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ARTICLES

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I. INTRODUCTION

In an illuminating 2008 article in the *Hofstra Law Review*, Scharlette Holdman and Christopher Seeds helped to bring the concept of cultural competency much needed attention in the field of capital litigation.[1] They presented a view of cultural competency as "at root a collection of knowledge, abilities, and skills."[2] Because cultural competency allows for translation across cultures, Holdman and Seeds took the position that this skill is a prerequisite for a capital defense attorney who is representing a client of a different ethnicity, nationality, social group, or subgroup in the mitigation phase of a capital case.[3]

While cultural competency discourse often focuses upon the relationship between a professional and his or her client, it is important to recognize that the concept extends beyond the client to "the level of the organization/system" in which the client must function.[4] In the world of a capital defendant, this system incorporates a diverse array of people, including judges, juries, court personnel, attorneys, psychologists, investigators, prison guards, and fellow inmates, among others. Drawing upon Holdman and Seeds's work, Michael L. Perlin and Valerie McClain explained that "culturally competent people can grasp, reason, and behave effectively when faced with culturally diverse situations, where assumptions, values, and traditions differ from those to which they are accustomed."[5] By employing the same skills used to communicate effectively with a client, a culturally competent attorney may communicate more effectively with the judge, jury, and any others with whom the client will have significant interactions.

Litigating in a culturally competent manner is of particular importance both to defense attorneys and prosecutors in a contest over whether a defendant is intellectually disabled, and hence cate-

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1. Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation*, 36 HOFSTRA L. REV. 883 (2008).

2. *Id.* at 891.

3. *See generally id. passim.*

4. DERALD WING SUE, MULTICULTURAL SOCIAL WORK PRACTICE 29–30 (2006).

5. Michael L. Perlin & Valerie McClain, *"Where Souls Are Forgotten": Cultural Competencies, Forensic Evaluations, and International Human Rights*, 15 PSYCHOL. PUB. POL'Y & L. 257, 259 (2009).

gorically excluded from the reach of the death penalty. This Article explores the intersection between capital punishment, cultural competency, and the determination of intellectual disability in capital proceedings. Part II of this Article begins by looking to history and briefly examining historical understandings of intellectual disability and the past treatment of intellectually disabled persons. In doing so, special emphasis is placed on the historical development of theories of criminal responsibility of intellectually disabled persons from which the present law emerged. Part III of this Article delineates the contemporary definitions of intellectual disability offered by leading expert organizations in the field. This Part also addresses the impact of these definitions on how state legislatures and courts have defined the category of persons excluded from the reach of the death penalty based upon intellectual disability. Part IV shifts to consider the procedures established by states for determining whether a capital defendant is intellectually disabled. Part V addresses four ways in which cultural competency may be of critical importance to both defense attorneys and prosecutors in litigating the issue of whether a defendant is intellectually disabled. Finally, Part VI presents a brief synopsis.

II. A HISTORICAL PERSPECTIVE ON THE TREATMENT OF INTELLECTUALLY DISABLED PERSONS

A. Early Approaches to Intellectual Disability

Although evidence from pre-historic remains suggests that among both early humans and Neanderthals intellectually disabled individuals were cared for and valued by their small kinship groups,[6] the treatment of intellectually disabled persons has not always been so favorable. In fact, the response to intellectually disabled persons has varied dramatically over time and across civilizations.[7] Treatment has been heavily dependent upon the particu-

6. C. THOMAS GUALTIERI, BRAIN INJURY AND MENTAL RETARDATION: PSYCHOPHARMACOLOGY AND NEUROPSYCHIATRY 55 (2002).

7. *See* PATRICIA AINSWORTH & PAMELA C. BAKER, UNDERSTANDING MENTAL RETARDATION 50 (2004); E.H. Sherr & D.M. Ferriero, *Mental Retardation*, *in* CONCISE ENCYCLOPEDIA OF BRAIN AND LANGUAGE 351, 351 (Harry A. Whitaker ed., 2010).

lar customs, values, and beliefs of the society in the particular era.[8] In many early societies, for example, individuals who now would be classified as mildly intellectually disabled were not singled out if they were capable of farming, fishing, and hunting.[9]

Categorization of persons as being intellectually disabled and recognition that different treatment of such persons may be necessary can be traced back as far as 1552 B.C. in ancient Egypt to the *Therapeutic Papyrus of Thebes*.[10] Leading religious figures in ancient China and Persia—Confucius and Zoroaster, respectively—acknowledged and advocated for the humane treatment of persons with intellectual disabilities.[11] In ancient Rome, the Twelve Tables of Rome[12] set forth a concern for the handling of the property of a male head-of-household with an intellectual disability, noting that "'[i]f a person is a fool, let this person and his goods be under the protection of his family or his paternal relatives, if he is not under the care of anyone.'"[13]

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8. AINSWORTH & BAKER, *supra* note 7, at 50; Sherr & Ferriero, *supra* note 7, at 351.

9. LINDA HICKSON ET AL., MENTAL RETARDATION: FOUNDATIONS OF EDUCATIONAL PROGRAMMING 2 (1995).

10. AINSWORTH & BAKER, *supra* note 7, at 50; Eugene E. Doll, *The Mentally Deficient: A Historical Survey of Research and Management of Mental Retardation in the United States*, *in* READINGS ON THE EXCEPTIONAL CHILD: RESEARCH AND THEORY 21, 22 (E. Philip Trapp & Philip Himelstein eds., 1962). The *Therapeutic Papyrus of Thebes* is an ancient Egyptian scroll that is nearly sixty-five feet long and more than a foot wide, containing more than one hundred pages and a total of 2289 lines of hieratic script addressing ancient medical knowledge and practices. VICTOR ROBINSON, THE STORY OF MEDICINE 21 (1943).

11. COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2484 (Harold I. Kaplan et al. eds., 3d ed. 1980); Doll, *supra* note 10, at 23.

12. The Twelve Tables of Rome, which were posted upon bronze tablets in the Roman Forum, were a written codification of Roman legal traditions. GARY FORSYTHE, A CRITICAL HISTORY OF EARLY ROME: FROM PREHISTORY TO THE FIRST PUNIC WAR 201–03 (2006); MARY R. LEFKOWITZ & MAUREEN B. FANT, WOMEN'S LIFE IN GREECE AND ROME: A SOURCE BOOK IN TRANSLATION 95 (3d ed. 2005); *see generally* A DICTIONARY OF GREEK AND ROMAN ANTIQUITIES 1031–1033 (New York, American Book Co., William Smith & Charles Anthon eds., 1843).

13. MARY JOY QUINN, GUARDIANSHIPS OF ADULTS: ACHIEVING JUSTICE, AUTONOMY, AND SAFETY 18 (2005); *see also* Alfred A. Baumeister, *Mental Retardation: Confusing Sentiment with Science*, *in* WHAT IS MENTAL

Similar property concerns are also evident in England's historical treatment of the intellectually disabled. Providing an early example of distinguishing between the often conflated and sometimes overlapping categories of the intellectually disabled and the mentally ill, the Crown in thirteenth-century England took custody of the lands of a person deemed an "idiot" and retained the profits thereof.[14] Although the Crown was required to provide the "necessities" for intellectually disabled persons and the property was to be returned to the "right heirs" after their death, the Crown otherwise enjoyed the profits of the estate during the person's lifetime.[15] For persons who were deemed "lunatics," however, the King served instead as a guardian and was responsible for transferring the profits for the maintenance of the mentally ill person or his family.[16] In light of the harsher consequences resulting from a finding that one was an "idiot," English juries were loath to find a person was intellectually disabled and instead often stretched to conclude that he was instead mentally ill.[17]

Property rights have not been the only point of legal contestation with regard to intellectual disability. The intersection between intellectual disability and criminal responsibility has been a subject of debate for centuries.[18] The concept "of a defense to criminal responsibility based on mental disability goes back as far as the ancient Greek and Hebrew civilizations."[19] Talmudic scholars, for instance, specifically exempted intellectually disabled persons from criminal responsibility.[20]

RETARDATION?: IDEAS FOR AN EVOLVING DISABILITY IN THE 21ST CENTURY 95, 99 (Harvey N. Switzky & Stephen Greenspan eds., rev. ed. 2006).

14. GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 327 (3d ed. 2007).

15. Comment, *Lunacy and Idiocy—The Old Law and Its Incubus*, 18 U. CHI. L. REV. 361, 362 (1951) [hereinafter *Lunacy and Idiocy*].

16. MELTON ET AL., *supra* note 14, at 327.

17. *Lunacy and Idiocy*, *supra* note 15, at 364 n.11.

18. James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 432 (1985).

19. MELTON ET AL., *supra* note 14, at 205.

20. COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, *supra* note 11, at 2484; *see also* Julio Arboleda-Flórez, *When Something Goes Wrong with the Fetus: Rights, Wrongs, and Consequences*, *in* PARENTHOOD AND MENTAL HEALTH: A

In England, "[a]s early as the 1300s people who were *idiots* were considered 'not to blame' for crimes committed."[21] Expounding upon the subject in the eighteenth century, William Blackstone indicated that it is "a deficiency in will, which excuses from the guilt of crimes."[22] This deficiency, he noted, "arises . . . from a defective or vitiated understanding, *viz.* in an *idiot* or a *lunatic*."[23] As such, Blackstone stated that "idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: . . . not even for treason itself."[24] For the British courts at the time, the ultimate determination of whether a person was intellectually disabled was a question of fact to be determined by the jury.[25] As was simply stated by Sir Matthew Hale, "idiocy or not is a question of fact triable by a jury."[26]

Originally publishing his *New Natura Brevium* in 1534, Lord Anthony Fitz-Herbert offered a practical, but narrow, legal definition and assessment tool for juries to use in determining whether a person is intellectually disabled:[27]

BRIDGE BETWEEN INFANT AND ADULT PSYCHIATRY 89, 94 (Sam Tyano et al. eds., 2010).

21. Anthony J. Holland, *Criminal Behaviour and Developmental Disability: An Epidemiological Perspective*, *in* OFFENDERS WITH DEVELOPMENTAL DISABILITIES 23, 23 (William R. Lindsay et al. eds., 2004).

22. 4 WILLIAM BLACKSTONE, COMMENTARIES *24.

23. *Id.*

24. *Id.*

25. 1 WILLIAMS HAWKINS & JOHN CURWOOD, A TREATISE OF THE PLEAS OF THE CROWN: OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER PROPER HEADS 1–2 (8th ed. 1824); *cf.* SHEILA RIDDELL ET AL., THE LEARNING SOCIETY AND PEOPLE WITH LEARNING DIFFICULTIES 178 (2001) (noting that the assessment of whether a person is intellectually disabled for purposes of maintaining control over one's property was a question of fact to be determined by a lay jury).

26. THOMAS E. FINEGAN, ELEMENTARY EDUCATION: REPORT FOR THE SCHOOL YEAR ENDING JULY 31, 1916 816 (1917).

27. *See* LIAM CONCANNON, PLANNING FOR LIFE: INVOLVING ADULTS WITH LEARNING DISABILITIES IN SERVICE PLANNING 3–4 (2005) (noting that Fitz-Herbert's definition, which was issued during an era concerned with paternalistic control of the intellectually disabled, was one of the earliest definitions of intellectual disability); RUDOLF PINTNER, INTELLIGENCE TESTING: METHODS AND RESULTS 6 (1923) (addressing Fitz-Herbert's test as a primitive intelligence test); NILA BANTON SMITH, READING INSTRUCTION FOR TODAY'S CHILDREN 28 (1963) (discussing Fitz-Herbert's intellectual disability test).

> And he who shall be said to be a Sot and Idiot from his Birth, is such a Person who cannot account or number Twenty-pence, nor can tell who was his Father, or Mother, nor how old he is, & c., so as it may appear he hath no understanding of Reason what shall be for his Profit, or what for his Loss: But if he have such Understanding that he know, and understand his Letters, and do read by Teaching or Information of another Man, then it seemth he is not a Sot, nor a natural Idiot.[28]

After publication of Fitz-Herbert's *New Natura Brevium*, his "test became popularized almost immediately as the 'counting to twenty-pence test'" with many early authorities citing Fitz-Herbert's test for intellectual disability.[29] As a "primitive intelligence test,"[30] Fitz-Herbert's assessment tool represented a sixteenth-century nascent version of more contemporary understandings of intellectual disability through its weaving together of "the developmental, intellectual, and social aspects" of intellectual disability.[31]

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28. ANTHONY FITZ-HERBERT, THE NEW NATURA BREVIUM OF THE MOST REVEREND JUDGE, MR. ANTHONY FITZ-HERBERT 519 (6th ed. 1718). Sir Anthony Fitz-Herbert was a famous jurist during the reign of Henry VIII, whose legal reputation was tied "not only to the sound judgments he pronounced, but from the seven useful and learned works that with which he followed his early undertaking." EDWARD FOSS, BIOGRAPHIA JURIDICA: A BIOGRAPHICAL DICTIONARY OF THE JUDGES OF ENGLAND FROM THE CONQUEST TO THE PRESENT TIME 258–59 (London, John Murray 1870).

29. Ellis & Luckasson, *supra* note 18, at 417.

30. R. C. SCHEERENBERGER, A HISTORY OF MENTAL RETARDATION 36 (1983).

31. Doll, *supra* note 10, at 23; *see also* Bryan H. King et al., *Mental Retardation*, *in* CLINICAL CHILD PSYCHIATRY 391, 391 (William M. Klykylo & Jerald L. Kay eds., 2d ed. 2005) (contextualizing Fitz-Herbert's definition as a functional impairment criterion evaluation for intellectual disability); BRIAN H. KIRMAN, THE MENTALLY HANDICAPPED CHILD 49 (1973) (indicating that this test "foreshadow[ed] the much more elaborate test batteries devised by Wechsler and others, and contain[ed] a recognition of the different ways in which intelligence may be expressed, either in performance or verbally"); Ellis & Luckasson, *supra* note 18, at 417 (noting that through its emphasis on permanency, being congenital, intellectual impairment, and functional ability that the definition is "not wholly dissimilar from modern definitions of mental retardation").

Fitz-Herbert's voice was not the only one heard on the subject. As part of the continuing conversation among the English commentary class regarding the distinction between intellectual disability and mental illness, John Locke entered the fray in 1690.[32] Differentiating between "idiots" and "madmen" in his *An Essay Concerning Human Understanding*, Locke stated "that madmen put wrong ideas together, and so make wrong propositions, but argue and reason right from them; but idiots make very few or no propositions, and reason scarce at all."[33]

While Locke exerted considerable influence in shaping attitudes on the subject of intellectual disability, the writings of Sir Matthew Hale on this issue were of greater importance within the legal community.[34] Expressing his views in *The History of the Pleas of the Crown*, first published posthumously in 1736,[35] Hale suggested that Fitz-Herbert's definition of intellectual disability, with its references to not knowing how to count to twenty-pence, one's parentage or age, the letters of the alphabet, or how to read, certainly addressed factors that could be evidence of "idiocy."[36] However, Hale cautioned that Fitz-Herbert's definition was "too narrow" for a comprehensive understanding of intellectual disability.[37]

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32. *See* JAMES C. HARRIS, INTELLECTUAL DISABILITY: UNDERSTANDING ITS DEVELOPMENT, CAUSES, CLASSIFICATION, EVALUATION, AND TREATMENT 140 (2006); *see also* CARLO PIETZNER, QUESTIONS OF DESTINY: MENTAL RETARDATION AND CURATIVE EDUCATION 4 (1988).

33. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 108–09 (Philadelphia, Kay & Troutman 1849); *see also* MARTIN HALLIWELL, IMAGES OF IDIOCY: THE IDIOT FIGURE IN MODERN FICTION AND FILM 29–30 (2004) (discussing Locke's understanding of intellectual disability).

34. *See* 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN (Philadelphia, Robert H. Small, 1st American ed. 1847).

35. *See* HAROLD J. BERMAN, LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION 467 n.59 (2006); DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 199 n.17 (1941); A CATALOGUE OF THE LAW COLLECTION AT NEW YORK UNIVERSITY WITH SELECTED ANNOTATIONS 450 (Julius J. Marke ed., 1953); GREAT BRITAIN LAW COMMISSION, UNFITNESS TO PLEAD: A CONSULTATION PAPER 13 n.1 (2010).

36. 1 HALE, *supra* note 34, at 29.

37. *Id.*

A little over two centuries after the original publication of Fitz-Herbert's *New Natura Brevium*, and around the time of the first publication of Hale's text, Fitz-Herbert's definition of intellectual disability still appeared in decisions of British courts.[38] Hale's observation, however, that Fitz-Herbert too narrowly defined intellectual disability[39] also increasingly appeared in the writings of commentators and courts. For example, Lord Tenterden noted in *Ball v. Mannin*[40] that Fitz-Herbert's definition ran contrary to common sense, for even a three-year old child may be capable of knowing the letters of the alphabet.[41] Thus, while Fitz-Herbert's definition did not disappear, it was increasingly balanced by Hale's observation that Fitz-Herbert's definition was too restrictive an understanding of intellectual disability.[42]

B. Historical Perspective on the American Experience with Intellectual Disability

British legal approaches to the criminal responsibility of intellectually disabled offenders landed on the shores of American jurisprudence. By drawing upon "[e]stablished authorities," early American courts "accepted that an 'idiot' cannot be convicted of a criminal offense."[43] The principal debate did not revolve around this foundational point but focused more narrowly upon "the level of disability sufficient to constitute 'idiocy,' and the legal relevance of lesser degrees of disability."[44] In addressing these questions, courts in the United States drew distinctions between "idiots," "imbeciles," and "morons," with the level of impairment diminishing from "idiot" to "imbecile" to "moron."[45] While "idiots" were exempt from criminal responsibility, "imbeciles" could be

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38. *See Lunacy and Idiocy*, *supra* note 15, at 365 n.13 (citing and quoting 2 LILLY'S REGISTER 284 (1735)).

39. 1 HALE, *supra* note 34, at 29.

40. Ball v. Mannin, 4 Eng. Rep. 1241 (1829).

41. LEONARD SHELFORD, A PRACTICAL TREATISE ON THE LAW CONCERNING LUNATICS, IDIOTS, AND PERSONS OF UNSOUND MIND 3 (London, Law Booksellers & Publishers 1833).

42. *See* 1 HAWKINS & CURWOOD, *supra* note 25, § 1, at 2 n.3; SHELFORD, *supra* note 41, at 3.

43. Ellis & Luckasson, *supra* note 18, at 432.

44. *Id.* (footnote omitted).

45. *Id.* at 421 n.38.

punished depending upon their capacity.[46] American courts "consistently held that mental retardation must be almost totally disabling to constitute a defense to accusations of crime."[47] The practice through most of American history has been that "[m]entally retarded offenders with less severe impairments—those who were not 'idiots'—suffered criminal prosecution and punishment, including capital punishment."[48]

In many ways, however, the early years of the Republic offered a healthy environment for the intellectually disabled. "Feebleminded people might [have] be[en] teased, their . . . habits might [have] disgust[ed], but unlike the mad and the criminal, they were not feared."[49] In many circumstances, intellectually disabled persons were well cared for by members of extended families.[50] The American Sunday School Union's[51] children's book *The Idiot* reflected the sentiment of the time.[52] In this text, the moralist sermonized that "'[t]his tale of the idiot has been told you . . . to soften your heart, and to excite in your bosom a kindly disposition towards the helpless and afflicted.'"[53] Religiously inspired views of care for the disabled, such as the *Gospel of Saint Matthew*'s admonition to attend to the "least brothers of mine," were of particular salience.[54]

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46. *Id.* at 432, 434.

47. *Id.* at 432.

48. Atkins v. Virginia, 536 U.S. 304, 340–41 (2002) (Scalia, J., dissenting).

49. JAMES W. TRENT, JR., INVENTING THE FEEBLE MIND: A HISTORY OF MENTAL RETARDATION IN THE UNITED STATES 7 (1994).

50. *Id.*

51. The American Sunday School Union stood as a significant and widespread voluntary religious organization. *See generally* EDWIN WILBUR RICE, THE SUNDAY-SCHOOL MOVEMENT AND THE AMERICAN SUNDAY-SCHOOL UNION (1917). The American Sunday School Union later became the American Missionary Fellowship in 1974, and it recently became InFaith. *See* EDWIN L. FRIZEN, JR., 75 YEARS OF IFMA 1917–1992: THE NONDEMONATIONAL MISSIONS MOVEMENT 60 (1992); INFAITH ORG., http://infaith.org/we-are-now-infaith/ (last visited May 16, 2012).

52. TRENT, JR., *supra* note 49, at 8.

53. *Id.*

54. *See Matthew* 25:40 (New American Bible); *see generally* GUALTIERI, *supra* note 6, at 55 (considering the impact of the biblical directive of *Matthew* on the treatment of intellectually disabled persons).

Unfortunately, this sensitivity did not last, as changes in societal values and beliefs in the late 1800s and early 1900s soon ushered in the worst period for intellectually disabled persons in the history of the United States. In a sense, intellectual disability itself became criminalized. "People came to view mentally retarded individuals as a threat to society, and a principal source of criminal and immoral behavior."[55] As noted by Justice Thurgood Marshall:

> By the latter part of the [nineteenth] century and during the first decades of the [twentieth century], . . . social views of the retarded underwent a radical transformation. Fueled by the rising tide of Social Darwinism, the "science" of eugenics, and the extreme xenophobia of those years, leading medical authorities and others began to portray the "feebleminded" as a "menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems."[56]

With these sentiments fueling the idea that intellectually disabled individuals were essentially criminals in waiting, many perverse consequences ensued, including the forced segregation and sterilization of intellectually disabled children and adults.[57] In fact, a horrifying tide swept across the entire country as state governments and the federal government declared disabled children to be "'unfitted for companionship with other children,' a 'blight on mankind,' whose very presence in the community was 'detrimental to normal' children, and whose 'mingling . . . with society' was 'a

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55. Ellis & Luckasson, *supra* note 18, at 417.

56. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 461–62 (1985) (Marshall, J. dissenting) (fourth alteration in original) (footnote omitted) (quoting HENRY H. GODDARD, THE POSSIBILITIES OF RESEARCH AS APPLIED TO THE PREVENTION OF FEEBLEMINDEDNESS, PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION 307 (1915)).

57. Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 400 (1991).

most baneful evil.'"[58] With little protection in place to protect disabled individuals, children were even removed by force of law from their homes against the will of their parents so that they could be segregated into institutions and removed from society.[59]

That American elites had lost their way[60] is, perhaps, best reflected in the legal community by "progressive"[61] jurist Oliver

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58. *Id.* at 400–01 (alteration in original) (footnotes omitted) (quoting Washington, Vermont, California, and Oregon laws and legislative reports from 1905 to 1916).

59. *Id.* at 402–03.

60. "Eugenic sterilization, though its seems retrograde and authoritarian today, was a part of the Progressive ethos, advocated by scientific professionals and supported in many states by a broad upper- and middle-class constituency of educated reformers—people who believed that they knew what was best for society." Jason S. Lantzer, *The Indiana Way of Eugenics: Sterilization Laws, 1907–74*, *in* A CENTURY OF EUGENICS IN AMERICA: FROM THE INDIANA EXPERIMENT TO THE HUMAN GENOME ERA 26, 27 (Paul A. Lombardo ed., 2011). Professor Harry G. Hutchison has explained:

> [I]t is clear that Carrie Buck was swept up in a vortex deploying a broad conception of the police power in order to advance the progressives' goal of domination and control. The political, social, and legislative events leading up to her sterilization were not isolated from larger ones connected to the decision to use the "objectivity" of science to advance a predetermined outcome. This deduction follows the observation that "Nietzsche was mostly right; that while the will to power has always been present, American democracy increasingly operates within a political culture—that is a framework of meaning—that sanctions a will to domination." Carrie Buck's story is more than simply a narrative involving the imposition of a bureaucratic atrocity on a single individual or even a group of individuals who also lost their reproductive capacity. Instead, her story is the outcome of a larger narrative, a gathering storm unleashed by elites pursuing domination and control, and even the extirpation of those they held in contempt.

Harry G. Hutchison, *Waging War on the "Unfit"? From* Plessy v. Ferguson *to New Deal Labor Law*, 7 STAN. J. C.R. & C.L. 1, 38 (2011).

61. For a discussion of the relationship between the progressive movement in the United States and eugenics and forced sterilization, see DONALD K. PICKENS, EUGENICS AND THE PROGRESSIVES *passim* (1968); Gavin J. Reddick, *Eugenic Sterilization*, *in* 1 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 545, 545–46 (Paul Finkelman ed., 2006); CHRISTINE ROSEN, PREACHING EUGENICS: RELIGIOUS LEADERS AND THE AMERICAN EUGENICS MOVEMENT 12 (2004); Hutchison, *supra* note 60, *passim*.

Wendell Holmes'[62] infamous holding and reasoning in the 1927 case of *Buck v. Bell*.[63] At issue in *Buck v. Bell* was a Virginia law that provided for the forced sterilization of intellectually disabled men and women.[64] Bringing suit against the Superintendent of the State Colony for Epileptics and Feeble Minded for the State of Virginia, Bell's guardian sought an injunction under the Fourteenth Amendment to the United States Constitution, arguing that forced sterilization violated Ms. Bell's constitutional rights.[65] Writing for the United States Supreme Court over the dissent of only one of his colleagues,[66] Holmes found that:

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62. Professor G. Edward White has noted that, prior to and at the time of his death, Oliver Wendell Holmes was canonized by progressives as their champion. G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 273 (2000). Charles Carpenter stated of Holmes that "Justice Holmes has been a great dissenter . . . perhaps due to the fact that he has been a great liberal." Charles E. Carpenter, *Oliver Wendell Holmes, Jurist*, 8 OR. L. REV. 269, 270 (1929). Carpenter added that "no judge who has sat upon the bench has ever been more progressive in his attitude." *Id.* Similarly, Oswald G. Villard praised Holmes as "the idol of progressives who believed that America must evolve and change." Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 792 n.52 (2000) (quoting Oswald G. Villard, *Issues and Men, the Great Judge*, 140 NATION 323, 323 (1935)). H. L. Mencken, however, suggested these views were wishful mischaracterizations by progressives who were "'frantically eager to find at least one judge who was not violently and implacably' opposed to their theory of the Constitution, [and] read into Holmes's opinions Progressive attitudes and ideas that were 'foreign to his way of thinking.'" DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 152 n. 51 (2011) (quoting H. L. Mencken, *Mr. Justice Holmes*, AM. MERCURY (May 1930)).

63. 274 U.S. 200 (1927).

64. *Id.* at 205–06.

65. *Id.* at 205–07.

66. Justice Pierce Butler dissented without an opinion; interestingly, he was the Court's sole Catholic justice and devout parishioner, who received communion daily. Patrick McKinley Brennan, *Are Catholics Unreliable from a Democratic Point of View? Thoughts on the Occasion of the Sixtieth Anniversary of Paul Blanshard's American Freedom and Catholic Power*, 56 VILL. L. REV. 199, 205 (2011). In general, the American Catholic community and its leaders stood in strong opposition to forced sterilization and the eugenics movement that was sweeping the nation's elites. MAROUF ARIF HASIAN, JR., THE RHETORIC OF EUGENICS IN ANGLO-AMERICAN THOUGHT 101–11 (1996).

> In view of the general declarations of the Legislature and the specific findings of the Court obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.[67]

For progressive supporters of forced sterilization, "[t]he ruling had both symbolic and material importance . . . . If Holmes, the Court's ancient Nestor,[68] upheld the law, certainly Virginia [and states like it] [were] on the progressive track toward utopia."[69]

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67. *Buck*, 274 U.S. at 207 (citation omitted).

68. *See* MORTON S. FREEMAN, A NEW DICTIONARY OF EPONYMS 124 (1997) ("[W]hen a man is characterized as a *Nestor*, he is being referred to as an old man with the wisdom of the ancient Nestor, the Homeric hero who fought in the Trojan War with the Greeks. It is reputed that he lived so long that he ruled three generations of men.").

69. GREGORY MICHAEL DORR, SEGREGATION'S SCIENCE: EUGENICS AND SOCIETY IN VIRGINIA 133–34 (2008). An editorial in the *Charlottesville Daily Progress*, a newspaper in Carrie Buck's hometown, praised the decision:

> "Over the protests of many who held up their hands in holy horror at the thought of merely discussing such a thing publicly, much less actually practicing it with the sanction of the state," the new law "placed Virginia in the front rank of the states which are committed to a progressive program of welfare legislation." The editor lauded the "obvious wisdom of this highly beneficial law" and claimed that Carrie Buck was a fit "subject for this type of treatment." The paper heaped plaudits on Holmes, "that incomparable jurist who, despite his eighty-five years, unfailingly is found in sympathy with the

Eventually, the mania of the late 1800s and first decades of the twentieth century that led society to fear intellectually disabled persons subsided.[70] Resistance grew among the professional communities that had earlier championed the above discussed dehumanizing restrictions upon the disabled.[71] "By the 1950s, authorities commonly agreed that no significant link existed between mental retardation and criminality."[72] With a waning fear that the intellectually disabled people were criminals in waiting, society's attention towards this community declined in general.[73] Instead of alarm, the greater problem became "inattention . . . [to] the unique needs of retarded defendants in the criminal justice system."[74]

As late as 1987, the assessment of disabled persons' criminal responsibility and potential sanction for criminal violations was not dramatically different in the United States than criminal responsibility and sanction of such offenders was for centuries under British law. Persons who were considered to be severely or profoundly intellectually disabled were not considered criminally responsible for their actions.[75] Such individuals were not considered competent to stand trial.[76] The American Bar Association's *Criminal Justice Mental Health Standards* expressly recognized that incompetency to stand trial could "arise from . . . mental retardation or other developmental disability . . . so long as it results in a defendant's inability to consult with defense counsel or to under-

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> most progressive tendencies in our social machine," who "delivered a concise, convincing opinion, which is a genuine classic." The editors liked Holmes's prose so well that they reprinted the decision's peroration, "which bristles with the wisdom that has been nurtured by a long judicial experience, and which in Mr. Holmes, is the companion trait of a profound social insight." . . . The editor concluded, "Virginia is fortunate in having had this eminently sane and beneficial law, safely run the gamut of judicial review and permanently enrolled upon the statute books."

Id. at 134–35.

70. Ellis & Luckasson, *supra* note 18, at 419–20.

71. *Id.* at 420.

72. *Id.*

73. *Id.*

74. *Id.* at 421.

75. *See* Penry v. Lynaugh, 492 U.S. 302, 333 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

76. *See id.*

stand the proceedings."[77] As a practical matter though, then as now, courts and attorneys—both prosecution and defense—often focused upon mental illness, not intellectual disability, in the application of the concept of incompetency to stand trial.[78] Thus, in the courtrooms of 1987, as in the courtrooms of today, many intellectually disabled defendants went unrecognized.[79]

Several reasons explain why such disabilities did then and even now often go unnoticed by counsel or the court. Intellectually disabled persons will often attempt to hide their disability by cooperating with authority figures and by pretending that they understand their lawyer when in reality they do not.[80] Moreover, even if a defendant raises the issue of his or her competency to stand trial, "[c]ourts seldom find mentally retarded defendants incompetent to stand trial on the basis of mental retardation."[81] There appears to be resistance in practice to finding a person not competent to stand trial based upon intellectual disability.[82]

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77. AM. BAR ASS'N, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.1(c) (1984), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_tocold.html.

78. JOHN PARRY, CRIMINAL MENTAL HEALTH AND DISABILITY LAW, EVIDENCE AND TESTIMONY: A COMPREHENSIVE REFERENCE MANUAL FOR LAWYERS, JUDGES AND CRIMINAL JUSTICE PROFESSIONALS 334 (2009); *see also* David R. Katner, *Revising Legal Ethics in Delinquency Cases by Consulting with Juveniles' Parents*, 79 UMKC L. REV. 595, 608 (2011).

79. *See* PARRY, *supra* note 78, at 334; *see also* Katner, *supra* note 78, at 608. This is a long-standing problem. LABORATORY OF CMTY. PSYCHIATRY AT HARVARD MED. SCH., COMPETENCY TO STAND TRIAL AND MENTAL ILLNESS 6 (1973) ("It is our impression that the competency issue is raised too often for the mentally ill and too infrequently for the mentally retarded.").

80. PATRICIA A. ZAPF & RONALD ROESCH, EVALUATION OF COMPETENCE TO STAND TRIAL 125 (2009).

81. 1 CRIMINAL PRACTICE MANUAL § 3:10 (2005).

82. In an article in the *Texas Wesleyan Law Review*, Jacqueline Gonzales notes:

> When determining competency to stand trial and sentencing, the Author has heard some people argue that mentally retarded individuals should be responsible for their actions if they are going to try and fit into society. In other words, if they are going to live normal lives in society, then they need to abide by society's rules. Others argue courts should not consider mental retardation because it is too easy for defendants to work the system by faking a disability.

As of 1987, an intellectually disabled defendant who was not deemed incompetent to stand trial was subject to the same sanctions as a defendant of average intelligence up to and including the potential of capital punishment.[83] Change began in 1988 when the state of Georgia became the first state to exempt persons who were competent to stand trial but intellectually disabled from the reach of the death penalty.[84] The federal government followed suit shortly thereafter. As part of legislation restoring the federal death penalty,[85] the Anti-Drug Abuse Act of 1988 permitted the application of the death penalty to drug-related murders but also provided that "[a] sentence of death shall not be carried out upon a person who is mentally retarded."[86] In 1989, Maryland became the second state to prohibit applying the death penalty to persons with intellectual disability.[87]

That same year, counsel on behalf of Johnny Paul Penry argued to the United States Supreme Court that the application of the death penalty to intellectually disabled offenders was unconstitutional under the Eighth Amendment as "cruel and unusual punishment."[88] Penry insisted that evolving standards of decency should prohibit the execution of intellectually disabled persons.[89] The Supreme Court rejected Penry's argument.[90] Noting that only

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Jacqueline Gonzales, *Improving the Handling of Mentally Retarded Defendants in the Criminal Justice System*, 17 TEX. WESLEYAN L. REV. 143, 146 (2011).

83. *See* Penry v. Lynaugh, 492 U.S. 302, 333 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304, 319–21 (2002) (concluding that capital punishment constitutes cruel and unusual punishment for "mentally retarded offender[s]").

84. EMILY FABRYCKI REED, THE PENRY PENALTY: CAPITAL PUNISHMENT AND OFFENDERS WITH MENTAL RETARDATION 84–86, 200–03 (1993).

85. For all practical purposes, the federal death penalty had been defunct since the United States Supreme Court's ruling in *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972). *See generally* Eric A. Tirschwell & Theodore Hertzberg, *Politics and Prosecution: A Historical Perspective on Shifting Federal Standards for Pursuing the Death Penalty in Non-Death Penalty States*, 12 U. PA. J. CONST. L. 57, 66, 73–77 (2009).

86. Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, § 7001(l), 102 Stat. 4181, 4390 (codified at 21 U.S.C. § 848 (2006)).

87. REED, *supra* note 84, at 209–13.

88. *Penry*, 492 U.S. at 311.

89. *Id.* at 333–34.

90. *Id.* at 335.

two states had prohibited the execution of intellectually disabled offenders,[91] the Supreme Court was not persuaded that society's standards of decency had evolved to the point of prohibiting application of the death penalty to intellectually disabled persons who were not severely or profoundly intellectually disabled and as to whom no criminal responsibility had attached for centuries.[92] The Cout speculated, however, that "a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society.'"[93]

While Penry was unsuccessful in persuading the Supreme Court of his position, the decision itself served as a catalyst for significant legislative change among the states. In 1990, Tennessee and Kentucky followed the lead of Georgia and Maryland in banning application of the death penalty to intellectually disabled persons.[94] By 2001, Arizona, Arkansas, Colorado, Connecticut, Florida, Indiana, Kansas, Missouri, Nebraska, New Mexico, New York, North Carolina, South Dakota, Texas, Virginia, and Washington would also ban the execution of intellectually disabled persons.[95]

The *Penry* decision undermined the principle objections that had been raised in legislative debates over proposed legislation to prohibit the execution of the intellectually disabled. The pre-*Penry* debate in the Maryland General Assembly provides a useful example.[96] In Maryland, opponents of statutorily prohibiting the execution of the intellectually disabled argued that reform "was unnecessary," and stated that "[p]eople with mental retardation don't get put to death anyway, because they lack the capability to form the criminal intent required to be condemned to death."[97] In a closely related objection to the prohibition bill, Maryland prosecutors had similarly argued "that [legislative prohibition] was not necessary and doesn't do anything."[98] Prosecutors asserted that

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91. *Id.* at 334–35.
92. *Id.* at 340.
93. *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
94. Atkins v. Virginia, 536 U.S. 304, 314 (2002).
95. *Id.* at 314–15.
96. *See* REED, *supra* note 84, at 211.
97. *Id.*
98. *Id.* (internal quotation marks omitted).

"[i]t would be like giving medicine to someone who wasn't sick because the then existing law allowed a person's mental capacity to be considered as a mitigating factor."[99] *Penry* served as a clear sign to the states' legislators that intellectually disabled persons could have the necessary criminal intent to be tried and convicted of a capital crime. Moreover, *Penry* illustrated that it was realistic to anticipate that a jury might impose the death penalty upon an intellectually disabled defendant even after being given the opportunity to consider this intellectual limitation as a mitigating circumstance.

In the 2003 decision *Atkins v. Virginia*, the Supreme Court considered "the consistency of the direction of change" among the states in the fourteen years since the *Penry* decision, and by "[c]onstruing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' . . . conclude[d] that . . . the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender."[100] However, the Court expressly indicated that "[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded."[101] The Court added that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus."[102] Having discussed the American Association on Mental Retardation's 1993 definition of mental retardation and the American Psychiatric Association's 2000 definition of mental retardation and their similarity to existing state statutes, the Supreme Court left to the states the task of defining mental retardation for purposes of exclusion from the sanction of capital punishment.[103] In this manner, the *Atkins* Court thus imposed a limitation on the execution of intellectually disabled persons but left it to the states to define the parameters of intellectual disability that would require exclusion from the reach of the death penalty.[104] Reiterating this point in *Bobby v. Bies*, the

99. *Id.* (internal quotation marks omitted).

100. *Atkins*, 536 U.S. at 304, 321 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) and Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

101. *Id.* at 317.

102. *Id.*

103. *Id.* at 308 n.3, 317 & n.22.

104. *Id.* at 321.

Court stated that *Atkins* "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation 'will be so impaired as to fall [within the *Atkins*' compass].'"[105]

III. CONTEMPORARY DEFINITIONS OF INTELLECTUAL DISABILITY

A. Definitions Offered by Professional Organizations

In addressing intellectual disability, the *Atkins* Court drew upon the definitions of intellectual disability set forth by the American Association on Mental Retardation ("AAMR") and the American Psychiatric Association. The AAMR, now known as the American Association on Intellectual and Developmental Disabilities ("AAIDD"),[106] is a multi-disciplinary organization[107] that has played a leading role in defining and classifying intellectual disability for nearly a century.[108] As changes in the field have resulted in changed understandings of intellectual disability, the AAIDD has been steadfast in refining its definition, setting forth new definitions of intellectual disability in 1921, 1933, 1941, 1957, 1959, 1961, 1973, 1977, 1983, 1992, 2002, and 2010.[109] AAIDD's defi-

105. Bobby v. Bies, 556 U.S. 825, 831 (2009) (alteration in original) (quoting *Atkins*, 536 U.S. at 317).

106. The organization that is now AAIDD retained its founding name of the Association of Medical Officers of American Institutions for Idiotic and Feebleminded Persons until 1906. RICHARD M. GARGIULO, SPECIAL EDUCATION IN CONTEMPORARY SOCIETY: AN INTRODUCTION TO EXCEPTIONALITY 141 (4th ed. 2012). At that point, it became the American Association for the Study of the Feebleminded; thereafter, it became the American Association on Mental Deficiency in 1933, the American Association on Mental Retardation in 1987, and assumed its current appellation the American Association on Intellectual and Developmental Disabilities in 2007. *Id.*

107. *See* JAMES E. YSSELDYKE & ROBERT ALGOZZINE, SPECIAL EDUCATION: A PRACTICAL APPROACH FOR TEACHERS 340 (1995).

108. *See, e.g.*, Ting-Wei Guo et al., *The Deiodinase Type 2 (DIO2) Gene and Mental Retardation in Iodine Deficiency*, *in* COMPREHENSIVE HANDBOOK OF IODINE: NUTRITIONAL, BIOCHEMICAL, PATHOLOGICAL AND THERAPEUTIC ASPECTS 635, 635 (Victor R. Preedy et al. eds., 2009) (stating that the AAMR is a leading organization in classifying and defining mental retardation).

109. AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT xi–xii (Robert Luckasson et al. eds., 10th ed. 2002); *see also* THE AAIDD AD HOC COMM. ON TERMINOLOGY AND CLASSIFICATION, INTELLECTUAL DISABILITY: DEFINITION,

nitions have been enormously influential on policy-makers in a wide variety of contexts.[110]

The AAIDD's most recent definition of intellectual disability declares that "[i]ntellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills" originating before age eighteen.[111] Significant limitation in intellectual functioning is operationally defined by the AAIDD as "an IQ score that is approximately two standard deviations below the mean, considering the standard error of measurement for the specific instruments used and the instruments' strengths and limitations."[112] The AAIDD operationally defines significant limitations in adaptive behavior "as performance that is approximately two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, or practical or (b) an overall score on a standardized measure of conceptual, social, and practical skills."[113]

The American Psychiatric Association's definition of intellectual disability is similar to the AAIDD's definition.[114] In its *Diagnostic and Statistical Manual of Mental Disorders* ("*DSM-IV-*

CLASSIFICATION, AND SYSTEMS OF SUPPORT xiv–xv (Robert L. Schalock et al. eds., 11th ed. 2010) [hereinafter AAIDD MANUAL].

110. "[T]he AAMR definition of 1961 became the most widely used and influential definition of its day—influencing the wording of state-level education codes and legislation concerned with individuals with mental retardation." Donald L. MacMillan & Daniel J. Reschly, *Issues of Definition and Classification*, *in* ELLIS' HANDBOOK OF MENTAL DEFICIENCY, PSYCHOLOGICAL THEORY AND RESEARCH 47, 47 (William E. MacLean, Jr. ed., 3d ed. 1997). Similarly, the Individuals with Disabilities Education Act ("IDEA") has generally modified its definition of intellectual disability to remain in accord with the AAIDD's definition. LINDA WILMSHURST, ABNORMAL CHILD PSYCHOLOGY: A DEVELOPMENTAL PERSPECTIVE 525 (2009).

111. AAIDD MANUAL, *supra* note 109, at 1.

112. *Id.* at 31.

113. *Id.* at 43.

114. Originally founded in 1844 as the Association of Medical Superintendents of American Institutions for the Insane, it became the American Medico-Psychological Association in 1892, and in 1920, it became The American Psychiatric Association. Laura D. Hirshbein, *Foreword* to MICHAEL I. CASHER & JOSHUA D. BESS, MANUAL OF INPATIENT PSYCHIATRY vii n.1 (2010).

TR"),[115] the organization defines mental retardation as a "disorder . . . characterized by significantly subaverage intellectual functioning (an IQ of approximately 70 or below) with onset before age 18 years and concurrent deficits or impairments in adaptive functioning."[116] In setting forth diagnostic criteria for mental retardation, the American Psychiatric Association advances three criteria:

> (A) Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test . . . .
>
> (B) Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.
>
> (C) The onset is before age 18 years.[117]

While the Court emphasized the definitions promulgated by the AAIDD and the American Psychiatric Association in *Atkins*,[118] the American Psychological Association has also contributed significantly to the discussion regarding what constitutes an intellectual disability. The American Psychological Association defines mental retardation as "(a) significant limitations in general intellectual functioning; (b) significant limitations in adaptive functioning, which exist concurrently; and (c) onset of intellectual and adaptive

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115. The American Psychiatric Association produced its first *Diagnostic and Statistical Manual of Mental Disorders* in 1952. SOPHIA F. DZIEGIELEWSKI, DSM-IV-TR IN ACTION 7 (2d ed. 2010). Thereafter, it updated and revised this manual with new revised editions in 1968, 1980, 1987, 1994, and 2000. *Id.*

116. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 39 (4th ed., text rev. 2000) [hereinafter DSM–IV–TR].

117. *Id.* at 49.

118. Atkins v. Virginia, 536 U.S. 304, 308 n.3 (2002).

limitations before the age of 22 years."[119] Significant limitations in general intellectual functioning is operationally defined as "a score that is two or more standard deviations below the mean on a valid and 'comprehensive, individual measure of intelligence that is administered in a standardized format and interpreted by a qualified practitioner.'"[120] Whether an individual has significant limitations in adaptive functioning is to "be determined through the use of 'a valid and comprehensive, individual measure of adaptive behavior.'"[121]

B. Definitions Offered by the States

From the outset, states have looked to the above organizations when defining intellectual disability for purposes of creating statutory exemptions from the death penalty. For example, in 1988, when Georgia became the first state to prohibit executing intellectually disabled persons, it defined mental retardation as a condition in which a person has "significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period."[122] As noted by the Georgia Supreme Court, Georgia's "statutory definition of 'mentally retarded' is consistent with that supplied by the American Psychiatric Association's Diagnostic and

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119. AM. PSYCHOLOGICAL ASS'N, MANUAL OF DIAGNOSIS AND PROFESSIONAL PRACTICE IN MENTAL RETARDATION 13 (John W. Jacobson & James A. Mulick eds., 1996).

120. Alexis Krulish Dowling, Comment, *Post-*Atkins *Problems with Enforcing the Supreme Court's Ban on Executing the Mentally Retarded*, 33 SETON HALL L. REV. 773, 797 (2003) (quoting AM. PSYCHOLOGICAL ASS'N, *supra* note 119, at 13); *see also* DAVID C. DEMATTEO ET AL., FORENSIC MENTAL HEALTH ASSESSMENTS IN DEATH PENALTY CASES 169 (2011) (indicating that under the American Psychological Association's definition, "'significant limitations in general intellectual functioning' include IQ scores that are two or more standard deviations below the mean IQ score on a valid and comprehensive individual measure of intelligence. This corresponds with an IQ score of 70 or less on the Wechsler intelligence measures . . . .").

121. Dowling, *supra* note 120, at 797 (quoting AM. PSYCHOLOGICAL ASS'N, *supra* note 119, at 13).

122. GA. CODE ANN. § 17-7-131(a)(3) (2008 & Supp. 2011); REED, *supra* note 84, at 201.

Statistical Manual of Mental Disorders (Third Edition 1980)."[123] Similarly, Tennessee, the first state to legislatively prohibit executing intellectually disabled offenders after the *Penry* decision, relied upon the language of the 1983 manual of the then American Association on Mental Deficiency (now the AAIDD) to define intellectual disability.[124]

Over time, "almost every state allowing the death penalty has adopted a definition of 'mental retardation' that closely tracks . . . clinical definitions" that have been set forth by either the AAIDD, the American Psychiatric Association, or the American Psychological Association.[125] Thus, it should be no surprise that the most widely adopted approach to defining intellectual disability is a three prong test: (1) deficient intellectual functioning assessed in terms of an IQ score; (2) deficits in adaptive skills; and (3) onset during the developmental period.[126] Nonetheless, scholars have noted that states regularly fail to "operationally define some or all of the diagnostic elements in any meaningful manner."[127] While there are certainly problems that may arise from this failure, including courts potentially considering inappropriate factors in their analysis, there is also a distinct advantage of failing to operational-

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123. Stripling v. State, 401 S.E.2d 500, 504 (Ga. 1991). The Georgia definition of intellectual disability does vary from the *DSM-III* in favor of the AAIDD's definition in one respect. The Georgia definition uses the language of "during the developmental period," which was part of the definition of the AAIDD's definition in its 1973 and 1983 manuals rather than the *DSM-IV*'s language of onset for the age of eighteen. AAIDD MANUAL, *supra* note 109, at 8.

124. Coleman v. State, 341 S.W.3d 221, 230 & n.8 (Tenn. 2011); State v. Smith, 893 S.W.2d 908, 929 (Tenn. 1994) (Reid, J., concurring in part and dissenting in part).

125. Corena G. Larimer, Comment, *Equal Protection from Execution: Expanding* Atkins *to Include Mentally Impaired Offenders*, 60 CASE W. RES. L. REV. 925, 931 & n.36 (2010) (collecting statutory provisions).

126. John Matthew Fabian et al., *Life, Death, and IQ: It's Much More Than Just a Score: Understanding and Utilizing Forensic Psychological and Neuropsychological Evaluations in* Atkins *Intellectual Disability/Mental Retardation Cases*, 59 CLEV. ST. L. REV. 399, 405 (2011); Jessica Hudson et al., *Lightning But No Thunder: The Need for Clarity in Military Courts Regarding the Definition of Mental Retardation in Capital Cases and for Procedures in Implementing* Atkins v. Virginia, 55 NAVAL L. REV. 359, 364 (2008).

127. DEMATTEO ET AL., *supra* note 120, at 169.

ly define key terms of the definition. First and foremost, state courts are not confronted by statutory definitions of intellectual disability that are tied to understandings of intellectual functioning or adaptive behavior limitations that are consistent with past rather than present expert understandings. State courts can thus more easily adapt to changing expert testimony and improved understandings within the relevant scientific and social scientific fields. Simply stated, state courts regularly rely upon expert testimony predicated upon the AAIDD and *DSM-IV-TR* definitions and informed by research in the field to interpret broad statutory concepts for assessing intellectual disability.

As illustrations, the use of such expert testimony is evident in recent decisions of both the Nebraska and Tennessee Supreme Courts. For example, addressing expert testimony that relied upon the AAIDD and *DSM-IV-TR* definitions of intellectual disability, the Nebraska Supreme Court concluded:

> The Nebraska statute uses but does not define two key diagnostic criteria of mental retardation: "significantly subaverage general intellectual functioning" and "deficits in adaptive behavior." To understand what these terms mean, how they are measured, and how they are to be considered in diagnosing mental retardation, clinical expertise is not only helpful, but essential. Supplied with nothing more than the language of the statute, it would be impossible for a lay finder of fact to reach any meaningful determination of whether a convicted defendant with an IQ in the low 70's is a person with mental retardation.[128]

Similarly, the Tennessee Supreme Court enumerated the following as two of the six principles that guide the court's interpretation of the Tennessee statute that defines intellectual disability for purposes of the death penalty:

> (5) The Court's application of the statute may be guided and informed by the clinical standards, crite-

128. State v. Vela, 777 N.W.2d 266, 306 (Neb. 2010) (footnote omitted).

> ria, and practices customarily used to assess and diagnose intellectual disability.
>
> (6) In instances where the proper application of the statute is not clear, the Court may confirm its interpretation of the statute by considering . . . the clinical standards, criteria, and practices customarily used to assess and diagnose intellectual disability.[129]

These decisions are reflective of the conclusion of numerous state courts that by defining intellectual disability in broad strokes, their respective legislatures intended to allow for expert testimony and knowledge to fill in the operational definitions of these terms based on ongoing developments in expert understandings of intellectual disability.

IV. STATE APPROACHES TO DETERMINING INTELLECTUAL DISABILITY

With the *Atkins* Court leaving states with the task of determining how to implement the constitutional protection against executing intellectually disabled persons,[130] states have adopted four different approaches to determining who makes the decision as to whether the defendant is intellectually disabled. First, some states have assigned the responsibility to the trial jury.[131] If the trial jury finds the defendant guilty of a capital crime, the jury will then have to determine whether the defendant is intellectually disabled and accordingly not eligible for the death penalty.[132] Second, some

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129. *Coleman*, 341 S.W.3d at 240 (footnote omitted) (interpreting TENN. CODE ANN. § 39-13-203 (2010)).

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

131. *See, e.g.*, GA. CODE ANN., § 17-7-131(c) (2008 & Supp. 2011); VA. CODE ANN. § 19.2-264.3:1.1(C) (2008 & Supp. 2011).

132. *See, e.g.*, GA. CODE ANN., § 17-7-131(c) ("In all criminal trials in any of the courts of this state wherein an accused shall contend that he was insane or otherwise mentally incompetent under the law at the time the act or acts charged against him were committed, the trial judge shall instruct the jury that they may consider, in addition to verdicts of 'guilty' and 'not guilty,' the additional verdicts of 'not guilty by reason of insanity at the time of the crime,' 'guilty but mentally ill at the time of the crime,' and 'guilty but mentally retarded.'"); VA. CODE ANN. § 19.2-264.3:1.1(C) ("In any case in which the offense may be pun-

states have instead assigned the responsibility for determining whether the defendant is intellectually disabled to the trial judge.[133]

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ishable by death and is tried before a jury, the issue of mental retardation, if raised by the defendant in accordance with the notice provisions of subsection E of § 19.2.264.3:1.2, shall be determined by the jury as part of the sentencing proceeding required by § 19.2-264.4."); VA. CODE ANN. § 19.2-264.4(A) (2008 & Supp. 2011) ("Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. Upon request of the defendant, a jury shall be instructed that for all Class 1 felony offenses committed after January 1, 1995, a defendant shall not be eligible for parole if sentenced to imprisonment for life. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.").

133. *See, e.g.*, COLO. REV. STAT. § 18-1.3-1102 (2011) ("(1) Any defendant may file a motion with the trial court in which the defendant may allege that such defendant is a mentally retarded defendant. Such motion shall be filed at least ninety days prior to trial. (2) The court shall hold a hearing upon any motion filed pursuant to subsection (1) of this section and shall make a determination regarding such motion no later than ten days prior to trial."); IDAHO CODE ANN. § 19-2515A(2) (2004 & Supp. 2011) ("In any case in which the state has provided notice of an intent to seek the death penalty pursuant to section 18-4004A, Idaho Code, and where the defendant intends to claim that he is mentally retarded and call expert witnesses concerning such issue, the defendant shall give notice to the court and the state of such intention at least ninety (90) days in advance of trial, or such other period as justice may require, and shall apply for an order directing that a mental retardation hearing be conducted. Upon receipt of such application, the court shall promptly conduct a hearing without a jury to determine whether the defendant is mentally retarded."); IND. CODE ANN. § 35-36-9-4(b) (LexisNexis Supp. 2011) ("[T]he defendant must prove by clear and convincing evidence that the defendant is an individual with mental retardation."); NEB. REV. STAT. § 28-105.01(4) (2008) ("If (a) a jury renders a verdict finding the existence of one or more aggravating circumstances as provided in section 29-2520 or (b)(i) the information contains a notice of aggravation as provided in section 29-1603 and (ii) the defendant waives his or her right to a jury determination of the alleged aggravating circumstances, the court shall hold a hearing prior to any sentencing determination proceeding as provided in section 29-2521 upon a verified motion of the defense requesting a ruling that the penalty of death be precluded under subsection (2) of this section. If the court finds, by a preponderance of the evidence, that the defendant is a person with mental retardation, the death sentence shall not be imposed."); NEV. REV. STAT. ANN. § 174.098 (LexisNexis 2011) ("(1) A defendant who is charged with murder of the first degree in a case in which the death penalty is sought may, not less than 10 days before the date set for trial, file a motion to declare that the

Where such a determination is made pre-trial, the defendant remains free to argue intellectual disability to the jury as a mitigating factor if he or she is convicted; however, the judge's ruling is the fact-finder's decision for purposes of *Atkins*.[134] Third, at least one state has provided for an election procedure, allowing for a pre-trial determination by a trial judge through agreement of the defense and prosecution, but if no agreement is reached, the issue is reserved for a jury.[135] Fourth, some states have created a hybrid approach in which the defendant essentially gets two opportunities to demonstrate that he or she is intellectually disabled and therefore categorically barred from application of the death penalty.[136]

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defendant is mentally retarded. . . . (6) If the court determines based on the evidence presented at a hearing conducted pursuant to subsection 2 that the defendant is mentally retarded, the court must make such a finding in the record and strike the notice of intent to seek the death penalty. Such a finding may be appealed to the Supreme Court pursuant to NRS 177.015."); S.D. CODIFIED LAWS § 23A-27A-26.3 (2004) ("Not later than ninety days prior to the commencement of trial, the defendant may upon a motion alleging reasonable cause to believe the defendant was mentally retarded at the time of the commission of the offense, apply for an order directing that a mental retardation hearing be conducted prior to trial. If, upon review of the defendant's motion and any response thereto, the court finds reasonable cause to believe the defendant was mentally retarded, it shall promptly conduct a hearing without a jury to determine whether the defendant was mentally retarded."); WASH. REV. CODE ANN. § 10.95.030(2) (West 2012) ("A diagnosis of intellectual disability shall be documented by a licensed psychiatrist or licensed psychologist designated by the court, who is an expert in the diagnosis and evaluation of intellectual disabilities. The defense must establish an intellectual disability by a preponderance of the evidence and the court must make a finding as to the existence of an intellectual disability.").

134. *See, e.g.*, NEB. REV. STAT. § 28-105.01(4); S.D. CODIFIED LAWS § 23A-27A-26.3.

135. *See, e.g.*, LA. CODE CRIM. PROC. ANN. art. 905.5.1(C)(1) (2008) ("Any defendant in a capital case making a claim of mental retardation shall prove the allegation by a preponderance of the evidence. The jury shall try the issue of mental retardation of a capital defendant during the capital sentencing hearing unless the state and the defendant agree that the issue is to be tried by the judge. If the state and the defendant agree, the issue of mental retardation of a capital defendant may be tried prior to trial by the judge alone.").

136. *See, e.g.*, ARK. CODE ANN. § 5-4-618(d)(2)(B)(i) (2006) ("If the court determines that the defendant does not have mental retardation, the defendant may raise the question of mental retardation to the jury for determination de novo during the sentencing phase of the trial."); N.C. GEN. STAT. § 15A-2005(c), (e) (2011) ("If the court does not find the defendant to be mentally

Under such a model, a defendant may have a pre-trial hearing before a judge,[137] but if the defendant does not prevail, he or she may also raise the issue as part of a sentencing determination by the jury.[138] Overall, "[i]n most jurisdictions, a judge serves as the fact-finder on the mental retardation question, whereas in a minority of jurisdictions the *Atkins* determination is left to the jury."[139]

Aside from the differences discussed above, there are two other extremely important procedural variances among the states as to how they determine whether an individual defendant is intellectually disabled. First, states vary in terms of the timing of when determinations are made:

> Most states have implemented pretrial hearings at least in part because an early decision "spares both the State and the defendant the onerous burden of a futile bifurcated capital sentencing procedure." Yet other states have opted for a determination after the guilt-phase trial but before sentencing . . . , and others adjudicate the *Atkins* claim as part of the sentencing phase trial[.][140]

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retarded in the pretrial proceeding, upon the introduction of evidence of the defendant's mental retardation during the sentencing hearing, the court shall submit a special issue to the jury as to whether the defendant is mentally retarded as defined in this section."); OKLA. STAT. ANN. tit. 21, § 701.10b(E), (F) (West Supp. 2012) ("The district court shall conduct an evidentiary hearing to determine whether the defendant is mentally retarded. If the court determines, by clear and convincing evidence, that the defendant is mentally retarded, the defendant, if convicted, shall be sentenced to life imprisonment or life without parole. If the district court determines that the defendant is not mentally retarded, the capital trial of the offense may proceed. A request for a hearing under this section shall not waive entitlement by the defendant to submit the issue of mental retardation to a jury during the sentencing phase in a capital trial if convicted of an offense punishable by death.").

137. *See, e.g.*, ARK. CODE ANN. § 5-4-618(d)(2)(A); N.C. GEN. STAT. § 15A-2005(c); OKLA. STAT. ANN. tit. 21, § 701.10b(E).

138. *See, e.g.*, ARK. CODE ANN. § 5-4-618(d)(2)(B); N.C. GEN. STAT. § 15A-2005(e); OKLA. STAT. ANN. tit. 21, § 701.10b(F).

139. State v. Jimenez, 908 A.2d 181, 189 (N.J. 2006).

140. *Id.* (citations omitted) (quoting State v. Williams, 831 So. 2d 835, 860 (La. 2002), *superseded by statute as recognized in* State v. Turner, 936 So. 2d 89 (La. 2006)).

Second, although every state that has considered the issue has allocated the burden of proof to the defendant to establish that he or she is intellectually disabled,[141] states have varied with regard to what level of proof is required. Georgia imposes the highest burden and is the only state that requires a defendant to prove his or her intellectual disability beyond a reasonable doubt.[142] A number of other states require a defendant to prove that he or she is intellectually disabled by clear and convincing evidence.[143] Most states, however, require defendants to prove that they are intellectually disabled by only a preponderance of the evidence.[144]

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141. *Id.* at 191; *see also* James Gerard Eftink, Note, *Mental Retardation as a Bar to the Death Penalty: Who Bears the Burden of Proof?*, 75 MO. L. REV. 537, 566 (2010) (indicating that "no state places the burden of proving mental retardation on the state").

142. GA. CODE ANN. § 17-7-131(c)(2) (2008 & Supp. 2011).

143. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-753(G) (2010 & Supp. 2011); COLO. REV. STAT. § 18-1.3-1102(2) (2011); DEL. CODE ANN. tit. 11, § 4209(d)(3)(b) (2007); FLA. STAT. ANN. § 921.137(4) (West 2006 & Supp. 2012).

144. *See, e.g.*, ARK. CODE ANN. § 5-4-618(c) (2006); CAL. PENAL CODE § 1369(f) (West 20011); IDAHO CODE ANN. § 19-2515A(3) (2004 & Supp. 2011); 725 ILL. COMP. STAT. ANN. 5/114-15(b) (West 2006); MD. CODE ANN., CRIM. LAW § 2-202(b)(2)(ii) (LexisNexis 2002 & Supp. 2011); NEB. REV. STAT. § 28-105.01(4) (2008); NEV. REV. STAT. ANN. § 174.098(5)(b) (LexisNexis 2011); TENN. CODE ANN. § 39-13-203(c) (2010); UTAH CODE ANN. § 77-15a-104(12)(a) (LexisNexis 2008); VA. CODE ANN. § 19.2-264.3:1.1(C) (2008 & Supp. 2011). Courts have also regularly adopted the preponderance of the evidence standard in the absence of express statutory declaration regarding what level of burden should be imposed upon the defendant. *Williams*, 831 So. 2d at 860; Russell v. State, 849 So. 2d 95, 148 (Miss. 2003); State v. Lott, 779 N.E.2d 1011, 1015 (Ohio 2002); Commonwealth v. Mitchell, 839 A.2d 202, 210 n.8 (Pa. 2003); Franklin v. Maynard, 588 S.E.2d 604, 606 (S.C. 2003); *Ex parte* Briseno, 135 S.W.3d 1, 12 (Tex. Crim. App. 2004). Notably, while the Indiana Supreme Court has concluded that its state's clear and convincing evidence standard imposed too high a hurdle and instead lowered the bar to a preponderance of the evidence, the Georgia Supreme Court recently upheld application of the reasonable doubt standard against a constitutional challenge, and the Arizona Supreme Court upheld its state's imposition of a clear and convincing evidence standard. *Compare* Pruitt v. State, 834 N.E.2d 90, 99–103 (Ind. 2005) (plurality opinion) *with* State v. Grell, 135 P.3d 696, 701–05 (Ariz. 2006) *and* Stripling v. State, 711 S.E.2d 665, 667–69 (Ga. 2011).

V. THE IMPORTANCE OF CULTURAL COMPETENCY IN LITIGATING WHETHER A DEFENDANT IS INTELLECTUALLY DISABLED

The vast majority of *Atkins* determinations will involve borderline defendants—those who are either mildly intellectually disabled or those who are just above the demarcation line.[145] In the litigation fight between prosecution and defense, cultural competency may be critical in determining whether the defendant is categorically excluded from the death penalty or subject to the imposition of this most serious punishment. This section addresses four ways in which cultural competency may be critical in litigating *Atkins* determinations.

A. Identifying Intellectually Disabled Clients

Cultural competency is of tremendous importance to identifying a client who may be intellectually disabled. In fact, when attorneys attempt to discern whether their clients suffer from an intellectual disability, they need to be aware of at least two different levels of culture. First, attorneys must recognize that different cultural groups react in divergent manners to intellectual disability in the family setting. Within certain cultural groups there is a greater tendency to conceal intellectual disability.[146] For example, studies have shown that Chinese mothers often resort to self-reliance or avoidant coping strategies when addressing a child with an intellectual disability rather than seeking assistance from outsiders or even those within an extended family.[147] Second, cultural

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145. *See* John H. Blume et al., *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL'Y 689, 694–95 (2009).

146. *See* HERBERT GROSSMAN, EDUCATING HISPANIC STUDENTS: IMPLICATIONS FOR INSTRUCTION, CLASSROOM MANAGEMENT, COUNSELING, AND ASSESSMENT 245 (2d ed. 1995); NAT'L RESEARCH COUNCIL, MENTAL RETARDATION: DETERMINING ELIGIBILITY FOR SOCIAL SECURITY BENEFITS 26 (2002); ZOLINDA STONEMAN & PHYLLIS W. BERMAN, THE EFFECTS OF MENTAL RETARDATION, DISABILITY, AND ILLNESS ON SIBLING RELATIONSHIPS: RESEARCH ISSUES AND CHALLENGES 352 (1993).

147. Subharati Ghosh & Sandy Magaña, *A Rich Mosaic: Emerging Research on Asian Families of Persons with Intellectual and Developmental Disabilities*, *in* 37 INT'L REV. RES. MENTAL RETARDATION 195 (Laraine Masters Glidden & Marsha Mailick Seltzer eds., 2009), *available at* http://www.waisman.wisc.edu/CulturalContext/pubs/2009_A_Rich_Mosaic.pdf.

variances may exist in terms of how families address, discuss, and understand a condition. For some, disability will be explained in medical terms, whereas other cultures may attribute disability to a personal failing of family discipline or an individual child's effort.[148] Similarly, there may be cultural variances among individuals with regard to seeking or accessing medical and therapeutic services.[149]

Attorneys must also recognize that there is a strong tendency among intellectually disabled persons to attempt to conceal their disability. "Many mentally retarded people have difficulty accepting . . . [their] diagnosis, and some never accept identities as retarded people. As a result, many attempt to pass by feigning normal mental abilities . . . ."[150] Because intellectually disabled persons are often ashamed of their disability, often they will go to great lengths to conceal it from those trying to assist them, including counsel in a capital proceeding.[151] This is especially problematic due to the fact that, unlike persons with a physical disability, "the deficits of the mentally retarded person are not always readily apparent to . . . attorneys."[152]

In many respects, attempts at concealment may be particularly strong among high-functioning intellectually disabled persons for whom there is in general a greater sense of personal stigma

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148. *See id.* at 194–97.

149. *See id.*

150. MARSHALL B. CLINARD & ROBERT F. MEIER, SOCIOLOGY OF DEVIANT BEHAVIOR 455 (14th ed. 2011).

151. HUMAN RIGHTS WATCH, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION, 13 HUMAN RIGHTS WATCH 12 (2001), *available at* http://www.hrw.org/sites/default/files/reports/ustat0301.pdf. Scharlette Holdman provided to Human Rights Watch an example of a defendant, who had for years been using his younger sister to perform his schoolwork, and went to such extremes in concealing his intellectual disability that he obtained assistance from counsel in registering for a college level calculus course. Sean O'Brien offered the example of a defendant who had managed to conceal his disability through most of his adult life by lying about his background and working at an extremely repetitive job. *Id.*

152. Ronald S. Ebert & Jeffrey S. Long, *Mental Retardation and the Criminal Justice System: Forensic Issues*, *in* FORENSIC PSYCHOLOGY AND NEUROPSYCHOLOGY FOR CRIMINAL AND CIVIL CASES 376 (Harold V. Hall ed., 2008).

related to their intellectual disability.[153] These concealment concerns can be particularly acute where "[d]efense teams . . . do not share the client's culture [and] may overlook symptoms of impairment, attributing them to language difficulties or cultural differences."[154] An attorney that is more familiar with her client's culture, however, will be better positioned to understand a client's true intellectual functioning. As a result, a more culturally competent attorney will be more likely to recognize when she is dealing with an intellectually disabled client.

B. The Importance of Culture to IQ Tests

Attorneys can also easily, and mistakenly, overlook the importance of culture to the intelligence quotient portion of an intellectual disability determination. IQ tests are not exact and precise measurements of global intelligence but are instead estimations of intelligence focused upon a particular range of abilities.[155] Simply stated, IQ testing is not an exact science.[156] If attorneys do not educate themselves as to the literature suggesting "chronic problems" and "cultural bias in intelligence tests,"[157] they may do their clients a grave disservice.

Recognizing the potential distorting effect of culture on IQ testing, the *DSM-IV-TR* directs that "[c]are should be taken to ensure that intellectual testing procedures reflect adequate attention to the individual's ethnic, cultural, or linguistic background."[158] This end is generally "accomplished by using tests in which the individual's relevant characteristics are represented in the stand-

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153. ELAINE E. CASTLES, "WE'RE PEOPLE FIRST": THE SOCIAL AND EMOTIONAL LIVES OF INDIVIDUALS WITH MENTAL RETARDATION 100–01 (1996).

154. Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 755 (2008).

155. GARY GROTH-MARNAT, HANDBOOK OF PSYCHOLOGICAL ASSESSMENT 134 (5th ed. 2009).

156. *See* PHILOMENA OTT, TEACHING CHILDREN WITH DYSLEXIA: A PRACTICAL GUIDE 114 (2007); Vikki F. Howard et al., *Biological and Genetic Factors in Human Development*, *in* HANDBOOK OF PSYCHOSOCIAL CHARACTERISTICS OF EXCEPTIONAL CHILDREN 86 (Vicki L. Schwean & Donald H. Saklofske eds., 1999).

157. LISA J. COHEN, THE HANDY PSYCHOLOGY ANSWER BOOK 90 (2011).

158. DSM-IV-TR, *supra* note 116, at 46.

ardization sample of the test or by employing an examiner who is familiar with aspects of the individual's ethnic or cultural background."[159] An examiner "should take into account factors that may limit test performance," including "the individual's sociocultural background [and] native language," not only in the choice of testing instruments but also in the "interpretation of results."[160] Such precautions are particularly important in a diverse nation like the United States.[161]

The AAIDD gives similar guidance to examiners. The organization cautions that in assessing intellectual disability a "[v]alid assessment considers cultural and linguistic diversity."[162] Furthermore, the AAIDD notes that "[l]imitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture."[163]

Listed among its ten challenges to the accurate measurement of intelligence and interpretation of IQ scores, the AAIDD includes a concern with "test fairness," where it takes note of "individuals of diverse ethnicity or culture, who may achieve markedly different results."[164] In addition, the AAIDD also raises concerns about test selection. The organization advises that "the selection of a specific standardized measure with which to assess intelligence should be based on several individual factors, such as the individual's social, linguistic, and cultural background."[165] In making an assessment, the organization advises examiners to "[t]ake into account such factors as the individual's culture [and] language."[166] With respect to making a retrospective diagnosis, the AAIDD expressly cautions that the assessor needs to

> [b]e sensitive to language differences and culturally based behaviors and beliefs. Thus, one needs to investigate and understand the culture, the degree of acculturation, and the language competency of the

159. *Id.* at 46.
160. *Id.* at 42.
161. COHEN, *supra* note 157, at 90–91.
162. AAIDD MANUAL, *supra* note 109, at 1.
163. *Id.*
164. *Id.* at 36.
165. *Id.* at 41.
166. *Id.* at 25.

> individual as well as the ways they affect the person. However, do not allow cultural or linguistic diversity to overshadow or minimize disability.[167]

The AAIDD further notes that "[a]ccuracy of assessment for a given individual requires that those conducting the psychological . . . assessments . . . [a]dhere to standards of their relevant professions regarding the assessment of intellectual functioning and adaptive behavior, such as those standards published by . . . the American Psychological Association."[168]

Through its ethical precepts, the American Psychological Association also addresses the concerns identified in the *DSM-IV-TR* and by the AAIDD. Under Standard 9.06 of the Ethical Principles of Psychologists and Code of Conduct (2010), the Association advises:

> When interpreting assessment results, including automated interpretations, psychologists take into account the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic and cultural differences, that might affect psychologists' judgments or reduce the accuracy of their interpretations. They indicate any significant limitations of their interpretations.[169]

In addition, the American Psychological Association's Council of Representatives recently adopted the Specialty Guidelines for Forensic Psychology.[170] Guideline 10.02 provides that "[f]orensic practitioners [should] use assessment instruments whose validity and reliability have been established for use with members of the

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167. *Id.* at 96.

168. *Id.* at 24.

169. AM. PSYCHOLOGICAL ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT STANDARD 9.06 (2010), *available at* http://www.apa.org/ethics/code/index.aspx?item=4.

170. AM. PSYCHOLOGICAL ASS'N, SPECIALTY GUIDELINES FOR FORENSIC PSYCHOLOGY (2011), *available at* http://www.ap-ls.org/aboutpsychlaw/SGFP_Final_Approved_2011.pdf.

population assessed."[171] Under Guideline 10.03, practitioners are exhorted to "consider . . . personal, linguistic, and cultural differences that might affect their judgments or reduce the accuracy of their interpretations" when they are interpreting assessment results.[172]

Unfortunately, despite the cultural sensitivity that the AAIDD and others have tried to foster, the issue of cultural bias in IQ test results remains a serious one. Given this foundation, the "elephant in the room,"[173] or perhaps what can be found in "Pandora's Box,"[174] is that "[m]easures of intellectual functioning may systemically underreport the IQ of African Americans and Latinos because of the cultural biases inherent in IQ test construction."[175] Additionally, evidence exists suggesting IQ tests "are less valid and reliable when used with nonnative English speakers, poorly educated individuals, or individuals raised in non-Western or third-world cultures."[176] Relatedly, "individuals from these minority

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171. *Id.* at 13.

172. *Id.* at 13–14.

173. SCOTT WILLIAMS, CHURCH DIVERSITY: SUNDAY THE MOST SEGREGATED DAY OF THE WEEK 38 (2011) ("'The elephant in the room' is an idiom for an obvious truth that is being ignored or going unaddressed. The term is often used to describe an issue that involves a social taboo, such as race, religion, [or] sexual orientation . . . . It is applicable when a subject is emotionally charged and the people who might have spoken up decide that it is probably best avoided.").

174. In modern usage, opening Pandora's box expresses a wariness of "unleash[ing] a stream of unforeseen problems." FERDIE ADDIS, OPENING PANDORA'S BOX: PHRASES BORROWED FROM THE CLASSICS AND THE STORIES BEHIND THEM 119 (Kim Casey ed., Reader's Digest Ass'n 2012) (2010). Pandora, an Eve like figure, in Greek mythology had

> a storage jar (later mistranslations made it a box), which the gods had filled with wars, plagues, famines and all the other evils in the world. When she arrived on Earth, perhaps through curiosity or perhaps out of malice, lifted the lid and unleashed a torrent of troubles on mankind.

Id. at 120.

175. DEMATTEO ET AL., *supra* note 120, at 162; *see also* Jonathan L. Bing, Note, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since* Penry *and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59, 90 (1996) (noting that "there is evidence that members of minority groups score lower on IQ tests due to an inherent cultural bias in the test").

176. DEMATTEO ET AL., *supra* note 120, at 162 (citation omitted).

groups may be more likely than their White, English-speaking counterparts to be classified as mentally retarded using one of the standard measures of intellectual functioning."[177] Although the existence of and severity of the problem is undoubtedly open to debate, "[m]ost psychologists and educational specialists consider intelligence tests to be at least somewhat biased against African Americans and members of lower social classes."[178] Thus, minorities may be classified as intellectually disabled in part because of bias in testing.[179]

There are a number of different reasons why cultural bias may exist in IQ testing, including, among others, the content, phrasing, application, and assessment of IQ tests.[180] For example, words, concepts, and contexts chosen for testing have traditionally given an advantage to white middle- and upper-class test-takers and a disadvantage to less wealthy test-takers.[181] As an illustration, a questioner asks the following: "A conductor is to an orchestra as a teacher is to what?"[182] Potential answers offered to test-takers include a "book," a "school," a "class," or an "eraser."[183] If a child has "been exposed to the concept of [an] 'orchestra,' [or] perhaps [even] attended a concert," that child has an advantage in answering.[184]

In one of the more significant judicial cases placing the issue of cultural bias in IQ testing before a court, the United States District Court for the Northern District of California found that the evidence demonstrated that the scoring disparity between African-American and white students was based, at least in part, on cultural

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177. *Id.*

178. SPENCER A. RATHUS, HDEV 179 (Jon-David Hague et al. eds., student ed. 2012) (citation omitted).

179. *See* RONALD L. TAYLOR ET AL., MENTAL RETARDATION: HISTORICAL PERSPECTIVES, CURRENT PRACTICES, AND FUTURE DIRECTIONS 220–221 (2005).

180. GRAHAME HILL, A LEVEL PSYCHOLOGY THROUGH DIAGRAMS 25 (2nd ed. 2001).

181. CHARLES ZASTROW & KAREN K. KIRST-ASHMAN, UNDERSTANDING HUMAN BEHAVIOR AND THE SOCIAL ENVIRONMENT 136 (8th ed. 2010).

182. *Id.*

183. *Id.*

184. *Id.*

bias in testing.[185] The trial court found evidence of cultural bias in the testing language, the cultural values of the test, and the cultural contexts of the test.[186] As illustrations of cultural bias in terms of values and contexts, the trial court judge noted:

> Cultural differences can also be found in specific test items[,] . . . . [for example] the "fight item" on WISC tests. This question asked children what they would do if struck by a smaller child of the same sex. The "correct" answer is that it is wrong to strike the child back. Young black children aged six and seven "missed" this item more than twice as often as their white counterparts. The difference can only be attributed to a cultural variation at that age. Similarly, it may be that such questions as who wrote Romeo and Juliet, who discovered America, and who invented the light bulb, are culturally biased.
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> At a more subtle level, such skills as "picture arrangement" may be tested in a biased fashion if the pictures, which generally are of caucasian persons, relate to situations more typical of white, middle class, life than the experiences of many black children. . . . Put succinctly by Professor [Asa] Hilliard, black people have "a cultural heritage that represents an experience pool which is never used" or tested by the standardized I.Q. tests.[187]

While improvements have certainly been made to reduce the cultural bias in IQ testing since, and in part because of, this 1979 decision, cultural bias has not dissipated entirely.[188] In 2002, when

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185. Larry P. *ex rel.* Lucille P. v. Riles, 495 F. Supp. 926, 956–60 & nn.64–71 (N.D. Cal. 1979), *aff'd in part and rev'd in part*, 793 F.2d 969 (9th Cir. 1984).

186. *See id.*

187. *Id.* at 958–59 (footnotes omitted) (citations omitted).

188. ROD PLOTNIK & HAIG KOUYOUMDJIAN, INTRODUCTION TO PSYCHOLOGY 291 (9th ed. 2011) ("In today's IQ tests, many of the above kinds of biases have been reduced. However, researchers still believe that it's virtual-

addressing the enduring over-representation of minorities in special education classrooms, the President's Commission on Excellence in Special Education "found that several factors were responsible for this over-representation, including the reliance on IQ tests that have known cultural bias."[189] That same year, the United States Court of Appeals for the Ninth Circuit rejected an argument from parents that a school district should have considered their daughter's IQ score in determining her eligibility for special education services under the Individuals with Disabilities Education Act.[190] Explaining its reasoning, the court noted that IQ tests "have come under increasing criticism in recent years because of cultural bias and other factors tending to diminish their reliability and they have undergone a number of successful legal challenges."[191] Thus, although improvements have been made, cultural bias arguably continues to skew testing results.[192]

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ly impossible to develop an intelligence test completely free of cultural bias because tests will reflect, to some degree, the concepts and values of their culture.") (citation omitted)).

189. PRESIDENT'S COMM'N ON EXCELLENCE IN SPECIAL EDUC., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 26 (2002), *available at* http://www2.ed.gov/inits/commissionsboards/whspecialeducation/reports/images/Pres_Rep.pdf.

190. Ford *ex rel.* Ford v. Long Beach Unified Sch. Dist., 291 F.3d 1086, 1087–89 (9th Cir. 2002).

191. *Id.* at 1089.

192. PLOTNIK & KOUYOUMDJIAN, *supra* note 188, at 291.

> [C]ultural differences in what we perceive and what we tune out affect our reaction to *all* IQ questions and to all real-life situations, not just to questions specifically about perception. Our experiences are constantly passed through cultural filters. We pick up on different aspects of the same item or situation so that items on tests or everyday situations have different meanings to different people. People who share the mainstream culture have an advantage because they see things the same way their testers . . . do, not because they are smart.
>
> Thus, even those IQ questions most carefully constructed to be "fair" or "culture-neutral" can readily be shown to be culture-bound and biased at a multitude of structural levels. And, as with an onion, peeling away layers of bias leaves nothing. The bias is not something that can be scrubbed off the surface. No matter how hard we try to frame questions objectively, we are testing cultural awareness, not intelligence.

The application of these findings in the context of *Atkins* proceedings is not unknown. James Were and the State of Ohio stand at the forefront of this issue. In Mr. Were's case, expert witnesses testified before an Ohio trial court that the Stanford–Binet IQ tests that Were took as a child were culturally biased.[193] While not the sole factor in reaching the trial court's conclusion that Were failed to establish that he had significantly sub-average general intellectual functioning, the trial court did find as part of its determination that "Were's IQ scores . . . were unreliable, given the cultural bias of the tests at the time Were took them."[194]

Were challenged the trial court's findings on appeal.[195] In upholding the trial court's ruling, the Ohio Court of Appeals for the First District noted that "[a]ll three experts agreed that, at the time that Were took the IQ tests, the tests were culturally biased against minorities" and that one of the experts "testified that the effect of this bias would have been to artificially lower a minority's score."[196] On appeal before the Ohio Supreme Court, Were specifically argued "that the trial court's findings that his IQ tests were culturally biased and more likely than not resulted in lower scoring [was] erroneous."[197] The Ohio Supreme Court rejected this conclusion.[198] The Court found that

> [t]his claim lacks merit. During cross-examination, [one of the experts] stated that the Stanford–Binet test that Were took in the 1960s was considered to be culturally biased. [Another expert] later explained that the test administered to Were was considered culturally biased because there were "no minorities in the standardization sample. It was an all-white sample." [That same expert] also testified

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MARK NATHAN COHEN, CULTURE OF INTOLERANCE: CHAUVINISM, CLASS, AND RACISM IN THE UNITED STATES 232 (1998).

193. State v. Were, No. C-030485, 2005 WL 267671, at *10 (Ohio Ct. App. Feb. 4, 2005).

194. *Id.*

195. *Id.* at *9.

196. *Id.* at *11.

197. State v. Were, 890 N.E.2d 263, 293 (Ohio 2008).

198. *Id.* at 294.

> that cultural bias would have the effect of lowering test scores for minorities.[199]

This is not the only concern lurking for defendants or the only potential tool—although an extraordinarily incendiary tool—available to the State. Professor Penny White also notes that potential problems may arise for defendants who speak English as a second language.[200] A court may simply ignore such defendants' IQ scores as not sufficiently reliable.[201] Furthermore, where language adaptations occur, there is the possibility that "courts may discount the results of special-circumstances tests that are adapted for other languages under the premise that such tests are not the 'gold standard' for intelligence measurement in the United States."[202] The State of Tennessee has taken such a position in litigating a capital case involving a Vietnamese-born defendant, arguing that the defendant's IQ score is both artificially low and inaccurate because of his language difficulties and the cultural bias of the testing.[203]

The fact that cultural bias may be creating artificial differences in IQ scores is also a potential tool for capital defense attorneys. Addressing an educational—not criminal—context, Professors Robert G. Meyer and Christopher M. Weaver note that

> [a]n interesting, and probably provocative, possibility is that the concerns about IQ tests favoring certain groups (i.e., white students) could be in fact argued in the reverse direction. It does not always benefit a child to receive a higher score on an IQ

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199. *Id.*

200. Penny J. White, *Treated Differently in Life but Not in Death: The Execution of the Intellectually Disabled After* Atkins v. Virginia, 76 TENN. L. REV. 685, 696 (2009).

201. *Id.* at 697.

202. *Id.*

203. Van Tran v. State, No. W2005-01334-CCA-R3-PD, 2006 WL 3327828, at *4–6 (Tenn. Crim. App. Nov. 9, 2006); *see also* Coleman v. State, 341 S.W.3d 221 (Tenn. 2011) (noting that the State of Tennessee had argued past cases that scores on IQ tests should not be considered solely on their face value and citing *Van Tran v. State* as an example).

> test (i.e., if the child could benefit from remedial services).[204]

Applying this concept to capital challenges invites interesting possibilities for a defense counsel raising equal protection challenges under both the relevant state constitution and the federal Constitution. For example, assume the defendant is white and slightly above any demarcation line drawn under the State's law for being classified as intellectually disabled. The defendant has a potential equal protection argument that he is being treated differently than, for example, an African-American defendant of the same level of intellectual functioning. The argument arises because cultural bias in testing may result in a white defendant scoring higher despite being at the same level of intellectual functioning as an African-American or Hispanic defendant.[205]

It has become clear that "IQ scores are not precise measures like marks on a thermometer."[206] Though defendants continue to run squarely into some walls in making this argument,[207] they have also enjoyed some successes in getting courts to

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204. ROBERT G. MEYER & CHRISTOPHER M. WEAVER, LAW AND MENTAL HEALTH: A CASE-BASED APPROACH 315 (2006).

205. Linda Knauss & Joshua Kutinsky, *Into the Briar Patch: Ethical Dilemmas Facing Psychologists Following* Atkins v. Virginia, 11 WIDENER L. REV. 121, 129–30 (2004).

206. JOHN REAVES & JAMES B. AUSTIN, HOW TO FIND HELP FOR A TROUBLED KID: A PARENT'S GUIDE TO PROGRAMS AND SERVICES FOR ADOLESCENTS 26 (1990).

207. *See, e.g.*, Maldonado v. Thaler, 625 F.3d 229, 238 (5th Cir. 2010) (noting that neither the Texas Court of Criminal Appeals nor the Fifth Circuit have "recognized the Flynn Effect as scientifically valid"); Ledford v. Head, Civil Action No. 1:02-CV-1515-JEC, 2008 WL 754486, at *7 (N.D. Ga. Mar. 19, 2008) ("The Court was not impressed by the evidence concerning the Flynn effect."); Bowling v. Commonwealth, 163 S.W.3d 361, 374–75 (Ky. 2005) (noting that Kentucky does not consider the "Flynn effect" in evaluating IQ scores); Smith v. State, 245 P.3d 1233, 1235 (Okla. Crim. App. 2010) (rejecting application of the "Flynn effect" due the language of Oklahoma's mental retardation provision, which authorizes consideration of the standard measure of error but no other adjustments to the intelligence quotient derived from "an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist" (quoting OKLA. STAT. tit. 21, § 701.10b (West Supp. 2012))); Neal v. State, 256 S.W.3d 264, 273 (Tex. Crim. App. 2008) ("We have previously refrained from applying the Flynn ef-

at least seriously consider questions related to measurement errors,[208] the "Flynn effect,"[209] and the "practice effect,"[210] and their potential respective roles in inflating scores.[211] With courts increasingly recognizing raw scores as inexact, culture and its role in the battle over IQ and intellectual functioning is a potential incendiary tool that may find broader application in borderline cases.

C. The Importance of Culture in the Consideration of Adaptive Behavior

The second prong of intellectual disability assessment, consideration of adaptive behavior, firmly embraces considering the individual in the context of his or her culture. In fact, it makes it

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fect . . . noting that it is an 'unexamined scientific concept' that does not provide a reliable basis for concluding that an appellant has significant sub-average general intellectual functioning." (quoting *Ex parte* Blue, 230 S.W.3d 151, 166 (Tex. Crim. App. 2007))).

208. The standard error of measurement is "used to calculate a confidence interval, which is a band of scores around the observed IQ score in which the individual's true IQ score is most likely to fall." DEMATTEO ET AL., *supra* note 120, at 183. Even where tests are well-developed and validated measures, "some degree of measurement error" is inevitable. *Id.* at 182. For those tests, which are well-standardized measures, "the standard error of measurement is approximately 3 to 5 points." AAIDD MANUAL, *supra* note 109, at 36.

209. "The Flynn effect refers to the gradual, systematic, and population-wide improvement in intelligence test performance over time that causes IQ test norms to become obsolete approximately every 20 years." DEMATTEO ET AL., *supra* note 120, at 184. For a general discussion of the "Flynn effect," see AAIDD MANUAL, *supra* note 109, at 37; DEMATTEO ET AL., *supra* note 120, at 184–90.

210. "The *practice effect* refers to gains in IQ scores on tests of intelligence that result from a person being retested on the same instrument [or] . . . . similar instrument [that is] . . . . readministered within a short time period." AAIDD MANUAL, *supra* note 109, at 38.

211. *See, e.g.*, Holladay v. Allen, 555 F.3d 1346, 1350 n.4, 1358 (11th Cir. 2009) (finding in the context of a federal habeas challenge to an Alabama capital sentence that the trial court's application of the "Flynn effect" was not clearly erroneous); Walker v. True, 399 F.3d 315, 322–23 (4th Cir. 2005) (remanding because of a trial court's failure to consider the "Flynn effect" in determining IQ in the context of a federal habeas challenge to a Virginia capital sentence); State v. Burke, No. 04AP-1234, 2005 WL 3557641, at *12–13 (Ohio Ct. App. Dec. 30, 2005) (establishing that a trial court is required to consider evidence of the "Flynn effect" and may apply it in determining the defendant's IQ but is not required to accept this testimony).

imperative. The *DSM-IV-TR*'s diagnostic criteria for intellectual disability includes:

> [c]oncurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.[212]

Similarly, the AAIDD notes that in assessing adaptive skills, "the person's strengths and limitations in adaptive skills should be documented within the context of community and cultural environments typical of the person's age peers and tied to the person's need for individualized supports."[213] Furthermore, the AAIDD instructs clinicians that in assessing intellectual disability they:

> must take into account the cultural context of the individual. The key challenges are to describe important sociocultural differences and, subsequently, "to evaluate the individual's status in light of expectations and opportunities for the development of various competencies." Behavioral expectations may differ across cultural groups, along with education and training in adaptive skills. Assessments, therefore, must consider relevant ethnic or cultural factors and expectations.[214]

Because it is impossible to develop adaptive tests to reflect all cultural variances, however, examiners must exercise good clinical judgment with cultural sensitivity when selecting cultural measures of adaptive behavior and interpreting the scores.[215]

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212. DSM-IV-TR, *supra* note 116, at 49.

213. AAIDD MANUAL, *supra* note 109, at 53.

214. *Id.*

215. Sharon A. Borthwick-Duffy, *Adaptive Behavior*, *in* HANDBOOK OF INTELLECTUAL AND DEVELOPMENTAL DISABILITIES 284 (John W. Jacobson et al. eds., 2007).

Courts have consistently recognized the importance of the defendant's "cultural group" in assessing his or her adaptive skills.[216] Despite the centrality of culture to assessing deficits in adaptive skills, this has been a highly under-litigated part of the determination of intellectual disability. Yet, this can be a fertile field for both defense attorneys and prosecutors who seek to litigate the issue of whether the defendant's adaptive skills are deficient within his or her cultural group. This is especially so because, as discussed in the next section, the adaptive capabilities of many intellectually disabled persons are significantly higher than is generally assumed by persons who are not professionals within the intellectual disability field.

D. The Importance of Culture to Communicating with an Audience

Cultural competency requires not just competency in relating to and understanding a lawyer's client, but also competency in communicating with and understanding a lawyer's audience.[217] "Besides the professional knowledge and experiences [that judges and jurors] bring to their assigned roles, a variety of personal factors, including . . . culture . . . will affect their perceptions, feelings, thinking, behavior, and decisions."[218] For judges, "[c]ultural attitudes, values, and beliefs will shape thinking and decision making

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216. *See, e.g.*, State v. Grell, 135 P.3d 696, 708–09 (Ariz. 2006) (stating the importance of the defendant's age and cultural group when analyzing the adaptive functioning component of a mental retardation diagnosis); Dufour v. State, 69 So. 3d 235, 245 (Fla. 2011) (stating the importance of culture when assessing an individual's adaptive behavior); Murphy v. State, 66 P.3d 456, 459 (Okla. Crim. App. 2003) (stating that an individual's adaptive functioning is analyzed by the standards expected of that individual by his or her cultural group); *Ex parte* Woods, 296 S.W.3d 587, 589 n.3 (Tex. Crim. App. 2009) (noting that meeting the standards of one's cultural group is one factor used to analyze impairments in adaptive behavior).

217. *Cf.* BARBARA MUELLER, COMMUNICATING WITH THE MULTICULTURAL CONSUMER: THEORETICAL AND PRACTICAL PERSPECTIVES 314 (2008) (discussing the importance of cultural competency for marketers and advertisers).

218. WEN-SHING TSENG ET AL., CULTURAL COMPETENCE IN FORENSIC MENTAL HEALTH: A GUIDE FOR PSYCHIATRISTS, PSYCHOLOGISTS, AND ATTORNEYS 11 (2004).

in a case."[219] Similarly, "all members of the jury bring with them their own cultural 'software.'"[220] For juries, "cultural aspects such as how a person thinks, believes, and values things are . . . difficult to detect. The successful attorney will pay attention to the cultural backgrounds of the jury members and will know how to deal wisely with their cultures throughout the court process."[221]

Within American society, a tendency exists to underestimate persons with disabilities and focus more upon their limitations than their respective talents and abilities.[222] A substantial stigma, therefore, accompanies being labeled as intellectually disabled,[223] a stigma that includes an unfortunate tradition of grossly underestimating the potential of persons with mental retardation.[224] For example, in her research, Professor Jane Mercer found that persons identified by neighbors as being intellectually disabled had "a significantly lower mean IQ and more physical disabilities" than those who met the clinical definitions of intellectual disability.[225] Other scholars have observed that:

> Most lay persons underestimate the possible existence of mental retardation, thinking that anyone with mental retardation is virtually incapable of almost any self-care. As a result, many people find it difficult to imagine that a person with mental retar-

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219. *Id.*

220. SLAWOMIR MAGALA, CROSS-CULTURAL COMPETENCE 199 (2005).

221. TSENG ET AL., *supra* note 218, at 12.

222. LISA POE & GLENDA EDWARDS, VA. DEP'T OF MENTAL HEALTH, MENTAL RETARDATION AND SUBSTANCE ABUSE SERVS., MENTAL RETARDATION STAFF ORIENTATION WORKBOOK 10 (rev. ed. 2002), *available at* http://www.dbhds.virginia.gov/documents/ODS/OMR-WaiverStaffWorkbook.pdf; *see also Mental Retardation: From Knowledge to Action*, WORLD HEALTH ORG. REGIONAL OFF. FOR SE. ASIA, http://www.searo.who.int/en/Section1174/Section1199/Section1567/Section1825_8093.htm (last updated Dec. 20, 2004).

223. James W. Ellis, *Tort Responsibility of Mentally Disabled Persons*, 6 AM. B. FOUND. RES. J. 1079, 1087 (1981).

224. CONCISE ENCYCLOPEDIA OF SPECIAL EDUCATION: A REFERENCE FOR THE EDUCATION OF THE HANDICAPPED AND OTHER EXCEPTIONAL CHILDREN AND ADULTS 625 (Cecil R. Reynolds & Elaine Fletcher-Janzen eds., 2d ed. 2002).

225. JANE R. MERCER, LABELING THE MENTALLY RETARDED: CLINICAL AND SOCIAL SYSTEM PERSPECTIVES ON MENTAL RETARDATION 94 (1973).

> dation could drive a car, work, take the bus, or perform simple tasks with relative ease. They assume mental retardation would be detected quickly and easily because it would be so "obvious."[226]

Accordingly, "[w]hen most people think of a person with intellectual disabilities, they generally consider a person who is low functioning and totally dependent upon others for support."[227]

Contrary to the public perception of intellectual disability, "*mildly* retarded individual[s] . . . are frequently able to find and keep a semiskilled job. . . . They are generally able to care for themselves adequately and to travel about familiar locales with ease."[228] Some of these individuals obtain driver's licenses and drive vehicles,[229] and some even marry[230] and rear children.[231] Persons who are mildly intellectually disabled often learn to read and write to approximately a sixth-grade level by late adolescence.[232] In addition, mildly intellectually disabled persons may learn arithmetic, though as with reading and writing skills, they

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226. Denis W. Keyes et al., *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 529, 530 (1998) (footnote omitted); *see also* David L. Rumley, Comment, *A License to Kill: The Categorical Exemption of the Mentally Retarded from the Death Penalty*, 24 ST. MARY'S L.J. 1299, 1325 (1993) (stating that "a misconception exists that all mentally retarded persons are 'profoundly' retarded").

227. Robert M. Hodapp et al., *Intellectual Disabilities*, *in* THE CAMBRIDGE HANDBOOK OF INTELLIGENCE 200 (Robert J. Sternberg & Scott Barry Kaufman eds., 2011).

228. 3 THE CORSINI ENCYCLOPEDIA OF PSYCHOLOGY AND BEHAVIORAL SCIENCE 947 (W. Edward Craighead & Charles B. Nemeroff eds., 3d ed. 2001).

229. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, YOUR CHILD: EMOTIONAL, BEHAVIORAL, AND COGNITIVE DEVELOPMENT FROM BIRTH THROUGH PREADOLESCENCE 358 (David B. Pruitt ed., 2000); JOHN TEMPLE, THE LAST LAWYER: THE FIGHT TO SAVE DEATH ROW INMATES 187 (2009).

230. Jean Spruill et al., *Assessment of Mental Retardation*, *in* WISC-IV: CLINICAL USE AND INTERPRETATION 302 (Aurelio Prifitera et al. eds., 2005).

231. Bo Fernhall, *Mental Retardation*, *in* ACSM'S EXERCISE MANAGEMENT FOR PERSONS WITH CHRONIC DISEASES AND DISABILITIES 304 (J. Larry Durstine & Geoffrey E. Moore eds., 2d ed. 2003).

232. Spruill et al., *supra* note 230, at 302.

stay behind their classmates.[233] Although performing these tasks may at times be difficult,[234] mildly intellectually disabled persons "often blend into the nonretarded population in the years before and after formal schooling."[235] Far from individuals who should be feared, they can be good citizens and neighbors.[236] Approximately eighty-five percent of intellectually disabled persons will fall within this mild intellectual disability category.[237] And, it is within this range where intellectually disabled persons' adaptive skills will be at their greatest level of variance.[238] The battleground in intellectual disability hearings will be drawn precisely between those who are just above and those who are just below the dividing line between being considered intellectually disabled and not being considered intellectually disabled.[239]

The public, in general, continues to conceive of intellectual disability in a manner not far removed from Fitz-Herbert's 1534 "counting to twenty-pence" definition. Defense attorneys litigating *Atkins* claims run squarely into judges and juries with this inaccurate perception based upon their cultural expectations of the degree to which they expect intellectually disabled persons to be limited in functionality.[240] A culturally competent defense attorney must

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233. Benjamin L. Handen, *Intellectual Disability (Mental Retardation)*, *in* ASSESSMENT OF CHILDHOOD DISORDERS 555 (Eric J. Mash & Russell A. Barkley eds., 4th ed. 2007).

234. Stephen Greenspan, *Foolish Actions in Adults with Intellectual Disabilities*, *in* 36 INTERNATIONAL REVIEW OF RESEARCH IN MENTAL RETARDATION 149 (Laraine Masters Glidden ed., 2008), *available at* http://www.stephengreenspan.com/pdf/foolishaction.pdf.

235. Robert M. Hodapp & Elizabeth M. Dykens, *Mental Retardation (Intellectual Disabilities)*, *in* CHILD PSYCHOPATHOLOGY 488 (Eric J. Mash & Russell A. Barkley eds., 2d ed. 2003); *see also* Jean Spruill et al., *supra* note 230, at 302.

236. LEOPOLD D. LIPPMAN, MENTAL RETARDATION—A CHANGING WORLD 5 (1979).

237. Spruill et al., *supra* note 230, at 302.

238. JACQUELINE CORCORAN & JOSEPH WALSH, CLINICAL ASSESSMENT AND DIAGNOSIS IN SOCIAL WORK PRACTICE 38 (2d ed. 2010).

239. *See* Blume et al., *supra* note 145, at 694–95.

240. Margaret Talbot, *The Executioner's I.Q. Test*, N.Y. TIMES MAGAZINE (June 29, 2003), http://www.nytimes.com/2003/06/29/magazine/29RETARDED.html?scp+1&sq=Talbot%20the%20executioner%27s%20IQ&st=cse.

recognize this inaccurate societal perception and educate the judge and jury.

Beyond just educating the fact-finder, the culturally competent attorney should strive to find ways to describe the defendant's adaptive limitations in a manner that has a greater capacity to resonate culturally. Professor Stephan Greenspan's piece, *Foolish Action in Adults with Intellectual Disabilities: The Forgotten Problem of Risk-Unawareness*, provides one such conduit. Professor Greenspan notes that "[a]ll human beings behave foolishly on occasion, but people with [intellectual disability] behave foolishly more frequently and in situations where danger signs are evident to most individuals, and their foolish actions are more likely to have serious life-altering consequences."[241] Not surprisingly, cognitive deficiency is more central to the foolish behaviors of intellectually disabled adults than those of normal intelligence.[242]

Greenspan offers a number of illustrations to help demonstrate this. For example, he explains that while anyone can be a victim of crime, "people with [intellectual disability] are often at risk of being victimized criminally, for reasons having to do both with their cognitive limitations and associated personality adaptations (especially an acquiescent interpersonal style)."[243] Greenspan illustrates the point using an incident involving an intellectually disabled woman in her thirties who was able to live alone and who "bemoaned the fact that she did not have a boyfriend. A van driver told her he liked her and would be her boyfriend if she gave him $1000 . . . [and the intellectual disabled woman] emptied her bank account to give the man the money."[244] Similarly, "[p]eople with [intellectual disability] often make poor health decisions, owing to mistaken ideas about illness, lack of knowledge about healthy practices, difficulty knowing when to seek help, and lack of ability to follow through on medical regimens."[245] People in general often make poor health choices, but a particular illustration helps to demonstrate a cognitive divide. During an outbreak of herpes, for instance, an intellectually disabled woman "became

241. Greenspan, *supra* note 234, at 151.
242. *Id.* at 175–76.
243. *Id.* at 180.
244. *Id.*
245. *Id.* at 182 (citation omitted).

very upset and tried to cut the herpes sores off with a scissor."[246] That a defendant may attempt to flee from law enforcement is hardly limited to persons with intellectual disability. However, cognitive limitations are reflected in a case where a defendant "panicked and jumped out of his car while it was still moving . . . . [with] [h]is rationale for this dangerous act [being] a belief that the police would continue to chase the car rather than him."[247]

Such acts of "foolishness" may provide a more culturally resonant illustration of the broader adaptive deficiencies that the defense counsel must demonstrate to the fact-finder. While such acts and limitations have not been central in the literature in the field in recent years in large part out of reaction against paternalism, lack of risk-awareness and deficient cognitive reasoning are precisely the "behaviors that experienced clinicians and family members see as much more central to the [intellectual disability] construct."[248] They also provide a means that may be more culturally resonant, as they are with family members, with fact-finders.

VI. CONCLUSION

For centuries under Anglo-American law, only the most severely intellectually disabled defendants were placed beyond the reach of capital punishment. However, from 1988 to 2003, a dramatic transformation took place, as state legislatures acted to categorically exclude intellectually disabled persons from the death penalty. In the intervening centuries, the professional community's understanding of intellectual disability significantly changed with the category of persons who are considered intellectually disabled having expanded. In drafting legislation that excluded intellectually disabled persons from the death penalty, state legislatures relied upon these broadened and more expansive definitions derived from leading expert organizations, especially the AAIDD and the American Psychiatric Association. Non-experts in the field, including judges and juries, however, continue to have an understanding of intellectual disability that may be more akin to Fitz-

246. *Id.*
247. *Id.*
248. *Id.* at 148.

Herbert's narrow 1534 *New Nautra Brevium* definition than the definitions promulgated by the AAIDD or under the *DSM-IV-TR*.

This creates an exceedingly complex backdrop for litigating intellectual disability in the context of capital proceedings. Many of these litigation disputes over intellectual disability involve close cases. In such litigation, cultural competency provides both defense attorneys and prosecutors with a powerful tool in litigating the final few feet or inches in these sharply contested matters. While not an exclusive list, cultural competency is particularly salient (1) in initially identifying a defendant as a person who may be intellectually disabled, (2) in litigating the deficiency or lack thereof of the defendant's intellectual functioning, (3) in litigating the deficiency or lack thereof in the defendant's adaptive skills, and (4) in arguing these issues persuasively to a judge or jury. Cultural competency in close cases could mean the difference between life and death.