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Mental Retardation and Being Put to Death by the State, Part 1

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Introduction

The current medical term is Intellectual Disability but, as in many things, the law lags behind the science and still uses the term mental retardation. Just as the courts and West's Key Number System held back the development of labor law by classifying it under "Master and Servant" the courts and legislatures continue to use term retardation. It is a term which has some adverse and misleading connotations but we are doomed to use it in the law for now.

Whether or not a person is deemed legally "mentally retarded" can have significant consequences under the law. It can mean that the person receives educational opportunities and special government benefits. Or, conversely, it can mean person is tracked in a special education program rather than having a mainstream educational experience. The correct diagnosis is important and there has been much debate over how such a determination can be made that one person qualifies for the diagnosis and another does not.

In the criminal law, however, whether a person is diagnosed as mentally retarded may determine whether or not the state will put that person to death.[1] Right now there are hearings being conducted by Judges of the Superior Court throughout the State of California and by judges of courts throughout the other death states of this country. One I.Q. point can make the difference between whether a person will be put down by lethal injection or allowed to live the rest of her or his life in prison. In this month's *Criminal Justice* column we will review general history and parameters of this determination. In next month's column, in *Part 2*, we will explore how this determination is made.

Atkins

The United States Supreme Court decided that it was cruel and unusual punishment for the state to kill a person who is mentally retarded. In *Atkins v. Virginia*, 536 U.S. 304 (2002), in an opinion by Justice Stevens, the Court held that killing violated our standards of decency as articulated in *Trop v. Dulles*, 356 U.S. 86 (1958). As a result,

the Eighth Amendment to the Constitution, made applicable to the states and the people by the Fourteenth, prohibits the practice. As a result, if a condemned inmate raises the issue, the courts are required to determine whether or not the inmate is retarded under the law before putting him or her to death.

Of course, the United States has clung onto the death penalty itself even though it is considered an abomination by the rest of the Western world. It is outlawed entirely in the European Union and the United States is one of the leading countries in executing people, along with China and Iran. And it comes at a great human and economic expense. There have now been hundreds of documented wrongful convictions and hundreds more that will never be detected even after the innocent people are killed. Moreover, to even keep the number of innocent people convicted to the numbers we have now, the financial cost is astronomical. Some states have finally come to the conclusion that their death penalty should be repealed with permanent imprisonment being the sentence for those convicted of capital type crimes.

But the courts have been making death procedurally easier to impose or, at least, have made the barriers to reviewing death sentences even more substantial.[2] The Supreme Court of the United States has even made the shocking statement that actual innocence is not a sufficient ground for review of a death sentence.[3] But, as in *Atkins,* the Court has made some restrictions as to whom may be executed.

Back in 1986, the Supreme Court held in *Ford v. Wainwright*, 477 U.S. 399 (1986), that executing a prisoner who becomes insane on death row constitutes cruel and unusual punishment in violation of the Eighth Amendment. If someone is so mentally disturbed that they cannot understand that they are being executed or understand, in some general sense, why they are being executed, it seems pointless. Executions are supposed to be a form of punishment and punishment requires that there be some sort of understanding on the part of the person being punished as to what is happening and why. Otherwise, execution would not be distinguishable from some sort of cleansing system.[4]

After *Atkins*, in *Roper v. Simmons*, 543 U.S. 551 (2005), the Court held that it is unconstitutional for the state to execute minors. People who were under the age of 18 at the time of the offense can be permanently imprisoned for murder[5] but cannot be executed. The Court took note of the attitude of the rest of the world on this and also considered, again, the purpose of death as a punishment. The Court noted that minors have not fully developed as adults. They do not have the mental capacity to have fully appreciated the nature and consequences of their acts.

So the *Atkins* case fits into this line of cases rejecting execution of people who do not have the full capacity to appreciate what they did or why they did it. We do not punish people with limited mental capacity, or minors or the insane in the same way we punish those who can reflect and make intelligent choices and appreciate that

they are being punished. Instead, the state can lock them up for the rest of their lives.

Parenthetically, it is also true that there have been a number of people with mental retardation who have been condemned to death and years later exonerated and the real killer identified. It seems that people with retardation are more vulnerable to being falsely accused, to being set up by informants and to making false confessions. Besides being philosophically inappropriate to kill the retarded, it is prudent to leave them alive in case it is determined someone else really committed their crime.

In any event, it is now a binary switch – mentally retarded, not executed; not mentally retarded, executed. As a result, we have "*Atkins* hearings." Some cases are remanded years or decades after the alleged crime to determine if the defendant is mentally retarded. Other cases go to an *Atkins* hearing before trial or immediately after a death verdict. During these hearings, the lawyer for the defendant presents evidence to a judge alone. The evidence may include lay witnesses with anecdotal testimony about adaptive behavior and testimony from neuropsychologists and other experts about testing and their opinions. The prosecution calls other witnesses and their own experts. At the end, the judge decides which way that binary switch is activated.

Where Does the Switch Activate

There are a few determinations in the criminal law by which one set of human beings decides whether another will live or die. Generally, the decision to kill a prisoner is to be made by a jury, having all of the mitigating evidence available. It cannot be arbitrary or automatic.[6] It seems unusual that a death determination would be based on arbitrary criteria, like age, for instance. The idea that a person will not be killed if she or he was 17 years and 364 days old at the date of the offense but that another will be killed for being one day older seems foreign to the current jurisprudence. However, if one can accept that a switch as arbitrary as age, the idea of mental retardation is also arbitrary but is also troubling on another level.

Using metal retardation as a switch to determine death or permanent incarceration, supposes that a judge can decide where the line is to start with and that is not the case. Mental retardation cannot be determined with that sort of accuracy demanded of close cases for a variety of reasons.

The actual clinical determination of mental retardation involves a complex analysis of a number of factors. It is a clinical judgment based on imperfect testing, an analysis of adaptive functioning deficits and some historical reconstruction. In the next month's *Criminal Justice* column we will explore the nature of the determination in more detail as it is made by clinicians and as relied upon in courts today. For now, it will suffice to say that the United States supreme court in *Atkins* adopted the

definition in the 1992 version of the Manual issued by American Association for the Mentally Retarded (AAMR) and the California Courts have recognized the 2002 version of the AAMR Manual. We now have a 2010 version of the Manual issued by the same scientific group but with the new name, American Association for Intellectual and Developmental Disabilities or AAIDD.

While the clinical criteria may differ, the definition of mental retardation involves three elements found under all three of these AAMR/AAIDD Manuals. Those elements are also recognized by the California Penal Code Section 1376 and by the American Psychiatric Association in its Diagnostic and Statistical Manual (now the DSM IV-TR) as well as other sources around the world. The three elements are 1) limitations in intellectual functioning; 2) deficits in adaptive functioning; and 3) onset before age 18. There has been progress in understanding more about these first two elements over the years and there are some refinements in the clinical criteria that should be considered in making a diagnosis.

First, the intellectual functioning element has generally been the subject of IQ testing. Forty years ago, the cut off for mental retardation was considered to be 70. It was recognized that testing was not absolutely accurate and varied from instrument to instrument based on norming and other factors. In recent decades, much work has been done to create more sensitive tests and to norm them in a comprehensive fashion. The accepted criteria for test results to satisfy this element is two standard deviations below the norm. This is accepted to be in the 70 to 75 Full Scale IQ range. We will go into this in more detail next month. There is no bright line here and, given the limitations of testing, there cannot be.

Second, the adaptive functioning deficits element is to be considered in conjunction with the findings on the limitations on intellectual functioning. In the1992 AAMR Manual, there were ten arbitrary categories of which a person had to show adaptive functioning deficits in two. In the 2002 and 2010 AAMR/AAIDD Manuals there are three domains with a greater number of sub-categories. There is a requirement that there be significant deficits within one domain. Some of these adaptive behavior deficits can be scored on standardized tests. Others are more subjective. Yet others are the subject of administering an instrument to family members and people who knew the subject growing up. Essentially, the criteria for this element are whether there is a significant deficit in adaptive behavior as expressed in 1) conceptual, 2) social, or 3) practical adaptive skills. Again, we will go into this more in next month's column.

Third, the element of onset before age 18 seems to be fairly straightforward. It would eliminate, for instance, someone suffering an illness after age 18 that cause intellectual limitations and adaptive deficits. While this may be entirely arbitrary when deciding whether a person should live or die, it made sense as a diagnostic tool for chart notes and patient planning. The problem for the application of the onset before age 18 as a legal element is that we are often dealing with adults, maybe even

in their fifties, sixties or seventies, who may or may not have had adequately normed and valid testing before age 18 and who may not have witnesses available to their functioning before they turned 18. They may also have subsequent trauma or be subject to dementia or even mental illness that makes testing difficult.

Nevertheless, with all of these concerns, there is a valid scientific basis to evaluate all three elements and to use the diagnostic criteria in order to make a determination of whether a person is or is not mentally retarded. In many cases, there will not be a question as to whether a person activates the switch because the evidence is strong in one direction or the other. However, due to human fallibility, the competitive nature of prosecution and defense and the ambiguousness of evidence in close cases, this is an area in which we are seeing and will see extensive litigation.

Conclusion

We will resume with this analysis in more detail in Part 2 of this *Criminal Justice* column. Like many things in the law, this becomes a battle of experts. The Attorneys General and District Attorneys who want to have the defendant put to death can call into question the testing, the observations and the ultimate conclusions of historical experts and observers as well as current experts now brought forth on behalf of the defendants. The defendant has the burden of proving by a preponderance that he is mentally retarded and her or his lawyers are often trying to cobble together a lost and destroyed record or to recreate the recollections of people who have long forgotten or are unavailable or even dead.

As we will see next time, this is an interesting process. The testing and the norming and interpretation of the tests are critical to getting even a ballpark idea of a person's FSIQ. The anecdotal and tested aspects of adaptive functioning are also complicated and intriguing. The reconstruction of the historical record is often a challenge. We will also discuss briefly the etiology of mental retardation and the incredible new research into genetics and epigenetics. Even for those who do not do death cases, the changing understanding of the scientific community regarding mental retardation is fascinating.

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[1] It may also determine whether or not a misdemeanor should be diverted pursuant to Penal Code Section 1000.20 *et seq*. where the defendant is a client of the regional center or whether juvenile or criminal proceedings should be adjourned pursuant to Welfare and Institutions Code Section 6512 if commitment proceedings are initiated. However, here, we will be concerned with the implications for the execution of a defendant convicted of a capital crime.

[2] The jurisprudence, if it can be called that, under AEDPA and other judicial and statutory procedural bars has become more restrictive. The procedural maze of post-conviction relief is almost unintelligible to anyone but those few lawyers who are versed in this arcane field.

[3] *Herrera v. Collins*, 506 U.S. 390 (1993).

[4] There have been over 1200 people executed in this country since 1976. The group killed are disproportionally of color and poor,. It would not be much of a leap for critics in other countries to see this as ethnic cleansing which is a violation of the treaty or Rome.

[5] Although not for other offenses. See, *Graham v. Florida*, 560 U.S. ___ (2010)

[6] See, *Lockett v. Ohio*, 438 U.S. 536 (1978) and, more recently, e.g., *Wiggins v. Smith*, 539 US 510 (2003).