictions – renders any resulting criminal conduct among these cohorts blameworthy, even if such individuals otherwise may not have fully intended their actions.

meaningful intent inquiry could bring us closer to legitimating the claim that criminal law only punishes those with a guilty mind.

I. MENS REA AND THE ELEMENTS OF CULPABILITY

The criminal law is inextricably bound up in issues of culpability or blameworthiness. It is virtually beyond dispute that innocent conduct should be beyond the reach of the law, leaving only culpable action subject to punishment.[22] As set forth below, both historically and currently, the criminal law initially situates that culpability in the element of mens rea.[23] This section then breaks down the assumptions embedded in a finding of mens rea to help explain why such a linkage is possible. In particular, asserting that a person has the requisite intent to commit an offense suggests that he or she has at least three discrete capacities:

A. Consciousness: subjective awareness and rational understanding of social norms and potential risks (to others' interests);

B. Choice: ability to rationally consider those norms and determine whether to abide by or violate them, as well as to fully be aware of one's actions; and

C. Control: the power to deliberately violate social norms and exercise independent judgment.

Although it may not have been a distinction implemented into law until the tenth century,[24] mens rea has long marked the dividing line between accidental and intentional harms;[25] between the law's selective power to punish and state-inflicted vengeance for conduct with harmful

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[22] *See, e.g.*, R. George Wright, *The Progressive Logic of Criminal Responsibility and the Circumstances of the Most Deprived*, 43 CATH. U. L. REV. 459 (1994).

[23] *See* Stephen F. Smith, *Proportional* Mens Rea, 46 AM. CRIM. L. REV. 127, 127 (2009) (arguing that mens rea is meant to demonstrate at least a "modicum of moral blameworthiness as a precondition to punishment").

[24] Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L. J. 815, 830 (1980)

[25] As Holmes explained with regard to early legal claims being limited to harms intentionally inflicted, "even a dog distinguishes between being stumbled over and being kicked." OLIVER WENDELL HOLMES, THE COMMON LAW 3 (Dover Publications 1991) (1881).

consequences;[26] and between criminal law and a civil system seeking to protect individuals without regard to morality.[27] Eventually, mens rea became such a defining feature of criminal law that every first-year law student learns that a "guilty act" (*actus reus*) is usually only criminal if it is accompanied by a "guilty mind" (mens rea).[28]

The connection between mens rea and culpability persists. Stuart Green's definition of culpability as "the moral value attributed to a defendant's state of mind during the commission of a crime" or something which "reflects the degree to which an individual offender is blameworthy or responsible or can be held accountable" demonstrates the near perfect overlap between these two concepts.[29] Indeed, the Model Penal Code titles its section on mens rea "Culpability Requirements,"[30] and requires that a culpability element be assigned to every criminal offense unless a legislature clearly and deliberately indicates its intent to do otherwise.[31]

State and federal criminal codes also continue to include proof of mental state among the required elements defining the vast majority of criminal offenses, particularly non-regulatory crimes.[32] While refusing to hold that proof of some mens rea is a constitutional due process mandate, the Supreme Court has made clear that a "vicious will" element in any

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[26] Martin R. Gardner, *The* Mens Rea *Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 652 (1993) (observing that when law historically focused on "compensating and buying off the feud" between parties, it "likely paid little attention to niceties of culpability"). Robinson, *supra* note 24, at 823-24 (arguing that historically, liability was based on instinctive impulse to exact revenge on apparent source of the evil result).

[27] Robinson, *supra* note 24, at 816 n.9 (citing A. KIRALFY, POTTER'S OUTLINES OF ENGLISH LEGAL HISTORY 156, 158, 163-65 (5th ed. 1958)). *See also* Arenella, *Convicting the Morally Blameless*, *supra* note 19, at 1527.

[28] *See* Jeremy M. Miller, Mens Rea *Quagmire: The Conscience* or *Consciousness of the Criminal Law?*, 29 W. ST. U. L. REV. 21, 21 (2002) ("Crimes require a mental state or 'mens rea' element. *Everyone* in law understands this" (emphasis in original)).

[29] Stuart P. Green, *Why it's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1547, 48 (1997).

[30] MODEL PENAL CODE § 2.02 (1985).

[31] *See* MODEL PENAL CODE §§ 2.02(3), 2.05(1)(b) (1985); Paul H. Robinson & Markus Dirk Dubber, *An Introduction to the Model Penal Code* 12-13, *available at* http://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf (explaining the intent of the Code's authors to require a clear legislative purpose excluding a culpability element).

[32] Although legislatures may choose to enact strict liability crimes with no mens rea, they typically do so primarily for so-called "public welfare" or regulatory offenses. *See* Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 & n.5, 72-73 (1933) (coining term "public welfare offenses" and cataloguing examples of such low-level, strict-liability crimes). More serious, mala in se offenses (those that are considered "inherently wrong"), typically require some proof of the defendant's moral culpability. *See* Arenella, *Convicting the Morally Blameless*, *supra* note 19, at 1527.

offense definition is no "provincial or transient notion."[33] Scholars, too, have exhorted the importance of punishing only those who are truly blameworthy and, accordingly, "deserving" of public opprobrium.[34] Offenses which are strict liability – requiring an *actus reus*, but no mens rea – have been routinely criticized in legal scholarship.[35]

Despite this context, some have pointed more recently to an evisceration of the intent element, or at least have acknowledged that most of the heavy lifting when it comes to addressing culpability occurs in sentencing.[36] Indeed, at the sentencing stage, a judge or jury is compelled to consider not only the offense committed, but also aggravating and mitigating factors about both the offense and the offender. In a wide ranging inquiry, bounded only by statutory sentencing ranges and, occasionally, mandatory minimums, the decision-maker may well take into account the diminished culpability of the defendant with mental retardation, but at best, this may be one of many factors that he or she weighs.[37] An individual's culpability – or, more pointedly, his *lack* thereof, may also be manifest in his affirmative defense to a charge.[38] Compared with both of these facets of the criminal law, mens rea tends to be focused more on the

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[33] Morissette v. United States, 342 U.S. 246, 250 (1952).

[34] *See*, *e.g.*, Smith, *supra* note 23, at 127 (arguing that the federal mens rea doctrine is designed to exempt all "innocent" or "morally blameless" conduct from punishment and should also be used to prevent disproportionate punishment).

[35] See, *e.g.*, Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 954-59 (1999) (critiquing trend toward "liability without fault"); Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 425-28 (1993) (outlining retributivist and utilitarian objections to strict liability); Sayre, *supra* note 32, at 78-83 (arguing that strict liability should be limited to offenses with "really slight" penalties).

[36] *See*, *e.g.*, Green, *supra* note 29, at 1548 ("Although the elimination or diminution of the criminal intent requirement has become fairly commonplace (particularly in the regulatory area), this diminution is nevertheless viewed by most commentators as inconsistent with the moral underpinnings of the criminal law."); Doug Husak, *The Costs to Criminal Theory of Supposing that Intentions are Irrelevant to Permissibility*, 3 CRIM. L. & PHIL. 51 (2008).

[37] In recent decades, the Federal Sentencing Guidelines have aimed to reduce judicial discretion in sentencing. *See* Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1940-44 (1988). *See also* Gardner, *supra* note 26, at 652 (arguing that individualized determinations of a defendant's "evil motive," background, and character is an open-ended speculation better suited to the competence of judges engaged in sentencing *after* a determination of guilt has been made).

[38] *See* Gardner, *supra* note 26, at 747-48.

offender than the offense, and it is a more discrete inquiry than sentencing.[39]

Even acknowledging that mens rea may not be a precise index to the extent of blameworthiness or to the punishment to be imposed on a particular occasion, however, mens rea indicates at least a threshold level of culpability.[40] Further, the theory and history underlying mens rea, and the credibility of our system of justice, make clear the import of establishing some level of blameworthiness as part of the case-in-chief, long before sentencing. As the Model Penal Code notes in its articulation of mens rea standards (and its implicit critique of strict liability), "crime does and should mean condemnation, and no court should have to pass that judgment unless it can declare that the defendant's act was culpable."[41]

Consistent with the purpose of mens rea as a measure of culpability, the mens rea inquiry should be meaningful. For most defendants, mens rea signifies the "moral underpinnings of the criminal law," because its shorthand presumes a number of capacities critical to moral (or immoral) decision-making on the part of a defendant.[42] I refer to these as (A) Consciousness, (B) Choice, and (C) Control, and I address each in turn below.

A. Consciousness

There are two types of consciousness that comprise the first part of mens rea. The first is awareness of a legal or moral norm.[43] The second is awareness of the likely consequences of certain conduct – that is, how one's behavior may affect or, really, harm, another person, object, or entity. Each of these interpretations of consciousness has underlying it cognitive or social skills; and the criminal law presumes a certain level of competency in

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[39] *See* Green, *supra* note 29, at 1548 ("Culpability reflects the degree to which an individual offender is blameworthy or responsible or can be held accountable. It characterizes the actor, rather than the act and its consequences.")

[40] Albert Levitt, *The Origin of the Doctrine of* Mens Rea, 17 U. ILL. L. REV. 117, 136 (1922) (noting also that, "[i]f the mind of the criminal or sinner is guilty, the punishment is greater than if his mind is not guilty."). *See also* Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 261 (1987).

[41] MODEL PENAL CODE § 2.05 (1985) (explaining reason for rule that non-intent/ strict liability offenses should typically only be considered non-criminal violations).

[42] Green, *supra* note 29, at 1548.

[43] *See* Herbert L. Packer, Mens Rea *and the Supreme Court*, 1962 SUP. CT. REV. 107, 108 (1962).

these areas on the part of all adults.[44] Taking the example of a defendant charged with arson, I demonstrate how each of these types of consciousness comes into play.[45]

First, while ignorance of the law is famously no excuse for failing to comply with its terms, a person must have some awareness (some might say "notice")[46] of the social and moral codes to which he is subject, if not the precise rules, before he or she may be considered blameworthy for violating them. As some theorists have noted, "for norms to have meaning, the actor must be able to appreciate the prohibition."[47] Rather than a requirement that individuals learn every code in the code book, this element means that individuals are at least familiar with principles of social engagement.[48] For our model defendant, such consciousness would include a general understanding that it is normatively "wrong" in some respect – morally, socially, legally – to deliberately set fire to objects (especially other people's objects) for the sake of watching them burn. He or she may not understand that a law exists forbidding the behavior or even exactly why it is impermissible; but he should nonetheless perceive it to be a punishable wrong.

An appreciation of norms like this draws on particular cognitive and social skills. For instance, an individual would need to understand what it means to live in a culture shaped by norms and the importance of abiding by norms generally. More specifically, he or she would need to be able to learn, appreciate, and remember particular social mores and expectations. In addition to cognitive skills required to obtain such information (potentially including literacy, ability to comprehend verbal instructions or ideas, and memory), a person would likely need access to and participation in social networks that could transmit and reinforce specific norms.

Apart from understanding general or specific social expectations, individuals should have an ability "to comprehend the consequences their

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[44] The exceptions, of course, are adults who have been found not competent for trial. *See* Part III.A.1, *infra*.

[45] Under the Model Penal Code, a person may be guilty of arson if he "purposely starts a fire . . . whether on his own property or another's, and thereby recklessly (a) places another person in danger of death or bodily injury or (b) places a building or occupied structure of another in danger of damage or destruction." MODEL PENAL CODE § 220.1(2) (1985).

[46] It is, in part, this lack of notice that some point to in criticizing strict liability offenses. *See* Elizabeth Nevins-Saunders, *Incomprehensible Crimes: Defendants with Mental Retardation Charged with Statutory Rape*, 85 N.Y.U. L. REV. 1067, 1078-82 (2010). *See also* Lambert v. California, 355 U.S. 225 (1957) (holding a statute criminalizing failure to register as a felon unconstitutional for lack of notice).

[47] Larry Alexander & Kimberly Kessler Ferzan, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 17 (2009).

[48] *See* Robinson, *supra* note 24, at 819-20.

actions will have on others" before they may be subject to punishment.[49] This second type of consciousness means that, whether or not a person knows there is a rule against setting fires, or that it is morally wrong to set fire to another person's property, the law expects all adults to appreciate the likely injury he or she would cause by lighting matches in a neighbor's garage and setting them atop an old collection of comic books. Divorced from specific rules, this is the most common type of awareness enshrined in the criminal law. The Model Penal Code, for instance, focuses its culpability element on awareness of risk or danger that a particular outcome is likely to occur.[50]

Again, such awareness assumes particular skills on the part of the defendant. Cognitively, an individual would need to understand cause and effect across a wide range of substantive areas. In our arson example, this means the individual would need to know not only what he is doing (lighting a match), but the effect that lighting that match near the comic books could have (matches can create a fire, dry paper can stoke flames, a small fire can grow to become a big one, fire can permanently destroy a building or other property, a person may be in or near a garage attached to a home, etc.).

What's more, there is an empathetic component to this kind of consciousness. The very notion of "harm" implies an awareness of others' interests and how one's own actions might affect another person, object, or entity. Closely tied to a consciousness of social norms, this form of awareness could add emotional content to a basic understanding of cause and effect (burning someone's stuff is not just against the rules, it is also likely to hurt someone) and a normative judgment (that effect on someone else – the harm – is a bad thing). Thus, even the baseline expectations of consciousness implicate a relatively high order of cognitive and social development.

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[49] ALEXANDER & FERZAN, *supra* note 47, at 17 ([A]ctors must have substantial capacity to empathize with other human beings and affectively to comprehend the consequences that their actions will have on others before they can rightly be said to violate a moral or legal norm.")

[50] Specifically, the Code's culpability elements focus on awareness of risk of harm to another. MODEL PENAL CODE § 2.02(2) (1985). *See also* Robinson, *supra* note 24, at 816-17, 819-820 (explaining that conduct is "blameworthy" in the view of the Model Penal Code when an individual engages in conduct and is aware or should be aware of its harmful consequences or risk thereof).

B. Choice

Once a person appreciates the norms against which his or her conduct will be measured, he or she must be rationally able to evaluate the norm (or risk of harm) and the costs and benefits of violating it. "The criminal law presupposes that actors are rational actors who are capable of using reason to guide their conduct. It also assumes that actors have the capacity for self-reflection."[51] And, implicit in this ability is the capacity to act independently, without undue influence from others. While there is a rather thin line between consciousness and choice, choice reflects the deliberation and decision-making which occurs, at least in part, based on a particular consciousness. It designates the moment of intentional compliance or non-compliance with social and legal norms; accordingly, mens rea has been referred to as "the mental state of defiance."[52]

The capacity to choose whether or not to engage in a certain behavior or to undertake a particular course of conduct is a quality that many scholars focus on when they discuss the import of recognizing mens rea as determinative of moral blameworthiness. This is, in H.L.A. Hart's terms, what it means to be a "choosing being," where people are held accountable for their choices and conduct.[53] Such a theory of individual accountability only makes moral sense if the individual has, indeed, made a conscious or at least rational, independent choice.[54]

Choice arguably involves a higher level of cognitive ability and psychosocial skills than consciousness of norms. In their work with adolescents, psychologists Elizabeth Cauffman and Laurence Steinberg propose a helpful model of psychosocial factors that affect decision-making, including (1) responsibility, (2) perspective, and (3) temperance.[55]

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[51] ALEXANDER & FERZAN, *supra* note 47, at 17.

[52] Green, *supra* note 29, at 1548 n.29 (1997) (citing JEROME HALL, PRINCIPLES OF CRIMINAL LAW 281-86 (1947 ed.); *See also* Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L. J. 719, 744 n. 95 (1992).

[53] H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY 49 (1968). *See also* ALEXANDER & FERZAN, *supra* note 47, at 55 (without choice, there is no responsibility); Claire Finkelstein, *The Morality of Criminal Law: A Symposium in Honor of Professor Sandy Kadish*, 88 CAL. L. REV. 895, 919 (2000) (discussing Kadish's theory of criminal law as a mechanism for ascribing responsibility and assigning blame).

[54] *See* Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1004, 1013 (1932) ([W]ithout a free exercise of choice one can not be said to have a guilty mind.").

[55] ALEXANDER & FERZAN, *supra* note 47, at 745 ("These categories are not mutually exclusive, nor are they without some cognitive elements. The ability to appreciate the long-term consequences of an action, for example, is an important element of perspective, but requires the cognitive ability to weigh risks and benefits, and is related to the ability to

Although the third of these components will be considered in greater detail in the context of "control," below, the first two are certainly descriptive of some of the skills needed for thoughtful decision-making.

Examples of cognitive skills that provide a foundation for decision-making might include use of logic, comprehension of certain facts (such as the relationship between cause and effect), and the ability to weigh costs and benefits.[56] At the same time, psychosocial capacities underlying responsibility include self-reliance, clarity of identity, self-esteem, independence, and work orientation (pride in the successful completion of tasks).[57] Perspective requires the ability to consider situations from different viewpoints and place them in broader social and temporal contexts, including the ability to see short and long term consequences and to take other people's perspectives into account.[58]

Choice also suggests that a person is acting of his or her own accord, and not because he or she was coerced, manipulated, or compelled by circumstances or another person. In extreme cases, there may be affirmative defenses which preclude a finding of criminal liability on these grounds, including self-defense, necessity, and duress.[59] But the baseline legal presumption is that defendants who have engaged in certain conduct with the required mens rea have a moral and intellectual agency sufficient to hold them responsible for their behavior.[60]

C. Control

Finally, a truly culpable person not only will have chosen to behave in a certain anti-social way, but also will execute that decision with intention. More than just engaging in the conduct itself, this element of mens rea refers to the state of mind underlying the move from thought to action, so that the action is a deliberate one. The criminal law requires "a

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forgo immediate gratification, which is an element of temperance.").

[56] Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence*, 18 BEHAV. SCI. & L. 741, 743-44 (2000). *See* Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1 (1992); Marilyn Jacobs Quadrel, Baruch Fischhoff, & Wendy Davis, *Adolescent (In)vulnerability*, 48 AM. PSYCHOLOGIST 102 (1993) for other studies assessing the cognitive skills involved in decision-making. While these studies focused on adolescents, they found no major cognitive differences between adults and teenagers, at least for those fifteen and older.

[57] Cauffman & Steinberg, *(Im)maturity of Judgment in Adolescence*, *supra* note 56, at 747-48.

[58] *See generally*, *Id.* at 745.

[59] *See* Steven J. Mulroy, *The Duress Defense's Uncharted Terrain: Applying it to Murder, Felony Murder, and the Mentally Retarded Defendant*, 43 SAN DIEGO L. REV. 159 (2006).

[60] *See* Arenella, *Convicting the Morally Blameless*, *supra* note 19, at 1522-23

level of socialization and, except for those who fit extreme and narrowly defined exceptions such as the insanity defense, a level of intelligence, rationality, and *capacity to act otherwise*…."[61] Punishable conduct therefore must not be accidental, inadvertent, or arising from an impulse that the defendant was unable to control. As noted above, in Cauffman and Steinberg's terms, this aspect of control would be considered "temperance;" a term which represents a person's impulse control, ability to evaluate situations before acting, and self-restraint from aggressive behavior.[62] The Supreme Court has also linked self-control to culpability, finding that an inability to control one's actions can make a person less deserving of punishment.[63]

It is possible, and important, to unpack the content and capacities which underlie mens rea. But it is risky, as well. In exposing the gravity of the load we ask mens rea to bear in contrast to the ease with which it is typically dispatched in criminal cases, we may call into question more broadly the assumption of culpability it is meant to signify.[64] Some have critiqued the criminal law's assignment of blame, charging that it is based on a relatively flimsy account of moral agency.[65] Such a challenge to mens rea and culpability generally is, however, beyond the scope of this project. In fact, I assume that the law's basic assumptions about intelligence, rationality, and capacity to act (or refrain from acting) may be borne out in the population generally, even if such attributes "simply may not in fact be true of a given offender."[66] Yet, these assumptions are ill-founded across the class of defendants with mental retardation.[67]

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[61] Peter W. Low, *The Model Penal Code, The Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability?*, 19 RUTGERS L. J. 539, 548 (1988) (emphasis added).
[62] Cauffman & Steinberg, *(Im)maturity of Judgment in Adolescence*, *supra* note 56, at 748-49 (describing psychological testing measuring "impulse control" and "suppression of aggression" in teenagers versus adults).
[63] *See* Graham v. Florida ___ U.S. ___; 130 S.Ct. 2011, 2026 (2010) (citing lack of behavioral control as a factor leading to diminished culpability among juveniles).
[64] *See* Smith, *supra* note 23, at 127 (referring to the "traditional role" of mens rea as a means of exempting all morally blameless conduct from criminal liability).
[65] Arenella, *Convicting the Morally Blameless*, *supra* note 19 at 1610.
[66] Low, *supra* note 61, at 548.
[67] *Id.*

II. APPLYING THE MENS REA ASSUMPTIONS TO DEFENDANTS WITH MENTAL RETARDATION

Having broken down what it means to be culpable and the constituent parts of *mens rea* in Part I, I now consider whether it is accurate to assume that people with mental retardation are truly culpable, even where they fail to meet the assumptions underlying *mens rea*. That is, in many, if not most, cases involving a competent defendant with mental retardation, the prosecutor may be able to provide evidence that the defendant acted with the requisite *mens rea* to commit a particular offense. In the arson example, for instance, the prosecution may only need to demonstrate that a defendant started a fire by lighting matches in a neighbor's garage and setting them down on or near the stack of old comic books to show that he purposely or recklessly engaged in criminal conduct.[68] As discussed in Part II, the presumption of culpability attending this conduct is only possible because we presume the consciousness, choice, and control of the defendant. But while such a presumption may be valid for defendants of average intelligence, a deeper examination of the capacities and tendencies of people with mental retardation demonstrates the gulf between the assumption and reality for this limited population of defendants.

There are two forces at work in undermining the overall culpability of defendants with mental retardation: cognitive capacity and psychosocial capacity.[69] Deficits in brain functioning may explain some of the reason that a person with mental retardation cannot even form mens rea for a particular offense and, accordingly, should not be criminally liable for committing it. Moreover, cognitive capacity to form mens rea alone should not necessarily imply a truly culpable intent. For juveniles, according to Steinberg and Cauffman and, by analogy, for people with mental retardation, immature psychosocial and behavioral development should obviate culpability. Significantly, then, even where there may be evidence that an individual has the requisite *mens rea* – a person took something that

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[68] Elements for the offense of arson, including the element of intent, of course vary across jurisdictions. See Model Penal Code § 220.1 cmts. 4 and 8 and accompanying footnotes.

[69] Cognitive abilities include attributes such as information processing, comprehension, logic, and abstract reasoning. Non-cognitive deficits might include behavioral components, like impulse control, and social skills, such as social reasoning, judgment, and vulnerability to manipulation or pressure of others. Lois A. Weithorn, *Conceptual Hurdles to the Application of* Atkins v. Virginia, 59 HASTINGS L. J. 1203, 1208 (2008).

did not belong to him – he still may not have the understanding or culpability that that *mens rea* is meant to signify.[70]

One significant difference in making this claim for juveniles versus adults with mental retardation is the type of evidence available to demonstrate it. Advances in neuroimaging technology have enabled advocates for juveniles to rely not only on psychosocial research regarding the behavioral and cognitive immaturity of young people, but also on brainscanning,[71] which can reveal detailed images, activity, and development of the juvenile brain.[72] Recent Supreme Court jurisprudence has, in turn, relied in part on such neuroimaging advances in finding juveniles categorically less culpable than their adult counterparts, and therefore exempt from life sentences without parole for non-homicide offenses.[73]

For defendants with mental retardation, the neuroimaging research is not nearly so clear. There are a number of reasons for this. First and foremost, while longitudinal studies demonstrate relatively consistent brain structure and maturation among children and adolescents,[74] there is no such consistency in the brains of people with mental retardation. That is, while people in this cohort may share a diagnosis with relatively clear cognitive and adaptive features, the etiology giving rise to their intellectual disability is very diverse[75] and, in many cases, unknown.[76] Brainscanning studies on

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[70] Cauffman & Steinberg, *(Im)maturity of Judgment in Adolescence*, *supra* note 56, at 391-94. *Cf. infra* note 181 (citing authority for argument that a person may demonstrate legal mens rea without actually bearing real culpability).

[71] There are a range of neuroimaging technologies, but most relate to advances in magnetic resonance imaging ("MRI"), which provides incredibly detailed pictures of brain anatomy. Most pertinently, functional MRIs ("fMRIs") actually track images of the brain while it is engaged in a particular function, providing data about underlying "neuronal or metabolic activity." Teneille Brown & Emily Murphy, *Through a Scanner Darkly: Functional Neuromaging as Evidence of a Criminal Defendant's Past Mental States*, 62 STAN. L. REV. 1119, 1127 (2010).

[72] *See*, *e.g.*, Brief for Am. Psychol. Assoc. et al. as Amici Curiae Supporting Respondents at 9-12, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633) (citing neuropsychological research to demonstrate that "the adolescent brain has not reached adult maturity").

[73] Graham v. Florida, __ U.S. __, 130 S. Ct. 2011, 2026 (2010) (citing past psychosocial research about "the nature of juveniles" and noting that "brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.").

[74] Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCI. 861, 861 (1999).

[75] One study suggests there are over 750 known genetic causes of mental retardation, accounting for approximately one-third of mental retardation cases. ELIZABETH M. DYKENS, ET. AL., GENETICS AND MENTAL RETARDATION SYNDROMES: A NEW LOOK AT BEHAVIOR AND INTERVENTION 3, 5 (Brookes 2000).

people with mental retardation generally are rare because of this heterogeneity.[77] Instead, studies are done only in a limited way on those with a common genetic etiology, such as Down Syndrome[78] or Fragile X Syndrome.[79] This leaves the vast majority of people with mild mental retardation out of the brain-imaging research world and limits the applicability of any common neurological finding about this subpopulation for criminal justice policy purposes.

Even among testable genetic subgroups, however, the results of brainscanning studies are not substantial. There are insufficient studies of these subclasses,[80] and the research may be limited because it is so difficult for research subjects with mental retardation to actually comply with requisite protocols.[81] When tests are done, their findings may be limited, as even common etiology does not guarantee consistent results; there may be significant variation in how a genetic mutation affects different individuals.[82] Finally, it is also often difficult to trace the linkage between brain abnormality, and particular traits as complex as, say, intelligence.[83]

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[76] Researchers have identified the cause of mental retardation in just 25-40 percent of those with mild mental retardation, the group most likely to be found competent in the criminal justice system. 2002 AAMR MANUAL, *supra* note 3 at 32.

[77] Doron Gothelf et al., *The Contribution of Novel Brain Imaging Techniques to Understanding the Neurobiology of Mental Retardation and Developmental Disabilities*, 11 MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES RESEARCH REVIEWS 331 (2005); Manuel Martin-Loeches *Electrophysiology and Intelligence: The Electrophysiology of Intellectual Functions in Intellectual Disability*, 45 J. OF INTELL. DISABILITIES RES. 63, 63-64 (2001).

[78] Down Syndrome is the most common genetic cause of mental retardation, though it affects only 1 in 730 births. Wayne Silverman, *Down Syndrome: Cognitive Phenotype*, 13 MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES RESEARCH REVIEWS 228, 228 (2007).

[79] Fragile X Syndrome is the second most common genetic cause of mental retardation, though it affects only one in 2,000 to 4,000 live births. Allan Reiss et al., *Brain Imaging in Neurogenetic Conditions: Realizing the Potential of Behavioral Neurogenetics Research*, 6 MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES RESEARCH REVIEWS 186, 186 (2000). *See* Allan Reiss et al., *Neurodevelopmental Effects of the FMR-1 Full Mutation in Humans*, 1 NATURE MED. 159, 159 (February 1995).

[80] Katie R. Williams, et. al., *Emotion Recognition by Children With Down Syndrome: Investigation of Specific Impairments and Error Patterns*, 110 AM. J. ON MENTAL RETARDATION, 378, 390 (2005) (noting lack of neurological studies on Down Syndrome subjects to further elucidate psychological testing results).

[81] See, e.g. Doron Gothelf et al., *supra* note 77, at 338; Curry et. al., *supra* note 6, at 474.

[82] *See* Deborah J. Fidler, et. al., *The Down Syndrome Behavioral Phenotype: Taking a Developmental Approach*, DOWN SYNDROME RESEARCH AND PRACTICE 37 (*available at* http://www.down-syndrome.org/reviews/2069/reviews-2069.pdf). For instance, Fragile X affects males and females differently (females tend to have a broader range of symptoms, but are generally less affected than males). S. H. Mostofsky et al., *Decreased Cerebellar*

Despite these limitations, there have been some developments in neuroimaging studies which confirm the findings of social science studies of people with mental retardation. In this section, I challenge the validity of the *mens rea* presumptions – and, accordingly, the implication of culpability – for individuals with mental retardation in light of psychosocial and neuroscientific research.

A. Consciousness

As defined in Part I, there are two different aspects of consciousness underlying the association between mens rea and culpability: awareness of a legal or moral norm and awareness of one's own conduct and its likely consequences. These two aspects of consciousness each entail different cognitive and psychosocial skills, all of which may be impaired in people with mental retardation.

Cognitively, people of different levels of mental retardation may not always have the capacity to glean what norms or rules exist in a given community. First, one of the key features of mental retardation is a limited intelligence. Even those with "mild" mental retardation who receive all necessary supports and training are unlikely to achieve academic skills beyond the sixth-grade level; those with "moderate" retardation will probably not progress beyond second-grade work.[84] Cognitive deficits can limit even basic skills or information acquisition. For instance, individuals with mental retardation struggle with literacy, so they may not be able to read about or otherwise learn what codes they are expected to comply with.[85]

Social transmission of moral and legal norms is also unlikely to occur with this population, as people with mental retardation rarely socialize with peers of average intelligence, individuals who may have greater access to and may be likely disseminate the sort of media messages about permissible and impermissible conduct (however skewed it may

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Posterior Vermis Size in Fragile X Syndrome: Correlation with Neurocognitive Performance, 50 NEUROLOGY 121, 121 (1998).

[83] Martin-Loeches, *supra* note 77, at 72.

[84] DSM-IV-TR, *supra* note 3, at 43.

[85] *See* Atkins, 536 U.S. at 320 (including "diminished ability to understand and process information" and "to engage in logical reasoning" among cognitive and behavioral impairments of people with mental retardation); *see also* Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 514 (2002) (explaining that individual with mental retardation who has been arrested may refuse phone call not because he is uninterested in speaking with anyone, but rather because he may not remember any phone numbers, may be unable to read a phone book, or may not even know how to operate the phone).

be).[86] As some have put it bluntly: "Developmentally disabled people typically lack social skills and have not had the same opportunities or peer group contact so critical in the development of appropriate social behavior that normal individuals have had."[87]

Even if taught the rules, the ability of people with mental retardation to understand[88] or remember[89] information (much less its social, moral, and legal value) is likely to be affected. As Miles Santamour, a former consultant to the President's Committee on Mental Retardation, put it, "[t]he majority of mentally retarded persons don't understand why it's wrong to steal, but they will say it's wrong to steal."[90] Moreover, people with mental retardation may have difficulty abstracting[91] or applying lessons learned on one occasion to a subsequent context, making it difficult to confirm whether a rule has actually been learned and understood. [92]

There is evidence that these deficits occur in criminal justice contexts. For example, the inability to understand written and unwritten prison rules manifests itself in a disproportionately high rate of infractions among prison inmates with mental retardation.[93] Similarly, studies have shown that people with mental retardation have a dramatic impairment when it comes to understanding the provisions of the *Miranda* rights.[94]

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[86] See AINSWORTH & BAKER, UNDERSTANDING MENTAL RETARDATION 114-15 (2004) (discussing potential for limited social options for people with mental retardation and their resulting dependence on family members or paid caregivers for recreation and socialization); ROBERT PERSKE, UNEQUAL JUSTICE?: WHAT CAN HAPPEN WHEN PERSONS WITH RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES ENCOUNTER THE CRIMINAL JUSTICE SYSTEM 18 (1991) (indicating that adults with retardation often "fail to relate well with those their age" and are likely to relate best to children or elderly adults).

[87] SARAH F. HAAVIK & KARL A. MENNINGER, II, SEXUALITY, LAW, AND THE DEVELOPMENTALLY DISABLED PERSON 152 (1981)

[88] *See, e.g.*, John J. McGee & Frank J. Menolascino, *The Evaluation of Defendants with Mental Retardation in the Criminal Justice System*, in THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION: DEFENDANTS AND VICTIMS 55, 58 (Ronald W. Conley et al. eds., 1992) (citations omitted) ("[P]eople with mental retardation encode information in an extremely limited manner, and . . . lose[] information at a much faster rate" than their non-retarded peers). *See also* Ellis & Luckasson, *supra* note 4, at 428 (describing limited comprehension of "receptive" communications among people with mental retardation, hampering their ability to understand questions, instructions, or directions).

[89] *See* Ellis & Luckasson, *supra* note 4, at 428.

[90] Dee Reid, *Unknowing Punishment*, 15 STUDENT LAW. 18, 21 (1986).

[91] *See* ROSALYN KRAMER MONAT, SEXUALITY AND THE MENTALLY RETARDED 33 (1982)

[92] McGee & Menolascino, *supra* note 88, at 58 (citations omitted).

[93] Garcia & Steele, *supra* note 17, at 835.

[94] Cloud et al., *supra* note 85, at 501 ("….mentally retarded people simply do not understand the Miranda warnings."). *See also* Caroline Everington & Solomon M. Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation*, 37 MENTAL RETARDATION 212, 212, 213 (June 1999) (citing studies

Individuals with mental retardation, and even those who tested just above the IQ level defining mental retardation, simply could not understand the warnings, including both the meaning of individual words (even when the vocabulary was simplified) and the concepts behind them.[95]

The second form of consciousness, the more generalized understanding of one's own actions and how they might impact another, may also demand things that most people with mental retardation may be unable to do. Even though a person's lack of understanding may not approach the total failure to appreciate his or her own actions that some insanity standards require,[96] he or she may nonetheless fail to fully appreciate his or her own capacity, conduct, or impact.[97] For example, people with mental retardation may not recognize the relationship between cause and effect, whether because they lack substantive education (say, they never learned or figured out how fire travels) or because the idea of a series of interrelated events in a chain is too complex and abstract for a person of limited intelligence to comprehend.[98]

Not surprisingly, these deficits are manifested in social situations. That is, people with mental retardation face difficulty anticipating or, subsequently, understanding how their own actions could impact – or harm – other people.[99] While this concern is particularly relevant in a person's choice whether to adhere to a particular norm or rule, as discussed below, it may also have implications for his or her understanding of whether rules exist, as well as the scope and application of those rules to the individual.[100]

Overall, the presumption of norms awareness that partially undergirds the connection between mens rea and culpability simply does not hold true for people with mental retardation. Because of mental capacity, training, and socialization, defendants in this population are unlikely to intuit, learn, or understand what society expects of them, and

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indicating "that significant deficits in [*Miranda*] understanding appear to exist for this population.").

[95] Cloud et al., *supra* note 85, at 514.

[96] *See*, *e.g.*, THE MODEL PENAL CODE § 4.01(1) (defining insanity as circumstances where a defendant "lacks substantial capacity" to "appreciate the criminality [wrongfulness] of his conduct" or to "conform his conduct to the requirements of the law").

[97] Reid, *supra* note 90, at 21 ("[M]ental retardation can interfere greatly with the ability to . . . even understand the nature or consequences of one's actions").

[98] John Langone, *Mild Mental Retardation*, *in* MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES 113, 124 (2d ed. 1996).

[99] *See* McGee & Menolascino, *supra* note 88, at 59 (explaining that people with mental retardation have difficulty recognizing social cues, understanding the reactions of others, or comprehending their own role in relation to another).

[100] *See* Philip L. Fetzer, *Execution of the Mentally Retarded: A Punishment Without Justification*, 40 S.C. L. REV. 419, 439 (1988).

may even be unaware of the full nature of their behavior and its consequences.

B. Choice

Even if a person with mental retardation could be made aware of a rule and understood it in general terms, it is unlikely he would be able to make a meaningful choice about whether or not to engage in particular conduct or violate a particular norm. The ability to make a reasoned choice may be hampered in people with mental retardation because of difficulties in the overlapping areas of decision-making, moral reasoning, and independent thinking.

In general, this population struggles with the analytic skills necessary for thoughtful decision-making. People with mental retardation lack social and cognitive problem-solving skills,[101] and some researchers have argued that this deficit may be a risk factor associated with increased criminality among this population.[102] Even people with mild mental retardation are typically limited to concrete thinking or superficial categorization.[103] They tend not to have the ability to perform the sort of cost/benefit analysis that people with average intelligence might engage in before making a decision.[104] Nor can they engage in if-then propositions or other mental predictions, strategic thinking, or foresight.[105] Instead of novel or problem-solving techniques, they rely on behaviors or responses which are familiar, even if those mechanisms have been unsuccessful in the past.[106]

Moreover, there are specific disabilities for this population when it comes to making moral decisions. As indicated above with regard to consciousness, a person with mental retardation may lack the tools required

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[101] CLASSIFICATION IN MENTAL RETARDATION (H.J. Grossman, ed., Am. Assn. on Mental Deficiency, 1983) (1973).

[102] B. Brown and T. Courtless, THE MENTALLY RETARDED OFFENDER (The President's Comm'n on Law Enforcement and the Administration of Justice, 1971); *See also* Jones, *supra* note 4, at 727 (referring to "cognitive deficits and limited problem-solving abilities" of people with intellectual disabilities).

[103] Appelbaum & Appelbaum, *supra* note 11, at 488.

[104] *See* Atkins, 536 U.S. at 320 (finding deterrence rationales inapplicable to defendants with mental retardation).

[105] Appelbaum & Appelbaum, *supra* note 11, at 488 (citing Herman H. Spitz, *Intellectual Extremes, Mental Age, & the Nature of Human Intelligence*, 28 MERRILL-PALMER Q. 167-78 (1982)).

[106] R.S. Rueda & S.H. Zucker, *Persuasive Communication Among Moderately Retarded and Nonretarded Children*, 19 EDUCATION AND TRAINING OF THE MENTALLY RETARDED 125-31 (1984).

to make the decision that certain conduct is wrongful—a necessary step before he could even reject the behavior in favor of compliance with a social or moral norm.[107] People with mental retardation may have a less mature or complete moral development than others due to limitations in a range of cognitive and psychosocial factors, including intelligence, limited opportunity for interaction with others, exclusion from an enriching environment, chronological age, and mental age.[108] These circumstances have profound effects for an individual's ability to develop and sustain a moral framework in which to evaluate the effect of his or her own conduct, even if he or she is aware of community norms.[109]

The capacity to choose also requires a sense of agency and self-determination that many people with mental retardation lack, often because of their longstanding relationship with and dependence upon caregivers.[110] Indeed, parents and other caretakers of people with mental retardation may be so overprotective that their children may develop a so-called "'functional' retardation" even beyond their intrinsic intellectual disability, meaning that they fail to develop initiative, social skills, and other mature behaviors because of a learned fear of and inexperience with independence.[111]

There are a number of ways in which this vulnerability can manifest itself, but whatever the derivation, this is one of the scenarios that experts most often point to in explaining criminal involvement of people with mental retardation.[112] Indeed, people with mental retardation are frequently trained to be – and rewarded for being – compliant with the wishes and demands of others, including those who wish them ill or seek to advance

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[107] McGee & Menolascino, *supra* note 88, at 59-60.

[108] Ellis & Luckasson, supra note 4, at 429, 429 n. 78 (citing factors relating to moral development).

[109] Diane Courselle et. al., *Suspects Defendants, and Offenders with Mental Retardation in Wyoming*, 1 WYO. L. REV. 1, 23 (2001) (citing McGee & Menolascino, *supra* note 88, at 60) ("Full moral development takes into account the consequences of an action not just for actor, but more abstract concepts such as how others will be affected by the action.").

[110] Reed at 810-11 (noting that people with mental retardation often lack assertiveness and decision-making abilities because of dependence on caregivers).

[111] AINSWORTH & BAKER, supra note 86, at 124.

[112] See, *e.g.*, Joan Petersilia, *Doing Justice? Criminal Offenders with Developmental Disabilities* (Cal. Policy Research Ctr. Univ. of Cal. 2000) at 12; Hubert R. Wood & David L. White, *A Model for Habilitation and Prevention for Offenders with Mental Retardation*, *in* THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION: DEFENDANTS AND VICTIMS, *supra* at 88, 157-58, 162. *See also* Everington & Fulero, *supra* note 94, at 212-13; Stephen Greenspan, *Functional Concepts in Mental Retardation: Finding the Natural Essence of an Artificial Category*, 14 EXCEPTIONALITY 205, 214 (2006).

their own criminal ends.[113] Relatedly, because of their low social status, these individuals suffer low self-esteem[114] and are eager to conceal their disability or "pass" as a person of average intelligence.[115] These factors make even adults with mental retardation highly manipulable.[116] This is consistent with some of the neurological findings regarding people whose mental retardation is caused by Down Syndrome.[117] People with Down Syndrome tend to experience high levels of atrophy in the amygdala part of their brains, particularly as they age,[118] and research suggests that a dysfunctional amygdala may lead a person to be overly trusting.[119]

Social science research also suggests that in both criminal and non-criminal circumstances, the need for social acceptance makes people in this population prone to suggestibility and to acquiescence, regardless of whether they might actually disagree with their interlocutor.[120] Thus, while a person may appear to make an affirmative, knowing act, his or her conduct may well not be considered the product of his own independent will. To fit in or please someone a person with mental retardation might take to be a friend or a peer of higher status, for instance, he or she might agree to serve as a lookout, do a drug buy, or participate in an assault.[121]

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[113] Dick Sobsey & Tanis Doe, *Patterns of Sexual Abuse and Assault*, 9 SEXUALITY & DISABILITY 243, 252 (1991).

[114] MONAT, *supra* note 91, at 8 ("The mildly mentally retarded are often viewed as having very poor self imagery and self worth."); Jones, *supra* note 4, at 729; Sobsey & Doe, *supra* note 113, at 253 (discussing damage of stigmatization to individuals' self-image).

[115] ROBERT EDGERTON, THE CLOAK OF COMPETENCE (1967) (stating that people with mental retardation were "dogged" in efforts to pass as "normal," and "struggled to maintain self-esteem by hiding their incompetence.")

[116] Greenspan, *supra* note 112, at 214.

[117] J. D. Pinter et al., *Amygdala and Hippocampal Volumes in Children with Down Syndrome: A High Resolution MRI Study*, 56 Neurology 972, 972 (2001); Silverman, *supra* note 78, at 228.

[118] *Id.* at 973.

[119] *See* Michael Davis & Changjun Shin, *The Amygdala*, 10 CURRENT BIOLOGY ISSUE 4, R131 (Feb. 2000).

[120] Reichard et al., *supra* note 11, at 227 ("[R]etarded people may be easily led and be open to the suggestions of others; they may be . . . unable to answer questions; . . . and they may say what they think one wants them to say, including confessing to anything, in order to curry favor."); Everington & Fulero, supra note 94, at 213 (providing empirical data to suggest subjects with mental retardation will agree to even a preposterous statement) (citing Carol K. Sigelman et al., *When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded Persons*, 19 MENTAL RETARDATION 53-58 (1981)); Petersilia, *supra* note 112, at 14.

[121] *See*, *e.g.*, Ballou v. Booker, 777 F.2d 910, 911 (4th Cir. 1985) (suggesting that defendant's confession concerning sexual assault occurred because victim's parents urged him to make such a statement to police).

Indeed, although much of the criminal law regards these individuals as perpetrators, in many circumstances, they may more accurately be described as victims.[122] In some circumstances, the law acknowledges as much. Many states legislate this victim status, making it a form of statutory rape for individuals to have sex with people whom they know or should know have mental retardation.[123] The Supreme Court has even drawn an explicit connection between these traits and culpability, finding that vulnerability and susceptibility to manipulation are key reasons that people with mental retardation should not be subject to the death penalty.[124] As discussed below, the lack of independence may further indicate non-culpability when it comes to executing a particular decision or actually engaging in a course of conduct, but it first comes into play in the choice to violate an established norm or rule.

C. Control

The final prong underlying the connection between culpability and mens rea is the assumption that an individual acts intentionally and thoughtfully on his or her choice to comply with or violate social norms. People with mental retardation, however, not only may suffer from poor impulse control as a direct result of their mental condition, but also, as explained above, may be vulnerable to a range of undue pressure to act from others. Both of these manifestations of mental retardation make it difficult to claim that this population is truly responsible for its own conduct.

In the juvenile context, both the social science and neuroscience literature have documented that young people tend to have limited impulse control.[125] Based in part on these findings, the Supreme Court has deemed young people less culpable as a class and constitutionally shielded them

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[122] *See* Sobsey & Doe, *supra* note 113, at 253; *see also* MONAT, *supra* note 91, at 8.

[123] Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 U. ILL. L. REV. 315, 397–403, Tbl. B (1997) (charting laws which include the complainant's mental incapacity as a basis for statutory rape).

[124] *See Atkins*, 536 U.S. at 318 (recognizing that mental retardation can make person follow, rather than lead, and thus be less culpable than other offenders).

[125] *See, e.g.*, Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence*, 58 Am. Psychol. 1009, 1013-14 (2003); Mary Beckman, *Crime, Culpability, and the Adolescent Brain*, 305 SCI. 596, 597-98 (2004)..

from the most severe sentences of the death penalty[126] and life without parole for non-homicide offenses.[127]

Limited impulse control is also a key feature of mental retardation.[128] As with juveniles, social scientists have noted its impact on culpability for defendants with mental retardation.[129] And likewise, the Supreme Court has acknowledged that lack of impulse control among this population in part accounts for their reduced culpability.[130]

For those whose mental retardation derives from Fragile X Syndrome, there may be neurological evidence related to this feature. Structural MRI studies show an enlarged caudate nucleus, located in the basil ganglia part of the brain, in both males and females with Fragile X.[131] Further, studies of lesions in the basal ganglia have shown "disturbances in attention control, response inhibition, cognitive flexibility, and goal-oriented behavior."[132] It is therefore "likely" that the enlarged caudate nucleus in the brains of people with Fragile X Syndrome plays a role in the observed cognitive and behavioral disturbances in individuals with Fragile X.[133]

Even where a person with mental retardation might be cognitively able to control his or her own impulses, he or she may still not really control his or her own actions because of a susceptibility to pressure from others, especially those who do not have mental retardation. Given the research on this dynamic outlined with regard to "choice," above, as well as the law's acknowledgment of its relevance to culpability, there is little

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[126] *See* Roper v. Simmons, 543 U.S. 551, 568–69 (2005) (abolishing death penalty for juveniles in part because of their "impetuous and ill-considered actions and decisions" (citation omitted).

[127] *See* Graham v. Florida ___ U.S. ___; 130 S.Ct. 2011, 2026 (2010) (striking down sentences of life imprisonment without parole for juveniles convicted of non-homicide offenses, based in part on evidence that they have impaired impulse control).

[128] *See, e.g.*, Ellis & Luckasson, *supra* note 4, at 429; Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 153.

[129] *See* McGee & Menolascino, *supra* note 88, at 58.

[130] Atkins v. Virginia, 536 U.S. 304, 318 ("[T]here is abundant evidence that [persons with mental retardation] often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders").

[131] Reiss et al., *Neurodevelopmental Effects of the FMR-1 Full Mutation in Humans*, *supra* note 79, at 161.

[132] David Hessl et al., *The Neuroanatomy and Neuroendocrinology of Fragile X Syndrome*, 10 MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES RES. REVIEWS 17, 18 (2004) (citing M. T. Abrams & A. L. Reiss, *The Neurobiology of Fragile X Syndrome*, 1 MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES RES. REVIEWS 269 (1995); MM Mazzocco et al., *The Neurocognitive Phenotype of Female Carriers of Fragile X: Additional Evidence for Specificity*, 14 J. DEV. BEHAV. PEDIATR. 328 (1993).

[133] *Id.*

principled reason to assume that a person with mental retardation truly controls – and therefore should be responsible for – his own conduct.

III. THE STATUS QUO: HOW THE SYSTEM FAILS DEFENDANTS WITH MENTAL RETARDATION

As I have suggested, we claim to answer a threshold question of blameworthiness through the typically required element of mens rea.[134] A patchwork of other doctrines – namely, insanity, competency, and diminished capacity – account for defendants with mental retardation.[135] These avenues arguably supplement the mens rea inquiry into culpability insofar as they provide some acknowledgment of the relationship between mental disability and criminal responsibility. But they do so in a way that tends to champion social control, public safety, and efficiency over individualization and fairness. As set forth below, these aspects of the criminal law are insufficient responses to the diminished culpability of this population of defendants. This gap in the doctrine results in perversions of justice not only for the individual defendants, but also for the criminal law itself.

A. At the Margins: Substantive Criminal Law Doctrines that Address Mental Retardation

1. Competency

The competency and insanity doctrines are the law's primary answer to defendants who claim that their mental disability makes them nonresponsible for their otherwise criminal conduct. Accordingly, these two doctrines skim the least culpable individuals with mental retardation – those with "gross" and "verifiable" disabilities – out of the pool of defendants at some point in the criminal process.[136]

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[134] Smith, *supra* note 23, at 127 (indicating that the mens rea doctrine does "guarantee a modicum of moral blameworthiness as a precondition to punishment."). Smith's argument, however, is that such a baseline signifier of culpability fails to fulfill the traditional role of mens rea in that it allows for sentencing that is disproportionate with relative blameworthiness. *Id.* at 127-28.

[135] Other legal doctrines account for mental disabilities, but these tend to be more procedural in nature and less concerned with questions of culpability. For instance, mental retardation is a factor to be weighed in determining the voluntariness of confessions and declarations of consent pursuant to Fourth and Fifth Amendment interrogations and searches. *See* note 16, *supra.*

[136] *See* United States v. Moore, 486 F.2d 1139, 1179 (D.C. Cir. 1973) (Leventhal, J., concurring) ("the criminal law cannot vary legal norms absent a disability that is both gross and verifiable…..A few may be recognized as so far from normal as to be entirely beyond

The competency doctrine does not specifically speak to culpability, but it does mandate a connection between criminal responsibility and cognitive understanding. Under the Due Process Clause, defendants who cannot rationally and factually understand the proceedings against them and/or cannot consult with their attorney "with a reasonable degree of rational understanding" are legally incompetent and, therefore, ineligible for prosecution or sentencing.[137] Those whom a court determines (after psychiatric and/or psychological evaluation) to be unlikely to regain competency are typically referred to the jurisdiction of the public mental health system, where the facts of the alleged criminal offense may be used to demonstrate that they are too dangerous to remain at liberty in the community.[138] After hearings or even a trial, these defendants may face involuntary civil commitment. But they avoid criminalization and a criminal record unless and until they regain competency (or have it "restored").[139] Because incompetency is, in effect, an exit ramp off the criminal track (albeit an onramp to the civil commitment track), its exercise is constrained.

Ultimately, the competency doctrine privileges public safety and prosecution over individualization and fairness when it comes to defendants with less severe forms of mental retardation. It not only requires a near complete lack of awareness on the part of the defendant,[140] but also may be

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the reach of criminal justice, but in general, the criminal law is a means of social control that must be potentially capable of reaching the vast bulk of the population."). *See also* note 146, *infra*.

[137] Dusky v. United States, 362 U.S. 402, 402 (1960) (stating that findings of competency require district judge to analyze defendant's ability to consult rationally with his attorney); *see also* State v. Garfoot, 558 N.W.2d 626, 632 (Wis. 1997) ("[A] defendant may be incompetent based on retardation alone if the condition is so severe as to render him incapable of functioning in critical areas."). The assessment considers the individual's status at the time of the legal proceedings, and therefore may become an issue any point in the process, up to and including sentencing. *See* Drope v. Missouri, 420 U.S. 162, 181 (1975).

[138] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 341-42 (5th ed. 2009). The proceedings following the finding of incompetency, if any, occur pursuant to a state's civil commitment law, and may result in involuntary hospitalization or other compelled treatment, services, or habilitation.

[139] Defendants with mental retardation can receive training to become competent, but because their cognitive understanding is not likely to increase significantly. *See* Ellis and Luckasson, *supra* note 4, at 424 ("legal rules which focus upon the prospect of 'curing' mentally ill people may not address the condition of retarded people in an appropriate or useful fashion.").

[140] *See* Godinez v. Moran, 509 U.S. 389, 402 (1993) (acknowledging that competency doctrine has a "modest aim" and minimal requirements). *See also* Bonnie, *supra* note 18, at 429 (noting that, "the threshold of competence for defendants with mental retardation is set

a perversely ineffective legal response to people with mental retardation. First, the notion that people with mental retardation might be "restored" to competency over a period of weeks or months of treatment, makes no sense. Moreover, people with such intellectual disabilities typically make every effort to conceal their disability from others and therefore may evade efforts to detect their incompetency.[141] The problem is magnified further because defense counsel typically lack the time, funding, and specialized training required to effectively interview – or even identify – clients with mental retardation.[142] The combined result of policy limitations on the doctrine, resistance among some individuals to being considered incompetent, and difficulties in identifying mental retardation is an under-referral of these defendants for competency evaluation.[143]

2. Insanity

The circumstances relating to the insanity doctrine are similar in that insanity law provides an extremely rare way out of the criminal justice system for defendants with mental retardation. This defense focuses in on the culpability question, as it considers whether a defendant should be held criminally accountable despite a mental condition[144] which may have impaired his understanding of his conduct and/or capacity for self-control during commission of the offense.[145] While definitions of insanity vary widely across the country, legal formulations often break down into two different prongs: a cognitive prong ("I didn't know what I was doing" and/or "I didn't know it was wrong")[146] and/or a volitional prong ("I could

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relatively low in practice."); Ronald Schouten, *Commentary: Training for Competence—Form or Substance?*, 31 J. AM. ACAD. PSYCHIATRY L. 202, 203 (2003).

[141] *See* MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 240-41 (1994); Ellis & Luckasson, *supra* note 4, at 430.

[142] *Id.*, at 422-423 (explaining difficulties for defense counsel in identifying and responding to clients with mental retardation.).

[143] *Id.*, at 420-24 (hypothesizing reasons for this "pattern of under-referral").

[144] While the term "insanity" or, as it appears in some legal standards, "mental disease or defect" may suggest that the defense applies only to those with mental illnesses, mental retardation, itself or in combination with mental illness, may also serve as the basis of an insanity defense. *See, e.g.*, United States v. Jackson, 553 F.2d 109, 113-14 (D.C. Cir. 1976) ("It is accepted in this jurisdiction that mental retardation is a mental defect that will support an insanity defense.").

[145] Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1202 (2000).

[146] The Supreme Court has separated the cognitive prong into a cognitive prong and a "moral" one, placing elements such as the ability to distinguish between right and wrong and the ability to understand the wrongfulness of one's actions into the "moral capacity" category. *See* Clark v. Arizona, 548 U.S. 735, 750 (2006) ("Seventeen States and the

not control my own actions").[147] In most jurisdictions, an insanity acquittal results in automatic commitment to a public mental health facility, up to and including indefinite hospitalization.[148]

Regardless of the exact terms of a particular insanity law, the doctrine is limited and has become even more so in recent decades. While public perception may be that the defense is commonplace,[149] studies suggest that less than 1% of defendants in criminal cases try to use the insanity defense and, of these, only one-quarter use it successfully.[150] A 36-state survey found an average of 33.4 insanity acquittals per state, per year from 1970 to 1995, many of them in misdemeanor prosecutions.[151]

Most commentators identify the tipping point leading to the limitation of the defense as the 1982 trial of John Hinckley, who successfully employed it to obtain an acquittal after his assassination attempt on then-President Ronald Reagan.[152] In the political upheaval which followed the verdict, many jurisdictions limited the reach of the doctrine. Congress, for instance, dramatically reduced the scope of its

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Federal Government have adopted a recognizable version of the *M'Naghten* test with both its cognitive incapacity and moral incapacity components.").

[147] The Model Penal Code's definition of insanity, for instance, allows for these prongs to be argued in the alternative, requiring that an individual "lacks substantial capacity *either* to appreciate the criminality [wrongfulness] of his conduct *or* to conform his conduct to the requirements of the law" due to a mental disease or defect. Model Penal Code § 4.01(1) (emphasis added).

[148] *See* A. Thomas Elliott, *Procedures for Involuntary Commitment on the Basis of Alleged Mental Illness*, 42 U. COLO. L. REV. 231, 234-35.

[149] *See* Daniel J. Nusbaum, Note, *The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of "Abolishing" the Insanity Defense*, 87 CORNELL L. REV. 1509, 1512 n.9 (2002) (citing studies showing the public's dramatic overestimation the use of the insanity defense).

[150] Laura Reider, *Toward A New Test for the Insanity Defense: Incorporating the Discoveries of Neuroscience into Moral and Legal Theories*, 46 UCLA L. Rev. 289, 342 (1998) (citing study on use of insanity defense in eight states).

[151] Carmen Cirincione & Charles Jacobs, *Identifying Insanity Acquittals: is It Any Easier?*, 23 LAW & HUM. BEHAV. 487, 487 (1999). A National Mental Health Association report found that as many of 86% of insanity pleas occur in nonviolent felonies and misdemeanors. NATIONAL MENTAL HEALTH ASSOCIATION, MYTHS & REALITIES: A REPORT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE 20-21 (1983).

[152] See Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal in the Twenty-first Century*, 56 AM. U. L. REV. 51, 98-99 (2006); RICHARD J. BONNIE ET AL., A CASE STUDY IN THE INSANITY DEFENSE: THE TRIAL OF JOHN W. HINCKLEY, JR. 121-27 (2d ed. 2000); HENRY J. STEADMAN ET AL., BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM 35-39 (1993); Russell D. Covey, *Criminal Madness: Cultural Iconography and Insanity*, 61 STAN. L. REV. 1375, 1427 (2009).

insanity doctrine with the Insanity Defense Reform Act of 1984.[153] Some jurisdictions abandoned the defense all together.[154] Over twenty jurisdictions replaced or added to the insanity defense with the more punitive verdicts "Guilty but Mentally Ill" or "Guilty but Mentally Retarded."[155] Unlike an insanity verdict, these verdicts constitute criminal findings, imposing culpability, and criminal sentences, notwithstanding a person's inability to control himself or understand his own actions.[156] The trend has continued long past Hinckley's case. In 1993, for instance, Arizona halved its insanity rule, eliminating the possibility for defendants to claim they did not understand what they were doing.[157] Ultimately, a number of factors have conspired to limit the insanity doctrine's influence: its legislative demise, its relatively extreme diagnostic requirements, even its unpopularity with the public.[158]

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[153] Under the IDRA, defendants are entitled to acquittal only if a "severe" mental disease or defect, rendered him or her "unable to appreciate the nature and quality or wrongfulness of his [or her] acts." 18 U.S.C.A. § 17(a). At the same time, Congress changed the Federal Rules of Evidence to prohibit experts from opining as to whether the defendant possessed (or not) the requisite mens rea. Fed. R. Evid. 704(b).

[154] *See, e.g.*, IDAHO CODE ANN. § 18-207 (2008), KAN. STAT. ANN. § 22-3220 (2007); MONT. CODE ANN. § 46-14-102 (2007); UTAH CODE ANN. § 76-2-305(1) (2008).

[155] HENRY J. STEADMAN ET AL., BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM 35-39 (1993) (summarizing state and federal reform efforts following the Hinckley case). *See also* Bradford H. Charles, *Pennsylvania's Definitions of Insanity and Mental Illness: A Distinction with a Difference?*, 12 TEMP. POL. & CIV. RTS. L. REV. 265, 268 (2003).

[156] Practically speaking, a person found "Guilty but Mentally Retarded" is usually first sentenced in the criminal system without regard to his or her disability and only then may or may not receive any special treatment or services related to his or her mental condition. *See* DRESSLER, *supra* note 138, at 365 ("The effect of a GBMI verdict is that the convicted party receives the sentence that would otherwise be imposed if she were found guilty; after sentencing, however, she may receive psychiatric care in the prison setting or in a mental institution."). Alternatively, a defendant found "guilty but mentally ill" may receive mental health treatment until his mental health has rebounded, at which point he must serve the remainder of his imposed sentence. *See, e.g.*, Alaska Stat. § 12.47.050 (2004).

[157] In 1983, post-*Hinckley*, Arizona became one of the few states to put the burden of proof on the defendant to prove his sanity by clear and convincing evidence. *Id.* § 13-502(C). A decade later, the alternative form of the insanity rule was eliminated: since 1993, a defendant must prove that he or she "did not know the criminal act was wrong." *Id.*. § 13-502(A).

[158] Michael L. Perlin, "*His Brain Has Been Mismanaged with Great Skill": How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 42 AKRON L. REV. 885, 899 (2009) ("The notion of any defense that allows criminals to claim they were not responsible for acts that they admittedly did is rejected in total by a significant percentage of the population.").

3. Diminished Capacity

Litigants who are not at the extremes of incompetence or insanity have been forced to rely on just one other doctrine to address their difference in culpability during the case-in-chief: the diminished capacity defense.[159] As suggested below, diminished capacity has so many different iterations in jurisdictions across the country that it is somewhat difficult to define succinctly.[160] Most commonly, however, courts and commentators use the term as the Model Penal Code does, to refer to evidence of a mental abnormality offered to show that the defendant was not capable of forming the necessary mental state for a particular crime,[161] or, in other words, to negate mens rea.[162]

In theory, a doctrinal vehicle that permits evidence of mental retardation to challenge or negate mens rea sounds like a cozy response to the unjustified presumption of culpability mens rea represents for these defendants. It also provides a platform for such evidence where the disability does not rise to the level of insanity. In reality, however, there are two problems with relying on diminished capacity to cure such ills for defendants with mental retardation: limitations on its application in practice and limitations on its application in theory. In practice, its application is extremely limited, and even in theory, it fails to address some of the subtler examples of diminished culpability among this population.

First, like tests for insanity and competence, the defense has been so watered down, particularly over the past half-century, that it has become a virtually useless defense for most people with mental disabilities. Some states have banned diminished capacity defenses altogether.[163] Others only

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[159] While sometimes called a defense (here and elsewhere), it is more aptly considered an issue of evidentiary relevance or sufficiency: an argument that the government has not met its burden to prove the defendant had the requisite mens rea beyond a reasonable doubt. *See* Hendershott v. People, 653 P.2d 385, 393-94 (Colo. 1982).

[160] *See* DRESSLER, *supra* note 138, at 367-76 (suggesting that there are at least four different versions of diminished capacity and stating that "[b]ecause of the confusion pervading this area of the law, any generalization about it is just that – a generalization subject to exceptions and inconsistencies").

[161] Jennifer Kunk Compton, *Expert Witness Testimony and the Diminished Capacity Defense*, 20 AM. J. TRIAL ADVOC. 381, 382 (1996).

[162] *See* Model Penal Code § 4.02(1) (1985) ("Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove the defendant did or did not have a state of mind that is an element of the offense").. Ambiguities in legal opinions and dicta make it unclear how many states actually apply the Model Penal Code standard, but Dressler notes that the figure seems to be between eleven and fifteen states. DRESSLER,*supra* note 138, at 369.

[163] Arizona, for instance, prohibits evidence of a defendant's mental disorder for anything but an insanity defense, including evidence to negate mens rea. Clark v. Arizona, 548 U.S. 735, 742 (2006) (finding that Arizona's limitation on the use of evidence of mental illness

allow the defense in murder prosecutions.[164] Very few states permit the defense outside of specific intent crimes.[165] Thus, in Wyoming or Connecticut, if a defendant can prove that he could not have fully premeditated a killing, he can use the defense to preclude a first-degree murder conviction.[166] But the same defendant has no claim in his assault or rape case, since these are general intent[167] crimes. Moreover, some states have restricted the use of the diminished capacity defense to those crimes which have "lesser-included-offenses," so that negating mens rea for murder means that the individual would still be found guilty of the lesser-included offense of second-degree murder.[168]

While the genesis for such a narrow reading of the doctrine is not universally agreed upon, much like insanity, the appearance of the diminished capacity defense in some high-profile cases seems to have chilled public and political support for the doctrine. In particular, the successful use of the defense in the 1979 murder trial of Dan White despite his apparently cold-blooded killing of then San Francisco Mayor George Moscone and fellow Board of Supervisors member Harvey Milk, may have contributed to public backlash against the diminished capacity doctrine.[169]

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comports with due process). *See also* Cal. Penal Code § 25(a) (2010) (abolishing the diminished capacity defense); People v. Carpenter, 627 N.W.2d 276, 283 (Mich. 2001) (precluding evidence of mental abnormality to negate specific intent); Chestnut v. State, 538 So.2d 820 (Fla. 1989) (same); Bethea v. United States, 365 A.2d 64, 89-90 (D.C. 1976) (same).

[164] *See* Compton, *supra* note 161, at 392 n.96 (citing cases).

[165] *See, e.g.*, *State v. McVey*, 376 N.W.2d 585, 588 n.1 (Iowa 1985) (listing over a dozen jurisdictions which limit diminished capacity defenses to specific intent crimes); *see also* People v. Guzikowski, 1999 Mich. App. LEXIS 2339, 3 (Mich. Ct. App. 1999) ("[D]iminished capacity is only a partial defense and it is only available in cases where the prosecution is required to prove a specific intent.").

[166] *See* State v. Evans, 523 A.2d 1306, 1323 (Conn. 1987); Olsen v. State, 67 P.3d 536 (Wyo. 2003).

[167] A general intent crime "requires only that a defendant intend to do the act that the law proscribes." U.S. v. Gonyea, 140 F.3d 649, 653 (6th Cir. 1998) (citations omitted).

[168] *See, e.g.*, State v. Sessions, 645 P.2d 643, 644 (Utah 1982) (noting that ". . . in most cases [diminished capacity] reduces a defendant's guilt to a lesser included offense which requires only a general intent."); McCarthy v. State, 372 A.2d 180, 182 (Del. 1977) (the "purpose of [a diminished capacity defense] is [. . .] negating the requisite intent for a higher degree of the offense" to prove "that in fact a lesser degree of the offense was committed." (quoting 22 A.L.R.2d 1228, 1238 (1968)).

[169] Miguel A. Méndez, *Diminished Capacity in California: Premature Reports of Its Demise*, 3 STAN. L. & POL'Y REV. 216, 222 (1991); John Rubin, *The Diminished Capacity Defense*, 92 ADMIN. OF JUSTICE MEM. Sept. 1992 at 1, 1 (Sept. 1992). DRESSLER, *supra* note 138, at 347. For a fascinating account of how the media distorted the diminished capacity defense in the case, *see* Carol Pogash, *Myth of the 'Twinkie Defense': The Verdict in the Dan White Case Wasn't Based on his Ingestion of Junk Food*, S.F. CHRON, Nov. 23,

Limitations on the doctrine champion social control over individualized retribution, and they offer a clearly drawn line for efficient enforcement. But the line makes little sense if the underlying rationale for diminished capacity is that a defendant, while responsible for certain impermissible conduct, should be considered less culpable because of his mental disability.[170] The application only to specific intent crimes or those that have lesser-included included offenses winds up being arbitrary.[171] The only real justification for such a limitation seems to be a concern that, if defendants charged with general intent crimes can negate the mens rea element, the defendant might be exonerated altogether – an untenable result from a social control standpoint,[172] but the only one which makes sense if there is any significance to a state of mind requirement.[173]

The second, more serious problem with the existing diminished capacity doctrine is that even if diminished capacity permits evidence to negate mens rea in all crimes[174] (as it does in Colorado), it still generally fails to account for the difference in culpability for defendants with mental retardation who demonstrate intent to commit a particular act, but still are less blameworthy than other adults who do not have mental retardation.[175]

Negation of mens rea due to a mental abnormality is extremely rare, making the diminished capacity defense of limited utility.[176] Thus, a person

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2003, at D1.

[170] *See, e.g.,* State v. Correra, 430 A.2d 1251, 1253 (R.I. 1981)

[171] *See* Compton, *supra* note 161, at 392 (stating that the "courts have given no logical answer to this dichotomy" of allowing evidence of mental abnormality to negate specific intent, but not general intent").

[172] Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. OF CRIM. L. & CRIMINOLOGY 1, 13 (1984) (noting that a "major argument" against the use of the diminished capacity defense is "that its adoption will endanger the public.").

[173] Courts have also justified limiting the diminished capacity defense as a way to distinguish it from the insanity defense. State v. McVey, 376 N.W.2d 585, 587 (Iowa 1985). As the Colorado Supreme Court suggested in *Hendershott v. People*, 653 P.2d 385, 394 (Colo. 1982), however, such an argument would suggest that legal sanity is a "proxy for mens rea," which it is not.

[174] Approximately fifteen states and the Model Penal Code allow for evidence of diminished capacity to be introduced to negate the mens rea of any crime. DRESSLER, *supra* note 138, at 369-70.

[175]. *See* People v. Conley, 411 P.2d 911 (Cal. 1966) (overturning a first-degree murder conviction even though defendant met all elements, including requisite mens rea, because he was not aware of general obligation to act within the confines of society's laws). *See also* Stephen J. Morse, *Diminished Capacity: A Moral and Legal Conundrum*, 2 INT'L J.L. & PSYCHIATRY 271, 282 (1979) (describing the *Conley* court as " . . . justify[ing] a manslaughter instruction . . . " by " . . . imparting independent meaning into the concept of malice aforethought.").

[176] *See, e.g.*, Morse, *Undiminished Confusion in Diminished Capacity*, *supra* note 172, at 41-42; Arenella, *Convicting the Morally Blameless*, *supra* note 19, at 1524.

with mental retardation may, because of his disability, react impulsively and excessively to provocation, may be goaded to act by a manipulative peer, may not realize his own strength or the boundaries of social interactions – but he may, all the same, "knowingly" or "purposefully" take a swing at another.[177] It is not an accident or conduct based on a hallucination or a delusion. A diminished capacity defense would therefore offer no succor to the defendant charged with even aggravated assault, despite the fact that it is a specific intent crime with lesser included offenses, if there were evidence that he had the requisite mens rea. The fact that he might have acted criminally only because of his mental retardation would not provide him any sort of legal cover or acknowledgment of his diminished culpability. These limitations render the current diminished capacity doctrine an interesting, but insufficient means for addressing cognitive difference in the criminal law.

B. Interstitial Perversions

In lieu of legitimate doctrinal tools for addressing a wide berth of defendants with mental retardation who are not at the extremes of incompetence or insanity and who are unlikely to be able to avail themselves of diminished capacity, defense counsel and courts must seek options outside the substantive criminal law. Sentencing is the most legitimate mop used to clean up what may otherwise be a mess of doctrinal injustice, but it is an imperfect instrument in many regards, and it does not prevent the initial spill. More problematic are tools such as juror nullification[178] or the use of unorthodox defenses. Such responses may threaten other criminal law pillars as advocates seek to address the defendant's mental retardation in a legal system which largely deems the condition irrelevant.

1. Sentencing

It is in large part because of failings of the diminished capacity doctrine that some scholars and judges addressing cases in this area have urged replacing it with a sentencing scheme that would account for

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[177] *See* Part II, *supra* for more extensive discussion of how mental retardation may affect criminality.

[178] Juror nullification "occurs when a jury--based on its own sense of justice or fairness refuses to follow the law and convict in a particular case even though the facts seem to allow no other conclusion but guilt." Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239, 239 (1993).

differences in culpability.[179] Sentencing has the great advantage of being one of the few moments in the criminal process where decisionmakers are accustomed to individualized determinations generally and on the question of blameworthiness specifically.[180] As a result, it is the last, and most prominent, bastion of culpability mitigation.[181] This is particularly true in the death penalty context, where mental disability is a required mitigation factor at sentencing.[182] Some states include mental retardation as a mitigating factor for sentencing purposes or exclude people with mental retardation from mandatory minimums.[183] But even where state sentencing guidelines direct decisionmakers to consider particular factors, the trial court has the discretion to determine the weight of any enhancement or mitigation.[184] The ability to consider mental capacity as a mitigating factor thus does not translate into a mandate to do so.

Moreover, the reliance on discretion of a judge or jury—particularly unfettered discretion—does not guarantee that justice will be done. Indeed, there may be reason to fear that jurors, or even judges, will sentence more, rather than less, harshly because of the defendant's mental retardation if they have the option to do so.[185] Some have even argued that people with

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[179] *See, e.g.*, Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 863-65 (1977); Morse, *Undiminished Confusion in Diminished Capacity*, *supra* note 172 at 25-28.

[180] *See, e.g.*, Arenella, *The Diminished Capacity and Diminished Responsibility Defenses*, *supra* note 179, at 863-65 (explaining that courts are better able to tailor sentences to match culpability than juries); Gardner, *supra* note 26, at 652 (arguing that individualized determinations of a defendant's "evil motive," background, and character is an open-ended speculation better suited to the competence of judges engaged in sentencing *after* a determination of guilt has been made).

[181] Judge Leventhal noted that "the most that it is feasible to do with lesser disabilities is to accord them proper weight in sentencing.'" United States v. Moore, 486 F.2d 1139, 1179 (D.C. Cir. 1973) (Leventhal, J., concurring) (quoting Model Penal Code 2.09 cmt. at 6 (Tentative Draft No. 10, 1960).

[182] *See* Penry v. Lynaugh, 492 U.S. 302, 328 (1989). In the wake of *Atkins*, the Court has continued to emphasize that "impaired intellectual functioning is inherently mitigating," even in cases where there appears to be no nexus between the person's mental retardation and the offense. *See* Tennard v. Dretke, 542 U.S. 274, 287 (2004).

[183] *See* People v. Watters, 595 N.E.2d 1369, 1373–74, 1378 (Ill. App. Ct. 1992) (holding that trial court had discretion to disregard mandatory sentence of incarceration for sexual assault where defendant had IQ of about 60).

[184] *See* State v. Blackstock, 19 S.W.3d 200, 211 (Tenn. 2000) (describing trial court's discretion to mitigate sentence by providing examples of statutory mitigating factors, including whether defendant's culpability was reduced due to mental or physical condition and whether unusual circumstances of offense show that intent was unlikely). Tennessee law requires judges determining a sentence to consider evidence offered in mitigation but does not mandate that particular factors be considered or particular weight be given to such factors. TENN. CODE ANN. §§ 40-35-113, 210(b)(5) (West 1997).

185 *See Atkins*. 536 U.S. at 321 ("[R]eliance on mental retardation as a mitigating factor

mental retardation are over-represented in the criminal justice system because key players in the system, including judges and lawyers, are unsure how to "deal with this population in a professional manner."[186]

But even mandating a particular sentencing mitigation strategy based on mental retardation would not solve the problem of diminished culpability among defendants with mental retardation. That is, sentencing is an after-the-fact way of ameliorating the problem that current law is unfair because it fails to allow defendants with mental retardation "doctrinal purchase" to argue for mitigation.[187] The consequences of a criminal conviction, including not only the sentence, but the trauma of the process and the collateral consequences which may follow a conviction cannot be undone because a judge or jury shows mercy on a defendant at the sentencing stage.

2. Ad Hoc Defense Strategies

The lack of "doctrinal purchase" – means that defense counsel are sometimes desperate to introduce evidence of mental retardation, even if it means putting forth an inappropriate defense. Knowing that the case is really about a person's mental retardation, but lacking a way to introduce the evidence through mens rea or diminished capacity, for instance, an attorney may seek to put on an insanity, duress, entrapment, or other defense, simply to get the evidence before the jury. To introduce the idea that a client was more of a patsy or a victim of his co-defendant's manipulation, for instance, defense counsel might seek to present a duress defense. In essence, these lawyers are seeking juror nullification based on mental retardation since the law otherwise makes an individual's cognitive capacity largely irrelevant.

Juror nullification may be one way to accurately reflect community standards of justice or distaste for the criminal justice status quo, particularly as applied in a given case.[188] But this is hardly the most

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can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.")

[186] Jeffrey Schlit, *The Mentally Retarded Offender and Criminal Justice Personnel*, 46 Exceptional Children 16 (1979).

[187] Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 296 (2003). And so Morse proposes a "Guilty But Partially Responsible" verdict—if defendant's capacity for rationality was substantially diminished at the time of the crime and that that diminished rationality substantially affected his or her criminal conduct." *Id.* at 299-300.

[188] *See, e.g.*, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 680 (1995) (arguing that jury nullification is a tool African-Americans should use to "prevent the application of one particularly destructive instrument of white supremacy—American criminal justice—to some African-American

efficient way to manage the injustice of prosecuting those who lack culpability, and it may have unintended pernicious effects. Lawyers are not permitted to encourage jurors to "nullify" the law directly.[189] Moreover, some suggest that such nullification is an affront to the rule of law and the need for predictability in the criminal justice system.[190] To the extent that people identify immorality or injustice in the criminal justice system, for instance, they may be less inclined to comply with the law themselves.[191]

More significantly, this strategy is only available where judges actually permit counsel to introduce the evidence in the first place. Judge Jack B. Weinstein would have judges "exercise their discretion to allow nullification by flexibly applying the concepts of relevancy and prejudice and by admitting evidence bearing on moral values," but few judges could be presumed exercise their discretionary muscle in quite this way.[192]

IV. JUSTIFICATIONS FOR THE STATUS QUO

If the psychosocial and neuroimaging evidence makes it so clear that people with mental retardation are not as blameworthy as other criminal defendants, then why are they so disproportionately represented in the criminal justice system? Put differently, why do judges, prosecutors, and defense counsel – and even the law itself – perpetuate the legal fiction that these individuals are equally culpable? There are a number of potential explanations, but none suffices to justify the nearly wholesale rejection of bedrock principles underlying the doctrine of mens rea.

A. Dangerousness/Social Control

Preventing "dangerousness" may be the biggest concern of all: acknowledging differences in culpability means that at least some

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people); Jack B. Weinstein, 30 CARDOZO L. REV. 1, 121-22 (2008) (noting that jurors may nullify convictions where they believe the law to be unjust or in conflict with their conscience).

[189] Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959, 988 (2006) ("[A]rguing for nullification is forbidden by professional canons of ethics).

[190] Darryl K. Brown, *Jury Nullification within the Rule of Law*, 81 MINN. L. REV. 1149, 1151-54 (1997).

[191] *See* Paul H. Robinson, Geoffrey P. Goodwin, & Michael D. Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 2013-15 (2010) (demonstrating empirically that "knowledge of systemic injustice can negatively affect not only compliance, but also other relevant variables such as cooperation and moral credibility.").

[192] Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239, 241 (1993).

dangerous people will be free of legal consequences and supervision, simply because of their mental retardation. The criminal law often seeks a difficult balance between social control and individual liberties, and the fear that a whole class of defendants would avoid taking (full) responsibility may just tip the scales too heavily towards individual liberties. Indeed, some might argue that a person with mental retardation may be even more dangerous than an average offender.[193] After all, releasing a person who has difficulty understanding norms and applying rules in new situations sounds like a recipe for recidivism. Nonetheless, other administrative and civil procedures could be used to accommodate this interest in incapacitation, without compromising individual liberties through unfair, criminal punishment.

First, criminal law is about more than simply social control or management of undesirable conduct. There are already legal categories of people who cannot be subject to criminal processes and/or punishments, no matter how great the harm they have caused may be: the incompetent and the criminally insane. To be sure, our discomfort with potentially absolving people from criminal responsibility explains why we have limited application of these categories to extreme cases, namely, those who are very young and those who are very mentally impaired.[194] However rare these categories may be, they do offer a precedent of excluding certain people from criminal liability and sanctions all together.

The context of insanity and competency is also instructive because it provides a model for resolving some of those concerns related to dangerousness of people in this marginal population. In most jurisdictions, when a court officially finds a person to be incompetent (and not likely to regain competency) or legally insane, the individual is not simply released to re-enter society. Rather, the person may be *civilly* committed (in the case of incompetency) or *criminally* committed (in the case of insanity), to the public mental health system. Whether an additional individual is committed through a civil process (competency) or as an automatic result of

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[193] *See, e.g.*, *Atkins*, 536 U.S. at 321 (noting that "reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury"); Reid, *supra* note 90, at 22 ("Even when an attorney recognizes that mental retardation may legitimately mitigate his or her client's responsibility for the offense, it's difficult to convey that successfully to a jury."). *But see* Arenella, *The Diminished Capacity and Diminished Responsibility Defenses*, *supra* note 179, at 857 (1977) (noting that "an offender's mental abnormality may be an aggravating, as well as a mitigating, factor if it makes him dangerous to society.").

[194] *See* Part III.A.1-2, *infra*, for a more extensive overview and critique of the doctrines of incompetency and insanity, specifically with regard to defendants with mental retardation.

a verdict (insanity), the commitment is meant to include supervision, treatment, rehabilitation, or training, all of which are theoretically designed to ensure that the person is not a danger to self or others due to his or her mental condition. Commitment may be involuntary and may range from limited outpatient services to long-term inpatient care in a secure facility, depending usually on the severity of both the person's condition and likelihood of dangerousness. Such measures would seem to address some utilitarian concerns for safety of the community, up to and including the need for incapacitation and victim protection.

B. Malingering

Skeptics have often raised concerns that certain legal benefits that might inure to people with mental disabilities should be used sparingly, if at all, due to the potential for fraud or malingering.[195] Expert evaluation, however, can typically detect malingering.[196] The mental retardation diagnosis in particular, requires not only IQ testing, but also ongoing impairment in at least two areas of adaptive functioning, and a record of onset prior to the eighteenth birthday.[197] Chromosomal analysis, while not necessary for a diagnosis, may help establish or confirm the diagnosis and, more specifically, its etiology.[198]

A "false negative" diagnosis of mental retardation likely occurs more frequently than a "false positive." That is, people with mental retardation tend to do everything possible to hide their disability or pass as a person of average intelligence. Thus, while policymakers may fear that people will fake their way out of legal responsibility, the bigger concern is those who actually inadvertently "fake" their way in.[199] People with mental retardation, not necessarily cognizant of the seriousness of their situation, may not reveal their disability to parties like their counsel, who, in turn,

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[195] Atkins, 536 U.S. at 353 (Scalia, J., dissenting) (raising fear that *Atkins* decision will inspire legions of defendants to "feign" symptoms of mental retardation).

[196] *See* Steven J. Mulroy, *The Duress Defense's Uncharted Terrain: Applying it to Murder, Felony Murder, and the Mentally Retarded Defendant*, 43 SAN DIEGO L. REV. 159 (2006) ("Most experts testify that retardation cannot be feigned").

[197] *See* Jonathan L. Bing, *Protecting the Mentally Retarded from Capital Punishment: State Efforts since* Penry *and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59, 89-90 (1996) (listing reasons there is no real risk of defendants faking a mental retardation diagnosis, including need for early identification, need to demonstrate not only low IQ but impaired adaptive functioning, and procedural hurdles such as the burden and standard of proof).

[198] Curry et al., *supra* note 6, at 468-72. *See also* note 77, *supra*, and accompanying text.

[199] *See* Bing, *supra* note 197, at 90 (including defendant's interest in not being perceived as having mental retardation among reasons that make malingering unlikely).

may not be trained to identify the condition. Identifying mental retardation is complex because a proper diagnosis requires the attentiveness and cooperation of defense counsel and others working with the defendant (such as family members, law enforcement or court staff) to notice and potentially raise the issue with the court.[200] Yet these same parties may have legitimate strategic reasons precluding them from doing so.[201]

C. Administration

Requiring a more intensive analysis of mens rea based on mental retardation also raises administrative concerns. Sorting individuals with mental retardation from those who do not has become an issue in the wake of the Supreme Court's decision in *Atkins*, which involved the final penalty phase of trial.[202] Additional procedural problems exist when assessing mental retardation at the outset of the criminal process.[203] Certainly, an official diagnosis of mental retardation does include extensive cognitive and adaptive testing by experts in mental retardation (not just psychiatrists).[204] Moreover, age of onset requirements may entail an investigation into school or other records to demonstrate manifestation of the disability prior to age 18.[205] Particularly to the extent that government

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[200] *See* Appelbaum & Appelbaum, *supra* note 11, at 483-84.

[201] In some cases, for instance, defense counsel may wish to conceal a client's mental disability to obtain a short sentence or other disposition, rather than risk a longer term civil commitment based on a finding of incompetency. *See* James K. McAfee & Michele Gural, *Individuals with Mental Retardation and the Criminal Justice System, the View from the States' Attorneys General*, 26 MENTAL RETARDATION, 5, 8 (1988). *See also* Wright Williams & Jean Spruill, *The Criminal Justice/Mental Health System and the Mentally Retarded, Mentally Ill Defendant*, 25 SOC. SCI. MED. 1027, 1030-31 (1987) (finding that among defendants with mental illness found incompetent, those also diagnosed with mental retardation served more time incarcerated in hospitals/jails than their incompetent peers without mental retardation) (1987).

[202] Weithorn, *supra* note 69 (identifying difficulty in clinical and conceptual identification of mental retardation).

[203] Kelly Christine Elmore, Atkins v. Virginia*: Death Penalty for the Mentally Retarded – Cruel and Unusual – The Crime, not the Punishment*, Note, 53 DEPAUL L. REV. 1285, 1338-39 (2004)

[204] James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL AND PHYS. DISABILITIES L. REP. 11, 14 (2003) (detailing elements and expertise required for proper evaluation of mental retardation).

[205] Penny J. White, *Treated Differently in Life but not in Death: The Execution of the Intellectually Disabled after* Atkins v. Virginia, 76 TENN. L. REV. 685, 709-10 (2009)..

contests the finding, the process can become even more complex and costly.[206]

In addition, there are a host of conceptual and diagnostic issues which may lead to complex and costly litigation battles, some of which have been raised in the context of *Atkins*. Who gets to decide the definition of mental retardation and by what standard of proof must it be demonstrated? What happens to a person whose IQ score puts her just over the line of mild mental retardation, but diagnosticians insist her adaptive impairments make a mental retardation diagnosis appropriate?[207] What if the score is alleged to be due to "the practice effect" (an increase which may occur when the subject has sat through a number of IQ exams) or some other contestable phenomenon?[208]

It would be naïve to dismiss these potential issues – and the costs and time needed to resolve them. But it would also be naïve to think that concerns and litigation battles in capital cases are likely to be fought with equal vigor in every case, particularly those where the political and public safety concerns are far less pronounced. People who are suspected of having mental disabilities are routinely screened for competency evaluations and may be given at least a tentative diagnosis of mental retardation at that time.[209] In relatively minor cases, prosecutors may well stipulate to such a finding.

Once we have established who has mental retardation, we may still have a second administrative concern, the even more difficult issue of determining with precision what significance a diagnosis of mental retardation has for a person's culpability. In making his argument for character-based system of culpability, which would allow defendants "to contest…their status as blameworthy moral agents" Peter Arenella similarly recognizes that such a change could come with significant administrative (and other) costs.[210] This concern may really boil down to a suspicion about the reliability of mental health testimony in general, particularly as it

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[206] Weithorn, *supra* note 69, at 1204 ("Much post-Atkins litigation has involved disputes about whether a particular defendant is or is not 'mentally retarded.'").

[207] *See* Ellis, *supra* note 204, at 13 (rejecting statutory reliance on particular IQ cut-off limits as "difficult to administer" despite their appeal for policymakers).

[208] *See* Weithorn, *supra* note 69, at 1231 (raising these and other issues which could affect who may be considered a person with mental retardation in post-Atkins litigation).

[209] Moreover, some jurisdictions mandate that court-appointed competency evaluators have expertise in developmental disabilities. GARY B. MELTON, ET. AL., PSYCHOLOGICAL EVAULATIONS FOR THE COURTS 155 (Guilford Press 3d ed. 2007) (1987).

[210] Arenella, *Convicting the Morally Blameless*, *supra* note 19, at 1616.

might result in "unjust" freedom for "dangerous" individuals.[211] Psychiatry and psychology are not exact sciences, and a connection between a diagnosis and culpability is a particularly complicated endeavor. On the other hand, this is precisely the legal question that we ask judges and juries to consider whenever sanity is at issue. Such determinations are not beyond the reach of the whole criminal justice system.

None of these administrative concerns justifies our ignoring the unfair prosecution and punishment of people with mental retardation. However, they should be factors considered in any proposal for change, and do inform the proposal I offer in Part V, below.

D. Prosecutorial Burden

The more the government needs to prove about a defendant's intent, the more difficult it is for prosecutors to indict a felony, to ensure that a defendant can be detained pretrial, or to prevail at trial.[212] By contrast, eliminating the mens rea requirement, as strict liability crimes do, is a prosecutorial piece of cake.[213] Thus, accounting for the lack of culpability among people with retardation might untenably complicate the job of prosecutors and make it harder to secure convictions.

Critics have argued that requiring proof of more complex mens rea requirements – anything beyond the Model Penal Code "knowing" and "reckless" standards – is at best unnecessary and at worst impossible.[214] Determining whether a person drove "willfully and maliciously" through a neighbor's fence, for instance, may require a complex examination of the person's motivation for her conduct, something which may be unknowable or unconscious.[215] The Code defines culpability in relatively simple terms,

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[211] The government made a similar policy argument in its opposition to the application of a diminished capacity defense to non-specific intent crimes in Colorado. Hendershott v. People, 653 P.2d 385, 395 (Colo. 1982).

[212] *Cf.* Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 404 (1993) (noting that the strict liability standard "affords both an efficient and nearly guaranteed way to convict defendants.").

[213] In the seminal case of *Morissette v. United States*, Justice Jackson acknowledged this prosecutorial advantage: "The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries." Morissette, 342 U.S. 246, 263 (1952).

[214] Gardner, *supra* note 26, at 652 (observing that before the division between criminal and tort law, the focus was on "compensating and buying off the feud" between parties, so the law "likely paid little attention to niceties of culpability").

[215] *Id.* at 714-15.

while providing basic procedural protections including notice, efficient use of charging decisions, predictability of outcomes, and limited prosecutorial overreaching.[216] Notably, however, the standard of proof changes through the criminal justice process, from "probable cause" to "preponderance of the evidence" to "beyond a reasonable doubt," giving the government time to build its case, and allowing it some leeway to demonstrate the defendant's intent with weaker evidence in the early stages of the case.

But ease of prosecution is only one criminal justice value. It must be weighed against a need to punish only blameworthy conduct. While culpability may be further "plumbed" in affirmative defenses and at sentencing, courts have been careful to preserve an initial culpability determination by including a mens rea requirement as the rule, rather than the exception, in the vast majority of criminal laws.

E. Net Widening

There is also a concern that abandoning the traditional mens rea analysis will produce an overwhelming number of claims from people with a range of disabilities and other issues.[217] Such a concern is not surprising. Any change in criminal practice or procedure which could result in some form of leniency is going to be subject to concerns about both floodgates and slippery slopes. If we apply more scrutiny to mens rea for people with mental retardation, the argument goes, why not those who act under the influence of drugs or alcohol? Or due to mental illness? Indeed, in some jurisdictions, any of these conditions can serve as the basis for a diminished capacity defense, precisely because the person's thought processes may be compromised.

Line drawing due to mental retardation, however, can limit this net-widening concern. Many jurisdictions preclude diminished capacity defenses based on intoxication, and we could similarly draw a bright line here to exclude people with what might be considered a self-imposed impairment.[218] Distinguishing between mental retardation and mental

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[216] *Id.* at 686-88.

[217] *See, e.g.*, Robert C. Topp, *A Concept of Diminished Responsibility for Canadian Criminal Law*, 33 U. TORONTO FAC. L. REV. 205, 213 (1975) (citing "fear that once the proverbial floodgates are opened, the courts will be deluged" with such pleas of diminished capacity).

[218] *See* Morse, *Diminished Rationality, Diminished Responsibility*, *supra* note 187, at 300-01 (explaining that "voluntary ingestion of mind-altering substances, including ethanol (alcohol), is culpable" as opposed to a mental disorder, which is a "non-culpable"—and therefore mitigating—condition). Of course, addiction experts would counter that alcoholism or drug addiction are no more self-imposed than mental retardation or mental

illness is also fairly commonplace in both the medical and legal communities. As demonstrated above, a diagnosis of mental retardation is multi-layered, hard to fake, and quite distinct from a mental illness, even as the two conditions may commonly co-occur in the same individual. Tellingly, the common fear that eliminating the death penalty for people with mental retardation would result in a flood of petitions based on mental retardation has not been borne out.[219] To the contrary, courts have been able to manage the claims, and a substantial number of them have turned out to be valid.[220]

F. What Would We Do if We Knew?

Perhaps the most cynical version of why we disregard the reduced culpability of defendants with mental retardation is that we simply do not have a good alternative. If we determined, as we have with juveniles, that people with mental retardation were, as a class, less culpable, we would not have a particularly satisfying set of services or treatment plans to send them to in lieu of a sentence of incarceration. Prisons are inappropriate, dangerous placements for people with mental retardation. It is beyond dispute that people with mental retardation tend to be subject to more disciplinary infractions and more abuse during incarceration,[221] while rehabilitative services for this population are even less common than treatment for people with mental illnesses.[222] But public mental hospitals, which are the most secure alternative for people found to be not guilty by reason of insanity, are often equally inappropriate.[223] Mental retardation,

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illness. *See generally* Alan I. Leshner, *Addiction is a Brain Disease, and it Matters*, 278 SCI. 45 (1997).

[219] *See* John H. Blume, Sheri Lynn Johnson & Christopher Seeds, *An Empirical Look at* Atkins v. Virginia *and its Application in Capital Cases*, 76 Tenn. L. Rev. 625, 628 (2009) (finding that "*Atkins* has not opened floodgates of non-meritorious litigation" and noting that just seven percent of death row inmates have filed *Atkins* claims).

[220] *See id.* at 628-29 (noting that "nearly forty percent of all defendants who allege mental retardation have, in fact, proved it," a rate "substantially higher" than any other typical post-conviction claim).

[221] *See* Ellis & Luckasson, *supra* note 4, at 479-80 (citation omitted) (acknowledging that mentally retarded prisoners receive more disciplinary infractions).

[222] *Id.* at 480 (citing United States v. Masthers, 539 F.2d 721, 729 n.56 (D.C. Cir. 1976) ("[P]risons provide few, if any, meaningful programs or services for the retarded."), Bertram S. Brown & Thomas F. Courtless, *The Mentally Retarded in Penal and Correctional Institutions*, 124 AM. J. PSYCHIATRY 1164, 1164, 1169 (1968), Santamour & West, *supra* note 221 at 28-29).

[223] Reid, *supra* note 90, at 21 (explaining that in mental hospitals "treatment is designed for the insane, not the retarded. Because the treatments offered in mental hospitals will have no effect, retarded persons end up warehoused indefinitely in inappropriate settings.").

unlike mental illness, is not typically ameliorated with a regimen of medications.

The only viable option for state-imposed measures designed specifically to protect the community and to serve the needs of this population, is civil commitment to a state's system for "training and rehabilitation" of people with mental retardation. As noted above, this system theoretically has the advantage of targeting this population, rather than lumping them in with people who have no intellectual disabilities or people with mental illnesses. It also has a more appropriate theoretical basis. That is, civil commitment is purportedly geared toward protecting the safety of the community rather than imposing punishment for blameworthy conduct. It may be far from ideal to use the criminal justice system as a funnel into such an impoverished mental health services system, but at least it is a more legitimate forum to address a population that lacks the consciousness, choice, and control to be deemed criminally culpable.

V. PROPOSALS

Abandoning the myth that a showing of mens rea for defendants with mental retardation indicates actual culpability requires that we rethink how the criminal law addresses these adults. We have three choices. First, change the substantive law, so that mens rea would require a different, more specific showing of state-of-mind for defendants with mental retardation. Second, remove defendants with mental retardation from the jurisdiction of adult criminal court and address their conduct through a problem-solving court. Third, create a new doctrine that makes mental retardation relevant to the question of culpability. As set forth below, only the third option responds precisely to the prevailing myth of mens rea, without creating an overly complex infrastructure or causing other untenable problems.

A. Change the Substantive Law

If the assumptions undergirding the use of mens rea as an indicia of culpability are valid for people of average intelligence, might there be a way to demonstrate that those assumptions are well-founded for a particular individual with mental retardation? In other words, we could change the law of mens rea so that the government would bear the burden of showing that a person charged with arson has a capacity to understand his or her own actions, as well as social norms (consciousness); can make thoughtful and independent decisions (choice); and is able to control his conduct to a

reasonable degree (control) – not just that he "purposely" set a fire. This could be a pretrial showing, out of the purview of the jury, and if the government could meet its burden, it would only be required to meet the traditional mens rea standard before the jury. If the government was unable to meet this initial burden, it would be precluded from prosecuting the case as charged. Alternatively, the jury could hear the expanded evidence with regard to mens rea. We could call this "mens rea illustrated," since it clarifies, rather than heightens, the usual narrow mens rea standard.

A model of this latter version used to occur in California homicide cases. There, the definition of "malice" required for a first-degree murder conviction required the state to show something akin to consciousness: that the defendant was aware of an obligation to act within the general body of the law regulating society at the time of the offense.[224] Further, the definition of deliberation and premeditation – also required for a first-degree charge – mandated a showing analogous to "choice": that "the accused maturely and meaningfully reflected upon the gravity of his lethal act."[225]

The mens rea illustrated approach has a number of advantages. First and foremost, it addresses the underlying culpability gap, as only those who were actually blameworthy would face criminalization for their actions. And the questions it seeks to answer are not wholly unfamiliar to forensic experts. The "consciousness" and "control" questions, for example, find analogies in the cognitive and volitional prongs of the insanity test described in Part III.A, above. It also treats people with mental retardation as individuals, acknowledging that some function at a much more sophisticated level than others and therefore could and should be subject to both the rewards and the challenges that individuals without mental retardation face. For developmental disability advocates, this so-called "dignity of risk," can be a key element of achieving community integration and the ideal of normalization.[226]

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[224] People v. Conley, 411 P.2d 911, 918 (1966).

[225] People v. Wolff, 394 P.2d 959, 975 (1964). Notably, however, the California legislature repealed these provisions in the wake of the Dan White case, narrowing the cognitive elements required for a first –degree murder conviction. *See* Méndez, *supra* note 169, at 221 (describing change of murder law in California after Dan White case, including unintended consequences of "simplifying" the state-of-mind elements).

[226] Robert Perske, *The Dignity of Risk*, *reprinted in* WOLF WOLFENSBERGER, THE PRINCIPLE OF NORMALIZATION IN HUMAN SERVICES 194, 194–95 (1972) (advocating opportunities for people with mental retardation to take risks commensurate with their functioning)); *see also* WOLFENSBERGER, *supra*, at 27 (arguing for "normalization," which urges maximum integration of people with mental retardation into conditions and norms of mainstream society).

On the other hand, "mens rea illustrated" raises problems of evidence and administration. First, there may be a difficult issue of proof, as lawmakers or courts seek to establish precisely what constitutes "consciousness," "choice," and "control," and whether those terms might need to be individuated for each offense. There could be legal or practical problems if courts found these to be vague standards.[227] Even if such a conflict did not arise, demonstrating mens rea illustrated would seem to require a (potentially expensive) expert battle for every case involving a defendant with mental retardation. To the extent that the expert testimony about mens rea goes before a jury, there may be a concern that the expert(s) could inappropriately encroach on the role of the jury in determining the legal question of whether the defendant had the requisite mens rea. Finally, mens rea illustrated makes no accommodation for strict liability offenses, such as statutory rape, which have essentially no mens rea requirement but rely on a different set of assumptions for their validity.[228]

Unfortunately, this option may just be too complex and expensive to administer across the board, especially for offenses as insignificant as misdemeanors, which comprise the vast majority of charges against people with mental retardation.[229] In addition, to the extent that charges, particularly serious ones, are dismissed when prosecutors fail to meet their burden to show mens rea illustrated, prosecutors, judges, and lawmakers may have insurmountable political objections to the proposal.

B. Create an Alternative Court

Alternatively, cases with defendants with mental retardation could proceed in a different kind of forum or court. While an appealing alternative in some regards, the costs – in terms of dignity, administration, infrastructure, and overbreadth/judicial philosophy – make this an imprecise fit for the problems presented in this paper. The two nearest analogies in terms of alternative court systems are the juvenile justice system and so-called "problem-solving courts," such as mental health courts.

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[227] *See In re Winship*, 397 U.S. 358, 364 (1970) (establishing constitutional requirement that government must prove every element of crime beyond a reasonable doubt).

[228] *See* Nevins-Saunders, *supra* note 46, at 1081, 1113 (arguing that prosecutors should have to prove assumptions underlying strict liability i.e., that defendant understands both that people below a certain age cannot legally consent to sexual activity and that the particular complainant was underage).

[229] William I. Gardner, Janice L. Graeber & Susan J. Machkovitz, *Treatment of Offenders with Mental Retardation*, *in* TREATMENT OF OFFENDERS WITH MENTAL DISORDERS 332 (Robert M. Wettstein ed. 1998).

The analogy to juvenile court for this population is obvious, yet problematic. That is, despite their chronological age of adulthood, people with mental retardation are often referred to by their "mental age."[230] They are also routinely infantilized by parents, caregivers, and policymakers.[231] And it is, in part, this behavioral comparison that has led to legal comparisons. Analogies between children and adults with mental retardation have been made in areas such as competence[232] and the death penalty.[233] A natural extension of this comparison might suggest that adult defendants with mental retardation should simply be charged in juvenile court. After all, the juvenile justice system is premised, in part, on the idea that young people are not as blameworthy as adults.[234] Perhaps adults with mental retardation should also be subjected to less punitive, less stigmatic, and more limited, rehabilitation-oriented proceedings with greater confidentiality and individualized treatment.

While this option is compelling for these reasons, it ultimately fails on both theoretical and practical grounds. First, there are significant differences between people with mental retardation and juveniles, reasons which go to the underlying justification for a separate juvenile court. That is, the notion of rehabilitation – that a young person can, with the proper supervision and services, reform and outgrow any criminal impulses – is not quite the same for adults with mental retardation. Indeed, while neuroscience research has revealed that juveniles typically outgrow the impulse control, risk-seeking behaviors that make them less culpable than

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[230] A "mental age" technically means that a person has an IQ score equivalent to what a typical person of a particular age might expect. Thus, an adult with a "mental age" of seven scored what a typical seven-year-old would score on the same test. Dorothy Griffiths, Sexuality and People Who Have Intellectual Disabilities, in A COMPREHENSIVE GUIDE TO INTELLECTUAL & DEVELOPMENTAL DISABILITIES 573, 573 (Ivan Brown & Maire Percy eds., 2007).

[231] *See, e.g.*, Steven Reiss & Betsey A. Benson, *Awareness of Negative Social Conditions Among Mentally Retarded, Emotionally Disturbed Outpatients*, 141 AM. J. PSYCHIATRY 88, 88-89 ("Retarded people tend to be treated like children long after they become adults.").

[232] Ellis & Luckasson, *supra* note 4, at 417 (pointing to "the accepted analogy between the presumed incapacity of children and mentally retarded adults to form criminal intent.").

[233] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 567, 575 (2005) (analogizing diminished culpability of people with mental retardation to diminished culpability of youth and finding analogy basis to constrain execution of individuals who committed crimes before age eighteen).

[234] The exceptions, of course, are juveniles who have been removed to adult court, typically because they meet a certain age threshold and they are charged with a sufficiently serious offense. M. A. Bortner, *Traditional Rhetoric, Organizational Realities: Remand of Juveniles to Adult Court*, 32 CRIME AND DELINQUENCY 53, 54 (1986).

adults,[235] there is no such predictable change in the brain of an adult with mental retardation: they will never "outgrow" their condition.[236] People with mental retardation can be trained to learn different skills and adaptive behaviors, but their capacity for development is much more limited. The services and supports necessary for this growth would be completely different than that demanded by juvenile population, exponentially expanding the range of services that courts and pretrial service agencies need to employ.

Of course, the primary objection to treating people with mental retardation in juvenile court is that to do so would be infantilizing and degrading to this class of adults. Notwithstanding the common use – even in this article – of the shorthand "mental age" of an adult with mental retardation, the convention is not necessarily an apt reflection of the individual's physical, emotional, and learning experiences.[237] Segregating people with mental retardation into a separate system where they would enjoy fewer rights than other adult criminal defendants[238] could, unnecessarily impinge efforts at integration.[239] Accordingly, disabilities advocates would be hard pressed to support such a proposal, and without their support, such a dramatic change in policy and law would be difficult.

Sending this population to an adult "problem solving" court solves the problem of infantilization, but raises other concerns. Most significantly, the theory behind problem-solving courts such as drug courts or mental health courts is, as the name suggests, that they solve "the problem" allegedly underlying a person's criminality, whether that problem is addiction or failure to obtain mental health treatment.[240] But even assuming that the theory works for defendants in these other scenarios, how could one

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[235] *See* ELIZABETH S. SCOTT & LAURENCE D. STEINBERG, RETHINKING JUVENILE JUSTICE 44-50 (2008); Mary Beckman, *Crime, Culpability, and the Adolescent Brain*, 305 SCI. 596 (2004).

[236] *See supra* notes 6, 142 and accompanying text.

[237] *See* Dorothy Griffiths, Sexuality and People Who Have Intellectual Disabilities, in A COMPREHENSIVE GUIDE TO INTELLECTUAL & DEVELOPMENTAL DISABILITIES 573, 573 (Ivan Brown & Maire Percy eds., 2007).

[238] While *In re Gault*, 387 U.S. 1 (1967), made clear that juvenile defendants are entitled to certain key procedural protections enjoyed by their adult counterparts, there remain differences in the rights of juvenile versus adult defendants, such as entitlement to a jury trial. *See McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (denying juveniles the right to jury trial).

[239] Garcia & Steele, *supra* note 17, at 841-43, 857-58 (rejecting use of a juvenile justice philosophy that equates adults with mental retardation and children in the criminal justice system or otherwise completely segregates defendants with mental retardation from other adult defendants).

[240] Bruce Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L. J. 1055, 1055 (2003).

"solve" the "problem" of mental retardation?[241] With constant training, management, or supervision, a person might learn, for instance, the difference between appropriate (legal) and inappropriate (illegal) sexual conduct,[242] but the lesson would need to be, like mental retardation, virtually lifelong.[243]

To the extent that specialty courts have addressed the needs of this population, they have done so in conjunction with mental health courts.[244] The risk in this is that people with mental retardation have often not fared well when lumped together with people with mental illnesses. Their treatment regimes, providers, behaviors, and outcomes can all be very different from people with mental illnesses.[245] But their relative numbers sometimes mean that their particular issues are not addressed when they are competing for the services and expertise of limited providers.

Aside from dignity and administration issues, the principal problem with forum-based solutions is reach. A specialty court promises repeat players and institutions, building knowledge and services more attuned to a particular population. For even assuming they become as widespread as other problem-solving courts, these "mental retardation" dockets are unlikely to reach many defendants, particularly those in smaller jurisdictions. Based only on geography, then, significant numbers of people with mental retardation would still have no policy or doctrinal relief for their unjust criminalization.

C. Flip the Presumption

If the problem with prosecuting defendants with mental retardation is the misplaced presumption of their culpability, then the most appropriate response may be a presumption which tilts in the opposite direction. That is, we should assume that this class of defendants cannot really be culpable and therefore cannot fulfill the requisite element of mens rea. As a consequence, charges against these defendants should be presumptively

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[241] *Cf.* President's New Freedom Comm'n on Mental Health, Achieving the Promise: Transforming Mental Health Care in America (2003), available at http://www.mentalhealthcommission.gov/reports/FinalReport/downloads/FinalReport.pdf (noting that "recovery from mental illness is now a real possibility").

[242] AINSWORTH & BAKER, supra note 86, at 97-103, 115-17 (emphasizing importance of sex education for this population).

[243] *See* MONAT, *supra* note 91, at 28 (noting that process of sex education for even mildly mentally retarded adults "will take longer, need to be more concrete, and be a repetitive system of delivery of information").

[244] *See supra* note 4.

[245] *See* Ellis & Luckasson, *supra* note 4, 423-25.

dismissed. Such a solution could be perceived as overbroad, and unduly disregarding another primary purpose of criminal law: public safety. Accordingly, prosecutors and courts could adopt a bifurcated response based on the dangerousness of the offense instead of relieving all defendants with mental retardation from all criminal liability.

Under a two-tiered approach, the presumption would apply to those charged with non-violent offenses.[246] Under certain circumstances related to public safety, the government could overcome the presumption and proceed even in such non-violent cases, as detailed below. For the most serious offenses, however, the individual could be tried and convicted as usual,[247] although the sentence would be limited to the least restrictive means necessary to secure the safety of the community. While such an approach is not a perfectly titrated response to the diminished culpability problem for this population,[248] it balances concerns about convicting and punishing morally blameless individuals against concerns about public safety, and it makes the most political, administrative, and theoretical sense of all the proposed options.

Procedurally, such cases would depend on a mix of cabined discretion and bright line rules. The bright line rules delineate to whom the doctrine would apply (defendants with mental retardation, unless the legislature or local rules expanded the target population), and for what offenses (violent vs. non-violent). Beyond these baseline points, discretion would come into play. Some cases involving defendants with mental retardation who may not be truly culpable are already informally managed through prosecutorial charging decisions in the first place.[249] This proposal

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[246] The actual fault line between the two types of offenses is likely to become a controversial political or judicial question, and I leave to others the task of making finer distinctions than the rough "violent"/"non-violent" divide I have offered here. *See, e.g.*, Jeff Bellin, *Crime Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 22-31 (SMU Dedman Sch. of Law Legal Studies Research Paper No. 64, Oct. 14, 2010), *available at* http://ssrn.com/abstract=1692312 (proposing a strategy for classifying offenses into categories of severity). Nonetheless, I draw this line recognizing that the presumption of non-culpability runs across all offenses. Accordingly, any countervailing argument must be both legitimate and narrowly tailored. If public safety is the justification for disregarding the lack of culpability among defendants with mental retardation, it should be at issue only in cases where a real threat to safety, i.e., violence, is alleged.

[247] In such cases, mental disability would remain a mitigating factor. *See* Penry v. Lynaugh, 492 U.S. 302, 328 (1989).

[248] For instance, the proposal would not even presumptively dismiss the arson defendant mentioned throughout this paper, given that the offense raises countervailing public safety concerns.

[249] Scholars have acknowledged the phenomenon of courts using discretion to address mental retardation where doctrinal tools are not available. *See* Donald H.J. Hermann,

would *mandate* that prosecutors engage in a more formalized, holistic approach to every case with a defendant reasonably known or suspected to have mental retardation. Where there is some indication that the individual may not have acted but for his mental retardation or may otherwise have been impaired due to his cognitive impairment, the government would act on its own to dismiss or decline to prosecute a case. To effectively make such a determination, prosecutor offices would need to develop teams with some specialization in mental retardation.[250] Building in such expertise is one way to ensure that the power of prosecutorial discretion is wielded effectively.

Resting with prosecutorial discretion, however, is a far from perfect solution, given the contrary incentives prosecutors face to assign blame and secure convictions.[251] To counteract this possibility and to accommodate the very real possibility that defense counsel may be the first to recognize a defendant's intellectual disability, judges could also entertain a defendant's motion to dismiss on the basis of mental retardation. As with questions of competency, such a motion, if contested, could invoke a pre-trial hearing.[252] Beyond establishing a person's diagnosis, the hearing could also be a forum for considering the government's argument for overcoming the presumptive dismissal. To provide some structure for the court's decision (and to provide a framework for prosecutors considering discretionary decisions in these cases), courts could weigh a number of enumerated factors not unlike those relevant under the Bail Reform Act for pretrial release.[253] Considerations relating to a defendant's culpability and the need to begin or continue a prosecution could include (1) community ties and support, (2) rehabilitative or supervisory programs in place, (3) nature and severity of cognitive disability and co-occurrence of other disabilities, (4) nature of the offense (particularly considering the alleged role of the

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Howard Singer, & Mary Roberts, *Sentencing of the Mentally Retarded Criminal Defendant*, 41 ARK. L. REV. 765, 789-90 and accompanying notes (citing case law to support claim that judges should (and do) mitigate post-trial sentences for defendants who are *willing* to plead guilty but are "*de facto* incompeten[t]" to do so, and therefore would otherwise miss out on the sentencing benefit of a guilty plea). *See also* fns. 9 & 10, *supra*, for other examples of parties using (and failing to use) discretion to address differences related to mental retardation that legal doctrine fails to account for.

[250] In smaller jurisdictions, such teams could be available regionally for consult with more dispersed or smaller offices.

[251] *See* Smith, *supra* note 23, at 153 n.106 (quoting U.S. Department of Justice policy of seeking to charge and convict defendant of most serious offense, as well as maximum supportable sentence).

[252] It is also possible that a culpability and competency hearing could be combined into one proceeding.

[253] 18 U.S.C. § 3142(g).

defendant and his or her relationship to other parties involved), and (5) defendant's criminal history. Assuming the government has not *sua sponte* decided not to prosecute, it would be the defendant's burden to prove his mental retardation, by a preponderance of the evidence, but it would be the prosecution's burden to prove that the case should go forward, notwithstanding the relative insignificance of the charge. In other words, the presumption is that, where the defendant has mental retardation and the offense is nonviolent, the case will be dismissed.

First, and most obviously, this approach provides a comprehensive legal acknowledgment that a person's mental retardation may affect his criminality even if it does not occur on the extremes of insanity or incompetency. Moreover, unlike sentencing, bifurcation addresses culpability at the front end of the criminal process, rather than presuming culpability with a criminal conviction and merely seeking to mitigate harm after the fact (and after the trauma of a trial) through a sentencing reduction.[254] In so doing, this bifurcated solution provides the missing doctrinal hook that leads to the perversions of justice for people with mental retardation in the criminal justice system.

The proposal is also feasible. It would gain the support of advocates for people with mental retardation. Unlike a juvenile court add-on or an absolute rule that no one with mental retardation would ever be held criminally liable, it does not infantilize, and it does preserve some "dignity of risk," without overstating the capacities or culpability of a vulnerable population.[255] At the same time, the fact that public safety concerns are addressed so explicitly in the plan makes it much more politically palatable to prosecutors, legislators, and other law enforcement-oriented policy-makers.

Administratively, the plan would be easier to implement than the potentially burdensome and complex task of proving up the capacities of mens rea illustrated or developing an alternative court system. At its worst, it could engender a clash of experts over the diagnosis of mental retardation that would trigger its application. But, as noted in Part V, assigning a bifurcated system lowers the stakes for the parties in most cases and, presumably, their thirst for battle.

Bifurcation is also consistent with sentencing justifications for people with mental retardation, including retributivism, deterrence, rehabilitation, and incapacitation. First, there is no retributive justification

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[254] Much like competency, the issue of a person's mental retardation (and the according protections this proposal would offer him or her) could be raised at any point in the process, by any party with knowledge of the defendant's condition.

[255] *See* Denno, *supra* note 123, at 359 (articulating principle that there is no "dignity" in treating people with mental retardation "as though they possess capacities that they do not in fact have.").

for punishing people who are not culpable. *A fortiori*, they do not *deserve* punishment. Second, prosecuting and sentencing people mental retardation will not deter crime. As the Supreme Court stated in *Atkins*, these individuals are highly unlikely to have the cognitive capacity to perform the cost/benefit risk analysis that underlies any effective deterrerence-based strategy.[256] Third, rehabilitation, another fundamental theory of punishment, is possible for people with mental retardation. As noted with regard to problem-solving courts, these individuals can be taught, educated, and trained – within certain limits – so it is conceivable that they could obtain supports and services that could minimize the risk of future offenses.[257] However, such rehabilitation would need to be specialized and ongoing to be effective.[258]

In most circumstances, then, we are left with incapacitation as the final justification for punishment. To the extent that a person is so violent that he or she poses a threat to the community, some might argue that culpability is irrelevant and that any distinctions based on mental capacity are insignificant. Imposing criminal prosecution and, potentially, penalties, despite the very real likelihood that a person lacks blameworthiness, is not a concession to be taken lightly. Yet, allowing prosecutions to proceed in such instances is an acknowledgment of political reality and public safety.

Given the severity of consequences underlying the incapacitation justification, however, particularly for defendants with mental retardation (who routinely suffer more during incarceration than their counterparts of average intelligence),[259] any criminal proceeding and subsequent sentence based on incapacitation should occur under the least restrictive means necessary to ensure the safety of the community. Supervision in a group home or placement in a secure mental health facility with appropriate habilitation services, for instance, may appropriately serve to incapacitate a defendant with mental retardation, without subjecting him or her to particularly inhumane treatment in a prison.

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[256] Atkins v. Virginia, 536 U.S at 320. Not imposing criminal liability on defendants with mental retardation is also unlikely to deter criminal conduct of those who do not have mental retardation, as people of average intelligence would only assess their risk based on similarly situated individauls (i.e., those without mental retardation). *Id.*

[257] *See* Ellis & Luckasson, *supra* note 136, at 477 n.353 ("[C]ommunity treatment centers reveal that community based corrections can serve as a practical alternative to conventional imprisonment" (citing R. L. Harbach, *An Overview of Rehabilitation Alternatives*, *in* REHABILITATION AND THE RETARDED OFFENDER 122, 132-35 (P. Browning ed. 1976)).

[258] This kind of programming is very unlikely to occur in any meaningful way in a prison setting, as correctional facilities have limited rehabilitative services and programs targeting people with mental retardation are virtually nonexistent. *See* Joan Petersilia, *Prisoner Reentry: Public Safety and Reintegration Challenges*, 81 THE PRISON J. 360, 361 (2001) ("[T]he corrections system retains few rehabilitation programs"). *See also supra* note 229.

[259] *See* note 11, *supra*.

In some sense, this, too, may be an overbroad response. It does not directly address the individual's culpability in a particular case. But as a response to what I have argued is an over-inclusive mens rea standard for more serious offenses, this proposal begins to reset the balance. Moreover, any overbreadth could compensate for the many other ways that a person's mental retardation affects his or her criminal outcomes in disproportionately negative ways.[260]

CONCLUSION

Culpability is what makes criminal law a moral venture, rather than simply a regulatory scheme. It is simply unjust to punish people who are not blameworthy, and the criminal law, like Holmes's poor dog, has acknowledged the difference that intention makes.[261] Accordingly, in virtually all criminal cases, there is at least some requirement of culpability, a requirement typically imposed through the mens rea element. We can make this association between culpability and mens rea only because we presume that defendants have certain baseline capacities, to wit: an awareness of social and legal norms (and of their own conduct); an ability to reflect and make independent decisions about whether to comply with those norms; and an ability to execute those decisions thoughtfully, or otherwise restrain untoward impulses.

For defendants with mental retardation, however, the assumption that they have these underlying capacities is simply inapt. Decades of psychosocial research on this population demonstrates that that members of this group are not at all likely to have the consciousness, choice, and control that imbue a finding of mens rea with culpability. While its depths are just beginning to be plumbed (and its current findings are limited for defendants with mental retardation as a class), neuroimaging research also has begun to reveal evidence that these individuals are less culpable than people with average intelligence.

The fact that people with mental retardation are different from other criminal defendants has not gone totally unnoticed by the criminal law. But frequently, there is no doctrinal support for the introduction of evidence regarding this difference. This is particularly true outside the very limited sieves of the insanity, competency, and diminished capacity doctrines.

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[260] *See* Atkins, 536 U.S. at 320-21 (noting "special risk of wrongful execution" for defendants with mental retardation because of increased likelihood of compelled confessions, diminished ability to assist counsel, difficulty serving as credible witnesses, etc.)

[261] *See* note 26, *supra*.

And, lacking viable alternatives, defendants may be compelled to take unorthodox measures to have courts consider the truly relevant information about their intellectual disabilities. While sentencing can also cure some doctrinal ills for this population, there is no just reason that a vulnerable population of defendants should have to be put through a traumatic process – especially one which wrongfully presumed their blameworthiness, convicted them, and saddled them with collateral consequences – just to have that conviction later "mitigated."

This article has proposed a remedy which meets this doctrinal problem at its source. By flipping the inaccurate presumption of culpability attending the element of mens rea, it seeks to reverse the overbroad criminalization of people with mental retardation. While the flip enables us to dismiss non-violent charges against this class of defendants, political and administrative concerns beg for a different result for those charged with violent offenses. In these more serious cases, defendants might be subject to normal criminal proceedings, but at least their sentences would need to be narrowly tailored to the least restrictive alternative to satisfy an express theory of punishment – a standard which does not typically apply to criminal dispositions.

It may seem like a radical proposal to presumptively dismiss a criminal case simply due to a person's diagnosis or mental health condition. But given the research on people with mental retardation, and our theoretical and doctrinal tradition of holding only blameworthy people criminally accountable, it is the status quo which seems radical. We cannot refer to mens rea as a bedrock of criminal law if it so fails this population of defendants.

It is safe to say that a number of defendants – those with mental illness or head injuries or drug addictions or even just irrational moments due to grief or trauma – might similarly believe that mens rea fails to adequately capture their culpability (or, more likely, lack thereof). Advocates for these populations may therefore seek to avail themselves of a doctrine which presumptively dismisses non-violent cases against their clients. Not all of these individuals are similarly situated. Those with brain injuries that happened to have occurred in adulthood, for instance, may resemble people with mental retardation in every regard but for the fact that the onset of their condition occurred after age 18. At first blush, there would certainly seem to be no principled reason for treating members of the two groups differently. But more work will need to be done to assess whether the psychosocial and/or neurological evidence bears out this analogy. And, even if it does, there may be political, administrative, or

even theoretical differences which justify differential treatment for different classes of defendants.

In the end, we may question whether our current mens rea doctrine is an appropriate measure for a sufficiently large number of defendants to really be the default rule. But whether the doctrine is revised in general or there are additional carve-outs, it is critical that defendants with mental retardation not be charged, convicted, and sentenced for offenses for which they are not truly culpable.