Intellectual Disability and Punishment: The Influence of Culpability in the Application of Punishment Among Intellectually Disabled Offenders

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Word Count: 40,061

A thesis submitted in fulfilment of the requirements for the

degree of Master of Arts in Criminology

The University of Auckland, 2021

Abstract

Intellectually disabled offenders do not have the intellectual capability to understand or comprehend capital punishment or its consequences. Under interpretations of the Eighth Amendment of the United States Constitution, intellectually disabled offenders have been excluded from capital punishment, with the United States Supreme Court ruling in *Atkins v. Virginia* (2002) that capital punishment for intellectually disabled offenders violated the Eighth Amendment's prohibition against cruel and unusual punishment due to the evolving public standards of decency.

Expanding from this exclusion from capital punishment, this thesis aims to determine whether the punishment of intellectually disabled offenders in non-capital cases also violates the Eighth Amendment's prohibition against cruel and unusual punishment. Additionally, the thesis explores the role of intelligence and cognition, culpability and understanding, national standards, and alternative punishment options.

This thesis focuses on the legislative and judicial landscape within the United States relating to intellectual disability, intelligence quotient, and capital punishment and non-capital punishment concerning intellectually disabled offenders. The thesis uses conceptual jurisprudence to investigate the relationships between intelligence and cognition, legislative history, the Eighth Amendment, and alternative punishment methods. The thesis also adds a New Zealand link to the punishment of intellectual disability via sports-related traumatic brain injuries. A basic alternative punishment model is proposed for use with intellectually disabled offenders.

This thesis concludes that the Eighth Amendment should apply to all forms of punishment, capital, and non-capital alike, for intellectually disabled offenders. Intellectually disabled offenders lack understanding, culpability, and responsibility for the consequences of their actions. These findings imply that there should be a national standard for the legal classification of intellectual disability and consideration for the inclusion of other individuals, such as those who have sustained traumatic brain injuries. Further, many alternative methods of punishment can be utilised for intellectually disabled offenders that would enable successful rehabilitation and reintegration into society.

To summarise, this thesis lends weight to the view that various alternative forms of punishment are better suited to the successful rehabilitation of intellectually disabled offenders and their reintegration into society.

Dedication

This thesis is dedicated to my grandparents: Margo & Brian, Brenda & Peter.

I wish you were all still here to read it.

Acknowledgements

First and foremost, I would like to acknowledge and thank my supervisor, Dr James Oleson, for his continued assistance, support, and creative allowances throughout the completion of this project. I have not always been the most communicative throughout this process, and I appreciate the support you gave regardless. The knowledge and experience you provided throughout this project have been invaluable. It was a privilege to work on this project under your supervision, and I am very grateful you agreed to supervise me.

Special thank you to my parents, Karen & Tod Verney, for their love and encouragement while I completed this project.

I also wish to finally acknowledge the outpouring of support from my family and friends who kept me motivated, pushed me forward and helped make sure I produced something I was proud of. Especially to those who endured me talking passionately about this project a little too much, I hope you can read it and understand why. I cannot name you all but thank you to each and every one of you.

This thesis could not have been completed without all of your support, and I am incredibly grateful.

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Chapter One: Introduction

Intellectually disabled individuals face continued struggles within the community and even further within the criminal justice system. These offenders are not eligible for the death penalty after the *Atkins v. Virginia* (2002) ruling, which states that execution of intellectually disabled offenders violates the United States Constitution under the Eighth Amendment prohibiting cruel and unusual punishment. This begs the question, why does this ruling not apply to the punishment of intellectually disabled offenders in non-capital cases, and should this be considered if alternative punishment options are available?

Aims of Research, Key Terms & Research Questions

This thesis explores the punishment of intellectually disabled offenders in the United States, particularly their eligibility for capital punishment under the Eighth Amendment, the lack of a national standard for the eligibility criteria, and potential alternative measures of punishment for an intellectually disabled offender when considering all surrounding factors of intelligence, cognition, and understanding. This thesis's implications can also be linked to intellectually disabled offenders in New Zealand as the alternative measures of punishment provided can be universally applied to different criminal justice systems. Further, much of the thesis content regarding intellectually disabled offenders and non-capital applications of punishment, including alternative methods of punishment, can be linked to the wider world, particularly New Zealand.

The key terms involved in this research include intellectually disabled and mentally retarded, capital punishment, intelligence quotient, criminal responsibility and blameworthiness, mental impairment, and cruel and unusual punishment. The term mentally retarded is only used to explain the understanding and acceptance of individuals with intellectual impairments throughout the clinical field and within the criminal justice system, where the term is being phased out and replaced with the term intellectually disabled.

The main research question for this thesis is 'If the application of capital punishment for defendants with intellectual disabilities violates the Eighth Amendment, should this not apply to the application of all punishment for the intellectually disabled?'

In addition to the main research question, eight secondary questions, summarised below in bullet points, are also individually addressed in one chapter each of the thesis. These secondary questions are posited to assist in answering the main research question and expand our understanding of the continually changing relationship between intellectually disabled offenders and their punishment.

- What is the progression of understanding for the appropriate punishment of intellectually disabled offenders within the criminal justice system?
- To what degree can individuals who are intellectually disabled be held responsible for their criminal actions?
- How are individuals with low intelligence quotient (IQ) scores taken advantage of within the criminal justice system?
- What are the criteria for the classification of the intellectually disabled and how does this relate to an individual being too mentally impaired to be eligible for the death penalty?
- What is the Flynn Effect and how does it impact intellectually disabled offenders?
- If the Eighth Amendment bars execution of intellectually disabled offenders, why does this not apply to non-capital offences?
- What are the alternative measures that can be taken to address an offender with intellectual disabilities in a way that is appropriate for their understanding of punishment?
- How does New Zealand link to the application of punishment for intellectually disabled offenders through traumatic brain injury and sport?

Research Context

Internationally, the use of capital punishment is a heated debate; most developed countries have abolished it entirely, while others utilise it in a somewhat restricted format for certain types of offences. The United States could be considered the most widely recognised Western country to continue using capital punishment. While there was a short moratorium between 1972 (*Furman v. Georgia*) and 1976 (*Gregg v. Georgia*), capital punishment remains a lingering model in the United States criminal justice system. As of August 2020, according to the Death Penalty Information Center, 28 states currently have the death penalty, 3 of which have a current gubernatorial moratoria (California, 2019; Oregon, 2011; Pennsylvania, 2015), which means that the governor of

that state used their authority to commute all current death sentences to life without the possibility of parole. The remaining 22 states do not currently have the death penalty (Death Penalty Information Center, 2020). Those states that still authorise the death penalty are often heavily restricted to particular forms of crime and particular types of offenders, with some categorical exclusions. Debates within the United States explore the moral reasoning and implications of executing certain individuals, especially those who are not considered to have the mental capacity to understand their actions and connect these actions to the punishment they receive. The types of people who have been categorically excluded from death penalty eligibility include offenders under the age of eighteen (*Roper v. Simmons*, 2005), legally insane offenders (*Ford v. Wainwright*, 1986), offenders who do not remember committing a crime (*Madison v. Alabama*, 2019), and offenders who are intellectually or developmentally disabled (*Atkins v. Virginia*, 2002).

The definition of intellectual disability used and applied in legal terms varies by jurisdiction, state-by-state, as it would across countries, due predominantly to the subjective nature of the phenomenon. Different psychologists tasked with defining and applying the definition to individuals have different and sometimes opposing opinions about whether particular individuals satisfy the definition. The most prominent definition of intellectual disability under *Atkins v. Virginia (2002)* was a three-prong clinical definition provided in the Diagnostic and Statistical Manual of Mental Disorders (American Psychiatric Association, 2013) involving significantly subaverage intellectual function, significant limitations in adaptive function measured against everyday living experiences, and limitations that were apparent before the individual was 18 years of age. Further, in *Atkins* (2002), an indication was made that an IQ of approximately 70 or under constituted an individual who was mentally impaired and unfit for capital punishment. Florida set a firm rule where if defendants claimed intellectual disability, they had to prove an IQ of 70 or less (Florida Statutes, 2012). The Supreme Court then decided in *Hall v. Florida* (2014) that the bright-line cut off in Florida was unconstitutional in the application of the death penalty. The margin of testing error in IQ tests is significant; being more than one point means that life or death is dictated by a test that is not entirely accurate. In turn, this leads to individuals who may be under the threshold scoring an IQ of above 70 due to testing error and therefore being eligible for the death penalty (Freckelton, 2016).

Individuals with an intellectual disability are overrepresented in criminal justice systems across the world. In the United States, around 2% of the general population have an IQ score below 70, a

key indicator for intellectual disability (Spreat, 2020); further, somewhere between 0.5 and 1% of the general population have adaptive behaviour deficits, another key indicator for intellectual disability. However, many studies suggest that between 4 and 10% of US inmate populations are intellectually disabled (Spreat, 2020); this is not dissimilar to other countries such as England, Norway, and Australia. Using the United States Bureau of Justice Statistics, Spreat (2020) explains that of the 2,298,300 individuals incarcerated in 2016, approximately 160,000 were individuals with intellectual disability where the expected figure from the general population would only be 23,000.

This research examines not only the application of capital punishment upon the intellectually disabled, but other non-capital punishments for these intellectually disabled offenders within the United States. This thesis holds that cruel and unusual punishment for intellectually disabled offenders is not restricted to the application of capital punishment; but extends to all other standard punishments and environments such as life without the possibility of parole, solitary confinement, or even general prison populations. Consequently, this thesis explores and provides alternative punishments for intellectually disabled offenders that consider blameworthiness and accountability, understanding, education, and rehabilitation to form a cohesive method of punishment for offenders who are intellectually disabled. These alternative punishment options are universal to a point among Western societies, accounting for the differences in punishment beliefs due to cultural and religious ideas. The basic alternative options proposed can be modified to work with any standard criminal justice system that shares similar punishment values, including New Zealand's. The focus of this thesis is the United States purely for the depth of prior research and knowledge and the impact the Eighth Amendment has had on punishment. Further, this thesis is focused on offenders who are considered intellectually disabled and the classification, criteria, and IQ testing an offender must meet to be determined as intellectually disabled in the criminal justice system. Additionally, the high incarceration rate for intellectually disabled offenders necessitates the planning and provision of a system that acknowledges these offenders and offers them appropriate forms of rehabilitation and reintegration for non-capital offences. Furthermore, lack of a national standard in the United States for the determination of intellectual disability and the resulting state-by-state variation is an essential feature for this thesis when exploring the retentionist ideals surrounding capital punishment, and the experience intellectually disabled individuals have within the criminal justice system.

Research Justification

Despite the extensive academic writing on the application of the death penalty to intellectually disabled offenders, the literature is sparse on alternative punishments and approaches available for these offenders. Furthermore, the lack of a national standard for the classification of intellectual disability has resulted in different states having different criteria for classifying an offender as sufficiently intellectually disabled to be ineligible for the death penalty. Following the United States Supreme Court ruling in *Atkins v. Virginia* (2002), the sentencing of an intellectually disabled individual to death is a violation of the EighthAmendment's clause for cruel and unusual punishment. Marcus (2014) posits that the Eighth Amendment is violated in *Atkins* for individuals who are intellectually disabled because offenders with intelligence limitations are viewed as less culpable than those without. There are two main identifiable gaps here; the first is why individuals with intellectual disability can still be treated the same as those with regular intelligence for non-capital cases that do not incur the death penalty. The second encompasses the idea noted by Billotte (1994) that 89% of intellectually disabled people are only mildly disabled, although for the intellectual disability to be considered a mitigating factor, the intellectual capabilities must be almost entirely disabling. However, this does not mean that mildly disabled individuals are culpable for criminal responsibility to the extent that an average citizen is. The still significant gap in understanding and ability supports differential treatment for such mildly disabled defendants because individuals with intellectual disability cannot be held to the same standard as other offenders. This raises the need for an entirely different system for intellectually disabled offenders, not just for capital cases but also for all offences (Marcus, 2014). Even prior to *Atkins*, *Tison v. Arizona* (1987) made clear that an intellectually disabled adult who has committed murder should be held legally accountable; however, the punishment must be proportionate to the seriousness of the crime and the offender's moral culpability. Different degrees of severity of intellectual disability aside, some commonalities make it difficult for intellectually disabled offenders to understand and appreciate the consequences of their actions. Although non-capital crimes are less severe than capital crimes, this does not change the level of understanding for intellectually disabled offenders.

This thesis argues that the failure to take intellectual disability into account in non-capital cases also constitutes cruel and unusual punishment. It, therefore, suggests alternative approaches to the

punishment of these offenders. The thesis focuses on the United States because the relationship between intellectual disability and capital punishment originates in the United States. However, these factors can be explored in a New Zealand context in order to develop universally appropriate future programs and alternative punishment options for intellectually disabled offenders.

Methodology

The thesis focuses on the legislative and judicial landscape within the United States concerning intellectual disability, intelligence quotient, capital punishment, and all other forms of punishment linked to intellectually disabled offenders. This thesis explores and critiques the legislative and judicial landscape with the analysis of significant Supreme Court rulings and examines how this has impacted the capital punishment of vulnerable groups, with a particular focus on intellectual disabilities.

Therefore, this thesis is primarily a study of conceptual jurisprudence, aimed at providing a conceptual analysis of related core legal themes by clarifying the relationships between the explored concepts. Predominantly, this thesis examines conceptual jurisprudence in the American setting concerning capital punishment for the intellectually disabled, the application of intelligence quotient tests to decide intellectual disability, the lack of a national standard for clinical classification and the overall connection to the application of other forms of punishment in the United States. Using conceptual jurisprudence, this thesis explores and examines the Constitution of the United States, specifically the Eighth Amendment, in addition to the significant Supreme Court decisions that have rules on cruel and unusual punishment or other related issues.

This research also examines academic literature, clinical classifications, and criteria documents to expand our understanding of intellectually disabled offenders and their relation to the criminal justice system. Also analysed herein are significant policy introductions and Supreme Court decisions such as *Atkins v Virginia* (2002) and *Hall v. Florida* (2014) concerning the application of capital punishment for the intellectually disabled over time. Capital cases that were decided prior to legislative action are generally ineligible for protection. From the resulting exposition of the relevant literature and judicial history, this thesis will analyse the use of capital punishment for intellectually disabled offenders and propose a classification standard that can be used both nationally and

internationally; and consider the options for punishment in non-capital cases of intellectually disabled offenders who lack the mental capacity to understand their punishment.

Thesis Structure

This thesis uses six chapters to address the research questions through an analysis of jurisprudence, clinical classification, academic literature and providing alternative methods and forms of punishment for individuals who do not have the mental capacity to understand or link the punishment they receive to the crime they committed.

Chapter One: Introduction: This section of the thesis has given a brief overview and introduction of the related topics and how they link to this thesis specifically; further, it has been explained why this research is important and what it will add to the academic discourse. It has also explained the scope of the research in addition to the rationale behind the research question and what tools and methods will be utilised to help answer it, as well as providing additional sub-questions for further depth.

Chapter Two: Laws and Legislation of Capital Punishment: Chapter two provides an in-depth exploration of prior law, legislation, and jurisprudence of relevance to capital punishment in the United States, as well as establishing the significance of retentionist views that are held in the United States for capital punishment relating to capital crimes, and the retention of harsh punishments for non-capital crimes. Further, the gradual restrictions of the application of capital punishment and the relationship to intellectually disabled offenders over time play a prominent role in this chapter, with questions raised concerning culpability and responsibility. The sub-questions addressed in this chapter are 'What is the progression of understanding for the appropriate punishment of intellectually disabled offenders within the criminal justice system?' and 'To what degree can individuals who are intellectually disabled be held responsible for their criminal actions?'

Chapter Three: Intelligence Quotient and Mental 'Retardation': Chapter three focuses on the definitions and classifications of the key variable; intellectually disabled offenders. It explores the evolution of definitions provided by the American Psychiatric Association in the *Diagnostic and Statistical Manual ofMental Disorders* (APA, 2000; 2013) and the World Health Organisation in the *International Classification of Diseases* (WHO, 2018) while linking these definitions to the state-

by-state classification standard, intelligence quotient and the testing systems. Cognition, blameworthiness and what this means for capital punishment eligibility criteria and the understanding of punishment for intellectually disabled offenders are also linked to the definitions provided by APA and WHO. The sub-questions explored in this chapter are ‘What are the criteria for the classification of the intellectually disabled and how does this relate to an individual being too mentally impaired to be eligible for the death penalty?’ and ‘How are individuals with low intelligence quotient (IQ) scores taken advantage of within the criminal justice system?’. This chapter also briefly touches on ‘What is the Flynn Effect and how does it impact intellectually disabled offenders?’

Chapter Four: The Eighth Amendment in the Application of Punishment: The fourth chapter of the thesis looks at the Eighth Amendment, specifically the section regarding cruel and unusual punishment, and explores what this means for the punishment of both intellectually disabled offenders and other individuals. It analyses what makes a punishment cruel and unusual, alongside the evolving standards of decency present in judicial concepts across time. Further, chapter four examines the implication of this amendment in the alternative punishment measures that intellectually disabled offenders receive when they are not eligible for the death penalty. While additionally exploring the victimisation of these individuals within the criminal justice system and the impact of life without the possibility of parole and solitary confinement with the lack of understanding to relate the punishment to the offence. This chapter aims to answer the sub-question, ‘If the Eighth Amendment bars execution of intellectually disabled offenders, why does this not apply to non-capital offences?’

Chapter Five: Alternatives: This chapter provides an overview of alternative measures that could be utilised for intellectually disabled offenders when considering the information compiled from previous chapters. It considers potential alternatives for the successful rehabilitation and reintegration of intellectually disabled offenders into the community by reviewing and analysing current and past programmes created explicitly for intellectually disabled offenders. Using these past programmes, there is discussion of the environment, education, and support that intellectually disabled offenders need to rehabilitate into a community setting successfully. Finally, this chapter proposes a basic alternative punishment model based on a multitude of previous programmes and supporting research which then suggests how intellectually disabled offenders need to be punished in order to support their successful future reintegration. The sub-question focused on in this chapter

is ‘What are the alternative measures that can be taken to address an offender with intellectual disabilities in a way that is appropriate for their understanding of punishment?’

Chapter Six: Discussion/Conclusion: This final chapter introduces a New Zealand link, and explores the issues surrounding traumatic brain injury, crime, and high-impact sporting injuries, specifically rugby in New Zealand. Further, there is discussion surrounding traumatic brain injury more broadly in relation to *Atkins v. Virginia* (2002) and the impact on offending and punishment with respect to similarities towards intellectually disabled individuals. This chapter answers the final sub-question of ‘How does New Zealand link to the application of punishment for intellectually disabled offenders through traumatic brain injury and sport?’ It then reviews the aims and research questions of the thesis, answers the thesis questions, and explores the key findings and their implications. Finally, this thesis provides critiques of the research and suggests avenues for further research in this field.

Chapter Two: The Jurisprudence of Capital Punishment

What is the progression of understanding for the appropriate punishment of intellectually disabled offenders within the criminal justice system?

To what degree can individuals who are intellectually disabled be held responsible for their criminal actions?

Introduction

Capital punishment is a longstanding practice that is embedded deeply within the United States criminal justice system. There has been rising rhetoric since the late 1970s in Europe surrounding capital punishment and human rights (Zimring, 2003). Many first-world Western countries have abolished capital punishment and believe that the use of the death penalty becomes a question of human rights and limiting government power as opposed to the costs and benefits of the punishment itself (Zimring, 2003). Zimring (2003) further noted that capital punishment was not included in human rights debates until after Western European countries had ceased its use. So, whereas many other first-world Western countries abolished capital punishment under the belief that it breaches fundamental human rights, the United States has continued to use capital punishment as an option in more than half of the states. As of 2020, according to the Death Penalty Information Center, 28 states still utilise capital punishment.

Regarding human rights as a case against the death penalty in the United States, there is little to no discourse surrounding human rights advocation when it comes to abolition rhetoric. While Amnesty International and other abolitionist organisations have explored a discourse of political and human rights issues regarding the death penalty in Europe, such a discourse has not arisen within the United States (Zimring, 2003). Zimring (2003) suggests it is a tactical decision where pushing the human rights appeal is unsuitable in areas where the death penalty is still an active part of the criminal justice system. Further,the argument in the US is focused solely on the criminal justice system rather than any larger governmentor the possibility of limiting their powers. In 2018, only 20 countries worldwide carried out executions, the top five countries being China, Iran, Saudi Arabia,

Vietnam, and Iraq (World Coalition Against the Death Penalty, 2019). Further, in December of 2018, the United Nation's General Assembly for the seventh time issued a moratorium on the use of the death penalty, with 121 of the 193 United Nations countries in favour of this moratorium (World Coalition Against the Death Penalty, 2019).

Capital punishment within the United States peaked between 1930 and 1967, with around 100 death penalty sentences being carried out annually (Carelli, 1997). Moreover, in the 1960s, about 1 in every 10 convicted murderers was handed a death penalty sentence (Stevens, 1978). The United States justice system operates under the Constitution, it is the supreme law of the United States. Within the Constitution and with particular interest in this research is the Eighth Amendment. This particular section of the Constitution states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (U.S. Const. amend. VIII). As annotated by the Senate, this amendment means that bail and punishment for a crime are not to be overly disproportionate or unreasonably severe in relation to the crime committed (United States Senate, 1994). In the Supreme Court decision *Furman v. Georgia* (1972), Justice Brennan brought forward the following four key principles used to define a cruel and unusual punishment (*Furman v. Georgia*, 408 U.S. 238, 240-241, 1972):

1. A punishment that is degrading to human dignity through its severity is cruel and unusual
2. A severe punishment that is obviously inflicted in an arbitrary fashion is cruel and unusual
3. A severe punishment that is clearly rejected throughout society is cruel and unusual
4. A severe punishment that is patently unnecessary is cruel and unusual

Any punishment that violates these principles could be considered an unconstitutional form of punishment. Capital punishment only remained absent during the resulting moratorium period between Supreme Court decisions *Furman* and *Gregg v. Georgia* (1976), after which capital punishment was resumed. *Furman* was a highly significant Supreme Court case for the continual use of capital punishment, the ruling stated that the use of capital punishment violated the Eighth Amendment clause for cruel and unusual punishment and therefore was unconstitutional, specifically due to the arbitrariness and discrimination in its application (Bright, 2015), as defined in principle two above. According to Falco & Freiburger (2011), at the time of this decision, public support for capital punishment within the United States reached a minimum, and the Supreme Court also based their decision that capital punishment was unconstitutional on the wide public opposition.

In line with public opinion being integral with Supreme Court decision making, The Marshall hypothesis proposed by Justice Thurgood Marshall within the *Furman* ruling posited that public support for capital punishment is based on how informed and knowledgeable about the realities of capital punishment the public are. With that in mind, Marshall explained that the less educated are more likely to favour capital punishment, and therefore countries with a less educated population are more likely to continue using capital punishment and to experience significant public support for its application in the criminal justice system.

Gregg v. Georgia (1976) led to the resumption of the death penalty in the United States following its ruling that capital punishment did not violate the Constitution in every circumstance. The majority decision, led by Justice Stewart, explained that the death penalty itself did not violate the Eighth Amendment since the primary concern of the drafters had been preventing tortures and other barbaric methods of punishment (*Gregg v. Georgia*, 1976). Further, Justices Stewart, Powell and Stevens all concluded that capital punishment for murder does not violate the Eighth Amendment under all circumstances. The Eighth Amendment is continually interpreted flexibly to move forward with the evolving standards of decency, by forbidding punishment that is considered excessive in the unnecessary infliction of pain and suffering or is disproportionate to the crime committed. This leaves space for some crimes to be considered proportionate to the death penalty. In their dissent against the majority decision, Justices Brennan and Marshall presented two similar opinions on this ruling in that capital punishment is inconsistent in connection with the cruel and unusual punishment clause in the Eighth Amendment (*Gregg v. Georgia*, 1976). Upon the reintroduction of capital punishment, only six executions were carried out between 1976 and 1982 (Boellstorff, 1996). From the late 1970s to the late 1990s, however, the subsequent steady increase in annual executions has been attributed to strengthening public support forcapital punishment as a vent for rising public anger towards violent crime and its perpetrators (Costanzo& Costanzo, 1994).

Retentionist v. Abolitionist

According to Amnesty International, as of July 2018, more than two-thirds of the countries in the world have abolished the death penalty either in law or in practice (Amnesty International, 2018). There are 106 entirely abolitionist countries with no legal provision for the death penalty for any

crime; 8 countries that are abolitionist for ordinary crimes with laws providing the death penalty only for crimes considered exceptional such as crimes under military law; and 28 countries that are abolitionist in practice with retention of the death penalty but the absence of any executions in the past decade suggest that they have an established practice of not utilising the death penalty (Amnesty International, 2018). The remaining 56 countries are retentionist in their use of the death penalty, including the United States of America.

The retentionist arguments for capital punishment tend to revolve around three main points: general deterrence, retribution, and incapacitation. In *The Death Penalty – A Debate*, co-authored by one abolitionist and one retentionist, the retentionist Ernest van den Haag puts forward the promise of general deterrence as the main reason to continue capital punishment (Gorecki, 1985). In the eyes of a retentionist, capital punishment is an excellent form of deterrence to the general public. While this does not provide specific deterrence to the offender, it is about preventing others in the general population from criminal behaviour. Retribution, as explained in Adinkrah & Clemens (2018), provides that the death penalty is a deserved and appropriate punishment for an individual who has committed murder as they have willingly and consciously taken a life. Often retentionists believe in an eye for an eye, the law of retaliation, and that a murderer should be murdered. Finally, incapacitation, capital punishment guarantees that the executed offender can never commit another crime, which increases the safety of the general population (Adinkrah & Clemens, 2018). For retentionists, the possibility that a paroled murderer presents a chance of them committing another crime is essential to their argument, therefore meaning that the death penalty is the only adequate sentence to protect society (Hochkammer, 1970).

In opposition, The American Civil Liberties Union (ACLU) posits several reasons in favour of the total abolition of capital punishment, most notably being that capital punishment is cruel and unusual; hence, it violates the Eighth Amendment. ACLU explains that capital punishment is cruel because it is a punishment used in the early days of penology alongside other harsh corporal punishments that were used regularly. As other corporal punishments no longer have a place in civilised society today, the argument is that capital punishment, another form of corporal punishment, should also no longer have a place in a civilised society. Further, capital punishment has a no return policy, where the justice system makes mistakes, a death penalty that has been conducted cannot be rescinded in the event an individualis subsequently found not guilty due to

evidence later discovered as the punishment has most likely already been carried out. ACLU also explains that capital punishment denies due process and violates the equal protection guarantee in the Constitution; the imposition of capital punishment is said to be arbitrary and is often applied randomly against minorities, including but not limited to people of colour, poor or uneducated people, or the mentally ill (Bedau, 1973; ACLU, 2012).

The world has slowly leaned towards an abolitionist state of mind, most notably beginning with Cesare Beccaria's *On Crimes and Punishment* (1995 ed.). Written in 1764, it had a profound impact on the views of capital punishment around the world. Beccaria examined capital punishment and concluded that there was no justification in the state taking a life as punishment, except in sporadic cases; this theory added heavily to the abolitionist argument. The abolitionist movement in the United States specifically gained traction in the early to mid-Nineteenth Century, predominantly in the northeast (DPIC, 2021). Pennsylvania in 1834 was the first state to move executions away from the public eye and into the private space as a step away from the spectacle, starting to carry out executions within correctional facilities that were emerging across the country. Michigan became the first US state to abolish the death penalty for all crimes except treason in 1846. While some states did begin to abolish the death penalty, other states continued to use the punishment as a standard option; many states made more offences punishable by the death penalty, especially for crimes committed by slaves. From 1963, all mandatory capital punishment laws were abolished, and discretionary death penalty statutes were enacted, which meant that sentencing could consider circumstances and provide discretionary sentencing on a case-by-case basis (Bohm, 1999). For the United States, the Progressive Period of the abolitionist movement was marked in the first half of the Twentieth Century. According to Bedau (1997), from 1907 to 1917 six states completely abolished the death penalty, and three other states limited the use of the death penalty to crimes of treason and first-degree murder of a law enforcement official. However, with World War One concluding in 1918 and the fear of a revolution matching that of the Russian Revolution, public panic led to reinstatement of the death penalty by 1920 in five of the six states that had abolished it (Bedau, 1997). This reintroduction of the death penalty saw the beginning of a spike in the use of the death penalty that led through to the 1940s, powered on by retentionist arguments that the death penalty was a necessary measure of social control (Bohm, 1999).

According to Gallup polls, when asking if individuals within the United States are in favour of the

death penalty for a person convicted of murder, those in favour of the death penalty have slowly but steadily declined from the 1950s to the 2010s (Gallup, 2019), seeing a small spike in favour of the punishment around the late 1980s and early 1990s, a time in which fear of crime and the following tough on crime rhetoric was at its peak. According to Robert Dunham, the executive director at the Death Penalty Information Center, in an interview conducted in 2017 (Raconteur, 2017), 2016 saw a record low of executions and death penalty sentences handed out in the United States since 1991. Just 20 executions were carried out in the United States in 2016, and only 31 new death penalty sentences were handed out.This significant four decade decline in the use of the death penalty led Dunham to consider the realisation of a country-wide abolition being closer than ever before (Raconteur, 2017).

Restrictions of Capital Punishment

As the justice system in the United States developed and changed with the evolving public expectations, the Supreme Court handed down many key rulings in relation to the use of capital punishment and the restrictions that should be in place to regulate such a severe form of punishment. There are several identifiable Supreme Court decisions this research will touch on in relation to capital punishment that are not directly related to intellectual disability but have restricted the blanket sentencing of offenders to death through the Eighth Amendment and its relation to the use of cruel and unusual punishment.

Many of these rulings are either in relation to the crime itself or to the proportionality to the severity of the punishment, while others explicitly concern the offender and their culpability. *Coker v. Georgia* (1977) is the oldest Supreme Court ruling directly related to this research and the gradual restrictions of offences punishable by death. The *Coker* ruling decided in a 7-2 majority that the imposition of the death penalty for the crime of adult rape is disproportionate and therefore a form of cruel and unusual punishment under the Eighth Amendment. Justice White held the majority opinion; he noted that as rape does not involve taking another human life, the death penalty is an excessive and grossly disproportionate punishment in its severity and revocability, therefore unconstitutional under the Eighth Amendment. *Kennedy v. Louisiana* (2008) was a ruling much in the same vein as *Coker*, except in relation to rape of a child that does not result in the victim's death,

nor was death intended. The Supreme Court ruled that the use of capital punishment for the rape, but not murder, of a child or where death was not intended, is a disproportionate punishment in relation to the crime and would violate the Eighth Amendment. This decision meant that sentences of death are now only eligible in cases involving murder or crimes against the state, no longer involving any cases of rape without the intent of murder.

In 2005, *Roper v. Simmons* ruled that it is unconstitutional to impose capital punishment upon individuals whose crimes were committed while under the age of 18. This decision overruled a similar decision in *Stanford v. Kentucky* (1989), where the age was under 16. In contrast to *Coker*; this ruling looked at the offender and their ability to be subjected to capital punishment. *Stanford* saw in a 5-4 decision that it was a state responsibility to determine whether individuals between the ages of 16-18 being eligible for the death penalty violates the Eighth Amendment and that it could not at the time of the decision be considered cruel and unusual punishment to sentence an individual in that age bracket to death due to the current national decency standards (*Stanford v. Kentucky*, 492 U.S. 361, 365-374, 1989). Following this decision, 16 years later in *Roper*, when asked if the execution of minors violates the Eighth Amendments clause for cruel and unusual punishment, another 5-4 decision ruled that due to the evolution in national standards of decency, the execution of minors is cruel and unusual punishment and therefore prohibited. Further, considering the overwhelming international opinion against the execution of minors, the decision was made to no longer allow any minors to be eligible for the death penalty.

Panetti v. Quarterman (2007) focused on the ability of the offender to understand the reason for their execution, and if the death penalty is appropriate for an individual who does not understand their sentence of death. Looking back at another landmark decision in *Ford v. Wainwright* (1989), where the Supreme Court ruled that individuals who are insane cannot be eligible for the death penalty under the Eighth Amendment, *Panetti* went one step further in that while the individual may have expressed an understanding and awareness of the crime and its consequences; delusions or other mental impairments could prevent the individual from understanding the meaning of the punishment handed down and the resulting reality, even if the individual has said they understand the facts. One of the most recent Supreme Court decisions, *Madison v. Alabama* (2019), once again looks at the offender's competency in relation to the application of punishment. This decision was based upon two questions relating to an offender no longer having memory of the crime committed due to a

mental disability, alongside offenders who suffer from severe cognitive dysfunction that may impair the ability to remember the crime committed or understand the punishment in relation to the crime. This decision concluded that the Eighth Amendmentdoes not prohibit the execution of an offender who cannot remember committing the crime they were convicted of, but it does prohibit the execution of offenders who cannot rationally understand the punishment in relation to the crime due to reasons such as psychosis or dementia.

All of these cases show the progressive and maturing nature of the restriction of capital punishment in line with the Eighth Amendment. Furthermore, the consideration for cruel and unusual punishment shows that the use of capital punishment is often disproportionate to the crime committed, and that other alternative punishments are more appropriate in relation to the crime. Furthermore, in examining the relationship between intellectually disabled offenders and capital punishment, the gradual progression ofunderstanding and the evolving standards of decency imply that intellectually disabled offenders should not be eligible for any punishment they do not have the capacity to understand fully. This understanding protects intellectually disabled offenders who are largely overrepresented in the criminal justice system from being subjected to the death penalty. The definition of intellectual disability used in the criminal justice system clearly means that these offenders are not capable of understanding or comprehending the severity of their actions and therefore should not be punished in the same way as non-intellectually disabled offenders. Thus, intellectually disabled offenders cannot be held criminally responsible for their actions in the same way that offenders who have normal cognitive functioning can be; this is exceptionally clear for capital punishment.

Intellectual Disability and Supreme Court Decisions

As briefly explained above, *Ford v. Wainwright* (1986) was a landmark decision focused on the imposition of the death penalty upon the insane offender. The majority opinion by Justice Marshall explained that the execution of the insane should be considered savage and inhumane as it has no deterrent or retributive effect and therefore was in violation of the Eighth Amendment under cruel and unusual punishment. This decision was based on two independent factors in the case of a crime punishable by the death penalty. In order to be ineligible, the offender must be unaware of their

upcoming execution, the reason for it, and its implication. Further, the decision was made based on the knowledge and tradition of not executing insane individuals due to the questionable value in retribution and deterrence, alongside its offensive nature to the public (Bicknell, 1990).

In *Penry v. Lynaugh* (1989), the Supreme Court declined to accept the idea that the Eighth Amendment ban on cruel and unusual punishment excluded intellectually disabled offenders from being eligible for the death penalty. Justice O'Connor, speaking for the majority, explained that there was not enough evidence of a strong public opinion against the execution of intellectually disabled offenders to prohibit the execution under the Eighth Amendment (*Penry v. Lynaugh*, 1989). Justice O'Connor had previously stated in *California v. Brown* (1987) that the imposition of a death sentence requires a reasoned moral response from the offender directly related to their personal culpability of the offender (Bicknell, 1990). Those who dissented in *Penry* used the idea of reasoned moral response to justify intellectually disabled individuals being excluded from capital punishment, saying that the death penalty is indeed cruel and unusual for intellectually disabled offenders as their mental impairment renders them insufficiently blameworthy. While the four Justices against the decision did not disagree with the majority opinion in *Penry*, they pressed that upholding capital punishment upon the intellectually disabled is unacceptable due to capital punishment being so disproportionate (Kaye, 2017).

In perhaps the most crucial Supreme Court ruling for intellectually disabled offenders, *Atkins v. Virginia* (2002) held that the use of capital punishment for intellectually disabled offenders violates the Eighth Amendment clause for cruel and unusual punishment, overruling the decision made in *Penry.* The Supreme Court found that in the time between these two decisions, public opinion surrounding the execution of intellectually disabled individuals had changed dramatically (Kaye, 2017), which was enoughto lead to the decision against the execution of intellectually disabled individuals. According to Bonnie (2004), at the time of the *Atkins* decision, eighteen states and the federal government already had laws in place that excluded the execution of intellectually disabled offenders; following the decision, a further seven adopted the same laws.

Arguably, the most critical issue identified in *Atkins* is the lack of a national standard. The resulting state-to-state variation involves slight or major differences in the application of punishment relating to intellectually disabled offenders. The Supreme Court gave very little guidance about implementing the *Atkins* ruling, or about what aspects of current operations in particular states were

constitutional or needed change (Bonnie, 2004). Bonnie (2004) also explains that a key difficulty in the legislative drafting of *Atkins*is if intellectual disability is defined in terms of an individual having a significant limitation in intellectual functioning or in terms of performance on an IQ test, specific detail should be included to reference an intended cut-off score. According to the American Psychiatric Association Council (APA), incorporating aspecified cut-off score is irrelevant; because different tests have different scoring schemes, and because citing a specific cut-off score would not account for the standard error of measurement (Bonnie, 2004). The APA further explains that a significant limitation in intellectual functioning is a performance of at least two standard deviations below the mean on an IQ test (Bonnie, 2004).

Following from *Atkins*, the *Hall v. Florida* (2014) ruling was a Supreme Court decision that struck down state use of a measured IQ score of 70 as the upper limit to measure intellectual disability in offenders on the basis that it created an unconstitutional risk that intellectually disabled offenders would be executed (Kaye, 2017). One of the major issues identified in *Atkins* that was then addressed in *Hall* was the fact that states cannot execute an individual with an intellectual disability; however, the states could separately define and control who is considered intellectually disabled (Cooke et al., 2015). Often this would result in a single IQ point marking the difference between life and death for some offenders in particular states, such as Florida. There is more to consider in the definition of intellectual disability than an arbitrary cut-off IQ score of 70, including the presence of significantly subaverage intellectual functioning, deficits in adaptive functioning such as social skills, and the presentation of these other factorsprior to the age of 18 (Cooke et al., 2015).

Conclusion

There is a gradual progression in understanding not only for the appropriate punishment of intellectually disabled offenders within the criminal justice system but also for other offender groups for whom, under the Eighth Amendment, capital punishment could be considered cruel and unusual punishment. *Mens rea* is a vital component in the decision of criminal culpability, even more so when it comes to intellectually disabled offenders. *Mens rea* is defined as criminal intent with four hierarchical categories: purpose/intent, offender made an underlying conscious decision to act; knowledge, offender is certain the offence will result in a particular outcome; recklessness, offender

consciously disregarded the risk present; and negligence, offender was not aware of the present risk, but should have been aware. According to Nevins-Saunders (2012), it should be assumed that intellectually disabled defendants cannot be culpable and do not fulfil the elements of *mens rea*, and they suggest that any charges should be dismissed where only in serious cases should intellectually disabled offenders be subject to standard criminal proceedings and even then, the punishment should be appropriate for intellectual disability. Further, *mens rea* marks the line between accidental and intentional harm; two types of consciousness make up a part of *mens rea*: awareness of the norm and awareness of the consequence of certain conduct (Nevins-Saunders, 2012). Alongside this, to commit an offence with intent suggests that the individual has the capacity of consciousness, choice, and control (Nevins-Saunders, 2012). That is the awareness and understanding of social norms and risks, the ability to rationally consider and weigh up deliberately whether to abide by or discard the norms and the power to violate social norms with full knowledge of the consequences. This dictates that an individual has the required cognitive abilities to have culpability in a crime they have committed. Individuals must understand that actions have consequences, an overall understanding of harm, social norms, and the basic law, alongside the ability to measure the risk versus the reward. An intellectually disabled individual may lack the cognitive capacity to decide if certain actions are wrongful, as this skill may require agency and self-determination, something that often intellectually disabled individuals lack due to their lifelong dependence upon others to care for them. Further, intellectually disabled individuals are often easily peer pressured and have poor impulse control; this makes it hard to force them to take sole responsibility for their actions where they may have been externally pressured. The Supreme Court has acknowledged that the poor impulse control of intellectually disabled individuals partially accounts for reduced culpability for their actions. The *Atkins* court held that if the culpability of a murderer is insufficient to justify capital punishment, those who have lesser culpability, such as intellectually disabled offenders, do not merit that kind of punishment (*Atkins v. Virginia*, 2002; see also Faigman, Shaw & Scurich, 2018).

This chapter has presented a judicial review of Eighth Amendment opinions from the US Supreme Court related more specifically to capital punishment with the aims of answering two sub-questions: ‘To what degree can individuals who are intellectually disabled be held responsible for their criminal actions?’ and ‘What is the progression of understanding for the appropriate

punishment of intellectually disabled offenders within the criminal justice system?'

The first question focuses on criminal responsibility for intellectually disabled offenders and if their understanding of punishment and consequences is adequate for capital punishment. It is clearly importantthat *mens rea* is considered when determining criminal responsibility or culpability for any offender, especially those who are intellectually disabled. Often intellectually disabled individuals do not have the intellectual functioning to form *mens rea* in any capacity; hence they are often considered less blameworthy than other offenders. Intellectually disabled offenders are categorically less culpable than offenders of average intelligence. An examination of the cognitive and psychosocial capacity of intellectually disabled offenders reveals that the deficits in functioning prevent these individuals from forming *mens rea* and therefore are not culpable for their offence (Nevins-Saunders, 2012). This lack of *mens rea* or blameworthiness mandates that capital punishment is not an appropriate punishment. However, when considering the factors used to come to this conclusion, should intellectually disabled offenders also have different non-capital forms of punishment that are appropriate for their levels of understanding? This is important to consider when a primary concern identified in Nevins-Saunders (2012) is the prevention of dangerousness, wherein acknowledging the different levels of culpability, especially among intellectually disabled offenders, implies that there are some individuals who are considered dangerous that are free of legal consequences due to their lack of culpability. This idea of preventing dangerousness was previously explored by Robinson (2001), with the notion that the criminal justice system has shifted from punishing offenders for the crimes they commit in the past, to preventing them from committing future crimes using incarceration to control criminals who are considered dangerous. Robinson (2001) argues that it is impossible to punish dangerousness, as to punish someone involves causing someone pain or loss for a crime, which is only possible in relation to something that has already occurred, while dangerousness is the future likelihood of someone causing harm or injury. Therefore, it is only possible to incapacitate a dangerous person, not punish them. So, when considering the potential dangerousness of intellectually disabled offenders and appropriate punishment, it is crucial to understand that the punishment is for the crime they committed and not for future crime. Dangerous intellectually disabled offenders do not need to be free of legal consequences, and their punishment can still be adequate for their level of understanding in relation to the seriousness of the crime but should not be harsher because of their potential future

dangerousness.

The second question explored in this chapter is the progressive understanding of appropriate punishment of intellectually disabled offenders within the criminal justice system. It is clear from the Supreme Court decisions discussed above that there has been a gradual move away from the use of capital punishment not only for intellectually disabled offenders but also for other offenders, especially for crimes that are not considered proportionate or appropriate to the use of capital punishment. This includes but is not limited to decisions involving the execution of underage individuals in *Roper,* the execution of the insane in *Ford,* and the inability of certain offenders to understand their punishment or remember their offence in *Panetti* and *Madison*. What is made clear is how the treatment of at-risk offenders, including the intellectually disabled, the mentally ill, the underage and those with differences from the average offender, has significantly changed the application of capital punishment from being no different to being now somewhat restricted. The significant remaining issues to be addressed are the appropriate alternative punishments that consider all aspects of an intellectually disabled offenders understanding of the crime and, therefore, the correct consequences, and the specific criteria and the intellectually disabled to be wholly excluded from the application of capital punishment.

Chapter Three: Intelligence Quotient & Mental 'Retardation'

How are individuals with low IQ scores taken advantage of within the criminal justice system?

What are the criteria for the classification of the intellectually disabled and how does this relate to an individual being too mentally impaired to be eligible for the death penalty?

What is the Flynn Effect and how does it impact intellectually disabled offenders?

Introduction

This chapter will explore three of the secondary questions in relation to the overarching thesis as stated above. The main focus of this chapter is the clinical classification of intellectual disability in addition to intelligence and how it is measured. This thesis then briefly examines the experiences of low intelligence offenders in the criminal justice system. Intellectually disabled offenders in the United States and many other countries face several extra problems during each stage of the criminal justice process (Everington,2014).

Offenders with intellectual disabilities tend to have a harsher experience within the criminal justice system. Offenders with intellectual disabilities are more likely to be arrested; and more likely to be held in custody awaiting trial. They are more likely to be convicted with longer sentences and more likely to be abused during their sentence than offenders without intellectual disabilities (Nevins-Saunders, 2012). Further, they often suffer extreme difficulty in being granted parole (Everington, 2014).

During the process within the criminal justice system prior to conviction and punishment, intellectually disabled offenders can have difficulty remembering details, locating witnesses to the event, and credibly testifying in their own defence. They are highly susceptible to suggestion, especially in an interrogation environment when faced with authority figures such as the police. Individuals who work within the criminal justice system are often not educated and informed on how to identify and cater to the needs of individuals with intellectual disabilities (Everington, 2014). This can heighten the chances of intellectually disabled offenders suffering difficulties in the criminal justice system. Intellectually disabled offenders often may not fully understand the interrogation

process and therefore may go to extremes to cooperate with police, which could jeopardise their right to acceptable police treatment and a fair judicial process (Marcus, 2014).

This voluntariness and a lack of understanding of Miranda warnings often lead individuals with intellectual disabilities to confess readily to police, even if it is a false confession, thereby contributing to the disproportionate number of intellectually disabled offenders who are sentenced to death (Fetzer, 1989). Intellectually disabled offenders are also known to confess more easily to crimes and plead guilty more often when compared to offenders who are not intellectually disabled (Fetzer, 1989). Intellectually disabled people have difficulty understanding or recognising certain things that might lead them to commit crime and do not comprehend their actions and the consequences. According to Nevins-Saunders (2012), intellectually disabled people do not recognise cause and effect, often due to a lack of education or because the idea is too complex for their limited intellectual capabilities. Further, intellectually disabled individuals have difficulty understanding how their actions might impact others and the possible harms they could cause. Additionally, their inability to understand possible harms due to reduced capability for decision making and moral reasoning may prevent them from making a logical and rational choice (Nevins-Saunders, 2012).

Applying the appropriate punishment to intellectually disabled offenders is hindered by their restricted mental capacity. The often lack the ability to learn from the consequences of their actions or to understand how to act in society properly. What has been mentioned in the Supreme Court is the connection between intellectually disabled offenders being susceptible to manipulation throughout the criminal justice process and the decision that these offenders should not be eligible for capital punishment (Nevins-Saunders, 2012). A brief examination of the M'Naghten rule is worthwhile in the context of the intellectually disabled offender. This rule focuses on the ability of the offender to see the difference between right and wrong and is most often brought up during insanity cases (Fetzer, 1989). As this is primarily used for offenders who are considered insane, the issue of criminal responsibility is at the forefront rather than the actual ability of the offender to function on their own; further, intellectual disability alone has not been enough to establish a defence under the rule (Fetzer, 1989).

This brief examination of low intelligence offenders within criminal justice systems communicates that these individuals have a consistently more difficult time due to their lack of

understanding and the unintentional exploitation from crucial parties who are not equipped to deal with offenders of low intelligence.

Intelligence & Cognition

Intelligence is defined in Britannica by Sternberg as a mental quality that involves an individual's ability to learn from personal experience, adapt to new situations and use prior knowledge to manipulate and adapt to the current environment or situation (Sternberg, 2020). There are several ways to test or infer intelligence; Geiger et al. (2010) explain the three main approaches to intelligence testing: understanding an external criterion, psychometric testing that results in intelligence quotient scores, and neurobiological understanding.

Geiger et al. (2010) explore the differences between intelligence and cognition, explaining cognition as the basic ability to process information and apply knowledge, while intelligence is linked to differences in mental capacity between individuals. Further, Anderson (2004) explained another way in which cognition and intelligence are different; cognition is an age-dependent increase in performance while intelligence is an individual difference that remains constant over time. Expanding on these differences, Geiger et al. (2010) posit that intelligence is trait-based while cognition is state-based; intelligence as a trait is represented in a behavioural or biological disposition that is not specific to any particular environments or situations but rather constant over time. Contrastingly, cognition is characterised by the functional ability of an individual in a particular environment or situation, which is subject to fluctuations and, therefore, state-dependent (Geiger et al., 2010).

There has always been speculation that low intelligence might partially lead to criminal activity and behaviour (Ellis & Walsh, 2003) because low intelligence means the ability to weigh up the rewards and the consequences for criminal actions is diminished. In 1911, Goddard first considered the intelligence of offenders and what that might mean; he explored the heredity nature of low intelligence, then known as feeblemindedness, tracing back family lineages to correlate this low intelligence with criminal behaviour (Ellis & Walsh, 2003). Following the introduction of the standardised intelligence tests, Goddard (1914) published a book on low intelligence called *Feeblemindedness*, where he concluded that at least 50% ofall criminals had a mental deficiency,

which was significantly higher than the 2 to 3% estimate for the general population. According to Goddard (1914), low intelligence did correlate to heightened criminality purely due to the inability of a feebleminded individual to distinguish right from wrong. However, low intelligence was not the sole explanation for criminal behaviour; instead, a number of other factors were to be taken into account, such as environment and temperament (Ellis & Walsh, 2003). Goddard (1914) estimated that 40 to 50% of immigrants entering America were feebleminded, which was a threat to American society (Oleson, 2016) as it implied that race was the biggest issue in criminality, not intelligence. Goddard's book instigated various other research on feeblemindedness throughout the 1920s and 1930s, which transitioned the cause of crime to be understood as being related solely to race and class rather than intelligence (Oleson, 2016). This brought forward the evolution of standardised testing for intelligence as one that was riddled with issues surrounding validity, especially when it came to race; cultural bias was strikingly apparent. Administering intelligence tests among World War I draftees found that 37% of white draftees and 89% of black draftees were considered feebleminded (Vold & Bernard, 1986). By the 1930s, some researchers worked on the idea that intelligence quotient scores of criminals were significantly lower than for the entire population, and further throughout the 1940s to 1970s there were claims of test bias for eugenic purposes (Ellis & Walsh, 2003).

Eventually, this discourse surrounding the singular linkage to race and class, and heightened criminal behaviour was the influential argument produced by Hirschi & Hindelang (1977). They stated that intelligence quotient is at least the same level of importance as race or class to predict delinquency. Oleson (2016) furthers this idea by attributing the effect of intelligence quotient on crime to a lack of cognitive abilities, which can be exacerbated by external factors such as low socioeconomic status. However, research evidence in the late 1990s concluded that low intelligence only ranked 19th among factors contributing to serious and persistent offending (Ellis & Walsh, 2003). A concept brought forwardand addressed more recently regarding intelligence testing and offending behaviour is the appearance ofan intellectual imbalance, a significantly higher score on one component of an intelligence quotient test than the other (Ellis & Walsh, 2003). This intellectual imbalance works in one of two ways: either the performance IQ score is far exceeding the verbal IQ score or vice versa. A performance IQ score measures an individual's visuospatial intellectual abilities such as reasoning, spatial processing and awareness, attention to detail and

visual-motor integration (Lange, 2011a). On the other hand, verbal IQ measures an individual's overall verbal intellectual abilities; including acquired knowledge and understanding, verbal reasoning, and attention to verbal information (Lange, 2011b). Many studies exploring this intellectual imbalance have found that the imbalance is specifically directed towards performance IQ scores measuring exceedingly higher than verbal IQ scores among delinquents, criminals and individuals with antisocial personality disorders (Ellis & Walsh, 2003).

Ellis & Walsh (2003) examine two key theoretical explanations for the relationship between intelligence and offending, the first being Moral Maturation theory, as brought forward by Lawrence Kohlberg in 1984. Kohlberg stated that moral reasoning in humans develops through stages and that this is soe what tied to intellectual maturation. Further, how quickly an individual moves through intellectual development links to moral reasoning and making important decisions when it comes to offending. The second theory relating to the link between intelligence and offending behaviour that Ellis & Walsh (2003) examine is hemispheric functioning theory; this is when two hemispheres of the neocortex in the brain make important decisions and can obey instructions. The left and right hemispheres in the brain have different functions; in this context, the left hemisphere has shown in studies to have greater control over language and expresses an overall more friendly and social tone than that of the right hemisphere (Ellis & Walsh, 2003). Hemispheric functioning theory explains that any underdevelopment of the left hemisphere in the brain, or the inability to override the functions of the right hemisphere, can lead to the increased possibility of an individual exhibiting antisocial behaviour.

There is validity in the common belief that there is a strong positive relationship between low intelligence and crime. While many studies support this notion, both Hirschi & Hindelang (1977) and Wilson & Herrnstein (1985) identified in their studies an inverse association between low intelligence and offending, even just between intelligence of any kind and the chance of offending (Mears & Cochran, 2013). One of the main reasons that low intelligence is linked to criminal activity and offending is that those individuals with low intelligence may significantly lack the moral awareness or ability to understand how to behave within society correctly and therefore are more likely to do the wrong thing, break the rules and offend (Langdon, Clare & Murphy, 2011 in Mears & Cochran, 2013). Further, according to a multitude of research, those with lower intelligence and lower cognitive abilities are less likely to have sufficient self-control and reasoning, which further increases

their risk of engaging in criminal activity and offending (Mears & Cochran, 2013). Apart from the lack of inward abilities that might lead an individual to offend, those individuals with low intelligence are often less able to successfully navigate social interactions and situations, including with friends, family, and romantic interests (Mears & Cochran, 2013). This lack of social ability leads to a trail of weak social bonds, and therefore a greater association with delinquent individuals and often to a much higher likelihood of offending.

Mental Retardation & The Diagnostic and Statistical Manual of Mental Disorders

To further explore individuals and offenders with low intelligence, it is important to delve into the clinical classifications of intellectual disability characterised not only by low intelligence markers but also other significant factors. It is also important to understand and describe the historical changes in the public perspective and within the criminal justice system that have altered how intellectually disabled people are integrated into society and treated within the criminal justice system accordingly.

Intellectual disability has attracted strong stigma in the past, and although some social stigma does remain, slow steps have been made to reduce the stigma and allow these individuals to realise their place in society. Intellectually disabled individuals are often othered, feared and mistreated throughout time and only in recent years have the opinions and actions towards the intellectually disabled become more positive. The changes towards a more positive and accepting society for the intellectually disabled are due to a continued better understanding of the disability itself, how it is diagnosed and what can be done for these individuals to live a fulfilling life within the general population. The most significant difference across time is the slow transition away from the use of terms that are considered insulting to these individuals. In the past, intellectually disabled individuals have been referred to as idiots, morons, the feebleminded or the mentally retarded, the latter specifically throughout professional and clinical history until recently. Apart from terms used to describe individuals with developmental difficulties, another major change was from the view that these individuals did not have value in their lives and needed to be segregated from the general population to the introduction of the principle of normalisation posed by Dr Wolf Wolfensberger. This principle focused on integrating and providing a lifestyle to the intellectually disabled that is similar

to the common ways people function in society (Wolfensberger, 1972). This principle is mostly reflected in the way society views and treats intellectually disabled people today. The treatment of intellectually disabled offenders has evolved in much the same way, and the improved understanding of the differences between the intellectually disabled offender and an offender of average intelligence has over time created a more catered pathway for intellectually disabled offenders to be punished. Nevertheless, some remaining issues are present within the system that hinder the intellectually disabled offender.

As in the Diagnostic and Statistical Manual of Mental Disorders Fifth Edition, compiled by the American Psychiatric Association, intellectual disability is listed in the neurodevelopmental disorder group of conditions. Disorders in the neurodevelopmental disorder group usually have onset during the developmental period of an individual's life, and this is true with intellectual disability, where a condition of clinical diagnosis is for onset to be prior to the age of 18 (DSM-5, 2013, APA). Further, neurodevelopmental disorders are characterised by impairments in functioning such as social, personal, academic, or occupational functioning (DSM-5, 2013, APA). In the DSM-5, intellectual disability is interchangeably referred to as intellectual developmental disorder and is characterised specifically by deficits in mental abilities, including but not limited to problem-solving, reasoning, and judgement (DSM-5, 2013, APA). This means that individuals with intellectual developmental disorder have impairments that affect their functioning to the point where they fail to meet the social standard for basic aspects of daily life. In the DSM-5, the American Psychiatric Association explains that both the terms intellectual disability and intellectual development disorder are equivalent and interchangeable terms used within the DSM and in the ICD-11. Further, a United States federal statute in 2010 called Rosa's Law (Public Law 111-256 Rosa's Law) replaced the term mental retardation with intellectual disability; mental retardation is no longer the term commonly used by medical or other professionals and instead intellectual disability is the most universal term. The significance of this change in official terminology greatly impacts the perception of intellectually disabled individuals and aids in integrating these individuals into society seamlessly with less of a barrier created by stigma.

According to the DSM-5 (APA, 2013), the clinical classification for the diagnosis of Intellectual Developmental Disorder must meet three main criteria: the individual must have confirmed deficits in intellectual functioning such as problem-solving, judgement and reasoning, among others through

clinical assessment in standardised intelligence tests. To meet this Criterion A, individuals would need to score approximately two standard deviations or more below the general populations average, and this equates to an IQ test score of 75 or less. Then, the individual must have deficits in adaptive functioning where they fail to meet developmental and social standards for their own personal independence and rely on ongoing support for one or more daily activities such as communication and independent living across all aspects of social environments. Adaptive functioning is usually measured by knowledgeable informants such as parents or caregivers and other forms of individual evaluation such as medical or educational. To meet Criterion B, an individual needs to be sufficiently impaired in at least one of the three forms of adaptive functioning, either conceptual, social, or practical, so much so that they need ongoing support to perform in different environments. Finally, the onset of these intellectual and adaptive deficits must be within the developmental period, commonly referred to as under the age of 18.

Within the classification of intellectual disability in the DSM-5, there are four prongs of severity that intellectual disability function on: mild, moderate, severe, and profound (APA, 2013). To determine the severity of the disability, the focus is on adaptive functioning and not on IQ test scores; this is due to both adaptive functioning giving a better idea of the level of support required and IQ scores being less valid in the lower sections of the range (APA, 2013). Mild intellectual disability would be characterised by difficulty in learning within school children and adults such as reading, writing and mathematics. As adults, mildly intellectually disabled individuals have impairments in abstract thinking, short-term memory, and lack the ability to use academic skills. Individuals who are moderately intellectually disabled have the same troubles as mildly disabled however it is markedly more challenging for these individuals to function without daily assistance to complete basic tasks, and academic differences from peers are more apparent. Additionally, severely intellectually disabled individuals often have extremely limited conceptual skills and a very low level of understanding of language and other basic concepts; full-time care is often needed to provide an adequate amount of support to these individuals. Finally, profoundly intellectually disabled individuals have little to no conceptual skills past the physical world; often they do not understand language or basic concepts but may be able to attain some visuospatial skills, full-time care is needed to provide adequate support.

The ICD-11 is the International Classification of Diseases 11th Revision (ICD-11; WHO, 2018);

this is a globally recognised diagnostic classification standard. The ICD-11 definition and classification of intellectual disability are similar to the DSM-5 in that it is in the group of neurodevelopmental disorders, and it is considered a disorder of intellectual development (WHO, 2018). This disorder is similarly characterised in the ICD-11 as an individual who has significantly below average intellectual and adaptive functioning present during the developmental stage of the individual's life. The ICD-11 groups the classification of intellectual development disorders according to the same severity scale as the DSM-5: mild, moderate, severe, and profound. The classification and description of the four different severities are based upon the same features and characteristics as the DSM-5; however, there are also more details surrounding the approximate intelligence testing scores. For example, mild intellectual development disorder is defined as an IQ test score of approximately two to three standard deviations below the average, moderate would show three to four standard deviations below, severe and profound both showing results of four or more standard deviations below the average. The American Association on Intellectual and Developmental Disabilities (AAIDD; previously American Association of Mental Retardation, AMMR, 2002) also has a classification criterion for intellectual disability, similarly to the APA and ICD definitions regarding intellectual functioning and adaptive behaviour. However, the AAIDD definition provides a larger window of onset, being before the age of 22. Further, AAIDD (AMMR, 2002) provides additional considerations to assess and define intellectual disability, such as community environment and cultural differences that may influence how people communicate and behave.

In the New Zealand Prison Operation Manual (POM) (Department of Corrections, 2018). The definition of intellectual disability is a combination of clinical classifications where an individual has a permanent impairment that results in significant sub-average general intelligence as measured in IQ tests, significant deficits in at least two of the following: communication, self-care, home living, social skills, use of community services, self-direction, health and safety, reading, writing, and arithmetic, leisure and work. These deficits become apparent during the developmental stages of life (e.g., prior to 18). Although clinical professionals take responsibility in diagnosing individuals with intellectual disability, there is a disconnect between diagnosis and appropriate punishment, as will be discussed in subsequent chapters.

Intelligence Quotient

Intelligence Quotient (IQ) is a measurement of an individual's personal intelligence derived from the result of specially designed tests. Often the results of these tests are portrayed on a bell curve, with the average intelligence being 100; most individuals in society fall between a score of 85 to 115. On the extreme ends of the curve, IQ scores below 70 indicate an intellectual deficit often associated with different degrees of intellectual disability, whereas IQ scores over 130 often indicate genius intelligence. IQ tests are considered one of the primary indicative measures of intellectual disability both clinically and within the criminal justice system. They are an indicator of intellectual functioning that can satisfy one prong of the clinical diagnostic criteria for intellectual disability if the individual is shown to have an IQ of 70 to 75 or less (Reynolds et al., 2010). According to the AAMR, only about 1% of the general population is intellectually disabled; however, the mildly intellectually disabled make up almost 90% of the total intellectually disabled population (Fetzer, 1989). According to Kane (2003), many studies have found that the average IQ of the prison population is approximately two-thirds of a standard deviation below that of the general population.

Individuals with low IQs are seven times more likely to be incarcerated at some stage in their life than individuals with an average or above-average IQ (Kane, 2003). Additionally, offenders with lower IQs are more likely to commit the more serious crimes that come with more severe sentences in comparison to offenders with average or above-average IQs (Kane, 2003). Kane (2003) explains that there are generally three characteristics that death row inmates share, all of which are linked to low IQ. These characteristics are that their crimes were impulsive and offered immediate gratification, the offenders did not give any thought to the possible personal risks that committing this crime would produce, and for those offenders who did not intend to kill during their offence, they often killed due to an inability to deal with their victim intelligently.

The Flynn Effect explains the phenomenon of the general upwards trend in IQ scores over time; James Flynn was originally credited with its documentation and collected IQ data within about 20 countries. Flynn found that beginning in the 1930s, IQ increases begun with an increase of approximately 20 points per every 30-year generation (Flynn, 1999; see also Ceci et al., 2003). Specifically, in various IQ tests such as the Wechsler Performance IQ test, an increase of 10 to 20 points was seen, 9 points in the Wechsler Verbal IQ test, 20 points for fluid IQ tests and 10 point

increases in culture-fair IQ tests (Flynn, 1999; see also Ceci et al., 2003).

In the past 30 years, there has been a significant reduction in the number of Americans considered intellectually disabled (Ceci et al., 2003). According to Flynn (1999), in 1974, 2.27% of the school-age population could be considered intellectually disabled, while in 1992, only 0.94% of the school-age population could be. Alongside this, Flynn (1999) found that within the last 100 years between 1892 and 1992, the average 20-year-old Briton gained 55 IQ points (Ceci et al., 2003). This gain in IQ points leads us to believe that the significant improvement in intelligence test performance over time causes the expected average or normal outcome of an IQ test to be obsolete within approximately one generation. The relationship between the classification of intellectually disabled and the Flynn Effect is concerning the cut-off scores to fit the classification criteria. When IQ tests captured 2.27% of the school-age population as intellectually disabled in 1974, the same test would only capture the bottom 0.94% as intellectually disabled in 1992 (Ceci et al., 2003). Therefore, fewer than half of the classified intellectually disabled individuals in 1974 would still be considered so in 1992 with the gradual increase in IQ as explained in the Flynn Effect. To combat this effect and keep a consistent testing system, the major IQ tests are renormed every 15 to 20 years to account for the IQ increase across the population (Ceci et al., 2003). This renorming process includes testing manufacturers to add and remove questions, while also collecting data from multiple age-appropriate groups, to ensure the test behaves correctly. Further, according to Ceci et al. (2003), nearly 38% of all students who were on the cusp of being eligible for the classification and diagnosis of intellectual disability did indeed fall below the cusp when retested on a renormed IQ test from the one they originally took. This suggests that there is some dependence on the type of test administered among several other factors, that could significantly change the classification of an individual and their fitness for certain types of punishments. It is important to note however, that recent research on the Flynn Effect suggests in recent cohorts its nature is varied across time and space (Bratsberg & Rogeberg, 2018) where some places see declines or no change in IQ scores. The implication of this changing classification for the intellectually disabled and the classification as such is that those who may have missed out on the classification of intellectually disabled due to less than 10 IQ points would subsequently classify on a renormed test years after the original test was administered. This makes it even more important to have other means of determining intellectual disability other than a particularly arbitrary scale of intelligence

compared to the ever-changing general population.

Psychologists then become an even more integral and important part of the legal process when it comes to capital punishment cases due to the ability to identify data limitations and errors when it comes to the Flynn Effect and the impact this might have on offenders and their eligibility for the classification of mentally retarded across time (Hagan et al., 2010). For example, when a score from an offender is considered invalid, psychologists have the justification to share the higher or lower score within an estimated range that they believe is the correct score; however, it is currently not believed to be accurate enough to devise a score based on the Flynn Effect and substituting it from the score obtained (Hagan et al., 2010). Thus, a common argument in research is whether to adjust IQ scores for capital punishment cases, keeping in mind the Flynn Effect. However, according to Hagan et al. (2010), making alterations of the IQ scores obtained based on the knowledge that the Flynn Effect exists is not standard psychological practice, and there is no legal framework to force these adjustments with the Flynn Effect in mind.

Conclusion

There are three reasons often given by supporters of capital punishment to explain why the application of the death penalty among murderers is appropriate; these are the protection of society, future deterrence, and retribution (Fetzer, 1989). However, these reasons often do not align with the punishment of the intellectually disabled, nor do they imply that capital punishment is the ideal form of punishment for any offender. The use of the death penalty warrants no more social safety or protection than a life without parole sentence, and only proves that it is an excessive punishment beyond the crime committed. As Fetzer (1989) explains, deterrence is based on the idea that future offenders will reconsider committing a crime for fear of the same punishment being bestowed on them, weighing up the risk and rewards to do so. Intellectually disabled people cannot necessarily weigh the pros and cons of their actions beforehand, and most likely cannot see the consequences that their actions might have. Therefore, execution of the intellectually disabled will most likely only have a deterrent effect on non-disabled offenders rather than intellectually disabled offenders. Essentially, according to Fetzer (1989), the reasons that are given in favour of capital punishment are not suitable when it comes to the intellectually disabled; sentencing these offenders to death

demonstrates no deterrent value, has minimal retributive benefit and is excessive under the Eighth Amendment.

In exploring the sub-questions in this chapter, it is evident that the experience intellectually disabled offenders have within the criminal justice system proves that the system is often underprepared for their needs; further, the application of punishment upon them has in the past been inappropriate for their level of understanding. What can also be seen is the slow changes being made within the system to try and accommodate or counter the issues intellectually disabled offenders face. Intellectually disabled offenders are taken advantage of throughout the criminal justice system by many different individuals, both intentionally and unintentionally. While some improvements have been made, many more things need to be implemented into the system to adequately cater to their needs and allow them a fair process within the system.

The criteria for the classification of intellectually disabled that the criminal justice system works from is based on what was decided in Atkins court; this definition and classification is based on the clinical definitions given by the APA, ICD and AAIDD. It operates on the three-prong clinical definition, exhibiting significantly subaverage intellectual functioning, experiencing significant limitations in adaptive functioning, and these limitations being present prior to the age of 18 (Marcus, 2014). What was also concluded in Atkins was that the indicative IQ scores of below 70 are markers of intellectual disability, which led to a firm bar being set in states such as Florida where an individual must have an IQ of below 70 to even be considered intellectually disabled (Marcus, 2014). This firm bar was known as a bright-line cut-off score, where individuals with an IQ score above 70 were immediately ineligible to be considered intellectually disabled. The Supreme Court ruled this unconstitutional in Hall as the rules in Atkins had been interpreted too narrowly, reliance on the IQ score alone was not enough to rule out an individual being intellectually disabled, and other factors must be considered. While clinical definitions share similarities and are reasonably clear, it is evident the resulting interpretation changes depending on the jurisdiction. Therefore, it would be in the best interest of intellectually disabled individuals to have a clear national standard to not violate the Constitution, especially with the consideration of the Flynn Effect and how this impacts intellectually disabled offenders

Chapter Four: The Eighth Amendment in the Application of Punishment

If the Eighth Amendment bars execution of intellectually disabled offenders, why does this not apply to non-capital offences?

Introduction

This thesis discusses the implications of the Eighth Amendment in the punishment of intellectually disabled offenders, especially capital punishment, and the impact of the clause for cruel and unusual punishment upon its application. However, although the standard forms of non-capital punishment mightbe suitable for offenders of standard intellect, they may not be appropriate for intellectually disabled offenders. Nevertheless, while the Eighth Amendment prohibits capital punishment in cases of intellectually disabled offenders, it does not apply to non-lethal punishments that could be considered excessive for intellectually disabled offenders.

This chapter explores the Eighth Amendment in-depth, unpacking and examining the basic meanings and the clauses integrated within it, further understanding how it is used in the United States justice system and its impact on the intellectually disabled offender. This chapter also focuses on the worldwide use of solitary confinement, life without the possibility of parole, and the effect these punishments have on both intellectually disabled and non-intellectually disabled offenders. This focus is due to the long-lasting damage that these alternate punishments can inflict on not only vulnerable offenders, but all offenders. Finally, this thesis will analyse these types of punishments in relation to cruel and unusual implications for intellectually disabled offenders alongside the extra victimisation and challenges they face within prison.

To begin with, the Eighth Amendment must be explained before the cruel and unusual punishment clause can be specifically focused on. The Eighth Amendment (VIII) in the United States Constitution states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted" (U.S. Const. amend. VIII). First introduced in 1791, it serves to limit the federal and state governments from imposing tough penalties on offenders before

and after they are convicted. The Eighth Amendment has three main clauses: cruel and unusual punishment, excessive fines, and excessive bail; not much further information is given aside from neither excessive bail nor fines shall be required or imposed, nor shall cruel and unusual punishments be inflicted. During the incorporation of theBill of Rights, the Supreme Court ruled that the cruel and unusual punishment clause applies to both the states and the federal government. The excessive fines clause was unanimously ruled to also apply to the states in *Timbs v. Indiana* (2019); however, the excessive bail clause has not been applied to the states, only to the federal government (Stevenson & Stinneford, 2015). Most of the interpretations seen within the criminal justice system and especially the Supreme Court weigh on the simple wording in the constitution, which means the interpretation is always changing. According to Stevenson & Stinneford (2015), because the Eighth Amendment was enacted so long ago, there are continuing debates as to if the application of the Amendment should be to the standard of when the Amendment was adopted in 1791 or change and adapt to fit contemporary ideas. Examining the criminal justice system in terms of progressiveness, there is a high rate of error when it comes to the use of capital punishment upon individuals who were wrongly convicted of crimes (Stevenson, 2015). From the 1970s, 154 people have been proven innocent after being sentenced; at the same time, more than 1400 people were executed; this means that for every nine people executed, there has been one person exonerated (Stevenson, 2015).

Looking at the idea of punishment itself, there are generally six standard purposes for punishment that Billotte (1994) identifies: deterrence, both general and specific, retribution, rehabilitation, incapacitation, and denunciation. When thinking about these standard purposes for punishment in relation to the use of capital punishment specifically, there are only two purposes that can justify the death of an offender through capital punishment. The four purposes of punishment that cannot justify the use of capital punishment upon any offender include specific deterrence, due to death being such a finite and severe punishment to inflict to stop an offender from committing a crime again; incapacitation is intended for an offender who will be reintroduced into society after a time which is not possible with capital punishment; death can denounce an offender, but once again it is too severe to simply reassure society that people who break the law are punished; and rehabilitation is only possible with an offender who is living in order to rehabilitate them, which is not possible with capital punishment (Billotte, 1994). This leaves only general deterrence and retribution as purposes

of punishment that can justify capital punishment. General deterrence works as it discourages the rest of society from committing the same crime, and retribution is achieved when an offender is punished in a way society deems deserving for the crime.

When Billotte (1994) further discusses the standard purposes of punishment, they describe that life imprisonment can achieve the same purpose as capital punishment in having the offender not commit another crime within society. Imprisonment is a more successful form of incapacitation according to Billotte (1994) when compared to capital punishment as there is possibility for error in the criminal justice system, and capital punishment cannot be reversed once it is carried out. The essence of these ideas corroborates this thesis's argument; imprisonment may be the better option to capital punishment but should still not be used lightly as prison does greatly deprive an individual of liberty alongside creating drastic changes in quality of life.

When it comes to intellectually disabled offenders and non-capital punishments, the same concerns expressed in *Atkins* surrounding capital punishment can be applied to life without the possibility of paroleand solitary confinement. Similarly to the use of capital punishment, specific deterrence does not providea penological purpose for the use of non-capital punishments upon intellectually disabled offenders because it is too finite and severe of a punishment to stop them from committing another crime as often they are in total isolation. Furthermore, rehabilitation cannot be utilised as an offender serving life or in solitary confinement is not provided with rehabilitative services as they are never to reintegrate, this is the same as incapacitation as the intention is for offenders to eventually be reintroduced into society, which is not the goal with long-term alternative punishments. As for general deterrence, this does not provide a penological purpose for punishment of intellectually disabled offenders because often society cannot relate to the intellectually disabled offenders and would not be able to link themselves to being in a similar situation, therefore not deterring them from committing a similar crime. Further, retribution is not served with intellectually disabled offenders because society may not consider intellectually disabled offenders deserving of punishment when the consideration of culpability is brought forward. Finally, denunciation is not served with non-capital punishment for intellectually disabled offenders as it is too severe for the lack of understanding and culpability to reassure society that those who break the law will be punished accordingly.

Not one of the six penological purposes of punishment can be served for intellectually disabled

offenders, either for capital punishment or non-capital punishment. *Atkins* explains that the penological purposes of punishment are not served when it comes to the execution of intellectually disabled offenders,so why does *Atkins* not apply to non-capital cases when it serves no penological purpose to punish intellectually disabled offenders in this way. It could be linked to the *McCleskey v. Kemp* (1987) decision surrounding racial bias in the application of the death penalty, where the majority opinion expressed concern that in allowing individuals to challenge their punishment on the ground of racial bias, other defendants would raise similar claims and other arbitrary factors in criminal cases that would undermine the criminal justice system (*McCleskey v. Kemp*, 481 U.S. 279, 314-319, 1987). Likewise, this sentiment could be linked to the application of punishment towards intellectually disabled offenders where the Courts may consider that the exemption from non-capital punishment in addition to capital punishment might undermine the criminal justice system.

Cruel and Unusual Punishment

The Eighth Amendment raises some of the more difficult questions: What does it mean for a punishment to be cruel and unusual? How is the cruelty of a punishment supposed to be accurately measured? Moreover, if a punishment is considered cruel, why should we be concerned with it being unusual as well? (Stevenson & Stinneford, 2015).

Cruel and Unusual Punishment under the Eighth Amendment is punishment that is considered excessive for the crime committed. The Eighth Amendment not only stops barbaric punishments from being imposed upon offenders but also prohibits punishments that are disproportionate to the crime (Stevenson, 2015). For example, while life imprisonment may be considered acceptable for some crimes committed, the Constitution would be violated if an offender was sentenced to death for stealing. The Eighth Amendment also stops capital punishment from being used in a discriminatory manner, such as in racial terms, or in terms of privilege or the use of inhumane execution methods, all of which would be considered cruel and unusual and violates the Eighth Amendment (Stevenson, 2015).

In an interpretation of the Eighth Amendment by Stinneford (2008), four questions are vital to the understanding of the cruel and unusual punishment clause in the Eighth Amendment. The

questions include what standard should the Supreme Court use in deciding if a punishment is unconstitutionally cruel, does this clause only prohibit barbaric punishments or also disproportionate punishments, does the clause prohibit capital punishment and are certain methods of modern punishment such as solitary confinement barbaric enough to be unconstitutional under a violation of the Eighth Amendment. Justices Scalia and Thomas have offered answers to these questions in their own interpretations: the standards that were set when the Eighth Amendment was adopted, 1791, are adequate for deciding if a punishmentis cruel and unusual; only barbaric methods of punishment are prohibited under the clause, not disproportionate punishments; as capital punishment was acceptable punishment in 1791 when the Eighth Amendment was adopted then the cruel and unusual punishment clause does not prohibit it; and modern punishments may only violate the clause for cruel and unusual punishment if they are designed to deliberately inflict pain on an individual for the sake of inflicting pain (Stinneford, 2008). As then pointed out by Stinneford (2008), this approach ignores the vital attribute of unusual in the Justices answering of these questions, unusual in the Eighth Amendment is explained not necessarily to mean rare or different but instead work in conjunction with cruel for punishments that are cruel when compared to longstanding tradition or practice. Additionally, in 2017, Stinneford demonstrates that the word cruel in the Clause for Cruel and Unusual Punishment in the Eighth Amendment does not mean cruel as motivated by cruel intentions but rather unjustly harsh of a punishment, meaning that cruel refers to the effect the punishment will have on the offender and not the intent of the person deciding the punishment. Considering this, Stinneford (2017) defines cruel and unusual punishment fully as punishments that are unjustly harsh when considering longstanding prior practice.

Therefore, Stinneford (2008) answers these four questions again with this altered meaning of unusual: The appropriate benchmark for deciding cruel and unusual punishment is not subjective to the current Supreme Court, nor should it be the standards of when the Eighth Amendment was originally adopted, rather it should be looked at if a punishment has been used continually for a long time, this shows that multiple generations of people have considered it to be an appropriate punishment, a punishment becomes unusual then when it falls out of usage for a significant time. The cruel and unusual punishment clause does prohibit both disproportionate and barbaric methods of punishment; when a punishment is harsher than what is traditionally expected for a similar crime it is cruel and unusual. Capital punishmentis still currently constitutional as it is a traditional punishment

that has not fallen out of usage for multiple consecutive generations. However, some applications of capital punishment are cruel and unusual, such as executing a minor or executing someone for theft as these uses of capital punishment have not been used for a significant amount of time. Finally, modern methods of punishment such as solitary confinement can pose a risk of physical or mental pain that is excessive and could be found cruel and unusual should their effect be considered harsher than punishment practices they replaced (Stinneford, 2008). During the *Atkins* decision, the Court described that the ruling is backed by the lack of reasoning, judgement, and impulse control an intellectually disabled offender possesses (*Atkins v. Virginia*, 2002; see also Salekin et al., 2010). Further, intellectually disabled offenders do not act with moral culpability on the same level as other average intelligence offenders.

Two important aspects that can identify and determine an intellectually disabled offender and their ability to stand trial or be eligible for standard methods of punishment come down to the comprehension of Miranda rights and the competence to stand trial (Salekin et al., 2010). *Dusky v. United States* (1960) determined that defendants must meet a minimum level of competence to stand trial; more specifically, the defendant must be able to consult with their lawyer with a suitable amount of understanding and an understanding of the procedures of the criminal justice system including the charges against them. This has been coined the *Dusky* standard and essentially requires defendants to have a minimum level of cognitive skills to be fit for trial; this is something that oftentimes intellectually disabled offenders do not possess and therefore there do not have the cognitive ability to participate in judicial proceedings (Salekin et al., 2010). There are issues identified with the *Dusky* standard; finding an individual to be incompetent can lead to prolonged limbo in the criminal justice system and difficulty placing intellectuallydisabled offenders into the correct method of punishment (Ellis & Luckasson, 1988).

The Clause referring to Cruel and Unusual Punishments within the Eighth Amendment has led to the total prohibition of some types of punishment under the Constitution, such as drawing and quartering, among other barbaric punishments. The Supreme Court has in the past acknowledged and struck down the use of capital punishment under the Eighth Amendment, usually when the offence is not equal to the punishment of death (e.g., *Coker v. Georgia*, 1977; *Kennedy v. Louisiana*, 2008). However, the use of capital punishment is still permitted oftentimes when the offender is convicted of murder. The other two Clauses in the Eighth Amendment: The prohibition of Excessive

Fines and Excessive Bail, were held by the Supreme Court that excessive fines are those that are an amount grossly excessive to deprivation of property without due process. The Supreme Court held that the federal government could not set excessive bail; this is bail at a figure that is higher than reasonably calculated. When exploring the Eighth Amendment Clause concerning Cruel and Unusual Punishment, does this Clause only prohibit the punishment methods that are considered barbaric or punishments that are also disproportionate to the offence committed? According to *Solem v. Helm* (1983), it is unconstitutional and a violation of the EighthAmendment to impose a disproportionate sentence to the offence committed, such as a life sentence for writing a fictitious check. As the offending in *Solem* was relatively minor criminal conduct, the imposition of a severe punishment such as life without the possibility of parole was not relative, and it was concludedthat this was cruel and unusual under the Eighth Amendment.

Beyond this, the most common consideration with the Cruel and Unusual Punishment Clause concerns whether it wholly prohibits the use of capital punishment when considering it does not advance public good or reduce offending and therefore should it no longer be used in any circumstance? However, some argue that some crimes committed are so atrocious that the offender deserves capital punishment. While capital punishment, in general, is ever the consideration within the Eighth Amendment, what this thesis also wants to focus on are relatively recent or modern methods of punishment that could be considered Cruel and Unusual and therefore unconstitutional. Confinement which imposes a degree of physical distress has been attacked under the cruel and unusual punishment clause of the Eighth Amendment; this does include solitary confinement. According to Berkson (1975), many courts have declared solitary confinement unconstitutional when basic personal items such as soap, toilet paper, and toothbrushes are not provided. Furthermore, if the room is not heated and ventilated adequately, or no mattress has been provided during sleeping hours. The most significant aspect of solitary confinement being kept constitutional under the Eighth Amendment is limiting the amount of time an offender is kept in solitary confinement to a short few days at maximum. However, the United Nations and many others have found that solitary confinement violates human rights and condemns its use regardless of these rules.

Beyond punishment as inherently physical and violent, violations of the Eighth Amendment under cruel and unusual punishment can come from poor and inadequate living conditions in prisons that are considered to present an unreasonable risk of serious harm or deprive basic human needs

(Center for Constitutional Rights & National Lawyers Guild, 2010). However, the unconstitutional threshold is high, and courts often allow conditions that are restrictive and harsh pending they are not harmful (*Rhodes v. Chapman*, 1981). Violations of the Eighth Amendment from poor conditions can include non-nutritional food (*Robles v. Coughlin*, 1983), opportunities for exercise (*Keenan v. Hall*, 1996), adequate sanitation and personal hygiene (*DeSpain v. Uphoff*, 2001), overcrowding (*French v. Owens*, 1985), and isolation (*Jones El v. Burge*, 2001; see also *Scarver v. Litscher*, 2006). Living conditions such as these were foundin Parchman Prison in Mississippi and many others across New Orleans, Arkansas, Ohio, and Pennsylvania, all considered unconstitutional living conditions under the Eighth Amendment (Berkson, 1975). These methods include the extended use of solitary confinement, life without the possibility of parole, the use of different variations of execution methods – if these methods of punishment are rebuked under the Eighth Amendment for an offender, what about the consideration for those offenders who are in the low IQ, intellectually disabled bracket, does this make it more Cruel and Unusual or barbaric to use these methods on these offenders.

In 2016, Bobby James Moore raised two questions related to the Eighth Amendment in a petition to the Supreme Court (Gray, 2019). These questions included if there was a violation of the Eighth Amendment if in prior decision *Atkins* and *Hall* using outdated standards of determining if an individual is severely enough intellectually disabled to be barred from execution, and if excessive periods of confinement under the death penalty constitutes as cruel and unusual punishment (Gray, 2019). This second question Moore wanted to raise regarding excessive periods of confinement could also be used in terms of not only confinement under the death penalty but for offenders who are sentenced to life without the possibility of parole. Unfortunately, the Supreme Court decided only to review the issue of intellectual disability and declined to consider prolonged periods of confinement under the EighthAmendment (Gray, 2019).

There are a number of cases that have not been previously discussed in this research that relate to the Supreme Court and its use of the Eighth Amendment where certain punishments are considered cruel and unusual. This includes *Wilkerson v. Utah* (1878), where punishments such as drawing and quartering,public dissection, burning alive, and disembowelment was considered cruel and unusual by the SupremeCourt and therefore unconstitutional, similar historic punishments were considered cruel and unusual in *Robinson v. California* (1962). In *Solem v. Helm* (1983), the Supreme Court first tackled the idea of a disproportionate sentence length when aligned with the crime committed being

cruel and unusual. The Supreme Court, in this case, outlined three factors that needed to be considered in the determination of a sentence being proportionate or not: the gravity of the offence and the harshness of the penalty, the sentences of other offenders in the same jurisdiction and the sentences in other jurisdictions for the same offence. Moving on from *Solem*, *Harmelin v. Michigan* (1991) has a different interpretation of disproportionate from the Supreme Court, where for non-capital sentences the only consideration for the Eighth Amendment is if the length of the sentence is grossly disproportionate. Here the Supreme Court acknowledged that a punishment could be cruel but not unusual, and therefore it was still permissible under the Eighth Amendment. A case that is considered by some to be a principle of proportionality under the Eighth Amendment is that of *Weems v. United States* (1910), where the Supreme Court used judicial review to declare a sentence cruel and unusual under the Eighth Amendment (Finkel, 2001).

Specifically, for intellectually disabled offenders there is an entirely different level of understanding that these individuals have as explained throughout this thesis. Thus, while it does depend on the individual severity of intellectual disability for the level of understanding, there is a lower threshold between the average offender and an intellectually disabled offender as to when punishment is considered cruel and unusual.

Evolving Standards of Decency

Prior to *Atkins*, certain states did already ban the imposition of the death penalty upon intellectually disabled offenders. Each state usually required the intellectually disabled defendant to provide evidence they were intellectually disabled (Entzeroth, 2001). An example is a section in the Kentucky Penal Code that prohibited the execution of a seriously intellectually disabled offender; this came into effect much before *Atkins* in 1990 (Entzeroth, 2001). In order for this to function in the criminal justice system, a motion stating that the defendant is seriously intellectually disabled had to be filed and then the court would decide if there was sufficient evidence as to if the offender was intellectually disabled and if they could be sentenced to death or not (Entzeroth, 2001). If this were the case the defendant would then be subject to possible other punishments including life without parole, life without parole until 25 years has been served, life imprisonment, or an imprisonment term more than 20 years but less than 50 years. Following Kentucky in 1990, many other states created

legislation to prohibit the execution of intellectually disabled offenders; this includes Arizona, Alabama, Illinois, Mississippi, Missouri, Oklahoma, and South Dakota early in 2000, ultimately not far before the imposition of *Atkins* in 2002. One of the reasonings in *Atkins* surrounded the evolving standards of decency that had occurred in the late 1990s and early 2000s, wherein a national consensus was formed on capital punishment of intellectually disabled offenders using recent state law changes, views of national and international organisations, and criminal justice system analysis (Snodgrass & Justice, 2007), *Atkins* Court identified that many state legislation had been altered to exclude the death penalty for intellectually disabled offenders and that this showed a direction of change among society of the view people had of intellectually disabled offenders. In addition, even states that did not have specific laws or legislations changed to stop the execution of intellectually disabled offender had not carried out executions of intellectually disabled offenders in years, many official organisations including APA and AAMR opposed the death penalty being carried out upon intellectually disabled offenders, and there was an overall worldwide disagreement with the imposition of the death penalty upon intellectually disabled offenders (*Atkins v. Virginia*, 2002*).*

The term evolving standards of decency originated from the opinion by Chief Justice Earl Warren in *Trop v. Dulles* (1958) and is a key part of Eighth Amendment jurisprudence; Chief Justice Warren described that the Eighth Amendment evolves over time alongside the changes in societal values (*Trop v. Dulles*, 356 U.S. 86, 100-101, 1958). It is used primarily in cases where the Eighth Amendment and cruel and unusual punishment are considered when the decision can be applied to the changing standards society have concerning decent treatment. *Weems v. United States* (1910) was the first case that utilised the concept of evolving standards of decency without the term, where suggestions were made for public opinion to be used to help interpret the application of the Eighth Amendment (Matusiak et al., 2014). For the Court to determine the current social standards of decency, Aarons (2008) suggested that there are six factors to be considered: history, judicial precedent, statutes, jury verdicts, penological goal, and international and comparative law. Evolving standards of decency have been used several times in Supreme Court cases since *Trop,* both *Atkins* and *Roper* rulings applied the evolving social standards ofdecency where the Court decided that society has matured away from the application of capital punishment for intellectually disabled and juvenile offenders.

Raines (2002) posited that the test used to determine whether a punishment was cruel and

unusual, the same which held that the execution of juveniles violated the Eighth Amendment, provides proof that the execution of intellectually disabled offenders is likewise unconstitutional under the Eighth Amendment.

Under this test, the punishment must not be considered a barbarous method of punishment that was outlawed previously, the punishment must prove to match the evolving standards of decency in society, and it must not be excessive in terms of infliction of unnecessary pain nor grossly disproportionate to the crime committed (Raines, 2002). The role that *Atkins* has had in evolving standards of decency not only to intellectually disabled offenders but also other average offenders is immense. The Supreme Court concluded in *Atkins* that in light of the evolving standards of decency, the execution of intellectually disabled offenders was excessive under the Eighth Amendment, as the practice was deemed unusual and society had begun to develop a consensus against the use of capital punishment on intellectually disabled offenders (Raines, 2002).

Atkins has sparked many further changes to the criminal justice system in favour of decency and knowledge that offenders have different levels of culpability and understanding, which should influence how they are punished. Essentially, the prohibition of capital punishment among intellectually disabled offenders in *Atkins* concludes that these offenders do not possess the required level of culpability for the imposition of capital punishment (Nickel, 2003), much the same as juvenile offenders who are not eligible for capital punishment due to their age and therefore lessened culpability. Ream (1990) explained that the imposition of capital punishment upon intellectually disabled offenders does not provide purpose for incapacitation, deterrence, or retribution justifications of those still in favour of its use against intellectually disabled offenders. Incapacitation of intellectually disabled offenders can be accomplished in other ways such as life without parole or being placed indefinitely in an institution; hence execution as a means of incapacitation is too severe a punishment under the Eighth Amendment (Ream, 1990). Additionally, the justification for the use of deterrence is the same, wherein intellectually disabled offenders are often not capable of understanding the consequences of their actions, which is what deterrence is based upon (Ream, 1990). Deterrence is successful when crimes are planned, deliberate, and the offender knows the consequences of their actions if they were to get caught (Ream, 1990); intellectually disabled offenders often act at the will of others or act impulsively, therefore, do not contemplate the consequences of their actions nor understand the implication of a death sentence.

Ream (1990) explains that retribution is the hardest justification to rebuttal; however, in essence, no moral society would revel in the knowledge of an intellectually disabled offender being handed down such an extreme punishment when there are other alternative options, especially with the knowledge given to society that this individual does not understand the meaning of death. According to Ream (1990), capital punishment is not a justifiable punishment for the intellectually disabled offender. The *Atkins* court held that the execution of intellectually disabled offenders did not contribute to the deterrence or retribution purposes of punishment as identified in Billotte(1994).

Further, *Atkins* identified that intellectually disabled offenders are less culpable than offenders who are not intellectually disabled, the lessened culpability can be linked to functional limitations such as the reduced ability to process and understand information, communicate with others, understand right from wrong, learn from experience, control impulse, or engage in logical reasoning or abstract thinking (Stevens & Price, 2006). The influence of *Atkins* has been felt significantly through capital cases, even though it provided a rather convoluted and vague view of defining intellectual disability and what punishments are appropriate for intellectually disabled offenders under the Eighth Amendment (Marcus,2014).

While *Atkins* has considerably created an evolving standard of decency for intellectually disabled offenders, this is particularly only seen in capital cases; intellectually disabled offenders committing lower-level crimes do not receive the benefit or consideration of the *Atkins* ruling in the application of their punishment. Marcus (2014) explored the significance of *Atkins* not only on capital cases, but non-capital cases, and it was concluded that while *Atkins* has strongly influenced capital cases, in exploring aspects of non-capital cases for intellectually disabled offenders such as confessions, interrogation, and sentencing, Marcus concluded that *Atkins* has no impact on non-capital cases in the criminal justice system. Even when other research has concluded that the treatment of intellectually disabled offenders needs to be altered in all aspects of the criminal justice system, and not just for capital cases, the view ofthe Supreme Court does still only view the significance of *Atkins* under capital cases.

When *Atkins* is explored in research one major issue that is addressed time and time again is the lack of a national standard, this often means that the criteria for intellectual disability differ state-by-state and the procedures differ accordingly (Wood et al., 2014). What is unique is that intellectual disability is not a legal term but rather a psychiatric one being used in a predominantly legal system

(DeMatteo et al., 2007), and while the Supreme Court did allude to clinical definitions, they did not endorse any particular one, nor did they address any further issues with the clinical definition that were raised (Wood et al., 2014). Most states do use the three-prong definition of intellectual disability as set forth by the AAIDD, in the DSM, or something similar as referenced in *Atkins*; however, the slight differences can change the eligibility dramatically.

The challenge faced for intellectually disabled offenders now is receiving an adequate punishment after the use of capital punishment has been prohibited. As *Atkins* does not greatly affect non-capital cases, intellectually disabled offenders are often vulnerable to receiving punishment that will not adequately assess and meet their needs. Further, as Freckelton (2016) points out, another challenge now for the evolving standards of decency is the use of *Atkins* not only in non-capital cases to provide suitable punishment for the intellectually disabled, but the expansion of the definition of intellectually disabled to include offenders who are intellectually disabled but the onset was not prior to the age of 18 due to brain injuries, degenerative neurological conditions and other functional issues that cause similar results as intellectual disability.

Freckelton (2016) uses New Zealand to illustrate how the criminal justice system works if capital punishment of intellectually disabled offenders does not occur. However, it is based on defendants being found unfit to stand trial or not guilty by reason of insanity, which is a larger overarching concept that could apply to not only intellectually disabled offenders but many others, it is usually focused on mentally ill offenders. These offenders are often detained within a special care facility to fully assess and meet their needs and allow for rehabilitation efforts to be made for future release. Freckelton (2016) believes that this is a good response and works well because the conceptualisation of intellectually disabled is through a health pathway rather than a legal or justice pathway while still providing community protection; this is what Freckelton (2016) believes that the United States should attempt to do in order to combine humanity and evolving standards of social decency with community safety.

Intellectually Disabled Offenders in the Criminal Justice System

Often crimes committed by intellectually disabled individuals are not entirely due to their below-average intelligence; instead, it is due to the combination of personal experience, external

environmental influences, and individual differences (Davis, 2005). There was at one time during the early 1900s, a professional view that individuals with intellectual disabilities were predisposed to committing crimes due to their disability. However, this view phased out when causes of crime were shifted from being due to biological makeup of a person more towards psychological and sociological influences (Davis, 2005).

As intellectually disabled individuals are now integrated into the community they are much more susceptible to becoming involved in the criminal justice system (Perske, 2003). They are frequently taken advantage of by average and above-average intelligence offenders and often assist in law-breaking activities without entirely understanding their involvement or the consequences of their involvement. According to Davis (2005), there is no surprise that once intellectually disabled offenders are in the criminal justice system, they are more likely to receive long sentences and less likely to have access to parole or probation services. This is mainly due to inability to understand or adapt to the criminal justice system and its rules, alongside trying to cover up their disability, pretending to understand their rights, being overwhelmed by the police and the criminal justice system, and being confused about their own responsibility and involvement in the crime. Billotte (1994) adds that there are important factors to be considered when sentencing intellectually disabled offenders, such as the security level of the prison andthe type of population within the prison. Additionally, due to judges and juries being more likely to punish intellectually disabled offenders excessively, the system needs to provide a retributive ceiling that will ensure the punishment is adequate and not excessive.

Cockram & Underwood (2000) identify three explanations as to why intellectually disabled individuals are more likely to become involved in the criminal justice system. The first is the susceptibility hypothesis,which proposes that individuals with intellectual disability are more likely to become involved in the criminal justice system due to personal characteristics including communication issues, impulsivity, lack of moral reasoning, lack of social knowledge, and being easily taken advantage of (Cockram & Underwood, 2000). These characteristics make intellectually disabled individuals more likely to commit a crime and more likely to be apprehended according to the New South Wales Law Reform Commission (1993). The second explanation provided by Cockram & Underwood (2000) is the psychosocial disadvantage explanation, which is an extension of the susceptibility hypothesis where the overrepresentation of intellectually disabled individuals

who are unemployed, uneducated, lack social skills, experienced childhood institutionalisation, or struggle with drug and alcohol addiction leads them to commit crime (Deane & Glaser, 1994). Finally, Cockram & Underwood (2000) identify the different treatment hypothesis (Zimmerman et al., 1987), which suggests that intellectually disabled offenders aremore likely to be considered delinquent by the courts due to their portrayal in the criminal justice system.A study conducted in Western Australia found that intellectually disabled offenders recorded more low-security ratings when they first entered prison; however, by the time they left, intellectually disabled offenders recorded more medium and maximum-security ratings (Cockram, 2005). It is discovered that this is because intellectually disabled offenders in Western Australia are transferred to a protective unit which is within a maximum-security prison, meaning that intellectually disabled prisoners serve their entire sentences in a maximum-security facility even if the offences are minor (Cockram, 2005). The use of a protective unit or protective custody is meant as a kindness; however, it will limit access to job, education, recreation, and rehabilitation. The reasoning for the use of a protective unit for intellectually disabled offenders is that due to the incidence of physical and mental abuse from other offenders in prisons, intellectually disabled offenders are more likely to be abused and exploited by others similarly to within the community. Further, intellectually disabled offenders are more likely to struggle with the prison environment and cause discipline issues, especially within maximum-security units they are usually placed under to protect them from exploitation (Cockram, 2005).

Hayes (2007) identifies five major issues that need addressing when it comes to intellectually disabled offenders in prison. These issues are uncertainty about the number of offenders with intellectual disability (and their prevalence within the criminal justice system), lack of identification of offenders with intellectual disability which leads to inappropriate treatment within the criminal justice system, professionals in the criminal justice system lacking the knowledge of intellectually disabled offenders and how to deal with them, a lack of different options for intellectually disabled offenders within the criminal justice system, and a scarcity of help within the community and in wider areas to meet the needs of intellectually disabled offenders. Prisons and other services within the criminal justice system often have many responsibilities towards the offenders in their services (Hayes, 2005a); this includes a duty of care, application of appropriate education, skills and specialist programmes, therapeutic interventions and adequate education and training of staff. The problem

comes when there is a lack of knowledge about specific individuals needs and therefore an inability to plan for each person where they can make the most of what is offered to them while in prison; therefore Hayes (2007) explicitly pushes the importance of identifying offenders with intellectual disabilities in the criminal justice system. It was found in a Scottish study by Myers (2004) that a higher number of individuals were identified as intellectually disabled in one prison compared to others when the evaluations were completed by a nurse who had specialist qualifications and knowledge of intellectually disabled offenders, leading to the conclusion that there are more intellectually disabled offenders identified correctly when staff are trained and knowledgeable in that area. The disadvantages of individuals not correctly being identified as intellectually disabled are varied and include misdiagnosis or the thought that the individual is being uncooperative or behaving in a disordered manner (Myers, 2004). This could lead to the intellectually disabled individual not receiving the appropriate care and being placed in a mental health unit or care facility that is inadequate at meeting their individual needs, leading to further negative impacts later down the line such as being labelled troublesome or extreme behavioural changes (Hayes, 2007). The only time Myers (2004) found it appropriate for an intellectually disabled offender to be placed in psychiatric care or offered other diversions from the criminal justice system is if they are also diagnosed with a mental health disorder or problem, Myers goes on to explain that this is important and in the best interest of the intellectually disabled offender as most psychiatric stays are longer than a standard prison sentence the individual might receive. However, there are many issues with intellectually disabled offenders being given prison sentences as well, often these offenders are more vulnerable to abuse and mistreatment within the prison environments Myers (2004) suggests they be put into. Nevins-Saunders (2012) considered prisons to be inappropriate places for intellectually disabled offenders due to them being subject to more disciplinary infractions and abuse while incarcerated alongside a distinctive lack of rehabilitative services available for the intellectually disabled prison population even when compared to the options for treatment of mental illness.

The prison environment is extremely tough and even well-adjusted and seasoned offenders can struggle; when it comes to intellectually disabled offenders they are underequipped to cope with the demands of prison in terms of social interaction, emotional knowledge, and entirely intellectually insufficient (Cockram, 2005). Intellectually disabled are vulnerable to abuse and mistreatment within

the community and even more vulnerable as offenders in the prison system; additionally, prisons lack the support a community environment can bring to intellectually disabled individuals, and there are little to no structured opportunities for intellectually disabled offenders to learn and grow in prison for a then successful transition back into the community. Cockram (2005) makes an argument similar to many others than imprisonment should be the last resort for offenders with intellectual disability, as it provides no rehabilitative function (not even for average intelligence offenders) and may even significantly deteriorate the mental health and adaptive skills an intellectually disabled offender might possess. While some studies have implied that rehabilitation is not possible for intellectually disabled offenders, Nevins-Saunders (2012) refutes this, explaining that there are examples within problem-solving courts that intellectually disabled individuals can be educated and trained within limits, meaning that they are capable of receiving support that would reduce the chance of reoffending and increase the chance of successful rehabilitation. Billotte (1994) makes a similar point to Cockram (2005), as rehabilitation is not effective for intellectually disabled offenders in the prison system, these individuals need to receive adequate training, rehabilitation and work programmes in order to reintegrate into society upon release, but prisons are not equipped to provide this.

Throughout the 1980s to the late 1990s, the expansion of long-term solitary confinement across US prisons exploded with the supermax, estimations come to a total of 20,000 new solitary confinement cells were available (Reiter et al., 2020). The current annual estimate of inmates in solitary confinement in the United States varies from 80,000 to 250,000 (Reiter et al., 2020). Solitary confinement is considered torture in terms of human rights and has been associated with increased self-harm, anxiety, depression, paranoia, and aggression (Reiter et al., 2020).

The damaging psychological consequences of solitary confinement tend to be related to long-term durations (Haney, 2003). There is little knowledge surrounding the effect of solitary confinement on short periods (Arrigo & Bullock, 2008); however, it is well established that the effects long-term are severe. Supermax prisons are characterised by isolation and sensory deprivation that push the boundaries of human endurance (Oleson, 2002). Even short periods of restricted sensory input produce breakdowns in cognition; this is seen in a study conducted by Heron (1957), where subjects were confined to a cubicle under comparable conditions of confinement to supermax isolation facilities. These subjects suffered cognitive impairment, visual and auditory hallucinations,

lowered thinking capacity, and limited brain function after only ninety-six hours due to the prolonged exposure to a monotonous environment (Heron,1957). It was concluded that a changing sensory environment is essential for human functioning, taking this into consideration if ninety-six hours can have a dramatic effect on cognitive functioning, what are the effects of longer-term isolation on death row and other long term supermax prisoners? (Oleson, 2002). Both Haney (1993, 2003, 2006), Grassian (1983), and Grassian & Friedman (1986) have explored solitary confinement and its effects on individuals in a considerable amount of depth. Haney (1993) notes that with the lack of social interaction inmates in solitary confinement receive, in long-term situations they no longer crave social interaction but begin to fear it. Humans require social contact and interactions to keep control of the environment they reside in, to connect with others and give and receive social support; however, Haney (1993) explains that this lack of social contact long-term leads to many negative effectson the ability for individuals to interact with others. Solitary confinement does not give inmates the chance to engage in social contact or reality testing, which is used to validate and understand the environment they are in (Haney, 2006). This inability to understand the environment makes it difficult to decide what is real and what is not and can lead to psychosis, suicidal behaviour, and even self-mutilation for inmates in solitary confinement long-term (Haney, 2003; 2006). The rigidity of solitary confinement for inmates creates rage, anger, and frustration (Haney, 2003), all of which are used as reasoning for an individual to be in solitary confinement in the first place, yet these individuals feel these emotions due to the confinement (Haney, 1993). In Grassian's 1983 study, they identified a condition named SHU syndrome among a group of prisoners who were in the solitary confinement unit called SHU (Security Housing Unit) in California's Pelican Bay State Prison. This syndrome is characterised by changes in thinking, concentration, and memory, alongside problems with impulse control. Grassian (1983) concluded that the use of solitary confinement causes significant psychiatric issues in all individuals that are subjected to it.

Haney (2003; 2006) mentions that inmates in long-term solitary confinement are at an increased risk of developing mental illness, especially illness such as depression and anxiety which are linked to social isolation. Further, for those individuals with pre-existing mental illness, often they are more likely to be placed in long-term solitary confinement due to trouble adjusting to the general prison population (Haney,2003) and are more likely to develop more severe psychiatric problems in solitary confinement (Haney, 2006). Considering this, it would be clear that intellectually disabled

offenders would be more likely to be placed in solitary confinement long-term due to their inability to adjust to the general prison population and vulnerability to being taken advantage of. Therefore, they are then more likely to receive the negative consequences of being in solitary confinement for long periods, such as developing mental health issues and losing what ability to interact socially they might have possessed previously. Solitary confinement has negative consequences on an individual's ability to successfully reintegrate into any society, including the general prison population or the outside community. It has been demonstrated across many studies that solitary confinement can produce many negative psychological effects even in entirely healthy prisoners (Arrigo & Bullock, 2008). Inmates who have been in solitary confinement have trouble managing their behaviour and rely on the structure of the prison to limit their conduct (Arrigo & Bullock, 2008). Suppose solitary confinement can so strongly impact an intellectually healthy individual. In that case, the effects it can have on an intellectually disabled individual can be catastrophic and often means that these individuals will never be capable of integrating back into a community.

Death row syndrome is linked back to Grassian & Friedman (1986), where a study of 14 inmates in solitary confinement was conducted; these inmates were in their cells for 23 hours a day. Due to these conditions, Grassian & Friedman (1986) identified severe psychiatric reactions to the conditions which have become known as death row syndrome, in which an individual on death row waives or refuses further appeals on their death sentence so they will be executed sooner. This raises questions of the mental state of these inmates (Schwartz, 2005) as they are essentially volunteering to die. For example, among the 188 executions carried out between 1977 and 1992, there were 22 who volunteered to be executed (Oleson, 2006). Further, among the 632 executions carried out between 1993 and 2002, 75 death row inmates volunteered for execution. These inmates could have volunteered for execution for several reasons, including not wanting to grow old in prison, bad conditions on death row, mental health issues including depression, guilt towards the victim or their family for ongoing pain, or even to escape the criminal justice system and its lengthy and complicated processes (Oleson, 2006). However, it is important to note that the United States does not acknowledge the concept of death row syndrome and often ignore it completely in the criminal justice system (Oleson, 2006).

Offenders on death row often wait years, if not decades, to be executed. The average time prisoners spent on death row rose between 1987 and 2009, and again between 2010 and 2011

according to Simmons (2009), and according to the Carson & Golinelli (2013) in 2012, the average length of stay on death row from sentencing to execution is 198 months, which translates to 16.5 years. Simmons (2009) argues that this lengthened delay between sentencing and execution does constitute cruel and unusual punishment, prisoners are not only living within solitary confinement conditions, but they are living under a life imprisonment sentence with the chance of execution. *Lackey v. Texas* (1995) was a case where the question was raised as to if executing an individual who has already spent 17 years on death row is a violation of the Eighth Amendment clause for cruel and unusual punishment. Justice Stevens noted that an execution after 17 years might not benefit the penological purposes behind retribution and deterrence (*Lackey v. Texas*, 513 U.S., 1045, 1045, 1995). However, the court denied this petition and carried out the execution in 1997 (Oleson, 2006). They are housed in solitary confinement for the duration of their time waiting for their sentence to be carried out. As of research conducted by Smith (2008), more than 3,000 individuals were in this exact position awaiting certain death, with those waiting for execution in 2006 the average time since their sentence was handed down to when they were finally executed was 12 years (Smith, 2008). The conditions described above have birthed the concepts of death row phenomenon and death row syndrome, the phenomenon describes the experience of the harsh death row conditions and is defined using three key components: temporal (amount of time between sentence and execution), physical (the conditions an inmate is held in until their execution), and the experiential (what it means to live when you are sentenced to death) (Smith, 2008). Death row syndrome is used to describe specificallythe psychological effects of the death row experience or the experience of longstanding time spent in solitary confinement conditions (Smith, 2008). In a study of Alabama's death row inmates in 1978, Johnson (1981) inmates described feelings of fear, loneliness, and lack of emotional capability from beingon death row.

While the use of capital punishment has been declining, the concept of death in punishment is still ever-increasing in the form of life without the possibility of parole (Girling, 2016); the use of capital punishment is indeed slowly being phased out due to pushing from abolitionists and an ever progressive society. However, it is only being replaced with an equally painful punishment of death by incarceration, although the pain is felt differently (Johnson & McGunigall-Smith, 2008). Death by incarceration, aka life without parole, can be considered a civil death; offenders who are sentenced to life without parole lose their freedom from civil society permanently, they no longer live in society;

instead, they exist in prisons (Johnson & McGunigall-Smith, 2008).

Conclusion

Under *Atkins,* intellectually disabled offenders are not eligible for the death penalty; this has been one of the many advances in jurisprudence linked to the evolving standards of decency throughout society and the criminal justice system. What is now an issue and slightly behind the current standards of decency is the implications of *Atkins* on non-capital cases for intellectually disabled offenders, and the impact of other standard forms of punishment that are used, unaltered, on intellectually disabled offenders.

Evolving standards of decency have proved to be an important interpretation of the Eighth Amendment and the application of punishment, it has been utilised not only for the exemption of intellectually disabled offenders from capital punishment in *Atkins*, but also many other rulings that are based on the use of capital punishment upon a certain type of offender or for a certain type of crime. There is no exact method to measure the current societal standards (Matusiak et al., 2014); however, there are many factors that can be considered by the court to evaluate the current standards of decency and apply that adequately to the current issue being evaluated.

There seems to be no reason as to why the Eighth Amendment cannot be used in non-capital cases to exempt intellectually disabled offenders from certain punishments, intellectually disabled offenders are often confused about the consequences of crime and lack social and environmental understanding of the criminal justice system. Therefore, they should not be subjected to punishments such as life without the possibility of parole or solitary confinement as these punishments can sometimes even be considered harsh or frowned upon for non-intellectually disabled offenders. Non-capital cases involving intellectually disabled offenders could also be considered under the evolving standards of decency, looking at the history of intellectually disabled offenders, the previous opinions as stated in *Atkins*, public opinion and international law, an evolving standard of decency could be identified as to the treatment of intellectuallydisabled offenders and if they should be punished differently to non-intellectually disabled offenders.

Chapter Five: Alternatives

What are the alternative measures that can be taken to address an offender with intellectual disabilities in a way that is appropriate for their understanding of punishment?

Introduction

This thesis has continually explained why individuals with intellectual disabilities are disproportionately represented in each sector of the criminal justice system. The four main pillars or stages of the criminal justice system that showcase the struggles these individuals have within the system are outlined in Petersilia (1997) as being arrest and prosecution; pretrial incarceration; plea bargaining, court processing and sentencing; and incarceration, parole, and recidivism.

To reiterate, within the standard criminal justice system, there is often little to no consideration made for intellectually disabled offenders and the different style of care or punishment they might require for them to understand the negative impacts of their actions fully and not to reoffend. Under the arrest and prosecution stage of the criminal justice system, intellectually disabled offenders make no attempt to hide what they have done and often confess to more than what they have done to try and please figures of authority (Petersilia, 1997). The struggle has only just begun at this stage as further on in the pretrial incarcerations phase these offenders have difficulty being granted bail, often due to lack of a job or a stable living situation; something that intellectually disabled offenders may find hard to obtain. When it comes to points in the criminal justice system such as plea bargains, processing through the courts and eventually sentencing, an offender with intellectual disability tends to already be at a disadvantage as during the arrest and prosecution stage they often provide more incriminating evidence, making plea bargaining much more difficult; additionally, they can be made to appear unreliable by the prosecution and therefore less credible in court (Petersilia, 1997). In the final stages of the criminal justice system, such as incarceration, parole and recidivism, intellectually disabled offenders do not usually get separated from the general population and this means they are more often abused or victimised by the general prison population as they are more vulnerable. There is a severe lack of appropriate programs for

rehabilitation and education and these offenders are less likely to be granted parole or successfully meet their parole requirements upon release (Petersilia, 1997). One of the main reasons the incarcerations rates of intellectually disabled offenders is so high is because probation is usually granted to offenders of higher intelligence with a history of good education and work. Petersilia also tackles the issue of accountability (2000), where they posit that the issue itself is not if offenders with intellectual disabilities should be held accountable for their actions; instead, it is the manner in which they are held accountable which is important. Intellectually disabled offenders being held accountable means they should be treated adequately in courts, not be housed in environments where they face potential higher risks of being victimised and not be denied access to education, treatment, and work opportunities (Petersilia, 2000). What is significantly understood from this notion is that prison especially is a particular example in whichintellectually disabled offenders are at higher risk of being victimised. Hence, they should not be housed in prisons, inadvertently advocating for diversion from incarceration in standard facilities or alternative punishment routes.

Intellectually disabled offenders are often the forgotten cohort within the criminal justice system. For example, Fetzer (1989) points out that there are procedures such as competency hearings to protect the rights of offenders who may not be able to assist in their own defence used specifically for mentally ill offenders; however, no such procedures are present to protect the rights of the intellectually disabled offender adequately. Additionally, Rockowitz (1986) points out a general unwillingness among criminal justice system institutions to take any responsibility for intellectually disabled offenders; a number of reasons for this are described as being correctional facilities not having appropriate programs for intellectually disabled offenders, mental health facilities not able to care for those that are not mentally ill, and other care facilities in the criminal justice system just not having the appropriate resources to take on these offenders and have a positive impact (Hutchison et al., 2013). Prior to 1997, some cities in the United States did have programs that help intellectually disabled offenders transition to parole or probation outside of a prison environment. This included Boston, Fort Worth and Cleveland and the programs offered structure and support to work which, according to Petersilia (1997), considerably reduced reoffending and rearrest rates. The goal of these programs is not to excuse the crimes intellectually disabled offenders committed nor have them escape from punishment but to recognise the needs of intellectually disabled offenders and help them return to society productively, which would result in less reoffending.

According to the United Nations (2009) in their handbook regarding prisoners with special needs, individuals with intellectual disabilities should be diverted from the criminal justice system where possible; most notably this should be done during their first point of contact with law enforcement agencies. Further, those with severe intellectual disabilities should never be held in prisons (United Nations, 2009). The United Nations (2009) continually emphasises the importance of diversion protocol throughout the criminal justice system for those individuals who are intellectually disabled, including during prosecution, trial, and imprisonment. The use of diversional measures becoming the norm may mean that the introduction of legislation and procedures is necessary to ensure diversion is used correctly, alongside the training of individuals who work within the criminal justice system (United Nations, 2009). Diversionary measures would also be more effective if there are sentencing alternatives available and introduced that could be used for individuals who have intellectual or mental disabilities where they committed more serious offences; the United Nations (2009) suggests sentences that include comprehensive medical care and supervision in a suitable facility. For this to be effective, courts need to have access to all information regarding an individual and their intellectual abilities, and this can be provided by clinical professionals who have conducted assessments and screening as soon as possible during the criminal justice process.

This handbook created by the United Nations in 2009 outlines the minimum requirements of the criminal justice system in their care of intellectually and mentally disabled offenders who filter through the system. It is discussed in this handbook that law enforcement and sentencing authorities should use imprisonment in a formal prison setting as the last resort for these offenders, and the preference should always be diversional options unless it is beyond possible. If prison is the only necessary option, or for other facilities that are used for the housing of intellectually disabled offenders, many important aspects must be present for adequate care to be provided according to the United Nations. These aspects include management strategies that incorporate appropriate prison conditions that promote mental and physical health and well-being, ensuring there is sufficient staff with in-depth knowledge regarding identifying intellectually disabled individuals and the appropriate care,with training also provided to all members of staff. Additionally, intellectually disabled offenders, much like standard offenders, must have access to legal counsel, careful and educated risk assessment, access to mental health services and accommodation

when applicable. Finally, continuity of care is extremely important if the intention is the eventual reintegration into the community, followed by rehabilitation programs and family contact and involvement (United Nations, 2009). The key messages in this handbook produced by the United Nations (2009) are summarised to be that individuals with disabilities in the criminal justice system need to be able to access facilities and services on an equal basis to others, and legislation and procedures need to be readily in place so that these individuals are not disadvantaged or discriminated against. Due to the difficulties experienced in prison environments for the intellectually disabled, prison sentences should be a last resort, and all other options should be exhausted before prison for these offenders (United Nations, 2009).

Programme Review

The programs for intellectually disabled offenders tend to provide a range of services to aid these offenders and their families through the criminal justice system (Maschella, 1986). Below this thesis will recount and review several programs used in criminal justice systems across the world to accommodate offenders with intellectual disabilities.

Concannon (2019) describes a programme in New Jersey for intellectually disabled offenders called the Developmentally Disabled Offenders Programme (DDOP), which was created by the Arc Foundation.The programme aims to use a personalised justice plan that locates alternatives to incarceration and provides case management for offenders in the criminal justice system who have an intellectual disability (Arc Foundation, 2019). Arc Foundation further aims to thoroughly train criminal justice professionals and service providers in interacting with intellectually disabled offenders and develop specific rehabilitation plans alongside intensive services for intellectually disabled juvenile offenders, all through the DDOP. This programme is a good starting stage where a personalised program, individual case management and adequately trained staff and professionals provide supervised support for intellectually disabled offenders. Where this falls short, however, is the seeming lack of regimented or extremely structured education and training that could cement successful rehabilitation and reintegration for all the individuals that are deferred through it.

Kramer (1986) breaks down a programme for the intellectually disabled offender in Camarillo

State Hospital and Developmental Center. In this programme, each offender is connected with an interdisciplinary team that includes a psychologist, social worker, multiple different therapists, and teachers alongside medical staff. One of these individuals is also designated as the Quality Mental Retardation Professional/Client Plan Coordinator (QMRP), who is responsible for the individual's overall care and ensuring the appropriate services and team are provided throughout their time in the programme (Kramer, 1986). Before the offender has been in the programme for 30 days, there is an evaluation and meeting to create an Individual Programme Plan (IPP) where the needs of the offender are identified, and a plan is formed to provide services to the offender while they reside there adequately. The programme itself is an extremely structured behavioural points system; during the day each individual receives an hourly point score for their behaviour and participation in each hourly activity; points are awarded by the team member running the activity at the time. Points are based on positive reinforcement for the correct behaviours, and this system was built for consistency and understanding between the offenders and the staff (Kramer, 1986). There are three behaviour levels in the points system and different levels mean the participants have different privileges; all offenders are placed at level 2 upon arrival and can either move up to level 1 or down to level 3 depending on their behaviour. Point scores are totalled daily and averaged over a week; to move up to the higher level the points score must be high enough for two weeks before the promotion. Kramer (1986) further explains that offenders can reach what is called a primo level; this is when level 1 has been successfully maintained for a specific time, at primo level the points system becomes obsolete and behavioural monitoring becomes randomly scheduled and infrequent. Interestingly enough, when this level was established it was found that offenders could not maintain their primo level and often lost it very quickly, which reinforced the idea that the gap between a hugely structured environment and a much less structured environment was too tough to transition between.

Overall, the elements of this programme seem effective and suited for each individual need, alongside the points system being easy to understand and implement; however, it can be noted that this programme is not necessarily equipped to deal with large groups of offenders due largely to its placement at a hospital and considering such a large percentage of prison populations are intellectually disabled offenders it would be important to try and create an environment that can cater to the large amount of intellectually disabled offenders within the criminal justice system. This

programme is diverse in that it provides interdisciplinary care alongside an individual programme plan such as in the Developmentally Disabled Offenders Programme created by Arc Foundation. It is structured and uses an adequately supervised surveillance system which aids in a successful transition into the community; however, as it is run in a hospital it is not equipped to deal with large groups of offenders, which in turn means a large percentageof intellectually disabled offenders miss out.

Hayes (2007) makes mention of a model used in Southern Australia called the Magistrates Court Diversion Programme (MCDP), which was originally introduced in 1999 and discussed at length by Hunter& McRostie (2001) & Skrzypiec, Wundersitz & McRostie (2004). The court aims to address recidivism by assisting offenders who have intellectual disabilities; according to the Legal Services Commission of South Australia (LSC, 2019), as of May 2019, the MCDP now only operates in the regional courts located in Murray Bridge, Mount Gambier, Port Augusta and Whyalla as the programme has been replaced with the Treatment Intervention Court in other Magistrate Courts. Offenders under the MCDP have their progress monitored and attend court regularly for reviews, and if an offender is non-compliant they may be removed from the programme and referred back into the standard court system. Similar to other programs of its nature, services include education, vocational training, social skills training, addressing social welfare and physical health needs among several other things (Hunter & McRostie, 2001; Hayes, 2007). This model was good in its time but became outdated and was evolved into a new programme, it applied diversion and monitoring which adequately supported intellectually disabled offenders, however its new counterpart, the Treatment Intervention Court, seems more focused on illicit drug use and its links to minor offending, which does not often apply to intellectually disabled offenders, nor is it an appropriate diversion tool to use in every situation (LSC, 2021).

The last programme that this thesis will mention is the Mentally Retarded Offender Programme (MROP) which is described in depth by the United States Department of Justice in a programming manual for intellectually disabled inmates to use within correctional facilities (Coffey & Institute for Economic and Policy Studies, 1989). This programme started during *Ruiz v. Estelle* (1980) in Texas where it was found that special habilitation needs of inmates with intellectual disabilities were not met and therefore failed to meet the constitutional obligation to provide adequate conditions of confinement (*Ruiz v. Estelle*, 1980). Onwards from this, the programme was developed and

approved in 1986, cited on behalf of the United States Department of Justice as being the most extensive and ambitious programme aimed at intellectually disabled offenders (Coffey & Institute for Economic and Policy Studies, 1989). The goal of MROP is to provide intellectually disabled offenders with the facilities to learn different skills that will help them function independently in the community and not reoffend; additionally, this takes place in a safe and supportive environment to help make these goals possible (Coffey & Institute for Economic and Policy Studies, 1989). Once again, an individualised treatment plan is developed where the focus is on four different aspects for successful rehabilitation: habilitation, social and professional support, security, and continuity of care. The MROP is an excellent base programme with many aspects to consider; the needs of offenders being considered, diversion and education options with plenty of support to encourage successful reintegration into the community. It could be a great starting place for the rollout of a national diversion programme for the United States and is described in great detail in the United States Department of Justice handbook as having many avenues and support that some other programs do not offer and can be added onto.

When looking into how New Zealand identifies and handles intellectually disabled offenders, there is a lack of a structured programme or system that would benefit these offenders. According to Brandford (1997), based on a strict definition of intellectual disability, the prevalence of these offenders in prison is between 0.3 and 0.37%; this figure is expected to have grown, especially when considering this study had a particularly strict definition of intellectual disability. However, in the Prison Operations Manual (POM), a referral process is outlined that is dependent on several external factors that the intellectually disabled offender cannot control. This includes a prison staff member who must originally identify possible intellectual disability andmust refer the individual for assessment, and if the offender is confirmed to be intellectually disabled, prison clinical professionals make recommendations to staff members in respect to their needs (Department of Corrections, 2018). This provides several issues to begin with; first, staff members who are not experienced with intellectual disability will not be able to successfully identify an individual who needs to be put forward for an assessment; and second, once recommendations are made with respect to the personal needs of the intellectually disabled offender, there are few diversionary or specified options available for these offenders and often their situation does not change nor are any systems put in place for additional support. McCarthy & Duff (2019) explain the additional legislative

changes which have impacted the care of intellectually disabled offenders within the criminal justice system. Prior to 1992, intellectually disabled offenders were managed under mental health legislation; however, the Mental Health Act of 1992 intentionally excluded intellectually disabled offenders, which left several legislative gaps regarding how to deal with these offenders and where to put them. The Intellectual Disability Act (2003) established a scheme of compulsory care and rehabilitation to intellectually disabled offenders, which stated that these offenders were to either be placed in a secure hospital facility or a supervised care facility within the community. However, once again, there is no specific focus on intellectual disability;instead, these offenders are lumped alongside mentally ill individuals or in a supervised care facility in thecommunity that would not be used for any serious offending. The structure outlined below would give the New Zealand criminal justice system a kickstart into successfully handling intellectually disabled offenders and produce more successful outcomes.

Environment, Education and Support

Often the consideration within the criminal justice system for intellectually disabled offenders is that rehabilitation is pointless and will be unsuccessful due to these individuals lacking the ability to learn past the most elemental and basic manner (Bicknell, 1990). However, this sentiment is often thought of in the form of these offenders either being placed in a prison environment or a mental health facility, both of which do not cater to the needs of intellectually disabled offenders. What would benefit intellectually disabled offenders is a much more tailored environment where essential life, behaviour and cognitive skills are taught so that reintegration is possible into a supportive community setting.

According to The Americans with Disabilities Act (ADA), when compared with prison conditions for intellectually disabled offenders, it is certain that prisons must ensure there is equal access to provide support and services to intellectually disabled offenders as is with any other offenders (Weiss, 2013). There is no clear indication of what these supports and services must entail, however, and where Holland et al. (2002) suggests habilitative methods as opposed to criminal justice methods to deal with challenging and offending behaviour that intellectually disabled offenders might display in prison environments, there is little indication that the ADA would mean the inclusion of habilitative

processes. Further, according to Glaser and Florio (2004), intellectually disabled offenders are often turned away from standard disability services due to their disruptive behaviour and their needs of habilitation are rarely met. While a large portion of intellectually disabled offenders would greatly benefit from a habilitative approach to punishment, there are other intellectually disabled offenders whose offending behaviour is too dangerous for habilitative or integrative community support settings (Spreat, 2020). This is when Spreat agrees that while it is not ideal for these offenders to be within a prison environment, it may be the appropriate consequence.

Options for Justice is a non-profit organisation operating in St. Louis City and County, St. Charles County and Lincoln County in the United States which focuses solely on serving individuals with intellectual disabilities who are at risk of becoming involved with the Criminal Justice System or already are involved (Options for Justice, 2021). One of the major things that this organisation does is offer education and training to people who work within the criminal justice system and the social services realm relating to engaging and interacting with individuals with intellectual or developmental disabilities (Linhorst, Bennett & McCutchen, 2002). This training includes at police academies and to existing police officers, to judges, lawyers and probation and parole officers; what is considered the most important is the training and education provided to police officers as they are often the first point of contact within the Criminal Justice System and can massively impact an intellectually disabled individuals journey through the system itself. This training that Options for Justice provide to those involved in the Criminal Justice System includes the basics of intellectual and developmental disabilities, how to identify individuals with these disabilities, how to interact with them and even how their disability affects and interacts with crime and participation in crime (Linhorst, Bennett & McCutchen, 2002). What is more important is that the training provided by this organisation is modified to suit who it is being delivered to. An example given by Linhorst, Bennett & McCutchen (2002) is that police officers need to apply the knowledge in their everyday working life, such as when questioning or arresting an individual or offender with an intellectual disability. Options for Justice also provide direct assistance to individuals with intellectual disability during pretrial and post dispositional stages in the Criminal Justice System (Linhorst, Bennett & McCutchen, 2002). During the pretrial phase, Options for Justice workers will educate staff andprovide specific information regarding the particular individuals' disability and educate the individual and their family about the progress and processes in the Criminal Justice System. Similar to the post-disposition

phase, Options for Justice can assist in making referrals to community services and educate social workers about the individual's disability and what they need to be supported (Linhorst, Bennett & McCutchen, 2002). According to Linhorst, Bennett & McCutchen (2002), from 1st July 1998, Options for Justice had directly assisted 558 individuals, the majority being young African American males who were diagnosed as intellectually disabled.

Glaser and Florio identify in 2004 an emerging best practice model for services accommodating offenders with intellectual disability. Using this best practice model as a starting structure this thesis will produce an alternative punishment proposal and plan for the intellectually disabled offender. The best practice model is fully explained in Simpson et al. (2001), with the desired components being continuity of services throughout the criminal justice system; flexible funding; comprehensive individual programs; consistent interventions; staff training, understanding and support provided to offenders; community education and skills-based interventions to aid in cognitive behaviour and reintegration into society. Spreat (2020) agrees that while prison may be acceptable for intellectually disabled offenders when necessary to separate them from society, it is noted that these intellectually disabled offenders are severely overrepresented, and many intellectually disabled offenders have a fairly low offending behaviour. So, considering this, it could be seen that an alternative institution that is either stand-alone or integrated into a prison or mental health facility designed specifically for intellectually disabled offenders would be beneficial. Hayes (2004, 2005b) describes that there should be a clear criterion for the release of an individual with intellectual disability and that indeterminate sentences should not be utilised to make sure that these individuals are not lost within the criminal justice system. Supplementary to this, Hayes (2007) points out that successful options for rehabilitation and reintegration of intellectually disabled offenders provide residential programs that are staffed 24/7, with a range of security levels where offenders can manage their behaviour and achieve lower security ratings as they slowly transition back into the community. Like many others, Hayes (2007) agrees that there needs to be a particular focus on personalised justice plans for each offender with intellectual disabilities which is continually monitored with access to living skills programs and courses that will prepare offenders to reintegrate back into the community. These sentiments are reiterated multiple times by both Mason & Murphy (2002) and Menolascino (1975), intellectually disabled offenders need to have access to vocational training and special education classes that will assist these offenders to function positively in the

community upon release; further, probation and parole services for these offenders should go above and beyond standard procedures to provide extra support in the transition. Once again, the treatment should be individualised and personal to the offender and their specific needs as related to the extent of their intellectual disability (Menolascino, 1975), which would be professionally and clinically assessed upon their entrance to the criminal justice system and continually updated during their time within the system. Hutchison et al. (2013) makes note of the importance of case management with intellectually disabled offenders; attaching case managers to all offenders, and especially intellectually disabled ones, can make a significant difference in how the criminal justice system is navigated. A case manager can not only provide support through the trial by explaining the extent of the offenders' intellectual disability to judges and lawyers, but they can also work alongside criminal justice personnel on ensuring the correct supports and services are available to the offender during their time in the criminal justice system and when they are released back into the community (Hutchison et al., 2013).

Alternative Proposal Model

Wolfensberger (1983) and other individuals have the idea that normalisation and integration of intellectually disabled individuals throughout society means that offenders with intellectual disabilities should be treated the same as any other offender, while other professionals believe that this group doesnot belong in the criminal justice system at all and should be diverted. Salekin et al. (2010) has also pointed out that this move towards normalisation and fostering independence and similarity among intellectually disabled individuals have deinstitutionalised care and been replaced with community-based environments. The issue identified here is then an increased risk for offending as these offenders are not provided with adequate opportunities to understand and learn about their behaviour and its consequences before being placed back in the community they offended in to begin with. In an attempt to find a middle ground, this thesis will propose a system that operates in some ways as a correctional facility. However, it provides extreme amounts of specialist support for offenders to rehabilitate and eventually succeed in reintegrating into society.

Many prior studies explain similar if not identical needs and expectations for intellectually disabled offenders in order for them to be successful with reintegration and rehabilitation into the

community. Fundamentally, intellectually disabled individuals have learning difficulties; they learn more slowly and have trouble understanding abstract concepts and skills (Salekin et al., 2010). The needs of intellectuallydisabled offenders are then to provide a space where they can learn skills, be educated on social norms, and understand how to re-enter the community at the pace they are capable of, all while being housed in a secure facility that will provide adequate care until the time they are ready to go back into residential living spaces. Using the needs and expectations identified above in this chapter as well as previous and current programs running in prisons across the United States and other countries, this thesis will now propose a basic universal punishment structure for intellectually disabled offenders outside of the prison system.

One of the most important aspects of this punishment system for the intellectually disabled offender is the separation from the prison system and the mental health system. Although this punishment system aims to bridge the gap between prison and mental health, often these facilities are not equipped to deal with intellectually disabled offenders adequately and their care falls behind; the creation of a system specifically for them would cater specifically to the needs of intellectually disabled offenders and create a more successful system where they can slowly transition back into the community safely. These facilities would operate outside prisons and would be akin to punishment spaces specifically designed for the intellectually disabled. Further, these facilities would be staffed with nurses, case managers, education tutors, programme facilitators, psychologists, and custodial staff, all of whom are specially trained to work with intellectually disabled offenders.

Individuals who would enter this punishment system would be deferred from courts as an alternative to being given a prison sentence; the goal is for these individuals to not go to prison at all and instead bedeferred directly into this specialised punishment system. According to Lindsay et al. (2018), diversion from the criminal justice system is not new for offenders with intellectual disabilities; Menolascino (1974) proposed a system for intellectually disabled offenders that combined several community residential and education options for offenders outside of the criminal justice system. However, unfortunately, effective diversion for the intellectually disabled offender is difficult to come by. There are no structured diversion systems in place, and diversion cannot occur unless the offender's intellectual disability is identified as early as possible in the criminal justice process (Lindsay et al., 2018). This means an important aspect within this process of diversion is

the identification of intellectually disabled individuals itself. This should specifically take place pre courts and means that all criminal justice system staff should be adequately trained on the identification and treatment of intellectually disabled offenders before they eventually get deferred to the specific punishment system. Courts would have a mandatory minimum timeframe for the sentencing of individuals to the intellectually disabled offender system, and then each individual would be assessed on a case-by-case basis upon entry to the system which would determine how long they will stay. Upon entry to the system, each individual would be subject to a psych assessment to determine the level of intellectual disability which will, in turn, give a better understanding of their specific needs. From there a case manager would be assigned and an Individual Offender Programme Plan (IOPP) would be created; this would start with the case manager completing a needs assessment where the goal is to create a personalised programme plan that the offender needs to complete all relevant programs to address their offending before they are transitioned for release back into the community. When an IOPP is developed for each individual, there are a number of principles that need to be considered by the case manager; the accountability and responsibility the offender has for their actions and behaviour, the level of competency the offender has, due process must be maintained, the IOPP is an intervention and diversion programme that is the least restrictive alternative to their normal patterns of living, alongside normalisation requiring a schedule that is as close to standard patterns of living in the community the individual had (Coffey & Institute for Economic and Policy Studies, 1989). According to Coffey & Institute for Economic and Policy Studies (1989), this is habilitation, which is defined as the process in which the level of an intellectually disabled individual's knowledge and skills are assessed, anda plan is created to ensure they can move towards higher levels of independence with support. Three key components are identified for the creation of a habilitation plan for intellectually disabled persons: there needs to be an individually determined understanding of the persons level of knowledge, skills, and needs; a singular and independent plan for each person; and the integration of resources and professionals to deliver adequate services. The length of an individual's stay in the facility is then based on the severity of the offence where the higher severity of the offence, the longer and more programs need to be completed; additionally, when programs are completed as per the IOPP, the next stage is the transitional stage where offenders have completed their programs but need to prove they are ready to reintegrate into the community through a gradual behavioural integration system.

Much like the programme at the Camarillo State Hospital and Developmental Center reviewed in Kramer (1986), a suitably structured behavioural points system would be used to continually evaluate an offender's behaviour through the system and track their ongoing progress alongside their suitability for transition into the community upon the end of their minimum sentence length, however under this proposed system, it would also account for the seriousness of the offence committed to begin with. Once offenders have their IOPP and begin their plan they will receive point scores for their behaviour and participation in programmes and everyday life, they will move up or down security levels depending on these scores - offenders are placed on the scale as per the seriousness of their initial offence. Levels work as low, medium, high, and maximum; there are a maximum of 20 points allocated per day and 140 per week, participants must score at least 100 points per week for three weeks to move to a lower level and if they score less than 50 points per week for three weeks they will move up a level.

These punishment facilities need to provide a number of things in order to positively impact the offender and their eventual transition back into the community; this includes adequate education and rehabilitation programs, varying levels of security and monitoring, understanding and supportive staff and criminal justice system personnel who have knowledge of appropriate care for the intellectually disabled, alongside structured integration and transition support including work training. There needs to be a variety of programs that address the multiple and complex needs of intellectually disabled offenders. This includes structured rehabilitation programs, problem-solving, situational awareness, social skills, education, leisure skills, physical education, life skills and competency training. These courses need to be provided at an educational level that is appropriate and accessible to the offenders by being broad enough to manipulate the delivery to ensure understanding is adequately obtained.

The programs provided through this system would have an emphasis on habilitation, social and community support, security, and continuity of care. They would be labelled under motivational programs, offence-focused programs, drug and alcohol programs, education programs and other programs. Motivational programs would aim to motivate offenders to understand their offending and increase their engagement with other programs offered. It would also provide culturally based programs that would bring offenders closer to their own culture alongside religious programs for those offenders who are religious or those who want to grow closer to a religion.

Offence-focused programs include sex offenders' programs, psychological treatment, youth offenders' programs and a basic overall rehabilitation program. The programme for sex offenders would be focused on offenders who did commit a sexual crime or a sexually motivated crime, and it would aim to help these offenders understand the laws and consequences of sexual crimes, alter behaviours and attitudes towards illegal sexual conduct. On top of this, each individual would personally relate to their own crimes,the contributing factors to these crimes such as additional substance abuse, describe the victim's viewpoint, their own personal feelings and then discuss appropriate skills and behaviours for sexual and interpersonal contact. Psychological treatment would be cognitive behavioural therapy (CBT) based, which was found in Barrera (2017) after a review of nineteen articles relating to the success of CBT in intellectually disabled individuals. The sixteen articles that contained quantitative studies all found at least one statistically significant improvement on the outcome measures, and thirteen found statistical significance on at least half of the outcome measures. Of the additional three qualitative studies, all three had participants of CBT feeling positive and no studies reported a regression after participation in CBT (Barrera, 2017). It would be rare that youth offenders would be deferred to this system and not to other youth avenues within the criminal justice system; however, there can still be programs available that cater to the slightly different aspect of youth compared to adults with intellectual disabilities, with aims of a structured programme that is completed into the transition section faster so youth can reintegrate faster. The basic rehabilitation programme helps to alter thoughts, attitudes, and behaviours, alongside developing strategies for maintaining long term positive changes.

Drug and alcohol treatment and intervention programs would be comprehensive programs operating alongside basic offender programs but would be intensive and aimed at offenders whose offending was heavily influenced by the use of drugs or alcohol. Additionally, this program/treatment would be used for offenders who committed alcohol or drug-related crimes. This programme would focus on providing offenders with the knowledge, attitudes, and skills to support themselves through alcohol or drug addiction and recovery, as well as exploring the relationship between drug and alcohol use, the crimes committed, and what the past, present and future consequences of drug and alcohol use would be on their lives and offending.

Education programs are varied but most offenders would need to participate in all of the programs under this pillar to be eligible for transition stages as they are important programs for

future community reintegration. Those who are not clinically trained often believe that intellectually disabled individuals do not have the ability to read (Tasse, 2009); however, it is a well-established fact according to both the American Psychiatric Association (2000) and Barclay et al. (1996) that mildly intellectually disabled adults can learn to read and write at the comprehension level up to age twelve. Education programmes prove to be extremely important to the development of understanding among intellectually disabled offenders and beyond programmes available to tackle the offending itself alongside its contributing factors, educational programmes become the next most important aspect of an intellectually disabled offenders' rehabilitation. Depending on the severity of an individual's intellectual disability will change the ability they have to benefit from educational programmes fully; however, basic life and leisure skills programmes should be accessible to all intellectually disabled offender in some form so that they can produce some semblance of independence upon integration back into the community. These education programmes include literacy and numeracy courses, physical education and leisure skills programs and the overarching life skills programs, including meal planning/food shopping, cooking and preparation, money handling, job hunting and applications, community safety and sex education. Finally, the one programme under education that may not be suitable for every offender to complete is the driving program, this is more suited to individuals who have significant intellectual capacity to learn to drive, and there may not be many offenders who fallunder this category. However, if an intellectually disabled offender can learn and understand the theory and pass all relevant testing, they are eligible to drive.

Finally, the 'other' type programs, this includes social skills, problem-solving, situational/critical thinking and competency. Social skills programs help to identify important social skills and that when they are displayed appropriately they can elicit positive responses from others, such as learning to respond to and give out compliments, appreciation, affection, encouragement, asking for help, anger, and failure alongside learning when, where, and how to display these skills accordingly. Problem-solving is an important skill that can be taught; a programme teaching problem solving to intellectually disabled offenders would include having them identify a problem that brought them as offenders to the position they are currently in, or a problem they have experienced recently. This programme would have them explore where, what, why, and when the problem occurred/occurs and how to respond accordingly, followed by evaluating the positive and negative consequences of

each response. Situational and critical thinking skills are important to have individuals think before they act in certain situations alongside understanding one situation provides multiple options of action. This thinking skills programme would be based on the Edward de Bono Six Thinking Hat model which has in the past been modified for use in prison (NZ Howard League, 2021). It involves presenting premade situations to the offenders and then having them think about the facts, positives, negatives, emotions, creativity (what they could do), and the process (decision/planning aka what they would do) in each situation. This allows offenders to critically assess different options for actions in various situations and stand back and think before they act. Finally, the competency programme should be used for all intellectually disabled offenders to teach them about how the criminal justice system works and enable them to understand the impact and consequences of their actions. This includes teaching offenders to define terms commonly used in the criminal justice system such as trial, testimony, and probation, alongside having the offender understand and define their own charges and the meaning and consequences of them, understanding and explaining their legal rights and finally understanding the effect of the crime on the victim and all those involved.

Beyond the plethora of programmes offenders would be scheduled to do throughout their sentence; they would also be allocated behavioural and psychological counselling which would be reduced appropriately according to individual progress alongside work experience when possible for those offenders who have completed a significant amount of their programme plan and are at a low-security level to be suited for work experience outside the facility.

Conclusion

Lindsay et al. (2018) explores the links between intellectually disabled offenders and antisocial personality disorder. They theorise that with all offenders who are intellectually disabled most societies can divert them away from the formal criminal justice system as this thesis proposes above; Lindsay et al. (2018) mentions diversion into health or social services systems, however, in health systems offenders with intellectual disabilities would not be considered criminal and in social service systems offenders with intellectual disabilities would miss out on specific services for them. Further, Lindsay et al. (2018) explains that in practice there is also a natural tension between the attitudes held by criminal justice personnel towards offenders in general, let alone offenders with intellectual disability, alongside health and social services staff holding attitudes towards offenders

regardless of their intellectual ability. This is when the design of a separate, integrated health, social service, and correctional system as proposed above would be ideal for the punishment, habilitation and eventual reintegration of intellectually disabled offenders. Staff would be trained and knowledgeable in the care of intellectually disabled offender, and the system is made for eventual integration back into society, but offenders are still kept separate while they complete their time within the system.

Lindsay et al. (2018) understood that while intellectually disabled offenders committing offences in the wider community left them more likely to be arrested, there is strong evidence of significant under reporting of offending behaviour among intellectually disabled offenders in more residential settings. Often caregivers or family members are reluctant to report offences committed, especially those offences committed by individuals who have more severe forms of intellectual disability (Lindsay et al., 2018). One study looked at the reporting of offences in community residential services, and it was found that staff were unlikely to record or report negative behaviour, including serious assaults (Lyall et al., 1995). This can be detrimental to the understanding formed by the intellectually disabled offender as they are not taught that what they did was wrong and are never corrected on social boundaries and consequences of actions. It is important for intellectually disabled individuals to face the consequences of their actions, and where caregivers may not want to report offences committed because they do not want the offender to be punished in a prison setting, the separate system proposed above would be a middle ground where appropriate care is provided alongside adequate punishment.

Overall, there are a huge number of alternative measures of punishment that can be used to address an offender with intellectual disabilities that is appropriate for their levels of understanding; this includes systems outside of the United States. Many prior studies and research have explored programmes and systems that use a multitude of measures such as diversion, habilitation, behavioural schemes and alternative incarceration; however, they have not been used in conjunction, nor have any been used in an entirely new facility specifically meant for the needs of the intellectually disabled. What is proposed in this chapter is a fusion of multiple realms of alternative measures or punishments that take place in an environment suitable for the development of understanding among intellectually disabled offenders and focused on continual education and eventual successful transition back into the community.

Chapter Six: Discussion/Conclusion

How does New Zealand link to the application of punishment for intellectually disabled offenders through traumatic brain injury and sport?

Traumatic Brain Injury: Crime, *Atkins,* and the New Zealand Link

Traumatic Brain Injury (TBI) is caused by a blow, bump, or jolt to the head including the head violently or suddenly hitting an object, or an object piercing the skull into the brain which disrupts normal brain function. It is one of the leading causes of death and disability in both young people and adults in the US according to Thurman et al. (1999). Concussion is the most common form of mild TBI (Headway, 2021), the most common causes of TBI in New Zealand are falls (38%), mechanical forces (21%), car accidents(20%), and assault (17%). A concussion is defined by the American Academy of Neurology for Sports Concussion (Giza et al., 2013) as a syndrome of altered brain function which typically affects memory and orientation, further defined by the National Health Institute (2010) as altered brain function caused byan external force. According to the Centre for Disease Control and Prevention (CDC), in 2014, there were approximately 2.87 million cases of TBI, with over 837,000 cases among children, in the US. There are an estimated 13.5 million people in the US living with a disability related to TBI. In the US, TBI is the leading cause of long-term disability in young people, including children (Feigin et al., 2012). Across a multitude of studies, the majority of TBI victims are young males (Theadom et al., 2014), most commonly caused by vehicular trauma (Myburgh et al., 2008) with the second most common cause of TBI being falls.

Depending on the extent of the injury, symptoms of a TBI can be mild, moderate, or severe, with significantly different consequences (Gallo et al., 2017). Mild TBI's can be classified as such when loss of consciousness is less than 30 minutes and disorientation lasts for less than 24 hours (Theadom et al., 2016). Many studies have concluded that approximately 90-95% of TBIs are classified as mild; however, as research develops it has been discovered that mild TBI may be far from mild in terms of consequences. Individuals who sustain mild TBI may experience symptoms such as headaches, dizziness, or irritability (Agarwal et al., 2020), which under the Diagnostic and

Statistical Manual of Mental Disorders (DSM-IV) can be recognised as post-concussion syndrome. Post-concussion syndrome includes the classification criteria of a history of TBI which caused significant cerebral concussion, cognitive impairment in either attention or memory, and at least three of the following eight possible symptoms: fatigue, sleep disturbance, headache, dizziness, irritability, affective disturbance, personality change, or apathy being present from at least three months from when the injury was sustained (DSM-IV). A study of individuals suffering from minor head injuries found that 63% of them reported post-concussion symptoms one month after the injury occurred (Theadom et al., 2016). Mild TBIs may also predispose individuals to other brain diseases such as dementia and neurodegenerative disease (Theadom et al., 2014); additionally, multiple or recurrent TBIs can make the brain more vulnerable to further damage. Among moderate TBI cases, according to Agarwal et al. (2020) for the American Association of Neurological Surgeons (AANS), approximately 60% will make a positive recovery while about 25% will be left with a moderate level of disability, death, or a vegetative state will occur in about 7 to 10%of moderate TBI cases with the rest living with a severe disability. Severe TBIs have the least positive outcomes with only 23 to 33% of sufferers experiencing positive recovery, another 33% do not survive, while moderate to severe lifelong disability occurs in approximately a sixth of severely injured individuals, the remainder are in a persistent vegetative state (Agarwal et al., 2020). Moderate, severe and even mild TBIs could lead to significant neurocognitive and developmental difficulties which can affect brain function and behavioural regulation, or memory and learning difficulties depending on the extend of injury and the area impacted (O'Rourke et al., 2016).

There are eight types of traumatic brain injury as identified by the AANS (Agarwal et al., 2020). These are hematoma, a blot clot within the brain or on the surface of the brain; a contusion, bruising of brain tissue; intracerebral haemorrhage (ICH), bleeding within the brain tissue; subarachnoid haemorrhage (SAH), bleeding in the area between the brain and the skull; diffuse injuries, microscopic changes scattered throughout the brain that can occur with and without a mass lesion associated; diffuse axonal injury, impaired function and gradual loss of axons which can leave individuals with severe disabilities; ischemia, insufficient blood supply to certain areas of the brain; and skull fractures, linear fractures or cracks in the skull (Agarwal et al., 2020).

Individuals who experience TBI often live with ongoing consequences such as cognitive problems including concentration, problem-solving and thinking clearly; and problems with memory

or motor skills including balance, reduced stamina, and reflexes (Brain Injury New Zealand, 2021; Headway, 2021).

Additionally, they may have a lower tolerance to light and sound, have difficulty expressing themselves in conversation and understanding others or social situations (Headway, 2021). Most significantly for this thesis, individuals with TBI may experience personality changes that range from irritability, anger, depression, anxiety, and strong mood swings (Brain Injury New Zealand, 2021; Headway, 2021). Individuals who suffered TBI even mildly are still likely to experience even the slightest of cognitive defects such as on memory and attention (Snodgrass & Justice, 2007); even these defects make it difficult to interact socially with others and be as productive as those who have not suffered a TBI.

A study conducted by Feigin et al. (2012) confirmed conclusions from previous research that explained Māori people were more likely to sustain a TBI when compared to people of European origin. Additionally, Māori people between the ages of 15 and 64 were more likely to sustain TBI from assault-related incidents than those of European origin, which can be linked to the larger number of interpersonal assaults in young Māori adults in New Zealand (Feigin et al., 2012). An estimated 13% of the general New Zealand population will experience at least one TBI in their lifetime (Te Ao et al., 2015), and it is even higher among New Zealand men aged between 35 and 39 years old, rising to 14.3%.

The link between TBI and sport has been acknowledged as early as 1928 when Harrison Martland, the New York City Medical Examiner at the time, observed ‘Punch Drunk Syndrome’ where former boxers were observed to have an array of neurological defects and motor issues (Stewart et al., 2016). Concussions are frequent in sport, and, according to New Zealand Rugby (2018), you do not need to be knocked out or even hit directly on the head to be concussed. There are an estimated 1.6 - 3.8 million sporting-related mild TBIs in the US per year (Stewart et al., 2016). In New Zealand, rugby is the cause of the most sporting injuries for people aged 5 to 40 (Quarrie et al., 2020). Hollis et al. (2011) found that for every 10 hours of game time played in rugby union, approximately 7% of players sustained a mild TBI. Additionally, in a meta-analysis, Gardner et al. (2014) found that concussions in male rugby players occurred more frequently at the community/amateur level than at the school-age level, followed by the elite level. Earlier research conducted by Hollis et al. (2009) reported a high instance of injuries sustained by rugby players, with

more than one quarter being head injuries, most being mild TBIs. Concerning the increased use of protective headgear in rugby to reduce the severity of head injuries, some research has found that this has no protective benefit on reducing the incidence of mild TBI's (Hollis et al., 2009). Many sporting related concussions go unrecognised, which means that the prevalence rates in research may be under the actual rate (Gardner et al., 2015). As approximately 90% of sporting concussions occur without the player losing consciousness, it can be difficult to determine concussions and often players are not given a concussion diagnosis (Gardner et al., 2015). The incidence of sports related TBIs is higher in New Zealand when compared to other countries and other activities, especially rugby, equestrian, cycling,and football (Theadom et al., 2014). Māori and Pasifika players were seen to be at an increased risk of sustaining a sporting related TBI (Theadom et al., 2014), and both children and adults sustained frequent TBI's in rugby and cycling sports, while adults also suffered higher rates in equestrian sports and children in football.

The many possible symptoms of TBI, as explained previously, establish that individuals with a history of TBI are unable to conform to societal expectations, including the law, and therefore are more at risk of committing a crime (Giardino, 2009). According to Schofield et al. (2015), adults who experienced a TBI in childhood were 1.7 times more likely to be incarcerated when compared to their siblings who did not experience a TBI. Much like intellectually disabled offenders, offenders who have suffered a TBI are linked to poor prison behaviour, often due to the inability to adjust to the environment (Shiroma et al., 2012). In New Zealand prison populations specifically, in 1998, 86% of male prisoners reported having experienced at least one TBI in their lifetime, which was the highest prevalence of TBI in offenders internationally (Barnfield & Leathem, 1998). Freedman and Hemenway (2000) found that of 16 death row inmates interviewed, 12 had a history of brain damage. Often TBI or brain damage is associated with injury to the frontal lobes, which can lead to functioning changes towards social perception, impulse control, judgement, and emotional changes (Turkstra et al., 2003). Individuals who have suffered from a TBI maybe unable to correctly perceive situations and environments, make poor social judgements, or lack the communications skills to progress in social interaction. These consequences of TBI can be associated with the increased chance of committing crime (Turkstra et al., 2003), much the same as intellectually disabled individuals. There is a significantly recognised association between TBI, aggression, and incarceration, as seen in Barnfield & Leathem (1998), with other research finding between 80 to

90% of inmates in studies reported experiencing mild TBI at some stage in their lives, and 29% reporting moderate or severe TBI at some stage in their lives (Slaughter, Fann & Ehde, 2003).

While offenders with a history of TBI do not have explicit protection from the death penalty as do intellectually disabled or juvenile offenders under *Atkins* and *Roper* respectively, there are other options for them to mitigate exemption from the death penalty. Giardino (2009) looked specifically at capital defendants who were US soldiers who have post-traumatic stress disorder (PTSD) or TBI and explained that during the sentencing phases of their trials there is an opportunity to provide relevant mitigating evidence to be excluded from death penalty consideration. Regarding TBI, it can cause several intellectual and adaptive functioning deficits that do not excuse criminal actions, much like intellectual disability, but does reduce the culpability of the individual (Giardino, 2009). In *Tennard v. Dretke* (2004), the Court found that impaired intellectual functioning was a mitigating factor of offending, and there is evidence that individuals with a severe lack of intellectual functioning may be exempt from a death sentence. Additionally, in *Atkins* and *Roper,* the Supreme Court has acknowledged that mitigating evidence would help to ensure that the death penalty was only imposed on offenders who were deserving of execution, and those with significant mitigating evidence would be spared the death penalty in sentencing.

Both the *Atkins* and *Roper* holdings with the Supreme Court examined the level of culpability possible for intellectually disabled and juvenile offenders and then determined it was not a high enough level to be considered for the death penalty (Snodgrass & Justice, 2007). In addition, the execution of these offenders was found not to provide penological purpose in favour of the death penalty, nor did it align with the evolving standards of decency within society. The *Atkins* and *Roper* cases brought about debate as to whether the rulings should be expanded to exclude other impaired individuals from the death penalty, such as those having experienced brain injury (Snodgrass & Justice, 2007). There would be issues, as raised in Snodgrass & Justice (2007), if offenders with brain injuries were to be excluded from capital punishment, such as if offenders with mild and severe brain injury would be eligible, how to diagnose brain injury correctly, and how to detect brain damage if it did not outwardly present itself. However, both the American Bar Association (2006) and the American Psychiatric Association (2005) have recommended that those jurisdictions that still use the death penalty as punishment exempt individuals with other mental disorders, such as TBI, from receiving the death penalty. Snodgrass & Justice (2007) make an argument for offenders with TBI

using the same arguments used in *Atkins* and *Roper* for intellectually disabled and juvenile offenders to have them excluded from death penalty consideration. There are some key similarities between intellectually disabled offenders and offenders with TBI which was used in *Atkins* to exclude intellectually disabled individuals from capital punishment, such as having a diminished capacity to understand information, communicate, learn from experience, engage in logical reasoning, or abstract thinking, lack of impulse control and understand social interactions, all of which also often apply to individuals with TBI (Snodgrass & Justice, 2007). This line or reasoning implies that if these characteristics diminish the culpability of intellectually disabled individuals and, therefore, exempt them from the death penalty, the same should hold for offenders who have suffered TBI. As illustrated in *Atkins* for intellectually disabled offenders, the purposes of capital punishment do not serve the same purpose for offenders with TBI as offenders with no TBI, the cognitive and behavioural limitations of individuals with TBI means they are not capable of understanding the retributive purpose of the death penalty, nor does deterrence have an impact on crimes that are acted on impulse rather than planned, which is often the case for TBI offenders (Snodgrass & Justice, 2007). The major difference between intellectually disabled people and individuals suffering from TBI is the age of onset, for intellectually disabled individuals there is a clinical classification, and the criteria is that symptoms must be present prior to the age of 18 to fit the entire criteria. This clinical classification does not apply to individuals who suffer from TBI, as while some do experience TBI prior to the age of 18, a vast majority experience it in adulthood (Snodgrass & Justice, 2007).

Understanding the relationship between TBI and criminal activity reveals there are many links between TBI and intellectual disability which should indicate a similar approach to punishments throughout the criminal justice system. However, offenders with TBI are not exempt from capital punishment and must provide mitigating evidence to prove they should be excluded, and this is all on a case-by-case basis that is then decided by an individual entity whether this offender should be sentenced to death or not. In a New Zealand context, while there is no capital punishment, there is clearly a relationship between TBI from a multitude of different types of injuries and criminal activity. This does not seem to be explicitly considered when an offender is punished, nor does it make a difference to sentencing or type of punishment unless the injury is so bad the individual is unfit to stand trial. Much like intellectually disabledoffenders, the New Zealand criminal justice system

needs to consider the understanding that these offenders possess and the implications of certain punishments on the ability to rehabilitate or progress positively in the environment they are placed into.

Overview of Aims and Research Questions

Based on one overarching research question that was supplemented by six sub-questions, this thesis has explored the punishment of intellectually disabled offenders in the United States, with a particular focus on the Eighth Amendment and exclusion from capital punishment. What has also been explored throughout this thesis includes intelligence quotient, culpability, evolving standards of decency, the lack of a national standard, alternative punishment measures and a New Zealand link with traumatic brain injury through sports.

To review, the main question posed by this thesis has been 'If the application of capital punishment for defendants with intellectual disabilities violates the Eighth Amendment, should this not apply to the application of all punishment for the intellectually disabled?' and the secondary questions were:

- What is the progression of understanding for the appropriate punishment of intellectually disabled offenders within the criminal justice system?
- To what degree can individuals who are intellectually disabled be held responsible for their criminal actions?
- How are individuals with low IQ scores taken advantage of within the criminal justice system?
- What are the criteria for the classification of the intellectually disabled and how does this relate to an individual being too mentally impaired to be eligible for the death penalty?
- What is the Flynn Effect and how does it impact intellectually disabled offenders?
- If the Eighth Amendment bars execution of intellectually disabled offenders, why does this not apply to non-capital offences?
- What are the alternative measures that can be taken to address an offender with intellectual disabilities in a way that is appropriate for their understanding of punishment?

- How does New Zealand link to the application of punishment for intellectually disabled offenders through traumatic brain injury and sport?

In attempting to answer these secondary questions, the analyses presented in this thesis have revealed a continual progression of understanding and evolving standards of decency within the US criminal justice system that acknowledges that intellectually disabled offenders have a lower degree of understanding and therefore are less culpable or responsible for their actions. Additionally, intellectually disabled offenders face many challenges in the criminal justice system, including during the arrest, sentencing, and prison process. These challenges often start with the state-by-state rules for the classification of intellectually disabled and how *Atkins* failed to provide a universal definition. Further, under the Eighth Amendment, this thesis sees no reason as to why the ideas that stop the execution of intellectually disabled offenders does not also apply to their punishment for non-capital offences as many alternative measures can be taken to address an intellectually disabled offender that will be appropriate for their level of understanding. Finally, when exploring traumatic brain injury as a similar reason to be excluded from capital punishment under the Eighth Amendment, New Zealand becomes included in the discussion due to the significance of rugby and other sporting related head injuries that are proven to cause significant cognitive damage and would therefore support the idea for alternative punishment should these individuals commit a crime, which according to many studies is highly likely.

The use of secondary questions in this thesis has allowed for a wider exploration of themes and ideas guided towards supporting the main research question. In answering these questions throughout the thesis, an answer to the main research question has been formed.

Key Findings and Implications

This thesis concludes that under evolving standards of decency, the application of punishment under the Eighth Amendment for intellectually disabled offenders should translate to all punishments, not only capital. The reasons for excluding intellectually disabled offenders from capital punishment also apply to non-capital cases: intellectually disabled offenders lack the same level of understanding, culpability, and responsibility that non-intellectually disabled offenders possess. Just as they are incapable of understanding the consequences of capital punishment, so

too are they incapable of understanding the consequences of life in prison without the possibility of parole. The Eighth Amendment prohibits cruel and unusual punishment: subjecting an intellectually disabled offender to the same punishments that a non-intellectually disabled offender might face, including solitary confinement or life without the possibility of parole, is cruel and unusual and therefore unconstitutional. Intellectually disabled people are a highly disadvantaged group in society and are often overrepresented in the criminal justice system because of consequences related to their disability, such as impulsivity or being easily taken advantage of by others. Additionally, the justifications for punishment such as retribution and deterrence do not have the same effect on intellectually disabled offenders and cannot be used as a reason to punish these offenders. Excluding intellectually disabled offenders from traditional avenues of punishment is possible, there are numerous possible alternative forms and methods of punishment that are suitable for intellectually disabled offenders, many of which have been trialled in some form in the US, and this would align with evolving standards of decency.

It is understood in this thesis that there has been a gradual progression of understanding towards the appropriate punishment and treatment of intellectually disabled offenders within the criminal justice system, alongside other groups of offenders or types of offences being excluded from capital punishment consideration. As intellectually disabled individuals lack the cognitive ability to know right from wrong, have poor impulse control and are easily manipulated by others, they cannot be held fully criminally responsible for their actions. This is further acknowledged in *Atkins,* where if the culpability of a murderer is insufficient to justify the use of capital punishment, those who are known to have lesser culpability, such as intellectually disabled offenders, should not be considered for capital punishment. The supporters of capital punishment often justify its use primarily on the basis of protection of society, retribution, and deterrence. These justifications for capital punishment do not apply to intellectually disabled offenders; they demonstrate no deterrent value, have little to no retributive benefit and are excessive under the Eighth Amendment's cruel and unusual clause. In terms of non-capital cases, the punishment of intellectually disabled offenders should also be considered in terms of culpability, as they are not as criminally responsible for their actions the punishment of any crime committed by an intellectually disabled offender should be altered accordingly. When considering potentially dangerous intellectually disabled offenders, or those who have committed more heinous crimes, there is still a distinct difference between them and a non-

intellectually disabled offender who has committed the same crime, therefore there should be a slightly different punishment, one that will successfully support an intellectually disabled offender while also providing the purposes of punishment. There has been a social shift away from support of capital punishment, this is reflected in the number of cases citing evolving standards of decency as an exclusion from capital punishment. Nevertheless, there are identifiable gaps where individuals need to use mitigating evidence to be excluded from capital punishment, such as traumatic brain injury and post-traumatic stress disorder where there could be a blanket prohibition. The issue of excluding so many groups from capital punishment, including the intellectually disabled, is to then find appropriate and adequate alternative methods of punishment that will appease the social need for criminals to be punished, while also providing services and support that allow these often overrepresented individuals make positive changes and help reduce recidivism by not reoffending. Beyond the legislative and judicial issues surrounding capital punishment, non-capital punishment and the intellectually disabled, there are a number of issues identified in this thesis pertaining to the experiences of intellectually disabled offenders within the criminal justice system. Intellectually disabled offenders are taken advantage of in many different sections of the criminal justice system, including during arrest, interrogation, processing,sentencing, and then within prison facilities, this is not always intentional, but can be due to the lack of knowledge and training provided to staff and personnel on how to identify and treat intellectually disabled offenders correctly.

Much of this thesis can be linked directly back to New Zealand. It is understood that New Zealand also has identifiable issues with the way intellectually disabled offenders are dealt with in the criminal justice system, as evidenced by the lack of specific diversionary options and structured support. The implications of this these provide a parallel between the United States and New Zealand in terms of non-capital punishment for intellectually disabled offenders where there needs to be a separation from criminal justice facilities alongside mental health facilities. Instead, a specific facility that caters to intellectually disabled offenders would greatly benefit the New Zealand criminal justice system and could reduce reoffending, where the same benefit would be seen in the United States. There is a long way to go in terms of adequate specialist services being provided even with current legislation in place.

Several implications arise from the findings of this thesis, one being the need for a national US

standard for the identification and classification of intellectually disabled offenders. While the clinical definitions cited in *Atkins* are relatively clear and share similarities, the lack of a national standard leaves a state-by-state interpretation that can change drastically depending on who interprets it. It would be in the best interest of intellectually disabled individuals to have a clear national standard, with consideration for the Flynn Effect and other mitigating factors. What might also be considered in the categorical exclusion of other groups from the use of capital punishment, this includes offenders suffering from a traumatic brain injury or other impactful disorders or illnesses that change the cognitive functioning of the brain.

As for the main research question of this thesis: 'If the application of capital punishment for defendants with intellectual disabilities violates the Eighth Amendment, should this not apply to the application of all punishment for the intellectually disabled?' there should be no reason for not applying the consequences of the various interpretations of the Eighth Amendment to non-capital cases. Consequently, excluding intellectually disabled offenders from punishments that may be too harsh for their level of culpability, responsibility, and understanding. Intellectually disabled offenders should not be subjected to punishments such as life without the possibility of parole or solitary confinement practices that are even considered cruel and unusual for non-intellectually disabled offenders. As intellectually disabled offendersdo not have the same ability to form intent, often act impulsively, and can be easily manipulated alongside many other mitigating factors, they should be punished in the criminal justice system through a diversion programme that encompasses their needs and supports them throughout the punishment into eventual rehabilitation and reintegration into society. This thesis explored alternative punishment options for intellectually disabled offenders and found that it was better for intellectually disabled offenders to have their own programmes and systems for rehabilitation and punishment than to be lumped into health or social service systems or to be placed in standard prisons. Diversion plays a huge role in the application of punishment for intellectually disabled offenders; with this and the above in mind, it is important to designa model system or program that encompasses health, social service, and correctional systems catered specifically for intellectually disabled offenders. This would be ideal for the integrated punishment, habilitation, rehabilitation, and reintegration for intellectually disabled offenders - they are still subjected to a punishment separated from society. Still, the aim is for eventual integration back into society after a specified amount of time, without the use of indefinite sentences as in healthcare

facilities or life without the possibility of parole as in correctional facilities.

Critiques and Future Research

This thesis is based upon United States jurisprudence; while there is a lot to unpack within the United States regarding intellectually disabled offenders and the application of punishment, further links could have been made to wider world perspectives. This thesis did not make wider world perspectives due to several reasons including time limitations and word count constraints. Further, as in the case of a New Zealand perspective, there was a lack of available literature and information pertaining to this topic to specifically focus only on New Zealand. Being based in New Zealand might have suggested a focus on intellectually disabled offenders here; however, there is little literature or jurisprudence from the New Zealand criminal justice system on the topics in this thesis, making it difficult to limit the study to New Zealand alone. Suggested further research for this thesis would be a deeper look into non-capital punishment and intellectually disabled offenders, ideally expanding outside of the United States and comparing approaches made in different countries. In addition, there needs to be an additional exploration of punishment options for intellectually disabled offenders and providing system and programme structures for these offenders that are adequate for their eventual reintegration back into society. Finally, there is a need for a deeper look into intellectually disabled offenders within New Zealand, including prevalence, alongside punishment options that can be managed and implemented among or alongside the criminal justice system.

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