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Bryant Buechele
Southern Methodist University Dedman School of Law, wbuechele@smu.edu

PSYCHOLOGY'S ROLE IN LAW: A DISCUSSION OF HOW THE SUPREME COURT VIEWS THE ROLE OF THE DSM-V IN *HALL V. FLORIDA*

*Bryant Buechele**

WHAT role should psychology-based definitions of mental conditions play in death penalty cases? In *Hall v. Florida*, the U.S. Supreme Court reigned in state's autonomy to apply the death penalty, examining how a state can independently define "intellectual disability" when deciding whether a criminal is eligible for the death penalty.[1] In doing so, the Court limited the states' autonomy and debated the relevancy of independent scientific research and definitions in determining whether a criminal is intellectually disabled from a legal rather than medical framework.[2] The majority primarily argued that clinical definitions are useful and should be used as a guide at the very least,[3] while the dissent contended that clinical definitions have little room in a legal framework and thus should not be held to the esteem that the majority attempted.[4]

This Note argues that the majority's opinion in *Hall v. Florida* was correct: Florida's statute for classification of a defendant as intellectually disabled was unconstitutionally restrictive because it disregarded the nuances of psychological research in diagnosing intellectual disability. The majority promotes an inclusive viewpoint of psychology's role in law without being overly deferential. While the dissent makes salient points regarding the problems with leaning on academic research that may not represent a national consensus, in this case the use of academic research is appropriate because the goals of psychology and law are in line: both look for elements of intellectual disability in terms of how they affect an individual's deterrability. By incorporating the American Psychological Association's (APA) flexible standard for determining intellectual disa-

* J.D. Candidate 2016, Southern Methodist University Dedwar School of Law; Articles Editor, SMU Law Review Association; B.A., Major in Psychology, with Distinction and General Honors Notation, Indiana University. Bryant wishes to thank his family and friends for their support and guidance.

1. *See Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014).
2. *See id.*
3. *See id.* at 2000.
4. *See id.* at 2006 (Alito, J., dissenting).

bility, the Court prevents dependence on bright-line rules that are often biased and inaccurate.

I. BRIEF HISTORY OF DEATH PENALTY LAW

The Eighth Amendment prohibits inflicting cruel and unusual punishments, and "[t]he Fourteenth Amendment applies those restrictions to the States."[5] What constitutes cruel and unusual punishment regarding the death penalty has been hotly debated for decades, so much so that at one point the Supreme Court temporarily suspended the death penalty at the federal level.[6] After reinstating the death penalty as a constitutional practice, the Supreme Court has since narrowed who is eligible for the death penalty; most relevant to this Note are the bars on executing juveniles[7] and the intellectually disabled, on the theory that those groups have the kind of diminished capacity that makes their crimes less culpable and the death penalty unwarranted.[8]

In 2002 in *Atkins v. Virginia*, the Supreme Court recognized that a national consensus had developed against the practice of executing intellectually disabled criminals.[9] Applying the principles of the Eighth and Fourteenth Amendments, the Court determined that executing such persons was unconstitutional.[10] A crucial part of the decision rested on the idea that mentally retarded criminals, now referred to as "intellectually disabled," have diminished capacity to "process information, to learn from experience, to engage in logical reasoning, or to control impulses . . . [which] make[s] it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."[11] The defendant's inability to understand the concept of the death penalty takes away a basic rationale for using it—the idea that we can use the possibility of that punishment to deter individuals from "murderous conduct."[12] The Court established that intellectually disabled criminals are not eligible for the death penalty, but it left to the states the implementation of this new restriction.[13]

II. INTELLECTUAL DISABILITY IN PSYCHOLOGY

Influential in the *Atkins* decision was the clinical definition of intellectual disability, which has three levels of analysis.[14] Clinical definitions of this disorder are based on a finding of "subaverage intellectual function-

5. *Id.* at 1992 (citing Roper v. Simmons, 543 U.S. 551, 560 (2005)); *see also* U.S. CONST. amend. VIII; U.S. CONST. amend XIV.
6. *See* Furman v. Georgia, 408 U.S. 238, 239-40 (1972).
7. *See generally* Roper v. Simmons, 543 U.S. 551, 568 (2005).
8. *See* Atkins v. Virginia, 536 U.S. 304, 320 (2002).
9. *Id.* at 315-16.
10. *Id.* at 321.
11. *Id.* at 320.
12. *Id.*
13. *See id.* at 317.
14. *See id.* at 318.

ing, [as well as] significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18."[15] Psychologists understand that intelligence quotient (IQ) tests, the primary way of measuring intellectual functioning, should not be used to create a definitive intelligence number, and thus the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) places equal weight on the second criterion of adaptive functioning to get a more accurate overall assessment of an individual's true intelligence level.[16]

IQ tests are not used without context of other behavioral factors because of the errors inherent in the test and their cultural bias.[17] IQ tests necessarily must take into account the Standard Error of Measurement (SEM), which reflects the inaccuracy of IQ tests and the flexibility needed to use them.[18] The SEM of the IQ tests in *Hall* indicated that with a 95% confidence interval, the true intelligence level would be within about five points of the score indicated by the test, but attempting to narrow the score range quickly reduces the confidence level.[19] IQ tests are further criticized for being culturally biased, possibly creating false positive indications of intellectual disability among non-white, lower income test-takers.[20]

In clinical situations, adaptive functioning is measured using standardized tests given to family members or friends, measuring how independently individuals can operate to possibly demonstrate their decision-making capabilities or capacity to process information.[21] Each of these measurements, IQ score and adaptive functioning, by themselves are not capable of determining whether an individual is intellectually disabled, but when used together they can be much more useful in diagnosing intellectual disability.[22] Building on that logic, the Court in *Hall* found that a Florida statute that effectively did not account for factors beyond the somewhat faulty IQ test was unconstitutionally limited in scope.[23]

III. INTELLECTUAL DISABILITY IN *HALL*

After *Atkins,* many states created statutes that defined who is intellectually disabled to avoid assigning the death penalty to those criminals who fall within that diagnosis.[24] Under Florida's statute, intellectual disability is defined as "significantly subaverage general intellectual function-

15. *Id.*
16. *See* Sara Reardon, *Science in court: Smart enough to die?*, NATURE, Feb. 19, 2014, http://www.nature.com/news/science-in-court-smart-enough-to-die-1.14742; *see also* Jeffery Usman, *Capital Punishment, Cultural Competency, and Litigating Intellectual Disability*, 42 U. MEM. L. REV. 855, 896-97 (2012).
17. *See* Usman, *supra* note 16, at 897-98.
18. *See* Hall v. Florida, 134 S. Ct. 1986, 2001 (2014).
19. *See id.*
20. *See* Usman, *supra* note 16, at 891.
21. *See* Reardon, *supra* note 16.
22. *See id.*
23. *See Hall*, 134 S. Ct. 1986, at 2001.
24. *See id.* at 1996.

ing existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18."[25] This "significantly subaverage general intellectual functioning" was defined in that statute as "performance that is two or more standard deviations from the mean score on a standardized intelligence test."[26] The Court noted that the plain language of the statute would be constitutional, but the Florida Supreme Court's interpretation of the statute is too inflexible to define inherently complex human characteristics.[27] As applied in Florida, this definition essentially means that anyone who scores above 70 on an IQ test is not considered intellectually disabled for the purposes of an *Atkins* proceeding; consequently, a score above 70 acts as a mandatory evidentiary cutoff that prevents the defendant from providing further evidence to show that although he scored above 70, he is in fact intellectually disabled.[28]

In *Hall*, the Court divided 5-4, primarily on the basis of the extent that psychological research and the professional community's definition of intellectual disability should be used in legal proceedings.[29] Writing for the majority, Justice Kennedy argued that the Court should be "informed by the views of medical experts . . . [and although] [t]hese views do not dictate the Court's decision . . . the Court [should] not disregard these informed assessments."[30] Because medical experts in the field agree that IQ tests should not be used in isolation, the Court determined that legal definitions of intellectual disability that rely solely on IQ tests in isolation are inaccurate, overly rigid, and too open to the possibility of executing intellectually disabled individuals in violation of *Atkins*.[31] The Court referenced the fact that its decision in *Atkins* was primarily based on clinical definitions of intellectual disability, and stating that intellectually disabled individuals suffer from the kind of "diminished capacity" for understanding the nature of their actions that prevents them from being deterred by the possibility of the death penalty.[32] This diminished capacity also increases the probability that intellectually disabled individuals could be executed because they are more likely to give false confessions and are unable to adequately represent themselves in the courtroom, possibly leading the jury to mistake their disorder with a lack of remorse.[33]

IV. DISSENT'S COUNTERARGUMENTS

The dissenting opinion by Justice Alito and joined by Justices Roberts, Scalia, and Thomas, of whom Justices Scalia and Thomas also dissented in

25. *Id.*, 134 S. Ct. at 1994 (quoting FLA. STAT. §921.137(1) (2013)).
26. *Id.*
27. *Id.* at 2000.
28. *See id.* at 2001.
29. *See id.* at 1989-90.
30. *Id.* at 2000 (citing Kansas v. Crane, 534 U.S. 407, 413 (2002)).
31. *See id.* at 1990.
32. *Id.* at 1993. (citing Atkins v. Virginia, 536 U.S. 304, 319 (2002)).
33. *See id.* at 1993.

Atkins, argued that *Atkins* explicitly left the issue of defining intellectual disability to the states and should not be heavily influenced by scientific definitions.[34] In previous Eighth Amendment cases, "the Court referred to the evolving standards of a maturing 'society,' . . . [meaning] the standards of *American society as a whole*."[35] According to the dissent, the Court has now ignored that standard, instead following the standards of "professional societies," specifically the APA.[36] The ideas of professional societies are "by no means dispositive," and, according to the dissent, should not be followed to the extent that the majority in this case seems to follow them.[37]

V. ARGUMENT ANALYSIS

The dissent inappropriately disregards the benefits of applying the standards of professional societies, whose opinions are incredibly helpful in this aspect of a legal framework for multiple reasons. First, a majority of the states already have statutes that contain the more complex parts of the DSM-V's steps for diagnosing intellectual disability, giving some weight to the idea that a national consensus within American society is developing, if not already developed.[38] Second, the dissent mischaracterizes the majority's reliance on the DSM-V, which was much narrower in scope than the dissent states. The majority leaves room for states to create their own normative evaluations of intellectual disability as long as the statutes capture the same goals and ideas of the DSM-V, even if it does not directly follow the analytical steps found in the DSM-V.

The bright-line test used in Florida is not representative of what a majority of states use, and because of their lack of scientific validity, these types of tests are inappropriate when deciding who lives and who dies. As the Court stated in its opinion, "professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range," indicating that IQ tests are not as accurate as Florida's statute purported them to be.[39] IQ tests by design are subject to standard errors of measurement, reflecting the concept that "an individual's intellectual functioning cannot be reduced to a single numerical score."[40] Additionally, "most defendants have taken several IQ tests and achieved a range of scores, which can vary widely depending on the type of test and the version used,"[41] as was the case in *Hall*, where the defendant took multiple IQ tests and received scores ranging from 60 to 80; however, the scores below 70, the established threshold score for indicating intellectual disability, were excluded

34. *See id.* at 2001-02 (Alito, J., dissenting).
35. *Id.* at 2002 (emphasis in original).
36. *Id.*
37. *Id.* at 2006.
38. *See id.* at 1996 (majority opinion).
39. *Id.* at 1995.
40. *Id.*
41. Reardon, *supra* note 16.

for evidentiary reasons at trial.[42] The dissent's argument that Florida's statute takes care of this issue by allowing multiple IQ tests shows a misunderstanding of what IQ tests measure and what the score is capable of indicating.[43] IQ tests do not measure decision-making ability or "ability to function in society"—a significant factor in determining whether a person is intellectually disabled to the level of being undeterrable—and this is the primary reason why the DSM-V incorporates the criterion of adaptive functioning.[44] A "vast majority" of states already recognize how inaccurate IQ tests are, as shown by their statutes that incorporate more realistic based measurements of cognitive functioning beyond the IQ test, such as adaptive functioning.[45] The Court referred to this majority as indicating a "consistency in the trend" of states designing nuanced statutes that do not have the mandatory cutoff at a certain IQ level that was present in Florida's statute.[46]

If the death penalty is reserved for the "worst of the worst," then it is vital that state statutes incorporate more forgiving steps to avoid this punishment.[47] A mandatory cutoff of the intellectual disability analysis that applies when a defendant scores even one point above the threshold score of 70 is too rigid for assessing a condition that exists on a range and cannot be accurately measured by a score alone. Florida's statute is one of only a few state statutes that use a bright-line test,[48] indicating that it does not rise to the level of a developing national consensus, and its limited analysis is uncomfortably more likely to allow intellectually disabled criminals to be executed.

Even if clinical definitions are not easily applied in the courtroom, the majority stated that scientific research is not dispositive of law and thus allows states to create a valid normative way to define intellectual disability that captures the goal of *Atkins*.[49] Some commenters interpret *Hall* as limiting states to follow the guidelines of the DSM-V and extrapolate that *Hall* may result in psychology having an inappropriate influence on law.[50] The criticism comes from the idea that psychological concepts are difficult to apply in a legal framework, mainly because of the layman's difficulty of applying academic theory to real world situations.[51] Instead, the Court seems to leave open the possibility for states to create their own definition of intellectual disability, as long as it reaches the goal of preventing individuals who, because of their deficits in understanding,

42. *Hall*, 134 S. Ct. at 1992.
43. *See id.* at 1995.
44. Reardon, *supra* note 16.
45. *Hall*, 134 S. Ct. at 1998.
46. *Id.*
47. *See* Kansas v. Marsh, 548 U.S. 163, 206 (2006).
48. *See Hall*, 134 S. Ct. at 1996.
49. *See id*.
50. *See* Christopher Slobogin, *Scientizing Culpability: The Implications of Hall v. Florida and the Possibility of a "Scientific Stare Decisis"* 23 WM. & MARY BILL RTS. J. (forthcoming) (manuscript at 7) (available at http://ssrn.com/abstract=2477862).
51. *See id.* at 8.

have less moral culpability for their actions.[52] It is because Florida incorrectly used clinical definitions that the statute was questionable, implying that if a state chooses to use clinical definitions, it must use *enough* of the clinical definition to meet the underlying goals of the medical diagnosis.[53]

Normative evaluations that would be applied by a jury could create unjust results if juries mistake a defendant's disability for a lack of remorse.[54] *Atkins* recognized the probability that intellectually disabled defendants would make poor witnesses and could be more likely to make false confessions or seem unremorseful to a jury who does not encounter intellectual disability often.[55] To prevent this, the DSM-V's definition should at least be a guide with a primary focus on the adaptive functioning of the defendant. Florida's law strayed too far from that guide because it ignored the importance of the adaptive functioning assessment; however, it may be possible for states to create their own normative definition of intellectual disability as long as it captures both components of intellectual functioning and adaptive function as laid out in *Atkins*.

In *Hall*, the Court clarified its previous decision in *Atkins*, essentially stating that although states may create their own definitions of intellectual disability for death penalty purposes, they must use established clinical definitions as a base guide.[56] Further, using only the most rigid part of the clinical definition, as was the case in Florida, is incorrect because it does not achieve the goal of preventing those who lack the ability to engage in logical reasoning and appropriate decision-making from receiving the "harshest of punishments" while still holding them accountable for their actions.[57]

VI. FUTURE OF THE DEATH PENALTY

With the death penalty continuously losing popularity among U.S. citizens, the Court recognized this growing trend by further narrowing the application of the death penalty.[58] At the very least, a narrowed application of the death penalty should spark serious discussions about the United States' use of the death penalty in the future. Criticism of the death penalty often comes in various forms, including the inaccuracy of jury verdicts and the possibility of executing an innocent person,[59] the

52. *See* Atkins v. Virginia, 536 U.S. 304, 316 (2002).
53. *See Hall*, 134 S. Ct. at 1994.
54. *See Atkins*, 536 U.S. at 320.
55. *See id.*
56. *See Hall*, 134 S. Ct. at 1998-99.
57. *Id.* at 1992.
58. *See Shrinking Majority of Americans Support Death Penalty*, PEWRESEARCH, Mar. 28, 2014, http://www.pewforum.org/2014/03/28/shrinking-majority-of-americans-support-death-penalty/.
59. *See* Ed Pilkington, *US death row study: 4% of defendants sentenced to die are innocent*, THEGUARDIAN, Apr. 28, 2014, http://www.theguardian.com/world/2014/apr/28/death-penalty-study-4-percent-defendants-innocent (stating that a new study indicates that roughly 4% of death row inmates in the U.S. are likely innocent).

questionable deterrence effect of the death penalty,[60] and the exorbitant expense of the execution process as compared to a life sentence.[61] As of 2012, "[o]ver two-thirds of the countries in the world – 141 – have now abolished the death penalty . . . [and] the overwhelming majority of all known executions took place in . . . China, Iran, North Korea, Yemen, and the United States.[62] There may be benefits to using the death penalty, but such a permanent and powerful procedure deserves introspection.

VII. CONCLUSION

States may not be required to strictly follow the APA's clinical definition of intellectual disability after *Hall*, but the path of least resistance would be to use the clinical definition as closely as possible. The Court's primary concern with the Florida statute was that it used a bright-line test that was too rigid for an issue as serious as deciding whether or not a criminal should be executed. After *Hall*, a statute defining intellectual disability should be flexible and fluid enough to give defendants who may be intellectual disabled the appropriate avenues to provide evidence of their disability that accounts for the complexity of human mental conditions.

60. *DEATH PENALTY FACTS*, AMNESTY USA, (last updated May 2012), http://www.amnestyusa.org/pdfs/DeathPenaltyFactsMay2012.pdf.
61. *Id.*
62. *Id.*