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The Application of *Atkins:* Suggestions for Importing Definitions of Intellectual Disability from the Capital Context to Competency Proceedings

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Table of Contents

I. Introduction..... 3
II. Definitions of Intellectual Disability Post-*Atkins* and *Hall* 4
III. Recognized Error and Unresolved Issues in Current Legal Definitions of I/DD 8
A. The First Prong: Intellectual Functioning..... 8
B. The Second Prong: Adaptive Behavior 9
C. Broader Concerns: Over-Reliance on and Manipulation in Expert Testimony 12
IV. Applying Death Penalty Jurisprudence to the Competency Context 14
A. The Broad Framework of Competency Doctrine 15
B. Failures of the Competency Framework in Accommodating Intellectual Disability..... 17
V. Additional Complicating Factors in Competency: Modern Trends in California Prisons 18
VI. Concluding Thoughts and Future Research Directions..... 20
VII. Conclusion 26

I. Introduction

In a speech at the University of Michigan this past October, Antonin Scalia lamented the plethora of recent challenges to the death penalty in the highest court and commented that "it wouldn't surprise [him]" if the death penalty's days were numbered.[1] Similarly, only a few months ago in February, the Pope issued perhaps the Catholic Church's most absolute condemnation of the death penalty, stating that the commandment "Thou shalt not kill" was of "absolute value" and applies "to both the innocent and the guilty," and called for an international abolition of capital punishment.[2]

Given the severe recent constraints placed on capital punishment through injection protocol litigation and the subsequent de facto moratoriums or effective holds on executions in the vast majority of states, it seems highly likely that the death penalty has reached its nadir.[3] The question then, for death penalty advocates and the broader legal community, becomes how to best incorporate the brilliant efforts of the capital defense community to demand humane and ethical treatment of offenders into other areas of the law. Perhaps nowhere is this more necessary and potentially impactful than with the treatment of offenders with intellectual disability.

The criminal justice system is replete with procedures and standards that are altered when the offender has an intellectual disability - the reading of Miranda rights, interrogations, plea-bargaining, jail and prison programming, and parole board hearings as just some examples. While the death penalty sphere has witnessed the most comprehensive litigation around definitions of intellectual disability, a thorough understanding of the offender's individual level of cognitive functioning plays a vital role at an even earlier stage of every criminal proceeding: competency. While the literature has expertly detailed current definitions of intellectual disability within the context of the death penalty following the Court's decisions in Atkins v. Virginia and Hall v. Florida, these discussions are typically limited to how intellectual disability is factored into capital punishment. Similarly, there are several excellent recent explorations of the modern competency doctrine, focusing on the limited applicability of the competency restoration programs for offenders with intellectual disability and the need to extend the exemption from the death penalty automatically to offenders found incompetent to stand trial.[4]

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[1] Scott Bomboy, Scalia's death penalty comments in a global perspective, Constitution Daily (last visited May 13, 2016, 3:00 PM), http://blog.constitutioncenter.org/2015/10/scalias-death-penalty-comments- in-a-global-perspective/.

[2] Philip Pullela, Pope calls for worldwide abolition of death penalty, Reuters (last visited May 13, 2016, 3:00 PM), http://www.reuters.com/article/us-pope-capitalpunishment-idUSKCN0VU0GH.

[3] The Death Penalty Information Center considers twenty-two of the thirty- two current states with the death penalty to either have moratoriums or unclear statuses.

[4] J. Amy Dillard, "Madness Alone Punishes the Madman: The Search for Moral Dignity in the Court's Competency Doctrine as Applied in Capital Cases." 79 Tenn. L. Rev. 461 (2012).

There has not, however,[5] been a direct call for the Atkins and Hall approach to intellectual disability to be applied to competency doctrine. This re-framing would 1) demand competency doctrine to embrace Hall's tying of legal definitions of intellectual disability to evolving medical standards while also 2) recognizing the challenges still faced and needs for reform in accurately and humanely diagnosing intellectual disability in the capital context.

The article explores the definitions of intellectual disability by the Supreme Court in Atkins and Hall before outlining current gaps between the Court's alleged tying of the doctrine to modern scientific definitions and the ways in which assessments of intellectual disability in many states continue to fall short of these standards, as well as other areas of recognized error that the Court has not yet addressed. The next section broadly outlines competency doctrine and the stated purposes of competency proceedings before noting the problems in attempting to apply this doctrine to current understandings of intellectual disability, and in particular the deficiencies of the restoration framework. This section also highlights current increases in California of defendants being found incompetent to stand trial and the potential ramifications of this development with regards to individuals with intellectual disabilities as an example of the need for re-thinking the doctrine more generally. Finally, the paper makes recommendations for future research on intellectual disability in the capital context, in particular with regards to expert testimony, and methods for importing the Atkins/Hall approach to intellectual disability into the competency context.

As such, this article is not intended to be a guideline for practitioners or even necessarily a novel approach to either doctrine – instead, it is an identification of the stated concerns of two realms of criminal procedure with regards to a specific population (individuals with intellectual disability), and a call for a re-working of competency proceedings to embrace the advances courts have made in approaching intellectual disability in the capital context.

II. Definitions of Intellectual Disability Post-*Atkins* and *Hall*

In 2002, the Supreme Court overruled its earlier decision in *Penry v. Lynaugh* and declared the execution of defendants determined to have an intellectual disability[6] to be

[5] As far as this author can determine.
[6] At the time, the Court used the term 'mental retardation,' but has since embraced the terminology now used by the scientific community of
'intellectual disability.'

unconstitutional. Considering the case of Richard Atkins, the Court cited the defendant's IQ score of 59 and the "national consensus" that had emerged since *Penry* in holding that under the Eighth Amendment and the nation's "evolving standards of decency", death was an excessive punishment.[7] Because individuals with an intellectual disability have an "impaired capacity to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others," the Court was not persuaded that the "execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty."[8]

In determining how to define intellectual disability, the Court relied on "two virtually identical and clinical definitions then in existence – one provided by the American Association on Mental Retardation (AAMR)…and the other by the American Psychiatric Association (APA) in its Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR)."[9] Between these clinical approaches, the defendant was required to prove three prongs: 1) intellectual functioning that is "significantly sub-average"; 2) adaptive behavior that is "significantly limited"; and 3) the origin of these impairments in childhood, prior to the age of 18.[10] Rather than explicitly identifying sufficient tests or mechanisms for measuring intellectual disability, the Court instead left to the states "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."[11] Furthermore, the Court did not directly address the issue of how the legal criteria for intellectual disability would continue to interact with clinical developments, in particular whether the legal criteria would remain "static" or change with "subsequent legal and medical developments" or be implemented based on "clinical judgment" or based on a "rigid application of legal rules."[12]

This lack of clarity led to a wide range of interpretation and disparate approaches among states' methods of assessing intellectual disability and even defining the criteria themselves. As perhaps the more measurable of the first two prongs, many states focused on defining intellectual functioning through standardized IQ tests, in particular

[7] Atkins v. Virginia, 536 U.S. 304, 321 (2002) (citing Ford v. Wainwright, 477 U.S. 399, 405 (1986)).
[8] *Id.* at 318, 321.
[9] John H. Blume, Sheri Lynn Johnson, Paul Marcus, and Emily Paavola, "A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorial Bar", 23 William & Mary Bill of Rights Journal 393, 394 (2014).
[10] *Id.* at 394.
[11] *Atkins*, 536 U.S. at 317 (alteration in original).
[12] Robert M. Sanger, IQ, "Intelligence Tests, "Ethnic Adjustments" And Atkins", 65 American University Law Review 87, 95 (2015).

the WAIS-IV and the Stanford-Binet V. Normed to reflect an average citizen's score,[13] the tests seek to determine the participants level of intellectual ability through a series of questions administered typically by a licensed professional. In the case of the WAIS-IV, intellectual disability is measured by two standard deviations from the 'mean' – with a standard deviation of 15, a score indicating intellectual disability typically falls in the range of 70-75 or below (when accounting for standard measurement of error).[14]

Following the Court's decision in *Atkins*, state legislatures often directly reflected the Court's use of clinical language in their statutes and defined intellectual disability with the three prongs.[15] Several legislatures and many lower courts, however, also began to adopt more rigid standards for intellectual disability through the form of firm cut-off scores, defining "significant sub average intellectual functioning" as an IQ score of 75 or below.[16] In *Hall v. Florida*, the Court addressed this issue and resolved some of the ambiguity surrounding its decision in *Atkins* by holding that these kinds of "rigid IQ cutoffs" adhered to in states like Alabama, Florida, Mississippi, and others were unconstitutional.[17] In doing so, the Court reaffirmed that "IQ scores used to ascertain the intelligence of persons facing the death penalty should be treated with 'studied skepticism' and that courts must recognize these tests' imprecision.'"[18] Moreover, and perhaps most importantly, the Court finally committed itself to evolving with the medical understandings of intellectual disability, relying on clinical definitions from the AAMR and the DSM-IV to confirm that diagnoses of intellectual disability would be based on "clinical assessment and not limited by a mechanical application of strict rules."[19]

As demonstrated in *Hall*, intellectual disability cannot simply be measured through intellectual functioning, requiring additional inquiries into the defendant's adaptive behavior. In *Atkins*, the Court emphasized this point and held that "clinical definitions of mental retardation require not only sub-average intellectual functioning, but also

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[13] "Norm-referenced tests" compares participants to one another's scores, as opposed to some objective, criterion-based assessment. Scores are normed as "average" at approximately 100 for the WAIS and 520 for the Stanford-Binet.

[14] American Psychiatric Association, (2013). *Diagnostic and statistical manual of mental health disorders: DSM-5* (5th ed.). Washington, DC: American Psychiatric Publishing at 37 (hereinafter *DSM-5*).

[15] Statutes frequently read to require "significant sub average general intellectual functioning" that exists concurrently with "deficits in adaptive behavior" manifesting before the age of 18. Death Penalty Information Center, *States that have changed their statutes to comply with the Supreme Court's decision in Atkins v. Virginia* (last visited May 13, 2016, 3:00 PM), http://www.deathpenaltyinfo.org/states-have-changed-their-statutes- comply-supreme-courts-decision-atkins-v-virginia.

[16] *Id.*

[17] *Hall v. Florida*, 134 S. Ct. 1997, 2000 (2014).

[18] Sanger, 65 American University Law Review at 95.

[19] *Id.* at 97.

significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18."[20] Adaptive behavior is categorized into three main domains: conceptual, practical and social.[21] In order to be diagnosed as intellectually disabled, the defendant must have demonstrated significant deficits in at least one of these areas.[22]

In direct response to Florida's (and other states with rigid IQ cut-offs) overreliance on IQ tests, the *Hall* Court placed the importance of measuring adaptive behavior at the heart of its opinion. Emphasizing that "an individual's ability or lack of ability to adapt or adjust to the requirements of daily life, and success or lack of success in doing so, is central to the framework…in diagnosing intellectual disability," the Court has embraced a more nuanced and medically sound approach with a focus on how diminished cognitive functioning reflects itself in everyday deficits.[23] Experts and practitioners have found that this kind of information is best derived from as many relevant sources outside the formal assessment context as possible, such as school records, Social Security records, driving records, employment history, medical records, and social and family histories.[24] In order to create a "comprehensive picture of the individual's functioning," the Court recognized the need for testimony on adaptive deficits to appropriately conduct what is a "conjunctive and interrelated assessment."[25]

Finally, the third prong of the assessment is the age-of-onset requirement. The AAIDD 2010 Manual establishes this 'age-of-onset' at eighteen, but the APA's DSM-5 looks to whether there is proof of disability during the entire "developmental period," including prenatal, perinatal, and post-natal causes. Theoretically, this standard could encourage the courts to look beyond the traditionally strict age-18 cut-off, but state legislatures have not generally followed suit.[26] Scholars like Natalie Cheung have advocated for the courts to extend the age-of-onset requirement to twenty-two, following the lead of states like Indiana.[27] Cheung highlights the difficulty defendants may have in proving an intellectual disability if they did not take an IQ test prior to age eighteen and argues that the four

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[20] *Atkins*, 536 U.S. at 317.

[21] *DSM*-5 at 33.

[22] Am. Ass'n on Intellectual Dev. & Disability, Intellectual Disability: Definition, Classification, and Systems of Supports 33 (11th ed. 2010) (hereinafter AAIDD 2010 Manual).

[23] *Hall*, 134 S.Ct. at 1991.

[24] AAIDD 2010 Manual at 47-49.

[25] *Hall* at 2001.

[26] Death Penalty Information Center, States that have changed their statutes to comply with the Supreme Court's decision in Atkins v. Virginia (last visited May 13, 2016, 3:00 PM), http://www.deathpenaltyinfo.org/states-have-changed-their-statutes-comply-supreme-courts-decision-atkins-v-virginia.

[27] Maryland had also extended its age-of-onset requirement to 22, but the legislature abolished the death penalty in 2013. Natalie Cheung, "Defining Intellectual Disability and Establishing a Standard of Proof: Suggestions for a National Model Standard", 23 Health Matrix: Journal of Law-Medicine 317, 340-41 (Spring 2013) (citing Ind. Code Ann. § 35-36-9-2 (West 2016)).

"extra years" under an extended standard more adequately reflect the modern administrative landscape, where low-income individuals may not have interacted enough with the system to have formal records of intellectual disability.[28] While this requirement was not at issue in *Hall*, the Court and state legislatures have consistently highlighted its importance and incorporated the age cutoff into their analyses.

III. Recognized Error and Unresolved Issues in Current Legal Definitions of I/DD

A. The First Prong: Intellectual Functioning

Despite the Court's new 'mandate' in *Hall*, "determinations of whether a particular individual is intellectually disabled is based, in significant part, on IQ test scores."[29] The tests, whether the WAIS or the Stanford-Binet, primarily used to determine these test scores "are not considered to be absolutely accurate," and as such a "standard error of measurement must be taken into account when interpreting the score obtained on any test."[30] Both the DSM and AAIDD define the standard error of measurement as plus or minus five points from the IQ score obtained on the test and require the error is accounted for in any scientifically viable score – for example, the "true IQ score of a person who obtains a score of 75 is within the range of 70-80."[31] Outside of this recognized error, however, there are several other established flaws with the current tests, only some of which the courts have officially accepted as relevant.

Perhaps the most commonly discussed form of error among IQ tests is the Flynn Effect, named after defendant James Flynn. In essence, the Flynn Effect encapsulates the observation that as time progresses, the US population gest better at "some of the kinds of tasks measured" by standardized IQ tests.[32] Thus, "to ensure that all defendants are held to the same metric," 0.3 points must be subtracted for each year since the test at issue was 'normed' to the overall population.[33] Without fully exploring the statistical proof behind

[28] Natalie Cheung, 23 Health Matrix: Journal of Law-Medicine at 340.
[29] Sanger, 65 American University Law Review at 90.
[30] Anne James, Richard Burr, Lisa Greenman, James R. Patton, Anne James, Wendy Peoples, "A Practitioner's Guide to Defending Capital Clients Who Have Mental Retardation/Intellectual Disability" 49 (International Justice Project 3d ed., 2010) (hereinafter Practitioner's Guide).
[31] Practitioner's Guide at 49.
[32] Nancy Haydt, Stephen Greenspan, and Bhushan S. Agharkar,
"Advantages of DSM-5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in Atkins Cases", 82 UMKC Law Review 359, 365 (2014).
[33] Haydt, Greenspan, and Agharkar, 82 UMKC Law Review at 365.

this phenomenon, the upshot of the Effect is that for every three years since the test was normed, the defendant's score must be reduced by 1 full point.

In addition to the Flynn Effect, there are a number of other scientifically recognized forms of error on standardized IQ tests. The WAIS-III is plagued by substandard norms that inflate scores by several points as well as the "Tree Stump Effect," which describes the phenomena that individuals can score a 48 on the test without answering a single item correctly.[34] Excessive re-testing, improper administration of the test, or improper scoring are other commons factors that can lead to a faulty score – and these are identified issues for scientifically supported tests like the WAIS and the Stanford-Binet, let alone the other numerous instruments that are sometimes used by experts but "are not appropriate for diagnosing or ruling out intellectual disability."[35] None of these forms of error were acknowledged by the Court in *Atkins* or *Hall*, and the Tenth Circuit Court of Appeals later outright rejected the Flynn Effect in entirety, holding there was "no scientific consensus on its validity" and that it deserved "no consideration in the mental retardation determination."[36] While *Hall* clearly placed a halt to some of the most egregious state practices involving IQ scores, the courts' and state legislatures' continued overreliance on this single factor in the overall determination of intellectual disability remains to be more fully addressed.

B. The Second Prong: Adaptive Behavior

The Supreme Court's opinion in *Hall* also left open the appropriate considerations and methods courts should require in measuring the second prong of the intellectual disability inquiry, adaptive behavior. Put simply, the adaptive prong's "sole purpose" is to "ascertain that the measured intellectual impairment has had real-life consequences."[37] While the Court rejected state practices that denied defendants the right to present evidence on the second prong, like rigid IQ score cut-offs, it provided no guidance on how to courts should assess the daily consequences of cognitive impairment.[38]

The Court's reticence to more fully define adaptive behavior testing is likely the result of several factors. First, while most courts and the medical community accept IQ tests like the WAIS and Stanford-Binet as appropriate tools to determine intellectual functioning (at least when

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[34] See James R. Flynn, What is Intelligence? Beyond the Flynn Effect (Cambridge University Press 2009).
[35] Practitioner's Guide at 53.
[36] Haydt, Greenspan, and Agharkar, 82 UMKC Law Review at 382-83 (citing *Hooks v. Workman*, 689 F.3d 1148, 1170 (10th Cir. 2012).
[37] James W. Ellis, "Mental Retardation and the Death Penalty: A Guide to State Legislative Issues," 27 Mental & Physical Disability Reporter 11, 13 n.29 (January/February 2003).
[38] "the law requires that [Hall] have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime." *Hall*, 134 S.Ct. at 2001.

administered correctly and when accounting for error), there is no clear-cut, widely accepted standardized test for adaptive behavior. Experts have sometimes used the Vineland Adaptive Behavior Scale and the Woodcock- Johnson Scales of Independent Behavior, but these tests have severe limitations.[39] The Vineland is used primarily to test "social skills," but it is not a comprehensive measurement of adaptive functioning and has been criticized for its heightened focus on "more concrete skills" rather than the more "subtle, abstract and multi-faceted adaptive deficits."[40] Meanwhile, the Woodcock-Johnson Scales are designed primarily to "measure adaptive functioning and social skills in children," making them ill-suited to assess adaptive functioning for adult subjects.[41] Recently, the AAIDD developed the Diagnostic Adaptive Behavior Scale (DABS), a set of adaptive functioning tests created to be more rooted in current scientific definitions of how limitations manifest.[42] But, without more time to evaluate potential error in the test's administration and application in the courtroom, the DABS currently is a merely promising option for assessing adaptive functioning.

Second, given the purpose of the second prong and the issues courts have had with IQ tests, standardized tests may not even be an appropriate means to measure adaptive behavior. Both the APA and AAIDD call for multiple sources of data to compile a holistic understanding of a defendant's individual cognitive functioning and, above all, potential adaptive deficits.[43] Standardized tests cannot capture all of the information needed for a scientifically rigorous assessment on adaptive behavior without supplementary evidence from records and interviews with a defendant's family members, friends, former teachers, or other persons who can attest to her behavior. Moreover, while standardized tests may appear enticing as administratively efficient and 'objective,' the Court's experience with IQ tests demonstrates the false clarity offered by trying to simply determine IQ with one, or even multiple, tests. Standardized tests frequently contain inherent error, are often subject to expert manipulation, and can be too easily adopted by states as bright-line, dispositive factors in what is designed to instead be a complex, multi-faceted evaluation of intellectual functioning. As such, perhaps the Court and states would be better served by establishing required criteria that must be considered under the adaptive behavior prong, along with records (such as social security and education records) and testimony

[39] Cheung, 23 Health Matrix: Journal of Law-Medicine at 347.
[40] Practitioner's Guide at 46.
[41] Cheung, 23 Health Matrix: Journal of Law-Medicine at 347.
[42] The test's stated purpose is to assess "limitations" based on an individual's ability to "perform activities – what a person does, rather than can do…dependent on the expectations of age, culture group, and the demands of particular situations and environments." Am. Ass'n of Intellectual and Dev. Disabilities, "FAQ on AAIDD's New Behavior Scale" (last visited May 13, 2016, 3:00 PM), https://aaidd.org/intellectual- disability/diagnostic-adaptive-behavior-scale/faqs#.Vwsk4BMrJZ0
[43] "In addition to the use of a standardized measure of adaptive behavior…information derived from an individual's social history must be considered." Brief for the ARC of the United States and the Bazelon Center for Mental Health Law in Support of Petitioner at 8, Ortiz v. United States,
664 F.3d 1151 (2011) (quoting DSM-5 at 49-50). "Different sources of data are 'essential to providing corroborating information that provides a comprehensive picture of the individual's functioning.'" ARC Amicus Brief at 9 (quoting AAIDD 2010 Manual at 47).

that must be gathered (from a client's immediate family members, for instance). In doing so, the court would have clear markers to use when assessing adaptive behavior while also retaining flexibility to explore other relevant factors and considerations in the specific case at hand.

Several states have already demonstrated the dangers of not properly defining adaptive behavior. In her article "Defining Intellectual Disability and Establishing a Standard of Proof," Natalie Cheung highlights Tennessee and Texas as examples of the "varying definitions" of adaptive behavior and their effects on "what evidence defendants are required to present" to satisfy the second prong.[44] In *Coleman v. State*, the Tennessee Supreme Court relied on the APA's definition in the DSM-IV to define adaptive behavior as requiring "significant limitations in at least two of the following basic skills: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety."[45] The DSM has changed from requiring deficits in a strict number (two) of skills-based criteria to a more broad-based assessment of "impairment in everyday adaptive functioning" in the conceptual, social, and practical domains, scientifically outdating Tennessee's approach.[46] But at the time of the decision, the Tennessee court, like many other states, generally followed the prior scientific thinking to craft its definition of adaptive behavior.

This kind of general compliance with scientific thinking, however, contrasts sharply with Texas's definition of adaptive behavior and the need for a more uniform standard. In *Ex Parte Briseño*, the Texas Court of Appeals established a requirement of "substantial impairments in a person's ability to meet the expected cultural and age-appropriate 'standards of maturation, learning, personal independence, and/or social responsibility.'"[47] As many scholars have noted, "the Lonestar State created out of non-clinical whole-cloth the so-called 'Briseño factors' which make it extraordinarily difficult to prove deficits in adaptive functioning" because they demand deficits under *all* criteria of adaptive behavior skills.[48] When applied to the first prong and IQ scores, these kinds of modifications to definitions of intellectual disability were found to frustrate the Eighth Amendment under *Hall*, but no such case has yet to address this issue for adaptive behavior.

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[44] Cheung, 23 Health Matrix: Journal of Law-Medicine at 329.
[45] Cheung, 23 Health Matrix: Journal of Law-Medicine at 330 (quoting Coleman v. State, 341 S.W.3d 221,248 (Tenn. 2011)).
[46] See *DSM*-5.
[47] Cheung, 23 Health Matrix: Journal of Law-Medicine at 330 (quoting Briseño 135 S.W.3d 1, 7 (Tex. Crim. App. 2004)). See also Tex. Health & Safety Code Ann. § 591.003 (1) (2012).
[48] Blume, 23 William & Mary Bill of Rights Journal at 399.

C. Broader Concerns: Over-Reliance on and Manipulation in Expert Testimony

Underlying critiques of the current approaches to both the first and second prong are concerns with not only the accuracy of the instruments measuring intellectual disability, but also the methods and qualifications of practitioners implementing these instruments. Despite the enormous role experts play in assessing intellectual disability with the choice of instrument, interpretation of raw scores, and presentation of findings, neither the AAIDD nor the APA directly address the "criteria for who is qualified to testify as an expert regarding a capital defendant's intellectual disability."[49] The Court's decisions in *Atkins* and *Hall* are similarly silent on this issue, deferring to local legislatures and courts to determine the legitimacy of the testifying expert. Because most mental health professionals are not experts in intellectual disability with "training, experience and expertise in diagnosing and working with people" with intellectual disability, the states who have no standard for testifying experts "risk executing an [individual with intellectual disabilities] due to reliance on the testimony of inexperienced 'experts.'"[50]

Perhaps no case better illustrates the dangers of failing to effectively regulate expert testimony than *Ex Parte Briseño*, the Texas capital case that also established the state's unique approach to adaptive behavior measurements. The defense expert in that case, specializing in the treatment of intellectual disability, focused on the defendant's deficits in adaptive behavior in accordance with current scientific thinking and ultimately concluded the defendant's IQ score of 72 and adaptive deficits pointed to a diagnosis of intellectual disability.[51] And yet, the court chose to accept the testimony of the state's expert, despite the expert only specializing in statistical methodology and broader forensic diagnosis, and his conclusion of anti-personality disorder.[52] In doing so, the court created the above- mentioned and much-maligned *Briseño* factors and, even more tragically, sentenced a man to death who likely had an intellectual disability under widely accepted scientific definitions.

The use of ethnicity-based upward adjustments for IQ scores, detailed by Robert Sanger in his article "IQ, 'Ethnic Adjustments' and *Atkins*," are another disturbing example of forensic experts manipulating intellectual disability measurements in ways inconsistent with proper forensic thinking. "Ethnic adjustments" refer to "the practice of adding

[49] Cheung, 23 Health Matrix: Journal of Law-Medicine at 330; Although the AAIDD does spend an "entire chapter" discussing the importance of an expert with "clinical judgment" in order to obtain a reliable diagnosis. Practitioner's Guide at 43.
[50] Practitioner's Guide at 43; Cheung, 23 Health Matrix: Journal of Law-Medicine at 333.
[51] *Ex Parte Briseño*, 135 S.W.3d 1,13 (Tex. Crim. App. 2004).
[52] Id.

points to African American and Latina/o IQ scores for the purposes of an *Atkins* hearing."[53] Sanger details the Florida Supreme Court case *Hodges v. State*, where the court accepted the testimony of one prosecution expert that "IQ tests tend to underestimate particularly the intelligence of African- Americans" and that he was "above where one would function if he [was a person with an intellectual disability]."[54] As Sanger points out, the Florida court (prior to the Supreme Court's ruling in *Hall*) simultaneously held that there was firm cutoff IQ score of 70 for individuals to be eligible for the death penalty, but African-Americans and Latinos could have their scores upwardly inflated if they scored below this threshold in order to make them eligible.[55]

Sanger has also recognized that the acceptance of ethnicity-based upward adjustments are not "confined to Florida," but have also appeared in cases in Texas, Alabama, Tennessee, Missouri, California, Pennsylvania, and Ohio, as well as the Fifth Circuit. In cases like *Champion* and *Lewis*, California courts accepted testimony from neuropsychologist Charles Hinkin that "because Blacks ordinarily perform more poorly than Whites on those tests, it is preferable to use ethnically corrected norms when scoring the tests."[56] In *Champion*, the California Supreme Court affirmed the death penalty sentence.[57] In Texas, the testimony of one frequent state expert who upwardly adjusted scores, George Denkowski, was found to be so egregious that the Texas State Board of Examiners of Psychologists banned him from practicing forensic psychology in Texas.[58] Denkowski had served as an expert for the prosecution "in at least 25 capital and noncapital cases in Texas and around the country," including four inmates who at the time of his disbarment had already been executed, and had used justifications like the defendant's "impoverished background" find defendants competent.[59] For example, Denkowski believed individuals raised in low-income circumstances may not have learned "basic skills like using a thermometer or maintaining hygiene" because those skills may not have been "valued" in their communities, and he raised IQ and adaptive behavior scores on this unscientifically based premise.[60]

Ethnicity-based upward adjustments are, unsurprisingly, a "fallacy, both logically and clinically," for several reasons.[61] By comparing an individual's performance on the test to "norms of a particular group rather than the standardized norms of the community as a whole," upwardly adjusting scores defeats the principle underlying norming at all, which

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[53] Sanger at 108.
[54] Hodges v. State, 55 So. 3d 515 (Fla. 2010).
[55] Sanger, 65 American University Law Review at 108-09.
[56] In re Champion, 58 Cal.4th 965, 988 (Cal. 2014); Sanger at 114 (citing 12 Reference Hearing Transcripts at 2011, In re Lewis, No. S117235 (Cal. June 24, 2011)).
[57] See *In re Champion*, 58 Cal.4th 965.
[58] Texas Defender Service, "Forensic Psychologist Banned from Making [Intellectual Disability] Evaluations in TX Death Penalty Cases" (April 15, 2011), http://texasdefender.org/wp-content/uploads/g.denkowski-press- release.pdf.
[59] *Id.*
[60] Brandi Grissom, "Psychologist Who Cleared Death Row Inmates is Reprimanded," New York Times (April 14, 2011 http://www.nytimes.com/2011/04/15/us/15ttpsychologist.html?_r=0.
[61] Sanger, 65 American University Law Review at 117.

is measuring how the individual scores in comparison to the "community as a whole."[62] Sanger goes on to note that there may be a correlation between socioeconomic statuses and test scores, but that the science detailing a correlation on the baseline of genetics and race is much more uncertain.[63]

Following its general practice of non-intervention in regulating intellectual disability experts, the Supreme Court denied cert when given the opportunity to address ethnicity-based upward adjustments in *Hernandez v. Stephens*.[64] While these kinds of adjustments are a particularly egregious form of expert score manipulation, they represent the broad deference afforded to forensic experts (regardless of specific expertise) in their assessment of intellectual disability and the ways in which state experts have historically been willing to "creatively" manufacture death-eligible scores.

While the above-discussed changes of intellectual disability assessments and the experts who administer would improve outcomes for defendants facing the death penalty, directly tying the legal assessment tools of intellectual disability to evolving medical definitions, as the Court did in *Atkins* and *Hall*, has not been extended to other realms of criminal procedure. Until this occurs, many offenders, defendants, and incarcerated men and women with intellectual disabilities will remain unidentified and face a system that does not properly account for or accommodate their needs and cognitive abilities.

IV. Applying Death Penalty Jurisprudence to the Competency Context

As the "gravest sentence our society may impose," the death penalty requires courts to exercise heightened scrutiny for error and an attention to the humanity of defendants that continues to remain absent from the criminal context at large.[65] Offenders with intellectual disabilities are one group the courts have found deserving of exemption from capital punishment. So, the question remains – why should this increased protection be limited to the death penalty?

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[62] Id.
[63] Id. at 122.
[64] In *Hernandez*, the Fifth Circuit had affirmed the death penalty sentence of a Latino man whose IQ was upwardly adjusted. *Id.* at 91.
[65] *Hall*, 134 S.Ct. at 2001.

When turning to the more "typical" world of non-capital criminal procedure, one mechanism stands out as seemingly designed to account for the complexities and vulnerabilities of persons with intellectual disabilities: determinations of competency. Grounded in the concept that a defendant has the right to present her own defense, the right to not be tried while incompetent has been firmly entrenched in the American legal system dating back to the 19th century.[66] And yet, the idea of incompetence, much like intellectual disability, has taken on an aura of "I'll know it when I see it," stunting a more nuanced approach that would acknowledge the myriad of disabilities and disorders a defendant could have. Within this framework, importing legal understandings of intellectual disability from the capital context could more closely tie competency proceedings to evolving medical standards, and subsequently allow the proceedings to actually live up to their lofty Constitutional aspirations.

A. The Broad Framework of Competency Doctrine

The general competency landscape can be laid out through a brief description of the main holdings in several Supreme Court cases. The Court first established the test for determining competency in *Dusky v. United States*.[67] In a brief opinion, the Court adopted the Solicitor General's recommendations and set out two primary elements for the competency assessment: a defendant must have 1) a "sufficient present ability to consult with his lawyer" and 2) a "rational as well as factual understanding of the proceedings against him."[68] In simpler terms, the defendant needs to have the ability to "see, hear, and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense."[69] Later, in *Jackson v. Indiana*, the Court more fully addressed the issue of competency to stand trial and fleshed out the basis of the right.[70] There, the Court found that the state of Indiana's indefinite commitment of an illiterate, deaf, and mute defendant until the court could deem him sane violated his rights under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[71] Basing its holding

[66] David W. Beaudreau, "Due Process or 'Some Process'? Restoring pate v. Robinson's Guarantee of Adequate Competency Procedures", 47 Ca. W. L. Rev. 369, 375-76 (2011).
[67] Haleigh Reisman, "Competency of the Mentally Ill and Intellectually Disabled in the Courts", 11 J. Health & Biomedical L. 199, 209 (2015).
[68] Dillard, 79 University of Baltimore School of Law at 475.
[69] Practitioner's Guide at 199 (quoting Odle v. Woodford 238 F.3d 1084, 1089 (9th Cir. 2001)).
[70] Reisman, 11 J. Health & Biomedical L. at 208.
[71] Reisman, 11 J. Health & Biomedical L. at 206 (quoting Jackson v. Indiana, 406 U.S. 715, 730-31 (1972): "a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future").

on the Fourteenth Amendment, the Court found it "unnecessary" to reach the petitioner's Eighth Amendment claims.[72]

In *Drope v. Missouri* and *Pate v. Robinson*, the Court further elaborated that a court has the obligation to sua sponte order an evaluation and conduct a hearing where there is "sufficient doubt" surrounding the defendant's competency.[73] The question of competency can be raised anytime from arraignment through sentencing.[74] Broadly, competency doctrine is seen to serve four main legal purposes: 1) to protect the accuracy of the individual's adjudication as a criminal, 2) to guarantee a fair trial as provided under the Sixth Amendment, 3) to "preserve the dignity and integrity of the legal process," and 4) to ensure a defendant understands the reasoning behind her punishment if she is found guilty.[75] Courts have also consistently cited the Due Process Clause as an additional source of the competency requirement – in other words, the right to not stand trial and be found guilty while incompetent has roots in the Fourteenth Amendment as well.[76]

Within this broad framework, the Court permits the State to place the burden on the defendant to establish competency by a preponderance of the evidence,[77] but the State cannot demand proof of competency by clear and convincing evidence.[78] The Court has not defined a method of determining competency, instead leaving the standard open-ended and at the discretion of the judge. Not surprisingly, however, courts have recognized both mental illness and intellectual disability as sufficient conditions for a defendant to be found incompetent to stand trial because they may substantially affect a defendant's ability to understand the proceedings and assist counsel.[79] Similar to intellectual functioning testing in the capital context, courts frequently rely on forensic experts and standardized instruments to determine competency. The McGarry Scale or "Competency to Stand Trial Instrument" is one of the most prevalent, testing a defendant's competency through a 13-point checklist.[80] Another common tool is the MacArthur Competence Assessment Tool – Criminal Adjudication (MacCAT-CA).[81] While these tests are not specifically designed to test the competency of persons with an intellectual disability, the Competence Assessment to Stand Trial for Defendants with

[72] Jackson v. Indiana, 406 U.S. at 739.
[73] Reisman, 11 J. Health & Biomedical L. at 211; Practitioner's Guide at 197.
[74] 18 U.S.C. § 4241(a) (2006).
[75] Reisman, 11 J. Health & Biomedical L. at 208-09 (quoting Dillard, 79 Tenn. L. Rev. at 474).
[76] See Drope v. Missourri, 95 S.Ct. 896, 900 (1975); Pate v. Robinson, 86 S.Ct. 836, 842 (1966).
[77] Medina v. California, 505 U.S. 437 (1992).
[78] *See Cooper v. Oklahoma*, 517 U.S. 348 (1996).
[79] Reisman, 11 J. Health & Biomedical L. at 210.
[80] Practitioner's Guide at 198.
[81] See Thomas Grisso et. al, Evaluating Competencies: Forensic Assessments and Instruments (2d ed., Kluwer Academic/Plenum Publishers 2003).

Mental Retardation, or CAST*MR, is one of a limited number of measurement tools more closely tailored to I/DD.[82]

These standardized tests, however, are still subject to same issues of error and expert manipulation, and as a result the courts have remained unpredictable in what level of IQ will result in a finding of competence.

B. Failures of the Competency Framework in Accommodating Intellectual Disability

Even though intellectual disability has a clear impact on a defendant's ability to assist counsel and understand proceedings, current competency standards fail to properly integrate modern scientific approaches to I/DD and differentiate intellectual disability from mental illness. Looking to the capital context and both the APA's and AAIDD's definitions of intellectual disability, defendants with cognitive deficits may have multiple barriers to competently stand trial. Defendants with intellectual disabilities frequently experience problems engaging in abstract thinking and the type of "goal-directed behavior" that requires a person to sequence decisions and understand their consequences. As a result, a defendant's ability to follow the ordered intricacies of trial will often be limited and unlikely to satisfy the *Dusky* demand of a "rational as well as factual understanding(s) of the proceedings." Defendants with I/DD also struggle with decision-making, as it also requires "integrative thinking" and "an awareness of a hierarchy of goals and desires."[83] These decision- making difficulties can have a profound impact on a defendant's capacity to "consult" with her lawyer, assert preferences for strategic decisions, or provide relevant information to "assist" with her own defense.[84]

Moreover, individuals with intellectual disabilities often overestimate their own abilities and have developed sophisticated "masking techniques" to hide their impairments - what Robert Edgerton has termed the "cloak of competence."[85] This type of behavior is particularly common in individuals with mild intellectual disability. Given that the current system requires the judge or counsel to raise competency issues, there is an especially high risk of failing to identify and hold hearings for individuals who, in reality, may not truly understand the proceedings or providing the kind of effective self-assistance that a

[82] Practitioner's Guide at 200.
[83] Practitioner's Guide at 22.
[84] Deficits in decision-making also have major implications for a defendant's ability to properly understand and evaluate plea deal options, but this complex additional area of competence falls outside the scope of this paper.
[85] Robert Edgerton, The Cloak of Competence (University of California Press, Berkeley and Los Angeles, CA, 1993).

competent defendant would. While individuals with severe mental illness may be easily identifiable and present clear questions of competency, the nature of intellectual disability shows the pitfalls of failing to distinguish between mental illness and I/DD and the need for courts to be proactive in making determinations.

Even if a defendant with an intellectual disability is identified by the court and found incompetent to stand trial, however, the current system's methods for handling these defendants are still inadequate. When a defendant is found incompetent to stand trial, the case remains open while the defendant participates in a competency restoration program.[86] Once the defendant has been restored to competency, the proceedings resume.[87] But, if "sufficient doubt" as to the defendant's competency emerges again later, the restoration process is repeated.[88]

As Haleigh Reisman and several other scholars have noted, the criminal system has traditionally failed to properly distinguish between mental illness and intellectual disability in the realm of competency, especially given that the "courts' use of competency restoration programs for persons with intellectual disabilities are inappropriate since the likelihood of restoration to competency is low."[89] While mental illnesses are not necessarily curable, they often have treatment plans that can allow individuals to live with little to no assistance. Meanwhile, intellectual disability is a permanent, cognitive condition that is "incurable," rendering the kinds of jail-based or outpatient restoration programs typically ordered by the courts improper. The limited studies that have been done on the success of restoration programs for individuals with intellectual disabilities have borne out these problems, although this kind of research is admittedly underdeveloped.[90] Overall, the courts tend to "tilt toward findings of competence in marginal cases," likely because of the reduced likelihood that individuals with intellectual disability will be "restored" to competency through a restoration program.[91]

V. Additional Complicating Factors in Competency: Modern Trends in California Prisons

Aside from differences in the nature of intellectual disability and mental illness, recent developments in states like California also suggest an immediate need to import more

[86] Reisman, 11 J. Health & Biomedical L. at 199.
[87] *Id.*
[88] *Id.*
[89] *Id.* at 229-30.
[90] *Id.* at 230.
[91] Richard Bonnie, "The Competence of Criminal Defendants with MR to Participate in Their Own Defense", 81 Journal of Criminal Law and Criminology 419, 422 (1990).

current scientific understandings into the procedures following a finding of incompetency. There is a high rate of co- occurrence between mental illness and intellectual disability in the general population, and this is replicated among individuals who are currently incarcerated and diagnosed in California.[92] Thus, establishing a completely separate procedure for persons accused of criminal acts who have an intellectual disability ignores, in the majority of cases, the more complex nature of the individual's cognitive functioning. While the defendant may benefit from some restoration procedures like an appropriate medication regimen, these programs still do not address the underlying intellectual disability and will not "restore" her to competence.

In addition to the issue of co-occurrence, the current structural limitations of restoration facilities in states like California show the logistical challenges of existing competency doctrine. In Los Angeles, cases where defendants were found incompetent to stand trial have increased from 944 in 2010 to 3,528 in 2015.[93] This rapid uptick in findings of incompetency has exposed California's dearth of facilities providing restoration procedures, especially for individuals who cannot simply be medicated in order to be "restored" to competence. As a result, there have been several recent suits against the state for improper detentions.

For example, in *In Re Williams*, the California Second District Court of Appeal considered a defendant found incompetent to stand trial due to a "developmental disability" who was placed at county jail for a period of over two years while awaiting a transfer to a developmental center to undergo restoration treatment.[94] The court held that the defendant's placement in county jail for treatment was improper and that, in light of the Department of Developmental Services' determination that the defendant required treatment in a regional facility, his continued detention at the county jail was unreasonable.[95]

In particular, the details of *In re Williams* highlight some of the more troubling aspects of current competency doctrine and restoration procedures for persons with intellectual disabilities. While awaiting trial on "a variety of sex crime charges" when he was determined to have a "moderate" intellectual disability, Mr. Williams was placed on a six-to-nine month waitlist for the regional Porterville Development Center.[96] Porterville, however, refused to take the defendant because of "safety concerns," despite the fact that,

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[92] Joan Petersilia, "Clark v. California, Screening, Referral, and Prevalence of California Prisoners with Developmental Disability", Stanford Law School (May 9, 2011).
[93] Taylor Walker, *More Mental Health Competency Cases in LA,* witness LA (March 1, 2016), http://witnessla.com/courts/2016/taylorwalker/more- mental-health-competency-cases-in-la-felony-theft-thresholds-bills-target- rape-kit-backlogs-and-justice-thomas-speaks/.
[94] *In re Williams*, 228 Cal.App.4th 989, 989 (2d Dist. 2014).
[95] *Id.*
[96] *Id.* at 993.

as the district attorney observed, Mr. Williams was limited to a wheelchair and was "very limited in his physical capacity" for the entirety of the case.[97] In August 2013, over two and half years after charges were filed and two years since a determination of incompetency, the defendant filed a writ of habeas corpus, with the court eventually finding his length of detention without treatment to be unreasonable.[98]

In Re Williams is an indictment of current competency system's ability to handle intellectual disability, but it is especially interesting because of the relevance of the defendant's accused crime, a sex offense, in affecting his ability to receive 'restoration treatment.' As Joan Petersilia and others have noted, the numbers of incarcerated persons with intellectual disabilities and sex offenders are both growing rapidly in California's prison population (some of the only demographics to be doing so), and the convergence of the two populations is also becoming an increasingly important issue.[99] In re Williams, then, cannot be dismissed as an outlier of unique circumstances, but must instead be viewed as a possible predictor of the dangerous limitations of the competency system for a large population of defendants, both in California and likely elsewhere. The need for a revised competency doctrine that is more attuned to medical realities of intellectual disability has never been higher, and current definitions of intellectual disability in the capital context provide a clear starting point.

VI. Concluding Thoughts and Future Research Directions

When evaluating the current rhetoric and statistics in our criminal justice system, there is a definitive sense that the upcoming era will be defined by a more data-based approach to crime that will be more efficient and, hopefully, more effective. But while, as President Obama himself said, our criminal system may not be "as smart as it should be,"[100] being thoughtful about criminal policy cannot only focus on reducing the numbers on crime rate, the disproportionate incarceration of minorities, and rates of recidivism. There must also be a focus on the humanity and individuality of each defendant, including their unique abilities and disabilities. Offenders with intellectual disability are a rapidly growing population in the criminal system, and a more nuanced and scientifically driven

[97] *Id*. at 998.
[98] *Id*. at 1014-15.
[99] Joan Petersilia, "Clark v. California, Screening, Referral, and Prevalence of California Prisoners with Developmental Disability," Stanford Law School, May 9, 2011.
[100] David Hudson, President Obama: 'Our Criminal Justice System Isn't as Smart as It Should Be, the White House (July 15, 2015, 1:12 PM), https://www.whitehouse.gov/blog/2015/07/15/president-obama-our-criminal-justice-system-isnt-smart-it-should-be.

understanding of their condition will only allow the system to function more effectively and efficiently.

The holdings from *Atkins* and *Hall* are examples of the Court grappling with and embracing modern scientific understandings of intellectual disability, and this approach should be encouraged. But, there are at least two clear areas that need addressing in the current landscape. First, there is still a great deal of existing error in measuring intellectual disability: under the intellectual functioning prong, the courts have still not recognized scientifically-accepted instrument errors like the Flynn Effect, and under the adaptive behavior prong, the broader uncertainty on what methods are legally required have produced expert- and test-based error. The thoughts below are both suggestions for changes in the current capital and competency doctrine while also acknowledging areas of need for future research.

1. *Courts or state legislatures should more clearly define legally acceptable practices for measuring intellectual disability, regardless of the proceeding, in order to ensure rigorous, scientifically- legitimate assessments and prevent expert score manipulation.*

While perhaps the most effective way to guarantee proper methods of measuring intellectual disability would be to require complete transparence (and the resulting public accountability), this is unlikely, especially for standardized instruments like the WAIS-IV or the new adaptive behavioral tests. Because these instruments are normed to the general public and are subject to phenomena like the "practice effect," where individuals tend to score higher on the test the more exposure they gain, the creators and administrators of these instruments are unsurprisingly very protective of their dissemination.[101] As a result, it would be difficult to publicize the contents of the instruments to any meaningful degree without, at least in the eyes of these experts, compromising their usefulness.
Courts or state legislatures can still prevent some of the worst abuses by developing criteria for the instruments experts may use in assessing intellectual disability that are aligned with current best practices in the scientific community. For example, under the first prong, the Wechsler Intelligence Scale for Children (WISC), the Wechsler Adult Intelligence Scale (WAIS), and the Stanford-Binet Intelligence Scale are all tests that have been recently normed and are "reputable and reliable instruments."[102] State legislatures or courts could use these as standard and proper means of measuring intellectual functioning while also using the common components of these already-established tests to determine the validity of any new, potentially more accurate instruments.

[101] Practitioner's Guide at 44-5.
[102] *Id.* at 44.

Under the adaptive behavior prong, decision-makers should also identify reliable standardized instruments and what characteristics make the tool reliable in order to assess future alternatives. The recently developed Diagnostic Adaptive Behavior Scale may be a strong starting point if it proves to be an effective and relatively error-free mode of measuring intellectual disability, but there is no way to yet say if that is the case.[103] Given that adaptive behavior assessment is highly individualized, however, courts and legislatures should begin by requiring the introduction and use of records that may indicate a disability, such as education, employment, and medical histories as well as clinical interviews with "a person or persons who knows the individual well."[104] These decision-makers should also codify the APA and AAIDD recommendation that assessors focus on deficits rather than any skills or strengths the defendant demonstrates in her behavior and directly tie these measurements to the domains outlined by the AAIDD and APA. By doing so, scientifically suspect approaches like the Briseño factors would be rendered invalid, and courts would not be able to dismiss claims of intellectual disability simply by pointing to isolated perceived behavioral strengths.

2. *Courts or state legislatures should officially acknowledge recognized forms of error in current standardized tests and require their consideration in proceedings when determining intellectual disability.*

Even after *Atkins* and *Hall*, the Supreme Court has only required lower courts and state legislatures to account for the standard measurement of error. The Flynn Effect and Tree Stump Effect are both widely accepted as valid scientific phenomena, and courts should follow suit and demand that experts integrate these forms of error into calculations of a defendant's cognitive functioning. Were the legislature to incorporate these requirements into a statute on measuring intellectual disability, it would only serve to further guarantee more accurate IQ scores in competency and capital adjudications.

As stated in the first recommendation, identifying reliable measurement tools for assessing IQ and adaptive behavior would reduce the chance of error from an inappropriate instrument and allow the courts to ensure that recognized error, like the Flynn and Tree Stump Effect, was not ignored by the expert. Moreover, limiting the options for acceptable tests could address issues of re-testing and the "practice effect," where a defendant's score may improve simply from having taken similarly structured intellectual functioning assessments before. Consolidating the tests that experts can use

[103] A thorough look into the development of the DABS and its potential advantages can be found in "Development and Standardization of the Diagnostic Adaptive Behavior Scale: Application of Item Response Theory to the Assessment of Adaptive Behavior," by Tassé et al. Marc J. Tassé, Robert L. Schalock, David Thissen, Giulia Balboni, Henry (Hank) Bersani, Jr., Sharon A. Borthwick-Duffy, Scott Spreat, Keith F. Widaman, Dalun Zhang, and Patricia Navas, 121:2 American Journal on Intellectual and Developmental Disabilities 79-94 (2016).
[104] AAIDD Manual 2010 at 45.

would allow the courts to quickly determine potential risk for a skewed score from re-testing.

3. *Forensic expert witnesses' testimony on intellectual disability should be subject to higher scrutiny from the courts. States should develop specific certification criteria for experts who assess intellectual disability and testify to their findings, and these criteria should be tied to evolving standards in the field.*

Even with standardized testing and increasingly defined diagnostic guides from the APA and AAIDD, determining intellectual disability is still a highly discretionary practice. Since the Supreme Court has only prohibited practices like basing diagnoses entirely from an IQ score or using firm cut-off scores, it is especially important that local legislatures and courts hold forensic witnesses to a high standard of expertise. Ethnicity-based upward adjustments should be strictly prohibited, both under the intellectual functioning and adaptive behavior prongs. Moreover, state legislatures and the courts should develop criteria, either statutory-based or through an administrative agency, that requires a level of training in specifically diagnosing intellectual disability. While mental health organizations have published "ethical codes and practice guidelines" for forensic testimony, there are currently no mechanisms demanding these guidelines be followed.[105] By developing more concrete standards and threatening disbarment if a clinician neglects best practices in assessment and testimony, decision-makers could prevent faux-experts like George Denkowski taking advantage of judicial deference to expert testimony in this field to promulgate bad science, and the substantial harm to defendants that results.

In conjunction with these broad recommendations on expert testimony, more research is needed in this area. While Matthew Large and Olav Nielssen studied experts' reports in sixty-seven personal injury cases to determine the "degree of diagnostic agreement among adversarial mental health experts,"[106] this author is not aware of any similar studies on experts testifying in criminal trials on intellectual disability, either in competency or capital proceedings. Furthermore, like Dr. Hinkin in California, there appear to be cadres of forensic experts who typically testify for the state in certain regions (in Mississippi, for example, Drs. Gil Macvaugh and Robert McMichael are two common experts used by the state in Atkins cases). An exploration of patterns in their scoring of tests and treatment of prior IQ scores that might rule a defendant death-ineligible may support

[105] Nancy Haydt, "The DSM-5 and Criminal Defense: When Does a Diagnosis Make a Difference?" 4 Utah Law Review 850, 850 (2016).
[106] Haydt, 4 Utah Law Review at 853 (citing the study by Large and Nielssen entitled "Factors Associated with Agreement Between Experts in Evidence About Psychiatric Injury," 36 J. Am. Acad. Psychiatry L. 515, 516-17 (2008)).

Large and Nielssen's findings that "both bias and error" affect even well credentialed forensic experts.[107]

4. *Competency proceedings should be reformed to differentiate between intellectual disability and mental illness and to provide forms of treatment and alternative pathways than current restoration programs for defendants with intellectual disabilities.*

As currently established, competency proceedings do not properly account for the differences between mental illness and intellectual disability, either at the early stages of the proceedings (where potential incompetence is identified and the court undertakes a competency inquiry) or in response to a finding of incompetence. Intellectual disability involves, as listed above, a complex series of inquiries that are very distinct from assessments of mental illness – defendants with an intellectual or developmental disability face much different challenges than persons with mental illnesses in communication, comprehension, and overall cognitive functioning, all of which inform competency. Moreover, in the majority of cases, it may be wise to have competency assessments include separate inquiries into both the presence of mental illness and intellectual disability.

Above all, however, this distinction is vital not only in how competency is determined at trial, but because once a finding of incompetency has been made, "competency restoration programs for persons with intellectual disabilities are inappropriate since the likelihood of restoration to competency is low."[108] Some scholars, like Barry Wall and Paul Christopher, have outlined training programs for intellectual disability who are found incompetent to stand trial that may be effective in restoring competence to satisfy the current legal standard,[109] but intellectual disability is still a "lifelong condition that is incurable."[110] There can be no real "restoration" of competency, because there cannot be any medicating or legitimate changes to the underlying condition.
In general, "very few studies and information exist regarding competency restoration" for defendants with intellectual disabilities, even though a growing number of defendants have intellectual disabilities.[111]

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[107] Haydt, 4 Utah Law Review at 855.
[108] Reisman, 11 J. Health & Biomedical L. at 230.
[109] Barry W. Wall, MD, and Paul P. Christopher, MD, "A Training Program for Defendants with Intellectual Disabilities Who Are Found Incompetent to Stand Trial." 40 J Am. Acad. Psychiatry Law 366, 366-73 (2012) (conducting a study on the Slater Method and articulating findings on restoration of competency for individuals with borderline intellectual functioning).
[110] Reisman, 11 J. Health & Biomedical L. at 229.
[111] *Id.* at 232.

More research is needed on current restoration practices and facilities, especially in light of cases like In re Williams and the expansion of cases where defendants with intellectual disabilities have been found incompetent to stand trial. There are many complex factors in these situations that are beyond the consideration of this paper: the appropriateness of forcible medication for defendants with both mental illness and intellectual disability, how defendants should be treated if found "permanently incompetent" because of an intellectual disability (whether civil or criminal commitment is appropriate), and more general questions on the usefulness of criminal punishment for offenders with intellectual disabilities, considering that traditional justifications like deterrence and rehabilitation are not as relevant.

The challenge for criminal defense advocates will be to successfully analogize the protection of a defendant with an intellectual disability against the death penalty to her protection against being tried while incompetent. As the Court reiterated in *Medina v. California*, "the Due Process Clause affords an incompetent defendant the right not to be tried."[112] Meanwhile, the Court invalidated capital punishment for defendants with intellectual disabilities under the Eighth Amendment.[113] Advocates could argue for the importation of intellectual disability definitions in the capital context to competency doctrine in several ways. First, *Atkins* and *Hall* both grounded problems with executing offenders with intellectual disabilities in "evolving standards of decency" and found state standards that were not tied to current medical definitions of I/DD did not adequately safeguard the rights of these defendants. The concept of due process is similarly one of the "least confined" rights and "most absorptive of powerful social standards of a progressive society."[114] As such, the protection of due process rights, like the right to not be tried while incompetent, should also evolve with changing scientific and social standards. Much like understandings of the cognitive effects of intellectual disability has led the Court to protect offenders from the death penalty, competency proceedings should be re- structured to account for changing scientific standards differentiating between underlying disorders, whether intellectual disability or mental illness, that may cause a defendant to be incompetent to stand trial.

Second, advocates could emphasize the Court's position in *Medina* that due process requires a suspension of criminal proceedings "until such time, if any, that the defendant regains the capacity to participate in his defense and understand the proceedings against him."[115] Advocates could highlight the tension this leaves between restoration proceedings and the nature of intellectual disability, given that defendants with intellectual disabilities severe enough to hinder their understandings of proceedings or ability to assist counsel will never "regain" competency. The Court's outlining of the intellectual disability prongs in the capital context could then be referenced as a possible approach for

[112] *Medina v. California*, 505 U.S. 437, 449 (1992) (citing *Drope v. Missouri*, 420 U.S. at 172-73).
[113] See Atkins v. Virginia, 536 U.S.; See Hall v. Florida, 134 S.Ct.
[114] Medina v. California, 505 U.S. at 454 (O'Connor, concurring).
[115] *Id.* at 448.

testing in competency proceedings and the basis for an alternative path for defendants with I/DD. In this way, rather than highlighting the discrepancies in how the same population is treated in the capital and competency contexts, advocates could focus more on the potential incompatibility of the due process right to not be tried while incompetent with intellectual disability, both because of common behaviors like masking techniques and the problems with "restoring" intellectual disability.

The most promising approach, however, may be to interpret *Atkins* as holding that when courts are required to more closely interrogate psychological conditions, like intellectual disability, there is a greater need to rely on current scientific definitions and frameworks. Thus, in the capital context, the Court has emphasized the three prongs outlined by the APA and AAIDD when assessing I/DD. In a realm like competency, where highly individualized inquiries over whether the defendant understandings the proceedings around her and can effectively assist counsel, there is a similar need for a rigorous, scientific approach to diagnosis. Assessments of adaptive behavior, with a focus on the individual's unique cognitive strengths and especially deficits, would be especially useful in determining competency. Moreover, while there is not a risk of death, there are serious potential ramifications as to restoration's effectiveness if the defendant has an intellectual disability and not mental illness.

VII. Conclusion

If the criminal system is to deal more effectively with defendants with intellectual disabilities while promoting dignity and justice, the difficult questions above must be investigated and discussed. This discussion is in full swing in the realm of the death penalty, and it is time to expand it to competency and other areas of our justice system. Intellectual disability may not affect competency in every area of the law in the same way – competency to enter into a contract cannot mean competency to stand trial. But, where a significant deprivation of liberty is at risk in the criminal system, whether incarceration or capital punishment, there must be some consistency in how the courts approach the diagnosis of permanent conditions like intellectual disability.

Advocates against the death penalty have creatively fought for and crafted an exception for defendants with intellectual disability, one in which diagnosing intellectual disability is not an impressionistic, judge-driven assessment, but closely tied to scientific, predictable standards. Only through this kind of rigorous approach can the courts accurately and consistently determine whether defendants with intellectual disability are competent to stand trial.