In Atkins v. Virginia the U.S. Supreme Court declared execution of persons with mental retardation to constitute cruel and unusual punishment, and thus to be unconstitutional under the Eighth Amendment. However, the Court left all considerations regarding how to implement the decision explicitly to the states. Since Atkins was decided in 2002, legislatures, courts, and mental health experts have struggled with its implementation, highlighting the complexities that can arise when the courts base legal rules on clinical findings. This column reviews the Atkins case and considers the challenges associated with a clinical determination that can have life-or-death consequences for capital defendants. (Psychiatric Services 60:1295–1297, 2009)

In 2002 the U.S. Supreme Court declared execution of persons with mental retardation to constitute cruel and unusual punishment, and thus to be unconstitutional under the Eighth Amendment (1). The case that triggered the decision, reversing an earlier Supreme Court precedent (2), involved Daryl Atkins, a man with 16 prior felony convictions, who faced the death penalty for the abduction, robbery, and murder of an airman from a local military base. Since Atkins v. Virginia was decided, legislatures, courts, and mental health experts have struggled with its implementation, highlighting the complexities that can arise when the courts base legal rules on clinical findings.

Atkins represented a distinct break with the courts’ usual approach to the impact on sentencing of a defendant’s mental state at the time of the crime (3). At least since the U.S. Supreme Court decision in Lockett v. Ohio in 1978 (4), capital defendants have had the right to introduce evidence of their mental state at the sentencing hearing as a mitigating factor. In essence, defendants were permitted to argue that their mental retardation, mental illness, intoxication, or other impairing condition at the time of the crime so diminished their responsibility for their actions that the ultimate penalty of death should not be imposed. The jury was then charged with weighing evidence of the defendant’s mental state, along with other mitigating factors, against the nature of the crime and any other considerations that might be considered aggravating in deciding on a sentence.

Precisely this process was followed in Daryl Atkins’ case. Testimony was presented on his behalf by an expert psychologist, who characterized him as having mild mental retardation, noting a full-scale IQ score of 59. A jury nonetheless determined that the death penalty should be imposed; after the initial sentence was vacated because of a procedural error, a second jury—which listened to an additional psychologist hired by the prosecution who testified that Atkins was of normal intelligence but had an antisocial personality disorder—again endorsed the death penalty. Under the rules then in place, having had the opportunity to present his mental state evidence to the jury for its consideration, Atkins had received the consideration to which he was entitled. In challenging his sentence, Atkins was asking the Supreme Court to go beyond its traditional jurisprudence and recognize mental retardation as an absolute bar to imposition of a death sentence.

Justice Stevens’ opinion for a six-justice majority did just that. Pointing to a developing consensus among the states that persons with mental retardation had a reduced level of culpability and should not be put to death, the majority held that evolving standards of decency precluded execution of persons with mental retardation. However, although Stevens recognized that there might be serious disagreement about whether a particular defendant is mentally retarded, all considerations regarding how to implement the decision were explicitly left to the states. Atkins’ own case was remanded to the Virginia courts to determine whether he was mentally retarded and thus could not be executed.

Issues in applying Atkins
In the years since the decision in Atkins, a considerable body of literature has developed, both legal and clinical, considering the challenges associated with a clinical determination that can have life-or-death consequences for capital defendants. Among the issues that have been addressed are the definition of mental retardation, the means that should be used to assess mental retardation, and the procedures that should be followed for the legal determination of retardation, including the identity of the decision maker. One wonders whether, had the Court known just how tangled these questions would become, it might have decided Atkins differently.

Defining mental retardation for
legal purposes offers a good example of the complexities involved. In the majority opinion, Atkins cited both the American Association on Mental Retardation (AAMR) and the DSM-IV definitions of mental retardation, which are similar but not identical. Both DSM and AAMR approaches embrace requirements for significantly below-normal intellectual functioning (usually evidenced by IQ scores) combined with evidence of deficits in adaptive functioning. The 2002 post-Atkins revision of the AAMR definition reads, “Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18” (5).

By leaving the definition of mental retardation to each state to determine, however, Atkins led to the current situation in which there are significant differences across jurisdictions, including major deviations from both the DSM and AAMR approaches (6). Some states require only “significantly subaverage intellectual functioning,” while others demand an IQ score below 70. Although most states follow DSM and AAMR in asking whether the impairments occurred before age 18, at least three states extend that to age 22, and one speaks only of manifestations “during the developmental period.” Kansas uniquely mandates that the deficit in intellectual functioning “substantially impair one’s capacity to appreciate the criminality of one’s conduct or to conform one’s conduct to the requirements of the law.” With regard to adaptive behavior, there are states that speak of impairments only in general terms, while others require deficits in one or more specified domains. The end result of this confusing welter of definitions is that a defendant might be considered mentally retarded and ineligible for the death penalty in one jurisdiction but face execution in another.

Issues related to the definition of mental retardation are likely to become still more complicated over time, as the concept of mental retardation itself evolves. In 2007 the AAMR changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD), reflecting its desire to avoid the stigma that had become attached to the term mental retardation (7). Experts in the field now argue that intellectual disability, currently the preferred term, should not be viewed as an invariant personal trait but as dependent on the interaction between the person and a given environment. Altering the environment may reduce the level of disability, perhaps below the point where the person could be said to be disabled (8). How this change may affect defendants’ claims in capital cases remains to be seen, but there is a risk that the very concept on which the Supreme Court relied to reach its decision will mutate radically in coming years.

Assessment of the intellectual and adaptive deficits that all states require for a determination of mental retardation is another area of uncertainty. With regard to intellectual performance, although an IQ below 70 has been an informal landmark of mild mental retardation, the AAMR definition avoids a fixed cutoff point and the DSM refers to an IQ of “approximately 70” as the border. Where the line should be drawn in a particular case, however, is not a simple matter, particularly when testing has been performed on several occasions with varying results, which often occurs. Experts recommend that comparison of an individual score to published norms take into account errors in measurement (3). Thus, an IQ of 71 can best be understood as expressing a 95% likelihood that a person’s IQ is between 65 and 77 (9). How certain one wants to be that a defendant is not mentally retarded before imposing a death sentence will have an impact on where the line is drawn, but a 95% level of certainty would appear to require a minimum full-scale IQ score of 78.

Another complicating variable is the so-called “Flynn effect.” It is well known that IQ scores tend to rise over time, although the basis for this phenomenon is unclear (10). In the United States, IQ scores tend to rise about .3 point per year. Hence, it has been argued that raw scores should be adjusted according to the number of years since the test being used had been normed. By using this approach, a defendant scoring 73 on a test normed ten years previously would have his score adjusted to 70, on the basis that this score better reflects contemporary norms (10). In addition, because many defendants are tested more than once (usually at least once by experts for the prosecution and again by experts for the defense), some commentators believe that further adjustments should be made for practice effects when testing occurs at close intervals, perhaps less than six months apart (3). But how much to adjust any score is unclear.

Assessing adaptive deficits leads to still other conundrums. AAIDD recommends the combined use of standardized measures and structured interviews, including information gathered from people who have had a chance to observe the person being evaluated in various settings (5). Although a plethora of standardized instruments exists to assess adaptive functions, none have the broad acceptance of the major tests of IQ, and the data they generate require an even higher degree of interpretation than IQ test scores (3,9). Moreover, for defendants who have spent long periods of time incarcerated, there may simply not be enough evidence of their ability to adapt in noninstitutional settings to allow valid conclusions to be drawn. Indeed, one commentator has argued that none of the existing tests assesses the kind of adaptive deficits most prevalent among persons with mild mental retardation—gullibility and credulity—though they are exactly the traits most likely to result in their being drawn into criminal activity (8).

Along with the uncertainties regarding the definition of mental retardation and the assessment of core deficits, the states have shown great variability in the procedures established for reviewing claims that a defendant is mentally retarded (11). Generally, defendants must prove that they are retarded by a preponderance of the evidence, but some states require them to meet a more rigorous
standard of clear and convincing evidence. The determination is usually made before the trial begins, so that everyone can be aware of whether the death penalty is at issue; however, in other states it will be raised before sentencing or as part of the sentencing process. Judges will make the decision in many states, but in some jurisdictions the matter will be decided by a jury. Because there is reason to believe that these procedural differences may affect the outcome of the legal determination regarding whether the defendant is mentally retarded, these variations can have immense significance for persons facing capital charges (11).

**Atkins and its ironies**

The difficulties in the application of Atkins are no better exemplified than by the proceedings involving Daryl Atkins himself. After his case was remanded by the U.S. Supreme Court to the Virginia courts, a third sentencing jury decided that he was not mentally retarded and again imposed a death sentence. However, that sentence too was overturned by the Virginia Supreme Court, on the grounds that an unqualified psychologist had offered testimony for the prosecution and that the jury should not have been told of Atkins’ previous sentences (12). When the case was returned for a fourth sentencing hearing, something remarkable happened: the attorney for Atkins’ codefendant, who had fingered Atkins as the triggerman—thus making him eligible for the death penalty—came forward to say that his client had been coached ten years earlier by the prosecution to eliminate inconsistencies in his account. On this basis, the trial court vacated Atkins’ death penalty and imposed a sentence of life in prison, an action upheld by the Virginia Supreme Court in June 2009—seven years after the U.S. Supreme Court ruled on the case (13).

In the end, Daryl Atkins was spared the death penalty, although he was never able to convince a jury that he was mentally retarded. However, the rule spawned by his case lives on, and indeed appeared to be influential in the U.S. Supreme Court’s decision in 2005 to establish an absolute bar to the death penalty for defendants under the age of 18 at the time of their crimes (14). The decision in Atkins can be seen as a reflection of our society’s deep ambivalence about the death penalty; although reluctant to surrender the option of imposing the ultimate penalty, we are nonetheless inclined to surround it with so many restrictions that it will only rarely be applied. Reliance on a clinical concept for that purpose, though, has produced a seemingly endless list of challenges, illustrating once again how poorly legal and clinical constructs mix.

**References**

13. In re Commonwealth of Virginia, 677 SE2d 236 (Va 2009)