

THE INSANITY OF GENIUS: CRIMINAL CULPABILITY AND RIGHT-TAIL PSYCHOMETRICS

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“[A]s a brute has no vice or virtue, so neither has a god; his state is higher than virtue, and that of a brute is a different kind of state from vice.”¹

INTRODUCTION

Suppose that on the day after Christmas, a man “goes postal” and kills seven victims in a workplace massacre.² Now suppose that at trial, the man pleads not guilty by reason of insanity, and recounts a fantastic story, claiming that he had been selected by the Archangel Michael to travel back in time, kill Hitler, and avert the Holocaust. Suppose that he tells the court that (after receiving three signs from Heaven) he was blown through a time portal to Berlin, 1940, and that the individuals he killed were not coworkers, but Hitler and six high-ranking Nazi officials. In exchange for saving tens of millions of lives, he claims, he was given a soul. Suppose that the man tells the court that after his mission, he died in a German police station and was now in Purgatory. The judge and the jurors in the courtroom, he claims, are automatons or demons; his parents, seated in the front row of the gallery, are not *really* his parents, merely constructs of his parents; his defense attorney is an archangel.

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¹ ARISTOTLE, *Nicomachean Ethics*, in *THE BASIC WORKS OF ARISTOTLE* 927, 1037 (Richard McKeon ed., W.D. Ross trans., 1941).

² All of these facts are drawn from the case of Michael McDermott. See *Commonwealth v. McDermott*, 864 N.E.2d 471, 475-82 (Mass. 2007); Court TV News, *Workplace Massacre Insanity Trial*, <http://www.courttv.com/trials/mcdermott/> (last visited Jan. 22, 2009) (briefly describing facts and offering links to CourtTV.com’s coverage of the case). They are presented as a hypothetical because Massachusetts is a jurisdiction without capital punishment and this Article focuses in large part upon the Supreme Court’s capital jurisprudence.

As a general rule, employing the insanity defense is risky.³ But suppose that the man also has another characteristic of penological importance: an intellectual quotient (“IQ”) score that is very rare. Suppose that his IQ score is 35 (a score so low that only one in 40,000 people score it). If so, he probably would not even have been deemed competent to stand trial and would have been excused for his crime. And even if he *does* stand trial, and even if he *is* found guilty of capital murder, an IQ score of 35 will shield him from execution.⁴ Now, though, suppose the man’s IQ is *not* 35. Suppose, instead, that it is 165 (a score so high that only one in 40,000 people score it). In such a case, even though his IQ is as far away from the norm as the man with an IQ of 35, the law affords him no special protection. A jury might very well find him guilty of all seven counts of first-degree murder, and a judge might impose the maximum penalty available.⁵ He might die for his crimes.⁶

Thus, there appears to be a strange relationship between IQ and culpability. If the man has an IQ of 35, he will be excused for his crimes because of his cognitive deficits. The man with an IQ of 165, however, will not be excused, even though his IQ is just as rare as an IQ of 35; for instead of being mentally retarded, he is a genius.⁷

For millennia, people have been fascinated by genius.⁸ Indeed, ancient Romans built shrines to the household gods (believed to be responsible for individuals’ fortunes) called *geniuses*. And while the definition of genius has evolved over time—variously denoting personal spirits, divine creative

³ See, e.g., *Holman v. Gilmore*, 126 F.3d 876, 883 (7th Cir. 1997) (“What little scientific data we possess implies that trying to persuade the jury that the accused is mentally ill is worse than no defense at all. . . . [I]f persuaded that the defendants are indeed nutty, jurors believe that death is the only sure way to prevent future crimes.”); see also *infra* note 355 (indicating that the insanity defense is rarely invoked and rarely successful).

⁴ See *infra* Part II.B (describing prohibition against execution of the mentally retarded). The McDermott killings took place on December 26, 2000. The Supreme Court did not decide that the Eighth Amendment prohibits the execution of mentally retarded offenders until 2002. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). But because of the mandatory appellate review of capital convictions required by *Gregg v. Georgia*, 428 U.S. 153, 206-07 (1976), even a death sentence imposed upon a mentally retarded defendant in 2001 would almost certainly be barred by *Atkins*.

⁵ This is what happened in the McDermott case. Rochelle Steinhaus, *Jury Rejects Insanity Claims, Convicts “Mucko” of First-Degree Murder*, COURT TV, Apr. 24, 2002, http://www.courtstv.com/trials/mcdermott/verdict_ctv.html. Of course, the court was presented with additional evidence suggesting that the symptoms of McDermott’s mental illness were malingered. See *McDermott*, 864 N.E.2d at 478 (describing internet searches and the purchase of a monograph on malingered).

⁶ Of course, Massachusetts does not have the death penalty. See Death Penalty Information Center, *Death Penalty Policy by State*, <http://www.deathpenaltyinfo.org/death-penalty-policy-state> (last visited Jan. 31, 2009). Accordingly, Michael McDermott was never eligible for execution.

⁷ See *infra* notes 70-73 and accompanying text (operationalizing genius at various IQ scores).

⁸ See Penelope Murray, *Poetic Genius and Its Classical Origins*, in *GENIUS: THE HISTORY OF AN IDEA* 9, 9-29 (Penelope Murray ed., 1989) (tracing origins of genius to ancient Greece and Rome).

energy, eminence, and intelligence—people have remained transfixed by the idea of divine traits existing in human beings.⁹

Today, when people speak of genius, they typically refer to intelligence. Until eugenics fell out of fashion after World War II, the study of intelligence was a cornerstone of mainstream social science.¹⁰ Superior intelligence was associated with health, wealth, and status, while inferior intelligence was associated with poverty, disease, and crime. Even after criminologists turned their attention from innate traits (such as intelligence) to social forces (such as poverty) in an attempt to explain the origins of crime, IQ scores remained a robust predictor of crime. Contemporary criminologists generally agree that offenders have an average IQ score of about 92, or eight points below the population average of 100.¹¹

Despite this strong relationship between IQ and offending, jurists rarely confront the subject of criminal IQ. Criminal cases rarely mention IQ and scholars rarely consider the issue. In 2002, however, the Supreme Court took up the case of *Atkins v. Virginia*¹² and held that the Eighth Amendment prohibits the execution of mentally retarded offenders.¹³ The Court held that the goals of punishment are not served by executing individuals with low IQ scores.¹⁴

This raises a perplexing question, however: Are the goals of punishment served by executing individuals with *high* IQ scores? Given that IQ scores are distributed in a bell curve pattern, and that individuals with borderline genius IQ scores are as divergent from the population average as individuals who are borderline mentally retarded, what kind of punishment is appropriate for the genius?

Genius offenders are uncommon, and little is known about the crimes of the gifted, but anecdotal evidence suggests that when high IQ offenders *do* commit crimes, they are often more dangerous and elusive than average offenders.¹⁵ How, then, to punish them? Should punishment be a threshold matter, in which a requisite quantum of understanding warrants equal punishment for all? Or should geniuses, perceiving faster and presumably knowing more, be punished more severely than average offenders? Or

⁹ See WILHELM LANGE-EICHBAUM, *THE PROBLEM OF GENIUS* 153-54 (Eden Paul & Cedar Paul trans., 1932) (“Man loves to feel himself incorporated in the tragically exalted image of the genius, just as in that of the god. In these images, the human spirit sees itself most splendidly reflected, grasps its own nature in the purest and most subtilised essence, and ardently experiences itself as holy.”).

¹⁰ See, e.g., STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 146-233 (1981) (describing twentieth-century America’s fascination with intelligence testing).

¹¹ See, e.g., Travis Hirschi & Michael J. Hindelang, *Intelligence and Delinquency: A Revisionist Review*, 42 AM. SOC. REV. 571, 581 (1977).

¹² 536 U.S. 304 (2002).

¹³ *Id.* at 321.

¹⁴ *Id.*

¹⁵ See *infra* Part II.A.

should geniuses, perhaps seeing the social world in a way that most individuals cannot fathom, be punished less?

The answer may depend on what kind of genius is being considered. Individuals with IQ scores high enough to provide an advantage over average people might deserve equal (or greater) punishment than those with average IQ scores. But those with stratospheric scores might not deserve punishment at all. They might be exculpated not because they are above mere human law, nor because geniuses necessarily suffer from madness, but because their cognitive “gifts” have sufficiently alienated them from prevailing social norms, rendering them functionally insane.

Part I of this Article outlines the structure of genius, describing the evolution of the idea, the development of IQ testing, and the relationship between IQ and madness. Part II describes the punishment of genius, what little is known about high IQ offenders, and the jurisprudence of mental defect, and outlines three alternatives for punishment of high IQ offenders. Part III discusses the madness of genius, showing that genius, like intelligence generally, exists across a spectrum, and that not all geniuses are created equal. Because profound intelligence may contribute to a socialization deficit, the genius with an IQ score on the far-right tail of the bell curve may view the nature and quality of their actions and/or the moral rightness of their actions in a way that renders them functionally insane under legal standards.

I. THE STRUCTURE OF GENIUS

Part I.A traces the evolution of the concept of genius, from guardian spirit to creativity to eminence to intelligence. Part I.B then describes the distribution of IQ scores and suggests that high scores may be sufficiently divergent from the mean in quantity that they exhibit qualitative differences. Just as low IQ scores can establish the requisite conditions for mental retardation, so might sufficiently high IQ scores lead to fundamental shifts in cognition.

A. *The Evolution of Genius*

Rooted in antiquity, the definition of genius has evolved over time.¹⁶ The Oxford English Dictionary provides seven interrelated definitions, all related to four qualities, each associated with notions of divine dispensa-

¹⁶ See J.C. Oleson, *The Evolution of the Concept of Genius*, 12 TELICOM 14 (1998) (tracing the evolution of genius through four definitions); see also GEORGE BECKER, *THE MAD GENIUS CONTROVERSY* 21-53 (1978) (tracing the history of the concept of genius); H.J. EYSENCK, *GENIUS: THE NATURAL HISTORY OF CREATIVITY* 11-46 (1995) (same); Murray, *supra* note 8, at 9-29 (same).

tion, that appear to govern the fate of individuals: spirit, creativity, eminence, and intelligence.

1. Genius as Spirit

Homer described any supernatural force that was not Olympian gods as a *daimon* (δαίμων);¹⁷ similarly, Plato described *daimones* both as intermediaries between men and gods and as guardian spirits allotted to each man at birth. For example, in the *Apology*, Socrates referenced a *daimonion* that occasionally spoke to him, guiding him in decisionmaking.¹⁸ This version of the *daimon* most resembles the Roman *genius*, the procreative spirit of paternal ancestry allotted to each Roman man at the hour of his birth.¹⁹ The concept was expanded later so that *genius* referred to a procreative spirit who determined both a man's character and his accomplishments. Every man had a *genius*, which acted upon him as an external agent.

2. Genius as Creativity

The idea of the *genius* as an external force was influential in formulating Renaissance and romantic conceptions of genius. For more than a thousand years, the idea of *genius* was abandoned. Early Christians had interpreted *daimones* as demons.²⁰ Indeed, not until the arrival of the Italian Renaissance was there renewed interest in the exceptional individual. The Florentine Marsilio Ficino popularized the notion of *genios*, men of exceptional creative ability who became known both for their talents and their *pazzia*.²¹ Around this same time *genius* was linked to creativity, an association that endures today.²² Creative *pazzia*, loosely interpreted as insanity, drew from two classical sources: Plato's idea of divine madness²³ and Aristotle's notion of melancholia.²⁴

¹⁷ See Murray, *supra* note 8, at 27 (describing Homeric conception of *daimon*).

¹⁸ PLATO: THE COLLECTED DIALOGUES 17 (Edith Hamilton & Huntington Cairns eds., 1989).

¹⁹ See BECKER, *supra* note 16, at 21-22 (describing Roman view of *genius*).

²⁰ See, e.g., BARBARA G. WALKER, THE WOMAN'S ENCYCLOPEDIA OF MYTHS AND SECRETS 221 (1983).

²¹ See BECKER, *supra* note 16, at 24.

²² See, e.g., ROBERT ROOT-BERNSTEIN & MICHÈLE ROOT-BERNSTEIN, SPARKS OF GENIUS: THE THIRTEEN THINKING TOOLS OF THE WORLD'S MOST CREATIVE PEOPLE 27-28 (1999) (associating creativity and *genius*); HAROLD BLOOM, GENIUS: A MOSAIC OF ONE HUNDRED EXEMPLARY CREATIVE MINDS 7 (2002) (same); EYSENCK, *supra* note 16 (same).

²³ In the *Phaedrus*, Plato argued that man's greatest blessings come through four varieties of divine madness: Apollo's prophetic madness; Dionysus' ritual madness; the Muses' poetic madness; and the erotic madness of Aphrodite and Eros. Plato wrote:

There is a third form of possession or madness, of which the Muses are the source. . . . But if any man comes to the gates of poetry without the madness of the Muses, persuaded that skill

Pazzia, in linking Platonic possession-states to Aristotelian melancholia, forged an enduring relationship between the concepts of genius and madness. George Becker suggests that these Renaissance geniuses remained fundamentally rational.²⁵ While there was something indeed irrational about the generative powers of genius, it was generally agreed that the mind's power of judgment restrained the imagination from real madness.

With the ascendance of the Romantic Movement, however, the central role of reason was usurped by the irrational imagination. Originality supplanted reason as the chief attribute of the great man.²⁶ Men no longer venerated the sage, but glorified the poet.²⁷ Scientists, viewed as mere calculators, were no longer regarded as geniuses, but artists were hailed for their madness by a kind of ecstatic *geniekult*.²⁸

Later, inspired by the work of Charles Darwin, nineteenth-century researchers of genius began to apply evolutionary concepts to their investigations. Cesare Lombroso claimed that genius could be traced to the same degenerative organic causes that were responsible for madness or idiocy.²⁹ Lombroso believed that the genius was an *atavism*, an evolutionary throwback to a more primitive form. Degeneration theorists and their opponents continued to debate the sanity of genius through the 1940s.³⁰

alone will make him a good poet, then shall he and his works of sanity with him be brought to naught by the poetry of madness

PLATO: THE COLLECTED DIALOGUES, *supra* note 18, at 492.

²⁴ Aristotle drew from Plato's idea of divine madness, explaining the ecstatic inspiration of the poet in terms of shifts within the four Hippocratic humours. Murray, *supra* note 8, at 20 ("[T]hose who are full of hot black bile become frenzied (*manikoi*) or brilliant (*euphuesis*) or amorous or easily moved to anger and desire, and some become more talkative. Many too, if this heat approaches the seat of the intellect, are affected by fits of frenzy or possession . . .").

²⁵ BECKER, *supra* note 16, at 26.

²⁶ See Neil Kessel, *Genius and Mental Disorder: A History of Ideas Concerning Their Conjunction*, in GENIUS: THE HISTORY OF AN IDEA 197 (Penelope Murray ed., 1989) (describing romantics' emphasis on originality).

²⁷ See THOMAS CARLYLE, ON HEROES, HERO-WORSHIP & THE HEROIC IN HISTORY 67 (Norman & Charlotte Strouse ed., Univ. of Cal. Press 1993) (1876).

²⁸ See, e.g., BECKER, *supra* note 16, at 28. Becker explains that "[u]nlike the neoclassical inquiries into genius, which were rooted in the notion of an exacting science of human nature ('Genielehre'), the Romantics' pronouncements, as set forth by Coleridge, Shelly, and others, inevitably led to . . . [an] ecstatic celebration of genius." *Id.* at 27-28. The romantic emphasis on creativity, spontaneity, and intuition, coupled with the disinterest in judgment, knowledge, and memory, strengthened the association between genius and madness. *Id.* at 28.

²⁹ See CESARE LOMBROSO, THE MAN OF GENIUS, at vi (1891) ("Just as giants pay a heavy ransom for their stature in sterility and relative muscular and mental weakness, so the giants of thought expiate their intellectual force in degeneration and psychoses.").

³⁰ See BECKER, *supra* note 16, at 30 (noting that the mad genius debate abated after World War II).

Belief in a link between creative genius and mental illness endures, and research in this area continues.³¹ Adele Juda conducted a study of 113 German artists, architects, composers, writers, and their relatives, reporting that artists and their first-degree relatives had higher rates of psychiatric abnormality than would be normally expected.³² N.C. Andreasen examined thirty creative writers and found elevated rates of mood disorders.³³ While only 1 percent of the general population suffers from manic-depression, 3 percent from cyclothymia (a mild form of manic-depression), and only 5 percent from major depression, 80 percent of Andreasen's writers had experienced one or more episodes of major depression, mania, or cyclothymia.³⁴ Similarly, Kay Redfield Jamison found that artists experience up to eighteen times the suicide rate of the general population, eight to ten times the rate of depression, and ten to forty times the rate of manic-depression and cyclothymia.³⁵

3. Genius as Eminence

The same preoccupation with evolution that led scholars of genius to degenerationist theories led other researchers in a different direction: eminence. Some contemporary scholars still equate genius with greatness.³⁶ Francis Galton, Darwin's second cousin, published *Hereditary Genius* in 1869.³⁷ It differed from earlier works on genius by applying statistical analyses instead of mere biographical accounts.³⁸

Galton made three interrelated claims. First, he suggested that people varied in terms of their mental abilities: at one end of the intellectual distribution are the very dull, while at the other end of the spectrum are the superior, those he described as geniuses.³⁹ Second, he suggested that the genius

³¹ See, e.g., ARNOLD M. LUDWIG, *THE PRICE OF GREATNESS: RESOLVING THE CREATIVITY AND MADNESS CONTROVERSY*, at v (1995) (reviewing research relating creativity and madness).

³² See Adele Juda, *The Relationship Between Highest Mental Capacity and Psychic Abnormalities*, 106 AM. J. PSYCHIATRY 296, 296-99 (1949).

³³ See Nancy C. Andreasen, *Creativity and Mental Illness: Prevalence Rates in Writers and Their First-Degree Relatives*, 144 AM. J. PSYCHIATRY 1288, 1288-89 (1987).

³⁴ See *id.* at 1289.

³⁵ See KAY REDFIELD JAMISON, *TOUCHED WITH FIRE* 88-89 (1993) (reporting elevated rates).

³⁶ See, e.g., GENE N. LANDRUM, *PROFILES OF FEMALE GENIUS: THIRTEEN CREATIVE WOMEN WHO CHANGED THE WORLD* 21 (1994); DEAN KEITH SIMONTON, *GREATNESS: WHO MAKES HISTORY AND WHY* 19 (1994).

³⁷ See FRANCIS GALTON, *HEREDITARY GENIUS: AN INQUIRY INTO ITS LAWS AND CONSEQUENCES* (Prometheus Books 2006) (1869).

³⁸ VICTOR SEREBRIAKOFF, *MENSA: THE SOCIETY FOR THE HIGHLY INTELLIGENT* 171 (1985) ("Galton was the first in the field of individual psychology, as he put it, 'To treat the subject in a statistical manner and arrive at exact numerical results.'").

³⁹ See GALTON, *supra* note 37, at 39 ("[E]minently gifted men are raised as much above mediocrity as idiots are depressed below it . . .").

would emerge, almost without exception, to achieve distinction.⁴⁰ Third, he suggested that these natural abilities were heritable, and that genius ran within families.⁴¹

He sought to demonstrate his thesis by examining the pedigrees of almost one thousand geniuses (those who have accomplished what only one in four thousand can hope to achieve) that he had selected from dictionaries and encyclopedias based on the space allotted to them. Those who distinguished themselves by accomplishing the most, Galton reasoned, would have the most extensive encyclopedia entries. The space devoted to describing their achievements would be a reliable indicator of their eminence (their genius).⁴² Galton then looked at their relatives, assessing the likelihood that an eminent individual would be related to another eminent individual. He demonstrated that the more eminent an individual was, the more likely he was to have eminent relatives.⁴³ Assuming four sons born to each of the population, “the chances that the son of a genius will himself be a genius will be 129 times as great as that of a parent chosen at random.”⁴⁴ Galton attributed the eminence of genius to three requisite factors: capacity, zeal, and the innate tendency to work hard.⁴⁵

⁴⁰ See *id.* at 41 (“If a man is gifted with vast intellectual ability, eagerness to work, and power of working, I cannot comprehend how such a man should be repressed.”).

⁴¹ See *id.* at 42 (“[S]ocial advantages are incompetent to give that status [eminence] to a man of moderate ability.”). While Galton focused on the inheritance of the qualities associated with genius, other researchers focused on traits associated with crime and degeneracy. See Sheldon H. White, *Intelligence Testing in Historical Perspective: Conceptual Foundations of IQ Testing*, 6 PSYCHOL. PUB. POL’Y & L. 33, 36-37 (2000) (“While Francis Galton in England was finding family connections to show that genius breeds true, Richard Dugdale (1879) was publishing his celebrated study of the Jukes to show that crime, pauperism, and disease were all associated in one family tree.”).

⁴² The same view was embraced by Catharine Cox, in her historiometric contribution to Terman’s longitudinal study of genius. Using encyclopedic entries and other documentation, she assessed the IQ of 301 historic figures. CATHARINE M. COX, GENETIC STUDIES OF GENIUS, VOLUME II, THE EARLY MENTAL TRAITS OF THREE HUNDRED GENIUSES 4 (1926). She noted that “in general great eminence is coincident with great genius . . .” *Id.* at 20-21. She suggested that while “[a] certain number of those who simulate the qualities of great men win temporary recognition,” the selectivity of history distinguishes those of true genius from those who were merely popular. *Id.* at 20.

⁴³ See GALTON, *supra* note 37, at 290 (showing frequencies of eminent relations).

⁴⁴ SEREBRIAKOFF, *supra* note 38, at 171.

⁴⁵ GALTON, *supra* note 37, at 39 (“I do not mean capacity without zeal, nor zeal without capacity, nor even a combination of both of them, without an adequate power of doing a great deal of very laborious work. But I mean a nature which, when left to itself, will, urged by an inherent stimulus, climb the path that leads to eminence, and has strength to reach the summit—one which, if hindered or thwarted, will fret and strive until the hindrance is overcome, and it is again free to follow its labour-loving instinct.”). More recently, it has been suggested that physiological factors that explain the desistance of crime over the lifespan may also explain the decline in the productivity of genius. See Satoshi Kanazawa, *Why Productivity Fades with Age: The Crime-Genius Connection*, 37 J. RES. PERSONALITY 257, 269-70 (2003) (associating both crime and genius to fluctuations in testosterone levels that “turn off” once males marry and have children).

In studying genius, other scientists have adopted Galton's method. James McKeen Cattell ranked the top one thousand eminent people by measuring the space their biographical entries filled in American, English, French, and German biographical dictionaries.⁴⁶ Havelock Ellis drew 1,030 subjects from the Dictionary of National Biography.⁴⁷ Michael Hart compiled a list of history's one hundred most influential persons,⁴⁸ using eminence as an index of their influence. Mildred George Goertzel, Ted George Goertzel, and Victor Goertzel described the traits of three hundred eminent people,⁴⁹ and Dean Keith Simonton used historical data to establish relationships between a variety of personal factors and achieved eminence.⁵⁰

4. Genius as Intelligence

Scientific efforts to empirically measure genius also characterize the fourth, and most common, view of genius: exceptional intelligence.⁵¹ The modern fascination with intelligence began with the formulation of the Binet-Simon intelligence scale in 1905.⁵² In 1916, Lewis Terman published the American version of the Binet-Simon scale, the very influential Stanford-Binet.⁵³ One year later, Terman used documentary materials to com-

⁴⁶ James McKeen Cattell, *A Statistical Study of Eminent Men*, 62 *POPULAR SCIENCE MONTHLY* 359, 361-62 (1903).

⁴⁷ HAVELOCK ELLIS, *A STUDY OF BRITISH GENIUS 1-9* (2d ed. 1927).

⁴⁸ MICHAEL H. HART, *THE 100: A RANKING OF THE MOST INFLUENTIAL PERSONS IN HISTORY* (2d ed. 1992).

⁴⁹ MILDRED GEORGE GOERTZEL ET AL., *THREE HUNDRED EMINENT PERSONALITIES: A PSYCHOSOCIAL ANALYSIS OF THE FAMOUS passim* (1978).

⁵⁰ SIMONTON, *supra* note 36, at 142-79.

⁵¹ Of course, intelligence testing is a controversial subject. *See, e.g.*, RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE 1* (1994) (“[F]or the last thirty years, the concept of intelligence has been a pariah in the world of ideas. The attempt to measure it with tests has been variously dismissed as an artifact of racism, political reaction, statistical bungling, and scholarly fraud.”); *THE BELL CURVE DEBATE: HISTORY, DOCUMENTS, OPINIONS*, at xii (Russell Jacoby & Naomi Glauberman eds., 1995) (challenging the premises and conclusions of Herrnstein and Murray's book). While some psychologists such as Charles Spearman believe in a general intelligence (“g”) that relates to all intellectual abilities and is reducible to a single value (like IQ), others such as Howard Gardner and Robert Sternberg believe in multiple intelligences. *See* Ulric Neisser et al., *Intelligence: Knowns and Unknowns*, 51 *AM. PSYCHOLOGIST* 77, 78-79 (1996). The psychometric approach to intelligence, which is the dominant approach among theorists, posits a manifold ability like general intelligence with specialized abilities that relate to it. *Id.* at 77-79, 95-97.

⁵² *See* ALFRED BINET & THÉODORE SIMON, *THE DEVELOPMENT OF INTELLIGENCE IN CHILDREN passim* (Elizabeth S. Kite trans., 1916) (describing creation of the Binet-Simon test).

⁵³ *See* LEWIS M. TERMAN, *THE MEASUREMENT OF INTELLIGENCE: AN EXPLANATION OF AND A COMPLETE GUIDE FOR THE USE OF THE STANFORD REVISION AND EXTENSION OF THE BINET-SIMON INTELLIGENCE SCALE passim* (1916). The Stanford-Binet has been an enduring and influential test. ARTHUR R. JENSEN, *BIAS IN MENTAL TESTING* 143 (1980) (“The Stanford-Binet has been translated and

pare Galton's accomplishments against the accomplishments of normal children of his age, concluding that Galton had a childhood IQ approaching 200.⁵⁴ These two projects, the Stanford-Binet and the historiometric assessment of Galton's IQ, laid the foundation for Terman's five-volume *Genetic Studies of Genius*.⁵⁵ Commencing in 1921, the study continues to this day.⁵⁶

Setting out to challenge the stereotype of the neurotic genius,⁵⁷ Terman selected 1,440 genius California schoolchildren with IQs of 135 or greater.⁵⁸ In 1925, he published *Mental and Physical Traits of a Thousand Gifted Children*, concluding that geniuses are actually more popular, healthy, and accomplished than average children.⁵⁹

In 1928, Terman added fifty-eight new subjects, siblings of his original geniuses, raising the total number to 1,528: 857 boys and 671 girls.⁶⁰ They were studied throughout their lives, for more than thirty-five years. Although the study did not reveal a single genius of the caliber of an Einstein or a Picasso, the group accomplished an impressive amount. More than 85 percent started college, and almost 70 percent graduated (ten times

adapted in many countries throughout the world. For more than half a century it has been the most widely used individual test of intelligence.”)

⁵⁴ See Lewis M. Terman, *The Intelligence Quotient of Francis Galton in Childhood*, 28 AM. J. PSYCHOL. 209, 209 (1917) (estimating Galton's IQ).

⁵⁵ LEWIS M. TERMAN ET AL., GENETIC STUDIES OF GENIUS, VOLUME I, MENTAL AND PHYSICAL TRAITS OF A THOUSAND GIFTED CHILDREN (1925) [hereinafter TERMAN ET AL., VOLUME I]; COX, *supra* note 42; BARBARA S. BURKS ET AL., GENETIC STUDIES OF GENIUS, VOLUME III, THE PROMISE OF YOUTH: FOLLOW-UP STUDIES OF A THOUSAND GIFTED CHILDREN (1930); LEWIS M. TERMAN & MELITA H. ODEN, GENETIC STUDIES OF GENIUS, VOLUME IV, THE GIFTED CHILD GROWS UP: TWENTY-FIVE YEARS' FOLLOW-UP OF A SUPERIOR GROUP (1947) [hereinafter TERMAN & ODEN, VOLUME IV]; LEWIS M. TERMAN & MELITA H. ODEN, GENETIC STUDIES OF GENIUS, VOLUME V, THE GIFTED GROUP AT MID-LIFE: THIRTY-FIVE YEARS' FOLLOW-UP OF THE SUPERIOR CHILD (1959) [hereinafter TERMAN & ODEN, VOLUME V]. Even after Terman's death, the study of the gifted group has continued, and a sixth volume of the study was released in 1995. CAROLE K. HOLAHAN & ROBERT R. SEARS, THE GIFTED GROUP IN LATER MATURITY (1995). Serebriakoff applauded Terman's project as “the biggest, longest term and most thorough research in the whole field of the social sciences.” SEREBRIAKOFF, *supra* note 38, at 219.

⁵⁶ Daniel Goleman, *75 Years Later, Study Still Tracking Geniuses*, N.Y. TIMES, Mar. 7, 1995, at C1 (noting study began in 1921).

⁵⁷ See Jennifer L. Jolly, *Foundations of the Field of Gifted Education*, 28 GIFTED CHILD TODAY 14, 14 (2005) (showing that Terman's study was intended to refute the stereotype established by Lombroso).

⁵⁸ See TERMAN ET AL., VOLUME I, *supra* note 55, at 19-42 (describing search methods). The initial threshold was IQ 140, but was adjusted downward to include additional students. See TERMAN & ODEN, VOLUME V, *supra* note 55, at 2.

⁵⁹ See TERMAN ET AL., VOLUME I, *supra* note 55, at 633-41 (reporting superior social skills, health, morality, and achievement).

⁶⁰ See TERMAN & ODEN, VOLUME V, *supra* note 55, at 3; see also BURKS ET AL., *supra* note 55, at 16-18 (describing methodology).

the rate at that time).⁶¹ Two-thirds of men and three-fifths of women went on to graduate work.⁶²

Before reaching the age of forty-three, the women in Terman's study published five novels, five volumes of poetry, thirty-two scholarly books, four plays, more than 150 essays and more than two hundred scientific papers.⁶³ Seven were listed in *American Men of Science*, two in *Who's Who in America*, and two in the *Directory of American Scholars*.⁶⁴

Men in Terman's study accomplished even more. Eighty-six percent of the men worked in the professions and higher business ranks.⁶⁵ Seventy appeared in *American Men of Science*, thirty-one in *Who's Who in America*, and ten in the *Directory of American Scholars*.⁶⁶ They produced sixty scholarly books, thirty-three novels, 375 short stories and plays, 230 patents, and almost two thousand scientific papers.⁶⁷ Their rates of death, delinquency, divorce, and mental illness were all below average; their jobs were better, their salaries higher, and their professional achievements greater than comparable American men with average IQ scores.⁶⁸

Geniuses, Terman suggested, were not frail shut-ins who verged on madness; rather, they were superior to average humans in nearly every way, like goodness personified.⁶⁹ According to Terman, the threshold for genius is 140 IQ,⁷⁰ but others have suggested different qualifying scores, for example: 132 (the minimum score required for membership in the 98th percentile high IQ society, Mensa),⁷¹ 143 (a score "broadly considered to rep-

⁶¹ Terman & Oden, Volume V, *supra* note 55, at 144.

⁶² *Id.* (reporting academic achievement).

⁶³ *Id.* at 145.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 146.

⁶⁷ Terman & Oden, Volume V, *supra* note 55, at 146-47.

⁶⁸ *Id.* at 143 ("The superiority of the group is greatest in intellectual ability, in scholastic accomplishment, and in vocational achievements. Physically the gifted subjects continue to be above average as shown in their lower mortality record and in the health ratings. . . . The incidence of such other problems such as excessive use of liquor (alcoholism) and homosexuality is below that found in the total population, and the delinquency rate is but a small fraction of that in the generality. Clearly, desirable traits tend to go together.").

⁶⁹ *E.g.*, Leslie Margolin, *Goodness Personified: The Emergence of Gifted Children*, 40 *SOCIAL PROBLEMS* 510, 522 (1993) ("Taken as a whole, these descriptors make gifted children appear divinely, quintessentially praiseworthy . . . [and they are] portrayed as specializing not only in cognitive and academic areas, but in everything.").

⁷⁰ Terman & Oden, Volume V, *supra* note 55, at 2 ("The original criterion for inclusion [in the study] for the Binet-tested subjects was an IQ of 140 or above . . .").

⁷¹ Simonton, *supra* note 36, at 219. For a discussion of the history of Mensa, see Serebriakoff, *supra* note 38, at 15-53.

resent a genius-level intellect”),⁷² or 180 (a score so high that only one in 3.5 million people would attain it).⁷³

B. *The Symmetry of Human Intelligence*

This section describes the distribution of IQ scores, first describing the bell-shaped (normal) curve associated with human intelligence, the relative frequencies associated with various thresholds, and some of the terminology associated with different IQ levels. The second section suggests that quantitative shifts can result in qualitative changes, and that incremental changes in IQ score are not always matters of gradual degree, but represent cognitive leaps.

1. The Bell Curve

It is generally believed that intelligence, like height or weight, is distributed across a bell-shaped (normal) curve among human beings.⁷⁴ By definition, the average IQ score is 100. Intelligence tests are normed with 100 as the mean score. Because this is a normal distribution, most IQ scores cluster near the mean; as scores radiate farther out, the percentage of people possessing that score decreases. For example, on an IQ test with a standard deviation (σ) of sixteen points, such as the Stanford-Binet, 68 percent of people would score between 84 and 116 (within one standard deviation of the mean). Someone with a 116 IQ scores higher than approximately 84 percent of the population (i.e., 0.13 percent + 2.15 percent + 13.59 percent + 34.13 percent + 34.13 percent). Someone with a 132 IQ (the 98th percentile), the threshold for borderline genius, scores two standard deviations above the mean. See Figure 1, below.

⁷² SIMONTON, *supra* note 36, at 219.

⁷³ *E.g.*, LETA S. HOLLINGWORTH, CHILDREN ABOVE 180 IQ 1 (1942).

⁷⁴ *See, e.g.*, JENSEN, *supra* note 53, at 71-84 (defending the claim that intelligence is distributed normally, particularly between IQ scores from 60 to 150). *But see* Cyril Burt, *Is Intelligence Distributed Normally?*, 26 BRIT. J. STAT. PSYCHOL. 175, 175 (1963) (suggesting that IQ distribution may not resemble a normal curve, but a Pearson Type IV curve).

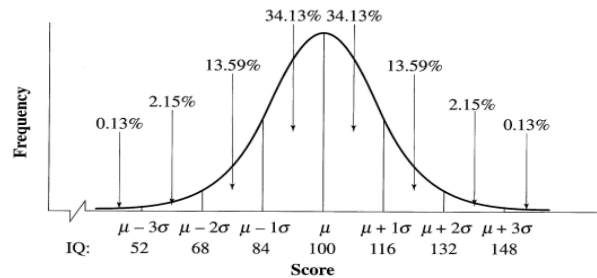


Figure 1: Normal Distribution of IQ Scores

Throughout the twentieth century, various labels were associated with IQ scores. On the left side of the curve, individuals with an IQ score below 70 were labeled *feeble-minded*.⁷⁵ Within that grouping, those with IQ scores between 50 and 70 were called *morons*; those with scores between 20 and 50 were called *imbeciles*; and those with IQ scores below 20 were described as *idiots*.⁷⁶ These technical terms, later incorporated into the common lexicon, are no longer employed by psychometricians. Today, the term *mental retardation* (or developmental disability) is used and denotes an IQ score of 70 or less, accompanied by other diagnostic criteria.⁷⁷ In the center of the curve, average intelligence ranges from about 90 to about 110. On the right

⁷⁵ See generally HENRY HERBERT GODDARD, *Feeble-mindedness* 4 (1914) (describing mental retardation).

⁷⁶ Jean Barclay, *A Historical Review of Learning Difficulties, Remedial Therapy and the Rise of the Professional Therapist*, in *Therapy & Learning Difficulties* 23, 23 (John Swain & Sally French eds., 1999) (outlining taxonomy of feeble-mindedness).

⁷⁷ The American Psychiatric Association explains:

The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.

AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 41, 49 (4th ed. 2000). There are four degrees of severity of mental retardation: mild (IQ level from 50 or 55 to approximately 70), moderate (IQ level from 35 or 40 to 50 or 55), severe (IQ level from 20 or 25 to 35 or 40), and profound (IQ level below 20 or 25). *Id.* at 42.

side of the curve, some educators talk in terms of *giftedness*, using standard deviations as threshold values. An IQ score of 132 (2σ) qualifies one as *gifted*; at 148 (3σ), one is *highly gifted*; at 164 (4σ), as *exceptionally gifted*, and at 176 (5σ), as *profoundly gifted*.⁷⁸ Some psychologists eschew these categories of giftedness and adhere to traditional categories of IQ testing, as described by Lewis Terman or David Wechsler.⁷⁹ According to Terman, from 110 to 120, individuals are described as possessing *superior intelligence*; from 120 to 140, as possessing *very superior intelligence*; and above 140, as being a *genius* or *near-genius*.⁸⁰

It is at about the two standard deviation mark on the right tail of the bell curve that the appellation *genius* begins to be invoked,⁸¹ and that the world of high IQ societies opens up.⁸² With an IQ score of 132 (the 98th percentile), an individual is eligible to join Mensa,⁸³ the High Potentials Society,⁸⁴ and the Mysterium Society.⁸⁵ As scores increase linearly, their frequencies become exponentially rarer. At 137 (the 99th percentile), Intertel,⁸⁶ the Top One Percent Society,⁸⁷ and Chorium.⁸⁸ At 149 (the 99.9th percentile), the International Society for Philosophical Enquiry,⁸⁹ the Triple Nine Society,⁹⁰ and the Iquadrivium Society.⁹¹ At 164 (the 99.997th percentile), the Prometheus and Epimetheus Societies.⁹² At 176 (a score attained

⁷⁸ John D. Wasserman, *Assessment of Intellectual Functioning*, in HANDBOOK OF PSYCHOLOGY, VOLUME 10: ASSESSMENT PSYCHOLOGY 417, 435 (John R. Graham & Jack A. Naglieri eds., 2003).

⁷⁹ See TERMAN, *supra* note 53, at 36; DAVID WECHSLER, THE MEASUREMENT OF ADULT INTELLIGENCE 36-37 (3d ed. 1944).

⁸⁰ TERMAN, *supra* note 53, at 79.

⁸¹ See SIMONTON, *supra* note 36, at 219.

⁸² See Darryl Miyaguchi, *A Short (and Bloody) History of the High I.Q. Societies*, <http://www.eskimo.com/~miyaguch/history.html> (last visited Jan. 12, 2009) (describing the development and history of numerous high IQ societies).

⁸³ SEREBRIAKOFF, *supra* note 38, at 13 (tracing development of Mensa International); Mensa Information, <http://www.mensa.org/> (follow "Mensa Information" hyperlink) (last visited Jan. 12, 2009).

⁸⁴ High Potentials Society, <http://www.highpotentialssociety.org/Society/society.html> (follow "About Society" hyperlink) (last visited Jan. 12, 2009).

⁸⁵ Mysterium Society, <http://www.mysteriumsociety.org/> (follow "Admission" hyperlink) (last visited Jan. 12, 2009).

⁸⁶ Intertel, <http://www.intertel-iq.org/> (last visited Jan. 12, 2009).

⁸⁷ Top One Percent Society, <http://www.toponesociety.com/> (last visited Jan. 12, 2009).

⁸⁸ Chorium: The High I.Q. Society for Musicians, <http://chorium.synthasite.com/> (last visited Jan. 12, 2009).

⁸⁹ International Society for Philosophical Enquiry, <http://www.thethousand.com/admission/> (last visited Jan. 12, 2009).

⁹⁰ Triple Nine Society, <http://www.triplenine.org/> (last visited Jan. 12, 2009).

⁹¹ Kevin Langdon, High-IQ Societies and the Tests They Accept for Admission Purposes, <http://www.polymath-systems.com/intel/hiqsocs/hiqsocs1.html> (last visited Jan. 12, 2009).

⁹² The Prometheus Society, <http://www.prometheussociety.org/> (last visited Jan. 14, 2009); Epimetheus Society, <http://www.epimetheussociety.com/> (last visited Jan. 14, 2009).

by only one in a million), the Mega Society.⁹³ And at 196 (a score attained by one in a billion), one is eligible to join the Giga Society.⁹⁴ Worldwide, there are only seven members in the Giga Society.⁹⁵

There is one final point that needs to be made about the distribution of human intelligence. In addition to extending asymptotically with increasingly rare scores on either end, the normal curve is symmetrical. The left tail mirrors the right. Thus, an individual with an IQ score of 84 is as far from the mean as the individual with an IQ score of 116 and the individual with an IQ score of 132 is as far from the mean as the individual with an IQ score of 68. Thus, the individual with an IQ score of borderline genius is (at least cognitively) as different from the average person as is the mentally retarded individual.⁹⁶

2. Transformations: Quantity Becomes Quality

Although some individuals suggest that the difference between the average person and the genius is one of degree, Wechsler has argued that aggregate quantitative differences can manifest as qualitative changes.

[O]ur description of the difference between a genius and an average person by a statement to the effect that he has an IQ greater by this or that amount, does not describe the difference between them as completely or in the same way as when we say that a mile is much longer than an inch. The genius (as regards intellectual ability) not only has an IQ of say 50 points more than the average person, but in virtue of this difference acquires seemingly new aspects (potentialities) or characteristics. These seemingly new aspects or characteristics, in their totality, are what go to make up the “qualitative” difference between them.⁹⁷

Just as the individual with mental retardation may face challenges in functioning in the world, so too might the genius. While some things may come easily to them, individuals with genius-level IQ scores often struggle with isolation, frustration, and depression.⁹⁸ They may be misunderstood,

⁹³ About the Mega Society, <http://www.megasociety.org/about.html> (last visited Jan. 14, 2009).

⁹⁴ World Intelligence Network—Giga IQ Society, <http://giga.iqsociety.org/intro.htm> (last visited Jan. 14, 2009).

⁹⁵ Giga Society Members, <http://giga.iqsociety.org/members.htm> (last visited Jan. 14, 2009).

⁹⁶ See Nancy M. Robinson et al., *Two Tails of the Normal Curve: Similarities and Differences in the Study of Mental Retardation and Giftedness*, 55 AM. PSYCHOL. 1413, 1413 (2000) (“Individuals who are mentally retarded or gifted share the burden of deviance from the norm, in both a development and a statistical sense.”).

⁹⁷ DAVID WECHSLER, *THE RANGE OF HUMAN CAPACITIES* 134 (Hafner Pub. Co. 1969) (1952).

⁹⁸ See, e.g., ELLEN WINNER, *GIFTED CHILDREN: MYTHS AND REALITIES* 225 (1996) (“Even Terman admitted that children with very high IQs faced acute social problems. Terman’s subjects who scored 170 or higher on IQ tests were said to have ‘one of the most difficult problems of social adjustment that any human being is ever called upon to meet.’”).

bullied, and ostracized by their peers,⁹⁹ bearing out Jonathan Swift's warning: "When a true genius appears in the world, you may know him by this sign, that the dunces are all in confederacy against him."¹⁰⁰ Although most people with genius-level IQ scores presumably suffer these indignities in stoic silence, feelings of resentment and rebellion can accumulate. In a number of notorious cases, geniuses have turned against society, applying their prodigious intellectual gifts to crime with terrible effect.¹⁰¹

II. THE PUNISHMENT OF GENIUS

Part II discusses the relationship between intellectual ability and criminal culpability. Part II.A describes what is known about the relationship between IQ and crime, what little is known about the enigma of the genius offender. It also identifies some of the causes of crime in genius-level populations. Part II.B describes the law's treatment of capital offenders with limited intellectual abilities, tracing the common law origins, and focusing on three decisions from the United States Supreme Court: *Penry v. Lynaugh*,¹⁰² *Atkins v. Virginia*,¹⁰³ and *Roper v. Simmons*.¹⁰⁴ Part II.C employs the penological factors identified by the Court to consider the appropriate punishment for offenders with genius-level IQ scores: the same punishment that offenders with average IQ scores receive, more punishment, or less.

A. *The Enigma of Genius Offenders*

It is commonly agreed among criminologists that low IQ is a robust predictor of delinquency and criminality.¹⁰⁵ For example, Donald Lynam

⁹⁹ See Jean Sunde Peterson & Karen E. Ray, *Bullying Among the Gifted: The Subjective Experience*, 50 GIFTED CHILD Q. 252, 253-55 (2006) (reporting that 67 percent of gifted children reported being bullied by eighth grade and described depression, unexpressed rage, and school absenteeism as responses).

¹⁰⁰ EYSENCK, *supra* note 16, at 11.

¹⁰¹ See, e.g., J.C. Oleson, *Sipping Coffee with a Serial Killer: On Conducting Life History Interviews with a Criminal Genius*, 9 THE QUALITATIVE REP. 192, 195 (2004), available at <http://www.nova.edu/ssss/QR/QR9-2/oleson.pdf> (describing research with a subject with a 162 IQ who self-reported killing fifteen victims and who, in part, traced the origins of his crime to the stigma of giftedness).

¹⁰² 492 U.S. 302 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁰³ 536 U.S. 304 (2002).

¹⁰⁴ 543 U.S. 551 (2005).

¹⁰⁵ See, e.g., CHARLES GORING, *THE ENGLISH CONVICT* 184 (1919) ("[T]he one vital mental constitutional factor in the etiology of crime is defective intelligence"); HENRY HERBERT GODDARD, *THE CRIMINAL IMBECILE* 106 (1915) ("[T]he most careful studies indicate that somewhere in the neighborhood of 50 percent of all criminals are feebleminded."); HERRNSTEIN & MURRAY, *supra* note 51, at 235

and his colleagues claim that the negative IQ-delinquency relationship “is one of the most robust findings across numerous studies of juvenile delinquency.”¹⁰⁶ There is a substantial body of research to suggest that low IQ functions as a risk factor (placing those with below-average intelligence at greater risk for delinquency and crime) and that high IQ operates as a protective factor (making those who possess it more resilient and reducing the likelihood they will turn to crime),¹⁰⁷ but it has been suggested that wrongly treated, intelligent offenders “turn into criminals of the most dangerous and elusive type.”¹⁰⁸ The relationship between low IQ and crime, after all, is not linear but curvilinear, with the highest rates of delinquency appearing to fall in the 70 to 90 range, falling precipitously below 50 and above 100.¹⁰⁹

It should come as no surprise that crimes of genius are statistically uncommon; individuals with IQ scores of 132 or higher constitute only 2 percent of the population¹¹⁰ and typically enjoy legitimate means to success, wealth, and influence.¹¹¹ It would be odd if they committed more than a

(“Taking the scientific literature as a whole, criminal offenders have average IQs of about 92, eight points below the mean.”); Hirschi & Hindelang, *supra* note 11, at 572 (“IQ is an important correlate of delinquency. It is at least as important as social class or race.”); Terman, *supra* note 53, at 11 (“[N]ot all criminals are feeble-minded, but all feeble-minded are at least potential criminals.”). All of these sources suggest a relationship between low IQ and offending. *But see* Carl Murchison, *CRIMINAL INTELLIGENCE* 28 (1926) (finding that the IQ scores of prisoners in an unnamed federal penitentiary were actually 75 percent higher than those of the guards and suggesting that many criminals have average or above-average intelligence). Of course, the inverse relationship between IQ and crime may in part be an artifact of the populations we study. Criminologists know a great deal about offenders in jail and prison—the failures of the criminal world—but know little about offenders who got away with their crimes. J.C. Oleson, *Extreme Criminology*, 59 *FORENSIC UPDATE* 22, 22-24 (1999) (outlining challenges of access to meaningful criminology). Feldman writes:

Even the most enthusiastic supporters of a link between crime and low IQ will agree that some offenders will be found to have high IQ scores. This is likely to be the case when we move away from street crimes to organized crime and corporate crime, both of which require considerable skills, of the kind likely to be associated with high verbal scores.

Philip Feldman, *THE PSYCHOLOGY OF CRIME: A SOCIAL SCIENCE TEXTBOOK* 156 (1993). Because so little is known about high IQ crime, some investigators have even suggested that offenders may be superior. Harry Elmer Barnes & Negley K. Teeters, *NEW HORIZONS* 7 (3d ed. 1959) (“Since we seldom arrest and convict criminals except the poor, inept, and friendless, we can know very little of the intelligence of the bulk of the criminal world. It is possible that it is, by and large, superior.”).

¹⁰⁶ Donald Lynam et al., *Explaining the Relation between IQ and Delinquency: Class, Race, Test Motivation, School Failure, or Self-Control?*, 102 *J. ABNORMAL PSYCHOL.* 187, 187 (1993).

¹⁰⁷ See, e.g., Michael Shader, U.S. DEP’T OF JUSTICE, *RISK FACTORS FOR DELINQUENCY: AN OVERVIEW* 4, <http://www.ncjrs.org/pdffiles1/ojdp/frd030127.pdf> (last visited Jan. 14, 2009) (listing risk and protective factors of delinquency).

¹⁰⁸ Cyril Burt, *THE SUBNORMAL MIND* 182 (3d ed. 1977).

¹⁰⁹ See Jensen, *supra* note 53, at 360.

¹¹⁰ Cyril Burt, *THE YOUNG DELINQUENT* 354 (3d ed. 1944).

¹¹¹ See *id.* at 108 tbl.4.4; see generally Robert Merton, *SOCIAL THEORY AND SOCIAL STRUCTURE* (enlarged ed. 1968) (describing anomie theory and suggesting that conformists accept society’s goals (such as wealth) and the legitimate means of obtaining them (such as employment) while

fraction of known offenses. But some offenses are correlated with high IQ because they require the access that intelligence affords and require significant intelligence to execute.¹¹²

It has been found that such crimes as forgery, bribery, securities violations, and embezzlement are associated with higher IQs than is the average for the offender population in general, whereas assaults, homicide, rape, and sex offenses in females are associated with lower IQs. . . . Because these are high frequency offenses, they naturally weigh heavily in determining the average offender's characteristics, such as IQ.¹¹³

Despite the relative infrequency of offending by those with genius-level IQ scores, it has been suggested that gifted individuals constitute a substantial fraction of the incarcerated population in the United States.¹¹⁴ This is not an isolated phenomenon. Historically, the genius has presented a threat to the status quo, and has been punished by those individuals with access to the levers of power.¹¹⁵ Henry Rhodes wrote:

[T]he genius and the criminal type are fundamentally one and the same thing. This is not an original opinion. It has been endorsed for thousands of years by society itself. Society punishes the genius while he lives, even if its laws do not permit it to put him in jail or execute him. . . . The ordinary man comes to terms with society. The . . . genius will not. Those who will not are, when all is said and done, actual or potential criminals. It is the aim of the genius, although it may not be more than sub-conscious, to overthrow society and rebuild it upon lines that would bring it into harmony with *him*.¹¹⁶

Havelock Ellis's study of British genius supports Rhodes's conclusion. Ellis found that over 16 percent of the men in his study had been imprisoned on one or more occasions and that numerous others in his study had only escaped imprisonment by voluntary exile.¹¹⁷ The one hundred most influential people in Michael Hart's survey also included an unusually high concentration of criminals: at least fourteen were imprisoned and/or executed, an-

innovators, like criminals, accept society's goals but reject the socially-approved means of realizing them).

¹¹² See, e.g., Anthony Walsh, *Cognitive Functioning and Delinquency*, 31 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 285, 285 (1987) (finding positive correlation between cognitive function and property crimes, which require planning and offer deferred gratification).

¹¹³ JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE* 165 (1985).

¹¹⁴ See MARYLOU KELLY STREZNEWSKI, *GIFTED GROWN UPS: THE MIXED BLESSING OF EXTRAORDINARY POTENTIAL* 164 (1999) ("Gifted people are found in jail, just as they are everywhere else. However, they form a disproportionately larger portion of the prison population, perhaps as much as 20%. This is in contrast to the 3 to 5% of the general public who are gifted.")

¹¹⁵ See, e.g., I.F. STONE, *THE TRIAL OF SOCRATES* 133-56, 174-80 (Doubleday 1989) (1988) (outlining socio-political events that led to Socrates' execution).

¹¹⁶ HENRY T.F. RHODES, *GENIUS AND CRIMINAL* 37, 59 (1932).

¹¹⁷ See ELLIS, *supra* note 47, at 201.

other eight faced voluntary or involuntary exile, and numerous others were engaged in non-criminal legal battles.¹¹⁸

There may actually be two categories of jailed genius. The first category consists of iconoclasts of the kind that Rhodes described—individuals who incur the wrath of established authority by advancing a new vision of things. Socrates,¹¹⁹ Joan of Arc,¹²⁰ Galileo,¹²¹ Thoreau,¹²² and Gandhi¹²³ are all examples of this type of genius. Geniuses in this category might violate laws because their moral reasoning occurs on a much higher level than it does for most people in society.¹²⁴

The second category consists of individuals who use their intellectual gifts to commit crimes and avoid detection. Examples of this type of genius may include Nathan Leopold and Richard Loeb,¹²⁵ Caryl Chessman,¹²⁶ and

¹¹⁸ See HART, *supra* note 48.

¹¹⁹ See STONE, *supra* note 115, at 181-96 (describing trial and punishment of Socrates).

¹²⁰ See GEORGE BERNARD SHAW, SAINT JOAN 3-4 (Stanley Weintraub ed., Bobbs-Merrill Company, Inc. 1971) (1924).

¹²¹ See, e.g., BERTOLT BRECHT, GALILEO 87-114 (Eric Bentley ed., Charles Laughton trans., Grove Weidenfeld 1966) (1940) (describing Galileo Galilei's 1633 trial for suggesting, heretically, that the earth revolved around the sun); GIORGIO DE SANTILLANA, THE CRIME OF GALILEO 210, 237-60 (1955) (same).

¹²² See HENRY DAVID THOREAU, THE ANNOTATED WALDEN: WALDEN; OR, LIFE IN THE WOODS 301-02, 468-69 (Philip Van Doren Stern ed., 1970) (describing, *inter alia*, Thoreau's night spent in jail for refusing to pay poll taxes that he philosophically opposed).

¹²³ See, e.g., M.K. GANDHI, GANDHI'S AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH 3 (Mahadev Desai trans., 1948) (noting periods spent in prison for sedition).

¹²⁴ In 1916, Lewis Terman appreciated the implications that IQ might have on morality, writing: Morality depends on two things: (a) the ability to foresee and to weigh the possible consequences for self and others of different kinds of behavior; and (b) upon the willingness and capacity to exercise self-restraint. . . . Moral judgment, like business judgment, social judgment, or any kind of higher thought process, is a function of intelligence.

TERMAN, *supra* note 53, at 11.

¹²⁵ The 1924 thrill-kill murder of fourteen-year-old Bobby Franks by millionaire prodigies Nathan Leopold (with an IQ of 210) and Richard Loeb (with an IQ of 160) was touted as "the crime of the century." See HAL HIGDON, LEOPOLD & LOEB: THE CRIME OF THE CENTURY 7-8 (Univ. Ill. Press 1999) (1975). Disfiguring Franks' face with acid and concealing his body in a culvert, Leopold and Loeb nearly got away with their offense; only because Leopold's eyeglasses were found near the body did police crack the case. *Id.* at 59. After his arrest, Leopold chilled the press with his arrogance, icily telling journalists that killing Bobby Franks "was just an experiment. It is as easy for us to justify as an entomologist in impaling a beetle on a pin." *Id.* at 126; *but see* NATHAN F. LEOPOLD, JR., LIFE PLUS 99 YEARS 48-49 (1958) (claiming he meant the statement to describe not the murder of Bobby Franks but the reporters' hounding of the defendants).

¹²⁶ Caryl Chessman (with an IQ initially measured at 178, but later revised to the 130 to 140 borderline-genius range) tangled the California courts into knots for years, smuggling best-selling books from his cell on San Quentin's death row, before being executed—for kidnapping (not murder)—in 1960. See MILTON MACHLIN & WILLIAM READ WOODFIELD, NINTH LIFE 15-30 (1962); WILLIAM M. KUNSTLER, BEYOND A REASONABLE DOUBT? THE ORIGINAL TRIAL OF CARYL CHESSMAN *passim* (1961) (recounting Chessman's criminal biography).

Theodore Kaczynski.¹²⁷ Even William James Sidis, the individual who may have had the highest IQ score of all time,¹²⁸ might belong to this category. Sidis was convicted in 1919 for assaulting a Boston police officer and for rioting,¹²⁹ only because his psychiatrist father “pulled the appropriate strings” did he avoid eighteen months at hard labor.¹³⁰

But the categories are not distinct, and it can be difficult to know whether the crime of a genius is the product of their vision or merely uninspired wrongdoing. For example, while a genius who kills in the name of an idea might insist that the crime is justified by necessity,¹³¹ if that idea lies too far outside the norms of society, the genius will either be executed or

¹²⁷ The search for Unabomber Theodore Kaczynski (with an IQ of 167) lasted for eighteen years—the biggest manhunt in United States history. JOHN DOUGLAS & MARK OLSHAKER, UNABOMBER: ON THE TRAIL OF AMERICA’S MOST-WANTED SERIAL KILLER, at back cover (1996) (describing the search as the “longest and costliest manhunt in FBI history”). Kaczynski’s intelligence both fomented his crimes and helped him avoid detection. *See, e.g.*, ALSTON CHASE, HARVARD AND THE UNABOMBER: THE EDUCATION OF AN AMERICAN TERRORIST 37-151 (2003) (describing Kaczynski’s offenses); ROBERT GRAYSMITH, UNABOMBER: A DESIRE TO KILL *passim* (1997) (same). His prosecution raised perplexing legal issues for the attorneys involved in the case. *See* MICHAEL MELLO, THE UNITED STATES OF AMERICA VERSUS THEODORE JOHN KACZYNSKI: ETHICS, POWER, AND THE INVENTION OF THE UNABOMBER 112-28 (1999) (describing usurpation of Kaczynski’s decisionmaking powers by attorneys); David Luban, *Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 827-30 (2005) (same); Michael Mello, *The Non-Trial of the Century: Representations of the Unabomber*, 24 VT. L. REV. 417 *passim* (2000) (same); J.C. Oleson, *Is Tyler Durden Insane?*, 83 N.D. L. REV. 579, 636-47 (2007) (same).

¹²⁸ *See* AMY WALLACE, THE PRODIGY (1986) (detailing Sidis’s biography). At the age of eighteen months, Sidis was regularly reading the *New York Times*. *Id.* at 23. At three years of age, as a surprise for his father, he taught himself Latin; later that year, he taught himself Greek. *Id.* at 23-25. At six, he knew at least eight languages. *Id.* at 25. Between six and eight, he wrote four books: the volumes on anatomy and astronomy were lost, but in his book on language, he developed a synthetic language that is simpler than Esperanto, and in his book on mathematics, he developed principles of perpetual calendars. *Id.* at 39-44. At eleven, after years of passing the entrance exams, Harvard University admitted him as a special student, and that same year he presented a paper entitled “four dimensional bodies” to the Harvard Mathematical Society. *Id.* at 50, 59. At fifteen, he graduated *cum laude* and somewhere between twenty-two and twenty-seven, he hypothesized the existence of black holes (fourteen years before publication of the first commonly recognized description). WALLACE, *supra*, at 156-57. He continued to study languages:

His incomparable grasp of linguistics had not lessened, and now he was explaining Chinese pictographs and Bantu dialects to his seven-year-old sister. William could learn a language in a day. According to Helena, “Billy knew all the languages in the world, while my father knew only twenty-seven. I wonder if there were any that Billy didn’t know.”

Id. at 126. The director of New York City’s Aptitude Testing Institute estimated Sidis’s IQ score as being “easily” between 250 and 300. As a point of comparison, Einstein’s IQ was 200. *Id.* at 283.

¹²⁹ *Id.* at 136-41.

¹³⁰ *Id.* at 150.

¹³¹ *See* J.C. Oleson, “Drown the World”: *Imperfect Necessity and Total Cultural Revolution*, 3 UNBOUND 19, 98-99 (2007), available at <http://www.legaleft.org/wp-content/uploads/2008/04/3unb019-oleson.pdf> (exploring the viability of the necessity defense in light of global warming to justify killing thousands of victims).

confined as insane.¹³² In the case of Kaczynski, it is not clear if he was a mad bomber, suffering from paranoid schizophrenia,¹³³ or a Luddite philosopher who had the requisite resolve to kill in order to draw attention to his views.¹³⁴ Similarly, in the case of Dr. Jack Kevorkian, it is not clear whether he is a murderer or a visionary who exemplifies the values of medicine, but is too far ahead of his time.¹³⁵ Simonton wrote that Napoleon's eminence stemmed from a willingness to sanction millions of murders. "Yet, owing to the scope and drama of this homicidal enterprise, Napoleon has gone down in the records as a 'great man.'"¹³⁶ Indeed, by 1841, Napoleon had qualified as one of Thomas Carlyle's few great heroes of history,¹³⁷ and later was described as *the* most eminent man in history,¹³⁸ and as one of the greatest geniuses in history.¹³⁹ Perhaps great crimes are forgiven in the figures that history defines as great (e.g., Caesar, Napoleon, and Stalin).¹⁴⁰ Perhaps, in part, this is why society remains fascinated by the idea of the criminal genius.¹⁴¹

¹³² See Oleson, *supra* note 127, at 649-50 ("Society needed to believe that Kaczynski was a 'mad bomber' because the alternative—a Harvard-educated genius who peered into the inner workings of modernity and was so horrified by it that he could maim and kill other people, and to keep doing it for seventeen years—was unimaginable.").

¹³³ See Court TV News, Psychological Evaluation of Theodore Kaczynski, <http://www.courttv.com/trials/unabomber/documents/psychological.html> (last visited Jan. 26, 2009) (summarizing Dr. Sally Johnson's finding that Kaczynski was legally competent but provisionally diagnosing him with "Schizophrenia, Paranoid Type, Episodic with Interepisode Residual Symptoms"). Nevertheless, many commentators have suggested that Kaczynski's logic was sound. See William Finnegan, *Defending the Unabomber*, THE NEW YORKER, Mar. 16, 1998, at 61 (quoting James Q. Wilson as saying, "If it is the work of a madman, then the writings of many political philosophers—Jean Jacques Rousseau, Tom Paine, Karl Marx—are scarcely more sane").

¹³⁴ See J.C. Oleson, *Evil the Natural Way: The Chimerical Utopias of Henry David Thoreau and Theodore John Kaczynski*, 8 CONTEMP. JUST. REV. 211, 219 (2005) (noting that the Unabomber's Manifesto justified killing people in order to draw attention to the message).

¹³⁵ See Jack Lessenberry, *Death Becomes Him*, VANITY FAIR, July 1994, available at <http://www.pbs.org/wgbh/pages/frontline/kevorkian/aboutk/vanityfair.html> (describing legal defense of Jack Kevorkian for participating in physician-assisted suicide). In 1999, for his role in the suicide of Thomas Youk, Kevorkian was sentenced to ten to twenty-five years in prison for second-degree murder. See Bryan Robinson et al., *Kevorkian Sentenced to 10 to 25 Years for Murder*, COURT TV, Apr. 13, 1999, http://www.courttv.com/trials/kevorkian/041399ym_ctv.html. Despite public support for physician-assisted suicide, and its legalization in some jurisdictions, the practice remains illegal in most U.S. jurisdictions and is condemned by the American Medical Association. See J.C. Oleson, *Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution*, 63 WASH. & LEE L. REV. 147, 183-99 (2006) (describing the medical euthanasia debate vis-à-vis legal ethics).

¹³⁶ SIMONTON, *supra* note 36, at 312.

¹³⁷ See CARLYLE, *supra* note 27, at 203-09 (describing Napoleon).

¹³⁸ See Cattell, *supra* note 46, at 362 (identifying Napoleon as the most eminent figure in history).

¹³⁹ See COX, *supra* note 42, at 425-28 (including Napoleon in the historiometric study of 301 geniuses).

¹⁴⁰ Indeed, the sheer audacity of a crime may make a criminal seem great. See J.C. Oleson, *The Celebrity of Infamy: A Review Essay of Five Autobiographies by Three Criminal Geniuses*, 40 CRIME, LAW & SOCIAL CHANGE 391, 407-08 (2003).

Unfortunately, despite widespread interest in the phenomenon, criminologists know virtually nothing about criminal geniuses.¹⁴² Terman's exhaustive study, for all its meticulous detail, said almost nothing about crime and delinquency.¹⁴³ The handful of studies that exist suggest that psychological abnormalities may play a larger role in bright delinquents than in their average peers,¹⁴⁴ but almost all of these studies used juveniles with above-average (but not genius-level) IQ scores and studied delinquency (not adult crime). The only systematic research published on adult genius offenders, although preliminary, suggests that "intellectually gifted people do commit crimes, including serious crimes."¹⁴⁵

There is a celebrity of infamy. It is no coincidence that we are as interested in Al Capone as Albert Einstein, as interested in Ted Bundy as Teddy Roosevelt, and as interested in John Wayne Gacy as John Wayne. . . . [B]oth the genius (a social personification of that which is divine in our human faculties) and the criminal (a social personification of the antisocial and malevolent impulses that psychologist Carl Jung said constitute the "shadow archetype") are powerful icons. While they seem different from us, there is something strangely familiar about both the genius and the criminal. In them, we see alienated aspects of ourselves, refined and magnified, and reflected back with a kind of majesty. The genius and the criminal fascinate us, and when a rare individual exists as *both* genius and criminal, we struggle to reconcile his divinity (of genius) with his wickedness (of crime).

Id. (citations omitted). The inability of the human mind to appreciate destruction on a grand scale may also lead people to overlook aggregate misery incurred by epic crimes. As Stalin was (apocryphally) said to say, "A single death is a tragedy; a million deaths is a statistic." RALPH KEYES, *THE QUOTE VERIFIER* 41-42 (2006) (describing variations on the quotation and concluding that Stalin probably never said it).

¹⁴¹ See RICHARD TITHECOTT, *OF MEN AND MONSTERS: JEFFREY DAHMER AND THE CONSTRUCTION OF THE SERIAL KILLER* 148 (1997) ("Our construction of the 'high-IQ killer' is a sign of our desire to figure the serial killer as being above and beyond society, as someone who attempts to assert his freedom."); J.C. Oleson, *Contemporary Demonology: The Criminological Theories of Dr. Hannibal Lecter, Part Two*, 13 *J. CRIM. JUST. & POPULAR CULTURE* 29, 31-32 (2006) ("We are both attracted to and repulsed by the criminal genius.").

¹⁴² See, e.g., RONALD BLACKBURN, *THE PSYCHOLOGY OF CRIMINAL CONDUCT* 188 (1993) ("The more 'gifted' offender has received relatively little attention in research . . ."). To date, there has only been one published volume dedicated to "criminal genius." See DEAN LIPTON, *THE FACES OF CRIME AND GENIUS: THE HISTORICAL IMPACT OF THE GENIUS-CRIMINAL passim* (1970) (providing historical overview of eight historic figures).

¹⁴³ In total, the original five-volume *Genetic Studies of Genius* filled six thousand pages, but there was almost no discussion of crime or delinquency. In the culminating volume, Terman and Oden dedicated just one brief paragraph to the subject. See TERMAN & ODEN, *VOLUME V, supra* note 55, at 46.

¹⁴⁴ See, e.g., JOHN COWIE ET AL., *DELINQUENCY IN GIRLS* 72-90 (1968) (supporting a prominent role for psychiatric causes in high IQ delinquency); Dennis Gath et al., *Psychiatric and Social Characteristics of Bright Delinquents*, 116 *BRIT. J. PSYCHIATRY* 151, 158 (1970) (same); Dennis Gath et al., *Criminological Characteristics of Bright Delinquents*, 11 *BRIT. J. CRIMINOLOGY* 275, 275 (1971) (same); Dennis Gath & Gavin Tennent, *High Intelligence and Delinquency—A Review*, 12 *BRIT. J. CRIMINOLOGY* 174, 179-80 (1972) (same).

¹⁴⁵ J.C. Oleson, *The Worst of All: A Study of Offending in High IQ Populations*, 7 *CARIBBEAN J. CRIMINOLOGY & SOC. PSYCHOL.* 44, 66 (2002). See also Elizabeth Monk-Turner et al., *Gender Disparity in Criminal Offenses Among Persons of High IQ*, 50 *INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY* 506, 506, 513-16 (2006) (analyzing Oleson data and finding a gender effect among violent geniuses but not geniuses generally).

An international study that combined self-report questionnaires obtained from 424 individuals with genius-level IQ scores and follow-up interviews conducted with forty-four of these individuals measured the prevalence and the incidence of seventy-two different offenses, as well as rates of arrest and conviction.¹⁴⁶ The measured offenses ranged in seriousness from “abused work privileges” to “killed another human being (excluding war-time situations),”¹⁴⁷ and captured both undetected offenses—the crimes they got away with—and offenses that resulted in prosecution and incarceration. While there were a handful of offenses worthy of a “mastermind,”¹⁴⁸ most of the reported offenses were remarkable for their unexceptionality. By and large, the geniuses were not planning the overthrow of society;¹⁴⁹ rather, they were abusing work privileges, stealing things worth \$5 or less, being drunk in public, and making unauthorized copies of software, records, tapes, or videocassettes.¹⁵⁰ Although a small number of respondents were responsible for a disproportionate number of offenses,¹⁵¹ overall the geniuses reported offending at rates comparable to those described in two classic studies of self-reported crime.¹⁵² The rates of arrest and conviction, however, were lower among the genius criminals than in the two previous studies.¹⁵³ Perhaps geniuses use their verbal aptitudes to talk their way out of prosecution,¹⁵⁴ and perhaps they use the money, status, and privilege associated with high IQ to secure top legal representation. Perhaps to the

¹⁴⁶ See Oleson, *supra* note 145, at 51-56 (describing study’s methodology).

¹⁴⁷ *Id.* at app. 1 (listing seventy-two measured offenses).

¹⁴⁸ For example, one incarcerated participant reported stealing poisons and planting improvised bombs in churches as part of a planned “war against society.” James C. Oleson, *The Crimes of Genius: A Self-Report Study of Offending in High IQ Individuals* 97 (1998) (unpublished Ph.D. dissertation, University of Cambridge) (on file with author). Another conspired with friends to blow up a bridge. *Id.* at 113. Another earned millions of dollars by operating a clandestine methamphetamine laboratory. *Id.* at 101. One respondent even described killing fifteen people during his tenure as a cocaine trafficker. See Oleson, *supra* note 101, at 195 (describing self-reported homicides).

¹⁴⁹ Cf. RHODES, *supra* note 116 (describing the fundamental incompatibility between the genius and society).

¹⁵⁰ See Oleson, *supra* note 145, at 79 tbl.4 (reporting most commonly reported offenses).

¹⁵¹ See *id.* at 59 (reporting that 7.1 percent of the subjects were responsible for 46.6 percent of all reported offenses); see also MARVIN E. WOLFGANG ET AL., *DELINQUENCY IN A BIRTH COHORT* 88-89 (1972) (finding that 18 percent of their subjects were responsible for 51.9 percent of all reported offenses).

¹⁵² See Oleson, *supra* note 145, at 61-62 (comparing findings to data from Porterfield’s 1946 study of students at Texas Christian University and Wallerstein’s and Wyle’s 1947 study of New Yorkers). “Comparing results from the current study with results obtained by Porterfield (1946) and Wallerstein and Wyle (1947) suggests that high IQ offenders have comparable prevalence rates to subjects with average IQ scores.” *Id.* at 67.

¹⁵³ See *id.* at 63-66 (finding lower rates of arrest and conviction). This is consistent with the findings reported by Gath and his colleagues. See Gath & Tennent, *supra* note 144, at 179-80.

¹⁵⁴ See Gath & Tennent, *supra* note 144, at 180 (“Society puts a high valuation on intellectual ability, and there may be a tendency to make excuses for those who possess it and fail to make use of it.”).

extent geniuses engage in sanctionable but non-criminal offenses (e.g., plagiarism),¹⁵⁵ “victimless” crimes (e.g., prostitution),¹⁵⁶ or sophisticated crimes that depend on access to elite instrumentalities (e.g., securities fraud),¹⁵⁷ they elude detection, arrest, conviction, and incarceration.¹⁵⁸ Genius-level intelligence, then, may serve a prophylactic function, effectively insulating offenders from criminal entanglement.¹⁵⁹

How should geniuses be punished when caught? Just as there is little criminological work on this population, there is little case law dealing with the crimes of genius. There *is*, however, a considerable body of work dealing with the individuals at the other end of the IQ distribution (scores below 70: a measure of intelligence as different from the population mean as that of the genius). By studying the jurisprudence associated with mental retardation (and with juveniles and the insane), it may be possible to glean principles that relate IQ to criminal culpability, and to then apply these principles to the case of the criminal genius.

B. *The Punishment of Idiocy: Mirror Images*

The jurisprudence of mental illness and mental defect extends thousands of years into the past.¹⁶⁰ Although early jurists did not clearly distin-

¹⁵⁵ See, e.g., AM. HISTORICAL ASS'N, STATEMENT ON STANDARDS OF PROFESSIONAL CONDUCT (2005), available at <http://www.historians.org/PUBS/Free/ProfessionalStandards.cfm> (noting that “[a] persistent pattern of deception may justify public disclosure or even termination of a career” but that “as a practical matter, plagiarism between scholars rarely goes to court”).

¹⁵⁶ See Erik Luna, *The Model Penal Code Revisited: Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 551-62 (2000) (noting that many ‘victimless crimes’ are rarely—and selectively—prosecuted).

¹⁵⁷ See, e.g., Susan P. Shapiro, *The Road Not Taken: The Elusive Path to Criminal Prosecution for White Collar Offenders*, 19 LAW & SOC'Y REV. 179, 182 (1985) (reporting that of every one hundred suspects investigated by the SEC, ninety-three have committed violations carrying criminal penalties, but only eleven are selected for criminal treatment, only six are indicted, only five convicted, and only three sentenced to prison).

¹⁵⁸ See HERRNSTEIN & MURRAY, *supra* note 51, at 246 (describing a negative correlation between IQ and penetration into the criminal justice system: “stopped by the police but not booked,” “booked but not convicted,” “convicted but not incarcerated,” or “sentenced to a correctional facility”).

¹⁵⁹ See Francis T. Cullen et al., *Crime and the Bell Curve: Lessons Learned from Intelligent Criminology*, 43 CRIME & DELINQ. 387, 395 (1997) (raising the possibility that “smarter criminals are better at avoiding detection,” but noting that other research either does not support a detection effect or dismisses it as not meaningful).

¹⁶⁰ E.g., NORMAN J. FINKEL, *INSANITY ON TRIAL* 8 (1988) (“[I]t is enough to simply note that types, shadings, and classifications of disorders have appeared in the ‘psychiatric’ literature for centuries, as far back as the Hellenic age.”); Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN'S L. REV. 725, 764 (2004) (“Insanity was recognized as a complete criminal defense under Roman law. An insane person was treated as an ox or other beast for the purpose of tort and criminal liability, in that he could not be held responsible for his conduct in any fashion, but his ‘keeper’ could be liable in tort for failing to restrain the insane man.”).

guish the defenses of insanity and idiocy, even the tenth-century laws of Æthelred treated those who did not choose their crime differently from those who did.¹⁶¹ Cnut, Æthelred's successor, placed even more emphasis on intentionality.¹⁶² Like children below the age at which they distinguish good from evil,¹⁶³ the madman and the idiot were not accountable for their crimes. By the thirteenth century, Henry de Bracton suggested that offenders who lacked understanding (*ratio*) of their acts were like animals and should be treated with leniency.¹⁶⁴ Writing in the early seventeenth century, Edward Coke differentiated the idiot who suffered from *fatuitas* (the equivalent of severe or profound retardation) from the idiot who suffered from *stultitia* (less severe, but still subnormal, intelligence),¹⁶⁵ both, however, were entitled to excuse under the law.¹⁶⁶ In the late seventeenth century, Matthew Hale devoted the fourth chapter of the *History of the Pleas of the Crown* to "the defects of ideocy, madness and lunacy in reference to criminal offences and punishments"¹⁶⁷ and by the eighteenth century, William Blackstone concluded that "idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities; no, not even for treason itself."¹⁶⁸

Throughout the nineteenth century, the jurisprudence of Coke and Hale was applied to U.S. criminal cases involving mental defect.¹⁶⁹ Some

¹⁶¹ See NIGEL WALKER, *CRIME AND INSANITY IN ENGLAND, VOLUME ONE: THE HISTORICAL PERSPECTIVE* 16 (1968) ("And if it happens that a man commits a misdeed involuntarily, or unintentionally, the case is different from that of one who offends of his own free will, voluntarily and intentionally . . .").

¹⁶² See *id.* at 16-17 ("[W]e must make due allowance and carefully distinguish between age and youth, wealth and poverty, freemen and slaves, the sound and the sick.").

¹⁶³ While the age at which it was assumed a child could tell good from evil was seven in ancient Rome, the age of discretion was twelve in Bracton's era. See *id.* at 28.

¹⁶⁴ See *id.* at 26-28 (quoting Bracton as noting "what can be said about the child and the madman . . . the one is protected by his innocence of design, the other by the misfortune of his deed" and that some offenders "are not very different from animals who lack understanding (*ratio*)," but noting that Bracton probably meant the mentally ill, not those with mental defect). Still, by the thirteenth century, the law recognized the idiot as a special legal class. For example, the Statute on the King's Prerogative authorized the crown to assume custody over the property of those with mental defect. *Id.* at 25 ("The King has the custody of the lands of natural fools (*fatuorum naturalium*), taking their profits without waste, finding them their necessaries . . . and after their death must return them to the rightful heirs . . ."). See also *supra* note 1 and accompanying text (suggesting that "brutes" are not subject to conceptions of virtue).

¹⁶⁵ See FINKEL, *supra* note 160, at 9 (describing Coke's views).

¹⁶⁶ See WALKER, *supra* note 161, at 36 ("[S]ince Coke says that 'stultitia' includes someone who 'knows not good from evil', it was probably severe enough to serve as an excuse.").

¹⁶⁷ *Id.* at 35 (noting that Hale's book shaped legal practice on the subject more than any other work for two centuries).

¹⁶⁸ WILLIAM BLACKSTONE, 4 COMMENTARIES *24.

¹⁶⁹ See Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900-1930*, 16 L. & HIST. REV. 63, 83 (1998) (noting that for most of the nineteenth

so-called feebleminded offenders were sometimes excused for their offenses,¹⁷⁰ but excuse often came at the cost of personhood.¹⁷¹

But in the last twenty-five years, several Supreme Court decisions have focused upon the principle of intentionality that shaped the laws of Æthelred and Cnut, and was elaborated upon in the work of Coke and Hale. In three landmark decisions, the Court has prohibited the execution of the insane,¹⁷² the mentally retarded,¹⁷³ and defendants younger than eighteen.¹⁷⁴ Each of these cases is described in this section, and the penological themes that shaped the Court's reasoning identified, for subsequent application in cases of criminal genius.

1. *Ford v. Wainwright*: Insanity and Capital Punishment

In 1986, a splintered Supreme Court held that execution of the insane violates the Eighth Amendment.¹⁷⁵ In arriving at this decision, Justice Thur-

century, “[i]n the exceptional case of the insane or the idiotic lawbreaker, constitutionally incapable of distinguishing ‘right’ from ‘wrong,’ criminal responsibility was suspended”).

¹⁷⁰ See GODDARD, *supra* note 105, at 100-03 (arguing that criminal imbeciles should not be executed, but confined in penitentiaries or prisons).

¹⁷¹ This is a compelling idea, and one that has been written about by many scholars. See, e.g., HERBERT FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* 164 (1972) (noting that the insane and children are not viewed as responsible agents who did not have criminal mens rea, but are viewed as not being responsible agents); Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1137 (1985) (suggesting that rationality and self-control are essential attributes of personhood). In the early twentieth century, individuals with mental handicap were stripped of their liberty, self-determination, and reproductive rights. See generally Willrich, *supra* note 169, at 63-67 (describing effects of eugenic movement on those with mental handicap). In the 1927 case of *Buck v. Bell*, Oliver Wendell Holmes, writing for an eight-to-one Court, upheld Virginia's law authorizing the compulsory sterilization of feebleminded persons for the protection and health of the state. 274 U.S. 200, 205-08 (1927). Holmes famously wrote:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

Buck, 274 U.S. at 207 (citation omitted). But see Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 53-55 (1985) (suggesting that eighteen-year-old Carrie Buck was not feebleminded at all, but was committed to the Virginia State Colony for Epileptics and Feebleminded as a way to cover up her rape by the nephew of her adoptive mother).

¹⁷² *Ford v. Wainwright*, 477 U.S. 399, 401 (1986) (prohibiting execution of the insane).

¹⁷³ *Atkins v. Virginia*, 536 U.S. 304, 304 (2002) (prohibiting execution of the mentally retarded).

¹⁷⁴ *Roper v. Simmons*, 543 U.S. 551, 551 (2005) (prohibiting execution of offenders who were under the age of eighteen at the time of their offense).

¹⁷⁵ *Ford*, 477 U.S. at 401 (“For centuries no jurisdiction has countenanced the execution of the insane, yet this Court has never decided whether the Constitution forbids the practice. Today we keep faith with our common-law heritage in holding that it does.”).

good Marshall, writing for the plurality, relied heavily on early Anglo-American authority, citing Blackstone, Coke, and Hale.¹⁷⁶ Justice Marshall noted that while the prohibition against executing the insane was nearly universal,¹⁷⁷ the underlying rationale was unclear. Some commentators had suggested the rule stemmed from society's own sense of dignity and decency;¹⁷⁸ others, because madness is said to be its own punishment;¹⁷⁹ others, because executing the insane lacks deterrent value;¹⁸⁰ others, because executing people who lack the capacity to come to grips with conscience or deity is offensive to religious principles;¹⁸¹ and others, because executing those who do not understand why they are being punished results in ineffectual retribution.¹⁸² In his concurrence, Justice Lewis Powell agreed with these grounds for the prohibition, noting that the U.S. Bill of Rights was intended to go at least as far as its British counterpart.¹⁸³ He also identified another historic reason to forbid the execution of the insane: preventing the insane person from allowing errors in trial that a sane defendant could correct.¹⁸⁴

Justice William Rehnquist wrote the dissent.¹⁸⁵ He noted that while there *is* a common law heritage of not executing insane offenders, the determination of sanity was a power that historically resided with the executive, *not* the judiciary.¹⁸⁶ Thus, despite the majority's claim of keeping "faith to our common law heritage" and adhering to "evolving standards of decency,"¹⁸⁷ the Court's holding was "at best, a half truth."¹⁸⁸ Because no state actually authorized the execution of the insane, the dissent concluded, the real legal issue was what procedures should be employed in sanity determinations. "The Court reaches the result it does by examining the common law, creating a constitutional right that no State seeks to violate, and then concluding that the common-law procedures are inadequate to protect the newly created but common-law based right."¹⁸⁹

¹⁷⁶ *Id.* at 406-08.

¹⁷⁷ *Id.* at 408.

¹⁷⁸ *Id.* at 407-10.

¹⁷⁹ *Id.* at 407-08.

¹⁸⁰ *Id.* at 407.

¹⁸¹ *Ford*, 477 U.S. at 407.

¹⁸² *Id.* at 408.

¹⁸³ *Id.* at 418.

¹⁸⁴ *Id.* at 419.

¹⁸⁵ *Id.* at 431. Additionally, Justice O'Connor, joined by Justice White, concurred in part and dissented in part. She agreed with Justice Rehnquist's dissent that the Eighth Amendment does not create a substantive right not to be executed while insane, but concluded that Florida positive law created a protected liberty interest not served by existing due process. *Id.* at 427-31.

¹⁸⁶ *Ford*, 477 U.S. at 431.

¹⁸⁷ *Id.* at 432-33.

¹⁸⁸ *Id.* at 433.

¹⁸⁹ *Id.* at 435.

Despite Justice Rehnquist's dissent, the die was cast. The Court had created a categorical prohibition against execution for all insane offenders,¹⁹⁰ founding its holding upon the early jurisprudence of the common law and applying a number of penological factors (e.g., deterrence, retribution, and risk of procedural error) to a discrete class of offender.

2. *Atkins v. Virginia*: Mental Retardation and Capital Punishment

Three years after *Ford v. Wainwright*, the Court considered whether the Eighth Amendment prohibited the execution of another class of offender who, according to early jurists such as Coke and Hale, deserved analogous legal protection: the mentally retarded. In *Penry v. Lynaugh*,¹⁹¹ another splintered Court held that the Eighth Amendment did not prohibit the execution of retarded offenders, but did require capital juries to be allowed to consider mental retardation as a mitigating factor.¹⁹² Justices Blackmun, Brennan, Marshall, and Stevens supported a categorical prohibition against the execution of retarded defendants;¹⁹³ Justices Scalia, White, Kennedy, and Chief Justice Rehnquist opposed the requirement that juries be required to consider retardation as mitigation.¹⁹⁴ The swing vote, Justice Sandra Day O'Connor, wrote for the majority, noting that the Eighth Amendment prohibits punishment that would have been considered cruel and unusual during the adoption of the Bill of Rights,¹⁹⁵ but that the test is not static. The prohibition against cruel and unusual punishment was also defined by the "evolving standards of decency that mark the progress of a maturing society."¹⁹⁶ To evaluate these evolving standards, Justice O'Connor wrote, the Court relies upon objective evidence of social views, particularly the laws enacted by U.S. state legislatures,¹⁹⁷ though patterns of jury sentencing also provide objective indicia.¹⁹⁸

¹⁹⁰ Of course, the establishment of categorically excluded classes creates inequities between similarly situated offenders. The mentally ill but sane defendant is executable, while the insane defendant is not, even though the insane offender may be far more culpable. See Dora W. Klein, *Categorical Exclusions from Capital Punishment: How Many Wrongs Make a Right?*, 72 BROOK. L. REV. 1211, 1214-16 (2007) (describing the consequences for penal proportionality when classes of offender are excluded).

¹⁹¹ 492 U.S. 302 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁹² *Id.* at 340.

¹⁹³ *Id.* at 341, 350.

¹⁹⁴ *Id.* at 358 ("[A]ll mitigating factors must be able to be considered by the sentencer, but need not be able to be considered for all purposes.").

¹⁹⁵ *Id.* at 330.

¹⁹⁶ *Id.* at 330-31 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

¹⁹⁷ *Penry*, 492 U.S. at 331 ("The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.").

¹⁹⁸ *Id.*

Justice O'Connor surveyed the work of early jurists, noting that "[i]t was well settled at common law that 'idiots,' together with 'lunatics,' were not subject to punishment for criminal acts committed under those incapacities."¹⁹⁹ But, she noted, historically the "idiot" was one who totally lacked understanding or could not distinguish between good and evil, corresponding to the most serious forms of mental retardation.²⁰⁰ "Idiots" typically had an IQ of 25 or less.²⁰¹ Justice O'Connor wrote that defendants suffering from this magnitude of incapacity are already protected under the law: defendants who are not competent cannot be tried,²⁰² and defendants who are unaware of the punishment they are about to suffer and why they are to suffer it cannot be executed.²⁰³ Virtually all death penalty states that list statutory mitigating factors include the impaired ability to appreciate the criminality of one's conduct or to conform it to the requirements of law.²⁰⁴ Some list mental defect explicitly.²⁰⁵

Justice O'Connor entertained Penry's claim that executing a mentally retarded offender with the reasoning ability of a seven-year-old would be cruel and unusual because it is disproportionate to his level of culpability. She noted that the Eighth Amendment was violated if a punishment is grossly out of proportion to the crime or "makes no measurable contribution to acceptable goals of punishment, and hence is nothing more than the purposeless and needless imposition of pain and suffering."²⁰⁶ She noted that capital punishment has two principal goals—deterrence and retribution—and that "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."²⁰⁷ Despite support for Penry's claim from amici that all mentally retarded defendants, regardless of their degree of retardation, have disabilities that reduce their level of blameworthiness,²⁰⁸ the majority in *Penry* did not categorically bar execution of the retarded. There simply was no evidence of a national consensus against it.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 331-33.

²⁰¹ *Id.* at 333. *See also supra* text accompanying note 76 (indicating that "idiots" were those with IQ scores of about 20 or less).

²⁰² *Penry*, 492 U.S. at 333.

²⁰³ *Id.* ("[S]omeone who is 'unaware of the punishment they are about to suffer and why they are to suffer it' cannot be executed." (citing *Ford v. Wainwright*, 477 U.S. 399, 422 (1986))).

²⁰⁴ *Id.* at 337.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 335 (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

²⁰⁷ *Id.* at 336 (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)).

²⁰⁸ *Penry*, 492 U.S. at 336-37 ("[American Association on Mental Retardation et al. as amici curiae] contend that because of 'disability in the areas of cognitive impairment, moral reasoning, control of impulsivity, and the ability to understand basic relationships between cause and effect,' mentally retarded people cannot act with the level of moral culpability that would justify imposition of the death sentence. Thus, in their view, execution of mentally retarded people convicted of capital offenses serves no valid retributive purpose." (citations omitted)).

In *Ford v. Wainwright*,²⁰⁹ no state permitted the execution of the insane, and twenty-six states had statutes explicitly requiring suspension of the execution of a capital defendant who became insane. In *Thompson v. Oklahoma*,²¹⁰ eighteen states established a minimum age in their death penalty statutes, and all required that defendants were sixteen or older at the time of the offense. Penry, however, could point to only two states and a federal statute prohibiting execution of the mentally retarded.²¹¹ Justice O'Connor wrote, "In our view, the two state statutes prohibiting execution of the mentally retarded, even when added to the [fourteen] States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus."²¹² Instead of jury sentences, Penry provided public opinion polls showing public opposition to the execution of the mentally retarded. About these, Justice O'Connor wrote, "The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely. But at present, there is insufficient evidence of a national consensus"²¹³

Thirteen years later, however, in *Atkins v. Virginia*,²¹⁴ the Court revisited the question and held that the execution of mentally retarded offenders categorically violates the Eighth Amendment.²¹⁵ The Court's holding was so different because its analysis was so different. Writing for the six-person majority, Justice Stevens stated that the Eighth Amendment is *not* judged by the standards in place during the enactment of the Bill of Rights,²¹⁶ but by contemporary standards.²¹⁷ Justice John Paul Stevens acknowledged that previous cases have described the laws enacted by the country's legislatures as the "clearest and most reliable objective evidence of contemporary values" for the Court's proportionality analysis,²¹⁸ but noted that the Court's *own* judgment is also brought to bear on Eighth Amendment questions.²¹⁹ Justice Stevens indicated that the number of states that prohibited the execution of the mentally retarded increased from two to nineteen.²²⁰ Interest-

²⁰⁹ 477 U.S. 399 (1986). *See supra* Part II.B.1 (describing penological considerations in *Ford*).

²¹⁰ 487 U.S. 815 (1988). *See infra* Part II.B.3 (describing categorical prohibition of juveniles).

²¹¹ *Penry*, 492 U.S. at 334 (identifying an existing statute in Georgia, a pending statute in Maryland, and the federal Anti-Drug Abuse Act of 1988).

²¹² *Id.*

²¹³ *Id.* at 335.

²¹⁴ 536 U.S. 304 (2002).

²¹⁵ *Id.* at 321.

²¹⁶ *Id.* at 311 ("A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the *Bill of Rights* was adopted, but rather by those that currently prevail.").

²¹⁷ *Id.* at 311-12 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

²¹⁸ *Id.* at 312 (citing *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

²¹⁹ *Id.* (citing *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

²²⁰ *Atkins*, 536 U.S. at 314-15.

ingly, however, he emphasized that it is not the number of states that is significant, but the consistent direction of the change.²²¹ In assessing national consensus, Justice Stevens looked beyond the calculus of state legislatures to the positions of professional and religious organizations, and to public opinion polls.²²² This was novel. In *Penry*, measures of public opinion had been deemed insufficient to serve as indicia of a national consensus.²²³

Considering the goals of punishment, Justice Stevens echoed *Penry*, writing:

Gregg v. Georgia identified “retribution and deterrence of capital crimes by prospective offenders” as the social purposes served by the death penalty. Unless the imposition of the death penalty on a mentally retarded person “measurably contributes to one or both of these goals, it ‘is nothing more than the purposeless and needless imposition of pain and suffering,’ and hence an unconstitutional punishment.”²²⁴

Justice Stevens noted that retributive and deterrent concerns did not warrant the execution of the mentally retarded. Retribution is served when parity exists between the most egregious of crimes and the most exacting of punishments. If, under the Court’s narrowing jurisprudence,²²⁵ the average murderer exhibits a conscience that is insufficiently depraved to justify the death penalty, then the mentally retarded murderer, with reduced culpability born of limited cognitive abilities,²²⁶ lacks sufficient depravity to qualify as well. Deterrence is served when the increased punishment of one defendant inhibits the likelihood of offending in others. But the same limited cognitive abilities that reduce the culpability of the mentally retarded also make them less able to process information about the risk of execution.²²⁷ They are undeterred by the availability of capital punishment. Justice Stevens then noted an additional concern: risk of procedural error. He considered the risk of false confessions,²²⁸ the lack of remorse that juries may ascribe to the demeanor associated with mental retardation,²²⁹ and the likelihood that mental retardation could simultaneously operate as a mitigating factor but increase the perceived risk of future dangerousness.²³⁰ Again, as in *Ford v. Wainwright*, the majority considered both evidence of national consensus

²²¹ *Id.* at 315.

²²² *Id.* at 316 n.21.

²²³ *Penry*, 492 U.S. at 334-35; *see also supra* text accompanying note 213 (noting Court’s unwillingness to accept poll data as a legitimate basis for ascertaining evolving standards of decency).

²²⁴ *Atkins*, 536 U.S. at 319 (citations omitted).

²²⁵ *Id.* (citing *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980)).

²²⁶ *Id.* at 320 (identifying a number of factors: “the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses”).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 321.

²³⁰ *Atkins*, 536 U.S. at 321.

and various penological factors, notably retribution, deterrence, and risk of procedural error.²³¹

Justices Scalia and Thomas and Chief Justice Rehnquist vigorously dissented. The Chief Justice took issue with “the Court’s decision to place weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion.”²³² In a blistering separate dissent, Justice Antonin Scalia took issue with nearly everything else.

Writing that the Court’s holding “does not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate,”²³³ Justice Scalia suggested that because only those with profound or severe mental retardation would have been exempted from the death penalty at the time of the adoption of the Bill of Rights, the majority’s opinion “pays lipservice” to evolving standards of decency as a disingenuous means to invalidate a constitutional punishment.²³⁴ Witheringly, he criticized the majority’s count of legislatures, noting that—at best—47 percent of death penalty jurisdictions prohibited the execution of the mentally retarded,²³⁵ and suggesting that the direction of legislative change is an inadequate indicator of social attitudes.²³⁶ But Justice Scalia reserved the “Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’” to the majority’s use of professional and religious organizations, international standards, and opinion polls.²³⁷ He criticized the Court’s reasoning about retribution (suggesting that only the sentencer can know whether retardation reduces the offender’s culpability enough to exempt him from the death penalty) and deterrence (suggesting that deterrence is served if even some retarded offenders are deterred) and incapacitation (a third justification of punishment not taken up by the majority).²³⁸ He took issue with the majority’s determination that the mentally retarded are at “special risk” of execution, arguing that even if this is so, the appropriate claim would be one of due process, not a violation of the Eighth Amendment.²³⁹ Ultimately, Justice Scalia concluded, “[I]n the end, it is the *feelings* and *intuition* of a majority of the Justices that count—the perceptions of decency, or of penology, or of mercy, entertained . . . by a majority of the small and unrepresentative segment of our society that sits on this Court.”²⁴⁰

²³¹ See *supra* Part II.B.1.

²³² *Atkins*, 536 U.S. at 322 (Rehnquist, J., dissenting).

²³³ *Id.* at 337-38 (Scalia, J., dissenting).

²³⁴ *Id.* at 340-42.

²³⁵ *Id.* at 342-43.

²³⁶ *Id.* at 344-45.

²³⁷ *Id.* at 347.

²³⁸ *Atkins*, 536 U.S. at 350-51.

²³⁹ *Id.* at 352.

²⁴⁰ *Id.* at 348-49 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 823 n.8 (1988) (plurality opinion) and *Thompson v. Oklahoma*, 487 U.S. 815, 873 (1988) (Scalia, J., dissenting)).

“*Atkins* was a major development in the Court’s capital jurisprudence.”²⁴¹ Despite two vigorous dissenting opinions, the Court in *Atkins* expanded proportionality analysis from merely counting legislative prohibitions and jury decisions in the states to include the views of professional and religious organizations, international practices, and public opinion polls. Ultimately, the Court explicitly asserted its own judgment in the matter. And it would do so, again, three years later.

3. *Roper v. Simmons*: Youth and Capital Punishment

Even under ancient law, it was an established matter that young children were not subject to the death penalty.²⁴² But the Court’s interpretation of the age at which offenders exercise sufficient discretion to be eligible for capital punishment has changed over time. Just as the Court’s proportionality analysis of the execution of retarded defendants shifted, so too has its Eighth Amendment analysis of juveniles.

In *Thompson v. Oklahoma*,²⁴³ engaging in a similar proportionality analysis to that used in *Ford*,²⁴⁴ the Court held that executing a defendant who was younger than sixteen at the time of the offense *did* violate the Eighth Amendment. But the next year (on the same day the Court decided *Penry*), in the case of *Stanford v. Kentucky*,²⁴⁵ by limiting the weight afforded to proportionality analysis,²⁴⁶ the Court held that executing a defen-

²⁴¹ J.C. Oleson, *An Expendable Man: The Near Execution of Earl Washington Jr.*, 10 THEORETICAL CRIMINOLOGY 387, 388 (2006) (book review).

²⁴² See *supra* notes 163-64 and accompanying text (describing prohibition against punishing children under age of discretion).

²⁴³ 487 U.S. 815 (1988).

²⁴⁴ In conducting its proportionality analysis, the plurality considered the legislative enactments of the states, the penal practices of other countries that share our Anglo-American heritage, the views of the American Bar Association and the American Law Institute, the reluctance of juries to impose capital punishment on young defendants, retribution, and deterrence. *Id.* at 825-38. The plurality also considered the mental state of juveniles, noting the importance of youth as a mitigating factor:

But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly “during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment” expected of adults.

Id. at 834 (citations omitted). The plurality noted that adolescents are “more vulnerable, more impulsive, and less self-disciplined than adults. . . . [O]ffenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America’s youth.” *Id.* (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11 (1982)). Inexperience, limited education and intelligence, impulsivity, and emotionality all served as operative factors as well. *Id.* at 835.

²⁴⁵ 492 U.S. 361 (1989), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005).

²⁴⁶ See *id.* at 379-80 (“While the dissent is correct that several of our cases have engaged in so-called ‘proportionality’ analysis, examining whether ‘there is a disproportion ‘between the punishment imposed and the defendant’s blameworthiness,’” and whether a punishment makes any ‘measurable

dant who was sixteen or seventeen at the time of the offense *did not* violate the Eighth Amendment. Thus, for many years, the bright line of capital culpability was drawn at the age of sixteen. But in the case of *Roper v. Simmons*,²⁴⁷ the Court reconsidered the issue and determined that evolving standards of decency prohibited the execution of defendants under the age of eighteen at the time of the offense.

In *Roper*, the Court built upon the foundation it had laid in *Thompson* (barring execution of those younger than sixteen) by relating the developmental limitations at issue in *Atkins* (barring execution of the mentally retarded) to adolescence.²⁴⁸ Acknowledging that legislative indicia were not as available to support the prohibition against executing juveniles as they were against executing the mentally retarded,²⁴⁹ the *Roper* plurality focused its proportionality analysis on the differences that exist between adolescent offenders and adults. It identified three key distinctions. First, juveniles are less mature, less responsible, and more impetuous than adults; for these reasons, people under eighteen are barred from voting, serving on juries, or marrying without parental consent.²⁵⁰ Second, juveniles are more susceptible to environmental pressures, including peer pressure, than adults.²⁵¹ Third, the personality traits of juveniles are mutable, less fixed than those of adults.²⁵² The plurality then considered the characteristics of adolescence against the penological goals of retribution and deterrence. It noted (per *Atkins*) that psychological factors that inhibit decisionmaking and reasoning, and that exacerbate suggestibility and impulsivity, diminish personal culpability.²⁵³ The plurality then considered the penal practices of other nations,²⁵⁴ and ultimately exercised its own judgment in overruling *Stan-*

contribution to acceptable goals of punishment,' we have never invalidated a punishment on this basis alone. . . . '[P]roportionality' analysis itself can only be conducted on the basis of the standards set by our own society; the only alternative, once again, would be our personal preferences." (citation omitted).

²⁴⁷ 543 U.S. 551 (2005).

²⁴⁸ *Id.* at 564, 570-71 ("Just as the *Atkins* Court reconsidered the issue decided in *Penry*, we now reconsider the issue decided in *Stanford*. . . . In *Thompson*, a plurality of the Court recognized the import of these characteristics with respect to juveniles under 16, and relied on them to hold that the *Eighth Amendment* prohibited the imposition of the death penalty on juveniles below that age. We conclude the same reasoning applies to all juvenile offenders under 18." (citation omitted)).

²⁴⁹ *Id.* at 565 ("Impressive in *Atkins* was the rate of abolition of the death penalty for the mentally retarded. . . . By contrast, the rate of change in reducing the incidence of the juvenile death penalty, or in taking specific steps to abolish it, has been slower.").

²⁵⁰ *Id.* at 569 (citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

²⁵¹ *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (2005)).

²⁵² *Id.* at 570.

²⁵³ *Roper*, 543 U.S. at 571-72.

²⁵⁴ *See id.* at 575-78.

ford,²⁵⁵ holding that the Eighth Amendment prohibited capital punishment for all juvenile defendants.²⁵⁶

Justice O'Connor wrote a dissenting opinion in which she argued that the legislative record of "evolving standards" was too thin to support the plurality's holding.²⁵⁷ Justice Scalia, joined by Justice Thomas and Chief Justice Rehnquist, wrote a dissenting opinion in which he challenged the plurality's legislative counting.²⁵⁸ noted that scientific studies could just as easily support contradictory claims about the adolescent mind,²⁵⁹ and excoriated the plurality for relying upon international law.²⁶⁰ Their dissents, however, were doomed, for the Court's jurisprudence has undergone a transformation over the last twenty years.

In *Ford* (1986), *Penry* (1989), and *Stanford* (1989), the Court's analysis was driven by consulting the number of state legislative enactments. Laws (and, to a lesser extent, jury sentencing) served as objective indicia of national consensus in ascertaining the evolving standards of decency; proportionality analysis (relating the culpability of the class of the offender to the penological goals of retribution and deterrence) was a secondary consideration. Public opinion polls and the views of professional associations were afforded little, if any, weight in assessing social standards. Yet by the time of *Atkins* (2002) and *Roper* (2005), legislative enactments were but one measure of evolving social standards, and proportionality analysis counted for much, if not all, of the analysis.

Psychological factors that impair the ability to reason and make decisions reduce the culpability of the offender; if a class is *sufficiently* impaired, their disability compromises the goals of retribution and deterrence to such a degree that imposing punishment does not advance these goals "and hence is nothing more than the purposeless and needless imposition of pain and suffering."²⁶¹

²⁵⁵ *Id.* at 574.

²⁵⁶ *Id.* at 578.

²⁵⁷ *Id.* at 587-88 (O'Connor, J., dissenting).

²⁵⁸ *Id.* at 609 (Scalia, J., dissenting) ("Words have no meaning if the views of less than 50 percent of death penalty States can constitute a national consensus.").

²⁵⁹ *Roper*, 543 U.S. at 617-18. ("[T]he American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court. In its brief in *Hodgson v. Minnesota*, the APA found a 'rich body of research' showing that juveniles are mature enough to decide whether to obtain an abortion without parental involvement. . . . [B]y middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems." (citation omitted)).

²⁶⁰ *See id.* at 627 ("To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.").

²⁶¹ *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

In some ways, the Court's holdings in *Atkins* and *Roper* restored parity among the insane, the retarded, and the child that had existed in early courts.²⁶² But as the Court's Eighth Amendment analysis shifts away from crude legislative counting toward an examination of the relationship between mental states and culpability, new asymmetries emerge. For example, the severely mentally ill defendant can be executed (as long as he is sane), even though his illness may affect him in a manner functionally equivalent to mental retardation; the mentally retarded defendant, however, cannot be executed.²⁶³ Gaps, cliffs, and inequities still exist in the Court's jurisprudence of capital punishment,²⁶⁴ but proportionality analysis (focusing on the mens rea of the offender instead of the nature of the offense) can inform a more sophisticated penology.²⁶⁵ And because the genius is as removed from the population IQ mean as the mentally retarded person,²⁶⁶ it may be possible to invert the proportionality analysis at work in *Atkins* to evaluate the culpability of offenders with genius IQ scores.

C. *Matching Culpability and Punishment for Geniuses*

1. Culpability

Culpability is related to mens rea, responsibility, and blameworthiness.²⁶⁷ These, however, are slippery concepts. Mens rea has been described as peerless "for the varieties of senses in which it has been used and for the quantity of obfuscation it has created,"²⁶⁸ and there are many overlapping definitions of responsibility in the law (i.e., one can be responsible in a moral sense, responsible in the sense of causing an action, and legally re-

²⁶² See *supra* notes 161-64 and accompanying text (describing leniency historically afforded to the madman, the idiot, and the child).

²⁶³ See, e.g., Laurie T. Izutsu, *Applying Atkins v. Virginia to Capital Defendants with Severe Mental Illness*, 70 BROOK. L. REV. 995, 1000-03 (2005) (suggesting that defendants with severe mental disorders should be exempted from capital punishment because their cognitive and behavioral impairments are analogous to the mental retardation exempted in *Atkins*).

²⁶⁴ See Nita A. Farahany, *Cruel and Unequal Punishment*, 33 *tbl.1* (Vanderbilt Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 08-40, 2008), available at <http://papers.ssrn.com/abstract=1194691> (comparing mental retardation to traumatic brain injury, dementia, autism, ADHD, epilepsy, and bacterial meningitis across five categories of adaptation and demonstrating unequal treatment of comparable disorders).

²⁶⁵ See Adam Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 222 (2009) (suggesting that neuroscience may someday allow sentencers to tailor penalties to defendants' subjective experiences of punishment).

²⁶⁶ See *supra* note 96 and accompanying text.

²⁶⁷ See, e.g., Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319, 319 (1996) ("'Culpability' is often used to denote an actor's overall moral responsibility or blameworthiness with respect to some morally bad state of affairs.").

²⁶⁸ Sanford H. Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273, 273 (1968).

sponsible).²⁶⁹ In general, however, it can be said that culpability is a quality that attaches to actors, not acts; that culpability is scalar, not binary; and that culpability describes the mental state of a rational actor when he freely chooses to engage in a blameworthy action. This is the sense of the term employed when analyzing the culpability of the genius offender.

The Supreme Court has held that mental retardation—which is closely linked (although not identical) to low IQ—reduces culpability.²⁷⁰ So, too, do insanity and adolescence.²⁷¹ The Court's exclusion of these groups from eligibility for capital punishment is based upon reduced culpability (which in turn stems from limited mental function). There are two means by which limited mental function reduces culpability.²⁷² The first is *cognitively*. If an individual freely chooses a blameworthy action, but does so because his knowledge is erroneous, he may be less culpable (or not culpable at all). Thus, the individual who tries to assassinate the President of the United States as a product of his mental illness has not acted culpably, and may be excused under the defense of insanity.²⁷³ A similar rationale excuses conduct under the defense of mistake of fact.²⁷⁴ Retarded individuals do not process information as effectively as others, and may not appreciate facts essential to moral decisionmaking. The second way that impaired mental function reduces culpability is *volitionally*. The individual who engages in blameworthy conduct with accurate knowledge, but who does not freely choose his action, may be less culpable (or not culpable at all). The person who drives on a suspended license in order to take a loved one to the hospital in an emergency has not acted culpably, and may be justified under the excuse of necessity.²⁷⁵ The same theory excuses conduct under the defense of duress.²⁷⁶ Retarded individuals may be more impulsive than others, and therefore may not enjoy the same range of alternative behaviors.

²⁶⁹ See generally PETER CANE, *RESPONSIBILITY IN LAW AND MORALITY* 29-31 (2002) (describing various conceptions of responsibility).

²⁷⁰ See *supra* Part II.B.2 (describing *Atkins*).

²⁷¹ See *supra* Part II.B.1 (describing *Ford*); Part II.B.3 (describing *Roper*).

²⁷² Hart provides a cogent summary of the defenses that operate in common law:

[T]he individual is not liable to punishment if at the time of his doing what would otherwise be a punishable act he was unconscious, mistaken about the physical consequences of his bodily movements or the nature or qualities of the thing or persons affected by them, or, in some cases, if he was subjected to threats or other gross forms of coercion or was the victim of certain types of mental disease.

H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 28 (1968).

²⁷³ See, e.g., *United States v. Hinckley*, 292 F. Supp. 2d 125, 126-27 (D.D.C. 2003).

²⁷⁴ See Kenneth W. Simons, *Criminal Law: Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. & CRIMINOLOGY 447 *passim* (1990) (outlining defense).

²⁷⁵ See *State v. Baker*, 579 A.2d 479, 482 (Vt. 1990) (“Necessity is a ‘confession and avoidance’ defense, raised as ‘justification for the commission of a crime.’ The defense is ‘founded upon public policy and provides a justification distinct from the elements required to prove the crime.’” (citation omitted)).

²⁷⁶ See Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1335 (1989) (outlining defense).

Culpability, then, inheres in deliberate and conscious wrongdoing.²⁷⁷ It is culpable to freely choose, with foresight and understanding, to harm another person. Because mentally retarded individuals may not have full powers of cognition and volition, they are protected under the Eighth Amendment. Individuals with genius-level IQ scores, however, may possess greater foresight and more information than average persons, and may be *more* culpable than average in the commission of their crimes.

The case of Mensa member George Trepal may serve as a useful illustration.²⁷⁸ In 1991, Trepal was convicted of first-degree murder (and other felonies) and sentenced to death. His sentence was affirmed in 1993.²⁷⁹ Trepal had numerous altercations with the family next door, the Carrs.²⁸⁰ It is believed that after leaving a note on their door, warning them to move away, Trepal broke into their house, carried bottles of Coca-Cola back to his own residence, uncapped them, and laced them with thallium, a lethal toxin outlawed in 1982 with no known antidote.²⁸¹ He then replaced the poisoned bottles in the Carr house and waited. He waited as Peggy Carr and her children grew sick with a mysterious illness, as her hair fell out, and as she lapsed into the coma from which she never recovered.²⁸² Trepal's method was "cold, calculated, and premeditated."²⁸³ It required deliberation, planning, intelligence, special skills (chemistry), and specialized equipment (thallium and a bottle capping device). Moreover, it required resolute malignancy from Trepal. It required the ability to watch the Carrs going to and from the hospital and to say nothing, to *do* nothing. It was sublime wickedness.

How should high IQ offenders like Trepal be punished? If cognitive deficits sufficiently reduce the culpability of mentally retarded offenders to exclude them from execution, what about their reciprocal? What penological significance should be assigned to high IQ? Part II.C.2 evaluates three alternatives: punishing genius criminals the *same* as everyone else, punishing them *more*, and punishing them *less*.²⁸⁴

²⁷⁷ See Oleson, *supra* note 127, at 598 ("Knowledge, and the choice that knowledge affords, lies at the heart of criminal culpability.").

²⁷⁸ See generally JEFFREY GOOD & SUSAN GORECK, POISON MIND *passim* (1995) (describing undercover investigation of Trepal).

²⁷⁹ Trepal v. State, 621 So. 2d 1361, 1364 (Fla. 1993), *cert. denied*, 510 U.S. 1077 (1994).

²⁸⁰ *Id.* at 1364.

²⁸¹ *Id.*

²⁸² *Id.* at 1363 n.1.

²⁸³ *Id.* (citing statutory aggravating factor).

²⁸⁴ See Oleson, *supra* note 127, at 646 n.462 ("Since the law treats those with mental retardation differently than those with normal cognitive abilities, perhaps individuals with marked intellectual gifts should be treated differently as well, either exculpated for their difference or punished more severely, for having known better.").

2. Three Penological Alternatives

The Supreme Court, in *Ford*, *Atkins*, and *Roper*, has expanded and changed its Eighth Amendment analysis.²⁸⁵ By incorporating the views of professional and religious organizations, public opinion polls, foreign custom, and sociological and psychological evidence, the Court's proportionality analysis has eclipsed mere legislative counting. Its analyses of retribution and deterrence, rooted in scientific data, can be applied with equal vigor to offenders with cognitive gifts as to those with mental defects.

a. Equality

One possibility, and the most likely under existing law, is that individuals with high IQ scores are punished just like everyone else. Such an approach seems to embody the principle of "equal and impartial justice under the law."²⁸⁶ Under this approach, intelligence operates as a threshold variable, and any offender who possesses the requisite quantum of understanding is subjected to the same punishment for a given crime as everyone else. Although they may have committed their identical crimes for different reasons, the genius offender with an IQ score of 140, the average offender with an IQ score of 100, and the dull offender with an IQ score of 80 all receive the same punishment. Under this approach, the "Mensa Murderer" receives the same punishment that the dull offender who committed first-degree murder by means of poison would receive.

This approach, more so than the two that follow, focuses upon the offense, not the offender.²⁸⁷ So long as the offender possesses enough intelligence to form the requisite mens rea for a crime, his IQ score is irrelevant to matters of culpability and punishment. Thus, IQ operates like age: below a certain threshold, the quality assumes penological significance,²⁸⁸ but once that threshold is crossed, any increases in the variable no longer matter. The twenty-one-year-old is punished in the same way as the thirty-year-old, the fifty-year-old, and the eighty-year-old.²⁸⁹

²⁸⁵ See *supra* Part II.B (describing changes in the Court's Eighth Amendment analysis).

²⁸⁶ *Caldwell v. Texas*, 137 U.S. 692, 697 (1891). *But see* Kolber, *supra* note 265, at 189-90 (arguing that punishments that seem objectively equal result in punishments that are subjectively disparate).

²⁸⁷ See George P. Fletcher, *The Nature and Function of Criminal Theory*, 88 CAL. L. REV. 687, 699 (2000) ("The German literature has cultivated the point as the distinction between an act-based criminal law (*Tatstrafrecht*) and an actor-based criminal law (*Taterstrafrecht*). . . . Liberal regimes stress the limited focus of the criminal sanction; it must be imposed solely for acts, not for the crime of being different.").

²⁸⁸ See *supra* note 163 and accompanying text (describing age of discretion).

²⁸⁹ Of course, in some cases, age may matter at the high end, too. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (2007) ("Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be

This approach is parsimonious, obviating the need for courts to assess IQ in imposing sentences,²⁹⁰ but it ignores the influence that IQ exerts on retribution and deterrence. The genius, by definition, has an extraordinary capacity to engage in logical reasoning, to abstract principles from concrete events, and to understand and process information.²⁹¹ The genius may also control his impulsivity better than others.²⁹² Applying the proportionality analysis from *Atkins*,²⁹³ then, the genius may deserve *more* punishment than others.

b. *Severity*

In *Atkins* (as in *Ford*), the Court considered the evidence of a national consensus against execution, a proportionality analysis relating the mental ability of retarded offenders to the goals of retribution and deterrence, and the risk of procedural error.²⁹⁴ There is no national consensus on the punishment of geniuses, since individuals with 132-plus IQ scores are rarely convicted,²⁹⁵ but the *Atkins* proportionality analysis *can* be inverted and *can* be applied to the genius criminal.

In terms of retribution, the genius may deserve more punishment than average offenders. The offender who purposefully engages in a crime is more culpable than the offender who does so knowingly, recklessly, or negligently.²⁹⁶ The conscious evaluation of crime associated with purpose implies a heightened mens rea. A similar rationale explains why first-degree murder is punishable by death under common law, while second-degree murder is not: a homicide committed in a willful, deliberate, and premedi-

equally efficient as and less costly than incarceration.”); Kelly Porcella, Note, *The Past Coming Back to Haunt Them: The Prosecution and Sentencing of Once Deadly But Now Elderly Criminals*, 81 ST. JOHN’S L. REV. 369, 380-96 (2007) (describing penological considerations that both support and oppose reduced sentences for elderly prisoners). Perhaps, similarly, IQ within the normal range should not carry penological significance, but very low and very high IQ scores should. See *infra* Part III (suggesting that offenders with very high IQ scores may not deserve punishment).

²⁹⁰ Indeed, under the federal sentencing guidelines, IQ is a discouraged factor—one that courts ordinarily should not consider in imposing a sentence. See U.S. SENTENCING GUIDELINES MANUAL § 5H1.3 (2007) (“Mental . . . conditions are not ordinarily relevant in determining whether a [sentence] departure is warranted . . .”).

²⁹¹ See JENSEN, *supra* note 53, at 213-30 (describing factor loading of IQ tests).

²⁹² See Donald Lynam et al., *Explaining the Relation Between IQ and Delinquency: Class, Race, Test Motivation, School Failure, or Self-Control?*, 102 J. ABNORMAL PSYCHOL. 187, 191-93 (1993) (finding a negative relationship between intelligence and impulsivity).

²⁹³ *Atkins v. Virginia*, 536 U.S. 304, 319-20 (2002).

²⁹⁴ See *supra* Part II.B (describing *Atkins* and *Ford*).

²⁹⁵ See *supra* note 158 and accompanying text.

²⁹⁶ See MODEL PENAL CODE § 2.02 (2007) (articulating general requirements of culpability).

tated manner is more blameworthy than a murder committed impulsively.²⁹⁷ Perhaps the genius, processing information more effectively than others, possessing foresight, and acting less impulsively, is guilty of “murder-zero.”²⁹⁸ Because he is less likely to act impulsively, the genius’s mens rea more resembles the highly culpable mental states of purpose or knowledge than it does less culpable states such as recklessness or negligence. Therefore, retributive principles may militate for punishing the genius more than offenders with average IQ scores.

In terms of deterrence, because the genius is less impulsive and may be more aware of the costs and benefits associated with criminal conduct, increased punishment may deter him.²⁹⁹ Of course, increased policing may have a greater deterrent effect than increased punishment.³⁰⁰ For even with draconian punishments in place, the genius may conclude that given his intellectual gifts, the likelihood of detection and punishment is low.³⁰¹ He may believe that his offense will vanish into the “Dark Figure” of crime—offenses that go undetected, unreported, unsolved, and unpunished.³⁰² But the genius, more than average offenders, may be able to overcome bounded rationality³⁰³ and to appreciate that a very long sentence multiplied by even a minimal risk of punishment is equivalent to a very brief sentence with a high risk of punishment. For the genius, just maintaining a severe sentence on the books may be enough. Indeed, like Galileo gazing upon the inquisitor’s instruments of torture,³⁰⁴ the mere availability of punishment may be sufficient to quell any criminal impulse in the mind of a genius with sufficient imagination.

²⁹⁷ See *Bullock v. United States*, 122 F.2d 213, 214 (D.C. Cir. 1941) (noting that a cold-blooded murderer is “more dangerous, more culpable[,] or less capable of reformation than one who kills on . . . impulse”).

²⁹⁸ I am grateful to my colleague, Emery Lee, for this term.

²⁹⁹ See *Atkins v. Virginia*, 536 U.S. 304, 319-20 (2002).

³⁰⁰ See Daniel S. Nagin, *Deterrence and Incapacitation*, in *THE HANDBOOK OF CRIME AND PUNISHMENT* 345, 351-52 (Michael Tonry ed., 1998) (reporting that fear of arrest, more than severity of punishment, appears to deter criminal conduct).

³⁰¹ This may be a realistic assessment. See, e.g., Shapiro, *supra* note 157, at 182 (noting that of every one hundred offenses that ripen to SEC investigation, ninety-three are determined to have committed violations carrying criminal penalties, eleven are selected for criminal treatment, six are indicted, five convicted, and only three sentenced to prison).

³⁰² See CLIVE R. HOLLIN, *PSYCHOLOGY AND CRIME* 15-16 (1989) (defining the Dark Figure as crime not represented by official statistics and suggesting that the Dark Figure is four times larger than that reported by official statistics).

³⁰³ See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1075-1102 (2000) (demonstrating that policies based on expectations about rational actors fail to account for cognitive biases).

³⁰⁴ See BRECHT, *supra* note 121, at 110 (describing a scene in which Pope Urban VIII instructs his Inquisitor not to torture Galileo—“At the very most, he may be shown the instruments”—and in which the Inquisitor replies ominously, “That will be adequate, Your Holiness. Mr. Galilei understands machinery.”).

c. *Leniency*

Perhaps, though, society should not punish the genius more than others. Perhaps, heeding the maxim *quod licet Jovi non licet bovi* (what is permitted to Jupiter is forbidden to cattle), society should not punish the genius at all.³⁰⁵ Aristotle, in the *Politics*, suggested that “legislation is necessarily concerned only with those who are equal in birth and capacity; and that *for men of pre-eminent virtue there is no law—they are themselves a law.*”³⁰⁶ A similar argument was marshaled by Hegel:

A World-historical individual is not so unwise as to indulge a variety of wishes to divide his regards. He is devoted to the One Aim, regardless of all else. It is even possible that such men may treat other great, even sacred interests, inconsiderately; conduct which is indeed obnoxious to moral reprehension. But so mighty a form must trample down many an innocent flower—crush to pieces many an object in its path.³⁰⁷

Presumably, the individuals referenced by Aristotle and Hegel would be included among the “eminent” identified by Galton and those whom Terman counted among “geniuses.”³⁰⁸ Perhaps the genius, knowing more and seeing farther, should not be subjected to the law in the same way that other citizens are. Perhaps, if society’s laws are blinkered and myopic, the genius should be allowed to transgress them without penalty. Thoreau enjoined people to follow their morality, even when that path led to conflict with the law,³⁰⁹ and many luminaries have been jailed or executed for making that choice. It has been said that geniuses, possessing superior moral reasoning and self-restraint, are more moral than others.³¹⁰ This may be so. Research on moral reasoning suggests that people *do* think about moral problems in different ways.³¹¹ While low IQ children uniformly exhibit

³⁰⁵ See *supra* note 1 and accompanying text (suggesting that the god-like man, like a brute, exists beyond human conceptions of virtue).

³⁰⁶ ARISTOTLE, *Politics*, in THE BASIC WORKS OF ARISTOTLE 1114, 1195 (Richard McKeon ed., Benjamin Jowett trans., 1941) (italics added).

³⁰⁷ GEORG HEGEL, THE PHILOSOPHY OF HISTORY 32 (J. Sibree trans., 2004).

³⁰⁸ Galton’s investigation was limited to a study of eminent British men between 1660 and 1868, and would not have considered any of Aristotle’s contemporaries. See GALTON, *supra* note 37, at 2. Similarly, Terman’s longitudinal study looked only at his twentieth-century cohort, and Cox’s historimetric analysis of genius among historic figures extended back only to 1450. See COX, *supra* note 42, at 32.

³⁰⁹ See THOREAU, *supra* note 122, at 456 (“It is not desirable to cultivate a respect for the law, so much as for the right. The only obligation which I have a right to assume, is to do at any time what I think right.”).

³¹⁰ See *supra* note 124 (quoting Terman).

³¹¹ See, e.g., Lawrence Kohlberg, *Stage and Sequence: The Cognitive-Developmental Approach to Socialization*, in 1 MORAL DEVELOPMENT: A COMPENDIUM 35-36 tbl.6.6 (Bill Puka ed., 1994). At stage one, decisions are motivated by avoidance of punishment; at stage two, by desire for reward or benefit; at stage three, by anticipation of disapproval of others, whether real or imagined; at stage four, by an-

immature moral thinking, those with high IQ scores can exhibit either mature or immature thinking.³¹²

Inasmuch as IQ adequately represents cognitive function, and inasmuch as cognitive reasoning is the driving force behind moral judgment, individuals with genius-level IQ scores should make moral decisions by employing post-conventional reasoning. Because these principles are not tethered to social norms but to universal principles (e.g., dignity, liberty, sanctity of life), moral decisions could result in prosecution. Perhaps then, in cases where the visionary genius chafes against the yoke of society's rules, he deserves less punishment than others.

Yet while this may appear to be a harmless concession in the cases of Socrates,³¹³ Thoreau,³¹⁴ Gandhi,³¹⁵ and Martin Luther King, Jr.,³¹⁶ enlightenment is always easier to see in retrospect. In the here and now, it can be difficult to distinguish the iconoclast from the criminal.³¹⁷ Is Kevorkian a mere murderer or a physician whose morality is ahead of his time?³¹⁸ Is Kaczynski a madman or an all-too-lucid terrorist who killed from political necessity?³¹⁹ Was Leopold's killing of Bobby Franks an aberrant act or the true sign of a Nietzschean superman who transcended good and evil?³²⁰

III. THE MADNESS OF GENIUS

Perhaps the answer is neither that geniuses should be punished *more* than others, nor that they should be punished *less*, but that different kinds of geniuses should be exposed to different levels of punishment. Geniuses, after all, are a heterogeneous group.

icipation of dishonor and guilt over concrete harm done to others; at stage five, by concern about maintaining the respect of equals and the community, as well as concern for self-respect; and at stage six, by adherence to universal principles. *See id.* at 35-36.

³¹² *See id.* at 45 ("In other words, children below average in IQ are almost all below average in moral maturity. Children above average in IQ are equally likely to be low or high in moral maturity.")

³¹³ *See supra* note 119.

³¹⁴ *See supra* note 122.

³¹⁵ *See supra* note 123.

³¹⁶ *See* MARTIN LUTHER KING, JR., *Letter from the Birmingham Jail*, in *WHY WE CAN'T WAIT* 77 (Martin Luther King, Jr. ed., 1963) (describing King's jailing).

³¹⁷ *See, e.g.*, James Forman, Jr., *A Little Rebellion Now and Then Is a Good Thing*, 100 MICH. L. REV. 1408 *passim* (2002) (reviewing Nicholas N. Kittrie's discussion of politically motivated offenders in *REBELS WITH A CAUSE: THE MINDS AND MORALITY OF POLITICAL OFFENDERS* (2000)).

³¹⁸ *See supra* note 135 and accompanying text (describing Kevorkian's incarceration).

³¹⁹ *See* Oleson, *supra* note 131, at 57-61 (describing a possible imperfect necessity defense).

³²⁰ *See* Oleson, *supra* note 140, at 399 ("Nathan Leopold and Richard Loeb murdered Bobby Franks for the intrinsic thrill of killing, to prove that they were supermen, and lived beyond the pedestrian categories of mere good and evil.")

Like the relationship between IQ and offending,³²¹ the relationship between IQ and culpability may be curvilinear. Culpability may increase with IQ up to a point (e.g., 130 to 150), but then dissipate as IQ surpasses that level. If so, some geniuses should be punished the same as everyone else (or perhaps punished more, in light of retributive and deterrent considerations) but other geniuses should be excused for their crimes. The reason for excusing them, however, is not that they are like gods, operating above the law (*quod licet Jovi non licet bovi*), but because their cognitive abilities render them functionally insane.

Part III.A describes a body of competing research on high IQ. Some research suggests that geniuses are happier, healthier, and better adjusted than their normal IQ peers; other research, however, suggests that geniuses are particularly vulnerable to isolation, perfectionism, and psychiatric disorder. Part III.B articulates a theory that may explain the competing research on psychosocial adjustment, focusing on the cognitive gulf that may exist between the genius and society. Part III.C considers the possibility that some geniuses, isolated by their stratospheric IQ scores, may view their actions, and the moral significance of their actions, so differently from the rest of us that they are functionally insane.

A. *The Contested Nature of Genius*

For centuries, genius has been associated with pathology and degeneration.³²² Its Renaissance origins were infused with eccentricity and madness, and the biological and social health of geniuses was an issue of considerable debate well into the twentieth century.³²³ Lewis Terman's longitudinal *Genetic Studies of Genius* effectively dashed the stereotype of the neurotic and unbalanced eccentric.³²⁴ There is a substantial body of research (much from the field of gifted education) that supports Terman's claim that IQ is positively correlated with health, wealth, and achievement.³²⁵ It has been shown that people with high IQs achieve more professional success,³²⁶ divorce less often,³²⁷ and that high IQ children exhibit greater psychosocial maturity than their average peers.³²⁸

³²¹ See *supra* text accompanying note 109.

³²² See BECKER, *supra* note 16, at 24 (describing pazzia).

³²³ See *id.* at 30 (describing the waning of the mad genius controversy).

³²⁴ See *supra* notes 57-59 and accompanying text.

³²⁵ See *supra* notes 59-69 and accompanying text (describing achievements of Terman subjects).

³²⁶ See, e.g., HERRNSTEIN & MURRAY, *supra* note 51, at 51-61 (noting that high IQ improves occupational choice and success).

³²⁷ See *id.* at 174 (describing inverse relationship between IQ and divorce).

³²⁸ See Paul M. Janos & Nancy M. Robinson, *Psychosocial Development in Intellectually Gifted Children*, in THE GIFTED AND TALENTED: EDUCATIONAL PERSPECTIVES 149, 150-51 (Frances Degan Horowitz & Marion O'Brien eds., 1985).

However, a contemporary of Terman, Leta Stetter Hollingworth, arrived at a somewhat different conclusion, arguing that very high IQ scores are associated with serious social and emotional problems.³²⁹ Her view is supported by contemporary research as well. For example, it has been demonstrated that being labeled “gifted” as a child is associated with mid-life doubts about living up to one’s potential and with diminished psychological well-being at age eighty.³³⁰ Other studies have concluded that 160-plus IQ scores are associated with reduced self-esteem and dramatically increase the risk of isolation, loneliness, and unhappiness.³³¹ Even Terman, the unswerving champion of high IQ, acknowledged that individuals with 170-plus IQ scores suffer from adjustment problems and confront “one of the most difficult problems of social adjustment that any human being is ever called upon to meet.”³³² Re-analyzing the Terman data, another study demonstrated that while only 13 percent of men with verbal intelligence scores below 97.8 were maladjusted, 25 percent of those with scores between 117.1 and 136.4 were, and 45 percent of men with scores greater than 175 were.³³³ Among creative geniuses, rates of psychiatric disorder (especially mood disorder) are high.³³⁴ And suicide is an ever-present threat: the extant literature suggests that “young people who are gifted may be at greater risk for taking their own lives.”³³⁵

A substantial body of research has attempted to reconcile these seemingly contradictory accounts of genius.³³⁶ Most studies remain agnostic,

³²⁹ HOLLINGWORTH, *supra* note 73, at 267-83.

³³⁰ Carole K. Holahan & Charles J. Holahan, *Being Labeled as Gifted, Self-Appraisal, and Psychological Well-Being: A Life Span Developmental Perspective*, 48 INT’L J. AGING & HUM. DEV. 161, 161 (1999).

³³¹ See MIRACA U.M. GROSS, EXCEPTIONALLY GIFTED CHILDREN 233-35 (1993) (reporting extreme difficulties in forming congenial relationships with age-peers of average IQ for 160-plus subjects).

³³² WINNER, *supra* note 98, at 225.

³³³ See Grady M. Towers, *The Outsiders*, GIFT OF FIRE, Mar. 1995, available at <http://www.prometheussociety.org/articles/Outsiders.html>. The test of verbal intelligence was the Concept Mastery Test, which is not normalized in the same way IQ scores are; reported intelligence levels should not be read as IQ equivalents. *Id.*

³³⁴ See *supra* note 32-34 and accompanying text.

³³⁵ Nancy M. Robinson & Kathleen D. Noble, *Social-Emotional Development and Adjustment of Gifted Children*, in 4 HANDBOOK OF SPECIAL EDUCATION: RESEARCH AND PRACTICE 57, 66 (Margaret C. Wang et al. eds., 1991). See also Eric Konigsberg, *Prairie Fire: The Life and Death of a Prodigy*, THE NEW YORKER, Jan. 16, 2006, at 45 (describing suicide of fourteen-year-old with a 178 IQ); Sean Thomas, *Only the Bright Commit Suicide*, TIMES ONLINE, Jan. 16, 2004, http://www.timesonline.co.uk/tol/life_and_style/health/features/article996719.ece (reporting relationship between high IQ and suicide).

³³⁶ See, e.g., Nicholas T. Galluci et al., *Intellectually Superior Children and Behavioral Problems and Competence*, 22 ROEPER REV. 18 *passim* (1999) (contrasting clinicians’ publications that support Hollingworth’s view and standardized tests that support Terman’s view); Ann F. Garland & Edward Zigler, *Emotional and Behavioral Problems Among Highly Intellectually Gifted Youth*, 22 ROEPER REV. 41 *passim* (1999) (describing research supporting Terman’s claim of general well-being and research supporting Hollingworth’s observation about psychosocial vulnerability).

neither favoring the view of Terman nor the view of Hollingworth, concluding (predictably) that more research is needed. Some researchers, however, have raised the possibility “that the relationship between IQ and adjustment is curvilinear, changing from positive to negative at some point within the gifted range.”³³⁷ For example, in one study, children with 145-plus IQ scores showed greater maladjustment than those with slightly lower IQ,³³⁸ in another, psychosocial problems were reported in 20 percent to 25 percent of very high IQ subjects, but in only 5 percent to 7 percent of moderately gifted subjects, and in 6 percent to 16 percent of average subjects.³³⁹ Hollingworth suggested that

intellectually gifted children between 130 and 150 IQ seem to find the world well suited to their development. As a group, they enjoy the advantages of superior size, strength, health, and beauty; they are emotionally well balanced and controlled; they are of good character; and they tend to win the confidence of their contemporaries, which gives them leadership. This is the “optimum” range of intelligence, if personal happiness is being considered. If a parent would want his child to enjoy “every advantage,” he could not do better than wish the child to be endowed with an IQ not lower than 130 or higher than 150. Above this limit, however—surely above 160 IQ—the deviation is so great that it leads to special problems of development which are correlated with personal isolation.³⁴⁰

One attempt to elaborate Hollingworth’s theory of “optimal IQ” focuses upon the cognitive differences that exist between the genius and others. If differences are great enough, it is claimed, prodigious intellectual gifts can become liabilities.

B. *The Cognitive Gulf*

Building on Hollingworth’s “optimal IQ” theory, Towers has developed a theory that explains why geniuses with 160-plus IQ scores may face obstacles that geniuses in the 130 to 155 IQ range do not.³⁴¹ Hollingworth notes that people with IQs between 125 and 155 are more intelligent than most of their peers, allowing them to become confident leaders. Additionally, there are enough in that range to establish a cohort of giftedness. “But those of 170 IQ and beyond are too intelligent to be understood by the gen-

³³⁷ Ingrid N. Grossberg & Dewey G. Cornell, *Relationship Between Personality Adjustment and High Intelligence: Terman Versus Hollingworth*, 55 *EXCEPTIONAL CHILDREN* 266, 267 (1988). *But see* Maureen Neihart, *The Impact of Giftedness on Psychological Well-Being: What Does the Empirical Literature Say?*, 22 *ROEPER REV.* 10, 16 (1999) (“The research does not support the broad conclusion that there’s a level of IQ at which problems in adjustment significantly increase.”).

³³⁸ ABRAHAM J. TANNENBAUM, *GIFTED CHILDREN: PSYCHOLOGICAL AND EDUCATIONAL PERSPECTIVES* 102 (1983) (showing increased social adjustment problems among 145-plus subjects).

³³⁹ Janos & Robinson, *supra* note 328, at 173.

³⁴⁰ HOLLINGWORTH, *supra* note 73, at 265-66.

³⁴¹ Towers, *supra* note 333.

eral run of persons with whom they make contact. They are too infrequent to find congenial companions. They have to contend with loneliness and personal isolation.³⁴²

Towers argues that “there is a limit beyond which genuine communication between different levels of intelligence becomes impossible.”³⁴³ He does not define genuine communication but suggests that a gulf of roughly 30 IQ (2σ) points makes it impossible. Presumably, the borderline retarded (68 IQ) and the threshold Mensan (132 IQ) could communicate superficially (“Nice day out.”), but Towers argues that more sophisticated exchange is unlikely. Yet even if Towers is wrong about the requisite IQ differential or the ambit of communications impeded by the gulf,³⁴⁴ his theory has profound consequences, given the relative scarcity of IQ scores under a normal distribution. Figure 1, *supra*, depicts the distribution of IQ scores. According to Towers, genuine communication is possible only within two standard deviations. Thus, the average Joe can communicate with about 95 percent of people ($\mu \pm 2\sigma$), although half of those he encounters will be smarter than he.

The threshold Mensan, on the other hand, with an IQ of 132 ($\mu + 2\sigma$) can engage in genuine communication with 50 percent of people—everyone from the mean to 164 IQ. He will be intellectually superior to almost 48 percent of them, and still able to carry on a significant conversation with the 2 percent possessing higher IQ scores.

But the individual with an IQ of 164 ($\mu + 4\sigma$) can engage in genuine communication with less than 3 percent of human beings. And such communication depends upon finding individuals with borderline genius intelligence (~ 132 IQ).

Of course, the higher the IQ, the smaller the pool of individuals within two standard deviations. The individual with a 196 IQ ($\mu + 6\sigma$)—approximately that of Galton,³⁴⁵ Einstein,³⁴⁶ or Leopold³⁴⁷—could engage in genuine communication with only 0.003 percent of the population. His likelihood of ever meeting an intellectual equal would be remote (only one in a billion people have such a score).³⁴⁸

In writing about the case of William James Sidis,³⁴⁹ Towers speculates that if an IQ of 160 or 170 can result in adjustment problems, life must have been unbearable with a 250 to 300 IQ. He quotes Aldous Huxley: “Perhaps

³⁴² HOLLINGWORTH, *supra* note 73, at 265.

³⁴³ Towers, *supra* note 333.

³⁴⁴ For example, the differential might be forty points, or fifty, and it may not be genuine communication that is impeded, but highly abstract or symbolic expression.

³⁴⁵ See *supra* note 54 and accompanying text (reporting Galton’s IQ).

³⁴⁶ See WALLACE, *supra* note 128, at 283 (reporting Einstein’s IQ).

³⁴⁷ See *supra* note 125 (reporting Leopold’s IQ).

³⁴⁸ See Darryl Miyaguchi, Generic IQ Chart, <http://www.eskimo.com/~miyaguch/combnorm.html> (last visited Feb. 4, 2009).

³⁴⁹ See *supra* notes 128-30 and accompanying text (describing Sidis).

men of genius are the only true men. In all the history of the race there have been only a few thousand real men. And the rest of us—what are we? Teachable animals.”³⁵⁰ Accordingly, Towers concludes that “Sidis was a feral child; a true man born into a world filled with animals—a world filled with us.”³⁵¹

While it may be hyperbolic to describe geniuses as true men born into a world of human beasts, if there is any merit to the Hollingworth-Towers theory, individuals with IQs above optimal levels may suffer socialization problems. In extreme cases, the criminal genius may be so dramatically under-socialized, and may understand the world in such a fundamentally different way from others, that he may be functionally insane.

C. *The Case for Insanity*

Insanity is a contentious defense.³⁵² Although its roots extend to Roman law,³⁵³ the contemporary insanity defense is viewed with suspicion by the public,³⁵⁴ juries,³⁵⁵ and legislators.³⁵⁶ In those rare cases when the insanity defense is successfully raised, there is often tacit agreement among all court actors to exculpate the offender.³⁵⁷ Still, even under the rigorous M’Naghten test for insanity in effect in many jurisdictions,³⁵⁸ some offenders are found not guilty by reason of insanity because

³⁵⁰ Aldous Huxley, *Young Archimedes*, in 4 THE WORLD OF MATHEMATICS 2223, 2242 (James Roy Newman ed., 1956).

³⁵¹ Towers, *supra* note 333, at 16.

³⁵² See HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 131 (1968) (“There is no more hotly controverted issue in the criminal law than the question of whether, and, if so, to what extent and according to what criteria, individuals whose conduct would otherwise be criminal should be exculpated on the ground that they were suffering from mental disease or defect when they acted as they did.”).

³⁵³ See Milhizer, *supra* note 160, at 764 (noting that insanity was a complete defense to crime under Roman law).

³⁵⁴ See Michael L. Perlin, “The Borderline Which Separated You From Me”: The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment, 82 IOWA L. REV. 1375, 1375-76 (1997) (noting that among teenagers and post-Hinckley polls, 90 percent of respondents believed the insanity defense was overused).

³⁵⁵ See PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN’T GIVE PEOPLE WHAT THEY DESERVE 43, 243-44 (2006) (noting that the defense is raised in less than 1 percent of felony cases and is successful in only about 26 percent of those cases).

³⁵⁶ See Stephen M. Leblanc, Comment, *Cruelty to the Mentally Ill: An Eighth Amendment Challenge to the Abolition of the Insanity Defense*, 56 AM. U. L. REV. 1281, 1283 (2007) (“Since 1979, four states—Montana, Idaho, Utah, and Kansas—have eliminated the [insanity] defense.”).

³⁵⁷ See, e.g., Edward Griew, *The Future of Diminished Responsibility*, 1988 CRIM. L. REV. 75, 79-80 (noting that lawyers benignly choose not to focus on statutory requirements).

³⁵⁸ Julie E. Grachek, Note, *The Insanity Defense in the Twenty-First Century: How Recent United States Supreme Court Case Law Can Improve the System*, 81 IND. L.J. 1479, 1485 (2006) (noting that a 2002 American Academy of Psychiatry and the Law survey found “that 25 states use the M’Naghten

at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong.³⁵⁹

Focusing singularly on cognition (not volition or affect) and requiring a total lack of knowledge (rather than impaired appreciation), the M’Naghten test is difficult to satisfy.³⁶⁰ Indeed, though he was found not guilty, M’Naghten himself did not satisfy it.³⁶¹

Excusing criminal conduct for a genius defendant by reason of insanity would be extraordinarily difficult. As a threshold matter, under M’Naghten, it would be difficult to establish genius as a “defect of reason, from disease of the mind.” The disease of mind element has been interpreted broadly in most jurisdictions,³⁶² but even contemporary courts that include mental defect (retardation) within the definition of “disease of mind” would be reluctant to include genius. While for nineteenth-century degenerationists, genius as mental disease was uncontroversial,³⁶³ for contemporary psychologists, high IQ connotes superior function and health, not pathology.³⁶⁴ Thus, while establishing genius as a disease of the mind is not a doomed endeavor, it would require assembling a body of research on the profoundly gifted and demonstrating that genius, the reciprocal of mental retardation, may result in maladaptive consequences.³⁶⁵ Just as mental retardation is associated with limitations in adaptive functioning,³⁶⁶ so too might the profoundly intelligent person struggle with “communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.”³⁶⁷

Test, 17 states use the ALI/MPC Test, 4 states have abolished the insanity defense, 3 states utilize the IIT, and 1 state uses the *Durham Test*”).

³⁵⁹ FINKEL, *supra* note 160, at 21. The federal test for insanity resembles the M’Naghten standard. See 18 U.S.C. § 17a (2006).

³⁶⁰ See Oleson, *supra* note 127, at 605 (noting cognitive focus and insensitivity to degrees of incapacitation).

³⁶¹ See FINKEL, *supra* note 160, at 22 (noting that even under the legal standard established by the Lords in his case, M’Naghten should have been convicted).

³⁶² See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 363 (4th ed. 2006) (noting that the term is typically undefined).

³⁶³ See Arthur MacDonald, *Criminological Literature*, 3 AM. J. PSYCHOL. 219, 221-22 (1890) (“In the last analysis the genius differs from the insane man, in having not only a single association of ideas, but almost an infinite series of ideas; and, still more important, the vastness of his intelligence permits him to correct the wildness of his imagination. The genius then, is original and abnormal, but has a critical mind. The insane man is original, but lacks the critical spirit.”).

³⁶⁴ See *supra* note 59 and accompanying text.

³⁶⁵ See, e.g., *supra* notes 329-40 and accompanying text.

³⁶⁶ See *supra* note 77 (outlining diagnostic criteria of mental retardation).

³⁶⁷ *Id.*

If the disease prong of M’Naghten *is* established, the genius offender must then prove that he did not know the nature and quality of his actions or, if he did know them, did not know they were wrong. Yet, in all likelihood, the genius *would* know the nature and quality of his actions.³⁶⁸ Unless afflicted by a mental disorder that interferes with his perception, his high IQ would, if anything, leave him *better equipped* to appreciate the nature of his acts.³⁶⁹ But the other wrongfulness prong may hold promise. If a court interprets the wrongfulness prong as requiring a lack of knowledge about *legal* wrongness, the insanity defense will almost certainly be precluded. Inasmuch as the genius might possess a factual knowledge of the law but lack an affective response to it, he resembles the psychopath.³⁷⁰ If, however, the wrongfulness prong can be satisfied by demonstrating a lack of knowledge about *moral* wrongness, the genius may qualify.³⁷¹ The genius may understand the wrongfulness of his actions in a manner alien to most people: he may know that his actions were technically illegal but, compelled by post-conventional moral reasoning,³⁷² may follow “higher laws.”³⁷³ Understanding more and seeing farther than the rest of society, the genius’s actions may be consistent with rationally derived moral principles but appear bizarre, irrational, and inexplicable to others.

³⁶⁸ *But see* Terry A. Maroney, *Emotional Competence, “Rational Understanding,” and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375 *passim* (2006) (identifying essential role of emotions in rational decisionmaking).

³⁶⁹ *See* Grover C. Gilmore et al., *Age Effects in Coding Tasks: Componential Analysis and Test of the Sensory Deficit Hypothesis*, 21 PSYCHOL. & AGING 7, 15 (2006) (reporting that artificial sensory deficits resulted in reduced IQ-related functions).

³⁷⁰ Psychopaths lack empathy, but possess intact reasoning and cognitive abilities. *See, e.g.*, HERVEY CLECKLEY, *THE MASK OF SANITY* 37-38 (5th ed. 1976) (describing characteristics of the psychopath, including *inter alia*, absence of delusions and other signs of irrational thinking). Under tests for insanity that are purely cognitive, then, psychopaths are sane, despite suffering from a clinically-recognized personality disorder. *See* AM. PSYCHIATRIC ASS’N, *supra* note 77, at 701-03 (defining antisocial personality disorder). The criminal responsibility of the psychopath is a matter of considerable academic debate. *See, e.g.*, Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character and Responsibility*, 67 IND. L.J. 719, 746-47 (1992) (claiming psychopaths are rational and should be held criminally responsible); Maya Mei-Tal, *The Criminal Responsibility of Psychopathic Offenders*, 36 ISR. L. REV. 103, 120-21 (2002) (claiming psychopaths are incapable of empathy and should not be held criminally responsible). Today, the psychopath often dwells in the worst of all possible worlds. Antisocial personality disorder can serve as a basis for involuntary civil commitment, but not exculpate for criminal acts. *See* Oleson, *supra* note 127, at 608 n.185 (describing *Kansas v. Crane*, 534 U.S. 407 (2002)).

³⁷¹ *See* *People v. Serravo*, 823 P.2d 128, 133-37 (Colo. 1992) (discussing courts that have applied a legal wrongness test and those that applied a moral wrongness test, and concluding that moral wrongness is the appropriate standard).

³⁷² *See supra* note 311 (describing Kohlberg’s research on moral reasoning).

³⁷³ In so doing, the genius may appeal to natural law. *See* JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 11 (rev. ed. 1990) (quoting St. Augustine as stating that “an unjust law is no law at all”).

Mounting a successful insanity defense on the basis of genius under M’Naghten is unlikely: doing so would require both the court’s acceptance of genius as a mental disorder and satisfying the wrongfulness prong with moral knowledge. Nevertheless, the concept of genius can be employed in other exculpatory efforts. For example, in capital cases it could be argued that the same psychological considerations that underlie the majority’s reasoning in *Atkins* should apply with equal force in the case of the genius criminal. Of course, because criminal geniuses are so rare, it is impossible to establish Eighth Amendment boundaries for these cases by consulting legislative enactments or jury decisions, but the Court’s proportionality analysis can be applied. Cognitive deficits form the basis for Eighth Amendment protection in cases of mentally retarded defendants; conversely, cognitive excess should establish analogous safeguards for geniuses:

The very gifted child or adolescent, perceiving the illogical conduct of those in charge of his affairs, may turn rebellious against all authority and fall into a condition of negative suggestibility—a most unfortunate trend of personality, since the person is then unable to take a cooperative attitude toward authority. A person who is highly suggestible in a negative direction is as much in bondage to others around him as is the person who is positively suggestible.³⁷⁴

In addition to suggestibility (a penological factor of note for the *Atkins* majority),³⁷⁵ the genius may suffer from isolation³⁷⁶ and problems with communication and interpersonal relationships.³⁷⁷ Just as mentally retarded defendants may be viewed as remorseless by juries, so too might genius offenders—muted by a cognitive gulf—seem cold or inhuman.³⁷⁸ At least in artistic geniuses, recognized forms of mental illness—especially mood disorders—are surprisingly common.³⁷⁹

In the hands of a skillful capital attorney, high IQ, which may initially seem like an aggravating factor,³⁸⁰ can be recast as mitigation evidence.³⁸¹

³⁷⁴ HOLLINGWORTH, *supra* note 73, at 260-61.

³⁷⁵ *Atkins v. Virginia*, 536 U.S. 304, 318 (2002).

³⁷⁶ *See supra* note 342 and accompanying text.

³⁷⁷ *See supra* Part III.B and associated text (describing cognitive gulf).

³⁷⁸ *See, e.g.*, Oleson, *supra* note 140, at 401 (describing the horrified reaction of reporters when Leopold coolly described the killing of Bobby Franks “as an experiment . . . as easy . . . as . . . impaling a beetle on a pin”). *See also* ALBERT CAMUS, *THE STRANGER* 64-65 (Matthew Ward trans., 1989) (suggesting that Meursault’s trial hinges more upon his dispassionate response to his mother’s death than with evidence of his crime).

³⁷⁹ *See supra* note 35 and accompanying text.

³⁸⁰ *See supra* Part II.C.2.b and accompanying text (stating case for increased culpability).

³⁸¹ *See, e.g.*, Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 *HOFSTRA L. REV.* 835, 837-45 (2008) (describing use of a mitigation counter-narrative against the master crime narrative). Courts *do* apply high IQ as mitigation evidence. *See* Trepal

The cognitive gulf, and its attendant socialization deficit, militates against holding the extraordinary genius to the conventional social standards. If it is wrong to punish an animal for a crime,³⁸² it must also be wrong to punish a feral child.³⁸³ It must also be wrong to punish those whose “gifts” have resulted in de facto banishment from society.

Even when insanity itself cannot be established—and even in non-capital cases when genius cannot be proffered as formal mitigation evidence—high IQ offenders are treated more leniently by courts, possibly because the verbal ability of gifted defendants allows judges to empathize with them.³⁸⁴ Focusing on the genius’s unusual capacity for rehabilitation,³⁸⁵ courts may be drawn to psychiatric dispositions,³⁸⁶ especially when the offender’s conduct does not make sense (e.g., a wealthy offender who steals, a murderer whose violence is more ritualistic than utilitarian).³⁸⁷ In such cases, psychic abnormalities (madness, mental retardation, youth, and perhaps even genius) can serve as a pretext for clemency. Courts that focused on the otherness of the offender instead of their egregious crimes spared the lives of Leopold, Loeb,³⁸⁸ and Kaczynski.³⁸⁹

Certainly, the archetype of the eccentric and misunderstood genius is a powerful trope for defense counsel. Even when a defense of full-fledged insanity is impossible, the cognitive differentness of the high IQ offender can be invoked to argue for reduced culpability. Although there is no *Atkins*-style bright line rule for high IQ punishment, the borderline genius with a 130 IQ is as different from average as the constitutionally protected

v. State, 621 So. 2d 1361, 1363 (Fla. 1993) (counting “high intelligence” among non-statutory mitigating factors).

³⁸² See *Holloway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945) (“To punish a man who lacks the power to reason is as undignified and unworthy as punishing an inanimate object or an animal. A man who cannot reason cannot be subject to blame. Our collective conscience does not allow punishment where it cannot impose blame.”).

³⁸³ See *supra* note 351 and accompanying text.

³⁸⁴ Gath et al., *supra* note 144, at 277 (suggesting that high IQ delinquents may better articulate their emotional problems than delinquents of average intelligence).

³⁸⁵ See BURT, *supra* note 108 (noting that bright delinquents “[t]actfully and wisely handled . . . are among the most hopeful cases that the psychologist is called upon to study”).

³⁸⁶ Whether an offender is better off with a psychiatric disposition than a custodial sentence is another question. See Joseph Goldstein & Jay Katz, *Abolish the “Insanity Defense”—Why Not?*, 72 YALE L.J. 853, 868 (1963) (“[T]he insanity defense is not a defense, it is a device for triggering indeterminate restraint.”). See also *supra* note 171 (describing loss of personhood).

³⁸⁷ See Alec Samuels, *Mental Illness and Criminal Liability*, 15 MED. SCI. & L. 198, 199-200 (1975) (“[I]f a defendant just kills his victim for what appears to be a very ordinary motive such as greed or jealousy, diminished responsibility stands little chance of being established, but . . . the further removed from normal behaviour the behaviour of the defendant the more he appears to be mentally ill . . .”).

³⁸⁸ See *supra* note 125 and accompanying text. See also CLARENCE DARROW, *His Closing Argument in the Loeb-Leopold Trial*, in CLARENCE DARROW ON THE DEATH PENALTY 1, 22-26 (1991).

³⁸⁹ See *supra* note 127 and accompanying text.

mentally retarded offender with an IQ of 70.³⁹⁰ The genius with a 180 IQ is as different from the mean as the “idiot” (who was treated with leniency even under early English law).³⁹¹ Although gifted people may be more successful in passing as normal than mentally retarded people, both groups are out of sync with the rest of society and are deviant, “in both a developmental and a statistical sense.”³⁹² Accordingly, courts should be urged to consider the role of intelligence in matters of culpability and desert in cases involving genius, as well as cases involving retardation.

CONCLUSION

In 2002, the Supreme Court prohibited the execution of mentally retarded defendants and in so doing established Eighth Amendment parity among this group, the insane, and juvenile offenders.³⁹³ In many ways, the Court’s capital jurisprudence mirrors the early penal philosophy of Æthelred and Cnut, distinguishing between those who choose their crimes and those who do not (cannot).³⁹⁴ Of course, not all offenders with mental abnormalities are afforded Eighth Amendment protection: those who suffer from mental illness,³⁹⁵ traumatic brain injury,³⁹⁶ or psychopathy³⁹⁷ face execution for their crimes even though their disabilities can be equally incapacitating to mental retardation. A great deal of legal scholarship has identified these inconsistencies and suggested more principled ways of restricting punishment for offenders who suffer from mental abnormalities.³⁹⁸

One category of mentally abnormal offender, however, has not been considered in this light: the genius. That high IQ offenders have been overlooked is not surprising. Despite society’s longstanding fascination with the idea of genius,³⁹⁹ astonishingly little is known about intelligent criminals.⁴⁰⁰ Criminological research suggests that high IQ is a protective factor and inhibits criminal offending,⁴⁰¹ but history shows that many geniuses have

³⁹⁰ See *supra* note 96 and accompanying text.

³⁹¹ See *supra* notes 164-68 and accompanying text.

³⁹² Robinson, *supra* note 96, at 1413.

³⁹³ See *supra* Part II.B (describing *Atkins* and related cases).

³⁹⁴ See *supra* notes 161-162 and accompanying text.

³⁹⁵ See Izutsu, *supra* note 263 (arguing for Eighth Amendment protection for offenders with serious mental illness).

³⁹⁶ See Farahany, *supra* note 264 (showing Eighth Amendment inequities for those with mental retardation and those with traumatic brain injuries).

³⁹⁷ See Mei-Tal, *supra* note 370, at 121 (arguing that psychopaths should not be held responsible for their conduct and should not be punished).

³⁹⁸ See, e.g., Maroney, *supra* note 368, at 1425-33 (articulating policy recommendations that better reconcile psychological research and legal standards for competence).

³⁹⁹ See Murray, *supra* note 8, at 9-29 (tracing history of the idea of genius).

⁴⁰⁰ See *supra* note 142 and accompanying text.

⁴⁰¹ See Shader, *supra* note 107, at 4 (identifying high IQ as protective factor).

been persecuted, prosecuted, and executed.⁴⁰² When individuals with high IQs *do* become offenders, they are among the most dangerous of criminals. The thrill-kill murder of Bobby Franks by Leopold and Loeb remains a cultural meme nearly a century after the crime;⁴⁰³ the hunt for the Unabomber was the biggest, most expensive manhunt in American history.⁴⁰⁴ White-collar offenders, typically highly intelligent and well-educated, are less notorious, but inflict very real social harms. The losses associated with white-collar antitrust, fraud, and corruption dwarf all losses associated with street crime;⁴⁰⁵ workplace violations, environmental crimes, and unsafe products result in tens of thousands of deaths and millions of injuries each year, eclipsing all combined violent street crime.⁴⁰⁶

In many ways, high IQ offenders seem *more* culpable than average offenders.⁴⁰⁷ The genius, processing information more effectively than others, possessing foresight, and acting less impulsively, may exhibit a culpability that resembles purpose more than knowledge, recklessness, or negligence.⁴⁰⁸ Their keen intelligence, coupled with the great harms of which they appear capable, can make them seem positively diabolical.⁴⁰⁹

But some geniuses deserve exculpation for their crimes. After all, the borderline genius is as far removed from the norm as is the person with borderline mental retardation;⁴¹⁰ gaps of this magnitude result not only in quantitative variation, but in qualitative differences;⁴¹¹ thus, by virtue of his mental defect, the mentally retarded defendant has been deemed less blameworthy than others by the U.S. Supreme Court.⁴¹² If culpability radiates from the mean as does IQ, dissipating in the asymptotic tails, the genius should be similarly exculpated. Yet even if, as a general rule, IQ is positively correlated with culpability (i.e., blameworthiness increases with intelligence), defendants possessing extraordinary IQ scores should be exculpated. Not because, as Aristotle suggested,⁴¹³ their state is above virtue in the way that the brute's state is below vice, but because IQ scores above a

⁴⁰² See *supra* notes 114-18 and accompanying text.

⁴⁰³ See HIGDON, *supra* note 125 (describing killing).

⁴⁰⁴ See DOUGLAS & OLSHAKER, *supra* note 127 (describing Unabomber manhunt).

⁴⁰⁵ JAMES WILLIAM COLEMAN, *THE CRIMINAL ELITE* 10 (5th ed. 2002) (“The economic cost of white-collar crime is vastly greater than the economic cost of street crime.”).

⁴⁰⁶ *Id.* (“‘[N]onviolent’ white-collar criminals undoubtedly kill considerably more people than all the violent street criminals put together.”).

⁴⁰⁷ See *supra* Part II.C.2.b (exploring justification for enhanced punishment).

⁴⁰⁸ See MODEL PENAL CODE § 2.02 (2007) (articulating general requirements of culpability).

⁴⁰⁹ See Michael Mello, *The Non-Trial of the Century: Representations of the Unabomber*, 24 VT. L. REV. 417, 435 (2000) (quoting Sam Houston and describing Kaczynski as “cold as a lizard and ambitious as Lucifer”).

⁴¹⁰ Robinson et al., *supra* note 96, at 1413.

⁴¹¹ See WECHSLER, *supra* note 97, at 134.

⁴¹² See *Atkins v. Virginia*, 536 U.S. 304, 304-05 (2002).

⁴¹³ See *supra* note 1 and accompanying text.

certain level may cease to function as a gift and may in fact operate as a curse. The genius may struggle with communication and socialization⁴¹⁴ and may spend his entire life in de facto isolation.⁴¹⁵ In extreme cases, this isolation may leave him with an alien understanding of right and wrong, rendering him functionally insane.⁴¹⁶ Maya Mei-Tal could have been describing a genius when she wrote, “Outwardly he seems sane, a normal human being, but a closer acquaintance reveals a degree of maladjustment resembling insanity.”⁴¹⁷

Criminal geniuses are, by definition, rare.⁴¹⁸ In the criminal justice system, high IQ offenders are rarely stopped, arrested, or convicted.⁴¹⁹ Accordingly, many judges may never be confronted by a criminal genius. Those who are can, in most cases, impose appropriate sentences without affording any special consideration to IQ. But defendants with extraordinarily high IQ scores may present the court with a challenge: how to invert and apply *Atkins*. The offender with a 180 IQ, after all, is as divergent from the norm as the “idiot” who was exculpated even under the laws of Bracton.⁴²⁰ In the rarest of cases, judges may need to think carefully about the relationship between intelligence and culpability. In those cases, they should remember that intelligence colors developmental and social adjustment on the right tail of the distribution, as surely as on the left.

⁴¹⁴ See *supra* Part III.B.

⁴¹⁵ See *supra* note 351 and accompanying text.

⁴¹⁶ See *supra* Part III.C.

⁴¹⁷ Mei-Tal, *supra* note 370, at 105-06 (describing psychopath).

⁴¹⁸ They are at least as rare as genius. Borderline genius starts at about IQ 132, and Terman’s threshold was IQ 140. See *supra* notes 70-71.

⁴¹⁹ See HERRNSTEIN & MURRAY, *supra* note 51, at 246-47.

⁴²⁰ See *supra* note 164 and accompanying text.