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NOTES

DEFENDING DISABILITIES: HOW INDIANA SHOULD APPROACH ADJUDICATION AND PUNISHMENT OF INDIVIDUALS WITH INTELLECTUAL DISABILITIES IN SEXUAL CRIMES

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I. INTRODUCTION

Late on a winter night, a young man named Raymond Garnett stopped by a friend's house to ask for a ride home.¹ His friend, Erica Frazier, heard him outside and opened her bedroom window.² Instead of giving Raymond a ride, Erica invited him to come into her bedroom, so he climbed through the window.³ Erica and Raymond conversed and then engaged in voluntary sexual intercourse.⁴ When this encounter occurred, Raymond was twenty years old, and Erica was thirteen.⁵

Raymond has Down Syndrome and his IQ level is fifty-two.⁶ Raymond's guidance counselor at school indicated that his reading skills are at the level of a third-grade child, and his social skills are on par with children who are eleven or twelve years old.⁷ His counselor further indicated that Raymond attended special education classes and, at one point, received education at home to avoid social taunting from his peers.⁸ Raymond's disability affected him to the point that he could not understand assigned duties, and as a result, his attempts to complete vocational work failed.⁹ When he was attempting to work, Raymond

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1. Garnett v. State, 632 A.2d 797, 799 (Md. 1993).

2. *Id.*

3. *Id.*

4. *Id.*

5. Russel Christopher & Kathryn Christopher, *The Paradox of Statutory Rape*, 87 IND. L.J. 505, 511 (2012) (citing Garnett, 632 A.2d at 799).

6. *Id.* at 510 (citing Garnett, 632 A.2d at 798).

7. Garnett, 632 A.2d at 798.

8. *Id.*

9. *Id.* at 799.

frequently lost his way trying to return home from work.¹⁰ Unfortunately, Raymond failed the State's functional tests required for graduation, so he could not earn a diploma and had to settle for a certificate of completion in school.¹¹

When Raymond first encountered Erica, she told Raymond that she was sixteen years old.¹² Erica had several friends who reinforced this false reality in Raymond's mind.¹³ Because Raymond's classmates at school abused him so much, he probably found solace when he thought he found a friend in Erica. However, after the sexual encounter occurred between them, Raymond was charged with second degree rape under Maryland law based on the age disparity, Raymond being four years older than Erica and her being younger than fourteen.¹⁴

The applicable rape statute in this case imposed strict liability; no consideration could be given to Raymond's mental state or his disability.¹⁵ The Maryland statute read that a person is guilty of second degree rape if the person has vaginal intercourse with someone, "[w]ho is under fourteen years of age and the person performing the act is at least four years older than the victim."¹⁶ Someone found guilty under this statute was thus labeled a rapist and faced a potential twenty-year prison sentence.¹⁷ Raymond's disability likely prohibited him from understanding that his actions could lead to such a serious penalty. Although the Maryland Court of Appeals sentenced Raymond to five years of probation, the court affirmed his conviction, marking Raymond with the stigma that comes with being a felon and a rapist.¹⁸

Based on the wording in the statute, the prosecution needed to prove only that Raymond had sex with Erica while an age disparity existed to convict Raymond of the crime of statutory rape. Since the Maryland statute did not permit a defendant to argue that he or she made a mistake regarding the victim's age, Raymond could not defend against the charges by explaining how his disability made him more susceptible to being deceived and more disposed to believe what his friends had told him. Indeed, his guidance counselor had stated that he functioned socially as a child between the ages of eleven and twelve.¹⁹ The court even mentioned in its opinion that, "[a]rguably, had Raymond's chronological age, 20, matched his socio-intellectual age, about 12, he and Erica would have fallen well within the four-year age difference obviating a violation of the statute, and Raymond would not have been charged with any crime at all."²⁰

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*; see *Strict Liability*, BLACK'S LAW DICTIONARY (11th ed. 2019).

16. MD. CODE ANN. art. 27, § 463 (1957, 1992 repl. vol.).

17. *Id.*

18. *Garnett*, 632 A.2d. at 799, 805.

19. *Id.* at 798.

20. *Id.* at 800.

This Note argues that Raymond's case illustrates a scenario where justice was not served. The Maryland statute denied Raymond the ability to offer his intellectual disability as a mitigating factor in a crime that carried a high penalty. Indeed, crimes which do afford any consideration to a defendant's mental state typically carry small penalties or monetary fines.²¹ The statute applying to Raymond, however, could impose a maximum sentence of twenty years in prison, and label him as a felon and a rapist.²² Arguably, the scenario envisioned when drafting this statute involved a person who could appreciate the risks in having sex with someone who appears young and could understand the risk that the other person might misrepresent their age.²³

Raymond presents a foil for this scenario contemplated by legislators. Indeed, based on the factual findings in the case, one could even argue that Raymond is the victim. Taking into account Raymond's IQ level, Erica's misrepresentations that were reinforced by her friends, along with the increasing awareness about sexuality at younger ages, "there is every reason to question whether the victim was [Raymond], rather than [Erica]."²⁴ Raymond's case poignantly manifests how the law can unjustly punish people who may not genuinely possess criminal intent, are not a serious threat to society, and should be afforded an alternative punishment and rehabilitation opportunities.

This Note focuses on providing a solution to an Indiana statute that fails to properly account for individuals with intellectual disabilities. The issue in Raymond's case is not an isolated problem, but one that affects individuals with similar mental limitations. In particular, this Note focuses on examining Indiana's statute governing sexual misconduct with a minor, which is essentially Indiana's equivalent to Maryland's law in the *Garnett* case.²⁵ Indiana's statute poses problems for individuals with intellectual disabilities that are similar to the challenges Raymond faced in Maryland.²⁶ Although Indiana's statute provides a mistake of age defense, the language and application of the defense to defendants with intellectual disabilities is not adequate and fails to properly assess culpability relating to people who share Raymond's disabilities.²⁷

Raymond's case is a powerful, yet unfortunate illustration of the disproportionate punishment some statutes impose. Labeling someone a felon and a rapist for a crime that they could not appreciate or understand should not be accepted by society. Indiana's statute, although different from Maryland's, fails to adequately address how to assess culpability when someone like Raymond is involved. Indiana's legislature must implement wording into the statute to guard against disproportionately punishing individuals with an intellectual disability.

21. *Id.* at 806 (Eldridge, J., dissenting) (stating that such a high penalty for a strict liability crime is unusual and does not comport with typical public policy reasoning).

22. *Id.* at 799.

23. *Id.* at 807 (Eldridge, J., dissenting).

24. *Id.* at n.17 (Bell, J., dissenting).

25. *See* IND. CODE § 35-42-4-9 (2021).

26. *See generally id.*

27. *See* IND. CODE § 35-42-4-9(c) (2021).

More so, Indiana should adopt alternative punishment programs that appropriately punish individuals with intellectual disabilities by focusing on rehabilitation rather than retribution.

This Note advocates that Indiana has a duty to amend its statute governing sexual misconduct with a minor, and institute new adjudicatory and punitive procedures based off a diversion program adopted in the California Penal Code. Defining intellectual disability is crucial to understanding how to assess an individual's culpability. Grasping the limitations and challenges faced by individuals with intellectual disabilities will reveal why Indiana's current statutory language and punishment methods are harmful to their health and wellbeing.

Part II of this Note firmly establishes the effects of an intellectual disability on an individual. Complex sexual interactions further exacerbate the limitations and challenges individuals with intellectual disabilities grapple with daily. Further, this section emphasizes the lamentable treatment these individuals face once they become involved in the criminal justice system.

Part III identifies culpability as a paramount concept that shows why individuals with intellectual disabilities may face unjust punishment. This section also analyzes how Indiana treats individuals with intellectual disabilities under its sexual misconduct with a minor statute. This Note also analyzes multiple theories of punishment, revealing that punishing individuals with intellectual disabilities in certain contexts cannot be justified by any relevant theory. Finally, this Note proposes the solution that Indiana should adopt a diversion program derived from or similar to the California Penal Code. This program provides defendants with intellectual disabilities the opportunity to receive diagnoses and treatments from health professionals and alternatives to incarceration through placement in rehabilitation centers. The diversion program would, therefore, fill the gap that exists in the Indiana's statute.

Part IV concludes that Indiana must address the gap in its statute before it becomes a serious problem. To protect its residents, Indiana has a duty to adopt a diversion program in its statute to guard against the criminal justice system's continued abuse towards individuals with intellectual disabilities.

II. BACKGROUND

A. Establishing the Significant Limitations and Challenges Faced by Individuals with Intellectual Disabilities

Defining "intellectual disability" is imperative to understanding the exact population an amendment to Indiana's sexual misconduct with a minor statute would protect.²⁸ The latest edition of the Diagnostic and Statistical Manual of

28. The term "mental retardation" is antiquated and no longer used by mental health professionals. "Intellectual disability" is the common term used to describe some sort of cognitive limitation. However, much of the material that will be subsequently cited uses the former terminology (mental retardation). The quoted materials will be incorporated as they were at the

Mental Disorders (“DSM-5”) states that an intellectual disability is characterized by “deficits in general mental abilities, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience.”²⁹ These deficits in intellectual functioning naturally impair social and adaptive behavior as well.³⁰ For instance, an individual who suffers from an intellectual disability fails to meet standards of “personal independence and social responsibility” in their daily life.³¹ These limitations or failures in behavioral functioning include limited communication, difficulty in social participation, lack of personal independence, and significantly below average performance in academic or occupational domains.³²

Several criteria must be met before affirmatively diagnosing an individual with an intellectual disability.³³ Generally, an intellectual disability is a disorder that manifests in an individual’s developmental stage by clear deficits in both intellectual and adaptive behavior.³⁴ The DSM-5 lists three criteria that must be met to affirmatively diagnose an intellectual disability: (1) Deficiencies in intellectual functioning must be confirmed by clinical assessment and standardized intelligence testing catered to the individual; (2) deficiencies in adaptive functioning indicating a failure to achieve developmental and sociocultural standards which limits both personal independence and an individual’s ability to practice social responsibility; and (3) onset of these deficiencies must occur during the developmental period.³⁵ An intellectual disability, then, is a disorder that adversely affects an individual’s daily life in numerous ways.

Varying levels of severity exist on the spectrum of intellectual disabilities. According to the DSM-5, an intellectual disability’s severity is measured by evaluating adaptive functioning and not by IQ scores.³⁶ Adaptive functioning is more helpful in assessing intellectual disabilities because it more accurately identifies the support levels an individual requires, whereas IQ levels can be skewed by additional disabilities and are typically less reliable in the lower range

time they were written, but for consistency’s sake, “intellectual disability” will be the prevailing term used to address the issue this Note focuses on.

29. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS 31, (5th ed. 2013). First published in 1952, the DSM is widely considered by the health care community as an authoritative guide to understanding and diagnosing mental disorders. The DSM is in its fifth iteration. See *DSM-5: Frequently Asked Questions*, AM. PSYCHIATRIC ASS’N, <https://www.psychiatry.org/psychiatrists/practice/dsm/feedback-and-questions/frequently-asked-questions> [<https://perma.cc/9ZV4-T39E>] (last visited Feb. 10, 2022).

30. DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS, *supra* note 29.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 33.

35. *Id.*

36. *Id.*

of IQ scores.³⁷ Moreover, comorbidity is a significant factor that skews IQ results from accurately reflecting an individual's levels of intellectual and adaptive functioning.³⁸ The Centers for Disease Control and Prevention define comorbidity as a situation where multiple diseases or conditions exist simultaneously within the same person.³⁹ Therefore, "Clinical training and judgment are required to interpret test results and assess intellectual performance."⁴⁰

The DSM-5 contains graphic tables that illustrate and explain the four intellectual disabilities categories: mild, moderate, severe, and profound.⁴¹ These tables describe how individuals who fall into these categories function in the conceptual, social, and practical domains.⁴² For this Note's purposes, the focus will be specifically on individuals who suffer from a moderate intellectual disability.⁴³

A moderate intellectual disability affects an individual's development in the conceptual domain such that conceptual skills "lag markedly behind those of peers."⁴⁴ Indeed, this developmental impediment has lasting effects into adulthood. For an adult who possesses a moderate intellectual disability, academic skill is typically equivalent to a child in elementary school.⁴⁵ The DSM-5 states that ongoing assistance is required to help these individuals complete conceptual tasks in their daily life and even suggests that more competent family members or caretakers assume these responsibilities completely for the individual.⁴⁶

In the social domain, a moderate intellectual disability impedes the individual's ability to properly interact with others and understand social skills.⁴⁷ Despite these impediments, individuals can still form and maintain friendships, and even experience romantic relationships in adulthood.⁴⁸ However, significant

37. *Id.*

38. *Id.* at 37.

39. *Comorbidities*, CTR. DISEASE CONTROL & PREVENTION, https://www.cdc.gov/arthritis/data_statistics/comorbidities.htm [<https://perma.cc/EGG5-KQ44>] (last updated May 17, 2019).

40. DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS, *supra* note 29, at 37.

41. *Id.* at 33.

42. *Id.* at 35.

43. Moderate disabilities impose greater challenges on individuals than mild disabilities, but not as serious challenges as severe or profound disabilities. This Note focuses on the moderate category because it seems to be the "lowest" level that needs protection in statutes. Since severe and profound disabilities impose even greater limitations on adaptive and intellectual functioning, it follows that statutory amendments would apply to people who possess severe or profound levels of intellectual disabilities.

44. DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS, *supra* note 29, at 35.

45. *Id.*

46. *Id.*

47. *What is Intellectual Disability?*, AM. PSYCHIATRIC ASS'N (Aug. 2021), <https://www.psychiatry.org/patients-families/intellectual-disability/what-is-intellectual-disability> [<https://perma.cc/G3ND-RREF>].

48. DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS, *supra* note 29, at 35.

obstacles are present when an individual may be forming these relationships. Individuals who possess a moderate intellectual disability may not accurately interpret a social cue (such as consent) or may even fail to perceive a social cue altogether.⁴⁹ The DSM-5 states that, “social judgement and decision-making abilities are limited, and caretakers must assist the person with life decisions.”⁵⁰ Raymond’s story poignantly captures this point, demonstrating that limited social judgment clearly poses significant challenges for individuals navigating daily life and its vicissitudes.⁵¹ Since the DSM-5 suggests that individuals with an intellectual disability require assistance in very basic daily tasks, it follows that more complex tasks such as interpersonal interactions are even more difficult for such individuals.

B. Sexual Interactions: Another Layer of Difficulty in Adaptive Functioning

Human experience has shown very clearly that relationships can be difficult. Whether it be political disagreements, struggles between social classes, or simply personalities which are at variance with one another; human beings face challenges in their social interactions every day. Consequently, navigating interactions with others can require a certain level of self-awareness regarding the context in which someone might find themselves. For an individual with an intellectual disability, adapting to complex social interactions and situations is significantly hindered.⁵² Indeed, moderate intellectual disabilities impose difficulties associated with, “social judgment; assessment of risk; self-management of behavior, emotions, or interpersonal relationships.”⁵³

Sexual interactions add another layer of emotional, physical, and psychological complexity to human interactions.⁵⁴ Agustín Fuentes is a professor at Princeton University who holds a Ph.D. in Anthropology from the University of California, Berkeley, and wrote that sex is a “seriously complicated” act.⁵⁵ This complexity is played out in what Fuentes calls “a series of events and negotiations with hard to predict results.”⁵⁶ Within this complex framework of socio-sexual interaction, Fuentes elaborates that humans inevitably carry with them a host of personal characteristics and experiences into every potential sexual encounter.⁵⁷ These characteristics and personal elements include an individual’s exposure to

49. *Id.*

50. *Id.*

51. *Garnett*, 632 A.2d. at 799.

52. DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS, *supra* note 29, at 35.

53. *Id.* at 38.

54. See Agustín Fuentes, *Why is Sex So Complicated*, PSYCH. TODAY (Dec. 3, 2012), <https://www.psychologytoday.com/us/blog/busting-myths-about-human-nature/201212/why-is-sex-so-complicated> [<https://perma.cc/YLT4-VUSQ>] (explaining why basic and natural sexual interactions are so complex).

55. *Id.*

56. *Id.*

57. *Id.*

and understanding of sexual interactions, as well as factors such as age.⁵⁸ Indeed, Fuentes emphasizes that sexuality is a central part of human nature that influences “social intercourse,” and the mutual “exchanges of thoughts and feelings.”⁵⁹

Much to their detriment, individuals with intellectual disabilities face unique challenges that can lead to harmful sexual experiences, both for themselves and for others. On a natural level, research indicates that sex drive in individuals with intellectual disabilities is just as powerful as the sex drive in their peers.⁶⁰ Additionally, people with intellectual disabilities frequently receive no formal sexual education.⁶¹ Indeed, this insulation from sexuality leads to individuals with intellectual disabilities failing to acquire social skills and a “fear of and inexperience with independence.”⁶² Even more, a person with an intellectual disability frequently lacks a peer group and is limited to interactions with younger children, thus seizing from them the opportunity to learn about appropriate sexual behavior which “makes it more likely that all of his social interactions, including sexual ones, will be with his intellectual and social peers who may be significantly younger.”⁶³

The complex nature of sexual interactions is difficult for an individual like Raymond to grasp, which led to his unfortunate statutory rape conviction. Raymond’s case is disheartening because there is every reason to question whether Raymond was the victim as opposed to the criminal in this case.⁶⁴ Considering Raymond’s disability and Erica’s misrepresentation about her age—which was further reinforced to Raymond by Erica’s friends—one can conclude that Raymond’s naiveté and difficulty understanding social and sexual behavior caused him to be deceived. Without training, education, and age-appropriate exposure to sex, individuals with intellectual disabilities are more likely to act impulsively.⁶⁵ It leaves individuals like Raymond more susceptible to being misled, deceived, and exploited by people like Erica. This vulnerability can have severe impacts on an individual’s life, evidenced by Raymond being forced to carry the “felon” and “rapist” stigmas for the rest of his life.

58. *Id.*

59. *Id.*

60. Elizabeth Nevins-Saunders, *Incomprehensible Crimes: Defendants with Mental Retardation Charged with Statutory Rape*, 85 N.Y.U. L. REV. 1067, 1094 n.124 (2010) (citing John F. Simonds, *Sexual Behaviors in Retarded Children and Adolescents*, 1 J. DEV. & BEHAV. PEDIATRICS 173, 175 (1980)).

61. *Id.* at 1094.

62. *Id.* at 1095.

63. *Id.* at 1095-96.

64. *Garnett v. State*, 632 A.2d 797, 816 n.17 (Md. 1993) (Bell, J., dissenting).

65. *Sex and Intellectual Disabilities*, AM. PSYCH. ASS’N (Dec. 2017), <https://www.apa.org/monitor/2017/12/seeking-intimacy-sidebar> [<https://perma.cc/4F52-ULPK>].

C. Into the Depths: Prevailing Problems for Individuals with Intellectual Disabilities in the Criminal Justice System

Individuals with intellectual disabilities are not only mistreated by poorly written laws, but their plight continues in the abuse they receive from the criminal justice system.⁶⁶ Additionally, Raymond's case is not an isolated instance, for many individuals like him encounter unfair treatment that extends beyond simple mens rea or strict liability.⁶⁷ Individuals with intellectual disabilities suffer abuse and injustice from the very moment they encounter law enforcement to their subsequent hearings, adjudication, and sentencing.⁶⁸ The challenges for people like Raymond, therefore, permeate every phase of the criminal justice system. Before they even commit a crime, individuals with intellectual disabilities are frequently more predisposed towards criminal activity.⁶⁹ Children with intellectual disabilities are 3.4 times more likely to be abused than children without disabilities; this abuse contributes to higher crime rates by individuals with disabilities because many people who were abused sexually in childhood become sexual offenders later in life.⁷⁰ Indeed, the unfortunate reality is that "their experience as victims [is] linked to their later experience as offenders."⁷¹ These individuals not only suffer from increased likelihood of crime on a personal level, but they are also more vulnerable to being manipulated.⁷² Individuals with disabilities are "frequently used by other criminals to assist in law-breaking activities without understanding their involvement in a crime or the consequences of their involvement."⁷³ A common need and desire to feel accepted by others compounds their vulnerability which, in turn, often makes them agree to engage in criminal actions simply to cultivate friendships.⁷⁴

Even when these individuals are not involved in criminal action, they are more likely to arouse suspicion among law enforcement.⁷⁵ A primary way they engender suspicion is by unintentionally acting or responding to police officers in a way that can be easily misunderstood.⁷⁶ For instance, Ethan Saylor, a twenty-six-year-old man with Down Syndrome died from asphyxiation caused by police

66. See generally Leigh Ann Davis, *People with Intellectual Disabilities in the Criminal Justice System: Victims & Suspects*, ARC 1, 1 (June 2005), https://www.uwgb.edu/UWGBCMS/media/bhttp/files/ARC_DD_and_CJ.pdf [<https://perma.cc/KM4G-WGBS>].

67. See *Mens Rea*, BLACK'S LAW DICTIONARY (11th ed. 2019).

68. See generally *id.*; see also Robert Perske, *False Confessions From 53 Persons With Intellectual Disabilities: The List Keeps Growing*, 46 INTELL. & DEVELOPMENTAL DISABILITIES 468, 468-479 (2008).

69. Davis, *supra* note 66, at 1.

70. *Id.*

71. *Id.*

72. *Id.* at 2.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

officers when they tried to arrest him.⁷⁷ Saylor had just seen a movie with his caretaker when, after briefly exiting the theater, he decided he wanted to watch the movie again.⁷⁸ Saylor's mistake was that he failed to purchase a ticket for the second viewing.⁷⁹ After having the police called on him, Saylor was not cooperating and became extremely agitated when the officers tried to restrain him, even though his caretaker pleaded with the officers to let her handle the situation.⁸⁰ The officers used excessive force to subdue Saylor because, as his caretaker tried to explain, Saylor became severely panicky and uncooperative when touched.⁸¹ Tragically, the officers took Saylor to the ground and fractured cartilage in his larynx which caused him to suffocate.⁸² A simple miscommunication and lack of understanding by the officers resulted in his unnecessary death.

A key factor leading to lamentable stories like Saylor's is that, once individuals with intellectual disabilities encounter law enforcement, they typically default to certain behaviors.⁸³ These behaviors include trying to cover up their disability or not understanding their rights—even though they pretend to understand them—often because they are overwhelmed.⁸⁴ Unfortunately, these natural reactions exacerbate issues with police officers and lead to further injustice. Once they feel overwhelmed, these individuals tend to react hastily, rashly, and impulsively in the presence of police.⁸⁵ More often than not, individuals with intellectual disabilities simply say what the officers want to hear or even confess to a crime they did not commit out of confusion.⁸⁶

Corinthian Bell, a man diagnosed as “mentally retarded,” was accused of murdering his own mother.⁸⁷ After enduring over fifty hours of questioning by law enforcement, Bell finally confessed to the murder.⁸⁸ However, DNA evidence exonerated Bell and proved that another person was responsible.⁸⁹ By the time this evidence was produced, Bell had already spent seventeen months in jail.⁹⁰ Therefore, individuals with intellectual disabilities are susceptible to coercion, vulnerable to exploitation, and are made to suffer for their own difficulties in

77. David M. Perry, *Justice for Down Syndrome Man Who Died in Movie Theater*, CNN (Aug. 29, 2013, 12:24 PM), <https://www.cnn.com/2013/08/29/opinion/perry-down-syndrome-death/index.html> [<https://perma.cc/T9ET-GU5T>].

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. Davis, *supra* note 66, at 2.

84. *Id.*

85. *Id.*

86. *Id.*

87. Perske, *supra* note 68, at 469.

88. *Id.*

89. *Id.*

90. *Id.*

understanding. Through no real fault of their own, individuals with intellectual disabilities can be the unfortunate catalyst of their own arrest.

Once individuals with intellectual disabilities become involved in the criminal justice system, “[t]hese individuals are less likely to receive probation or parole and tend to serve longer sentences due to an inability to understand or adapt to prison rules.”⁹¹ Additionally, once in prison, individuals with intellectual disabilities are at a greater risk for being exploited and abused by both prison staff and their fellow prisoners.⁹² If an individual with an intellectual disability fails to understand an order, he or she is often “physically forced to comply.”⁹³ One man recounted an instance where he saw a fellow prisoner with mental health needs being thrown into a shower because the man failed to bathe when instructed.⁹⁴ An individual’s inability to grasp protocols or instructions due to difficulty processing information or anxiety can even lead to a disciplinary report.⁹⁵ In turn, these reports may then result in prolonged sentences or even solitary confinement.⁹⁶ Even more, solitary confinement has been shown to exacerbate intellectual disabilities.⁹⁷ The bleak reality is that these vulnerable individuals encounter severe threats to their personal health and safety at every stage throughout their sojourn in the criminal justice system.

Individuals with intellectual disabilities are simply more vulnerable to all the negative effects of the criminal justice system. Whether it be engendering police suspicion or not understanding their rights, these individuals need a safety net and legal protection. Indeed, even when justly convicted, these individuals are significantly more likely to suffer abuse and exploitation in prison. Indiana has not had to face this issue very often; however, the legislature has a duty to protect Indiana residents and must make changes before any major issues arise. Indiana stands in a position where it can enact more circumspect legislation, and provide alternatives to traditional incarceration before the abuse becomes even more prevalent among individuals with intellectual disabilities.

91. Davis, *supra* note 66, at 2.

92. Jennifer Sarrett, *U.S. Prisons Hold More Than 550,000 People with Intellectual Disabilities—They Face Exploitation, Harsh Treatment*, CONVERSATION (May 7, 2021, 8:44 AM), <https://theconversation.com/us-prisons-hold-more-than-550-000-people-with-intellectual-disabilities-they-face-exploitation-harsh-treatment-158407> [<https://perma.cc/C5R8-8WZ3>].

93. *Id.*

94. *Id.*

95. Jennifer Sarrett & Alexa Ucar, *Beliefs About and Perspectives of the Criminal Justice System of People with Intellectual and Developmental Disabilities: A Qualitative Study*, 3 SOC. SCI. & HUMAN. OPEN 1, 2 (2021).

96. *Id.*

97. Sarrett, *supra* note 92.

III. ANALYSIS

A. Culpability: The Core Factor in Assessing Guilt

To protect individuals with intellectual disabilities from unjust punishment, laws must be shaped to accurately assess an individual's fault. The age-old axiom, "[l]et the punishment fit the crime," drives right at the idea of culpability. Culpability is the foundation that undergirds criminal liability, for it is the conceptual term used to describe an individual's "moral blameworthiness."⁹⁸ The concept of culpability harkens back to what has been the "criminal law's mantra" for hundreds of years: "*Actus non facit reum nisi mens sit rea.*"⁹⁹ This timeless axiom translates to: "[a]n act does not make [the doer of it] guilty, unless the mind be guilty."¹⁰⁰ In practice, someone is not criminally culpable unless the government proves both the "actus reus" and the "mens rea" of a crime.¹⁰¹

The mens rea of a crime is especially important when crafting legislation that will take intellectual disabilities into consideration. As Raymond's case demonstrated, the issue raised on appeal was not whether Raymond performed the criminal act, but the extent to which Raymond's disability immunized him from culpability.¹⁰² Therefore, equitably prosecuting and punishing individuals with intellectual disabilities rests heavily on a statute's mens rea requirement.

The term mens rea is defined as, "the state of mind that that the prosecution, to secure a conviction, must prove that the defendant had when committing a crime."¹⁰³ So, mens rea is distinct from the specific criminal action a defendant performs and strictly addresses the defendant's mental disposition. Although mens rea has elicited some confusion as to its precise meaning, the term has essentially split into a broad definition and a narrower definition.¹⁰⁴ The broader definition describes mens rea as synonymous with personal blameworthiness; that is, the conditions pertaining to the criminal actor's mental state at the time that he or she is committing the crime.¹⁰⁵ This broad construction of mens rea reflects a somewhat subjective-leaning evaluation of culpability that, inevitably, is subject to ambiguity. The narrower definition attempts to limit the conception of mens rea to the mental elements prescribed by a statute.¹⁰⁶ While the former is more

98. *Culpability*, BLACK'S LAW DICTIONARY (11th ed. 2019).

99. JOSHUA DRESSLER & STEPHEN GARVEY, CRIMINAL LAW: CASES AND MATERIALS 157 (8th ed. 2019).

100. *Id.*

101. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 117 (7th ed. 2015). *See* DRESSLER & GARVEY, *supra* note 99 (for a discussion of actus reus). In rare cases, some crimes involve strict liability, *see Strict Liability*, BLACK'S LAW DICTIONARY (11th ed. 2019).

102. *Garnett*, 632 A.2d at 800.

103. *Mens Rea*, BLACK'S LAW DICTIONARY (11th ed. 2019).

104. Paul H. Robinson, *Mens Rea*, ENCYCLOPEDIA OF CRIME & JUSTICE 995, 995-96 (Joshua Dressler ed., 2d ed., 2002).

105. *Id.*

106. *Id.*

concerned with the mental state from a moral perspective, the latter perspective is more positivist.¹⁰⁷

One need not ascribe to either the broad or the narrow definition of mens rea to understand the rational underpinnings of its utility. The reason for adding a mens rea requirement to a statute is to ensure that laws do not punish innocent conduct, such as where a person commits a criminal act without criminal intent.¹⁰⁸

Moreover, if the goal is to protect ‘innocence’ by ruling out morally undeserved punishment, mens rea doctrine must do more than guarantee a modicum of moral blameworthiness as a precondition to punishment. It must also ensure that the acts which lead to criminal liability will be *sufficiently blameworthy* to deserve the sanctions imposed by the substantive offense. Only then will ‘innocence’ truly be protected against criminal liability, and the traditional role of mens rea fulfilled.¹⁰⁹

Mens rea, therefore, can be the fulcrum upon which guilt and innocence rest. Logically, mens rea requires efforts to examine and understand the defendant’s mind at the moment they committed the crime. To understand an individual’s mindset, consideration must be given to an individual’s intellectual disability when determining a defendant’s relative culpability. The Maryland statute denied Raymond that consideration, but Indiana must not make the same mistake and leave a gap in its sexual misconduct with a minor statute. If the goal is to equitably and fairly administer justice, mens rea is the means for bringing about a more comprehensive and circumspect approach to assessing crimes committed by someone who has an intellectual disability.

B. How Indiana’s Statute Neglects the Intellectually Disabled Population

Indiana’s statute governing sexual misconduct with a minor is not strict liability as it was in the *Garnett* case; however, the problem exists where the statute remains silent. The statute states in relevant part: “[a] person at least eighteen (18) years of age who knowingly or intentionally performs or submits to sexual intercourse or other sexual conduct...with a child less than sixteen (16) years of age, commits sexual misconduct with a minor, a Level 5 felony.”¹¹⁰ The offense is heightened to a Level 4 felony if committed by a person who is age twenty-one (21) or older.¹¹¹ The offense is further heightened to a Level 1 felony if committed:

By using or threatening the use of deadly force, if it is committed while armed with a deadly weapon, if it results in serious bodily injury, or if the commission of the offense is facilitated by furnishing the victim, without

107. Legal Positivism is defined as “The theory that legal rules are valid only because they are enacted by an existing political authority...not because they are grounded in morality or in natural law.” *Legal Positivism*, BLACK’S LAW DICTIONARY (11th ed. 2019).

108. Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 129 (2009).

109. *Id.* at 127-28.

110. IND. CODE § 35-42-4-9(a) (2021).

111. IND. CODE § 35-42-4-9(a)(1) (2021).

the victim's knowledge, with a drug . . . or a controlled substance...or knowing that the victim was furnished with a drug or controlled substance without the victim's knowledge.¹¹²

Unlike the statute in the *Garnett* case, Indiana's statute provides a defense based on mens rea if the defendant "reasonably believed" that the alleged victim was "at least sixteen (16) years of age at the time of the conduct."¹¹³ However, this defense is inapplicable if the crime was committed under the circumstances described in section (a)(2).¹¹⁴

Indiana's statute also provides two more defenses that are founded on specific status relationships the defendant may possess. The first provides a defense if the two individuals involved are married, and the second provides a defense if the age gap does not exceed four years and the individuals are in an ongoing relationship; however, both defenses are likewise nullified by the circumstances described in section (a)(2).¹¹⁵

Indiana's mens rea requirement does not adequately guard against disproportionately punishing an individual with an intellectual disability. In 2019, Indiana amended the statute to include "knowingly or intentionally" as the required mental element.¹¹⁶ In Indiana, "[a] person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so."¹¹⁷ Likewise, "[a] person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so."¹¹⁸ While this amendment may seem like a step that could help insulate people like Raymond from disproportionate punishment, the added mens rea is a somewhat hollow consolation to someone in Raymond's position. The issue was not that Raymond did not intend to have sex, but that he could not understand or be expected to understand that he may be criminally liable because Erica's age was not what she claimed it was. As discussed earlier, Raymond conceded that he and Erica engaged in voluntary sexual intercourse; his defense rested on the contention that his disability caused him to be deceived regarding Erica's age. Additionally, once intent to perform an action is proven or conceded, the "knowingly" element is satisfied as well.¹¹⁹ Indeed, attempting to envision a scenario where an individual did not know they were having sex or did not intend to have sex with a minor is likely quite rare.¹²⁰

112. IND. CODE § 35-42-4-9(a)(2) (2021).

113. IND. CODE § 35-42-4-9(c) (2021).

114. *Id.*

115. IND. CODE §§ 35-42-4-9(d), (e) (2021).

116. 2019 Ind. ALS 40, 2019 Ind. Acts 40, 2019 Ind. PL 40, 2019 Ind. SEA 551.

117. IND. CODE § 35-41-2-2(a) (2021).

118. IND. CODE § 35-41-2-2(b) (2021).

119. *Trevino v. State*, 428 N.E.2d 263, 267 (Ind. Ct. App. 1981) (holding that "intentionally" is the highest degree of culpability, and that "if conduct is engaged in 'intentionally,' it necessarily follows that it must be engaged in 'knowingly' also.").

120. For intent, extraordinary circumstances may exist where someone is forced to have sex

The pertinent aspect in Indiana's statute is the carve-out for a defense if the defendant "reasonably believed" that the victim was at least sixteen at the time the sexual activity occurred.¹²¹ The statute's reasonable belief defense, however, still does not fully shield a defendant from liability. "Knowledge of the victim's age is not an element of the crime;" therefore, a defendant asserting this defense "admits all the elements of the crime but proves circumstances which excuse the defendant from culpability."¹²² Although the wording may seem to indicate that an intellectual disability could serve as an exculpatory or mitigating factor because of a mistake of age, Indiana courts and additional statutes appear to indicate otherwise.

An intellectual disability is generally not a defense to a crime.¹²³ Indiana has statutorily defined an individual with an intellectual disability as someone who manifests, before the age of twenty-two, "significantly subaverage [sic] intellectual functioning" and "substantial impairment of adaptive behavior."¹²⁴ These requisite symptoms must also be "documented in a court ordered evaluative report."¹²⁵ Although this definition is consistent with the definition set forth in the DSM-5, in comparison, the statute's definition is extremely superficial and lacks description.¹²⁶ Having such vague elements required for a finding that someone has an intellectual disability does not give the court or juries much guidance on how to understand an individual's disability and, by extension, assess their culpability. What is more, the developmental disability statute is relevant only inasmuch as it operates in conjunction with the death penalty statute.¹²⁷

The relationship between intellectual disabilities and the death penalty stems from the United States Supreme Court's landmark decision in *Atkins v. Virginia*.¹²⁸ The issue in the *Atkins* case was whether the death penalty should ever be imposed on individuals with intellectual disabilities after Daryl Atkins suffered capital punishment.¹²⁹ Daryl Atkins was convicted of multiple crimes including abduction, capital murder, and armed robbery.¹³⁰ Atkins' defense relied

with a minor because of duress, but such scenarios are rare and not relevant to this Note. For the knowledge element, a possible defense to this element could be extreme drunkenness, or being under the influence of drugs; however, these scenarios are also not within the purview of this Note.

121. IND. CODE § 35-42-4-9(c) (2021).

122. *Moon v. State*, 823 N.E.2d 710, 715 (Ind. Ct. App. 2005).

123. 21 AM. JUR. 2D, *Criminal Law* § 35 (2022).

124. IND. CODE § 35-36-9-2 (2021).

125. *Id.*

126. *Compare id.* (discussing the limitations an intellectual disability imposes in the broadest sense), with DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS, *supra* note 29 (providing concrete examples and diagnostic measures to properly identify an intellectual disability).

127. *See* IND. CODE § 35-36-9-2 (notes to decisions) (formerly named the Mental Retardation Statute); *see also* *Rogers v. State*, 698 N.E.2d 1172, 1181 (Ind. 1998).

128. *See Atkins v. Virginia*, 536 U.S. 304, 306-307 (2002).

129. *Id.* at 307 (using the old label, "mental retardation," instead of intellectual disability).

130. *Id.*

on Dr. Evan's testimony, a forensic psychologist who testified that Atkins had an intellectual disability and concluded, after administering an IQ test, that Atkins had an IQ of 59.¹³¹ By way of comparison, Raymond had an IQ level of 52.¹³² Despite the expert testimony and the arguments raised to mitigate sentencing, the jury sentenced Atkins to death.¹³³ Upon appeal and review, the Supreme Court held that the death penalty would violate the Eight Amendment's Constitutional protection against "cruel and unusual punishment."¹³⁴

The Court's reasoning presented insightful considerations into how courts could apply punishment to individuals with intellectual disabilities, certain challenges faced by such individuals, and how justice is best served when these individuals do commit crimes. The opinion in *Atkins*, penned by Justice Stevens, specifically highlighted language used by two dissenting justices from the Virginia Supreme Court, Justice Hassell and Justice Koontz.¹³⁵ Both Justices believed applying the death penalty to Atkins was "excessive," especially because Atkins had the mental age of a child between the ages of nine and twelve.¹³⁶ Interestingly, Justices Hassell and Koontz seem to echo the concerns voiced by the court in Raymond's case discussed earlier.¹³⁷

The Court continued to adopt Koontz and Hassell's position, arguing that individuals with intellectual disabilities are necessarily, to some degree, less culpable for their actions.¹³⁸ "By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way."¹³⁹ The Court voiced further that, regarding an intellectual disability's impact on culpability, "[T]here is abundant evidence that [individuals with intellectual disabilities] often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders."¹⁴⁰ The Court is right on the mark, as the DSM-5 reinforces this very concern, "gullibility and lack of awareness of risk may result in exploitation by others and possible victimization, fraud, unintentional criminal involvement, false confessions, and risk for physical and sexual abuse. These associated features can be important in criminal cases. . . ."¹⁴¹ The United States Supreme Court has thus recognized some key aspects to intellectual disabilities that warrant more comprehensive evaluation.

One could argue that the Court is opening the door to unduly exonerating

131. *Id.* at 308-09.

132. *Garnett*, 632 A.2d at 798-99.

133. *Atkins*, 536 U.S. at 309.

134. *Id.* at 321.

135. *Id.* at 310.

136. *Id.*

137. *Compare id.*, with *Garnett*, 632 A.2d. at 800.

138. *Atkins*, 536 U.S. at 310.

139. *Id.*

140. *Id.* at 318.

141. DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS, *supra* note 29, at 38.

criminals from their bad actions and instituting an unfair deviation from the traditional standard of justice. The Court, wisely, tried to preempt any criticism by qualifying its rationale in saying that the deficiencies inherent in an intellectual disability “do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.”¹⁴² One can infer from the Court’s reasoning that lawmakers, judges, and juries should take notice that an intellectual disability is an essential aspect to consider when crafting laws and assessing proper degrees of punishment.

To help develop this thesis, the Court reviewed the general arguments for retribution and deterrence.¹⁴³ Regarding retribution, a punishment’s severity ought to be directly proportional to the offender’s culpability.¹⁴⁴ Proportionality is a timeless principle of the American criminal justice system and premised on the age-old axiom, “let the punishment fit the crime.” To assess culpability, though, an individual’s intellectual disability should be a natural and substantive factor in determining the severity of punishment. Furthermore, an intellectual disability can interfere with deterrence-focused goals because individuals struggle to adequately comprehend “the possibility of execution as a penalty and, as a result, control their conduct based upon that information.”¹⁴⁵

The Court’s reasoning in *Atkins* thoroughly analyzes the role intellectual disabilities play in assessing culpability and determining punishment. Indeed, *Atkins* indicates a significant shift in attitude towards intellectual disabilities in the law. The holding in *Atkins* signals a departure from a more rigid application of the law to a more holistic evaluation of personal culpability.

The *Atkins* decision may have been a monumental victory for the rights and protection of individuals with intellectual disabilities, but the United States Supreme Court has recoiled at taking the next step. How to assess the culpability of individuals with intellectual disabilities in non-capital cases has essentially been ignored.¹⁴⁶ Indeed, the Court has failed to recognize that intellectual disabilities be considered in any way in non-capital cases, either as a bar to punishment or even as a mitigating factor.¹⁴⁷ The decision whether to include intellectual disabilities into the discussion at all regarding guilt or proportional punishment is left to each jurisdiction.¹⁴⁸ As a result, individuals suffering from intellectual disabilities “can be sentenced to life without parole or other harsh mandatory sentences without an opportunity to present their mental condition as a mitigating factor that reduces their sentence.”¹⁴⁹

Indiana law has not changed much in response to the *Atkins* decision. In one

142. *Atkins*, 536 U.S. at 318.

143. *Id.* at 319-20.

144. *Id.* at 319.

145. *Id.* at 320.

146. Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1161 (2009).

147. *Id.*

148. *Id.*

149. *Id.* at 1161-62.

sense, though, Indiana was ahead of the game in terms of sentencing. In a 1998 case, four years before the United States Supreme Court decided *Atkins*, the Indiana Supreme Court held that sentencing a “mentally retarded” defendant to death *or* life without parole is prohibited.¹⁵⁰ However, the Indiana Supreme Court also held that, even where a defendant suffers from an inherited intellectual disability and has an IQ of 67, “low mental capacity is not a defense to a criminal charge.”¹⁵¹ Additionally, “the finding of mitigating factors is not mandatory but rests within the sound discretion of the court.”¹⁵² Therefore, in Indiana, the fate of an individual like Raymond who has an intellectual disability rests solely within the court’s discretion. Even where a court may find that an intellectual disability exists, “a finding concerning a defendant’s mental retardation determines only his or her eligibility for a particular criminal punishment.” Therefore, an intellectual disability cannot serve as a bar to conviction, and its purpose of mitigating sentencing is reduced to capital cases.

C. Lloyd v. State

Indiana’s statute remains silent on issues of intellectual disabilities¹⁵³; indeed, there is a dearth of Indiana cases addressing the issue of sexual misconduct that also include a discussion of intellectual disabilities. Many Indiana cases involve individuals with intellectual disabilities being the victims of sexual misconduct¹⁵⁴; however, only one Indiana case addresses the issue where the *defendant* is the one with an intellectual disability.¹⁵⁵ Although this single case is unpublished, precedential force is not the main concern. The case still helpfully illustrates how Indiana has applied the statute governing sexual misconduct with a minor.

Lloyd v. State is a case from 2008 where Chester Lloyd, a forty-four-year-old man, was arrested and charged with sexual misconduct with a minor.¹⁵⁶ Two psychiatrists examined Lloyd several months later (but before trial) and found that he was “mentally disturbed, interrupted by hallucinations, and seemed to respond to unseen stimuli.”¹⁵⁷ Additionally, the psychiatrists reported that he “failed to understand the scope of the charges against him, the role of many courtroom personnel, or the nature of courtroom proceedings.”¹⁵⁸ These behaviors generally track with the described limitations of an intellectual disability; that is, being unable to understand proper social functions and appreciate societal

150. *Rogers*, 698 N.E.2d at 1173.

151. *Hester v. State*, 512 N.E.2d 1110, 1112 (Ind. 1987).

152. *Magers v. State*, 621 N.E.2d 323, 324 (Ind. 1993).

153. *See* IND. CODE § 35-42-4-9 (2021).

154. *See generally, e.g., Mefford v. State*, 983 N.E.2d 232 (Ind. Ct. App. 2013); *Hamilton v. State*, 955 N.E.2d 723 (Ind. 2011); *Krumm v. State*, 793 N.E.2d 1170 (Ind. Ct. App. 2003).

155. *Lloyd v. State*, No. 79A02-0704-CR-356, 2008 Ind. App. Unpub. LEXIS 420, at *1 (2008).

156. *Id.* at *2.

157. *Id.* at *3.

158. *Id.*

expectations regarding the law.¹⁵⁹ Lloyd received treatment for his symptoms and stood trial several months later.¹⁶⁰ The trial court sentenced him to thirty-years at the Department of Correction, citing his lengthy criminal history as a justifying factor.¹⁶¹

Lloyd filed an appeal claiming that the trial court abused its discretion in sentencing because it did not consider his mental illness as a mitigating factor.¹⁶² The appellate court agreed that Lloyd's mental state should have been considered by the trial court as a mitigating factor.¹⁶³ The court took note that, during the interim period following the charges, and before he stood trial, a forensic psychologist reported Lloyd to be mentally retarded.¹⁶⁴ Indeed, the court stated in its own words, "with regard to the character of the offender, we note that Lloyd is mentally retarded...has low intellectual functioning, is illiterate, and hallucinates at times."¹⁶⁵ Despite the testimony of doctors and psychologists, results of testing while hospitalized, and the challenges that the court admitted Lloyd faced, the Indiana Court of Appeals affirmed Lloyd's maximum, enhanced sentence and the consecutive, presumptive sentence of ten years, amounting to a thirty-year confinement.¹⁶⁶ Furthermore, the appellate court offered only a minimal explanation for how it reached its decision. The main rationale, according to the court, was that Lloyd's criminal history and "failure to be rehabilitated" outweighed the impact his disability had on mitigating his culpability.¹⁶⁷

The appellate court's decision in *Lloyd* is concerning for multiple reasons, but primarily because the rationale provided does not adequately address the issue of intellectual disability. Although the court acknowledges that Lloyd's mental state should be weighed as a mitigating factor, its analysis focuses heavily on the aggravating circumstances.¹⁶⁸ Indeed, beyond listing Lloyd's diagnoses and symptoms, the court gives no indication that it considered how his mental state may have affected his culpability. Though the court did state that Lloyd's inability to rehabilitate was concerning, this fact should not have carried significant weight considering that learning from one's mistakes and understanding the consequences of one's actions are common limitations imposed by intellectual disabilities.¹⁶⁹

Lloyd highlights the knowledge, understanding, and experience lacking in Indiana's courts when evaluating intellectual disabilities. Arguably, should

159. See DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS, *supra* note 29, at 31.

160. *Lloyd*, 2008 Ind. App. Unpub. LEXIS 420, at *3.

161. *Id.* at *3-5.

162. *Id.* at *6.

163. *Id.* at *11-12.

164. *Id.* at *11.

165. *Id.* at *14.

166. *Id.*

167. *Id.* at *12-13.

168. See generally *id.* at *12-15.

169. DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS, *supra* note 29, at 31.

Indiana courts face another fact-pattern similar to *Garnett* or *Lloyd*, it would essentially be an issue of first impression. Since no cases exist in Indiana that squarely align with the issues presented in *Garnett*, Indiana's courts lack guidance on how to apply the current reasonable belief defense in Indiana's sexual misconduct with a minor statute to individuals with intellectual disabilities. This looming issue presents Indiana legislators with the opportunity to amend a statute in anticipation of a problem. What lawmakers need to recognize is the severely adverse effects individuals with intellectual disabilities suffer when involved in the criminal justice system—even when appropriately found guilty. The fact that individuals with intellectual disabilities suffer abuse from the criminal justice system and traditional punishment demands that statutory language account for intellectual disabilities.

The issue cannot be stressed enough. Data from the Centers for Disease Control and Prevention has indicated that rates of children being born with intellectual disabilities has been steadily increasing.¹⁷⁰ Intellectual disabilities are going to play a larger role in the criminal justice system, so preparation is crucial. As more information regarding mental health is discovered, and as people become more forthcoming about the actual challenges they face from their intellectual disabilities, all parties involved in the criminal process ought to be well-apprised of how to more equitably apply the principles of justice. Although it has not encountered issues yet outside of *Lloyd*, Indiana stands at a pivotal point in time where evolving and existing problems could be preemptively legislated for to avoid concerns about the inequitable application of justice. After all, at the most basic level, laws are meant to protect the innocent and punish the guilty.

D. Theories of Punishment Applied to Intellectual Disabilities

Lawmakers have the responsibility to write and enact laws that, by nature, carry with them various levels of punishment for people who violate these laws. Instinctively, most people believe that punishment should be proportional. To be sure, one can hope that Indiana legislators seek to achieve proportionality and justice in the laws they draft and the punishments those laws impose. However, no system is perfect, and an equitable application of justice is at the mercy of human fallibility.

Virtually no one disagrees that bad actions should be punished, that victims should be cured of their injuries, and that the common good should be protected. As these principles become applied to concrete situations, however, views quickly deviate. *How* to apply the principles of our criminal justice system is the perennial question affecting Indiana's legislators. Punishment is a critical aspect of lawmaking, though presumably the most unsavory. Punishment “intentionally inflicts pain on persons convicted of criminal conduct by taking their life, liberty,

170. Benjamin Zablotsky et al., *Estimated Prevalence of Children with Diagnosed Developmental Disabilities in the United States 2014-2016*, NAT'L CTR. HEALTH STAT. DATA BRIEF 1, 2 (2017).

and/or property.”¹⁷¹ Indeed, the quality and future of so many lives hinge upon this weighty affair.

Statutory language is the primary medium for codifying criminal behavior and the attendant consequences. “Lawmakers must ascertain not only what conduct is wrongful but must also determine who may properly be held accountable for the wrongful conduct.”¹⁷² Even more, “when punishment *is* deemed appropriate, legislators must decide *what* and *how much* punishment fits the offense and the offender.”¹⁷³ With such great power, lawmakers possess a duty to protect Indiana’s interests and the citizens whose lives their laws may impact. However, any system that intentionally inflicts suffering requires justification.¹⁷⁴

Two theories of punishment have emerged that essentially encapsulate the prevailing rationales for imposing punishment: retributivism and utilitarianism.¹⁷⁵ Each theory espouses a different focus when viewing how to assess punishment while also providing a different justification for their respective methods. Retributivism is more focused on past wrongdoing; a person who commits a crime deserves punishment merely because he or she committed that crime.¹⁷⁶ Understandably, retributivism is more backward-looking. The retributivist position mirrors a strict liability mentality because it focuses primarily on the actus reus rather than taking a defendant’s mental state into consideration.¹⁷⁷ In a sense, a retributivist seems to adopt the position of a legal positivist—if someone performs an action, and that action is forbidden by law, the inquiry is essentially complete.¹⁷⁸ Punishment becomes due.

Retributivists do face the question of “how much” when considering punishment, and the general consensus is that the punishment must be proportional to the crime.¹⁷⁹ Here, at least, retributivists make some qualification regarding a punishment’s severity. Arguably, this presents an opportunity to delve into the mens rea analysis. However, “a distinctive aspect of retributivism is that the moral desert of an offender is a *sufficient* reason to punish him or her...such

171. DRESSLER, *supra* note 101, at 11.

172. *Id.*

173. *Id.*

174. *Id.*

175. DRESSLER & GARVEY, *supra* note 99, at 34.

176. *Id.* at 35.

177. See *Strict-Liability Crime*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining strict liability as “an offense for which the action alone is enough to warrant a conviction, with no need to prove a mental state.”).

178. Legal Positivism is defined as, “The theory that legal rules are valid only because they are enacted by an existing political authority...not because they are grounded in morality or in natural law.” *Legal Positivism*, BLACK’S LAW DICTIONARY (11th ed. 2019).

179. DRESSLER & GARVEY, *supra* note 99, at 41 (citing MICHAEL S. MOORE, RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179-82 (Ferdinand Schoeman ed., 1987)).

moral desert [is] only a *necessary* condition of punishment.”¹⁸⁰ The theory does not seem to comprehend a situation where the actor, though he or she committed the illegal action, can be exonerated by mitigating circumstances—because the action occurred, someone must be punished.

Retributivist justifications, then, seem to pose dangers for individuals with intellectual disabilities who would attempt to demonstrate that they lack culpability by citing their mental limitations. Raymond’s case is a perfect example. Raymond was unable to use the factual findings in his case and the real limitations he faced from his disability to explain his actions or even mitigate his sentence. Under a retributivist view, Raymond performed the action, so he must be punished. The retributivist, however, neglects to consider a crucial distinction regarding punishment. Although the punishment imposed by a conviction of statutory rape may be proportional to the *crime*, it may not be proportional to the *person*. Herein lies the tragedy of Raymond’s case: a young man with Down Syndrome, deceived by a friend, was labeled a rapist and a felon and made to carry an even heavier burden than the one he was born with.

In contrast, utilitarianism is more forward-looking by being less concerned with the criminal actor and more focused on “the supposed benefits that will accrue” from imposing punishment.¹⁸¹ At first glance, this appears similar to the retributivist approach because, at least on its face, it fails to address any mens rea consideration. Utilitarianism does consider the individual, at least in some sense, as an individual’s good is tied to the overall benefits that accrue from punishment. One benefit includes general deterrence, since the knowledge and threat of impending punishment would seem to deter a reasonable person from committing that crime, thus “reducing future violations” and the suffering they cause.¹⁸²

Deterrence is somewhat twofold, as punishing an individual for a crime can serve to deter both the one punished and those who perceive that such actions will lead them to the same punishment. Therefore, punishing an individual, whose culpability is arguably mitigated (or even absent) because of his disability, may very well help deter others. For instance, a criminal with average intellectual and adaptive ability may conclude that, if someone with an intellectual disability can be convicted of such-and-such crime, then there is certainly a lesser chance for someone like himself to escape liability. However, does this deterrence argument have a similar effect on individuals who are intellectually disabled? Most likely not, as “learning from experience” is one of the primary limitations associated with intellectual disability.¹⁸³ Punishment as a means of deterrence is only helpful insofar as the individual can make the connection between performing a bad action and receiving punishment *because of* that bad action. Utilitarianism thus begs the question: should an individual with an intellectual disability be disproportionately punished merely to stop “normal” people—arguably more

180. *Id.* at 42.

181. *Id.* at 36.

182. Kent Greenwalt, *Punishment*, 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282, 1286-87 (Joshua Dressler ed., 2d ed. 2002).

183. DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS, *supra* note 29, at 33.

culpable and aware their actions are blameworthy—from committing the same crime? This apparent imbalance seems to undercut the utilitarian theory that punishment facilitates individual deterrence as well.

According to the utilitarian, punishment facilitates individual deterrence because, in theory, “the actual imposition of punishment creates fear in the offender... a penalty should be severe enough to outweigh in his [the offender’s] mind the benefits of the crime.”¹⁸⁴ This premise reveals a problem when applied to individuals with intellectual disabilities, because one’s disability often frustrates the goal; that is, to promote greater discernment when an individual is thinking about committing a crime. So, again, this benefit appears to gloss over possible exceptions to its theory such as individuals with intellectual disabilities.

The last social benefit conceived by utilitarianism is reform. “Reform is usually conceived as involving more positive steps to make offenders less antisocial by altering their basic character, improving their skills, or teaching them how to control their crime-producing urges.”¹⁸⁵ Conceptually, this plan seems practical and effective; however, an intellectual disability can severely hinder an individual from understanding the broader, future implications of punishment. Reform is probably the most realistic goal for individuals with intellectual disabilities, and probably a prerequisite step for achieving deterrence on the individual level.

Taking these theories of punishment into consideration, Indiana legislators must recognize that its sexual misconduct with a minor statute fails to provide for proportional evaluation and punishment of individuals with intellectual disabilities. Simply put, people like Raymond demand more individualized consideration than the broad, justifying principles espoused by retributivism or utilitarianism. Punishment, at the most fundamental level, must be fair in a society that values justice. Punishment is also necessary based upon human nature; consequences from actions generate a causal link between certain behavior and certain effects, thus creating a negative association within the individual and society regarding that behavior. Punishment—when applied properly—can be conducive to fostering a safe and secure society that promotes well-being. Equitable application is difficult but including intellectual disabilities into the analysis is essential to maintaining the integrity of the criminal justice system and of fairly administering justice. For the crime of sexual misconduct with a minor, a crime that carries lasting stigmas, statutory language must account for intellectual disabilities as a mitigating, or even exculpatory, factor in assessing an individual’s culpability and provide individuals with alternatives punishment.

E. Diversion: A Path to Equitable Punishment and True Rehabilitation

To protect its citizens from unjust punishment and potential abuse in the criminal justice system, Indiana should amend its sexual misconduct with a minor

184. Greenwalt, *supra* note 182.

185. *Id.*

statute to include a diversion program codified in the California Penal Code.¹⁸⁶ Despite the political climate in Indiana being staunchly conservative, and this proposed program hailing from a liberal state, the following solution ought to be a viable option for Indiana. Indeed, helping to more equitably administer justice, especially to Indiana residents who may not have the resources to advocate for themselves, should not be a politically charged issue. The proper administration of justice should know no political party.

In 1997, the Ninth Circuit decided a class action case brought by individuals with developmental disabilities who were incarcerated in various correctional facilities operated by the State of California.¹⁸⁷ The class alleged discriminatory treatment by the named correctional facilities based on the disabilities shared by its members.¹⁸⁸ By its decision, “The Court recognized [individuals with intellectual disabilities] are vulnerable to physical, sexual and verbal abuse, exploitation . . . and that they require accommodations from the usual routines of incarcerated life.”¹⁸⁹ The California legislature responded to this case and calls for criminal justice reform by instituting the diversion program included in the Clark Remedial Plan, a plan put together by the California Department of Corrections and Rehabilitation to facilitate a better environment for incarcerated individuals who possess various disabilities.¹⁹⁰

The Clark Remedial Plan—essentially a policy guideline assembled by the Department of Corrections and Rehabilitation to comply with the terms of the settlement in *Clark*—codified certain measures to address prison reform, thus providing correctional facilities with specific guidelines to streamline processes designed to help these individuals.¹⁹¹ First, facilities should proactively seek to identify individuals with disabilities so that they can provide adequate accommodations.¹⁹² Second, correctional facilities should provide proper education to incarcerated individuals on how to avoid recidivism and how better to mold their behavior to comply with the law.¹⁹³ In a similar vein, correctional

186. See generally CAL. PENAL CODE § 1001.22 (Deering 2022).

187. *Clark v. California Dep’t of Corr.*, 123 F.3d 1267, 1269 (9th Cir. 1997). (Although this case was brought by individuals with developmental disabilities, a developmental disability is simply a “broader category” that includes all intellectual disabilities, but also encompasses physical disabilities.). See NAT’L. INST. OF HEALTH, *About Intellectual and Developmental Disabilities (IDDs)*, <https://www.nichd.nih.gov/health/topics/idds/conditioninfo> [https://perma.cc/GTQ6-MAPB] (last updated Nov. 9, 2021).

188. *Clark*, 123 F.3d at 1269.

189. Jim Concannon, *Our Weakest Members: Developmentally Disabled People in the Criminal Justice System*, LEXIPOL (Feb. 13, 2019), <https://www.lexipol.com/resources/blog/developmentally-disabled-people-in-the-criminal-justice-system/> [https://perma.cc/3YLX-CL4G].

190. *Id.*; see generally *Clark*, 123 F.3d at 1267.

191. See generally *Clark Remedial Plan*, CAL. DEP’T OF CORR., <https://prisonlaw.com/wp-content/uploads/2020/01/Clark-v-California-CLARK-Remedial-Plan.pdf> [https://perma.cc/A3PX-T9EF].

192. Concannon, *supra* note 189.

193. *Id.*

facilities have a duty to protect inmates with disabilities from violence, abuse, and exploitation, as well as assist the inmates with their own self-care and hygiene.¹⁹⁴ The Clark Remedial Plan acknowledges the need for not just better treatment, but the need for efficacious rehabilitation.

Indiana’s legislature should amend its sexual misconduct with a minor statute by adding language similar to § 1001.22 of the California Penal Code to Indiana’s reasonable belief defense.¹⁹⁵ The penal code uses the phrase “diversion-related treatment and habitation” and defines such treatment as including “specialized services . . . directed toward the alleviation of developmental disability or toward social, physical, or economic habilitation or rehabilitation of an individual with a developmental disability.”¹⁹⁶ Some of these specialized services include diagnosis, professional evaluation, treatment, therapy, counseling, employment opportunities, and even domiciliary care and personal living arrangements.¹⁹⁷ Rather than let jury members or judges—who likely have only a minimal understanding of intellectual disabilities—determine culpability and what punishment is appropriate, the diversion program places the treatment of these individuals in the hands of experienced health professionals.

The application of this chapter of the penal code applies to any offense charged as a misdemeanor or a felony, with some exceptions (e.g., murder).¹⁹⁸ Diversion becomes an option when the court suspects that a defendant has a disability and the defendant subsequently consents to the program.¹⁹⁹ The code further provides the court with the power to refer the defendant, if consenting and found eligible, to a regional center where he or she would be evaluated to determine whether they qualify for certain treatments and/or habitation.²⁰⁰ The court then seeks input on this issue from the district attorney, the probation department and regional center, as well as the public defender, after which the court has the power to order diversion.²⁰¹

By adopting this program, Indiana would fill the gap in its sexual misconduct with a minor statute and guard against further abuse from the criminal justice system. This diversion approach is a net benefit for all parties involved. While crimes are still punished and the integrity of Indiana law is protected, the interests of individuals with intellectual disabilities are likewise protected, and they are held accountable for their actions in a way that protects their rights and rehabilitates them more effectively. Unlike Raymond’s case, this program acknowledges and appreciates the challenges individuals face from their disabilities. Therefore, Indiana should amend the statute on sexual misconduct with a minor to provide a diversion option should an individual qualify for

194. *Id.*

195. Compare IND. CODE § 35-42-4-9(c), with CAL. PENAL CODE § 1001.22 (Deering 2022).

196. CAL. PENAL CODE § 1001.20 (2022).

197. *Id.*

198. CAL. PENAL CODE § 1001.21 (Deering 2022).

199. CAL. PENAL CODE § 1001.22 (Deering 2022).

200. Concannon, *supra* note 189.

201. *Id.*

alternative treatment under the law pending an evaluation. Then, if diversion is appropriate, the individual would be placed in a facility most appropriate based off the recommendations of experienced mental health professionals, and justice would be truly proportional.

IV. CONCLUSION

Indiana should amend its statute governing sexual misconduct with a minor and institute new adjudicatory and punitive procedures to justly charge and punish individuals who possess intellectual disabilities. Since the Supreme Court's decision in *Atkins v. Virginia*, awareness of and concern for individuals with intellectual disabilities in the criminal justice system are rising. As evidenced by the *Garnett v. State* case, individuals who suffer moderate intellectual disabilities are not receiving just treatment under the law. Even more, the plight of individuals with intellectual disabilities continues throughout each step of the criminal process, especially once they are incarcerated. Because individuals with intellectual disabilities struggle with adaptive and cognitive functioning, they struggle to understand consequences and have difficulty controlling their natural impulses. Raymond Garnett is a prime example of someone who failed to understand the law, and his is not an isolated case. The somber reality is that Indiana's statute is written in such a way that it fails to account for intellectual disabilities and thus risks unjust prosecution and incarceration.

Indiana's statute governing sexual misconduct with a minor lack the necessary language to properly assess culpability for a violator who has an intellectual disability. Because intellectual disabilities pose new challenges and raise questions about an individual's culpability, additional language is needed in the statute to provide a better alternative for criminal evaluation and punishment. An intellectual disability does not necessarily make someone immune from liability by any means, but it certainly can play a mitigating role, especially when strong natural impulses like sex are part of the crime. The key issue is whether an individual with an intellectual disability truly appreciates the wrongfulness of his or her actions enough to warrant incarceration and even whether incarceration is the best option for punishment.

Indiana is poised to address the newer issue of intellectual disability and its place in the domain of punishment. Indiana should adopt the diversion program codified in the California Penal Code. This program allows for individuals to be diverted from traditional courtroom procedures so medical professionals can evaluate their disability. Furthermore, the program provides alternative rehabilitation locations so that these individuals can receive therapy, education, and even a place to live while serving their sentence. Although Indiana is a more conservative state and this program began in California, the health and well-being of some of Indiana's weakest members is not something to be politicized. Indiana stands in a position to positively and preemptively address the issues involved with intellectual disabilities and criminal punishment.