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Mentally Retarded Criminal Defendants

James W. Ellis*  
Ruth A. Luckasson**

Defendants who are mentally retarded present difficult doctrinal and practical issues for the criminal justice system. Given the frequency with which these issues arise, it is surprising that they have received so little systematic attention from courts and commentators. At the practical level, mentally retarded defendants often go unrecognized, and therefore the difficult issues which may be present are overlooked. When the doctrinal issues are dis-

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The authors wish to express their deep gratitude to Penni Adrian, Don Bruckner, Patti Williams, and Bonnie Stepleton, law students at the University of New Mexico, and Caroline Everington, doctoral student in special education at the University of New Mexico, for their assistance in researching this Article.

1. During the eugenics scare in the early decades of this century, retarded defendants received substantial — indeed inordinate — attention. See infra Part III. In the last fifty years, however, interest in retarded defendants appears to have subsided dramatically. But see Mickenberg, Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem, 17 CAL. W.L. REV. 365 (1981); Comment, The Mentally Retarded Offender in Omaha-Douglas County, 8 CREIGHTON L. REV. 622 (1975); Person, The Accused Retardate, 4 COLUM. HUM. RTS. L. REV. 239 (1972); Pieski, Subnormal Mentality As a Defense in the Criminal Law, 15 VAND. L. REV. 769 (1962).

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cussed, it is frequently in the context of defendants who are mentally ill, and the differences between mental illness and mental retardation are ignored. The legal rules appropriate for mentally retarded defendants have become, at best, an afterthought to the fervent battles involving criminal defendants who are mentally ill.3

In a sense, the problems posed by mental retardation were also an afterthought in the promulgation of the new ABA Criminal Justice Mental Health Standards.4 From the beginning they were entitled “Criminal Justice Mental Health Standards.”5 Although numerous mental health professionals served on the various interdisciplinary task forces from the outset,6 mental retardation professionals were appointed only after the first year. Moreover, while the final version of the Mental Health Standards explicitly discusses mentally retarded defendants, previous drafts did so inconsistently.7

However, the early omission of issues related to mental retardation was remedied and the final Mental Health Standards repre-

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3. Many of the most authoritative and helpful studies and treatises on mental disability and the criminal law make little or no mention of mental retardation. See, e.g., H. Steadman, Beating a Rap?: Defendants Found Incompetent to Stand Trial (1979); R. Roesch & S. Golding, Competency to Stand Trial (1980); A. Goldstein, The Insanity Defense (1967); S. Halleck, Psychiatry and the Dilemmas of Crime (1971); H. Fingarette & A. Hasse, Mental Disabilities and Criminal Responsibility (1979); Mentally Disordered Offenders: Perspectives from Law and Social Science (J. Monahan & H. Steadman eds. 1983).

4. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS (1984) [hereinafter cited as MENTAL HEALTH STANDARDS 7-x.y]. The ABA House of Delegates formally adopted the Mental Health Standards as chapter seven of the ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980) on August 7, 1984. Nevertheless, when considering each chapter of the ABA Standards for Criminal Justice, the House of Delegates votes only upon the black letter standards. Therefore, the commentary accompanying the Mental Health Standards does not represent ABA policy; its purpose is to assist practitioners by explaining the Mental Health Standards' underlying legal and mental health rationales. All citations to the commentary are to the August 1984 edition of the Mental Health Standards submitted to the House of Delegates. Some minor changes should be expected in the final commentary, which will appear in the ABA Standards for Criminal Justice, because the Standing Committee on Association Standards for Criminal Justice is presently updating the commentary.

5. Emphasis added. See ABA STANDARDS FOR CRIMINAL JUSTICE (1st Tent. Draft 1983) [hereinafter cited as FIRST TENTATIVE DRAFT]. "Mental health" is inappropriate as an umbrella term because people with mental retardation are not ill. See infra note 52. A more encompassing and accurate title would be "Mental Disability Standards." The term "disability" is now used to describe both mental illness and mental retardation. See generally THE MENTALLY DISABLED AND THE LAW (S. Brakel & R. Rock eds., rev. ed. 1971). The ABA's own journal in the field is similarly entitled the Mental and Physical Disability Law Reporter.

6. Although some psychiatrists and a somewhat larger number of psychologists work with people who are mentally retarded, most members of these professions have no experience and little training in the area of retardation. See infra parts VI & VII (discussion of mental retardation professionals).

7. See generally FIRST TENTATIVE DRAFT.
sent one of the first comprehensive, albeit imperfect, attempts to address the problems of retarded defendants. They provide a useful vehicle for analyzing the current state of the law regarding the impact of mental retardation on both procedural and substantive issues that the criminal courts must address.

This Article attempts to provide a preliminary overview of the issues in the Mental Health Standards as they relate to defendants with mental retardation. Part I reviews the history of the treatment of retarded defendants in the criminal justice system. Part II describes the characteristics of people with mental retardation and the consequences of those characteristics. Part III then discusses the extent to which mental retardation should be exculpatory of criminal responsibility. Part IV analyzes the critical importance of competence issues to mentally retarded defendants. Part V elaborates upon dispositional issues including civil commitment and sentencing. Parts VI and VII discuss the role of mental retardation professionals in the criminal justice system. Part VIII concludes with a discussion of specialized training for participants in the criminal justice system in mental retardation.

I. History of Attitudes Toward Mentally Retarded Defendants

The distinction between mental illness and mental retardation has been long recognized, although inconsistently applied, in Anglo-American law. Observations about the difference between "idiots" and "lunatics" can be traced back to at least the thirteenth century, although the legal distinction originally was applied in property law rather than criminal cases. Three centuries later, Fitzherbert provided a definition and a loosely structured test to determine whether an individual was an "idiot":

[An idiot is] a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, etc., so as it may appear he hath no understanding of reason what shall be for his profit, or what for his loss. But if he have such understanding that he know and understand his letters, and do read by teaching of another man, then it seems he is not a sot or natural fool.

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8. Cf. Model Developmentally Disabled Offender Act [hereinafter cited as Model Developmentally Disabled Offender Act], reprinted in Disabled Persons and the Law: State Legislative Issues 722-79 (B. Sales, D. Powell, R. Van Duzend et al. eds. 1982). This was one of several earlier model statutes prepared for the ABA Commission on the Mentally Disabled. Unlike the ABA Standards for Criminal Justice, the model acts were not presented to the ABA House of Delegates and do not represent official ABA policy.

9. Comment, Lunacy and Idiocy — The Old Law and its Incubus, 18 U. CHI. L. REV. 361, 362 (1951). A lunatic is "congenitally insane" and thus potentially treatable — unlike an idiot, who is born "mentally deficient or disturbed." Id.


11. S. Glueck, Mental Disorder and the Criminal Law 128 (1925) (quoting A. Fitzherbert, Natura Brevis (1534)). The test has been described as a "crude but by no means ridiculous form of intelligence test." 1 N. Walker, Crime and Insanity
This test became popularized almost immediately as the "counting-twenty-pence test," and is cited, with some variations, by numerous early authorities.12

The early definitions commonly required that idiocy be both congenital and permanent.13 In this, and in their focus on both intellectual impairment and its impact on functional ability, the early definitions are not wholly dissimilar from modern definitions of mental retardation.14

The perceived immutability of idiocy fostered a defense to criminal prosecution which some believed to be superior to the defense available to mentally ill defendants.15 The relative liberality of the defense of idiocy may also have been related to the accepted analogy between the presumed incapacity of children and mentally retarded adults to form criminal intent.16 People also may have perceived mentally retarded individuals as less dangerous to others than mentally ill persons.17

This situation did not survive into the current century. People came to view mentally retarded individuals as a threat to society, and a principal source of criminal and immoral behavior.18 A
leader in this alarmist movement, Dr. Henry Goddard, declared that mentally retarded people constituted a "menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems." Retarded people were believed to have a congenital deficit in moral sensibility analogous to color-blindness. Another influential authority of the era, Walter Fernald, observed that "[e]very imbecile, especially the high-grade imbecile, is a potential criminal, needing only the proper environment and opportunity for the development and expression of his criminal tendencies." Many authors recounted (or invented) elaborate and lurid genealogical "studies" to illustrate the rela-


21. Fernald, The Imbecile with Criminal Instincts, 14 J. Psycho-Asthenics 16 (1909), reprinted in 2 THE HISTORY OF MENTAL RETARDATION: COLLECTED PAPERS, supra note 20, at 165, 180. One of the original developers of intelligence tests believed the tests should be used to identify mentally retarded individuals, whom he considered potential criminals, for lifelong segregation:

The feebleminded . . . [are] by definition a burden rather than an asset, not only economically but still more because of their tendencies to become delinquent or criminal. To provide them with costly instruction for a few years, and then turn them loose upon society as soon as they are ripe for reproduction and crime, can hardly be accepted as an ultimate solution of the problem. The only effective way to deal with the hopelessly feebleminded is by permanent custodial care.

L. Terman, The Intelligence of School Children 132-33 (1919).

22. For an account of the methodology in one such work, see S. Gould, supra note 19, at 158-74 (1981). Gould documents the discredited methodology of Goddard in his studies including: failure to test an unbiased sample, over-utilization of visual identification and intuition of testers, and the alteration of photographs to demonstrate physical features supposedly identified with mental retardation. Id.
tionship between mental deficiency and crime and immorality, and to demonstrate the genetic origin of the disability.\textsuperscript{23}

The measures the alarmists thought necessary to prevent the corrosion of society by the presumed criminality of retarded people included the sterilization of all “feeble-minded” people and their permanent segregation from society.\textsuperscript{24} These efforts achieved remarkable political success.\textsuperscript{25} The link between sterilization and segregation laws and the perception of retarded people as potential criminals appears in the language of Justice Holmes’s decision upholding the Virginia eugenic sterilization statute: “It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . . Three generations of imbeciles are enough.”\textsuperscript{26} Given the nature of the claims made by the alarmists, their recommendations included remarkably few suggestions directed at the criminal law’s treatment of the supposedly dangerous and immoral “feebleminded.”\textsuperscript{27}

Many mental retardation professionals came to reject the

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\textsuperscript{23} See, e.g., R. DUGDALE, “THE JUKEs”: A STUDY IN CRIME, PAUPERISM, DISEASE AND HEREDITY 41-55 (5th ed. 1895); A. ESTABROOK, THE JUKE IN 1915 63-67 (1916); H. GODDARD, THE KALLIKAK FAMILY 18-19 (1912). These accounts were apparently very influential, and citations to them can be found in many discussions of mental retardation from that era. See, e.g., S. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 332 (1925). It is noteworthy that some of these very authors employed the same methodology to demonstrate the necessity for miscegenation laws. See, e.g., A. ESTABROOK & I. MCDOUGLE, MONGREL VIRGINIANS: THE WIN TRIBE (1926).
\textsuperscript{24} P. TYOR & L. BELL, supra note 18, at 105-22.
\textsuperscript{26} Buck v. Bell, 274 U.S. 200, 207 (1927). Justice Holmes’s factual assertions about the disabilities of Carrie Buck and her daughter were in error. See Gould, Carrie Buck’s Daughter, NAT. HIST., July 1984, at 14, 16-18.
\textsuperscript{27} Goddard, for example, accepted that many retarded offenders would be entitled to a defense of insanity, concluding that it was of the highest probability that persons of a mental age under twelve years, like the normal boys or girls of the same age, do not know and cannot be expected to know the quality of their acts. And this is sufficient, because the law requires no more than a reasonable doubt, and there certainly is a very reasonable doubt as to whether such persons know the quality of an act of murder and know that it is wrong.

H. GODDARD, THE CRIMINAL IMBECILE: THE ANALYSIS OF THREE REMARKABLE CRIMINAL CASES 99 (1915). Nevertheless, Goddard believed that retarded defendants, whether convicted or acquitted on grounds of mental disability, should be incarcerated for life, under the theory that an “imbécile” will “never recover; he will never be free from the danger of following the suggestion of some wicked person or of yielding

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theories of the alarmists by the 1930s, and some of the most influential leaders of the eugenics movement eventually recanted their earlier views. By the 1950s, authorities commonly agreed that no significant link existed between mental retardation and criminality.

The abandonment of the alarmist view led to a period of marked decline in the attention paid to issues presented by mentally retarded criminal defendants. The next significant development was the growing recognition in the 1960s and 1970s that the criminal justice system ill-treated retarded defendants. Sporadic proposals for reform accompanied these observations. President Kennedy's Panel on Mental Retardation noted problems in the areas of the insanity defense, confessions, competence to stand trial, and disposition following conviction and acquittal. Other authorities proposed a special court for retarded defendants and separate treatment following conviction. The Supreme Court declared unconstitutional the system of indefinite commitment of retarded defendants found permanently incompetent to stand trial.

These events of the last two decades occurred against the backdrop of a more general movement toward fuller recognition of the rights of retarded people in all areas of American law. Despite isolated exceptions, criminal justice issues have engendered less activity and movement toward reform than other legal problems facing retarded people. The contemporary literature remains sparse and actual improvements in the treatment of mentally retarded defendants are difficult to detect. Although the last ves-

to his own inborn and uncontrolled impulses. It will never be safe for him to be at large.” Id. at 102.

One statutory response to this kind of fear was the enactment of defective delinquent and sexual psychopath statutes, aimed at both mentally ill and mentally retarded defendants. The Mental Health Standards properly call for the repeal of all such statutes. See Mental Health Standards, supra note 4, 7-8.1 & commentary at 447-53.

32. Allen, Toward an Exceptional Offenders Court, in MENTAL RETARDATION 3, 5-6 (Feb. 1966).
36. See supra text accompanying notes 31-34.
tiges of alarmist views about the criminality of retarded people have not been eliminated,37 the greater problem today is inattention and failure to identify the unique needs of retarded defendants in the criminal justice system.

II. Characteristics of Mentally Retarded Defendants

A. The AAMD's Definition and its Meaning

There is general agreement about the definition of mental retardation.38 The American Association on Mental Deficiency (AAMD), the principal professional organization in the field of mental retardation,39 has adopted the following definition: "Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period."40

37. See, e.g., United States v. Masthers, 539 F.2d 721, 732 (D.C. Cir. 1976) (Robb, J., dissenting). Judge Roger Robb remarked that the majority's decision to require scrutiny of the adequacy of a retarded defendant's guilty plea "licenses every illiterate moron to violate the law with impunity." Id.

38. Terminology in this field is somewhat complex. "Mental retardation" is today the accepted term in modern usage, although the archaic "mental deficiency" has not been completely abandoned. Another common term in current usage is "developmental disabilities," a broader concept encompassing a number of handicapping conditions, including mental retardation. See, e.g., Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-6081 (1982). Previously accepted terminology included "idiots," "imbeciles," "morons," and "feebleminded," all used to describe different degrees of mental retardation. The terminology was used without precise uniformity: "idiot" corresponded roughly with severe and profound retardation, "imbecile" with moderate retardation, and "moron" and "feebleminded" with mild retardation. On occasion each term has been used as an umbrella term to include all levels of disability. In common conversation, of course, these terms have become epithets, but they remain on the books in the statutes of a substantial number of states. See, e.g., S.C. CODE ANN. § 44-47-50(a) (Law. Co-op. 1985); IOWA CONST. art. II, § 5. Their continuing use offends mentally retarded people and their families. See A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 119 (1975). Stone remarks that "[p]erhaps there is no other place in the mental health system where labels are more odious and more invidious." Id.


40. AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 1 (H. Grossman ed. 1983) [hereinafter cited as AAMD, CLASSIFICATION IN MENTAL RETARDATION].

The causes of mental retardation are numerous and complex, including both environmental and genetic factors. See D. MACMILLAN, MENTAL RETARDATION IN SCHOOL AND SOCIETY 81-166 (2d ed. 1982); N. ROBINSON & H. ROBINSON, THE MENTALLY RETARDED CHILD 51-133 (2d ed. 1974).
Courts, legislatures, and other professional organizations have accepted this definition.

General intellectual functioning is a phenomenon measured, and thus defined, by intelligence tests. It is, therefore, quantifiable as an intelligence quotient (IQ) score. The AAMD's definition sets the upper boundary of mental retardation at an IQ level of 70, which is approximately two standard deviations from the mean score of 100. For an individual to be classified as mentally retarded, the deficit in intellectual functioning must be accompanied by impairments in adaptive behavior defined as "significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized scales." Thus, adaptive behavior is a term of art, which is not synonymous with maladaptive behavior. The inclusion of adaptive behavior in the definition of mental retardation requires that intellectual impairment, measured by an intelligence test, have some practical impact on the individual's life.

The final requirement of the definition of mental retardation is that the disability must become manifest before the age of eighteen. The origin of this requirement is obscure, and its relevance to criminal justice is limited. If an individual impaired in both intellectual function and behavior would otherwise be classified as


AAMD, Classification in Mental Retardation, supra note 40, at 23. The authors of the current definition caution that "[t]his upper limit is intended as a guideline; it could be extended upward through IQ 75 or more, depending on the reliability of the intelligence test used." Id. at 11.

The immediate predecessor to the current edition of the manual explicitly cast the definition in terms of standard deviations, but this definition was modified because of concern that it might suggest a greater precision than current testing instruments can provide. Id. at 23.

From 1959 to 1973 the AAMD definition was substantially broader, including all persons with IQ scores more than one standard deviation from the mean (approximately IQ 85). Persons whose scores fell in the range of 70-85 were labeled "borderline retarded." This approach was abandoned in 1973 because professionals recognized that individuals in the so-called "borderline retarded" group frequently did not function as mentally retarded people. This group is no longer labeled retarded by professionals in the field. Id. at 6.

Id. at 11.

See id. at 203-16 (illustrations of deficits in adaptive behavior at various levels of mental retardation). The most frequently used scales for measuring adaptive behavior are the AAMD Adaptive Behavior Scale and the Vineland Social Maturity Scale.

Three scholars in the field of mental retardation have recently proposed that the adaptive behavior component be omitted from the definition because "the essence of mental retardation involves inefficient cognitive functioning." Zigler, Balla & Hodapp, On the Definition and Classification of Mental Retardation, 89 Am. J. Mental Deficiency 215, 227 (1984).

See, e.g., Mental Health Standards, supra note 4, 7-9.1 commentary at 459.
mentally retarded, it matters little whether the onset of the problem occurred when the person was a child or an adult. The criminal law generally will be concerned with the manifestations and consequences of the individual’s handicap and not the date of its origin.

Mentally retarded people are classified in a system of four categories: mild, moderate, severe, and profound. Approximately eighty-nine percent of the people classified as mentally retarded fall within the “mildly retarded” category. Mildly retarded people have IQ scores in the range between 50 to 55 and approximately 70, and thus have a substantial disability. Judges and other criminal justice personnel unfamiliar with this classification scheme may find the labels of “mild” and “moderate” to be euphemistic descriptions of individuals at those levels of disability.

B. Mental Retardation Contrasted with Mental Illness

Mental retardation is often confused with mental illness. This confusion can have unfortunate consequences in the criminal justice system.

The American Psychiatric Association defines “mental disorder” as “an illness with psychologic or behavioral manifestations and/or impairment in functioning due to a social, psychologic, genetic, physical/chemical, or biologic disturbance. The disorder is not limited to relations between the person and society. The illness is characterized by symptoms and/or impairment in functioning.” While there may be some points of similarity between this definition and the AAMD’s definition of mental retardation, the cardinal difference is that mental retardation is not an illness.

“Temporal manifestation of retardation is not germane to the issues confronted within Part IX of these standards.” Id.

48. AAMD, CLASSIFICATION IN MENTAL RETARDATION, supra note 40, at 13.

Somewhat different (and arguably archaic and misleading) terminology is occasionally still employed in the context of special education. Mildly retarded people may be characterized as “educable,” and moderately retarded people as “trainable.” D. Evans, THE LIVES OF MENTALLY RETARDED PEOPLE 14 (1983).

49. DSM-III, supra note 43, at 40. People who are “mildly retarded” should not be confused with the so-called “borderline retarded,” who are no longer considered mentally retarded. See supra note 44.

50. See AAMD, CLASSIFICATION IN MENTAL RETARDATION, supra note 40, at 203-16 (illustrative descriptions of adaptive behaviors at each level of retardation). See also infra note 286.


52. Syndicated columnist George Will has captured this distinction vividly, noting that retarded people are often described as if they suffered from a disease: “Jonathan Will, 10, fourth-grader and Orioles fan (and the best Wiffle-ball hitter in southern Maryland), has Down’s syndrome. He does not ‘suffer from’ (as the newspapers are wont to say) Down’s syndrome. He suffers from nothing, except anxiety about the
Mentally ill people encounter disturbances in their thought processes and emotions; mentally retarded people have limited abilities to learn.  

Important consequences for the criminal justice system flow from the difference between mental illness and mental retardation. Many forms of mental illness are temporary, cyclical, or episodic. Mental retardation, by contrast, involves a mental impairment that is permanent. Thus, 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. Similarly, to discuss “restoration” of competence to stand trial presupposes that the individual was previously competent. Since most mentally retarded people became disabled at birth or as young children, this formulation is neither accurate nor meaningful. Perhaps the most significant danger of confusing mental illness and mental retardation in the criminal justice system is the failure to understand that psychiatric treatment appropriate for mentally ill people will do nothing to assist a retarded person who is not mentally ill. If the treatment is being provided to influence the mentally retarded defendant’s competence to stand trial or to render the individual nondangerous, the failure to provide habilitative services tailored to the defendant’s needs


The American Psychiatric Association includes mental retardation in its classification system of mental disorders. DSM-III, supra note 43, at 36-41. This does not make mental retardation an illness. The purpose of the American Psychiatric Association’s nosology in DSM-III is to allow psychiatrists to classify the symptoms presented by patients. Since some mentally retarded people may also suffer from mental illness, see infra note 59 and accompanying text, identification of the fact that a mentally ill patient is mentally retarded may have important consequences for diagnosis and treatment.

Thus people of any level of intelligence may be mentally ill. However, most mentally retarded people are free of mental illness. See infra note 59 and accompanying text.

The consequences of the mental impairment, including deficits in adaptive behavior, may be ameliorated through education and habilitation. Therefore, it is not accurate to state categorically that mental retardation is “permanent” or “incurable.” See AAMD, CLASSIFICATION IN MENTAL RETARDATION, supra note 40, at 15 (“The AAMD definition carries no connotation of chronicity or irreversibility and, on the contrary, applies only to levels of functioning.”) (emphasis omitted); CURATIVE ASPECTS OF MENTAL RETARDATION: BIOMEDICAL AND BEHAVIORAL ADVANCES xii (F. Menolascino, R. Neman, & J. Stark eds. 1983). But cf. Durham v. United States, 214 F.2d 862, 875 (D.C. Cir. 1954) (defining “mental defect” as “a condition which is not considered capable of either improving or deteriorating . . .”).

See, e.g., State v. Krol, 68 N.J. 236, 255, 344 A.2d 289, 299 (1975) (declaring unconstitutional a statute that required confinement of insanity acquittes until they were restored to reason). But see Jones v. United States, 463 U.S. 354, 361-70 (1983) (Constitution permits the government, on the basis of an insanity judgment, to confine an acquitted to a mental institution until he has regained his sanity).

“Habilitation” is the term used by mental retardation professionals to describe the array and combination of services that mentally retarded people need to address their disabilities. The Accreditation Council for Services for Mentally Retarded and Other Developmentally Disabled Persons (AC/MRDD) defines habilitation as “the process by which the staff of an agency assists individuals to acquire and maintain those life skills that enable them to cope more effectively with the demands of their
may result in needlessly protracted, possibly lifelong, confinement.\textsuperscript{58}

Mental illness and mental retardation are not mutually exclusive conditions; some mentally retarded people are also mentally ill. Dr. Frank Menolascino has estimated that the incidence of mental illness among retarded people is approximately thirty percent.\textsuperscript{59} Not only is the combined effect of their disabilities a burden,\textsuperscript{60} but our service delivery systems frequently make no allowance for their needs. Mental retardation facilities often refuse to serve persons with the behavioral disorders these individuals may manifest, and mental illness facilities often lack any expertise or programming for the habilitation of mentally retarded persons.\textsuperscript{61}

C. The Incidence of Mental Retardation Among Criminal Defendants

The mental retardation literature has addressed no other subject in criminal law as extensively as the incidence of retardation among criminal defendants and prisoners, and its implications regarding the "criminality" of mentally retarded people.\textsuperscript{62} The pub-
lished studies have produced widely disparate conclusions. The best modern evidence suggests that the incidence of criminal behavior among people with mental retardation does not greatly exceed the incidence of criminal behavior among the population as a whole.

Although the early alarmist literature which proclaimed that mentally retarded people were naturally destined to become criminals — and in fact that mental retardation caused criminality — has been debunked, the question of a causal relationship has not been fully resolved. Monahan and Steadman, in their study of the epidemiology of crime and mental illness, suggest an analysis of causation which may be a useful model in considering the parallel subject in mental retardation. They suggest that there are three possible paths that may link mental disorder (illness) to crime: mental disorder and crime may coexist without any causal relationship, mental disorder may predispose individuals toward criminality, or mental disorder may inhibit individuals from criminality.

Applying this model to mental retardation, a striking difference between the two types of disabilities becomes clear. As with mental illness, mental retardation may coexist with criminality. It may also inhibit criminal behavior, as with a person who is profoundly retarded and so physically involved (disabled) that he requires assistance with every movement. But mental retardation provides conclusive evidence that intelligence level plays a role in delinquent and/or criminal behavior.” F. Menolascino, supra note 59, at 181.

63. Compare Brown & Courtless, The Mentally Retarded in Penal and Correctional Institutions, 124 Am. J. Psychiatry 1164, 1166 (1968) (national average of about 10% with some states lower than 3%) with McCarty, supra note 62, at 416 (25 to 50% of all prisoners found to be “feeble-minded!”).

64. Early in this century, one authority observed that the statistics on retarded offenders were inflated by researchers counting only prisoners, thus failing to account for different rates of apprehension and parole at different levels of intelligence. The author then conducted her own study of the percentage of “feeble-minded” among criminals in Chicago and concluded that it was less than 10%. Bronner, A Research on the Proportion of Mental Defectives Among Delinquents, 5 J. Crim. L. & Criminology 561, 568 (1914).

65. See Biklen & Milnarcik, Criminal Justice, Mental Retardation and Criminality: A Causal Link?, 10 Mental Retardation and Developmental Disabilities 172 (J. Wortis ed. 1978) (an estimate of retarded persons in prisons may not reflect any greater propensity of the mentally retarded to commit crime than other segments of the general population); MacEachron, Mentally Retarded Offenders: Prevalence and Characteristics, 84 Am. J. Mental Deficiency 165, 168 (1979) (prevalence rates for retarded offenders in Maine and Massachusetts were only slightly higher than the prevalence rate of mental retardation in the general population). See generally Sarnamour, A Functional Discussion of Mental Retardation and Criminal Behavior, in The Retarded Offender, supra note 33.


67. Id. at 182. See generally Teplin, The Criminality of the Mentally Ill: A Dangerous Misconception, 142 Am. J. Psychiatry 593 (1985); Teplin, Criminalizing Mental Disorder: The Comparative Arrest Rate of the Mentally Ill, 39 Am. Psychologist 794 (1984) (suggesting that mentally ill persons are undergoing criminalization with adverse public policy consequences).
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will rarely, if ever, cause criminality. Mental retardation is a learning deficiency rather than a thinking disorder; the irrationality, paranoia, and delusions that can indicate mental illness and which are related to criminality are not indicators of mental retardation. But while direct causation can be ruled out, there are indirect consequences of mental retardation, including the iatrogenic effects on personality and behavior of living in dehumanizing institutions. These consequences may affect the interaction between the mentally retarded and the criminal justice system.

D. Characteristics of People with Mental Retardation

Mentally retarded people are individuals. Any attempt to describe them as a group risks false stereotyping and therefore demands the greatest caution. Nevertheless, some characteristics occur with sufficient frequency to warrant certain limited generalizations. Several of these traits have important implications for the

68. However, mental illness and mental retardation can coexist in the same individual, and those mentally retarded people may have symptoms of mental illness associated with criminal behavior. See supra note 59 and accompanying text.

69. Two distinguished social scientists recently analyzed the relationship between crime and intelligence. Their review of the data, controlling for socioeconomic status and cultural and family background, suggests that the average IQ of offenders is approximately 92, eight points less than the average of the population (but not within the mental retardation range), and that deficits in verbal ability account for much of that difference. The data also suggest that offenders of lower intelligence commit different types of crimes than other offenders. Crimes such as forgery, embezzlement, and securities fraud are associated with higher IQs; impulsive crimes such as assault, homicide, and rape are associated with lower IQs; and property crimes and drug and alcohol related offenses are associated with offenders of average IQ. The scholars suggest several possible explanations for these relationships: more intelligent criminals are deterred by the risk of arrest and prosecution and thus choose lower risk crimes; less intelligent offenders have fewer internal controls and thus commit impulsive crimes that do not involve preparation, planning, and delayed achievement of the criminal goal; and less intelligent offenders do not usually have the skills or social contacts to enter settings in which crimes such as embezzlement could be committed. J. Wilson & R. Herrnstein, Crime and Human Nature 148-72 (1985). See also Hirschi & Hindelang, Intelligence and Delinquency: A Revisionist Review, 42 Am. Sociological Rev. 571, 575 (1977) (the link between intelligence and crime is attributable to a person's experience in school); Edgerton, Crime, Deviance and Normalization: Reconsidered, in DEINSTITUTIONALIZATION AND COMMUNITY ADJUSTMENT OF MENTALLY RETARDED PEOPLE 145 (R. Bruninks, C. Meyers, B. Sigford & K. Lakin eds. AAMD Monograph No. 4 1981).

70. One author has commented: It is a typical observation in behavioral research that there is more variability within a group of mentally retarded persons than between retarded and non-retarded persons . . . . Mentally retarded people are not alike, because mental retardation is not an entity. It is a collection of well over 200 syndromes that have only one element in common: relative inefficiency at learning by the methods and strategies devised for other people to learn. Haywood, Reaction Comment, in THE MENTALLY RETARDED CITIZEN AND THE LAW 677 (1976). See Edgerton, supra note 69, at 145 (emphasizing the variation among retarded offenders).
criminal justice system, and therefore merit close attention to determine if they exist in an individual criminal case.

1. Communication and Memory

Many mentally retarded people have limited communication skills. The most seriously disabled persons have no expressive language and limited or no receptive language.\(^{71}\) Therefore, it would not be unusual for a mentally retarded individual to be unresponsive to a police officer or other authority or to be able to provide only garbled or confused responses when questioned. Even when the mentally retarded person's language and communication abilities appear to be normal, the questioner should give extra attention to determining whether the answers are reliable. Several factors can influence the reliability of an answer. For example, many people with mental retardation are predisposed to "biased responding" or answering in the affirmative questions regarding behaviors they believe are desirable, and answering in the negative questions concerning behaviors they believe are prohibited.\(^{72}\) The form of a question can also directly affect the likelihood of receiving a biased response,\(^{73}\) and thus police officers, judges, and lawyers may inadvertently or intentionally cause the susceptible mentally retarded accused person to answer in an inaccurate manner by asking a question in an inappropriate form.

Further, many mentally retarded persons are reluctant to resist questioners by refusing to answer questions that are beyond their ability.\(^{74}\) Even when a person with mental retardation can verbalize effectively, memory will often be impaired. This is particularly true of events which the individual had not identified as important.\(^{75}\) Because few mentally retarded people are able to de-
termine what information might have legal significance for their case, spontaneous memory and cursory questioning cannot reliably ascertain all the facts.

2. Impulsivity and Attention

People with mental retardation are often described as impulsive or as having poor impulse control. This characteristic appears to be related to problems in attention and thus involves attention span, focus, and selectivity in the attention process. In the criminal justice system, deficits in attention or impulse control can have important implications in almost all steps from the commission of the offense through sentencing. The mentally retarded person might accompany perpetrators or actually commit a crime on impulse or without weighing the consequences of the act; when stopped by the police he might be unable to focus on the alleged crime or appreciate the gravity of his arrest; in trial preparation the individual would likely be similarly ineffective at focusing on the relevant aspects of the incident or attending to the task of assisting counsel; at trial the individual may appear deviously to steer away from certain lines of testimony or may appear obstinate when in fact his attention disability prevents him from responding appropriately. Similar problems may arise at each step of the judicial process.

3. Moral Development

Studies on the moral development of people with mental retardation reveal that some individuals have incomplete or immature concepts of blameworthiness and causation. Some mentally retarded people will determine or assign guilt even when a situation
is the result of an unforeseeable accident. The inability to distinguish between an incident which is the result of blameworthy behavior and an incident which results from a situation beyond the individual's control can have serious consequences. For example, a defendant with retardation may plead guilty to a crime which he did not commit because he believes that blame should be assigned to someone and he is unable to understand the concept of causation and his role in the incident.

Similarly, some people with mental retardation will eagerly assume blame in an attempt to please or curry favor with an accuser. This phenomenon of “cheating to lose” may give rise to unfounded confessions.79

4. Denial of Disability

Certain dimensions of self-concept and self-perception are also often affected by mental retardation. It is not uncommon for individuals with mental retardation to overrate their own skills, either out of a genuine misreading of their own abilities80 or out of defensiveness about their handicap.81 This tendency is evident in estimates by retarded people of their academic achievement, physical skill, and intellectual level.82 It is therefore not surprising when a mentally retarded person brags about how tough he is or how he outsmarted a victim, when in fact, he accomplished neither feat. Overrating is probably closely tied to desperate attempts to reject the stigma of mental retardation. Many mentally retarded individuals expend considerable energy attempting to avoid this stigma.83 In a similar vein, some mentally retarded people make ill-advised and damaging attempts to enhance their status or deny their disability in the courtroom.84

Given these characteristics, it should not be surprising that few


81. Cf. Cleland, Patton & Seitz, The Use of Insult as an Index of Negative Reference Groups, 72 Am. J. Mental Deficiency 30, 33 (1967) (the most common insults used by people with mental retardation relate to intelligence, indicating that denial of their intellectual limitations is a nearly universal defense).


84. See, e.g., Tyars v. Finner, 709 F.2d 1274, 1277 (9th Cir. 1983). During involuntary commitment proceedings the retarded respondent began to punch the air and yell “pow, pow” when he heard the incriminating testimony on his alleged aggressiveness. Id.
people with mental retardation identify themselves as disabled when arrested or at any other point in the criminal justice system. In fact, many of these individuals will go to great lengths to hide their disability.85

5. Lack of Knowledge of Basic Facts

The very nature of the cognitive deficits inherent in the classification of a person as mentally retarded means that most individuals with mental retardation will know less than most people without mental retardation.86 This knowledge deficit is often aggravated by the special education curriculum for mentally retarded children, which is less informative than the regular curriculum. Special education students will often be excluded from certain classes and activities that teach general knowledge about the world, in order to focus more time and attention on learning basic skills or participating in vocational training.87 For example, while other students are learning the concepts and vocabulary of civics and social studies, students with mental retardation may instead receive extended instruction in reading or engine assembly. Although special curricula are necessary for most mentally retarded students, their exclusion from certain courses is not without cost.

6. Motivation

Many people with mental retardation appear to be less motivated toward the mastery of problems than people of normal intelligence. The general desire to be effective at life's tasks, a strong motivator for mentally typical people, fails to motivate most mentally retarded people in the same way.88 However, the desire to please authority figures does appear to be a powerful motivator. Many persons with mental retardation, especially those who have experienced institutionalization, have a particular susceptibility to perceived authority figures and will

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85. Incarcerated mentally retarded offenders have been described as "clever in masking their limitations." Santamour & West, supra note 76, at 18.
86. At least four of the twelve subtests found in the commonly used Wechsler Intelligence Scale-Revised are designed to assess vocabulary, information, similarities, and comprehension. Thus, an IQ score indicating mental retardation will almost always mean that the person has deficits in each of these areas. D. Wechsler, WECHSLER'S MEASUREMENT AND APPRAISAL OF ADULT INTELLIGENCE (5th ed. 1972).
seek the approval of these individuals even when it requires giving an incorrect answer. Such "outer-directed" behavior suggests that many people with mental retardation will be particularly vulnerable to suggestion, whether intentional or unintentional, by authority figures or high-status peers.

The phenomenon of "learned helplessness," or "fatalistic passivity," has also been reported in people with mental retardation. This characteristic resignation has been attributed to the experiencing of repeated failures and the tendency among mentally retarded people to attribute their failures to uncontrollable factors.

III. Criminal Responsibility of Retarded Defendants

A. The Defense of Mental Nonresponsibility

The relevance of mental retardation to criminal responsibility has been debated for centuries. Established authorities have long accepted that an "idiot" cannot be convicted of a criminal offense. The principal points of contention have centered around the definition of the level of disability sufficient to constitute "idiocy," and the legal relevance of lesser degrees of disability.

Courts have consistently held that mental retardation must be almost totally disabling to constitute a defense to accusations of crime. In the famous early eighteenth century case of Rex v.

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89. See, e.g., Harter, Mental Age, IQ and Motivational Factors in the Discrimination Learning Set Performance of Normal and Retarded Children, 5 J. EXPERIMENTAL CHILD PSYCHOLOGY 123, 137-38 (1967).
91. Mental nonresponsibility is commonly referred to as "insanity." See infra text accompanying notes 138-40.
92. See supra notes 9-30 and accompanying text.
93. See, e.g., 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *24: "The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, viz. in an idiot or a lunatic. For the rule of law as to the latter, which may easily be adapted also to the former, is that "furiosus furore solum puitur." In criminal cases therefore idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself." Id. Accord M. DALTON, THE CountREY JUSTICE 223 (1619) ("If one that is non compos mentis, or an idiot, kill a man, this is no felony; for they have no knowledge of good and evil, nor can have a felonius intent, nor a will or mind to doe harm . . .").
94. "[Imbecility] differs from idiocy in the circumstance that while in the latter there is an utter destitution of every thing like reason, the subjects of the former possess some intellectual capacity, though infinitely less than is possessed by the great mass of mankind." I. RAY, supra note 13, at 65. The exculpation of severely and profoundly retarded persons never engendered much controversy. "The general principles that determine the legal relations of idiocy are so obvious, and the fact of its existence so easily established that little occasion has been afforded for doubt or diversity of opinion." Id. at 78.
Arnold, the English court of Common Pleas formulated what came to be known as the “wild beast” test: “it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment.”

More than a century later, the House of Lords created the most famous and long-lasting definition of those mentally disabled people who are entitled to exculpation. The M’Naghten test was phrased in terms of “a defect of reason, from disease of the mind.” There remained some uncertainty as to whether it was meant to include defendants whose incapacity resulted from mental deficiency. However, since “idiocy” and “imbecility” were at that time universally viewed as forms of insanity, there is little doubt they were both understood to be within the formulation. Almost immediately, courts incorporated the “right from wrong” test into jury instructions where the claim was that the defendant “was of very weak intellect.”

96. 16 How. St. Tr. 695 (1724). See 1 N. Walker, supra note 11, at 52-57 (1968) (discussing the case in historical context).

97. 16 How. St. Tr. at 765. It should be noted that the Arnold case involved a defendant who claimed to be mentally ill rather than mentally retarded. “They admit he was a lunatic, and not an idiot. A man that is an idiot, that is born so, never recovers, but a lunatic may, and hath his intervals; and they admit he was a lunatic.” Id.


99. Id. at 722. See R. Moran, Knowing Right from Wrong: The Insanity Defense of Daniel McNaughton (1981) (an investigation into the political nature of the crime and the verdict); Daniel McNaughton: His Trial and the Aftermath (D. West & A. Walk eds. 1977) (a compilation of commentaries on the historical, medical, and legal consequences of the decision); 1 N. Walker, supra note 11, at 84-103, see also Diamond, On the Spelling of Daniel M’Naghten’s Name, 25 Ohio St. L.J. 84 (1964).

100. See, e.g., State v. Palmer, 161 Mo. 152, 172, 61 S.W. 651, 657 (1901) (“Mental disorders cannot be regarded as evidence of insanity which will confer legal responsibility for crime, however, unless they are caused by or result from disease or lesion of the brain. . . . Thus, mere weakness of mind does not excuse crime, nor will bad education or bad habits, nor the fact that a person is of a low order of intellect . . . .”).


A similar result had been reached earlier in this country by Justice Story, sitting as Circuit Judge, in United States v. Cornell:

There is no pretence to say, that the prisoner is in any legal or accurate sense, deficient in understanding. It was proved by all the witnesses, by his own witnesses, it was admitted by his counsel, that he was compositus, having intelligence to discern what was right and what was wrong. All that was suggested was, that he was more ignorant and somewhat
Subsequent litigation focused on whether a defendant was sufficiently retarded to be held unable to distinguish right from wrong. Numerous courts have held evidence of mental retardation insufficient to justify an acquittal, or in some cases, even to warrant a jury instruction on insanity. The only point of disagreement involved claims that a retarded adult defendant had a "mental age" equivalent to that of a child incapable of committing a crime.

Surprisingly, the debate about the analogy between mental deficiency and the criminal law's treatment of children began before the development of intelligence tests and the subsequent popularity of the notion of "mental age." Justice Seymour's charge to the jury in State v. Richards relied upon the comparison drawn by Lord Hale between infants and "imbeciles:" "[I]nasmuch as children under fourteen years of age are prima facie incapable of crime, imbeciles ought not to be held responsible criminally unless of capacity equal to that of ordinary children of that age."

more stupid than common men, of bad education, and bad passions, and bad habits. Now these are precisely the common causes of crimes; but certainly they form no legal excuse or justification for the commission of them.


103. Mental retardation appears to have been often described by the phrase "weak minded." Ambiguities in 19th century terminology of mental disability make it impossible to be certain whether all such cases involved mental retardation. At least in England, it was not uncommon for persons whose behavior was viewed as eccentric and morally unacceptable to be labelled as "weak minded," or even as "idiots" or "imbeciles," without a suggestion that the person was mentally deficient. R. SMITH, TRIAL BY MEDICINE: INSANITY AND RESPONSIBILITY IN VICTORIAN TRIALS 116 (1981).

104. E.g., State v. Finski, 163 S.W.2d 785, 788 (Mo. 1942); Wartena v. State, 105 Ind. 445, 450, 5 N.E. 20, 23 (1866); State v. Johnson, 233 Wis. 668, 674, 290 N.W. 159, 162 (1940); Craven v. State, 93 Tex. Crim. 328, 247 S.W. 515, 517 (1923). See H. WEIHOFEN, supra note 30, at 120 n.4 (1954) (listing cases); Annot., 44 A.L.R. 584 (1926).

Some states had statutes which provided that "idiots" were incapable of committing crimes. H. WEIHOFEN, supra note 30, at 50 n.1. But courts uniformly held that this did not create a defense broader than that provided by the locally adopted test for insanity. See, e.g., Singleton v. State, 90 Nev. 216, 522 P.2d 1221, 1223 (1974) (even when there was expert testimony that defendant's IQ fell within the professionally accepted definition of an "idiot," the appropriate test was still M'Naghten).

105. "Mental age" is a means of describing the severity of a mentally retarded person's disability. The concept was invented by Alfred Binet, one of the creators of the earliest intelligence tests. The concept of mental age represents an attempt to compare the intellectual functioning of the individual being tested with the performance of mentally typical (nonretarded) people. Thus, a child with a chronological age of 12 may receive a similar score on an IQ test to a nonretarded child who is six years old, and therefore be said to have a mental age of 6. This is accomplished by identifying for each question or item on an IQ test the age level at which most children typically can answer the question successfully. See N. ROBINSON & H. ROBINSON, THE MENTALLY RETARDED CHILD 340-42 (2d ed. 1976).


107. 39 Conn. 591 (1873).

108. Id. at 594. Defendant, described as "considerably below par in intellect" but "not a mere idiot," was charged with burning a barn. Id. at 592. The prosecution's witnesses are said to have described him as "inferior in intellect to children ten years of age," while defense witnesses stated that "they are acquainted with many children of six years who are his superiors in mental capacity." Id. at 594. In applying the analogy, Justice Seymour charged the jury to be careful of the imperfection of the comparison "between the healthy and properly balanced, though immature, mind of a
The Richards case has been severely criticized and its approach has not been followed in subsequent cases. Following the popularization of intelligence tests early in this century, defendants frequently sought to use the "mental age" component of test results to seek exculpation based on analogy to the legal rules governing children whose chronological age compared with the defendant's mental age. These attempts were universally unsuccessful. The courts held that there was not full equivalence between a child and a mentally disabled adult, and resisted a doctrine which might have resulted in successful defenses for substantial numbers of defendants.

child, and the unhealthy, abnormal and shrivelled intellect of an imbecile." Id. The instruction also asserted the relevance of the defendant's life-long confinement in almshouses, suggesting that this constraining background had an impact on his ability to control his own impulses: "He has, it appears, been seldom left to the free guidance of his own judgment." Id. at 595. Justice Seymour concluded by instructing the jury to specify if their acquittal was on the ground of want of mental capacity . . . in order that the prisoner may in that event have the benefit under our statute of a home where he will be kindly cared for, but kept under such restraints as to prevent his doing injury to the persons or property of others.

Id.

109. E.g., H. Weihofen, supra note 30, at 193 n.77. But see S. Glueck, Mental Disorder and Criminal Law 196-97 (1925) (feebleminded adults with a mental age of seven to fourteen should enjoy a rebuttable presumption of innocence when pleading not guilty by reason of insanity).

110. See H. Weihofen, supra note 30, at 39, 193 n.78.

111. A typical case was State v. Schilling, 95 N.J.L. 145, 148, 112 A. 400, 402 (1920), in which a 28-year-old man was said to have a mental age of 11: There is a vast difference between a child at the age of 11 years and that of a man of 28, and while perhaps there is a presumption that an infant of tender years is incapable of committing a crime, that presumption does not extend to one of advanced years, requiring the state to rebut it . . . . The presumption of the lack of power of thought and capacity in favor of a child is due more to the number of years he has lived than to the character of the development of his mind . . . but that reason does not apply when he comes to manhood. Id. at 402. See also Chriswell v. State, 171 Ark. 255, 258, 283 S.W. 981, 983 (1926) ("where an adult person has the intelligence of a child from 7 to 9 years of age, that fact alone cannot be made the test [of insanity]"); People v. Marquis, 344 Ill. 261, 176 N.E. 314 (1931) (subnormal mentality is not a defense to a crime unless it renders the accused unable to distinguish right from wrong). Cf. Commonwealth v. Stewart, 255 Mass. 9, 151 N.E. 74 (1926) (defendant unsuccessfully objected to testimony that a person with a mental age of 13 could be capable of first degree murder); State v. Kel- sie, 93 Vt. 450, 452, 108 A. 391, 392 (1919) (defense counsel's attempt to ask expert witness whether 33-year-old defendant would qualify as an imbecile was rejected because the expert had already testified that "the accused was mentally and morally an 8-year old boy"); Annot., 44 A.L.R. 554, 556 (1926) (a comparison of chronological with mental age when defining subnormal mentality is not, without more, a defense to a crime).

112. E.g., In re Ramon M., 22 Cal. 3d 419, 429-30, 584 P.2d 524, 531, 149 Cal. Rptr. 387, 394 (1978) ("Approximately 16% of the adult population and a much higher percentage of adolescents between ages 14 and 18 have mental ages below 14 years. Under defendant's proposed interpretation . . . all such persons would be presumed incapable of committing crimes."). Cf. Commonwealth v. Szachewicz, 303 Pa. 410, 154
In the last three decades, the few reported judicial opinions addressing the criminal responsibility of mentally retarded individuals have focused on the relationship between modern formulations of the test for insanity and the disabilities of the defendants. In *Durham v. United States*,113 dissatisfaction with the perceived harshness of the *M'Naghten* test led the United States Court of Appeals for the District of Columbia to formulate a new test that created a defense for acts which were the “product of mental disease or defect.”114 The definition of the disabilities entitling a defendant to this defense was extremely significant. Recognition of a retarded defendant’s mental condition as a “mental defect” would be outcome-determinative under this test where that condition was held to have “produced” the criminal behavior. In *Durham*, the court used “disease” to signify a condition capable of improving or deteriorating. “Defect” signified a permanent condition, either congenital, the result of an injury, or the residual effect of mental or physical disease.115

Eight years later, the same court warned that this passage in *Durham* had not been intended to define the terms, but rather to differentiate between the two kinds of disabilities. In *McDonald v. United States*,116 the court ruled that the definitions were to come from the judiciary; factfinders were not bound by ad hoc definitions formulated by experts.117 Therefore, the court ruled, juries should be instructed that “a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.”118 This meant that definitions by mental disability professionals, such as the AAMD’s definition of mental retardation, would not be dispositive on the issue of criminal responsibility. The court retained the authority to define “mental defect” more narrowly (or more broadly) than mental retardation professionals, basing the choice on jurisprudential rather than clinical considerations.119

A. 483, 484-85 (1931) (related doctrine of partial responsibility “would turn loose on society a class of dangerous citizens, who, because of their legalized immunity, would prey on other members of society without much restraint.”) Similarly, an early adherent of more lenient doctrinal treatment of retarded defendants insisted that those acquitted receive “absolutely indeterminate incarceration” in a special institution or colony. S. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 385 (1925) (emphasis in original).

113. 214 F.2d 862 (D.C. Cir. 1954).
114. Id. at 874-75.
115. Id. at 875.
116. 312 F.2d 847 (D.C. Cir. 1962).
117. Id. at 851. “A psychiatrist’s determination of ‘a mental disease or defect’ for clinical purposes . . . may or may not be the same as the jury’s purpose in determining criminal responsibility.” Id.
118. Id.
119. Id. In the *McDonald* decision, the court required more than the results of intelligence testing to warrant sending the issue of insanity to the jury. Id. at 850. An IQ score of 68 standing alone was not evidence of a mental defect sufficient to invoke the *Durham* charge. The court concluded that where “other evidence of mental abnormality appears, in addition to the IQ rating, . . . the instruction should be given.”
The Durham test was not adopted by any other jurisdiction and after two decades even the Court of Appeals for the District of Columbia replaced it because its reliance on expert testimony regarding causation of criminal behavior was perceived to be unworkable. The abandonment of the Durham rule shifted the debate to the meaning and relative merits of the M'Naghten test and that of the American Law Institute's [ALI] Model Penal Code. The latter test provides: "A person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."

Courts employing the ALI's test have held that the term "mental defect" includes mental retardation. The precise contours of the definition of "mental defect" are less significant under the ALI's test than under Durham; under the ALI's test, a finding of mental defect is only a prerequisite to determining whether the defendant could appreciate criminality or conform his conduct.

The American Bar Association's Mental Health Standards reject the ALI's test and recommend a modified version of the M'Naghten test: "[A] person is not responsible for criminal conduct if at the time of such conduct, and as a result of a mental disease or defect, that person was unable to appreciate the wrongfulness of such conduct." Mental defect is defined to include

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123. MENTAL HEALTH STANDARDS, supra note 4, 7-6.1(a). The test contained in this standard is similar to the new federal test for insanity enacted by Congress in 1984:

It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

Act of Oct. 12, 1984, Pub. L. No. 98-473, § 402(a), 98 STAT. 2057 (1984) (to be codified at 18 U.S.C. § 20). The principal difference between the ABA's standard and the new federal test is the latter's inclusion of the adjective "severe" to modify mental disease or defect. The legislative history indicates that the drafters were concerned with the severity of mental illness, rather than mental retardation:

The concept of severity was added to emphasize that non-psychotic behavior disorders or neuroses such as an "inadequate personality," "immature
mental retardation "which substantially affected the mental or emotional processes of the defendant at the time of the alleged offense."124

The principal difference between the ALI's test, which had previously been endorsed by the ABA,125 and the new standard is the omission of the so-called "volitional prong." Thus, under the Mental Health Standards, a defendant would not be exculpated if a mental disease or defect prevented him from conforming his conduct to the law's requirements. The ABA committee's argument for this change exclusively involves mental illness, suggesting that in practice the volitional test is often combined with vague or broad definitions of "mental illness." The mixture of "these two imprecise notions results in expert opinions regarding the psychological causes of criminal behavior which strain the public's credulity and offend moral sentiments, especially in cases involving defendants with personality disorders, impulse disorders, or some other diagnosable abnormality short of a clinically recognized psychosis."126

There are two separate contentions in this rationale. The first is that mental illness constitutes an "imprecise notion," fraught with definitional and diagnostic fuzziness. This is somewhat less true of mental retardation, for which a uniform definition is more generally accepted and for which the methodologies of diagnosis and


124. MENTAL HEALTH STANDARDS, supra note 4, 7-6.1(b). The commentary to this standard notes:

it is not possible to state, in the abstract, that a certain level of retardation (e.g., severe, as opposed to moderate or mild) would or would not cross the threshold [to warrant exculpation]. To impose such limitations would take insufficient account of both the continuing imprecision of the diagnostic process and the unique features of each individual's disorder.

125. See MENTAL HEALTH STANDARDS, supra note 4, Part VI introduction at 318.

126. Id. 7-6.1 commentary at 327-36. A leading advocate for the ABA's omission of the volitional prong has asserted that "[t]he volitional inquiry probably would be manageable if the insanity defense were permitted only in cases involving psychotic disorders." Bonnie, The Moral Basis of the Insanity Defense, 69 A.B.A. J. 194, 196 (1983). Cf. supra note 123.
testing are somewhat more objective. The second component of the committee's explanation is that the general public finds the notion of "irresistible impulse" implausible in those defendants capable of appreciating the wrongfulness of their conduct. This contention may be equally true for mentally ill and mentally retarded defendants. Popular tolerance may not be much greater for claims that retardation impaired impulse control than for assertions that mental illness did so.

While the public credulity about irresistible impulses may be the same for both kinds of disability, the omission of the volitional prong of the insanity defense may have a particular impact on retarded defendants. As discussed previously, a common characteristic of many mentally retarded people is a reduced ability to control impulses.\(^\text{127}\) This trait may have its roots in the cognitive impairment that leads to reduced intellectual functioning. The ability to control impulsive behavior is related to the ability to understand both the nature of behavior and the social circumstances that make an action appropriate or inappropriate to a particular occasion. Thus, to some extent, impulsivity may reflect an educational deficit, because proper teaching can equip most retarded persons to tailor their actions to social expectations. This deficit is particularly common in people who have been institutionalized.\(^\text{128}\)

There should be considerable discomfort with the prospect of punishing retarded individuals whose ability to control their impulses is underdeveloped or atrophied, in part, as an iatrogenic consequence of state action.\(^\text{129}\)

Other features of the Mental Health Standards' formulation of the insanity defense are also noteworthy. By explicitly including mental retardation within the definition of mental defect, the Mental Health Standards reject the argument that the insanity defense should be unavailable to mentally retarded people who are

\(^{127}\) See supra notes 76-77 and accompanying text.

\(^{128}\) This phenomenon has long been observed:

The history of the prisoner's life is somewhat significant. From early childhood it has been spent in alms-houses, subjected to constant constraint. In the most ordinary acts of his life he has been governed by the superior will of others to whose care he has been committed. He has, it appears, been seldom left to the free guidance of his own judgment. When so left, he seems to have acted without forecast, under the pressure of immediate wants and impulses.

State v. Richards, 39 Conn. 591, 595 (1873).

\(^{129}\) It is not our contention that the existence of retarded individuals with impairments in their ability to control their behavior should dictate the choice between the ALI's test and that of the Mental Health Standards. However, the appropriate treatment of these defendants should be one factor in deciding to abandon the volitional component of the insanity defense. In those jurisdictions that retain the volitional component, courts should be aware of these factors in deciding the individual cases of retarded defendants who assert the defense.
not also mentally ill. The ABA Commission on the Mentally Disabled recently published a proposed model statute which took this approach.\textsuperscript{130} This statute provides that "[d]efendants who have a developmental disability but who do not also have a mental illness are not entitled to assert a defense that they are not guilty by reason of insanity..."\textsuperscript{131} The comment to this section of the model statute argues that developmental disabilities (including mental retardation) present issues of criminal responsibility which are more appropriately addressed in the context of the doctrine of "diminished capacity."\textsuperscript{132} Subsequent sections of the statute provide for a verdict of acquittal by reason of diminished capacity, and an accompanying set of procedures for evaluation and commitment of those so acquitted. The approach taken by the \textit{Mental Health Standards} is preferable to that of the model statute. Arguments can be made for abolishing the insanity defense entirely, and relying, instead, solely upon the requirement of mens rea for exculpation of the mentally disabled.\textsuperscript{133} Nevertheless, abolishing the insanity defense for mentally retarded defendants and leaving it in place for mentally ill defendants would create a serious inequity; the inability to appreciate the wrongfulness of criminal conduct would exculpate a person who was mentally ill, but would not exculpate a mentally retarded person. No principled reason has been advanced for the differential treatment of these two similarly situated groups of defendants, each of whom is equally "innocent" of responsibility for his conduct.\textsuperscript{134} Another feature of the \textit{Mental Health Standards} is the use of the term "appreciate" instead of "know" in the formulation of the defense. The commentary states that this choice parallels that of the drafters of the AIL's test for the cognitive component of their formulation, and reflects the view that a responsibility test should go beyond a defendant's "superficial intellectual awareness;" the

\textsuperscript{130} \textit{MODEL DEVELOPMENTALLY DISABLED OFFENDERS ACT}, \textit{supra} note 8, §§ 1-4.
\textsuperscript{131} \textit{Id.} § 10(1).
\textsuperscript{132} \textit{Id.} § 10(2), (3). It should be noted that the \textit{Mental Health Standards} provide for the admissibility of evidence of mental condition relevant to the issue of mens rea. See \textit{MENTAL HEALTH STANDARDS}, \textit{supra} note 4, 7-6.2 commentary at 341.
\textsuperscript{133} \textit{MODEL DEVELOPMENTALLY DISABLED OFFENDER ACT}, \textit{supra} note 8, § 10(1)-(4). The act avoids the use of the term "commitment" and opts for the euphemism of "provision of habilitation services on an involuntary basis." \textit{Id.} § 10(6)(b).
\textsuperscript{135} Other commentators also have suggested that the insanity defense is inappropriate for retarded defendants, but these suggestions appear to be based, in part, on practical considerations concerning subsequent confinement. S. HAYES & R. HAYES, \textit{SIMPLY CRIMINAL} 165 (1984) (the authors suggest that under the Australian system, because a retarded person will not "recover" from his retardation, the insanity defense is inappropriate); \textit{see also} S. HAYES & R. HAYES, \textit{MENTAL RETARDATION: LAW, POLICY AND ADMINISTRATION} 406 (1982) (arguing that the principle of normalization requires that mentally retarded people should receive no special doctrinal treatment on the basis of their disability).
focus of the inquiry into criminal responsibility should not be limited, as the term “know” might suggest, to a defendant’s limited understanding of the law or prevailing morality. Instead, the test for criminal responsibility should take into account all aspects of the defendant’s mental and emotional functioning which relate to the ability to recognize and understand the significance of one’s actions.\textsuperscript{136}

Although this shift in terminology is relevant to the mental condition of some mentally ill defendants, it is particularly important in cases involving mental retardation. When a retarded defendant’s understanding of the wrongfulness of his conduct is in question, it is often a “lack of appreciation for the subtleties of social interaction and abstract concepts of right and wrong that impair his behavior.”\textsuperscript{137} Identifying the issue as the retarded defendant’s ability to “appreciate” the wrongfulness of his conduct allows the trier of fact to focus more realistically on the defendant’s actual understanding than does the more ambiguous “knowledge” formulation.

Finally, it should be noted that the label which the Mental Health Standards assign to the defense, “mental nonresponsibility” rather than “insanity,” is a felicitous choice for cases involving mental retardation. The commentary argues that the newer term is preferable because “‘insanity’ carries with it too much stigmatizing baggage and . . . conjures up visions from an earlier era.”\textsuperscript{138} In addition to “conjur[ing] up visions of beastlike derangement,”\textsuperscript{139} “insanity” also connotes a mental illness or disease, which is inapplicable to mental retardation.\textsuperscript{140} Therefore, the term “mental nonresponsibility” has the additional virtue of eliminating the confusion as to whether retarded defendants who are not mentally ill are entitled to assert the defense.

\begin{itemize}
\item \textsuperscript{136}Mental Health Standards, supra note 4, 7-6.1 commentary at 330-35; see also Model Penal Code § 4.01 commentary at 178-80 (1985) (stating that the inquiry should focus on “whether the defendant was without capacity to conform his conduct to the requirements of law”).
\item \textsuperscript{137}Tupin & Goolishian, Mental Retardation and Legal Responsibility, 18 De Paul L. Rev. 673, 677 (1969); see Empirical Study: The Mentally Retarded Offender in Omaha-Douglas County, 8 Creighton L. Rev. 622, 646 (1975) (arguing that, although mentally retarded persons may be able to distinguish right from wrong in the abstract, they have difficulty applying the abstract concepts to specific factual settings). See generally Gray, The Insanity Defense: Historical Development and Contemporary Relevance, 10 Am. Crim. L. Rev. 559, 573 (1972) (discussing Piaget’s theories of abstract thinking and moral development).
\item \textsuperscript{138}Mental Health Standards, supra note 4, ch.7 introduction at 5.
\item \textsuperscript{139}Id. part VI introduction at 316.
\item \textsuperscript{140}The stigmatizing aspects of the label “insane” may be felt in a particularly acute manner by mentally retarded people and their families. Cf. S. Hayes & R. Hayes, Simply Criminal 69 (1984) (“The aims of the criminal process . . . [cannot] be fulfilled adequately or appropriately while mentally retarded offenders remain categorised as ‘insane’”).
\end{itemize}
B. Guilty But Mentally Ill

Dissatisfaction with the perceived leniency of the insanity defense has led a number of states to adopt statutes providing an alternative verdict of "guilty but mentally ill." The momentum for adoption of these laws appears to have increased following the insanity acquittal of John Hinckley, Jr. The guilty-but-mentally-ill statutes typically provide for the alternative verdict to be offered in jury instructions in cases in which the defendant has raised the defense of insanity. The Mental Health Standards unequivocally recommend that states refuse to adopt this verdict.

The ABA’s criticism of these statutes is based on the belief that they may prove confusing to juries and thus result in compromise verdicts or otherwise deny an acquittal to a mentally nonresponsible defendant with meritorious defenses. The commentary does not discuss the extent to which these statutes affect mentally retarded defendants or the meaning and impact of the alternative verdict in mental retardation cases.

Initially, it appears that the very formulation of the "guilty but mentally ill" verdict would make it inapplicable to mentally retarded defendants who were not also mentally ill. Although "insanity" has become a legal term whose meaning is sufficiently flexible to encompass defendants who are mentally retarded, "mental illness" appears unambiguously to exclude those who are not mentally ill. But some of the guilty-but-mentally-ill statutes are not so clear.

Michigan’s law, the first to be enacted, is typical in its confusing treatment of mentally retarded defendants. It provides that a defendant can be found guilty but mentally ill if he raises the defense of insanity, which can be based on mental retardation, and


143. In New Mexico the court delivers the guilty-but-mentally-ill instruction upon the defendant’s claim that he lacked the mens rea necessary for the offense, even if the defendant’s request for an insanity instruction is denied by the trial court. State v. Page, 100 N.M. 788, 791, 676 P.2d 1353, 1356 (Ct. App. 1984).

144. Mental Health Standards, supra note 4, 7-6.10(b).


146. See supra note 122 and accompanying text.

the trier of fact finds he “was mentally ill at the time of the commission of that offense.” This would appear to make the verdict unavailable when the defendant’s insanity defense was based solely on evidence of mental retardation. However, a subsequent section provides that a defendant found guilty but mentally ill shall be evaluated by the department of corrections “and be given such treatment as is psychiatrically indicated for his mental illness or retardation.” Other states define “mental illness” for purposes of the guilty-but-mentally-ill defense to include mental retardation. Another approach has been to define mental illness in terms similar to the state’s mental illness civil commitment statute. This presumably excludes mentally retarded people, as they do not fall within the scope of that statute. Certainly the most confusing of the guilty-but-mentally-ill laws are those that define “mentally ill” in terms similar to those employed in the formulation of the insanity defense itself.

149. Id. § 768.36(3) (emphasis added). The confusion between mental illness and mental retardation is exacerbated by the reference to “psychiatrically indicated.” Although some psychiatrists work with mentally retarded individuals, they are not the principal experts on mental retardation. See infra notes 392-402 and accompanying text.
151. Compare N.M. Stat. Ann. 31-9-3(A) (1978 & repl. 1984) (“mentally ill means a substantial disorder of thought, mood or behavior which afflicted a person at the time of the commission of the offense and which impaired that person’s judgment . . . .”) with N.M. Stat. Ann. 43-1-3(N) (1978 & repl. 1984) (“mental disorder means the substantial disorder of the person’s emotional processes, thought or cognition which grossly impairs judgment, behavior or capacity to recognize reality”).
152. Pennsylvania defines “mentally ill” for guilty-but-mentally-ill purposes as “one who as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law,” and defines “legal insanity” as “laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know he was doing what was wrong.” 18 Pa. Cons. Stat. Ann. § 314(c) (Purdon 1982). Similarly, Alaska defines the insanity defense in terms of the defendant being “unable, as a result of a mental disease or defect, to appreciate the nature and quality of that conduct,” Alaskan Stat. § 12.47.010 (1984), and defines guilty-but-mentally-ill in terms of “the defendant lack[-ing], as a result of a mental disease or defect, the substantial capacity either to appreciate the wrongfulness of that conduct or to conform that conduct to the requirements of law.” Id. § 12.47.030. Under these statutes, jurors could probably tell that mentally retarded defendants were included in the scope of both the insanity and guilty-but-mentally-ill instructions, but the jurors’ ability to disentangle the definitions for other purposes is open to serious doubt.
In one sense, where mentally retarded defendants are within the scope of the statutes, they are no more disadvantaged by guilty-but-mentally-ill instructions than are mentally ill defendants. Each group is subjected to the risk of jury confusion and compromise verdicts, although the risk for retarded defendants may be somewhat higher because of ambiguous terminology. In another sense, however, mentally retarded defendants are at greater risk. Typically, guilty-but-mentally-ill statutes do not guarantee treatment for defendants who are convicted under this verdict. But the likelihood that mentally retarded individuals will receive necessary and individualized habilitation may be even smaller where the focus of the statute is on "psychiatrically indicated treatment." For a convict whose need is special education, mental health treatment, particularly if it is of marginal quality, will do little to alleviate that need. The availability of the guilty-but-mentally-ill verdict may persuade some juries and some defendants that there is an increased opportunity for appropriate treatment, but this is unlikely to be true for mentally retarded people.

IV. Competence Issues for Mentally Retarded Defendants

For a mentally retarded defendant, many of the most important issues in the criminal justice system turn on the question of "competence." This term eludes precise definition, but the issues within its scope help explain its basic meaning. These issues involve the individual's ability to understand certain important and relevant concepts and to act on the basis of that understanding at a minimally acceptable level of skill. While the term "competence" is not ordinarily employed in discussions of the insanity defense, the questions of a retarded person's ability to appreciate the wrongfulness of his conduct (and perhaps to conform his actions to the requirements of the law) invoke the same principles and thus constitute a parallel inquiry.

This section will analyze three competence issues to which mental retardation is particularly relevant: competence to waive constitutional rights in the context of confessions, competence to stand trial, and competence to enter a plea of guilty.


154. See supra note 150.

155. For a discussion of habilitation in prisons, see supra notes 363-91 and accompanying text.

156. There are, of course, numerous other contexts in which the competence of a retarded defendant may come into question, including competence to testify and competence to waive other constitutional rights, such as assistance of counsel, jury trial, and appeals.
A. Confessions

American courts have long recognized that confessions by mentally retarded persons are somewhat suspect, although they have not always been successful in articulating the reasons for their skepticism.\(^\text{157}\) Long before *Miranda v. Arizona*\(^\text{158}\) and its detractors made criminal confessions a long-playing national controversy,\(^\text{159}\) courts occasionally overturned convictions because they believed questionable confessions should not have been admitted into evidence. Some such cases have involved mentally retarded defendants.

The confession of a boy "of crude and feeble mind and irresolute will" was held to be inadmissible when it was shown that the confession was made as an angry crowd threatened to hang the boy (and had already hanged another person for the crime).\(^\text{160}\) In another case, the Supreme Court of Mississippi threw out the confession of an individual who was described as "not bright" and whose employer testified that "[h]e is going to give you the answer you desire. If you want a 'yes,' he will give it to you; and if you want a 'no,' he will give you that."\(^\text{161}\) The Alabama Supreme Court found inadmissible the confession of a "colored" servant "of weak mental capacity, and humble, docile disposition" to her employer, who had locked the servant in a smoke-house until she confessed.\(^\text{162}\) The Supreme Court of Arkansas threw out a confession by a "stupid and weak-minded" teenager who had not been told of the possible consequences of such a confession and who had been promised that if he confessed he would not be harmed.\(^\text{163}\)

It certainly would be inaccurate to suggest that American courts readily excluded criminal confessions on grounds of mental deficiency in the nineteenth and early twentieth centuries. For exam-

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157. For a modern statement of the law in this area, see W. LAFAYE & J. ISRAEL, 1 CRIMINAL PROCEDURE 525-27 (1984); see also Annot., 8 A.L.R.4th 16 (1981) (mental subnormality is one factor identified in the totality of the circumstances to be considered in determining voluntariness). For a discussion of Canadian cases addressing the same problem, see Henderson, Mental Incapacity and the Admissibility of Statements, 23 CRIM. L. Q. 62, 71-73 (1980).


162. Hoober v. State, 81 Ala. 51, 52, 1 So. 574, 575 (1886).

163. Williams v. State, 69 Ark. 599, 600, 65 S.W. 103, 104 (1901). *See also* State v. Mason, 4 Idaho 543, 548, 43 P. 63, 64 (1895) (holding a confession coerced from a "half-witted" boy by the armed emissary of an insurance company inadmissible); Hamilton v. State, 77 Miss. 975, 978, 27 So. 606, 608 (1900) (holding confessions of a "dull" defendant in response to the repeated urging of his employer involuntary and thus inadmissible); Peck v. State, 147 Ala. 100, 102, 41 So. 759, 760 (1906) (holding confession of a "weak minded" defendant, evoked by a question that assumed the defendant's guilt, inadmissible).
ple, the Georgia Supreme Court rejected a challenge to a confession by a "man of weak mind" who was not an "idiot," declaring that persons who knew the difference between right and wrong and were capable of committing the crime were "liable to be convicted upon their own confession." The court was unpersuaded by claims that such confessions were unreliable, and observed that: "[E]xperience teaches that, in point of fact, the cunning and crafty are much more likely to conceal and misrepresent the truth, than those who are less gifted.

Nevertheless, courts did widely accept some degree of mental disability as sufficient to call into question the validity of a confession.

As these early cases suggest, the relevance of mental retardation to the validity of a confession has more than one component. One consideration is the increased likelihood that the retarded person may be abnormally susceptible to coercion and pressure, and therefore more likely to give a confession that is not truly voluntary. Another consideration is the possibility that the suspect will make a false confession out of a desire to please someone perceived to be an authority figure. There is also reason for concern that the retarded suspect does not understand, and may be incapable of understanding, the ramifications of a confession, and his right not to confess.

These considerations mirror the factors involved in obtaining legally adequate consent from retarded people in other areas, such as medical care and admission to residential facilities and institutions. Confessions involve waivers of constitutional rights, and
thus require careful judicial scrutiny to ensure their validity.\textsuperscript{171} Considerations affecting the validity of such a waiver parallel those involved in other forms of consent.\textsuperscript{172} The three necessary elements of a legally valid consent or waiver are capacity, information, and voluntariness.\textsuperscript{173} Each of these elements presents particular problems in confession cases involving mentally retarded people.\textsuperscript{174}

Whether a waiver is "intelligent" (and therefore valid) depends on the circumstances of the particular case, "including the background, experience, and conduct of the accused," according to Johnson \textit{v.} Zerbst.\textsuperscript{175} This description is surely broad enough to encompass a suspect's mental retardation as a relevant factor. An intelligent waiver\textsuperscript{176} requires that the individual make "a rational choice based upon some appreciation of the consequences of the decision,"\textsuperscript{177} and a retarded person's limited intelligence may diminish his ability to appreciate these consequences, just as it may limit his ability to appreciate the wrongfulness of his conduct.\textsuperscript{178} Courts have recognized that a person's mental retardation does not, by itself, render him automatically incapable of the waiver inherent in a voluntary confession.\textsuperscript{179} Mental retardation, how-

\textsuperscript{171} Johnson \textit{v.} Zerbst, 304 U.S. 458, 464 (1938).
\textsuperscript{172} Friedman, \textit{Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons}, 17 \textit{ARIZ. L. REV.} 39, 71 (1975).
\textsuperscript{173} \textit{CONSENT HANDBOOK}, supra note 170, at 6-13; Friedman, \textit{supra} note 172, at 52; see Waltz & Scheuneman, \textit{Informed Consent to Therapy}, 64 \textit{NW. U.L. REV.} 628, 630-46 (1970).
\textsuperscript{174} Courts have recognized, for example, that mental retardation may be relevant to the issue of voluntariness even where it has been determined that an individual's capacity and information were acceptable. \textit{See}, e.g., State \textit{v.} Cheshire, 313 S.E.2d 61, 65 (W.Va. 1984).
\textsuperscript{175} 304 U.S. 458, 464.
\textsuperscript{176} An intelligent waiver by a mentally retarded person is, of course, an oxymoron. The Third Circuit discussed the intelligent waiver of a defendant's \textit{Miranda} rights as follows: \textsuperscript{177} [I]ndeed it may be argued forcefully that a choice by a defendant to forego the presence of counsel at a police interrogation is almost invariably an unintelligent course of action. It is not in the sense of shrewdness that \textit{Miranda} speaks of "intelligent" waiver but rather in the tenor that the individual must know of his available options before deciding what he thinks best suits his particular situation. In this context intelligence is not equated with wisdom. Collins \textit{v.} Brierly, 492 F.2d 735, 738-39 (3d Cir.), \textit{cert. denied}, 419 U.S. 877 (1974).
\textsuperscript{177} Cooper \textit{v.} Griffin, 455 F.2d 1142, 1146 (5th Cir. 1972).
\textsuperscript{178} See \textit{supra} note 137 and accompanying text.
\textsuperscript{179} \textit{See} Commonwealth \textit{v.} White, 362 Mass. 193, 196, 285 N.E.2d 110, 113 (1972) (the court admitted the otherwise valid confession of a feeble-minded and illiterate defendant); State \textit{v.} Anderson, 379 So. 2d 735, 736-37 (La. 1980) (in considering whether a mentally retarded defendant knowingly and intelligently waived his rights,
ever, raises serious questions about the suspect’s understanding of the situation. Moreover, the Supreme Court has placed the burden of persuasion to establish the validity of the waiver on the state. Therefore, it is in the interest of prosecutors and law enforcement officials to document that each confession by a retarded suspect was within his capacity.

The capacity issue is likely to focus on the retarded person’s ability to understand the warning which Miranda requires the police give to all suspects. The first issue is whether the retarded suspect understands the concepts which constitute the warning. The concepts of what “rights” are, what it means to give them up voluntarily, the notion of the ability to refuse to answer questions asked by a person of great authority, the concepts of the subsequent use of incriminating statements, the right to counsel and the right to have the state pay for that counsel, and the idea that the suspect can delay answering questions until a lawyer arrives are all of some abstraction and difficulty. A substantial number of retarded people will not know what one or more of these ideas means. A related difficulty is that the vocabulary of many retarded people is so limited; they may not be able to understand the warning even if they are familiar with its component concepts.

Several courts have held a confession inadmissible where it was

court considered additional factors including expert testimony and the arresting officer’s ambivalent testimony questioning whether the defendant ever understood the rights explained to him); accord The President’s Panel on Mental Retardation, Report of the Task Force on Law 33 (1963).


181. The Miranda Court required that police warn each suspect “prior to any questioning that he has the right to remain silent, that anything he says can and will be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.” Id. at 479 (1966).

182. It has been suggested that the anxiety some retarded defendants will experience upon being arrested may reduce their ability to understand the warning statement. F. Menolascino, Challenges in Mental Retardation: Progressive Ideology and Services 185 (1977).

183. See Cooper v. Griffin, 455 F.2d 1142, 1145 (5th Cir. 1972). The Cooper court found substantial uncontroverted testimony that neither boy was capable of meaningfully comprehending the Miranda warning. The special education teachers testified that the boys would not have understood the gravity of the charges against them, the consequences of a conviction, any defenses which might be available to them, or any circumstances which might mitigate the charges. Id. See also Henry v. Dees, 658 F.2d 406, 411 (5th Cir. 1981) (mentally retarded defendant did not “separately and independently” name his constitutional rights because it was unlikely that he understood the complex waivers and their consequences).

184. See People v. Bruce, 62 A.D.2d 1073, 1073-74, 403 N.Y.S.2d 587, 589 (N.Y. App. Div. 1978). Indeed, the Bruce court found it necessary to explain the meaning of voluntary to the defendant, a 17-year-old boy with an IQ of 59, before accepting his guilty plea. Id.

185. See id., 403 N.Y.S.2d at 588-89 (A special education teacher testified that the defendant who had an IQ of 59 “had a vocabulary of the approximate level of a 10 year old, and would have difficulty understanding the entire warning form, unless it were read at a slow pace with emphasis on certain words . . . . The officer . . . . did not attempt to explain the meaning of the warning to defendant.”).
shown that the defendant was unlikely to have understood the warning and where it was read to them "in a summary fashion, without elaboration."\textsuperscript{186} One state court has turned this holding into a more general rule: "When expert testimony indicates that a defendant could have intelligently understood the waiver of his constitutional rights only if they were simply and clearly explained, the record must expressly and specifically establish that such an explanation was given."\textsuperscript{187} These concerns arise even with defendants classified as mildly retarded.\textsuperscript{188}

A substantial problem develops when the difficulties with a mentally retarded defendant's capacity are not identified at the time his confession is sought.\textsuperscript{189} Capacity problems may work to the serious disadvantage of the defendant if they result in an invalid confession being used against him at trial. They may also create serious problems for the prosecution if the disability is later identified and the confession proves to be inadmissible. A number of indicators might provide early warning of a capacity problem. One would be to identify whether the suspect is literate.\textsuperscript{190} An-

\textsuperscript{186} E.g., Toliver v. Gathright, 501 F. Supp. 148, 150 (E.D. Va. 1980); see infra note 193.

\textsuperscript{187} Hines v. State, 384 So. 2d 1171, 1181 ( Ala. Crim. App. 1980). Although such elaboration and explanation may require a deviation from the usual wording of the \textit{Miranda} test, this deviation should not create a difficulty as long as the explanation is clear and complete. The Supreme Court has held that the "precise formulation of the warning" is not required as a "talismanic incantation." California v. Prysock, 453 U.S. 355, 359 (1981).

\textsuperscript{188} The defendants in Toliver, Cooper, and Bruce were all mildly retarded. See supra notes 183-86. In Cooper, the court characterized the defendants as having "extreme mental deficiency." 455 F.2d 1142, 1145 (5th Cir. 1972). Although the defendant's IQ scores fell within the "mild" range, the court's characterization is understandable, because the level of handicap, especially for verbal tasks like those involved in a \textit{Miranda} waiver, was substantial. See id.

Unlike these cases Hines involved a defendant with an IQ of 39, which is on the border between severe and moderate retardation. Hines misspelled his last name two different ways in signing the waiver form, and there was expert testimony that at his level of functioning "tying a shoe would be a complex task." 384 So. 2d at 1175-76.

\textsuperscript{189} See, e.g., People v. Redmon, 127 Ill. App. 3d 342, 468 N.E.2d 1310, 1313 (1984) (16 year-old defendant had an IQ between 70 and 73). In Redmon, the defendant's confession, obtained after 19 hours of interrogation, was suppressed for lack of capacity to waive his right to counsel. \textit{Id.} at 1316. During the interrogation, police officers repeatedly read Redmon the \textit{Miranda} warning, but he understood it only later, when the prosecutor explained the warning in greater detail. \textit{Id.} at 1315.

\textsuperscript{190} Morrow, A Legal Framework: An Insider's Perspective, in \textsc{Rehabilitation and the Retarded Offender} 60-61 (P. Browning ed. 1976). The author notes that "[a]pparently the question, 'Can you read?' is rarely asked." \textit{Id.} The mechanisms that a retarded person has used all his life to minimize the stigma that accompanies his disability may make identification of this problem a little more difficult. Morrow depicts a scene in which the defendant, in his desire to please the police officer, makes a statement. The police officer normally writes down the statement, reads it back, says "something to the effect of 'read this over . . . is it right?,' and requests the accused's signature. Sometimes the retarded person will appear to read the document to himself, but in fact, will not read it at all." \textit{Id.}
other approach is to ask about the suspect's educational background. Observing the ease with which he signs his name would also provide some clue. Indications of confusion and inconsistency may also indicate a lack of capacity. The scope of the accused person's apparent vocabulary may also provide some guidance. Ultimately, the most useful approach is to ensure that the warning itself is given in a clear and unhurried fashion. Whenever a doubt arises, explanations should be offered and inquiries made to determine if the accused has really understood.

The inquiry about the capacity of an individual to consent is closely related to the issue of whether he has sufficient information upon which to base a choice. The information component of legally adequate consent for a retarded suspect may turn on whether he understands the concepts contained in the waiver. But retarded individuals, particularly if they have led a life isolated from the community, may also lack basic information about the workings of the criminal justice system. Failure to understand the adversarial nature of prosecutions and the concepts of trials and their consequences should invalidate a confession.

The third element of legally adequate consent is that the act must be voluntary. This component has engendered a great deal of litigation concerning the confessions of mentally retarded suspects. The concern with this element is not that the suspect did not understand what was being asked of him, but rather that his action, either a confession or a waiver of the right to counsel, was the product of coercion. In evaluating voluntariness, the Supreme Court has warned of the importance of "the unusual susceptibility of a defendant to a particular form of persuasion." An individual with mental retardation may be particularly susceptible to nonphysical coercion.

191. See People v. Varecha, 353 Ill. 52, 57-58, 186 N.E. 607, 608-09 (1933) (court must look to defendant's ability to be taught in determining his mental competence).
192. Id.; see supra note 188.
194. This element of the "consent triad" has been the focus of much litigation concerning the confessions of mentally typical people. See, e.g., Cobbs v. Grant, 8 Cal. 3d 229, 245, 502 P.2d 1, 11, 104 Cal. Rptr. 505, 515 (1972). It is the concentrated focus on information in this context that leads to the somewhat misleading label "informed consent." See CONSENT HANDBOOK, supra note 170, at 6.
195. The Supreme Court has recently observed: "This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." Oregon v. Elstad, 105 S. Ct. 1285, 1297 (1985). But Elstad and the decisions it cites involved marginal misunderstandings by defendants who were mentally typical. The "ignorance of the full consequences" of a mentally retarded defendant may be different in kind, not just degree, from those envisioned by the Elstad majority.
problems with retarded defendants in cases involving prolonged questioning, threats and promises of leniency, a strip search, and a polygraph test. Another court noted that a retarded defendant, confronted with an accomplice’s statement implicating him, “was particularly likely to have an exaggerated perception of the dangers of remaining silent.”

Some courts have suggested that mental deficiency alone, without a showing of threats, deprivation of food, or some similarly extreme circumstance will not render the voluntariness of a confession suspect, but intimidation and coercion may take on subtle forms with a mentally retarded suspect. More than twenty years ago, the President’s Panel on Mental Retardation observed:

The retarded are particularly vulnerable to an atmosphere of threats and coercion, as well as to one of friendliness designed to induce confidence and cooperation. A retarded person may be hard put to distinguish between the fact and the appearance of friendliness. If his life has been molded into a pattern of subservience, he will be less able than the average person to withstand normal police pressures. Indeed they may impinge on him with greater force because their lack of clarity to him, like all unknowns, renders them more frightening. Some of the retarded are characterized by a desire to please authority: if a confession will please, it may be gladly given. “Cheating to lose,” allowing others to place blame on him so that they will not be angry with him, is a common pattern among the submissive retarded. It is unlikely that a retarded person will see the implications of consequences of his statements in the way a person of normal intelligence will.

In considering the voluntariness of a confession, this court must take into account a defendant’s mental limitations, to determine whether through susceptibility to surrounding pressures or inability to comprehend the circumstances, the confession was not a product of his own free will. The concern in a case involving a defendant of subnormal intelligence is one of suggestibility.

623 F.2d at 937-38.
198. United States v. Hull, 441 F.2d 308, 312 (7th Cir. 1971).
200. Id.
203. United States v. Barnes, 520 F. Supp. 946, 957 (D.D.C. 1981). Other courts have suggested that the significance of mental retardation may be less where the defendant has had extensive experience with the criminal justice system. E.g., United States v. Young, 355 F. Supp. 103, 111 (E.D. Pa. 1973). Still other courts have suggested that whether the retarded suspect is employed may be relevant. E.g., People v. Bruce, 62 A.D.2d 1073, 403 N.Y.S.2d 587, 589 (1978). It is not clear from these opinions whether employment is thought relevant to the suspect’s capacity to understand the waiver or to his susceptibility to coercion. E.g., State v. Anderson, 379 So. 2d 735, 737 (La. 1980).

204. President’s Panel on Mental Retardation, Report of the Task Force
These factors should induce great caution in law enforcement officials seeking confessions and in courts reviewing their legal adequacy.205

Part II of the new Mental Health Standards206 addresses "Police and Custodial Roles," but does not directly treat the waiver and confession problems. It does, however, recommend that law enforcement personnel receive specialized training to help them identify mental health and mental retardation problems.207 Further, in a different context, the Mental Health Standards recognize the problem with involving mental retardation professionals in the interrogation process in the absence of counsel; Miranda-type warnings are insufficient where the defendant is unaware of the precise nature of the interview and the adversarial role of the interviewer.208

B. Competence to Stand Trial

The competence of mentally retarded defendants to stand trial is a crucial issue.209 While the doctrine in this area is well settled, practical problems with its implementation loom large, and the nature of mental retardation exacerbates those problems.

The courts have long accepted that it is impermissible to try a defendant who lacks the ability to understand the proceedings or to present a defense. Blackstone declared that such persons could not be tried.210 This view has been fully supported by other com-

ON LAW 33 (1963); see also Morrow, supra note 190, at 60 (the retarded individual's desire to assimilate may also make it very difficult to identify him as retarded); CONSENT HANDBOOK, supra note 170, at 11 (mentally retarded persons are more likely to acquiesce to requests from authority figures).

205. One appellate court stated with admirable candor: "We do not know enough about intelligence quotients (IQ) and mental retardation to rule conclusively on this question. Yet we do know enough to believe the matter needs further analysis." Commonwealth v. Daniels, 366 Mass. 601, 608, 321 N.E.2d 822, 828 (1975). The court went on to suggest that expert testimony on mental retardation might be necessary at suppression hearings. Id., 321 N.E.2d at 828.

206. MENTAL HEALTH STANDARDS, supra note 4, 7-2.1 - 7-2.9.

207. Id. 7-2.8.

208. See id. 7-3.1 commentary at 75-76. The Mental Health Standards point out the potentially ironic result of a mental health professional's presence at the interrogation. The contrast between antagonistic police interviewers and the compassionate mental health or mental retardation professional interviewer may induce the defendant to make legally damaging statements he might not otherwise make. This is particularly true in light of the professional's sophisticated interviewing techniques. Questions that require seemingly innocuous answers may be intended to evoke, and may result in, legally damaging responses. Id.


210. Blackstone elaborated:
Also, if a man in his sound memory commits a capital offense, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried, for how can he make his defense?

4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *24. Hale reached the same conclusion:
If a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he ought not by law to be ar-
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mentators and courts in England and America. The United States Supreme Court has observed that trying an incompetent defendant violates due process. And although the public has fixed its attention on the insanity defense, Dr. Alan Stone is certainly correct in calling competence to stand trial "the most significant mental health inquiry pursued in the system of criminal law."

The theoretical applicability of the competence doctrine to mentally retarded defendants has never been seriously questioned. The early pronouncements of the doctrine used the term "insane," which was then broad enough to encompass people labeled "idiots." The fact that a functional measure, rather than one limited by clinical etiology, determined incompetence is demonstrated by the early English cases which discussed the competence of deaf mutes. These cases were followed by the North Carolina Supreme Court in State v. Harris. Harris held that a deaf and dumb prisoner who, despite efforts to educate him, was unable to understand the significance of a trial ought not be compelled to participate; "[w]hether arising from physical defect or mental disorder, he must, under such circumstances, be deemed "not sane,"

raigned during such his phrenzy; but be remitted to prison until that incapacity be removed; The reason is, because he cannot advisedly plead to the indictment . . . . And if such person after his plea, and before his trial, become of non sane memory, he shall not be tried . . .


211. See Youtsey v. United States, 97 F. 937 (6th Cir. 1899) (discussion of early authorities); 1 N. WALKER, supra note 11, at 219-41 (detailed discussion of the British experience); United States v. Chisolm, 149 F. 284, 285-86 (S.D. Ala. 1906) (announcing a test for competence that was similar to the modern formulation because it measured competence by a person's ability to aid counsel and testify at trial); Commonwealth v. Braley, 1 Mass. 103, 104 (1804); State v. Peacock, 50 N.J.L. 653, 654-55, 14 A. 893, 894 (1888) (court held proof of insanity was improperly excluded by the lower court and was injurious to the defendant); Freeman v. People, 4 Denio 9, 20 (N.Y. 1847) ("The true reason why an insane person should not be tried, is, that he is disabled by an act of God to make a just defence if he have one.").


214. See A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 200 (1976). Competence issues involve vastly larger numbers of defendants than does the insanity defense. See id. at 203; Steadman & Hartstone, Defendants Incompetent to Stand Trial, in MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE, supra note 3, at 39-42; see generally H. STEADMAN, BEATING A RAP?: DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL (1979).

215. 1 N. WALKER, supra note 11, at 223.

216. Id.

217. 53 N.C. (8 Jones) 136 (1860).
Another nineteenth-century American case acknowledged that mental retardation could constitute the basis for incompetence, but required that the degree of disability be substantial. The same concerns that retardation could cause incompetence, but that the retardation had to be truly disabling, continued well into this century.

The new Mental Health Standards recognize that mental retardation may be the source of incompetence to stand trial. Standard 7-4.1 identifies the test for competence as "whether the defendant has sufficient present ability to consult with defendant's lawyer with a reasonable degree of rational understanding and otherwise to assist in the defense, and whether the defendant has a rational as well as factual understanding of the proceedings." The same standard explicitly recognizes that incompetence "may arise from . . . mental retardation or other developmental disability . . . so long as it results in a defendant's inability to consult with defense

218. Id. at 143. Even at that early date, the court explicitly recognized that the provision of counsel was insufficient to cure the problems of incompetence. Id.
219. State v. Arnold, 12 Iowa 479 (1861).
220. Id. at 484. The court noted that testimony had indicated that defendant's "manner occasionally indicated mental imbecility," but ruled that he had failed to rebut the presumption of sanity:

To do this, evidence of mere incapacity to fully understand and comprehend all his legal rights; and to make known in the most succinct and intelligent manner to his counsel all the facts material to his defense, is not sufficient. A doubt must be raised whether at the time there is such mental impairment, either under the form of idiocy, intellectual or moral imbecility, or the like, as to render it probable that the prisoner cannot, as far as may devolve upon him, have a full, fair and impartial trial.

Id.

A substantial degree of disability was also generally required to successfully invoke the insanity defense. See supra note 94.

221. See State v. Brotherton, 131 Kan. 295, 300, 291 P. 954, 960 (1930) (observing that the court below "showed a proper concern that no person of feeble mind should be put to trial on a serious charge"); Act of 1919, ch. 299, § 2, 1919 Kan. Sess. Laws, 490, 490 (codified at KAN. STAT. ANN. 39-237 (1923)) (repealed 1939). The act stated: "That whenever in a court of record, during the hearing of any person charged with a misdemeanor or crime, it shall be made to appear to the court that the person is feeble-minded the court shall summarily remand such person to the probate court of the county for examination . . . [for possible civil commitment]." Id. See also H. Weihofen, Mental Disorder as a Criminal Defense 434 n.21 (1954) (similar statutes recognizing retardation as a cause of incompetence to stand trial).

222. See State v. Lammers, 171 Kan. 668, 669, 237 P.2d 410, 411 (1951). In Lammers, the trial court's charge to the examining commissioners stated:

You have been appointed . . . to ascertain, after a thorough examination, . . . whether he be insane, an idiot or an imbecile and unable to comprehend his position and make his defense. A person may be illiterate, have a low degree of competency and a low I.Q. rating as relates to scholastic matters but he may have a normal or high degree of competency through native or natural ability.

Id.

223. Mental Health Standards, supra note 4, 7-4.1(b). This standard is similar to the test announced by the Supreme Court in Dusky v. United States, 362 U.S. 402, 402 (1960) ("whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings against him."). Id. See Favole, supra note 120, at 247-57 (a compilation of tests employed by the various states for competence to stand trial).
counsel or to understand the proceedings." 224

One issue that remains unresolved in the modern era is the degree of retardation necessary for finding a defendant incompetent to stand trial. Courts often rely upon IQ scores 225 and estimates of "mental age" 226 to determine whether a defendant is competent. Many appellate courts conclude that even a relatively low level of intellectual functioning is sufficient to establish competence. 227

The approach taken by the Mental Health Standards is preferable. The commentary observes that "[competition is functional in nature, context dependent and pragmatic in orientation. If a defendant is capable of meeting the articulated requirements for competence, the presence or absence of mental illness is irrelevant." 228 The same is true for mental retardation. While the presence or absence or degree of mental illness or mental retardation "may certainly be significant in evaluating the defendant's competence," 229 the ultimate question is the actual ability of the individual defendant to perform tasks required at trial.

Mental retardation may affect an individual's functioning in ways that make him incompetent to stand trial. 230 A defendant's receptive and expressive language skills, vocabulary, conceptual

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224. Mental Health Standards, supra note 4, 7-4.1(e).

225. A surprisingly large number of reported cases involve expert testimony in which the witness ascribes an IQ score or range of IQ scores to the defendant without administering any standardized intelligence tests. See, e.g., State v. Rogers, 419 So. 2d 840, 842 (La. 1982). In the Rogers case, a psychiatrist who had not conducted any intelligence tests testified that the defendant's IQ was between 60 and 70, and concluded that he was competent to stand trial because of "[his] ability to recall the phone number and city block number at his mother's house where he resided, [and] his place of employment . . . . [and because of] defendant's statement that he had dropped out of school in the eighth grade." Id. Dr. Mauroner did not determine whether the defendant had been socially promoted in school, and none of the doctors inquired as to whether he could read or write. Although this same witness "conceded that a psychological test would be the most accurate means of determining the level of defendant's retardation, he insisted that a test result showing even severe mental retardation would not cause him to change his opinion that the defendant could assist counsel at trial." Id. See also State v. Bennett, 345 So. 2d 1129, 1137 (La. 1977) (the "guesses" by expert witnesses, none of whom had tested the defendant, ranged from IQ scores of 35 to 90). This sort of guesswork, of course, does not fall within the proper scope of expert testimony. See infra note 397. It may also violate the ethical code of the witness's profession. Id.

226. Cf. supra notes 105-12 and accompanying text.

227. For a compendium of decisions organized by levels of intellectual functioning, see Annot., 23 A.L.R.4th 493 (1983).

228. Mental Health Standards, supra note 4, 7-4.1 commentary at 187.

229. Id.

230. The court in State v. Williams, 381 So. 2d 439, 449 (La. 1980), stated that: "Being mentally retarded or of subnormal intelligence is not in itself proof of incapacity . . . . However, when substandard mental ability combines with other problems to prevent a defendant from rationally assisting his counsel, a fair trial cannot proceed." (footnotes omitted). The first sentence in this statement is certainly true, but the second suggests that factors unrelated to mental retardation produce the effect of incompetence. This may be misleading because the effects of the mental retardation
ability, and low level of general knowledge may all impair his ability to participate in his defense. Even at the higher levels of mild mental retardation, a defendant may be unable to understand a concept like "waiver" or the elements of the crime with which he is charged unless special efforts are made to explain them and assist him in understanding them.\textsuperscript{231} Therefore, courts err when they suggest that it is only the accompanying presence of a mental illness that makes a mentally retarded person incompetent to stand trial.\textsuperscript{232}

Similarly, courts should not accept expert testimony from an evaluator who merely tells the court that a retarded defendant is not psychotic, and therefore is competent to stand trial.\textsuperscript{233} Such testimony is even less helpful than that of an expert who tells the court the defendant's IQ score or estimates his mental age and may themselves be the indicia of incompetence. This is demonstrated by the \textit{Williams} case itself in which there was testimony that the defendant was:

\begin{quote}
moderately retarded, suffering from a severe speech disorder and hampered by an extremely primitive ability to cope. Williams cannot read or write, remember his address or his attorney's name . . . . His judgmental capacity is impaired by an inability to concentrate and a limited education . . . . [He] does not know the name of the President of the United States.
\end{quote}

\textit{Id.} With the possible exception of the speech impediment, each of these factors is almost certainly a direct consequence of defendant's "mild to moderate" mental retardation.

\textsuperscript{231} In United States v. Glover, 596 F.2d 857, 865 (9th Cir.), \textit{cert. denied}, 444 U.S. 857 (1979), a defendant with an IQ of 67 and a first to second-grade reading level, was so described by an expert witness for the defense. The prosecution's expert witness basically agreed but stated that the defendant would be competent if questions, terms, and proceedings were explained to him in 'simple words and simple sentences, using concrete examples. \textit{Id.} The court held that the defendant could be competent if properly assisted, asserting that the extra burden upon counsel of assisting the defendant "certainly does not establish that the defendant is incompetent to stand trial." \textit{Id.} at 867.

\textsuperscript{232} \textit{See} State v. Edwards, 257 La. 707, 711-12, 243 So. 2d 806, 808 (1971) (distinguishing a case which found defendant incompetent to stand trial at roughly the same level of retardation, IQ 59, because the defendant involved was psychotic).

\textsuperscript{233} \textit{E.g.,} State v. Bennett, 345 So. 2d 1129 (La. 1977). The \textit{Bennett} court found "[i]t was insufficient [to show competence] for the court to find that defendant was not psychotic, was oriented as to time and place and was aware of his surroundings." \textit{Id.} at 1137. The factors listed by the court are traditional diagnostic indicia for the lack of psychosis. The witness in \textit{Bennett} revealed a lack of understanding of both mental retardation and the criteria for competence to stand trial by stating "that a severely retarded individual with an IQ of 10 might be aware of his surroundings, and thus he could presumably assist counsel and understand the proceedings against him 'within his capabilities."

\textit{Id.} The Supreme Court of Louisiana correctly rejected this contention, noting that "[d]ue process, however, requires a level of effective participation by an accused in criminal proceedings against him." \textit{Id.}

This sort of misleading testimony may result from the court's appointment of mental health professionals as evaluators who lack any knowledge or experience in the field of mental retardation. Standard 7-4.4(a)(iii) requires that evaluators have appropriate training and experience. \textbf{MENTAL HEALTH STANDARDS, supra} note 4, 7-4.4(a)(iii); \textit{see also} id. 7-3.10. Knowledge about mental illness is not a sufficient qualification for evaluating a retarded defendant unless the mental health professional also happens to have expertise in the area of mental retardation. \textit{See} text accompanying notes 51-61. Testimony by such an unqualified witness may go unchallenged at the hearing because the witness's qualifications in the area of mental illness are known and accepted by counsel and the court, but this illusory expertise ill serves the court and may result in substantial injustice to both the defendant and the prosecution.

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then makes a conclusory statement about his competence to stand trial.\textsuperscript{234} Courts should not only insist on testimony which evaluates the defendant’s degree of mental retardation, but also should require descriptions of its effects in some detail, and explanations of how these effects would affect the individual’s ability to participate in a trial.\textsuperscript{235} Only this kind of detailed, nonconclusory testimony will allow the court itself to retain the ultimate decision on competence rather than merely deferring the decision to evaluators whose expertise does not extend to the nature of the trial process.\textsuperscript{236}

An even greater concern than the possibility of misleading testimony on competence is the likelihood that the failure to detect the defendant’s disability will result in no competence evaluation at

\textsuperscript{234} State v. Bennett, 345 So. 2d 1129, 1137 (La. 1977). The court noted that “[t]he . . . hearing redounded with statements by the two examining physicians that defendant was able to assist counsel, but there was scant testimony to support this conclusion.” \textit{Id.}

\textsuperscript{235} Such testimony can be provided by a qualified mental retardation professional who has personally interviewed and evaluated the defendant without resort to any diagnostic instruments beyond the adaptive behavior scales and the generally accepted intelligence tests. \textit{Cf.} notes 400-09 and accompanying text. Some evaluators, however, make use of a check list for estimating a defendant’s competence to stand trial. \textit{Laboratory of Community Psychiatry, Harvard Medical School, Competency to Stand Trial and Mental Illness 106-13} (1973) [hereinafter cited as \textit{Laboratory of Community Psychiatry}]; \textit{see also} Lipsitt, Lelos & McGarry, \textit{Competency for Trial: A Screening Instrument}, 128 Am. J. Psychiatry 105 (1971) (competency screening questions and test results discussed). The Harvard Laboratory’s work was published as a monograph by the National Institute of Mental Health, and some evaluators have apparently asserted that a score derived from this check list represents “competency to stand trial according to National Institute of Mental Health Standards.” \textit{State v. Young}, 291 N.C. 562, 565, 231 S.E.2d 577, 580 (1977); \textit{State v. Willard}, 292 N.C. 567, 575, 234 S.E.2d 587, 592 (1977). This checklist has received substantial criticism. \textit{See, e.g.,} Brakel, \textit{Presumption, Bias and Incompetency in the Criminal Process}, 1974 Wis. L. Rev. 1105, 1107-08; \textit{see also} \textit{Mental Health Standards}, supra note 4, 7-4.1 commentary at 184-85 (check lists of specific criteria fail to fully resolve the issue of the defendant’s competence). The check list is useful in directing the attention of evaluators to the relevant issues affecting competence to stand trial, but the suggested “scores” given to mentally retarded defendants in some of the published clinical examples are highly questionable. The defendant’s second, and improved, explanation of the concepts in question may not represent a true increase in understanding of the trial process. The improved response may merely represent mimicking of an answer supplied by the evaluator. \textit{See Laboratory of Community Psychiatry}, supra, at 106-13.

236. \textit{Bennett}, 345 So. 2d at 1137. Although the \textit{Bennett} court agreed that “it may be impossible in a pretrial competency hearing to avoid reliance upon psychiatric prediction concerning the accused’s capabilities, the trial court may not rely so extensively upon medical testimony as to commit the ultimate decision of competency to the physician.” \textit{Id.} \textit{See also} \textit{Mental Health Standards}, supra note 4, 7-4.8(c)(ii) (court is to decide on the issue of competence “by the greater weight of the evidence.”); \textit{id.} 7-3.9(a) (“[T]he expert witness should not express, or be permitted to express, an opinion on any question requiring a conclusion of law . . . properly reserved to the court or the jury.”). Of course the same principle applies where the expert witness is a mental retardation professional other than a psychiatrist or other physician.
all. The efforts that many mentally retarded people typically expend in trying to prevent any discovery of their handicap may render the existence or the magnitude of their disability invisible to criminal justice system personnel. These attempts to “pass” as a mentally typical person may be as “successful” in the context of a trial as they often are in the setting of confessions and Miranda warnings. This may account for what prominent observers have identified as the relative “paucity [of case law and commentary on competence] which cite mental retardation.” These observers conclude “[i]t is our impression that the competency issue is raised too often for the mentally ill and too infrequently for the mentally retarded.” The Mental Health Standards place responsibility on the prosecutor, defense counsel, and the court itself to raise the issue of competence whenever any of those individuals “has a good faith doubt as to the defendant’s competence.” Nevertheless, experience teaches that without extraordinary diligence, these persons are most likely to raise the issue of competence only when the defendant is acting in a bizarre or disruptive fashion. This extra diligence is warranted because the prospect of an undetected mentally retarded defendant sitting through a trial he does not understand is exactly the evil the doctrine of competence was

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237. See Mickenberg, Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem, 17 CAL. W.L. REV. 365, 367 (1981) (contending that most retarded defendants are never examined for competence to stand trial).

238. See supra notes 80-85.

239. See supra text accompanying notes 189-93.

240. LABORATORY OF COMMUNITY PSYCHIATRY, supra note 235, at 6. The authors of the Harvard study view this result as paradoxical because

Id. at 14.

241. MENTAL HEALTH STANDARDS, supra note 4, 7-4.2(a); see also Drope v. Missouri, 420 U.S. 162, 177 (1975) (trial court should have ordered a competency exam, as motion for continuance alleged that defendant was not “of sound mind” and requested a psychiatric examination).

242. Many of the reported cases in which a retarded defendant was found incompetent to stand trial involved individuals who also manifested obvious symptoms of mental illness. See, e.g., People v. Samuel, 29 Cal. 3d 469, 499-500, 629 P.2d 485, 489-90, 174 Cal. Rptr. 684, 688-89 (1981) (regressed behavior including eating feces); see also Sessoms v. United States, 359 F.2d 268, 270 n.3 (D.C. Cir. 1966) (defendant was “narcissistic” and “schizoid”).

243. The need for great caution in preventing incompetent defendants from being tried extends to the appellate courts, which have traditionally given substantial deference to trial courts on the issue of competence. See, e.g., People v. Murphy, 72 Ill. 2d 421, 451, 381 N.E.2d 677, 682 (1978) (trial court in a position to observe defendant and his conduct). However, judges are not experts on mental retardation and its manifestations and consequences. Where the record below indicates that the trial judge received only conclusory, inconsistent, or incompetent testimony from evaluators, or relied solely on the court’s own observation of the defendant’s docility and apparent attentiveness, an appellate court can appropriately scrutinize whether there was an adequate basis for the finding that a retarded defendant was competent to stand trial. See, e.g., State v. Bennett, 345 So. 2d 1129, 1137-38 (La. 1977) (psychiatric reports were conclusory and without support).
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originally designed to prevent.244

Finally, it is worth noting that mentally retarded defendants present unique issues regarding attempts to effect245 competence once they have been found incompetent. It was previously believed that the incompetence of retarded defendants was almost always permanent. "Treatment" with the hope of eventually rendering the defendant able to stand trial was thus futile.246 Modern developments in the field of habilitation247 and special education248 have greatly increased our ability to teach retarded individuals particular concepts and skills. The disability which makes some retarded defendants incompetent will be so substantial that no teaching or habilitation can effect competence. For many others, however, a carefully designed and individualized program of habilitation may make it possible for the defendant to receive a fair trial.249 It is clear, however, that this can only be accom-

244. See supra note 210.

245. The term "effect" is more appropriate for retarded defendants than the more common "restore" because most mentally retarded defendants who are incompetent will not have been competent at any previous time. Testimony Presented to the ABA Standing Comm. on Assoc. Standards for Criminal Justice 2 (1983) (testimony of Thomas E. Coval and Dr. Sheldon R. Gelm on behalf of the AAMD). See also MENTAL HEALTH STANDARDS, supra note 4, 7-4.10 (stating that a defendant determined to be incompetent to stand trial has a right to treatment to "effect" competence).

246. PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 35 (1963). The task force concluded that

[in the case of the mentally retarded defendant, unlike the mentally ill, there is often little point in finding inability to stand trial at the moment, but requiring that a trial must follow 'recovery.' Limited, though valuable, gains may be possible if the patient receives treatment and training, but for the majority of the retarded, the likelihood of great change remains slight.

Id.

247. See supra note 57.


249. See MENTAL HEALTH STANDARDS, supra note 4, 7-4.10 (provides for the right to habilitation pursuant to an individualized plan designed to effect the defendant's competence). For example, when the nature of the incompetence is the individual's general inability to understand concepts of the complexity required for trial, habilitation is unlikely to be successful. On the other hand, when a defendant's incompetence results from the lack of general knowledge about the role of the various participants in criminal trials, or from correctible gaps in vocabulary and communications skills, a trial may be possible within the time framework allowable under law. See generally Jackson v. Indiana, 406 U.S. 715 (1972); MENTAL HEALTH STANDARDS, supra note 4, 7-4.14 (trial of defendant rendered competent by habilitation).
plished by qualified mental retardation professionals experienced in the arts of habilitation. It is cruelly futile to send such defendants to state hospitals for the mentally ill that have no programs to habilitate retarded individuals, and this happens far too frequently.\textsuperscript{250}

C. Competence to Plead Guilty

Guilty pleas by mentally retarded defendants present one of the most difficult doctrinal and practical problems faced by the criminal justice system in the mental disability area. Courts are sharply divided on the appropriate standard for competence to plead, and the practical consequences of the choice between the competing formulations are substantial.

Historically, acceptance of the idea that some retarded defendants are incompetent to enter a plea has paralleled the awareness that some defendants are incompetent to stand trial.\textsuperscript{251} Pleas had special significance for medieval courts, and the failure, or refusal, of a defendant to enter a plea made it impossible to convict or punish him.\textsuperscript{252} Therefore it was of the greatest importance to know whether the failure to plead was a conscious decision, or, in the alternative, "by visitation of God," a category which included "idiots."\textsuperscript{253}

Of course, today guilty pleas have an entirely different significance.\textsuperscript{254} The operation of the criminal justice system depends on a predictable quantity of plea bargaining, and for many defendants, a plea bargain appears to be their only substantial hope of reducing their sentence.\textsuperscript{255} Therefore, the modern criminal justice


\textsuperscript{251} See supra notes 209-250.

\textsuperscript{252} The most common difficulty with which medieval and Tudor judges had to contend at the outset of a trial for felony or treason was the man who simply refused to plead "guilty" or "not guilty." Unless he uttered the necessary words, reverence to the ritual of the law made it unthinkable to proceed with the trial, with the result that he could not be convicted and executed. More important still for the Exchequer, his property would not be forfeit. But to take this course for the sake of one's dependents called for great fortitude, since the courts' remedy was to order the man who refused to plead to be subjected to the peine forte et dure, which consisted of slowly pressing him to death under an increasing weight, unless his endurance gave out in the process and he consented to plead. 1 N. Walker, supra note 11, at 220. Therefore, if a prisoner refused to plead, as was quite likely if he was a madman or deaf-mute, the first question for the court was: "Is he mute of malice, or by visitation of God?" \textsuperscript{Id.}

\textsuperscript{253} Id.


\textsuperscript{255} Recent research suggests, however, that at least for common law crimes, the defendant has less to gain from a plea bargain than any other participant in the trial. LaFree, Adversarial and Nonadversarial Justice: A Comparison of Guilty Pleas and Trials, 23 Criminology — (in press 1985).
system provides numerous incentives for all parties to attempt to negotiate a plea of guilty to avoid trial. At the same time, a guilty plea has the effect of waiving all of the defendant’s constitutional rights in the adjudicative process and is the full equivalent of a conviction. The prospect of a mentally retarded defendant entering a guilty plea without fully understanding its consequences is most alarming, because those consequences are uniquely momentous for that defendant.

While it is generally recognized that the standard for competence to plead guilty is higher than for other kinds of consent or waivers, the key issue today is whether the standard to plead guilty is higher than, or otherwise different from, the standard for competence to stand trial. It appears that most courts view the tests as identical, and thus apply the Dusky test for competence to stand trial to the issue of the adequacy of a guilty plea. There is, however, a substantial and persuasive minority view. The Ninth Circuit has rejected the identity of the two tests in a case involving mental illness, and the District of Columbia Circuit has rejected their identity in a case involving the issue of mental retardation.

The reason for establishing a different test for competence to plead is the imperfect match between the test for competence to stand trial and the issues involved in assessing the adequacy of a plea. The ABA’s trial standard requires the court to inquire “whether the defendant has sufficient present ability to consult with defendant’s lawyer with a reasonable degree of rational un-

256. But see supra note 255 (incentives offered by the criminal justice system to entice defendants to plead guilty do not work to defendants’ best advantage); Brereton & Casper, Does it Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts, 16 LAW & SOC’Y REV. 45, 64 (1981-1982).
257. The Supreme Court noted long ago that “[a] plea of guilty... is itself a conviction. Like a verdict of a jury, it is conclusive. More is not required; the court has nothing to do but give judgment and sentence.” Kercheval v. United States, 274 U.S. 220, 223 (1927).
258. See CONSENT HANDBOOK, supra note 170, at 22-23 (suggesting that the formality of checking the adequacy of a retarded person’s consent should vary with the importance of the consequences of his decision); see also Monroe v. United States, 463 F.2d 1032, 1036 (5th Cir. 1972) (noting the significant consequences of a guilty plea to include the waiver of several constitutional rights, including the privilege against self-incrimination, trial by jury, and confrontation).
259. See, e.g., United States v. Young, 355 F. Supp. 103, 111 (E.D. Pa. 1973) (“[T]he procedures for taking a guilty plea are more stringent than those for waiving Miranda rights.”).
260. See supra note 223 and accompanying text.
derstanding and otherwise to assist in the defense, and whether the defendant has a rational as well as factual understanding of the proceedings."\textsuperscript{264} A court using this standard to assess the adequacy of a guilty plea will inquire into the defendant's memory of relevant events and his ability to communicate,\textsuperscript{265} rather than address his appreciation of the consequences of a guilty plea and his ability to assess its desirability in his case. The alternative selected by the United States Court of Appeals for the Ninth Circuit in \textit{Seiling v. Eyman} is a separate test which focuses more directly on the issues involved in the plea bargaining process: "A defendant is not competent to plead guilty if a mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the nature of the consequences of his plea."\textsuperscript{266} The Ninth Circuit defends this choice on the grounds that it "requires a court to assess a defendant's competency with specific reference to the gravity of the decisions with which the defendant is faced."\textsuperscript{267}

The D.C. Circuit found the Ninth Circuit's approach particularly helpful in reviewing the guilty plea of a mentally retarded defendant in \textit{United States v. Masthers}.\textsuperscript{268} The trial court had accepted a guilty plea from a mildly retarded defendant with a reported IQ of 57. The court of appeals, concerned that the plea may have been incompetent, held that the trial court's observations of the defendant's demeanor and the colloquy in accepting the plea\textsuperscript{269} were not sufficient to justify a finding that the plea was competent and voluntary.\textsuperscript{270} Judge Bazelon, writing for the court, noted that the defendant's answers in the colloquy almost never went beyond a simple affirmation. This apparently disguised the defendant's disability from both the trial judge and from his own counsel.\textsuperscript{271} Judge Hastie's concurring opinion observed that

\textsuperscript{264} \textit{MENTAL HEALTH STANDARDS, supra note 4, 7-4.1; cf. Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam) (stating the test for competence to stand trial is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable understanding and whether he has a rational as well as factual understanding of the proceedings against him").}

\textsuperscript{265} \textit{See, e.g., State v. Cheshire, 313 S.E.2d 61, 64 (W. Va. 1984).}

\textsuperscript{266} \textit{Sieling v. Eyman, 478 F.2d 211, 215 (9th Cir. 1973) (quoting Schoeller v. Dunbar, 423 F.2d 1183, 1194 (9th Cir.) (Hufstedler, J., dissenting), cert denied, 400 U.S. 834 (1970)); see also United States v. Webb, 433 F.2d 400, 404 n.3 (1st Cir. 1970) (citing \textit{In re Williams}, 165 F. Supp. 879 (D.D.C. 1958)) ("Courts have recognized that the conclusion that a defendant is competent to stand trial does not necessarily mean he has the mental capacity needed for an intelligent decision to plead guilty.").}

\textsuperscript{267} \textit{Seiling, 478 F.2d at 215.}

\textsuperscript{268} \textit{539 F.2d 721, 726 (D.C. Cir. 1976).}

\textsuperscript{269} \textit{See FED R. CRIM. P. 11.}

\textsuperscript{270} \textit{Masthers, 539 F.2d at 723-25. The court of appeals sought to explore the issue as it related to mentally retarded defendants by inviting the Mental Health Law Project to participate as an amicus curiae.}

\textsuperscript{271} \textit{Id. at 723-25 (Defendant Masthers acquiesced with simple responses of "Yes Ma'am" or "No Ma'am" to all but one question asked during the colloquy. At sentencing, the defendant explained his pending marriage: "[W]e haven't been together for about three years and we were getting married this month or last month, like she is expecting a kid." When the trial judge replied, "Not yours, I take it," defendant responded: "I don't know."); see R. EDGERTON, THE CLOAK OF COMPETENCE: STIGMA IN}
as special efforts are made to improve the understanding of the deaf litigant and the litigant who little comprehends English, "it seems neither fair nor humane to refuse to make an analogous appropriate special effort when it appears that an accused person's comprehension is substantially impaired because of mental retardation." Masthers accurately reflects what we know about common characteristics of mentally retarded people, and correctly analyzes the effect of both the disability and the individual's attempt to disguise it in criminal proceedings.

The Mental Health Standards take a somewhat ambiguous position on the applicability of the trial competence test to the adequacy of guilty pleas. The commentary notes that there may be defendants who are competent to stand trial but whose mental illness makes it impossible for them to plead at an acceptable level of competence. But the standard itself states that "[o]rdinarily, absent additional information bearing on defendant's competence, a finding made that the defendant is competent to stand trial should be sufficient to establish the defendant's competence to plead guilty." This appears to establish a rebuttable presumption that a defendant who meets the test for standing trial will also be competent to plead. To the extent that it merely suggests that the two groups will substantially overlap, and that defendants competent to stand trial will most frequently be competent to plead, the statement is certainly accurate. However, it would be misleading for courts to use the standard to justify a refusal to inquire into competence to plead where there may be reason to doubt that the defendant's guilty plea was knowing and voluntary.

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272. Masthers, 539 F.2d at 730; see supra note 37 (discussion of Judge Robb's dissenting opinion).


274. MENTAL HEALTH STANDARDS, supra note 4, 7-5.1 commentary at 291-95. The commentary uses the example of a defendant so overwhelmed by guilt caused by the mental illness that the guilty plea seems necessary to expiate the guilt. Id. Guilty pleas prompted by mental illness, and not actual guilt, should not be accepted. Id.

275. MENTAL HEALTH STANDARDS, supra note 4, 7-5.1(a)(i).

276. This refusal to inquire into competence to plead probably also misreads the standard. The commentary accompanying the standard explicitly anticipates cases in which additional information suggests a difference in the competence to perform the two different tasks involved in trials and pleas: "[T]he test should not be equated to that of competence to stand trial testing whether the defendant has the mental capacity to assist his attorney to make the plea decision, but instead should directly address the defendant's ability to make that decision in light of all the attendant factors . . . ." Id. 7-5.1 commentary at 292.
The approach taken in *Sieling* and *Masthers* is particularly attractive for cases involving mental retardation. There are likely to be a significant number of retarded defendants who remember the events of the incident at issue, can communicate with counsel, and understand the proceedings of trial, but nevertheless are incapable of weighing the choices necessary to make a competent plea of guilty. But the very existence of this presumed subset of retarded defendants is the reason that different tests are troubling. If a defendant is so retarded that he is incompetent to plead but not incompetent to stand trial, he is denied the opportunity to reduce his sentence through effective plea bargaining — an opportunity available to all other defendants.

Therefore, defendants who are incompetent to plead guilty but are competent to stand trial will, at least theoretically, face the prospect of a harsher sentence than a similarly situated nonretarded defendant who can avail himself of the opportunity to plea bargain.277 Denying this opportunity to the first defendant solely because of his disability offends basic notions of fairness and equal protection. An artificial identity between the standards for trial and pleading avoids the creation, or recognition, of this anomalous class. This artificial identity can be created only by accepting guilty pleas from some defendants who cannot understand the nature and consequences of their agreement, or by refusing to try some defendants who can understand the nature of trial proceedings and assist counsel.278

The better approach would be to accept, as the *Mental Health Standards* implicitly do, the fact that a realistic inquiry into the defendant’s competence to enter a guilty plea will produce a small group of defendants who are denied access to the advantages of plea bargaining.279 Fair implementation of this approach requires that the sentencing judge be informed of the defendant’s incompetence to enter a guilty plea. The judge should then take the defendant’s incompetence to plead into account and reduce the sentence to approximate that which the defendant might have received had he been able to engage in effective plea bargaining.280

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277. *But see supra* note 255.

278. The model statute suggested by the ABA Commission on the Mentally Disabled argues that another, more satisfactory, resolution of the dilemma is available. Section nine of that act provides for a more thorough and detailed explanation of the nature of the guilty plea that the defendant must make. The commentary to this section suggests that this approach is preferable to the Ninth Circuit’s test in *Sieling* because it “appear[s] to provide the same protection without the ambiguities and complications introduced by a having [sic] dual standards of competence.” *MODEL DEVELOPMENTALLY DISABLED OFFENDERS ACT*, *supra* note 8, commentary at 746. As desirable and appropriate as the Model Act’s more detailed explanation is, it can only reduce the size of the group of retarded defendants competent to stand trial but incompetent to plead guilty. This reduction is a valuable mitigation of the problem, but appearances to the contrary notwithstanding, it is not a complete solution because it does not offer a comparable guarantee of the adequacy of pleas to that afforded by the *Sieling* test.

279. *See supra* note 274 and accompanying text.

280. This reduction is not the same as, and should not be viewed as a substitute for,
This imprecise substitute for the availability of the plea bargaining process would reduce the unfairness to those defendants denied effective plea bargaining, recognizing that different tasks are involved in trials and pleas, and that the competence required for one is not identical to that required for the other.

Finally, it should be noted that the number of defendants incompetent to plead guilty because of mental retardation can be reduced substantially through modern special education. It is true that some defendants are so substantially disabled that no educational efforts will allow them to attain the competence required to meet the Sieling test. For example, some retarded defendants, even with skilled teaching, will still be incapable of grasping the abstract concepts involved in a plea agreement. Others, however, would be incompetent to plead only because they do not know the meaning of key words or because, unaided, they cannot understand the bargaining process or the conceptual foundation for a particular proposed agreement. Many individuals in this latter group are able to learn the necessary in-

the mitigating impact of mental disability recognized in standard 7.9.3. See infra note 320.

281. The plan is a necessarily imprecise substitute for plea bargaining because the judge cannot replicate with complete accuracy the process and product of plea negotiations. Plea negotiations typically depend on factors such as the strength of the prosecution's case and the expense of bringing it to trial. It does not seem impractical or inappropriate to ask the sentencing judge to approximate the likely result of hypothetical negotiations by taking these factors into account. Of course plea bargaining also depends on the defendant's willingness to forego a trial by pleading guilty, and there is no practical way for a court to replicate the defendant's decision-making process if the defendant lacks the ability to comprehend the terms of the proposed agreement. Establishing the unavailability of the plea bargaining process as a mitigating factor in sentencing thus gives a few defendants the benefit of a bargain to which they would not have agreed if they were competent. It also gives defendants the theoretical benefits of both pleading to a lesser offense (reduced sentence) and pleading not guilty (the possibility of acquittal). At the same time, it requires the state to give up that portion of the full sentence it would have lost in a plea bargain without the plea's concomitant benefits to the prosecution (certainty of conviction and avoiding the expense of trial). Nevertheless, these factors merely evidence the unavoidable imprecision of attempting to replicate a negotiating process when one party is incapable of negotiating. Further, because the number of defendants who are triable but incompetent to plead will be very small, the imprecision and awkwardness of this approximation will be outweighed by the advantages of realistic evaluations of the defendant's competencies and more equitable treatment of disabled defendants.

282. As Judge Hastie observed in Masthers, if the defendant "should be permitted to withdraw his plea, it should not be too difficult to find someone skilled in working and communicating with the mentally retarded who could and would communicate effectively with him, so that his participation in any further proceeding would be knowing and meaningful." Masthers, 539 F.2d at 730 (Hastie, J., concurring).

283. For example, on remand in the Masthers case, the trial judge substituted the simple question "Did anyone scare you into this?" for the more inaccessible and unfamiliar "coerced" in conducting the colloquy on a new proposed guilty plea. It appears that the defendant clearly understood the judge's question when phrased in this manner. See Note, supra note 273, at 178 n.9 (quoting a telephone interview with observers at Masthers's trial).
formation and skills from a competent special education teacher.\textsuperscript{284} Of course, the ability to effect competence in these defendants requires referral to professionals with skills and training which match the nature of the particular handicap involved.\textsuperscript{285} The availability of this professional expertise offers the realistic prospect that a substantial number of retarded defendants can be made competent to decide whether or not to plead guilty.\textsuperscript{286}

\textbf{V. Dispositional Issues}

\textbf{A. Civil Commitment}

The civil commitment of defendants found not guilty by reason of insanity has fostered a great deal of controversy,\textsuperscript{287} although very little has focused on mentally retarded defendants.\textsuperscript{288} The commitment of defendants found permanently incompetent to stand trial has received less public attention,\textsuperscript{289} but presents issues acknowledged to be of particular importance to retarded defend-

\begin{itemize}
\item \textsuperscript{284} See supra note 248 (discussing the training and capabilities of modern special educators).
\item \textsuperscript{285} The typical order committing the retarded incompetent defendant to the state mental hospital, or other psychiatric facility or agency, to “restore” competence usually fails because those facilities typically lack expertise in special education. Today, however, the implementation of the Education for Handicapped Act, 20 U.S.C. §§ 1400-61 (1982), has produced a substantial pool of special education talent in communities throughout the nation. Courts and other agencies involved in the criminal justice system should have little difficulty in enlisting the assistance of qualified mental retardation professionals with these skills.
\item \textsuperscript{286} For example, one of the authors, Professor Luckasson, recently served as an expert witness in the case of a mentally retarded convict whose earlier plea of guilty was being challenged in state court as incompetent. Evaluation of the prisoner’s intelligence revealed him to be mildly mentally retarded with an extremely limited vocabulary and understanding of the criminal justice system. For example, when he was asked the meaning of the operative terms of the plea bargain he had “approved,” he could only define “rights” as the opposite of “lefts” and identify “waive” as a physical gesture. His understanding of these terms had not been explored at the time of his original plea. It also became clear during the evaluation that the defendant had thought a guilty plea appropriate because he felt bad that he had not prevented the commission of the crime by another person and not because he himself had committed it (as he apparently had not). The trial judge agreed to a withdrawal of the original guilty plea. Subsequently, it became clear that the defendant’s best interest would be served by an \textit{Alford} plea, resulting in a sentence of time already served, rather than a new trial. See North Carolina v. Alford, 400 U.S. 25, 37 (1970). However, this would be possible only if the defendant became competent to agree to the even more conceptually complex \textit{Alford} plea. Using standard special education methodology, it was possible to teach the defendant the necessary vocabulary and concepts in four sessions over a period of one week. The trial judge then conducted a thorough inquiry into the defendant’s current competence and accepted the plea.
\item \textsuperscript{288} Courts have held, apparently without exception, that statutes providing for subsequent commitment of insanity acquittees apply to acquittees who are mentally retarded. See, e.g., United States v. Shorter, 343 A.2d 569, 571-72 (D.C. 1975).
\item \textsuperscript{289} But see H. STEADMAN, BEATING A RAP? DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL 1-10 (1979).
\end{itemize}
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ants. For both groups of defendants, the key issue is whether commitment must be according to procedures established for all civil patients, or in the alternative, by a special system of commitment designed for individuals in the criminal justice system. The Mental Health Standards provide a system of special commitment for mentally ill and mentally retarded defendants found permanently incompetent and not guilty by reason of mental nonresponsibility. The proposed provisions of this special commitment system are particularly important for mentally retarded defendants.

The Mental Health Standards establish as the criteria for special commitment that the individual be "currently mentally ill or mentally retarded: and, as a result [pose] a substantial risk of serious bodily harm to others." This requirement precludes commitment when the sole ground is the mere continuation of mental disability. Some state statutes still provide that an insanity acquittee cannot be released until he is free from mental disability.

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290. See, e.g., Jackson v. Indiana, 406 U.S. 715, 738 (1972) (criminal commitment of a mentally retarded deaf-mute until he became sane held unconstitutional, given the lack of a substantial probability that he could ever fully participate in a trial).

291. The Supreme Court held in Jackson that permanently incompetent defendants could not be held indefinitely without a general commitment hearing on their current mental condition. Id. In Jones v. United States, 463 U.S. 354, 366-68 (1983), the Court declined to require that acquittees who had established their own insanity at criminal trial receive a commitment hearing at which the state bore the burden of persuasion. Cf. Addington v. Texas, 441 U.S. 418, 431-32 (1979) (requiring that the state bear the burden of persuasion by clear and convincing evidence at general commitment hearings). The Supreme Court in Jones distinguished Jackson on the ground that the insanity acquittee had been found by the criminal trial jury to have committed the criminal act. 463 U.S. at 364 n.12. It is this distinction that appears to support the constitutionality of using special commitment procedures in seeking the confinement of permanently incompetent defendants whose "factual guilt" has been determined by a trial court. See Mental Health Standards, supra note 4, 7-4.13(b).

292. Mental Health Standards, supra note 4, 7-4.13, 7-7.3.

293. The criteria for commitment and the procedures for adjudicating commitment cases are identical for acquitted and incompetent defendants. See id. 7-4.13(b)(ii).

294. Id. 7-7.4(b).

295. See, e.g., VA. CODE § 19.2-181 (Supp. 1985) (requiring that an acquittee be committed as long as he or she "is insane or mentally retarded or . . . his discharge would be dangerous to the public peace and safety"). A 1984 amendment substituted the term "mentally retarded" for "feebleminded." Act of April 9, 1984, ch. 703, 1984 Va. Acts 1527, 1543.

For a listing of states' statutory grounds for commitment of insanity acquittees see Note, Commitment Following an Insanity Acquittal, 94 Harv. L. Rev. 605, 606 n.6 (1981). See generally Yankulov v. Bushong, 80 Ohio App. 497, 504, 77 N.E.2d 88, 92-93 (1945) (court ordered a mentally retarded acquittee released on habeas corpus because he could not be found dangerous as a result of continuing insanity). The court reasoned:

While it is established that Steve Yankulov is a moron and therefore easily subject to influence, whether for good or bad, he is apparently no different than any other moron, and the mere fact that a person is a moron does not subject him to incarceration in a hospital for criminal insane persons.

Id. at 504, 77 N.E.2d at 93.
Such provisions are unreasonable and arguably unconstitutional\(^{296}\) for both mentally ill and mentally retarded defendants because the state lacks a distinctive interest in confining insanity acquittees who lack a relevant characteristic that differentiates them from general civil patients. The only such trait that has been asserted is their dangerousness.\(^{297}\) The mere continuation of mental disability, in the absence of a showing of dangerousness, cannot justify the commitment of an acquittee. This is particularly true when the disability results from mental retardation because, unlike individuals with an episodic or cyclical or curable mental illness, few acquittees who are mentally retarded will be able to shed their retardation during commitment.\(^{298}\) Thus, for most retarded acquittees, a provision requiring their confinement until they persuade a court that they are no longer retarded or “insane” constitutes a life sentence — even when it is demonstrable that the individual is not dangerous to anyone.

The procedures for special commitment are also of particular interest in cases involving mentally retarded individuals. The Mental Health Standards establish procedural protections that grant the basic rights enjoyed by proposed patients under most mental health civil commitment statutes.\(^{299}\) However, these procedures may be substantially more rigorous than those usually employed for the civil commitment of mentally retarded persons.\(^{300}\) Paradoxically, mentally retarded acquittees and defendants found permanently incompetent to stand trial may receive greater procedural protection under these Mental Health Stan-

\(^{296}\) See State v. Krol, 8 N.J. 236, 246-49, 344 A.2d 289, 295-96 (1975) (holding that due process and equal protection require that the standard for commitment of a person who has been acquitted by reason of insanity be cast in terms of continuing mental illness and dangerousness to self and others, and not in terms of insanity alone). Although the United States Supreme Court did not directly hold that a statute would be unconstitutional if it provided for release of an insanity acquittee only if he showed that he was no longer insane and no longer dangerous, the formulation of its holding in Jones approved confinement “until such time as he has regained his sanity or is no longer a danger to himself or society.” 463 U.S. at 370 (emphasis added).

\(^{297}\) See MENTAL HEALTH STANDARDS, supra note 4, 7-7.4 commentary at 413-16.

\(^{298}\) See supra note 54.

\(^{299}\) See, e.g., MENTAL HEALTH STANDARDS, supra note 4, 7-7.5, 7-7.8 commentary at 430-33. The procedural protections do differ from the usual commitment procedures in some respects. Acquittees are entitled to representation by counsel, confrontation and cross-examination of adverse witnesses, independent expert witnesses, the privilege against self-incrimination, and an expedited appeal. Id. 7-7.5. The rules of evidence, including the prohibition on hearsay testimony, apply. Id. 7-7.5(d). But, in contrast to many civil commitment statutes, periodic review is less frequent and acquittees cannot be released without a court order. Special acquittees may petition for a rehearing one year after commitment and every two years thereafter. And unlike regular commitment review, the burden of initiating review rests with the special acquittee. Id. 7-7.8 & commentary at 430-33. For a general discussion of state law, see Van Duizend, McGraw & Kelitz, An Overview of State Involuntary Commitment Statutes, 8 MENTAL & PHYSICAL L. REP. 328 (1984).

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dards than they would receive if subjected to their state's general civil commitment laws. The resolution of this paradox lies in reform of those general commitment laws which fail to provide basic procedural protections. The fact that the American Bar Association has identified these protections as necessary for the commitment of acquittees suggests that no fewer protections can be afforded to individuals who have not been accused of any wrongdoing, but whose commitment is sought on civil grounds.

Perhaps the most important of these procedures for retarded acquittees and incompetent defendants are the requirements for periodic review. The Mental Health Standards provide that one year after the initial commitment hearing and every two years thereafter, the state has the burden of persuading the court by clear and convincing evidence that the acquittee or incompetent defendant still meets the commitment criteria. This is likely to be especially important for retarded individuals, who may stand a greater than average chance of getting lost in the system and thus remain in confinement long after its necessity has ended. But unless the superintendent of the facility petitions for their release, acquittees and incompetent defendants must initiate the periodic review hearings. Because of their limited ability to understand their rights, the procedures for implementing them, and their acquiescence to authority, mentally retarded individuals will often lack the ability to trigger periodic review of their continued confinement. Thus, for retarded persons, the requirement of regularly available legal counsel is particularly crucial, and a heavy responsibility falls upon the attorney to both ascertain carefully whether the retarded person understands his or her rights and to contest continued confinement whenever the client has not com-

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301. This is particularly true of incompetent defendants, who will have received a hearing on both whether they committed the criminal act and a commitment hearing. See Mental Health Standards, supra note 4, 7-4.13, 7-7.5.

302. Indeed, standard 7-7.3(b) provides for the use of general commitment procedures, rather than those designed for violent insanity acquittees, for those acquittees whose cases do not involve dangerous felonies, but requires that those procedures satisfy due process. This requirement is directed at those states whose mental retardation civil commitment statutes lack basic procedural protections. See Mental Health Standards, supra note 4, 7-7.3 commentary at 405-10.

303. In particular, the procedural protections provided at the special commitment hearing described in standard 7-7.5 and at periodic reviews described in standard 7-7.8 constitute a floor for implementing the requirement of fundamental fairness in the general civil commitment of mentally retarded persons.

304. Mental Health Standards, supra note 4, 7-7.8.

305. See id. 7-7.9.

306. See id. 7-7.8(a).

307. See supra notes 88-90 and accompanying text.

308. See supra notes 88-90 and accompanying text.
petently waived such a hearing.\textsuperscript{309}

Finally, it is noteworthy that the \textit{Mental Health Standards} acknowledge that specially committed mentally retarded persons have rights during their confinement equivalent to those enjoyed by civilly committed individuals.\textsuperscript{310} Among the most important of these is the right to habilitation.\textsuperscript{311} By casting the rights of acquittees in terms equivalent to those found in the civil commitment system, the \textit{Mental Health Standards} avoid limiting the right to habilitation to the rather parsimonious formulation recognized by the Supreme Court in \textit{Youngberg v. Romeo}.\textsuperscript{312} In \textit{Romeo}, the Court held that substantive due process required that civilly committed mentally retarded persons receive habilitation sufficient to ensure their physical safety and freedom from unnecessary physical restraint. Though the Court did not suggest that its ruling constituted the entirety of a retarded person's constitutional right to habilitation,\textsuperscript{313} the habilitation specially committed retarded persons are entitled to receive under the \textit{Mental Health Standards} is not limited to whatever the Court ultimately concludes to be the minimum requirement of due process. State statutes,\textsuperscript{314} and possibly state constitutions,\textsuperscript{315} typically provide a more explicit and expansive right to habilitation, including the right to an individualized habilitation plan.\textsuperscript{316} The \textit{Mental Health Standards} requirement of equivalent habilitation rights to those enjoyed by civilly committed persons also protects specially committed retarded individuals from a lack of appropriate mental retardation services at state mental hospitals that do not otherwise serve retarded people.\textsuperscript{317}

\begin{footnotes}
\item[310] See \textit{MENTAL HEALTH STANDARDS}, supra note 4, 7-7.6.
\item[311] See supra note 57.
\item[312] 457 U.S. 307, 322-23 (1982).
\item[313] See Romeo, 457 U.S. at 326-29 (Blackmun, J., concurring); see also Ellis, \textit{The Supreme Court and Institutions: A Comment on Youngberg v. Romeo}, 20 \textit{MENTAL RETARDATION} 197, 198 (1982) ("[B]y tying Mr. Romeo's right to habilitation to his right to freedom from undue restraint within the institution, the court left open the possibility that the right to habilitation includes the training needed to acquire community living skills for those individuals whose release from the institution is feasible.").
\item[314] See \textit{DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES}, supra note 8, at 849-64 (compilation of relevant state statutes).
\item[315] See generally Meisel, \textit{The Rights of the Mentally Ill Under State Constitutions}, 45 \textit{LAW & CONTEMP. PROBS.} 7 (Summer 1982).
\item[317] The appropriate comparison group for determining an acquittee's or an incompetent defendant's right to habilitation would clearly be mentally retarded people in residential confinement in that state, whether they were located in the same facility or in another. The \textit{Mental Health Standards} would not be satisfied if a state claimed that specially committed persons were entitled only to those services offered to other committed persons confined at the same facility, if other mentally retarded people were receiving more appropriate habilitation in other facilities.
\end{footnotes}
B. Sentencing

Mentally retarded defendants who are convicted or who plead guilty present the issue of the possible relevance of their disability in the determination of an appropriate sentence. Disagreeing with those courts that have held that mental retardation has no relevance in setting a criminal sentence, the Mental Health Standards provide that "[e]vidence of mental illness or mental retardation should be considered as a possible mitigating factor in sentencing a convicted offender." The commentary to this section justifies its provision by reference to the appropriateness of "individualized justice" and apparently is premised on the notion that a defendant's mental retardation is extremely likely to have influenced his or her criminal actions in a way that reduces the degree of culpability.

In addition to the usual ways in which many defendants do not reach the sentencing stage, including incompetence and acquittal, a substantial number of retarded defendants are "diverted" from the criminal justice system before going to trial. Some of this process occurs through formal referrals to community retardation agencies from personnel in the criminal justice system. See, e.g., Schwartz, A Diversionary System of Services for the Mentally Retarded Offender, in The Retarded Offender 298, 298-302 (M. Santamour & P. Watson eds. 1982); Note, The Mentally Retarded Offender in Omaha-Douglas County, 8 Creighton L. Rev. 622, 649-57 (1975). Other retarded persons accused of being lawbreakers are diverted informally through a decision by service providers in the community that invoking a criminal sanction would be undesirable. See Edgerton, Crime, Deviance and Normalization, in Deinstitutionalization and Community Adjustment of Mentally Retarded People, supra note 69, at 145, 162. For a proposed statutory structure for the diversion of retarded defendants, see Model Developmentally Disabled Offender Act, supra note 8, § 7.

McCune v. State, 56 Tex. Crim. 207, 212, 240 S.W.2d 305, 309 (1951) ("We have been cited to no decision requiring or permitting the trial judge to instruct the jury in his charge that they might consider feeble-mindedness of the accused in mitigation of the punishment to be assessed in the event of conviction."); see H. Wehofen, Mental Disorder as a Criminal Defense 206-11 (1954); S. Glueck, Mental Disorder and the Criminal Law 412-18 (1925). But cf. May v. State, 398 So. 2d 1331 (Miss. 1981) (remanding for resentencing a mildly retarded fourteen-year-old, who had been tried as an adult, on the issue of mitigation because special education opportunities were not available at the state penitentiary).

Although some of the provisions of the Standards relating to sentencing are limited to the more seriously disabled mentally retarded defendants, see infra notes 326-62 and accompanying text, this provision applies unambiguously to all individuals who have mental retardation.

Id. 7-9-3 commentary at 463; cf. Morris, Sentencing the Mentally Ill, in Reform and Punishment: Essays on Criminal Sentencing 125 (M. Tonry & F. Zimmer eds. 1983) (arguing that a defendant's mental illness should normally reduce the severity of the punishment imposed but that occasionally it should be a factor that prolongs punishment).

Cf. ABA Standards for Criminal Justice, supra note 4, 18-3.2(b)(1)(D) (2d ed. 1981) (suggesting mitigation of criminal sentences when "the offender because of youthful age or any physical or mental impairment lacked substantial capacity for judgment when the offense was committed"). The commentary refers to this provision as "a 'diminished responsibility' criterion." Id. 18-3.2(b)(1)(D) commentary at 18,229.

In contrast the Model Developmentally Disabled Offender Act provides: "In sen-
tion is particularly appropriate where a convicted criminal's "ability to control his actions is thought to have been impaired or weakened . . .", so that conformity to the law which he has broken was a matter of special difficulty for him as compared with normal persons normally placed. The United States Supreme Court has held that mental condition may not be constitutionally excluded from consideration in capital sentencing. The Mental Health Standards extend the principle of allowing consideration of mental condition to sentencing in noncapital cases. This broader requirement of mitigation may prove imprecise in its im-

...ing a defendant who is developmentally disabled, the court shall impose the least restrictive alternative consistent with the needs of the defendant, and of public safety." Model Developmentally Disabled Offender Act, supra note 8, § 11(3). This approach to sentencing incorporates a modified mandate to employ no greater restriction than individual circumstances require — a requirement that is absent in the sentencing of mentally typical convicts. The Model Act's commentary argues that this simply legitimates consideration of developmental disability in determining the degree and duration of the restraints on liberty to be imposed, and establishes a presumption in favor of selecting a sentence or conditions of probation which are no more harsh, hazardous or intrusive and involve no more restrictions on the defendant's physical freedom or social interaction than are absolutely essential. Id. commentary at 760; cf. American Association on Mental Deficiency, The Least Restrictive Alternative: Principles And Practices, 51-52 (H.R. Turnbull ed. 1981).

The Model Act thus incorporates into sentencing a principle designed to reduce unnecessary deprivation of liberty in the civil commitment process. This is a much more substantial departure from traditional theories of sentencing than is the Mental Health Standards' requirement of mitigation. But it should be recalled that the Model Act also provides that a developmental disability cannot constitute the basis for a defense of nonresponsibility, and thus retarded convicts under its provisions include some who would have been acquitted under standard 7-6.1. See supra notes 130-35. 323. H. Hart, Punishment And Responsibility 15 (1968). Of course this justification for mitigation sounds remarkably like the volitional prong of the insanity defense, which was rejected in standard 7-6.1. See supra note 125-29. The Mental Health Standards' call for mitigation can thus be read as a partial substitute for the full exculpation some mentally disabled defendants would have received under a broader definition of the insanity defense. Cf. B. Wootton, Crime and the Criminal Law 77 (1983) (arguing that mental disability should not form a defense to criminal charges, but instead should be considered as a factor at sentencing, relevant "to the choice of treatment most likely to be effective in discouraging [the defendant] from offending again"). But see R. Singer, Just Deserts: Sentencing Based on Equality and Desert 81 (1979). Singer argues against mitigation for provocation or duress: "To attempt to alter the substantive criminal law in the sentencing criteria . . . is both duplicitous and undesirable." Singer accepts the relevance of diminished capacity, but believes its determination by the jury should not be displaced by the sentencing judge. Id.

324. Eddings v. Oklahoma, 455 U.S. 104, 116 (1982), held that the sentencing judge in a capital case could not decline to consider the possibly mitigating circumstances of a defendant's mental state arising from a troubled family background. Id. The Eddings majority relied on the plurality opinion in Lockett v. Ohio, 438 U.S. 586, 604 (1978) (opinion by Burger, C.J.), which declared that, while individualization of sentencing was not constitutionally required in noncapital cases, a statute precluding consideration of any possible mitigating circumstances in a death penalty case constituted cruel and unusual punishment. One of the limited mitigating circumstances recognized by the statute in Lockett was that the "offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." Id. at 607, 612-13. One of Lockett's accomplices "received a lesser penalty because it was determined that his offense was 'primarily the product of mental deficiency' . . . ." Id. at 591.
plementation, but it may also reduce the problems caused by inappropriate imprisonment of vulnerable retarded convicts.\textsuperscript{325}

The \textit{Mental Health Standards} also propose a system of commitment\textsuperscript{326} at sentencing for those defendants with particularly severe disabilities. This system provides for habilitation of less disabled mentally retarded convicts in correctional facilities,\textsuperscript{327} and for more substantially handicapped offenders in mental retardation facilities "preferably under the supervision of the jurisdiction's department of mental health or mental retardation."\textsuperscript{328} The more seriously disabled convicts may be committed upon the petition of either the prosecutor or the offender\textsuperscript{329} if a court, by clear and convincing evidence, finds that the defendant "requires treatment or habilitation in a . . . mental retardation facility rather than an adult correctional facility."\textsuperscript{330} This dichotomous system for the habilitation of retarded convicts parallels the proposed system for treating mentally ill offenders, but raises substantially different issues as applied to persons with mental retardation.

The first issue involves the separation of two groups of retarded offenders on the basis of the severity of their disability.\textsuperscript{331} Mentally ill convicts deemed severely disabled enough to qualify for post-conviction commitments are those "who suffer a substantial disorder of thought, mood, perception, orientation or memory

\begin{footnotesize}
\begin{enumerate}
\item We have also suggested reducing of sentences to diminish potential injustice arising from the trial and conviction of defendants found incompetent to enter a plea of guilty. See \textit{supra} notes 280-281 and accompanying text. This adjustment should be separately considered from any reduction due to mitigating circumstances.\textsuperscript{326}
\item The approach bears some resemblance to the diversion of mentally disabled offenders. See \textit{supra} note 318. It differs from diversion in that it follows a criminal trial and conviction and because it results in a formal criminal sentence. See \textit{MENTAL HEALTH STANDARDS}, \textit{supra} note 4, 7-9.10(a).\textsuperscript{327}
\item \textit{MENTAL HEALTH STANDARDS}, \textit{supra} note 4, 7-9.7(a).\textsuperscript{328}
\item \textit{Id.} 7-9.7(b).\textsuperscript{329}
\item \textit{Id.} 7-9.8(a).\textsuperscript{330}
\item \textit{Id.} 7-9.9(d). The clear and convincing standard is set forth at \textit{id.} 7-9.9(c).\textsuperscript{331}
\item A parallel distinction is drawn between prisoners who are "seriously mentally retarded" and other mentally retarded prisoners. \textit{Id.} 7-10.1(b)-(c); see \textit{infra} note 341, 385-91. In the context of defining the scope of the insanity defense, Congress has also apparently attempted to distinguish defendants on the basis of the severity of their mental retardation. Insanity Defense Reform Act of 1984, § 402(a), 18 U.S.C.A. § 20(a) (West Supp. 1985) ("as a result of severe mental disease or defect"). See \textit{supra} note 123. The Senate Report elaborates:
\begin{quote}
The provision that the mental disease or defect must be "severe" was added to section 20 as a Committee amendment. As introduced in S. 829, the provision referred only to a "mental disease or defect." The concept of severity was added to emphasize that nonpsychotic behavior disorders or neuroses such as an "inadequate personality," "immature personality," or a pattern of "antisocial tendencies" do not constitute the defense.
\end{quote}
\textit{S. REP. NO.} 225, 98th Cong., 2d Sess. 229, \textit{reprinted in} 1984 U.S. CODE CONG. & AD. NEWS 3411; \textit{cf.} \textit{supra} note 126. There is no indication that the effect of the modifier on mental retardation ("defect") was considered, and there is currently no clarifying caselaw.
\end{enumerate}
\end{footnotesize}
which grossly impairs judgment, behavior, or the capacity to recognize reality or the ability to meet the demands of life."\(^{332}\)

The commentary suggests that this dichotomy represents an attempt to reflect the psychiatric distinction between psychotic mental illness and lesser forms of mental disorder\(^ {333}\) and thus to assure that "the standard for commitment of the mentally ill should be the same for offenders and non-offenders."\(^ {334}\) No parallel distinction exists in most mental retardation commitment laws on the basis of the severity of an individual's handicap.\(^ {335}\) Nevertheless, the *Mental Health Standards* opt for a parallel structure, "reflect[ing] the policy view that the standard for commitment of the mentally retarded should, so far as possible, track the standard for the commitment of the mentally ill offender."\(^ {336}\) A distinction in severity is therefore drawn, defining a "seriously mentally retarded offender" as one who has "very significant subaverage general intellectual functioning existing concurrently with substantial deficits in adaptive behavior."\(^ {337}\)

Ultimately, the attempt to treat mental illness identically with mental retardation fails because of differences between the composition of the two groups. Within the universe of mentally ill people, there are a substantial number of people, perhaps a majority, whose disability is so mild, ill-defined, and common that it subverts the purposes of the *Mental Health Standards* to address their situations with the same legal rules that encompass mental illness that is truly disabling, particularly psychotic illnesses.\(^ {338}\) Mental retardation, as currently defined, presents no such problem.\(^ {339}\) Even though the majority of mentally retarded individuals, and presumably an even larger majority of retarded defendants who reach sentencing, are labeled as "mildly" mentally retarded,\(^ {340}\) their disability is not comparable in relative lack of severity to that of defendants whose mental illness results from a neurosis or personality disorder. The substantial disability en-

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332. *MENTAL HEALTH STANDARDS*, *supra* note 4, 7-9.1(b).
333. *Cf.* *AMERICAN PSYCHIATRIC ASSOCIATION, A PSYCHIATRIC GLOSSARY* 114 (5th ed. 1980) (defining psychosis as "[a] major mental disorder of organic or emotional origin in which a person's ability to think, respond emotionally, remember, communicate, interpret reality, and behave appropriately is sufficiently impaired so as to interfere grossly with the capacity to meet the ordinary demands of life.").
334. *MENTAL HEALTH STANDARDS*, *supra* note 4, 7-9.1 commentary at 458.
336. *MENTAL HEALTH STANDARDS*, *supra* note 4, 7-9.1 commentary at 458.
337. *Id.* 7-9.1(c).
338. During the reign of the *Durham* rule, the District of Columbia Circuit addressed similar issues in the debate about whether "psychopathic personality disorders" would suffice to support a defense of insanity. *See* *Blocker v. United States*, 288 F.2d 853, 860-62 (D.C. Cir. 1961) (Burger, J., concurring).
339. Note that individuals previously labeled "borderline" mentally retarded no longer fall within the definition of mental retardation. *See supra* note 44.
340. It is likely that an even larger majority of retarded defendants who reach sentencing are labelled as "mildly" mentally retarded. *See infra* note 342.
compassed by even "mild" mental retardation defeats any attempt
to find a parallel distinction in mental retardation analogous to
the division in mental illness between psychoses and less disabling
disorders.

Both the definition and the underlying attempt at distinction
are problematic. The commentary notes that the majority of
people with mental retardation are mildly retarded and sug-
jects that the distinction between the "seriously" mentally re-
tarded offender and other mentally retarded convicts should be
drawn somewhere within the mildly retarded range, with all pro-
foundly, severely, and moderately retarded persons within the
class of the "seriously" retarded, and some mildly retarded offend-
ers included while others are excluded. The Mental Health
Standards attempt to accomplish this division by adding modifiers
to the American Association on Mental Deficiency definition of
mental retardation: the individual's intellectual functioning must
be "very significantly subaverage" and the deficit in adaptive be-
avior must be "substantial." These "qualifying artifices require the sentencing tribunal to consider "[t]he totality of the
circumstances" in determining whether a particular mildly re-
tarded offender falls within the commitment criteria, but "do not
allow the sentencing tribunal to divide mathematically the I.Q.
range of mild retardation and to thereby fix a precise I.Q. prereq-
usite dictating a commitment or incarceration decision."

Drawing this line in individual cases is an unenviable task.
Determining whether it is worth the effort requires an evaluation of the anticipated benefit of the dichotomy. The principal purpose of drawing the line must be based on a conclusion that the less-disabled portion of mildly retarded individuals will more appropriately receive habilitation in prison while profoundly, severely, moderately, and the remainder of the mildly retarded convicts will more appropriately receive habilitation in mental retardation facilities. The validity of these premises are open to question. It is true that the population of large residential facilities for mentally retarded people is now concentrated at the more disabled end of the spectrum of disability. However, this strong trend toward deinstitutionalizing mildly retarded persons, and many individuals with much more substantial handicaps, merely reflects the
tions below the mean and ranks in the bottom three percent of the population is not “very significant[ly] subaverage.” It is even more difficult to imagine a mentally retarded defendant convicted of a criminal offense who does not have a “substantial” deficit in adaptive behavior.

349. The symmetry of parallel treatment of mentally ill and mentally retarded convicts may also have some modest benefit, but standing alone, it would surely be insufficient to warrant the litigation that will result from the required distinctions between “seriously” retarded convicts and others.

Another possible rationale would suggest that it is politically unacceptable for less seriously mentally retarded individuals to “escape” the full brunt of punishment by commitment, or transfer to a mental retardation facility pursuant to standard 7-10.4 of the Mental Health Standards. This argument appears more persuasive regarding mental illness that is less severe than psychosis than it does for “mild” mental retardation, which is a substantial disability. See supra notes 338-40 and accompanying text.

Finally, it may be thought desirable to limit the use of state coercion in effecting involuntary habilitation. This is a principal reason for limiting the mental illness civil commitment criteria to those with substantial disorders, and may apply in similar fashion to mentally ill convicts. But society has not similarly rationed its use of coercion in the area of mental retardation. See supra note 335. Of course, this rationale would not apply to habilitation that the convict or prisoner seeks pursuant to standard 7-9.8(a) or 7-10.4(a). When neither the prosecution nor the offender objects to commitment at the time of sentencing, standard 7-9.9(b) still requires expert certification that the individual’s retardation is “serious.” There is no similar requirement in the case of a consensual transfer pursuant to standard 7-10.3, and indeed a prisoner seeking a transfer need not even allege that he is “seriously mentally retarded.”

350. Hauber, Bruininks, Hill, Lakin, Scheerenberger & White, A National Census of Residential Facilities: A 1982 Profile of Facilities and Residents, 89 Am. J. MENTAL DEFICIENCY 236, 244 (1984) (“nearly half (46.8%) of the residents of facilities of 16 or more [residents] were profoundly retarded”). This concentration, however, does not provide useful data for deciding which individuals among the mildly retarded population of convicts will appropriately be served in such facilities.

It is also paradoxical that the more “seriously” retarded offenders are guaranteed placement consistent with the least restrictive alternative principle, while less disabled retarded individuals, who are usually viewed as the most likely candidates for community placement, have no such right under the standards. See MENTAL HEALTH STANDARDS, supra note 4, 7-9.10(b).

351. For example, the ENCOR (Eastern Nebraska Community Office of Retardation) program has had great success in providing services in the community for severely and profoundly retarded people, and even those who are also “medically fragile.” See K. CASEY, J. McGEE, J. STARK & F. MENOLASCINO, A COMMUNITY-BASED SYSTEM FOR THE MENTALLY RETARDED: THE ENCOR EXPERIENCE 4 (1985); see also J. STARK, J. McGEE & F. MENOLASCINO, INTERNATIONAL HANDBOOK OF COMMUNITY SERVICES FOR THE MENTALLY RETARDED 89, 161-68 (1984). Further evidence is provided by the thorough study of the process of deinstitutionalizing the residents of the much-litigated Pennhurst institution in Pennsylvania. J. CONROY & V. BRADLEY, PENNHURST LONGITUDINAL STUDY: A REPORT OF FIVE YEARS OF RESEARCH AND
judgment that they can receive more humane and efficient services in smaller community residential facilities. This reveals little about the relative merits of large residential facilities in comparison to prisons for mildly retarded individuals.

Part of the difficulty may stem from the apparent premise that the array of alternatives is limited to prisons and large residential mental retardation facilities. Mental retardation professionals have developed "structured correctional services" which provide habilitation to mentally retarded offenders in the community. There is no reason to believe that these services will be more effective or appropriate for "seriously" retarded convicts.


353. F. MENOLASCINO, CHALLENGES IN MENTAL RETARDATION: PROGRESSIVE IDEOLOGY AND SERVICES 195 (1977); see Note, The Mentally Retarded Offender in Omaha-Douglas County, 8 CREIGHTON L. REV. 622, 667-68 (1975); see also THE MENTALLY RETARDED OFFENDER, supra note 33; Harbach, An Overview of Rehabilitation Alternatives, in REHABILITATION AND THE RETARDED OFFENDER 122, 132-35 (P. Browning ed. 1976) (the result of community treatment centers reveal that community based corrections can serve as a practical alternative to conventional imprisonment).

354. Specialized community services are especially attractive for the habilitation of mentally retarded offenders since generic residential institutions for mentally retarded people usually lack the facilities and expertise necessary to deal with such offenders. Santamour and West explain:

When placed in institutions for retarded persons, [offenders] victimize the other residents and disrupt routine. They present security risks and training needs that the institutions are ill-equipped to handle because of facility design and staffing patterns geared to meet the needs of the docile multiply handicapped individual. Accordingly, it is generally accepted in the field of retardation that the choice of residence for rehabilitation and training of the offender is some place other than existing state institutions for the mentally retarded.

Santamour & West, The Mentally Retarded Offender: Presentation of the Facts and a Discussion of Issues, in THE RETARDED OFFENDER 7, 29 (M. Santamour & P. Watson eds. 1982); see THE PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 40 (1963). Similar concerns were voiced more than 60 years ago. See W. Fernald, ANNUAL REPORT OF THE MASSACHUSETTS STATE SCHOOL FOR THE
than for those functioning at the upper end of the mildly retarded category; yet only the former appear to be eligible under the Mental Health Standards for post-conviction commitment to such programs.\textsuperscript{355}

The problem may also inhere in the structure of the sentencing standards, which focus on whether the offender "requires" habilitation in a mental retardation facility.\textsuperscript{356} It is not completely clear what is meant by the term "requires."\textsuperscript{357} In any event, sentencing contemplates a formal inquiry into the individual habilitation needs of a particular offender, and yet access to this inquiry is limited artificially by a prerequisite of severity of handicap. The Mental Health Standards presuppose that the questions of degree of disability and need for services in a specialized facility will produce the same answer. This may be true for mentally ill prisoners; psychotic individuals may need the more intensive services of a mental health facility while persons with neuroses and personality disorders can be treated effectively in prison. Mental retardation, however, is different from mental illness, and the dividing line between "seriously" and "non-seriously" retarded offenders may not be closely related to habilitation needs. It is likely that most profoundly and severely retarded individuals would be difficult to serve in prison; the severity of their mental disability and the likelihood of accompanying physical handicaps\textsuperscript{358} require specialized professional attention which few prisons provide.\textsuperscript{359} Aside from discussion of physical disability, there is nothing in the literature to suggest that prisons are categorically better able to provide habilitation to individuals in the higher functioning range of


\textsuperscript{356} See MENTAL HEALTH STANDARDS, supra note 4, 7-9.7. See also supra note 350.

\textsuperscript{357} See MENTAL HEALTH STANDARDS, supra note 4, 7-9.7(a) (providing for habilitation in prison for convicts whose retardation does not "necessitate commitment"); id. 7-9.9(d) (formulating the criteria for commitment in terms of whether the offender "requires . . . habilitation in a . . . mental retardation facility rather than an adult correctional facility"); see also id. 7-10.4(b) (providing for transfer from prison when the seriously mentally retarded prisoner "requires care not available in the correctional facility").

\textsuperscript{358} For example, "requires" could be synonymous with "would benefit from" or, in the alternative, "will deteriorate or regress without." These different formulations will, of course, describe different groups of offenders.

\textsuperscript{359} There is a higher incidence of physical handicaps among severely and profoundly retarded individuals. Fewell & Cone, Identification and Placement of Severely Handicapped Children, in SYSTEMATIC INSTRUCTION OF THE MODERATELY AND SEVERELY HANDICAPPED 46, 47-48 (M. Snell 2d ed. 1983).

\textsuperscript{359} See Ruiz v. Estelle, 503 F. Supp. 1265, 1340-45 (S.D. Tex. 1980), aff'd in part and rev'd in part on other grounds, 679 F.2d 1115, 1167 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983). Severely or profoundly mentally retarded persons who have serious physical handicaps also require intensive specialized physical therapy services. For general discussions of the importance of physical therapy to people with mental retardation, see B. BOBATH, ABNORMAL POSTURAL REFLEX ACTIVITY CAUSED BY BRAIN LESIONS (2d ed. 1971); K. BOBATH, A NEUROPHYSIOLOGICAL BASIS FOR THE TREATMENT OF CEREBRAL PALSY (2d ed. 1980); M. IVANAINEN, BRAIN DEVELOPMENTAL DISORDERS LEADING TO MENTAL RETARDATION (1985); S. LEVITT, TREATMENT OF CEREBRAL PALSY AND MOTOR DELAY (2d ed. 1982).
mild retardation than for other mildly retarded persons. Therefore the definition of the dividing line between the two categories of retarded offenders does not seem well suited to the tasks it is asked to perform in the Mental Health Standards.

The resolution of this difficult problem may be found in the individualized hearing processes which the Mental Health Standards already provide. The attraction of parallelism with mental illness is outweighed by the dissimilar service needs of mentally retarded individuals and the different relationship between those needs and the severity of an individual's disability. Therefore, the attempt to classify retarded persons on the basis of "seriousness" of their disability should be abandoned, and a hearing on individual habilitation needs provided to any mentally retarded offender or prisoner whose commitment or transfer to a mental retardation facility is proposed. Such hearings will be superior to a categorical exclusion in distinguishing those individuals who belong in prison from those who are more appropriately placed in specialized facilities.

C. Mentally Retarded Prisoners

As a federal court has recently observed, "[m]entally retarded persons meet with unremitting hardships in prison." They are more likely to be victimized, exploited, and injured than

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360. Similarly, there are fewer differences in management requirements for serving individuals with IQs of 50, as contrasted with 65, than there are in the mental health field in serving psychotic prisoners as contrasted with those who merely have neuroses or personality disorders.

361. If a jurisdiction believes that individual commitment or transfer proceedings may result in too many retarded convicts finding their way out of prisons and into mental retardation facilities, limitations can be accomplished through the formulation of commitment and transfer criteria. See supra note 357.

362. This is not to say that the severity of a particular individual's disability is irrelevant, because it may be an appropriate factor to consider in determining where his habilitation needs can be served.


365. "[I]nmates with low intelligence levels are prime targets for exploitation. Consequently, they are peculiarly in need of special protection from physical, emotional, sexual, and financial abuse at the hands of others." Ruiz, 503 F. Supp. at 1344.

366. "Mentally retarded prisoners are markedly and abnormally prone to receive more injuries than the average inmate. Some of their injuries occur on the job; others are suffered at the hands of other inmates or security officers." Id. at 1344.

Injuries and beatings are also far from uncommon in large residential facilities confining mentally retarded people. Cf. Youngberg v. Romeo, 457 U.S. 307, 310-12 (1982); Woestendiek, The Deinstitutionalization of Nicholas Romeo: The Unwitting Revolutionary of Pennhurst, Phil. Inquirer, May 27, 1984, (Inquirer Magazine), at 18 (detailing beatings sustained by Nicholas Romeo at the Pennhurst State Hospital for the mentally retarded following the Supreme Court's decision); New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 756 (E.D.N.Y. 1973) (1300 reported
other inmates. They are also more likely to be charged with disciplinary violations, and partially as a result, to serve longer sentences. Finally, they are unlikely to receive any habilitation designed to address the problems caused by their mental retardation.

One of the most important provisions in the Mental Health Standards is the declaration that mentally retarded prisoners have a right to habilitation. This explicit recognition of the habilitation needs of retarded individuals is a substantial advance from previous standards, which typically discussed treatment incidents of injuries, assaults, and fights in an eight month period in one institution); D. Rothman & S. Rothman, The Willowbrook Wars 17-23, 75-76 (1984) (describing injuries, abuse and neglect suffered by residents of Willowbrook, a New York State institution for the mentally handicapped).

367. Ruiz, 503 F. Supp. at 1344. The court explained: [Retarded inmates] are slow to adjust to prison life and its requirements, principally because they have almost insurmountable difficulties in comprehending what is expected of them. Not understanding or remembering disciplinary rules, they tend to commit a large number of disciplinary infractions. Because they are often not as well coordinated as persons of average intelligence, they also frequently fail to meet work performance quotas and are, therefore, subjected to disciplinary action for laziness or refusal to work.

Id.

The Ruiz court also observed that retarded inmates tend to fare poorly before disciplinary adjudication tribunals, in part because they seldom have the assistance of counsel and are unable to make a persuasive presentation on their own behalf. The court also noted that retarded prisoners are punished in solitary confinement with disproportionate frequency. Id.

368. Id. at 1344. In addition to problems with disciplinary infractions, the Ruiz court observed that retarded prisoners "are frequently unable to succeed in institutional programs whose completion would increase their chances for parole, and they are also unlikely to be able to present well-defined employment and residential plans to the Parole Board." Id.

369. "[P]risons provide few, if any, meaningful programs or services for the retarded." United States v. Masthers, 539 F.2d 721, 729 n.56 (D.C. Cir. 1976); see Ruiz, 503 F. Supp at 1344; Brown & Courtress, supra note 63, at 1164, 1169. Santamour and West argue that "[t]he retarded offender is rejected ... by the correctional field, who place the retarded offender as low man on the totem pole of those who might benefit from treatment and rehabilitation programs." Santamour & West, supra note 364, at 28-29.

370. See Mental Health Standards, supra note 4, 7-9.7, 7-10.8. This right is extended to all retarded offenders and prisoners regardless of the "seriousness" of their mental retardation.

The Mental Health Standards distinguish between "seriously mentally retarded prisoners" and others who are less severely disabled. They provide that seriously mentally retarded prisoners can be transferred to a mental retardation facility while those who are less severely disabled are to receive habilitation services in correctional facilities. This distinction leads to the same problems discussed in the section on sentencing. See supra notes 326-62 and accompanying text.

371. E.g., A.B.A. Standards for Criminal Justice 23-5.1(a) (1982) ("Prisoners should receive routine and emergency medical care, which includes the diagnosis and treatment of ... mental health problems."); Standards for Health Services in Correctional Institutions 27 (Am. Pub. Health Ass'n 1976) ("Mental health services should be made available in every correctional institution."); see George, Standards Governing Legal Status of Prisoners, 59 Denver L.J. 93, 101 (1981). But see Committee on Accreditation for Corrections, Manual of Standards for Adult Correctional Insts. standard 4278 (1977) (designating as "essential" the requirement that "[w]ritten policy and procedure specify that qualified psychological and psychiatric personnel provide services for inmates diagnosed as severely mentally retarded") The accompanying discussion does not make clear whether "severely
for mental illness without specific mention of the nonmedical services directed toward the amelioration of the handicaps caused by mental retardation.\textsuperscript{372} There is little caselaw on the issue of whether failure to offer habilitation to retarded prisoners constitutes cruel and unusual punishment under the eighth amendment\textsuperscript{373} and therefore this provision of the \textit{Mental Health Standards} may be particularly influential in determining whether such services are provided.

Following the United States Supreme Court's decision in \textit{Estelle v. Gamble} that failure to provide needed medical care can constitute cruel and unusual punishment,\textsuperscript{374} numerous courts have held that psychiatric services are a form of medical care that must be available to mentally ill prisoners.\textsuperscript{375} However, mental retardation is not an illness,\textsuperscript{376} and habilitation includes services which are not medical in nature;\textsuperscript{377} thus courts may not automatically

\textit{mentally retarded"} is intended as a term of art reflecting the American Association on Mental Deficiency classification system, but states:

Severely mentally retarded inmates should be placed in facilities specially designed for their treatment. If they cannot be placed in such facilities outside the correctional institution, the institution should provide adequate services for their health, development and protection of their dignity. Where possible, programs should provide for their continued physical, intellectual, social, and emotional growth and should encourage the development of skills, habits, and attitudes that are essential to adaptation to society.

\textit{Id.}

372. For a discussion of habilitation, see \textit{supra} note 57. Of course, some mentally retarded prisoners will also be mentally ill, and these individuals will also require mental health treatment. \textit{See supra} notes 59-61 and accompanying text; \textit{HANDBOOK OF MENTAL ILLNESS IN THE MENTALLY RETARDED} (F. Menolascino & J. Stark eds. 1984); \textit{MENTAL HEALTH AND MENTAL RETARDATION: BRIDGING THE GAP} (F. Menolascino & B. McCann eds. 1983); \textit{PSYCHIATRIC APPROACHES TO MENTAL RETARDATION} (F. Menolascino ed. 1970).

373. \textit{U.S. Const.} amend. VIII.


375. The leading case is Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977). \textit{See also} Balla v. Idaho State Bd. of Corrections, 595 F. Supp. 1558, 1576-77 (D. Idaho 1984); Ruiz v. Estelle, 503 F. Supp. 1265, 1332-34 (S.D. Tex. 1980), \textit{aff'd in part and rev'd in part on other grounds}, 679 F.2d 1115 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983); J. GOBERT & N. COHEN, RIGHTS OF PRISONERS 334-42 (1981); Brenner & Galanti, \textit{Prisoners' Rights to Psychiatric Care}, 21 \textit{IDAHO L. REV.} 1-34 (1985). \textit{But see} Capps v. Atiyeh, 559 F. Supp. 894 (D. Or. 1983). In \textit{Capps}, the court recognized a constitutional right to mental health care, but expressed concern about the subjectivity of psychiatric diagnoses, the possibility of malingering prisoners feigning mental illness, professional differences about the necessity of treatment in particular cases, and the possibility that some mentally ill prisoners may be uncooperative with treatment efforts. \textit{Id.} at 916-21. The court stated: "The inmates must, therefore, show a pattern of cases, each of which discloses, with little or no room for reasonable mental medical opinions to differ, (1) a serious mental illness (2) for which the inmate wants treatment (3) which he does not receive (4) thereby causing the inmate to suffer mental pain." \textit{Id.} at 917-18.

376. \textit{See supra} notes 51-53.

377. \textit{See supra} note 57.
conclude that the constitutional guarantee of medical care necessarily extends to habilitation services for retarded prisoners. The one court which has considered the matter concluded in *Ruiz v. Estelle* that the eighth amendment guarantees the availability of habilitation to mentally retarded inmates.\(^{378}\)

This conclusion can be supported without designating habilitation as "medical," nor does it require courts to recognize a more general right to rehabilitation for all prisoners.\(^{379}\) It is well documented that mentally retarded people, institutionalized without proper habilitation, will regress and lose vitally important life skills they previously possessed.\(^{380}\) If such regression occurs in a prison setting, the eighth amendment's right to protection from harm\(^{381}\) precludes the state from denying habilitation which would prevent that harm.\(^{382}\) Where habilitation is necessary\(^{383}\) for

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\(^{378}\) *Ruiz*, 503 F. Supp. at 1345-46. The portion of the district court's opinion reversed by the court of appeals was unrelated to the provisions regarding retarded prisoners, which had resulted in a consent decree prior to completion of the appeal. The consent decree required, in pertinent part, that defendants identify mentally retarded and other special needs prisoners, evaluate their needs, provide "individualized treatment and placement plans appropriate for such prisoners' needs and assurances for their implementation," and comply with procedural requirements for transferring mentally disturbed prisoners to mental institutions. *Ruiz*, 679 F.2d at 1167.

\(^{379}\) Most courts have been reluctant to recognize such a right. J. GOBERT \& N. COHEN, RIGHTS OF PRISONERS 342-43 (1981); see McCray v. Sullivan, 509 F.2d 1332, 1335 (6th Cir.), cert. denied, 423 U.S. 859 (1975) (failure of prison authorities to provide a rehabilitation program, by itself, does not constitute cruel and unusual punishment). Indeed, rehabilitation is offered less frequently as a justification for imprisonment. See Bainbridge, *The Return of Retribution*, 71 A.B.A. J. 61 (May 1985); see also Act of Oct. 12, 1984, Pub. L. No. 98-473, ch. 227 (D), 98 Stat. 1998 (to be codified at 18 U.S.C. § 3582(a)) ("imprisonment is not an appropriate means of promoting correction and rehabilitation").


\(^{382}\) Cf. Youngberg v. Romeo, 457 U.S. 307, 329 (1982) (Blackmun, J., concurring) (if a mentally retarded individual possesses basic self-care skills and is sufficiently educable to maintain those skills with training then a state facility responsible for his care may be constitutionally required to provide that training).

\(^{383}\) The determination of a mentally retarded individual's habilitation needs is not fraught with the uncertainty and subjectivity that concerned one court regarding mental illness in *Capps v. Atiyeh*, 559 F. Supp. 894, 916-921 (D. Or. 1983). See supra note 375. The diagnosis of an individual as mentally retarded is a relatively objective exercise that uses standard instruments of measurement. There is no professional disagreement about what constitutes substantial impairment from mental retardation. Feigning mental retardation is more difficult than feigning mental illness, and habilitation does not always require the same kind of conscious decision to cooperate with the professional. Notwithstanding the Supreme Court's contrary view, there is a
an individual prisoner's mobility, physical safety, or other protected constitutional interests, such services cannot be denied.\textsuperscript{384} The right to habilitation recognized in the \textit{Mental Health Standards} should be reflected in the courts' interpretation of the eighth amendment.

The provisions in the \textit{Mental Health Standards} for committing and transferring prisoners to mental retardation facilities are more problematic.\textsuperscript{385} The difficulties stem, in part, from the fact that retarded convicts may not be suitable residents for either prisons or general mental retardation institutions,\textsuperscript{386} and therefore any provision will engender difficulties in the many jurisdictions where no other alternatives currently exist. Nevertheless, it is troubling that some mentally retarded convicts may be committed to a mental retardation facility without a determination whether that facility is appropriate for retarded convicts, whether it is willing to receive them, and whether the convicts need, or would benefit from, the services the facility can provide.\textsuperscript{387} Simi-

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consensus among mental retardation professionals that habilitation is possible and desirable for severely and profoundly retarded people. \textit{Cf.} Youngberg v. Romeo, 457 U.S. at 316 n.20 (stating that mental retardation professionals disagree as to whether effective training is possible for all severely retarded people.) The belief of the Justices that no such consensus exists is flat wrong. \textit{See} Ferleger, \textit{Anti-Institutionalization and the Supreme Court}, 14 \textit{RUTGERS L. J.} 595, 628-32 (1983).

\textsuperscript{384} \textit{Cf.} Youngberg v. Romeo, 457 U.S. at 319 (concluding that liberty interests require that a state provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint).

\textsuperscript{385} One set of difficulties surround the question of the degree of restriction that retarded offenders require. The \textit{Mental Health Standards} provide that committed or transferred retarded convicts should not "be permitted access into the community by . . . mental retardation officials without authorization from appropriate correctional officials or the court." \textit{MENTAL HEALTH STANDARDS}, supra note 4, 7-9.11, 7-10.8. Giving judges or correctional officials the final say over the liberty of such individuals makes some sense when the convict has demonstrated a risk of dangerous behavior. \textit{Cf. id.} 7-7.11 (requiring a court order for authorized leave of specially committed acquittees). However, for some offenders transferred or committed at the time of sentencing there will be no indicia of dangerousness, or as the commentary suggests, "a threat to security," and thus in their cases the limitation is unwarranted. \textit{See supra} note 245, at 19 (testimony of Gelman and Coval). In addition, the \textit{Mental Health Standards} presuppose that the commitment or transfer is to a remote and secure facility, although it may in fact be to a "structured community program," for which the concept of limitation on "access to the community" is not meaningful. \textit{See supra} note 353.

\textsuperscript{386} \textit{See supra} notes 354, 363-69. The unsuitability of some retarded convicts for either institution buttresses the argument for creating special programs designed for mentally retarded offenders.

\textsuperscript{387} \textit{MENTAL HEALTH STANDARDS}, supra note 4, 7-9.9(b). This standard addresses the sentencing of offenders when neither the individual nor the prosecution objects to the commitment, and the only evidentiary requirement is a professional report that the individual is "seriously mentally retarded." The Commentary suggests that under such circumstances, "the reason for an evidentiary hearing is eliminated." \textit{Id.} 7-9.9 commentary at 476-77. But there remain two possible reasons for such a hearing. One is that the facility proposed for the commitment is not a party to the bargain, and may have legitimate objections to the commitment. The other is that the convict, while not "objecting," may not be competently consenting to the placement. Some retarded
larly, when a retardation facility objects to the transfer of a retarded prisoner, the court may order his placement upon evidence that he is "seriously mentally retarded and requires care not available in the correctional facility" without ascertaining whether the proposed facility is willing or suitable.

The alternative approach, which recognizes a right, or at least an interest, in a facility determining the clients it can appropriately serve, is not cost-free either, because it creates the risk of all available facilities declining to serve retarded offenders. Ultimately, where no existing facility believes it can properly provide habilitation to these individuals, the better approach is to create new programs specifically designed to address their needs.

VI. The Role of Mental Retardation Professionals

It has long been recognized that the fair and efficient administration of the criminal justice system requires the involvement of qualified professionals from disciplines other than the law. These professionals serve a variety of roles, including scientific, evaluative, consultative, and therapeutic. In this section, we will discuss the special concerns that arise when professionals perform evaluations and subsequently give expert testimony about mentally retarded defendants.

One of the first issues to arise is the selection of appropriately qualified professionals. Given the historic confusion between mental illness and mental retardation, it is not surprising to find confusion on the question of which professionals have mental retardation expertise useful to the criminal justice system. Thus, courts have often addressed questions regarding scientific inquiry in the area of mental retardation and criminal justice, evaluation consultation, and habilitation, without the assistance of mental retardation professionals. Excessive reliance has been placed on individuals will lack the ability to make such a judgment. See supra note 170. Because Vitek v. Jones, 445 U.S. 480, 487-94 (1980), suggests that there is an important liberty interest at stake in commitment even when the alternative is imprisonment, care should be taken to protect that interest on behalf of an individual who lacks the capacity to voluntarily waive his rights.

388. MENTAL HEALTH STANDARDS, supra note 4, 7-10.4(b).
389. Cf. N.M. STAT. ANN. § 43-1-13(I) (1978 & Repl. 1984) ("[N]o developmental disabilities treatment or habilitation facility is required to detain, treat or provide services to a client when the client does not appear to require such detention, treatment or habilitation.").
390. See supra note 354, 369.
391. See supra note 353; SANTAMOUR & WEST, supra note 353, at 27-31. For a compilation of state laws on transfers from prisons to mental hospitals, see Favole, supra note 120, at 281-95.
392. MENTAL HEALTH STANDARDS, supra note 4, 7-1.1 commentary at 14.
393. See supra text accompanying notes 51-61.
394. See, e.g., State v. Schlaps, 78 Mont. 560, 577-78, 254 P. 858, 862 (1927) (testimony of teacher who administered test ruled properly excluded as not competent to express an opinion); State v. Bennett, 345 So. 2d 1129, 1137 (La. 1977).

This problem can be compared to a similar problem that arises when mentally retarded defendants are imprisoned. Daniel and Menninger explain: "Mentally re-
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psychiatrists to fulfill these duties, even after psychiatrists have suggested the limitations of their expertise.395

Selecting a qualified professional involves many factors. One major concern is the type of training received by the professional asked to evaluate or testify about a mentally retarded defendant’s condition. In contrast to psychiatrists and other mental health professionals, whose training is usually limited to the needs of people with mental illness, mental retardation professionals have focused their training on the special needs and characteristics of people with mental retardation. The graduate course work of special education teachers, for example, will generally include work in the impaired learning ability of mentally retarded people; specialized educational curricula, techniques, methods, and materials; standardized assessment of deficiencies; applied behavior analysis;

395. In 1961, Dr. Walter Barton, president of the American Psychiatric Association, observed: “Psychiatrists as a group are disinterested in mental retardation. Many have no more accurate knowledge about the retarded than the layman does.” Barton, The President’s Page: The Psychiatrist’s Responsibility for Mental Retardation, 118 AM. J. OF PSYCHIATRY 362, 362 (1961). Other psychiatrists express similar views. Dr. Menolascino states:
[Psychiatry’s] withdrawal and the historical events that led up to it have resulted in a number of stereotyped views or blindspots that psychiatrists characteristically exhibit when they must deal with the retarded. Briefly these blindspots are: uncritical acceptance of mental age as an adequate description of a person; treatment nihilism that is usually based on lack of program knowledge and a myopic view of conceivable or even available program alternatives; and excessive focus on the severely retarded and their families, in contrast to the mildly retarded.

Menolascino, Psychiatry’s Past, Current and Future Role in Mental Retardation, in PSYCHIATRIC APPROACHES TO MENTAL RETARDATION 709, 717 (F. Menolascino ed. 1970). According to Dr. Bernstein, “Psychiatrists generally are not interested in and do not use the broad range of knowledge or treatment techniques available when confronted with [mentally retarded] patients.” Bernstein, Mental Retardation, in THE HARVARD GUIDE TO MODERN PSYCHIATRY 551, 551 (A. Nicholi ed. 1978); see also Dybwad, Psychiatry’s Role in Mental Retardation, in DIMINISHED PEOPLE: PROBLEMS AND CARE OF THE MENTALLY RETARDED 123 (N. Bernstein ed. 1970). Dybwad has stated:

“[A] profession’s commitment to a human problem and its solution can be measured by the extent and quality of its research operations in that field, by the volume of relevant papers in the journals maintained or largely supported by the profession, and by the attention given to the particular subject in the course of the profession’s academic training program. On all of these three counts the factual evidence clearly points to a lack of interest in or commitment to mental retardation on the part of the psychiatric profession.”

Id. at 123-24. See also 6 AM. JUR. PROOF OF FACTS IDIocy and Mental Deficiency Proof 1, 254 (psychiatrist more likely to concentrate on mental diseases of psychogenic origin than on mental deficiency).
communication for mentally retarded people; and extensive field
work and supervised teaching of people with mental retardation
in a variety of settings, including residential facilities and public
schools. Other professionals, whose work addresses the types of
disabilities which often accompany mental retardation, such as
speech, language and hearing impairments, physical and motor
disabilities, and vocational training and transitional problems,
should have similarly extensive training in mental retardation.

The Federal Rules of Evidence limit the availability of “expert”
status for the purpose of testimony. Rule 702 provides:

If scientific, technical, or other specialized knowledge will as-
sist the trier of fact to understand the evidence or to determine
a fact in issue, a witness qualified as an expert by knowledge,
skill, experience, training, or education, may testify thereto in
the form of an opinion or otherwise.\textsuperscript{396}

This requirement limiting testimony to the individual profes-
sional’s area of expertise is reflected in the \textit{Mental Health Stan-
dards}.\textsuperscript{397} The \textit{Mental Health Standards} preclude mental health
professionals from testifying, evaluating, or otherwise participat-
ing in the trial and adjudication of a mentally retarded individual
if the mental health professional’s expertise does not include sub-
stantial training and expertise in the field of mental
retardation.\textsuperscript{398}

Thorough assessment of the abilities and weaknesses of a men-
tally retarded defendant can result in information of tremendous
assistance to a court. However, the assessment process requires
great care and professional skill and any proffered results must be
viewed with caution. At many points during the process, seem-
ingly minor departures from good practice can severely limit the
utility or validity of an assessment report.\textsuperscript{399}

\begin{itemize}
\item \textsuperscript{396} FED. R. EVID. 702.
\item \textsuperscript{397} MENTAL HEALTH STANDARDS, supra note 4, 7-1.1(a) (“the [mental health and
mental retardation] professional’s performance within these roles should be limited to
the individual professional’s area of expertise and should be consistent with that pro-
fessional’s ethical principles”).
\item \textsuperscript{398} The \textit{Mental Health Standards} define mental retardation professionals as:
individuals who have received extensive, formalized, post-graduate educa-
tion and training in identifying specific functional deficits or habilitation
needs of persons with mental retardation or developmental disability.
Mental retardation professionals include special education teachers,
speech and language pathologists, audiologists, physical therapists, occupa-
tional therapists, and those psychiatrists, psychologists, clinical social
workers, psychiatric nurses or other mental health professionals who have
received the necessary education and training on mental retardation is-
\textit{Mental Health Standards, supra note 4, 7-1.1 commentary at 14. For a discussion
of training techniques employed by mental retardation professionals, see D. MACMIL-
LAN, MENTAL RETARDATION IN SCHOOL AND SOCIETY (2d ed. 1982); SYSTEMATIC IN-
STRUCTION OF THE MODERATELY AND SEVERELY HANDICAPPED (M. Snell 2d ed. 1983);
E. Polloway, J. Payne, J. Patton & R. Payne, STRATEGIES FOR TEACHING RE-
TARDED AND SPECIAL NEEDS LEARNERS (3d ed. 1985).

\item \textsuperscript{399} See HANDBOOK OF PSYCHOLOGICAL ASSESSMENT (G. Goldstein & M. Hersen
eds. 1984). Even when an examination has been conducted in consistence with good
Competent, professional assessment requires personal observation and interaction with the allegedly mentally retarded defendant. The Mental Health Standards instruct that no witness should be qualified as an expert on a defendant's mental condition unless the witness "has performed an adequate evaluation, including a personal interview with the individual whose mental condition is in question, relevant to the legal and clinical matter(s) upon which the witness is being called to testify." This required evaluation may be particularly important in cases involving mentally retarded defendants because it precludes hypothetical testimony about the mental status of a defendant based solely on the characteristics of a particular class of mentally retarded individuals without analyzing the individual characteristics of the defendant.

Only professionals who have training and experience in evaluating people with mental retardation should perform the assessments. As discussed earlier, mental retardation differs sufficiently from other forms of mental disability that training in mental illness cannot, without more, qualify a physician to provide useful information about a mentally retarded person. Similarly, typical medical school training and the attainment of the academic degree of M.D. cannot, without more, qualify a physician to give expert testimony about mental retardation. The Mental Health Standards recognize that the field of mental retardation requires particular training and experience and that relatively few professionals have expertise in both mental illness and mental retardation.

Courts should not operate under the illusion that the simple administration of any test will resolve all questions regarding a re-professional practice, the report may prove inadequate. One study found that despite specific instructions to examiners to report on the issues of competence and sanity, the majority of reports submitted to the court made no mention of either issue. Geller & Lister, The Process of Criminal Commitment for Pretrial Psychiatric Examination and Evaluation, 135 AM. J. PSYCHIATRY 53, 58 (1978).

400. MENTAL HEALTH STANDARDS, supra note 4, 7-3.11(a)(iii).

401. To qualify as an expert under Standard 7-3.11 three criteria must be established. The professional must meet certain clinical educational and training requirements that are more stringent than merely possessing an academic degree. Thus, the commentary advises that "a mental health professional whose training has been limited to evaluating mental illness should not be permitted to testify as an expert in a case involving a mentally retarded defendant." Id. 7-3.11 commentary at 142. Some psychiatrists and other physicians will be qualified in the area of mental retardation, but most will not.

402. Id. 7-3.11 commentary at 143. The commentary states: "Standard 7-3.11 attempts to assure that only those mental health and mental retardation professionals who are truly qualified to testify as experts are permitted to do so." Id. Of course, a few mental disability professionals will have training and experience that gives them expertise in both mental illness and mental retardation. These professionals are uniquely qualified to assist courts in evaluating defendants who may have both disabilities. See supra notes 59-61 and accompanying text.
Systematic assessment requires the thoughtful selection and administration of valid examination instruments together with careful observation, interviewing, and analysis of all the data by a professional with proper training and experience. The test instruments chosen must meet the minimum criteria for test construction. These include a supportable theoretical base, proper question content, proper item format, standardized administration, standardized scoring, adequate reliability (dependability), adequate validity (a true measurement of what the test claims to measure), and normative data. Few tests in common use can be rated highly in all categories. A determination of how a certain test rates can only be made after thorough analysis of the accompanying test manual and supporting statistical data as well as independent scholarly research performed with the test. This is not to suggest that less than scientifically perfect tests can never be used, but only that the substantial number of tests which do not withstand scientific scrutiny must be used with great care by professionals thoroughly grounded in evaluation skills. Any test battery must be scrutinized by courts in terms of the above criteria and the skills and experience of the examiner.

The legal issues of each case will dictate the relevant tests to be administered. In all cases where the defendant is suspected of being mentally retarded, an individual intelligence test should be administered in order to formulate an estimate of the defendant's general intellectual functioning. Even if a defendant has had IQ tests in the past, a new examination should almost always be conducted in order to provide a comparison to the older test results. This test assures that an examination was conducted in a manner

403. Courts should similarly reject testimony in which no evaluation was performed. In State v. Bennett, 345 So. 2d 1129, 1138 (La. 1977), the court dismissed the testimony of a psychiatrist and a coroner, each of whom alleged an IQ level for the defendant without performing an examination. The court stated: "The conclusory reports by Drs. Rees and Anthony that defendant was able to assist counsel were not, without supporting information which was lacking at the hearing, entitled to reliance by the court." Id. Similarly, in State v. Rogers, 419 So. 2d 840 (La. 1982), a psychiatrist's "intuitive interactions with the patient," absent testing, were rejected as "clearly insufficient." Id. at 844.

404. For example, the name of a test may suggest that it will evaluate one aspect of intelligence, while in fact scientific data indicate that it evaluates an entirely different aspect. Similarly, a test may require such subjective judgment on the part of the examiner that adequate reliability between different examiners can never be achieved. In addition, the test may have been standardized on a population of pre-school children and, therefore, normative data for adults have never been collected. HANDBOOK OF PSYCHOLOGICAL ASSESSMENT, supra note 399, at 19-37.

405. This is an appropriate topic for cross-examination. See 1 J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY 200-88 (3d ed. 1981) (discussing the leading psychological tests).

406. Substantial disparities between test scores for the same individual generally indicate a variety of problems that invalidate the scores. It may mean that a test is unreliable, that an examiner did not receive adequate professional preparation, that testing conditions such as physical environment or the rapport with the examinee were improper, or that test anxiety depressed the score. See A. ANASTASI, PSYCHOLOGICAL TESTING 23-44 (4th ed. 1976).
consistent with good professional practice, and also that the witness is testifying based upon his own evaluation rather than one whose principal virtue may be that it is conveniently on file.

Many cases also will require one or more of the following: personality assessment, adaptive behavior assessment, moral development examination, speech and language evaluation, motoric functioning evaluation, or academic achievement evaluation — as well as mental retardation forensic evaluations in the indicated legal issues. 407 A professionally competent assessment should provide the court with an indication of the defendant’s general intellectual functioning or IQ. However, careful analysis of the defendant’s performance on an IQ test may provide more specific information that will be even more valuable to the court. Other information from different parts of the assessment will often elucidate the defendant’s ability to understand concepts, use numbers, remember past events and previously learned information, put representative items in proper sequential order, solve puzzles, answer questions, respond speedily, resist coercion, and the like. These are factors an examiner untrained in mental retardation will be unable to evaluate without the assistance of an expert professional. This knowledge, therefore, is central to the court’s needs from an expert witness. The evaluation can produce testimony regarding the defendant’s abilities and characteristics that the court can apply to the relevant legal test, 408 and about the possibilities for effecting change in the defendant’s functioning. 409

Expert witnesses need some familiarity with relevant legal issues in addition to their professional expertise. 410 The Mental Health Standards recognize the existing limitations in forensic training for mental health professionals. 411 Such training appears to be even more rare for mental retardation professionals. Crea-

407. See id. at 180-81.

408. Note that the expert witness is limited in his or her ability to testify to the ultimate legal issue in controversy. MENTAL HEALTH STANDARDS, supra note 4, 7-3.9.

409. The next step in the process is designing an individualized habilitation plan for effecting the desired change (such as attainment of competence to stand trial). The outlines of such a plan may be presented to the court for approval. See Bennett, A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial, 53 GEO. WASH. L. REV. 375, 389-92 (1985).

410. Although experts may not be permitted to testify about the ultimate legal issues, see supra note 408, they will need to understand the legal elements of competence to stand trial or the defense of mental nonresponsibility, for example, in order to present relevant and coherent information in their testimony.

411. MENTAL HEALTH STANDARDS supra note 4, 7-3.10. In addition to requiring that the evaluating mental health and mental retardation professional have sufficient professional education and clinical training, the Mental Health Standards also require “sufficient forensic knowledge, gained through specialized training or an acceptable substitute therefor, necessary for understanding the relevant legal matter(s) and for satisfying the specific purpose(s) for which the evaluation is being ordered.” Id. 7-3.10(b).
tion of such training programs is essential if the courts are to have access to a sufficient number of competent professional experts in the field of mental retardation.412

Assuming a witness has the necessary professional expertise as well as sufficient forensic knowledge, the mental retardation expert might usefully testify to issues such as the defendant’s intelligence,413 his ability to understand the components of the Miranda warning or to waive his constitutional rights,414 his general level of functioning,415 his academic attainment and potential,416 and similar aspects of his disability.417

VII. The Right to a Mental Retardation Professional as an Expert Witness

Recently, the United States Supreme Court in *Ake v. Oklahoma*418 ruled that “when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist’s assistance on this issue, if the defendant cannot otherwise afford one.”419

The Court reached this conclusion by applying the four-part standard now common in procedural due process cases,420 factoring the defendant’s interest affected, the governmental interest in avoiding the requested procedures, the probable value of the additional safeguard sought, and the risk of erroneous deprivation if the safeguard is not provided.421 The Court emphasized that the defendant’s interest in the accuracy of the proceeding is “uniquely compelling.”422 The Court went on to discuss the pivotal role of

412. In the absence of such organized training programs, it falls to counsel to be sure that the expert eyewitness in a particular case has sufficient understanding of the relevant legal issues.

413. See, e.g., People v. Bruce, 62 A.D. 2d 1073, 403 N.Y.S. 2d 587, 588-89 (1978) (certified school psychologist testified on IQ testing as well as on defendant’s ability to waive constitutional rights).

414. See, e.g., Cooper v. Griffin, 455 F.2d 1142, 1143-44 (5th Cir. 1972) (defendants’ special education teacher and their rehabilitation specialist testified that neither boy could understand the Miranda warning); Hines v. State, 384 So. 2d 1171, 1177 (Ala. Crim. App. 1980) (special education professor testified that defendant was susceptible to suggestion and could not understand the abstract concepts of the Miranda warning).

415. See, e.g., Cooper, 455 F.2d at 1143-44.

416. See, e.g., May v. State, 398 So. 2d 1331, 1334 (Miss. 1981) (defendant’s special education teacher testified to defendant’s abilities in math, language, and spelling; his speech pathologist testified on the evaluation she had performed for school placement).

417. See United States v. Masthers, 539 F.2d 721, 730 (D. C. Cir. 1976) (Hastie, J., concurring) (“It should not be too difficult to find someone skilled in working and communicating with the mentally retarded who could and would communicate effectively with him, so that his participation in any further proceedings would be knowing and meaningful.”).


419. Id. at 1092.


421. Ake, 105 S. Ct. at 1094.

422. Id. at 1094.
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psychiatrists when insanity is raised in a criminal defense, and the impossibility of maintaining an insanity defense without an appropriate expert witness. Finally, the Court found the state's economic interest in avoiding the cost of an expert to be outweighed by the importance of the individual's interest.

Applying Ake to the situation of a mentally retarded defendant asserting the defense of mental nonresponsibility must surely produce a similar result. The four-part test yields a virtually identical analysis except that when a defendant is mentally retarded, the necessary expert testimony will be provided by a mental retardation professional whose training and experience conforms to the requirements specified earlier.423

While Ake dealt only with the insanity defense, the Court's reasoning suggests that a similar conclusion would be reached on other criminal issues to which expert testimony by a mental disability professional was comparably crucial. The procedural due process balancing test produces parallel results when applied to a defendant's request for expert assistance in the context of competence to stand trial or of civil commitment subsequent to acquittal by reason of mental nonresponsibility. In each instance, due process is denied by requiring a mentally disabled defendant to litigate the issue without the assistance of a competent professional with relevant training and experience in the appropriate discipline or disciplines.

The Mental Health Standards provide for the right to an independent expert witness in the context of incompetence to stand trial,424 the defense of mental nonresponsibility,425 commitment following acquittal,426 and sentencing.427 The Mental Health Standards thus anticipated Ake, and made similar provisions for other adjudications to which mental condition or ability are crucial issues.

VIII. Specialized Training in Mental Retardation
Professionals in the field of mental retardation have long called

423. See supra note 398 and accompanying text; see also Decker, Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents, 51 CIN. L. REV. 574, 580-99 (1982) (discussing the constitutional right to expert defense services under the due process clause and the sixth amendment).
424. MENTAL HEALTH STANDARDS, supra note 4, 7-4.8(a)(i).
425. Id. 7-3.3(a).
426. Id. 7-7.5.
427. Id. 7-9.4. The standards for postconviction commitment and involuntary transfer from prisons to mental facilities provide for the right to call independent expert witnesses. See Id. 7-9.9(a)(iii), 7-10.5(a)(iii). Although these standards do not explicitly address the right of indigents to such assistance at state expense, there is nothing in the text or commentary to suggest that this right was intentionally omitted.
for specialized training in mental retardation for all participants in the criminal justice system. Police officers have often been identified as primary targets for this training, because their initial contacts with mentally retarded offenders are crucial to ultimate resolution of the case.

Part II of the Mental Health Standards addresses police and custodial rules. The frequent failure to identify potential issues of competence and nonresponsibility prior to trial induced the framers of the Mental Health Standards to require that when police officers have reason to believe that an individual is mentally retarded, they should communicate that information to the prosecutor or the court. The ability of police to detect mental retardation in defendants is limited, however, and thus courts cannot rely upon this process to identify defendants who may be mentally retarded.

The Mental Health Standards address specialized training for law enforcement personnel as well as for individuals who have custodial responsibilities. It calls for the involvement of mental health and mental retardation professionals in the design of curriculum and training materials for police officials.

Police often perceive individuals who are mentally ill as a greater law enforcement problem than persons with mental retardation. As a result, police departments may err in focusing all of their training upon the characteristics of mentally ill individuals, and ignoring the indicia of mental retardation. A police officer may incorrectly conclude, for example, that an individual has no special medical needs, when in fact he is a mentally retarded person with very low verbal ability who requires regular doses of an anti-seizure medication. Or arresting officers may assume that the individual does not wish to make a phone call, when in fact he cannot remember his mother's telephone number, cannot read the telephone book, or is simply unable to operate a telephone.

The Mental Health Standards provide that custodial personnel "should receive training in identifying and responding to the symptoms and behaviors, including self-injurious behavior, associated with mental illness and mental retardation. Emphasis should be placed on those symptoms and behaviors that arise or are aggravated by the fact of incarceration, particularly as they relate to suicide prevention." While suicide prevention is a principal concern during incarceration, attention should also be paid to other

430. MENTAL HEALTH STANDARDS, supra note 4, 7-2.1 to -2.9.
431. Id. 7-2.5(c).
432. Id. 7-2.8.
434. Id. 7-2.8(c).
forms of self-injurious behavior in which some mentally retarded persons may engage, including self-biting, head-banging, psychogenic vomiting, and the like.\textsuperscript{435} The distress, guilt, shame, or confusion of the arrest may trigger such behaviors and the potential danger to the mentally retarded person requires that police officers recognize and effectively manage the situation, preferably with the assistance of competent mental retardation professionals.

Lawyers also need education in the area of mental retardation. The limited ability of most lawyers to recognize mental retardation in their clients has been well documented.\textsuperscript{436} The \textit{Mental Health Standards} suggest that educational programs and courses in mental retardation be offered by law schools, bar associations, and other judicial organizations.\textsuperscript{437}

There is a similarly acute need for mental retardation professionals to become more knowledgeable about, and thus more effective in, the criminal justice system.\textsuperscript{438}

\textbf{Conclusion}

Mentally retarded criminal defendants present substantial difficulties for the criminal justice system.\textsuperscript{439} These difficulties are exacerbated by misunderstandings about the nature of mental retardation and confusion about the similarities and differences between this disability and mental illness. The new \textit{Mental Health Standards} fall prey to similar misunderstandings and confusion in a few instances, but generally represent a substantial improvement over current laws and practices. Translating these proposed improvements into the reality of everyday practice will greatly improve the quality of justice that these individuals receive.

\textsuperscript{435} See American Assoc. on Mental Deficiency, Life-Threatening Behavior: Analysis and Intervention 3-278 (J. Hollis & C. Meyers eds. AAMD Monograph No. 5 1982).

\textsuperscript{436} Brown & Courtless, supra note 63, at 1168; see Haggerty, Kane & Udall, supra note 433, at 59-60 (1972).

\textsuperscript{437} MENTAL HEALTH STANDARDS, supra note 4, 7-1.3.

\textsuperscript{438} See \textit{Id.} 7-1.3(d).

\textsuperscript{439} State v. Bennett, 345 So. 2d 1129, 1136 (La. 1977). The Bennett court observed: The mentally retarded offender poses unique problems for the criminal justice system: his reduced understanding challenges traditional notions of criminal responsibility; his physical presence at trial is offset by an abstraction of mind which may be severe enough to invoke the ban against trying a defendant in absentia; his need for specialized care and training argues against his commitment upon conviction to a penal institution ill-equipped to habilitate him.

\textit{Id.}