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Douglas Mossman

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ATKINS V. VIRGINIA: A PSYCHIATRIC CAN OF WORMS
DOUGLAS MOSSMAN, M.D.*

I. INTRODUCTION

Over the past quarter century, the U.S. Supreme Court has repeatedly told the nation’s criminal courts, “If you want to impose the death penalty, get psychiatric help!” After the Supreme Court ruled in 1972 that sentencers could not have “untrammeled discretion” in how they imposed the death penalty,1 some states changed capital punishment statutes to make the death penalty automatic when homicides were committed under specific conditions.2 But in rulings issued between 1976 and 1982, the Supreme Court said that this solution was unacceptable: state statutes had to let the judges and juries who issue death sentences consider individualized information about each defendant.3 Sentencers must have the opportunity to learn about any aspect of a defendant’s character that might be offered in mitigation, and then must weigh potential mitigating factors when deciding a defendant’s fate.4 Such factors include information presented in testimony by mental health professionals about a defendant’s broken home, his being abused in childhood, and his adulthood emotional disturbances.5

In the late 1980s, the Supreme Court was asked whether simply having a mental disability—mild mental retardation—should exempt a murderer from the death penalty. The majority’s answer in Penry v. Lynaugh6 was no. The Court did say that letting jurors consider expert testimony about retardation and childhood abuse was crucial to a “reasoned moral response” about whether to impose a death sentence.7 Yet when Penry was issued in 1989, only two states had statutes that prohibited execution of persons simply because they had mental retardation.8 The Court thought this was not “sufficient evidence at present of a national consensus” that executing such persons would be “cruel and unusual punishment.”9

When the Supreme Court decided Atkins v. Virginia10 in June 2002, however, eighteen of the thirty-eight states that permitted capital punishment also had legislation that barred the execution of persons with mental retardation.11 This legislative trend helped convince a majority of justices that the “national consensus” required to exempt mentally retarded persons from the death penalty now existed.12

* Professor and Director, Division of Forensic Psychiatry, Wright State University School of Medicine; Adjunct Professor, University of Dayton School of Law. B.A., Oberlin College, 1976; M.D., University of Michigan, 1981. The author thanks Marshall B. Kapp, Stephen J. Morse, and Michael L. Perlin for their helpful comments on earlier drafts of this article.

5. Id. at 107-08.
7. Id. at 322.
11. Id. at 314-15.
12. Id. at 316.
As a result, a practice that the Court found acceptable in 1989 had become unconstitutionally "cruel and unusual punishment" thirteen years later.

Whether Atkins reflects good legal reasoning or—as Justice Scalia called it in his dissent—"nothing but the personal views of its members," it is poor psychiatric thinking for three reasons. First, Atkins implicitly assumes that persons with mental retardation comprise a discrete psychiatric category of individuals who are readily and naturally distinguishable from other persons, when, in fact, the opposite is the case: mental retardation is a classification defined by arbitrary statistical boundaries. Second, Atkins mistakenly (and perhaps ominously) approves of basing opinions about moral capacities on a person's psychiatric diagnosis; in offering protection to a group of mentally disabled persons, Atkins at the same time stigmatizes those citizens as morally inferior by virtue of their mental condition. Third, through its characterization of the links between reduced moral culpability, mental retardation, and exemptions from the death penalty, Atkins commits the American criminal justice system to deciding whether sufferers of other psychiatric disabilities also have reduced blameworthiness and deserve barriers to execution.

This article offers one psychiatrist's perspective on the problems Atkins raises for courts that handle death penalty cases. In contrast to the overarching aim of the majority's opinion in Atkins—making the administration of capital punishment more equitable—the Supreme Court's latest prescription of psychiatric help may only add a new layer of complexity and confusion to the already capricious process through which the U.S. criminal justice system imposes death sentences. To explain why, I first provide a brief review of the Supreme Court's 1989 Penry decision, focusing on the role that evidence of mental retardation played in death penalty cases before Atkins was decided. Section III then considers Daryl Renard Atkins' criminal case, which nicely illustrates the type of information that Penry required jurors to consider in making death penalty determinations—and the contributions of mental health professionals to those jury determinations. Following this, the article looks at how the Supreme Court majority in Atkins characterized the appellant's mental condition and the diagnostic process. Section IV discusses the actual process of diagnosing mental retardation, the ambiguities in that process, and the way that courts and legislatures may distort clinical diagnosis for use in legal proceedings. Section V describes the contradiction between professional organizations' treatment of, and response to, Atkins and these organizations' customary stance on the use of diagnoses for non-clinical purposes. Section VI describes the potential implications of the Atkins decision for capital defendants with psychiatric problems as incapacitating as, or more disabling than, mental retardation. Section VII concludes with a summary of how the Atkins majority's statements may affect testimony by mental health experts, and the effect of such testimony in future death-sentencing determinations.

13. Id. at 338.
II. THE BACKDROP FOR ATKINS: PENRY V. LYNNAUGH

In October 1979, Johnny Paul Penry entered the home of Pamela Livingston and raped, beat, and fatally stabbed her. Penry, a then-twenty-two-year-old man on parole following a previous rape conviction, gave authorities two confessions following his arrest, and, after being found competent to proceed with adjudication by the trial court, Penry underwent a jury trial for capital murder in March 1980. Penry raised the insanity defense at his trial, so that before jurors made their decision about his guilt, they had heard defense-introduced psychiatric testimony describing his mental retardation, the beating he suffered in childhood, and the brain damage that probably resulted. The defense also presented testimony from Penry’s mother, sister, and aunt describing his physical and emotional mistreatment during childhood and his problems with mastering even modest cognitive tasks. Jurors also had heard rebuttal testimony from two psychiatrists called by the prosecution. Although the State’s experts did not support an insanity verdict, they both acknowledged that Penry’s intellect was extremely limited and that he could not learn from mistakes.

The jury found Penry guilty of capital murder. The following day, at the close of Penry’s penalty hearing, the jury decided whether Penry deserved a death sentence by considering three “special issues”:

1. Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
2. Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
3. If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

The jury gave unanimous affirmative responses, which, under then-existing Texas law, required the trial court impose a death sentence.

In his habeas petition to the U.S. Supreme Court, Penry made two claims: (1) the Texas death-sentencing process violated the Eighth Amendment prohibition against cruel and unusual punishment by precluding jurors from weighing mitigating evidence about his mental condition in their sentencing deliberations and (2) to execute a mentally retarded killer would itself be cruel and unusual punishment. The Court endorsed Penry’s first claim. Writing for the majority, Justice Sandra Day O’Connor noted that the Court had previously endorsed Texas’s sentencing

15. Id. at 307-08.
16. Id. at 308-09.
17. Id. at 309.
18. Id.
19. Id. at 310.
20. Id.
21. Id. (quoting TEX. CODE CRIM. PROC. ANN., art. 37.071(b) (Vernon 1981 & Supp. 1989)).
22. Id.
23. Id. at 312.
24. Id.
scheme "'on the assurance that...[it] would...allow the jury to consider...mitigating circumstances..., including a defendant's prior criminal record, age, and mental or emotional state,'" and that "'the Eighth and Fourteenth Amendments require that the sentencer 'not be precluded from considering, as a mitigating factor, any aspect of a defendant's character...as a basis for a sentence less than death.'" The Court found that the wording of Texas's special issues, and the jury instructions at Penry's trial, prevented jurors from expressing their "reasoned moral response" to the mitigating evidence that Penry presented. For this reason, the Supreme Court remanded Penry's case for re-sentencing.

However, four Justices endorsed Penry's assertion that the Eighth Amendment required a per se death penalty exemption for all mentally retarded defendants. The majority felt that, under the Court's Eighth Amendment jurisprudential standards for ascertaining "evolving standards of decency," "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Poll data available in 1989 clearly suggested that the public opposed executing mentally retarded persons, but only Georgia and Maryland had enacted legislative bars. This was not enough "evidence of a national consensus against executing mentally retarded people" to convince a majority that such executions must always be unconstitutional. The majority decision signaled, however, that the Court might well conclude that executions of mentally retarded persons did offend "evolving standards of decency" if several more state legislatures had enacted bars to such executions.

The Penry majority also considered arguments from amicus briefs, filed by the American Association on Mental Retardation (AAMR) "and other groups working with the mentally retarded," stating that mentally retarded persons' deficits in

25. Id. at 316 (quoting Jurek v. Texas, 428 U.S. 262, 272-73 (1976)).
26. Id. at 317 (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)). The Court added that it had reaffirmed this position in holding that "'just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.'" Id. at 318 (quoting Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982)).
27. Id. at 328.
28. Id. at 340. When Texas retried Penry in 1990, he was again found guilty of capital murder and sentenced to death. Penry, 532 U.S. at 782. Penry's case once again found its way to the U.S. Supreme Court where, in Penry v. Johnson, 532 U.S. 782 (2001), the Court held that instructions given to the jury during resentencing still did not allow jurors to properly utilize mitigating evidence at sentencing, and that the jury instructions were internally inconsistent. Id. at 799-800. As a result, the Court once again vacated Penry’s death sentence and remanded his case to the trial court. Id. at 804.
29. In separate opinions, Justice Brennan (joined by Justice Marshall) and Justice Stevens (joined by Justice Blackmun), concurring in part and dissenting in part, argued that the Eighth Amendment prohibits execution of mentally retarded offenders. Penry, 492 U.S. at 341-50. Justice Brennan asserted that an offender's retardation always "limits his or her culpability so that...the ultimate penalty of death is always and necessarily disproportionate to his or her blameworthiness and hence is unconstitutional." Id. Justice Stevens asserted that the majority's discussion of competing arguments "respecting capital punishment of the mentally retarded...compels the conclusion that such executions are unconstitutional." Id. at 350.
31. Id. at 331.
32. Id. at 334-35 (summarizing data).
33. Id. at 334.
34. Id. at 335.
35. Id. at 331.
36. Id. at 335.
cognition and moral reasoning always prevented them from having the level of culpability needed to impose a death sentence.\textsuperscript{37} Although these deficits made mental retardation a mitigating factor that the sentencer “must be allowed to consider,”\textsuperscript{38} the \textit{Penry} majority could not “conclude that all mentally retarded people...—by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility—inevitably lack the cognitive, volitional, and moral capacity”\textsuperscript{39} to deserve a death sentence.\textsuperscript{39} As the then-current edition of AAMR’s classification manual pointed out, persons with mental retardation are “a heterogeneous population” with “marked variations in the degree of deficit manifested.”\textsuperscript{39}

Penry urged the Court to consider “mental age”—estimated by one expert in Penry’s case as six and one-half years—as a reason to bar his execution, because a normal child so young would certainly be spared the death penalty.\textsuperscript{40} Justice O’Connor noted, however, that mental age calculations were imprecise and did not factor in the capacity of mentally retarded persons to utilize adulthood experiences.\textsuperscript{41} Moreover, making a retarded person’s mental age a barrier to execution “could have a disempowering effect if applied in other areas of the law. Thus, on that premise, a mildly mentally retarded person could be denied the opportunity to enter into contracts or to marry by virtue of the fact that he had a ‘mental age’ of a young child.”\textsuperscript{42}

The heterogeneity of mentally retarded persons and the inherent imprecision in specifying mental impairment combined to convince a Supreme Court majority that it would be incorrect, and potentially stigmatizing, to declare that the diagnosis of mental retardation identified a group of persons who always lacked full moral accountability.\textsuperscript{43} Instead, said \textit{Penry}, a capital defendant with mental retardation should be judged as would any other such defendant—as a unique individual, any of whose personal traits might serve as a factor militating against the ultimate sanction.\textsuperscript{44} This majority position served as the backdrop against which jurors assessed the culpability of Daryl Renard Atkins, whom the Commonwealth of Virginia tried for capital murder in 1998.\textsuperscript{45}

\section*{III. THE \textsc{Atkins} Decision}

\section*{III.A. Prelude to Murder}

Though Daryl Atkins was still a teenager when he was arrested for murder, his intellectual limitations and potential criminality had been evident for years.

\begin{itemize}
\item 37. \textit{Id.} at 336.
\item 38. \textit{Id.} at 337.
\item 39. \textit{Id.} at 338.
\item 40. \textit{Id.} (quoting \textsc{Classification in Mental Retardation} 12 (Herbert J. Grossman, M.D. ed., Am. Ass’n on Mental Deficiency 1983)). Concerning the tenth edition, see \textit{infra} note 83 and accompanying text.
\item 41. \textit{Penry}, 492 U.S. at 339.
\item 42. \textit{Id.}
\item 43. \textit{Id.} at 340.
\item 44. \textit{Id.} at 338.
\item 45. \textit{Id.} at 319.
\end{itemize}
Documents prepared by Atkins' appeals attorneys report that he flunked and repeated second grade and received mainly Ds and Fs through seventh grade.\(^{47}\) School officials finally referred him for special education testing, but he never was evaluated.\(^{48}\) He got all Fs in eighth grade, and despite not meeting requirements for entering high school, he was placed in the ninth grade, where his average was D+.\(^{49}\) During the two years he spent in the tenth grade, he averaged a D-.\(^{50}\) He did better once he was placed in classes for "slow learners," but he still left school without graduating.\(^{51}\) By age eighteen\(^{52}\)—when he was arrested and charged with the murder of Eric Nesbitt—Atkins had not learned how to do laundry or cook meals for himself.\(^{53}\)

Atkins' serious antisocial behavior began in early adolescence. At age thirteen, he was convicted of breaking and entering and petty larceny,\(^{54}\) and he started abusing drugs in the eighth grade.\(^{55}\) At age seventeen, he was convicted of two counts of grand larceny for stealing from two other boys.\(^{56}\) A few months before Nesbitt's murder, Atkins participated with other youths in two armed robberies; during one of these he hit the victim on the head with a bottle.\(^{57}\) Two weeks before Nesbitt's murder, Atkins approached a woman, held a pistol to her head, hit and knocked her down with the gun, started to leave, then returned and shot her in the stomach.\(^{58}\)

At around midnight on August 16, 1996—having spent the day drinking alcohol and smoking marijuana—Atkins and William Jones drove to a 7-11 store, intending to rob a customer.\(^{59}\) Eric Nesbitt, an airman from Langley Air Force Base, became their victim. The two men robbed Nesbitt at gunpoint, then took him to a nearby ATM and forced him to withdraw $200.\(^{60}\) They then drove to a deserted area and, ignoring Nesbitt's pleas to leave him unharmed, shot him eight times.\(^{61}\) A videotape of the ATM transaction allowed police to identify and locate the two men.\(^{62}\) When arrested, Atkins told police that Jones had shot Nesbitt.\(^{63}\) Jones gave no statement when police caught him, but later, with a lawyer present, Jones told authorities...
Atkins did the shooting, and was allowed to plead guilty to first-degree murder in exchange for his testimony against Atkins.64

III.B. Atkins’s Trial and State Appeal

At Atkins’ trial, both men said the other shot and killed Nesbitt, but Jones’ testimony was “more coherent and credible,” and the jury convicted Atkins of capital murder.65 During the trial’s penalty phase, jurors heard about Atkins’ previous criminal activity.66 The defense responded with one witness, a psychologist, who testified about his interviews of people who knew Atkins, his examination of school and court records, and results of an IQ test he had administered on which Atkins scored only 59.67 Despite the psychologist’s testimony that Atkins was “mildly mentally retarded” and would not pose a threat to others in prison, the jury sentenced Atkins to death.68 Atkins had to have a second sentencing hearing because the original trial court had used a misleading verdict form.69 At the second hearing, jurors again heard psychological testimony about Atkins’ retardation, plus testimony from his father and grandmother.70 Nonetheless, Atkins again received a death sentence.71

On appeal, Atkins’ lawyers did not argue that execution would be disproportionate to penalties imposed for similar crimes in Virginia.72 Rather, they contended that Atkins should not be sentenced to death because he was mentally retarded.73 A majority of the Virginia Supreme Court justices rejected this contention, relying on the holding in Penry that mental retardation could be a mitigating factor, but not an absolute barrier to capital punishment.74 Two of the justices disagreed, however, stating that although retarded persons commit crimes, they are “less culpable for their criminal acts” than other offenders because they “have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way.”75

III.C. The U.S. Supreme Court’s Decision

Impressed by “the gravity of the concerns expressed” in the Virginia Supreme Court’s dissenting opinion, the U.S. Supreme Court agreed to hear Atkins’ case and to revisit their 1989 decision in Penry.76 Between 1989 and 2002, the number of states with laws barring death sentences for mentally retarded persons had grown

64. Id.
65. Atkins, 536 U.S. at 307
66. Id. at 308.
67. Id. at 308-09.
69. Id. at 457-58.
70. Brief for Petitioner in Atkins, supra note 47, at 14-17.
71. Id. at 20.
73. Id.
74. Id. at 319.
75. Id. at 325 (Hassell, J., dissenting).
76. 536 U.S. at 310.
from two to eighteen, and legislatures in three other states had taken steps toward adopting such laws.\textsuperscript{77} Because of the passage of so many laws since the \textit{Penry} decision, a Supreme Court majority opinion, written by Justice Stevens, stated that “[m]uch has changed” in the public’s attitude about executing retarded persons.\textsuperscript{78} This “national consensus,”\textsuperscript{79} which reflected “the evolving standards of decency that mark the progress of a maturing society,”\textsuperscript{80} required the Court to change the stance it had adopted just thirteen years earlier. Henceforth, a diagnosis of mental retardation would spare any murderer from the death penalty.

Footnote three in \textit{Atkins} quotes at length from diagnostic criteria that professional organizations have developed to identify people with mental retardation.\textsuperscript{81} The ninth edition\textsuperscript{82} of the AAMR’s classification manual states that the term “mental retardation” refers to substantial limitations in present functioning. It is 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. Mental retardation manifests [itself] before age 18.\textsuperscript{83}

The current diagnostic manual of the American Psychiatric Association (APA) describes mental retardation as

\begin{quote}
significantly subaverage general intellectual functioning...accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety...[with] onset...before age 18 years.\textsuperscript{84}
\end{quote}

Referring to such criteria, Justice Stevens’ opinion states that, “by definition,” persons with mental retardation “have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”\textsuperscript{85} Although retarded criminals may know right from wrong, their mental deficiencies “diminish their personal culpability....Thus, pursuant to

\begin{footnotes}
\item[77] Id. at 314-15.
\item[78] Id. at 314.
\item[79] Id. at 316.
\item[80] Id. at 311-12 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (describing criterion for interpreting the Eighth Amendment’s prohibition of cruel and unusual punishment)).
\item[81] Atkins, 536 U.S. at 309 n.3.
\item[82] Concerning the current edition, see infra note 83.
\item[83] AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) [hereinafter AAMR 9]. For the most current edition of this text see AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (10th ed. 2002) [hereinafter AAMR 10].
\item[84] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed., text revision 41, 2000) [hereinafter DSM-IV-TR]. This definition is quoted in Atkins, 536 U.S. at 309 n.3.
\item[85] Atkins, 536 U.S. at 318.
\end{footnotes}
our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.\textsuperscript{86}

\textbf{III.D. Official Praise}

In official mental health circles, reactions to \textit{Atkins} have been favorable. The AAMR and the APA were among the many mental health organizations that had signed on to amicus briefs urging the Supreme Court to ban execution of retarded persons.\textsuperscript{87} When the \textit{Atkins} decision was announced, Doreen Croser, AAMR's Executive Director, was "deeply grateful" that the Supreme Court stopped "this barbaric practice of killing persons who do not have the full intellectual capacity to understand the crime they committed....This is an important day for disability advocates and for our country."\textsuperscript{88} Renée Binder, M.D., chair of the APA's Committee on Judicial Action, praised the decision "because it recognizes that there are objective and reliable determinations of whether an individual has mental retardation when the assessment is done by qualified professionals with substantial experience."\textsuperscript{89}

Dr. Binder's comment echoes points emphasized in the amicus brief that the APA (along with the American Psychological Association and the American Academy of Psychiatry and Law) filed with the Supreme Court.\textsuperscript{90} The brief argued that making a psychiatric diagnosis the basis for a life-or-death legal decision would cause no scientific or practical problems.\textsuperscript{91} Both "incorrect diagnoses" and "unnecessary legal wrangling" could be avoided when determining whether an accused killer has mental retardation "because mental retardation can be identified using time-tested instruments and protocols with proven validity and reliability."\textsuperscript{92}

To diagnose a person as having mental retardation, states the brief, professionals must find that "three necessary criteria are all present: significant limitations in intellectual functioning, significant limitations in practical or 'adaptive' functioning, and onset before adulthood."\textsuperscript{93} The brief claims that psychologists and psychiatrists can make "an objective determination" about whether an accused killer suffers from mental retardation using established tests of intelligence and adaptive functioning.

\begin{footnotes}
\item \textsuperscript{86} Id. at 319.
\item \textsuperscript{87} Id. at 316 n.21.
\item \textsuperscript{88} American Association of Mentally Retarded Persons, \textit{AAMR Applauds U.S. Supreme Court Decision to Ban Execution of Persons with Mental Retardation}, at http://www.aamr.org/\textit{Policies/death\_penalty.shtml} (last updated July 5, 2002).
\item \textsuperscript{91} APoA/APaA/AAPL Brief, supra note 90, at 3.
\item \textsuperscript{92} Id.
\item \textsuperscript{93} Id.
\end{footnotes}
so that clinicians “undertaking separate assessments should reach the same conclusion.” Yet to anyone knowledgeable about mental retardation, the tests used to establish its presence, how clinicians diagnose mental retardation, and the status of psychiatry in general, this assertion is remarkable.

IV. IS MENTAL RETARDATION A DISTINCTIVE CATEGORY?

IV.A. Psychiatric Diagnosis: Utility versus Validity

In a recent article, psychiatrists Robert Kendell and Assen Jablensky describe the beneficial influence that current, ruled-based diagnostic schemes have had on psychiatric practice. The APA’s 1980 diagnostic manual established an approach to classifying psychiatric disorders, maintained in subsequent editions, in which diagnoses are not dependent on theories of pathogenesis. Instead, mental disorders are categorized using lists of explicit criteria, a minimum number of which are required to render a specific diagnosis. Among the benefits of a standard, psychiatric lingua franca are better diagnostic agreement and communication between mental health professionals and “improve[d] communication with the users of services, care-givers, and society at large.”

Although current diagnostic classifications help psychiatrists organize clinical information and make treatment decisions, that does not necessarily mean that those classifications accurately reflect reality. “Thoughtful clinicians” recognize the still-primitive nature of psychiatric diagnosis, state Drs. Kendell and Jablensky. Yet many a diagnostic concept nonetheless tends to become reified. That is, people too easily assume that it is an entity of some kind that can be invoked to explain the patient’s symptoms and whose validity need not be questioned....[T]he mere fact that a diagnostic concept is listed in an official nomenclature and provided with a precise, complex definition tends to encourage this insidious reification.

Drs. Kendell and Jablensky note that most medical specialities do not characterize disorders according to constellations of symptom, but by underlying pathological processes. With a few exceptions (e.g., Alzheimer’s disease), however, the entities that psychiatrists call “disorders” are not associated with or defined by patterns of neuronal pathology but represent only commonly occurring associations of symptoms and signs of illness. As Drs. Kendell and Jablensky put it, “Psychiatry

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94. Id.
97. Id.
98. Kendell & Jablensky, supra note 95, at 4. Atkins represents graphic evidence of this last point, in that the majority’s position directly applies easily understood psychiatric diagnostic criteria to a legal decision. See Atkins, 536 U.S. at 318.
99. Kendell & Jablensky, supra note 95, at 5.
100. Id.
101. Id. at 8-9.
102. Id. at 9.
is in the position—that most of medicine was in 200 years ago—of still having to define most of its disorders by their syndromes.”

Several well-informed commentators have produced evidence suggesting that there may be no natural boundary between recognized mental disorder and normality or health....Cloninger...stated firmly that “there is no empirical evidence” for “natural boundaries between major syndromes,” that “no one has ever found a set of symptoms, signs, or tests that separate mental disorders fully into non-overlapping categories,” and that “the categorical approach...is fundamentally flawed....” The accumulation of such evidence and opinions led Allen Frances, the chairperson of the task force that produced DSM-IV, and Helen Egger to comment gloomily, but perhaps presciently, that “we are at the epicycle stage of psychiatry where astronomy was before Copernicus and biology before Darwin. Our inelegant and complex current descriptive system will undoubtedly be replaced by...simpler, more elegant models.”

**IV.B. Defining Mental Retardation**

What is true of psychiatric diagnosis in general is especially true when it comes to mental retardation. The “by definition” language of the *Atkins* decision suggests that persons who receive the diagnosis of mental retardation comprise a group of individuals whose constellation of deficits clearly distinguishes them from non-retarded persons. Yet the diagnosis of mental retardation—despite its clinical usefulness—is an entirely artificial construct: the line that separates persons who receive this diagnosis from individuals whose mental capacities are only well below average is a changing and arbitrary one.

There is no better illustration of this last point than decisions of the AAMR to “update” its definition of mental retardation ten times over the past century. The most recent changes were published five days before the *Atkins* decision, in the tenth edition of the AAMR’s official classification manual. Although psychiatric

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103. *Id.*
104. *Id.* at 7 (citations omitted).
105. Though I describe here the flaws and limitations of current psychiatric diagnostic schemes, I am not claiming that mental illness is merely a social construct for identifying deviant individuals whose behavior makes us label them as “different.” Like almost all psychiatrists, I think that persons who are diagnosed with mental disorders generally have real (and often biologically based) problems, but our current diagnostic schemes are far from perfect. For the classic statement of the view that mental illnesses are really just problems in living, see Thomas S. Szasz, *The Myth of Mental Illness*, 15 AM. PSYCHOLOGIST 113 (1960) (“the concept of mental illness has outlived whatever usefulness it might have had and that it now functions merely as a convenient myth”); but see Michael S. Moore, *Some Myths About “Mental Illness”*, 32 ARCHIVES GEN. PSYCHIATRY 1483 (1975) for a discussion of five versions of the “mental-illness-is-a-myth” argument in radical psychiatry and reasons for rejecting each version.
106. *Atkins*, 536 U.S. at 310.
107. Psychiatrists refer to such persons as having “borderline intellectual functioning.” This is not deemed an official “disorder” but is one of several “conditions that may be a focus of clinical attention.” DSM-IV-TR, supra note 84, at 740.
109. AAMR 10, supra note 83.
diagnoses are often revised to reflect new understandings, scientific breakthroughs, or availability of new treatment approaches, sometimes social and political developments play a role. The AAMR advertisements for Mental Retardation: Definition, Classification and Systems of Supports state (unabashedly) that the 2002 edition proposes a state-of-the-art method to define, classify, and support an individual with mental retardation. In view of the recent U.S. Supreme Court decision to ban execution of persons with mental retardation, the 10th edition is a timely and critical resource to the states as they strive to come up with a current and fuller definition of mental retardation.

The AAMR currently defines mental retardation as “a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before the age of 18.” This characterization appears reasonably close to the previously quoted definition used by the American Psychiatric Association. Beyond this point, however, the two groups begin to part. The APA’s diagnostic manual categorizes mental retardation according to its global severity, that is, as either mild, moderate, severe, or profound. Since 1992, however, the AAMR has rejected this approach. Instead, diagnosticians are asked to examine patterns of limitations in a person’s everyday functioning, and to then describe the degree of support those persons need, which may be “intermittent,” “limited,” “extensive,” or “pervasive.”

If persons with mental retardation were members of a homogeneous, discrete biological or psychological category of persons, readily distinguished from persons without mental retardation, professional organizations might have an easier time settling on clinical criteria for diagnosing the condition. Some retarded persons exhibit impairments that make them easily identifiable: they have severe academic

110. See generally Herb Kutchins & Stuart A. Kirk, Making Us Crazy: DSM: The Psychiatric Bible and the Creation of Mental Disorders (1997). For example, the authors observe, although the conventional view claims that science and hard evidence underlie decisions about DSM, we find that political negotiation and advocacy—as well as personal interest—are just as, and often more, important in determining whether a diagnosis is created... [S]cience is often subordinated to social and political influences in the development and use of the diagnostic categories contained in DSM.

111. Id. at 16.


113. DSM-IV-TR, supra note 84, at 42-44.

114. As the AAMR states, rather than mold individuals into pre-existing diagnostic categories and force them into existing models of service, the supports approach evaluates the specific needs of the individual and then suggests strategies, services and supports that will optimize individual functioning. The supports approach also recognizes that individual needs and circumstances will change over time. Supports were an innovative aspect of the 1992 AAMR manual and they remain critical in the 2002 system.

problems during childhood, limited communication skills, and need, even as grown-ups, to be supervised at work or where they live. But such individuals make up only 15 percent of all retarded persons. Mildly retarded persons, who comprise about 85 percent of all retarded individuals, usually develop social and work skills that are "adequate for minimum self-support," though they need guidance in making complicated decisions. As preschoolers, they often are indistinguishable from non-retarded children. The medical conditions that can cause intellectual impairment are countless and include chromosomal defects, biochemical abnormalities, and infections that alter the brain's development before birth or during early childhood. Doctors often can find a distinct biological source of a child's retardation, although many things that can cause serious intellectual impairment do not always do so. In many cases of mild mental retardation, doctors can point to no specific medical reason for the person's limitations. Clinicians thus cannot use biological tests to decide whether a person is mentally retarded.

IV.C. Placement on the "Bell Curve"

Instead, professionals identify persons with mental retardation using tests that measure intelligence and social capabilities. When the intellectual capabilities of a large, randomly selected group of persons are measured by such tests, the result is what statisticians call a "normal distribution," often described as a "bell curve" (which gave the title to Herrnstein and Murray's controversial book on the subject). At one end of the distribution lie geniuses and on the other end are

\[
f(x) = \frac{1}{\sigma \sqrt{2\pi}} e^{-\frac{(x-\mu)^2}{2\sigma^2}}
\]

where \( \mu \) is the mean (center) of the distribution and \( \sigma \) is the standard deviation. WAYNE W. DANIEL, BIOSTATISTICS: A FOUNDATION FOR ANALYSIS IN THE HEALTH SCIENCES, THIRD EDITION 79 (1983). When the normal distribution is used to represent the scores of a population, the fraction of the total area under the curve that lies between two points along the distribution represents the fraction of the population having scores that fall within a particular range.

116. The impairments of these individuals would result in their being diagnosed, in the DSM-IV-TR classification system, as having moderate, severe, or profound retardation. DSM-IV-TR, supra note 84, at 43-44.
117. Id.
118. Id. at 43.
119. Id.
120. Id. at 45-46. For additional discussion of conditions that may cause mental retardation, see Developmental Problems, in THE MERCK MANUAL § 19, ch. 262 (Mark H. Beers, M.D., & Robert Berkow, M.D., eds., 2003), at http://www.merck.com/pubs/mmanual/section19/chapter262/262e.htm (last visited Aug. 26, 2003).
121. Id.
122. See DSM-IV-TR, supra note 84, at 45 ("In approximately 30%-40% of individuals seen in clinical settings, no clear etiology for the Mental Retardation can be determined despite extensive evaluation efforts. Specific etiologies are more likely to be identified in individuals with Severe or Profound Mental Retardation.").
123. See generally AAMR 10, supra note 83, at 24-25.
124. Mathematicians often call this a "Gaussian" distribution, a term that honors the important work of the German mathematician and astronomer Carl Friedrich Gauss (1777–1855). The normal distribution was first described by Abraham De Moivre in 1733, but his paper was not discovered until 1924. The formula for the curve is
profoundly impaired persons; bright, average, and dull folks make up the vast majority in the middle. Intelligence testing lets psychologists place an individual along the spectrum of cognitive ability because such testing produces a numerical result—an "intelligence quotient" or IQ score. Less-well-known tests let psychologists and mental retardation specialists rank individuals in terms of other “adaptive” capabilities—such as communication abilities, work skills, and caring for oneself—for which the population as a whole is also continuously distributed.

IQ scores are set up so that the “mean” or average score is 100, and the “standard deviation”—a statistical term referring to mathematical properties of the bell curve—is 15. Approximately ninety-five percent of a normally distributed population lies within two standard deviations of the mean, and individuals lying outside this arbitrary statistical boundary are often deemed “abnormal.” A cut-off IQ score of “approximately 70”—two standard deviations below the mean score of 100—is the intelligence score used in the APA’s current diagnostic manual to separate persons with mental retardation from those designated as having “borderline intellectual functioning.”

The modifier “approximately” in the APA’s diagnostic criteria reminds mental health professionals that using 70 as a cut-off score reflects a statistical convention rather than a natural boundary between two distinctive groups of individuals. When conscientious mental health professionals interpret IQ scores and plan treatment interventions, they keep in mind that someone who scores 69 on an IQ test is practically indistinguishable from someone who scores 71, and that two persons with an IQ of, say, 67 and 73 have much more in common with each other than with a person who scores 88. If pre-Atkins state statutes and post-Atkins decisions are any guide, however, legislatures and courts often ignore such considerations when they put Atkins into practice. Of the eighteen state statutes in effect when Atkins was...
decided, eleven had language that made specific IQ scores part of the criteria for exempting a defendant from facing a possible death penalty.\textsuperscript{130}

Some subsequent state court decisions have followed the same pattern. For example, in defining mental retardation for purposes of capital sentencing, the Oklahoma Court of Criminal Appeals required that “no person shall be eligible to be considered mentally retarded unless he or she has an intelligence quotient of seventy or below.”\textsuperscript{131} The Ohio Supreme Court’s declaration of “substantive standards and procedural guidelines in determining whether convicted defendants facing the death penalty are mentally retarded” begins with the clinical definitions promulgated by the AAMR and APA. After noting, however, that most existing “state statutes prohibiting the execution of the mentally retarded require evidence that the individual has an IQ of 70 or below,” the Ohio Supreme Court’s definition adds to clinicians’ criteria “a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70.”\textsuperscript{132} Using such precise cut-offs mistakenly suggests that a one-point difference in two persons’ scores reflects a significant difference in their cognitive capacity.

\textbf{IV.D. Reliability of Measurements}

The availability of IQ test scores suggests that mental health professionals can offer courts objective, precise methods for deciding who is, or is not, impaired enough to receive the death penalty. Yet the numbers that IQ tests generate are far from being perfectly reliable measurements of a person’s cognitive ability. Under the best conditions, IQ tests have a “measurement error” of about five points.\textsuperscript{133} An individual who scores, say, 68 on one administration has a ninety-five percent chance of scoring between 63 and 73 on subsequent administrations. More than half

\begin{itemize}
  \item[\textsuperscript{130}] MD. ANN. CODE § 2-202(b)(1)(i) (2002) (IQ “of 70 or below”); KY. REV. STAT. § 532.130(2) (2002) (IQ “of 70 or below”); TENN. CODE ANN. § 39-13-203(a)(1) (IQ “of 70 or below”); N.M. STAT. ANN. § 31-20A-2.1(A) (2003) (IQ “of 70 or below”); ARK. CODE ANN. § 5-4-618 (2) (“rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below”); WASH. REV. CODE § 10.95.030(2)(c) (2003) (defining significantly below average intellectual functioning as IQ less than 70); NEB. REV. STAT. § 28-105.01(3) (stating that IQ less than 70 is “presumptive evidence of mental retardation”); S.D. CODIFIED LAWS § 23A-27A-26.2 (stating that IQ less than 70 is “presumptive evidence of mental retardation”); ARIZ. REV. STAT. ANN. 13-703.02 (2003) (pre-screening IQ score of 75 triggers additional assessment; IQ less than 65 establishes rebuttable presumption of mental retardation); FLA. STAT. ANN. § 921.137(1) (2002) (“significantly subaverage general intellectual functioning’ means performance that is two or more standard deviations from the mean score on a standardized intelligence test”); N.C. SESS. LAW 2001-346 § 1 (“significantly subaverage general intellectual functioning’ means performance that is two or more standard deviations from the mean score on a standardized intelligence test”).
  \item[\textsuperscript{131}] Murphy v. State, 54 P.3d 556, 568 (Okla. Crim. App. 2002).
  \item[\textsuperscript{132}] State v. Lott, 779 N.E.2d 1011, 1014 (Ohio 2002).
  \item[\textsuperscript{133}] DSM-IV-TR, supra note 84, at 41. For this reason, a leading text on child assessment states, “Individuals who use the test findings need to know that the IQ and other major scores used to make decisions about the child are not perfectly accurate because they inherently contain measurement error.” JEROME M. SATTLER, ASSESSMENT OF CHILDREN: COGNITIVE APPLICATIONS 109 (4th ed. 2001). Similar considerations underlie recommendations in psychologists’ official technical manual to report IQ scores using a range (or interval) of values: \[ \text{[R]eporting a score in terms of confidence intervals is a means of expressing the reliability of that test score. Confidence intervals assist the examiner in test interpretation by delineating a range of scores in which the examinee’s “true” score most likely falls, and reminds the examiner that the observed score contains measurement error.} \]
\end{itemize}

\textbf{THE PSYCHOLOGICAL CORPORATION, 1997 WAIS-III–WMS-III TECHNICAL MANUAL, 182.}
of those persons whose IQ results fall in the mildly retarded range receive scores of 65 to 70,\textsuperscript{134} that is, their scores' margin of error will include 70.

Another source of uncertainty stems from the fact that, for many items, the test administrator has to decide how many points a subject's response deserves. In normal clinical use, these imperfections do not matter a great deal. When testing a defendant for whom a one- or two-point change in IQ score has life-and-death implications, however, clinicians may have a hard time being dispassionately "objective" about how they interpret a response. The net result of all these imperfections is that judges, or juries,\textsuperscript{135} will often have a hard time deciding on which side of the arbitrary line between mentally retarded and merely "dull" a defendant falls.

If IQ testing generates nettlesome problems with imprecision and measurement error, measuring adaptive functioning—a key feature defining mental retardation\textsuperscript{136}—is even trickier. As one leading text on behavioral assessment points out, several

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{134} On an IQ test for a normally distributed population with a mean of 100 and standard deviation of 15, 1.29 percent of results can be expected to fall between 65 and 70, and 2.14 percent of results will fall between 55 and 70. Thus, about 57 percent of the results between 55 and 70 lie between 65 and 70. See DANIEL, supra note 124, at 491 (Table F).
\item \textsuperscript{135} The issue of who is constitutionally permitted or required to make the ultimate determination about mental retardation goes far beyond the scope of this article. In \textit{Ring v. Arizona}, 122 S. Ct. 2428 (2002), the U.S. Supreme Court held that aggravating factors in Arizona's death penalty statute operate as "the functional equivalent of an element of a greater offense," and that the Sixth Amendment therefore requires that a jury—not merely a judge—must determine that they are present if a death sentence is to be imposed. \textit{Id.} at 2443 (quoting \textit{Apprendi v. New Jersey}, 530 U.S. 466, 494 n.19 (2000)). Whether, following \textit{Atkins}, the \textit{absence} of mental retardation is an aggravating factor that must be determined by jurors remains a still open question. Yet, even if courts or statutes assign this determination to jurors, judges may still play a key role. For example, \textit{Murphy v. State} remands a condemned prisoner's case back to the district court for an evidentiary hearing on the sole issue of Petitioner's claim of mental retardation in accordance with this Order. At that hearing,...the District Judge shall determine if Petitioner has raised sufficient evidence (at trial, on appeal, or at the evidentiary hearing) of his mental retardation...for the issue of mental retardation to be decided as a question of fact by a jury at a resentencing hearing. \textit{Murphy}, 54 P.3d at 570. \textit{Murphy} appears to give the judge a gate-keeping role and the jury the ultimate decision-making role. However, the decision also states.

The trial judge's duty at an \textit{Atkins} hearing [on mental retardation] is to determine whether or not the factual determinations relating to the issue of mental retardation were imposed by the jury under the influence of passion, prejudice, or any other arbitrary factor. In administering this duty, the trial judge shall conduct his or her own \textit{de novo} review of the evidence presented at trial....Where a trial judge determines that a defendant is mentally retarded and, consequently, that the jury's decision finding the defendant not mentally retarded was due to the influence of passion, prejudice, or other arbitrary factor, that issue may be raised as a proposition of error for this Court to consider as part of its mandatory sentence review. \textit{Id.} at 569.

By contrast, the Ohio Supreme Court has placed the decision-making power solely in the hands of the trial judge:

The trial court shall make written findings and set forth its rationale for finding the defendant mentally retarded or not mentally retarded. We believe that these matters should be decided by the court and do not represent a jury question. In this regard, a trial court's ruling on mental retardation should be conducted in a manner comparable to a ruling on competency (i.e., the judge, not the jury, decides the issue).

\textit{Lott}, 779 N.E.2d at 1015.
\item \textsuperscript{136} See SATTLER, supra note 126 (describing DSM-IV-TR definition of mental retardation).
\end{enumerate}
\end{footnotesize}
features of adaptive behavior make it "difficult to define." Adaptive behavior is really not separable from intelligence; individuals use both cognitive and behavioral abilities to master social problems and function in their environment. What counts as adaptive behavior changes as one grows older: during school years, academic performance is crucial, but in adulthood, living independently and ability to earn a living are paramount. Adaptive behavior is also a function of a person's living situation and the demands of his unique social environment. Some people can function adequately in a close-knit rural town but cannot cope with demands of life in an urban metropolis. Far more than is the case with measuring intelligence, "adaptive behavior represents the interaction of personal, cognitive, social, and situational variables." Finally, the various available instruments for measuring adaptive behavior may give different results. This may be a consequence of differences in the instruments’ content, the type of responses the instruments require, the times at which the instruments were created, the types of persons used to develop the instruments, or simply the persons who do the ratings.

V. DIAGNOSES, LEGAL CATEGORIES, AND DISCRIMINATION

The APA’s support of the Atkins decision is strikingly at odds with organized psychiatry’s well established opposition to using diagnostic categories for legal and social purposes. In a 1996 amicus brief filed in Kansas v. Hendricks—a Supreme Court case concerning post-prison confinement of sex offenders—the APA explained why legal decisions should not be determined by categories derived from a medical diagnostic scheme:

The classification schemes are developed and periodically altered, through comprehensive field trials, research, and analysis, to serve diagnostic and statistical functions, forming a common (and always imperfect) language for gathering clinical data and for communication among mental health professionals....Such comprehensive classification schemes are not...designed to identify those [persons who are] subject to various legal standards....Not all

137. Id. at 190.
138. Id.
139. Id.
140. Kansas v. Hendricks, 521 U.S. 346 (1997) (holding that Kansas's Sexually Violent Predator Act, which permits civil commitment of persons who, due to a mental abnormality or a personality disorder, are likely to engage in "predatory acts of sexual violence," satisfies substantive due process requirements and violates neither the Constitution's double jeopardy prohibition nor its ban on ex post facto lawmaking).
141. Leroy Hendricks suffered from pedophilia. Hendricks, 521 U.S. at 360. According to DSM-IV-TR, pedophilia is diagnosed when a person is sixteen years or older, over a period of at least 6 months, [has] recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger)....[t]he person has acted on these urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty[; and]...[t]he person is at least age 16 years and at least 5 years older than the child or children.

DSM-IV-TR, supra note 84, at 572.
individuals who come within a DSM-IV\textsuperscript{142} category suffer an impairment that diminishes their autonomy.\textsuperscript{143}

In recent decades, each edition of the APA’s diagnostic manual has included a “Cautionary Statement” stating that the manual’s purpose is to provide clear descriptions of diagnostic categories in order to enable clinicians and investigators to diagnose, communicate about, study, and treat people with various mental disorders. The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility.\textsuperscript{144}

The APA’s diagnostic manuals also have emphasized the limitations of the diagnostic schemes they exemplify. The manuals have aimed not to categorize people, but to categorize their mental disorders. Therefore, it is wrong to believe that all individuals who are diagnosed with a particular disorder “are alike in all important ways....[I]ndividuals sharing a diagnosis are likely to be heterogeneous even in regard to the defining features of the[ir] diagnosis and boundary cases will be difficult to diagnose in any but a probabilistic fashion.”\textsuperscript{145} Noting that the “imperfect fit” between legal and medical categories poses “risks” and “dangers” of misusing diagnoses, the current manual warns (as did its predecessor) that, when deciding whether a person meets a particular legal standard of responsibility, “additional information is usually required beyond that contained in the [manual’s] diagnosis. This might include information about the individual’s functional impairments and how these impairments affect the particular abilities in question.”\textsuperscript{146} In other words, until \textit{Atkins}, the APA consistently opposed equating a person’s moral and legal responsibility to his psychiatric diagnosis.

Since its enactment in July 1990, the APA has vigorously endorsed the Americans With Disability Act (ADA), which provides broad protections against discrimination based on mental or physical disabilities.\textsuperscript{147} This position is consistent with organized psychiatry’s longstanding wish to reduce the discrimination and stigma associated with having a mental disorder.\textsuperscript{148} In a 1997 position statement, the

\textsuperscript{142} “DSM-IV” refers to AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter DSM-IV]. This was the current edition of the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS when this statement was written.


\textsuperscript{145} DSM-IV-TR, supra note 84, at xxxi.

\textsuperscript{146} Id. See also DSM-IV, supra note 142, at xxii (containing the same language as DSM-IV-TR).

\textsuperscript{147} 42 U.S.C. §§ 12101 et seq. (1994).

\textsuperscript{148} See Eve Bender, With Politics and Mental Illness, the More Things Change, PSYCHIATRIC NEWS, Nov. 1, 2002, at 10 (describing the persistence of bias against political candidates with mood disorders) (quoting Steven Mirin, M.E., APA Medical Director, who stated, “The fight against stigma has been waged on a number of fronts...[including] the arena of public education, where the APA has a leadership role”). Two former APA presidents have co-edited a book aimed at reducing the stigma associated with mental illness. See STIGMA AND MENTAL ILLNESS (Paul Fink & Allan Tasman eds., 1992). \textit{See also} Paul Jay Fink, Dealing with Psychiatry’s Stigma, 37 HOSP. COMM. PSYCHIATRY 814 (1986) (contending that “[t]he stigma associated with psychiatry is the most
APA criticized allowing psychiatric diagnoses to influence decisions about employment, insurance, housing, or credit, because such decisions often reflect widespread but baseless beliefs about mental conditions. Indeed, said the APA, categorical distinctions based on mental disorder are tantamount to class discrimination because they assume that everyone who has received a particular diagnosis or treatment is identical. In fact, individuals with the same diagnosis...may manifest different kinds of symptoms; even when the symptoms are the same, they may vary widely in their severity. Nor is there a direct or simple connection between symptoms severity and impairments that may be relevant to a particular decision.

Yet Atkins makes exactly this kind of “categorical distinction”: it says explicitly that all persons diagnosed with mental retardation necessarily lack the capacity to accept full moral responsibility for their actions. Justice Scalia made this very point in his dissent: “[T]he Court concludes that no one who is even slightly mentally retarded can have sufficient ‘moral responsibility to be subjected to capital punishment for any crime. As a sociological and moral conclusion that is implausible.” Justice Scalia might have added that, in many social contexts, making blanket decisions about people because of a mental disability—for example, denying them jobs, accommodations, or public services out of a belief that their disability makes them less responsible—has become illegal since the passage of the ADA. The more progressive approach—the approach mandated by the ADA and (usually) advocated by mental health professionals—is to make an individualized decision about a defendant, taking into account his mental condition, but not allowing it to determine his moral worth. Individualized decision making was the capital sentencing process that the Supreme Court’s Penry decision had recommended and that two sentencing juries implemented when they condemned Atkins. After hearing ample testimony about his mental retardation, jurors concluded, as Justice Scalia put it, that Atkins’ condition “was not a compelling reason to exempt him from the death penalty in light of the brutality of his crime and his long demonstrated propensity for violence.”

In criticizing his colleagues for their support of the majority’s position in Atkins, psychologist-attorney Donald Bersoff has voiced the same concerns about an absolute ban on executing retarded persons that Justice O’Connor had articulated in

critical problem facing the profession”).

150. Id.
151. Atkins, 536 U.S. at 321.
152. Id. at 339 (Scalia, J., dissenting) (quoting Thompson v. Oklahoma, 487 U.S. 815, 863-64 (1988) (Scalia, J., dissenting)).
154. See state statutes, supra note 130.
155. Penry, 492 U.S. at 320-22; Atkins, 536 U.S. at 308-09.
156. Atkins, 536 U.S. at 339 (Scalia, J., dissenting).
Penry. The support by mental health professionals of the barring of executions of retarded persons, Professor Bersoff argues,

is short-sighted....As important as it is to protect those who cannot protect themselves, it is equally important to promote the right of all persons to make their own choices, and, as a corollary, to be accountable for those choices. It is simply untrue that no person with mental retardation is incapable of carrying out a horrible murder with the requisite intent or foresight. If we accept the concept of blanket incapacity, we relegate people with retardation to second class citizenship, potentially permitting the State to abrogate the exercise of such fundamental interests as the right to marry, to have and to rear one’s children, to vote, or such everyday entitlements as entering into contracts of making a will.

VI. CONSEQUENCES OF ATKINS

VI.A. Broad Discretion in Implementing Atkins

The most obvious and immediate consequences of Atkins stem from the substantive and procedural latitude given to state courts and legislatures that will implement the decision. The decision uses the diagnostic criteria of experts in mental disability to show that persons with mental retardation are “by definition” less culpable and can never deserve a death sentence. Yet nothing in Atkins requires states to follow diagnostic criteria used by mental health professionals when they effectuate the decision’s constitutional mandate. To the contrary, the Atkins majority specifically left the task of codifying criteria for mental retardation to the states.

In many states with pre-Atkins statutes, specific IQ scores are either required for a diagnosis of mental retardation or constitute presumptive evidence for or against that diagnosis. Such laws potentially give results of a single administration of a single intelligence measure far more weight than mental health professionals believe is warranted and reflect a mode of decision making that is explicitly rejected in the previously quoted APA and AAMR diagnostic criteria. In most cases, statutes use two standard deviations below the mean IQ score as the cut-off point, but in some statutes, other scores (e.g., 65 or 75) are used for key decisions. In addition to adopting different IQ cut-off scores, states may create other substantive variations in their definitions of mental retardation. Also, states would appear to have some latitude in procedural matters, e.g., statutory provisions for testing and introducing

158. Id.
159. See Atkins, 536 U.S. at 318.
160. Id. at 317 (quoting Ford v. Wainwright, 477 U.S. 399, 416-17 (1986) (“As was our approach in Ford v. Wainwright, with regard to insanity, ‘we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.’”)).
161. See state statutes, supra note 130.
162. See section III.C, supra.
163. See state statutes, supra note 130.
164. ARK. CODE ANN. § 5-4-618 (a)(2) (2003) (“rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below”).
165. ARIZ. REV. STAT. ANN. 13-703.02(C) (pre-screening IQ score of 75 triggers additional evaluation).
evidence about intellectual functioning. The result could well be that, when states implement the *Atkins* ban, some will do so in ways that will permit execution of persons whom many mental health professionals would deem mentally retarded. Also, varying definitions and procedures could mean that some states will execute persons whom the statutes of other states would have exempted from the death penalty.

The problems with giving courts or legislatures the job of defining a mental disorder are reflected in some early post-*Atkins* decisions. At least one state supreme court has stated that it would leave this task to the legislature:

> It would not be appropriate for this court to usurp the authority of the legislature by fashioning procedural and substantive standards in relation to the *Atkins* hearing. Such matters are best left to the determination of the legislature following discussion and debate. The legislature may choose to eventually adopt procedural standards to govern *Atkins* issues that arise prior to conviction and sentence. We recognize that the circuit courts will have to conduct these hearings, at least for the time being, without definitive guidance from the legislature or from this court.\footnote{People v. Pulliam, No. 89141, 2002 Ill. LEXIS 947, *62 (Ill. Oct. 18, 2002).}

By contrast, in September 2002, the Ohio Supreme Court ordered, sua sponte, that oral argument be held on the “appropriate procedures” and the “appropriate substantive standard” for deciding whether a capital defendant has mental retardation,\footnote{State v. Lott, 774 N.E.2d 1220, 1221 (Ohio 2002).} and subsequently created a definition that gives decision-making power to the trial court.\footnote{State v. Lott, 779 N.E.2d 1011, 1015 (Ohio 2002).}

When the Oklahoma Court of Criminal Appeals faced the task of creating its state’s definition of mental retardation, it observed,

> That puts this State in an interesting position, considering our legislature has attempted to do just that, but our Governor has apparently disagreed with the legislature’s efforts. Thus, the task falls upon this Court to develop standards to guide those affected until the other branches of government can reach a meeting of the minds on this issue.\footnote{Murphy v. State, 54 P.3d 556, 567 (Okla. Crim. App. 2002).}

Oklahoma’s definition is substantially similar to the one found in DSM-IV-TR and requires the defendant “to prove he or she is mentally retarded by a preponderance of the evidence at trial.”\footnote{Id. at 568.} The court notes that “[i]ntelligence quotients are one of the many factors that may be considered,” and “are not alone determinative” of mental retardation.\footnote{Id.} Despite this, the court’s definition states that “to be considered mentally retarded,” a defendant must have “an intelligence quotient of seventy or below, as reflected by at least one scientifically recognized, scientifically approved, and contemporary intelligent quotient test.”\footnote{Id. (citations omitted).}
At least one federal court has already commented on the lack of direction in *Atkins*. In *Bell v. Cockrell*, the court had to determine "what to do with a capital habeas case in which the petitioner has consistently offered clinical evidence of mental retardation since his first trial, which took place in the 1970's." Discussing the disagreement between the petitioner's and Texas's beliefs about handling the case, the court said,

What this divergence of views exhibits is the welter of uncertainty following *Atkins*.... The Supreme Court neither conclusively defined mental retardation nor provided guidance on how its ruling should be applied to prisoners already convicted of capital murder.... In these circumstances, inferior federal courts have no useful role to play until and unless following *Atkins*, a death sentence is reaffirmed or again imposed on Bell by the state courts. Just how the state courts will implement *Atkins*, we cannot say.

VI.B. Misplaced Fears of Faking

The belief that exculpatory mental problems are easily faked has deep roots in Anglo-American law. As Professor Michael Perlin has noted, fear of feigned mental illness has "permeated the American legal system for over a century," and "the fear of feigned insanity and the distrust of expert witnesses' ability to identify malingering behavior continues to dominate insanity defense jurisprudence." It is therefore not surprising that Justice Scalia's *Atkins* dissent raises the fear of faking mental retardation by capital defendants, asserting that exempting mentally retarded persons from the death penalty will turn "the process of capital trial into a game," and that a simple reading of the official AAMR and APA definitions of mental retardation shows "this condition can readily be feigned." In fact, examination of diagnostic criteria suggests that mental retardation is hard to fake successfully, because the criteria require evidence that retardation began during childhood—evidence, that is, that the condition existed years before the defendant committed a capital crime. On occasion—for example, when young criminals like Atkins are involved—information about the defendant's childhood academic performance and social functioning may be sparse or ambiguous. In these cases, the defendant's current behavior (feigned or genuine) may influence what mental health experts conclude about his life-long capacities. But a possibility of spurious claims is not a reason for barring all legal claims of a certain sort, assuming that the reason for allowing such claims is sound in the first place.

173. Bell v. Cockrell, 310 F.3d 330 (5th Cir. 2002).
174. Id. at 331.
175. Id. at 332-33.
176. Joel Eigen, *Historical Developments in Psychiatric Forensic Practice: The British Experience*, 6 INT'L J.L. & PSYCHIATRY 423, 427-28 (1984) (quoting statement made in 1681 by Sir Robert Holbron that "a man may counterfeit himself to be mad, he may do it so cunningly as it cannot be discerned whether he be mad or so").
180. See, e.g., Dillon v. Legg, 441 P.2d 912, 917-18 (Cal. 1968) (stating the possibility of "fraudulent assertions...in isolated cases does not justify wholesale rejection of the entire class of claims in which that potentiality arises").
legislatures do not like to be perceived as coddling violent criminals, but concerns about faking did not stop many states from adopting statutory bars against executing the mentally retarded.\textsuperscript{181} Presumably, courts can deal with false claims of mental retardation as well as they deal with false claims of medical and psychological problems that arise in a variety of other legal circumstances. Moreover, in considering Justice Scalia's concern, it is important to recognize that assessing malingering is a core skill for mental health clinicians,\textsuperscript{182} particularly in contexts where being (or appearing) ill may confer advantages (e.g., avoiding punishment, financial awards) on the evaluatee.\textsuperscript{183}

Malingering is not, strictly speaking, a psychiatric diagnosis, because a feigned disorder is not, after all, a real disorder. Yet the APA diagnostic manual lists malingering as one of the "conditions that may be a focus of clinical attention" and tells clinicians,

Malingering should be strongly suspected if any combination of the following is noted:
1. Medicolegal context of presentation (e.g., the person is referred by an attorney to the clinician for examination)
2. Marked discrepancy between the person's claimed stress or disability and the objective findings [i.e., what the clinician directly observes in the evaluatee's behavior]
3. Lack of cooperation during the diagnostic evaluation and in complying with the prescribed treatment regimen
4. The presence of Antisocial Personality Disorder\textsuperscript{184}

Mental health professionals can use several tests specifically designed to detect feigned psychological problems, including the validity scales on the Minnesota Multiphasic Personality Inventory-2 (MMPI-2),\textsuperscript{185} the Structured Interview of Reported Symptoms (SIRS),\textsuperscript{186} the Validity Indicator Profile (VIP),\textsuperscript{187} and the Test

\textsuperscript{181} Atkins, 536 U.S. at 315-16. The Atkins Court states, Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition. Id.

\textsuperscript{182} See CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION (Richard Rogers ed., 2nd ed. 1997), a leading text on the detection of malingering [hereinafter CLINICAL ASSESSMENT].

\textsuperscript{183} See generally Loren Pankratz & Laurence M. Binder, Malingering on Intellectual and Neuropsychological Measures, in CLINICAL ASSESSMENT, supra note 182, at 223-36 (describing general principles of assessment and examples of tests to detect malingered cognitive problems). These authors comment that "the clinician should attend to the possibility of malingering any time financial issues or other external incentives are present." Id. at 232.

\textsuperscript{184} DSM-IV-TR, supra note 84, at 739.

\textsuperscript{185} See Roger L. Greene, Assessment of Malingering and Defensiveness by Multiscale Personality Inventories, in CLINICAL ASSESSMENT, supra note 182, at 169-207 (describing development and use of various MMPI scales in detecting malingering).

\textsuperscript{186} See Richard Rogers, Structured Interviews and Dissimulation, in CLINICAL ASSESSMENT, supra note 182, at 169-207 (describing development, evaluation, and applications of the SIRS).

\textsuperscript{187} See Richard I. Frederick et al., Validation of a Detector of Response Bias on a Forced-Choice Test of Nonverbal Ability, 39 Neuropsychology 118 (1994) (describing the evaluation of the VIP).
of Memory Malingering (TOMM). 188 Recent scholarship has offered clinicians new perspectives on the mathematical interpretation of results from malingering tests. 189

VI.C. A Psychiatric Can of Worms 190

Rather than worry about an onslaught of malingered mental retardation in the wake of Atkins, courts should ready themselves to address the decision’s most obvious logical 191 consequence: the claim that defendants with other serious mental limitations deserve diagnosis-based death penalty exemptions. Indeed, prominent psychiatrists called for this shortly after Atkins was announced. 192 Dr. Diane H. Schetky, the principal author of the APA’s position statement opposing death sentences for persons who commit crimes as juveniles, believes that “our current knowledge of neurological and psychological developments in adolescents” means that the Supreme Court’s arguments for sparing retarded persons from the death penalty “can and should be applied to individuals who commit their crimes as juveniles.” 193 Former APA president Dr. Alan A. Stone, noting that many forensic

188. See Tom N. Tombaugh, The Test of Memory Malingering (TOMM): Normative Data from Cognitively Intact and Cognitively Impaired Individuals, 9 PSYCH. ASSESSMENT 260 (1997) (describing the development and validation of the TOMM).


190. In its amicus brief to the Supreme Court in Atkins, the Criminal Justice Legal Foundation (CJLF) suggested that U.S. law on who might receive capital punishment was, after a “torturous” process, now fairly settled, but declaring a constitutional bar to executing mentally retarded persons would “reopen this can of worms” by causing “a disruption of the important and complex body of law surrounding capital punishment” that had developed since Furman. Brief of Amici Curiae of the Criminal Justice Legal Foundation at 7-8, Atkins v. Virginia, 536 U.S. 304 (2002) (No. 00-8452). The CJLF brief suggests that exempting persons with mental retardation would increase jurisprudential complexity and uncertainty as courts and legislatures attempted to predict future developments in death penalty law—that is, it would reopen a legal can of worms. This section suggests that by giving the Court’s imprimatur to equating moral incapacity with one’s mental disability, Atkins will force courts to examine the moral incapacities associated with other mental disabilities and has thus opened a psychiatric can of worms at least as messy as the legal problems that the CJLF feared.

191. As section VI.C explains, the whole notion of equating a particular mental disability with moral desert involves a logical mistake. Here, the phrase “logical consequence” only implies that, in establishing, as a constitutional principle, that defendants with mental retardation are less culpable and therefore deserve a death penalty exemption, the Supreme Court has obligated itself (and lower courts) to consider whether defendants with other, equally disabling mental disabilities also deserve an exemption. To refuse to do so would be logically inconsistent with Atkins.

192. Law professors immediately had similar thoughts. See RALPH REISNER, ET AL., 2002 UPDATE, LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 17 (3d ed. 2002) (discussing the logical extension of Atkins’ protections to persons with mental illnesses); see also Christopher Slobogin, What Atkins Could Mean for People with Mental Illness, 33 N.M. L. REV. 293 (2003). Every lawyer and judge with whom the author has discussed the Atkins decision believes that it entails an exemption for persons with mental illness similar to the exemption now available for persons with mental retardation.

193. Diane H. Schetky, Revisit Execution of Juveniles, CLINICAL PSYCHIATRY NEWS, Sept. 2002, at 26. Puzzlingly, the Supreme Court declined to do this when, in a 5-4 decision in In Re Stanford, it refused to grant certiorari. 123 S. Ct. 472 (2002). As Justice Stevens commented in his dissent, the petitioner asked the Court “to hold that his execution would be unconstitutional because he was under the age of 18 when he committed his offense...There are no valid procedural objections to our reconsideration of the issue now, and, given our recent decision in Atkins v. Virginia,...we certainly should do so.” Id. at 472 (Stevens, J., dissenting) (citations omitted).
psychiatrists favor total abolition of the death penalty, believes that if executing the mentally retarded is unconstitutional, then “it is certainly reasonable for the abolitionists to argue that it is equally unconstitutional to execute the mentally ill.” Mental illness and mental retardation have similar causes, says Dr. Stone, and “the mentally ill suffer from many of the same limitations” that (in the Supreme Court’s view) diminish the blameworthiness of retarded persons. “I believe the time will come when we recognize that it is equally indecent to execute the mentally ill.”

VI.C.1. Cognitive Disorders Acquired after Childhood

Obvious candidates for mental illness-based exemptions would be defendants who acquire, after childhood, the types of intellectual and functional deficits that persons with mental retardation display throughout their lives. Because of their adulthood onset, psychiatrists call such conditions “cognitive disorders” or “personality changes caused by medical conditions,” rather than mental retardation. Examples include mental deterioration that sometimes follows drug abuse or brain-damaging events such as head injuries, infections, and Alzheimer’s disease. Particularly when the brain’s frontal lobes are affected, persons lose their ability to integrate information, utilize experience, and control impulses. If a psychiatric definition is all that is required to lead courts to believe that retarded defendants are

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194. Psychiatrists with special expertise in and knowledge about conducting evaluations that are used in making legal determinations.
196. Id.
197. Id.
198. See generally DSM-IV-TR, supra note 84, at 135-80 (discussing and setting out diagnostic criteria for various deliria, dementias, and amnestic disorders).
199. Id. at 187. DSM-IV-TR characterizes a “personality change due to a general medical condition” as “a persistent personality disturbance that is judged to be due to the direct physiological effects of a general medical condition....Common manifestations of the personality change include affective instability, poor impulse control, outbursts of aggression or rage grossly out of proportion to any precipitating psychosocial stressor, marked apathy, suspiciousness, or paranoid ideation.” Id. For further description and diagnostic criteria, see id. at 187-90.
200. Id. at 168-70 (discussing conditions and diagnostic criteria for “substance-induced persisting dementia”). In contrast to states of intoxication or delirium caused by drugs or other chemical compounds, this condition “persists long after the individual has experienced the effects of Substance Intoxication or Substance Withdrawal.” Id. at 169. Among the compounds that may produce this condition are inhalants, toxic medications, antiepileptic drugs, heavy metals, industrial solvents, and insecticides. Id.
201. The official nomenclature calls this last condition “dementia of the Alzheimer’s type.” Id. at 154-58. For a discussion of dementias with other causes, see id. at 158-67.
202. See Clifford B. Saper et al., Integration of Sensory and Motor Function: The Association Areas of the Cerebral Cortex and the Cognitive Capabilities of the Brain, in PRINCIPLES OF NEURAL SCIENCE 356-58 (Eric R. Kandel et al. eds., 4th ed. 2000) (stating that lesions in or damage to the frontal cortex is associated with deficits in “active maintenance of information relevant to an ongoing behavior,” i.e., “working memory”; “damage to the frontal lobe [causes] difficulty performing tasks that involve planning”); see also Markku Linnola & Dennis S. Charney, The Neurobiology of Aggression, in NEUROBIOLOGY OF MENTAL ILLNESS 855, 860 (1999) (discussing association between anterior frontal lobe injury and “impulsive, aggressive, and antisocial functions...[and] generally impaired impulse control”).
not fully accountable for their acts, then consistency requires courts to exempt brain-damaged defendants from execution, too.

VI.C.2. Schizophrenia

It probably is rare for jurors to mete out death sentences to defendants who are known to have dementia or demonstrable brain damage, so rules sparing such individuals might have little practical impact on capital punishment decisions. But in recent decades, psychiatrists have recognized that many death row inmates have mental conditions that are associated with impaired cognition and reasoning. A prime example is schizophrenia. A 1990 study found that one-fifth of homicide defendants may have this disorder. Estimates of the incidence of schizophrenia on death row vary widely, but published reports suggest rates of at least five percent, and perhaps much higher. With the nation’s death row population currently standing at around 3700, this means that 200 or more condemned U.S. prisoners may have schizophrenia.

Schizophrenia’s best-known symptoms are delusions and hallucinations, and it is common for sufferers of the disorder to talk nonsense, to hold irrational but unshakable beliefs about reality, and to see or hear things that do not exist.

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204. Although "attaining consistency" seems like a reasonable jurisprudential goal to a psychiatrist, the author recognizes that this probably is not an adequate legal basis for a constitutionally-based death penalty exemption such as the one created by Atkins. Although a logically adequate basis might be an Eighth Amendment-based justification—executing people with demonstrable brain damage would be "cruel and unusual punishment" given modern standards of decency—no state has yet legislated a death penalty exemption for persons with severe mental illnesses. An Equal Protection-based argument therefore offers the best approximation to a constitutional basis for consistent treatment of persons with equally disabling mental conditions. A full discussion lies beyond the scope of this article, but this matter is dealt with at length by Professor Slobogin’s article in this volume. See generally Christopher Slobogin, What Atkins Could Mean for People with Mental Illness, 33 N.M. L. Rev. 293 (2003).
205. Portions of this subsection are adapted from a recent article written by the author. See Douglas Mossman, Unbuckling the "Chemical Straitjacket": The Legal Significance of Recent Advances in the Pharmacological Treatment of Psychosis, 39 SAN DIEGO L. REV. 1033, 1048-59 (2002).
207. See DSM-IV-TR, supra note 84, at 298 ("Schizophrenia is a disorder that lasts for at least 6 months and includes at least 1 month of active-phase symptoms (i.e., two or more of the following: delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior, negative symptoms).") For descriptions and explanations of the symptoms, associated features, prevalence, course, and diagnostic criteria for schizophrenia, see id. at 298-313. For additional discussion of schizophrenia and its treatment directed toward a legal audience, see Mossman, supra note 205, §§ II–III.
208. See Yarvis, supra note 206, at 255.
209. See Cunningham & Vigen, supra note 206, at 193, 200.
211. A delusion is [a] false belief based on incorrect inference about external reality that is firmly sustained despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary. The belief is not ordinarily accepted by other members of the person’s culture or subculture (e.g., it is not an article of religious faith).
212. A hallucination is "[a] sensory perception that has the compelling sense of reality of a true perception but that occurs without external stimulation of the relevant sensory organ." Id. at 823.
213. Id.
Psychiatrists no longer think that schizophrenia is caused by traumatic experiences or failures to negotiate childhood phases of psychological development. Instead, the symptoms of schizophrenia are believed to reflect disrupted brain circuitry that produces abnormalities in information processing, filtering stimuli, attention, and working memory. Over the last quarter century, brain imaging studies (e.g., CT and MRI scans) have shown that persons with schizophrenia have demonstrable decreases in brain matter, particularly in areas that are responsible for attention, memory, expressing emotion, social affiliation, and integrating information. Persons with schizophrenia cannot make normal associations among ideas and cannot distinguish between their own thoughts and those of others. They cannot suppress or filter inconsequential stimuli properly, so they have trouble focusing on what is important. Hallucinations occur when persons interpret their own thoughts as coming from outside themselves, while delusions arise from bad circuitry that makes bad connections between mental phenomena.

Persons with schizophrenia cannot help being susceptible to such symptoms, but these are often controllable with medication. Less remediable, however, are disturbances in complex mental processes that neuroscientists call “cognition” and

215. Id. at 783-84.
216. For a wonderful, illustrated explanation of these and other brain imaging techniques, see Saper et al., supra note 202, at 366-79.
217. A recent meta-analysis of fifty-eight studies found that “cerebral volume was lower—and total ventricular volume was higher—in patients with schizophrenia than in comparison subjects.” Ian C. Wright et al., Meta-Analysis of Regional Brain Volumes in Schizophrenia, 157 AM. J. PSYCHIATRY 16, 22 (2000). For a highly technical but authoritative summary of brain abnormalities ascertained in neuro-imaging studies, see Jeffrey A. Lieberman, Schizophrenia: A Neurodegenerative Disorder, 46 BIOLOGICAL PSYCHIATRY 729, 733-34 (1999).
220. Id. at 783-84.
221. Id. at 783-84.
222. For a highly technical but authoritative summary of brain abnormalities ascertained in neuro-imaging studies, see Jeffrey A. Lieberman, Schizophrenia: A Neurodegenerative Disorder, 46 BIOLOGICAL PSYCHIATRY 729, 733-34 (1999).
which, even more than overtly crazy thinking, are now recognized to be central to the disorder.\(^{223}\) The extent and severity of these disturbances (reflected in lack of emotion, reduced speech, and lost ability to initiate purposeful activity), rather than delusions and hallucinations, are the best predictors of the long-term disability that often occurs in schizophrenia.\(^{224}\) On average, schizophrenic patients—in addition to having hallucinations, delusions, and disorganized thoughts—experience a reduction in cognitive performance equivalent to having an IQ score of 85.\(^{225}\) Depending on when the disorder takes hold, persons with schizophrenia often cannot complete school, hold jobs, or have normal social relationships.\(^{226}\)

If the statistically defined limitations that comprise mental retardation are a barrier to the death penalty, then perhaps persons with schizophrenia—a disabling, biologically based disorder caused by disrupted brain circuits—should be spared as well. Lawyers for Jay D. Scott, an Ohio death row inmate, argued this very point in 2001 while Atkins was pending. An Ohio Supreme Court majority rejected this claim,\(^{227}\) and Scott was ultimately executed.\(^{228}\) But the defense’s argument persuaded one dissenting justice, who protested,

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I cannot get past one simple irrefutable fact: [Scott] has chronic, undifferentiated schizophrenia, a severe mental illness.... As a society, we have always treated those with mental illness differently from those without. In the interest of human dignity, we must continue to do so.... Executing [Scott] will be another assertion that taking the life of a person with mental illness is no different than taking the life of someone without mental illness.\(^{229}\)

This clear categorical-exemption-for-mental-illness reasoning fits well within the majority’s position in Atkins.\(^{230}\)

\(^{223}\). DSM-IV-TR, supra note 84, at 301; see generally Stanley R. Kay & Lisa M. Murrill, Predicting Outcome of Schizophrenia: Significance of Symptom Profiles and Outcome Dimensions, 31 COMP. PSYCHIATRY 91, 97 (1990) (stating that thought disturbance predicts poor functional outcome); Tonmoy Sharma, Cognitive Function in Schizophrenia: Deficits, Functional Consequences, and Future Treatment, 26 PSYCHIATRIC CLINICS N. AM. 25, 36 (2003) (“In the past few decades, cognitive dysfunction has been recognized as a fundamental feature of schizophrenia and has been shown repeatedly to have a negative association with functional outcome.”); Ronald Goldman, Neuropsychological Dysfunction and Schizophrenia: Implications for Pharmacotherapy, 18 DIRECTIONS IN PSYCHIATRY 35-47 (1998).

\(^{224}\). See supra note 223 and accompanying text.

\(^{225}\). Lieberman, supra note 218, at 733. In a comment crucial to this article’s topic, DSM-IV-TR notes that differentiating “between Borderline Intellectual Functioning and Mental Retardation (an IQ of 70 or below) is especially difficult when the coexistence of certain mental disorders (e.g., Schizophrenia) is involved.” DSM-IV-TR, supra note 84, at 740.

\(^{226}\). DSM-IV-TR, supra note 84, at 302.


\(^{229}\). Scott, 748 N.E.2d at 19 (Pfeifer, J., dissenting).

\(^{230}\). Since the Atkins decision, at least one state supreme court has declined to extend the protections of Atkins to a person with psychotic symptoms. State v. Weik, 2002 S.C. LEXIS 159 (S.C. Sept. 3, 2002). Although the defendant “was ‘hyper-religious,’ heard voices, and suffered from paranoid beliefs involving the CIA and the Masons,” id. at *4, the South Carolina Supreme Court stated summarily that, “while it violates the Eighth Amendment to impose a death sentence on a mentally retarded defendant,...the imposition of such a sentence upon
VI.C.3. Attention-Deficit/Hyperactivity Disorder

Several other psychiatric conditions are legitimate candidates for exemptions following Atkins. Perhaps states should be barred from executing murderers with attention-deficit/hyperactivity disorder (ADHD). Although this condition has been the subject of much public controversy, most psychiatrists regard ADHD as a real disorder that can severely disrupt functioning in children and often persists into adulthood.\textsuperscript{231} According to DSM-IV-TR, ADHD is "a persistent pattern of inattention and/or hyperactivity-impulsivity that is more frequent and severe than is typically observed in individuals at a comparable level of development," that begins in childhood, and that interferes "with developmentally appropriate social, academic, or occupational functioning.\textsuperscript{232}" Inattention may lead to the sufferer’s "not following details or rules"; impulsiveness can lead to "difficulties in social, academic, or occupational settings...and to engagement in potentially dangerous activities without consideration of possible consequences."\textsuperscript{233} These types of problems lie behind much criminal behavior, and, not surprisingly, the incidence of ADHD is elevated in adult prison populations.\textsuperscript{234} As is the case for schizophrenia, brain imaging studies of individuals with ADHD consistently point to a biological basis for these problems, again suggesting abnormal development of neuronal circuitry.\textsuperscript{235}

VI.C.4. Low CNS Serotonin Function

Another logical category for exemption is persons with low levels of the neurotransmitter serotonin.\textsuperscript{236} Since studies in the mid-1970s showed that suicide a mentally ill person is not disproportionate." \textit{Id.} at *4, *13. \textit{Weik} simply cites previous precedent for support, without considering the specific reasoning in \textit{Atkins} or types of data adduced in this article’s text. \textit{Id.} at *13 (citing State v. Wilson, 413 S.E.2d 19 (S.C. 1992)).


232. DSM-IV-TR, \textit{supra} note 84, at 85.

233. \textit{Id.} at 85-86.


235. Jay N. Giedd et al., \textit{Brain Imaging of Attention Deficit/Hyperactivity Disorder}, 931 ANNALS N.Y. ACAD. SCI. 33, 33 (2001) ("[T]he imaging studies of individuals with attention deficit/hyperactivity disorder (ADHD) consistently point to involvement of the frontal lobes, basal ganglia, corpus callosum, and cerebellum."); Judith L. Rapoport et al., \textit{Imaging Normal and Abnormal Brain Development: New Perspectives for Child Psychiatry}, AUSTL. & N.Z. J. PSYCHIATRY 272, 272 (2001) ("[A]natomic brain magnetic resonance imaging (MRI) studies in ADHD" reveal "consistent, diagnostically specific patterns of brain abnormality...."); F. Xavier Castellanos et al., \textit{Developmental Trajectories of Brain Volume Abnormalities in Children and Adolescents with Attention-Deficit/Hyperactivity Disorder}, 288 J.A.M.A. 1740, 1740 (2002) (MRI study showing that "patients with ADHD had significantly smaller brain volumes in all regions...[and in patterns, suggesting that genetic and/or early environmental influences on brain development in ADHD are fixed, nonprogressive, and unrelated to stimulant treatment").

236. A neurotransmitter is a substance "released on excitation from the axon terminal of a presynaptic neuron of the central or peripheral nervous system [that] travel[s] across the synaptic cleft to either excite or inhibit the target cell. Among the many substances that have the properties of a neurotransmitter...[is] serotonin." \textit{DORLAND'S ILLUSTRATED MEDICAL DICTIONARY} 1215 (29th ed. 2000) [hereinafter DORLAND'S].
victims had low levels of serotonin metabolites in the central nervous system (CNS), scientists have accumulated robust evidence linking low serotonin activity to impulsive behavior, alcohol abuse, and violence. By measuring and manipulating serotonin activity in many species—including fish, birds, rodents, dogs, and monkeys—as well as humans—scientists have found that lowering brain serotonin increases aggression, particularly spontaneous, impulsive aggression. Many individuals naturally have low serotonin activity, and such persons often are depressed, less responsive to external social controls of their behavior, and especially prone to satisfying appetites for food, sex, and drugs without thinking about consequences.

For a subset of heavy drinkers called “Type II” alcoholics, alcohol consumption is part of an overall pattern of impulsive, antisocial behavior. Studies of Type II alcoholics reveal a genetic predisposition linking violence, heavy drinking, and deficient serotonin functioning. For example, a series of Finnish studies found that among alcoholic men, those with low serotonin activity were particularly prone to violence. This may be because violence and heavy drinking both reflect a common source of poor impulse control—impaired CNS serotonin functioning. People with strong aggressive and antisocial tendencies are especially prone to

237. Kenneth G. Lloyd et al., Serotonin and 5-Hydroxy-Indoleacetic Acid in Discrete Areas of the Brainstem of Suicide Victims and Control Patients, 11 ADVANCES BIOCHEMICAL PSYCHOPHARMACOLOGY 387 (1974); Marie Åsberg et al., 5-HIAA in the Cerebrospinal Fluid: A Biochemical Suicide Predictor?, 33 ARCHIVES GEN. PSYCHIATRY 1193 (1976). 5-hydroxyindoleacetic (5-HIAA) acid is a metabolite, or breakdown product, of the neurotransmitter serotonin. DORLAND’S, supra note 236, at 844. Serotonin activity in the central nervous system can therefore be assessed by measuring levels of 5-HIAA in the cerebrospinal fluid (CSF), “the fluid contained with the four ventricles of the brain, the subarachnoid space, and the central canal of the spinal cord.” Id. at 1018. CSF is obtained using a medical procedure called a “lumbar puncture,” or more colloquially, a “spinal tap,” in which a needle is inserted between the lower lumbar vertebrae and a small amount of fluid is withdrawn for analysis. Id. at 1495.

238. For recent discussions on the links between serotonin levels and these behaviors, see J.D. Higley, Individual Differences in Alcohol-Induced Aggression: A Nonhuman-Prime Model, 25 ALCOHOL RES. & HEALTH 12 (2001); and F. Gerard Moeller et al., Psychiatric Aspects of Impulsivity, 158 AM. J. PSYCHIATRY 1783 (2001).

239. See I.R. Hseu et al., Effect of Exogenous Tryptophan on Cannibalism, Survival and Growth in Juvenile Grouper, Epinephelus coioides, 218 AQUACULTURE 251, 251 (2003) (“Cannibalism among juvenile groupers could be mitigated by the oral administration of” tryptophan, a biochemical precursor of serotonin.).

240. T.S. Sperry et al., Effects of Acute Treatment with 8-OH-DPAT and Fluoxetine on Aggressive Behaviour in Male Song Sparrows (Melospiza melodia morpha), 15 J. NEUROENDOCRINOLOGY 150 (2003) (noting that a bird’s behavior can be altered by administration of drugs that affect serotonin levels).


244. F. Gerard Moeller et al., Tryptophan Depletion and Aggressive Responding in Healthy Males, 126 PSYCHOPHARMACOLOGY 97 (1996).

245. Robert O. Pihl & Jordan B. Peterson, Alcohol, Serotonin and Aggression, 17 ALCOHOL HEALTH RES. WORLD 113 (1993); Linnoila & Charney, supra note 202, at 860-64 (summarizing studies in humans and animals).


247. Higley et al., supra note 243, at 17.
becoming aggressive when they drink.\textsuperscript{248} Biology confirms what criminologists have long known: many acts of criminal violence occur when perpetrators are intoxicated,\textsuperscript{249} and a large number of criminals who end up on death row were intoxicated at the time of their offenses.\textsuperscript{250}

Low serotonin activity is not itself a psychiatric diagnosis. Persons diagnosed with a broad variety of conditions—including depression, alcohol dependence, and antisocial personality disorder—may have low serotonin activity. What unites these persons is the biological status of their nervous system, which can be objectively and scientifically assessed by measuring a metabolite of serotonin in spinal fluid.\textsuperscript{251} Strong biological evidence links low serotonin to impulsiveness and to being less responsive to social cues that inhibit appetites and aggression. This means that people with low serotonin activity are at a physiological disadvantage when it comes to obeying the law’s dictates. If mental retardation renders a murderer not culpable enough to suffer the death penalty, then why shouldn’t low serotonin?

VI.C.5. Other Psychiatric Disorders

Brain damage, schizophrenia, ADHD, and low brain serotonin are just a few of the psychiatric conditions that are associated with impairment of—as the key wording in \textit{Atkins} put it—“capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”\textsuperscript{252} A slew of other psychiatric disorders, some of which are common among homicide defendants, produce many of the same limitations. Examples include manic-depression,\textsuperscript{253} pervasive developmental disorders,\textsuperscript{254} intermittent explosive
disorder, antismal personality disorder, and posttraumatic stress disorder. By making execution of persons with one psychiatric diagnosis "cruel and unusual punishment," Atkins has opened a psychiatric can of worms. In coming years, attorneys representing capital defendants will increasingly ask mental health experts to present courts with the burgeoning evidence of the biological bases for numerous other mental disorders. Confronted with such evidence, courts will have no choice but to examine several psychiatric conditions that may be at least as disabling as mental retardation. Courts must now decide whether these conditions, either by virtue of those conditions' "definition" or the conditions' brain-based relationship
to impaired mental functioning, should confer upon their sufferers the protections equal to those that *Atkins* has given to persons with mental retardation.

**VI.D. The Diagnosis-Implies-Excuse Mistake**

*Atkins* obligates courts both to decide whether several mental conditions should mitigate death sentences and to perpetuate the mistaken claim that it is a mentally disabled person’s *diagnosis* that provides the reason for our (often correct) impulse to hold him less than fully responsible. In expressing his reluctant agreement with Justice Scalia’s position in *Atkins*, Professor Bersoff notes,

> IQ, after all, is not the factor that render the imposition of the death penalty against those with mental retardation unjust. Rather, IQ is a proxy, and an imperfect one at that, for a combination of factors, such as maturity, judgment, and the capability of assessing the consequences of one’s conduct, that determine the relative culpability of a mentally retarded killer…. Culpability, not, IQ, should be the benchmark."²³⁹

In a series of superb articles,²⁶⁰ Professor Stephen Morse has articulated what roles he believes mental health professionals and psychiatric diagnosis should and should not play in deciding whether agents possess “sufficient capacity for rationality to be responsible.”²⁶¹ Professor Morse argues that when the law requires a decision whether a defendant lacks sufficient rationality to be fully responsible, what the factfinder most needs is “a detailed, descriptive account of the agent’s reasons for action in the context in question. These data may be obtained from family, friends, co-workers, observers, and mental health professionals.”²⁶² Although all these observers may have information relevant to the factfinder’s decision, what mental health professionals add, beyond being “trained, efficient observers,”²⁶³ is their scientific knowledge about the characteristics of people similar to the individual in question.²⁶⁴ Yet the decision whether someone’s capacity for rationality is sufficient to hold him responsible ultimately is “a common sense inference,” so that “the final judgment must be about the specific individual who is the potential subject of special mental health law treatment.”²⁶⁵

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²⁵⁹. Bersoff, supra note 157, at 568.
²⁶². *Id.* at 217.
²⁶³. *Id.*
²⁶⁴. *Id.* at 219.
²⁶⁵. *Id.*
Although Professor Morse has long believed that psychiatric diagnoses should play little or no role in legal proceedings, diagnosis is the vehicle mental health professionals use to decide what sort of problem a person has and what types of characteristics are displayed by other individuals who are similar to the person in question. Professor Morse questions "whether a diagnosis produces value added beyond the information conveyed by the behavioral criteria that define the diagnostic category." A reasonable response is that—to the extent that diagnostic schemes are valid and that an individual’s diagnosis has been properly rendered—a diagnosis invokes the consensus of mental health professionals, not just the opinion of the expert who happens to be testifying. Testifying experts can rely on, and convey to factfinders, what psychiatry knows about individuals with the diagnosis. Experts can use diagnoses to show that a particular defendant indeed shares psychological features (symptoms and behaviors) with others who receive the diagnosis, and that the defendant’s future clinical characteristics can be expected to follow a particular pattern. Identifying a set of symptoms and behaviors with a diagnosis (especially when scientific evidence links biology to patterns of thought and behavior) may serve the additional, important purpose of helping jurors and judges consider other explanations for a defendant’s behavior besides such common-but-psychologically-naive explanations as being the result of sheer evil, carelessness, faking, or not trying hard enough.

But if Professor Morse undervalues the contribution of psychiatric diagnoses to legal proceedings, the Atkins decision proves he is correct about the potential problems that relying on diagnoses can cause in mental health adjudications:

[D]iagnoses...tend to encourage the mistaken impression that the conduct of crazy people is just a mechanism, rather than action for reasons. Diagnoses tend to encourage question-begging about the foundational, nonresponsibility criterion that authorizes special mental health treatment. Diagnoses are therefore prejudicial and misleading. In addition, there is often dispute about the appropriate diagnosis, if any, which wastes time and distracts the factfinder from the essential question....

266. Id. See also Morse, Crazy Behavior, supra note 260, at 604-15; Morse, Failed Explanations, supra note 260, at 1059-70.
268. "DSM-IV was a team effort. More than 1000 people (and numerous professional organizations) have helped us in the preparation of this document." DSM-IV-TR, supra note 84, at xix. See also id. at xxiii-xxiv (describing the process by which the manual was created).
269. Notwithstanding the cautions discussed in section V, supra, the diagnostic manual notes the potentially valid uses of diagnoses in adjudicatory proceedings:

[When the presence of a mental disorder is the predicate for a subsequent legal determination (e.g., involuntary civil commitment), the use of an established system of diagnosis enhances the value and reliability of the determination. By providing a compendium based on a review of the pertinent clinical and research literature, DSM-IV may facilitate the legal decision makers' understanding of the relevant characteristics of mental disorders. The literature related to diagnoses also serves as a check on ungrounded speculation about mental disorders and about the functioning of a particular individual. Finally, diagnostic information regarding longitudinal course may improve decision making when the legal issue concerns an individual's mental functioning at a past or future point in time.

DSM-IV-TR, supra note 84, at xxxiii.
270. Morse, Crazy Reasons, supra note 258, at 220.
The essential question is what a particular defendant deserves. This moral determination may be informed by knowledge of the defendant's psychiatric diagnosis, but is logically independent of that diagnosis. Psychiatric diagnoses may summarize patterns of conduct, but the moral qualities of a particular act—and the appropriate legal response to that particular act—are not within the province of psychiatrists' special knowledge.

VII. CONCLUSION

Increased knowledge about the biological underpinnings of mental illness may well help convince courts that sufferers of several mental disorders deserve the same constitutional protections that Atkins confers upon defendants with mental retardation. Given the high rate of serious mental illness among homicide defendants, granting psychiatric exemptions could leave very few individuals eligible for the death penalty.

To death penalty opponents, such a development might seem desirable. U.S. law now regards execution as a special punishment that only the most blameworthy killers deserve. Yet, a high proportion of the murderers who become death row inmates have serious mental impairments. By focusing their arguments against executing persons who are psychiatrically impaired, capital punishment's opponents have an opportunity to use psychiatry to virtually abolish the death penalty. The moral basis for doing this is nicely summarized by psychologists Mark D. Cunningham and Mark P. Vigen, who, after reviewing studies describing the mental problems of death row inmates, write,

it is disturbing that so many inmates on death row are so obviously damaged—developmentally, intellectually, educationally, neurologically, and psychologically. To the extent that the death penalty is intended to punish those murderers who are most morally culpable, there would seem to be some miscarriage of that intent when it is visited upon individuals who are manifestly damaged, deficient, or disturbed in their psychological development and functioning.271

By creating an exemption for one group of persons who are "manifestly...deficient," Atkins seems like the beginning of a solution to the moral problem that Cunningham and Vigen describe. But death penalty opponents and advocates for the mental disabled should realize that Atkins carries the potential for creating other difficulties. The decision demeans persons with mental retardation by saying that solely by virtue of this condition, they lack the moral capacity to be fully culpable. It creates a national legal precedent for using psychiatric categories to single out a group of citizens for different legal treatment. It fails to recognize that psychiatric diagnoses are created for clinical purposes (chiefly, to guide treatment) and are often redefined as treatments, and scientific findings reveal the errors of older categorizations. Finally, Atkins tells mental health professionals that despite any "cautionary statements," courts will use their classification schemes to solve legal

271. Cunningham & Vigen, supra note 206, at 207.
and social problems that lie far beyond the purpose and intent of psychiatric diagnosis.

For several years, the U.S. Supreme Court has responded to grave flaws in the nation's administration of the death penalty with a series of procedural and substantive requirements that give mental health professionals big parts in the capital punishment process. With Atkins, the courtroom roles of psychiatrists and psychologists will now enlarge. In treatment settings, the mental health clinician often attempts to remove impediments to self-understanding and thereby enable people to function better. But mental health experts do not come to court with the purpose of promoting self-understanding, and neither their diagnostic classifications nor their therapeutic skills will "cure" the fundamental social and economic disparities that make even capital punishment's supporters uncomfortable.272

Given what psychiatrists and psychologists now know about the sources and behavioral consequences of mental disorders, it only makes sense for courts to request their insights. As Professor Gary B. Melton and his colleagues point out, "mental health professionals do have access to a body of specialized knowledge (i.e., knowledge commonly unshared by the lay public) that may assist legal factfinders in making informed judgments."273 It is hard to think of a situation in which courts have greater need for mental health professionals' observations, formulations, and opinions than when a jury decides whether a mentally impaired defendant deserves execution. But giving psychiatric diagnosis a determinative role in capital sentencing distorts the legitimate role of mental health experts in assisting the factfinder.274 In the long run, Atkins may compound problems in the administration of the death penalty if it convinces courts, juries, and legislatures that an accurate medical diagnosis will assure the fairness of—or, worse yet, is an

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272. See, e.g., George H. Ryan, Executive Order Creating the Governor's Commission on Capital Punishment (May 4, 2000), available at http://www.idoc.il.us/ccp/ccp/executive_order.html (last visited Sept. 19, 2002) (expressing support for the death penalty in principle, but establishing a commission to study and recommend safeguards in capital punishment because "the number of death sentences and criminal convictions being vacated or overturned has raised serious concerns with respect to the process by which the death penalty is imposed"). On January 31, 2000, "prompted by serious questions about the operation of capital punishment in Illinois," Governor Ryan issued a moratorium on administering the death penalty. REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 1 (Apr. 15, 2002). The Commission offered eighty-five recommendations concerning the death penalty's administration in Illinois. On January 11, 2003, just before leaving office, Governor Ryan issued a blanket commutation for all 167 death row inmates in the state. Jodi Wilgoren, Citing Issue of Fairness, Governor Clears Out Death Row in Illinois, N.Y. TIMES, Jan. 12, 2003, at 1. See also Dennis O'Brien & David Nitkin, Glendening Halts Executions; Md. Governor Is Second to Impose Moratorium; Racial, Geographic Inequality Seen; UM Study to Be Reviewed by Next General Assembly, BALTIMORE SUN, May 10, 2002, at 1A (stating that Maryland Governor, who also supports the death penalty in principle, halted executions in that state pending results of a University of Maryland study of racial disparities in death penalty sentencing).


274. FED. R. EVID. 702 states, If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. (emphasis added).
acceptable substitute for—a moral judgment about the defendant. 275 However Atkins affects determinations about who will be executed, it perpetuates the fantasy that “getting psychiatric help” makes death sentences fairer and more palatable.

275. As Professor Morse noted several years ago, “overreliance on experts promotes the mistaken and responsibility-abdicating view that these hard moral questions (i.e., whether and in what way to treat mentally ill persons differently) are scientific ones. . . .” Stephen J. Morse, Law and Mental Health Professionals: The Limits of Expertise, 9 PROF. PSYCHOL. 389 (1978).