A TEST THAT REFLECTS THE 'EVOLVING STANDARD OF DECENCY': PROTECTING THE INTELLECTUALLY DISABLED FROM CAPITAL PUNISHMENT UNDER THE EIGHTH AMENDMENT

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I. INTRODUCTION

For centuries, mental health has been one of the most misunderstood and controversial topics in society in both American culture and across the globe. From medieval times when the mentally ill were determined to be possessed by demons, to the use of frontal lobotomies as an accepted form of medical treatment, our society has struggled with the most appropriate and effective ways to deal with abnormal processes of the brain.[1] Although there have been numerous developments in the field of psychology, and as a culture, we know about the realities of mental illness, there continues to be a negative stigma associated with mental health.[2] According to two public opinion surveys performed in the United Kingdom and published in the *Journal of Mental Health*, researchers found little to no difference in public opinion regarding mental health stigma over a ten year span.[3] In fact, 80% of those studied responded that "most people are embarrassed by mentally ill people" and 30% agreed that "I am embarrassed by mentally ill persons."[4] One negative stereotype that has been associated with those who are mentally ill, especially hindering them in the legal system, is the perception of violence.[5] While only 3% of mentally ill patients are considered violent, one study "measured violence as the central element in television representations in 66% of items about mental illness, an interesting figure in that it corresponds with the

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[1] *See* STIGMA AND MENTAL ILLNESS 1–7 (Paul Jay Fink & Allan Tasman eds., 1992); *see also* Peter Byrne, *Stigma of Mental Illness and Ways of Diminishing It*, 6 ADVANCES IN PSYCHIATRIC TREATMENT 65, 65–67 (2000).

[2] *See* Byrne, *supra* note 1.

[3] *Id.* at 65 (citing Peter Huxley, *Location and Stigma: A Survey of Community Attitudes to Mental Illness: Enlightenment and Stigma*, 2 J. OF MENTAL HEALTH 73, 73–80 (1993)).

[4] *Id.*

[5] *Id.* at 66.

Royal College of Psychiatrists 1998 survey, where 70% believed that people with schizophrenia are violent and unpredictable."[6]

This Note will evaluate a more specific subset of the mental health field by focusing on the intellectually disabled. Previously known as "mental retardation," the American Association of Intellectual and Developmental Disabilities (AAIDD) defines an intellectual disability as a "significant impairment" in both intellectual functioning, such as learning, reasoning, and problem solving, as well as adaptive functioning, which is the "collection of conceptual, social, and practical skills that are learned and performed by people in their everyday lives."[7]

The criminally convicted are one of the only other subsets of society more feared or misunderstood than the mentally ill.[8] The criminally convicted are so disliked that society created a judicial system in which they could be put to death. In his book, *Stigma: How We Treat Outsiders*, Gerhard Falk wrote:

> It is therefore easily understood that those who are held guilty of a crime carry a stigma with them from which they may never be able to escape. That stigma may be called 'The Stigma of Conviction.' Those who carry such a stigma find that their social and economic opportunities are limited in American life.[9]

So, as can be imagined, a mentally ill criminal defendant, who would fall under both of these stigmatized classes, receives little sympathy from society.[10] Regardless of how society perceives this group of individuals, the Supreme Court categorically protected criminal defendants considered intellectually disabled from receiving the death penalty in the landmark case *Atkins v. Virginia*.[11] While the Court decided that the Eighth Amendment prohibited this form of punishment for this group, it allowed the states to determine what standards to use to classify defendants as intellectually disabled.[12] While the Court has yet to rule on a universal standard, it has periodically found certain methods that were adopted by state courts and

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[6] *Id.* (citing MEDIA AND MENTAL DISTRESS (Greg Philo & Addison Wesley Longman eds., 1996)).

[7] *Definition of Intellectual Disability*, AM. ASS'N ON INTELL. & DEV. DISABILITIES, http://aaidd.org/intellectual-disability/definition#.WlzNZpM-dn5 (last visited Jan. 12, 2019).

[8] GERHARD FALK, STIGMA: HOW WE TREAT OUTSIDERS 312 (Prometheus Books 2001).

[9] *Id.*

[10] *Id.*

[11] Atkins v. Virginia, 566 U.S. 304, 321 (2002).

[12] *Id.* at 317–21.

legislatures to be unconstitutional and thus, leaving more uncertainty to be deciphered by the states in this area of law.[13]

This Note's purpose is to evaluate the inconsistencies in the various standards developed by lower courts and state legislatures for determining whether a defendant qualifies as intellectually disabled. In light of recent Supreme Court decisions, where the Court found some state standards unconstitutional, this Note will ultimately propose a standard that considers the evolving field of psychology and legal precedent to create a standard that both protects the individual under the Eighth Amendment and protects the integrity and efficiency of the criminal justice system. First, this Note will delve into the history of the Eighth Amendment's protection against the death penalty. Then this Note will discuss other classes of criminal defendants that became categorically protected from capital punishment. Next, this Note will transition into a discussion of the Supreme Court's decision in *Atkins v. Virginia*.[14] After reviewing the general protection of the Eighth Amendment, this Note will evaluate the various standards state courts and legislatures have adopted for determining whether a defendant qualifies for this defense. Ultimately, this Note will develop a proposed universal standard that should be adopted by state legislatures.

II. HISTORY

A. Eighth Amendment Protection from the Death Penalty

The Eighth Amendment provides a constitutional right to be protected from excessive bail and cruel and unusual punishment.[15] This protection did not always encompass the death penalty; but, because of its serious nature, the Supreme Court has found that even our society's worst criminals are not outside the reach of this constitutional right.[16] It held:

> The Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic precept of justice that punishment for crime should be graduated and proportioned to the offense. By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.[17]

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[13] *See* Moore v. Texas, 137 S. Ct. 1039, 1052–53 (2017); Brumfield v. Cain, 135 S. Ct. 2269, 2281–82 (2015); Hall v. Florida, 572 U.S. 701, 723–24 (2014).

[14] 566 U.S. 304.

[15] U.S. CONST. amend. VIII.

[16] *See* Roper v. Simmons, 543 U.S. 551, 560–64 (2005).

[17] *Id.* at 560 (citing *Atkins*, 566 U.S. at 311).

While the Court's determination of what constitutes cruel and unusual punishment under the Eighth Amendment has evolved, it has continuously affirmed the amendment's weight in this context.[18]

The Court's rationale for using the Eighth Amendment to protect against the death penalty has evolved over time.[19] In 1972, for the first time, the Supreme Court invalidated death penalty sentences with support from the Eighth Amendment.[20] When the Eighth Amendment was ratified, a death sentence was widely accepted as a form of criminal punishment.[21] Therefore, the Court could not look to constitutional text or the intent of the founding fathers to find protection against the death penalty through the Eighth Amendment.[22] Similarly, the Court could not turn to its own precedent. Prior to this decision, the Court only addressed capital punishment in the context of the Eighth Amendment three times; each of these concerned the constitutionality of the method used for capital punishment rather than the validity of the practice itself.[23]

Instead, in *Furman v. Georgia*, the Court developed the "evolving standard of decency" doctrine for invalidating the death penalty.[24] In its opinion in *Furman*, the Court emphasized the importance of incorporating basic principles of human decency in its evaluation of "cruel and unusual punishment" under the Eighth Amendment.[25] Quoting previous case law, the Court said:

> It has been assumed in our decisions that punishment by death is not cruel, unless the manner of execution can be said to be inhuman and barbarous. It is also said in our opinions that the proscription of cruel and unusual punishments 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.' A like statement was made in *Trop v. Dulles*, that the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'[26]

The Court developed the evolving standard of decency doctrine to evaluate whether a form of punishment violated the Cruel and Unusual

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[18] *See* discussion *infra* Sections II.A and II.B.
[19] Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 8–9 (2007).
[20] *Id.* (citing Furman v. Georgia, 408 U.S. 238 (1972) (per curium)).
[21] *Id.* at 9–10.
[22] *Id.*
[23] *Id.* at 10–11.
[24] 408 U.S. 238, 269 (1972) (per curium).
[25] *Id.* at 242.
[26] *Id.* at 241–42 (internal citations omitted).

Punishment Clause of the Eighth Amendment.[27] The Court determined that the clause is violated—meaning it offends an evolving standard of decency—when a "national consensus" has formed against it.[28] While the *Furman* Court used this standard to invalidate death sentences, it clarified the doctrine just four years later in *Gregg v. Georgia*, to uphold state statutes maintaining the death penalty.[29] In *Gregg*, the Court said, "[t]hus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. . . . [T]his assessment does not call for a subjective judgment. It requires, rather that we look to objective indicia that reflect the public attitude toward a given sanction."[30] The Court relied on legislative intent as a source of objective indicia.[31] Although the role of the Court and judicial review must stand apart from the decisions of the legislature, the Court found that the "evolving standard of decency" was accounted for in the legislature's decision to maintain the death penalty.[32] So, even though the Court upheld the state death penalty statutes, it affirmed the importance of evaluating the public's perception of human decency when determining whether there has been a violation of the Cruel and Unusual Punishment Clause.[33] This became an important factor later, when specific criminal populations sought per se protection under the Eighth Amendment from capital punishment.[34]

In *Furman*, the Court first recognized that certain populations were more vulnerable to the death penalty.[35] The *Furman* Court quoted former Attorney General Ramsey Clark, who said, "[i]t is the poor, the sick, the ignorant, the powerless and the hated who are executed."[36] The Court recognized the disparity in minorities, specifically African Americans, receiving the death penalty as opposed to majority populations receiving life in prison for the same crime.[37] The Court also addressed the advantage given to defendants

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[27] *See id.* at 242; *see also* Lain, *supra* note 19, at 3–4.

[28] Lain, *supra* note 19, at 3.

[29] 428 U.S. 153 (1976).

[30] *Id.* at 173.

[31] *Id.* at 175–76.

[32] *Id.* at 173.

[33] *Id.*

[34] *See* Brian W. Varland, *Marking the Progress of a Maturing Society: Reconsidering the Constitutionality of Death Penalty Application in Light of Evolving Standards of Decency*, 28 HAMLINE L. REV. 311, 332 (2005).

[35] *See* Furman v. Georgia, 408 U.S. 238, 255–57 (1972) (Douglas, J., concurring) (per curium).

[36] *Id.* at 251.

[37] *Id.* ("Seventy-five of the 460 cases involved co-defendants, who, under Texas law, were given separate trials. In several instances where a white and a Negro were co-defendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty." (internal citation omitted)).

with wealth over defendants who are indigent in receiving the death penalty.[38] Although *Furman* presented an Equal Protection Clause issue in regard to sentencing minorities, the Court began to recognize that certain populations are affected differently by the use of capital punishment.[39] The Court stated:

> [I]t is 'cruel and unusual' to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.[40]

While vulnerable populations were not necessarily targeted in subsequent cases, the Court recognized the principle that "cruel and unusual punishment" can differ depending on the type of person being faced with it.[41] Combined with the evolving standard of decency doctrine, the Court began to recognize the importance of protecting certain classes of criminal defendants.[42]

B. Eighth Amendment Protection for Specific Populations

In terms of protection against cruel and unusual punishment, the Eighth Amendment has been a safe haven for vulnerable populations seeking protection from the harshest criminal punishment available in the American justice system.[43] Because of the severity of a death sentence as a punishment, the Court placed more limitations over time as to how and when it can be used.[44] It wrote:

> Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force. Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.' This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition

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[38] *Id.* ("The defendant of wealth and position never goes to the electric chair or the gallows." (internal citation omitted)).

[39] *See id.* at 255–57.

[40] *Id.* at 245.

[41] *See* Ford v. Wainwright, 477 U.S. 399, 405–06 (1986).

[42] *See id.* at 405–06, 419; Lockett v. Ohio, 438 U.S. 586, 620–21 (1978) (Marshall, J., concurring); Roberts v. Louisiana, 428 U.S. 325, 334–36 (1976).

[43] *See generally* FALK, *supra* note 8.

[44] *See* Susan M. Boland, *Walking the Edge of Death: An Annotated Bibliography on Juveniles, the Mentally Ill, and the Death Penalty*, 21 N. ILL. U. L. REV. 131, 131 (2001).

to the aggravating factors that can result in a capital sentence.[45]

Minors are one class of criminals that have been per se protected from capital punishment.[46] *Roper v. Simmons* is the landmark case for juvenile protection from the death penalty.[47] Prior to 2002, the Court found that it was not unconstitutional for juveniles at the age of sixteen or seventeen to be sentenced to death.[48] In *Roper*, the Court held that the use of the death penalty was a form of cruel and unusual punishment in the context of minor defendants.[49] In reaching this conclusion, the Court looked to the difference in culpability between minors and adults.[50] The Court reasoned that a death sentence would not be a proportional form of punishment because of the lesser culpable nature of minors.[51] In his dissent, Justice Scalia said "retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished to a substantial degree by reason of youth and immaturity."[52] The Court relied on studies and experts that explained characteristic differences that made minors more vulnerable to crime and less deserving of such an intense and final punishment.[53] The Court described some of characteristics as a lack of maturity, underdeveloped sense of responsibility, recklessness, susceptibility to negative influences and outside pressure, and underdeveloped personality traits.[54] In light of these characteristics, the Court held that the use of capital punishment would be too severe for the culpability of the offender.[55]

In protecting minors from being sentenced to death, the Court again looked to the evolving public perception of this form of punishment.[56] And again, the Court turned to the legislature to find objective indicia that society found this practice against human decency. In previous years, many state legislatures outlawed death sentences for minors.[57] The fact that none of these states had revoked their laws, as well as the trend in other legislatures to

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[45] Roper v. Simmons, 543 U.S. 551, 568 (2005) (internal citations omitted).
[46] *See id.* at 571.
[47] 543 U.S. 551 (2005).
[48] *See* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (O'Connor, J., concurring).
[49] *Roper*, 543 U.S. at 571–74.
[50] *Id.* at 569–70.
[51] *Id.* at 571.
[52] *Id.*
[53] *Id.* at 569–70.
[54] *Id.* at 569.
[55] *Id.* at 574, 578.
[56] *Id.* at 563–64.
[57] *Id.* at 564–65.

follow suit, persuaded the Court to find that the evolving standard of decency was one in which it was cruel and unusual to sentence minors to death.[58]

Minors were not the first nor the only class of criminals to receive per se protection from the death penalty under the Eighth Amendment. In *Atkins v. Virginia,* a man with an Intelligent Quotient (IQ) score of 59 was sentenced to death after being convicted of abduction, armed robbery, and capital murder.[59] The Supreme Court reversed and remanded the lower court's sentencing decision and held for the first time that criminals who were intellectually disabled were constitutionally protected from the death penalty under the Eighth Amendment.[60] In reaching its decision, the Court evaluated the history of Eighth Amendment protection and its application to criminals with intellectual disabilities.[61] The lower court in *Atkins* relied on a prior Supreme Court case, *Penry v. Lynaugh,* where the Court found that it was not unconstitutional to sentence a criminal with an intellectual disability to death.[62] In *Atkins*, the Court overruled *Penry* and hinged its argument on two major pillars.[63]

The first argument the Court gave for invalidating the verdict was the lack of culpability in individuals who are intellectually disabled.[64] The Court reasoned that "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses, . . . they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants."[65] The Court clearly stated that while these individuals are not free from criminal punishments, this form of punishment is reserved for our society's most morally culpable offenders and to sentence a person mentally incapable of being that culpable violates the fundamental integrity of the Eighth Amendment.[66]

The second argument the *Atkins* Court relied on was the evolving standards of decency as described in previous case law relating to the Eighth Amendment.[67] The Court said:

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[58] *Id.* at 563–65.
[59] *See* Atkins v. Virginia, 536 U.S. 304, 309 (2002).
[60] *Id.* at 321.
[61] *Id.* at 311–15.
[62] *Id.* at 307; *see also* Penry v. Lynaugh, 492 U.S. 302, 340 (1989).
[63] *Atkins*, 536 U.S. at 312, 316, 321.
[64] *Id.* at 316–17.
[65] *Id.* at 306–07.
[66] *Id.* at 319.
[67] *Id.* at 321.

> A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in his opinion in *Trop v. Dulles*: 'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'[68]

To determine what the evolving standard of decency was in the context of the intellectually disabled being sentenced to death, the Court relied on objective criteria provided by the legislatures, as well as its own judgment.[69] The Court emphasized the change in legislation since the *Penry* decision. The federal government, as well as several state legislatures, enacted statutes barring the use of the death penalty against criminals who are intellectually disabled.[70] The Court also noted that even the states that had not yet outlawed this practice rarely used it in this context.[71]

Although *Atkins* was clear in its prohibition of the death penalty for the intellectually disabled, it failed to provide a uniform standard for determining whether a criminal defendant qualifies as intellectually disabled.[72] Rather, the Court found that individual state courts and legislatures should determine that standard for themselves.[73] The Court said, "[a]s was our approach in *Ford v. Wainwright*, with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'"[74] This poses the purpose of this Note. Because the Court did not provide a bright-line rule for determining the standard, lower courts and legislatures have developed a variety of ways to determine intellectual disability. This Note will evaluate those standards and ultimately propose a standard that should be uniformly adopted.

III. ANALYSIS

After an evaluation of standards created by the states and Supreme Court precedent, it is clear that the weakness in state evaluations of intellectual disability is due to reliance on archaic medical standards or a lack of reliance

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[68] *Id.* at 311–12 (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)).
[69] *Id.* at 311–13.
[70] *Id.* at 313–16.
[71] *Id.* at 315–16.
[72] *See id.* at 320–21.
[73] *Id.* at 321.
[74] *Id.* at 317 (citing Ford v. Wainwright, 477 U.S. 399 (1986)).

on the medical community as a whole.[75] When considering Supreme Court precedent relating to the death penalty and recent cases delving into the issue of state standards for intellectual disability, this area of law appears to be leaning toward reliance on the evolving societal consensus, rather than history and tradition. There are two key components to the argument of what standard courts should be using to determine intellectual disability: IQ testing and expert medical opinion.[76] While both have weaknesses, the courts and legislatures should look to the latter when creating their standard.

A. Reliance on IQ Testing

IQ testing is the first important tool that lower courts and legislatures have used for determining whether a criminal defendant qualifies as intellectually disabled.[77] While IQ testing is an alluring tool because of its quantifiable and widespread applicability, legislatures should move away from this reliance in the context of intellectual deficits and the death penalty.

The Individual Quotient test—better known as "the IQ test"—developed in the early 1900s and has been praised as one of psychology's greatest advancements in society, while also being criticized for its rigidity and inability to provide a holistic analysis.[78] An IQ test is a series of subtests administered by a psychologist evaluating a person's visual, mathematical, linguistic, memory, information processing, reasoning, and problem solving abilities.[79] The result of the test is a score that is placed on a bell curve.[80] Depending on the population where the test is administered, a score of 100 is usually the average.[81] Although it has faced criticism in the psychology community, many lower courts and legislatures followed *Atkins* by relying on IQ testing to qualify a defendant for an intellectual disability defense because of its uniformity.[82] This reliance is problematic because of the test's rigidity and its lack of consideration of adaptive functioning.[83] For these reasons, while an IQ score should be a factor considered by legislatures and

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[75] *See* discussion *infra* Sections III.A and III.B and accompanying notes.

[76] *Compare* discussion of cases cited *supra* Sections II.A–B, *with* discussion *infra* Sections III.A–B.

[77] Hall v. Florida, 572 U.S. 701, 709–14 (2014).

[78] *See* Etienne Benson, *Intelligent Intelligence Testing: Psychologists Are Broadening the Concept of Intelligence and How to Test It*, 34 MONITOR ON PSYCHOL. 48 (2003); Jacque Wilson, *What Your IQ Score Doesn't Tell You*, CNN (Feb. 19, 2014, 8:59 AM), http://www.cnn.com/2014/02/19/health/iq-score-meaning/index.html.

[79] *See* Wilson, *supra* note 78.

[80] *Id.*

[81] *Id.*

[82] *See* Cortney Kohberger & Stephen Noffsinger, *Determining Intellectual Disability in a Post-Atkins Death Penalty Case*, 43 J. OF THE AM. ACAD. OF PSYCHIATRY & THE L. 526, 526–29 (2015).

[83] *See* Wilson, *supra* note 78.

lower courts, IQ scores should not be used as the primary determinative factor when developing a standard.

Many state legislatures created statutes so a criminal defendant could not qualify for an intellectual disability defense unless they scored below a specific IQ score.[84] This created the "strict score cutoff" standard.[85] In *Hall v. Florida*, the Court addressed the validity of a Florida statute that found a person was intellectually disabled as required by *Atkins* when they had a "significantly subaverage general intellectual functioning."[86] The statute defined "significant subaverage intellectual functioning" as "performance that is two or more standard deviations from the mean score on a standardized intelligence test."[87] This bright-line cutoff was also used by the Kentucky, Virginia, Arizona, Delaware, Kansas, North Carolina, and Washington legislatures.[88] In *Bowling v. Commonwealth*, the Kentucky Supreme Court elaborated on their decision to uphold the legislature's choice to define intellectual disability via a bright-line IQ cutoff.[89] The court said:

> The General Assembly chose not to expand the mental retardation ceiling by requiring consideration of those factors, but instead, like most other states that quantify the definition, chose a bright-line cutoff ceiling of an IQ of 70, a generally recognized level at which persons are considered mentally retarded. *Atkins* did not discuss margins of error or the 'Flynn effect' and held that the definition in KRS 532.130(2) 'generally conformed' to the approved clinical definitions.[90]

The Virginia state legislature adopted a similar statute requiring "significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning . . . that is at least two standard deviations below the mean . . . ."[91] In *Hall*, *Bowling*, and *Johnson*, the defendants received an IQ score below 80, but they were not found to be intellectually disabled because their scores did not fall below the required qualifying score of 70.[92] Although those legislatures and lower courts found the use of a bright-line cutoff conformed to the *Atkins*

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[84] Nina Totenberg, *With Death Penalty, How Should States Define Mental Disability?*, NPR (Mar. 3, 2014, 3:34 AM), https://www.npr.org/2014/03/03/284409882/with-death-penalty-how-should-states-define-mental-disability.

[85] *Id.*

[86] 572 U.S. 701 (2014).

[87] *Id.* at 711.

[88] *Id.* at 714–16.

[89] Bowling v. Commonwealth, 163 S.W.3d 361, 375 (Ky. 2005).

[90] *Id.*

[91] Johnson v. Commonwealth, 591 S.E.2d 47, 59 (Va. 2004).

[92] *Hall*, 572 U.S. at 707, 721–24; *Bowling*, 163 S.W.3d at 384; *Johnson*, 591 S.E.2d at 51–61.

requirements, this test, as discussed by the *Hall* Court, is too rigid for this area of law and it gives the opportunity for intellectually disabled defendants to be deprived of their constitutional protection from the death penalty under the Eighth Amendment.[93]

The use of a strict IQ requirement to qualify for an intellectual disability defense is problematic for two reasons. First, it provides for no variation or flexibility in testing. But, as the *Hall* Court recognized, it is possible to use variations of the IQ score as opposed to being bound to one score.[94] Other states incorporated a provision that allows for the "standard error of measurement" (SEM) to be considered when evaluating whether a person qualifies as intellectually disabled.[95] The *Hall* Court reasoned that "SEM reflects the reality that an individual's intellectual function cannot be reduced to a single numerical score . . . the SEM means that an individual's score is best understood as a range of scores on either side of the recorded score."[96]

The SEM of an IQ score accounts for the variations that can be present not only in the functioning of the individual, but also the environment and contextual changes that can occur in a standardized testing situation.[97] The *Hall* Court referenced the AAIDD's guide, which stated an IQ score could fluctuate due to several factors, such as "the test-taker's health, practice from earlier tests, the environment or location of the test, the examiner's demeanor, the subjective judgment involved in scoring certain questions of the exam, and simple lucky guessing."[98] As described by the American Psychological Association (APA), SEM is a standard deviation system in which there is a 68% confidence in a certain range of scores and 95% confidence in a broader range of scores.[99] *Hall* provides an example of a situation where a person has an IQ score of 71 and thus, would not qualify as intellectually disabled according to states that use a cutoff score of 70, but their SEM reflects a range from 66–76 with 95% confidence and 68.5–73.5 with 68% confidence.[100] This range of scores, which are dependent on percentages of confidence, allows for a more accurate and realistic interpretation of a person's true intellectual functioning.[101]

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[93] *Hall*, 572 U.S. at 704, 724.
[94] *Id.* at 721–23.
[95] *Id.* at 709–16.
[96] *Id.* at 713.
[97] *Id.* at 712–16.
[98] *Id.* at 713.
[99] *Id.*
[100] *Id.*
[101] *Id.* at 712–14.

Some lower courts and legislatures deviated from the use of an IQ cutoff to determine intellectual disability and instead, incorporated the possibility of deviation into the analysis prior to the Supreme Court's decision in *Hall*.[102] In *State v. Roque*, the Supreme Court of Arizona was asked to interpret an Arizona statute that created a standard for an intellectual disability defense.[103] Arizona Revised Statute § 13-703.02(A) required a court to appoint a prescreening psychological expert to determine an initial IQ score.[104] If that test returned a full-scale IQ of 75 or lower, the court appointed additional experts to test the defendant again. At this point, the court would then have a hearing to determine whether the defendant would be considered intellectually disabled.[105] The court held this statute was a fair indicium of intellectual functioning.[106] It noted that this procedure was multidimensional as opposed to relying on a single IQ score.[107] The court stated:

> The statute does not refer to individual IQ sub-tests or indices, but rather employs a single 'intelligence quotient' as an initial measure of 'significantly subaverage general intellectual functioning.' This number refers to the full-scale IQ . . . . In addition, the statute accounts for margin of error by requiring multiple tests. If the defendant achieves a full-scale score of 70 or below on any one of the tests, then the court proceeds to a hearing.[108]

Thus, the *Roque* court recognized that a wider range of IQ testing would provide a more accurate depiction of a defendant's cognitive functioning and would better account for situational or contextual differences.[109]

Other courts and legislatures have taken varying approaches in denouncing a strict IQ cutoff.[110] While the Idaho statute states that the IQ score must be at "70 or below," the Idaho Supreme Court supplemented the statute by finding that "the alleged error in IQ testing is plus or minus five points," allowing for some flexibility when evaluating the IQ requirement of the statute.[111] California's statute, on the other hand, does not explicitly allow for variation in the IQ score, but it does allow defendants who score above

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[102] *See* State v. Roque, 141 P.3d 368, 402–03 (Ariz. 2006).
[103] *Id.* at 377–78.
[104] *Id.* at 402 (citing ARIZ. REV. STAT. ANN. §§ 13-703.02(A), (C)).
[105] *Id.* (citing ARIZ. REV. STAT. ANN. § 13-703.02(F)).
[106] *Id.* at 403.
[107] *Id.*
[108] *Id.*
[109] *See id.*
[110] Pizzuto v. State, 202 P.3d 642, 651 (2008).
[111] *Id.*

the cutoff to introduce other evidence that could prove a qualification as intellectually disabled.[112] The United States Code and several other states, such as Louisiana, Nevada, and Utah, do not require a certain IQ score to qualify as intellectually disabled.[113] This is the ultimate direction state legislatures should move toward. Although IQ scores should be a factor considered by the courts, it is not an appropriate determinative standard when considered in the context of the death penalty, even when accounting for the variability in the SEM.

The second problem with the use of a strict IQ cutoff alone to determine whether a defendant qualifies as intellectually disabled is this method's omission of several adaptive functions of the brain that could be relevant to a diagnosis. The clinical psychology field has been discussing this deficit of relying on IQ testing without adaptive functioning considerations for years.[114] Professor Richard Nisbett, stated that "an IQ score doesn't measure your practical intelligence: knowing how to make things work . . . . It doesn't measure your creativity. It doesn't measure your curiosity."[115] The APA, which created the Diagnostic and Statistical Manual (DSM) as a basis for psychological diagnoses, discussed the discrepancies with IQ testing:

> But intelligence testing has also been accused of unfairly stratifying test-takers by race, gender, class and culture; of minimizing the importance of creativity, character and practical know-how; and of propagating the idea that people are born with an unchangeable endowment of intellectual potential that determines their success in life.[116]

Although the debate about the validity of relying on IQ testing alone originated in the clinical psychology realm, lower courts and state legislatures have been forced to question whether reliance on IQ testing without placing value on adaptive functioning is a fair analysis for defendants.[117]

Many lower courts and legislatures demonstrated their concern with the omission of adaptive functioning in IQ testing by incorporating this provision statutorily. In *State v. Agee*, the court stated that IQ test scores are "approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks."[118] The court

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[112] CAL. PENAL CODE ANN. § 1376 (2018).
[113] Hall v. Florida, 572 U.S. 701, 717–21 (2014).
[114] Benson, *supra* note 78.
[115] Wilson, *supra* note 78.
[116] Benson, *supra* note 78.
[117] *See* State v. Agee, 364 P.3d 971, 988–90 (Or. 2015).
[118] *Id.* at 988.

further reasoned that if a person has an IQ score above 70, he or she may have "such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning, that the person's actual functioning is comparable to that of individuals with a lower IQ score."[119]

While IQ testing has been used as an indicator of a person's level of functioning, especially in school settings, it was never intended to be a strict test to determine whether someone lives or dies, as it is used in the context of the death penalty.[120] The *Hall* Court recognized this flaw in using a stand-alone IQ score outside of the context in which it is typically employed.[121] The Court reasoned that "the flaws in Florida's law are the result of the inherent error in IQ tests themselves. An IQ score is an approximation, not a final and infallible assessment of intellectual functioning."[122] Although IQ testing can be an easy fall back for courts because of its quantifiable nature and standardization, it is important for legislatures to recognize its deficiencies and find other options besides pure reliance on the standardized test.

B. Current Medical and Psychological Field Reliance

While some courts have relied solely on traditional standardized tests, such as IQ testing, to determine intellectual disability, other courts have emphasized the importance of relying on evolving medical standards.[123] Considering the recent Supreme Court decisions, all legislatures should move toward this direction when developing a standard to determine intellectual disability. This has become a controversial issue for courts and legislatures in the attempt to set a standard for this defense against the death penalty.[124] In reference to a recent Supreme Court case that questioned the constitutionality of the medical standard used by the Texas Court of Criminal Appeals (CCA) to determine a defendant's classification as intellectually disabled, Justice Kennedy noted, "I think there is a conflict . . . between the standards used by the lower court and current medical standards."[125] On the one hand, courts have argued that medical standards frequently change and can be highly subjective, which makes them unreliable for courts to base their decision.[126] But, the opinion that the most recent medical

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[119] *Id.*

[120] *Id.* at 981–82.

[121] Hall v. Florida, 572 U.S. 701, 737–39 (2014).

[122] *Id.* at 722.

[123] *See id.* at 717–24.

[124] *See id.*

[125] Ariane de Vogue, *Supreme Court Takes Up Question of Death Penalty and Intellectual Disability*, CNN (Nov. 29, 2016), http://www.cnn.com/2016/11/29/politics/death-penalty-texas-intellectually-disabled/index.html.

[126] *Ex parte* Briseno, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004).

definitions should be the standard relied upon by courts in determining the mental functioning of a capital punishment defendant has become more widespread in recent years.[127]

In 2016, the Supreme Court was yet again faced with the responsibility of determining the constitutionality of a state legislature's standard for classifying a criminal defendant as intellectually disabled.[128] In *Moore v. Texas,* Bobby James Moore was sentenced to death after the Texas Court of Criminal Appeals denied his intellectual disability defense.[129] In making its decision, the lower court relied on the 1992 American Association on Mental Retardation (AAMR) manual.[130] Ultimately, the Court held that courts must rely on updated medical standards and the factors the CCA relied on to determine intellectual disability were unconstitutional.[131]

The 1992 AAMR manual was the predecessor to the most recent, eleventh edition of the AAIDD clinical manual.[132] One of the requirements established in the AAMR manual is that "adaptive deficits" be related to the individual's intellectual-functioning deficits.[133] The *Moore* court applied a seven-factor test first established in *Ex parte Briseno* to determine whether these deficits were related. The seven *Briseno* factors included:

> (a) Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and if so, act in accordance with that determination?
> (b) Has the person formulated plans and carried them through or is his conduct impulsive?
> (c) Does his conduct show leadership or does it show that he is led around by others?
> (d) Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
> (e) Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
> (f) Can the person hide facts or lie effectively in his own or others' interests?
> (g) Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?[134]

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[127] Moore v. Texas, 137 S. Ct. 1039, 1048–49 (2017).
[128] *Id.* at 1044–48.
[129] *Id.* at 1050–51.
[130] *Id.* at 1053.
[131] *Id.* at 1051–53.
[132] *Id.* at 1046.
[133] *Id.* at 1051.
[134] *Ex parte* Briseno, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004).

The *Briseno* factors were not based on any medical or evidentiary standard; rather, the Supreme Court found that the adaptive behavior requirement was extremely subjective and could lead to conflicting expert medical testimony.[135] Moreover, a disregard for evolving medical standards could have dangerous effects for criminal defendants facing capital punishment.[136] Therefore, the Court found that while medical opinions are to be considered, determining intellectual disability in the context of capital punishment requires additional analysis by the court:[137]

> We vacate the CCA's judgment. As we instructed in *Hall*, adjudications of intellectual disability should be 'informed by the views of medical experts.' That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus. Moreover, the several factors *Briseno* set out as indicators of intellectual disability are an invention of the CCA untied to any acknowledged source. Not aligned with the medical community's information, and drawing no strength from our precedent, the *Briseno* factors 'creat[e] an unacceptable risk that persons with intellectual disability will be executed.' Accordingly, they may not be used, as the CCA used them, to restrict qualification of an individual as intellectually disabled.[138]

While the Supreme Court has allowed state courts and legislatures to create their own standard for determining an intellectual disability defense, it drew a line in its decision in *Moore*.[139] The Court was comfortable giving lower courts discretion to create their own standard, but it was not willing to extend that discretion so far as to allow the lower courts to create their own factors free from any medical reliance.[140] This holding has solidified the importance of the medical community determining whether an individual is entitled to an intellectual disability defense.[141]

The Court's emphasis on inclusion of an updated medical standard in *Moore* was not the first time courts have touched on the weight of a medical standard in diagnosing the disorder.[142] Other state courts have recognized the importance of using evolving medical standards to establish whether or not a

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[135] *Moore*, 137 S. Ct. at 1046.
[136] *Id.* at 1044.
[137] *Id.*
[138] *Id.* (internal citations omitted).
[139] *Id.*
[140] *Id.*
[141] *See id.*
[142] *See generally* Hall v. Florida, 157 U.S. 701 (2014).

defendant is intellectually disabled.[143] The *Hall* Court laid the groundwork for this type of standard.[144] At the time, its analysis hinged on the most recent medical definition of intellectual disability stating, "[a]s the Court noted in *Atkins*, the medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changed circumstances), and onset of these deficits during the developmental period."[145]

Recently, another state court relied on the *Hall* language to guide it through a determination of whether a criminal defendant was considered intellectually disabled.[146] In *State v. Agee,* the Oregon Supreme Court was in an interesting position, because Oregon had not, legislatively or judicially, developed a specific procedural or substantive standard for determining intellectual disability.[147] The procedural approach adopted by the trial court was to conduct a pretrial hearing, where the defendant would be required to prove he or she was intellectually disabled by a preponderance of the evidence.[148] While the *Agee* court ultimately held that the defendant's IQ score was too high to meet the first prong of the analysis in determining intellectual disability, its decision relied on the consensus within the field of psychology.[149]

The debate between the state and the defendant in *Agee* provides a small-scale example of the larger issues that have been raised when determining intellectual disability in the context of the death penalty. In its pretrial hearing to determine the validity of the defendant's claim of intellectual disability, the state presented psychological experts that believed the defendant, with an IQ score ranging between 80 and 85, could not qualify as intellectually disabled, regardless of his adaptive functioning.[150] On the other hand, the defendant provided an expert opinion stating that because of his partial fetal alcohol syndrome and a brain injury, his IQ scores were not indicative of his classification as intellectually disabled.[151] Rather, the experts argued that his adaptive functioning, as in his day-to-day functioning, was a better indication of his intellectual disability.[152] This hearing is an example of the possibility

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[143] *See id.* at 708–15.
[144] *See generally id.* at 709–14.
[145] *Id.* at 710 (citing Atkins v. Virginia, 536 U.S. 304, 308 (2002)).
[146] *See* State v. Agee, 364 P.3d 971, 988–90 (2015).
[147] *Id.* at 976.
[148] *Id.*
[149] *Id.* at 983–85.
[150] *Id.* at 984.
[151] *Id.* at 984–85.
[152] *Id.*

of conflicting medical testimony that has driven the argument to use strict IQ cutoffs as the standard for intellectual disability. But, what is important about the *Agee* opinion is that the court was able to use the defendant's IQ score without giving it determinative value alongside medical expert opinions.[153]

In its analysis of the procedural and substantive process adopted by the lower court, the Oregon Supreme Court applauded the lower court's ability to strike a balance.[154] First, the court did not shy away from reliance on recent medical opinion.[155] The court discussed the importance of updated medical standards multiple times in its opinion.[156] It said:

> In deciding what weight to give to IQ scores, the court stated that it would rely on the [Diagnostic and Statistical Manual of Mental Disorders] and the AAIDD Green Book, which, the court found both gave significant relevance and weight to IQ scores. . . . Finally, the court concluded that there was no generally accepted scientific opinion in the field of psychology that diagnosis of intellectual disability should be based solely on adaptive functioning.[157]

The court reiterated the importance of relying on an updated psychological standard, as opposed to court-created standards, as done in *Briseno*, or a strict IQ cutoff, as seen in *Bowling*, *Hall*, and *Johnson*.[158]

Agee is notable because the court took the defendant's IQ score into consideration, but did not rely on it solely as a determinative factor to establish intellectual disability.[159] Rather, the court found a way to incorporate an IQ analysis, while also weighing the current standards of the psychology community.[160] Rather than denying the defendant the ability to use the defense solely because of his IQ score, the Oregon court continued its analysis of his intellectual functioning beyond his score.[161] The court reasoned:

> The trial court thus considered and weighed the evidence presented at the *Atkins* hearing and, based on that evidence, ruled that defendant had not met

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[153] *See id.* at 983–86.

[154] *See id.* at 986–87.

[155] *See id.*

[156] *See id.*

[157] *Id.* at 986.

[158] *Id.* at 1000. *Compare Ex parte* Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004), *with* Hall v. Florida, 572 U.S. 701 (2014), Bowling v. Commonwealth, 163 S.W.3d 361 (Ky. 2005), *and* Johnson v. Commonwealth, 591 S.E.2d 47, 59 (Va. 2004).

[159] *See Agee*, 364 P.3d at 983–87, 1000.

[160] *See id.*

[161] *Id.* at 986–87.

> his burden of establishing ineligibility by a preponderance of the evidence. The trial court did not, as defendant suggests, use a bright-line rule requiring an IQ score of at least two standard deviations below the mean for a determination of intellectual disability in determining whether defendant had made the necessary showing. The trial court determined that the defendant had not met the first prong—the intellectual functioning prong-based on his IQ scores, but it did not end its analysis there. Rather, as described, the court considered defendant's IQ subtest scores and the results of other neuropsychological tests administered by the examining psychologists and psychiatrists and found them all to be insufficient to establish intellectual disability. For those reasons, we conclude that the trial court's *Atkins* ruling was not erroneous at the time it was made, and we reject defendant's argument to the contrary.[162]

The court relied neither on a strict IQ cutoff nor the most radical medical opinion proposed by the defendant that adaptive functioning should be the sole consideration in a finding of intellectual disability.[163] Rather, the court was able to incorporate both arguments in a way that did not disadvantage the defendant, nor provide the opportunity for the intellectual disability defense to be abused.[164] Although the Supreme Court has struck down two standards developed by lower courts, it has still yet to propose a uniform way to establish intellectual disability in the context of protection from the death penalty under the Eighth Amendment.

Reliance on medical opinions is not a foreign concept in the judicial process. When a plaintiff loses a limb in a personal injury case, it is the medical expert's opinion that judges and juries rely on to reach conclusions.[165] Possibly because of the stigma and lack of understanding of the mental health field, or just the controversy that surrounds any issue relating to the death penalty in general, adopting the most recent medical opinion as a standard for the intellectual disability defense has been a controversial issue.[166] Regardless of this controversy, state legislatures should begin to adopt a standard that reflects this evolving perspective.

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[162] *Id.* at 986.
[163] *See id.*
[164] *Id.* at 983–87, 1000.
[165] *Id.* at 982–85.
[166] *Id.* at 989–90.

IV. RESOLUTION

A. Importance of a Uniform Standard

Although the *Atkins* Court allowed states to develop their own standard for determining intellectual disability, as the *Hall* Court noted, the states were not given complete autonomy.[167] In *Atkins*, *Hall*, and most recently *Moore*, the Court showed its power to regulate the standards that state legislatures and lower courts chose to adopt, but failed to provide a uniform standard to use when evaluating intellectual disability in the context of capital punishment.[168] The *Hall* Court interpreted *Atkins* stating, "[f]urthermore, immediately after the Court declared that it left 'to the States the task of developing appropriate ways to enforce the constitutional restriction,' the Court stated in an accompanying footnote that '[t]he [state] statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions.'"[169] Although the Court has been unwilling to explicitly define the standard that should be used, by establishing that all states cannot rely solely on an IQ score cutoff and must conform to "clinical definitions," the Court has begun to shape a uniform standard by ruling on individual tests that do not work.[170]

Some argue that there should not be a uniform test but rather, each state should be able to determine for themselves the standard they wish to use to classify individuals as intellectually disabled.[171] While state autonomy is an integral part of our judicial system, if the Supreme Court is going to continue to find specific tests unconstitutional without creating a uniform standard, individuals who are borderline intellectually disabled are left vulnerable to the arbitrary standard developed by any given state.[172] On the other hand, Justice Breyer believes that the only way to really protect this population is by attacking the larger issue, abolishing the death penalty.[173] While this might be the ideal solution, until that larger issue can be addressed, individuals who may be intellectually disabled are left vulnerable to possible death penalties at the hands of varying state standards. Therefore, Justice Breyer's argument

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[167] *See* Hall v. Florida, 572 U.S. 701, 720 (2014) ("If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in Atkins could become a nullity, and the Eighth Amendment's protection of human dignity would be become a reality.").

[168] *See* Atkins v. Virginia, 536 U.S. 304 (2002); *e.g.*, Hall v. Florida, 572 U.S. 701 (2014); *see also, e.g.*, Moore v. Texas, 137 S. Ct. 1039 (2017).

[169] *Hall*, 572 U.S. at 720.

[170] *Id.*

[171] *See id.* at 719–21.

[172] *See* Benson, *supra* note 78.

[173] *See* Vogue, *supra* note 125.

demonstrates why it *is* important for there to be a uniform standard developed. After the Court reached its decision in *Moore*, Justice Breyer stated, "I don't think there is a way to apply this kind of standard uniformly across the country, and therefore there will be disparities and uncertainties."[174] He is correct that there are disparities and uncertainties in the system as it is functioning right now, but I disagree that there cannot be a uniform standard developed. Although uniform standards can pose their own issues, such as being applied too broadly rather than on a case specific basis, there should at the very least be a uniform procedure in place to allow courts to most justly find resolutions in this area of law. If state legislatures adopt the same proposed standards, all of their bases will be covered.[175] The following standard considers previous state legislation and Supreme Court precedent, and it incorporates safeguards that both protect the individual from arbitrary or unfair rulings, as well as the efficiency and integrity of the criminal justice system.

B. The Procedure

First, state legislatures should establish a uniform procedure for courts to follow when determining whether a criminal defendant qualifies for capital punishment immunity through an intellectual disability defense. After considering various procedures adopted by state courts and legislatures, state legislatures should adopt a bifurcated approach to making this determination.

There have been a variety of arguments as to whether a determination of intellectual disability should be made before or after a finding of guilt.[176] Ultimately, it is both more cost effective for states, as well as in the interest

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[174] *Id.*

[175] *See* Bridget C. Dupey, *Moore v. Texas: The Continued Quest for a National Standard*, 95 DENV. L. REV. 781, 782–808 (2018).

[176] *Intellectual Disability and the Death Penalty*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/other/intellectual-disability-and-death-penalty (last visited Jan. 6, 2019) ("Advocates for the intellectually disabled want the decision made pre-trial, by a judge or unbiased jury, based solely on evidence of intellectual disability. Prosecutors in states like Virginia and Louisiana have been arguing for the decision to be made post-conviction by the same jury that found the person guilty of murder. It is clear that a pre-trial decision makes more sense; if a person is intellectually disabled and not eligible to be executed, the state saves the hundreds of thousands of dollars associated with a death penalty prosecution."). *See also* James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 14 (2003) ("Most of the States that have enacted legislation have chosen to have the issue addressed, in the first instance, in pretrial proceedings. This makes sense for a number of reasons. Most importantly, if the defendant has mental retardation, and therefore is ineligible for the death penalty, pretrial resolution of the issue saves the State the cost of an unnecessary capital trial. It is universally recognized that capital trials are vastly more expensive to conduct than noncapital trials.").

of fairness for the defendant, to have an initial pretrial determination of intellectual disability.[177] However, the best option would be for courts to have both. Professor James Ellis advocated for this approach.[178] First, the court would hold a pretrial bench hearing in which a judge is able to make a ruling on whether a criminal defendant qualifies as intellectually disabled, after which the trial will either proceed as a capital trial or a trial without the possibly of capital punishment.[179] Then, if the defendant or prosecution would like to challenge this finding by the judge, they are afforded the opportunity to argue their case to a jury before the sentencing phase of the trial.[180] This procedure has faced some adversity, but ultimately, it should be the procedure adopted by legislatures due to its compliance with constitutional standards.[181] Ellis explains this reasoning stating:

> This bifurcated approach to the issue may at first appear awkward to some legislators, and some prosecutors may initially be concerned that it offers the defendant 'two bites at the apple.' But as in *Jackson*, the bifurcation makes sense because its two prongs address two separate (although factually related) questions. The first, to be addressed by the judge, is the legal issue of whether the defendant is a person who is eligible for the death penalty. If the court does not find the defendant death-eligible because of mental retardation, it would be unconstitutional to proceed with a capital trial. The second inquiry, by the jury, is whether the prosecution has demonstrated that the defendant is factually an individual upon whom the death penalty may be imposed. Condemning a defendant to death who has properly raised the issue of mental retardation then becomes 'contingent on the finding of a fact' that is a necessary precondition to a capital sentence.[182]

In addition to the pre-conviction and post-conviction standard proposed by Ellis, there is another level of procedure that state legislatures should include in statutes. That next layer addresses the use of medical experts. The best procedural course that courts should follow is that after the defendant files a motion requesting a finding of intellectual disability, the court should appoint a mental health professional specialized in intellectual disability to make an initial judgment as to the level of intellectual functioning of the

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[177] *See* Ellis, *supra* note 176, at 14.
[178] *See id.* at 14–15.
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.* at 16.

defendant. Ellis emphasized the importance of the medical expert's specialized knowledge in intellectual disability.[183] He wrote:

> Defense counsel, in the first instance, and ultimately the court, will need an experienced and trained clinician whose expertise is the field of mental retardation. The evaluator (or in some cases, evaluation team) must not only be skilled in the administration and interpretation of psychometric (IQ) tests, but also in the assessment of adaptive behavior and the impact of intellectual impairment in the individual's life. A competent professional assessment will involve more than simply ascertaining an IQ score. It also requires the exercise of experienced clinical judgment in the field of mental retardation. The expertise of skilled mental disability professionals is crucial to implementing *Atkins*' protections and achieving the goals of the criminal justice system in these cases.[184]

After the court-appointed professional conducts an evaluation and reports to the court, the defendant and prosecution can provide their own experts to rebut or reinforce that finding to be heard by the judge at the pre-trial hearing.[185] This allows the court to have an objective base to work from before hearing expert testimony by either side. This process, along with the opportunity to be heard in front of a jury after the guilt phase of the trial, eliminates some of the possibilities for inconsistencies from expert testimony. As explained in *State v. Roque*, Arizona has adopted a similar multilevel approach.[186] The Arizona statute creates a three-tiered process for determining whether a defendant will qualify as intellectually disabled.[187] First, the court appoints a prescreening psychological expert used to determine an initial IQ score.[188] If the defendant scores within a range of scores according to the first psychological expert, the court appoints additional experts to determine the validity of the score and consider other factors.[189] Lastly, the court has a hearing on the issue to make a final determination of whether the defendant should be considered intellectually disabled and therefore protected from death penalty.[190]

In conclusion, combining the various approaches adopted by state legislatures and findings by the Supreme Court, the procedure for

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[183] *Id.* at 16–17.
[184] *Id.* at 14.
[185] *Id.* at 17.
[186] *See* State v. Roque, 141 P.3d 368, 402–03 (Ariz. 2006).
[187] *See id.* at 402.
[188] *Id.*
[189] *Id.*
[190] *Id.* at 403.

determining whether a criminal defendant qualifies as intellectually disabled should include the filing of a notice to the court and opposing counsel of the intent to raise the defense followed by a motion requesting appointment of a specialized medical expert. Next, the court should appoint a medical professional and conduct a pretrial hearing to make an initial decision on the intellectual functioning of the defendant. If the defendant disagrees with this finding, they are then given the opportunity to pose their case in front of a jury after conviction.

C. The Medical Standard

Before discussing a specific medical standard that legislatures should implement statutorily, the importance of relying on updated medical opinions to determine intellectual disability must be reiterated. While some argue reliance on medical opinions encourages inconsistent results, the Court several times has emphasized the dangers of not relying on medical opinions to establish intellectual disability.[191] For example, in *Moore*, the Justices found that when courts do not rely on updated medical standards, defendants are more likely to face inconsistent rulings.[192] After the Texas Solicitor General in *Moore* conceded that the *Briseno* factors developed by the Texas court did not cover all who could be intellectually disabled, Justice Ginsburg challenged him stating, "Isn't that a huge problem? Then you're opening the door to inconsistent results depending on who is sitting on the trial court bench, something we try to prevent from happening in capital cases."[193] Justice Breyer expressed similar sentiments stating, "It is a technical matter as to what standard should be used to determine disability with the consequence that some will be exempt from execution and others will not."[194] So, while medical standards evolve, not relying on updated standards provides more opportunity for abuse of the system than reliance on them from the beginning.

The traditional definition of intellectual disability is a three-part test depending first on IQ scores, secondly on adaptive functioning, and lastly on the age of onset.[195] But as previously explained, there has been significant push back on the use of IQ testing, with many professionals in the field

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[191] *See* Totenberg, *supra* note 83.

[192] *See id.*

[193] Nina Totenberg, *Supreme Court Tests Role of Intellectual Disability in Death Penalty Case*, NPR (Nov. 29, 2016, 4:26 PM), https://www.npr.org/2016/11/29/503766867/supreme-court-tests-role-of-intellectual-disability-in-death-penalty-case.

[194] *Id.*

[195] Hall v. Florida, 572 U.S. 701, 727 (2014).

advocating for more reliance on adaptive functioning.[196] For that reason, rather than treating the three parts as a checklist of sorts, in which one must have a certain IQ score to move on to the next level of analysis, as was seen in *Roque*, the factors should be considered with equal weight.[197]

Until there are better ways to evaluate intellectual functioning, state legislatures should include IQ scores as a factor considered by the courts, but with the ability to change this later as medical standards evolve, and without placing determinative value on the score alone. Next, state legislatures should include the most recent standard for adaptive functioning provided by the AAIDD.[198] The AAIDD divides adaptive behavior into three parts: conceptual skills, social skills, and practical skills.[199] Examples of conceptual skills include language, literacy, money, time, number concepts, and self-direction.[200] Examples of social skills include interpersonal skills, social responsibility, self-esteem, gullibility, naiveté, social problem solving, the ability to follow rules and obey laws, and to avoid being victimized.[201] Lastly, examples of practical skills include activities of daily living (personal care), occupational skills, healthcare, travel and transportation, schedules and routines, safety, use of money, and use of the telephone.[202] Including this three-part analysis with a non-exhaustive list of examples in state statutes would give some structure to the adaptive functioning analysis while still allowing for a medical evaluation specific to that defendant. The statutes should also include a requirement that there is evidence of the disorder before the age of eighteen. This is a fairly non-contested standard in both the medical field, as well as in the context of the intellectual disability defense to capital punishment.[203]

After laying out these factors, state legislatures should include a provision in their statutes allowing for consideration of other factors. The AAID, as well as The Arc for People with Intellectual and Developmental Disabilities, state that external factors aside from the three-part analysis must be considered when diagnosing intellectual disability.[204] The AAIDD wrote:

> But in defining and assessing intellectual disability, the AAIDD stresses that additional factors must be taken into account such as the community

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[196] See discussion *supra* notes 114–22 and accompanying text.
[197] *See* State v. Roque, 141 P.3d 368, 402–03 (Ariz. 2006).
[198] *See* AM. ASS'N ON INTELL. & DEV DISABILITIES, *supra* note 7.
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.*

> environment typical of the individual's peers and culture. Professionals should also consider linguistic diversity and cultural differences in the way people communicate, move, and behave. Finally, assessments must also assume that limitations in individuals often coexist with strengths.[205]

Ultimately state statutes should provide a framework for medical professionals to work within, while still allowing for individual variation. Many of these cases are fact specific, so a flexible standard is key. Mental competency is a complex field that neither legislatures nor judges have a lot of experience in typically; thus, it is important for the statutes to give a basic level of understanding such as using the three-part analysis provided by the AAIDD, but also allowing for medical experts to account for the individual defendant's intellectual functioning.[206]

V. CONCLUSION

Although our judicial system places great value in history and tradition when evaluating constitutional protections, it is clear that the Eighth Amendment's protection from the death penalty is more concerned with evolving societal perspectives and values. While this is beneficial in that it allows for variation and change in this area of the law, it also often leaves courts and legislatures unsure as to what standards to apply, resulting in inconsistent rulings. This was seen following the Court's abolition of the death penalty for individuals with intellectual disabilities in *Atkins*. To prevent inconsistency, state legislatures must adopt a universal standard that both adheres to the constitutional requirements discussed by the Supreme Court and promotes justice and efficiency in state and federal criminal courts. The proposed standard and process in this Note incorporates both of these requirements and therefore should be adopted by state legislatures.

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[205] *Id.*

[206] *See* discussion *supra* Sections III.A and III.B.