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Treated Differently in Life but Not in Death: The Execution of the Intellectually Disabled after Atkins v. Virginia

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TREATED DIFFERENTLY IN LIFE BUT NOT IN DEATH: THE EXECUTION OF THE INTELLECTUALLY DISABLED AFTER *ATKINS V. VIRGINIA*

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Shortly after the United States Supreme Court decided Atkins v. Virginia *in 2002, I found myself working on a case involving a death-sentenced mentally retarded man. The more I learned about the decision and the disability, the more convinced I became that my work would result in a life sentence for the man. But I was wrong. To date, that has not happened. Instead, despite every testifying expert's opinion that Heck Van Tran is mentally retarded, he awaits execution on Tennessee's death row, largely because of state judicial interpretations that have eviscerated* Atkins' *guarantee. Tran is not alone. All across America individuals who would qualify for classification as an intellectually disabled, or mentally retarded, citizen await death as a result of state statutes and judicial decisions that circumvent* Atkins' *promise. In an effort to assist less experienced practitioners presenting* Atkins *claims, this Article exposes some of the methods used to thwart* Atkins' *promise with the ultimate hope that those who are treated differently in life because of their disabilities will ultimately be treated differently in death as well.*

INTRODUCTION

When the United States Supreme Court barred the execution of the mentally retarded in *Atkins v. Virginia*,[1] it declined to establish either a uniform definition of mental retardation or a uniform procedure to be followed in determining the existence of retardation, instead deferring the matter to the individual states.[2] The Court's deferral has resulted in an incongruity with a perverse result: The Eighth Amendment takes on different meanings in different states. Even if every state faithfully applies *its* own laws, constitutional violations will occur. Thus, the full scope and protection of a fundamental right, the right of a mentally retarded offender to be spared execution, is wholly contingent upon state definitions and procedures. Because

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* This article is dedicated to Heck Van Tran; to his courageous and tireless lawyer, Brock Mehler, who gave the University of Tennessee College of Law Death Penalty Clinic the opportunity to draft his petition for certiorari; and to the students who helped—Noel Halpin, Daniel Headrick, Ellis Lord, Zanele Ngubeni, and Bill Reider.

1. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

2. *See id.* ("Our independent evaluation of the issue reveals no reason to disagree with the judgment of 'the legislatures that have recently addressed the matter' and concluded that death is not a suitable punishment for a mentally retarded criminal.").

mental retardation refers to a single, small class of individuals, the use of varying definitions or procedures can actually mean the difference between life and death. Identical offenders who commit identical crimes in different jurisdictions may be executed in one, while spared in the other. Surely this anomaly should not exist. The Eighth Amendment must have the same meaning in all capital punishment jurisdictions.

This Article identifies the effects of the hodgepodge of definitions, interpretations, and procedures that *Atkins'* deference to the states has generated and urges an adoption of uniform standards and procedures in each state that allows capital punishment. Part I of this Article outlines the underlying premises of *Atkins* and its resulting promise to mentally retarded defendants. Part II discusses the three elements of the most commonly used definitions of mental retardation—intellectual functioning, adaptive behavior, and age of onset—and explains how the varied use and interpretation of these definitions has resulted in inconsistent state decisions. Finally, some suggestions for reconciliation to meet the promise of *Atkins* are offered.

I. *ATKINS'* UNDERLYING PREMISES AND RESULTING PROMISE

A. Honoring the Recognition that Death Is Different

In 2002, the United States Supreme Court held in *Atkins v. Virginia* that the Eighth Amendment to the United States Constitution barred the execution of the mentally retarded.[3] Though unstated, the decision clearly rested on a central premise of the Supreme Court's Eighth Amendment jurisprudence: Death is different.[4] Because of its difference in degree and kind, a death sentence must

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3. *Id.* In the decade leading up to *Atkins*, the United Nations special rapporteur on executions received reports that the mentally retarded were being executed in only three countries: Japan, Kyrgyzstan, and the United States. Simon H. Fisherow, *Follow the Leader?: Japan Should Formally Abolish the Execution of the Mentally Retarded in the Wake of* Atkins v. Virginia, 14 PAC. RIM. L. & POL'Y J. 455, 456 (2005) (citing The Special Rapporteur, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ 380, *delivered to the Comm'n on Human Rights*, U.N. Doc E/CN.4/1995/61 (1994); Brief for The European Union as Amici Curiae Supporting Petitioner at 8, McCarver v. North Carolina, 533 U.S. 975 (2001) (No. 00-8727), 2001 WL 648605).

4. Justice Stewart, for example, highlighted the unique nature of capital punishment in *Furman v. Georgia* in 1972:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

408 U.S. 238, 306 (1972) (Stewart, J., concurring). Within twelve years of *Furman*, every member of the Court would agree with Justice Stewart's analysis:

> In the 12 years since *Furman* . . . every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be

serve the penological purposes of capital punishment;[5] because of its irrevocability, a death sentence must be preceded by safeguards that produce a fair and reliable result.[6]

B. Honoring the Narrowing Requirement

The Supreme Court in *Furman v. Georgia* interpreted the Eighth Amendment as requiring the class of defendants eligible for capital punishment to be narrowed to provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[7] Thus, the death penalty is reserved for a smaller, more culpable class of defendants. Mentally retarded individuals[8] suffer from cognitive impairments

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accompanied by unique safeguards to ensure that it is a justified response to a given offense.

Spaziano v. Florida, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part) (citations omitted).

5. In a joint opinion in *Gregg v. Georgia*, three members of the Court identified "retribution and deterrence of capital crimes by prospective offenders" as the primary purposes served by capital punishment. 428 U.S. 153, 183 (1976) (Stewart, Powell, & Stevens, JJ., plurality opinion). The *Atkins* Court noted that "[u]nless the imposition of the death penalty on a mentally retarded person 'measurably contributes to one or both of these goals, it "is nothing more than the purposeless and needless imposition of pain and suffering," and hence an unconstitutional punishment.'" *Atkins*, 536 U.S. at 319 (quoting Enmund v. Florida, 458 U.S. 782, 798 (1982) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977))).

6. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 605 (1978) (discussing the importance of mitigating evidence in capital cases). The *Atkins* Court noted that "[t]he risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty'" is high in cases involving mentally retarded defendants. *Atkins*, 536 U.S. at 320 (quoting *Lockett*, 438 U.S. at 605). "Mentally retarded defendants in the aggregate face a special risk of wrongful execution." *Id.* at 321; *see also* Panetti v. Quarterman, 127 S. Ct. 2842, 2846 (2007) (finding a constitutional violation when a state court failed to provide procedural protections to a death-sentenced inmate on the issue of competency to be executed).

7. *See Furman*, 408 U.S. at 313 (White, J., concurring) (noting the "great infrequency" in which the death penalty is applied); *see also* Godfrey v. Georgia, 446 U.S. 420, 427–28 (1980) (citing the *Furman* requirement that death penalty laws be applied equitably); *Gregg*, 428 U.S. at 188 (Stewart, Powell, & Stevens, JJ., plurality opinion) ("Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.").

8. At the time of the *Atkins* decision, the American Association on Mental Retardation ("AAMR") defined mental retardation as "substantial limitations in present functioning . . . characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." *Atkins*, 536 U.S. at 308 n.3. In 2002, the AAMR revised its definition of mental retardation but retained the use of the term. AM. ASS'N OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS xii (10th ed. 2002) [hereinafter AAMR]. Upon urging, in 2006 the AAMR changed

that do not enable them to possess the level of moral culpability that society deems essential to impose a sentence of death.[9] Because of this diminished culpability, the execution of a mentally retarded offender would neither act as a deterrent[10] nor "measurably contribute to the retributive end" of capital punishment.[11] Hence, the execution of a mentally retarded offender would violate the Eighth Amendment's narrowing principle, which requires that only the most deserving of execution are put to death.[12]

States must define mental retardation for the purpose of capital punishment in a manner that gives effect to that principle. If a state's definition (or its judicial interpretations of the definition) fails to exclude the mentally retarded from execution, the state violates the Eighth Amendment.

C. Honoring the Heightened Fairness and Reliability Requirements

The constitutionality of any death sentence depends upon a fair decision-making process, which assures that a death sentence is not imposed in an arbitrary, discriminatory, or capricious manner. The "qualitative difference" in a sentence of death demands "a corresponding difference in the need for

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its name to the American Association on Intellectual and Developmental Disabilities ("AAIDD"), and consequently, later adopted the term "intellectual disability" in lieu of "mental retardation." Press Release, American Ass'n on Intellectual and Developmental Disabilities, World's Oldest Organization on Intellectual Disability Has a Progressive New Name 120 (Nov. 2, 2006), *available at* http://www.aamr.org/news/news_item.cfm?OID=1314. The term "intellectual disability" is the "currently preferred term" for the mental health profession, and includes the same "population of individuals who were diagnosed previously with mental retardation in number, kind, level, type, and duration of the disability. . . ." Robert L. Schalock et al., *The Renaming of* Mental Retardation: *Understanding the Change to the Term* Intellectual Disability, 45 INTELLECTUAL AND DEVELOPMENTAL DISABILITIES 116, 120 (2007) (noting that the medical profession has used several terms over the last 200 years, but that the "three essential elements . . . have not changed substantially"). Because the term "mental retardation" was used in *Atkins* and continues to be used in the civil and criminal justice systems and in state and federal regulations (including regulations pertaining to the Americans with Disabilities Act), it will be used in this Article. *See* 28 C.F.R. § 35.104(1)(i)(B) (2009) (instructing that "physical or mental impairment" includes mental retardation).

9. *Atkins*, 536 U.S. at 316 ("[S]ociety views mentally retarded offenders as categorically less culpable than the average criminal.").

10. Proponents of capital punishment often cite its role in deterrence as support for their position. However, mentally retarded offenders suffer from cognitive impairments like "the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses" that lessen their ability to choose their behavior and control their conduct, thus diminishing any deterring effect. *Id.* at 320.

11. Retribution for crime is based on the theory that offenders should get what they deserve. However, "the severity of the appropriate punishment necessarily depends on the culpability of the offender. . . . If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." *Id.* at 319.

12. *See supra* note 7 and accompanying text.

reliability in the determination that death is the appropriate punishment in a specific case."[13] Moreover, the Eighth Amendment forbids "procedural rules that tend[] to diminish the reliability" of the death penalty determination.[14]

A mentally retarded offender suffers cognitive impairments that hinder the individual's ability to process information, make decisions, communicate, and relate to others.[15] These hindrances affect the individual's ability to assist counsel, testify, "make a persuasive showing of mitigation,"[16] and in turn, the hindrances "jeopardize the reliability and fairness of capital proceedings."[17] Thus, a mentally retarded offender faces an increased risk of wrongful execution.[18]

D. Honoring the Atkins Promise

The promise of *Atkins* is that the mentally retarded will not be executed.[19] Although the Supreme Court deferred the matter of defining mental retardation and the procedures used to determine its existence to the states,[20] its categorical ban on the execution of the mentally retarded nevertheless requires states to adhere to the basic principles of *Atkins* in both respects. Because the *Atkins* Court interpreted the Eighth Amendment as restricting the execution of *any* mentally retarded offender,[21] states should apply consistent, appropriate, and reliable standards and procedures. Otherwise, the Eighth Amendment takes on varied meanings in various locations, returning the country to a pre-*Furman*[22] scheme of capital punishment.

II. DEFINITIONS AND INTERPRETATIONS

Even though the *Atkins* Court deferred the task of developing ways to enforce its holding, it recognized that "statutory definitions of mental retardation . . . generally conform to [certain] clinical definitions."[23] The Court relied specifically on definitions provided by the American Psychiatric

13. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

14. *See* Beck v. Alabama, 447 U.S. 625, 638 (1980).

15. *See supra* note 8.

16. *Atkins*, 536 U.S. at 320–21. The Eighth and Fourteenth Amendments require that defendants in capital cases be given the opportunity to present independent mitigating evidence. *See* Lockett v. Ohio, 438 U.S. 586, 605 (1978).

17. *Atkins*, 536 U.S. at 306–07.

18. *Id.* at 321.

19. *Id.*

20. The Court deferred to the states "the task of developing appropriate ways to enforce the constitutional restriction" against executing the mentally retarded. *Id.* at 317 (quoting Ford v. Wainwright, 477 U.S. 399, 416 (1986)). The Court cited the definitions provided by the AAMR and the American Psychiatric Association (APA) in its opinion. *Id.* at 304, 309 n.3.

21. *See id.* at 321.

22. *See supra* text accompanying note 7.

23. *Atkins*, 536 U.S. at 317 n.22.

Association ("APA") in the *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-IV-TR") and by the American Association on Mental Retardation (AAMR) (now the AAIDD).[24] These definitions, though not identical, describe the same small group of individuals[25]—approximately one to three percent of the general population.[26] Every individual included in this group is entitled to the Eighth Amendment's protection against execution. As one federal judge has observed: "[B]oth the AAMR and DSM-IV-TR definitions reflect a national consensus. Thus, to the extent there is a conflict, should a defendant meet *either* definition, his execution is prohibited."[27]

The AAMR's 1992 definition of mental retardation, cited by the Court in *Atkins*,[28] was revised by the AAMR in 2002 to be "more consistent with widely used assessment instruments and the research supporting them [and] with the relevant inquiries in [the] criminal justice context."[29] The 2002 update was intended "to state, describe, organize, and extend the thinking in the field of mental retardation that has occurred over the past 10 years."[30] Thus, the definition of mental retardation set forth in the AAMR's 2002 book is the most accurate and reliable definition. That definition provides that mental retardation is "a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and

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24. *Id.* at 308 n.3. For a discussion of the AAMR's use of the term mental retardation and its adoption of a new organizational name, see *supra* note 8. The DSM-IV-TR uses three criteria to define mental retardation: "significantly subaverage general intellectual functioning," "significant limitations in adaptive functioning in at least two [of eleven] skill areas," and onset before age eighteen. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000) [hereinafter DSM-IV-TR]. The DSM-IV-TR also categorizes mental retardation in four degrees of severity based on IQ: mild, moderate, severe, and profound. *Id.* at 42.

25. James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 12–13 (2003) (noting that the various definitions are only important insofar as they are selected by legislatures and applied by clinicians, attorneys, and courts). The medical profession has settled on its own "specific criteria for diagnosis." *See* Phyllis Coleman & Ronald A. Shellow, *Toward a Uniform Standard for Mental Retardation in Death Penalty Cases*, 41 MENTAL RETARDATION 203, 204 (2003).

26. *See, e.g.*, AAMR, *supra* note 8, at 52 ("[T]he general guideline for consideration of intellectual functioning should be determined by professional clinical judgment and determined to be below the level attained by approximately 97% of individuals . . . ."). Conversely, approximately two to twenty-five percent of incarcerated offenders and four to twenty percent of death row inmates in the United States are mentally retarded. Peggy M. Tobolowsky, Atkins *Aftermath: Identifying Mentally Retarded Offenders and Excluding Them From Execution*, 30 J. LEGIS. 77, 86 (2003) (citations omitted).

27. United States v. Nelson, 419 F. Supp. 2d 891, 894–95 (E.D. La. 2006).

28. *See supra* note 8.

29. Tobolowsky, *supra* note 26, at 100.

30. AAMR, *supra* note 8, at 5.

practical adaptive skills."[31] The 2002 definition also specifies that onset occurs before age eighteen.[32]

The 2002 AAMR definition, the 1992 AAMR definition referenced in *Atkins*,[33] and the APA definition found in the DSM-IV-TR[34] contain three common elements: intellectual functioning, adaptive behavior, and age of onset.[35] The AAMR and DSM-IV-TR clinical definitions vary slightly, most prominently in their differentiation of the various skill areas considered in evaluating an individual's limitations in adaptive behavior.[36] But the slight variations do not result in any real differences in opinion about what constitutes the disability or merits a diagnosis.

While state legislatures have not adopted a uniform definition of mental retardation in response to *Atkins*, most state statutes quote verbatim or substantially from one of the clinical definitions to which the Court referred.[37] Other definitions provided by state legislation borrow from, but do not replicate, clinical definitions.[38] Still other statutes, including the federal statute

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31. *Id.* at 1.

32. *Id.*

33. *See supra* note 8.

34. *See supra* note 24.

35. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 308 n.3 (2002) (comparing the three common elements of the 1992 AAMR definition and the DSM-IV-TR definition).

36. For example, the APA identifies the following skill areas as components of adaptive functioning in the DSM-IV-TR: "Communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." DSM-IV-TR, *supra* note 24, at 41. The AAMR, on the other hand, identifies "three types of adaptive behavior" (conceptual, social, and practical) and "four other dimensions" for consideration (intellectual abilities; participation, interactions, and social roles; health; and context). AAMR, *supra* note 9, at 14.

37. *See e.g.*, ARIZ. REV. STAT. ANN. § 13-703.02(K)(3) (Supp. 2008) (defining mental retardation as "a condition based on a mental deficit that involves significantly subaverage general intellectual functioning, existing concurrently with significant impairment in adaptive behavior, where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen"); N.Y. CRIM. PROC. § 400.27(12)(e) (McKinney 2005) (defining mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which were manifested before the age of eighteen"); TENN. CODE ANN. § 39-13-203(a) (2006) (defining mental retardation to include "[s]ignificantly subaverage general intellectual functioning," "deficits in adaptive behavior," and onset by the age of eighteen); WASH. REV. CODE § 10.95.030(2)(a) (2008) (defining mental retardation as "(i) [s]ignificantly subaverage general intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period").

38. *See e.g.*, KAN. STAT. ANN. § 21-4623 (2007) (defining mentally retarded as "having significantly subaverage general intellectual functioning . . . to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law"); MO. ANN. STAT. § 565.030(6) (West Supp. 2008) (requiring that deficits and limitations in adaptive behaviors be "continual" and "extensive").

on the implementation of the death penalty, include no definition at all.[39] This definitional inconsistency produces the anomaly that an individual spared execution in one state because of mental retardation may nonetheless be subject to execution in a neighboring state. And even those states that use the same general definition of mental retardation apply and interpret the definitions inconsistently.

A. Intellectual Functioning

The first element of the definition of mental retardation addresses intellectual functioning. A mentally retarded or intellectually disabled individual suffers from "significant limitations in intellectual functioning."[40] Intellectual functioning, more commonly referred to as intelligence, refers to an individual's "general mental capability" and includes "reasoning, planning, solving problems, thinking abstractly, comprehending complex ideas, learning quickly, and learning from experience."[41]

All states include subaverage intellectual functioning as an element of their definition of mental retardation and thus require some means of measuring intellectual functioning.[42] The most common, though not the sole, method of measuring an individual's intelligence is by IQ testing.[43] The AAMR notes that "intellectual functioning is still best represented by IQ scores when obtained from appropriate assessment instruments."[44] The two most frequently used testing instruments are the Wechsler scales for children and adults and Stanford-Binet.[45] The utility of IQ scores is greatly questioned, but most critics

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39. The federal statute on mental capacity as it relates to a sentence of death simply states, "A sentence of death shall not be carried out upon a person who is mentally retarded." 18 U.S.C. § 3596(c) (2006).

40. AAMR, *supra* note 8, at 8. The DSM-IV-TR refers to this element as "significantly subaverage general intellectual functioning." DSM-IV-TR, *supra* note 24, at 41.

41. AAMR, *supra* note 8, at 14. "[I]ntelligence is not merely book learning, a narrow academic skill, or test-taking smarts. Rather, it reflects a broader and deeper capacity for comprehending our surroundings—catching on, making sense of things, or figuring out what to do." *Id.* at 40.

42. David DeMatteo, Geoffrey Marczyk, & Michele Pich, *A National Survey of State Legislation Defining Mental Retardation: Implications for Policy and Practice After* Atkins, 25 BEHAV. SCI. & L. 781, 789 (2007).

43. AAMR, *supra* note 8, at 51.

44. *Id.* at 41.

45. *Id.* at 59. The *Atkins* Court referred to the Wechsler Adult Intelligent Scales test as "the standard instrument in the United States for assessing intellectual functioning." Atkins v. Virginia, 536 U.S. 304, 309 n.5 (2002). Other measures of intelligence include the Kaufman Assessment Battery for Children, the Cognitive Assessment System, and other special tests for individuals "with limited verbal ability or profound cognitive impairments." AAMR, *supra* note 8, at 59–60, 63–66; *see generally* ESTHER STRAUSS, ELISABETH M. S. SHERMAN & OTFRIED SPREEN, A COMPENDIUM OF NEUROPSYCHOLOGICAL TESTS: ADMINISTRATION, NORMS, AND COMMENTARY 98-362 (Oxford Univ. Press 3d ed. 2006) (explaining the multitude of tests that

admit that the scores effectively predict certain kinds of achievement, particularly educational achievement.[46] Most of the tests measure both verbal and nonverbal intelligence functioning, but different tests assess "different combinations of abilities."[47] As a result, an individual's IQ often varies between different tests.[48]

Not all individuals have had appropriate or sufficient IQ testing during the relevant time periods.[49] For example, individuals who did not attend public schools regularly or at all and individuals who immigrated to the United States during their childhood may have never taken IQ tests. While federal law requires school districts "to identify, locate, and evaluate all children" between the ages of three and 21 who may have disabilities, numerous examples of noncompliance exist.[50] Even students regularly attending schools in the United States may have attended noncompliant or underfunded schools and been denied the benefit of standardized tests that are offered in other institutions.[51]

The opposite problem occurs when an individual has taken numerous tests that produce inconsistent scores.[52] It is well established that an individual's

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help determine levels of cognitive functioning).

46. STRAUSS ET AL., *supra* note 45, at 100. Of course, many abilities cannot be ascertained by intelligence tests including creativity, practical common sense, wisdom, and social skills.

47. *Id.*

48. *Id.*

49. *See, e.g.*, *Ex parte* Blue, 230 S.W.3d 151, 165–66 (Tex. Crim. App. 2007) (finding that the defendant was not mentally retarded based on the administration of "a few subsets" of the Wechsler test from which a full scale IQ was determined).

50. MATT COHEN, A GUIDE TO SPECIAL EDUCATION ADVOCACY—WHAT PARENTS, CLINICIANS AND ADVOCATES NEED TO KNOW 83 (Jessica Kingsley Publishers 2009). In July 2008, for example, the United States Department of Education reported that only thirteen states met the requirements of Part B of the Individuals with Disabilities Education Act ("IDEA"), which serves students ages three through 21. Press Release, U.S. Department of Education, Determination Letters on State Implementation of the IDEA (July 9, 2008), *available at* http://www.ed.gov/policy/speced/guid/idea/monitor/factsheet.pdf.

51. Congress passed the IDEA in 1975, guaranteeing "free appropriate public education" to children with disabilities who are eligible for special education services. COHEN, *supra* note 50, at 9, 31. The IDEA encompasses thirteen categories of disability, including mental retardation. *Id.* at 38. The IDEA entitles the student to a comprehensive evaluation based on a number of assessment tools that are accurate and unbiased. *Id.* at 30, 83–84. Although the IDEA has been in effect for more than thirty years, its provisions have not always been rigorously enforced. *Id.* at 9–10. Moreover, either a parent or the school system must first refer the child for an evaluation. *Id.* at 80.

52. *See e.g.*, *Ex parte* Perkins, 851 So.2d 453, 456 (Ala. 2002) (finding that defendant was not mentally retarded and attributing his declining intellectual functioning to alcohol abuse); Lewis v. State, 889 So.2d 623, 697–98 (Ala. Crim. App. 2003) (finding that defendant was not mentally retarded despite a decline in intelligence testing scores from 109 to 58 and attributing his childhood problems to his eventual diagnosis of personality disorder with delusional features); Burns v. State, 944 So.2d 234, 247, 249 (Fla. 2006) (finding that defendant was not mentally retarded based on IQ scores of 69 and 74); State v. Johnson, 244 S.W.3d 144, 152, 167 (Mo. 2008) (finding that defendant was not mentally retarded based on IQ scores of

intelligence may vary over time, but some courts desirous of a simple, bright-line cutoff use varying scores as a basis for finding an absence of the existence of the first criteria of mental retardation.[53]

Moreover, mental health professionals agree that the reliability of IQ scores is dependent upon the choice of test,[54] the competence of the examiner,[55] and the interpretation of the results.[56] The choice and time of the test can have a dramatic effect on the measurement of an individual's intellectual functioning.[57] In addition, the AAMR stresses that intellectual functioning must always be considered "within the context of community environments typical of the individual's age peers and culture" and in consideration of "cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors."[58]

Even assuming well-chosen tests and professionally competent examiners and assessors, an IQ test is an imperfect determinant of intellectual functioning for many reasons, including the standard measurement of error. As the mental health profession has cautioned, "all measurement, and particularly

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77, 63, 95, 78, 84, 67, and 67 taken from 1968 to 2004); Myers v. State, 130 P.3d 262, 267–68 (Okla. Crim. App. 2005) (finding that defendant was not mentally retarded based on his ability to drive, hold a job, and learn to read simple material, despite intelligence test scores that ranged from 66 to 88 throughout his lifetime).

53. *See e.g., Lewis*, 889 So.2d at 697 (court found that previously IQ score in average range "seriously undermine[d] IQ score indicating mental retardation"); *Johnson*, 244 S.W.3d at 152 (describing a situation in which the defendant had five IQ tests, with varying scores, where the jury concluded the defendant was not mentally retarded and the judge affirmed the death sentence); *Myers*, 130 P.3d at 267-68 (explaining that IQ scores ranging from 66 to 77 led the court to conclude defendant was not mentally retarded); Salazar v. State, 126 P.3d 625, 628 (Okla. Crim. App. 2005) (noting the court reasoned that "a truly mentally retarded individual will not, cannot produce test results over such a broad spectrum" because of scores ranging from 50 to 83); Hall v. State, 160 S.W.3d 24, 29 (Tex. Crim. App. 2004) (en banc) (noting the varying scores on a Test of Non-Verbal Intelligence ("TONI") led the court to conclude that defendant was not mentally retarded).

54. The choice of tests depends on "the individual's social, linguistic, and cultural background." AAMR, *supra* note 8, at 51; *see also* DSM-IV-TR, *supra* note 24, at 42 ("The choice of testing instruments and interpretation of results should take into account factors that may limit test performance (e.g., the individual's sociocultural background, native language, and associated communicative, motor, and sensory handicaps).").

55. AAMR, *supra* note 8, at 51–52.

56. *See id.* at 51–52.

57. *See, e.g., Hall*, 160 S.W.3d at 24. In *Hall*, the defendant scored 84 on a TONI. *Id.* at 29. "The TONI test was designed primarily for students who were difficult to test, sometimes because they did not speak English, or were paralyzed, or had some other disability not necessarily related to intelligence that impeded the effectiveness of the more comprehensive, individually-administered intelligence exams." *Id.* at 30. Under the Wide Range Achievement Test, however, the defendant achieved scores of 59, 51, and 55 in reading, spelling, and arithmetic, respectively. *Id.* Nevertheless, the Court of Criminal Appeals of Texas affirmed a holding that the defendant had not established subaverage intellectual functioning. *Id.* at 40.

58. AAMR, *supra* note 8, at 13.

psychological measurement, has some potential for error."[59] The standard error of measurement ("SEM") for well-standardized tests of general intellectual functioning is estimated to be three to five points.[60] This rate of error may be attributed to a variety of factors, including the performance of the test taker and the behavior of the examiner.[61] Although IQ scores are expressed as a specific number, the scores may actually represent "a range that would be approximately three to four points above and below the obtained score."[62] As a result of these variations, the mental health profession uses a range of numbers to determine intellectual functioning and specifically discourages any reliance on a fixed cutoff.[63]

While some states have heeded the scientific community's clear precautions[64] and avoided fixed IQ cutoffs,[65] far too many have not. Some state statutes define the intellectual functioning element of mental retardation to *require* an IQ score within a fixed cutoff.[66] Courts have interpreted other state statutes, though less specific, to require a fixed IQ cutoff.[67] By refusing to consider the standard error of measurement, a court can find a defendant who meets the medical profession's definition of subaverage intellectual functioning

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59. *Id.* at 57.

60. *Id.*; *see also* Douglas Mossman, Atkins v. Virginia: *A Psychiatric Can of Worms*, 33 N.M. L. REV. 255, 269–70 (2003) ("Under the best conditions, IQ tests have a 'measurement error' of about five points." (citation omitted)). "This means that if an individual is retested with the same instrument, the second obtained score would be within one *SEM* (i.e., ± 3 to 4 IQ points) of the first estimates about two thirds of the time." AAMR, *supra* note 8, at 57.

61. *Id.*

62. *Id.* The AAMR refers to this range as the "zone of uncertainty." *Id.*

63. *Id.* at 58. Also consider the approach taken by the DSM-IV-TR:

> Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument .... Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.

DSM-IV-TR, *supra* note 24, at 41–42.

64. *See* Mossman, *supra* note 60, at 269–70; Tobolowsky, *supra* note 26, at 96 ("[A]ny state's use of a fixed IQ cutoff score, without reference to standard measurement error and other factors concerning the specific instrument used, risks an inaccurate assessment of the intellectual functioning component of the mental retardation definition.").

65. *See, e.g.*, *In re* Hawthorne, 105 P.3d 552, 557 (Cal. 2005) ("[A] fixed cutoff is inconsistent with established clinical definitions ...."); Pruitt v. State, 834 N.E.2d 90, 106 (Ind. 2005) ("IQ tests are only evidence; they are not conclusive on either the subject's IQ or the ultimate question of mental retardation."); Bowling v. Commonwealth, 163 S.W.3d 361, 388 (Ky. 2005) (Keller, J., dissenting) ("A *score* on an IQ test ... is merely evidence of a person's actual IQ.... [Such evidence] might also come in the form of expert testimony as to the margin of error of a given testing procedure ...."); Commonwealth v. Miller, 888 A.2d 624, 631 (Pa. 2005) ("[C]onsistent with both the [AAMR and DSM-IV-TR] classification systems, we do not adopt a cutoff IQ score for determining mental retardation.").

66. *See e.g.*, TENN. CODE ANN. § 39-13-203(a) (West 2006).

67. *Hawthorne*, 105 P.3d at 560; State v. McManus, 868 N.E.2d 778, 785-86 (Ind. 2007).

to be death eligible.[68] For example, a defendant in an Ohio case was found not to be mentally retarded despite an IQ score of 72 under one test.[69] Although an expert testified that IQ tests possess a margin of error and "some wiggle room that goes about five points either way," the court rejected the argument for a downward adjustment to 70, the state cutoff for mental retardation.[70]

In addition to issues created by the standard error of measurement, other concerns about the validity of IQ scores exist. The validity of an IQ test score as a measurement of intellectual functioning is affected by the differences in test content, the age of the test taker, and the rise in national IQ scores over time, which is commonly referred to as the Flynn effect.[71] Some courts reject IQ cutoffs based on the age of the testing instrument as well as the Flynn effect, which results in heightened scores over the life of a test.[72]

Moreover, many contend that IQ tests only provide a valid measure of intellectual functioning for native English speakers,[73] creating yet another difficulty for defendants who speak English only marginally or as a second language. This concern is based not only on the fact that the tests are written in English, but also that their content is largely "drawn from white, middle-class culture."[74] Some argue that cultural test bias depresses IQ scores for minorities,[75] resulting in an over inclusion of non-native English speakers in the

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68. *See e.g.*, Phillips v. State, 984 So.2d 503, 508, 513 (Fla. 2008) (finding that defendant was not mentally retarded despite IQ scores ranging from 70 to 86); Jones v. State, 966 So.2d 319, 329 (Fla. 2007) (finding that IQ scores ranging from 67 to 75 did not equate to "significantly subaverage general intellectual functioning"); Rodgers v. State, 948 So.2d 655, 667, 668 (Fla. 2006) (finding that the defendant was not mentally retarded despite IQ scores ranging from 69 to 75).

69. State v. Frazier, 873 N.E.2d 1263, 1290 (Ohio 2007).

70. *Id.* at 1291 (noting that the state's expert testified that he had "a '95% confidence level' that Frazier's IQ test results were accurate within a range of a 71 IQ and 80 IQ).

71. The so-called "Flynn effect" is based on findings that the nation's IQ score increases about three points a decade if the same testing instrument is used. Kenneth J. Weiss, Barbara Haskins & Mark J. Hauser, *Commentary:* Atkins *and Clinical Practice*, 32 J. AM. ACAD. PSYCHIATRY & LAW 309, 310 (2004). Thus, using an outdated testing instrument can result in an inflated IQ score. *Id.* To combat this effect, the test is "renormed" every fifteen to twenty years, "making the test harder and 'hiding' the previous gains in IQ scores." Tomoe Kanaya, Matthew H. Scullin, & Stephen J. Ceci, *The Flynn Effect and U.S. Policies: The Impact of Rising IQ Scores on American Society Via Mental Retardation Diagnoses*, 58 AM. PSYCHOLOGIST 778, 778 (2003).

72. *See, e.g.*, Bowling v. Commonwealth, 163 S.W.3d 361, 388 (Ky. 2005) (Keller, J., dissenting) (recognizing the Flynn effect and its potential to account for a three point error). *Contra Ex parte* Blue, 230 S.W.3d 151, 165 (Tex. Crim. App. 2007) (refusing to consider the Flynn effect, which would have resulted in defendant's IQ falling between 64 and 69).

73. Harrison Kane, *Straight Talk about IQ and the Death Penalty*, 13 ETHICS & BEHAV. 27, 29 (2003) (noting that "[f]or racial and ethnic groups whose native language is English, IQ tests provide reliable and valid measures of cognitive ability").

74. Linda Knauss & Joshua Kutinsky, *Into the Briar Patch: Ethical Dilemmas Facing Psychologists Following* Atkins v. Virginia, 11 WIDENER L. REV. 121, 129 (2004).

75. *See, e.g.*, State v. Were, No. C-030485, 2005 WL 267671, at *10 (Ohio Ct. App. Feb.

class of protected individuals, while others contend that the differences are insignificant.[76]

Because of this uncertainty, the mental health community has devised methods to account for an individual's language particularities.[77] Nonetheless, courts may refuse to accept the test results because of the controversy. Further, courts may discount the results of special-circumstances tests that are adapted for other languages under the premise that such tests are not the "gold standard" for intelligence measurement in the United States. Finally, courts may ignore altogether tests administered in other languages and countries because of a dearth of information about or confidence in that country's testing procedures. Because most states regard IQ tests as the appropriate means of proving subaverage intellectual functioning[78] and place the burden of establishing mental retardation on defendants,[79] many non-English-speaking defendants are left without a means of establishing their mental retardation.

The mental health profession has established valid methods to determine an individual's intellectual functioning in special circumstances, even in the absence of standardized testing.[80] These include, among others, circumstances in which (1) the individual has a different cultural or linguistic background; (2) "earlier information is lacking or incomplete;" (3) the individual suffers from multiple disabilities making standardized assessment inappropriate; (4) "the individual uses a language, dialect, or communication system that differs significantly from that of the instrument's normative populations;" and (5) "there is a risk of practice effects due to repeated use of the same instrument outside of recommended time intervals."[81] Under these special circumstances, "the general guideline for consideration of intellectual functioning should be determined by professional clinical judgment."[82] The AAMR indicates that

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4, 2005) (finding that the defendant was not mentally retarded, despite having an IQ of 69, in part based on expert testimony that the minority defendant's IQ score was likely depressed).

76. Kane, *supra* note 73, at 29-30.

77. *See* AAMR, *supra* note 8, at 94. Such a situation requires "the use of *clinical judgment* to make decisions and/or to integrate the input from an interdisciplinary team whose function is to blend the multidimensional assessment and contextual information." *Id.*

78. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-703.02(C) (Supp. 2008); ARK. CODE ANN. § 5-4-618(a)(2) (2006); CONN. GEN. STAT. ANN. § 1-1g(b) (West 2007); FLA. STAT. ANN. § 921.137(1) (West 2006); IDAHO CODE ANN. § 19-2515A(b) (2004); N.C. GEN. STAT. § 15A-2005(a)(1) (2007); TENN. CODE ANN. § 39-13-203(a)(1) (West 2006).

79. *See e.g.*, ARIZ. REV. STAT. ANN. § 13-703.02(G) (Supp. 2008); ARK. CODE ANN. § 5-4-618(c) (2006); CAL. PENAL CODE § 1376(b)(3) (West Supp. 2009); COLO. REV. STAT. § 18-1.3-1102(2) (2008); IND. CODE ANN. § 35-36-9-4(b) (LexisNexis 2008); NEV. REV. STAT. ANN. § 174.098(7) (West Supp. 2008); N.C. GEN. STAT. § 15A-2005(c) (2007); TENN. CODE ANN. § 39-13-203(c) (West 2006).

80. *See* AAMR, *supra* note 8, at 94.

81. *Id.*

82. *Id.* at 52. To support a diagnosis of subaverage intellectual functioning, the clinical determination should be that the individual falls "below the level attained by approximately 97% of individuals." *Id.*

such professional clinical judgment refers to a "high level of clinical expertise and experience [that] emerges directly from extensive data."[83] Furthermore, "[i]t is based on the clinician's explicit training, direct experience with people who have mental retardation, and familiarity with the person and the person's environments."[84]

Some courts refuse to rely upon professional clinical judgment, instead preferring the simplicity of a standardized test score.[85] In the absence of an IQ score derived from a standardized test, some courts have held that an individual's intellectual functioning, and thus his or her mental retardation, cannot be established.[86] But this approach oversimplifies the complex and critical importance of a mental retardation diagnosis. "As much as the criminal justice system might prefer to have a hard-and-fast limitation measurable by a single IQ score, it is simply impossible to exclude consideration of other factors about the testing performed on the individual, or to ignore the need for clinical judgment by experienced diagnosticians."[87] "A simple IQ score cannot possibly consider the individual as a whole being within his or her unique life context."[88]

Practitioners raising *Atkins* claims must educate the courts about the complexity of intellectual functioning and discourage them from relying solely on an IQ test score. If the client has tested slightly above the jurisdiction's cutoff for mental retardation, counsel should offer expert proof about the standard measurement of error, the Flynn effect, or other factors that affect test validity. If the client has inconsistent IQ scores, counsel should produce experts to explain whether the inconsistencies result from the choice of test, the choice of examiner, the time of the test, or other factors such as the client's cultural or linguistic background. If no IQ test scores during the relevant time period exist, counsel must find experts to testify to an extrapolated score based on other assessments and the application of professional clinical judgment. Only by

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83. *Id.* at 95.

84. *Id.*

85. *See, e.g.*, State v. Black, 815 S.W.2d 166, 174–75 (Tenn. 1991) (finding that defendant was competent to stand trial despite a "consensus" from mental health professionals that the defendant's IQ was "in the lower end of the normal range" and that he "probably suffered a personality disorder of some sort").

86. *See, e.g.*, Van Tran v. State, No. W2005-01334-CCA-R3-PD, 2007 WL 3327828, at *26 (Tenn. Crim. App. Nov. 9, 2006) (refusing to rely on "social factors" as proof of mental retardation in the absence of a test of intellectual functioning prior to the age of eighteen). The *Van Tran* court specifically noted:

> Although experts may offer insightful opinions on the question of whether a particular person satisfies the psychological diagnostic criteria for mental retardation, the ultimate issue of whether a person is, in fact, mentally retarded for purposes of the constitutional ban on excessive punishment is one for the finder of fact, based upon all of the evidence and determinations of credibility.

Id. at *24 (citations omitted).

87. Ellis, *supra* note 25, at 13 (footnote omitted).

88. Knauss & Kutinsky, *supra* note 74, at 129.

explaining the parameters within which the mental health profession evaluates intellectual functioning can counsel hope to lead courts away from a one-dimensional analysis.

B. Deficits in Adaptive Behavior

The problems inherent in assessing an individual's intellectual functioning for purposes of diagnosing mental retardation[89] are more problematic when considered in light of the other two elements of the definition: limitations in adaptive behavior and onset before age eighteen. The second element necessary for a diagnosis of mental retardation requires significant limitations in "adaptive behavior"[90] or "adaptive functioning."[91] The mental health profession uses this criterion as a means of determining a mentally retarded individual's need for services and supports.[92] The AAMR defines adaptive behavior as "the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives."[93] The DSM-IV-TR defines adaptive functioning as "how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting."[94] The AAMR's 2002 definition identifies three broad domains of adaptive behavior (conceptual, social, and practical skills)[95] while the APA's DSM-IV-TR lists eleven skill areas that are coextensive.[96]

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89. *See supra* Part II.A.

90. *See* AAMR, *supra* note 8, at 73.

91. *See* DSM-IV-TR, *supra* note 24, at 42.

92. *See* AAMR, *supra* note 8, at 73, 81.

93. *Id.* at 73.

94. DSM-IV-TR, *supra* note 24, at 42.

95. AAMR, *supra* note 8, at 76. "Conceptual skills" include communication skills, money concepts, and self-direction. *Id.* at 42. "Social skills" encompass interpersonal skills, responsibility, self-esteem, gullibility, naiveté, the ability to follow rules and laws, and the avoidance of victimization. *Id.* "Practical skills" include activities of daily living (such as eating, dressing, preparing meals, taking medication, and managing money), occupational skills, and the maintenance of safe environments. *Id.*

The AAMR's 1992 definition listed ten skill areas to be used in evaluating adaptive behavior. *Id.* at 76. These skill areas were noted in *Atkins*. Atkins v. Virginia, 536 U.S. 304, 308 n.3 (2002). The primary use of the more differentiated skill areas in the 1992 version was for "planning supports or educational programming" for those who were mentally retarded, not for diagnosis. AAMR, *supra* note 8, at 81.

The purpose of conceptualizing the behavioral prong of the [1992 AAMR] definition around "limitations in adaptive skill areas" was to focus the attention of diagnosticians more directly on an individual's need for services and supports. While this is important to clinicians working in the service delivery system, it obviously is less significant for evaluations performed for criminal cases potentially involving capital punishment. Ellis, *supra* note 25, at 13 (footnote omitted).

96. The DSM-IV-TR definition refers to "significant limitations in adaptive functioning in

Limitations in adaptive behavior affect an individual's daily life as well as an individual's ability to respond to the demands of life and the environment in which he or she lives. Thus, the diagnostic focus is on the *performance* of adaptive behavioral skills, not on their acquisition. An individual who has "significant limitations . . . in adaptive behavior as expressed in conceptual, social, or practical adaptive skills" meets the adaptive behavior criterion for mental retardation.[97]

To diagnose adaptive behavioral skills, mental health professionals rely primarily upon information collected from interviews with third-party "informants"—family members, custodians, school officials, friends, and caregivers—and also collect and review school, military, medical, employment, institutional, and health records.[98] The ideal informant has been familiar with the individual being assessed "over an extended period of time, preferably in multiple settings."[99] The process is complicated when these informants cannot be accessed or do not exist. Mental health professionals also use standardized assessment instruments to evaluate an individual's limitations in adaptive behavior. But just as standardized IQ tests do not completely indicate intellectual functioning, neither do adaptive behavior tests fully represent an individual's capacity to adapt to life's demands.[100] Nonetheless, mental health professionals often use assessment instruments to evaluate whether an individual suffers from limitations in adaptive behavior.[101]

Not surprisingly, instruments used to measure adaptive behavior suffer from the same imperfections as those used to measure intellectual functioning. Similar to tests designed to measure intellectual functioning, "no single consistent [adaptive behavior] measurement device is used across all settings or with all populations."[102] Assessment of incarcerated individuals is particularly difficult "because the structure and supports provided by a prison environment tend to reduce (or at least alter) the environmental demands placed upon inmates."[103] Thus, the more reliable assessments are those that are conducted before incarceration, but such tests may not be available, again requiring

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at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." DSM-IV-TR, *supra* note 24, at 41.

97. AAMR, *supra* note 9, at 39.

98. *Id.* at 85.

99. *Id.*

100. *Id.* at 75; *see* DSM-IV-TR, *supra* note 24, at 42.

101. *See, e.g.*, AAMR, *supra* note 8, at 76–77, 87 (noting that "there are existing measures that address the three dimensions of adaptive behavior" and that "[t]here has never been a shortage of adaptive behavior scales"); STRAUSS ET AL., *supra* note 45, at 1082–83 (mentioning the Vineland Adaptive Behavior Scales, AAMR Adaptive Behavior Scales, Scales of Independent Behavior, Comprehensive Test of Adaptive Behavior Revised, and the Adaptive Behavior Assesment System as measures the AAMR lists for determining adaptive functioning).

102. Knauss & Kutinsky, *supra* note 74, at 130.

103. *Id.* at 131.

professionals to exercise clinical judgment in evaluating adaptive functioning.[104]

When standardized measures of adaptive behavior are used, the AAMR indicates that a significant limitation in adaptive behavior exists when "performance . . . is at least two standard deviations below the mean on *at least one domain* or on the total score of an instrument that measures all three domains."[105] The DSM-IV-TR specifies that "significant limitations in adaptive functioning [must exist] in at least two" of eleven skill areas to satisfy its second criteria for a diagnosis of mental retardation.[106]

Despite this correlation between the AAMR and DSM-IV-TR criteria, courts engage in a variety of disparate interpretations of the adaptive behavior element. Some courts, perhaps hoping to simplify a complex issue, use a strict checklist approach and categorize adaptive behavioral skills narrowly rather than as a multidimensional concept.[107] A few courts, however, correctly recognize that the adaptive behavior element should be applied flexibly, keeping in mind its purpose in the overall inquiry.[108]

Practitioners must urge courts to interpret the adaptive behavior element of mental retardation in conformity with the five basic assumptions that the

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104. *See supra* text accompanying notes 82–84.

105. AAMR, *supra* note 8, at 78. The AAMR explains that although persons suffering from mental retardation are assumed to have broad adaptive limitations, the requirement of a score at least two standard deviations below the mean on only one domain is justified for two reasons. *Id.* Of particular significance is the fact that "the probability of a person scoring two standard deviations below the mean on more than one domain would be so low that almost no one with an IQ in the upper mental retardation range would be identified as having mental retardation." *Id.* (citation omitted).

106. DSM-IV-TR, *supra* note 24, at 41.

107. *See e.g.*, *Ex parte* Briseno, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004) (listing "evidentiary factors which factfinders in the criminal trial context might . . . focus upon in weighing evidence as indicative of mental retardation or of a personality disorder"); *see also* State v. Brown, 907 So.2d 1, 31 (La. 2005) (noting a nonexclusive list of mental disorders and diagnoses that *may* indicate mental retardation).

108. *See, e.g.*, United States v. Nelson, 419 F. Supp. 2d 891, 900-901 (E.D. La. 2006) (finding that the defendant met the adaptive functioning criterion for mental retardation based on several assessment tests, school records, and interviews); Pruitt v. State, 834 N.E.2d 90, 109–110 (Ind. 2005) (commenting on Indiana's rejection of the DSM-IV-TR definition of adaptive functioning as a definitive measure and noting that Indiana's statutory law "is much more general and open-ended, requiring a showing of 'substantial impairment of adaptive behavior' without specifying any particular skill levels" (citations omitted)); Commonwealth v. Miller, 888 A.2d 624, 630–33 (Pa. 2005) (exploring both the AAMR and DSM-IV-TR definitions of mental retardation, acknowledging standard error of measurement, declining to adopt a cutoff IQ score for determining mental retardation, and examining test scores and expert testimony to evaluate defendant's adaptive functioning); *see also* KAN. STAT. ANN. § 76-12b01(a) (1997) (defining adaptive behavior as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of that person's age, cultural group and community").

AAMR has identified as "essential to the application of [its] definition."[109] The third assumption, that "[w]ithin an individual, limitations often coexist with strengths," is particularly relevant to the assessment of limitations in adaptive behavior.[110] Inherent in the requirement that significant limitations exist in at least one of the AAMR's three domains of adaptive behavior (or two of the DSM-IV-TR's eleven skill areas) to support a diagnosis of mental retardation[111] is this recognition that "[a]daptive skill limitations often coexist with strengths in other adaptive skill areas."[112] "[T]he presence of a strength in a particular [skill] area does not negate the coexistence of a limitation in another area of sufficient significance to establish the adaptive behavior component of the mental retardation definition."[113] This overlap in skill areas is noted by the AAMR: "[P]eople with mental retardation are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than other things. Individuals may have capabilities and strengths that are independent of their mental retardation."[114] But these strengths do not preclude a diagnosis of mental retardation if all of the requirements of the definition are satisfied, even if such strengths do not reflect common stereotypes among non-experts of what a person with mental retardation can do.[115]

Notwithstanding this essential assumption, judges sometimes use their own opinions about the significance of an individual's strengths to trump standardized measures of adaptive behavior and professional clinical judgment. For example, courts routinely use the fact that a defendant can drive,[116] marry,[117] procreate,[118] maintain relationships,[119] work,[120] or count[121] as a basis

109. AAMR, *supra* note 8, at 1.

110. *Id.* The other four assumptions necessary for the application of the AAMR definition of mental retardation as are follows: "Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture;" "Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors;" "An important purpose of describing limitations is to develop a profile of needed supports;" and "With appropriate personalized supports over a sustained period, the life functioning of the person with mental retardation generally will improve." *Id.*

111. *See supra* notes 95-96, 105–106 and accompanying text.

112. AAMR, *supra* note 8, at 41.

113. Tobolowsky, *supra* note 26, at 97 (footnote omitted).

114. AAMR, *supra* note 8, at 8.

115. Ellis, *supra* note 26, at n.29; Tobolowsky, *supra* note 27, at 97.

116. *See, e.g.*, Clark v. Quarterman, 457 F.3d 441, 446–47 (5th Cir. 2006) (explaining that the defendant "was able to both drive a car and follow the speed limits of the [mobile home] park"); Clemons v. State, No. CR-01-1355, 2003 WL 22047260, at *4 (Ala. Crim. App. Jun. 24, 2005) (noting that the defendant "was a delivery driver for Domino's pizza . . . [which] requires . . . a valid driver's license").

117. *See, e.g.*, McGowan v. State, 990 So.2d 931, 999 (Ala. Crim. App. 2005); Yeomans v. State, 898 So.2d 878, 902 (Ala. Crim. App. 2004) (recognizing that the defendant "married more than once").

for concluding that, despite scientific evidence to the contrary, the defendant does not suffer from sufficient limitations in adaptive behavior to satisfy the definition of mental retardation. As one federal judge has noted, "[i]t is important, in determining whether a person is or is not mentally retarded, not to pick and choose so as to over-emphasize certain characteristics."[122] Yet, that is exactly what some courts are doing. As a result, court findings reflect the stereotypical view that mentally retarded individuals must be "utterly incapable of caring for themselves, potentially dangerous, and 'unfit' to reproduce," as was once believed.[123] Counsel should argue that reliance on an individual's strengths to rebut an expert's opinion based on professional judgment and scientific assessment belies an assumption essential to the definition of mental retardation.[124]

In addition to overemphasizing a defendant's strengths, prosecutors sometimes ask courts to consider demographic facts, including a defendant's cultural, social, medical, and economic background, to justify rulings that are inconsistent with clinical findings and expert opinions.[125] For example, as has been noted with regard to intellectual-functioning tests,[126] courts have discounted adaptive behavior assessments and clinical findings based on a defendant's incarceration, co-existing mental illness, and language preference, reasoning that such tests are normed only to an English-speaking, healthy, and non-incarcerated American population.[127] Practitioners should point out the

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118. *See, e.g.*, *McGowan*, 990 So.2d at 999; *Yeomans*, 898 So.2d at 902; Stallworth v. State, 868 So.2d 1128, 1182 (Ala. Crim. App. 2001) (noting that the defendant "fathered and raised several children").

119. *See, e.g.*, *Clark*, 457 F.3d at 446 (noting that the defendant socialized with others); *Stallworth*, 868 So.2d at 1182 (noting that the defendant had had a long-term relationship).

120. *See, e.g.*, *McGowan*, 990 So.2d at 999 (recognizing that the defendant had "maintained construction jobs"); *Stallworth*, 868 So.2d at 1182 (noting that the defendant had "maintained a job for most of his adult life" and worked as a cook, a brick mason, and a landscaper).

121. *See, e.g.*, *Clemons*, 2003 WL 22047260, at *4 (noting that the defendant, a pizza delivery driver, "was expected to be able to make change out of the 'bank' that was provided").

122. Holladay v. Campbell, 463 F. Supp. 2d 1324, 1343 (N.D. Ala. 2006).

123. HUMAN RIGHTS WATCH, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION, MENTAL RETARDATION: AN OVERVIEW, at n.21 (Mar. 2001), http://www.hrw.org/legacy/reports/2001/ustat/ustat0301-01.htm#P206_25341.

124. *See supra* notes 110–111 and accompanying text.

125. *See, e.g.*, Rivera v. Dretke, No. B-03-139, 2006 WL 870927, at *15 (S.D. Tex. Mar. 31, 2006) ("[T]he State asks this Court to ignore the verbal portion of the WAIS-III test because the test was administered in English and [the defendant's] English proficiency (or lack thereof) renders it inaccurate.").

126. *See supra* notes 73–76 and accompanying text.

127. *See e.g.*, State v. Grell, 66 P.3d 1234, 1239-41 (Ariz. 2003) (noting co-existing mental illnesses); Van Tran v. State, No. W2005-01334-CCA-R3-PD, 2006 WL 3327828, at *15-*17 (Tenn. Crim. App. Nov. 9, 2006) (incarceration and language preferences); *Ex parte* Rodriguez, 164 S.W.3d 400, 405-07 (Tex. Crim. App. 2005) (Cochran, J., concurring) (noting co-existing

inequitable ramifications of this specious reasoning. Isolating only the language issue, one federal court commented on the result of denying *Atkins* protection to these individuals:

> [I]n theory, [a non-English speaking defendant], or someone similarly situated, can never convincingly satisfy his burden of proof . . . because he could never obtain a reliable score on any test recognized as the gold standard due to the fact that his alleged lack of proficiency in English disqualifies him from obtaining an accurate score in the first place. . . . [Such a result] is, in effect, stating that only fluent English speakers can qualify for the test that may ultimately prove that they are entitled to the *Atkins* shield.[128]

Another problematic trend is the tendency of courts to conclude that an individual's ability to engage in criminal conduct precludes a finding of limitations in adaptive behavior. Some courts have concluded, without expert opinion, that "being extensively involved in criminal activity" or having the "ability to repeatedly engage in illegal behavior" negates proof of adaptive behavioral limitations.[129] While the sheer complexity of some offenses might undermine a finding of adaptive behavioral limitations, criminal conduct may also indicate the exact opposite. Research indicates, for example, that repetitive maladaptive behavior "may be an adaptation judged by others to be undesirable but often representing a response to environmental conditions and, in some cases, a lack of alternative communication skills."[130] Thus, a court's view that the ability to commit a crime indicates adaptation to an environment and negates a finding of limitations in adaptive behavior directly conflicts with scientific research that the ability to commit a crime may actually indicate a maladaptation. Judges should be made aware, through expert testimony, of these research findings that undermine their suppositions.

In addition to a focus on criminal behavior in general, the courts of several states, including Tennessee,[131] Georgia,[132] Texas,[133] and Alabama,[134] have

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mental illnesses).

128. *Rivera*, 2006 WL 870927, at *19. The AAMR indicates that defendants under these types of special circumstances require professional clinical judgment in diagnosing mental retardation. *See supra* notes 80–84 and accompanying text.

129. Clemons v. State, No. CR-01-1355, 2003 WL 22047260, at *4 (Ala. Crim. App. Jun. 24, 2005).

130. AAMR, *supra* note 8, at 79.

131. *See, e.g.*, *Van Tran*, 2006 WL 3327828, at *25 (finding that the defendant did not prove mental retardation because, among other things, he knew the layout of the restaurant, "did the talking with one of the victims," "went into the office to collect the jewelry," escaped, and subsequently sold the jewelry and divided the proceeds).

132. *See, e.g.*, Morrison v. State, 583 S.E.2d 873, 876 (Ga. 2003) (finding that the defendant was not mentally retarded based on his actions in gaining the confidence of his eventual victims, taking items of value from the houses he robbed, selling the items to finance his escape, navigating interstate highways without the use of a map, attempting to delay detection by cutting a phone line and removing a license tag on a stolen car, and providing an

routinely focused on the facts of the underlying crime to refute clinical judgment that defendants suffer from limitations in adaptive behavior. One court has even developed its own list of questions to assess a defendant's adaptive behavior limitations, including whether the defendant "formulated plans and carried them through," whether the defendant can "hide facts or lie effectively in his own or others' interests," and whether "the commission of [the] offense require[d] forethought, planning, and complex execution of purpose."[135]

Far too few courts have realized the circularity of this reasoning—that a person who can plan and commit a crime cannot suffer from limitations in adaptive behavior and thus cannot be mentally retarded. As a federal court explained, holdings that use the facts of the crime to refute expert opinions as to mental retardation "may be a circular evasion of the *Atkins* majority opinion. . . . Neither *Atkins* nor [other precedent] suggest that [heinous] crimes render a defendant ineligible for exemption from the death penalty based on mental retardation."[136] With similar sentiment, a state appellate court twice reversed and remanded a capital case based on the introduction of irrelevant facts about the crime during the hearing to determine the defendant's mental retardation.[137] But these examples are the exception, not the rule. Practitioners can expose such faulty reasoning by introducing expert testimony.

However, even if experts testify, courts may substitute their own judgment to circumvent the findings and opinions of mental health professionals with regard to behavioral limitations. Courts should consider expert opinion when

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alias to police).

133. *See, e.g.*, Clark v. Quarterman, 457 F.3d 441, 446 (5th Cir. 2006) (finding that the defendant had adaptive functioning because of his actions in committing the crime, "including removing the butt stock of his gun to make it easier to conceal, purchasing ammunition for the gun, practicing with the gun, and removing evidence from the scene and concealing it"). The Fifth Circuit specifically noted that "evidence of a strength in a particular area of adaptive functioning necessarily shows that the defendant does not have a weakness in that particular area." *Id.* at 447.

134. *See, e.g.*, *Ex parte* Smith, No. 1010267, 2003 WL 1145475, at *10 (Ala. Mar. 14, 2003) (finding that the defendant did not suffer from adaptive behavior limitations based on his actions in giving a police officer a false name, enlisting the help of a friend to dispose of a gun, and shooting victims to eliminate witnesses); *Clemons*, 2003 WL 22047260, at *4 (noting that the defendant did not lack adaptive functioning because his "post-crime conduct supports the notion that he was a crafty criminal intent on minimizing his culpability and establishing a defense to his crime").

135. Williams v. State, 270 S.W.3d 112, 114 (Tex. Crim. App. 2008) (quoting *Ex parte* Briseno, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004)).

136. Holladay v. Campbell, 463 F. Supp. 2d 1324, 1347 n.30 (N.D. Ala. 2006) (citation omitted).

137. *See* Lambert v. State, 126 P.3d 646, 655–59 (Okla. Crim. App. 2005); Lambert v. State, 71 P.3d 30, 31–32 (Okla. Crim. App. 2003). The defendant's two death sentences were subsequently modified to two life without the possibility of parole sentences. *Lambert*, 126 P.3d at 659.

"[t]he conclusions of physicians, psychiatrists, and other experts in the field will bear upon the proper analysis."[138] Without question, accurate professional assessment of adaptive behavior limitations is essential to a fair evaluation of a claim of mental retardation.[139] Judges are ill-equipped to make these assessments on their own. Fortunately, practitioners are in a position to curb this judicial behavior by consistently building a clear record of expert proof. Experts should explain the role that professional clinical judgment plays in assessing adaptive behavior,[140] intellectual functioning,[141] and ultimately mental retardation. Specifically, experts should describe how properly trained mental health professionals use clinical judgment to evaluate individuals who come from different cultural or linguistic backgrounds. In addition, the role that clinical judgment plays in circumstances in which "earlier information is lacking or incomplete," "difficulties arise in selecting informants or validating informant observations," and "direct observation of the individual's actual performance has been limited . . ."[142] should be clarified to the court.

The Supreme Court in *Atkins* did not mandate the application of a particular mental health standard for mental retardation,[143] but it did recognize the significance of professional standards and framed the constitutional prohibition in medical rather than legal terms.[144] The Supreme Court, in *Ake v. Oklahoma*, recognized in a separate but related context that accuracy in diagnosing mental conditions is best achieved by seeking guidance from mental health professionals:

> [T]he assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. . . . Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense.[145]

Similarly, the AAMR has noted that "mental retardation is not susceptible to evaluation by non-experts, and the disability only can be assessed through scientific tests administered by experienced professionals in the field using their training, experience, and clinical judgment."[146]

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138. Panetti v. Quarterman, 127 S. Ct. 2842, 2863 (2007).
139. *See* Ake v. Oklahoma, 470 U.S. 68, 80–81 (1985).
140. *See supra* text accompanying note 105.
141. *See supra* notes 82–84 and accompanying text.
142. *See supra* notes 80–84 and accompanying text.
143. *See supra* notes 2, 20 and accompanying text.
144. *See* Atkins v. Virginia, 536 U.S. 304, 318–19 (2002).
145. Ake v. Oklahoma, 470 U.S. 68, 80–81 (1985).
146. Brief for American Association on Mental Retardation as Amici Curiae at 21, State v. Arellano, 143 P.3d 1015 (Ariz. 2006) (No. CV-05-0397-SA).

Although the Supreme Court recognized in *Ake* that "there often is no single, accurate psychiatric conclusion on legal insanity in a given case,"[147] such an analysis is apropos to a diagnosis of mental retardation. Mental retardation is a medical construct, not a legal one.[148] Practitioners must urge courts to avoid the unacceptable risk of error that accompanies the substitution of uninformed judicial judgment for expert opinion. In order to achieve heightened reliability, judges should be receptive to expert testimony and hesitant to substitute personal observations, unfair assumptions, and stereotypical conclusions for expert findings. When courts disregard expert testimony in favor of their own misinformed speculations, they not only violate the Eighth Amendment's heightened fairness requirement,[149] but they also run a high risk that a mentally retarded offender will be executed.

C. Age of Origination or Onset

The problems relevant to the intellectual functioning and adaptive behavior elements of the definition of mental retardation are exacerbated by the application of the third element of the definition: the time at which the disability begins. The 1992 and 2002 AAMR definitions require manifestation of mental retardation before the age of eighteen.[150] The purpose of this onset requirement is not to exclude some people with intellectual disabilities from the mental retardation category, but rather to differentiate between individuals with mental retardation and individuals with other mental deficits caused by injuries or diseases that occurred during adulthood.[151] The mental health profession has noted that this distinction between childhood and adult onset "is considerably more relevant to clinicians designing habilitation plans and systems of supports for an individual than it is to the criminal justice system, since later-occurring disabilities . . . would involve comparable reduction in culpability for any criminal act."[152] As one expert has suggested, "if there were a capital prosecution of an individual who met the definition of mental retardation *except*

147. *Ake*, 470 U.S. at 81.

148. Richard J. Bonnie, *The American Psychiatric Association's Resource Document on Mental Retardation and Capital Sentencing: Implementing* Atkins v. Virginia, 32 J. AM. ACAD. PSYCHIATRY L. 304, 304–05 (2004) ("One of the striking aspects of the *Atkins* decision is that the constitutional prohibition appears to be framed in the language of a clinical diagnosis—'mental retardation'—and not in terms of a traditional legal concept, such as competence or responsibility.").

149. *See supra* Part I.C.

150. AAMR, *supra* note 8, at 22–23. In order to differentiate it from other disabilities, early definitions of mental retardation, up to and including the 1983 AAMR definition, required that manifestation occur "during the developmental period." *Id.* at 21–22.

151. Ellis, *supra* note 25, at 13.

152. *Id.*

for the age on onset, principles of equality likely would require comparable exemption from capital punishment."[153]

The mental health community has cautioned against a rigid adherence to an inflexible onset requirement.[154] Since "[a]lmost every person with the requisite level of intellectual impairment and adaptive behavior deficit has had the disability since birth or childhood,"[155] the onset requirement should not be considered essential to the definition of mental retardation. Some states have adhered to the medical profession's guidance by requiring onset during the developmental period but not mandating a specific age of onset.[156] However, most states continue to require proof of onset by age eighteen[157] and disregard alternative proof of onset methods, despite the contrary recommendations of the mental health profession.[158] By reading the onset element as a hard and fast rule and applying it without exception, courts create an artificial barrier to the Eighth Amendment's protection for the mentally retarded.

When read inflexibly, the AAMR definition of mental retardation would require that an individual's "significant limitations both in intellectual functioning and in adaptive behavior" originate before age eighteen.[159] Because courts often find that the "diagnosis of mental retardation in an adult must be based on present or current intellectual functioning and adaptive skills and information that the condition also *existed in childhood*,"[160] a strict

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153. *Id.* at 21 n.33 (noting that legislatures through definition, courts through proportionality review or constitutional protections, or governors through clemency proceedings must disallow the execution of such an individual).

154. *See id.* (noting that the onset element of the definition of mental retardation should be more fluid than the other two elements for purposes of enforcing the death penalty).

155. Brief for American Association on Mental Retardation, *supra* note 146, at 17 (footnote omitted).

156. *See, e.g.*, COLO. REV. STAT. § 18-1.3-1101(2) (2008); GA. CODE ANN. § 17-7-131(a)(3) (2008); KY. REV. STAT. ANN. § 532.130(2) (LexisNexis 1999). Other states have deleted an onset requirement altogether. *See, e.g.*, NEB. REV. STAT. § 28-105.01(3) (2008); N.M. STAT. ANN. § 31-20A-2.1(A) (LexisNexis 2000). Still other states have set the age of onset beyond the age of eighteen. *See, e.g.*, IND. CODE ANN. § 35-36-9-2 (LexisNexis Supp. 1998) (stipulating that manifestation occur before the age of twenty-two); MD. CODE ANN., CRIM. LAW § 2-202(b)(1)(ii) (LexisNexis 2002) (stipulating that manifestation occur before the age of twenty-two).

157. *See e.g.*, ARIZ. REV. STAT. ANN. § 13-703.02(K)(3) (2008); ARK. CODE ANN. § 5-4-618(a)(1)(A) (2006); FLA. STAT. ANN. § 921.137(1) (West Supp. 2009); KAN. STAT. ANN. § 76-12b01(d) (1997); MO. ANN. STAT. § 565.030(6) (West Supp. 2008); TENN. CODE ANN. § 39-13-203(a)(3) (West 2006).

158. *See, e.g.*, Rogers v. State, 653 S.E.2d 31, 35 (Ga. 2007) (adhering to the strict cutoff of eighteen years of age for manifestation of mental retardation despite the defendant's assertion that he "possessed the same attributes of a juvenile offender that prompted the United States Supreme Court to prohibit the imposition of the death penalty on offenders under age 18").

159. Bonnie, *supra* note 149, at 305.

160. Jones v. State, 966 So.2d 319, 327 (Fla. 2007) (emphasis added); *see also* Neal v. State, 256 S.W.3d 264, 275 (Tex. Crim. App. 2008) (finding that despite an existing inability to

interpretation of the onset requirement would require evaluation, assessment, and perhaps diagnosis before age eighteen. Thus, an adult with present existing limitations in intellectual functioning and adaptive behavior would be unable to meet the definition unless he or she was tested or evaluated before the age of eighteen. Individuals who have been raised by caring, educated, and observant parents, attended quality schools, and had attentive pediatricians can easily prove the existence of limitations in intellectual functioning and adaptive behavior before age eighteen. These individuals were likely evaluated for limitations in both intellectual functioning and adaptive behavior during their childhood years, particularly if any problems were noted. Such evaluations would likely have been documented in educational, social service, and medical records from childhood. Through these records, an individual's level of intellectual and behavioral functioning before the age of eighteen can be readily ascertained.[161] In fact, school records, medical records, family histories, and social histories are recognized by the mental health profession as the most acceptable means of establishing age of onset.[162]

However, establishing age of onset is much more difficult, perhaps impossible, for a second group of individuals—those who were without consistent parental care, those whose parents are also mentally challenged, those who were born into poverty, those who did not regularly attend school, and those who did not receive periodic health care. Records and memories that do exist may be sparse,[163] and in cases of very poor or immigrant individuals, records may not exist at all.[164] The very factors that place an individual at risk for mental retardation—poverty, lack of access to medical care, impairment of caregivers, chronic family illness, child abuse and neglect, social deprivation, and parental cognitive disability[165]—are the same factors that dramatically impact an individual's ability to prove the existence and onset of mental retardation.

While test scores and behavior assessments indicating significant limitations before age eighteen are the traditional means of establishing age of

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cope in society, as well as behavior- and personality-related problems, the defendant "failed to establish the onset before age 18 of either significant sub-average general intellectual functioning or limitations in adaptive functioning").

161. *See* Bonnie, *supra* note 149, at 307.

162. *Id.*

163. *See, e.g.*, State v. Lynch, No. C-050914, 2006 WL 2788504, at *3 (Ohio Ct. App. Sept. 29, 2006) (characterizing the defendant's evidence of mental retardation onset before the age of eighteen as "scant" even though a school report classified him as such); *Ex parte* Blue, 230 S.W.3d 151, 163–64 (Tex. Crim. App. 2007) (finding that the defendant was not mentally retarded based on only the "anecdotal evidence" and "sketchy grade school records" that he offered as evidence).

164. *See, e.g.*, Pizzuto v. State, 202 P.3d 642 (Idaho 2008) (upholding grant of summary judgment to state based on defendant's inability to prove IQ at age eighteen when only testing occurred when defendant was twenty-eight).

165. AAMR, *supra* note 8, at 127.

onset,[166] practitioners should be aware that they are not the only methods available. For example, teachers, guidance counselors, and other school officials may testify to intellectual functioning as demonstrated by school achievement and advancement during the defendant's formative years.[167] Family members, custodians, friends, and associates can testify to the defendant's social skills before adulthood, including level of responsibility, self-esteem, gullibility, naiveté, and compliance with rules.[168] Those same individuals can comment on practical life skills including hygiene, self-direction, money management, occupational skills, and self-care existing before age eighteen.[169] In addition, a multitude of risk factors for mental retardation has been medically established.[170] "Mental retardation can be caused by any condition that impairs development of the brain before birth, during birth, or in the childhood years."[171] These include genetic conditions, problems during pregnancy, problems at and after birth, and poverty and cultural deprivation.[172] Thus, childhood onset of mental retardation may be indicated through historical evidence of family background,[173] the circumstances of an individual's birth, and childhood diseases.[174] In fact, the link between five risk factors for mental retardation—poverty, childhood abuse and neglect, social and emotional dysfunction, alcohol and drug abuse, and crime—has been described as "so tight in the lives of many capital defendants as to form a kind of social historical 'profile'."[175]

After conducting a thorough investigation into the client's background, counsel will be able to identify alternative sources of proof of age of onset. Counsel should introduce this evidence along with expert testimony identifying the age of onset and substantiating the use of alternative sources of proof. However, counsel should also educate the court about the limited purpose of the onset requirement and the inappropriateness of allowing the absence of proof of onset to trump clear evidence of limitations in intellectual functioning and adaptive behavior.

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166. *See supra* note 164 and accompanying text.

167. *See supra* notes 99–100 and accompanying text.

168. AAMR, *supra* note 8, at 42.

169. *Id.*

170. *See generally* AAMR, *supra* note 8, at 123–41 (discussing numerous risk factors linked to mental retardation).

171. The Arc, Causes and Prevention of Mental Retardation (May 2005), http://www.thearc.org/NetCommunity/Document.Doc?&id=147.

172. *Id.*

173. The Arc, Genetic Causes of Mental Retardation (December 1996), http://www.thearc.org/NetCommunity/Document.Doc?&id=92 ("Up to 60 percent of severe mental retardation can be attributed to genetic causes . . . .").

174. The Arc, Causes and Prevention of Mental Retardation, *supra* note 171.

175. Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 580 (1995).

CONCLUSION

"[I]n the light of our 'evolving standards of decency,' we therefore conclude that [capital punishment of the mentally retarded] is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender."[176] With those words, the United States Supreme Court promised those who had been treated differently in life because of their intellectual disabilities[177] would also be treated differently in death by exempting them from capital punishment. While the *Atkins* Court imposed a "substantive restriction" on the power to execute the mentally retarded, "the substantive right runs only as far as its effective enforcement."[178] The *Atkins* promise has been effectively annulled by state court decisions and will remain illusory as long as state legislatures apply inconsistent definitions of mental retardation with varying burdens of proof and state courts use specious reasoning and subjective interpretations. This leaves to practitioners the task of preserving the Eighth Amendment's special protection for the mentally retarded. By aggressively litigating claims of mental retardation and exposing the present inequities, counsel will underscore the shameful unfairness of a system in which the Eighth Amendment's meaning depends on the location of an individual's prosecution.

176. Atkins v. Virginia, 536 U.S. 304, 321 (2002) (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

177. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding the sterilization of a mentally retarded woman as involuntary and stating that "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, . . . society can prevent those who are manifestly unfit from continuing their kind").

178. Carol S. Steiker & Jordan M. Steiker, Atkins v. Virginia: *Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721, 734 (2008).