

Winter 2014

## Mental Retardation and the Death Penalty: The Need for an International Standard Defining Mental Retardation

Allison Freedman

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njihr>



Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

Allison Freedman, *Mental Retardation and the Death Penalty: The Need for an International Standard Defining Mental Retardation*, 12 *Nw. J. INT'L HUM. RTS.* 1 (2014).  
<http://scholarlycommons.law.northwestern.edu/njihr/vol12/iss1/1>

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Human Rights by an authorized administrator of Northwestern University School of Law Scholarly Commons.

# Mental Retardation and the Death Penalty: The Need for an International Standard Defining Mental Retardation

Allison Freedman

## I. INTRODUCTION

¶1 Within the international community, there is a consensus against the imposition of the death penalty on individuals with mental retardation.<sup>1</sup> The United States Supreme Court and several international human rights bodies have recognized that individuals with mental retardation should not be subject to the death penalty.<sup>2</sup> Additionally, most countries maintain that individuals who are insane or mentally retarded are shielded from execution.<sup>3</sup> However, reports of individuals with mental retardation who are facing the death penalty continue to surface.<sup>4</sup>

¶2 One reason for this may be the lack of an international standard defining mental retardation.<sup>5</sup> There is currently great variation between cultures in defining the level of

---

<sup>1</sup> The terms “mentally retarded” and “mental retardation” are now rejected in the disability community and the term “intellectual disability” is favored instead. In fact, in 2010, President Barack Obama signed Rosa’s Law, which replaced the term “mental retardation” with “intellectual disability” in all federal education, health, and labor laws 20 U.S.C. § 1140 (2010). However, the language in *Atkins v. Virginia*, 536 U.S. 304 (2002), as well as many of the statutes referenced throughout this article use the term “mental retardation.” Therefore, in order to avoid confusion in what is already a semantically complex area, this article will use the term mental retardation. Use of this term is not intended to stigmatize individuals with what is now recognized to be intellectual disability. Additionally, while the semantics have changed, the definition of intellectual disability is identical to the definition of mental retardation.

<sup>2</sup> See *Atkins*, 536 U.S. at 315, 321 (holding that evolving standards of decency have produced a national consensus in opposition to the execution of individuals with mental retardation such that “death is not a suitable punishment for a mentally retarded criminal”); U.N. Office of the High Commissioner for Human Rights, *The Question of the Death Penalty*, ¶ 4(g), U.N. Doc. E/CN.4/RES/2003/67 (Apr. 24, 2003), [http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=5021](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=5021) [hereinafter *Question of the Death Penalty*] (urging countries “not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person”); U.N. ESCOR, *Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty: Report of the Secretary General*, ¶ 89, U.N. Doc. E/2005/3 (Mar. 9, 2005), [http://www.nswccl.org.au/docs/pdf/UNDoc\\_E\\_2005\\_3.pdf](http://www.nswccl.org.au/docs/pdf/UNDoc_E_2005_3.pdf) [hereinafter *Report of the Secretary General*] (suggesting that the safeguard to protect individuals with mental retardation from capital punishment will need to be reformulated to include any form of mental disorder).

<sup>3</sup> *Report of the Secretary General*, *supra* note 2, ¶ 88.

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., *Frequently Asked Questions on Intellectual Disability*, AM. ASS’N ON INTELL. AND DEVELOPMENTAL DISABILITIES, <http://aaidd.org/intellectual-disability/definition/faqs-on-intellectual-disability#.UmRYRxZhyMN> (“The term intellectual disability covers the same population of individuals who were diagnosed previously with mental retardation in number, kind, level, type, duration of disability, and the need of people with this disability for individualized services and supports. Furthermore, every individual who is or was eligible for a diagnosis of mental retardation is eligible for a diagnosis of

mental functioning that constitutes retardation.<sup>6</sup> Additionally, definitions of mental retardation vary widely from country to country, with some countries conflating mental illness with mental retardation and others completely excluding mental retardation from their definition.<sup>7</sup> As a result, there is no way “to gauge the extent to which the widespread prohibition on the execution of the mentally retarded has in fact provided a safeguard for all those to whom it may apply in principle.”<sup>8</sup>

¶3 Marvin Wilson’s story exemplifies the inconsistency in the application of the death penalty with regard to individuals with mental retardation. Marvin Wilson, a 54-year-old American male convicted of shooting and killing another man, had an IQ of 61 and even lower functioning levels. He struggled in school, dropped out after 10th grade, and had trouble performing the simplest tasks without assistance. A board-certified expert concluded that Marvin was mentally retarded, yet he was put to death in Texas on August 7, 2012.<sup>9</sup>

¶4 The international community condemns the execution of individuals with mental retardation, and many international human rights bodies recommend a ban on such executions. However, the recommendations fail to provide the international community with guidance on what constitutes mental retardation. Therefore, an international standard would help avoid executions occurring because of confusion and a lack of understanding revolving around what qualifies as mental retardation.

¶5 Much recent scholarly research focuses on the lack of protection of individuals with mental illnesses and the need for such protection under the United States Constitution’s Eighth Amendment ban on cruel and unusual punishment.<sup>10</sup> However, little attention has been given to the already existing categorical exclusion for individuals with mental retardation under the Eighth Amendment. Because individuals with mental retardation have theoretically been exempted from the death penalty, less time has been spent exploring the problems that have arisen in the wake of the theoretical exclusion. Scholars have given even less attention to the way the ban on executing individuals with mental retardation actually functions on the international stage.

¶6 This article addresses the need for an international standard defining mental retardation so that the international consensus exempting individuals with mental retardation from the death penalty can be realized in practice. Part II provides an

---

intellectual disability.”); Robert L. Schalock et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 INTEL. & DEVELOPMENTAL DISABILITIES 116, 116-17 (2007) (“Increasingly, the term intellectual disability is being used instead of mental retardation . . . The term ‘intellectual disability’ covers the same population and renders the same individuals eligible for a diagnosis as those covered and rendered by ‘mental retardation.’”).

<sup>6</sup> ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 198 (4th ed. 2008).

<sup>7</sup> See generally *Death Penalty Worldwide Database*, BLUHM LEGAL CLINIC, <http://www.deathpenaltyworldwide.org/> [hereinafter *Death Penalty Worldwide Database*].

<sup>8</sup> HOOD & HOYLE, *supra* note 6, at 198.

<sup>9</sup> *INTELLECTUAL DISABILITIES: Texas Stands Alone in Its Unusual Test of Mental Retardation and Exemption From Execution*, DEATH PENALTY INFO. CTR. (July 31, 2012), <http://www.deathpenaltyinfo.org/intellectual-disabilities-texas-stands-alone-its-unusual-test-mental-retardation-and-exemption-execu>.

<sup>10</sup> See, e.g., Robert Batey, *Categorical Bars to Execution: Civilizing the Death Penalty*, 45 HOUS. L. REV. 1493 (2009); Liliana Lyra Jubilut, *Death Penalty and Mental Illness: The Challenge of Reconciling Human Rights, Criminal Law, and Psychiatric Standards*, 6 SEATTLE J. FOR SOC. JUST. 353 (2007).

overview of the semantic nuances in the language surrounding mental retardation that have likely led to some of the confusion regarding the definition of mental retardation. Part III explores the ethical and moral justifications for exclusion of individuals with mental retardation from the death penalty. Part IV explores why, despite an international consensus to the contrary, individuals with mental retardation are still executed today. To illustrate the grave problems resulting from the varied definitions of mental retardation, Part IV also provides a case study of an individual who was recently sentenced to death despite being mentally retarded. Part V provides a survey of all the countries that currently use the death penalty and categorizes these countries by their definition of mental retardation, looking at countries that (a) define only mental illness without a separate provision for mental retardation; (b) conflate the definitions for mental retardation and mental illness; (c) differentiate between mental illness and mental retardation; and (d) provide no definition for either mental illness or mental retardation. Finally, Part VI recommends an international standard for the definition of mental retardation to help realize the international ban on the death penalty for individuals with mental retardation. Part VI also provides an overview of the penal codes of all countries still employing the death penalty and their definitions of mental retardation, and analyzes trends found within these penal codes to recommend this definition of mental retardation for the international community.

## II. CONFUSION WITH COMMONLY USED TERMS

¶7 To understand the importance of an international standard for the definition of mental retardation, one must first distinguish between the many terms often associated with mental deficiencies. At the broadest level, mental disability, mental disorder, and mental illness<sup>11</sup> are often used as all-encompassing terms.<sup>12</sup> For example, under the approach taken by the American Psychiatric Association's Diagnostic and Statistical Manual, commonly known as the DSM-5,<sup>13</sup> a mental disorder is "a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning."<sup>14</sup> However, the drafters noted, "that no definition adequately specifies precise boundaries for the concept of 'mental

<sup>11</sup> See *infra* text accompanying notes 18-22 (explaining that while mental illness is often used interchangeably with mental disorder or mental disease as an all-encompassing term for psychological illnesses affecting mental functioning, mental illness also has a narrower meaning directed specifically at individuals with process disorders).

<sup>12</sup> CHRISTOPHER SLOBOGIN, MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY 2 (2006).

<sup>13</sup> See *Intellectual Disability*, AM. PSYCHIATRIC ASS'N (2013), <http://www.dsm5.org/Documents/Intellectual%20Disability%20Fact%20Sheet.pdf> [hereinafter *Intellectual Disability*] (noting that the DSM-5 makes several changes from the previous edition including changing the term mental retardation to intellectual disability, moving the focus away from strict IQ cut-offs to focus on impairments of general mental abilities that impact adaptive functioning, and removing the age cut-off for the development of symptoms and instead indicating that the symptoms must begin during the developmental period).

<sup>14</sup> AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 20 (5th ed. 2013) [hereinafter DSM-5].

disorder.”<sup>15</sup> In fact, the drafters of the DSM have included more than three hundred syndromes and psychological patterns in their listing of mental disorders.<sup>16</sup> Mental retardation is among the many syndromes and psychological patterns identified in the DSM-5.<sup>17</sup>

¶8 Some clinicians also differentiate further, indicating that within mental disorders there are two types of disorders—process disorders and development disorders.<sup>18</sup> Process disorders are generally called mental illnesses and they exist when the illness is a result of an event that changes an individual’s behavior.<sup>19</sup> These mental illnesses are not a continuous state of mental illness, but generally cause episodes of the disease.<sup>20</sup> Development disorders, however, are inherent to the person and do not appear in episodes, but are perpetual.<sup>21</sup> Mental retardation is generally classified as a development disorder.<sup>22</sup>

¶9 Mental retardation is a more discrete concept than the sweeping term mental disorder. However, as this article will demonstrate, there are still inconsistencies in the definition of mental retardation in countries throughout the world as well as confusion regarding what constitutes mental retardation in contrast to mental disorder.

¶10 In addition to the more medically laden terms, mental disorder and mental retardation, the terms “insane” and “incompetent” are used in the legal world. The Supreme Court of the United States held in *Ford v. Wainwright* that the Eighth Amendment’s bar against cruel and unusual punishment precludes the execution of insane or incompetent inmates.<sup>23</sup> However, while *Ford* established an exemption for the insane, the Court did not establish a definition of competence or insanity, nor did it provide procedures for determining these two concepts.<sup>24</sup> Confusion about the terms insane and incompetent has also arisen because *Ford* gave wide discretion to the states in defining procedures for competency determinations.<sup>25</sup> The uncertainty surrounding how to safeguard mentally incompetent individuals from execution has led to many proposals for reform, as well as suggestions for competency determination procedures.<sup>26</sup>

¶11 The discussion surrounding the definitions of mental illness, mental retardation, and insanity is important for two reasons. First, it is necessary to understand the differences between these definitions in order to understand what this article addresses.<sup>27</sup>

<sup>15</sup> AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxi (4th ed. 2000) [hereinafter DSM-IV-TR].

<sup>16</sup> SLOBOGIN, *supra* note 12, at 2.

<sup>17</sup> See DSM-5, *supra* note 14, at 20.

<sup>18</sup> Jubilut, *supra* note 10, at 361.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See DSM-5, *supra* note 14, at 20; see also *infra* Part IV (providing a full discussion of the definition of mental retardation).

<sup>23</sup> See generally 477 U.S. 399 (1986).

<sup>24</sup> Jubilut, *supra* note 10, at 356.

<sup>25</sup> Paula Shapiro, *Are We Executing Mentally Incompetent Inmates Because They Volunteer to Die?: A Look at Various States’ Implementation of Standards of Competency to Waive Post-Conviction Review*, 57 CATH. U. L. REV. 567, 568-69 (2008).

<sup>26</sup> *Id.*

<sup>27</sup> This article is intended only to provide guidance on the definition of mental retardation and why an international standard for this particular category of mental disorder could help narrow the implementation

Second, a discussion of these different terms illustrates why confusion has developed among countries throughout the world with regard to the definition of mental retardation. This background information, therefore, provides context for the discourse on mental retardation that follows.

### III. WHY INDIVIDUALS WITH MENTAL RETARDATION SHOULD BE EXCLUDED FROM THE DEATH PENALTY

#### A. *The International Consensus is Against the Execution of Individuals with Mental Retardation*

¶12 An international consensus has arisen with regard to excluding individuals with mental retardation from the death penalty.<sup>28</sup> For example, in 2002 the United States Supreme Court held in *Atkins v. Virginia* that executing individuals with mental retardation violated the United States Constitution’s Eighth Amendment ban on cruel and unusual punishment.<sup>29</sup> Although a case with precedential value only in the United States, in reaching its decision the Court relied, in part, on an amicus curiae brief submitted by the European Union stating that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”<sup>30</sup>

¶13 Several international human rights bodies have also recognized that individuals with mental retardation should not be subject to the death penalty. For example, in 1989, the United Nations Economic and Social Council (ECOSOC) passed a resolution recommending that member states take steps to “eliminate the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution.”<sup>31</sup> The United Nations Commission on Human Rights<sup>32</sup> also adopted several resolutions urging member states not to subject individuals to the death penalty who are “suffering from any form of mental disorder.”<sup>33</sup> Furthermore, in 2005, ECOSOC suggested that the safeguard to protect individuals with mental disabilities be reformulated to be consistent with the U.N. Commission on Human Rights, urging that states not impose the death penalty on “a person suffering from any form of mental disorder.”<sup>34</sup> The most recent recommendations encourage countries to exempt from execution individuals with any form of mental disorder, including those individuals with mental retardation.

---

of the death penalty in countries around the world. This article will not attempt to define mental illness or discuss deficiencies in the legal standards for insanity.

<sup>28</sup> *Report of the Secretary General, supra* note 2, ¶ 88 (indicating most countries proclaim that individuals with mental retardation are shielded from the infliction of the death penalty).

<sup>29</sup> *See generally* 536 U.S. 304 (2002).

<sup>30</sup> *Id.* at 316 n.21.

<sup>31</sup> U.N. ECOSOC, *Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, ¶ 1(d), U.N. Doc. E/1989/91 (May 24, 1989).

<sup>32</sup> The United Nations Commission on Human Rights was replaced by the United Nations Human Rights Council in 2006.

<sup>33</sup> *Question of the Death Penalty, supra* note 2, ¶ 4(g).

<sup>34</sup> *Report of the Secretary General, supra* note 2, ¶ 88.

*B. Executing Individuals with Mental Retardation Fails to Serve the Goals of the Criminal Justice System*

¶14 In addition to an international consensus on excluding individuals with mental retardation from the death penalty, the goals of the criminal justice system are ill served by the execution of individuals with mental retardation. As identified by courts, there are three main goals served by the death penalty—retribution, deterrence, and incapacitation.<sup>35</sup>

¶15 The first goal, retribution, refers to the idea that offenders should be punished for committing crimes when they freely violate existing social rules.<sup>36</sup> However, when looking at individuals with mental retardation, the idea of voluntarily violating social rules is more complicated. “People with severe mental disability are considered blameless and excused from crimes on insanity grounds, while those with lesser impairments, although convicted, might still be perceived as less than fully culpable and receive a reduced sentence.”<sup>37</sup> In the United States case *Atkins v. Virginia*, the Court recognized that people with mental retardation have “diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others,” and therefore their execution does not “measurably contribute” to the goals of retribution or deterrence.<sup>38</sup> In discussing the goal of retribution, the Court also noted that “the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”<sup>39</sup>

¶16 The second goal, deterrence, focuses on consequences and refers to the idea that society should punish individuals up to the point where the marginal cost of additional punishment equals the marginal benefit in prevented crimes.<sup>40</sup> This goal generally functions in one of two ways. First, increasing the certainty of punishment may deter potential offenders due to the risk of apprehension.<sup>41</sup> Second, the type or severity of punishment may deter potential offenders if they weigh the consequences of their actions and decide the risk of punishment is too great.<sup>42</sup> However, as explained by the Court in *Atkins*, because individuals with mental retardation have diminished capacities to understand and process information, the calculated component behind deterrence is unlikely to affect them. With regard to deterrence, the Court in *Atkins* specifically indicated that people with mental retardation are “less likely [to] process the information of the possibility of execution as a penalty” and are therefore less likely to be deterred by that information.<sup>43</sup>

---

<sup>35</sup> SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 469 (8th ed. 2007).

<sup>36</sup> JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 16 (3d ed. 2001).

<sup>37</sup> SLOBOGIN, *supra* note 12, at 14.

<sup>38</sup> 536 U.S. at 318.

<sup>39</sup> *Id.* at 319.

<sup>40</sup> KADISH ET AL., *supra* note 35, at 92-93.

<sup>41</sup> VALERIE WRIGHT, *DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT* 2 (2010),

[http://www.asca.net/system/assets/attachments/1463/Deterrence\\_Briefing\\_.pdf?1290182850](http://www.asca.net/system/assets/attachments/1463/Deterrence_Briefing_.pdf?1290182850).

<sup>42</sup> *Id.*

<sup>43</sup> 536 U.S. at 305.

¶17 The third goal, incapacitation, refers to the idea that by putting individuals in prison or subjecting them to the death penalty, these individuals will no longer be able to commit crimes like those for which they are being punished.<sup>44</sup> Research indicates that the perceived dangerousness of the offender is the most influential factor in death penalty proceedings and therefore the reason some view permanent incapacitation as a goal of the death penalty.<sup>45</sup> However, research on the subject does not support the idea that people with mental disorders, including mental retardation, are more dangerous.<sup>46</sup> In fact, the base rate for violence among individuals with mental disorders is no higher, and is probably lower, than the base rate for offenders without mental disorders.<sup>47</sup> Therefore, the idea that permanent incapacitation of individuals with mental retardation will help serve the goal of removing dangerous individuals from society lacks credibility; these individuals are no more dangerous than the average individual.

*C. Global Human Rights Norms Point Towards Excluding Individuals with Mental Retardation from Execution*

¶18 International human rights law has also focused on the protection of the dignity and rights of individuals with mental disorders.<sup>48</sup> The death penalty exception from a human rights law perspective has evolved because “[f]rom a human rights perspective, the intellectually disabled rank among the world’s most vulnerable and at-risk populations, both because they are different and because their disability renders them less able either to assert their rights or to protect themselves against blatant discrimination.”<sup>49</sup> As Human Rights Watch stated, “because of their mental retardation, these men and women cannot understand fully what they did wrong and many cannot even comprehend the punishment that awaits them.”<sup>50</sup>

*D. Procedural Hurdles Make it Difficult for Individuals with Mental Retardation to Present their Case in Court*

¶19 Individuals with mental disabilities also have a more difficult time presenting their case in court and are therefore more vulnerable to improper sentencing. For example, individuals with mental disabilities are less knowledgeable about their right not to answer questions without the advice of a lawyer, and less adept at negotiating pleas.<sup>51</sup> Moreover, in court, juries sometimes interpret the actions of such individuals as demonstrating a lack of remorse, and therefore their mental deficiency is often an aggravating factor in capital sentencing rather than a mitigating factor.<sup>52</sup>

---

<sup>44</sup> DRESSLER, *supra* note 36, at 16.

<sup>45</sup> SLOBOGIN, *supra* note 12, at 79.

<sup>46</sup> *Id.* at 80.

<sup>47</sup> *Id.*

<sup>48</sup> Jubilut, *supra* note 10, at 353.

<sup>49</sup> *Id.*

<sup>50</sup> HUMAN RIGHTS WATCH, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION 2 (2001), <http://www.hrw.org/reports/2001/ustat/>.

<sup>51</sup> *Id.* at 22.

<sup>52</sup> SLOBOGIN, *supra* note 12, at 63.

IV. WHY INDIVIDUALS WITH MENTAL RETARDATION ARE NOT, IN PRACTICE, ALWAYS EXCLUDED FROM THE DEATH PENALTY

¶20 Despite the international consensus excluding individuals with mental retardation from the death penalty, the goals of the criminal justice system, and international human rights law being ill served by executing individuals with mental retardation, reports of the execution of such individuals throughout the world continue to surface.<sup>53</sup> To determine why this is the case, it is helpful to look at both the United States as well as the international community.

A. *The United States: Inconsistency Among the States*

¶21 In *Atkins v. Virginia*, the Supreme Court of the United States embraced two clinical definitions of mental retardation, one supplied by the American Association on Mental Retardation (now the American Association on Intellectual and Developmental Disabilities (AAIDD)) and the other supplied by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR).<sup>54</sup> The Court held that states' measures for mental retardation in capital cases would be constitutional as long as they generally conformed to these clinical definitions.<sup>55</sup> The Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."<sup>56</sup> In so doing, the Court gave states discretion over the procedural aspects of the implementation of the categorical exemption, such as "whether determinations of mental retardation should be made by a judge or by a jury, whether determinations should occur before or after guilt-innocence trials, which party bears the burden of proof, and what entitles a mental retardation claim to an evidentiary hearing or bars it by procedural default."<sup>57</sup>

¶22 In response, states have developed a myriad of procedures. For example, some states leave the task of determining mental retardation to the jury, while others leave this task to the judge, and still others allow for such a determination to be made by either the

<sup>53</sup> *Report of the Secretary General*, *supra* note 2, ¶ 88.

<sup>54</sup> 536 U.S. at 308 n.3 (citing AAIDD's definition: "Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18," and The American Psychiatric Association's definition: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system . . . 'Mild' mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70.").

<sup>55</sup> *Id.* at 317 n.22.

<sup>56</sup> *Id.* at 317.

<sup>57</sup> John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL'Y 689, 693 (2009).

judge or jury.<sup>58</sup> Some state legislatures have even refused to address the procedures for implementing *Atkins* altogether.<sup>59</sup>

¶23 With substantial state discretion and a lack of procedures to guarantee the protections put in place by *Atkins*, the goal of exempting individuals with mental retardation from the death penalty cannot be realized in practice.<sup>60</sup> This has proven to be true, as several states have taken the Court's ruling allowing states to develop procedural rules as permission to deviate from the accepted definitions expounded by the Court.<sup>61</sup> The definitions accepted by the Court recognize that individuals with mental retardation generally have a wide variety of abilities and needs. Therefore, these recognized definitions do not allow for exclusion criteria, that is, criteria which would automatically exempt an individual from qualifying as mentally retarded.<sup>62</sup> However, some courts have been found to apply exclusion criteria by stereotyping and incorrectly categorizing individuals.<sup>63</sup> This has resulted in an improper application of *Atkins*, and the execution of individuals who qualify under the constitutional protection established in this case.<sup>64</sup>

### B. *The International Community: Inconsistency among Countries*

¶24 Like the United States, the international community has established a norm against the death penalty for individuals with mental retardation.<sup>65</sup> Similarly, despite such a norm, there is much inconsistency among different countries in the application of the death penalty for people with mental retardation. Just as the United States' categorical exemption for individuals with mental retardation has varied due to the lack of guidance in defining and applying procedural guidelines for determining which individuals classify as mentally retarded, the lack of a consistent definition for mental retardation in the international community has also resulted in inconsistent application of the exclusion of the death penalty for individuals with mental retardation throughout the world.<sup>66</sup>

¶25 There are currently ninety-three countries that still allow the death penalty.<sup>67</sup> Of these, thirty-seven include only mental illness in their definition of those excluded from the death penalty, sixteen conflate the terms mental illness and mental retardation, twenty-nine differentiate between mental illness and mental retardation, and eleven have

---

<sup>58</sup> J. Amy Dillard, *And Death Shall Have No Dominion: How to Achieve the Categorical Exemption of Mentally Retarded Defendants from Execution*, 45 U. RICH. L. REV. 961, 966 (2011).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 965.

<sup>61</sup> Blume et al., *supra* note 57, at 691.

<sup>62</sup> *Id.* at 697.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Report of the Secretary General*, *supra* note 2, ¶ 89.

<sup>66</sup> *See generally Death Penalty Worldwide Database*, *supra* note 7 (providing penal code and/or case law definitions of mental retardation and mental illness for all countries that maintain the death penalty; when analyzed together these definitions demonstrate inconsistency in defining mental retardation and therefore present inconsistencies in the application of the death penalty to individuals with mental retardation).

<sup>67</sup> *See Abolitionist and Retentionist Countries*, AMNESTY INT'L, <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> [hereinafter *Abolitionist and Retentionist Countries*] (listing countries that maintain the death penalty on the books).

no definition of mental illness or mental retardation in their penal code.<sup>68</sup> Due to this wide variance in defining mental retardation, there is currently no consistent application of the exclusion of individuals with mental retardation from the death penalty. It is impossible, on a worldwide basis, “to gauge the extent to which the widespread prohibition on the execution of the mentally retarded has in fact provided a safeguard for all those to whom it might apply in principle.”<sup>69</sup>

### C. An Exemplifying Case

¶26 To demonstrate the inconsistency in the application of the death penalty with regard to individuals with mental retardation, it is helpful to look again at the case of Marvin Wilson. Marvin, a 54-year-old American male convicted of shooting and killing another man, had an IQ of 61 and even lower functioning levels. Although a board-certified expert concluded that Marvin was mentally retarded, he was still put to death in Texas in 2012.<sup>70</sup>

¶27 The fact that Marvin was executed in Texas is significant. Despite the Supreme Court’s ruling in *Atkins* laying out specific guidelines for the definition of mental retardation, Texas has instituted an additional set of factors, called the “Briseño factors.”<sup>71</sup> These factors allow for the execution of individuals with mental retardation if, among other factors, the court determines the criminal offense required forethought, planning, and complex execution.<sup>72</sup> This case exemplifies the difficulties in allowing individual states to implement the ruling in *Atkins* and the problem with leaving the procedural application of the ruling on mental retardation to the states.

¶28 Outside the United States, specific cases of the execution of individuals with mental retardation are harder to identify. This is in part because the mental functioning of prisoners on death row has not been evaluated in most countries.<sup>73</sup> Moreover, because of the variation in the definitions for mental retardation, countries with definitions that fail adequately to protect individuals with mental retardation would not report executions of such individuals as a violation of the international consensus. Under these countries’ schemas, such individuals were not considered mentally retarded at the time of execution, and therefore did not meet the countries’ standards for retardation.<sup>74</sup>

---

<sup>68</sup> See generally *Death Penalty Worldwide Database*, *supra* note 7 (these numbers are approximations based on an analysis of the penal code and/or case law definitions for mental retardation provided in the Database).

<sup>69</sup> HOOD & HOYLE, *supra* note 6, at 198.

<sup>70</sup> *INTELLECTUAL DISABILITIES: Texas Stands Alone in Its Unusual Test of Mental Retardation and Exemption From Execution*, *supra* note 9.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* For further critique of the Briseño factors see, e.g., Blume et al., *supra* note 57, at 710-14; Carol S. Steiker et al., *Atkins v. Virginia: Lessons From Substance and Procedure in the Constitutional Regulation of Capital Punishment* 57 DEPAUL L. REV. 721, 727-28 (2008).

<sup>73</sup> HOOD & HOYLE, *supra* note 6, at 198.

<sup>74</sup> *Id.* (noting that while the United States is the only country *officially* continuing to execute individuals with mental retardation, “there appears to be no common agreement on how severe such retardation must be to lead to acquittal or the imposition of a lesser sentence than death”).

V. THE NUMBERS: DEFINITIONS OF MENTAL ILLNESS AND MENTAL RETARDATION BY COUNTRY

¶29 Despite the international consensus that individuals with mental retardation should not face the death penalty, the penal codes of countries that still employ the death penalty demonstrate that there is wide variation among countries in their definitions of mental retardation.<sup>75</sup> This can lead to improper application of the international norm that individuals with mental retardation should not be executed. Therefore, it is important to understand the vast variance among countries' definitions in order to understand why an international standard for the definition of mental retardation will help countries realize the already recognized international consensus against the execution of individuals with mental retardation.

¶30 Of the ninety-three countries that officially retain the death penalty, some have abolished the death penalty in practice while keeping it on the books (de facto abolitionist), while others both retain the death penalty in their penal codes and also continue to use the death penalty in practice (retentionist).<sup>76</sup> Countries that are de facto abolitionist retain the death penalty but have not executed anyone in the past ten years and are believed to have a policy or practice of not carrying out executions.<sup>77</sup> There are currently thirty-five countries that are de facto abolitionist.<sup>78</sup> Retentionist countries are those that have carried out an execution within the last ten years.<sup>79</sup> There are currently fifty-eight retentionist countries.<sup>80</sup> Whether retentionist or abolitionist in practice, because these countries officially retain the death penalty, the majority of their penal codes have language addressing mental disabilities. Therefore, in establishing an international standard for mental retardation, it is helpful to look at all ninety-three countries, regardless of the time frame in which they carried out their last execution.

¶31 The ninety-three countries that officially retain the death penalty can be further classified into categories based on their definitions of mental illness and/or mental retardation to help conceptualize the current problems with the definitions surrounding

---

<sup>75</sup> Compare BRUNEI PENAL CODE § 303 (stating that "individuals suffering from 'abnormality of mind' including 'arrested or retarded development' substantially impairing mental responsibility are not to face capital charges") with LIBYA PENAL CODE arts. 78, 83, 84 (indicating that individuals with "a lack of capacity or volition" may have reduced sentences).

<sup>76</sup> *Abolitionist and Retentionist Countries*, supra note 67.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (listing de facto abolitionist countries: Algeria, Benin, Brunei, Burkina Faso, Cameroon, Central African Republic, Republic of Congo, Eritrea, Ghana, Grenada, Kenya, Laos, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mongolia, Morocco, Myanmar, Nauru, Niger, Papua New Guinea, Russian Federation, Sierra Leone, South Korea, Sri Lanka, Suriname, Swaziland, Tajikistan, Tanzania, Tonga, Tunisia, and Zambia).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* (listing retentionist countries: Afghanistan, Antigua and Barbuda, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Botswana, Chad, China, Comoros, Democratic Republic of the Congo, Cuba, Dominica, Egypt, Equatorial Guinea, Ethiopia, Gambia, Guatemala, Guinea, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Kuwait, Lebanon, Lesotho, Libya, Malaysia, Nigeria, North Korea, Oman, Pakistan, Palestinian Authority, Qatar, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Singapore, Somalia, South Sudan, Sudan, Syria, Taiwan, Thailand, Trinidad and Tobago, Uganda, United Arab Emirates, United States Of America, Viet Nam, Yemen, and Zimbabwe).

mental disabilities.<sup>81</sup> These categories include: (1) countries that define only mental illness; (2) countries that conflate the definitions for mental illness and mental retardation; (3) countries that differentiate between mental illness and mental retardation; and (4) countries that provide no definition for either mental illness or mental retardation.

#### A. *Countries Defining Only Mental Illness*

¶32 Thirty-seven countries maintain only a definition for mental illness with no provision for or reference to mental retardation.<sup>82</sup> Almost all of these countries simply refer to individuals with “mental illness” or individuals that are “insane” or of “unsound mind,” failing to provide guiding factors for defining mental illness. Although this paper does not focus on the definition of mental illness, the countries that define only mental illness are important because their imprecise definition and lack of a separate provision for individuals with mental retardation indicate that such individuals may not be provided protections, such as exemption from the death penalty. These countries have neglected to identify the features particular to individuals with mental retardation that would likely afford them greater protections than a simple phrase such as “insane.”

#### B. *Countries Conflating the Definitions for Mental Retardation and Mental Illness*

¶33 There are sixteen countries that conflate the definitions for mental illness and mental retardation.<sup>83</sup> These countries fail to recognize the factors that differentiate individuals who are mentally retarded from those who are mentally ill. Countries conflate these terms in several different ways. Some countries use vague language such as “mental disorder,” “mental disease,” “mental defect,” “mentally deficient,” and “lacking capacity,” which does not explicitly fall into the category of mentally ill or mentally deficient. These terms also lack defining characteristics, which makes it unlikely that they can be applied consistently.<sup>84</sup>

¶34 Although many of these countries use language that appears to include individuals with mental retardation, there is no indication that the definitions are applied systematically because they do not officially differentiate between mental illness and mental retardation. Without two separate provisions, one for mental retardation and another for mental illness, countries risk misapplication of the single definition, leaving individuals to guess whether the provision applies to individuals with mental retardation.

---

<sup>81</sup> See generally *Death Penalty Worldwide Database*, *supra* note 7. The following categories and country lists are based on an analysis of the penal code and case law definitions of mental retardation provided in the Database. The categories are approximations of countries that fall within each category as the imprecise definitions and frequent conflation of mental illness and mental retardation make it difficult to definitively parse which countries fall within each category.

<sup>82</sup> These countries include: Algeria, Antigua and Barbuda, Bahrain, Belarus, Benin, Botswana, Burkina Faso, Chad, Comoros, Republic of the Congo, Equatorial Guinea, Guinea, Guyana, Iran, Japan, Kenya, Kuwait, Laos, Madagascar, Malaysia, Mali, Mauritania, Myanmar, Nauru, Niger, Saudi Arabia, Sierra Leone, Singapore, Somalia, South Korea, Sudan, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Tunisia, and Vietnam.

<sup>83</sup> These countries include: Central African Republic, Egypt, India, Iraq, Jordan, Liberia, Libya, Malawi, Maldives, Mongolia, Nigeria, Palestinian Authority, Papua New Guinea, Russian Federation, Zambia, and Zimbabwe.

<sup>84</sup> Countries using terms such as these include: Central African Republic, Egypt, Iraq, Jordan, Liberia, Malawi, Maldives, Mongolia, Nigeria, Russian Federation, Zambia, and Zimbabwe.

¶35 Still other countries do not provide protections for individuals with mental retardation in their penal codes, but make reference to increased protections for these individuals in case law. For example, although the penal code in Papua New Guinea seems only to include mentally ill individuals, case law suggests that sophistication and mental capacity beyond mere sanity could be considered in sentencing.<sup>85</sup> Although case law is better than no law on the subject, it is again unlikely that protections for individuals with mental retardation are being applied consistently without provisions in the penal codes of these countries.

### C. Countries that Differentiate Between Mental Illness and Mental Retardation

¶36 There are twenty-nine countries that differentiate between mental illness and mental retardation.<sup>86</sup> Some of these countries also provide guidance as to what constitutes mental retardation, so that one can differentiate these categories in practice.<sup>87</sup> However, many of these countries still lump the language for mental retardation and mental illness into the same provision without explicitly stating what constitutes mental retardation and what constitutes mental illness, which may cause confusion in practice. For example, the Brunei Penal Code states that “individuals suffering from ‘abnormality of mind’ including ‘arrested or retarded development’ substantially impairing mental responsibility are not to face capital charges.”<sup>88</sup> Although the provision provides for individuals with abnormality of mind, likely referring to mentally ill individuals, as well as individuals with arrested or retarded development, likely referring to individuals with mental retardation, it is not entirely clear from the provision that Brunei intends to exclude all individuals with mental illness and mental retardation from capital punishment. Similarly, Afghanistan states that an individual who “lacks his senses and intelligence due to insanity or other mental diseases has no penal responsibility . . .”<sup>89</sup> Again, while insanity, likely referring to the mentally ill, and mental disease, likely referring to people with mental retardation, are both encompassed in the definition, and clarifying language regarding lack of senses or intelligence is provided, it is not explicitly stated that mental retardation and mental illness are both provided for. Breaking the provision into two parts and placing them under different provisions in the penal code would help draw attention to the difference between mental illness and mental retardation and indicate that both are intended to be excluded from the death penalty.

¶37 Furthermore, several of these countries simply use the words mental illness and mental retardation in their definitions, but provide no indication of what constitutes

<sup>85</sup> *Ume v. State*, SCRA 10 of 1997, Supreme Court of Justice, May 19, 2006 (Papa N.G.), ¶ 74, <http://www.paclii.org/pg/cases/PGSC/2006/9.html>.

<sup>86</sup> These countries include: Afghanistan, Bahamas, Barbados, Belize, Brunei, Cameroon, Cuba, Eritrea, Ethiopia, Gambia, Ghana, Guatemala, Indonesia, Jamaica, Lebanon, Morocco, Oman, Qatar, Saint Lucia, South Sudan, Sri Lanka, Suriname, Syria, Tajikistan, Thailand, Uganda, United Arab Emirates, United States of America, and Yemen.

<sup>87</sup> It is also important to differentiate between mental illness and mental retardation because the diagnoses are not mutually exclusive and some individuals can present with both disabilities, leading to a dual diagnosis. *See, e.g., Information on Dual Diagnosis*, NADD, <http://thenadd.org/resources/information-on-dual-diagnosis-2/>.

<sup>88</sup> BRUNEI PENAL CODE, *supra* note 75, § 303.

<sup>89</sup> AFGHANISTAN PENAL CODE art. 67(1).

mentally ill and mentally retarded, simply substituting the two phrases for each other.<sup>90</sup> While this is important, as it indicates these countries recognize people with mental retardation as a set of individuals who should be afforded sentencing protections, without guidance in the definition as to the meaning of mental illness and mental retardation, one may easily conflate the two and subsequently misapply the provisions in practice, perhaps executing individuals with mental retardation because of a lack of understanding of what constitutes mental retardation.

#### D. Countries that Provide no Definition for Mental Illness or Mental Retardation

¶38 The last category encompasses those countries that have no penal code language indicating that either individuals with mental illness or mental retardation are exempt from the death penalty. There are eleven countries in this category.<sup>91</sup> Instituting an international standard for the definition of mental retardation could help these countries to recognize the importance of and be able to implement protections for individuals with mental retardation in the future.

### VI. THE FIX: AN INTERNATIONAL STANDARD<sup>92</sup>

#### A. The Adoption of an International Standard Will Help

¶39 Having identified the current problem surrounding individuals with mental retardation and the death penalty, the next step lies in identifying a solution. One possible solution exists in the adoption of an international standard defining mental retardation.<sup>93</sup>

¶40 This solution comports with the primary goal of human rights standards as well as the procedural norms for when new human rights standards are most often created in practice. The foremost goal of a new human rights standard is “the protection of those

<sup>90</sup> These countries include: Cuba, Indonesia, Qatar, Uganda, and United Arab Emirates. *Compare* CUBA PENAL CODE art. 20.1 (individuals are exempt from criminal liability or face diminished liability at sentencing if *mental retardation* substantially or completely impairs their ability to appreciate the consequences of their actions or to control their actions) (emphasis added), *with* CUBA PENAL CODE art. 20.1 (individuals are exempt from criminal liability or face diminished liability at sentencing if *mental disorder* substantially or completely impairs their ability to appreciate the consequences of their actions or to control their actions) (emphasis added).

<sup>91</sup> These countries include: Bangladesh, China, Democratic Republic of the Congo, Dominica, Grenada, Lesotho, North Korea, Pakistan, Saint Kitts and Nevis, Saint Vincent and the Grenadines, and Taiwan. Note that for Grenada and Saint Kitts and Nevis, no law in this area was located and therefore penal provisions for mental illness or mental retardation could exist.

<sup>92</sup> The definition expounded in this section has been adapted from a definition that was initially developed through a collaborative effort for the purposes of informing the deliberative process of the Inter-American Commission on Human Rights (IACHR) as part of the representation of death row prisoner Virgilio Maldonado.

<sup>93</sup> The AAIDD recently proposed recommendations for the 11th edition of the *International Classification of Diseases* (ICD-11), which is a classification system of all health conditions published by the World Health Organization (WHO). In these recommendations the AAIDD notes: “Maintaining a consistent terminology is crucial in ensuring fairness, accuracy, and consistency in and across countries in critical areas including clinical practice, teaching/training, research, population-based statistics reporting, and public health services.” Marc J. Tassé et al., *AAIDD Proposed Recommendations for ICD-11 and the Condition Previously Known as Mental Retardation*, 51 INTEL. AND DEVELOPMENTAL DISABILITIES 127, 128 (2013).

who are not protected.”<sup>94</sup> In practice, new human rights standards are most often created to fill a gap in protection.<sup>95</sup> In many cases, even when existing instruments provide protection in certain respects, a new or more developed instrument may be needed to enable members of a group to more effectively protect their rights and to clarify the duties of states.<sup>96</sup> Moreover, even if a right has been included in an instrument, there is often no mechanism to monitor and enforce its compliance, depriving victims of an adequate remedy.<sup>97</sup>

¶41 The lack of a consistent definition for mental retardation in the death penalty context is one such gap. While penal codes in many countries identify the need for exclusion of individuals with mental retardation from the death penalty, a new instrument is needed to afford people with mental retardation the protections identified by the international community.

¶42 Since many international standards do not create binding precedent and the process of creating new standards can be slow, some are skeptical of the usefulness of international standards in practice.<sup>98</sup> However, when supported by public advocacy, the influence of such standards, even when not binding, can promote reform of domestic law and practices, provide benchmarks for measuring the performance of state institutions, and improve accountability and redress available to victims.<sup>99</sup> Furthermore, as laws progress and cultural values evolve, international law must adapt to encompass these changes and gaps that may be created by this evolution.<sup>100</sup> While laws and cultural norms have evolved to expound an international norm against the death penalty for people with mental retardation, the protections afforded to these individuals are not realized in practice. Therefore, an international standard is needed to address the gap between the international consensus and the reality on the ground.

#### *B. What the Recommended International Standard Should Include*

¶43 Although only a select number of the ninety-three countries using the death penalty provide language helpful for defining mental retardation, it is useful to look at the language of these select countries to see how they have addressed defining mental retardation. In looking at a number of different countries’ language for defining mental retardation, one can create a definition that not only encompasses the most important facets of mental retardation, but also employs language broad enough to encompass all individuals with mental retardation. This definition must not, however, be so broad that it fails to provide guidance as to which individuals qualify as mentally retarded.

¶44 Surveying the language on mental retardation suggests the definition should include several features: (1) language concerning mental incapacity with regard to cognitive functioning; (2) language regarding how an individual’s mental defect

---

<sup>94</sup> INT’L COUNCIL ON HUM. RTS. POLICY, HUMAN RIGHTS STANDARDS: LEARNING FROM EXPERIENCE 62 (2006), [http://www.ichrp.org/files/reports/31/120b\\_report\\_en.pdf](http://www.ichrp.org/files/reports/31/120b_report_en.pdf) [hereinafter HUMAN RIGHTS STANDARDS].

<sup>95</sup> *Id.* at 7.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 8.

<sup>98</sup> *Id.* at 3.

<sup>99</sup> *Id.* at 4.

<sup>100</sup> *Id.* at 3.

originated; (3) language regarding the extent of the mental defect; and (4) language describing the ways in which a mental defect may affect an individual's functioning.<sup>101</sup>

### 1. Mental Incapacity: Cognitive Functioning

¶45 As noted previously, many countries do not explicitly define mental incapacity and simply state that individuals are “mentally disordered,” “mentally defective,” of “abnormal mind,” and “in a state of mental disturbance.” Because these terms do not provide guidance as to their meaning, it is important to further define mental incapacity.<sup>102</sup>

¶46 Several countries define mental incapacity with reference to cognitive deficits or intellectual impairment. Some countries that encompass these ideas in their definitions include: Brunei, Ethiopia, Guatemala, Thailand, and the United States. Thailand specifically refers to a “lack of intelligence,”<sup>103</sup> while Brunei states that “[i]ndividuals suffering from abnormality of mind” including “arrested or retarded development substantially impairing mental responsibility are not to face capital charges.”<sup>104</sup> Guatemala uses the phrase “incomplete or retarded mental development,”<sup>105</sup> and Ethiopia discusses “delayed development or deterioration of the mental faculties.”<sup>106</sup> Finally, the AAIDD in the United States says that “[i]ntellectual disability is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills. This disability originates before the age of 18.”<sup>107</sup>

### 2. How the Mental Defect Originated

¶47 Since mental retardation can originate from birth or can manifest later in life due to a traumatic event or disease, recognizing that there is not simply one way mental retardation can originate is an important aspect identified by only a few countries. Countries like Belize provide the most helpful language for this aspect of the definition. Belize asserts that an individual is not criminally liable while suffering from “abnormality of mind [due to] arrested or retarded development or any inherent causes or

---

<sup>101</sup> This survey was completed by reviewing the definitions of mental retardation and/or mental illness in all ninety-three countries that still officially employ the death penalty.

<sup>102</sup> The definition of mental incapacity should be distinguished from definitions of insanity. While insanity is a legal term of art which implicates whether or not an individual can be found guilty, an individual with a mental incapacity could potentially be found guilty but would receive a lesser punishment. *See generally* HENRY F. FRADELLA, FROM INSANITY TO DIMINISHED CAPACITY: MENTAL ILLNESS AND CRIMINAL EXCUSE IN CONTEMPORARY AMERICAN LAW (2007). This article advocates for the exclusion of the death penalty as a possible punishment even if such an individual is found guilty. Moreover, many countries use the term insanity interchangeably with mental illness. Neither of these terms is addressed as part of the definition of mental retardation and should not be confused with the goal of defining it.

<sup>103</sup> THAILAND CRIMINAL CODE art. 78.

<sup>104</sup> *See* BRUNEI PENAL CODE, *supra* note 75, § 303.

<sup>105</sup> GUATEMALA PENAL CODE arts. 23, 26.

<sup>106</sup> ETHIOPIA CRIMINAL CODE arts. 48, 49, 177, 180.

<sup>107</sup> *Definition of Intellectual Disability*, AM. ASS'N ON INTELL. AND DEVELOPMENTAL DISABILITIES, <http://aaidd.org/intellectual-disability/definition#.UmcJeRCtyno> [hereinafter AAIDD].

caused by disease or injury . . .”<sup>108</sup> In the United States, the AAIDD also indicates that for an individual with mental retardation, the “disability originates before the age of 18.”<sup>109</sup>

### 3. Extent of the Mental Defect: Partial or Complete

¶48 Many countries’ definitions also address the degree to which an individual is able to understand or comprehend his or her actions. Countries generally define such understanding in one of two ways.

¶49 Some countries view an individual’s comprehension as a *diminished or substantially impaired* awareness, understanding, or appreciation of their actions or the consequences of such actions. Brunei is the country which best exemplifies this distinction. Brunei uses the language “substantially impairing mental responsibility.”<sup>110</sup>

¶50 Other countries require that an individual be *completely* unable to understand or comprehend the nature of his or her actions. This is a more stringent standard because it is not enough for an individual to have only a diminished understanding, but instead the individual must be completely unable to understand or comprehend his or her actions. Some countries that use this distinction include Belarus and Liberia. Belarus states that one must be “deprived of understanding”<sup>111</sup> and Liberia asserts that an individual must “lack[] capacity to understand.”<sup>112</sup>

¶51 Still other countries include both diminished comprehension and complete inability to understand in their definition. For example, both Cameroon and Qatar differentiate between “partial incapacity” and “total incapacity.”<sup>113</sup>

### 4. How the Mental Defect Affects Functioning

¶52 Several countries also address the ways a mental defect may affect an individual’s functioning. Some such countries include Libya and the United States. Libya says that individuals with “a lack of capacity or volition” may have reduced sentences.<sup>114</sup> The

---

<sup>108</sup> Criminal Code §§ 26, 118 (2000) (Belize). *See also* GAMBIA CRIMINAL CODE art. 192A(1), (3) (stating that a person found guilty of murder and found to be “suffering from such abnormality of mind [whether arising from a condition of arrested or retarded development of mind, or any inherent causes or induced by disease or injury] . . . is not sentenced to death . . .”); Offenses Against the Person Act, § 5(1) (2005) (Jam.) (asserting that a person suffering from “abnormality of mind” due to “a condition of arrested or retarded development or any inherent cause induced by disease or injury . . .” cannot be convicted of capital murder); ST. LUCIA CRIMINAL CODE § 90(1) (indicating that the death penalty cannot be applied to those “suffering from such mental disorder [whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury] . . .”).

<sup>109</sup> *See* AAIDD, *supra* note 107. While the AAIDD requires mental retardation to originate before the age of 18, the DSM-5, published by the APA, recently removed such an age cut-off from its definition, opting instead to require the symptoms of the disability to originate during the developmental period. DSM-5, *supra* note 14. *See also infra* note 117 (noting that this article does not advocate for a particular age cutoff because it may be difficult for some countries to measure these cutoffs and may also draw an arbitrary line after which individuals will not be afforded necessary protections).

<sup>110</sup> *See* BRUNEI PENAL CODE, *supra* note 75, § 303.

<sup>111</sup> PENAL CODE OF THE REPUBLIC OF BELARUS art. 92.

<sup>112</sup> LIBERIA CRIMINAL PROCEDURE LAW § 6.1.

<sup>113</sup> CAMEROON PENAL CODE § 78, no. 65-LF-24 (1965) and no. 67-LF-1 (1967); QATAR PENAL CODE art. 54.

<sup>114</sup> LIBYA PENAL CODE, *supra* note 75, arts. 78, 83, 84.

American Association on Intellectual and Developmental Disabilities in the United States indicates that not only does a disability affect intellectual functioning but it also impacts adaptive behavior, which may cover many everyday social and practical skills.<sup>115</sup>

C. *A Recommended International Standard for the Definition of Mental Retardation*

¶53 After surveying the language of the most relevant penal codes<sup>116</sup> providing guidance on a definition for mental retardation, it becomes possible to develop a recommended international standard for the definition of mental retardation. The recommended standard aims to provide enough guidance for countries to determine who qualifies as mentally retarded while leaving the definition broad enough to allow for accommodation of the variance in resources and access to health information in different countries. This may require varying methods of proof and procedures.<sup>117</sup> However, while countries may use various methods of proof, this definition is intended to be exclusive; the use of varying methods of proof does not confer the ability for countries to change, add to, or diminish the definition, which would effectively invalidate the international standard. The recommended international definition of mental retardation is:

¶54 A significant cognitive disability or arrested development of the mental faculties, whether hereditary or acquired, that substantially impairs judgment, reasoning, volition, or adaptive behavior.

¶55 An individual who meets this definition should not be subject to the death penalty. This definition encompasses the ideas of mental incapacity with regard to cognitive ability, how the defect originated, the extent of the mental defect, and the ways in which the defect may affect an individual's functioning.<sup>118</sup>

¶56 The definition begins by recognizing that an individual may have either a significant cognitive disability or arrested development of the mental faculties. This captures the cognitive functioning aspect of mental incapacity while recognizing that the type and severity of the cognitive deficit may vary. Including "significant cognitive

---

<sup>115</sup> See AAIDD, *supra* note 107.

<sup>116</sup> The most relevant penal codes provide guidance on one or more of the four categories developed in Part VI, Section B above.

<sup>117</sup> Due to the varying economic circumstances of countries that could employ this standard, the recommended standard lays out characteristics for identifying an individual as mentally retarded while leaving the method of proof to vary by country. Some countries will likely use diagnostic testing while others may use only historical or anecdotal evidence. The evidence used in different countries will be that which is most appropriate for a country, depending on factors such as variance in resources. Moreover, because the combination of different types of evidence, rather than strict cutoffs in age or mental competency tests, is likely most helpful for proving mental retardation, resource poor countries unable to provide the accused with the resources for sophisticated testing may still have a variety of methods with which the accused may prove mental retardation. Differing methods of proof do not, however, diminish the importance of a universal definition for mental retardation, since it is the characteristics of individuals with mental retardation which need most to be identified, understood, and widely accepted.

<sup>118</sup> The AAIDD recently recommended a definition for intellectual disability, formerly known as mental retardation: "A disorder of intellectual disability is a condition characterized by significant limitations in intellectual functioning and adaptive behavior, originating during the developmental period." Tassé, *supra* note 93, at 129. This definition requires that an intellectual disability originate during the developmental period and does not recognize that intellectual disability can be caused by trauma or environmental factors that cause symptoms to develop later in life. Therefore, while this definition is a step in the right direction, the recommended definition in this article is still preferable.

disability” encompasses the sentiment in countries like Thailand that refer to a “lack of intelligence,”<sup>119</sup> while including “arrested development of the mental faculties” references the sentiment in countries like Guatemala that refer to an “incomplete or retarded mental development.”<sup>120</sup> This distinction is important as it provides protections for a wide range of individuals with mental retardation.

¶57 The next part of the definition, “whether hereditary or acquired,” helps to clarify that while mental retardation is an ongoing mental condition, an individual can be born mentally retarded or can also become mentally retarded through disease, trauma, or environmental factors. This concept is expressed in the definitions of countries such as Belize and the United States. Belize indicates that an individual is not criminally liable while suffering from “abnormality of mind [due to] arrested or retarded development or any inherent causes or caused by disease or injury . . .”<sup>121</sup> Moreover, the United States recognizes that mental retardation can develop from environmental factors such as lead or mercury poisoning or extreme neglect as a child.<sup>122</sup> This phrase also assists in setting mental retardation apart from mental illness, since mental illnesses more often manifest in temporary episodes.

¶58 The phrase “substantially impairs” encapsulates the degree of mental impairment. While some countries, such as Liberia and Mongolia, require complete mental impairment, others, such as Brunei, require only diminished mental capacity. The recommended definition includes individuals who exhibit substantial impairment so as not to exclude individuals with mental retardation who are mentally retarded but may not exhibit the most extreme form of mental retardation. In practice, it can be difficult to determine the extent of an individual’s impairment without mental acuity tests,<sup>123</sup> so this part of the definition also helps accommodate this difficulty.

¶59 Reference to an individual’s judgment, reasoning, volition, or adaptive behavior encompasses the way mental retardation affects daily functioning. This brings together definitions from countries such as Libya, which indicates that individuals with “a lack of capacity or volition” may have reduced sentences,<sup>124</sup> and the United States, which includes the concept of limitations in adaptive behavior that cover many everyday social and practical skills.<sup>125</sup> Including impairment in judgment, reasoning, volition, and adaptive behavior helps clarify that the effects of mental retardation can vary in different individuals.

#### D. *What is Not Included in the Definition and Why*

¶60 While the recommended definition aims to be specific enough to provide guidance for deciding if an individual qualifies as mentally retarded, there are several factors addressed in various countries’ definitions, which this article purposely does not include

<sup>119</sup> See THAILAND CRIMINAL CODE, *supra* note 103, art. 78.

<sup>120</sup> See GUATEMALA PENAL CODE, *supra* note 105, arts. 23, 26.

<sup>121</sup> Criminal Code (Belize), *supra* note 108, §§ 26, 118.

<sup>122</sup> *Mental Retardation*, ENCYCLOPEDIA OF MENTAL DISORDERS, <http://www.minddisorders.com/Kau-Nu/Mental-retardation.html#b>.

<sup>123</sup> See *infra* text accompanying notes 127-129 (noting that many countries do not have the ability to administer mental acuity tests, so reference to these tests has been left out of the definition).

<sup>124</sup> LIBYA PENAL CODE, *supra* note 75, arts. 78, 83, 84.

<sup>125</sup> See AAIDD, *supra* note 107.

in the recommended definition. These factors include: (1) a specific age before which an individual must manifest mental retardation; (2) a specific IQ score or outcome on a mental health test for competency; and (3) a time frame in which an individual must manifest mental retardation. Including these factors may make it difficult for countries to agree on the international standard or may put strain on resource poor countries that employ the definition. A definition including such provisions would not likely be adopted on an international scale and could prove difficult for many countries to implement if adopted at large.

¶61 While countries such as the United States include an age or time period before which an individual must manifest mental retardation,<sup>126</sup> it may not be possible to determine the precise age at which an individual manifested mental retardation. Furthermore, some countries may not have a system of health records or a healthcare system to which all individuals have access. It may, therefore, be impossible to determine the age at which an individual first showed signs of mental retardation. Moreover, some individuals may become mentally retarded as a result of a traumatic injury, disease, or environmental factors, in which case the age requirement would improperly create a barrier to protection of these individuals.

¶62 Some countries implement mental health tests to determine the competency of the accused.<sup>127</sup> While these tests can be helpful, they may be difficult to implement, especially in resource poor countries. For example, the Judicial Committee of Trinidad and Tobago indicated that “there was a shortage of qualified forensic psychiatrists in certain Caribbean countries and that this meant that the mental health of defendants in murder cases was not routinely assessed either by the State or the defen[s]e.”<sup>128</sup> Additionally, creating a cutoff on mental health tests such as those measuring IQ draws an arbitrary line, excluding individuals who may still manifest symptoms of mental retardation from receiving protections.<sup>129</sup>

¶63 Finally, while some countries provide protections for the mentally deficient only at certain junctures during a proceeding, these countries have misconstrued the characteristics of mental retardation. Since mental retardation is an ongoing mental deficiency, any reference to a time frame (e.g. during interrogations, trial, sentencing, or post-conviction) during which an individual must manifest mental retardation only confuses the issue and has therefore been left out of the definition.

## VII. CONCLUSION

¶64 Despite a consensus within the international community against the imposition of the death penalty on individuals with mental retardation, reports of capital punishment

<sup>126</sup> *Id.* (noting that in the United States, the AAIDD requires that an intellectual disability originates during the developmental period).

<sup>127</sup> *See, e.g.*, INT’L FEDERATION FOR HUM. RTS., THE DEATH PENALTY IN THAILAND 20-21 (2005), <http://www.fidh.org/IMG/pdf/Thailand411-2.pdf> (indicating that the law requires prison officials to conduct thorough examinations of the mental status of each and every prisoner condemned to death); AAIDD, *supra* note 107 (noting that IQ tests are used in the United States to help determine mental competency).

<sup>128</sup> *Report of the Secretary General, supra* note 2, ¶ 88.

<sup>129</sup> *See, e.g.*, AAIDD, *supra* note 107 (asserting that, in the United States, individuals with an IQ of 70, or in some cases as high as 75, have limited intellectual functioning).

being imposed on individuals with mental retardation continue to surface. One explanation for this is the lack of an international standard defining mental retardation.

¶65 There is currently great variation between countries in defining the level of mental functioning that constitutes retardation. Moreover, the semantic nuances in the language relating to mental retardation have likely contributed to the confusion surrounding the definition of mental retardation. Definitions of mental retardation vary widely from country to country, with some countries defining only mental illness, some countries conflating the definitions for mental retardation and mental illness, other countries differentiating between mental illness and mental retardation, and still others providing no definition for either mental illness or mental retardation.

¶66 One solution to this inconsistency is to provide an international standard for the definition of mental retardation to be used by all countries. By reviewing and identifying trends within the penal codes of all countries maintaining a definition of mental retardation in the context of the death penalty, this article recommends an international standard for the definition of mental retardation. Such a standard would provide guidance and help avoid executions occurring because of confusion and a lack of understanding regarding what constitutes mental retardation.