Rigidity and Flexibility in Diagnosing Mental Retardation in Capital Cases

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Following the U.S. Supreme Court ruling that the death penalty is unconstitutional in the case of persons with mental retardation, a new debate is emerging around diagnostic issues. Baroff (2003), Coleman and Shellow (2003), Greenspan and Switzky (2002), and Kanaya, Scullin, and Ceci (2002) provided different perspectives on diagnosis. Coleman and Shellow were concerned that in *Atkins v. Virginia* (2002), the Court failed to adopt a specific diagnostic standard. They stated their belief that this will result in inequality as states adopt different definitions. They argued that the Court should have selected one uniform standard. Greenspan and Switzky argued that mental retardation is an indirect, artificial, and insufficiently inclusive category to determine who should and who should not be executed. They argued that the execution exemption should be extended to all who demonstrate the same kind of vulnerabilities, regardless of whether one qualifies for the label of mental retardation. Baroff and Kanaya et al. made the case for more flexibility in diagnosing mental retardation due to the inherent problems in psychometric evaluations of IQ over time and across tests. Kanaya et al. reported that:

> Some borderline death row inmates or capital murder defendants who were not classified as mentally retarded in childhood because they took an older version of an IQ test might have qualified as retarded if they had taken a more recent test. (p. 789)

They stated that this effect influences mental retardation diagnosis for several years after a new test is introduced and concluded that:

> Our results imply that the year that a capital murder defendant was tested can determine whether she or he is sentenced to death as opposed to life imprisonment. This raises concerns regarding inmates on death row who tested above 70-75 cutoff on a test that was near the end of its normal cycling—when scores are highly inflated as well as an inmate who tested in the mental retardation range during the earliest years of a new norm—when the test is the hardest. (p. 788)

Kanaya et al.’s (2002) point is particularly important as the Wechsler Adult Intelligence Test–R—WAIS–R (Wechsler, 1981) was replaced by the WAIS-III about 7 years ago (Wechsler, 1997a). Also, the main alternative to the WAIS-III, the Stanford-Binet Intelligence Scale-4th ed. (Thorn-dike, Hagen, & Sattler, 1986), was standardized in the first half of the 1980s and is, therefore, likely to be producing inflated scores because examinees’ scores rise over time by about 0.3 points per year as norms become outdated (Wechsler, 1997b). It is also important to bear in mind that the Stanford-Binet standardization sample only went up to 23 years, 11 months and is, therefore, only of limited use with adults. Psychometric tests of adaptive behavior will also be subject to the same effect. Assessors should note that the Vineland Adaptive Behavior Scales (Sparrow, Balla, & Cicchetti, 1984) are currently undergoing re-standardization and, therefore, the existing norms should be used with caution (Beail, 2003).

The concerns of Coleman and Shellow (2003) predated the Supreme Court ruling. The states that had exempted persons with mental retardation from the death penalty had already adopted a range of definitions, some modeled after the American Association on Mental Retardation (AAMR, 1992) definition, some from their own state statutes (Keyes & Edwards, 1997). Prior to the Atkins decision, there were at least 18 states, including the federal government, that banned the execution of people with mental retardation. After the Atkins decision, another 7 states passed legislation to confirm the United States Supreme Court ruling.

In *Atkins v. Virginia* (2002), the Supreme Court recognized that the clinical definition of mental retardation requires “subaverage intellectual functioning” in addition to “significant limitations in adaptive skills such as communication, self care, and self direction” that manifest before 18 years of age. Thus, it is similar to the 1992 AAMR definition (Luckasson et al., 1992); it does not state what constitutes “subaverage” or “significant.” Coleman and Shellow (2003) stated that this omission will lead to inequalities. In fact, these authors could argue...
that this decision is reinforcing extant practices. Baroff (2003) noted that it allows greater flexibility when test scores are being interpreted and the decision gave Greenspan and Switký (2002) good reason to argue for extensions to exemption. Indeed, it would appear that attorneys in the United States have already been doing this. Keyes, Edwards, and Perske (1997, 2002) reported on 44 executions of people with mental retardation between 1984 and 2001. The IQs they reported ranged from 60 to 77 for 21 inmates, and an additional 6 inmates were described as having mild mental retardation. The remainder had an IQ of 70 or more or had vulnerabilities similar to mental retardation or no IQ data reported.

In this commentary we contribute to the debate by reporting some information from decisions made in the English courts concerning mental retardation and mitigation. Prior to the abolition of the death penalty in England in 1965, there were cases of persons with mental retardation being executed. The cases of Derek Bentley and Timothy Adams have received considerable publicity, resulting in books, plays, and films about them (Bentley, 1995; Kennedy, 1988). In both cases information concerning their mental retardation was not presented in mitigation during their trials. After years of campaigning and appeals, both men were subsequently posthumously pardoned. In a review of cases of wrongful imprisonment around this period (1950 to 1970), Brandon and Davies (1973) found 70 cases in which errors had been made and corrected by the courts. After mistaken identity, false confessions were the main reason for conviction. The authors noted that among these defendants was a disproportionate number with mental retardation.

Police officers and attorneys often fail to identify people with mental retardation or other vulnerabilities. Thus, legal protections now available through Miranda in the United States and the Police and Criminal Evidence Act (1984) in England were not available then. However, in England cases where defense attorneys challenged the actions of the police after failing to identify a defendant's vulnerabilities have resulted in significant developments concerning who should be afforded protection and have their vulnerabilities considered at the trial and during sentencing.

England has a common law system, which depends on a combination of statute and case law. Whereas statute law is derived from acts passed in the United Kingdom Parliament, case law is established by judgments in individual cases heard in the High Court, the Court of Appeal, and the House of Lords. Decisions made in these courts establish precedents binding on lower courts. This is similar to the binding role of decisions made in the U.S. Supreme Court. Similarly, most judgments are based on a consideration of the relevant statute and case law.

As in the United States, in court proceedings where a decision regarding whether or not a defendant or complainant has mental retardation is to be made, expert testimony may be submitted in evidence. In English law a range of terms have been used to refer to people with mental retardation in Acts of Parliament. For the purpose of this commentary, we need only consider the meaning of the term mental impairment because all previous terms have been redefined to have the same meaning as mental impairment, which is defined as "A state of arrested or incomplete development of mind, which includes significant impairment of intelligence and social functioning" (Mental Health Act 1983, p. 2). Social functioning is the same as adaptive behavior and is measured in the same way. The definition is similar in many ways to that provided by the U.S. Supreme Court in that no guidance is given regarding the meaning of significant. Also, as in the United States, the Court determines mental impairment/retardation. In England expert opinion is admissible to furnish the Court with scientific evidence that is likely to be outside the experience and knowledge of the judge or jury.

Commonly, the scientific evidence likely to be outside the judge or jury’s experience or knowledge concerns the assessment of intelligence, adaptive behavior, and other personality traits. In the past the English courts have been criticized for allowing powerful establishment figures to make unchallenged misjudgments (Odell, 1996). When attempts were made to submit evidence regarding mental retardation, the courts operated with very inflexible definitions. In the case of R v. Masih (1986), expert testimony was given regarding IQ. In this case the defendant’s IQ was found to be 72, which falls at the lower end of the “borderline” range. In the judge’s view, expert testimony in a borderline case was not, as a rule, necessary and was, therefore, excluded. The judgment went on to state that an IQ of 69 or below was required for a defendant to be formally classified as having mental retardation. Consequently, the ruling was applied in other cases. These judgments were made according to a very
rigid definition of mental retardation, with no consideration being given to the standard error of measurement of any given intelligence test or any of the other issues discussed in Baroff (2003) and Kanaya et al. (2002). Also, in the Masih judgment no account was taken of the defendant’s adaptive behavior. However, defense attorneys in the United Kingdom persisted in trying to present broader expert testimony, and some trial judges allowed it. Subsequently, judgments began to broaden the criteria for admissibility for expert psychological evidence.

In 1988, the Court of Appeal ruled that the police had not conducted their interrogation under appropriate conditions with respect to a person with an IQ of about 80, who was described in the judgment as having “subnormal mentality.” Later in the case of R v. Raghip (1991), the court of appeal placed less reliance on arbitrary cut-off IQs and recognized the importance of evidence from other psychological tests and areas of functioning, such as adaptive behavior and suggestibility (Beail, 2002). Consequently, the courts have moved away from a rigid diagnostic approach to recognizing the need for a psychological evaluation and formulation, thereby allowing flexibility to inform the court on a range of issues about the defendant’s vulnerabilities.

In the United States the imposition of the death penalty is typically reserved for the most criminally culpable and responsible offenders. Thus, it would seem ethical to move forward the judgment in Atkins vs. Virginia to enable exemption for vulnerable people rather than call for a narrow uniform standard. It is most likely that any attempt at uniformity will be challenged, as happened in England. The Supreme Court judgment provides attorneys throughout the United States with the scope to argue for the admissibility of a broad range of evidence and expert testimony. It also provides scope to appeal cases to the Supreme Court in states that try to adopt rigid criteria. Greenspan and Switzky (2002) did not explore issues of where the courts might draw the line with regard to exemption. However, the existing ruling provides lawyers, with the assistance of expert testimony, with the task of exploring where and how flexible the line is in the courts. Even with the Atkins decision, however, many state and federal prosecutors in the United States will try to minimize the severity of the defendant's mental retardation and argue that such findings are just “based on numbers.” Finally, prosecutors throughout the United States have urged the courts to allow them to have their experts administer the Minnesota Multiphasic Personality Inventory (MMPI) to all death row inmates, raising a claim under Atkins to prove that the inmate is malingering (Centeno v. Superior Court, 2004; Foster v. State, 2003).

References

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At least 44 people with mental retardation are dying, legally: at least 44 have been executed. Mental Retardation, 40, 243-244.


William J. Edwards would like to dedicate this article to Miki Taylor Katz for her friendship, encouragement, and understanding in accepting me for who I am. May she always have an angel by her side.

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