

INTELLECTUAL DISABILITY AND CRIMINAL RESPONSIBILITY

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DEFINITIONS [DSM-V]

- Onset during the developmental period.
- IQ below 70.
- Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.
- Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility.
- Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living.

WE ARE NOT TALKING, HERE, ABOUT LEARNING
DISABILITIES, AUTISM, OR OTHER
DEVELOPMENTAL DISABILITIES, NOR ABOUT
BRAIN INJURIES

A brain-injured person should have brain imaging plus an evaluation of their functional impairments by a neuropsychologist

A WORD ABOUT IQ

- The average IQ in the American population is 100. Fifty percent of the population falls between 90 and 110. [The average IQ for a range of professionals such as engineers, lawyers, psychologists, medical doctors, is 125.
- 80-90 is "Low Average."
- 70-90 is "Borderline."
- 55-70 is "mild"
- 35-55 is "moderate"
- 25-35 is "severe"
- 25 and below is "profound"

MILD INTELLECTUAL DISABILITY (55-70)

- **Conceptual Domain:** In adults, deficits in abstract thinking, executive functioning (i.e., planning, strategizing, priority-setting, and cognitive flexibility) and short-term memory, as well as functional use of academic skills. A concrete approach to problems and solutions compared with age-mates.
- **Social Domain:** Immature in social interactions. Difficulty accurately perceiving social cues. Language concrete or immature. Difficulty regulating emotion and behavior. Limited understanding of risk in social situations, social judgment is immature, and risk of being easily manipulated.
- **Practical Domain:** May need support with complex daily living tasks, such as child care, money-management, health care and work.

MODERATE INTELLECTUAL DISABILITY (35-55)

- **Conceptual Domain:** Conceptual skills have lagged markedly behind peers. In adults, academic skill development is typically at an elementary level and support is required for skills in work and personal life.
- **Social Domain:** Spoken language is simple. May not accurately interpret social cues. Social judgment and decision-making abilities are limited. Caretakers typically provide assistance with decisions.
- **Practical Domain:** Independence may be an issue. Employment tends to be in jobs that require limited conceptual and communication skills and support from co-workers or supervisors. Learning may require substantial repetition.

SEVERE INTELLECTUAL ABILITY (25-35)

- **Conceptual Domain:** Little understanding of written language or of concepts involving numbers, quantity, time, and money. Caretakers provide extensive support for problem-solving throughout life.
- **Social Domain:** Spoken language is very limited and concrete. Focused on the here and now. Very vulnerable to manipulation.
- **Practical Domain:** Requires support for all activities of daily living, including meals, dressing, bathing, and toileting. Cannot make responsible decisions regarding well-being of self or others. Skill acquisition in all domains involves long-term teaching and ongoing support.
- Another category called "Profound," but not likely to be involved in the criminal justice system because they are usually highly supervised.

- Individuals with ID do not grasp concepts at symbolic or abstract levels. This makes it hard for them to engage in a cost-benefit analysis of choices, or the logic of “if ____, then ____.” They may be unable to engage in moral reasoning. Their judgement is possibly impaired.
- They are inefficient learners, slow to learn new skills, and do not readily transfer learned skills to new setting. They have difficulty recognizing social cues, understanding the reactions of others, or comprehending their own role in relationship to others.
- They often exhibit a lack of agency. They are often dependent on others, eager to please, and easy to manipulate.

CAUSES?

- No common etiology.....Possible causes:
 - Inherited.
 - Conditions of birth, i.e., oxygen deprivation.
 - Early head injury (e.g., battered child syndrome)
 - Seizure Disorder
 - Down Syndrome
 - Fetal Alcohol Syndrome

HIGH RATES OF Co-MORBID CONDITIONS: PSYCHIATRIC,
SPEECH AND LANGUAGE, PHYSICAL ILLNESSES.

- Very few individuals with moderate-to-severe ID are found in the criminal justice system. Likely because of their high dependency and supervision by caregivers, their perceived lack of criminal intent by mental health and legal professionals, their diminished capacity to stand trial, and/or the poor likelihood of conviction.
- Numerous studies suggest that those caught up in the criminal justice system (CJS) tend to be individuals with mild to moderate ID or borderline IQ.

SPECIFIC VULNERABILITIES WITH LAW ENFORCEMENT

- Misreading social cues leading to inappropriate responses.
- Running from LE, or hiding.
- Smiling inappropriately.
- Becoming agitated or furtive.

RISK FACTORS...

- Male gender
- Psychosocial disadvantage
- Familial offending
- History of behavioral problems
- Unemployment
- Co-morbid mental health needs
- Poor coping strategies

INDIVIDUALS WITH ID "ARE THE LAST TO LEAVE THE SCENE,
THE FIRST TO GET ARRESTED, AND THE FIRST TO CONFESS."

...a California Sheriff's Deputy

PREVALENCE?

- Individuals with ID are 2-3% of the general population but 4-40% of the prison population, and there are similar numbers in jails and juvenile halls.
- But, 4-5 times higher risk of becoming victims of crime than those without ID.

WHY DO INDIVIDUALS WITH ID END UP IN THE CJS?

- Crimes may result from poor judgment, impulsivity.
- May be used by others to assist in law-breaking.
- May not understand the law or even right and wrong.

No “typical” crime for a person with ID.
Spans from misdemeanors to murder.



WHEN INTERROGATED....

Issues with Competence

- Difficulty understanding their rights.
- Difficulty understanding the legal process.
- Even more difficulty understanding written material.
- Embarrassed about their abilities, may say they understand.

Suggestibility

- More likely to be suggestible and acquiesce to statements made to them in interrogative interviews.
- Might be confused about who is responsible for the crime.
- Higher rate of false confessions.

MORE COMMON TO BE JUDGED NOT COMPETENT TO STAND
TRIAL THAN NOT CULPABLE: COMPETENCY IS THEREFORE
CRITICAL

COMPETENCE TO STAND TRIAL

- The Dusky Standard: Does the Defendant have sufficient present ability to consult with his/her lawyer with a reasonable degree of rational understanding, and a rational as well as factual understanding of the proceedings against him/her.
- Individuals with ID may understand the concrete aspects of court procedures, i.e., the judge's job, but may not be able to entertain more complicated concepts like plea bargains, or use abstract thinking to make rational decisions.
- Evaluations for CST may be done by those without sufficient training, or those who focus on the most concrete aspects of court procedures.

- For adults, Greenspan recommends the MacCAT-CA, published by PAR.
- For juveniles, I recommend the Juvenile Adjudicative Competency Interview (JACI)
- Restoration Programs may focus more on the most concrete aspects of competence.
- Individuals with ID may not be able to incorporate the new learning and memory required for “restoration.”

DEFENSES



- The Insanity Defense
- Self-Defense
- Imperfect Self-Defense
- Duress
- Diminished Capacity: Did not possess the requisite mental state
 - To form Intent
 - Ability to Premeditate/Deliberate

THE INSANITY DEFENSE

- Many states have abolished the American Law Institute standard, which was a standard that acknowledged cognitive limitations as well as deficits of emotional control, in favor of the M'Naghten Standard, which simply asks whether the defendant knew right from wrong. 17 states currently use some form of M'Naghten.
- In California, the "right"/"wrong" can be legal or moral. California uses the term "mental defect."
- Individuals with mild ID usually do know right from wrong, but may be convinced that a certain act is "right" or convinced by others to participate in an act.

LEGAL DEFINITIONS: “MENTAL DEFECT”

- California: Uses the term “defect”, for example in the Insanity Standard, where the language is “mental disease or defect,” and defines “defect” as “a condition not considered capable of either improving or deteriorating, and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease.”
- The District of Columbia Circuit applied the concept of “defect” to a defendant of subnormal intelligence “which includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.”
- Each state likely has its own definition.

SELF-DEFENSE AND IMPERFECT SELF-DEFENSE

- These may be relevant for defendants who have a history of victimization. Being a victim of, say, bullying, can cause a person to be hypervigilant to new danger or harm. [This is a symptoms of PTSD]. Such a person may act quickly to defend himself.
- Self-Defense: A reasonable (subjective and objective) belief in imminent harm and the need to defend oneself.
- Imperfect Self-Defense: A subjective belief in imminent harm and the need to defend oneself.

DURESS

- Duress may be an appropriate defense for an individual who gets involved with criminal “others,” and becomes afraid to resist their criminal intentions and actions.
- Reminder that individuals with ID are suggestible and easily manipulated.
- Each state likely has their own definition of “duress.”
- In California, there must be an imminent threat of harm.

DIMINISHED CAPACITY

- Each state likely has its own definition, and many states have abolished diminished capacity defenses (e.g, California substantially changed the law regarding diminished capacity some years ago).
- Generally: Evidence of a mental abnormality offered to show that a defendant was not capable of forming the necessary intent. Negates *mens rea*.
- Examples:
 - Premeditation and Deliberation, required for 1st degree murder. A person with ID may act impulsively and be unable to deliberate about the potential harm or the consequences of the crime.
 - Intent to kill: A person with ID might impulsively lash out, with no intent to kill.

“INTENT” REQUIRES:

- 1. Consciousness/Awareness: A rational understanding of social norms, awareness of one's actions, and understanding of potential risks of behavior. An understanding of cause and effect. The ability to consider situations from different viewpoints (abstract thinking).
- 2. Choice: The ability to determine whether to abide by social norms or violate them.
- 3. Control: The power to inhibit behavior and exercise independent judgement The power to withstand pressure from others.

THE FORENSIC EVALUATION

- **Document Review**
 - Audio/Video of Defendant's statement.
 - Police Reports(s) of the Incident.
 - Parent's Developmental History
 - School Records/ IEP Plans
 - Medical Records/Neurologist's Reports
 - Mental Health and Therapy Records
 - Previous Offenses/Records
 - Dependency Court Records, if any.
 - Custody Evaluation Report, if any.

May need multiple interviews or multiple hours.
Evaluator may not get most of her information from
the interview and will, instead, rely on records and
test results.



PSYCHOLOGICAL TESTING

- Cognitive Abilities
 - Wechsler Adult Intelligence Scale (WAIS-IV): surveys cognitive strengths and deficits and gives standardized scores for verbal comprehension, perceptual reasoning, working memory, processing speed, and gives an overall IQ, called the Full Scale IQ.
- Adaptive Abilities – Usually rated by a parent or informant.
 - Adaptive Behavior Assessment System (ABAS-III): Evaluates adaptive behavior in multiple areas, such as the practical, everyday skills required to function and meet environmental demands, communicate, and function socially.
 - Vineland Adaptive Behavior Scales (Vineland-3). Rates: Communication, Daily Living, Socialization, and Motor Skills, with subdomains.

Should clients with ID testify? May alienate jurors by smiling, sleeping, or staring, giving a false impression of callousness or lack of remorse.



CASE EXAMPLE

GOALS AND ETHICS FOR FORENSIC EXAMINERS IN ID

- To arrive at a diagnosis of ID that is soundly and empirically based.
- To explain in clear language what the diagnosis means for the functioning of the person.
- To dispel misimpressions of the individual, explain odd or troubling behavior.
- To help the trier of fact to appreciate how the ID symptomatology may have relevance for conduct, and how deficits may have impaired their insight about the impact of their behavior on others.
- To provide this information in a way which does not further demean or stigmatize the person.

THE DEATH PENALTY - ADKINS

- Adkins v. Virginia, Decided 2002.
 - Adkins and a co-defendant robbed and killed a man and took his car. Each blamed the other for the murder. Adkins was tested by a clinical psychologist who testified that he had an IQ of 59. Adkins was, nevertheless, convicted of armed robbery, abduction, and capital murder, and sentenced to death. The sentence was upheld by the Supreme Court of Virginia. It was then appealed to the U.S. Supreme Court.
 - The U.S. Supreme Court opined that the death penalty for individuals with ID violated the Constitution's 8th Amendment forbidding cruel and unusual punishments.
 - "By definition, the mentally retarded 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...They often act on impulse rather than pursuant to a premeditated plan, and in group settings, they are followers rather than leaders."

ADKINS.....

- “The possibility that the death penalty will be imposed is enhanced by the possibility of false confessions, (and) also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes....Mentally retarded defendants in the aggregate face a special risk of wrongful execution.”

- Hall v. Florida (2014). A determination of ID should not be made by an arbitrary IQ cut-off. Must consider errors of measurement in IQ tests, as well as measures of adaptive functioning.
- Moore V. Texas (2017). Consult with the American Psychological Association. A diagnosis of ID must rest on three things:
 - 1. Significantly subaverage intellectual functioning, typically measured by an IQ score roughly 2 standard deviations below the mean.
 - 2. Adaptive functioning deficits.
 - 3. Onset during childhood.
- Federal Court: In 1988, Congress enacted legislation reinstating the Federal death penalty, but it provided that the death sentence should not be carried out “upon a person who is mentally retarded.” The 1994 expanded Federal death penalty law again prohibited the death penalty for persons deemed “mentally retarded.”

IF INCARCERATED....

- High likelihood of being victimized in prison.
- More likely to serve longer prison sentence due to being impaired in ability to express remorse or insight.
- In prison, more likely to receive disciplinary infractions.
- More likely to serve longer prison sentences due to being impaired in ability to express remorse or develop “insight.”

OPTIONS

- California: Clark v. California 1997 >>> Penal Code 1001.20:
 - Defendants with a cognitive disability who commit a misdemeanor can be diverted.
 - The Court refers the defendant to the appropriate Regional Center for an evaluation about amenability to treatment.
 - Upon consultation with the District Attorney, Defense Attorney, and Probation, the Court determines whether diversion is appropriate.
- New Jersey: Developmentally Disabled Offenders Program
 - Created a liaison between the CJS and Human Services.

REFERENCE

- Nevins-Saunders, E. (2010). Not guilty as charged: The myth of *mens rea* for defendants with mental retardation. UC Davis Law Review.

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