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## Beyond Penry: The Remedial Use of the Mentally Retarded Label in Death Penalty Sentencing

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# BEYOND *PENRY*: THE REMEDIAL USE OF THE MENTALLY RETARDED LABEL IN DEATH PENALTY SENTENCING

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Temporal idols demanding an absolute faith tirelessly decree absolute punishments. And religions devoid of transcendence kill great numbers of condemned men devoid of hope.<sup>1</sup>

## INTRODUCTION

At one level, the Supreme Court's decision in *Penry v. Lynaugh*<sup>2</sup> apparently provided a victory for persons with mental retardation. In refusing to mandate the class-wide exemption of "mentally retarded" labeled persons from death penalty sentencing schemes and insisting instead on individualized adjudications in which evidence of mental retardation may be a mitigating factor, the Court lent its considerable voice to the argument against class-wide presumptions about persons with mental retardation.

In fact, however, the Court proscribed the use of the "mentally retarded" label in one of the few legal contexts in which it has some legitimate use. This Article argues that the class-wide exemption of "mentally retarded" persons from death penalty sentencing schemes represents an appropriate remedial use of the mentally retarded label, a use consistent with the prevailing scientific construct of mental retardation. It further argues that the decision to permit the introduction of evidence of mental retardation as a mitigating factor in death penalty sentencing may be only a Pyrrhic victory for defendants with mental retardation, given the legal understanding of mental retardation and criminality as individualistic disorders and the inhospitability of the legal system to offers of proof which challenge this schema. Finally, this Article contends that the class-wide exemption of offenders with mental retardation from death penalty sentencing schemes is mandated by current understandings of

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1. A. Camus, *Reflections on the Guillotine*, in RESISTANCE, REBELLION AND DEATH 175, 228 (J. O'Brien trans. 1974).

2. 109 S. Ct. 2934 (1989).

mental retardation and criminality and by considerations of moral fairness. The exemption provides the only means for the state to recognize its role in the political re-creation of the mentally retarded offender.

Part I of this Article reviews the Supreme Court's decision in *Penry v. Lynaugh*. It notes that the majority's refusal to mandate a class-wide exemption from capital sentencing schemes rested in part on its assertion that the abilities and life experiences of mentally retarded persons were too diverse to permit class-wide generalizations about their criminal culpability.

Part II of this Article provides an introduction to the phenomenology of mental retardation. It notes that mental retardation is a bureaucratic term that includes within its definitional criteria the appearance of statistically significant deficiencies in cognitive ability and adaptive behavior. It further notes that these deficiencies are norm-referenced and highly contextual; the decision to assign the mentally retarded label in response to these apparent deficiencies reflects a series of socio-political judgments. Part II also notes that the political nature of the mental retardation construct precludes any meaningful generalization about the absolute biological deficiencies of mentally retarded persons, but the interaction between the mentally retarded labeled individual and the society that labels her ensures that apparent deficiencies become politically real. Part II concludes that this political re-creation of mental retardation is a reality for all of those persons who are assigned the label and that the real mental retardation experience almost invariably includes a life of deprivation and diminishment.

Part III of the Article distinguishes between redemptive and remedial uses of the mentally retarded label. It contends that some uses of the label reflect the anachronistic view that mental retardation is a biological creation and that the appropriate role of the state is to minimize the societal inconvenience resulting from biological inequities, i.e., to redeem the state interests threatened by biological injustices. It contrasts that view with the critical vision of mental retardation as a socio-political creation; the role of the state in this vision is to remove the societal obstacles that are routinely erected in response to the perceived difference, i.e., to remedy the social injustice. Part III further provides an overview of the prevailing construct of criminality and notes that the history and philosophy of that construct parallel the history and philosophy of mental retardation. Finally, Part III concludes that some degree of class-wide exculpation in criminal sentencing schemes constitutes both an appropriate and necessary remedial use of the mentally retarded label.

Part IV of the Article offers the more specific contention that mentally retarded labeled persons should not be subject to death sentencing schemes. It first notes that traditional rationales for capital punishment fail in the case of the mentally retarded offender, while the arguments against the death penalty apply with particular force. It further notes that the *Penry* remedy of individualized mitigation will fail to ensure appropriate exculpation for at least three reasons: because persons with mental retardation are unfairly disadvantaged in the adversarial process; because jurors are unlikely to give effect to mental retardation as a mitigating factor; and because the insular adjudicative process

preserves the myths of mental retardation and criminality and shields decision-makers from empirical proof and moral deliberation. Part IV concludes that the class-wide exemption of mentally retarded persons from death sentencing schemes is the only way to protect against the unfair and immoral decision to end the life of a person with mental retardation.

### I. THE SUPREME COURT DECISION IN *PENRY v. LYNAUGH*

In *Penry v. Lynaugh*, the Supreme Court was called upon to decide the fate of Johnny Paul Penry, a mentally retarded man convicted and sentenced to death by a Texas jury for the 1979 rape and murder of Pamela Carpenter.<sup>3</sup> Testimony at Penry's pre-trial competency hearing<sup>4</sup> indicated that he suffered from organic brain damage, that he had an IQ between fifty and sixty-three, that he had the mental age of a six and one-half year old, and that his social maturity was that of a nine or ten-year-old.<sup>5</sup> Trial testimony indicated that Penry was unable to finish the first grade in school. His mother frequently beat him over the head with a belt when he was a child; he was in and out of a number of state schools and institutions as a child; his father removed him from state schools altogether when he was twelve; and, in the words of a psychiatrist testifying for the state, Penry "had been socially and emotionally deprived" and had endured "a very bad life generally."<sup>6</sup> Psychiatrists called by the defense and by the state differed on whether Penry could distinguish right from wrong,<sup>7</sup> but all agreed that Penry had extremely limited mental ability and an inability to learn from his mistakes.<sup>8</sup>

The Supreme Court vacated Penry's death sentence. Justice O'Connor, writing for the Court,<sup>9</sup> held that the Texas death sentencing scheme violated the eighth amendment in failing to allow the jury to give effect to Penry's mitigating evidence of mental retardation and childhood abuse.<sup>10</sup> The Texas scheme, which limited capital sentencing deliberations to three "special

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3. 109 S. Ct. at 2941.

4. The jury found Penry competent to stand trial. *Id.*

5. *Id.*

6. *Id.* at 2941-42.

7. Dr. Jose Garcia, testifying on Penry's behalf, indicated that the organic brain disorder made it impossible for Penry to appreciate the wrongfulness of his conduct or to conform his conduct to the law. *Id.* at 2941. Dr. Kenneth Vogtsberger, testifying for the state, opined that Penry knew the difference between right and wrong and had the potential to honor the law. *Id.* at 2942.

8. *Id.* at 2942.

9. That portion of Justice O'Connor's opinion holding the Texas scheme unconstitutional for failing to permit the jury to give effect to mitigating evidence of mental retardation was joined by Justices Brennan, Marshall, Blackmun and Stevens; that portion of the opinion holding that the execution of mentally retarded persons was permissible under the eighth amendment was joined by Justices Scalia, White, and Kennedy and Chief Justice Rehnquist. *Id.* at 2940.

10. *Id.* at 2948.

issues,"<sup>11</sup> failed to permit the jury to express its "reasoned moral response" to the evidence;<sup>12</sup> the jury, Justice O'Connor wrote, "must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime."<sup>13</sup>

Justice O'Connor went on to hold that the eighth amendment did not categorically prohibit the execution of mentally retarded persons.<sup>14</sup> After noting that "public sentiment" against the execution of mentally retarded persons was evidenced in a variety of opinion polls and in one state law prohibiting the execution of mentally retarded persons, Justice O'Connor concluded that there was "insufficient evidence" of a national consensus against executing mentally retarded persons.<sup>15</sup> Moreover, in a proportional culpability analysis that — either in its conception or its result — drew dissenting votes from every other member of the Court,<sup>16</sup> Justice O'Connor wrote that "in light of the diverse capacities and life experiences of mentally retarded persons, it cannot be said on the record before us today that all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty."<sup>17</sup>

## II. THE MYTH AND REALITY OF MENTAL RETARDATION

Whatever its intention,<sup>18</sup> the majority's holding in *Penry* that mentally retarded persons comprise too diverse a group to be accorded class-wide treatment in death sentencing schemes demonstrates a predictable lack of insight

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11. The "special issues" were whether the defendant acted "deliberately and with the reasonable expectation" that death would result; whether there was a "probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;" and whether the defendant's conduct was "unreasonable" in light of the provocation, if any was identified by the defense. *Id.* at 2942.

12. *Id.* at 2947 (quoting from *California v. Brown*, 479 U.S. 538, 545 (1987) (concurring opinion) ("[T]he sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime.") (emphasis in original)).

13. *Id.* at 2951.

14. *Id.* at 2958.

15. *Id.* at 2955.

16. Justices Brennan, Marshall, Stevens and Blackmun concurred in the need for a review of proportional culpability but disagreed with Justice O'Connor's conclusion. *Id.* at 2960, 2963 (Justice Brennan, with Justice Marshall, concurring in part and dissenting in part and Justice Stevens, with Justice Blackmun, concurring in part and dissenting in part.) Justices Scalia, White, Kennedy and the Chief Justice, meanwhile, maintained that the inquiry "has no place in our Eighth Amendment jurisprudence." *Id.* at 2964.

17. *Id.* at 2957.

18. Justice O'Connor's concern was that class-wide generalizations about mentally retarded persons "could have a disempowering effect" in other areas of the law. *Id.* at 2934. This might strike some as either ironic or disingenuous, given the Court's eagerness to deny the protection of "quasi-suspect status" to mentally retarded persons. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (deciding that "those who are mentally retarded . . . are . . . different, immutably so, in relevant respects" and that heightened scrutiny under the equal protection clause is not appropriate even though that question was moot in light of the Court's holding that the city zoning ordinance in question was invalid under a simple rational basis analysis).

into the mental retardation construct. The Court's decision ignores the contextual nature of mental retardation; it reifies the term and ignores the political processes that in fact "re-create" mental retardation in the interactions between the "mentally retarded" labeled person and the society that labels her. Justice O'Connor's assertion that mentally retarded persons possess "diverse capacities and life experiences" is true only in a narrow empirical sense and then only relatively. Indeed, the assertion ignores the common experience of mental retardation: the endogenous attributes that, by definition, compel — and then flow from — the decision to label someone "mentally retarded" and the life of deprivation that invariably accompanies the label. The Court, as a consequence, precludes the class-wide use of the mentally retarded label in one of the few political contexts in which the label retains its class-wide integrity.

#### A. Overview of the Mental Retardation Construct

There is, in an absolute sense, no such thing as a mentally retarded person. The decision to label someone "mentally retarded" represents a conscious social choice,<sup>19</sup> a choice laden with political values<sup>20</sup> and shaped by historical contingencies.<sup>21</sup> "Mental retardation" as an absolute entity is a myth,<sup>22</sup> one of the more insidious reifications of the behavioral sciences, a term with no scientific integrity outside the limited bureaucratic contexts that demand its use.<sup>23</sup>

No one, then, is mentally retarded until she has been labeled as such. The

19. St. Claire, *A Multidimensional Model of Mental Retardation: Impairment, Subnormal Behavior, Role Failures, and Socially Constructed Retardation*, 94 AM. J. MENTAL RETARDATION 88, 90 (1989) (noting that the decision to label a person "mentally retarded is a social-cognitive act," and the criteria used for determining mental retardation is "all a matter of choice, not fact").

20. See, e.g., S. SARASON & J. DORIS, *EDUCATIONAL HANDICAP, PUBLIC POLICY, AND SOCIAL HISTORY: A BROADENED PERSPECTIVE ON MENTAL RETARDATION* 417 (1979) (noting that "mental retardation is never a thing or a characteristic of an individual but rather a social invention stemming from time-bound societal values and ideology that make diagnosis and management seem both necessary and socially desirable"); B. FARBER, *MENTAL RETARDATION: ITS SOCIAL CONTEXT AND SOCIAL CONSEQUENCES* 6 (1968) (observing that "[u]ndoubtedly a relationship exists between political belief and theories of mental retardation").

21. See, e.g., Barnett, *Definition and Classification of Mental Retardation: A Reply to Zigler, Balla, and Hodapp*, 91 AM. J. MENTAL DEFICIENCY 111, 112 (1986) (noting that "mental retardation cannot be understood simply as an individual characteristic" but instead that "the judgment that someone is mentally retarded reflects the interaction between the cognitive abilities of the individual and those required by the society at a given historical moment").

22. R. BOGDAN & S. TAYLOR, *INSIDE OUT: THE SOCIAL MEANING OF MENTAL RETARDATION* 7 (1982) (observing that mental retardation is "a reification . . . a misnomer, a myth").

23. See, e.g., *id.* at 5-6 (noting that mental retardation "is a defective concept . . . it is not just less than useful, it is actually seriously misleading"); B. BLATT, *IN AND OUT OF MENTAL RETARDATION* 27 (1981) (observing that mental retardation is an "administrative term" with "little, if any, scientific integrity"); Molloy, *Behavioral Approaches to the Training of the Mentally Retarded*, 43, 55-56, in *THE EDUCATION AND TRAINING OF THE MENTALLY RETARDED: RECENT ADVANCES* (A. Ashman & R. Laura eds. 1985) [hereinafter *EDUCATION AND TRAINING*] (noting that the mental retardation label is incompatible with contemporary behavioral theories of learning "depending on the extent to which it is reified").

label comes with the promise of tangible benefits: educational opportunities, vocational opportunities and life choices that should come automatically, but do not. In a society that values attributes that, by definition, mentally retarded persons will not exhibit — a society that values rationality, independence and maximized economic utility more than it values passion, communality and equality — the mentally retarded label ultimately diminishes its recipient.<sup>24</sup> Through the complex interactions between the society and the labeled person, the “mentally retarded” person appears “retarded” and, increasingly, tailors her behavior to accommodate the expectations of her social environment. Mental retardation is thus re-created by the socio-political processes, and the re-creation is very real.

Mental retardation has, in fact, been re-created at several levels in recent history. The prevailing scientific construct of mental retardation for much of the late nineteenth and early twentieth century was a medical model, a construct which placed the locus of mental disability within the biological constitution of the disabled individual.<sup>25</sup> The role of science, under such a conception, was to cure or eliminate mental retardation, and the concomitant role of the state was to limit the social costs of the disability.<sup>26</sup>

A more recent view shifts the locus of disability from the biological make-up of the individual to the society that limits her opportunities.<sup>27</sup> This sociological construction of mental retardation recognizes that biology may have endowed individuals with certain mental limitations, but it is society that uses those limitations to disable her.<sup>28</sup> The role of science, under this conception, is to understand the interplay between the individual's natural limitations and the societal responses they evoke, and the proper role of the state is to limit or eliminate the disabling societal restrictions that confront the disabled person.<sup>29</sup>

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24. See Hayman, *Presumptions of Justice: Law, Politics and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1252-68 (1990) (observing that the law diminishes the mentally retarded person by promoting values that are anti-communalistic, anti-passionate and anti-egalitarian).

25. See Ferguson, *The Social Construction of Mental Retardation*, SOC. POL'Y, Summer 1987, at 51, 52.

26. See, e.g., *Buck v. Bell*, 274 U.S. 200 (1927) (upholding the sterilization of an allegedly mentally retarded young woman and insisting that “[t]hree generations of imbeciles are enough”). See generally S. SARASON & J. DORIS, *PSYCHOLOGICAL PROBLEMS IN MENTAL DEFICIENCY* 209-329 (1969) (tracing the history of the medical model of mental retardation and its socio-political consequences).

27. See, e.g., Ferguson, *supra* note 25, at 51-52 (reviewing the sociological construct of mental retardation). Cf. Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 J. SOC. ISSUES, Spring 1988, at 39, 39-41 (tracing the development of the sociological construct of disability generally).

28. See, e.g., Scheer & Groce, *Impairment as a Human Constant: Cross-Cultural and Historical Perspectives on Variation*, 44 J. SOC. ISSUES, Spring 1988, at 23, 23-24 (noting that the World Health Organization defines “impairment” as “an abnormality or loss of any physiological or anatomical structure or function”; “disability” as “the consequences of an impairment”; and “handicap” as “the social disadvantage that results from an impairment or disability”).

29. See, e.g., Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000 (Supp. IV 1986).

The most widely accepted definition of "mental retardation" today defines the term as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period."<sup>30</sup> Mental retardation is thus essentially a norm-referenced statistical creation;<sup>31</sup> it reflects no absolute judgments about intelligence but only the view that the labeled individual demonstrates lesser aptitudes and abilities than the norm.<sup>32</sup>

This construction of mental retardation is replete with complications. Popular conceptions aside, the term is far from monolithic; the standard construct is divided into four discrete classes, with considerable intellectual range both within and among the subdivisions.<sup>33</sup> The construct is also plagued by a host of problems in measurement: intelligence is such an organic concept,<sup>34</sup> and the measurement of intelligence and adaptive behavior are so problematic,<sup>35</sup> that even standardized assessments are apt to reveal more about the biases of

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30. CLASSIFICATION IN MENTAL RETARDATION 1 (H. Grossman ed. 1983) [hereinafter Grossman]; see also American Psychiatric Ass'n, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-III-R 31-32 (4th ed. 1987) (adopting the AAMD definition). The AAMD definition is itself the result of several reiterations: the behavioral component was added in 1959, and the threshold cognitive measure was changed in 1973 from one standard deviation below the norm (85 IQ) to two standard deviations below the norm (70 IQ). See Grossman, *supra*, at 5-7.

31. See Grossman, *supra* note 30, at 32; see also E. ZIGLER & R. HODAPP, UNDERSTANDING MENTAL RETARDATION 44 (1986) (noting that the IQ construct strictly conforms to the Gaussian or normal curve).

32. See, e.g., Hale, *Evaluation of Intelligence, Achievement, Aptitude and Interest*, in PSYCHOLOGICAL EVALUATION OF THE DEVELOPMENTALLY AND PHYSICALLY DISABLED 41, 52 (V. Van Hasselt & M. Hersen eds. 1987) [hereinafter PSYCHOLOGICAL EVALUATION] (noting that intelligence factors are measured only by norm-reference to middle-class conceptions of academic achievement).

33. The four classes of mental retardation are mild (IQ from 50-55 to approximately 70), moderate (IQ from 35-40 to 50-55), severe (IQ from 20-25 to 35-40) and profound (IQ below 20-25). See Grossman, *supra* note 30, at 13. Mildly mentally retarded persons likely comprise 75-85% of the labeled population, and moderately mentally retarded persons likely comprise about 10% of the labeled population. See D. BRANTLEY, UNDERSTANDING MENTAL RETARDATION: A GUIDE FOR SOCIAL WORKERS 7 (1988).

34. See generally E. ZIGLER & R. HODAPP, *supra* note 31, at 7 (reviewing the three basic models of intelligence: the psychometric model, which emphasizes measurable differences on standardized tests; the Piagetian model, which emphasizes the development of cognitive operations; and the information-processing model, which emphasizes the micro-processes for schematizing behavior).

35. Intelligence scales seem to adequately measure only two broadly defined abilities — verbal comprehension and, at times, perceptual organization — and these are measured only by reference to middle-class conceptions of academic achievement. See Hale, *supra* note 32, at 48-52. Adaptive behavior, meanwhile, is measured through the use of formal scales or through clinical assessment; both methodologies are replete with problems of validity and reliability. See Meyers, Nihira & Zetlin, *The Measurement of Adaptive Behavior*, in HANDBOOK OF MENTAL DEFICIENCY, PSYCHOLOGICAL THEORY AND RESEARCH 431, 433-77 (N. Ellis ed. 1979) [hereinafter HANDBOOK] (reviewing methodologies for the measurement of adaptive behavior and noting that "[l]ike intelligence, AB [adaptive behavior] is a loose construct and varies according to purpose and even one's philosophy of person-environment relations").



the evaluation than the abilities of the subject.<sup>36</sup> For these and other reasons, the scientific community has consistently cautioned against the common misuse of the term;<sup>37</sup> it is, in fact, a term with little explanatory or predictive value and no true scientific integrity beyond the limited bureaucratic context of general statistical comparisons and class-wide resource allocations.<sup>38</sup>

The scientific community thus evidences an emerging consensus of the contextual nature of mental retardation. In deciding whether any given individual is mentally retarded — indeed, in setting the general parameters for the class — the perspective and motivations of the inquisitor are critical. Thus, individuals may move in and out of the class of mental retardation, depending both on practical contingencies (e.g., the availability of resources to meet perceived needs) and prevailing philosophies (e.g., the relative emphasis on rationality versus passion and individual independence versus interdependence).<sup>39</sup> The mentally retarded person, then, may well have some biological limitations, but it is almost always a fairly debatable socio-political decision to view those limitations as disabling and, hence, to assign the “mentally retarded” label. Ultimately, the person is mentally retarded primarily because she needs to be labeled as such for one political reason or another.

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36. See, e.g., *Larry P. v. Riles*, 495 F. Supp. 926, 952-60 (N.D. Cal. 1979) (enjoining the use of nonvalidated IQ tests that had produced the disproportionate placement of black children in special classes for the educable mentally retarded), *aff'd in part, and rev'd in part*, 793 F.2d 969 (9th Cir. 1984); *In re William L.*, 477 Pa. 322, 350-51 n.26, 383 A.2d 1228, 1243 n.26 (1978) (noting that “[e]xperts generally agree that socially and culturally disadvantaged people tend to score lower on standardized intelligence tests”); see also Santamour & West, *The Mentally Retarded Offender: Restatement of the Facts and a Discussion of the Issues*, in *THE RETARDED OFFENDER* 7, 9-10 (M. Santamour & P. Watson eds. 1982) (reviewing evidence of bias in testing); Berkowitz, *Mental Retardation: A Broad Overview*, in *Id.* at 47, 49 (noting that “[t]here is little disagreement that racial and social biases have not been adequately addressed or accounted for in evaluation procedures”); Reschly, *Evaluation of the Effects of SOMPA Measures on Classification of Students as Mildly Mentally Retarded*, 86 AM. J. MENTAL DEFICIENCY 16 (1981) (noting that changes in evaluation instruments and methodologies aimed at eliminating cultural bias have not been entirely successful).

37. See Grossman, *supra* note 30, at 17-21; see also *supra* notes 19-23 and accompanying text.

38. Compare Neisworth & Bagnato, *Developmental Retardation*, in *PSYCHOLOGICAL EVALUATION*, *supra* note 32, at 179, 184-85 (noting that the assessment of the level of retardation is needed to provide optimal services to a mentally retarded child) with B. BLATT, *supra* note 23, at 27 (noting that mental retardation is an “administrative term” with “little, if any, scientific integrity”); see also Vane & Motta, *Basic Issues in Psychological Evaluation*, in *PSYCHOLOGICAL EVALUATION*, *supra* note 32, at 19, 27-29 (criticizing the use of intelligence and personality to predict behavior).

39. Changes in the definition of mental retardation, for example, have moved thousands of previously labeled persons outside the purview of the construct. See Grossman, *supra* note 30, at 5-8 (noting that the definition has been reformulated twice in the last thirty years, each time reducing the size of the “mentally retarded” population). Individual assessments, too, may move persons in and out of the class. B. BLATT, *supra* note 23, at 227; see also Koegel & Edgerton, *Black “Six-Hour Retarded Children” as Young Adults*, in *LIVES IN PROCESS: MILDLY RETARDED ADULTS IN A LARGE CITY* 145 (R. Edgerton ed. 1984) [hereinafter *LIVES IN PROCESS*] (noting how the “fuzziness” of the mental retardation construct produces phenomenon like the “six-hour retarded child”, who is mentally retarded only for the six hours a day that she receives special education services).

## B. Mental Retardation and the Myth of Constitutional Deficiency

By definition, the mental retardation construct includes two perceived deficiencies. First, the mentally retarded person must demonstrate sub-average cognitive ability — specifically, two standard deviations below the norm on some standardized measure of intelligence.<sup>40</sup> Second, the mentally retarded person must demonstrate a sub-average ability to adapt to a “normal” environment, an ability measured by a standardized “adaptive behavior” scale or in the course of a clinical assessment.<sup>41</sup>

Beyond these two basic tautologies, it is impossible to generalize in any meaningful fashion about the constitutional deficiencies of persons with mental retardation.<sup>42</sup> It is simply not true, for example, that persons with mental retardation are constitutionally unintelligent. Given the opportunity to learn in facilitative environments, persons with mental retardation can learn to improve their social skills,<sup>43</sup> their communication skills<sup>44</sup> and their problem-solving skills;<sup>45</sup> they can learn, in fact, to learn.<sup>46</sup> Confronted (as they inevitably are) with stifling environments that minimize their opportunities to learn,<sup>47</sup> persons with mental retardation will tailor their behaviors to maximize the eventfulness of their lives.<sup>48</sup> Accepting Ashley Montagu's definition of

40. See Grossman, *supra* note 30, at 6.

41. See sources cited *supra* notes 30-32, 35. Assessments commonly divide the behavior into categories or domains; commonly tested behavior domains include self-help skills, physical development, communication skills, cognitive functioning, domestic and occupational activities, self-direction and responsibility, and socialization. See Meyers, Nihira & Zetlin, *supra* note 35, at 453-54. Some assessments are designed to measure maladaptive behaviors, including “violent and destructive behavior, antisocial behavior, rebellious behavior, untrustworthy behavior, withdrawal, stereotyped behavior and odd mannerisms, inappropriate interpersonal manners, unacceptable vocal habits, eccentric habits, self-abusive behavior, hyperactive tendencies, sexually aberrant behavior and psychological disturbances.” *Id.* at 455.

42. There is no common etiology for mental retardation: it may be inherited, it may be organic, it may be environmental, or it may be “familial”, i.e., correlated with the presence of a mentally retarded parent through a heretofore unspecified interaction of nature and nurture. See E. ZIGLER & R. HODAPP, *supra* note 31, at 86-88.

43. See Castles & Glass, *Training in Social and Interpersonal Problem-Solving Skills for Mildly and Moderately Mentally Retarded Adults*, 91 AM. J. MENTAL DEFICIENCY 35 (1983).

44. See Kiernan, *The Exploration of Sign and Symbol Effects*, in 2 ADVANCES IN MENTAL HANDICAP RESEARCH 27 (J. Hogg & P. Mittler eds. 1983).

45. See Ashman, *Problem Solving and Planning: Two Sides of the Same Coin*, in EDUCATION AND TRAINING, *supra* note 23, at 169, 178-82.

46. See Glidden, *Training of Learning and Memory in Retarded Persons: Strategies, Techniques and Teaching Tools*, in HANDBOOK, *supra* note 35, at 619, 619-22. Thus, the conventional wisdom is false; IQs are not immutable. See Hale, *supra* note 32, at 60-61; Craft & Craft, *Sexuality and Personal Relationships*, in MENTAL HANDICAP 177, 187 (M. Craft, J. Bicknell & S. Hollins eds. 1985).

47. See, e.g. Ashman, *supra* note 45, at 178-82 (noting that maintenance and generalization of problem-solving strategies is possible for mentally retarded persons, but formal training and social opportunities are currently inadequate); see also *infra* notes 55-73 and accompanying text.

48. See Graffam & Turner, *Escape from Boredom: The Meaning of Eventfulness, in the Lives of Clients at a Sheltered Workshop*, in LIVES IN PROCESS, *supra* note 39, at 121.

intelligence as "the capacity to develop responses to any and every challenge of the environment,"<sup>49</sup> it is clear that persons with mental retardation are not unintelligent at all.

While the behavioral component of the mental retardation construct mandates that the labeled person have some relative behavioral deficiency, persons with mental retardation are not necessarily unable to cope with their environment in any absolute sense. According to the behavior paradigm, in fact, the great majority of persons with mental retardation possess life skills sufficient to live independently in a "normal" community;<sup>50</sup> their behavioral "deficiency" may be no more than a speech, hearing or motor skills impairment.<sup>51</sup> In addition, persons with mental retardation are not necessarily predisposed to maladaptive behaviors. Despite the persistent myth of the mentally retarded menace, there is no empirical link between intelligence and maladaptive behavior<sup>52</sup> or between mental retardation and violence.<sup>53</sup> Moreover, persons with mental retardation can unlearn their maladaptive behaviors where they do exist.<sup>54</sup>

### C. Mental Retardation and the Reality of Re-created Deficiency

While evidence does not permit generalizations about the constitutional deficiencies of persons with mental retardation, the dynamics of the re-creative process ensure that some class-wide generalizations will be possible. The perverse nature of the interaction between society and the labeled "mentally retarded" individual guarantees substantial cognitive and behavioral deficiencies. Persons labeled "mentally retarded" are expected to act mentally retarded, and society ensures that, eventually, they all do.

The mental retardation experience is dominated, first of all, by a pervasive and oppressive tutelage.<sup>55</sup> A comprehensive scheme of social system restraints

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49. Montagu, *The Sociobiology Debate: An Introduction*, in BIOLOGY, CRIME AND ETHICS 24, 32 (F. Marsh & J. Katz eds. 1985).

50. See Grossman, *supra* note 30, at 206-07.

51. Adaptive behavior scales typically include assessments of vocabulary, reading, writing, fine motor skills and perceptual development. See Meyers, Nihiria & Zetlin, *supra* note 35, at 453.

52. See Padd & Eyman, *Mental Retardation and Aggression: Epidemiologic Concerns, and Implications for Deinstitutionalization*, in EDUCATION AND TRAINING, *supra* note 23, at 145, 157 (noting that "most studies cannot support a direct relationship between intelligence and maladaptive behavior per se").

53. See Craft & Craft, *Low Intelligence and Delinquency*, in MENTAL HANDICAP, *supra* note 46, at 53.

54. See, e.g., Fantuzzo, Wray, Hall, Goins & Azar, *Parent and Social-Skills Training for Mentally Retarded Mothers Identified as Child Maltreaters*, 91 AM. J. MENTAL DEFICIENCY 135 (1986) (noting that training eliminated the maladaptive behavior of parents with a history of child neglect). See generally Lennox, Miltenberger, Spengler & Erfanian, *Decelerative Treatment Practices with Persons who have Mental Retardation: A Review of Five Years of Literature*, 92 AM. J. MENTAL DEFICIENCY 492, 494-500 (1988) (surveying reported treatment procedures for mentally retarded persons with behavior problems).

55. See, e.g., Kahn, *Mental Retardation and Paternalistic Control*, in MORAL ISSUES IN MENTAL RETARDATION 57 (R. Laura & A. Ashman eds. 1985) [hereinafter MORAL ISSUES] (noting

denies the mentally retarded person the opportunity to learn, to grow and to realize her human potential. The scheme even pervades formal law, which commonly denies the mentally retarded person the right to exercise her vote,<sup>56</sup> the right to choose her place of residence,<sup>57</sup> the right to marry,<sup>58</sup> the right to have children<sup>59</sup> and the right to raise her children.<sup>60</sup>

The mental retardation experience also includes a singular deprivation of formal educational opportunities. The deprivation is rooted, in part, in the failure of "special education," an effort doomed by philosophical and fiscal restraints.<sup>61</sup> It is rooted, too, in the narrow-minded and despairing nature of the curricula and methodology that characterize both mainstream and segregated instruction for mentally retarded persons.<sup>62</sup> It is rooted, also, in the inexplicable absence of community college and related formal academic programs for mentally retarded persons.<sup>63</sup> And finally, it is rooted in the deplorable

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that "the general practice is to extend paternalistic control to all cases of specifiable mental retardation"). On the predominance of paternalistic attitudes toward disabled persons generally, see Kamiencki, *The Dimensions Underlying Public Attitudes Toward Blacks and Disabled People in America*, 28 AM. BEHAVIORAL SCIENTIST 367, 383 (1985):

Although there is overwhelming leader and public support to do something to ease the plight of disabled people there has been little social and political action taken in this direction. If anything, these citizens have been the victims of the highest rates of poverty, unemployment, and welfare dependency in the country, and they have been more often discriminated against in housing, education, and transportation than any other minority group. The reason for the discrepancy between leader and public support for disabled persons and government action lies in the paternalistic attitudes people hold toward this sector of society. Although Americans readily express profound and sincere sympathy for disabled individuals, they also keep them in a position of social and economic subordination.

*Id.* (citations omitted).

56. See Note, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644 (1979); Note, *The Right to Vote of the Mentally Disabled in Oklahoma: A Case Study in Overinclusive Language and Fundamental Rights*, 25 TULSA L.J. 171 (1989).

57. See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

58. See *Cleburne*, 473 U.S. at 463 (Marshall, J., concurring in part and dissenting in part) (noting that "[m]arriages of the retarded were made, and in some states continue to be, not only voidable but also often a criminal offense").

59. See Burgdorf & Burgdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995 (1977).

60. See Hayman, *supra* note 24.

61. See Lilly, *The Regular Education Initiative: A Force for Change in General and Special Education*, 23 EDUC. & TRAINING IN MENTAL RETARDATION 253, 254-56 (1988).

62. See, e.g., Alper, *The Use of Teacher Questioning to Increase Independent Problem Solving in Mentally Retarded Adolescents*, 20 EDUC. & TRAINING OF THE MENTALLY RETARDED 83, 83-87 (1985) (noting that moderately retarded students can learn problem solving skills but that such opportunities are rarely provided in the classroom); Lilly, *supra* note 61, at 257 (noting that the special education systems "devised to 'save' children from general education have suffered from many of the same shortcomings inherent in that system").

63. See McAfee & Sheeler, *Accommodation of Adults who are Mentally Retarded in Community Colleges: A National Study*, 22 EDUC. & TRAINING IN MENTAL RETARDATION 262 (1987).

absence of habilitation and other educational services for mentally retarded adults.<sup>64</sup>

The mental retardation experience is also characterized by an acute economic deprivation. The stereotype of the mentally retarded person as dull, sluggish and capable of executing only routine and monotonous tasks<sup>65</sup> becomes a self-fulfilling prophecy for mentally retarded persons, even in the face of empirical evidence proving their suitability for a wide range of employment.<sup>66</sup> Mentally retarded persons are chronically under-employed and unemployed;<sup>67</sup> the great majority find work only in the stifling tedium of the sheltered workshop.<sup>68</sup> Deprived of even the most remote prospect of vocational opportunity, the mentally retarded person is reduced to a position of complete

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64. See, e.g., Scherenberger, *Comprehensive Programming*, in *THE RETARDED OFFENDER*, *supra* note 36, at 52, 60-61 (noting that "[a]dult services, in general, are inadequate" and that the problem is especially pronounced for mentally retarded persons with behavioral problems, for whom "few programs" have been created); Norley, *Restitution or Revenge*, in *REHABILITATION AND THE RETARDED OFFENDER 3* (P. Browning ed. 1976) (observing that "[o]ur present system of providing services for retarded people is immorally inadequate and ill conceived").

65. See, e.g., R. KURTZ, *SOCIAL ASPECTS OF MENTAL RETARDATION* 61 (1977) (noting that the stereotyped social identity of the mentally retarded person is dominated by "ineducability, social incapacity, fitness for only monotonous and repetitive tasks, sluggishness, and incompetence") (quoting N. HOBBS, *THE FUTURES OF CHILDREN* 34 (1975)).

66. See, e.g., Inge, Banks, Wehman, Hill & Shafer, *Quality of Life for Individuals Who Are Labeled Mentally Retarded: Evaluating Competitive Employment Versus Sheltered Workshop Employment*, 23 *EDUC. & TRAINING IN MENTAL RETARDATION* 97 (1988) [hereinafter Inge] (reviewing successful programs for integrated employment and concluding that "[c]learly it has been demonstrated that individuals with mental retardation can be competitively employed and that employment results in positive financial outcomes"); Rusch & Hughes, *Overview of Supported Employment*, 22 *J. APPLIED BEHAVIORAL ANALYSIS* 351, 351-53 (1989) (noting that mentally retarded persons have traditionally been considered unemployable in the competitive market, a view contradicted by an accumulating wealth of empirical data establishing their vocational competence).

67. See, e.g., Hasazi, Gordon, Roe, Finck, Hull & Salembier, *A Statewide Follow-up on Post High School Employment and Residential Status of Students Labeled, "Mentally Retarded,"* 20 *EDUC. & TRAINING OF THE MENTALLY RETARDED* 222, 233 (1985) (noting that the instant study confirmed the results of previous work indicating that "mentally retarded persons have greater difficulty finding work, are less likely to obtain full-time positions, perform less skilled jobs, and are paid less than nonhandicapped persons"); Richardson, Koller & Katz, *Job Histories in Open Employment of a Population of Young Adults with Mental Retardation: 1*, 92 *AM. J. MENTAL RETARDATION* 483, 489 (1988) (comparing the employment histories of mentally retarded persons and nonretarded persons who left school without academic qualifications and finding that mentally retarded "males with no services were more often unemployed and females spent more time out of the labor force than did nonretarded comparison subjects").

68. See, e.g., Schalock, McGaughey & Kiernan, *Placement into Nonsheltered Employment: Findings from National Employment Surveys*, 94 *AM. J. MENTAL RETARDATION* 80, 84-85 (1989) (finding from national survey of vocational programs that only 17 to 19% of mentally retarded persons served during the survey period were placed into nonsheltered settings). On the stifling impact of working in a sheltered environment, see, for example, Inge, *supra* note 66, at 103 (mentally retarded persons in competitive employment show greater advancement in a wide range of social and cognitive skills than matched individuals in sheltered employment); Rusch & Hughes, *supra* note 66, at 353 (surveying studies demonstrating the inability of sheltered workshops to provide meaningful training for mentally retarded persons).

economic dependency on the welfare state, the most entrenched member of the perpetual underclass.<sup>69</sup>

Finally, the mental retardation experience is characterized by a near-total social deprivation. The de-institutionalization effort has merely shifted the physical location of mentally retarded persons; even in residential settings, mentally retarded persons are in the community, but not a part of it.<sup>70</sup> Due in part to popular attitudes<sup>71</sup> and in part to an abysmal system of community services,<sup>72</sup> the life of the mentally retarded person remains characterized by restricted mobility, heightened dependency and an absence of social stimulation.<sup>73</sup>

In all facets of the life of the mentally retarded person, "normal" society responds more to the mentally retarded label than to the person selected to bear it. In conscious disregard of specific empirical evidence of equal ability, "normal" persons will tailor their expectations and attributions to accommodate the stereotyped perception of mental retardation.<sup>74</sup> Mentally retarded

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69. See, e.g., H. SIMMONS, *FROM ASYLUM TO WELFARE* 256-57 (1982) (reviewing the history of mental retardation policies in Ontario and concluding that, despite a host of "reforms," mentally retarded persons "were still at the bottom of the social and economic ladder, submerged in the large underclass that seems to be a permanent feature of advanced industrial societies"); Breitmayer & Ramey, *Biological Nonoptimality and Quality of Postnatal Environment as Codeterminants of Intellectual Development*, 57 *CHILD DEV.* 1151 (1986) (noting that the incidence of mild mental retardation is limited "almost exclusively" to economically disadvantaged families).

70. See, e.g., Bogdan & Taylor, *The Next Wave*, in *COMMUNITY INTEGRATION FOR PEOPLE WITH SEVERE DISABILITIES* 209-11 (S. Taylor, D. Biklen & J. Knoll eds. 1987) (noting that mentally retarded persons may be "in the community" but that they are not "part of the community"); Chadsey-Rusch, Gonzalez, Tines & Johnson, *Social Ecology of the Workplace: Contextual Variables Affecting Social Interactions of Employees With and Without Mental Retardation*, 94 *AM. J. MENTAL RETARDATION* 141, 149 (1989) (finding that mentally retarded employees, like mentally retarded children in mainstream school settings, "are physically integrated" but not "socially integrated").

71. See, e.g., Williams, *Receptivity to Persons with Mental Retardation: A Study of Volunteer Interest*, 92 *AM. J. MENTAL RETARDATION* 299, 299-300 (1987) (noting studies identifying "the public's general lack of receptivity towards mentally retarded persons" as a primary obstacle to their social integration).

72. See, e.g., Richler & Pelletier, *Service Delivery Patterns in North America: Trends and Challenges*, in *MENTAL HANDICAP*, *supra* note 46, at 47 (noting that even the mediocre system of community-based services has been crippled by fiscal constraints since the recession of the early 1980s).

73. See Graffam & Turner, *supra* note 48, at 142; see also Crapps, Langone & Swaim, *Quantity and Quality of Participation in Community Environments by Mentally Retarded Adults*, 20 *EDUC. & TRAINING OF THE MENTALLY RETARDED* 123 (1985).

74. See Bromfield, Weisz & Messer, *Children's Judgments and Attributions in Response to the "Mentally Retarded" Label: A Developmental Approach*, 95 *J. ABNORMAL PSYCHOLOGY* 81 (1986).

Several studies have shown that people form quite different attributions, expectancies, and behavior prescriptions for children labeled mentally retarded than for unlabeled children, even in the face of information placing the children at the same level of ability. Despite such equal ability information, the retarded label can make people more likely to attribute failure to low ability,

persons are expected to act in a fashion consistent with the stereotype,<sup>75</sup> and through the rigid use of the mental retardation schema,<sup>76</sup> all behavior is reduced to "retardation."<sup>77</sup> In the eyes of the beholder, the labeled person becomes truly retarded; the labeled person is thereby diminished, denied the full measure of her human dignity and her individual will.<sup>78</sup>

Inevitably, the stigmatization has constitutional impacts. The labeled person comes to believe in her own inability, her sense of helplessness reinforced and condoned at every turn.<sup>79</sup> She is socialized into dependency,<sup>80</sup> isolated

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less likely to attribute failure to insufficient effort, and less likely to believe that the failure can be reversed with increased effort. It is not surprising that people also indicate that the attributions and expectancies they tend to form for retarded children would discourage them from urging the child to persist after failure.

*Id.* (citations omitted). The instant study confirmed these effects of the mentally retarded label. *Id.* at 85-86. For a discussion of the ways in which labeling ultimately affects the behavior of the labeled person, see *infra* notes 79-84 and accompanying text.

75. See R. KURTZ, *supra* note 65, at 61 (observing that "mental retardation is a social status and role" and that "[i]rrespective of where along the scale of retardation one is categorized in a classification scheme, the mentally retarded person is expected to behave as if he or she is retarded, by acting as a retarded person is supposed to act") (emphasis in original).

76. See Gibbons & Kassin, *Information Consistency and Perceptual Set: Overcoming the Mental Retardation "Schema,"* 17 J. APPLIED SOC. PSYCHOLOGY 810 (1987).

77. See, e.g., Mest, *With a Little Help from Their Friends: Use of Social Support Systems by Persons with Retardation*, 44 J. SOC. ISSUES, Spring 1988, at 117, 124 (noting that "[b]y focusing on the most obvious difference that a physically or mentally disabled person may possess, and by assuming its centrality in that person's self-perception, laypersons and professionals alike commit a fundamental attribution error"). Cf. Fine & Asch, *Disability Beyond Stigma: Social Interaction, Discrimination, and Activism*, 44 J. SOC. ISSUES, Spring 1988, at 3, 8-15 (noting the reductionist tendency in stereotypical perceptions of disabled persons generally and the manner in which those perceptions preclude a full understanding of the disabled person's life experience).

78. Cf. Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 J. SOC. ISSUES, Spring 1988, at 39, 43-44 (noting that the normal person's projection of the existential fear of disability results in the relegation of the disabled person to a position of dependency and in the denial of her equality and choice).

79. The "helplessness-condoning" effects of the mentally retarded label appear to be all-pervasive:

The present evidence suggests that such effects may not be confined to the adults in the retarded child's world, but may extend to the child's nonretarded peers — at least the older ones. This, in turn, suggests that to understand the causes of helpless behavior in retarded children, we may need to focus not only on the role of adults, but on that of peers as well. The information that a child is retarded may have variable effects depending on the developmental level of those peers, but one possibility among older children and adolescents may be a set of closely linked attributional and judgmental processes that lead to a condoning of nonpersistence and relinquished control by the labeled child.

Bromfield, Weisz & Messer, *supra* note 74, at 86 (citations omitted).

80. See *supra* notes 55-73 and accompanying text. The parents of mentally retarded children are likely to contribute to this process, even when they act with the best of intentions. See Zetlin & Turner, *Self-Perspectives on Being Handicapped: Stigma and Adjustment*, in LIVES IN PROCESS, *supra* note 39, at 93, 113 (observing the ways in which parents, through over-protectiveness and

from opportunities to grow,<sup>81</sup> her life pervaded by a sense of rejection and loneliness.<sup>82</sup> Her salvation comes in the sanctuary offered by her labeled fellows<sup>83</sup> and in event-producing behaviors that appear maladaptive only when abstracted from their social context.<sup>84</sup>

Mental retardation is thus transformed into empirical fact as a consequence of the societal response to the reified construct.<sup>85</sup> Science may recognize this truth,<sup>86</sup> but the law, sadly, does not manifest the same insight.<sup>87</sup> In

denial, may socialize mentally retarded children "into dependency, compliance, and incompetence"). Ed Murphy, a mentally retarded labeled adult, remembers "trying to be like the other kids and having my mother right there pulling me away — she was always worried about me." R. BOGDAN & S. TAYLOR, *supra* note 22, at 37.

81. See, e.g., Kishi, Teelucksingh, Zollers, Park-Lee & Meyer, *Daily Decision-Making in Community Residences: A Social Comparison of Adults With and Without Mental Retardation*, 92 AM. J. MENTAL RETARDATION 430, 435 (1988) (comparing matched samples of mentally retarded and nonretarded persons and concluding that "[o]verall, nonretarded persons clearly had the expected choice-making opportunities in their daily lives; the persons with disabilities in our sample did not"). As a corollary to this isolation, mentally retarded persons are apt to confront a wide variety of situations that are everyday occurrences for nonlabeled persons but that are largely denied to the labeled person. Routine situations, thus, become new and threatening to the mentally retarded person and prompt a heightened anxiety that is alien to the nonlabeled person's experience. See Levine, *Situational Anxiety and Everyday Life Experiences of Mildly Mentally Retarded Adults*, 90 AM. J. MENTAL DEFICIENCY 27, 31-32 (1985).

82. See Luftig, *Assessment of the Perceived School Loneliness and Isolation of Mentally Retarded and Nonretarded Students*, 92 AM. J. MENTAL RETARDATION 472 (1988) (noting the frequent rejection and neglect experienced by mentally retarded children and finding that mentally retarded children report significantly more loneliness and isolation than their nonretarded peers); see also HANDBOOK, *supra* note 35, at 147-58 (noting that the experiential history of mentally retarded persons is likely to lead to heightened wariness, anxiety, outer-directedness and expectation of failure and result in a negative self-concept).

83. See, e.g., Turner, Kernan & Gelpman, *Speech Etiquette in a Sheltered Workshop*, in LIVES IN PROCESS, *supra* note 39, at 43, 70 (noting that a "fundamental and basic rule" among mentally retarded persons in a sheltered workshop is "not to call attention" to the stigmata of mental retardation," and concluding that, as a consequence, "here, for a few short hours each working day, in the company of cooperating fellows, one's self-esteem is secure").

84. See, e.g., Graffam & Turner, *supra* note 48, at 122 (noting that "[g]iven the limitations of social resources available to workshop clients and their perceptions of what it means to be 'normal' or 'grown up', it is not surprising that individuals may go to rather extreme lengths in an attempt to make their lives more eventful" and concluding that "[w]hen taken in context, such responses no longer appear as pathological or maladaptive"). Cf. Williams, *Perceptions of Mentally Retarded Persons*, 21 EDUC. & TRAINING MENTALLY RETARDED 13, 18 (1986) (noting generally that stereotypical perceptions of mentally retarded persons "are not simply socially imposed upon mentally retarded persons, but are actively maintained and reinforced by the ingratiating social strategies that mentally retarded persons often adopt in dealing with other members of society").

85. See van den Brink-Budgen, *Liberal Dialogue, Citizenship and Mentally Handicapped Persons*, 34 POL'Y STUDIES 374, 385 (1986) (noting that, through the interaction of biological and political status, "biological 'facts' become political 'facts' which, through an interactive process, emphasize and reinforce the biological").

86. See *supra* notes 19-24, 27-28, 32-33, 38-39 and accompanying text.

87. See Hayman, *supra* note 24, at 1248-52; see also Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 3 (1989) (noting changes in the scientific view of the world and contending that "the language in which we still tend



this sense, Justice O'Connor's observation of significant differences in ability and life experience among mentally retarded persons<sup>88</sup> is not atypical, but it is either misleading or simply wrong. Persons are not immutably mentally retarded; when significant deficits in cognitive or adaptive behavior are no longer detectable — either by virtue of individual habilitation or through a change in measurement philosophy — the person is, by definition, no longer "mentally retarded." The label (and its concomitant social restrictions) can then be removed. Until such time, however, the labeled individual invariably shares in the discrete mental retardation experience. In an absolute sense, then, there is no such thing as "mental retardation," but for every individual who bears the label, the political re-creation of "mental retardation" is certainly real.<sup>89</sup>

### III. THE MYTH OF CRIMINALITY AND THE REMEDIAL USE OF THE MENTALLY RETARDED LABEL

#### A. Remedial and Redemptive Uses of the Mentally Retarded Label

Some uses of the mentally retarded label are consistent with the political construct of the term. The label may be needed, for example, in bureaucratic decision-making, in allocating resources to avoid the otherwise harsh impacts of society. The label is used in such a situation in a self-conscious fashion; insight into the true nature of the label permits its use to ameliorate the unfair consequences of the re-creative process. Such uses of the label are remedial<sup>90</sup> and are truly egalitarian; they are designed to maximize opportunities — if not outcomes — that otherwise might be socially proscribed.<sup>91</sup>

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to ask legal questions and express legal doctrine has yet to reflect the shift in our perceptions").

88. *Penry v. Lynaugh*, 109 S. Ct. 2934, 2957 (1989).

89. See B. FARBER, *supra* note 20, at 19-20.

As deviants, they are stigmatized and treated differently from others; as incompetents, they generally fail to perform roles adequately in the basic institutions of the society. Moreover, especially in mild mental retardation, other attributes inhibiting life chances are also present, and the combination of these life-chance inhibitors insures the continued existence of retarded persons in the organizationally surplus population.

*Id.*

90. Remedial uses of the mentally retarded label recognize and ameliorate the diminishing effects that accompany the political re-creation of mental retardation. Redemptive uses of the mentally retarded label, meanwhile, are blind — through ignorance or malice — to the re-creative process; they establish and perpetuate the diminishment through the redemption of the societal interests that are apparently threatened by biological differences. See Hayman, *supra* note 24, at 1205-11. As Ed Murphy, a mentally retarded labeled adult, observes, "The word 'retarded' has to be there if you are going to give people help, but what the hell is the sense of calling someone retarded and not giving them anything?" R. BOGDAN & S. TAYLOR, *supra* note 22, at 92.

91. For a useful discussion of three distinct conceptions of equality — equality of outcome, equality of opportunity and equality of moral worth — in the general context of social responses to mental retardation, see R. VEATCH, *THE FOUNDATIONS OF JUSTICE: WHY THE RETARDED AND THE REST OF US HAVE CLAIMS TO EQUALITY* 119-29 (1986).

The use of the label in these contexts is quite opposed to uses which diminish the labeled person. The use of the label to deny rights — the rights, for example, to vote, to choose one's residence, to marry, to bear and raise children — are essentially redemptive, designed to redeem the state interests that seem threatened by the biological handicap. Redemptive measures are rooted in outmoded, individualistic notions of disability. They are essentially anti-egalitarian: they limit, rather than expand, opportunity, and the only outcomes they are concerned with are the threats to the status quo posed by the existence of mentally retarded persons.<sup>92</sup>

The remedial use of the mentally retarded label to achieve a vision of equality is compelled both by rights constructs and by notions of inter-personal obligation. It is clear, first, that remedial use is necessary to achieve real equality under rights theory. Admittedly, remedial measures necessitate the conferring of some special status for specified purposes; the treatment is thus inherently different. But differential treatment is not necessarily anti-egalitarian; on the contrary, where differential treatment is necessary to vindicate the moral worth of a group, or to restore its competitive standing or to ensure the fair distribution of resources, different is not unequal. As Rousseau noted, "It is precisely because the force of things always tends to destroy equality, that the force of legislation must tend to maintain it."<sup>93</sup> Consequently, theories of positive rights<sup>94</sup> and of positive liberty<sup>95</sup> are constructed to ensure the fair

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92. See Hayman, *supra* note 24, at 1205-11.

93. J. ROUSSEAU, *THE SOCIAL CONTRACT* 49 (C. Sherover trans. 1984).

94. See, e.g., Casebeer, *Running on Empty: Justice Brennan's Plea, the Empty State, the City of Richmond, and the Profession*, 43 U. MIAMI L. REV. 989, 1001 (1989) (noting that "positive definitions exclude what they do not affirm, especially when bounded by negative restraints called rights" and insisting that "to establish equality more than abstractly or formally, justice can only be known by a different negative, that is, by overcoming injustice"). Cf. Brennan, *Are Citizens Justified in Being Suspicious of the Law and the Legal System?*, 43 U. MIAMI L. REV. 981, 986 (1989) (insisting that lawyers "must highlight how legal doctrines no longer bear any relation to reality" and that they "must bring real morality into the legal consciousness" and concluding that "[c]ertainly, we as lawyers know the difference between formal and real equality, and must therefore lead the fight to close the gap between the two").

95. Justice Brennan credits Benjamin Cardozo with articulating the concept of positive liberty. Brennan, *Reason, Passion, and "The Progress of the Law"*, 10 CARDOZO L. REV. 3, 10-11 (1988). Justice Brennan observes that this conception of liberty as something other than the mere absence of restraint might have produced different decisions in cases like *Lochner v. New York*, 198 U.S. 45 (1905):

The concept of positive liberty is easily arrived at by considering the plight of an employee whose only "choice" is between working the hours the employer demands or not working at all. Such a choice strikes us, intuitively, as no choice at all. Upon reasoned reflection, we are able to give rational expression to this intuitive response by means of the concept of positive liberty. Only by remaining open to the entreaties of reason and passion, of logic and of experience, can a judge come to understand the complex human meaning of a rich term such as "liberty," and only with such understanding can courts fulfill their constitutional responsibility to protect that value.

*Id.* at 11; cf. Freeman, *Antidiscrimination Law: A Critical Review*, in *THE POLITICS OF LAW: A*

treatment of otherwise disadvantaged groups; to ensure, in other words, an equality that is real and not a mere formalism.

The remedial use of the label is also necessary to achieve equality as a moral obligation. Under such a conception, moral obligations are not limited to the recognition of individual "rights," whether those rights are of natural origin or derived from the state. Rather, the very inter-relationships among persons that are an inherent part of social life create their own sets of duties.<sup>96</sup> Paramount among these duties is the obligation to recognize the inherent worth of a fellow human being and to accord all persons the dignity that the fact of their humanity prescribes.<sup>97</sup> Responses among fellows that fail to facilitate the mutual realization of lives with dignity and relationships of respect are necessarily inadequate. Equality is equal humanity, and the unique nature of each set of inter-personal relationships demands non-uniform responses to realize its vision.

Whether a particular class-wide use of the mentally retarded label is truly remedial depends entirely on the context. If the attributes assigned to the term are empirically and morally correlated with the political ends which delimit the context and if the insightful use of the term is needed to remedy a political injustice, then class-wide use of the label is both necessary and appropriate. Consequently, if the re-created deficiencies that define mental retardation may be fairly correlated with proper understandings of culpability and if death sentencing schemes will otherwise unfairly discriminate against mentally retarded defendants, then the class-wide exemption of mentally retarded persons from those schemes is truly remedial.

### B. Mental Retardation and the Concurrent Myth of Criminality

The prevailing construction of criminality closely parallels the construction of mental retardation. They share similar histories and similar philosophical roots and are realized today in similar conceptions. Indeed, through much

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PROGRESSIVE CRITIQUE 96, 110-14 (D. Kairys ed. 1982) [hereinafter PROGRESSIVE CRITIQUE] (urging a shift in the focus of antidiscrimination law from the perpetrator's perspective to the victim's perspective and noting the institutional barriers to that change).

96. See, e.g., C. GILLIGAN, *IN A DIFFERENT VOICE* (1982) (contrasting the male-oriented individualistic paradigm of behavior with a feminine perspective in which "identity is defined in a context of relationships and judged by a standard of responsibility and care"); N. HAAN, E. AERTS & B. COOPER, *ON MORAL GROUNDS: THE SEARCH FOR PRACTICAL MORALITY* 337-75 (1985) (emphasizing the development of an "interpersonal morality" in which interactions with the environment and inter-personal dialogue shape moral development).

97. See Bayles, *Equal Human Rights and Employment for Mentally Retarded Persons*, in *MORAL ISSUES*, *supra* note 55, at 11, 25-26.

In going beyond equal rights for mentally retarded persons, the moral duty to pursue a policy of assuring a life of basic satisfaction for disadvantaged persons provides a basis for more rewarding lives for mentally retarded persons and a morally better society for everyone. Equal human rights are not enough. Society can do better, and there is a moral basis for doing so.

*Id.*

of recent scientific history, criminality and mental retardation were viewed as equivalents,<sup>98</sup> and, in the popular psyche at least, the myth of the "mentally retarded menace" — deficient both in intellect and self-control — no doubt lingers on.<sup>99</sup> Moreover, the official criminology embodied in the criminal justice system reifies criminal behavior in the same fashion that the law reifies mental retardation; the result is an empirical correlation between the two that is primarily of the state's creation.<sup>100</sup> In this scenario, the execution of the mentally retarded offender is only the inevitable conclusion of the re-creative process.

Scientific explanations for both mental retardation and criminality have historically centered on the biological constitution of the individual, and the legal construction of each is still premised on this individualistic conception of behavior. This constitutional model — or medical or biological model — locates the operative characteristic — the deviance or disability — within the individual.<sup>101</sup> Behavior, under this model, is determined by the individual, as she is biologically constituted. In the history of mental retardation, the progeny of the model include eugenic sterilization and forced segregation;<sup>102</sup> in criminology, the progeny include phrenology (the view that criminal behavior was determined by skull features), anthropometric theories (views that somatotype revealed inclinations toward criminality) and Lombroso's *homo delinquens*, the prototype of the modern criminal.<sup>103</sup>

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98. See, e.g., Fernald, *The Imbecile with Criminal Instincts*, 65 AM. J. INSANITY 747 (1909), quoted in Norley, *supra* note 64, at 11 (asserting that "[e]very imbecile is a potential criminal, needing only the proper events and opportunity for the development and expression of his criminal tendency"). See generally Santamour & West, *supra* note 36, at 7-8 (tracing the history of the perceived link between intelligence and criminality and noting that the "general equation between criminality and subnormal intelligence" dominated scientific thinking until the late nineteenth century when the scientific community decided that mental retardation simply "predisposes a person to commit criminal acts"); Friel, *The Mentally Retarded Offender: Texas CAMIO Research Project*, in THE RETARDED OFFENDER, *supra* note 36, at 176, 178-79 (reviewing the literature and identifying a "general equation of criminality and subnormal intelligence").

99. See, e.g., R. KURTZ, *supra* note 65, at 8-12 (noting that popular stereotypes of the mentally retarded person portray him as, among other things, a "menace," a "subhuman organism" and an object of "ridicule" or "shame"); Williams, *supra* note 84, at 18 (noting that a common general stereotype of the mentally retarded person portrays him as "amiable, though not especially bright or self-controlled" and noting that this stereotype is largely consistent with the stereotyped perception of other minorities).

100. See, e.g., Santamour & West, *supra* note 36, at 8 (noting the "growing awareness that the preponderance of mentally retarded individuals involved in the criminal justice system may be more an administrative and legal artifact than evidence for a causal relationship between mental retardation and criminality"); Padd & Eyman, *supra* note 52, at 153 (reviewing the literature and concluding that "a major factor contributing to the relationship between criminality and mental retardation appears to involve the interaction between social variables and the legal process").

101. For overviews of constitutional theories of mental retardation, see sources cited *supra* notes 25-30. For an overview of the history of constitutional theories of criminality, see H. EYSENCK & G. GUDJONSSON, *THE CAUSES AND CURES OF CRIMINALITY* 17-42 (1989).

102. See generally S. SARASON & J. DORIS, *supra* note 26, at 287-88 (noting the social realization of eugenics theories in the promulgation of segregation and sterilization laws).

103. See generally H. EYSENCK & G. GUDJONSSON, *supra* note 101, at 17-42 (reviewing early

The criminality construct — like mental retardation — enjoyed some respite from constitutional theory with the emergence of sociological models of criminality in the mid- twentieth century.<sup>104</sup> These models shifted the locus of the operative characteristic from the individual to the society she lives in. The focus, in the sociological models of both criminality and mental retardation, is on society's role in shaping and interpreting individual behavior; the constitutional traits of the individual retain significance, but only in the social context.

Beyond their formal differences, the newer sociological models pose two significant challenges to the traditional conceptions of crime and retardation that threaten the order of traditional thought. First, the new post-positivist models challenge the traditional views of causation, both in a specific and a more general sense. Not only do the new models reject the view that single internal causes dictate behavior, the models also challenge the view of human behavior as the linear product of absolute factors. In viewing behavior as the gestalt of the interplay between social and individual perception and reality, the models threaten both the "objective" nature of causation and, ultimately, the very linear quality of the concept as well.<sup>105</sup>

The second challenge goes directly to the political heart of the traditional models. Inherent in the constitutional models — and in the prevailing legal construct of criminality — is a highly individualistic conception of persons;<sup>106</sup> the only limitations on the realization of individual will are the ineluctable

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constitutional theories of criminality).

104. The history of the perceived relationship between mental retardation and criminality actually provides a perfect microcosm of the evolution of each of the separate constructs. Early theories tended to equate the two, with the locus of the operative trait resting exclusively within the individual. In the late nineteenth century, theorists posited that biology provided only a predisposition to deviance, one that might be overcome with appropriate engineering. See Santamour & West, *supra* note 36, at 7-8. With the arrival of the Depression, these theories tended to die along with most of the social science theories of the Progressives. See generally White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972) (tracing the relationship between social science and political and judicial philosophy in the early twentieth century). For the next forty years, the prevailing scientific view toward the correlation between intelligence and criminality was characterized by "denial and neglect." Santamour & West, *supra* note 36, at 8. The 1960s brought a renewed interest in the subject and a new awareness of the role of the social state in shaping behavior, including both "retardation" and "criminality." *Id.* This awareness now competes with re-emerging constitutional theories of behavior for the hearts and minds of the scientific and lay communities.

105. See, e.g., Haney, *The Good, the Bad, and the Lawful: An Essay on Psychological Injustice*, in PERSONALITY THEORY, MORAL DEVELOPMENT, AND CRIMINAL BEHAVIOR 107, 109 (W. Laufer & J. Day eds. 1983) [hereinafter PERSONALITY THEORY] (challenging the legal conception of criminality as "premised on centuries-old notions of free will and personal causation"). Cf. Horwitz, *The Doctrine of Objective Causation*, in PROGRESSIVE CRITIQUE, *supra* note 95, at 201, 206 (noting the demise of objective causation in the natural sciences and its concomitant demise in tort law).

106. See, e.g., Haney, *supra* note 105, at 107-09 (noting that "U.S. criminal law is supremely individualistic" and that "failures of will, defects of personality, genetic imperfections, and retarded moral development are all used by psychologists to account for crime in individualistic terms").

restrictions imposed by the creator. The post-positivist sociological model reveals truths that contradict this scheme. Not only does the new model identify society as a co-conspirator in restricting the realization of individual will, it challenges the conception of individual determinism. The role of social context in explaining behavior under the new models is inconsistent with the notions of an absolute and independent individual free will; the model threatens, as a result, the very notions of individual responsibility and culpability.<sup>107</sup>

The construct of mental retardation has been forever changed by the emergence of the new sociological models of behavior.<sup>108</sup> Within the criminality construct, meanwhile, the revolution has been less complete. The reaction in some scientific circles has been a renewed fervor for constitutional explanations of crime. Thus, recent years have seen great interest in biomedical,<sup>109</sup> bio-social<sup>110</sup> and moral development theories for criminal behavior,<sup>111</sup> all of which seek to explain criminal behavior by focusing, at least in substantial part, on objective endogenous factors. At a formal level, however, these theories could no longer ignore the overwhelming empirical evidence of the role of environmental influences. As a result, even the modern positivist theories acknowledge the concomitant role of social experience in shaping individual behavior.<sup>112</sup>

At the philosophical level, however, the issues are unresolved; classical positivist scientists concede the empirical support for the sociological model

107. Cf. R. BARNET, *THE ROOTS OF WAR* 6 (1972) (observing that "[t]he dismal view of man as a natural warrior offers a certain bizarre comfort because it absolves individuals of responsibility of identifying, much less removing, the specific political, organizational, and economic causes of militarism and war").

108. See *supra* notes 19-39 and accompanying text.

109. See Nassi & Abramowitz, *From Phrenology to Psychosurgery and Back Again: Biological Studies of Criminality*, in *BIOLOGY, CRIME AND ETHICS*, *supra* note 49, at 102 (critiquing biomedical approaches to criminality).

110. See, e.g., Jeffery, *Criminology as an Interdisciplinary Behavioral Science*, in *BIOLOGY, CRIME AND ETHICS*, *supra* note 49, at 44 (proposing a bio-social criminology).

111. See, e.g., Jennings, Kilkenney & Kohlberg, *Moral Development Theory and Practice for Youthful and Adult Offenders*, in *PERSONALITY THEORY*, *supra* note 105, at 281 (suggesting a link between moral development and delinquent behavior).

112. See, e.g., Kenrick, Dantchik & MacFarlane, *Personality, Environment, and Criminal Behavior: An Evolutionary Perspective*, in *PERSONALITY THEORY*, *supra* note 105, at 217, 227-33 (proposing a "sociobiological" approach to criminal behavior and noting the importance of "ecological factors"); Jennings, Kilkenney & Kohlberg, *supra* note 111, at 323 (proposing a moral developmental model of delinquency and noting the importance of "social interaction" in shaping development and behavior); H. EYSENCK & G. GUDJONSSON, *supra* note 101, at 7 (criticizing "situational" criminology but conceding that "the evidence is now conclusive that some such interactionist view is more in line with the evidence" than either a purely environmental or purely genetic theory of crime). See generally Ellis, *Genetics and Criminal Behavior: Evidence Through the End of the 1970's*, in *BIOLOGY, CRIME AND ETHICS*, *supra* note 49, at 65 (reviewing the literature and concluding that "nearly all" theorists allowed for the influence of environmental factors in molding criminality). Cf. Montagu, *supra* note 49, at 28 (acknowledging the likelihood of a "genetic basis" for behavior but noting that it is "clear that environmental factors play a decisive role in determining whether such behaviors will be developed or not").

but refuse to accept its deeper messages.<sup>113</sup> Advocates for a new criminology, in response, critique the methodology of the traditional positivist approach,<sup>114</sup> particularly its reductionist effort to identify "crime" and its "causes."<sup>115</sup> The new critical models reject absolute notions of "crime" and emphasize the contingent nature of both crime and behavior generally.<sup>116</sup> The new models note

113. This resistance should not be surprising. The resurgence of interest in constitutional theories of crime in reaction to the sociological critique roughly coincides with the remarkable resurgence of conventional political conservatism; the two, of course, are not unrelated. *See, e.g.*, Platt & Takagi, *Biosocial Criminology: A Critique*, in *BIOLOGY, CRIME AND ETHICS*, *supra* note 49, at 55, 55-58 (briefly tracing the revival of biological and sociobiological theories of crime and noting that C. R. Jeffery, like the theories' other proponents, is "very much in the mainstream of the new conservative tendency"); *see also* Montagu, *supra* note 49, at 24-26 (discussing the role of political views in shaping the sociobiology debate).

114. *See, e.g.*, Gould, *Sociobiology and Human Nature: A Post-Panglossian Vision*, in *BIOLOGY, CRIME AND ETHICS*, *supra* note 49, at 16, 18 (contending that "[h]uman sociobiology is unsupported, not merely bedeviled by unfortunate implications"); Platt & Takagi, *supra* note 113, at 59 (critiquing the "shoddy scholarship" in Jeffery's biosocial criminology); Nassi & Abramowitz, *supra* note 109, at 110 (noting that "there appears to be little empirical justification for the remarkable historical resiliency of the biomedical approach to crime").

115. *See, e.g.*, Gould, *supra* note 114, at 16, 21 (critiquing sociobiology as "essentially reductionist . . . the antidiscipline of human sciences"); Haney, *supra* note 105, at 109 (noting that individualistic conceptions of behavior inevitably mean that "political, sociological, and institutional variables over which individuals have virtually no control are given little currency in traditional psychological analysis"). *See generally* Secord, *Explanation in the Social Sciences and in Life Situations*, in *METATHEORY IN SOCIAL SCIENCE* 197, 218 (D. Fiske & R. Shweder eds. 1986) [hereinafter *METATHEORY IN SOCIAL SCIENCES*] (arguing for an expanded conception of persons and consideration of the complex social structures in which they behave: "[t]he interconnectedness of social life means that various behaviors are facilitated or discouraged by social structural factors that must be taken into account").

116. *See, e.g.*, Haney, *supra* note 105, at 114; Platt & Takagi, *supra* note 113, at 58-60 (critiquing biosocial criminology for the way in which it abstracts human beings and treats "working class" or "street" crime as "a behavioral problem which can be disassociated from the political economy"); Nassi & Abramowitz, *supra* note 109, at 102, 111 (noting that "[b]y lending scientific credibility to what is largely a political statement, the biomedical perspective on crime helps to perpetuate those very social, economic, and political realities in which the phenomenon is embedded").

Critical theorists in criminology are not, of course, the only ones to note the contingent nature of crime. Lawrence Friedman, for example, has noted the role of historical contingency in shaping traditional conceptions of crime in the United States. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1985). Friedman notes the paradigm shift in late eighteenth century America from a moral conception of crime to an economic conception, in which "[t]he criminal was not pictured any more as a sinner against God, but as a social danger . . . who invaded the rights of others" and in which "[t]he dominant use of criminal law . . . was as a defender of an economic and political order, and much less as a guardian of a code of sexual and social behavior." *Id.* at 293-94. Friedman notes that this retreat from a Victorian criminology had reversed itself by the late eighteenth century and that the renewed interest in a morality-based criminology was largely a reflection of a symbolic struggle between the emerging working class and the powerful middle-class: "[T]he issue was: whose norms were dominant, whose norms should be labeled right and true?" *Id.* at 584-88. Through it all, Friedman notes, "[t]he criminal law, legitimate and illegitimate, assumes that there is a reality called crime on which law operates." *Id.* at 589; *see also* S. BOK, *LYING: MORAL CHOICE*

that all behaviors exist on a continuum<sup>117</sup> and emphasize the essentially political nature of the decision to label some behaviors deviant. Consistent, perhaps, with the emerging science of chaos, new models of criminology also reject the traditional insistence on linear equations of crime and its causes;<sup>118</sup> they recognize, instead, the complex nature of the interactions among state and the individual, among reified crime and the labeled criminal.<sup>119</sup> The critical models recognize crime as a dialectical expression of the social state, an inevitable reflection of the inherent tension between social control and anomie.<sup>120</sup>

### C. Remedial Use of the Mentally Retarded Label in Assigning Culpability

Positivist and critical theories of criminology can find common ground on the issue of the culpability of the mentally retarded offender. Criminologists

IN PUBLIC AND PRIVATE LIFE 30-31 (1978) (noting the contingent nature of the fundamental concepts of "deception" and "violence," both of which may be either circumscribed or celebrated depending on the perspective); Shweder, *Divergent Rationalities*, in METATHEORY IN SOCIAL SCIENCE, *supra* note 115, at 163, 190 (noting that even "rationality" is not absolute, and that "there may be more than one conceptual reference point from which to construct an objective ethic").

117. See, e.g., H. TOCH & K. ADAMS, THE DISTURBED VIOLENT OFFENDER 121-22 (1989) (noting that mental illness and mental health, as well as crime and law abidingness, are not dichotomous but exist on a single continuum, and that the reasonableness of all behavior, including "criminal" behavior, is a question of degree).

118. See J. GLEICK, CHAOS 298-99 (1987) (noting how nonlinear dynamics may, among other things, liberate psychiatrists from their failed reductionist views of mental disorder); see also Richter, *Non-Linear Behavior*, in METATHEORY IN SOCIAL SCIENCE, *supra* note 115, at 284, 287 (illustrating the "complexity and richness" of nonlinear systems for explaining behavior).

119. See, e.g., Ball, *Toward a Dialectical Criminology*, in CRIME, LAW, AND SANCTIONS 11, 15 (M. Krohn & R. Akers eds. 1978) (rejecting classical and positive criminology as reductionist and urging a dialectical criminology which views crime not as the linear result of absolute causes but as the expression of the interaction between the personal gestalt and the historical zeitgeist); Morash, *An Explanation of Juvenile Delinquency: The Integration of Moral-Reasoning Theory and Sociological Knowledge*, in PERSONALITY THEORY, *supra* note 105, at 385 (drawing on the work of Lawrence Kohlberg, Carol Gilligan and Norma Haan to suggest an integrated sociological and developmental perspective on delinquent behavior); see also Tribe, *supra* note 87, at 39 (urging a "post-Newtonian perspective" on social meaning that "demands less an effort to uncover the hidden levers that translate governmental actions into objective effects, than an attempt to feel the contours of the world government has built — and to sense what those contours mean for those who might be trapped or excluded by them") (emphasis in original).

120. See, e.g., Ball, *supra* note 119, at 25, (concluding that the "Principle of Expressions tells us that the problem of crime is a problem of the whole" while the "Principle of Differentiation tells us that . . . notions of 'social control' or 'social defense' amount to little more than unrealistic assumptions about the possibilities of stemming the tides of history"); Chambliss, *Toward a Radical Criminology*, in PROGRESSIVE CRITIQUE, *supra* note 95, at 230, 237 (observing that "[c]apitalism is . . . not a predetermined system and lower-class criminality is not a predetermined response to capitalism; rather, both are solutions to certain structural contradictions of the political economy, which generate conflicts, dilemmas, and attempts at resolution"); see also M. HARRINGTON, THE NEW AMERICAN POVERTY 191 (1984) (rejecting the view that the demise of Victorian morality "caused" the increase in crime by noting that "the ways in which that cultural change affected various strata vary with the strata; i.e., the 'cause' is both cultural and a question of social structure").



from across the philosophical spectrum have questioned the fairness of punishing persons whose behavior is in substantial part a reflection of broader social injustices.<sup>121</sup> The force of the moral argument is overwhelming; ultimately, mitigation of culpability based on social deprivation tends to be rejected only for practical reasons<sup>122</sup> or, in truth perhaps, because of a failure of political courage. Nowhere is the argument for mitigation stronger than it is for the mentally retarded offender; the mentally retarded offender certainly is not the only one with a claim to diminished culpability, but surely her claim is the paradigm.

The positivist accepts the constitutional limitations on the mentally retarded person's ability to reason, both logically and morally. The positivist recognizes that the mentally retarded person is, inherently, a diminished person with diminished capacities. The positivist need not sort out the relative role of the creator and the state in the bio-social equation; what matters is that diminishment is the product of factors beyond the individual's control.<sup>123</sup> For the positivist, then, proportionality demands diminished culpability for the mentally retarded offender; linear equality permits no less.

The critical theorist, meanwhile, recognizes the dual reifications of mental retardation and criminality. The critical theorist recognizes that the "mentally retarded offender" is a political re-creation in a twin sense and that her behavior, perhaps more than anyone else's in modern society, is a reflection of the inexorable socio-economic forces fashioned by the state. For the critical theorist, then, diminished culpability for the mentally retarded offender is the

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121. See, e.g., N. MORRIS, *MADNESS AND THE CRIMINAL LAW* 62-63 (1982) (reviewing the arguments for recognizing insanity as a basis for diminished culpability and noting that if "we took the moral argument seriously . . . [we would] have to, as a matter of moral fairness, fashion a special defense of gross social adversity," given that "social adversity is grossly more potent in its pressure toward criminality . . . than is any psychotic condition"); A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 143-49 (1986) (noting that "[a]s long as a substantial segment of the population is denied adequate opportunities for a livelihood, any scheme for punishing must be morally flawed").

122. For Morris, the argument for the "gross social adversity" defense apparently refutes itself; the issue is raised only rhetorically, evidently because individualistic conceptions of culpability are sufficiently widespread and entrenched that the notion of exculpation for social disadvantage is simply oxymoronic. See N. MORRIS, *supra* note 121, at 62-63. Nonetheless, Morris would recognize criminogenic social pressures as mitigating factors in sentencing since punishment, unlike guilt, "may properly be a matter of degree." *Id.* at 146-47. Von Hirsch, meanwhile, offers only that "it may not be feasible to treat social deprivation as a mitigating factor: the sentencing system may simply not be capable of compensating for the social ills of the wider society." A. VON HIRSCH, *supra* note 121, at 147.

123. Nearly all constitutional theorists, for example, would recognize the role of environmental deprivation in precluding mentally retarded persons from learning to repress any criminal predisposition. See, e.g., Kenrick, Dantchik & MacFarlane, *supra* note 112, at 227-33 (noting the ecological factors that contribute to the realization of criminal propensity); Jennings, Kilkenny & Kohlberg, *supra* note 111, at 322-28 (noting the importance of social interaction in promoting moral development and reducing delinquent behavior).

inevitable result of an inquiry into the morality and fairness of punishing persons for behavior that the state has in large part prescribed.

#### IV. THE NEED FOR CLASS-WIDE REMEDY

Criminologists — both positivist and critical — provide the theoretical justification for diminished culpability for mentally retarded persons. The questions remain, however, as to the form and degree of exculpation. More specifically, the question raised here is whether and how mentally retarded persons should be excluded from death sentencing schemes, whether and how, that is, the state should provide exculpation from the most severe form of punishment. The answer offered by the Supreme Court in *Penry* is that evidence of mental retardation must be considered as a mitigating factor in individualized capital adjudications.<sup>124</sup> But a broader remedy is not only theoretically justified, it is a practical necessity. Stated in other words, leaving exculpation to the sentencing phase of the adjudicative process is not only theoretically unnecessary, it is, from a pragmatic perspective, simply unacceptable.<sup>125</sup>

##### A. The Illogic and Unfairness of Executing Mentally Retarded Persons

Traditional arguments in favor of the death penalty carry no persuasive force in the case of the mentally retarded defendant. There is, first, little empirical support for the theory of general deterrence, the leading historical

124. *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989).

125. For other analyses reaching the same conclusion, see *Penry v. Lynaugh*, 109 S. Ct. 2934, 2958-63 (Brennan, J., concurring in part and dissenting in part); *id.* at 2963 (Stevens, J., concurring in part and dissenting in part); *Fleming v. Zant*, 259 Ga. 687, 386 S.E.2d 339 (1989) (societal consensus in Georgia is that execution of mentally retarded persons is cruel and unusual punishment in violation of the Georgia Constitution); Fetzer, *Execution of the Mentally Retarded: A Punishment Without Justification*, 40 S.C. L. REV. 419 (1989); Blume & Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 ARK. L. REV. 725 (1988); Note, *The Supreme Court, 1988 Term*, 103 HARV. L. REV. 40, 148 (1989) (noting that the Court's decision in *Penry* "left mentally retarded defendants without meaningful eighth amendment protection"); ABA House of Delegates, Resolution, (Feb. 7, 1989); Am. A. Mental Retardation, Resolution on Mental Retardation and the Death Penalty (Jan. 1988). *Cf.* *Thompson v. State*, 456 So. 2d 444 (Fla. 1984) (death sentence vacated for moderately mentally retarded defendant); *State v. Behler*, 65 Idaho 464, 146 P.2d 338 (1944) (justice demands reduction of penalty from capital punishment to life imprisonment for defendant possessing "a very low order of intelligence"); *Neal v. State*, 451 So. 2d 743, 764 (Miss. 1984) (Hawkins, J., concurring in part and dissenting in part) (legislative duty to reduce death penalty to life imprisonment in warranted cases compels reduction of penalty for mentally retarded defendant "permanently condemned with the mind of a 7- to 10-year-old child"); *State v. Hall*, 176 Neb. 295, 125 N.W.2d 918 (1964) (reduction of penalty from death to life imprisonment is warranted for "low-grade moron or high-grade imbecile" (defendant IQ approximately 64)); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987) (death sentence vacated for mentally retarded defendant with IQ of approximately 63); *Commonwealth v. Irelan*, 341 Pa. 43, 17 A.2d 897 (1941) (sentence of death for defendant with minimal intelligence and impoverished background is abuse of discretion and must be reduced to life imprisonment).

justification for executions.<sup>126</sup> Given the empirical evidence on the need for swift and certain punishment to deter inappropriate behavior and the community's limited tolerance for the attendant horrors of executions, general deterrence may, in fact, be politically impossible.<sup>127</sup> Class specific deterrence, meanwhile, has never been an acceptable goal of capital punishment and is unlikely to be efficacious for the mentally retarded defendant under any philosophy of crime.<sup>128</sup> Finally, given the pervasive sense of difference which surrounds mentally retarded persons, there is good reason to question whether non-retarded persons will be deterred by the execution of mentally retarded defendants,<sup>129</sup> whatever deterrent value capital punishment might otherwise claim.

The incapacitation of the "dangerous" offender is the second historical justification for the death penalty.<sup>130</sup> Beyond the axiomatic observation that the "dangerous" offender need not be killed to be incapacitated — an observation that applies with equal force to the mentally retarded and non-retarded offender — the simple truth is that the concept of "dangerousness" has proven

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126. For a rather charitable description of the evidence in support of deterrence and references to contradicting studies see H. EYSENCK & G. GUDJONSSON, *supra* note 101, at 177-78 (noting that "[u]ntil the influential work of Ehrlich [Ehrlich, *The Deterrent Effects of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975)] there was no significant empirical support for the general deterrent effect of the death penalty" and that "Ehrlich's findings and basic assumptions have been criticized in the literature on various methodological grounds."). See also Gottlieb, *The Death Penalty in the Legislature: Some Thoughts about Money, Myth and Morality*, 37 U. KAN. L. REV. 443, 455 (1989) (observing that empirical evidence fails to establish the marginal deterrent value of capital punishment even when it is frequently employed, let alone when executions occur only sporadically). Moreover, there is some reason to believe that the death penalty may actually encourage capital crimes by its "brutalizing" effect on society. See King, *The Brutalizing Effect: Execution Publicity and the Incidence of Homicide in South Carolina*, 57 SOC. FORCES 683 (1978); Bowers & Pierce, *Deterrence or Brutalization: What is the Effect of Executions?*, 26 CRIME & DELINQ. 453 (1980) (capital crimes encourage by modeling homicidal conduct); Forst, *Capital Punishment and Deterrence: Conflicting Evidence?*, 74 J. CRIM. LAW & CRIMINOLOGY 927 (1983) (capital punishment increases the fear of detection which encourages the murder of witnesses and criminal justice personnel; capital punishment also decreases the likelihood that judges and juries will be willing to convict offenders who risk execution).

127. Cf. H. EYSENCK & G. GUDJONSSON, *supra* note 101, at 178 (reviewing the literature and concluding that "the findings suggest that in order for capital punishment to be maximally effective it has to be carried out immediately after the court's verdict and there must be certainty that it will take place if the person is convicted of a capital offense") with Levit, *Expediting Death: Repressive Tolerance and Post-Conviction Due Process Jurisprudence in Capital Cases*, 59 U.M.K.C. L. REV. 55 (1990) (noting the limitations on societal tolerance for state administered death).

128. See Fetzer, *supra* note 125, at 439-40.

129. Cf. Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed while Under Age Eighteen*, 36 OKLA. L. REV. 613, 639 (1983) (contending that "[e]ven if some . . . adults are deterred by the death penalty, the deterrent effect tends to lose much of its power when [the death penalty is] imposed upon an adolescent").

130. See generally A. VON HIRSCH, *supra* note 121, at 19 (citing the concept of "predictive restraint" as one of the traditional underpinnings of punishment theory).

even more problematic than the notion of "deterrence." The scientific community appears to be of a single mind that, legal demands notwithstanding, science is currently incapable of offering accurate, valid and reliable assessments of "dangerousness."<sup>131</sup> Moreover, to whatever extent the mentally retarded offender may have exhibited some propensity for violent behavior, the empirical evidence indicates that those behaviors can be unlearned and eliminated.<sup>132</sup> Tragically, given her likely history of environmental deprivation, the "unlearning" of violent behaviors will be, for the mentally retarded offender, more a matter of habilitation than rehabilitation.<sup>133</sup> In any event, incarcerated mentally retarded offenders are likely to be the victims of institutional violence more often than they are its perpetrators.<sup>134</sup>

The empirical collapse of the traditional notions of "deterrence" and "dangerousness" have shifted the focus of punishment theory to retribution.<sup>135</sup> Retribution theory calls for a punishment that is proportional to the crime, that is, for the exaction of "commensurate desserts."<sup>136</sup> As a general matter, it can certainly be argued with great force that death is never a commensurate dessert. Lawrence Kohlberg, whose work on moral reasoning shaped the dialogue in that field for the past quarter century, denounced state inflicted death as "per se unjust,"<sup>137</sup> and capital punishment has been variously described as

131. See, e.g., Stone, *The New Legal Standard of Dangerousness: Fair in Theory, Unfair in Practice*, in DANGEROUSNESS 13, 19-21 (C. Webster, M. Ben-Aron & S. Hucker eds. 1985) (noting that individual predictions of dangerousness are invalid and unfairly reintroduce race and class bias into the sentencing scheme); Menzies, Webster & Sepejak, *Hitting the Forensic Sound Barrier: Predictions of Dangerousness in a Pretrial Psychiatric Clinic*, in DANGEROUSNESS, *supra* at 115, 137 (noting that "dangerousness is a legal rather than psychiatric phenomenon" and that "[i]n the absence of ethical, theoretical, and empirical support, psychiatry may indeed be performing a spurious and arbitrary social control function"). Much of the problem with the legal construction of dangerousness may rest with the law's inability or unwillingness to recognize that dangerousness — like retardation and criminality — is a highly contextual concept. See Greenland, *Dangerousness, Mental Disorder, and Politics*, in DANGEROUSNESS, *supra* at 25, 37 (offering four findings on the phenomenology of criminal violence — that the urge to kill is episodic; that dangerous behavior is usually situation-specific; that offenders are usually young, poor, ill-educated men; and that victims are usually women or children — and noting that these findings tend to be ignored or discounted by clinicians who do not appreciate the situational or contextual aspects of dangerousness). But cf. *Barefoot v. Estelle*, 463 U.S. 880 (1983) (rejecting evidence that individual predictions of dangerousness cannot be made with certainty).

132. See *supra* notes 42-54 and accompanying text.

133. See Santamour & West, *supra* note 36, at 21.

134. See *id.* at 29 (noting that mentally retarded inmates "are victimized by the more sophisticated majority of inmates" and that, in the prison culture, "their needs for protection from abuse and exploitation are intensified").

135. Compulsory "rehabilitation" is the remaining traditional underpinning of punishment theory, but it too has become politically untenable. See A. von Hirsch, *supra* note 121, at 11-18. Of course, it provides little in the way of support for the death penalty.

136. *Id.* at 66.

137. Kohlberg & Elfenbein, *Moral Judgments about Capital Punishment: A Developmental-Psychological View*, in CAPITAL PUNISHMENT IN THE UNITED STATES 247, 291 (H. Bedau & C. Pierce eds. 1976) [hereinafter CAPITAL PUNISHMENT].

"outdated," "immoral," "wasteful," "cruel," "brutal," "unfair," "obstructive," "useless" and "dangerous."<sup>138</sup> In the context of the mentally retarded defendant, where diminished culpability is morally mandated, the conclusion is almost tautological that the most reprehensible of punishments can never be justly deserved; reserving the most severe punishment for the least culpable offenders only undermines any principled scheme of retribution.<sup>139</sup>

There is, finally, a compelling political argument against the execution of mentally retarded persons. Critical theorists have often noted the pronounced tendency of the criminal justice system to target marginalized populations.<sup>140</sup> It is doubtful whether any group in the United States has experienced the routine deprivation suffered by persons with mental retardation;<sup>141</sup> they are almost certainly the most marginalized of America's surplus populations.<sup>142</sup> Surely no group of persons has been so invisible, their voice rendered mute and incoherent by the social processes.<sup>143</sup> Vulnerable and expendable, persons with

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138. West, *Psychiatric Reflections on the Death Penalty*, in CAPITAL PUNISHMENT, *supra* note 137, at 419, 421-23; see also Neapolitan, *Support for and Opposition to Capital Punishment: Some Associated Social-Psychological Factors*, 10 CRIM. JUST. & BEHAV. 195, 202-03 (1983) (noting that, despite the claims of Van den Haag and others that support for capital punishment stems from and reinforces respect for life and the law, an empirical examination of attitudes indicates that "opposition [to capital punishment] more often than support is related to respect for human life, opposition to interpersonal violence, respect for the law, and sympathy for the victims of murder").

139. See Gottlieb, *supra* note 126, at 457 (insisting that "[i]n a society that does not believe the death penalty is appropriate for most murders, a principled advocate of retribution must point to a system or guidelines that assures that the decision of who is executed is in fact made on morally relevant grounds").

140. See, e.g., French, *Boundary Maintenance and Capital Punishment: A Sociological Perspective*, 5 BEHAVIORAL SCI. & L. 423, 429 (decrying "the abuse of capital punishment as a moral reaction (symbolic crusade) to social change at the expense of targeted marginal members of society" and urging an end to "the long held practice of sacrificing visible, marginal members of society as a means of placating the majority society"); see also Kelman, *The Origins of Crime and Criminal Violence*, in PROGRESSIVE CRITIQUE, *supra* note 105, at 214, 223-26 (calling for a complex theory of marginalization to account for noninstrumental criminal violence). Critical theorists, of course, are not the only ones to note the institutionalized inequities in the criminal justice system. Judge Lois G. Forer of the Philadelphia Court of Common Pleas has decried what she terms "apartheid justice": "[A]s one observes the long, complicated operations of the criminal justice system, it is evident that at every stage of the proceedings the poor are seriously disadvantaged." L. FORER, MONEY AND JUSTICE: WHO OWNS THE COURTS? 110 (1984).

141. See *supra* notes 55-89 and accompanying text. The criminal defendant with mental retardation, of course, is no exception to this rule. See, e.g., Santamour & West, *supra* note 36, at 31 (noting that the mentally retarded offender typically has little education, has been under- or unemployed, has little income and is likely to be a racial or ethnic minority).

142. See *supra* notes 69, 89.

143. See, e.g., van den Brink-Budgen, *supra* note 85, at 377 (noting that "[t]he assumption of incapability for dialogue produces . . . the self-fulfilling prophesy of their mute (or incoherent) response"); H. SIMMONS, *supra* note 69, at 261 (observing that unlike the organized working class or other minority groups, mentally retarded people "have never made their own history").

A recurrent theme in contemporary legal scholarship is the vital need for "story-telling" by minorities and other "out-groups" to challenge the mindset of the dominant group, e.g., Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412-13

mental retardation have been categorically diminished and decimated by the social state.<sup>144</sup> The history that has been made for persons with mental retardation has included the full litany of routine social horrors, but to the unexceptional tragedies of segregation, poverty, and despair must be added the unique horrors of institutionalization, eugenic sterilization and involuntary psychosurgery.<sup>145</sup> A categorical ban on the execution of persons with mental retardation is needed to break this horrendous tradition; it is, thus, remedial in an historical sense, as a political atonement, one that is both empirically sound and morally essential.

### B. The Inadequacy of Individual Mitigation

The *Penry* decision has been hailed for "decentralizing" the death decision, for leaving "to the people" the question of whether a mentally retarded defendant should be killed.<sup>146</sup> But "the people," in any meaningful political sense, do not include persons with mental retardation; they do include, on the other hand, the persons who have made the horrendous history of mental retardation. The adjudicative system ensures that this is as true of the capital jury as it is of the state legislature; "the people," for the person with mental retardation, are thus always "other people," and the "justice" they prescribe is invariably unfair.<sup>147</sup>

The *Penry* remedy of individualized adjudications will fail to ensure a fair mitigation for three reasons: first, because defendants with mental retardation are generally unable to utilize the full range of procedural protection normally inherent in the adjudicative process and, as a consequence, are likely to be punished to a disproportionate degree; second, because jurors are unable to transcend stereotypic responses to persons with mental retardation and are unable to accord adequate weight to mental retardation as a mitigating factor;

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(1989). Too often, though, the re-created mentally retarded persons are assumed to have no voice in this process. See, e.g., Gouldin, *The Mentally Retarded in the Criminal Justice System: Foreword*, 41 ARK. L. REV. 723, 723 (1988) ("As a group, the mentally retarded are not able to champion their own cause, for obvious reasons. Thus, the burden falls on the rest of society to determine how to deal with them.").

144. See W. WOLFENBERGER, *THE NEW GENOCIDE OF HANDICAPPED AND AFFLICTED PEOPLE* (1987) (describing societal treatment of biologically different people as processes of "devaluing" and "deathmaking").

145. See sources cited *supra* note 26.

146. Comment, *Youth, Mental Retardation, and Capital Punishment: Penry v. Lynaugh*, 109 S. Ct. 2934 (1989) and *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989), 13 HARV. J.L. & PUB. POL'Y 415, 432 (1990).

147. As a general matter, the criminal justice scheme isolates the criminal defendant in opposition to "the people." The prototype of the court as the independent agent in a triad of justice is on shaky conceptual ground in the criminal justice context; "the people," after all, are both a party to the dispute and its arbiter. See M. SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 26-28 (1981). The mentally retarded defendant is, in this sense, like all other criminal defendants, only more so: more different, more isolated, more opposed, more "other." See *infra* notes 167-69 and accompanying text.

and finally, because the adjudicative process utilizes an insular legal schema for decision-making that preserves the myth of the mentally retarded menace and shields the decision-makers from empirical proof and moral deliberation.

As to the first, persons with mental retardation seem to be particularly poor consumers of the services offered by the criminal justice system. Mentally retarded persons are easily subordinated and overborne; they are unusually apt to waive their procedural rights, to confess to allegations of crime and to accept less than vigorous advocacy on their behalf.<sup>148</sup> At trial, their testimony is apt to be inarticulate and imprecise,<sup>149</sup> a major handicap given the research demonstrating the importance of witness demeanor<sup>150</sup> and the detail of witness recall<sup>151</sup> on influencing juror perceptions of guilt.<sup>152</sup> These and a wide assortment of other systemic problems<sup>153</sup> inevitably tend to prejudice the cause of the mentally retarded defendant. Not surprisingly, then, persons with mental retardation constitute a disproportionate percentage of incarcerated offenders,<sup>154</sup> and the punishment they receive is disproportionately severe.<sup>155</sup>

Second, the stereotypic response to mental retardation is more apt to incite juror rage toward the mentally retarded defendant than it is to mitigate

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148. See Santamour & West, *supra* note 36, at 11-13 (noting that mentally retarded persons are easily intimidated and are uncommonly apt to plead guilty, waive jury trial and confess to crime and that their attorneys often do not attempt to bargain for a plea, do not request psychiatric studies or presentence exams, do not raise issues of competence or culpability, do not appeal and do not seek post-conviction relief); Fetzer, *supra* note 125, at 425 (noting that mentally retarded defendants are easily coerced and are apt to confess and plead guilty more readily than their nonretarded peers).

149. See Santamour & West, *supra* note 36, at 12 (noting that mentally retarded persons make poor witnesses); Fetzer, *supra* note 125, at 425 (noting that mentally retarded persons have greater difficulty in recalling events and in testifying credibly than nonretarded witnesses).

150. See, e.g., Hendry, Shaffer & Peacock, *On Testifying in One's Own Behalf: Interactive Effects of Evidential Strength and Defendant's Testimonial Demeanor on Mock Juror's Decisions*, 74 J. APPLIED PSYCHOLOGY 539, 544-45 (1989) (concluding that the conventional wisdom of trial attorneys is correct — that a defendant's poor self-presentational skills can undermine his chances of acquittal, especially when the evidence against him is weak).

151. See, e.g., Bell & Loftus, *Degree of Detail of Eyewitness Testimony and Mock Juror Judgments*, 18 J. APPLIED SOC. PSYCHOLOGY 1171, 1190-91 (1988) (concluding that "[t]he research described here provides unequivocal support for the hypothesis that subject-jurors are impressed by detail").

152. See generally Davis, *Psychology and the Law: The Last 15 Years*, 19 J. APPLIED SOC. PSYCHOLOGY 199, 209 (1989) (surveying the literature of the last fifteen years and finding "a large and highly heterogeneous literature that essentially documents that victim and defendant characteristics indeed influence trial outcomes, although such influences are typically subtle and likely to impact most the 'close' case").

153. See generally Santamour & West, *supra* note 36, at 11-13; Fetzer, *supra* note 125, at 425.

154. See Santamour & West, *supra* note 36, at 8-11 (noting that while mentally retarded persons comprise only 1-3% of the general population, studies variously indicate that they comprise between 8% and 30% of the prison population).

155. See *id.* at 19-20 (noting that "retarded offenders tend to serve longer sentences than nonretarded inmates for similar crimes"); Gottlieb, *supra* note 126, at 451 (noting that a "surprising percentage of death row inmates are mentally retarded").

against it.<sup>156</sup> Common stereotypes of the mentally retarded person portray him as a "subhuman organism,"<sup>157</sup> as a "menace"<sup>158</sup> and as a being without "self-control."<sup>159</sup> To the extent that less malevolent stereotypes emphasize the helpless nature of the mentally retarded person,<sup>160</sup> these are apt to dissolve in the course of adjudication; logical dissonance resolves the competing stereotypes in favor of those consistent with criminality,<sup>161</sup> and the juror processes the evidence in a fashion consistent with those schemata.<sup>162</sup>

At the capital sentencing stage, where the deck is already stacked against the convicted criminal,<sup>163</sup> the cause of the mentally retarded criminal becomes particularly problematic. Even jurors who receive and appreciate the mitigating nature of the evidence of mental retardation receive no instruction as to

156. See Santamour & West, *supra* note 36, at 17 (noting that "[m]yths regarding mental retardation are still perpetuated, and when a mentally retarded person is believed to be involved in a homicide, public outrage is often greater than with other offenders"); see also Penry v. Lynaugh, 109 S. Ct. 2934, 2962 (Brennan, J., concurring in part and dissenting in part) (quoting an editorial in a South Carolina newspaper approving the execution of a mentally retarded offender by arguing that a "retarded killer is more to be feared than a . . . normal killer" and that "[t]here is also far less possibility of his ever becoming a useful citizen").

157. R. KURTZ, *supra* note 65, at 8-9.

158. *Id.* at 9.

159. Williams, *supra* note 84, at 18.

160. See *supra* notes 74-82 and accompanying text.

161. Cf. H. TOCH & K. ADAMS, *supra* note 117, at 18-19 (on mental illness rather than mental retardation).

[C]onnotations of crime and mental illness . . . make these concepts hard to reconcile and combine. . . .

. . . It is hard to summon up sentiments that contrast so sharply, assuming it were possible to envision malevolent helplessness (or helpless malevolence) as a target of feelings. . . .

[The c]ombinations of madness and badness are also puzzling, and the mind rejects them. . . . The harm crime does is a tangible fact, whereas the defendant's hypothesized disability is an issue that is often in dispute by experts who assert and deny its existence. This makes it easy to resolve the problem of logical dissonance by classifying mad/bad persons as bad persons who are of somewhat eccentric dispositions and whose badness preempts our attention.

*Id.*

162. See generally Krzystofiak, Cardy & Newman, *Implicit Personality and Performance Appraisal: The Influence of Trait Inferences on Evaluations of Behavior*, 73 J. APPLIED PSYCHOLOGY 515, 519-20 (1988) (noting generally that the schematic processing of information can lead to systematic bias in perception, recall and appraisal, and specifically finding that the implicit attribution of personality traits influenced behavior evaluation, justifying inferences that "went beyond that which was strictly warranted, given the available behavioral information").

163. See, e.g., Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 YALE L.J. 351, 363 (1984) (observing that the rationales which support the presumption of innocence at the guilt stage of criminal proceedings provide "equal, if not greater support" for a presumption of life to offset "the advantages enjoyed by the state" in capital sentencing proceedings).



how to utilize it; as a consequence, whatever mitigating effects survive "cognitive dissonance" can be simply outweighed by a balancing of competing stereotypes.<sup>164</sup> Tragically, the full range of stereotypes victimizes the mentally retarded defendant at the capital sentencing stage: "dangerousness" and "treatability" still define the debate, and the conventional wisdom persists that the mentally retarded offender is both dangerous and untreatable.<sup>165</sup>

The persistence of the mental retardation stereotype also precludes the development of juror empathy.<sup>166</sup> Jurors in the case of the mentally retarded defendant will not be "peers" of the defendant in any real sense. Persons with mental retardation have been so thoroughly excluded from mainstream society<sup>167</sup> that their life circumstances are apt to be wholly alien to the arbitrators of their fate.<sup>168</sup> Their story, their behavior, their lives will be distinguished primarily by a pervasive sense of difference; they are diminished people, and the sacrifice of their lives is somehow different and not so great.<sup>169</sup> These tendencies are simply exacerbated by the particularized schema held by death-qualified juries, who, among other things, are apt to minimize the mitigating effect

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164. See Gottlieb, *supra* note 126, at 450-51 (noting that jurors are given "no guidance" to assist in the weighing of mitigating and aggravating factors, and that, as a consequence, extraneous factors and biases are apt to influence decisions); see also Note, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 HASTINGS L.J. 409, 411 (1990) (noting that sentencers "can and do" weigh mental disorder on the side of aggravation rather than mitigation); Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 298-300 (1989) (surveying situations in which mental disorder is inappropriately treated as an aggravating rather than a mitigating factor).

165. As *Penry* itself notes, the fact of mental retardation is "a two-edged sword." *Penry v. Lynaugh*, 109 S. Ct. 2934, 2949 (1989).

166. Cf. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1989) (urging that empathy with the offender is crucial to the fairness of the sentencing scheme and must be explicitly mandated to counter "the myth of dispassion").

167. See *supra* notes 55-89 and accompanying text; see also Scheer & Groce, *supra* note 28, at 33 (noting that, after a century of segregation, "most Americans have lost familiarity with disabled people").

168. See, e.g., Downie, *Ambivalence of Attitude to the Mentally Retarded*, in MORAL ISSUES, *supra* note 55, at 29, 37 (noting that it is difficult to understand the behavior of mentally retarded persons because "first of all, the behavior patterns are not of the same kinds as those of the mentally normal person [and s]econdly, it is harder in the case of the mentally retarded for the normal person to have the sympathetic insight, the *verstehen*, into what it is like to be on the inside of such behavior patterns"); see also Pillsbury, *supra* note 166, at 694-95 (noting that culpability is, in part, dependent on conceptions of the offender's individual autonomy and observing that "[e]mpathy supplies the motivation to take autonomy limitations seriously"); Haney, *supra* note 105, at 107-08 (noting that "[l]egal decision makers make their moral and psychological assessments under conditions that virtually require simplistic, stereotypic thinking" and that "[i]n many instances, these judgments are made quickly, are based on limited and superficial information, and are directed at persons whose life circumstances and situations are utterly unfamiliar to the decision makers themselves").

169. See Downie, *supra* note 168, at 35 (noting that mentally retarded persons "retain a certain dignity," but the moral attitude toward mentally retarded persons is sometimes "simply a regard for their sentence" and concluding that "there is therefore ambivalence in our moral attitude").

of deprivation and diminished capacity.<sup>170</sup>

Evidence suggests that the mental retardation schema can be overcome by the well-structured and persistent introduction of contrary evidence.<sup>171</sup> That prospect, though, is illusory in the adjudicative process. Thus, the third and final reason that individualized adjudications will not permit the necessary exculpation is the very insularity of the legal process. That the law is generally inhospitable to social science evidence is frequently noted.<sup>172</sup> It is not surprising, then, that the functionaries in the criminal justice system should manifest

170. See Luginbuhl & Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 LAW & HUM. BEHAV. 263, 275-79 (1988) (concluding that "the death-qualified jury in the penalty phase is oriented toward accepting the idea of aggravating circumstances and rejecting the idea of mitigating circumstances" and further noting that "[o]ur results make us question how receptive death-qualified jurors would be to such nonstatutory mitigating circumstances as low IQ"). See generally Cox & Tanfor, *An Alternative Method of Capital Jury Selection*, 13 LAW & HUM. BEHAV. 167, 169 (1989) (reviewing the literature and concluding that death-qualified juries are more authoritarian, more likely to presume guilt, more likely to reject pleas of insanity, less likely to regret erroneous convictions and more likely to regret erroneous acquittals).

171. See Gibbons & Kassin, *supra* note 76, at 822-23. Efforts to accustom the public to persons with mental retardation are problematic; while the scientific literature is replete with divergent findings, there is something of a consensus that mere exposure to persons with mental retardation or to information about mental retardation will not produce more positive attitudes or impressions among "normal" lay observers. See, e.g., Williams, *supra* note 84, at 18 (study finding no support "for the optimistic assumption that increased contact with mentally retarded persons will result in the public developing significantly more positive perceptions of these persons"); Sandler & Robinson, *Public Attitudes and Community Acceptance of Mentally Retarded Persons: A Review*, 16 EDUC. & TRAINING MENTALLY RETARDED 97, 99 (1981) (concluding that attitudes toward persons with mental retardation are likely to be improved by "carefully structured contact experiences, as opposed to contact per se"). The adjudicative process, needless to say, is not well-suited to an acculturation process; on the contrary, the time pressures of the process, the insularity of the scheme and the gestalt approach to culpability (i.e., the unstructured "weighing" of competing factors) all tend to reinforce schematic responding. See Gibbons & Kassin, *supra* note 76, at 811-12 (noting that "time pressure," "information-consistency" and "perceptual set" are factors that may facilitate schematic responding).

172. See, e.g., Finch, *The Role of Social Sciences in the Study of Law*, 12 STETSON L. REV. 641, 642 (1983) (noting that the traditional view of legal analysis is that "problems of the law can be resolved within the confines of the legal athenaeum"). Cf. Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 FORDHAM L. REV. 601, 602-03 (1990) (reviewing the uneasy relationship between law and science). Not surprisingly, commentators from the social sciences have been particularly harsh in their critique of legal insularity. See, e.g., Stone, *supra* note 131, at 21 (noting that "[t]o the legal mind a decision, even a predictive decision, made in good faith after all the evidence has been weighed, has a kind of procedural validity even if it defies empirical common sense and lacks moral substance"); Diamond, *Using Psychology to Control Law*, 13 LAW & HUM. BEHAV. 239 (1989) (observing that "efforts to use psychological research to influence legal decisions do not always meet with wild enthusiasm or even thoughtful consideration"); Thompson, *Death Qualification after Wainwright v. Witt and Lockhart v. McCree*, 13 LAW & HUM. BEHAV. 185, 202 (1989) (reviewing the Supreme Court's opinion in *Lockhart v. McCree* and concluding that "[i]f this opinion is forthright and sincere, reflecting the best efforts of the majority of the Court, it should raise serious doubts about the ability of these Justices to understand and deal with social science").

a profound ignorance about mental retardation.<sup>173</sup> Beyond this, decision-makers are unlikely to admit constructions of mental retardation or deviance which challenge the accepted political re-creations, particularly those aspects which preserve the commitment to individualistic accountability.<sup>174</sup> At the sentencing stage, then, issues of individual treatability and dangerousness become determinative, despite the fact that science proclaims the meaninglessness of those terms and the utter impossibility of predictions.<sup>175</sup> Moreover, ultimate culpability continues to rest in a highly individualistic conception of the mentally retarded offender, despite the fact that science recognizes society's complicity in shaping her being.

It is not that jurors would be unresponsive to scientific proof or to its attendant notions of collective responsibility;<sup>176</sup> the problem, rather, is that the rigid and insular adjudicative process ensures that the proof is not heard and

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173. See, e.g., Ravenel & Atkinson, *Introduction: Why This Text?*, in *THE RETARDED OFFENDER*, *supra* note 36, at 1, 1-2.

174. See, e.g., Hayman, *supra* note 24, at 1259-63 (noting the insularity of the legal construct of mental retardation); Diamond, *supra* note 172, at 240 (observing that "the legal system is likely to be more receptive to . . . research [when legal doctrine does not provide clear direction] than when it is asked to evaluate psychological research that raises an apparently settled legal question"). The law's pre-occupation with stare decisis helps preserve such constructs from meaningful review; it encourages ignorance of social science context. See, e.g., C. HAAR & D. FESSLER, *FAIRNESS AND JUSTICE: LAW IN THE SERVICE OF EQUALITY* 230 (1986) (noting that "[t]oo often, in their role as advocates, lawyers manipulate and reorder the record of the past; they separate a decision from its social, economic, and political context, in an effort to support an act or assertion for which they can find no modern justification").

175. See Dietz, *Hypothetical Criteria for the Prediction of Individual Criminality*, in *DANGEROUSNESS*, *supra* note 131, at 87, 99 (noting that it is currently impossible to make individualized predictions of crime and that until either the law or scientific knowledge changes, "a body of variously informed clinicians, most of whom have only minimal knowledge of crime, will remain empowered and expected by the courts and the public to make professional judgments about matters beyond their competence"); Rogers & Webster, *Assessing Treatability in Mentally Disordered Offenders*, 13 *LAW & HUM. BEHAV.* 19, 27 (1989) (reviewing the literature and finding "the lack of consensual understanding of what constitutes treatability" and an "absence of empirical research on the relationship of treatment to antisocial behavior and criminal recidivism" and concluding that "[u]ntil these two issues can be thoroughly addressed, forensic clinicians will remain in a prognostic quagmire, fraught with clinical and ethical perils"). Cf. Marquart, Ekland-Olson & Sorenson, *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 *LAW & SOC'Y REV.* 449, 465 (1989) (surveying empirical studies and concluding that "[p]unishment, particularly capital punishment, on the basis of predictions of future behavior will always involve a large proportion of false positives" and that "overprediction [of dangerousness] is the norm").

176. Cf. Black, *Compensation and the Social Structure of Misfortune*, 21 *LAW & SOC'Y REV.* 563, 570-73 (1987) (providing a cross-cultural historical analysis of conceptions of responsibility and suggesting that the movement from collective responsibility (through families or clans) towards individual responsibility is now being supplanted by a renewed desire for collective responsibility (through organizations)); Hans & Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 *LAW & HUM. BEHAV.* 151, 164 (testing Black's hypothesis with a study of mock jurors and concluding that the study provides "striking support for Black's assertion by demonstrating that even under conditions of identical action and harm, the corporation is held more culpable than the individual").

the notions never debated.<sup>177</sup> The law sanctions only the voice of the individualist in the behavioral debate; the resultant monologue creates an irrebuttable presumption in favor of punishment.<sup>178</sup> The "reasoned moral response" demanded of the sentencing jury<sup>179</sup> is thus "reasonable" only within the constricted limits of the law and is "moral" only as a pure tautology.<sup>180</sup> In a very real sense, then, the jurors are reduced to mere functionaries in the processing of a claim to life;<sup>181</sup> thus, the wisdom and morality of killing a person with mental retardation goes unchallenged in the technocratic process.<sup>182</sup>

177. See Worrell, *Psychiatric Prediction of Dangerousness in Capital Sentencing: The Quest for Innocent Authority*, 5 BEHAV. SCI. & L. 433, 445 (1987) ("Were it not for a scientific explanation for these offenders' behaviors, society would be much more likely to feel a heavy obligation to address the possibility that . . . social problems contributed to the defendants' acts.").

178. See Gergen, *Correspondence versus Autonomy in the Language of Understanding Human Action*, in METATHEORY IN SOCIAL SCIENCE, *supra* note 115, at 136, 153-55 (urging greater critical insight into, among other things, the individualistic bias in psychological theory and the influence of sociobehavioral scientists in maintaining dominant social institutions, given that "[t]he description of a people's internal states may dramatically alter others' actions toward them — including the giving and taking of life").

179. *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

180. See *Saffle v. Parks*, 58 U.S.L.W. 4322, 4330 (1990) (Brennan, J., dissenting) (observing that the Court's decision to uphold an instruction to the jury to "avoid any influence of sympathy" in capital sentencing not only reflects a constricted view of a "moral response," but fails to ensure that the jury appreciates the purported distinction between impermissible "sympathy" and permissible "moral judgment").

181. See *id.* at 4329 n.13 (quoting from the prosecutor's closing argument to the sentencing jury).

"[Y]ou're not putting Robyn Parks to death. You just have become a part of the criminal justice system that says when anyone does this, that he *must* suffer death. So all you are doing is you're just following the law, and what the law says, and on your verdict — once your verdict comes back in, the law takes over. The law does all of these things, so it's not on your conscience. You're just part of the criminal justice system that says when this type of thing happens, that whoever does such a horrible, atrocious thing *must* suffer death."

*Id.* (emphasis in opinion).

182. See, e.g., Worrell, *supra* note 177, at 437-38 (noting that technocratic assessments of "dangerousness" are used as a subterfuge to avoid moral responsibility in death sentencing); Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389, 404 (1989) (noting that "[m]ercy's demise reflects the increasing depersonalization and bureaucratization of our culture" and proposing a revival of mercy to temper the rationalistic workings of the "bureaucracy of death"); see also L. MASUR, RITES OF EXECUTION 162-63 (1989) (noting the persistence of cultural rituals in capital punishment and observing that "[b]eneath the facade of humane execution, the state continues to impose private, isolated, anonymous death"). Cf. Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 702 (noting that "[s]cientism transcends previous ideologies that justified the oppression of one class by another[; i]t actually justifies our oppression of ourselves by ourselves"); Hayman, *supra* note 24, at 1261-63 (observing that the state destroys families in the same fashion that it administers death to individuals, through "the near-total subjugation of human experience to the systematic functioning of the technocratic process").

Consider the stark contrast between the competing visions offered in the following passages:

The experience of the past and of our own time demonstrates that justice done is not enough, that it can lead to the negation and destruction of itself, if that

To ensure fairness, then, the "fact" of mental retardation may be properly proved within the adjudicative framework, but the mitigating effects of that fact must be established as a matter of law.<sup>183</sup> The mitigating effect of the "fact" of mental retardation will not depend, after all, on either the relative strength of the proof or the degree of retardation.<sup>184</sup> Rather, it is the absolute "fact" of the defendant's mental retardation, re-created as it is with its invariable concomitant story of deprivation, that demands mitigation for the mentally retarded defendant, at least to the point of preserving her life.<sup>185</sup>

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deeper power, which is love, is not allowed to shape human life in its various dimensions. It has been precisely historical experience that, among other things, has led to the formulation of the saying: summum jus, summa injuria. This statement does not detract from the value of justice and does not minimize the significance of the order that is based upon it; it only indicates another aspect, the need to draw from the powers of the spirit which condition the very order of justice, powers which are still more profound.

John Paul II, *Dives in Misericordia* ("Rich in Mercy"), PAPAL ENCYCLICAL Dec. 2, 1980.

The Court seeks to dignify [the decision in *Penry* to mandate consideration of mental retardation as a mitigating factor] by calling it a process that calls for a "reasoned moral response" . . . but reason has nothing to do with it, the Court having eliminated the structure that required reason. It is an unguided, emotional "moral response" that the Court demands be allowed — an outpouring of personal reaction to all the circumstances of a defendant's life and personality, an unfocused sympathy. . . . The Court cannot seriously believe that rationality and predictability can be achieved, and capriciousness avoided, by "narrow[ing] a sentencer's discretion to impose the death sentence," but expanding his discretion "to decline to impose the death sentence. . . ."

*Penry v. Lynaugh*, 109 S. Ct. 2968 (1989) (Scalia, J., concurring in part and dissenting in part) (citations omitted) (emphasis in original); see also Smykla, *The Human Impact of Capital Punishment: Interviews with Families of Persons on Death Row*, 15 J. CRIM. JUST. 331, 346 (1987) (contending that "[i]n addition to the cost and legal implications of crime control policies, it is necessary to consider equally the human consequences of implementation — a radical view perhaps for some who believe justice, or better yet law, is meted out along prescribed, rational, value-neutral, detached, precise, and objective ways") (emphasis in original).

183. See generally Sundby, *The Virtues of a Procedural View of Innocence — A Response to Professor Schwartz*, 41 HASTINGS L.J. 161, 170-71 (1989) (generally distinguishing legislatively determined facts, which mandate a range of punishment based on their absolute proof, from adjudicative sentencing facts, which permit a choice of punishments based on the relative strength and degree of proof). Cf. Pillsbury, *supra* note 166, at 709 (noting, on the subject of trans-racial empathy and racial bias in sentencing, that sentencers can be told not to regard the offender as the "other" but that "in individual instances of the exercise of discretion we cannot tell whether they have followed that advice" and concluding that "[g]iven our nation's history, it would be naive to suppose that a few well-chosen words of advice will solve the problem").

184. Cf. Sundby, *supra* note 183, at 170-71 (noting that the effect given to some sentencing facts is within the discretion of the sentencer, depending on, among other things, the strength of the proof).

185. The sentencer may be empowered to give greater mitigating effect to the fact of a particular defendant's mental retardation beyond simply exempting the defendant from execution; the degree of retardation, for example, may in this scenario become a sentencing fact which demands more or less mitigation. The point is, however, that the individual sentencer should never be permitted to give so little effect to the mitigating fact of mental retardation that the ultimate punishment is imposed, a likely outcome if mitigation is completely entrusted to the adjudicatory

Justice O'Connor's suggestion that evidence of mental retardation may be "a two-edged sword" for the mentally retarded defendant<sup>186</sup> is actually an optimistic perspective. The availability of mental retardation as a mitigating factor ultimately presents more of a Hobson's choice to the mentally retarded defendant. Balanced against the uncertain and problematic benefits of pleading her mental retardation are the well-documented and substantial costs of the mental retardation stigma. One can fairly imagine the mentally retarded defendant in the same situation as Raymond Babbitt in the recent movie "Rain Man". When asked if he was autistic, Raymond offered a palsied response that belied the deliberative balancing of a handful of "remedial services" against the host of diminishing stigma that had shaped his life: "I don't think so . . . no . . . definitely not."<sup>187</sup>

## V. CONCLUSION

A categorical proscription against the execution of mentally retarded persons is the only way to ensure the fair and equitable treatment of mentally retarded persons in the criminal justice process. The proscription represents an insightful and truly remedial use of the mentally retarded label in pursuit of an egalitarian vision. Its premises are empirically valid and conceptually sound, and its realization is morally essential. The proscription provides the state with one final opportunity to rise above its history of diminishment to declare the worth and dignity of a life.

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process. For sources in agreement, see *supra* note 125.

186. See *supra* note 165 and accompanying text.

187. *Rain Man* (United Artists 1988); see also McCullough, *The World Gained and the World Lost: Labeling the Mentally Retarded*, in *ETHICS AND MENTAL RETARDATION* 99, 116 (L. Kopelman & J. Moskop eds. 1984) (insisting that "there is no good reason that the world gained for the mentally retarded by being so labeled is to be purchased at the devastating price that many of the retarded have been forced to pay because of our failure to understand in a reliable manner the conceptual and ethical dimension of this crucially important diagnostic and social label").