

**IQ, CULPABILITY, AND THE CRIMINAL
LAW’S “GRAY AREA”: WHY THE RATIONALE
FOR REDUCING THE CULPABILITY OF
JUVENILES AND INTELLECTUALLY-
DISABLED ADULTS SHOULD APPLY TO
LOW-IQ ADULTS**

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I. INTRODUCTION

For too long, the criminal law has only provided legal protections at the guilt/innocence phase, namely, the phase at which a jury determines if a defendant is guilty of the crime for which the defendant is charged, or defendants who exist on the margins: namely, those who suffer from mental retardation, insanity, or are too young to appreciate the consequences of criminal conduct.¹ In so doing, the criminal law has failed to address the gray area in which most defendants reside, and for which all defendants lack sufficient legal protections. The term gray area refers to all defendants who, although not considered legally insane or intellectually disabled under relevant legal

1. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that the Eighth Amendment bars the execution of defendants for capital crimes committed before the age of eighteen).

standards, nonetheless suffer from significant cognitive or psychological impairments that render them less culpable for criminal conduct. For example, at the guilt/innocence phase of a criminal trial, the legal system offers few protections (if any) for defendants afflicted with mental illnesses, personality disorders, neurological impairments, or borderline intellectual functioning. This is fundamentally unjust, contrary to relevant empirical evidence regarding the effects of cognitive, psychiatric, and psychological disorders on culpability. Moreover, it results in profoundly unjust sentences that, in many cases, are entirely disproportionate to a defendant's culpability. As such, the time has arrived for courts and legislators to recognize that defendants need not be profoundly mentally retarded, insane, or under the age of eighteen to trigger legal and constitutional protections at the guilt/innocence phase that account for a defendant's reduced culpability or, in certain cases, a finding of zero culpability.

The extant constraints in the criminal justice system are primarily responsible for the system's failure to adequately assess culpability and, concomitantly, to fairly adjudicate guilt and innocence. In most jurisdictions, unless a defendant is intellectually disabled (i.e., an IQ below 70) or under the age of eighteen, the insanity defense is the sole basis upon which adult criminal defendants, some of whom suffer from severe psychiatric, psychological, and personality disorders, may be deemed insufficiently culpable for violations of the criminal law.² In the vast majority of criminal prosecutions, however, the insanity defense rarely succeeds because, in addition to showing that a defendant suffers from severe cognitive or psychiatric deficits, a defense lawyer must demonstrate that the defendant did not know the difference between right and wrong—a nearly impossible standard to meet.³ As such, a significant portion of convicted criminals—particularly those on death row—spend years in state and federal prisons while suffering from, severe mental illnesses, intellectual disabilities, personality disorders, and physical impairments (e.g., brain damage).⁴ And although these inmates

2. See Jennifer S. Bard, Opinion, *Unjust Rules for Insanity*, N.Y. TIMES (Mar. 13, 2002), <https://www.nytimes.com/2002/03/13/opinion/unjust-rules-for-insanity.html>.

3. See Scott Sandlin, *Insanity Defense Rarely Succeeds; Mentally Ill Face Complex Process*, ALBUQUERQUE J. (Aug. 28, 2005), <https://www.abqjournal.com/news/metro/384959metro08-28-05.htm>.

4. See Henry J. Steadman, et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 PSYCHIATRIC SERVICES 761, 764 (2009). The authors' study underscored the prevalence of inmates who suffer from mental illness:

The final, weighted prevalence rates of current serious mental illness for recently

may not be considered legally insane, they are certainly less culpable than inmates who do not suffer from such impediments and, in some instances, are not culpable at all.⁵ Simply put, they are the face of injustice and a symbol of perceived, but not actual, moral depravity. The result is that state and federal prisons house inmates whose culpability vastly differs, yet who are nonetheless subject to substantially similar—and undoubtedly punitive—sentences.⁶

For these reasons, this article strives to remedy the glaring inadequacies in the legal system's treatment of defendants who, although not intellectually-disabled or legally insane, suffer from significant impairments that in some circumstances render them less culpable—or not culpable at all—for criminal conduct. Specifically, this article focuses on adult criminal defendants with borderline intellectual functioning (i.e., an IQ between 71 and 85) and argues, by analogizing to juvenile offenders and intellectually-disabled adults, that such defendants are not culpable for certain criminal acts and, in many circumstances, are less culpable than defendants with IQs in the normal or above-average ranges.⁷ Indeed, low-IQ defendants like juveniles and intellectually-disabled adults exhibit behaviors and characteristics, particularly low-impulse control, that indicate a less or even non-culpable

booked jail inmates were 14.5% for men and 31.0% for women across the jails and study phases. When these estimates are applied to the 13 million annual jail admissions in 2007, assuming that the proportion of female admissions was 12.9%, there were about two million (2,161,705) annual bookings of persons with serious mental illnesses into jails. If a primary SCID diagnosis of PTSD was included as a serious mental illness, the weighted estimates increased to 17.1% for men and 34.3% for women.

Henry J. Steadman, et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 PSYCHIATRIC SERVICES 761, 764 (2009).

5. This article does not refer to a defendant's competency to stand trial; rather, the article analyzes the extent to which low-IQ, but not intellectually-disabled, adults lack culpability or, at a minimum, have reduced culpability, for charged offenses.

6. See Elizabeth Saunders, *Not Guilty as Charged: The Myth of Mens Rea for Defendants with Mental Retardation*, 45 U.C.D. L. REV. 1419, 1421-22 (2012). Professor Saunders explains as follows:

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. The recent proliferation of mental health courts, judicial panels, and media coverage demonstrates 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 agencies.

Id.

7. See WECHSLER ADULT INTELLIGENCE SCALE-REVISED (Pearson, 4th ed. 2008). The term "low-IQ adult" refers to individuals with an IQ score of 71 to 85 on a standardized intelligence scale, such as the Wechsler Adult Intelligence Scale Revised (4th Edition).

mental state. Accordingly, the law should provide sufficient doctrinal protections for these defendants, who reside in the gray area of criminal law and currently lack sufficient remedies to assert a cognizable defense at the guilt/innocence phase of a criminal trial.

Part II discusses the extant case law regarding juveniles and intellectually-disabled adults, including the landmark Supreme Court decisions that provide vital legal protections for both groups. Part III analyzes the relevant scientific evidence showing that low-IQ adults suffer from the same deficiencies as juveniles and intellectually-disabled adults, and argues that low-IQ adults should receive the same legal protections. Part IV explains how low-IQ adults, like juveniles and intellectually-disabled adults, often possess less culpable mental states and are thus unable to form the requisite *mens rea* to be found guilty of particular crimes. Part V develops a practical and workable standard whereby courts can discern which classes of low-IQ adults warrant a reduced or no-culpability finding, and addresses relevant counterarguments, including why it is not sufficient to simply address low IQ as a mitigating factor at the sentencing phase of criminal adjudications.

II. THE SPECIAL LEGAL PROTECTIONS FOR JUVENILES AND INTELLECTUALLY-DISABLED ADULTS

The Supreme Court's jurisprudence recognizes that juveniles and intellectually-disabled adults are less culpable and not culpable for various criminal acts.⁸ This recognition is predicated upon the fact that juveniles, due to underdeveloped brains, are not fully capable of controlling their impulses, and that intellectually-disabled adults likewise struggle to control their impulses or appreciate the consequences of specific actions.

A. THE LEGAL PROTECTIONS AFFORDED TO JUVENILES

In the United States, juveniles are considered less culpable for criminal conduct than adults because juveniles' brains are not fully developed, which leads to impulsive behavior that is not predicated on higher-level reasoning skills or deliberative decision-making.

1. JUVENILES AND BRAIN DEVELOPMENT

Relevant neuroscientific evidence, as developed through

8. See *Roper v. Simmons*, 543 U.S. 551 (2005).

functional magnetic resonance imaging, demonstrates that the brain does not fully develop until the age of twenty-five. Until the brain fully develops, juveniles will struggle with the ability to control impulses and appreciate the consequences of their actions.⁹ More specifically, although juveniles' "level of intelligence and ability to reason are generally indistinguishable from adults by the age of 16," research shows that juveniles are "much less capable of making sound decisions under stressful conditions or when peer pressure is strong."¹⁰ Indeed, the differences in juveniles' and adults' brains are attributable to two developmental processes that affect reasoning and impulse control:

In the past few decades . . . neuroscientists have discovered that two key developmental processes, myelination (the disposition of a layer of fatty tissue around nerve fibers, providing the insulation necessary to efficiently transmit electrical signals from one neuron to the next) and pruning of neural connections, continue to take place during adolescence and well into adulthood. Pruning is thought to be crucial because individuals are left with far too many neurons after the massive growth spurt that takes place in the brain during the first years of life and, again, just before puberty. As the brain matures, certain neural connections are used more than are others, as individuals learn, gain skills, and progress through life. Although the mechanism is not fully understood, during adolescence and into adulthood, the lesser-used connections shrivel away leaving those that remain more efficient.¹¹

Importantly, this research establishes that "the brain regions responsible for basic life processes and sensory perception tend to mature fastest, whereas the regions responsible for behavioral inhibition and control, risk assessment, decision-making, and

9. See Sara B. Johnson, et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESC. HEATH 216-221 (2010). In their study, the authors concluded as follows:

In the last decade, a growing body of longitudinal neuroimaging research has demonstrated that adolescence is a period of continued brain growth and change, challenging longstanding assumptions that the brain was largely finished maturing by puberty. The frontal lobes, home to key components of the neural circuitry underlying "executive functions" such as planning, working memory, and impulse control, are among the last areas of the brain to mature; they may not be fully developed until halfway through the third decade of life.

Id.

10. Jay D. Aronson, *Neuroscience and Juvenile Justice*, 42 AKRON L. REV. 917, 921-22 (2015).

11. *Id.*

emotion tend to take longer to mature.”¹² The practical impact is that both teenagers and young adults have a reduced capacity to exhibit higher-level reasoning skills and exercise impulse control.¹³ Put simply, the fundamental differences between juvenile and adult minds relate specifically to those areas of the brain responsible for controlling behavior.¹⁴

2. THE LEGAL PROTECTIONS AFFORDED TO JUVENILES

Based in substantial part the science of brain development, the United States Supreme Court recognizes that juveniles are not as culpable for criminal conduct as adults; as such, juveniles may neither receive the death penalty nor be sentenced to life without the possibility of parole.¹⁵

a. *Roper v. Simmons*

In *Roper v. Simmons*, the Supreme Court held in a 5-4 decision that the Eighth Amendment to the United States Constitution prohibits the imposition of capital punishment on a defendant for crimes committed while the defendant was under the age of eighteen.¹⁶ Writing for the majority, then-Justice Anthony Kennedy stated:

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies . . . tend to confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions” The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed These differences render suspect any conclusion

12. Jay D. Aronson, *Neuroscience and Juvenile Justice*, 42 AKRON L. REV. 917, 922-23 (2015).

13. *See id.*

14. *See* *Graham v. Florida*, 560 U.S. 48, 68 (2010).

15. *See* *Roper v. Simmons*, 543 U.S. 551 (2005); *Miller v. Alabama*, 567 U.S. 460 (2012).

16. *Roper*, 543 U.S. at 578.

that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means “their irresponsible conduct is not as morally reprehensible as that of an adult.” Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.¹⁷

In so holding, and for the purpose of determining culpability, the Court relied on its prior decision in *Atkins v. Virginia*, which prohibited the execution of intellectually-disabled adults (i.e., those with an IQ below 70), to emphasize that both juveniles and intellectually-disabled adults experience impairments in brain function that reduce and sometimes negate their culpability.¹⁸

b. *Miller v. Alabama*

In *Miller v. Alabama*, the Supreme Court held that the Eighth Amendment prohibits the imposition of a life sentence without the possibility of parole for juvenile offenders that are convicted of homicide.¹⁹ In so holding, the Court, relying on its decisions in *Roper* and *Graham v. Florida*, emphasized that juveniles’ “transient rashness, proclivity for risk, and inability to assess consequences . . . both lessened a child’s ‘moral culpability’ and enhanced the prospect that, as the years go by and neurological development occurs, [their] ‘deficiencies will be reformed.’”²⁰ Put another way, “juveniles have diminished culpability” that reflects a “lack of maturity and an underdeveloped sense of responsibility,” and that leads to “recklessness, impulsivity, and heedless risk-taking.”²¹ For these reasons, juveniles’ unique attributes—namely, underdeveloped brain function—reduce their culpability

17. *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (internal citations omitted). The Court’s decision in *Roper* extended its prior decision in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), where the Court held that the Eighth Amendment prohibited capital punishment for crimes committed while the defendant was under the age of sixteen. Additionally, the Court’s decision overturned its prior ruling in *Stanford v. Kentucky*, 492 U.S. 361 (1989), where the Court held that the Eighth Amendment did not prohibit capital punishment for defendants who were sixteen or seventeen years old at the time of the offense.

18. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

19. *Miller v. Alabama*, 567 U.S. 460 (2012).

20. *Id.* at 472 (internal citations omitted); *Graham v. Florida*, 560 U.S. 48 (2010) (holding that juveniles cannot be sentenced to life imprisonment for non-homicidal offenses).

21. *Miller*, 567 U.S. at 471.

and, consequently, the justifications for imposing the most severe punishments.²²

The Court's decisions in *Roper* and *Miller* stand for the proposition individuals who lack impulse control and an appreciation of the consequences of their actions are categorically less culpable than other defendants. As a corollary, these decisions support the proposition that *any* individual—whether juvenile or adult—who exhibits similar behavioral characteristics should be deemed less culpable and thus engender different treatment at the adjudicatory and sentencing phases of a criminal trial.

B. THE LEGAL PROTECTIONS FOR INTELLECTUALLY-DISABLED ADULTS

The United States Supreme Court has repeatedly recognized that IQ, along with adaptive and developmental disabilities, is relevant in determining culpability, although the Court's decisions are currently confined to intellectually-disabled defendants. Specifically, in *Atkins*, the Supreme Court held that the Eighth Amendment prohibited the execution of intellectually-disabled adults.²³ Writing for the majority, Justice Kennedy stated:

Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they *often act on impulse rather than pursuant to a premeditated plan*, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.²⁴

For these reasons, the Court held that the Eighth Amendment categorically prohibits the execution of intellectually-disabled adults for crimes that would otherwise warrant the death penalty. Likewise, in *Hall v. Florida*, the Court emphasized that

22. See *Miller v. Alabama*, 567 U.S. 460, 470 (2012).

23. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

24. *Id.* at 318 (emphasis added).

intellectually-disabled adults “have a ‘diminished ability’ to ‘process information, to learn from experience, to engage in logical reasoning, or to control impulses.’”²⁵

As discussed below, low-IQ adults share the same or substantially similar deficiencies as juveniles and intellectually-disabled adults. Thus, such deficiencies strongly support holding low-IQ adults less culpable or, in some instances, not culpable for criminal behavior.

III. THE SIMILARITY BETWEEN LOW-IQ ADULTS, JUVENILES, AND INTELLECTUALLY-DISABLED ADULTS

Defendants should not always be required to meet the definition of intellectual disability (i.e., an IQ below 70) to warrant a finding that such defendants are not culpable or, at the very least, are less culpable of criminal conduct. This proposition is buttressed by research demonstrating that adults with borderline intellectual functioning—an IQ between 70 and 85—on a standardized intelligence test, such as the Wechsler Adult Intelligence Scale-Revised (4th ed.), are more likely to commit crime.²⁶ Tellingly, the reasons underlying the link between low IQ and crime are strikingly similar to those pertaining to juvenile delinquency and intellectual disability; low-IQ adults struggle with impulse control and the ability to appreciate the consequences of their actions.²⁷

A. LOWER IQ SCORES CORRELATE WITH CRIMINAL AND DEVIANT BEHAVIOR

Empirical data demonstrates that IQ scores are inversely correlated to criminal conduct.²⁸ Accordingly, the lower an individual’s IQ score, the more likely they are to engage in criminal behavior.²⁹ For example, studies that have examined the IQs of criminal offenders found that “offenders score approximately [eight] points lower, on average, on standard IQ tests as compared

25. Hall v. Florida, 572 U.S. 701, 709 (2014).

26. See Kevin Beaver & John Paul Wright, *The Association Between County-Level IQ and County-Level Crime Rates*, 39 INTELLIGENCE 22, 22-26 (2011).

27. See Ilhong Yun & Julak Lee, *IQ and Delinquency, The Differential Detection Hypothesis Revisited*, 11 YOUTH VIOLENCE & JUV. JUST. 196, 206-07 (2013).

28. See *id.* at 198.

29. See *id.* at 197.

to the general population.”³⁰ Additionally, incarcerated white males have an average IQ of 93, which is approximately seven points below the population average.³¹ Furthermore, a study of 2,500 inmates in the southern United States revealed that the average IQ score of the inmates was 90—ten points below the national average.³² More broadly, nations and counties with higher average IQs have lower rates of violent crime.³³ Perhaps most importantly, the correlation between low-IQ adults and crime remains unchanged after controlling for age, race, gender, and socioeconomic status.³⁴ The point, of course, is that a demonstrable link exists between an individual’s cognitive ability, particularly cognitive deficits, and criminal conduct, and that low-IQ adults, like juveniles and intellectually-disabled adults, suffer from impairments that affect their ability to conform to the requirements of law or form a culpable mental state.³⁵

B. LOW-IQ ADULTS, LIKE JUVENILES AND INTELLECTUALLY-DISABLED ADULTS, LACK IMPULSE CONTROL

Scientific research strongly suggests that low-IQ adults struggle to control their impulses.³⁶ By way of background, “a long line of research in clinical psychology and neuroscience indicates that self-control, which is a part of the larger executive function housed in the prefrontal cortex of the brain, is closely linked to verbal intelligence.”³⁷ As Professors Ilhong Lee and Julak Lee explain, “[i]mpulsive violence offenders are often found to have deficient executive functions as well as low verbal IQ scores.”³⁸ In fact, low verbal IQ scores, even if not sufficiently low to constitute

30. Brie Diamond, Robert Morris, & J.C. Barnes, *Individual and Group IQ Predict Inmate Violence*, 40 INTELLIGENCE 115, 115-122 (2012) (studying the relationship between intelligence and prison misconduct, and concluding that an individual’s IQ, as well as the IQ of the prison unit, correlated with violent conduct in prison).

31. Brie Diamond, Robert Morris, & J.C. Barnes, *Individual and Group IQ Predict Inmate Violence*, 40 INTELLIGENCE 115, 115-122 (2012).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*; see also James Freeman, *The Relationship Between Lower Intelligence, Crime and Custodial Outcomes: A Brief Literary Review of a Vulnerable Group*, VULNERABLE GROUPS & INCLUSION (June 8, 2012), <https://www.tandfonline.com/doi/full/10.3402/vgi.v3i0.14834>.

36. See Ilhong Yun & Julak Lee, *IQ and Delinquency, The Differential Detection Hypothesis Revisited*, 11 YOUTH VIOLENCE & JUV. JUST. 196, 204 (2013).

37. *See id.*

38. *Id.*

an intellectual disability, impact an individual's ability to exercise self-control:

Research has consistently shown that language/verbal skills are related to a wide range of adverse behavioral outcomes. Impaired language skills of children lead to delinquency, school failure, and physical aggression, while proper language development *fosters emotional control and impulse regulation . . .* In fact, a long line of research indicates that language development is closely related to self-control “Children’s language comprehension and expression skills are critical to their understanding . . . and retrieval of rules that enable them to effect appropriate levels of self-control and emotional regulation.”³⁹

Thus, given the connection between self-control and verbal ability, and given that low self-control is causally related to impulsive and offensive behavior, its presence among low-IQ adults is unquestionably relevant to a culpability determination.⁴⁰ Put differently although low-IQ adults’ brains are fully developed, their actions are based on and motivated by the same cognitive deficiencies that juveniles and intellectually-disabled adults experience.

IV. LOW-IQ ADULTS, LIKE JUVENILES AND INTELLECTUALLY-DISABLED ADULTS, OFTEN LACK CULPABLE MENTAL STATES

Because of cognitive deficits that affect impulse control and reasoning, low-IQ adults often lack a culpable mental state—just like juveniles and intellectually-disabled adults.

A. THE *MENS REA* PROBLEM

Scholars widely recognize, and the relevant evidence suggests, that individuals with low IQs or other cognitive deficits may lack the requisite *mens rea*, or intent, necessary to commit a particular crime.⁴¹ Indeed, *mens rea* is the *sine qua non* of criminal

39. Ilhong Yun & Julak Lee, *IQ and Delinquency, The Differential Detection Hypothesis Revisited*, 11 YOUTH VIOLENCE & JUV. JUST. 196, 204 (2013) (emphasis added) (internal citation omitted).

40. *See id.* at 205.

41. *See* Elizabeth Saunders, *Not Guilty as Charged: The Myth of Mens Rea for Defendants with Mental Retardation*, 45 U.C.D. L. REV. 1419, 1437-50 (2012) (arguing that defendants with mental retardation lack the capacity to form the *mens rea* necessary to commit various crimes and thus are less culpable than individuals with

culpability; to possess the requisite *mens rea*, the criminal justice system requires that individuals must have “[a] subjective awareness and rational understanding of social norms and potential risks . . . [the] ability to rationally consider those norms and determine whether to abide by or violate them, as well as to be fully aware of one’s actions . . . [and] the power to deliberately violate social norms and exercise independent judgment.”⁴² As one scholar explains:

Culpability makes criminal law a moral venture, rather than simply a regulatory scheme. It is simply unjust to punish people who are not blameworthy. Criminal law, like Holmes’s poor dog, has acknowledged the difference that intention makes. Accordingly, virtually all criminal cases require some form 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 impulse.⁴³

To be sure, *mens rea* constitutes the “dividing line between accidental and intentional harms, [and] between the law’s selective power to punish and state-inflicted vengeance for conduct with harmful consequences.”⁴⁴ In this way, *mens rea* reflects “the moral value attributed to a defendant’s state of mind during the commission of a crime,” and “the degree to which an individual offender is blameworthy or responsible or can be held accountable.”⁴⁵

Importantly, low-IQ adults, due to cognitive deficits, often cannot form the requisite *mens rea* to be considered culpable for a criminal offense. For example, low-IQ adults often lack a sincere appreciation of the consequences of their actions because they

average IQ scores).

42. Elizabeth Saunders, *Not Guilty as Charged: The Myth of Mens Rea for Defendants with Mental Retardation*, 45 U.C.D. L. REV. 1419, 1428 (2012).

43. *Id.* at 1484.

44. *Id.* at 1428.

45. 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).

struggle to “understand cause and effect across a wide range of substantive areas,” and exhibit an “awareness of others’ interests and how one’s own actions might affect another person, object, or entity.”⁴⁶ Furthermore, low-IQ adults frequently lack the cognitive capacity to understand social norms, and to comprehend why a violation of those norms is normatively wrong:

Appreciating 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, 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 likely needs access to and participation in social networks that can transmit and reinforce specific norms.⁴⁷

In addition, low-IQ adults typically lack the capacity to act rationally, which requires individuals to use “reason to guide their conduct”; demonstrate “the capacity for self-reflection”; have the ability to “act independently, without undue influence from others”; and possess the “analytic process which precedes [a] decision.”⁴⁸ These capabilities constitute precisely what enables individuals to act “with intention,” rather than to engage in “accidental [or] inadvertent [behavior] arising from an impulse that the defendant cannot control,” which is typically not considered culpable.⁴⁹ Simply put, *mens rea* requires “impulse control, [the] ability to evaluate situations before acting, and self-restraint from aggressive behavior.”⁵⁰

Given the fundamental attributes of *mens rea*, in which “even the baseline expectations of consciousness implicate a relatively high order of cognitive and social development,” there can be little doubt that low-IQ adults may often lack the culpability, or blameworthiness, to warrant punishment for a violation of the criminal law.⁵¹ As one scholar explains:

46. Elizabeth Saunders, *Not Guilty as Charged: The Myth of Mens Rea for Defendants with Mental Retardation*, 45 U.C.D. L. REV. 1419, 1433 (2012).

47. *Id.* at 1432-33.

48. *Id.* at 1434.

49. *Id.* at 1436.

50. *Id.*

51. Elizabeth Saunders, *Not Guilty as Charged: The Myth of Mens Rea for*

In adult life, contrary to the DSM-III statement, perhaps increasingly so owing to the growing complexity of society, many people with borderline intellectual functioning do have problems in adaptive functioning. In fact, they face difficulties across all areas of ordinary life. They are at increased risk of experiencing physical problems, poverty, have more difficulties with activities of daily living, have limited social support and no access to specialised services. They often live problematic lives, functioning under high strain but unnoticed by the rest of society. Many people with borderline intellectual functioning do not have psychiatric disorders, but they are more vulnerable to the development of mental health problems than people of average or above average intelligence and may also be more vulnerable than people with mild intellectual disability. Several studies show increased risk for the development of almost all psychiatric disorders in childhood as well as in adulthood, including substance misuse and personality disorders.⁵²

Indeed, a similar study confirmed that “individuals with borderline intellectual functioning were more socially disadvantaged than individuals with IQs of 85 and over”; that “[t]here were disparities in the level of social support, educational attainment, income and debt”; and that [t]hey were also more likely to have experienced difficulties with activities of daily living and unstable backgrounds.”⁵³ Furthermore, these individuals were significantly more likely to struggle with, mental illnesses, personality disorders, and substance abuse.⁵⁴ Other empirical research confirms that low-IQ adults struggle to lead functional lives:

Although relatively independent in most daily routines, many of these persons actually require subtle cues, verbal prompts and reminders from caregivers for the performance of these activities. Failing such help, they are likely to get stranded, cheated or victimized in an unprotected world. They form a major share of the population of runaways, rowdies,

Defendants with Mental Retardation, 45 U.C.D. L. REV. 1419, 1434 (2012).

52. Jannelien Wieland and Frans G. Zitman, *It is Time to Bring Borderline Intellectual Functioning Back into the Main Fold of Classification Systems*, 40 BJPSYCH. BULL. 204, 205 (2016).

53. Angela Hassiotis, et al., *Psychiatric Morbidity and Social Functioning Among Adults with Borderline Intelligence Living in Private Households*, 52 J. INTELL. DISABILITY RES. 95, 102 (2008).

54. *See id.* at 99.

absconders, those in missing lists or apprehended for petty crimes. Their difficulties represent some of the most pervasive and troublesome problems in society. They are a large high-risk group that currently receive little, if any, formal educational, social or mental health supports.⁵⁵

Moreover, due to their cognitive deficits, low-IQ adults' behaviors often include "violent-aggression, theft, immaturity, restless-over activity, anti-social behavior, depression, passive-dependency, passive avoidance and approval-seeking tendencies."⁵⁶ Additionally, low-IQ adults' cognitive deficits "include lack of complete independence in activities of daily living, [and] being reactive rather than interactive or proactive during socialization."⁵⁷ Perhaps most importantly, "very few persons [with an IQ of 70-85] are able to handle or negotiate higher order mental or executive functions, such as . . . abstraction, reasoning, visuo-spatial reversal, comprehension of whole-part relationship, analysis-synthesis, planning, auditory attention-concentration, deductive thinking, problem solving, visual scanning, grapho-motor coordination and others."⁵⁸

It should come as no surprise that low-IQ adults often act in a manner that is not morally or legally blameworthy because they lack "the consciousness, choice, and control that underlie notions of blameworthiness."⁵⁹ For this reason, the criminal justice system's failure to meaningfully and systematically address differences in cognitive capacity (apart from competence or sanity) has repercussions "not only for people within the [low-IQ] population, but also for the integrity of the system itself."⁶⁰

B. LOW-IQ ADULTS' ACTIONS ARE NOT ALWAYS VOLUNTARY

Relatedly, because of demonstrable deficits in cognitive, emotional, and psychological functioning, a strong argument can be made that, in some circumstances, low-IQ adults' actions are not voluntary. To be sure, the law of intent is predicated upon the

55. Srinivasan Venkatesan, *Demographic, Cognitive and Psycho-Social Profile of Adults with Borderline Intellectual Functioning*, 4 J. CONTEMP. PSYCHOL. RES. 1, 1-2 (2017).

56. *Id.* at 5.

57. *Id.* at 6.

58. *Id.* at 9.

59. Elizabeth Saunders, *Not Guilty as Charged: The Myth of Mens Rea for Defendants with Mental Retardation*, 45 U.C.D. L. REV. 1419, 1426 (2012).

60. *Id.* at 1424.

notion that individuals either specifically or generally intend to cause the consequences of their actions. This is precisely why the criminal law, in the vast majority of cases, only punishes actions that are intentional, knowing, or reckless, the latter of which means that individuals must intend to commit an act despite being substantially certain that a particular result would occur, or by showing a conscious disregard for the risks of an action.⁶¹ If, as empirical evidence suggests, some low-IQ adults are unable “to handle or negotiate higher order mental or executive functions, such as abstraction, reasoning . . . analysis-synthesis [and] planning,”⁶² they cannot, in many circumstances, act with such a mental state.

The counterargument is that the criminal justice system separates the concepts of *mens rea* and voluntariness, particularly for specific intent crimes. To satisfy the voluntariness test, an individual need only intend to commit the specific act that gave rise to the harm.⁶³ The *mens rea* analysis is only concerned with whether an individual intended to cause the resulting harm. But courts should rethink this artificial distinction. After all, in situations where individuals did not necessarily intend to cause harm, separating an action from its intended or probable consequences casts doubt of the voluntariness of that action. For example, if an individual punches another person in the face during an altercation, and that person suffers from a heart condition and dies, it is highly likely that the individual would state that, if he or she had known of the individual’s heart condition, or of the risk of death, the individual would have never struck the person. In other words, the individual’s actions were predicated on an assumption regarding the likelihood of a resulting harm, without which the individual would not have acted. This and many other examples demonstrate the problems with construing voluntariness apart from the context within which an action occurs.

By way of analogy, state and federal courts have routinely held that confessions are coerced even though a defendant intentionally and voluntarily uttered incriminating statements. The reason is that the defendant made those statements under

61. See MODEL PENAL CODE § 2.02 (2019).

62. Srinivasan Venkatesan, *Demographic, Cognitive and Psycho-Social Profile of Adults with Borderline Intellectual Functioning*, 4 J. CONTEMP. PSYCHOL. RES. 1, 9 (2017).

63. See *Robinson v. California*, 370 U.S. 660 (1962).

certain assumptions or expectations (e.g., a confession would result in a more lenient sentence). Had those assumptions been removed, the defendant would likely have remained silent. The same principle holds true for actions that result in harm. The individual's intent to commit an act is inextricably connected to an expectation of the harm that will or will not occur. The expectation is what makes the action voluntary.

Some may also argue that the legal system routinely and justifiably holds individuals responsible for negligent acts, namely, acts in which a person did not intend harmful consequences, but nonetheless should have known that such consequences were a foreseeable result of specific actions or omissions. The problem with this is that the crimes for which mere negligence is sufficient to impose criminal liability are relatively few in number. The vast majority of state and federal statutes require something more, namely, knowledge of or a deliberate disregard for the likely consequences of a particular action. That, in a nutshell, is the point: the law connects actions and intentions when determining culpability and, therefore, it should not separate actions from intentions when determining voluntariness.

V. DEVELOPING A WORKABLE STANDARD AND ADDRESSING RELEVANT COUNTERARGUMENTS

The courts can—and should—develop a workable, reliable, and reasonable standard by which a defendant's low IQ can be asserted as an affirmative defense at the guilt/innocence phase, and not merely as a mitigating factor at sentencing.

A. DEVELOPING A WORKABLE STANDARD

Legal scholars often posit that low-IQ individuals, among other groups, should be viewed as less culpable than other defendants, although the rationale for doing so remains unclear. Yet, when asked questions such as “what IQ is sufficient to warrant reduced culpability”; “what do we do with adults who score one point higher than the threshold for reduced culpability”; “how do we account for environmental, developmental, and adaptive disabilities that arguably impact culpability”; and “what does reduced culpability actually mean regarding sentence length and other factors,” legal scholars struggle to provide a convincing answer. Resolving these and many other questions are necessary to formulate a coherent argument regarding IQs' relevance to culpability, including whether a workable standard can be

developed to determine which class of individuals with low IQs warrants a reduced culpability finding.

1. A STANDARD FOR DETERMINING REDUCED OR ZERO CULPABILITY AT THE GUILT/INNOCENCE PHASE

To address these arguments, legislators and courts should develop a workable standard to determine when, and under what circumstances, low-IQ adults warrant a finding of reduced or zero culpability and explain how this standard would be applied at the guilt/innocence phase. Two threshold questions concern the IQ test that should be used to accurately determine a defendant's IQ, and IQ range that should be included in the "low-IQ adult" category, particularly given the approximate standard error of measurement, which is plus or minus five points. Regarding the selection of an IQ test, the Wechsler Adult Intelligence Scale-Revised (4th ed.), which educational psychologists consider the "gold standard" in intelligence testing, is a reliable measure of intelligence and should be used.⁶⁴ With respect to the IQ range, scores between 70 and 85 should indicate a low-IQ adult because scores in this range are placed in the "borderline intellectual functioning category," which empirical research has shown significantly impacts an individual's ability to control impulses, develop analytical capabilities, problem-solve, and exercise higher-level reasoning skills.⁶⁵

Additionally, rather than establishing a separate affirmative defense to criminal charges, low IQ should be incorporated into the insanity defense and thus be an independent basis upon which to find that a defendant is not responsible for a particular crime. Doing so would reflect the fact that: (1) the traditional insanity test (the M'Naghten Rule), which requires defendants to show that they did not know the difference between right and wrong, is far too narrow and nearly impossible to satisfy;⁶⁶ and (2) states have begun to expand the insanity defense to exempt defendants from culpability who, because of a mental illness, defect, or irresistible

64. See D. Hartman, *Wechsler Adult Intelligence Scale IV (WAIS IV): Return of the Gold Standard*, 16 APPLIED NEUROPSYCHOLOGY 85, 85-87 (2009).

65. See Gisella Baglio, et al., *Social Competence in Children with Borderline Intellectual Functioning: Delayed Development of Theory of Mind Across All Complexity Levels*, 7 FRONTIERS IN PSYCHOL., Oct. 2016.

66. See *Clark v. Arizona*, 548 U.S. 735 (2006) (describing the general requirements under the M'Naghten rule).

impulse, are not considered legally responsible for the charged offense.⁶⁷ Including low-IQ adults in this category makes eminent sense because the impairments from which low-IQ adults suffer are similar to those affecting mentally ill and impulse-driven defendants.

Of course, the question of whether a low IQ is sufficient to negate the requisite *mens rea* for a specific crime would be a factual question for the jury, and the burden of proof would be placed on the defendant to demonstrate beyond a reasonable doubt that a low IQ was substantially responsible for the crime's commission.

2. A STANDARD FOR DETERMINING REDUCED CULPABILITY AT THE SENTENCING STAGE

At the sentencing stage, courts should also consider whether low-IQ adults warrant a finding of reduced culpability. Importantly, such a finding would not be identical to using low IQ as a mitigating factor because judges have the discretion to reject mitigation evidence and impose a sentence that falls within the upper or lower ranges established by applicable state or federal guidelines. And even if a judge accepts such evidence, a low-IQ defendant will nonetheless be sentenced within the relatively narrow ranges provided by state or federal guidelines, thus resulting in a sentence that fails to meaningfully reflect the low-IQ defendant's culpability. Rather, a finding that a defendant's low IQ substantially contributed to the commission of a particular offense should enable the court to depart downward from the applicable guideline range. This is not to say, of course, that a low IQ should be construed as mitigating *per se* at the sentencing stage. It is to say, however, that standardized procedures should be developed to discern, based on IQ scores, expert testimony, and evidence of adaptive and developmental difficulties, which low-IQ defendants warrant a finding of reduced culpability and, concomitantly, lower sentences.

This approach would reflect the fact that sentencing low-IQ defendants to a term of imprisonment would not, in some instances further any of the purposes of criminal punishment. As the Supreme Court in *Miller* stated with respect to juveniles' culpability:

67. See Carol A. Rolf, *From M'Naghten to Yates—Transformation of the Insanity Defense in the United States – Is It Still Viable?*, RIVIER C. ONLINE ACAD. J. (Spring 2006), <https://www2.rivier.edu/journal/roaj-2006-spring/j41-rolf.pdf>.

Because “[t]he heart of the retribution rationale” relates to an offender’s blameworthiness, “the case for retribution is not as strong with a minor as with an adult” Nor can deterrence do the work in this context, because “the same characteristics that render juveniles less culpable than adults”—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment Similarly, incapacitation could not support the life-without-parole sentence in *Graham*: Deciding that a “juvenile offender forever will be a danger to society” would require “mak[ing] a judgment that [he] is incorrigible”—but “incorrigibility is inconsistent with youth” And for the same reason, rehabilitation could not justify that sentence. Life without parole “forswears altogether the rehabilitative ideal” It reflects “an irrevocable judgment about [an offender’s] value and place in society,” at odds with a child’s capacity for change.⁶⁸

At bottom, individuals must, at the very least, “have the cognitive capacity to perform the cost-benefit risk analysis that underlies any effective deterrence-based strategy.”⁶⁹ If individuals lack such capacity, then the criminal law should impose sentences that reflect this fact. Currently, the law does so for juveniles and intellectually-disabled adults, but not for defendants with a low IQ, severe mental illness, or other cognitive and psychiatric impairments.

B. COUNTERARGUMENTS

Critics of this proposal are likely to assert several counterarguments regarding its practicality and workability in the criminal justice system.

1. REDUCING THE CULPABILITY OF LOW-IQ DEFENDANTS WILL HAVE UNINTENDED AND OVERBROAD CONSEQUENCES

Some may argue that incorporating low IQ into the guilt/innocence phase via the insanity defense, or requiring courts to impose lower sentences on defendants deemed less culpable by virtue of a low IQ, opens the floodgates to other groups who will invariably seek the same benefits. For example, high-IQ

68. *Miller v. Alabama*, 567 U.S. 460, 473 (2012) (internal citations omitted).

69. Elizabeth Saunders, *Not Guilty as Charged: The Myth of Mens Rea for Defendants with Mental Retardation*, 45 U.C.D. L. REV. 1419, 1483 (2012).

sociopaths and individuals with mental illnesses, such as anxiety disorders, bipolar disorder, or depression, may claim that they should be entitled to assert an insanity defense. As one scholar argues:

Any change in criminal practice or procedure potentially resulting in leniency will be subject to concerns about both floodgates and slippery slopes. If we apply more scrutiny to mens rea for people with mental retardation, for example, why not for those who act under the influence of drugs or alcohol, or for those suffering from mental illness? Indeed, in some jurisdictions, any of these conditions can serve as the basis for a diminished capacity defense precisely because these conditions compromise a person's thought processes.⁷⁰

This argument is exaggerated because it fails to appreciate the unique and debilitating effects of a low IQ on volition, choice, impulse control, and deliberation. Although high-IQ sociopaths and those who suffer from certain psychiatric illnesses, such as anxiety and depression, suffer from impairments that impact their behaviors, these effects do not preclude such individuals from forming a culpable state of mind.⁷¹ In other words, many, if not most, mentally ill individuals retain an *intrinsic* capacity to reason, control impulses, think analytically, and balance the costs and benefits of particular actions.⁷² Conversely, low-IQ adults lack these cognitive skills; in this way, they are fundamentally different from mentally ill individuals, and similar to juveniles and intellectually-disabled adults.

2. FACTORS OTHER THAN A LOW IQ AFFECT CULPABILITY

Critics may also assert that IQ cannot be considered in a vacuum and that environmental factors, such as socioeconomic status, influence individuals' capacity to make reasoned and culpable choices. Of course, few would dispute that genetics and the environment collectively contribute to an individual's intellectual, emotional, and psychological development. However, empirical studies that examine the effects of low IQ on adult behavior have accounted for these variables and concluded that they do not mitigate the effects of low IQ on the factors that matter

70. Elizabeth Saunders, *Not Guilty as Charged: The Myth of Mens Rea for Defendants with Mental Retardation*, 45 U.C.D. L. REV. 1419, 1470 (2012).

71. See Ana Sandoui, *Psychopathy: What Drives Pathological Selfishness?* (May 2018), <https://www.medicalnewstoday.com/articles/321839.php>.

72. See *id.*

most to criminal culpability: impulse-control, reasoning, analytical skills, compliance with societal expectations, and appreciation of the consequences of actions.⁷³ Indeed, as Professors Yun and Lee explain, “the correlation between low-IQ adults and crime remained unchanged after controlling for age, race, gender, and socioeconomic status.”⁷⁴ Simply put, low IQ transcends the environment and should transform how the criminal law defines culpability.

3. RECOGNIZING LOW IQ AS A MITIGATING FACTOR AT THE SENTENCING STAGE WILL LEAD TO INCONSISTENT SENTENCES FOR SIMILAR CRIMES

Some critics may argue that, if a low-IQ defendant is found guilty of a particular crime, allowing that defendant’s IQ score to serve as a mitigating factor at the sentencing phase will invariably lead to inconsistent sentences for substantially similar crimes. As a result, accounting for a defendant’s low IQ will introduce significant sentencing disparities into the criminal justice system, and thus frustrate the purpose of federal and state sentencing guidelines, which strive to ensure sentencing uniformity among similarly situated defendants.⁷⁵

This argument ignores the fact that sentencing should not always be uniform merely for the sake of uniformity. Defendants who are convicted of similar crimes often have very different backgrounds and personal histories, and these factors are relevant to a defendant’s blameworthiness. Indeed, the Court’s decisions in *Roper* and *Miller* underscore that an offender’s personal characteristics (e.g., age) should impact both the type and severity of sentence that an offender receives. And surely, if an offender’s low IQ (like an offender’s age or intellectual disability) demonstrates that, whether due to a lack of impulse control or inability to appreciate the consequences of specific actions, the offender is less culpable, then a reduced sentence is warranted. Put simply, the goal of uniformity in sentences should not preclude a court from conducting an individualized consideration of factors relevant to blameworthiness. Otherwise, the pursuit of uniformity

73. Ilhong Yun & Julak Lee, *IQ and Delinquency, The Differential Detection Hypothesis Revisited*, 11 YOUTH VIOLENCE & JUV. JUST. 196, 206-07 (2013).

74. *Id.*

75. See Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 749 (2006) (“Uniformity has become a dominant objective of the federal sentencing system”).

in sentencing will lead to the very injustices that it sought to remedy.

VI. CONCLUSION

The law does not sufficiently account for defendants who reside in the “gray area” of the criminal justice system. Instead, it focuses on protecting defendants at the margins (e.g., juveniles and intellectually-disabled adults) without acknowledging that many defendants do not necessarily fall into these categories but nonetheless suffer from substantially similar deficiencies that mitigate their culpability. This is precisely the case regarding low-IQ adults and, like other defendants residing in the law’s gray area, the law should acknowledge that they deserve the types of legal protections that justice requires. Hopefully this article can begin a discussion that will culminate in providing such protections for low-IQ defendants and, in so doing, render the criminal justice system more responsive to the law’s gray area.