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"Outsmarting" Death by Putting Capital Punishment on Life Support: The Need for Uniform State Evaulations of the Intellectually Disabled in the Wake of *Hall v. Florida*

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THE NEED FOR UNIFORM STATE EVALUATIONS OF THE INTELLECTUALLY DISABLED IN THE WAKE OF *HALL V. FLORIDA*

"I can still tend the rabbits, George? . . . I di'n't mean no harm, George."[1]

"Give mom a hug for me and tell her that I love her. Take me home, Jesus. Take me home, Lord. I ain't left yet, must be a miracle. I am a miracle. Y'all do understand that I came here a sinner and leaving a saint?"[2]

INTRODUCTION

Jerry Williams was murdered at the age of 21 outside a convenience store in Beaumont, Texas, in 1992.[3] Williams was a confidential informant for the police department and provided a tip that resulted in the arrest of Marvin Lee Wilson and Andrew Lewis for possession of cocaine.[4] Wilson and Lewis sought Williams out for payback for snitching, and after a verbal altercation with Williams, kidnapped, physically beat, and ultimately shot him to death.[5] Wilson was sentenced to death for the crime, and he appealed, arguing that his mental development was deficient, which made him "mentally retarded" under the

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[1] JOHN STEINBECK, OF MICE AND MEN 65 (Penguin Books 1993) (1937) (quoting Lennie Small).

[2] Charles Montaldo, *The Last Words of Executed Prisoners: Final Statement of Marvin Lee Wilson*, ABOUT NEWS (Sept. 12, 2014), http://crime.about.com/od/anylastwords/ig/Last-Words-of-Executed/Yokamon-Hearn.-P7j.htm [http://perma.cc/W42L-X47B].

[3] Associated Press, *Texas Executes Marvin Wilson Despite His Claims of Low IQ*, N.Y. DAILY NEWS (Aug. 8, 2012, 11:24 AM), http://www.nydailynews.com/news/national/texas-executes-marvin-wilson-claims-iq-article-1.1131326 [hereinafter *Texas Executes Marvin Wilson*].

[4] *Id.*; *Marvin Lee Wilson*, MURDERPEDIA, http://murderpedia.org/male.W/w/wilson-marvin-lee.htm [http://perma.cc/2XYA-4HN9] (last visited June 21, 2016).

[5] *Texas Executes Marvin Wilson*, *supra* note 3.

law and thus exempt from execution.[6] The highest court found that Wilson did not suffer from intellectual disability, and the state of Texas proceeded with Wilson's execution by lethal injection on August 7, 2012.[7] Prior to his execution, Wilson's IQ test showed that he had an IQ of 61—nine points below Texas's benchmark score of 70 and low enough to be considered "mentally retarded."[8]

Wilson's execution came after the Supreme Court's 2002 decision in *Atkins v. Virginia* in which the Court categorically held that the execution of those suffering from mental retardation constituted cruel and unusual punishment inconsistent with the protections of the Eighth Amendment.[9] The Court in *Atkins*, however, left it to the states to develop their own methods for determining whether a particular individual is intellectually disabled.[10] For example, according to Texas courts, an individual only reaches the level of intellectual disability that would preclude the state from carrying out an execution if he or she displays certain descriptive character traits—traits that are based on the character Lennie Small from John Steinbeck's classic novel *Of Mice and Men*.[11] As a result, despite Wilson arguably falling below what is considered intellectually deficient in many professional circles and the Texas statute, he was not sufficiently disabled, according to the Texas legislature, to be exempt from execution.[12]

More than a decade after Marvin Lee Wilson's execution, the Supreme Court again tackled the issue of the execution of the intellectually disabled in its 2014 decision, *Hall v. Florida*.[13] While the Court both reaffirmed the concerns raised in *Atkins*

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[6] John Rudolf, *Marvin Wilson Execution: Texas Puts Man with 61 IQ to Death*, HUFFINGTON POST (Aug. 7, 2012, 8:53 PM), http://www.huffingtonpost.com/2012/08/07/marvin-wilson-execution-texas_n_1753968.html [http://perma.cc/AH2Z-PXN5]; Wilson v. Thaler, 133 S. Ct. 81, No. 12-5349, 2012 WL 3186106, at *2 (*petition for cert. filed* July 19, 2012).

[7] Rudolf, *supra* note 6; *see* Wilson v. Thaler, 450 F. App'x 369, 371 (5th Cir. 2011), *writ for cert. denied*, Wilson v. Thaler, 133 S. Ct. (2012) (per curiam).

[8] *Id.*

[9] Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[10] *Id.* at 317. The terms "mental retardation" and "mentally retarded" have widely been replaced with the terminology "intellectual disability" and "intellectually disabled." As such, throughout this note the terms based in the root "intellectual disability" will be used as opposed to terms based in "mental retardation." AM. PSYCHIATRIC ASS'N, INTELLECTUAL DISABILITY (2013), http://www.dsm5.org/documents/intellectual%20disability%20fact%20sheet.pdf [http://perma.cc/9JRH-TH8Y]. For further discussion on the evolution of this terminology, see *infra* notes 22-24 and accompanying text.

[11] Diana Wray, *Updated Texas Uses* Of Mice and Men *Standards to Execute Mentally Disabled Man*, HOUS. PRESS (Jan. 30, 2015, 8:00 AM), http://www.houstonpress.com/news/updated-texas-uses-of-mice-and-men-standards-to-execute-mentally-disabled-man-6728580 [http://perma.cc/3EZG-599C].

[12] Rudolf, *supra* note 6.

[13] Hall v. Florida, 134 S. Ct. 1986 (2014).

that the execution of the intellectually disabled constitutes cruel and unusual punishment and further stated that a "bright-line" IQ test-score cutoff is unconstitutional, it once again did not provide a method for states to evaluate a particular defendant's potential intellectual disability.[14] The Court suggested factors that courts should consider, but its holding was limited to finding impermissible the use of a bright-line IQ score as a complete bar to presenting other evidence of intellectual disability.[15]

This note argues that to prevent the improper execution of intellectually disabled capital defendants under *Atkins* and *Hall*, there must be a uniform method for states to evaluate a defendant's intellectual abilities. Part I of this note provides background information on intellectual disabilities and the history of state death penalty statutes. Part II examines the Supreme Court's decision in *Atkins v. Virginia* and the changes to state statutes post-*Atkins*. Part III analyzes the Court's recent decision in *Hall v. Florida*, which affirms the categorical exclusion of the intellectually disabled from capital punishment but does not establish metrics for evaluating which defendants are intellectually disabled. Finally, Part IV proposes a method for evaluating a defendant's potential intellectual disability in light of the *Hall* decision and argues that this method should be adopted nationwide. Specifically, the note suggests that states, when determining a capital defendant's intellectual ability, should take a three-pronged approach that considers conceptual, social, and practical factors. Such a holistic examination comports with evolving standards of decency and would assist courts in making an accurate judgment, ensuring that those who are truly intellectually disabled are exempt from execution.

I. INTELLECTUAL DISABILITY AND DEATH PENALTY STATUTES IN THE UNITED STATES

A. Intellectual Disability

The American Association of Intellectual and Development Disabilities (AAIDD) defines intellectual disability as "a disability characterized by significant limitations in both intellectual functioning and in adaptive behavior."[16] Poor adaptive functioning affects many ordinary day-to-day aspects of life

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[14] *Id.* at 1990, 1996.

[15] *Id.* at 2001.

[16] *Definition of Intellectual Disability*, AM. ASS'N OF INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, http://aaidd.org/intellectual-disability/definition#.VFVt1NR4qfw [http://perma.cc/RVG4-PNML] (last visited June 21, 2016).

such as money and time management, social skills, and occupational abilities, among others.[17] Intellectual disability manifests before the age of 18[18] and affects about one to three percent of the total population.[19] One of the primary tools mental health professionals use in evaluating patients and making diagnoses is the *Diagnostic and Statistical Manual of Mental Disorders* (*DSM*).[20] The American Psychiatric Association (APA) published the first edition of the *DSM* in 1952.[21] The fifth and most recent edition, *DSM-5*, was released in May 2013 after over a decade of work,[22] and until its publication, intellectual disability was referred to as mental retardation.[23] This change in terminology reflected advocates' concerns that the term "mental retardation" and similar terms (i.e., "retarded" and "retard") are now offensive to many people.[24]

In addition to the change in terminology, the *DSM-5* also recommends a change in assessing an individual who possibly suffers from intellectual disability.[25] In particular, the *DSM-5* notes a specific concern with overemphasizing IQ scores in determining an individual's potential intellectual disability.[26] While still allowing for the use of IQ scores in holistically evaluating a particular individual's level of intellectual disability, the *DSM-5* states that IQ tests and similar assessments are to be used only in conjunction with other clinical assessment techniques.[27] The *DSM-5* states that a score "two standard deviations or more below" the average score of the population

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[17] *Id.*

[18] *Id.*

[19] *Intellectual Disability*, N.Y. TIMES, http://www.nytimes.com/health/guides/disease/mental-retardation/overview.html [http://perma.cc/B9MT-ST9L] (last visited June 21, 2016).

[20] *DSM*, AM. PSYCHIATRIC ASS'N, http://www.psychiatry.org/practice/dsm [http://perma.cc/56XN-THCV] (last visited June 21, 2016).

[21] *DSM: History of the Manual*, AM. PSYCHIATRIC ASS'N, http://www.psychiatry.org/practice/dsm/dsm-history-of-the-manual [http://perma.cc/98G8-RETW] (last visited June 21, 2016).

[22] *From Planning to Publication: Developing DSM*-5, AM. PSYCHIATRIC ASS'N, http://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-Development-of-DSM-5.pdf [http://perma.cc/QM8X-M4JS] (last visited June 21, 2016); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 5-6 (5th ed. 2013).

[23] INTELLECTUAL DISABILITY, *supra* note 10.

[24] Change in Terminology: "Mental Retardation" to "Intellectual Disability," 78 Fed. Reg. 46,499 (Aug. 1, 2013); Tammy Reynolds et al., *History of Stigmatizing Names for Intellectual Disabilities Continued*, MENTAL HELP (May 21, 2013), https://www.mentalhelp.net/articles/history-of-stigmatizing-names-for-intellectual-disabilities-continued/ [http://perma.cc/58H2-Q5QM].

[25] INTELLECTUAL DISABILITY, *supra* note 10.

[26] *Id.*

[27] *Id.*

constitutes intellectual disability—this is a score of "about 70 or below."[28]

B. A Brief History of American Capital Punishment

The first execution in what is now the United States for the punishment of criminal wrongdoing occurred in 1608 in Virginia when Captain George Kendal was convicted for spying for Spain.[29] In the early days of American capital punishment, a person could be sentenced to death for crimes such as stealing grapes or striking one's parents.[30] Additionally, during American capital punishment's infancy, capital sentencing was not discretionary—meaning that anyone convicted of a capital offense was sentenced to death, regardless of outside factors or circumstances.[31] In the late nineteenth and early twentieth centuries, all states moved towards discretionary sentencing for almost all capital crimes, while many other countries were at the same time abandoning capital punishment entirely.[32]

After a sizable surge in executions in the 1920s and 1930s, the United States began to retreat from capital punishment entirely in the early 1960s.[33] In 1958, the Supreme Court held in *Trop v. Dulles* that the Eighth Amendment contains an "evolving standard[] of decency that mark[s] the progress of a maturing society."[34] While the issues presented in *Trop* did not involve the death penalty, many who were opposed to capital punishment began to argue that American societal standards of decency had evolved to a point where the death penalty no longer complied with these standards.[35]

In the 1972 case *Furman v. Georgia*, the Supreme Court for the first time seriously questioned the constitutionality of death penalty practices in the states.[36] Justice Douglas, concurring in the Court's per curiam decision in *Furman*, stated that statutes that were discretionary, and thus that

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[28] *Id.*

[29] *Part I: History of the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/part-i-history-death-penalty [http://perma.cc/G2E3-KAT2] (last visited June 21, 2016).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[35] *Part I: History of the Death Penalty*, *supra* note 29; *Trop*, 356 U.S. 114 (discussing whether lost citizenship as a consequence for conviction by a court-martial for wartime desertion constituted cruel and unusual punishment under the Eighth Amendment).

[36] Furman v. Georgia, 408 U.S. 238, 239-40 (1972).

allowed the state to apply the death penalty arbitrarily and capriciously, were an unconstitutional violation of both the Eighth Amendment's protection against "cruel and unusual punishment" and the Equal Protection Clause of the Fourteenth Amendment.[37] While not a deciding factor in the Court's holding, Justice Douglas did note that both Furman and Branch (another plaintiff whose case the Court combined with Furman's for review) were mentally deficient.[38] The Court specifically mentioned that not only did Branch have an IQ well below that of the other inmates, but he also ranked in the bottom fourth percentile of his grade-school class.[39] While the decision in *Furman* initially appeared to be a victory for opponents of the death penalty, the Court did not outright hold the death penalty unconstitutional—it merely questioned the constitutionality of imposing the death penalty in the cases before it.[40]

Immediately after the *Furman* decision, many states began rewriting their death penalty statutes to accord with the ruling.[41] A return to mandated death sentences for capital offenses had been deemed unconstitutional by the Court in *Woodson v. North Carolina*, so states that wanted to maintain the death penalty needed to draft more refined discretionary statutes in light of these combined rulings.[42] The Court upheld these new statutes in a series of decisions that reinstated capital punishment in Florida, Georgia, and Texas by holding these states' new death penalty statutes constitutional.[43] These new statutes allowed parties to present, and juries to take into account, both aggravating and mitigating factors surrounding the defendant and the crime.[44] These statutes also instituted separate guilt and penalty phases of capital trials—meaning that after a jury returned a verdict of guilty, a second proceeding began to determine the sentence (i.e., death or some amount of prison time).[45] Finally, these statutes allowed state courts to conduct a procedural review of these sentences to see if a sentence was disproportionate.[46] While the Court approved these statutory changes, nowhere in *Gregg v. Georgia*—one in a

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[37] *Id.* at 256-57 (Douglas, J., concurring).

[38] *Id.* at 253.

[39] *Id.*

[40] *Id.* at 239-40 (majority opinion).

[41] *Part I: History of the Death Penalty*, *supra* note 29.

[42] Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

[43] Gregg v. Georgia, 428 U.S. 153, 207 (1976); Jurek v. Texas, 428 U.S. 262, 276 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

[44] *Gregg*, 428 U.S. at 163-66.

[45] *Id.* at 164-66, 191.

[46] *Id.* at 166-68.

series of decisions reinstating capital punishment—did the Court require states wishing to reinstate the death penalty to adopt any or all of these particular changes.[47]

Another notable case in this realm is *Hitchcock v. Dugger*.[48] There the Court reaffirmed earlier decisions dealing with jury consideration at sentencing of mitigating factors not explicitly enumerated in a state's death penalty statute.[49] In *Hitchcock*, the defendant argued that the jury was improperly instructed that the only mitigating evidence it could consider was the defendant's age at the time he had committed the crime and not evidence presented during his sentencing proceeding regarding his difficult and tumultuous childhood.[50] The Court held that the trial court improperly prevented the jury from considering all the mitigating factors presented to it (including those not explicitly enumerated in the Florida statute), but it suggested that the defendant could be sentenced to death if a jury was properly allowed to consider the evidence of all present mitigating factors.[51]

*C. State Death Penalty Statutes Post-*Gregg *and Pre-*Atkins

The Court's death penalty cases up to and including *Gregg* addressed the legality of the death penalty generally, but the Court never squarely wrestled with the constitutionality of executing intellectually disabled individuals until it decided *Atkins v. Virginia*. While death penalty statutes among the 50 states share many characteristics, each state has the ability to draft its own statute defining intellectual disability. Prior to the Court's decision in *Atkins*, 18 states explicitly defined mental retardation in their death penalty statutes.[52] While many of the states had similar definitions, each emphasized different evaluative factors.[53] For example, Arizona defined mental retardation as "a mental deficit that has resulted in significantly subaverage general intellectual functioning existing concurrently with significant limitations in adaptive functioning, where the onset of the forgoing conditions occurred

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[47] *See Gregg*, 428 U.S. 153; *Part I: History of the Death Penalty*, *supra* note 29.

[48] Hitchcock v. Dugger, 481 U.S. 393 (1987).

[49] *Id.* at 394.

[50] *Id.* at 397-98.

[51] *Id.* at 399.

[52] *State Statutes Prohibiting the Death Penalty for People with Mental Retardation*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/state-statutes-prohibiting-death-penalty-people-mental-retardation?scid=28&did=138 [http://perma.cc/2NFR-9R3L] (last visited May 20, 2016).

[53] *Id.*

before the defendant reached the age of eighteen."[54] Despite a statutory definition that appears to necessitate a holistic evaluation of a defendant, the Arizona statute also required "the appointment of a licensed psychologist whose only stated purpose was to evaluate capital defendants to determine their IQ."[55] Prior to *Atkins*, Arizona was the only state that explicitly listed "determin[ing] the defendant's IQ" as the qualified examiner's purpose.[56] Arkansas also explicitly referred to IQ in its statute, which stated that "[t]here is a rebuttable presumption of mental retardation when the defendant has an intelligence quotient of sixty-five (65) or below."[57] The following states' statutes explicitly require a score of 70 or below on a standardized IQ test to establish intellectual disability: Kentucky, Maryland, New Mexico, Nebraska, North Carolina, South Dakota, Tennessee, and Washington.[58] These states' definitions of mental retardation have become incredibly important since 2002, when the Court first decided that it violates the Eighth Amendment to execute the intellectually disabled but left for the states to decide how to determine whether a capital defendant suffers from a disability.

II. *ATKINS V. VIRGINIA* AND ITS IMPACT ON STATE DEATH PENALTY STATUTES

A. Atkins v. Virginia*: Executing the Intellectually Disabled Is "Cruel and Unusual"*

Daryl Atkins was arrested and later convicted of abduction, armed robbery, and capital murder for his involvement in the death of Eric Nesbitt on August 16, 1996.[59] Atkins committed this crime alongside William Jones, who testified against Atkins at his trial.[60] In exchange for his testimony, the prosecution allowed Jones to plead to first-degree murder, taking the death penalty off the table.[61] Jones's testimony during the guilt phase of Atkins's trial mirrored

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[54] ARIZ. REV. STAT. ANN. § 13-3982 (2016).

[55] *Id.*

[56] *Id.*; *State Statutes Prohibiting the Death Penalty for People with Mental Retardation*, *supra* note 52.

[57] ARK. CODE ANN. § 5-4-618(a)(2) (2015).

[58] KY. REV. STAT. ANN. § 532.130 (West 2016); MD. CODE ANN. CRIM. LAW § 412 (West 1987 & Supp. 1988) (repealed 2002); NEB. REV. STAT. § 28-105.01 (2015) (amended 2002); N.C. GEN. STAT. § 15A-2005 (2015); S.D. CODIFIED LAWS § 23A-27A-26.2 (2016); TENN. CODE ANN. § 39-13-203 (2016); WASH. REV. CODE ANN. § 10.95.030 (West 2015).

[59] Atkins v. Virginia, 536 U.S. 304, 307 (2002).

[60] *Id.*

[61] *Id.* at 307 & n.1.

Atkins's own testimony, except that each testified that the other held and shot the gun used to kill Eric Nesbitt.[62] Jones's testimony was clearer and more credible than Atkins's, particularly because Atkins's testimony substantially contradicted an earlier statement he made to the police upon his arrest.[63] Jones did not make any statements to the police after he was arrested.[64] The jury apparently credited Jones's testimony and found Atkins guilty.[65]

At the penalty phase of the trial, the defense called a forensic psychologist, Dr. Evan Nelson, who evaluated Atkins and determined that Atkins was "mildly mentally retarded."[66] Dr. Nelson conducted a full examination of Atkins, including an IQ test on which Atkins scored a 59.[67] During his testimony, Dr. Nelson asserted that in his professional opinion, Atkins's score on the IQ test could not be an "invalid test score" because testimony from those who knew Atkins throughout his life and his school records demonstrated that Atkins's "limited intellect had been a consistent feature throughout his life."[68] In this first sentencing, the jury was given a misleading verdict form, which resulted in the Virginia Supreme Court ordering a second sentencing proceeding, at which a jury again sentenced Atkins to death.[69] At this second proceeding, Dr. Stanton Samenow (on behalf of the state) testified that in his professional opinion, Atkins was actually of "average intelligence, at least" and attributed his poor performance in school to the fact that Atkins likely didn't pay attention and "did not want to do what he was required to do."[70]

In upholding Atkins's sentence, the Virginia Supreme Court relied heavily on the Supreme Court's decision in *Penry v. Lynaugh*, in which the Court upheld the constitutionality of the execution of the intellectually disabled.[71] Penry was sentenced to death for raping and murdering a young woman in Livingston, Texas, while he was out on parole for another rape charge.[72] Dr. Jerome Brown, a clinical psychologist, examined Penry before trial and found him to be suffering from

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[62] *Id.* at 307.
[63] *Id.* at 307 & n.2.
[64] *Id.*
[65] *Id.* at 307.
[66] *Id.* at 308.
[67] *Id.* at 309.
[68] *Id.* at 308-09 & nn.4-5.
[69] *Id.* at 309.
[70] *Id.* at 309-10 & n.6.
[71] Penry v. Lynaugh, 492 U.S. 302, 340 (1989).
[72] *Id.* at 307.

"mild to moderate retardation" with an IQ score of 54.[73] Penry appealed his sentence and argued that sentencing him to death despite his intellectual disability constituted cruel and unusual punishment under the Eighth Amendment.[74] The Court determined that there was not sufficient evidence to show a national trend towards eliminating the practice of executing the intellectually disabled, a metric often used by the Court in determining whether a punishment is cruel and unusual.[75] While the Court considered evidence from the American Association on Mental Retardation[76] in support of Penry's argument that people with intellectual disabilities lack the requisite culpability to warrant a capital sentence, the Court did not find the argument persuasive enough to justify excluding all those with intellectual disabilities from capital punishment.[77]

The Court in *Atkins* noted that societal standards and perceptions about executing the intellectually disabled had changed greatly since the *Penry* decision.[78] Shortly before the Court's decision in *Penry*, a case in Georgia involving an individual suffering from intellectual disability had garnered a great deal of national attention.[79] In 1986, Jerome Bowden was sentenced and scheduled for execution for crimes committed in Georgia, despite being diagnosed at the age of 14 with an intellectual disability.[80] The Georgia Board of Parole granted a stay of Bowden's sentence in response to protests across the state.[81] Despite a report from a psychologist appointed by the Parole Board indicating that Bowden's IQ score was 65, the Board concluded that Bowden had the requisite culpability and lifted the stay on his execution, and he was executed the following day.[82] Just two years later, the Georgia legislature passed a statute prohibiting the execution of the intellectually disabled.[83]

In evaluating whether there had been a change in societal standards of decency regarding the execution of the

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[73] *Id.* at 307-08.

[74] *Id.* at 312.

[75] *Id.* at 334.

[76] The American Association on Mental Retardation has since changed its name to the American Association of Intellectual and Developmental Disabilities (AAID). *See* AM. ASS'N OF INTELLECTUAL & DEVELOPMENTAL DISABILITIES, https://aaidd.org/ [http://perma.cc/4886-QDC8] (last visited May 20, 2016).

[77] *Penry*, 492 U.S. at 336-38.

[78] Atkins v. Virginia, 536 U.S. 304, 314-15 (2002).

[79] *Id.* at 313-14; Bowden v. Zant, 260 S.E.2d 465 (Ga. 1979).

[80] *Atkins*, 536 U.S. at 313 n.8.

[81] *Id.*

[82] *Id.*

[83] GA. CODE ANN. § 17-7-131 (1988).

intellectually disabled since the *Penry* decision, the Court focused not only on the number of states that had instituted bans on the execution of the intellectually disabled, but also on the importance of the underlying meaning behind the adoption of such statutes.[84] Indeed, the Court specifically noted that

> [g]iven the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.[85]

The Court went on to note that when state legislatures passed these statutes, they did so by overwhelming majorities.[86] And even in the few states that had not taken an explicit stance against the execution of the intellectually disabled, the practice of executing intellectually disabled offenders was extremely rare.[87]

The true problem, according to the Court, and the problem that continues to plague states today, is determining which offenders are in fact suffering from intellectual disabilities.[88] In *Atkins*, one of the major debates (beyond the constitutionality of executing the intellectually disabled generally) was whether or not Atkins himself was intellectually disabled.[89] The Court acknowledged that Virginia's concerns had merit, stating 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."[90] The Court observed that a clinical diagnosis of intellectual disability "require[s] not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18."[91] Despite its explicit concern about how to determine which offenders are indeed intellectually disabled and its acknowledgement that there is a growing national trend away from executing such defendants, the Court simply left "to the

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[84] *Atkins*, 536 U.S. at 315-16.
[85] *Id.*
[86] *Id.* at 316.
[87] *Id.*
[88] *Id.* at 317.
[89] *Id.*
[90] *Id.*
[91] *Id.* at 318.

State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."[92]

While the dissenters in *Atkins* focused primarily on what was, in their opinion, the majority attempting to "fabricate [a] 'national consensus'"[93] against the execution of the intellectually disabled, they also took issue with the majority purportedly excusing those who suffer from only "mild" intellectual disability from the death penalty.[94] Justice Scalia articulated this issue with the majority's holding by going to great lengths in his dissent to describe the characteristics of an "idiot" (what Justice Scalia identified as the commonplace term for someone suffering from severe or profound intellectual disability) in 1791, a status that at the time constituted exemption from capital punishment.[95] Indeed, Justice Scalia's underlying concern was not with granting immunity to those who are "severely" intellectually disabled, but in allowing for those who are merely "mildly" intellectually disabled to be exempted from the death penalty absent a national consensus calling for such an exemption.[96] This concern demonstrates why an evaluative system that is underinclusive—not exempting individuals suffering from more minor levels of intellectual disability from the death penalty—does not, according to Justice Scalia, raise constitutional concerns. Defendants who are severely intellectually disabled will likely score well below any maximum IQ score cutoffs instituted by states. It is those defendants who have only minor intellectual disabilities whose protection is compromised in such systems, but it is those very defendants who Justice Scalia took issue with exempting in his dissent in *Atkins*.

Almost as an afterthought, the dissenters also expressed concern that the symptoms of intellectual disability "can readily be feigned."[97] Justice Scalia mentioned that the risk of capital defendants "faking it" to achieve an exemption is not present in the mentally ill because at least there the defendant "risks commitment to a mental institution until he can be cured (and then tried and executed)."[98] Justice Scalia argued that the defendant who feigns intellectual disability risks

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[92] *Id.* at 317 (alteration in original) (quoting Ford v. Wainwright, 477 U.S. 399, 405, 416-17 (1986)).

[93] *Id.* at 347 (Scalia, J., dissenting).

[94] *Id.* at 340.

[95] *Id.*

[96] *Id.* at 340-41.

[97] *Id.* at 353.

[98] *Id.*

nothing at all.[99] Because a defendant who asserts a defense based on another mental illness, such as schizophrenia, will be institutionalized until he is deemed competent to stand trial, any potential benefit from faking a mental illness is outweighed by the consequence of institutionalization. Unlike the mentally ill, the intellectually disabled do not risk any such similar consequence, as intellectually disabled defendants receive the benefit of exemption from execution without any other associated consequences. As such, Justice Scalia's concern was that this could incentivize capital defendants who are not truly intellectually disabled from faking symptoms in the hope of being exempted from execution.

Though these concerns have some legitimacy on their face, the institution of a countrywide evaluation scheme for capital defendants claiming to suffer from intellectual disability could readily resolve these issues. While a defendant could potentially "fake" the symptoms of intellectual disability during a one-time evaluation (or perhaps even intentionally perform poorly on an IQ examination), it is nearly impossible for a defendant to fake historical documentation such as school records or interviews with teachers. Justice Scalia's concerns are valid in an evaluation regime that focuses solely on the results of IQ testing—particularly regimes that focus on the results of one test and ignore other previous testing results. But a more thorough and holistic evaluation procedure would certainly ease these concerns and ensure both that those who are not intellectually disabled do not derive an unjust "benefit" and also that those who do suffer from intellectual disability are not wrongly executed. As discussed below, however, states have still failed to adopt such a holistic review process.

B. The Impact of Atkins *and Changes to State Death Penalty Statutes*

In the wake of *Atkins*, states were left with the prospect of reformulating their death penalty statutes to comply with the Supreme Court's ruling but were given little guidance by the Court on how to do so. While the states successfully adapted their statutes to include a method for evaluating a capital defendant's potential intellectual disability, inherent in doing so was the risk that some defendants suffering from intellectual disability might still be executed.

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[99] *Id.*

One example of this risk manifested in the case of Marvin Lee Wilson. Wilson was sentenced to death after being found guilty of murdering a police informant in Texas in the early 1990s.[100] Wilson remained on death row after the Court's 2002 decision in *Atkins*, and he petitioned the Texas courts to reverse his death sentence because of his intellectual disability.[101] In the wake of the Court's decision in *Atkins*, Texas created a standard by which to evaluate capital defendants who claimed to suffer from intellectual disability and thus that they were exempt from the death penalty under *Atkins*.[102]

While many states took into account the clinical and scientific approaches recommended by professional organizations such as the AAIDD and the APA, Texas based its evaluative factors on a literary character—specifically, Lennie from John Steinbeck's *Of Mice and Men*.[103] These factors, known as the "*Briseño* factors" (named for the Texas court case in which they were developed), focus on social skills and do not take into account clinical evaluative techniques.[104] The factors specifically focus on "whether the defendant can formulate and carry out plans, display leadership, effectively lie or hide facts to protect the person's self-interest, and respond appropriately and coherently."[105]

In the case of Marvin Lee Wilson, the Texas court noted that because Wilson was married, had a child, and lied to the police to protect himself, he was not intellectually disabled under the *Briseño* factors and therefore was not immune from the death penalty.[106] Texas found Wilson not intellectually disabled despite Wilson's regular IQ scores of 61, testimony from family and friends that his behavior was consistent with intellectual disability, and a diagnosis of intellectual disability by a neuropsychologist during Wilson's appeal.[107] In this evaluation, the neuropsychologist found Wilson unable to dress himself in matching socks or button his shirt.[108] The Texas

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[100] *See supra* notes 3-8 and accompanying text.

[101] *Id.*

[102] Andrew Cohen, Of Mice and Men*: The Execution of Marvin Wilson*, THE ATLANTIC (Aug. 8, 2012), http://www.theatlantic.com/national/archive/2012/08/of-mice-and-men-the-execution-of-marvin-wilson/260713/ [http://perma.cc/AB7L-84MJ]; *Ex parte* Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004).

[103] Ed Pilkington, *Texas Set to Execute Death Row Inmate Diagnosed as 'Mentally Retarded,'* THEGUARDIAN (Aug. 5, 2012, 10:43 EDT), http://www.theguardian.com/world/2012/aug/05/texas-death-row-mentally-retarded [http://perma.cc/E7RU-H6FL].

[104] *US/Texas: Halt Execution of Man with Intellectual Disabilities*, HUM. RTS. WATCH (Aug. 7, 2012), http://www.hrw.org/news/2012/08/07/ustexas-halt-execution-man-intellectual-disabilities [http://perma.cc/3JEF-MG6G].

[105] *Id.*

[106] *Id.*

[107] *Id.*; Pilkington, *supra* note 103.

[108] Pilkington, *supra* note 103.

Supreme Court upheld Wilson's sentence, and the U.S. Supreme Court declined to grant certiorari.[109] Wilson was executed on August 7, 2012.[110]

The *Briseño* factors have been criticized throughout the country. The AAIDD stated that the factors "are based on false stereotypes . . . that effectively exclude all but the most severely incapacitated."[111] Numerous news articles covering Wilson's appeal questioned the legitimacy of using factors based on a literary character when a person's life hung in the balance.[112] John Steinbeck's son, Thomas Steinbeck, spoke with disbelief upon learning that his father's work was being used in such a way.[113] Mr. Steinbeck publicly stated, "I had no idea that the great state of Texas would use a fictional character that my father created to make a point about human loyalty and dedication . . . as a benchmark to identify whether defendants with intellectual disability should live or die."[114] Partially in response to the backlash surrounding the *Briseño* factors in the wake of Wilson's execution, in 2013, Texas State Senator Rodney Ellis proposed Senate Bill 750, which established new factors (based on the definition of intellectual disability from the AAIDD) to evaluate a capital defendant for intellectual disability.[115] This new standard would also require an IQ score of 75 or below to exempt a capital defendant from execution.[116] As of mid-2016, the Texas legislature is still considering the bill.[117]

Since *Atkins*, other states have taken a more scientific approach to defining intellectual disability, employing both IQ testing and other evaluative measures. Kentucky defines intellectual disability as "significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period."[118] The Kentucky statute defines "[s]ignificantly subaverage

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[109] *Texas Executes Marvin Wilson*, *supra* note 3; Wilson v. Thaler, 133 S. Ct. 81 (2012) (mem.).

[110] *Id.*

[111] Pilkington, *supra* note 103 (quoting AAIDD amicus brief in a different case).

[112] *See, e.g.*, *id.*; Rudolf, *supra* note 6; *Texas Executes Marvin Wilson*, *supra* note 3.

[113] Rudolf, *supra* note 6.

[114] *Id.* (alteration in original).

[115] Brandi Grissom, *Bill Would Limit Execution of Intellectually Disabled*, TEXAS TRIBUNE (Mar. 6, 2013), http://www.texastribune.org/2013/03/06/bill-would-limit-execution-intellectually-disabled/ [http://perma.cc/8Q8E-SDVU]; *83(R) Bill Stages for SB 750*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/history.aspx?LegSess=83R&Bill=SB750 [http://perma.cc/WA7B-UYWW] (last visited June 21, 2016); S.B. 750, 83rd Leg., Reg. Sess. (Tex. 2013).

[116] Grissom, *supra* note 115.

[117] *83(R) Bill Stages for SB 750*, *supra* note 115.

[118] KY. REV. STAT. ANN. § 532.130(2) (West 2016).

general intellectual function[]" as an IQ score "of seventy (70) or below."[119] Tennessee uses IQ scores, but only in conjunction with deficits in adaptive behavior that manifested before the age of 18.[120] Arkansas does not employ a strict IQ score cutoff, but instead provides that a score of 65 or lower on an IQ test is a "rebuttable presumption of mental retardation."[121] Washington's statute defines intellectual disability as "[s]ignificantly subaverage general intellectual functioning . . . existing concurrently with deficits in adaptive behavior" where "both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period."[122] Washington's definition of intellectual disability could be interpreted to require either a specific IQ score before evaluating a defendant's adaptive behavior or that the score be used in conjunction with consideration of the adaptive deficits. It is not entirely clear from a plain reading of Washington's statute whether an IQ score is a hurdle there as it is in other states.

Given these varying standards for defining intellectual disability, there is the potential for wildly inconsistent determinations of mental ability in capital cases. In *Hall v. Florida*, the Supreme Court had an opportunity to adopt a uniform standard that would guide states in determining what constituted an intellectual disability for death penalty purposes. Unfortunately, the Court's decision still leaves this area of the law in disarray. The next part analyzes *Hall* in detail.

III. *HALL V. FLORIDA*—AN OPPORTUNITY FOR UNIFORMITY IN EVALUATIONS, WASTED

A. Procedural History

The State of Florida sentenced Freddie Lee Hall to death for his role in the kidnapping, beating, rape, and murder of Karol Hurst and the murder of Lonnie Coburn, a sheriff's deputy.[123] When Hall was first sentenced, the Supreme Court had not yet made its decision in *Atkins* categorically excluding the intellectually disabled from execution.[124] Additionally, at the time of Hall's first sentencing, Florida did not take intellectual disability into account at all during sentencing

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[119] *Id.*
[120] TENN. CODE ANN. § 39-13-203 (2016).
[121] ARK. CODE ANN. § 5-4-618 (2015).
[122] WASH. REV. CODE § 10.95.030 (2015).
[123] Hall v. Florida, 134 S. Ct. 1986, 1990 (2014).
[124] *Id.*; Atkins v. Virginia, 536 U.S. 304, 314-15 (2002).

proceedings—not even as a mitigating factor.[125] But by the time of Hall's second sentencing, he was allowed to present evidence regarding his disability because Florida began considering intellectual disability as a mitigating factor per the Court's decision in *Hitchcock*.[126] During this second sentencing, Hall presented extensive evidence regarding his intellectual disability—which included school records, notes from former teachers who identified him as "[m]entally retarded," and testimony from his lawyer from a prior criminal trial who noted that Hall functioned "at best comparable to [his] 4-year-old daughter."[127] Hall also presented evidence from medical clinicians who stated that he was "significantly retarded" in their medical opinion.[128] Hall's siblings testified that their mother was not sympathetic to Hall's developmental struggles and regularly beat Hall for being "slow" or making simple mistakes.[129]

Despite this wide sampling of evidence, the jury sentenced Hall to death.[130] Though acknowledging that there was "substantial evidence in the record" to support the finding that "Freddie Lee Hall has been mentally retarded his entire life," the sentencing court felt that the medical professionals who testified on Hall's behalf may have exaggerated, as their testimony could not comport with the evidence that Hall had formulated a plan to steal a car, rob a convenience store, and murder two people.[131] The sentencing court went even further, stating that even if the medical professionals' testimony was entirely accurate, the presence of intellectual disability "cannot be used to justify, excuse or extenuate the moral culpability of the defendant in this cause."[132] The Florida Supreme Court upheld Hall's sentence, stating, "Hall's argument that his mental retardation provided a pretense of moral or legal justification had no merit."[133]

After the Supreme Court's decision in *Atkins* categorically excluded those suffering from intellectual disability from execution, Hall filed a motion claiming that his intellectual disability, according to *Atkins*, prevented him from being

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[125] *Hall*, 134 S. Ct. 1986.

[126] *Id.* at 1990-91 (citing Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987) (discussing the import of allowing juries at capital sentencing to consider all mitigating factors, such as testimonial evidence about a tumultuous upbringing, and not only those articulated in the state death penalty statute)); *see supra* notes 48-51 and accompanying text.

[127] *Hall*, 134 S. Ct. at 1990-91.

[128] *Id.* at 1991.

[129] *Id.*

[130] *Id.*

[131] *Id.* (quoting App. at 46).

[132] *Id.* (quoting App. at 56).

[133] *Id.* (quoting Hall v. Florida, 614 So.2d 473, 478 (Fla. 1993)).

executed.[134] During a court-ordered hearing to evaluate Hall's intellectual ability, Hall presented evidence of his disability, including his IQ scores.[135] While Hall had a myriad of IQ testing over the years with scores ranging between 60 and 80, the trial court excluded Hall's scores below 70 for evidentiary reasons.[136] As Florida's statute required an IQ score below 70 as a threshold qualification to be evaluated for intellectual disability, Hall was prevented from presenting any other evidence about his intellectual disability, and Hall's appeal was rejected.[137]

B. Majority Opinion

In granting certiorari, the Court considered not whether a person who is intellectually disabled could be executed (as those suffering from intellectual disability were already categorically excluded from execution in *Atkins*), but whether Florida's statute sufficiently identified those suffering from intellectual disability to appropriately exclude them from execution.[138] The Court noted again the reasons why those suffering from intellectual disabilities are categorically excluded from the death penalty: because "[n]o legitimate penological purpose is served by executing" those suffering from intellectual disability, and because those suffering from intellectual disability "face a 'special risk of wrongful execution.'"[139] The Court picked up where it left off in *Atkins*, determining whether or not state efforts in defining intellectual disability as required by *Atkins* had been successful.[140]

The Court looked to medical experts' work to determine what might constitute an appropriate definition of intellectual disability.[141] The Court returned to the general definition of intellectual disability that it relied on in *Atkins*: "significantly subaverage intellectual functions, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and the onset of these deficits during the

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[134] *Id.* at 1991-92.

[135] *Id.* at 1992.

[136] *Id.* The trial court did not admit a report completed by Dr. Mosman, the psychiatrist whose testing of Hall resulted in a score of 60, because Dr. Mosman was deceased at the time of trial and therefore could not testify to corroborate his report, which the court found lacked important details about how the score was obtained. Hall v. State, 109 So.3d 704, 707, 710 (Fla. 2012).

[137] *Hall*, 134 S. Ct. 1986.

[138] *Id.* at 1993.

[139] *Id.* at 1992-93.

[140] *Id.* at 1993 (citing Atkins v. Virginia, 536 U.S. 304 (2002)).

[141] *Id.*

developmental period."[142] On its face, the Florida statute appeared to be in line with these factors—using IQ testing as one factor to evaluate a defendant's potential intellectual disability without precluding other evidence.[143] The statute as interpreted by the Florida Supreme Court, however, prevented courts from taking into account other evidence that demonstrated potential intellectual disability.[144] Even more concerning, the Florida courts did not take into account an IQ test's standard error of measurement (SEM), which describes the reliability of the test.[145] In failing to account for the SEM, the Florida courts were risking reliance on scores that could be an inaccurate representation of a defendant's true level of intellectual functioning.[146]

The SEM supports the concept that intellectual functioning cannot be limited to a single numerical score.[147] When an individual takes an IQ test and receives a score, that individual's intellectual functioning is actually understood to exist within the range of scores around the numerical score they receive.[148] Put simply, if an individual scores a 70 on an IQ test, the "actual" score on the test is the range of scores from 65 to 75.[149] For an individual who scores a 70 on any one IQ test, the risk that a person who indeed has intellectual functioning below the score of 70 (as the "actual" range of scores falls both below and above 70) would be categorically prevented from presenting further evidence of disability is deeply concerning. Refusal to consider the SEM of IQ scores creates an unacceptable risk that those who do suffer from intellectual functioning will be executed.[150] Indeed, in *Atkins*, none of the state statutes the Court considered had a bright-line IQ score cutoff without also factoring in the SEM of the scores.[151] This risk does not even take into account other potential factors that influence IQ testing scores, including flaws in the actual test and administration errors.[152]

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[142] *Id.* at 1994 (citing *Atkins*, 536 U.S. at 308).

[143] *Id.*

[144] *Id.*

[145] *Id.* at 1994-95.

[146] *Id.* at 1995.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] Transcript of Oral Argument at 9, 25, Hall v. Florida, 134 S. Ct. 1986 (2014) (No. 12-10882).

[151] *Id.* at 6, 9, 25; s*ee generally* Atkins v. Virginia, 536 U.S. 304, 314 (2002) (discussing the number of states that passed legislation exempting the intellectually disabled from execution in the years since the Court declined to create such a categorical exclusion in *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

[152] *Hall*, 134 S. Ct. at 1995.

This exclusive reliance on a bright-line IQ score cutoff without consideration of the score's SEM is exactly what was happening in Florida, and indeed it is exactly what happened in the case of Freddie Lee Hall. Despite research and information from the psychological community that stated that evaluating a person's intellectual disability requires examining a number of factors, the Florida Supreme Court used the test as a fixed score, creating an unnecessary risk that individuals suffering from intellectual disability (including Hall) would be executed.[153]

While the Court in *Hall* spent a significant portion of its analysis evaluating the scientific concerns regarding the use of a bright-line score requirement, it later turned to a lengthier analysis of whether there was a consensus among the states that using a strict IQ test score cutoff is not compatible with evolving American societal standards of decency.[154] The Court noted that only Kentucky and Virginia had adopted a bright-line IQ score cutoff akin to Florida's.[155] Additionally, the statutes in Arizona, Delaware, Kansas, North Carolina, and Washington could be interpreted to impose a strict IQ score cutoff, but each had some safeguards that seemed to prevent the risks associated with such cutoffs.[156] For example, Arizona had taken the margin of error of the test administered into account and required a hearing for any defendant who scored a 70 or below on any one IQ test.[157] Arizona also recommended the use of scores from multiple tests as another method to avoid the risks associated with ignoring the margin of error implicit in IQ testing.[158] Kansas, Delaware, and Washington had executed a collective total of four individuals in the decade prior to *Hall*, and the Court found these cases unpersuasive because none of the defendants raised intellectual disability as a defense or mitigating factor.[159]

The Court observed that in addition to only nine states employing a strict IQ score cutoff, another factor that it needed to consider was the "[c]onsistency of the direction of change" in the other states.[160] Following *Atkins*, Connecticut, Illinois, Maryland, New Jersey, and New Mexico all abolished the death penalty, and New York's statute was invalidated by its Court of

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153 *Id.*

154 *Id.* at 1996-98.

155 *Id.* at 1996.

156 *Id.*

157 *Id.*; ARIZ. REV. STAT. ANN. § 13-753(K)(3), (5) (2011).

158 *Hall*, 134 S. Ct. at 1996; State v. Roque, 141 P.3d 368, 403 (Ariz. 2006); ARIZ. REV. STAT. ANN. § 13-753(F) (2016).

159 *Hall*, 134 S. Ct. at 1997.

160 *Id.*

Appeals.[161] And the vast majority of states that still employ the death penalty allow defendants to present additional evidence of intellectual disability, regardless of their IQ score.[162] The Court concluded that examining this state-to-state evidence and the professional information regarding the accuracy of IQ testing supported the finding that there is a societal consensus against bright-line IQ score cutoffs in evaluating intellectual disability.[163]

The Court acknowledged that it did not give states a procedure for evaluating whether the Eighth Amendment, as interpreted in *Atkins*, protects a person's specific level of intellectual disability.[164] The Court found that despite allowing states to create individual metrics by which to evaluate intellectual disability, this "did not give the States unfettered discretion to define the full scope of the constitutional protection."[165] Indeed, the Court made it seem as though it should have been practically obvious to states that the use of a strict IQ score cutoff would be unacceptable under *Atkins*. The Court specifically stated, "*Atkins* itself not only cited clinical definitions for intellectual disability but also noted that the States' standards, on which the Court based its own conclusion, conformed to those definitions."[166] The Court went even further and stated that the clinical definitions of intellectual disability (which state that IQ scores represent a range of scores and should not be employed as a fixed number) were a "fundamental premise" of the *Atkins* decision.[167] Despite seemingly giving the states full purview to establish a standard by which to evaluate intellectual ability in *Atkins*, the Court clarified that this deference was in fact limited. Specifically, "[i]f the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality."[168] Because the Florida statute's strict cutoff

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[161] *Id.*; State v. Santiago, 122 A.3d 1 (Conn. 2015); Joe Sutton, *Maryland Governor Signs Death Penalty Repeal*, CNN (May 2, 2013, 2:53 PM), http://www.cnn.com/2013/05/02/us/maryland-death-penalty/ [http://perma.cc/5FTC-NHKB]; Jeremy W. Peters, *Death Penalty Repealed in New Jersey*, N.Y. TIMES (Dec. 17, 2007), http://www.nytimes.com/2007/12/17/nyregion/17cnd-jersey.html?_r=0 [http://perma.cc/Q6SK-MDE6]; Associated Press, *Death Penalty Is Repealed in New Mexico*, N.Y. TIMES (Mar. 18, 2009), http://www.nytimes.com/2009/03/19/us/19execute.html [http://perma.cc/8UPY-5XPN]; People v. LaValle, 3 N.Y.3d 88, 129-31 (N.Y. 2004).

[162] *Hall*, 134 S. Ct. at 1997-98.

[163] *Id.* at 1998.

[164] *Id.*

[165] *Id.*

[166] *Id.* at 1999.

[167] *Id.*

[168] *Id.*

score went against the principles of *Atkins*, the Court held that it was unconstitutional.[169]

The Court in *Hall* also granted a great deal of deference to the conclusions of medical professionals and the greater medical community. In particular, the Court gave significant credit to the amicus brief submitted on Hall's behalf by the American Psychiatric Association.[170] The APA stated that Florida's strict IQ cutoff of 70 contradicted professional consensus about how to properly diagnose intellectual disability.[171] In fact, the Court specifically noted that neither Florida nor its amici had cited a single medical professional who found a strict IQ score cutoff to be an acceptable method of evaluating intellectual disability in his or her professional opinion.[172] Indeed, the Court stated that "[i]ntellectual disability is a condition, not a number."[173] The Court closed with the reflection that while the "[s]tates are laboratories for experimentation, . . . those experiments may not deny the basic dignity the Constitution protects."[174] Despite this concern, the Court again failed to offer a method for evaluating capital defendants for intellectual disability that would protect these most basic constitutional dignities, instead offering only advice on what not to do.

C. Dissent

In his dissent, Justice Alito expressed particular concern that the majority had created a framework that was "both conceptually unsound and likely to result in confusion."[175] Deeply entwined throughout Justice Alito's dissent is a concern that the majority stepped away from evolving standards of societal decency.[176] Justice Alito noted that one of the primary reasons that the Court in *Atkins* refrained from instituting a procedure for states to follow in determining if a defendant is "sufficiently" intellectually disabled to be exempt from capital punishment is because there was no consensus among the states as to what procedure to follow.[177] *Atkins*, according to

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169 *Id.* at 2000.
170 *Id.* at 2000-01.
171 *Id.* at 2001.
172 *Id.* at 2000.
173 *Id.* at 2001 (citing *DSM-5*, *supra* note 22, at 37).
174 *Id.* at 2001.
175 *Id.* at 2002 (Alito, J., dissenting).
176 *Id.*
177 *Id.* at 2003.

Justice Alito, does not bar a bright-line score cutoff.[178] Indeed, he observed that in writing the *Atkins* decision, the Court specifically stated that the professional consensus of what methods to use in evaluating capital defendants were "by no means dispositive."[179] Justice Alito contended that still no consensus exists, and he noted specifically that even Hall in his petition to the Court acknowledged that there is no uniformity among the states. Rather, Hall argued, "the precise number of States that share Florida's approach is immaterial."[180]

Justice Alito went on to conclude that the majority's analysis of current state statutes was both "aggressive" and "deeply flawed."[181] The majority recognized that many states do require consideration of the SEM, but Justice Alito argued that not only is there disagreement among the states about whether the SEM should be considered, but even among the states that do consider the SEM, there is no consensus on how exactly to evaluate the measurement.[182] According to Justice Alito, the majority attempted to make up for its inability to find state consensus by relying on the opinions of professional organizations that have no place in examining how or if societal standards of decency have evolved.[183] Professional organizations often change their opinions and retract earlier opinions in light of new research.[184] In relying on such opinions, Justice Alito accused the majority of opening the floodgates to further litigation and creating great uncertainty for the states.[185]

Justice Alito also did not entirely disagree with the majority's belief that Florida should have allowed Hall to introduce evidence of his diminished intellectual abilities beyond his score on standardized IQ testing. Instead, the Court required that a capital defendant, if scoring any lower than a 75 on any IQ test, must be permitted to submit evidence about his or her diminished adaptive abilities.[186] The dissent found that there must be a distinction between determining what a defendant's adaptive abilities are and what his intellectual functioning is, and that determining what adaptive functioning deficiencies a defendant has does not impact whether or not he should be

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[178] *See id.* at 2005.

[179] *Id.* (quoting Atkins v. Virginia 536 U.S. 304, 317 n.21 (2002)).

[180] *Id.* at 2003 (quoting Reply Brief for Petitioner at 2, Hall v. Florida, 134 S. Ct. 1986 (2014) (No. 12-10882)).

[181] *Id.* at 2003-04.

[182] *Id.* at 2004.

[183] *Id.* at 2005.

[184] *Id.* at 2006.

[185] *Id.*

[186] *Id.* at 2008.

exempted from death.[187] It is intellectual functioning, not adaptive abilities, that affects an individual's capacity to be culpable for his actions, and therefore only those defendants whose intellectual functioning is deficient should be exempted from execution, according to Justice Alito.[188]

The dissent was also concerned that the Court, and in turn, the states, had oversimplified the concept of taking SEM into account in considering IQ scores.[189] Justice Alito expressed great trepidation that the majority's oversimplification would not only confuse states, but would also overcomplicate the process of evaluating intelligence—as it appears that defendants would now need to introduce evidence regarding the accuracy of each and every test they have taken throughout their lives.[190] As a result of these concerns, the dissent would have both upheld Hall's sentence and the Florida statute without examining additional evidence supporting Hall's intellectual disability.[191] The dissent's concerns could have been remedied had the majority suggested a methodology for all states to follow in evaluating capital defendants.

IV. PROPOSED STANDARDIZED SCHEME FOR EVALUATING CAPITAL DEFENDANTS' COGNITIVE ABILITIES

To ensure that those capital defendants who truly suffer from intellectual disability are exempted from the death penalty, there must be a uniform method of evaluation. By allowing states to create varying methods of evaluation, the Supreme Court has fostered an environment in which capital defendants who should be categorically exempted from execution are precluded from presenting evidence to support the same categorical exemption. While realistic federalism concerns might find a countrywide evaluation scheme to be federal government overreach, the period between the Court's decisions in *Atkins* and *Hall* demonstrates that allowing states to create individualized evaluation schemes results in unequal exemption for capital defendants who are similarly intellectually disabled.[192] Ensuring that intellectually disabled defendants have

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[187] *Id.*

[188] *Id.* at 2009.

[189] *Id.* at 2011-12.

[190] *Id.* at 2010-11.

[191] *Id.* at 2012.

[192] *See, e.g.*, *Inmate Removed from Death Row*, ABC11 (Feb. 2, 2012, 8:41 AM), http://abc11.com/archive/8528653 [http://perma.cc/3X76-AD86] (showing a recent application of *Atkins* to remove an inmate from death row); Head v. Hill, 587 S.E.2d

the opportunity to present the entire spectrum of evidence regarding their intellectual disability will protect defendants from enduring punishment that is not only cruel and unusual under the Eighth Amendment, but also irreversible.

This is not to say that states should be barred from considering the results of IQ testing entirely in evaluating a defendant's intellectual disability. The usefulness of IQ testing is not to be discounted. To accurately and effectively employ the results of IQ testing, however, states must take into account the SEM.[193] Further, a state cannot rely on IQ testing results alone. Instead, a holistic evaluation, which includes allowing a capital defendant to present other information regarding his or her intellectual disability, even if that defendant's IQ testing puts them outside what is considered to be the range of IQ scores that constitute intellectual disability, will ensure that all capital defendants' intellectual abilities are properly evaluated.

These additional evaluative components are especially important in diagnosing intellectual disability, as IQ tests cannot gauge all components of a person's intelligence. In particular, IQ testing does not evaluate a person's practical intelligence—things like a person self-identifying as an audial learner and as a result asking more questions in a classroom setting to foster the personal learning experience.[194] Such practical intelligence considerations are especially important factors when evaluating whether an individual is potentially intellectually disabled, because the *DSM-5* defines intellectual disability as characterized by significant limitations in both intellectual functioning and adaptive behaviors (such as these "practical intelligence" considerations).[195]

In evaluating whether a defendant is intellectually disabled—meaning that a defendant has significant limitations both in intellectual functioning and adaptive behaviors that manifested before age 18—states need to consider factors that fall

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613, 620-21 (Ga. 2003) (requiring defendants to prove intellectual disability "beyond a reasonable doubt").

193 Ollie J. Seay, *Evaluating Mental Retardation for Forensic Purposes*, 2 APPLIED PSYCHOL. CRIM. JUST. 52, 54-55 (2006).

194 Jacque Wilson, *What Your IQ Score Doesn't Tell You*, CNN (Feb. 19, 2014, 8:59 AM), http://www.cnn.com/2014/02/19/health/iq-score-meaning/ [http://perma.cc/79NY-XFYC]; *see Practical Thinking: Examples & Quiz*, STUDY.COM, http://study.com/academy/lesson/practical-thinking-definition-examples-quiz.html [http://perma.cc/3FBW-EY96] (last visited June 21, 2016).

195 *Definition of Intellectual Disability*, AM. ASS'N. OF INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, http://aaidd.org/intellectual-disability/definition#.VFVt1NR4qfw [http://perma.cc/VPW7-WCNM] (last visited May 20, 2016); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 31 (5th ed. 2013).

into three general categories: conceptual, social, and practical.[196] A system of assessment that looks at a defendant's abilities using this spectrum of factors will enable states to properly identify which capital defendants are indeed intellectually disabled. Evidence should not be excluded solely based on the score on a test, the purpose of which is not to determine who is and who is not intellectually disabled.[197] That is why this proposed system of evaluation does not exclude the consideration of IQ testing scores; it simply precludes using IQ scores as the sole method of intellectual evaluation. As Justice Kagan noted in oral argument for *Hall v. Florida*, "[An IQ test score] is a tool to decide whether someone is mentally retarded, and it's a tool that functions in one prong of a three prong test."[198] Such a tool is invaluable in evaluating intellectual ability, but it cannot be used in a way that stifles other crucial evaluative methods.

A. Conceptual Factors

Under the proposed evaluative scheme, a capital defendant pursuing an exemption from capital punishment based on an alleged intellectual disability must first establish that he has diminished intellectual ability within a spectrum of conceptual factors. Conceptual factors are those that more concretely anchor a defendant's intellectual abilities in hard numbers, without taking into account the specific characteristics of any one defendant. Included in this evaluative prong would be the results of any IQ testing, as well as the defendant's formal educational history and performance. Even if the evidence presented during this phase of evaluation does not support a diagnosis of intellectual disability, a defendant would still be allowed to present further evidence of (and be evaluated for performance under) the remaining two factors (i.e., social and practical).

1. IQ Tests

It is not disputed that the accepted range of IQ testing scores that constitutes below average intellectual functioning is between 70 and 75.[199] Just because a particular person scores slightly outside the 75 maximum score, however, does not mean

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[196] *Id.*

[197] Wilson, *supra* note 194.

[198] Transcript of Oral Argument at 49, Hall v. Florida, 134 S. Ct. 1986 (2014) (No. 12-10882).

[199] *See* Seay, *supra* note 193, at 71.

that he or she definitely does not suffer from diminished intellectual functioning. The mean score of Americans with average intellectual functioning on standard IQ tests falls within the range of 85-115.[200] Standard IQ tests are scored with the average score being 100 (with the highest and lowest scores being above 200 and below 60, respectively),[201] with a standard deviation of 15, maintaining scores to a normal distribution curve.[202] In evaluating IQ test scores, one also needs to take into account the standard error of measurement implicit in all IQ tests.[203] The SEM evaluates if a specific test were repeated independently a number of times, how reliably the test would measure any one person's score.[204] The creator of the test identifies the SEM of any particular test.

The need to take SEM into account is especially prevalent in the present system of evaluating a defendant's potential intellectual disability, as many states (including Florida in the case of Freddie Lee Hall) allow one score above the range of 70-75 to preclude a defendant from presenting further information about his or her potential intellectual disability.[205] Under this note's proposed holistic evaluative system, which would require courts to consider all evidence of a defendant's disability, the concern over failing to consider the SEM of a particular test in evaluating a defendant's scores is somewhat quelled. In using IQ testing as a portion of this new evaluative system, however, the SEM inherent in the test still cannot be ignored.

In addition to considering the test's SEM, the court must also evaluate all IQ scores a defendant has received. Selective score consideration is another problem present in the post-*Atkins* evaluative scheme, putting intellectually disabled capital defendants at further risk. For example, in the case of Marvin Lee Wilson, the Texas court refused to consider his multiple IQ scores of 61, which demonstrated that he fell below Texas's maximum score requirement of 70.[206] By considering both

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[200] Kendra Cherry, *What Is the Average IQ?*, ABOUT HEALTH, http://psychology.about.com/od/intelligence/f/average-iq.htm [http://perma.cc/9SB8-GM4C] (last updated June 7, 2016).

[201] *Top 12 People with the Highest IQ Scores in the World*, LISTOVATIVE, http://listovative.com/top-12-people-highest-iq-world/ [http://perma.cc/6PFN-R4R6] (last visited June 21, 2016).

[202] Cherry, *supra* note 200.

[203] Seay, *supra* note 193, at 54-55.

[204] *Id.*

[205] Hall v. Florida, 134 S. Ct. 1986, 2011-12 (2014) (Alito, J., dissenting).

[206] Pilkington, *supra* note 103; Wilson v. Quarterman, 2009 WL 900807, at *7-8 (E.D. Tex. 2009) (unpublished), *aff'd sub nom.* Wilson v. Thaler, 450 Fed. App'x. 369 (5th Cir. 2011) (unpublished); Amicus Curiae Brief of American Association on

the SEM inherent in the test itself and the entirety of the defendant's testing history, states will be able to use IQ testing as the evaluative tool it is designed to be, instead of treating it as a diagnostic tool it never was and never will be.

2. Educational History

In addition to looking at the results of IQ testing, courts must also consider a defendant's educational history. While IQ testing can demonstrate a person's internal abilities, educational history demonstrates what a particular person was actually able to achieve conceptually. In evaluating educational history, a court will consider such factors as highest level of education achieved, whether the defendant received any special classification (e.g., placement in special education classes), and the defendant's performance in that education (e.g., grades throughout primary and secondary school). Beyond looking at raw data, courts should also consider more defendant-specific factors where available. For example, evaluative reports from a defendant's former teacher could provide extensive insight into a defendant's conceptual abilities. Studies have shown that those students who frequently act out in the academic setting also frequently suffer from some sort of educational disability (e.g., dyslexia, anxiety, dysgraphia).[207] If a particular defendant, in addition to poor performance in school, has frequent disciplinary citations or poor commentary on progress reports from teachers, this could support that the defendant suffered from an undiagnosed intellectual disability.

B. Social Factors

In addition to examining conceptual factors (those factors most commonly associated by laypersons with a diagnosis of intellectual disability), a court must also evaluate certain social factors associated with the defendant. Beyond having diminished "traditional" cognitive abilities (i.e., those abilities the population at large generally associates with intelligence), people with

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Intellectual and Developmental Disabilities in Support of Petitioner at 23-24, Wilson v. Thaler, 450 Fed. App'x 369 (5th Cir. 2011).

[207] Caroline Miller, *How Anxiety Leads to Disruptive Behavior*, CHILD MIND INST., http://www.childmind.org/en/posts/articles/2013-3-26-anxiety-and-disruptive-behavior [http://perma.cc/Y7WQ-H4VD] (last visited June 21, 2016); Richard Dowson, *Dyslexia—The Least Known, Most Common Learning Disability*, ALBERTA TCHRS.' ASS'N, http://www.teachers.ab.ca/Publications/ATA%20Magazine/Volume%2084/Number%201/Articles/Pages/Dyslexia%20The%20Least%20Known%20Most%20Common%20Learning%20Disability.aspx [http://perma.cc/3ARK-7SB9] (last visited June 21, 2016).

intellectual disabilities also tend to have certain diminished social abilities.[208] No two individuals with intellectual disabilities are the same, and while one person's intellectual disability might manifest in the form of extreme conceptual deficiencies but high social functioning, another person could have closer to average conceptual functioning but extremely deficient social functioning. Social functioning is categorically defined as an individual's ability to work and interact with other individuals, most broadly understood as a person's interpersonal skills. It is this unique quality of intellectual disability that necessitates a holistic evaluative approach and demonstrates why a system rooted exclusively in IQ testing is doomed to fail.

The primary diagnostic tool available to determine whether a defendant has diminished social abilities is to conduct interviews with both the defendant and those people who knew him growing up. It is particularly important to get a full history, as one of the diagnostic requirements of intellectual disability is that its onset was before age 18.[209] There is some concern, particularly among those who have written specifically on diagnosing criminal offenders with intellectual disability, about this age-of-onset requirement. Many of those individuals currently incarcerated in the United States come from lower socioeconomic backgrounds.[210] As a result, many of these offenders are not likely to have been evaluated for the presence of intellectual disability as they grew up, making it difficult to prove that their symptoms began before the age of 18.[211] In evaluating such defendants, the courts should allow a margin of discretion.

Parents, loved ones, friends, former teachers, and others who knew the defendant can discuss the defendant's social abilities at different developmental phases. These participants in the defendant's upbringing can discuss exactly when the defendant appeared to struggle with conceptual issues—for example, that he developed the ability to read much later than his friends or siblings—and can also comment more specifically on the presence of social deficits (e.g., he struggled to make friends as

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[208] Seay, *supra* note 193, at 52-53.

[209] *Definition of Intellectual Disability*, *supra* note 16.

[210] Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 CRIME & JUST. 311, 345 (1997).

[211] *See, e.g.*, Steven J. Mulroy, *Execution by Accident: Evidentiary and Constitutional Problems with the "Childhood Onset" Requirement in* Atkins *Claims*, 37 VT. L. REV. 591, 593 (2013) (discussing capital defendant who grew up in war-torn Vietnam and as a result had no information about age of onset of intellectual disability characteristics).

a younger child or had difficulty remaining independent from the influence of strong personalities).

Another important trait that can be gleaned from these interviews is whether the defendant was easily influenced by others. In many of the cases involving intellectually disabled defendants, the defendant did not act alone—and oftentimes faced the death penalty because of testimony from an alleged accomplice incriminating the defendant as the mastermind.[212] Courts have often found that this supports the argument that the defendant is not intellectually disabled (as the defendant was able to develop and execute a crime), when in reality such facts can support a defendant's diminished social capacity to say "no" to a dominating accomplice.

In evaluating the defendant on this spectrum, it is also crucial to interview the defendant himself. A psychological professional should conduct this interview, since diagnosing intellectual disability is not always a simple task. This is especially true in the context of interviewing criminal offenders who, while traditionally depicted as closed off emotionally, tend to have extreme emotional ranges, particularly in relation to their crimes.[213] A psychological professional, in addition to being trained generally in conducting evaluative interviews, will also be able to interpret the undercurrent of a defendant's answers by drawing out evidence of a potential intellectual disability beyond just the words contained in an answer. While there is likely to be concern over such an evaluation's cost (particularly the employment of a psychological professional), the costs associated with executing a death row inmate far outweigh those associated with conducting a thorough evaluation.[214] Indeed, ensuring that capital defendants with intellectual disabilities are not improperly executed will allow the reallocation of funds to conduct proper evaluations of potentially intellectually disabled defendants.

C. Practical Factors

In addition to evaluating a defendant's conceptual and social factors, the court must finally look to evidence regarding

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[212] *See, e.g.*, Hall v. Florida, 134 S. Ct. 1986, 2000 (2014); Atkins v. Virginia, 536 U.S. 304, 307-08 (2002).

[213] C. Frazier & T. Meisenhelder, *Exploratory Notes on Criminality and Emotional Ambivalence*, 8 QUALITATIVE SOC. 266 (1995).

[214] Kelly Phillips Erb, *Considering the Death Penalty: Your Tax Dollars at Work*, FORBES (May 1, 2014, 12:12 AM), http://www.forbes.com/sites/kellyphillipserb/2014/05/01/considering-the-death-penalty-your-tax-dollars-at-work/ [http://perma.cc/F8AN-UP4U].

a defendant's abilities within the realm of certain practical factors. Practical factors can be categorically defined as those factors that influence a defendant's ability to function in day-to-day life, outside of any formal academic or intellectual performance. These factors are those most likely to be overlooked in a standard judicial evaluation and also the ones least likely to be interpreted correctly. Under the post-*Atkins* evaluative system (and a sentiment that certain Justices maintained in *Hall*), many judges have expressed that a defendant cannot truly be intellectually disabled if he was able to commit the offense for which he is charged. Just because a person was capable of performing the actions required to constitute the crime, however, does not mean that person developed an elaborate plan to commit that crime. For example, in the case of Daryl Atkins, the crime involved a spur-of-the-moment decision—Atkins and his accomplice William Jones happened upon Eric Nesbitt outside a convenience store, abducted Nesbitt, took the money from his person, and later killed him.[215]

The realm of practical skills encompasses such things as a defendant's work history, including the types of jobs he has held, the length of time he was employed in any given position, and any employment evaluations that might be available. On the opposite end of the practical skills spectrum are such skills as the ability to tie one's own shoes, dress oneself, and prepare basic meals. Another important component of the practical skills evaluation is basic money management. While an inability to effectively manage money is not alone a sign of intellectual disability, this combined with lowered conceptual and social skills (or even skills under those umbrellas of evaluation that are somewhat deficient) supports a diagnosis of intellectual disability.

In looking at a defendant's conceptual, social, and practical abilities, a trained psychological professional can make an educated determination and diagnosis of whether a defendant suffers from intellectual disability and thus requires an exemption from the death penalty under *Atkins* and *Hall*. This holistic review is more accurate than placing someone's life in the balance based solely on a numerical scale. While it will admittedly take more time to evaluate defendants under this framework, Justice Breyer put this concern in perspective during the oral argument for *Hall*.

> Justice Breyer: . . . When [the IQ score is] there at 70, [the Defense] call[s] their expert, who informs the decision maker just what I said [i.e., other factors related to the defendant's intellectual abilities].

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[215] Atkins v. Virginia, 536 U.S. 304, 307 (2002).

> Now, that would take a little time, maybe 15 minutes, maybe a little longer. But that's what [the states] want to do, I think. And—and why not? I mean, what is so terrible about doing it?
>
> Mr. Winsor: What is so terrible about doing it is you would end up increasing the proportion of people, the number of people who would be eligible for a mental retardation finding.
>
> Justice Breyer: But only those who in fact are mentally retarded.[216]

CONCLUSION

The U.S. Constitution protects numerous fundamental freedoms—those of free speech, security in one's personal effects, and freedom of religious association. Deeply rooted in American principles and values of life, liberty, and the pursuit of happiness is the Eighth Amendment's protection against cruel and unusual punishment. Despite arguments on both sides regarding the inherent cruelty of a "life for a life," the Supreme Court maintains that the death penalty does not inherently violate the Eighth Amendment. The Court has noted, however, that some applications of the death penalty are cruel and unusual and has thus created categorical exceptions for certain people otherwise eligible for the death penalty, including people with intellectual disabilities as in *Atkins v. Virginia*.[217]

Despite this categorical exclusion, people with intellectual disabilities are not safe from improper execution, as many states have evaluative schemes based entirely on bright-line IQ score cutoffs—and these states often cherry pick which scores to consider. While the Supreme Court prohibited the use of such score maximums in *Hall v. Florida*, the Court again failed to give a metric by which to effectively and properly evaluate capital defendants' potential intellectual disabilities. By implementing a statewide scheme that evaluates capital defendants' conceptual, social, and practical deficiencies while also taking into account the error inherent in IQ testing, the justice system can ensure that all those with true intellectual disabilities are excluded from a death sentence. In a society that is quick to define its citizens by their quantitative metrics, it must be remembered no one number

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[216] Transcript of Oral Argument at 32, Hall v. Florida, 134 S. Ct. 1986 (2014) (No. 12-10882). Despite movement in the psychological community away from the terms "mentally retarded" and "retarded" more generally, this terminology is unfortunately still commonplace, as is demonstrated by Justice Breyer's passing use here. Negative colloquial use of such terminology is one reason for this change in terminology in the professional psychological community, but unfortunately, its continued use only furthers the stigma associated with being intellectually disabled. *See supra* notes 10, 22-24 and accompanying text.

[217] *Atkins*, 536 U.S. 304.

can define a person—particularly in the cases of Daryl Atkins, Freddie Lee Hall, and Marvin Lee Wilson, and especially not for those intellectually disabled defendants still fighting for justice at sentencing.

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