

Individualizing Justice After *Atkins*

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On August 6, 2005, newspapers and other media outlets reported that Daryl Atkins had been determined by a Virginia jury not to be retarded and therefore was mentally competent to receive the death penalty. A judge immediately scheduled his execution for December. Atkins, of course, is the convicted murderer whose case three years earlier had led the U.S. Supreme Court, in a landmark ruling, to declare that mentally retarded offenders are constitutionally exempt from the death penalty. While a bitter irony for Atkins, his family, and supporters, the Virginia jury's finding suggests that the practical effects of the Supreme Court's decision are less dramatic than many had anticipated. It shows that mere labels need not be determinative and that judges and juries as well as mental health experts called to assist them in capital cases can continue to work toward an individualized brand of justice.

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I don't know who is entitled to react with satisfaction to the news that someone has been sentenced to death. The prosecutors who tried the case? The victim's survivors? The surrounding community affected by the crime in a personal way? The larger community of all those who believe strongly that the death penalty fulfills appropriate retributive and deterrent goals and who therefore feel they have a moral stake in the outcome so long as the individual facts support it?

As I am not a member of any of these groups, the recent news that Daryl Atkins was found death eligible by a jury in Virginia gave me no particular moral satisfaction. It did, however, give me some sense of rightness as a lawyer. It fulfills a prediction I have been making to my law classes that what happened to Atkins since *Atkins* (the U.S. Supreme Court decision)¹ would, or at least could, happen. Second, that this is a good thing, at least in the sense that the ruling in *Atkins* was wrong, and this last twist in the case, much as it is to Daryl Atkins' individual disadvantage, does suggest things are working themselves out right generally.

I have never doubted that the decision in *Atkins* was wrong in categorically excluding from the death penalty the mentally retarded as a class and that *Penry*,² the case it overruled, which affirmed the prac-

tice of individualized assessments as distinct from going by the labels, was right. Quite apart from what one may think of the majority's reasoning that a national consensus (or even a trend) can be discerned from the laws of 18 states or the strange calculus that the culpability of a mentally retarded murderer cannot be greater than that of the "average [nonretarded] murderer," the problem with the *Atkins* holding is that it is jarringly out of tune with the rest of the law, especially the modern law. In *Atkins* the majority of Justices did not merely go wrong, they went in the wrong direction. In equating diagnosis with exemption, they delivered a profoundly regressive message or as Justice O'Connor, the writer of the *Penry* opinion noted, a "disempowering" message (Ref. 2, p 340). To treat the mentally retarded, legally or otherwise, as a "homogeneous group. . .bring[s] the risk of false stereotyping and unwarranted discrimination" said the dissenters in *Penry* before they went on to ignore their own warning (Ref. 2, p 344). They should have heeded it, just as the majority in *Atkins* should have.

Ultimately, however, the objection to *Atkins* is based as much on legal and intellectual grounds as on its social impact potential. Though Ralph Slovenko, writing in the *Journal*,³ sees it differently, for once I must disagree with him when he talks of *Atkins* as just newly bottled "old wine." Our law has long, if not always, striven to require a diagnosis-plus in dealing with the mentally handicapped. Even the old, medical model commitment laws asked for not just a finding of mental impairment but a resultant need for treatment. (Today, of course, it is dangerousness

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and perhaps a gun to the head for the “overt act.”) The mentally handicapped cannot write a valid will, not because of their handicap as such, but because of the decisional incapacity it may generate which must be separately proved. *Ford v. Wainwright*,⁴ the mental illness predecessor and counterpart to *Penry* and *Atkins*, was not about the inmate’s mental illness, which even the state’s doctors conceded, but about his resultant competency to understand the execution process (actually, it was all about procedure). *Atkins* is a new drink.

In the “old days” there was often an equation of one legal finding or status with another that had not been formally decided. Commitment to a mental hospital, for example, might mean an automatic judgment of incompetency for the patient and loss of other legal and civil rights. An acquittal by reason of insanity resulted in automatic hospitalization. And so on. Much reform effort went to and succeeded in disentangling such automatic legal conclusions or presumptions, and much of this was laudable. (Exceptions include *Jones v. United States*,⁵ as well as the idea popular with lawyers, but logically and medically dubious, that an involuntarily committed patient retains treatment decision capacity and rights.) *Atkins* cuts doubly against the grain: it (re)equates legal status with a particular (unrelated) exemption or disqualification, and it equates the medical diagnosis with the legal disablement.

But of course, *Atkins* left the decision of what constitutes the diagnosis of retardation to the states, with an explicit suggestion that deference to the medical profession was in order. And it is this that led to the bad result for Daryl Atkins. IQ numbers alone don’t decide the case, as is now clear (at least in Virginia); other cognitive and functional capacities must be considered. Ralph Slovenko wrote in his commentary, “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” (Ref. 3, p 317). He may have been correct to the extent that experts do not report on or testify to the ultimate legal issue, but the fact is that they are asked to do so all the time. I wish he had said “no different from pre-*Atkins*.” It would have been a finer point, and I would have been in agreement with him on that. The denouement in *Atkins*’ case shows that mental health experts are still individualizing the assessment; the inmate need not be treated as a category or cipher. The only difference is that the individualization goes under the rubric of trying to determine retardation, whereas under *Penry* it went under individual culpability and competence. The latter remains technically correct, but if *Atkins*-in-operation’s only imperfection is an intellectual one, I suppose both psychiatrists and lawyers can live with it.

It should be clear, after all, that individualized justice is not a one-way street. The benefits of appropriate, fine-tuned, expert inquiries—whether focusing on culpability and competency or mental retardation—can go in either direction. Apart from the fact that, from the state of Virginia’s perspective, justice was done, there is the further consideration that for every Daryl Atkins there ought to be a homicide-convicted counterpart who “passes” the superficial retardation test—that is, one who does not have the numbers, but who on further inquiry, is shown to be so functionally and adaptively impaired that the jury or whoever is designated to confront the issue will see it as right to save him from the harshest punishment.

References

1. *Atkins v. Virginia*, 536 U.S. 304 (2002)
2. *Penry v. Lynaugh*, 492 U.S. 302 (1989)
3. Slovenko R: Commentary: old wine in a new bottle. *J Am Acad Psychiatry Law* 32:317–18, 2004
4. *Ford v. Wainwright*, 477 U.S. 399 (1986)
5. *Jones v. United States*, 463 U.S. (1983)