Atkins v. Virginia: An Empty Holding Devoid of Justice for the Mentally Retarded

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Introduction

In the 2002 case *Atkins v. Virginia*,[1] the United States Supreme Court found that executing a mentally retarded person is excessive punishment; consequently, the Court held that condemning such individuals to death violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution.[2] The Court explained that there is a societal consensus that mentally retarded criminals are less culpable than other criminals, as demonstrated by the trend amongst states to legislate against executing the mentally retarded.[3] Additionally, the two key rationales for capital punishment—retribution and deterrence—do not apply with the same force to mentally retarded offenders as they do to those without mental retardation.[4] Finally, *Atkins* found that mentally retarded people often face a greater risk of execution for crimes they did not commit than those who are not mentally retarded. A variety of causes attributed to their impairment could make mentally retarded defendants more likely to be wrongfully convicted, including a false confession, an inability to assist counsel, being a poor witness, and appearing unremorseful to the jury.[5]

Despite recognizing that disagreement results when courts must determine whether an individual is in fact mentally

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

2. *Id.* at 321.

3. *Id.* at 315–16 (noting the "consistency of the direction of change" amongst the states toward legislating against executing the mentally retarded).

4. *Id.* at 319–20 (noting that "the lesser culpability of the mentally retarded offender surely does not merit that form of retribution [the death penalty]," and that "executing the mentally retarded will not measurably further the goal of deterrence").

5. *Id.* at 321 ("Mentally retarded defendants in the aggregate face a special risk of wrongful execution.").

retarded,[6] the *Atkins* Court did not articulate a test or procedure for states to follow in order to implement its decision that mentally retarded people must not be sentenced to death.[7] The *Atkins* Court left each state on its own to solve the problems presented by the holding—from formulating a definition of mental retardation to determining the applicable burden of proof and upon whom that burden falls.[8] As a result, amongst the states there is neither a uniform definition of mental retardation nor a uniform procedure for determining whether a defendant is mentally retarded,[9] and some state legislatures have declined to act on this issue at all.[10]

This Article compares the responses of three states to the *Atkins* decision, highlighting inconsistencies in the qualifications for mental retardation and in the processes courts use to determine mental retardation. These variations demonstrate the central flaw in the *Atkins* decision: the Court merely pointed out a constitutional violation without providing guidelines to ensure that such violations cease. *Atkins* failed to ensure protection from a death sentence for those who do not meet the culpability requirements for execution. As a result, states may still perform unconstitutional executions.

By leaving states the tasks of defining mental retardation and implementing procedures for determining whether a defendant is mentally retarded, the *Atkins* Court merely recognized a constitutional violation without providing either a remedy or a way to prevent further violations. In order to give bite to the *Atkins* holding, states should work from the same substantive definitions of mental retardation and follow uniform procedures for determining mental retardation. Uniformity is important because a ruling on mental retardation determines the death penalty's availability. Suggested considerations for a suitable rule include: examining factors indicative of the defendant's culpability in addition to mental retardation, eliminating age of onset requirements, complying with constitutional requirements for sentencing determinations

6. *Id.* at 317.

7. *Id.* ("As was our approach in *Ford v. Wainwright,* 477 U.S. 399 (1986), with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'").

8. *See id.*

9. *See infra* Part I.B.

10. *See, e.g.*, Gallo v. State, 239 S.W.3d 757, 769 (Tex. Crim. App. 2007) ("In the three legislative sessions since *Atkins,* the Texas Legislature has not established a statutory scheme for the presentation and determination of an issue of mental retardation in a capital murder trial. In the absence of legislative action, this Court has formulated temporary judicial guidelines in addressing *Atkins* claims.").

(including the applicable burden of proof), determining mental retardation pre-trial, and ensuring that intelligence quotient (IQ) test scores are not given too much weight in mental retardation determinations.

Part I of this Article provides background to place the *Atkins* decision in context, including a general discussion of executing the mentally retarded, a comparison of common definitions of mental retardation, a brief examination of the rationale for inflicting the death penalty as described in *Atkins*, and a synopsis of case law leading to the *Atkins* decision. Part II provides a detailed description of the *Atkins* holding and reasoning. Part III compares the methods used by Texas, New Jersey, and Louisiana in capital cases to determine whether a defendant is mentally retarded. Part IV concludes that due to deficiencies in the *Atkins* decision itself, the current implementations of the *Atkins* holding by the states are insufficient to safeguard against constitutional violations. Part IV also addresses proposed solutions to this problem, suggesting components of a sufficient "*Atkins*" rule.

I. The Setting of Atkins

A. Executing the Mentally Retarded

Since reinstating the death penalty in 1976,[11] the United States has executed at least thirty-three mentally retarded men.[12] Some estimate that over three hundred mentally retarded men and women currently sit on death rows across America.[13] One man named Earl Washington sat on death row for sixteen years after police convinced him to confess to a crime he did not commit.[14] Mr. Washington had an IQ of sixty-nine,[15] which falls in the range of mentally retarded.[16] Fortunately, DNA tests confirmed Washington's innocence before his death sentence was

11. *See* Gregg v. Georgia, 428 U.S. 153 (1976).

12. Jamie Fellner, *Mentally Retarded Don't Belong on Death Row*, S. F. CHRON., Jan. 1, 2004, at A19, *available at* http://hrw.org/english/docs/2000/01/04/usdom12804.htm (noting that it is likely that this number is actually greater, because this number represents only those executed who are known to have been mentally retarded).

13. *Id.* (citing expert estimates that 10–15% of the over 3,000 inmates currently on death row are mentally retarded).

14. *See* Death Penalty Information Center, *Earl Washington, IQ of 69, Confessed to a Crime He Did Not Commit*, http://www.deathpenaltyinfo.org/mental-retardation-and-death-penalty (last visited Sept. 28, 2008) (discussing Mr. Washington's innocence).

15. *Id.*

16. *See infra* notes 33–35 and accompanying text.

carried out, and he received an absolute pardon.[17]

The United States is in the global minority by continuing to impose the death penalty at all—let alone on mentally retarded individuals.[18] Before his retirement, Supreme Court Justice Blackmun noted that, "[t]aking international law seriously where the death penalty is concerned draws into question the United States' entire capital punishment enterprise."[19] While sixty countries retain the death penalty, the number currently carrying out executions is much lower.[20] The United States executed the fifth highest number of people per country in 2007, behind only China, Iran, Saudi Arabia, and Pakistan.[21] These five countries carried out eighty-eight percent of all known executions that year.[22]

In *Atkins*, the Supreme Court noted that, "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[23] The countries in the European Union voiced their interest in protecting the mentally retarded from execution in a brief as *amicus curiae* supporting Atkins, stating that the United States' practice of allowing the mentally retarded to be executed is at odds with the practice of other countries throughout the world.[24] The United Nations Commission on Human Rights also

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17. Death Penalty Information Center, *supra* note 14.

18. *See* AMNESTY INTERNATIONAL, ABOLITIONIST AND RETENTIONIST COUNTRIES, http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries (last visited Nov. 16, 2008) (noting that 137 (over two-thirds) of the world's countries "have now abolished the death penalty in law or practice").

19. Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1103 (2002).

20. *See* AMNESTY INTERNATIONAL, *supra* note 18 (noting that of the sixty retentionist countries, thirty-five "can be considered abolitionist in practice in that they have not executed anyone during the past 10 years and are believed to have a policy or established practice of not carrying out executions").

21. *See* AMNESTY INTERNATIONAL, DEATH SENTENCES AND EXECUTIONS IN 2007 6 (2008), http://www.amnesty.org/en/library/asset/ACT50/001/2008/en/b43a1e5b-ffea-11dc-b092-bdb020617d3d/act500012008eng.pdf.

22. AMNESTY INTERNATIONAL, FIGURES ON THE DEATH PENALTY, http://www.amnesty.org/en/death-penalty/numbers (last visited Nov. 16, 2008).

23. Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (citation omitted).

24. United States Supreme Court Amicus Brief, McCarver v. North Carolina, No. 00-8727, 2001 WL 648609, at *2 (noting that "[t]here is a growing international consensus against the execution of persons with mental retardation"); *see* Atkins v. Virginia, 534 U.S. 1053 (2001) (granting motion to consider amicus briefs filed in *McCarver v. North Carolina*, 533 U.S. 975 (2001) on behalf of the petitioner in *Atkins v. Virginia*, 536 U.S. 304 (2002)); *see also* European Union, Delegation of the European Commission to the USA, EU Policy on the Death Penalty, http://www.eurunion.org/legislat/deathpenalty/eumemorandum.htm (last visited Nov. 16, 2008) (explaining that executing those with any form of mental disorder is

encourages countries to refrain from imposing the death penalty on those with any form of mental disability.[25] Other groups demonstrated their opposition to the execution of mentally retarded individuals by filing *amicus curiae* briefs in *Atkins*, including the American Psychological Association, the American Association on Mental Retardation (AAMR),[26] and the United States Catholic Conference.[27]

B. *Essential Components of Common Definitions of Mental Retardation*

According to the Supreme Court, the AAMR is "the country's oldest and largest organization of professionals working with the mentally retarded."[28] The Supreme Court has cited the AAMR definition of mental retardation when determining whether a defendant is mentally retarded for purposes of the death penalty.[29] The Court also offered the American Psychiatric Association's definition of mental retardation,[30] observing that it was "similar" to that of the AAMR.[31] While the precise wording may differ, most definitions of mental retardation contain three common elements: limited intellectual functioning, limited adaptive behavior, and an onset before age eighteen.[32]

Limited intellectual functioning is often measured by the standardized Intelligence Quotient (IQ) test.[33] A score of seventy or below, which is two standard deviations below the mean, indicates significantly limited intellectual functioning;[34] however,

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"contrary to internationally recognised human rights norms and neglect[s] the dignity and worth of the human person").

25. *See* Sandra Babcock, *The Global Debate on the Death Penalty*, Z NET, Dec. 12, 2007, http://www.zmag.org/znet/viewArticle/15845.

26. The American Association on Mental Retardation is now the American Association on Intellectual and Developmental Disabilities (AAIDD). *See generally* American Association on Intellectual and Developmental Disabilities, http://www.aamr.org or http://www.aaidd.org. This Article uses both names in order to be consistent with the source or time period.

27. *See Atkins*, 536 U.S. at 316 n.21 (listing *amicus curiae* briefs).

28. Penry v. Lynaugh, 492 U.S. 302, 335 (1989).

29. *Atkins*, 536 U.S. at 308 n.3 (citing the 1992 definition of mental retardation from the AAMR, which is now the AAIDD).

30. *Id.*

31. *Id.*

32. *See, e.g.*, American Association of Intellectual and Developmental Disabilities, Frequently Asked Questions on Intellectual Disability and the AAIDD Definition, http://www.aamr.org/content_185.cfm?navID=62 (last visited Dec. 17, 2008) [hereinafter AAIDD FAQ].

33. *See id.*

34. *Id.*

due to the margin of error in IQ tests, an individual with mental retardation may score as high as seventy-five.[35] An IQ score alone, whether above or below seventy, is not indicative of the existence of mental retardation or the lack thereof: one must also examine the individual's adaptive behavior.[36]

Adaptive behavior is measured by testing the conceptual, social, and practical skills that individuals use in everyday life.[37] Significantly limited adaptive behavior is characterized by test scores two standard deviations below the mean on any one area of conceptual, social, or practical skills, or on an average of all three.[38] This element addresses the requirement that the intellectual impairment has produced real-world disabling effects, not merely a low IQ.[39]

Some, but not all, definitions of mental retardation for legal purposes require that the age of onset be under eighteen; others require manifestation before the age of twenty-two, or during the developmental period; a few definitions have no age requirement at all.[40] The primary purpose of the age of onset requirement "is to distinguish mental retardation from other forms of brain damage that may occur later in life, such as traumatic head injury or dementia caused by disease, illness, or similar conditions."[41] While these distinctions may be important for diagnosis and treatment,[42] they should not bear on a defendant's eligibility for

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35. *See Definition of Mental Retardation*, http://www.medterms.com/script/main/art.asp?articlekey=20174 (last visited Nov. 11, 2007) [hereinafter *Definition*] (noting that a score below seventy to seventy-five on the IQ test is considered mental retardation).

36. *See* AAIDD FAQ *supra* note 32.

37. *See id.* (listing examples of conceptual skills such as reading, writing, and money concepts; social skills such as responsibility, gullibility, naïveté, following rules, obeying laws, and avoiding victimization; and practical skills, including daily living skills, such as eating, dressing, preparing meals, and occupational skills).

38. *Id.*

39. *Id.*

40. *See, e.g.*, Death Penalty Information Center, State Statutes Prohibiting the Death Penalty for People with Mental Retardation, http://www.deathpenaltyinfo.org/article.php?did=138&scid= (last visited Sept. 28, 2008) (noting that New Mexico and Nebraska have no age of onset requirement; Colorado, Connecticut, and Georgia use the developmental period (as defined by each state); Indiana and Maryland use age twenty-two).

41. Attorney William D. Matthewman, Comment to Florida Rule of Criminal Procedure 3.203 and Florida Rule of Appellate Procedure 9.142 (proposed), Supreme Court of Florida Case No. SC 03-685 2 (June 2003), http://www.floridasupremecourt.org/clerk/comments/2003/03685_CommentsMatthewman.pdf.

42. *See Definition, supra* note 35.

the death penalty.[43] Individuals with significant deficiencies in mental functioning, regardless of the underlying cause, lack the level of culpability that is required to impose a death sentence.[44]

C. *Rationale for Inflicting the Death Penalty*

One goal of inflicting capital punishment is retribution.[45] The theory of retribution is based on the idea that the level of the offender's culpability should dictate the severity of the punishment.[46] In determining whether an individual's behavior meets the level of culpability warranting the death penalty, courts have considered four principles: whether the offender acted "rationally, purposefully, and deliberately"; the capacity of the individual to understand the consequences of his actions; whether the individual is able to behave as a "responsible, mature citizen"; and the level of personal responsibility of the individual.[47]

A second goal of capital punishment is deterrence,[48] based upon the idea that more severe punishments will prevent potential criminals from carrying out the wrongful conduct that triggered the punishment.[49] Due to this cause and effect relationship, punishment can serve as a deterrent only when the criminal engages in premeditation and deliberation of his or her crime.[50]

D. *Case Law Leading to* Atkins

In the 1989 case *Penry v. Lynaugh*,[51] the Supreme Court denied an Eighth Amendment challenge to the application of the death penalty to mentally retarded people.[52] The defense argued that it was cruel and unusual punishment to execute a mentally retarded person like Penry, who had the mental capacity of a seven-year-old child.[53] Further, the defense urged the Court to take the view that mentally retarded people cannot possess the

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43. *See generally* Matthewman, *supra* note 41 at 2–3 (arguing that the age of onset requirement should be abandoned when determining mental retardation of defendants in potential capital trials).

44. *Id.*

45. Joanna Hall, Atkins v. Virginia*: National Consensus or Six-Person Opinion?*, 12 AM. U. J. GENDER SOC. POL'Y & L. 361, 376 (2004).

46. *Id.*

47. *Id.* at 376–77.

48. *Id.* at 376.

49. *Id.*

50. *Id.*

51. Penry v. Lynaugh, 492 U.S. 302 (1989).

52. *Id.* at 340.

53. *Id.* at 328.

requisite level of culpability for a death sentence, and claimed that there was an "emerging national consensus" against executing mentally retarded people.[54] The Court, however, did not want to prohibit the punishment for an entire class of defendants,[55] and did not find sufficient evidence of a nationwide opposition to the practice to hold that it was excessive punishment.[56]

In a 1980 decision, *Godfrey v. Georgia*,[57] the Supreme Court discussed the necessity of finding that a defendant has higher moral culpability than an average criminal in order for the death penalty to be imposed.[58] The Court found that the petitioner's crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder," and consequently Godfrey could not be executed.[59] *Godfrey* solidified the important notion that the death penalty must be triggered by something about the offense or the offender that is sufficient to distinguish the situation from that in which the death penalty is not imposed.[60]

In the 1986 case *Ford v. Wainwright*,[61] the Supreme Court held that the Eighth Amendment prohibits the State from executing an insane person.[62] The Court formally recognized its longstanding principle that it is wrong to execute someone who, because of a mental illness, does not understand the justifications for the death penalty or its implications.[63] The decision, however, largely left "to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."[64]

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54. *Id.* at 328–29.

55. *See id.* at 338–39 (arguing that differences in experience and capabilities among mentally retarded people make categorical exclusion of them from the death penalty inappropriate).

56. *Id.* at 335 ("But at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment.").

57. Godfrey v. Georgia, 446 U.S. 420 (1980).

58. *See id.* at 427–33 (stating that crimes deserving the death penalty must be distinguished from other crimes by factors including the "depravity of mind" of the defendant).

59. *Id.* at 433.

60. *Id.* at 427 ("A capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'" (quoting Gregg v. Georgia, 428 U.S. 153, 188 (1976))).

61. Ford v. Wainwright, 477 U.S. 399 (1986).

62. *Id.* at 410.

63. *Id.* at 417.

64. *Id.* at 416–17.

One of the few instructions provided in the *Ford* opinion was that the procedures used by the states should further the goal of reaching a fair assessment of the defendant's mental state.[65] The *Ford* Court also advised the states to place as few restrictions as possible on the adversarial presentation of information relating to the defendant's mental state, stressing the need for accuracy in the factfinding determination.[66] The Court found it important that any state procedure allow the prisoner to participate in the process used to determine sanity by giving the defense the opportunity to present all relevant evidence in an adversarial proceeding.[67] The Court also stressed that it is important for the factfinder to consider multiple expert psychiatric opinions when determining issues of mental state.[68] The defendant must also be allowed to challenge or impeach the state-appointed psychiatrist's conclusions and methods.[69] Lastly, the determination of a defendant's sanity should not be left to the executive branch, which does not have the necessary neutrality for such factfinding.[70] These procedural requirements stem from the Court's "heightened concern for fairness and accuracy."[71]

II. *Atkins v. Virginia*

In *Atkins v. Virginia,* the Supreme Court held that executing a mentally retarded criminal is excessive punishment, and thus the practice violates the Cruel and Unusual Punishment Clause of

65. *Id.* at 417 ("Yet the lodestar of any effort to devise a procedure must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination.").

66. *Id.* (arguing that the "high stakes" and "imprecise" evidence involved in these cases create the need for unrestricted presentation of evidence, noting that "[i]t is all the more important that the adversary presentation of relevant information be as unrestricted as possible").

67. *See id.* at 413–14 (noting that all other proceedings leading up to the determination of a death penalty require the submission of all relevant information, so it "would be odd were [the court] now to abandon [its] insistence upon unfettered presentation of relevant information, before the final fact antecedent to execution has been found").

68. *Id.* at 414 ("[W]ithout any adversarial assistance from the prisoner's representative—especially when the psychiatric opinion he proffers is based on much more extensive evaluation than that of the state-appointed commission—the factfinder loses the substantial benefit of potentially probative information. The result is a much greater likelihood of an erroneous decision.").

69. *Id.* at 415.

70. *Id.* at 416 ("Perhaps the most striking defect in the [Florida] procedures . . . is the State's placement of the decision wholly within the executive branch. . . . The commander of the State's corps of prosecutors cannot be said to have the neutrality that is necessary for reliability in the factfinding proceeding.").

71. *Id.* at 414.

the Eighth Amendment.[72] The *Atkins* Court declared that "death is not a suitable punishment for a mentally retarded criminal," and that the mentally retarded should be categorically excluded from execution.[73]

The existence of state legislative action on this issue strongly influenced the Supreme Court's finding.[74] A claim that punishment is excessive is judged by today's standards rather than any historical views on the subject,[75] and the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[76] The Court observed a change since this issue was last brought to its attention: many state legislatures began banning the execution of mentally retarded individuals.[77] Such legislative action demonstrated to the Court an evolving public view that executing mentally retarded people is a punishment not proportional to their offense.[78] The Court was not concerned with the exact number of states that had enacted legislation in this area, but instead with the obvious trend against executing the mentally retarded.[79] Because the Supreme Court could find no valid reason to disagree with the judgment of the people as demonstrated through state legislatures, a majority of the Justices determined that executing mentally retarded people is excessive punishment.[80]

In determining whether to agree with the legislative trend, the *Atkins* Court discussed several factors. First, the Court found that mentally retarded criminals should not be immune from punishment, but should not be sentenced to death because they are less personally culpable than the average person is.[81] The reduced personal culpability is the result of the impairments of mentally retarded persons, including "diminished capacities to

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

73. *Id.* at 320.

74. *See id.* at 311–12 (stating that the proportionality of punishment should be determined by current societal standards, which are clearly demonstrated by current legislation).

75. *Id.*

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

77. *Id.* at 314–15.

78. *See id.* at 316 ("The practice [of executing the mentally retarded], therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.").

79. *Id.* at 315 ("It is not so much the number of these States that is significant, but the consistency of the direction of change.").

80. *Id.* at 321.

81. *Id.* at 318 ("Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.").

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."[82] These disabilities cause a mentally retarded person to be unable to "act with the level of moral culpability that characterizes the most serious adult criminal conduct,"[83] for which the death penalty is deemed acceptable.[84] It would be inconsistent to inflict the death penalty on a mentally retarded criminal when the culpability of the average murderer does not warrant the death penalty.[85]

A second factor resulting in the Court's agreement with the legislative trend toward banning the execution of the mentally retarded is that the common justifications for the death penalty do not apply to mentally retarded people.[86] The social purposes of the death penalty are "retribution and deterrence of capital crimes."[87] Society's interest in retribution is closely tied to the culpability of the offender.[88] Since the impairments of mentally retarded people make them unable to act with the high level of culpability required in order to inflict the death penalty,[89] society has no reasonable interest in seeing the death penalty imposed on the mentally retarded.[90]

Society also does not experience a measurable deterrence benefit from executing mentally retarded criminals.[91] The same impairments that make the mentally retarded less morally culpable also reduce their ability to reason in the ways necessary to control their behavior based on the possibility of execution.[92] Capital punishment is an effective deterrent "only when murder is the result of premeditation and deliberation."[93] Therefore, executing mentally retarded criminals who are incapable of these reasoning processes does not further society's interest in the

82. *Id.*

83. *Id.* at 306.

84. *See id.* at 311 (noting that punishment should be proportional to the offense).

85. *See id.* at 319.

86. *Id.* at 318–19.

87. *Id.* at 319 (quoting Gregg v. Georgia, 418 U.S. 153, 183 (1976)).

88. *Id.*

89. *Id.* at 306.

90. *See id.* at 319 (arguing that the death penalty is "purposeless" unless it accomplishes either deterrence or retribution).

91. *Id.*

92. *Id.* at 320.

93. *Id.* at 319 (citing Enmund v. Florida, 458 U.S. 782, 799 (1982)).

deterrence of capital crimes.[94]

Finally, the *Atkins* court noted that "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution."[95] Many aspects of the defense could be adversely affected by the fact that the defendant is mentally retarded. Mentally retarded defendants may have problems assisting their counsel, are usually poor witnesses, and can appear to lack remorse.[96] This makes demonstrating mitigating circumstances difficult when the prosecution demonstrates aggravating factors.[97] Attempting to show mental retardation as a mitigating circumstance can actually increase the likelihood that the jury will find that the aggravating factor of future dangerousness exists.[98] Additionally, mentally retarded people are in greater danger of giving false confessions.[99] These factors led the Court to the conclusion that the enhanced risk that a mentally retarded person will be executed weighs in favor of a formal ban on their execution.[100]

After determining that the execution of mentally retarded criminals is an Eighth Amendment violation, the *Atkins* Court explicitly stated that it would leave the difficult task of enforcing its holding to the states.[101] While it explained that potentially serious complications arise when trying to determine whether a defendant is in fact mentally retarded,[102] the opinion did not give much guidance to states on how to approach the issue. The Court observed that the existing statutory definitions of mental retardation, while not identical, are generally similar to the AAMR and the American Psychiatric Association definitions cited earlier in the opinion.[103] Most significantly, procedural aspects of enforcing the *Atkins* holding—such as the point in the proceedings

94. *Id.* at 320 ("[E]xecuting the mentally retarded will not measurably further the goal of deterrence.").

95. *Id.* at 321.

96. *Id.* at 320–21.

97. *Id.* at 320.

98. *Id.* at 321.

99. *Id.* at 320.

100. *Id.* at 320–21.

101. *Id.* at 317 ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." (quoting Ford v. Wainwright, 477 U.S. 399 (1986))).

102. *Id.* ("To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded.").

103. *Id.* at 317 n.22; *see also supra* Part I.B. (discussing definitions of mental retardation).

at which the issue of mental retardation should be addressed, how to determine if the defendant is mentally retarded, whether the issue must be presented to a jury, the applicable burden, and upon whom that burden falls—were not discussed.[104]

III. State Response to *Atkins*: Highlighting Texas, New Jersey, and Louisiana

A. Texas

Texas has not yet passed legislation establishing substantive and procedural mechanisms for implementing the *Atkins* holding.[105] As a result, in *Ex parte Briseno*,[106] the Texas Court of Criminal Appeals created its own test, noting its departure from the normal practice of deferring to legislative action because the Texas legislature had yet to act on the *Atkins* decision.[107] In settling on the applicable definition of mental retardation, the *Briseno* court noted that the parties had all used the same AAMR definition, which lawmakers also relied on in the Texas Health and Safety Code.[108] Thus, until further legislation was passed, the court adopted the AAMR and Health and Safety Code definition of mental retardation for use in capital sentencing.[109] However, this definition of mental retardation had been evolving for sixty-five years prior to the decision, and was likely to continue to evolve,

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104. *Id.* at 317.

105. Gallo v. State, 239 S.W.3d 757, 769 (Tex. Crim. App. 2007) ("In the three legislative sessions since *Atkins*, the Texas Legislature has not established a statutory scheme for the presentation and determination of an issue of mental retardation in a capital murder trial.").

106. *Ex parte* Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004).

107. *Id.* at 4–5. The court stated that it:

> does not, under normal circumstances, create law. . . . Nonetheless, this Court must now deal with a significant number of pending habeas corpus applications claiming that the death row inmate suffers from mental retardation and thus is exempt from execution. Recognizing that "justice delayed is justice denied" to the inmate, to the victims and their families, and to society at large, we must act during this legislative interregnum to provide the bench and bar with temporary judicial guidelines in addressing *Atkins* claims.

Id.

108. *Id.* at 7–8.

109. *Id.* at 7. The AAMR defined mental retardation as "a disability characterized by: (1) 'significantly subaverage' general intellectual functioning; (2) accompanied by 'related' limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18." *Id.* "[T]he definition under the Texas Health and Safety Code is similar: 'mental retardation' means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." *Id.*

making this a temporary fix.[110]

The *Briseno* opinion made it clear that in Texas, the ultimate determination of a defendant's mental retardation should be made by the factfinder, not by experts in the field.[111] Amazingly, the court held that psychological diagnostic criteria do not necessarily determine whether the defendant is mentally retarded for purposes of the Eighth Amendment's ban on excessive punishment.[112] Although the *Briseno* opinion applied the AAMR definition of mental retardation, the court pointed out that, often, the legal definition of a medical term does not match that in the field of psychiatry.[113] The court found the adaptive behavior criteria in the AAMR definition to be "exceedingly subjective," and found fault in the use of that definition because each side could simply retain experts who would give weight to their view.[114] To further its goal of giving the court leeway in determinations of mental retardation, the Texas court created a test that gives little, if any, weight to experts in the field of mental retardation. Instead, it instructs finders of fact to examine additional factors—which were invented by the court without any basis in scientific literature or evidence regarding mental retardation—in order to determine if the evidence indicates that the defendant is mentally retarded.[115]

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110. *Id.* at 8 n.29.

111. *Id.* at 9; *see also id.* at 9 n.30.

112. *Id.* at 9. The court stated that:

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

Id.

113. *Id.* at 8 n.28.

114. *Id.* at 8.

115. *Id.* at 8–9. The court listed seven factors:

> Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?[; h]as the person formulated plans and carried them through or is his conduct impulsive?[; d]oes his conduct show leadership or does it show that he is led around by others?[; i]s his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?[; d]oes he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?[; c]an the person hide facts or lie effectively in his own or others' interests?[; and p]utting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

The *Briseno* court also found that an applicant is not entitled to a jury review on a post-conviction habeas corpus review of an *Atkins* claim.[116] Support for this decision was found in the fact that the majority of states statutorily prohibiting execution of mentally retarded criminals left the finding of mental retardation to a judge rather than a jury,[117] and the *Atkins* court left the enforcement of its holding to the states.[118] In a 2007 decision, *Gallo v. State*,[119] the Texas Court of Criminal Appeals extended this holding, expressly stating that a jury determination is not required when an *Atkins* issue is presented at trial.[120]

Lastly, *Briseno* held that in a habeas corpus proceeding, the applicant bears the burden of proof to show that he is mentally retarded by a preponderance of the evidence.[121] The court reasoned that the issue of mental retardation was analogous to an affirmative defense, and thus the burden should be the same.[122] As additional support, the court pointed out that at the time of the decision, twelve of the nineteen states that statutorily prohibited execution of mentally retarded individuals placed a similar burden on the defendant.[123] Accordingly, under the *Briseno* test, an applicant must prove by a preponderance of the evidence that he has significantly subaverage intellectual functioning and significant limitations in adaptive functioning.[124] In the 2007 *Gallo* decision, the Texas Court of Criminal Appeals made it clear that the defendant also bears the burden of proving mental retardation by a preponderance of the evidence when the *Atkins* issue is raised at trial.[125] By placing a very difficult burden of proof on the defendant and inventing factors which purportedly indicate lack of mental retardation, the Texas courts created a procedure for determining mental retardation that is sufficiently

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Id.

116. *Id.* at 11 ("Thus, we hold that, when an inmate sentenced to death files a habeas corpus application raising a cognizable *Atkins* claim, the factual merit of that claim should be determined by the judge of the convicting court.").

117. *Id.* at 10 (citing State v. Williams, 831 So.2d 835, 860 & n.35 (La. 2002)).

118. *See id.* at 10–11 (arguing that the Supreme Court's failure to reject existing state practices indicates no preference for a jury determination of mental retardation).

119. Gallo v. State, 239 S.W.3d 757 (Tex. Crim. App. 2007).

120. *Id.* at 770 ("Although a jury determined the issue of mental retardation in this case, it is important to note at the outset that a jury determination of mental retardation is not required.").

121. *Briseno*, 135 S.W.3d at 12.

122. *Id.*

123. *Id.*

124. *Id.* at 14.

125. *Gallo*, 239 S.W.3d at 770.

lax to allow judges to continue to sentence mentally retarded individuals to death.

B. New Jersey

In 2005, the Appellate Division of the Superior Court of New Jersey found that the burden was on the State to prove beyond a reasonable doubt to a jury that the defendant was not mentally retarded—seemingly a step towards justice for mentally retarded offenders.[126] The Appellate Division found that a claim of mental retardation was similar to a claim of diminished capacity, which meant that the defendant lacked the capacity to form the required mens rea.[127] Portions of that holding, however, were reversed the following year when the New Jersey Supreme Court held that "the defendant has the burden to prove by a preponderance of the evidence that he is retarded."[128] The New Jersey Supreme Court held that mental retardation was more similar to insanity than diminished capacity, in that the person's punishment is reduced even though they may have had the required mental state.[129] The court supported its decision to place the burden of proof by a preponderance of the evidence on the defendant with the observation that, of all the states to address the issue, all but six place that burden on the defendant.[130] The New Jersey Supreme Court agreed with the Appellate Division that the jury should determine the existence of mental retardation[131] after the guilt-phase of the trial, but before the penalty-phase begins.[132] However, if the existence of mental retardation is so evident that "reasonable minds could not differ," the judge should make a determination pre-trial.[133]

Justice Albin's dissent to the majority opinion of the New

126. State v. Jimenez (*Jimenez II*), 908 A.2d 181, 190 (N.J. 2006) (citing State v. Jimenez (*Jimenez I*), 880 A.2d 468 (N.J. Super. Ct. App. Div. 2005)).

127. *Id.* at 191.

128. *Id.*

129. *Id.*

130. *Id.* at 188–89 ("[F]ive states use the clear and convincing evidence standard . . . and one state—Georgia—mandates that a defendant prove his or her mental retardation beyond a reasonable doubt.").

131. *Id.* at 189 (noting that "[i]n most jurisdictions, a judge serves as the factfinder on the mental retardation question, whereas in a minority of jurisdictions the *Atkins* determination is left to the jury"). In a subsequent motion to clarify, the New Jersey Supreme Court held that if a single juror is satisfied that the defendant has met his burden of proving mental retardation then the defendant is ineligible to receive the death penalty. *State v. Jimenez (Jimenez III)*, 924 A.2d 513, 514 (N.J. 2007).

132. *Jimenez II*, 908 A.2d at 191–92.

133. *Id.* at 192.

Jersey Supreme Court is noteworthy for his belief that "[b]y shifting the burden of proof to the defendant, the majority unnecessarily, and in my opinion unconstitutionally, increases the likelihood of wrongly executing a mentally retarded person."[134] The dissent analogized the issue of mental retardation to self-defense rather than to the insanity defense, saying that once the defendant raises the issue, the State has the burden of proof.[135] Because he believed lack of mental retardation to be a constitutional prerequisite for execution (rather than a statutory defense, such as insanity), Justice Albin thought that the State should be required to prove the absence of mental retardation beyond a reasonable doubt in order to sentence a defendant to death.[136]

C. *Louisiana*

The 2006 case *State v. Turner*[137] presented a challenge to the constitutionality of Louisiana's statute outlining a procedure for determining whether a defendant is mentally retarded.[138] In *Turner*, the Louisiana Supreme Court rejected the lower court's opinion, which had analogized the issue of mental retardation to competency to stand trial.[139] The Louisiana legislature had equated the issue of mental retardation with the insanity defense and delegated the determination of mental retardation to the jury.[140] The trial court felt that this would violate the defendant's due process and Eighth Amendment rights, and held that a judge, rather than a jury should make the determination of mental retardation.[141]

The Louisiana Supreme Court suggested that one factor in the trial court's decision was that juries are unreliable because they might view the defendant's low IQ as indicative of future dangerousness, which would unjustly sway the jury against a finding of mental retardation.[142] The trial court was also concerned that jurors who are asked to determine whether a

134. *Id.* at 193 (Albin, J., dissenting).
135. *Id.* at 194–95.
136. *Id.* at 195.
137. State v. Turner, 936 So.2d 89 (La. 2006).
138. *Id.* at 92–93.
139. *Id.* at 96.
140. *Id.*
141. *Id.* at 97.
142. *Id.* ("Thus, the defendant's mental retardation was a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates there is a probability he will be dangerous in the future . . . .")

defendant is mentally retarded might come to their conclusion by weighing the issue of mental retardation against other factors, rather than making an independent determination as required.[143] In these ways, juries have the potential to be dangerously unpredictable when given the task of determining the existence of mental retardation in a capital defendant.

The Louisiana Supreme Court recognized that scholars and courts had these and other concerns about delegating the issue of mental retardation to jurors at the penalty phase of the trial.[144] The *Turner* court itself noted another potential difficulty with jurors determining the existence of mental retardation at the penalty phase of the trial: the issue of mental retardation is not similar to other mitigating or aggravating factors that may be found by the jury because, if found, mental retardation completely bars the imposition of the death sentence.[145] Nonetheless, in upholding the statutory procedure for determining mental retardation of a capital defendant, the Louisiana Supreme Court rejected the trial court's belief that a jury was unreliable in making the determination of mental retardation.[146]

In sum, Louisiana statutorily requires the defendant to raise the issue of mental retardation in a pre-trial proceeding, and also requires the defendant to prove mental retardation to the jury by a preponderance of the evidence.[147] Interestingly, this is to take place at the capital sentencing hearing along with all other sentencing issues, even though the court recognized the difference between the issue of mental retardation and other sentencing factors.[148]

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143. *Id.* at 98–99 ("[P]lacing the *Atkins* mental retardation determination within the punishment proceeding could be confusing to jurors who might misconstrue it as interrelated with the culpability issues before them or otherwise be balanced with or against such issues." (quoting Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding them from Execution*, 30 J. LEGIS. 77, 109 (2003))).

144. *Id.* at 98 ("We are aware that both commentators and jurists have expressed serious reservations about jurors deciding the issue of mental retardation at the penalty phase of capital trials."); *see also id.* at 99 (noting that courts have expressed "concern about jurors' determination of mental retardation, during punishment phase, being improperly influenced by evidence that can only improperly appeal to jurors' emotions and passions").

145. *Id.* at 98 ("Thus, mental retardation is not a factor to be weighed in the jury's balance of aggravating and mitigating circumstances in sentencing, but is an absolute bar to capital punishment.").

146. *Id.* at 97–98 ("We find nothing in the Supreme Court's opinion to support a determination that a jury is unreliable for deciding the factual issue of whether the defendant is mentally retarded.").

147. *Id.* at 93.

148. *Id.*

IV. Deficiencies in the *Atkins* Rule and Suggested Modifications to Further the Goal of Eliminating Constitutional Violations

By leaving the task of defining mental retardation and implementing procedures for determining whether a defendant is mentally retarded to the states, the *Atkins* Court merely recognized a constitutional violation without providing a remedy or a means to prevent further violations from continuing.

A. Inconsistencies Between the State Solutions Illustrate The Need For a Uniform Standard

Texas, Louisiana, and New Jersey demonstrate significant differences in the ways that the states have implemented the Supreme Court's holding in *Atkins v. Virginia.* Texas and New Jersey use court-created rules, whereas Louisiana enacted a statute on the subject.[149] In each of those three states, the definition of mental retardation requires significantly subaverage intellectual functioning, limitations in adaptive functioning, as well as an onset prior to age eighteen.[150] In Texas, the judge makes the determination,[151] whereas in New Jersey and Louisiana this is the jury's responsibility.[152] Contrary to the other two states, judges in Texas are specifically instructed not to rely on experts.[153] All three states agree that the defendant has the burden of proving mental retardation by a preponderance of the evidence.[154] The courts in these states have analogized mental retardation to an affirmative defense,[155] competency to stand trial,[156] the insanity defense,[157] and diminished capacity,[158]

149. For a discussion of the specific tests and procedures used in Texas, New Jersey, and Louisiana, see *supra* Part III.

150. *See* State v. Jimenez (*Jimenez II*), 908 A.2d 181, 184 n.3 (N.J. 2006); State v. Turner, 936 So.2d 89, 106 (La. 2006); *Ex parte* Briseno, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004).

151. *Briseno*, 135 S.W.3d at 9.

152. *See Jimenez II*, 908 A.2d at 192 (holding that the judge determines the issue only "if reasonable minds could not differ"); *Turner*, 936 So.2d at 96 (noting that the Louisiana legislature delegated the determination of mental retardation to the jury, but also noting that the court would prefer a judge make the determination of mental retardation pretrial).

153. *See supra* notes 111–115 and accompanying text (discussing the Texas courts' refusal to rely on experts).

154. *See Jimenez II*, 908 A.2d at 190; *Turner*, 936 So.2d at 93; *Briseno*, 135 S.W.3d at 12.

155. *See Briseno*, 135 S.W.3d at 12.

156. *See Turner*, 936 So.2d at 96.

157. *See Jimenez II*, 908 A.2d at 191.

158. *See id.* (citing State v. Jimenez (*Jimenez I*), 880 A.2d 468 (N. J. Super. Ct.

demonstrating significant variation in approaches to mental retardation.

These differences demonstrate the wide array of approaches states have taken to mental retardation in capital cases. Due to the many discrepancies, it is possible that the same person could be found mentally retarded in one state, but not in another. For example, an individual whose IQ score sits just above the level of mental retardation may not be viewed as mentally retarded by a judge in Texas who does not consult experts and instead looks at court-created factors.[159] Then again, an expert in the field of mental retardation may explain to a jury in Louisiana or New Jersey that, despite the IQ score, other factors indicate that the defendant is mentally retarded, and the jury could then find the same defendant mentally retarded.[160] These differing procedural approaches could result in contradictory rulings on mental retardation. This produces an undesirable state of affairs, considering the result for the unlucky defendant is death. A solution to this problem is to set out a single standardized approach for courts to follow when faced with determining if a defendant is mentally retarded.

B. The Atkins *Decision Was Deficient Because it Failed to Provide the States With a Single Substantive Definition of Mental Retardation*

The Texas courts have decided not to rely solely on the guidelines of any existing definition of mental retardation, but rather to write their own criteria for determining the existence of adaptive limitations.[161] Such arbitrary rules are a direct result of a flaw in the *Atkins* decision: leaving the substantive issues involved in determining a defendant's mental retardation to the states.[162] *Atkins* gives too much deference to the states' preferred definitions of mental retardation, resulting in inconsistency. Rather than merely citing the AAMR and American Psychological Society in passing as examples of definitions of mental retardation,[163] the *Atkins* Court should have clearly formulated a definition for the states to use in evaluating defendants' claims of

App. Div. 2005)).

159. *See supra* notes 112, 115 and accompanying text.

160. *See Jimenez II*, 908 A.2d at 184 n.3 (noting that persons with IQ scores just over 70 might be mentally retarded); *Turner*, 936 So.2d at 93–94 (setting no explicit IQ requirements and allowing expert evidence in determining mental retardation).

161. *See supra* note 115 (listing the Texas court's recommended factors).

162. Atkins v. Virginia, 536 U.S. 304, 317 (2002).

163. *See id.* at 317 n.22.

mental retardation based on a uniform standard.

The inclusion, or lack thereof, of an age of onset requirement also results in discrepancies among state definitions of mental retardation. Setting inconsistencies between state rules aside, in order to hold true to the constitutional requirements of *Atkins*, states should not adhere to requirements for the age of onset of mental retardation. First, the *Atkins* Court focused on the fact that the traditional justifications of punishment—retribution and deterrence—do not apply to mentally retarded people due to their limitations in intellectual functioning.[164] When a defendant has significant limitations in intelligence and adaptive behavior, an additional finding that those limitations did not manifest before age eighteen does not lessen their effect on the defendant.[165] Mentally retarded individuals often exhibit deficiencies in conceptual skills such as reading and writing, as well as deficiencies in social skills manifested as gullibility, naïveté, and the ability to follow rules and avoid victimization.[166] Regardless of the age at which these limitations became known, they manifest as an impairment that equally diminishes the retributive and deterrent effects of the death penalty,[167] which the *Atkins* Court believed significant enough to warrant the prohibition of capital punishment for individuals who are mentally retarded.[168] Because the United States Supreme Court held that executing people with significantly diminished mental capacity qualifying as mental retardation is unconstitutional,[169] it clearly should still be unconstitutional to execute someone who met the mental criteria at the time of their crime, but whose diagnosis simply did not occur before a certain age.

The age of onset requirement poses further difficulty in that it is unclear how to determine whether mental retardation began before age eighteen in an individual who was diagnosed later in life.[170] Furthermore, the medical purpose of the age of onset requirement—distinguishing mental retardation from other

164. *Id.* at 319; *see also supra* notes 87–94 and accompanying text (discussing retribution and deterrence in relation to the mentally retarded).

165. *See supra* note 43 and accompanying text.

166. AAIDD FAQ, *supra* note 32; *see also supra* notes 37–38 and accompanying text (discussing the adaptive limitations of those with mental retardation).

167. *See supra* note 43 and accompanying text.

168. 536 U.S. at 321..

169. *Id.*

170. Elaine Cassel, *Justice Deferred, Justice Denied: The Practical Effect of* Atkins v. Virginia, 11 WIDENER L. REV. 51, 57 (2004) ("There is not a systematic method of determining how someone who is long past eighteen years of age became mentally retarded prior to reaching the age of eighteen.").

possible causes of the same symptoms—has no bearing on the court's inquiry into the fitness of the defendant for the death penalty.[171] Since the age at which an individual first experienced symptoms of mental retardation does not affect his or her fitness for execution, the *Atkins* protection against cruel and unusual punishment mandates that the age of onset requirement be eliminated from inquiries into mental retardation for purposes of capital trials.[172]

C. *The* Atkins *Court Should Have Cautioned the States Against Placing Too Much Weight on IQ Scores*

The use of IQ test scores in determining mental retardation has been criticized in several ways. First, it is important to consider the performance on an IQ test along with the other indicators of mental retardation, because "[a] simple IQ score cannot possibly consider the individual as a whole being within his or her unique life context."[173] An individual's limitations in adaptive behavior are as important as the performance on an IQ test, but are more difficult to measure and present as conclusive evidence in court.[174]

Another problem with viewing IQ tests as indicative of mental retardation is the phenomenon known as the "Flynn effect."[175] The Flynn effect refers to the overall improvement of IQ scores by 5 to 25 points every generation.[176] To compensate for this phenomenon, IQ tests are renormed[177] every 15 to 20 years to restore the mean score to 100.[178] The result, however, is that fewer people fall into the range for mental retardation as time

171. *See supra* notes 41–44 and accompanying text (discussing the purpose of the age of onset requirement in definitions of mental retardation).

172. *See* Matthewman, *supra* note 41, at 3 ("Principles of equal protection, and protections against cruel and unusual punishment, mandate that . . . the 'age of onset' requirement be eliminated entirely . . . .").

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

174. *See id.* at 130–31.

175. *See id.* at 127–28; *see also* Cornell University, *Timing of IQ Test Can Be a Life or Death Matter*, SCIENCE DAILY, Dec. 4, 2003, http://www.sciencedaily.com/releases/2003/12/031204073317.htm.

176. *See* Cornell University, *supra* note 175.

177. American Psychological Association, *Renorming IQ Tests Due to Flynn Effect May Have Unintended Consequences*, SCIENCE DAILY, Oct. 20, 2003, http://www.sciencedaily.com/releases/2003/10/031020053951.htm (explaining that "renorming" means making the IQ tests harder in an amount that will result in a mean score of 100).

178. *See id.*; Knauss & Kutinsky, *supra* note 173, at 127.

increases from each renorming of the IQ test.[179] Because of the instability in IQ tests caused by the Flynn effect, researchers have cautioned that some death row inmates who did not originally test in the range for mental retardation may actually fall in that range—and in fact have mental retardation—if tested again using a properly calibrated IQ test.[180] The implications of the inconsistency in IQ tests for the borderline mentally retarded individual are huge: it is the difference between life and death. It is imperative that the use of IQ test scores in determinations of mental retardation be eliminated or qualified as inconclusive so that mentally retarded people are no longer put to death due to the result of one inconsistent test.

Failure to diagnose mental retardation when relying on IQ test scores is not a mere possibility; it is a reality. One study found that three times the number of children fell within the range of mild mental retardation (an IQ score of 66-70) in the first five years after the test was recalibrated compared to the last five years before recalibration.[181] The researchers in that study advised against the use of IQ scores as a basis for important financial, social, or legal decisions, noting that when making such decisions, it may be insufficient to examine only whether or not an IQ score falls below a cutoff point.[182] The decision of whether to sentence a defendant to death or life in prison is one of the most important legal decisions that our judicial system makes. It follows that, because the score alone presents an incomplete picture of mental competency, courts should neither heavily weigh IQ tests nor view an IQ score as determinative evidence when making a decision on a defendant's mental retardation.

The most recognized definitions of mental retardation not only require an examination of adaptive functioning as well as intellectual ability (or IQ score), but also note that impairments in adaptive functioning, not low IQ scores, are the chief indicators of mental retardation.[183] Nevertheless, because an IQ test produces a quantifiable result in the form of a specific number, it is easy to use an IQ score to make a threshold determination of mental retardation. In *Ford v. Wainwright*, when the Supreme Court left

179. *See* Knauss & Kutinsky, *supra* note 173, at 127–28.

180. Cornell University, *supra* note 175.

181. *See* American Psychological Association, *supra* note 177.

182. *See* Cornell University, *supra* note 175.

183. *See* State v. Jimenez (*Jimenez II*), 908 A.2d 181, 184 (N.J. 2006) (citing the definition of mental retardation from the AMERICAN PSYCHIATRIC ASSOCIATION DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) (4th ed. 2000)); *see also* AAIDD FAQ, *supra* note 32.

the procedure for determining insanity to the states, it placed the highest importance on an accurate determination of the facts.[184] The *Atkins* court claimed to be following the precedent created by *Ford* by leaving the task of determining mental retardation to the states.[185] Thus, following *Ford*, the states should place accurate factual determination above all else, which they fail to do either by placing too much weight on IQ scores or by neglecting to consider evidence of adaptive impairment (as in Texas).[186]

If the IQ score is used as one prong in the determination of mental retardation, certain precautions should be taken to ensure that mentally retarded individuals will not be sentenced to death.[187] At a minimum, courts should note whether the IQ test used is at the beginning or the end of a cycle, in order to determine if the Flynn effect might come into play.[188] Additionally, if the score from an old IQ test is used, an inquiry should be made to determine how long after a renorming the test took place. The longer the period of time since the renorming of the test, the greater the likelihood that the Flynn effect would cause inflation in the score.[189] The possibility of an artificially raised score should be grounds for re-testing with a more recently recalibrated test.[190]

Alternatively, courts could compensate for the Flynn effect in the cutoff IQ score that they use to determine mental retardation. For example, the threshold could increase by a percentage corresponding to the Flynn effect increase on the overall norm, either annually or every two years. This may be difficult to implement, especially with no uniform definition of mental retardation, but would still be a step toward ensuring that constitutional violations do not occur.

Because of its inherent limitations, relying on IQ as a determinative factor is likely to result in the execution of mentally

184. Ford v. Wainwright, 477 U.S. 399, 417 (1986); *see also supra* note 66 and accompanying text (discussing *Ford*).

185. Atkins v. Virginia, 536 U.S. 304, 317 (2002) (quoting *Ford*, 477 U.S. at 405 (1986)).

186. *See supra* note 115 and accompanying text (discussing that Texas uses its own factors in lieu of those suggested by the AAIDD or other definitions as indicative of adaptive impairment.)

187. *See supra* notes 175–180 and accompanying text (noting the large potential for failure to diagnose mental retardation when relying on IQ tests).

188. *See id.*

189. *Id.*

190. *See* Knauss & Kutinsky, *supra* note 173, at 127–28 (noting that fewer people fall into the range for mental retardation as time increases from each renorming of the IQ test).

retarded people.[191] The Supreme Court in *Atkins v. Virginia* clearly held that such punishment is cruel and unusual.[192] It is unfortunate that the states seem to agree on the use of an IQ threshold, because, as we have seen, IQ tests are inexact measuring tools and do not take the whole picture of the defendant into account.[193] Authorities on mental retardation suggest using IQ tests only as an aid in the measurement of intellectual functioning, not as a determinative factor in the inquiry into mental retardation.[194] Courts should follow this advice, and either eliminate the use of IQ tests or lessen their reliance on IQ scores while compensating for the Flynn effect on any tests used.

D. By Failing to Provide Adequate Procedural Means to Determine Mental Retardation, the Atkins *Decision Failed to Protect Against Unconstitutional Punishment*

Prior to the *Atkins* decision, eighteen states had enacted statutes either limiting or banning the execution of mentally retarded people.[195] After *Atkins*, eight more states passed legislation on the issue.[196] Unfortunately, that leaves thirteen states with the death penalty whose legislatures have yet to provide a test or method for the courts to use in the six years since the *Atkins* ruling by the Supreme Court.[197] As the Texas court noted in *Ex parte Briseno*, the courts do not usually create the law, but are instead supposed to follow the law as enacted by the

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191. *See supra* notes 173–180 and accompanying text.

192. Atkins v. Virginia, 536 U.S. 304, 321 (2002); *see also supra* Part II (discussing *Atkins* in detail).

193. *See supra* notes 173–180 and accompanying text.

194. *See supra* notes 33–36 and accompanying text.

195. Death Penalty Information Center, State Statutes Prohibiting the Death Penalty for People With Mental Retardation, http://www.deathpenaltyinfo.org/article.php?did=138&scid (last visited Dec. 17, 2008) (listing Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Missouri, New Mexico, Nebraska, New York, North Carolina, South Dakota, Tennessee, and Washington as states that had banned the execution of mentally retarded people prior to *Atkins*).

196. Death Penalty Information Center, States That Have Changed Their Statutes to Comply With the Supreme Court's Decision in *Atkins v. Virginia*, http://www.deathpenaltyinfo.org/article.php?scid=28&did=668 (last visited Dec. 17, 2008) (noting that states that have updated their statutes are: California, Delaware, Idaho, Illinois, Louisiana, Nevada, Utah, and Virginia).

197. *See* Death Penalty Information Center, State by State Information, http://www.deathpenaltyinfo.org/state/ (last visited Dec. 17, 2008) (noting that, of the thirty-nine states that have the death penalty, those that have not enacted legislation are Alabama, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, Ohio, Oregon, Oklahoma, Pennsylvania, South Carolina, Texas, and Wyoming).

legislatures.[198] As was the situation in *Briseno*, lack of sufficient legislative action has forced some courts to effectively make the law in this area,[199] creating another layer of inconsistency amongst the states. To make matters worse, there is no assurance that the legislation enacted by the states prior to the *Atkins* decision in 2002 is sufficient to satisfy the constitutional requirements outlined in that decision. Even if citizens do challenge the constitutionality of the older statutes under *Atkins*, it is unlikely that they will be overturned because the *Atkins* decision gave the states so much discretion.

Comparing Texas, New Jersey, and Louisiana illustrates the massive irregularities between the states. Texas requires that a judge decide the issue, whereas New Jersey and Louisiana both give the task to a jury.[200] Texas, New Jersey, and Louisiana place the same burden of persuasion on the defendant—a preponderance of the evidence.[201] Alternatively, some states use the clear and convincing evidence standard,[202] and another requires proof beyond a reasonable doubt.[203]

Atkins made it clear that mentally retarded defendants are protected from receiving a death sentence by the constitution.[204] One scholar noted that, due to this constitutional protection, "[t]he States' ability to restrict that Eighth Amendment right by placing a heavy burden of persuasion on the defendant is therefore constitutionally suspect."[205] Based on precedent holding that States have less latitude when allocating the burden of persuasion in cases regarding rights derived from the United States Constitution itself, the scholar concluded that it is a violation of Due Process for States to assign the defense an elevated burden of persuasion such as "clear and convincing evidence" or "beyond a

198. *Ex Parte* Briseno, 135 S.W.3d 1, 4–5 (Tex. Crim. App. 2004); *see also supra* note 107 and accompanying text (discussing the *Briseno* court's rationale for creating a test on its own).

199. *See, e.g.*, *supra* Part III (discussing how courts in Texas, New Jersey, and Louisiana had to create new law or interpret new state statutes to comply with *Atkins*).

200. *See supra* note 152 and accompanying text.

201. *See* Gallo v. State, 239 S.W. 3d 757, 770 (Tex. Crim. App. 2007); State v. Jimenez (*Jimenez II*), 908 A.2d 181, 190 (N.J. 2006); State v. Turner, 936 So.2d 89, 93 (La. 2006).

202. *See Jimenez II*, 908 A.2d at 188–89; *see also* James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, at 1, 14, http://www.deathpenaltyinfo.org/MREllisLeg.pdf.

203. *Jimenez II*, 908 A.2d 181, 188–89.

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

205. Ellis, *supra* note 202, at 15.

reasonable doubt."[206] These considerations cannot be taken lightly when courts are facing constitutional issues related to cruel and unusual punishment, in the form of death for a mentally retarded offender.

In addition to *Atkins* establishing that mentally retarded people have constitutional protection against execution, policy considerations also suggest that the State cannot require a defendant to bear a heightened burden of proof.[207] As one scholar noted, "[t]he State's interest in the fair implementation of its capital punishment law is considerable, but it does not require the allocation of such a heavy evidentiary burden on the defendant."[208] The governmental interest does not justify an elevated burden. Furthermore, the Supreme Court believes that "[a] heightened standard does not decrease the risk of error, but simply reallocates that risk between the parties."[209] Placing a higher burden on the defendant does not ensure greater accuracy in determinations of mental retardation, but merely makes it more likely that, if there is an error, the harm will be to the defendant rather than to the government. Consequently, States should not be allowed to require defendants to meet a heightened burden in order to demonstrate that they are mentally retarded.

State laws also differ in the timing of the determination of mental retardation in the criminal process. For example, New Jersey examines the issue at the close of the guilt-phase of the trial, but before the sentencing-phase,[210] whereas the default rule in Louisiana is that the issue of mental retardation is determined at the sentencing hearing.[211] Not only do these varying practices result in contradictory application of the *Atkins* rule from state to state, but many States also fail to employ sufficient procedural safeguards to ensure the protection of the constitutional rights of mentally retarded individuals.

In the 2002 case *Ring v. Arizona*,[212] decided four days after *Atkins*, the Supreme Court held that capital defendants have the right to a jury determination of "all factual questions that are necessary preconditions to the death penalty."[213] In discussing

206. *Id.*
207. *See id.*
208. *Id.*
209. *Id.* (citing Cooper v. Oklahoma, 517 U.S. 348, 366 (1996)).
210. State v. Jimenez (*Jimenez II*), 908 A.2d 181, 191–92 (N.J. 2006).
211. State v. Turner, 936 So.2d 89, 93 (La. 2006).
212. Ring v. Arizona, 536 U.S. 584 (2002).
213. Ellis, *supra* note 202, at 16.

Ring, Justice Albin of the New Jersey Supreme Court contends that, since the State cannot sentence a mentally retarded person to death, the defendant's lack of mental retardation is equivalent to a fact that is necessary to increase a sentence from life imprisonment to death.[214] This argument is consistent with other courts that have pointed out that a finding of mental retardation is different from other sentencing factors because, if found, it is a complete bar to the death penalty.[215] Justice Albin believes that the Supreme Court's decisions in *Ring* and other cases dealing with the constitutionality of sentencing procedures make it clear that "[b]ecause the Eighth Amendment prohibits the execution of a mentally retarded person, a finding of lack of mental retardation is a fact that must be submitted to a jury and proven by the State beyond a reasonable doubt before a death sentence can be imposed."[216]

Justice Albin proposes that after the guilt phase of a trial, the State should be required to present additional factual findings in order to obtain a death sentence.[217] He claims that since the court cannot increase the sentence beyond the statutory maximum of life in prison if the defendant is mentally retarded, lack of mental retardation is a necessary factor that the state must demonstrate in order to increase the sentence.[218] If one views lack of mental retardation as a necessary element of the offense, it follows that the State cannot shift the burden to the defendant because the State is required to prove each element.[219]

Justice Albin further supports his position by pointing out that even before sentencing cases like *Ring*, our judicial system required a high degree of confidence in the outcome of criminal cases due to the great potential for loss of freedom.[220] Where the stakes are much higher, as in a death penalty case, no lesser standard should apply. A defendant should not be sentenced to death if there is a reasonable doubt that doing so would be a violation of the United States Constitution.[221] Therefore, the

214. *Jimenez II*, 908 A.2d at 194–95 (Albin, J., dissenting).

215. *See supra* note 145 and accompanying text.

216. *Jimenez II*, 908 A.2d at 193 (Albin, J., dissenting).

217. *Id.* ("At that stage [post-conviction, pre-sentencing], without any further factual finding, the defendant cannot receive a sentence greater than life.").

218. *Id.* at 194 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (quoting Apprendi v. New Jersey, 530 U.S. 366, 490 (2000))).

219. *Id.* (citing Mullaney v. Wilbur, 421 U.S. 684, 699–702 (1975)).

220. *Id.* at 193.

221. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002).

State should bear the burden of proving beyond a reasonable doubt that the defendant lacked mental retardation.[222]

The issue of mental retardation should be determined pre-trial. At a minimum, an early finding that the defendant is mentally retarded eliminates the need for an exceedingly costly and time-consuming capital trial.[223] Furthermore, after being qualified and sitting for a capital trial, jurors are more likely either not to find the defendant mentally retarded, or to ignore the mental retardation.[224] Because jurors are not well equipped to deal with the issue of mental retardation, it is dangerous to combine that dispositive issue with the other issues that the jurors are instructed to balance, which do not have such high consequences. This can result in juries simply balancing away the existence of mental retardation because they think that the individual should be sentenced to death.[225] Consequently, if juries are to decide this issue, the proceeding should take place pre-trial, before the jurors have been swayed by the presentation of other evidence having nothing to do with mental retardation, and when they will not be confused by the addition of other sentencing issues.

Regardless of whether a judge or jury decides the issue of mental retardation, the court should rely on experts in the field of mental retardation to aid in its decision-making. The use of a psychiatrist is not enough, as he or she may be untrained in the specific field of mental retardation.[226] As noted in Part III.A. above, the Texas Supreme Court specifically instructed the courts not to rely solely on the opinion of experts.[227] The Texas court dismissed the criteria given by the AAMR for determining limitations in adaptive behavior, and instead came up with its own criteria.[228]

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222. *Jimenez II*, 908 A.2d at 195 (Albin, J., dissenting) ("[A] reasonable doubt about a defendant's mental retardation must weigh in favor of life.").

223. Ellis, *supra* note 202, at 13 ("It is universally recognized that capital trials are vastly more expensive to conduct than noncapital trials.").

224. Cassel, *supra* note 170, at 57 ("If evidence of mental retardation is presented at the penalty phase with death qualified jurors, convictions are more likely.").

225. *Id.* ("A prosecutor's hope is that a jury committed to sentencing a defendant to death will 'nullify' and reject a persuasive claim of mental retardation if the facts of the killing are sufficiently gruesome. Juries in capital cases are already predisposed to both conviction and execution . . . .").

226. Ellis, *supra* note 202, at 11.

227. *See supra* notes 111–115 and accompanying text (discussing the effect of the *Briseno* opinion on the creation of Texas's test for determining mental retardation).

228. *Id.*

This approach is problematic for two reasons. First, it goes against the holding in *Atkins*, in which the Supreme Court recognized mental retardation as a specific condition that renders those afflicted ineligible for the death penalty.[229] The *Atkins* Court in no way suggested that the judge should consider factors other than those used in common definitions of mental retardation.[230] Second, "few participants in the criminal justice process—including prosecutors, judges, defense attorneys, and juries—understand the nature and significance of mental retardation."[231] In making a determination that could mean the difference between life and death for someone, it is simply not enough for a judge to examine the aspects of the defendant's condition that he or she sees fit. Thus, those with the greatest expertise in the field should determine the defining characteristics of mental retardation.

Moreover, in making its decision in *Atkins*, the Court explained that it would mirror the approach to insanity taken by the Court in *Ford v. Wainwright* and leave the enforcement of its holding up to the States.[232] In *Ford*, the Supreme Court specifically pointed out the importance of considering multiple expert psychiatric opinions when determining a defendant's mental state.[233] Because the *Atkins* Court applied the methodology used in *Ford*, the States should follow the instructions in the *Ford* opinion regarding the use of expert opinions. In this way, Texas blatantly overstepped the bounds of the *Atkins* decision by excluding the consideration of expert opinions.[234] In order to achieve accuracy and consistency, the use of experts in the field of mental retardation is an essential component of any judicial inquiry into mental retardation.

E. The Atkins *Court Should Have Instructed States to Focus on the Issues That Are Dispositive as to Whether a Defendant Can Be Sentenced to Death, Rather Than the Inexact Task of Labeling Defendants as Mentally Retarded*

Despite placing the task of defining mental retardation in the

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

230. *See id.* at 317–18 (acknowledging the existence of a national consensus on the scope of mental retardation); *see also* Ellis, *supra* note 202, at 5–10.

231. Cassel, *supra* note 170, at 58.

232. *Atkins*, 536 U.S. at 317.

233. Ford v. Wainwright, 477 U.S. 399, 414 (1986).

234. *See supra* notes 111–115 and accompanying text (discussing the *Briseno* opinion and Texas's test for determining mental retardation).

hands of judges who have no training in the field of mental retardation, there is one positive aspect of Texas's approach to this issue. The Texas court remarked that the purpose of the inquiry regarding the defendant's mental capacity is to determine "whether the person is, in fact, mentally retarded *for purposes of the Eighth Amendment ban on excessive punishment.*"[235] This statement highlights the underlying purpose of a court's examination of mental retardation, which is to determine whether the individual meets the criteria for execution, not whether the individual meets the court's arbitrary definition of mental retardation.

As explained in the *Atkins* decision, it is unconstitutional to execute mentally retarded people for three reasons: they do not have the requisite culpability; the traditional rationale for inflicting the death penalty does not apply to them; and, there is a national consensus against the practice.[236] This illustrates that, for the purpose of determining whether someone can or cannot be sentenced to death, describing an individual as mentally retarded is just another way of saying that they do not meet the necessary constitutional criteria for infliction of the death penalty. Because of this, courts and legislatures need not be as concerned with examining factors that indicate the existence of mental retardation,[237] as with an analysis of factors indicating whether the defendant meets the constitutional criteria, established by *Atkins*, that are required in order to be sentenced to death. The *Atkins* Court cited various reasons that mentally retarded people do not meet the criteria for the death penalty, including a diminished capacity to understand, process information, communicate, premeditate, and deliberate.[238] These are the characteristics of the defendant that courts should ultimately be concerned with, rather than the label of mental retardation.

Furthermore, as discussed in Part IV.D., the criteria should not be determined on a state-by-state basis.[239] Instead, the *Atkins* Court should have consulted experts in the field of mental

235. *Ex parte* Briseno, 135 S.W.3d 1, 9 (Tex. Crim. App. 2004) (emphasis added).

236. *Atkins*, 526 U.S. at 306–7. For a discussion of the factors courts should use to determine the level of culpability and whether retribution and deterrence apply to the particular defendant, see *supra* text accompanying notes 46–50.

237. For an example, see *supra* note 115 and accompanying text, listing the factors suggested for inquiry by the Texas courts in the discussion of *Ex parte* Briseno.

238. *See Atkins*, 526 U.S at 318–20; *see also supra* notes 81–94 and accompanying text (discussing reasons why the *Atkins* Court decided that the mentally retarded should not be subject to the death penalty).

239. *See supra* notes 195–234 and accompanying text.

retardation in order to determine the traits of a mentally retarded person that make them ineligible for the death penalty, and how best to determine if a defendant possesses those traits. Based on such an analysis, the Court could have formulated a useful rule for determining whether a defendant meets the mental standards to be sentenced to death under the United States Constitution, regardless of the label of mental retardation.

The task of measuring limitations in adaptive behavior, a component of all common definitions of mental retardation, is another area that presents significant difficulties in attempting to determine if an individual is mentally retarded. Despite lower than average mental capacity, most people with mental retardation live independently as adults; specifically, "about 87% of people with mental retardation will only be a little slower than average."[240] Thus, the limitations in adaptive behavior may be less apparent in these individuals.

Despite its difficulty, a thorough analysis of the existence of adaptive impairments is very important, because some people with mental retardation will score above the cutoff IQ score that is set as the maximum for mental retardation even though they fall below the mean for adaptive impairments.[241] Additionally, even if they appear to interact normally, the AAIDD notes that, due to inherent limitations, individuals with mental retardation are at a "substantial disadvantage . . . when attempting to function in society."[242] For example, aggression can be a symptom of mental retardation,[243] predisposing the mentally retarded to commit violent crimes. Thorough investigation into adaptive limitations is thus very important, as such limitations can be difficult to find but are crucial to an accurate assessment of the individual's mental capacity.

Determining whether adaptive impairments exist in incarcerated individuals is particularly difficult.[244] The "structure

240. *Definition*, *supra* note 35.

241. *See* Kimberly A. Meany, Atkins v. Virginia: *The False Finding of a National Consensus and the Problems with Determining who is Mentally Retarded*, 11 WIDENER L. REV. 137, 166 (2004) ("Health professionals argue that using a single cutoff score to determine mental retardation is 'arbitrary, because some children with mental retardation will score above that number . . . .'" (quoting Pasquale J. Accardo & Arnold J. Capute, *Mental Retardation*, 4 MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES RES. REVS. 2, 4 (1998))).

242. AAIDD FAQ, *supra* note 32.

243. *See* ENCYCLOPEDIA OF MENTAL DISORDERS, MENTAL RETARDATION, http://www.minddisorders.com/Kau-Nu/Mental-retardation.html (last visited Dec. 17, 2008).

244. *See* Knauss & Kutinsky, *supra* note 173, at 131.

and support provided by a prison environment tend to reduce (or at least alter) the environmental demands placed upon inmates," in effect making the individual appear more adapted to the environment.[245] Additionally, the usual measures of adaptive functioning have not been normed for use on a correctional population, nor were they designed for use on individuals in prison.[246]

If an inquiry into mental retardation is to be used to determine fitness for execution, the standard definition should be revisited every few years to account for advances in medicine and knowledge about mental retardation. The definition of mental retardation is constantly evolving with advances in research, understanding, and treatment.[247] The AAIDD has revised its definition of mental retardation ten times since 1908, and it is likely that the definition will continue to evolve.[248] While it is very important for the definition of mental retardation to become uniform among the states, it is more important that the goal of the inquiry be kept in mind—ensuring that individuals who do not meet the criteria for the death penalty are not executed. Accordingly, the definition of mental retardation adopted for use in death penalty cases should examine the characteristics of individuals who meet the definition of mental retardation in conjunction with the characteristics of a criminal mind that are necessary for imposing the death penalty.

F. Components of an "Atkins" *Rule that Would Ensure that States Do Not Continue to Unconstitutionally Sentence Mentally Retarded People to Death*

A judge should make the determination of mental retardation in a pre-trial proceeding.[249] If not determined pre-trial, the judge should still decide the issue because the jury is likely to be biased in its findings regarding mental retardation once it has heard all the facts in the capital trial.[250] The defendant should bear the

245. *Id.*

246. *Id.*

247. *See* AAIDD FAQ, *supra* note 32.

248. *Id.*

249. *See* Ellis, *supra* note 202, at 12–13 (noting that most states which have enacted legislation on the procedure for the determination of mental retardation have chosen to have a judge decide the issue in a pretrial proceeding). *But see State v. Jimenez (Jimenez II)*, 908 A.2d 181, 192-96 (N.J. 2006) (Albin, J., dissenting) (arguing that juries should determine the existence of mental retardation).

250. *See supra* notes 223–225 and accompanying text (discussing the reasons why the determination must take place pre-trial, and why jurors are not well equipped to make that determination).

burden of production, but when it is met, the State should be required to prove beyond a reasonable doubt that the defendant lacked mental retardation.[251] If the burden of persuasion is on the defendant, it should not be any higher than the preponderance of the evidence standard.[252] In this proceeding, the court should make use of experts in the specific field of mental retardation.[253] Any use of IQ score should be adjusted for the Flynn effect and supplemented by thorough examination of other factors.[254] No age of onset should be required.[255]

The dispositive issue is whether the defendant meets the requisite criteria for execution as set forth in *Atkins*, which requires balancing the mentally retarded defendant's culpability with the penological purposes served by the death penalty.[256] Thus, the court should determine whether the defendant acted rationally, purposefully, and deliberately; whether he or she has the capacity to evaluate the consequences of his or her conduct; whether he or she is able to conform to the behavior of a responsible mature citizen; the level of personal responsibility; and whether the individual engaged in premeditation and deliberation of the crime.[257]

If a defendant is not clearly mentally retarded, the court should weigh the defendant's interest in life against the government's interest in capital punishment.[258] If executing the defendant will not legitimately further the interests of retribution and deterrence, or if the defendant does not have heightened culpability to warrant the death penalty, the defendant should be

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251. *See* Ellis, *supra* note 202, at 15–17 (discussing potential constitutional issues with placing any burden of persuasion on the defense).

252. *See supra* notes 202–206 and accompanying text (referencing a potential constitutional issue with placing a heavy burden of persuasion on the defendant, such as "clear and convincing evidence" or "beyond a reasonable doubt").

253. *See supra* note 231 and accompanying text (noting that few participants in the criminal justice system understand the nature and significance of mental retardation); *see also supra* note 233 and accompanying text (referencing the Supreme Court's decision in *Ford*, where the Court specifically noted that multiple expert psychiatric opinions should be considered when determining issues of mental state).

254. *See supra* notes 173–194 and accompanying text (discussing the inaccuracies that can come from placing too much emphasis on the IQ score and what precautions should be taken to increase accuracy in determining mental retardation).

255. *See* Matthewman, *supra* note 41, at 3.

256. *See* Atkins v. Virginia, 526 U.S. 304, 306–7 (2002).

257. *See* Hall, *supra* note 45, at 376–77.

258. *See* Ellis, *supra* note 202, at 15.

given a maximum sentence of life in prison.[259] After balancing factors such as the severity of the crime against the defendant's limitations and mental capacity, the courts must conclude both that the defendant was more morally culpable than the average criminal and that the rationale behind the death penalty applies specifically to that defendant in order to increase the sentence from life in prison to death.[260] Only under these conditions can the court constitutionally inflict the death penalty under *Atkins*.[261]

Conclusion

The only way to ensure that mentally retarded people are not unconstitutionally sentenced to death is to stop using the death penalty in the United States for any offender, regardless of mental capacity. Since this solution does not appear to be on the horizon, the Supreme Court's holding in *Atkins v. Virginia* would seem to be the next best thing; in practice, however, the *Atkins* decision leaves much to be desired. Through the use of differing definitions of mental retardation and procedures for determining who is mentally retarded, states inconsistently apply the Supreme Court's holding in *Atkins*. By allowing the States to create their own tests, the *Atkins* rule was insufficient to guard against constitutional violations. In order to ensure that people are not subjected to cruel and unusual punishment, a single uniform and vigorous standard for determining mental retardation for capital punishment purposes is needed. Without such improvements, the States are free to continue executing those who, because they are mentally retarded, do not meet the constitutional requirements for inflicting the death penalty.

It bears repeating that the United States Supreme Court recognized that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[262] This assertion, combined with the agreement among many states that sentencing mentally retarded people to death is a cruel and unusual punishment, demonstrates that there is both national and global consensus on this issue. The *Atkins* decision was a step in the right direction by formally recognizing that executing mentally retarded people violates the United States Constitution, but it did not go far enough. In order to comply with the conclusion shared

259. See *Atkins*, 536 U.S. at 319–20.
260. *See id.*
261. *Id.* at 318–21.
262. *Id.* at 316 n.21 (citation omitted).

by the Supreme Court, many states, and much of the world, the United States still needs to establish a method for courts to use to determine whether defendants meet the constitutional requirements to qualify for infliction of the death penalty, which *Atkins* failed to provide.

A sufficient definition of mental retardation for use in capital trials would not include an age of onset requirement and would be updated periodically with advances in the field. Courts should rely on the use of experts in the specific field of mental retardation to aid in their determination of the issue, and should not place heavy emphasis on IQ test scores. Any use of IQ scores should be carefully monitored to guard against the use of scores that are artificially heightened due to the Flynn effect. The issue of mental retardation should be determined pre-trial. Once the defendant raises the issue of mental retardation, the State should have the burden of proving beyond a reasonable doubt that the defendant is not mentally retarded. These procedural safeguards are necessary in order to ensure that mentally retarded people are not sentenced to death in violation of their constitutional rights.