



CHAPTER

The Death Penalty, the Courts, and Intellectual Disabilities

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In 2002, the U.S. Supreme Court in *Atkins v. Virginia* found in a 6–3 decision that the execution of people with Intellectual Disability (ID, still known in most state statutes as mental retardation) violates the Eighth Amendment’s prohibition of cruel and unusual punishment. Although this decision was widely praised in the disability community and widely debated in the legal community, courts of the 37 states, the federal government, and the U.S. military, which have capital punishment, faced a need to clarify the standards by which the decision would be implemented. Since the *Atkins* decision, many psychologists, psychiatrists, and other experts in developmental disabilities have worked as individuals and in collaboration with other individuals and organizations to clarify the scientific and clinical basis on which expert witnesses could testify to the diagnosis of mental retardation in *Atkins* hearings. This chapter reviews the progress that has been made by the field of psychology and related disciplines in this effort.

In *Atkins*, Justice John Paul Stevens wrote for the majority. His statement describing the basis for the majority decision is a good summary of the characteristics of ID that led the court to its decision: “they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, and engage in logical reasoning, to control impulses, and to understand the reactions of others (*Atkins v. Virginia*, 2002)”.

It is emphasized that this decision simply removed the death penalty from consideration, and people with IDs are still responsible for their actions. If convicted of a capital crime, most individuals will serve life in prison. Although the *Atkins* decision was in some ways groundbreaking, for many years people with IDs have been regarded as less culpable for their crimes. In Wickham’s (2002) article, “Conceptions of Idiocy in Colonial Massachusetts,” she noted that the colonial law absolved “idiots” of guilt in capital cases and that this law was “traced directly to English statute...” She further cited Walker (1968) who noted that “English laws have incorporated modifications that take into account a criminal offender’s mental state as far back as the tenth century. What might be the earliest record of a case brought before the king was described as ‘an idiot who [in 1212] is in the prison

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because in his witlessness he confessed that he is a thief, although in fact he is not to blame” (p. 939).

Before *Atkins*, 18 states had statutes banning the death penalty for people with mental retardation. In the remaining states that had a death penalty, ID could be presented as a potentially mitigating factor in the sentencing phase of a capital trial. Thus, *Atkins* served to codify views that had become increasingly common in state legislatures and in the courts.

In 2005, the Division on Intellectual and Developmental Disabilities of the American Psychological Association formed a Committee on Mental Retardation and the Death Penalty. The committee’s members and other scholars and expert witnesses responded to *Atkins* in several ways. They wrote articles and presented at meetings of attorneys, forensic psychologists, and colleagues specializing in developmental disabilities. They also conducted evaluations of individual defendants, which led to court testimony regarding their diagnoses. The testimony and the resulting court decisions have contributed to progress in clarifying the validity of procedures for making this diagnosis in capital cases. However, there is much to be done.

This chapter summarizes progress in three categories. First, psychologists have a large body of research and clinical findings on ID that go back far before the *Atkins* decision. In other words, a great deal of relevant information existed before *Atkins*, and that information should be applied in *Atkins* hearings. Second, *Atkins* hearings have pushed some issues into the spotlight that might otherwise have received less attention. The following pages summarize what has been learned so far from *Atkins*. Third, there is much that needs to be learned, and the final section emphasizes the challenges that remain.

WHY ARE ATKINS CASES SO CHALLENGING?

Although there are decades of psychological research on the nature of mild ID, established clinical procedures for diagnosis, and a definition of ID that is widely accepted, translating what is known in customary research and clinical settings to the adversarial setting of the courtroom can be very difficult. Most clinical assessment procedures are used to determine the best services for the individual. These procedures are employed to examine strengths, weaknesses, and preferences and to present complex findings.

Clinicians and researchers work collaboratively and openly. Science shares objective information and usually progresses in small increments. Researchers acknowledge positive and negative findings and live comfortably with shades of gray.

Courtroom testimony, however, is presented in the adversarial context of defense and prosecution, and the court must produce a decision. It is a world of black and white with little tolerance for gray. The expert in ID who offers expert court testimony may present information using the same approach he or she would use to present clinical or research findings and fail to appreciate the court’s rules of evidence. On the positive side, the court does welcome scientific evidence. Different states embrace either the *Daubert* (*Daubert v. Merrell Dow Pharmaceuticals*, 1993) or *Frye* (*Frye v. United States*, 1923) standard for evidence presented by

experts. The *Frye* standard requires that the evidence be widely accepted in the field. The more stringent *Daubert* standard requires that the evidence be supported by scientific findings.

Information Already Known

Whether the expert is hired by the prosecution or the defense, it is his or her ethical responsibility to present information objectively (Committee on the Revision of the Specialty Guidelines for Forensic Psychology, 2011). Thus, it is essential that one knows and relies upon the established research on ID. The list of established findings that are relevant to *Atkins* is long, but a few examples may make the point.

First, psychological research over many years has identified numerous characteristics that are common, although not universal, in individuals with mild ID (Snell & Luckasson, 2009). I emphasize this group because they are the people who are most vulnerable to engaging in criminal activities. They are the most likely to be receiving no supports or services or to have never received a diagnosis of ID. They are the people who received special education services while in school but became invisible to human services providers as soon as they left school. They are the people who qualified for school services in the category of educable mental retardation but instead were classified as students with learning disabilities due to legal and social pressure on school systems.

Nevertheless, they are likely to have the characteristics of impulsiveness, responsiveness to immediate rather than long-term consequences, naïveté, gullibility, poor problem solving, and, of course, low intelligence. In addition, they are likely to come from backgrounds of social and economic deprivation and families with generations of similar problems.

Second, the work of Siperstein and his colleagues (Siperstein, Norins, Corbin, & Shriver, 2003) has shown that in many countries, including the United States, the public generally misunderstands mild ID and expects that such individuals are easy to identify by their physical appearance, their speech, or other readily apparent characteristics. This misunderstanding is common in court, and the expert witness must clarify for the court the fact that mild ID typically presents no obvious physical signs and that such individuals have many areas of competence to accompany areas of impairment (American Association on Intellectual and Developmental Disabilities, 2010).

Third, the most widely accepted definitions of ID are quite similar. The American Association on Intellectual and Developmental Disabilities (2010) and the American Psychiatric Association (2000) definitions require the same elements for a diagnosis: significant impairment in intelligence and adaptive functioning, both of which originate in childhood. Although there are differences in their descriptions of areas of adaptive behavior, the definitions are conceptually similar.

Fourth, there are well-established standards for the administration and interpretation of intelligence tests and related measures (American Educational Research Association, American Psychological Association, & National Council on Measurement in Education, 1999). These standards help to specify the reliability and validity of tests that may be relied on for diagnosis and guide us in interpretation by taking

into consideration factors such as the standard error of measurement of the test and the possible influence of the practice effect. Reliance on such standards is important, because the states affected by the *Atkins* decision often do not have sufficiently detailed statutes that specify standards for test administration.

Fifth, clinicians and others who have personal experience with people with mild ID readily find that these individuals eschew the label of mental retardation. The anthropologist Robert Edgerton (1967, 1993) has called this phenomenon of attempting to hide one's limitations the "cloak of competence." This finding is very important in *Atkins* cases because those not familiar with it may assume that people will eagerly try to fake the condition of mental retardation in order to avoid the death penalty. In fact, this author has found that even with their lives at stake, many defendants will try to do their best on tests and often to exaggerate their accomplishments in order to avoid the stigma of mental retardation.

Sixth and related to the point cited, research has identified many pitfalls in interviewing people with ID (Finlay & Lyons, 2001, 2002; Perry, 2004). Although an interview of the defendant is a customary part of an *Atkins* evaluation or any evaluation related to the diagnosis of ID, one must be aware of many ways in which the self-report of the defendant may be inaccurate. Interviews may be influenced by the communication limitations of the defendant (e.g., difficulty understanding the questions, particularly those of a conceptual nature, or difficulty responding to open-ended questions) or the tendency to try to hide one's limitations (i.e., the cloak of competence).

Seventh, the relationship between the conditions of poverty and mild ID are well established (Hurley, 1969), especially when such conditions are experienced in early childhood (Center on the Developing Child, 2008). Investigation of the background and history of *Atkins* defendants can be tragically sad as one documents the environmental deprivation and family history of limited education, unemployment, criminal activity, neglect, and abuse. These conditions contribute to ID. A failure to understand this relationship sometimes leads to misguided court testimony in which it is argued that these conditions are the cause of the defendant's limitations, and, thus, the diagnosis of mental retardation cannot be made. In fact, these conditions are such a familiar pattern that mild ID has historically been referred to as "cultural familial mental retardation."

Eighth, ID can coexist with mental health problems. Awareness of these "dual diagnoses" has increased in recent years leading to the publication of a diagnostic manual (Fletcher, Loschen, Stavrakaki, & First, 2007) and the *Journal of Mental Health Research in Intellectual Disabilities*. An understanding of dual diagnoses is important because it may be mistakenly argued in court that the defendant has a mental illness diagnosis that rules out mental retardation.

Ninth, Stephen Greenspan has argued for many years that a central characteristic of ID is naïveté or gullibility (e.g., Greenspan, Loughlin, & Black, 2001). Thus, people with mild ID are easily led into criminal activities and are very limited in their ability to deal with the criminal justice system. It is shocking to learn how poorly the general public understands their *Miranda* rights (Rogers, 2008) and how readily police interrogation techniques can induce innocent people

to confess to murder (Kassin, 2005; Kolker, 2010). These vulnerabilities are even greater for people with ID (Perske, 2008).

Tenth, it is important to note that a clinical evaluation emphasizes strengths in order to plan services that capitalize upon those strengths to promote success. An evaluation for the court is focused on deficits because its purpose is to determine a diagnosis, and an ID is, by definition, a condition characterized by deficits. As noted earlier, people with mild ID are a heterogeneous group with individual profiles of relative strengths and weaknesses. One cannot argue that the presence of a particular strength rules out ID, particularly if it is a strength shared with others with ID. In fact, the American Psychiatric Association (2000) definition of mental retardation specifically stated that there is no exclusion criterion for the diagnosis. Thus, neither having a mental illness, nor a learning disability, nor antisocial personality disorder, nor various other diagnoses excludes a diagnosis of ID. In a similar way, accomplishments such as driving a car, having a job, being married, and having friends do not rule out ID, although these arguments, and many others, have been made in court.

A final example of established knowledge that is relevant to *Atkins* comes not from the literature on developmental disabilities but from a classic book on social psychology research. Webb, Campbell, Schwartz, Sechrest, and Grove (1981) addressed the problem of research that relies on only one method. They specifically noted the limitations of interview and questionnaire methods and encouraged data collection using “nonreactive” methods. In light of the dependence on interviews in *Atkins* evaluations, Webb et al.’s warning should be carefully examined. “Interviews ... intrude as a foreign element into the social setting they would describe, they create as well as measure attitudes, they elicit atypical roles and responses, they are limited to those who are accessible and will cooperate, and the responses obtained are produced in part by dimensions of individual differences irrelevant to the topic at hand” (p. 1). Their proposed solution is one very applicable to *Atkins* evaluations. “No research method is without bias. Interviews ... must be supplemented by methods testing the same social science variable but having different methodological weaknesses” (p. 1).

THINGS LEARNED FROM ATKINS HEARINGS

Atkins hearings have brought increased attention to some issues that had previously seemed less important. A few examples follow.

The Flynn Effect

The best example of this increased attention is the Flynn effect. Flynn (1984, 2007) pointed out the rise of IQ scores over many years in countries around the world. The existence of this phenomenon is not particularly controversial. After all, norms do become out of date, and IQ tests are renormed every 10 or 15 years to make current scores more reflective of the general population. The issue that is often argued in court is whether the Flynn effect should be taken into consideration when interpreting the scores of individuals. The literature on this topic indicates

that on average scores rise about 0.3 points per year. Therefore, for an IQ test normed 10 years ago, the mean score for the population is now 103, rather than 100. Many courts have accepted Flynn's (2009) argument that inferring from the general population to an individual is something that psychological testing does regularly and that, although it is an approximation, applying the Flynn effect to the score of an individual leads to a more accurate understanding of the person's general intelligence.

Given the adversarial nature of court proceedings, it is not surprising that this issue continues to spark debate in the courtroom and in professional journals. For example, Hagan, Drogin, and Guilmette (2008, 2010) have acknowledged that the Flynn effect is a valid scientific finding but have argued that adjusting IQ scores to take this phenomenon into account is not customary practice and is too imprecise to be appropriate in court. They have taken the position that the Flynn effect varies depending upon the test used, the age of the test taker, and other factors. Cunningham and Tassé (2010) have supported taking the Flynn effect into consideration and cited studies showing that the effect holds in the range of scores that are most often at issue in *Atkins* cases (about IQ 70–80). Some of these differences may be semantic, because Hagan et al. (2008, 2010) and Cunningham and Tassé (2010) agreed that rising test scores should be considered but disagree regarding the terms score "adjustment" or "correction."

Kevin McGrew has created a blog that is a remarkable resource for information on *Atkins* cases and the associated literature. Among other topics, he has compiled a nearly complete bibliography of articles on the Flynn effect and has written several blog posts on this topic (<http://www.atkinsmrdeathpenalty.com>).

Malingering

Supreme Court Justice Antonin Scalia, in his dissenting opinion in *Atkins*, expressed concern "that the symptoms of this condition can readily be feigned" (*Atkins v. Virginia*, 2002) and that the decision would result in a flood of appeals by death row inmates. With regard to his first concern, research by Salekin and Doane (2009) has shown that the few instruments used to identify malingered ID lack acceptable validity. Considering this limitation and the general reluctance of people with low intelligence to embrace the label "mental retardation," the prevalence of malingering in *Atkins* cases is unknown. Fortunately, the requirement that the characteristics of ID be present in childhood serves to identify people who feign ID in adulthood but lack a history of impaired functioning.

With regard to Justice Scalia's second concern, Blume, Johnson, and Seeds (2009) reviewed the *Atkins* cases that had been ruled on in the 6 years following the 2002 decision. They found that only about 7% of death row inmates filed *Atkins* claims, and nearly 40% resulted in a decision supporting those claims (although the success rate has varied widely among states). Thus, contrary to Justice Scalia's prediction, *Atkins* has not resulted in a flood of frivolous claims.

As a practical matter, an *Atkins* evaluation must consider the possibility of malingering, but the best way to do that is unclear. One can cite Salekin and Doane (2009) and argue not to use tests that have been shown to be invalid for this

purpose. In this case, one must rely on the defendant's history of functioning since childhood and trust the examiner's judgment about how much effort the defendant put into testing. As an alternative, the examiner may use an instrument such as the Test of Memory Malingering (Tombaugh, 1996), a test of memory for pictures. Research by Hurley and Deal (2006) suggested that most people with mild ID should score very high on this test, indicating that they are showing good effort. On the other hand, some people with mild ID are genuinely deficient in their memory for pictures, and a low score could be mistakenly identified as malingering or intentional lack of effort.

Retrospective Evaluation

Atkins evaluations are, by their nature, retrospective. Experts are being asked to determine intellectual functioning in childhood, at the time of the crime, and, in some cases, currently. Perhaps the most extreme example of retrospective assessment came quite recently. On January 7, 2011, Governor Bill Ritter of Colorado granted a full and unconditional posthumous pardon to Joe Arridy who was convicted of killing a 15-year-old girl, sentenced to death, and executed by lethal gas 7 decades ago. The governor's press release indicated that

Arridy, who had an I.Q. of 46 and behaved more like a child than a man, confessed to the 1936 sexual assault and murder of Dorothy Drain in Pueblo. Drain and her sister were found in their home, both having been attacked with a hatchet. But an overwhelming body of evidence indicates the 23-year-old Arridy was innocent, including false and coerced confessions, the likelihood that Arridy was not in Pueblo at the time of the killing, and an admission of guilt by someone else (Office of Governor Bill Ritter, Jr., 2011).

The treatment of people with ID by our justice system has progressed greatly since 1936, but it is still a challenge to look back in time to diagnose this disability.

Intelligence

Retrospective assessment of intelligence depends on the availability of good records. If no earlier testing took place, or if school records are missing or incomplete, a valid IQ from childhood cannot be obtained. It is fortunate that the diagnostic criteria of the American Association on Intellectual and Developmental Disabilities make clear in the current (2010) manual and in earlier manuals that a measured IQ is not necessary for diagnosis. It is sufficient to demonstrate that the individual showed impaired functioning in childhood. Reschly (2009) described many of the complexities of establishing impaired functioning in childhood.

Even if IQ scores from childhood can be found in school or other records, recent experience in *Atkins* hearings has placed greater scrutiny on specific tests, circumstances of their administration, and qualifications of the examiner. Furthermore, although the Wechsler scales continue to be the most widely used individually administered intelligence tests, the *Atkins* decision has called attention to the theory of intelligence that underlies such tests. In all contemporary IQ tests, the Cattell–Horn–Carroll theory has influenced test construction, and the extent to

which the test reflects this theory provides evidence for the acceptability of the test (Benson, Hulac, & Kranzler, 2010). McGrew's blog, noted earlier, is an excellent source of information for assessing the psychometric strength of intelligence tests.

Adaptive Functioning

Perhaps because intelligence can be assessed with reasonable validity in a matter of minutes, the second requirement for a diagnosis of ID, impaired adaptive functioning, has taken a back seat to IQ in most discussions of ID diagnosis. Nevertheless, ID cannot be diagnosed without evidence of impairment in everyday functioning. Rating scales of adaptive behavior, such as the Adaptive Behavior Assessment System, Second Edition (Harrison & Oakland, 2003) are the most common method for assessing adaptive behavior. Although tests of adaptive behavior are reasonably correlated with practical skills, such as employment (Su, Lin, Wu, & Chen, 2008) and community independence (Woolf, Woolf, & Oakland, 2010), they should be supplemented with other information in *Atkins* evaluations (Olley & Cox, 2008). Missing IQ scores or scores that fall very close to the IQ 70 cutoff shift the emphasis of the evaluation to adaptive behavior. It is emphasized that impairment in adaptive behavior is not the same as the maladaptive behavior that is the focus of this volume. The American Association on Intellectual and Developmental Disabilities diagnostic manual (2010) makes clear that the two types of behavior are poorly correlated and maladaptive behavior should not be used to prove deficits in adaptive behavior.

On a similar note, the assessment of adaptive deficits is about deficits. As noted earlier, evidence of isolated examples of adaptive functioning does not disprove ID. Although the American Association on Intellectual and Developmental Disabilities manual (2010) clearly stated that people with mild ID are likely to have areas of adequate functioning, courts have mistakenly accepted examples of competent functioning to show that the defendant does not have an ID. Examples include knowing what days of the week the defendant could have visitors, having long-term gainful employment, being able to drive, passing the driver's test, and even being able to steal a television. As an even more extreme example, judges have relied on their own ability to diagnose ID on the basis of what they observe in court. In the case of James Lee Henderson, "The trial judge also explicitly relied upon his personal knowledge and recollection of Henderson's in-court demeanor during both the trial and [the state court] *habeas* hearing" (*Henderson v. Quarterman*, 2008).

The customary instruments used for diagnosis of ID are designed to assess current functioning. Thus, in looking back in time, the advice of Webb et al. (1981) to rely on as many sources as possible will help achieve consensual validity. Many *Atkins* evaluations in the first years after the decision relied on the available records, an interview of the defendant, and little else. More recent evaluations have been, in my experience, much more comprehensive. This is a good trend, but it raises a question of which sources of information are most valid. For instance, is information gathered in prison valid for a diagnosis of current or past functioning? The definition of adaptive behavior (American Association on Intellectual and Developmental Disabilities, 2010) is functioning in one's community, so functioning in the restricted circumstances of prison would appear to have limited value. Tests

of knowledge administered in jail or prison have similar limitations. There is no assurance that knowledge of adaptive functioning results in adaptive community behavior.

Is the self-report of defendants with known low intelligence a valid source? As noted earlier, substantial research on interviewing people with low intelligence should make one very cautious in interpreting this information (Finlay & Lyons, 2001, 2002; Perry, 2004).

Parents are the most common source of adaptive behavior information. Are parents automatically biased and assumed to provide false information indicating low functioning, or do parents show bias toward exaggerated accomplishments and want their children and their family to appear in the best light? Or is every case different, and is the clinical experience of the expert an essential component of a valid evaluation? This author votes for the latter.

Although the best source of information is not always clear, sometimes the worst source is. It is inappropriate and clearly invalid to ask a family member, friend, or other lay witness, "Do you think he has mental retardation?"

Interpreting Multiple Scores

Atkins cases typically offer mixed evidence for a diagnosis of ID, including a history of several IQ tests and academic achievement tests at different periods and with variable scores. Looking at this information from its black-or-white viewpoint, the court wants to know, which is the "true IQ" or the "true" level of academic functioning? Although academic performance would be expected to go up with each year of schooling, IQ is generally regarded as a stable trait. Nevertheless, scores can vary in puzzling ways.

The gray world of science acknowledges that there are many reasons that scores vary. Whitaker (2008) provided a clear discussion of the many factors influencing IQ score variability and noted that variability is greater in low IQ ranges than in the average range. In his meta-analysis of studies of the stability of low IQ, he found that for most individuals IQ remained fairly stable, but "14% of IQs changed by 10 points or more" on retesting. In a later study of people with low IQ, Whitaker (2010) concluded that "for low Full Scale IQs the WAIS-III can only be considered accurate to within 18 points above the measured IQ and 28 points below, and the WISC-IV to 16 points below the measured IQ and 25 points above it" (p. 517). This range is considerably larger than the standard error of measurement associated with IQ tests. These findings make it very difficult to assess IQ retrospectively in *Atkins* cases.

The exact reason(s) for score variability in any single case may not be certain, but taking the mean of several IQ scores is statistically inaccurate, although it has been done and accepted by courts in several *Atkins* cases.

Evaluating Non-English-Speaking Defendants

Awareness of cross-cultural factors in research and clinical practice has greatly increased in recent years (Byrne et al., 2009). However, in *Atkins* cases, the

evaluation of non-English-speaking defendants presents several challenges with regard to both IQ and adaptive functioning. For a person who lived most of his or her life in another country and culture, what norm group should be used to judge an adaptive functioning deficit? For IQ measurement, it is clear that an IQ test should be administered in the defendant's native language and not in English or with an interpreter. However, what is the appropriate test and norm group? Most non-English-speaking defendants in *Atkins* cases have been Spanish speaking, and there are several IQ tests in Spanish. Suen and Greenspan (2009) pointed out problems with the use of the Mexican WAIS. Kevin McGrew, mentioned earlier, is one of the authors of a more appropriate test, the Bateria III Woodcock-Muñoz (Woodcock, Muñoz-Sandoval, McGrew, & Mather, 2010), which includes in its normative sample individuals living in the United States but raised in various Spanish-speaking countries.

MORE INFORMATION IS NEEDED

Although psychologists and other experts in ID have successfully translated some of the extensive research and clinical base to the unfamiliar territory of the courtroom and have used the timely circumstances of *Atkins* to clarify new issues, much work remains. For instance, Haney and Specter (2001) have pointed out the special challenges in adjustment to prison life faced by people with developmental disabilities, but little is known about the specific, long-term effects of incarceration on people of low intelligence. For example, is there impairment or improvement in IQ? Is it possible that the environment of prison with healthy meals, access to exercise, social interaction, and the absence of street drugs and alcohol is actually an intellectually beneficial setting?

Perhaps the years since the *Atkins* decision have produced more questions than answers regarding the best implementation of this landmark case. The challenges will continue, but this author is confident that psychologists will provide leadership to assist the courts in the best application of science and clinical practice in *Atkins* decisions. Toward this end I recommend that information and skills related to forensic practice be a part of the training for all psychologists, especially those in applied areas. Few psychologists anticipate testifying in court, but the reality is that nearly all will testify at some time. They must be prepared to present the best science and practice to assist the court and to understand the role that they will play in the courtroom and the ways in which it differs from the customary clinical or research role. The specific skills needed for testimony in *Atkins* cases should be addressed in continuing education opportunities for psychologists and are described more fully in Olley (2009).

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