

Commentary: Old Wine in a New Bottle

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Professor Richard Bonnie, in the American Psychiatric Association's Resource Document on Mental Retardation and Capital Punishment,¹ which he drafted, makes the intriguing statement:

One of the striking aspects of the *Atkins* decision is that the constitutional prohibition appears to be framed in the language of a clinical diagnosis—"mental retardation"—and not in terms of a traditional legal concept, such as competence or responsibility. For this reason, state legislators can be expected to seek the guidance of psychiatrists and other mental health professionals in the drafting of post-*Atkins* statutes (Ref. 1, p 304).

Professor Bonnie points out that in *Atkins*² the U.S. Supreme Court adopted a clinical term—mental retardation—as the criterion for the legal exception. I question whether the Court's resorting to a clinical term is really a novelty. It is true that the courts are usually indifferent to diagnostic categories or conceptualizations and are quick to affirm the right of the courts or legislatures to define legal issues regarding mental illness without regard to professional nomenclature or preferences. However, there is nothing really new as a result of *Atkins* for forensic evaluators, who have always had to make clinical assessments in light of legal standards. The role of psychiatrists or other mental health professionals under *Atkins* will be no different from their roles in other areas of psychiatry and law.

Is there novelty in *Atkins* in framing the criterion in the language of a clinical diagnosis? The M'Naghten test of criminal responsibility asks whether cognition is affected by "mental disease or defect." The American Law Institute's (ALI) cog-

nitive-or-control test of criminal responsibility is also based on "mental disease or defect."³ Psychiatrists actually participated in the formulation of the ALI test. Psychiatrists too assisted Judge Bazelon in formulating a "product test" of criminal responsibility. At trial, in all cases, forensic experts are known to engage in a "battle of experts" as to the diagnosis of an accused.

In matters other than criminal responsibility, the law is similarly based on mental illness, however defined, as in competency to stand trial, civil commitment, or sexual offender legislation. Posttraumatic stress disorder as a diagnosis may entitle a veteran to benefits. The courts have recognized certain mental disabilities as falling under the Americans with Disabilities Act.⁴

In *Atkins*, the U.S. Supreme Court ruled that the Eighth Amendment's prohibition against "cruel and unusual punishments" bars the execution of offenders with "mental retardation." Professor Bonnie says that the two main legal issues under *Atkins* are (1) deciding who should bear the burden of persuasion on the issue of mental retardation, and (2) whether a judge in a pretrial hearing should make an initial determination of mental retardation before the capital sentencing proceeding. The determination of these issues will be as controversial as similar questions in other areas of psychiatry and law.

"Mental retardation" is not a matter of simple definition. An IQ score will not suffice. Disputes will arise, as under the test of criminal responsibility or other matters, as to who falls within its scope—who are the "mentally retarded" and what are the consequences of that condition. Persons with mental retardation are not members of a homogeneous, discrete, or psychological category of

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Commentary

persons. As Dr. Douglas Mossman noted in an article about *Atkins*, “[M]ental retardation is an artificial category imposed on a spectrum of human capability. The diagnostic line that separates persons with mental retardation from those who are only well below average is a changing and arbitrary one” (Ref. 5, p 27).

Atkins is old wine in a new bottle.

References

1. Bonnie RJ: The American Psychiatric Association’s Resource Document on Mental Retardation and Capital Sentencing: Implementing *Atkins v. Virginia*. *Am Acad Psychiatry Law* 32:304–8, 2004
2. *Atkins v. Virginia*, 536 U.S. 304 (2002)
3. Model Penal Code, sec. 401.1(1) (Tent. Draft No. 4, 1955)
4. Americans with Disabilities Act, Pub. L. 101–336, 104 Stat. 327 (codified as 42 U.S. Code §§ 12101 et seq., 1990)
5. Mossman D: Psychiatry in the Courtroom. *The Public Interest*, 150:22.7, 2003