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**EXECUTION BY ACCIDENT:  
EVIDENTIARY AND CONSTITUTIONAL PROBLEMS  
WITH THE “CHILDHOOD ONSET” REQUIREMENT IN  
*ATKINS* CLAIMS**

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## I. INTRODUCTION

In 1989, a Vietnamese immigrant named Heck Van Tran was convicted and sentenced to death for his part in a restaurant robbery which left three people dead.<sup>1</sup> Van Tran has the cognitive and adaptive problems associated with mental retardation.<sup>2</sup> Before going to jail, he was unable to live independently.<sup>3</sup> He cannot read at a third-grade level and displays deficits in memory and motor skills.<sup>4</sup> Additionally, he struggles severely to communicate in either Vietnamese or English.<sup>5</sup> Although he was a slow learner as a child, he was never given an IQ test as a Vietnamese child or teenage immigrant to the United States.<sup>6</sup>

Relying on *Atkins v. Virginia*,<sup>7</sup> which declared unconstitutional the execution of someone who was mentally retarded at the time of the offense, Van Tran's lawyers asserted that he was mentally retarded and thus ineligible for the death penalty. They presented evidence, including unrebutted testimony from two experts,<sup>8</sup> regarding all three prongs of the standard definition of mental retardation: (i) substantial intellectual deficiencies (measured by I.Q. tests); (ii) deficits in two or more categories of functional "adaptive skills"; and (iii) onset of the above symptoms during childhood.<sup>9</sup> After an evidentiary hearing, the trial court rejected Van Tran's *Atkins* claim.<sup>10</sup> The state appellate court upheld this denial,<sup>11</sup> and a *habeas* federal district court failed to find the requisite unreasonableness or illegality needed before *habeas* relief could be granted.<sup>12</sup>

Between the state courts and the federal *habeas* court, both the first and second prong of the mental retardation definition had already been found.<sup>13</sup> But Van Tran did not obtain relief, because the courts had found that Van Tran had failed to prove that his symptoms manifested

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<sup>1</sup> Van Tran v. State, No. W2005-01334-CCA-R3-PD, 2006 WL 3327828, at \*1 (Tenn. Crim. App. Nov. 9, 2006).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at \*5.

<sup>4</sup> *Id.* at \*4-8.

<sup>5</sup> *Id.* at \*21.

<sup>6</sup> *See id.* at \*11 (Van Tran only had one year of formal schooling).

<sup>7</sup> 536 U.S. 304 (2002).

<sup>8</sup> *Van Tran*, 2006 WL 3327828, at \*2-12.

<sup>9</sup> *See* TENN. CODE ANN. § 39-13-203 (setting out this definition under Tennessee law); *Atkins*, 536 U.S. at 318 (referencing this definition as the standard definition of mental retardation).

<sup>10</sup> *Van Tran*, 2006 WL 3327828, at \*15.

<sup>11</sup> *Id.* at 27.

<sup>12</sup> *Tran v. Bell*, No. 00-2451-SHM (W.D. Tenn. June 24, 2011). Under the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), the federal *habeas* court could only grant relief if it found the state courts' decisions were "contrary to, or an unreasonable application of, clearly established law," or based on "an unreasonable determination of the facts." 28 U.S.C. § 2254 (2006); *Harrington v. Richter*, 131 S.Ct. 770, 785 (2011).

<sup>13</sup> The state courts had found that Van Tran had met his burden of proving by a preponderance of the evidence the existence of the first, "intellectual deficit" prong, and one of the two required categories of "adaptive skills" deficits, that of "communication." *Van Tran*, 2006 WL 3327828, at \*16. On *habeas* review, the federal district court found a second adaptive deficit, that of "functional academics," satisfied in the record, meaning that the second prong of the mental retardation definition was also established. *Van Tran*, 2006 WL 3327828, at \*22.

before age 18.<sup>14</sup> Thus, although the courts found that Van Tran exhibited mental and emotional shortfalls indistinguishable from those exhibited by the irrefutably mentally retarded--deficits which were almost certainly present at the time of the offense--he was still scheduled for execution, because of a perceived lack of evidence establishing the first signs of the disorder while Van Tran was a minor. In essence, Van Tran is on Death Row because no one administered an IQ test to him as a child in the jungles of war-torn Vietnam.

Van Tran is not alone. Around the country, defendants who otherwise meet the generally accepted criteria for mental retardation are being denied the benefit of *Atkins*' protection against execution, because they fail to affirmatively establish that their undisputed cognitive and emotional deficits first presented when the defendant was a minor.<sup>15</sup>

This phenomenon is troubling for several reasons. First, when applying the mental retardation definition in these hearings, many courts set the proof bar too high, in several ways. For one thing, they expect actual IQ and/or other psychological tests to have been administered when the defendant was a child. This is unrealistic, given that so many of those sentenced to death are poor, or immigrant, or both, having grown up in circumstances where such testing was rare. Even middle-class American defendants often lack such testing, given an educational climate where people shy away from labeling someone mentally retarded.<sup>16</sup> In Van Tran's case, for example, despite the lack of pre-IQ tests, two defense experts testified based on other evidence that Van Tran met this "age of onset" requirement, and no state expert witness rebutted that testimony. Nonetheless, the state courts found for the State on this question.<sup>17</sup>

Moreover, many courts hearing these cases become skeptical of a defendant's *Atkins* claim once they learn that the defendant functions "normally," as in living his day-to-day life with relative autonomy. This reasoning ignores the strong consensus of experts in the field that persons can live on their own, marry, cook, hold a job, etc. and still be retarded.<sup>18</sup> A related problem is the tendency of some courts to use the defendant's prior criminal participation against him on the mental retardation (MR) issue, reasoning that anyone high-functioning enough to commit the underlying crime must not be retarded.<sup>19</sup> Still another unfair evidentiary obstacle occurs when a court finds that a mentally retarded defendant also has some other mental health problem, and the court rejects the *Atkins* claim based on speculation that the cognitive and emotive deficits could stem from the other mental disorder.<sup>20</sup> This approach ignores the "dual diagnosis" medical consensus that mental retardation often co-presents with a mental illness, and that the two mental problems are intertwined so as to make it impossible to separate out the mental illness as the sole cause of the patient's cognitive and adaptive defects. All of these

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<sup>14</sup> The state courts had also found that Van Tran had failed to prove the third prong, onset before 18. The federal *habeas corpus* did not overturn this finding, because it did not find that it was unreasonable or contrary to clearly established law. *Id.*

<sup>15</sup> See, e.g., *Walton v. Johnson*, 440 F.3d 160, 177-78 (4th Cir. 2006); *Burns v. State*, 944 So.2d 234, 249 (Fla. 2006); *Commonwealth v. Vandivner*, 962 A.2d 1170, 1188-89 (Pa. 2009); *State v. Strode*, 232 S.W.3d 1, 17 (Tenn. 2007).

<sup>16</sup> See discussion *infra* Section III.B.

<sup>17</sup> *Van Tran*, 2006 WL 3327828, at \*26.

<sup>18</sup> See discussion *infra* Part III.C.

<sup>19</sup> See *infra* text accompanying notes 142-46.

<sup>20</sup> See discussion *infra* Part III.D.

issues were present in Van Tran’s case,<sup>21</sup> making it an excellent example of the problems in court application of the *Atkins* MR definition.

Second, the “age of onset” requirement is itself irrational, unwarranted, and arguably unconstitutional. The requirement was originally designed by the medical community for clinical treatment purposes,<sup>22</sup> was mentioned in passing by the Court in *Atkins*,<sup>23</sup> and was adopted without careful consideration by states around the country because of its inclusion in medical definitions and the *Atkins* opinion.<sup>24</sup> *Atkins* never required or adopted the criterion, deciding to leave to the states the latitude to define MR.<sup>25</sup> In a sense, the childhood onset criterion was an accidental byproduct of the legal and policy debate leading up to *Atkins*. Strictly applied, it means that a defendant who suffers traumatic brain injury at age 17 with resulting cognitive and adaptive skill deficits, and a defendant who has the same injury and same deficits at age 19, will be treated very differently for purposes of the death penalty—even though, at the time of the offense, both had the exact same lessened culpability which stems from mental retardation. Again, the *Van Tran* case exemplifies this problem as well. Assuming *arguendo* that Van Tran developed his symptoms after 18, his symptoms nonetheless manifested sufficiently early that they likely existed at the time of the offense.<sup>26</sup> And those symptoms are so severe that it is hard to say he is less deserving of the *Atkins* exclusion than other defendants who have won their *Atkins* claims.<sup>27</sup>

Some scholarship has addressed various aspects of these concerns. Some commentators have cautioned against requiring actual test results from the defendant’s childhood.<sup>28</sup> Less scholarly attention has been given to courts’ use of a defendant’s day-to-day autonomy, or participation in criminal acts, as refutations of MR status, or to the improper use of co-presenting mental illness as a disqualifier.<sup>29</sup> These practical problems are underappreciated, and are

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<sup>21</sup> See *Van Tran*, 2006 WL 3327828, at \*24-25 (courts rejected Van Tran’s claim in part because he had held a job, had participated in distributing proceeds of the crime, and also suffered paranoid schizophrenia).

<sup>22</sup> AAIDD, *INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT*, 27 (2010) (hereinafter AAIDD, *INTELLECTUAL DISABILITY*).

<sup>23</sup> *Atkins*, 536 U.S. 308 n.39.

<sup>24</sup> See Corena G. Larimer, Comment, *Equal Protection from Execution: Expanding Atkins to Include Mentally Impaired Offenders*, 60 CASE W. RES. L. REV. 925, 931 (2010).

<sup>25</sup> *Atkins*, 536 U.S. at 308 n.39.

<sup>26</sup> The psychological testing establishing Van Tran’s cognitive and adaptive deficits were administered within a few years of the offense. Where defendant meets the first two prongs of the MR definition and there is no evidence of malingering or other cause of the condition, it is reasonable to presume the condition manifested sufficiently early. See *State v. White*, 885 N.E.2d 905, 917 (Ohio 2008). This is especially the case in *Van Tran*, where there was corroborative evidence of early development problems described immediately above.

<sup>27</sup> See *Van Tran v. State*, No. 02-9803-CR-00078, 1999 WL 177560, at \*1-8 (Tenn. Crim. App. Apr. 1, 1999) (detailing severe cognitive and adaptive problems); see also discussion *infra* Section III.E. (comparing other cases finding the defendant retarded or granting *habeas* relief on this issue).

<sup>28</sup> See John H. Blume et al., *Of Atkins and Men: Deviations From Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL’Y 689 at 729-30 (2009); Bryan Lester Dupler, *Capital Cases Involving Mental Retardation*, 93 AM. JUR. TRIALS 1, § 15 (2012); John Matthew Fabian, *Life, Death, and I.Q.: Forensic Psychological and Neuropsychological Evaluations in Atkins Intellectual Disability Cases*, 59 CLEV. ST. L. REV. 399, 407-409 (2011); Peggy Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. LEGIS. 77, 99 (2003); Penny J. White, *Treated Differently in Life But Not in Death: The Execution of the Intellectually Disabled After Atkins v. Virginia*, 76 Tenn. L. Rev. 685, 708-09 (2009).

<sup>29</sup> See Blume, *supra* note 28, at 725-729 (discussing co-presenting mental illness); Fabian, *supra* note 28, at 409-410 (same).

discussed herein. Similarly, some commentators have criticized in passing, as part of a general discussion of *Atkins* claims, the onset requirement itself.<sup>30</sup> A few have even suggested that the requirement is unconstitutional.<sup>31</sup> But few have developed a sustained legal challenge to the requirement.

This Article attempts a comprehensive discussion of the practical and theoretical problems with the onset requirement. It discusses the ways in which courts require unrealistic amounts of proof on the onset issue specifically and on related parts of the MR definition, including problems not previously discussed in the literature. Notably, this Article argues that where the first and second prongs of the MR definition are established, the burden should shift to the prosecution to prove adult onset of the condition;<sup>32</sup> where defense expert testimony that the defendant meets the definition is unrebutted, the claim should be granted absent extraordinary counter-proof;<sup>33</sup> and that where the defendant provides proof of deficits in designated categories of “adaptive skills,” evidence of the defendant’s high function in other categories of adaptive skills should be deemed irrelevant.<sup>34</sup>

The Article also updates the Eighth Amendment analysis to incorporate discussion of the very recent United States Supreme Court cases<sup>35</sup> protecting persons under age 18 from life without parole sentences, analyzing them side by side with *Atkins* itself and the analogous Eighth Amendment case *Roper v Simmons*,<sup>36</sup> where the Court invalidated executions of defendants who were under 18 at the time of the offense. It also examines a potential Equal Protection challenge to the onset requirement, discussing four different possible constitutional standards of review and evaluating several different defenses of the onset requirement under each standard of review. Where appropriate, the Article illustrates the arguments by reference to the *Van Tran* case, which is in many ways representative of the problems in this area of the law.

Part II provides background on the requirement itself. Part III explains those areas where courts often employ too strict a proof standard about “proof of onset,” and makes recommendations about how courts should decide such issues. Part IV argues that the onset requirement is unconstitutional under the Eighth Amendment. Part V argues that it is unconstitutional under the Equal Protection Clause. Part VI offers some concluding thoughts.

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<sup>30</sup> See Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing Atkins v. Virginia: How Legislatures And Courts Can Promote Accurate Assessments And Adjudications Of Mental Retardation In Death Penalty Cases*, 41 U. RICH. L. REV. 811, 854-56 (2007); Alexis Krulish Dowling, *Post-Atkins Problems With Enforcing The Supreme Court’s Ban On Executing The Mentally Retarded*, 33 SETON HALL L. REV. 773, 804, 05 (2003); Christopher Slobogin, *Mental Disorder As An Exemption From The Death Penalty: The ABA-IRR Task Force Recommendations*, 54 CATH. U. L. REV. 1333, 1136 (2005); White, *supra* note 28, at 708-10; see also James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 422, 423 (1985) (making a similar point pre-*Atkins*).

<sup>31</sup> See James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to States Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 21 n. 33 (2003); Nita A. Farahany, *Cruel and Unequal Punishments*, 86 WASH. U. L. REV. 859 (2009); Larimer, *supra* note 24, at 944-45; Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293, 299 (2003).

<sup>32</sup> See *infra* Section III.B.

<sup>33</sup> See *infra* Section III.E.

<sup>34</sup> See *infra* Section III.C.

<sup>35</sup> See *Miller v. Alabama*, 132 S.Ct. 2455 (2012); *Graham v. Florida*, 130 S.Ct. 2011 (2010).

<sup>36</sup> 543 U.S. 551 (2005).

## II. BACKGROUND

In *Atkins v. Virginia*, the Supreme Court held that the execution of mentally retarded offenders violated the Eighth Amendment's prohibition of cruel and unusual punishment.<sup>37</sup> Examining the trend of legislative and enforcement action in the various States, and the evidence establishing that such offenders had diminished culpability based on their mental impairments, the Court held that our nation's "evolving standards of decency" prevented the execution of those who were mentally retarded at the time of the commission of the offense.<sup>38</sup>

The Supreme Court made clear what characteristics of the mentally retarded rendered execution of them unconstitutional. The Court in *Atkins* identified two distinct lines of reasoning—one penological, one procedural—behind the view that MR was inconsistent with the death penalty. The penological reasoning was that executing the mentally retarded did not further either the policy of deterrence or retribution, the only two policies justifying imposition of the death penalty.<sup>39</sup> The procedural concern was that the mentally retarded were significantly less capable of defending themselves, causing a greater risk of error during trial and sentencing.<sup>40</sup>

Regarding the penological concerns, the Court in *Atkins* noted that, even when persons with MR knew the difference between right and wrong and were competent to stand trial, their intellectual deficits left them with a diminished capacity to (i) understand and process information; (ii) communicate; (iii) learn from experience; (iv) reason logically; (v) control impulses; and (vi) understand the reactions of others.<sup>41</sup> Persons with these deficits did not deserve retribution more than "the average murderer," who the Court, in prior cases, had already decided did not deserve the death penalty because they were not the "worst of the worst."<sup>42</sup> And persons with these deficits are also less capable of being deterred by the existence of capital sentences.<sup>43</sup>

Regarding the procedural concerns, the *Atkins* Court noted that persons with MR are (a) more likely to give false confessions, (b) less capable of assisting their counsel, (c) more likely to be poor witnesses, (d) more likely to have a demeanor giving a false impression of a lack of remorse, (e) less capable of presenting persuasive mitigation at sentencing, and (f) more likely, by their very status as MR, to cause the sentencing jury to find the aggravating factor of "future dangerousness."<sup>44</sup>

Although the *Atkins* majority was clear in its intent to protect the mentally retarded, it declined to provide a definition of the class, electing to allow the states to create their own definitions.<sup>45</sup> For its own discussion purposes, the Court noted, but did not explicitly adopt, the

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<sup>37</sup> 536 U.S. 304, 321 (2002).

<sup>38</sup> *Id.* at 311-12 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

<sup>39</sup> *Id.* at 317.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 318.

<sup>42</sup> *Id.* at 319 (citing *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) and *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980)); *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (explaining that the death penalty must be reserved for the "worst of the worst").

<sup>43</sup> *Id.* at 320.

<sup>44</sup> *Id.* at 320-21.

<sup>45</sup> *Id.* at 317 ("we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences" (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986))).



definitions of the two major medical organizations in the field.<sup>46</sup> Each of these definitions requires onset of the disability during the developmental period, defined as the period prior to the age of 18.<sup>47</sup> Thus, the onset criterion, while acknowledged to preexist *Atkins* in the medical literature, is not constitutionally required.

The first standard definition noted by the Court was the 1992 definition by the American Association on Mental Retardation (AAMR),<sup>48</sup> and the second was from the American Psychiatric Association (APA).<sup>49</sup> The two are nearly identical, each requiring (1) significantly subaverage intellectual functioning; (2) significant “adaptive skill” deficits in at least two adaptive skill areas (communication, self-care, home living, social skills, community resources use, self-direction, health/safety, functional academics, work and leisure);<sup>50</sup> and (3) onset of the above symptoms before age 18.<sup>51</sup>

Most death penalty states follow this three-prong approach in defining mental retardation.<sup>52</sup> All such states place upon the defendant the burden of persuasion on the issue of mental retardation, requiring the defendant to present competent evidence establishing each of the prongs of the MR definition.<sup>53</sup> Almost all such states require that the defendant prove this fact by a preponderance of the evidence.<sup>54</sup> Tennessee uses this proof burden, which was applied

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<sup>46</sup> *Id.* at 308 n.3 (citing the clinical definitions of mental retardation with approval).

<sup>47</sup> *Id.*

<sup>48</sup> The AAMR has since renamed itself as the American Association on Intellectual and Developmental Disabilities, and now prefers the term “intellectually disabled” (“ID”) over “mentally retarded” (“MR”). See AAIDD, INTELLECTUAL DISABILITY, *supra* note 22, at 3. For simplicity, the term “mentally retarded” (or “MR”) will be used herein. The terms “AAMR” and “AAIDD” will be used interchangeably, with the former being used primarily when discussing a publication or statement dating back from the time prior to the name change.

<sup>49</sup> *Atkins*, 536 U.S. at 308 n.3.

<sup>50</sup> The AAMR has since refined this prong of the definition to include a more permissive “spectrum” approach to the range of adaptive behaviors as an alternative to the stricter “two out of ten categories” approach. AAMR, MENTAL RETARDATION 81 (10th ed. 2002). But the latter approach has been retained in the APA’s definition, see American Psychiatric Association (APA), DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. Text Revision 2000) [“DSM-IV-TR”], was the approach adopted by the Supreme Court in *Atkins*, 536 U.S. at 308 n.39, and is the approach taken by death penalty states, see notes 48 through 50, *infra.*, so this Article uses that approach. Since the spectrum approach is more permissive, any argument herein regarding the prior approach would apply *a fortiori* to the spectrum approach.

<sup>51</sup> *Atkins*, 536 U.S. at 308 n.3 (citing AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992); DSM-IV-TR *supra* note 50, at 41).

<sup>52</sup> Almost every state allowing the death penalty has adopted a definition “that closely tracks” these clinical definitions. Larimer, *supra* note 24, at 931 n.36.

<sup>53</sup> See *State v. Dann*, 79 P.3d 58, 63 (Ariz. 2003); *Anderson v. State*, 163 S.W.3d 333, 347-48 (Ark. 2004); *Morrison v. State*, 583 S.E.2d 873 878-79 (Ga. 2003); *People v. Pulliam*, 794 N.E.2d 214, 236 (Ill. 2002); *State v. Williams*, 831 So.2d 835, 857 (La. 2002); *Branch v. State*, 2004 WL 1171756 at \*50 (Miss. 2004); *Johnson v. State*, 102 S.W.3d 535, 540 (Mo. 2003); *State v. Lott*, 779 N.E.2d 101, 10151 (Ohio 2002); *Murphy v. State*, 66 P.3d 456, 459 (Okla. Crim. App. 2003); *Pennsylvania v. Mitchell*, 839 A.2d 202, 210 n.8 (Pa. 2003); *Franklin v. Maynard*, 356 S.C. 276, 278 (S.C. 2003); *Ex parte Johnson*, 2003 WL 21715265 at \*2 (Tex. Crim. App. 2003); *Atkins v. Virginia*, 581 S.E.2d 514, 517 (Va. 2003).

<sup>54</sup> *Anderson v. State*, 163 S.W.3d 333, 347-48 (Ark. 2004); *Morrison v. State*, 583 S.E.2d 873 878-79 (Ga. 2003); *State v. Williams*, 831 So.2d 835, 857 (La. 2002); *Chase v. State*, 873 So.2d 1013, 1028 (Miss. 2004); *Johnson v. State*, 102 S.W.3d 535, 540 (Mo. 2003); *State v. Lott*, 779 N.E.2d 101, 10151 (Ohio 2002); *Murphy v. State*, 66 P.3d 456, 459 (Okla. Crim. App. 2003); *Commonwealth v. Mitchell*, 839 A.2d 202, 210 n.8 (Pa. 2003); *Franklin v. Maynard*, 356 S.C. 276, 278 (S.C. 2003); *Ex parte Briseno*, 135 S.W.3d 1, 12 (Tex. Crim. App. 2004); *Atkins v. Commonwealth*, 581 S.E.2d 514, 517 (Va. 2003).

by the courts in *Van Tran*.<sup>55</sup> The federal system takes a similar approach.<sup>56</sup> Internationally, the overwhelming majority of countries define mental retardation (or intellectual disability) in such a way as to require that the condition manifest before the age of 18 or during the developmental period.<sup>57</sup>

Most *Atkins* claims involve a defendant who is a “borderline” case, someone who might be “mildly retarded”<sup>58</sup> as opposed to severely or profoundly retarded.<sup>59</sup> Those with more severe mental retardation are either not going to have been able to commit the crime,<sup>60</sup> or have been found incompetent to stand trial.<sup>61</sup> Thus, many *Atkins* claims are going to be close calls. For that reason, getting the definition right, and applying it right, are vitally important. A requirement of onset during childhood does not mean that one has to be born with the cognitive and adaptive deficiencies in order to be classified as mentally retarded. While MR often originates at or near the time of birth, sometimes malnutrition, injury, infection, or other causes can cause onset at a later time.<sup>62</sup> As the Supreme Court has recognized, the classic clinical definition of mental retardation has long acknowledged that MR is caused by a variety of factors, some genetic, some environmental, and some unknown.<sup>63</sup> The multiplicity of causes was recognized by the Court in *Atkins* itself.<sup>64</sup> But whatever the nature of the cause, the defendant must prove that it manifested during childhood. According to the official medical definition of MR, onset need not have been formally identified prior to age 18, but it must at least be later determined to have first occurred prior to that time.<sup>65</sup>

Although the age-of-onset prong was given little attention by the Court, much of the state legislation that followed *Atkins* included it in an effort to mirror the *Atkins*-referenced

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<sup>55</sup> *Van Tran v. State*, No. W2005-01334-CCA-R3-PD, 2006 WL 3327828, at \*19 (Tenn. Crim. App. Nov. 9, 2006).

<sup>56</sup> *See, e.g., U.S. v. Davis*, 611 F.Supp. 472, 474-75 (D. Md. 2009) (“Since *Atkins*, other federal courts have applied [the AAIDD and DSM-IV-TR] definitions, noting that the two are essentially identical.”); *U.S. v. Sablan*, 461 F.Supp.2d 1239, 1242-43 (D. Colo. 2006) (explaining that preponderance of evidence is the proper standard for defendant’s burden).

<sup>57</sup> AAIDD, *INTELLECTUAL DISABILITY*, *supra* note 22, at 28 (“[R]etaining age 18 is consistent with diagnostic practices in many countries (e.g., throughout Europe and the Pacific Rim.)”); WORLD HEALTH ORGANIZATION, *ATLAS: GLOBAL RESOURCES FOR PERSONS WITH INTELLECTUAL DISABILITIES* 19 (2007), [http://www.who.int/mental\\_health/evidence/atlas\\_id\\_2007.pdf](http://www.who.int/mental_health/evidence/atlas_id_2007.pdf). The International Classification of Diseases and Diagnostic Statistical Manual of Mental Disorders were diagnostic instruments or classifications most often used to refer to intellectual disabilities. *Id.* The former requires manifestation during the developmental period, and the latter requires onset before the age of 18. *Id.* at 100.

<sup>58</sup> *See DSM-IV-TR*, *supra* note 50, at 49. (classifying mental retardation as Mild, Moderate, Severe, and Profound, based on IQ level).

<sup>59</sup> *See Fabian*, *supra* note 28, at 401 (citing AAIDD, *USER’S GUIDE: MENTAL RETARDATION DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT* 18 (2007) (AAIDD, *User’s Guide*)). Indeed, the mildly retarded make up 85% of all mentally retarded persons, APA, *DSM-IV-TR*, *supra* note 50, at 43, and an even greater percentage of those charged with capital crimes.

<sup>60</sup> *See Fabian*, *supra* note 28, at 401 (emphasizing that the mildly retarded often have the ability to drive, engage in meaningful relationships with others, sell drugs, and join gangs).

<sup>61</sup> *See Atkins v. Virginia*, 536 U.S. 304, 339-41 (2002) (Scalia, J., dissenting) (noting that historically the severely and profoundly mentally retarded received special treatment under the law).

<sup>62</sup> AAIDD, *INTELLECTUAL DISABILITY*, *supra* note 22, at 27-28.

<sup>63</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 443 n.9 (1985) (quoting AAMD, *CLASSIFICATION IN MENTAL RETARDATION* 4 (H. Grossman ed. 1983); *DSM-IV-TR*, *supra* note 50, at 45).

<sup>64</sup> *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002) (citing *DSM-IV-T*).

<sup>65</sup> AAIDD, *INTELLECTUAL DISABILITY*, *supra* note 22, at 27.

definitions.<sup>66</sup> As a result, nearly all death penalty states require, through statute or judicial decision, that defendant prove the condition manifested itself before adulthood.<sup>67</sup>

Although relevant in the clinical setting, this definition is flawed for use in the criminal law. Criminal law is more concerned with the consequences of the individual's condition on culpability than the prescription for treatment or care. The age of onset is relevant only to the latter.<sup>68</sup> The purpose of the requirement is simply to help distinguish MR from other, similar mental impairments.<sup>69</sup> The manner in which medical staff will treat or care for a mentally challenged patient—the use of drugs, the type of support programs to be used, etc.—may vary depending on whether a patient has a developmental disorder versus an adult-onset trauma or disease.<sup>70</sup> The related issue of determining “etiology,” the causation of the conditions, may also be relevant to, among other things, genetic counseling; referral to support groups; and statistical comparison of groups of patients for research, administrative, or clinical purposes.<sup>71</sup> But the age of onset will not change the effect of the mental and adaptive impairments on the patient's culpability and deterrability at the time that patient commits a crime. Nor will it change the practical difficulties in giving that patient a fair trial on the same level as an unimpaired defendant.

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<sup>66</sup> Larimer, *supra* note 25, at 931.

<sup>67</sup> Many states require onset before the age of 18, *see, e.g.*, ARIZ. REV. STAT. ANN. §13-753(K)(3) (2010 & Supp. 2011); ARK. CODE ANN. § 5-4-618(a)(1) (2006 & Supp. 2011); CAL. PENAL CODE § 1376(a) (West 2011); DEL. CODE ANN. tit. 11, § 4209(d)(3)(d)(2)-(3) (2007); FLA. STAT. ANN. § 921.137(1) (West 2006 & Supp. 2012); IDAHO CODE ANN. § 19-2515A(1)(a) (2004 & Supp. 2012); 725 ILL. COMP. STAT. ANN. 5/114-15(d) (2006); KAN. STAT. ANN. § 39-1803 (2000); LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1) (2008); MISS. CODE ANN. § 1-3-24 (Supp. 2011); MO. REV. STAT. § 565.030(6) (West Supp. 2012); MONT. CODE ANN. § 53-20-102(8) (2011); N.C. GEN. STAT. § 15A-2005(a)(1)(a) (2011); OKLA. STAT. ANN. tit. 10 § 1408 (West 2011); OR. REV. STAT. ANN. § 427.005(10)(a) (2011); S.D. CODIFIED LAWS § 23A-27A-26.1 (2004); TENN. CODE ANN. 39-13-203(a)(1) (West 2010); VA. CODE ANN. § 19.2-264.3:1.1(A) (2008 & Supp. 2012); WASH. REV. CODE ANN. § 10.95.030(2)(e) (West 2012); U.S. v. Davis, 611 F.Supp. 472, 474-75 (D. Mary. 2009) (“Since *Atkins*, other federal courts have applied (the AAID and DSM-IV-TR) definitions, noting that the two are essentially identical.”); *Ex parte Perkins*, 851 So.2d 453, 456 (Ala. 2002); *Commonwealth v. Miller*, 888 A.2d 624, 630 n.7 (Pa. 2005). Some states use an age of onset other than 18, *see, e.g.*, COLO. REV. STAT. ANN. § 16-8.5-101(9) (2011) (using age 22); IND. CODE ANN. § 35-36-9-2 (LexisNexis 1998 & Supp. 2011) (using age 22); MD. CODE ANN., CRIM. LAW § 2-202(b)(i)-(ii) (LexisNexis 2002 & Supp. 2011) (using age 22); N.H. REV. STAT. ANN. § 171-A:2 (LexisNexis 2010) (using age 22); UTAH CODE ANN. § 77-15a-102 (LexisNexis 2008) (using age 22). Others simply use the phrase “during the development period,” *see, e.g.*, GA. CODE ANN. § 17-7-131(a)(3) (2008 & Supp. 2011); KY. REV. STAT. ANN. § 532.130(2) (LexisNexis 2008); NEV. REV. STAT. ANN. §174.098(7) (LexisNexis 2011); OHIO REV. CODE ANN. § 5123.01(N) (LexisNexis 2011); S.C. CODE ANN. § 16-3-20(C)(b)(10); TEX. HEALTH & SAFETY CODE ANN. § 591.003 (West 2010 & Supp. 2012); WYO. STAT. ANN. § 8-1-102 (2011). But all states save Nebraska require manifestation during childhood. *See* NEB. REV. STAT. §28-105.01 (2008).

<sup>68</sup> ABA, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, 469 (1984) (“[A] temporal manifestation of retardation is not germane to the process of sentencing convicted offenders in adult criminal courts”); *see also* AAIDD, INTELLECTUAL DISABILITY, *supra* note 22, at 28 (explaining that the age of onset requirement is meant to help determine whether the deficiency is a result of irregular brain development); Slobogin, *supra* note 30, at 1136 (“[T]he only significant characteristic that differentiates these severe disabilities from mental retardation is the age of onset.”).

<sup>69</sup> AAID, **Error! Main Document Only.**INTELLECTUAL DISABILITY, *supra* note 22, at 27.

<sup>70</sup> AAIDD, INTELLECTUAL DISABILITY, *supra* note 22, at 58 (explaining that determining the origin of an intellectual disability will alert care providers as to what treatment steps and precautions should be taken).

<sup>71</sup> *Id.*

Indeed, where the two most definitive authorities for the MR definition--the sources relied on by the Court in *Atkins*,<sup>72</sup> the American Psychiatric Association and the AAMR/AAIDD-- provide any explanation for the age of onset criterion, they discuss it purely in terms of diagnosis, treatment, care, and the like. They discuss it without any reference whatsoever to considerations of capacity to understand or be responsible for the consequences of one's actions, to be deterred, to assist in one's own defense, or any other consideration remotely relevant to the criminal justice system.<sup>73</sup>

It should thus not be surprising that American Psychiatric Association, as well as the American Psychological Association and the National Alliance for the Mentally Ill, have all formally adopted recommendations to apply the *Atkins* reasoning to individuals who share the intellectual and adaptive deficits of MR even if there is *post*-18 onset.<sup>74</sup> This is also the position of the American Bar Association.<sup>75</sup> Additionally, Ruth Luckasson, the principal author of the 1992 and 2002 AAMR definitions, has noted the slight relevance of the onset requirement to criminal justice.<sup>76</sup> And this is overwhelmingly the view of legal scholars.<sup>77</sup>

The definition has both practical problems in implementation and inherent problems. First, the amount and type of proof required by many courts to prove this fact is unfair, unworkable, and contrary to the Supreme Court's understanding in *Atkins*. Second, the requirement itself is irrelevant, unwarranted, counterproductive, and unconstitutional.

### III. EVIDENTIARY HURDLES

#### A. General

When evaluating the third prong of the MR definition, courts should avoid drawing a bright line at evidence from before the defendant's 18th birthday. As the AAMR argued and the Arizona Supreme Court has held, evidence of post-18 behavior is still relevant to a determination of mental retardation.<sup>78</sup> Scholars have also cautioned against a strict standard of affirmative proof of onset before 18.<sup>79</sup>

*Atkins* itself helps to illustrate the difficulties involved in courts' application of the MR definition. The evidence for mental retardation in *Atkins* was actually less impressive than in many cases where courts reject the *Atkins* claim—including, for example, Van Tran's. In *Atkins*,

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<sup>72</sup> *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002) (citing AAMR and APA).

<sup>73</sup> See AAIDD, INTELLECTUAL DISABILITY, *supra* note 22, at 5-12 (definition of MR), 27-29 (diagnosis and classification), 57-79 (etiology); DSM-IV-TR, *supra* note 50, at 39 (childhood disorders generally), 41-48 (mental retardation).

<sup>74</sup> ABA, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. Rep. 668, 669-70 [hereinafter ABA Report].

<sup>75</sup> *Id.*

<sup>76</sup> Ellis, *supra* note 30, at 422-23 (“[T]he origin of this [manifesting before age 18] requirement is obscure, and its relevance to criminal justice is limited.”).

<sup>77</sup> See *supra* notes 30-31.

<sup>78</sup> *State v. Arellano*, 143 P.3d 1015, 1020 (Ariz. 2006); Brief of Amici Curiae AAMR et al., *State v. Arellano*, No. CV-05-0397-SA, at 16-17 (Sup. Ct. Ariz. Feb. 27, 2006).

<sup>79</sup> See, e.g., White, *supra* note 28, at 710 (warning of the “inappropriateness of allowing the absence of proof of onset to trump clear evidence of limitations in intellectual functioning and adaptive behavior”).

only one defense expert witness testified. He relied on interviews with people who knew the defendant, a review of school and court records, and the administration of one standard IQ test taking place post-arrest.<sup>80</sup> Van Tran had similar evidence, except that multiple experts using multiple tests consistently testified to his mental retardation.<sup>81</sup> Further, unlike *Van Tran*, in which the prosecution presented no evidence of its own, the prosecution in *Atkins* presented a rebuttal expert witness who testified that the defendant was *not* mentally retarded.<sup>82</sup>

Note the contrast with *Van Tran*. The state courts in *Van Tran* rejected the un rebutted testimony of the two defense experts based on their own independent evaluation of the evidence in the record. They noted the absence of IQ testing dating from Van Tran's childhood.<sup>83</sup> They noted that he was able to care for himself and hold a job.<sup>84</sup> They noted his participation in a cooperative scheme to rob the restaurant, and his role in dividing the proceeds from the robbery among the participants while they were fugitives.<sup>85</sup> They also noted that Van Tran had also been diagnosed as paranoid-schizophrenic, and that his mental illness, separate from mental retardation, might cause some of the cognitive and adaptive deficiencies noted by the experts.<sup>86</sup>

Although courts vary in the kinds of proof they require when evaluating *Atkins* claims, there are several common errors engaged in by courts which should be identified and avoided, all of them illustrated by *Van Tran*. These include unrealistic expectations of pre-18 testing data, which is directly related to the onset criterion; an improper use of co-occurring mental illness to reject *Atkins* claims, which can directly relate to the onset criterion where, as in many cases, the co-occurring mental illness manifests in adulthood; and an overemphasis on the defendant's day-to-day skills as disqualifying, which, while not related specifically to the onset criterion, is indirectly related as it illustrates courts' lack of understanding of the meaning and purpose of the three prongs of the standard MR definition. Each type of error will be discussed in turn.

## B. Expectation of Childhood-Era Testing Data

In denying *Atkins* claims, courts often place significant weight on a lack of IQ testing in childhood.<sup>87</sup> For instance, in *Ybarra v. State*, the Nevada Supreme Court upheld the defendant's death sentence despite his proof of a significant head injury at age nine and the un rebutted testimony of two experts that he was mentally retarded.<sup>88</sup> In doing so, the court noted his lack of intelligence testing as a child and explained his poor grades as resulting from a lack of effort.<sup>89</sup> Similarly, in *Commonwealth v. Vandivner*, the Pennsylvania courts noted the defendant's lack of

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<sup>80</sup> *Atkins v. Virginia*, 536 U.S. 304, 308-309 (2002).

<sup>81</sup> *See Van Tran v. State*, No. 02-9803-CR-00078, 1999 WL 177560, at \*6-11 (Tenn. Crim. App. Apr. 1, 1999).

<sup>82</sup> *Id.* at 309.

<sup>83</sup> *Id.* at 26.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 14.

<sup>86</sup> *Id.* at 26.

<sup>87</sup> *See, e.g., Ybarra v. State*, 247 P.3d 269, 279 (Nev. 2011); *Commonwealth v. Vandivner*, 962 A.2d 1170, 1186 (Pa. 2009); *see also State v. White*, 885 N.E.2d 905, 916-917 (Ohio 2008) (criticizing trial court for taking this approach).

<sup>88</sup> *Ybarra*, 247 P.3d 269, 277-78.

<sup>89</sup> *Id.* at 278-79.

intelligence testing and rejected his *Atkins* claim despite his placement in special education classes during school.<sup>90</sup>

Expecting childhood-era IQ or adaptive skills testing imposes an unfair burden on defendants. State definitions of mental retardation themselves do not require such formalized tests.<sup>91</sup> Some states may specifically require a defendant to present expert testimony,<sup>92</sup> but this expert testimony need not rely on an IQ test administered during the defendant's youth. Generally, all that is required is proof of manifestation before 18, not actual standardized IQ tests taken before the defendant turned 18.<sup>93</sup>

Of course, where such tests from an individual's childhood are available, they can be fairly definitive of whether their mental deficiencies manifested during the age of onset period.<sup>94</sup> But expecting them to be available creates an unfair burden for individuals who grew up without access to proper clinical or social services.<sup>95</sup>

Again, commentators recognize the unfairness in expecting testing evidence from defendants who were raised from disadvantaged backgrounds.<sup>96</sup> This is especially the case for individuals who are immigrants, or very poor, where relevant records may not exist.<sup>97</sup> Judges have echoed these concerns.<sup>98</sup> Indeed, one federal *habeas* court singled out a North Carolina court's disapproving reference to the lack of pre-18 IQ tests as an independent, unreasonable

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<sup>90</sup> *Vandivner*, 962 A2d 1185-86.

<sup>91</sup> See ARIZ. REV. STAT. ANN. §13-753(K)(3) (2010 & Supp. 2011); ARK. CODE ANN. § 5-4-618(a)(1) (2006 & Supp. 2011); CAL. PENAL CODE § 1376(a) (West 2011); COLO. REV. STAT. ANN. § 16-8.5-101(9) (2011); DEL. CODE ANN. tit. 11, § 4209(d)(3)(d)(2)-(3) (2007); FLA. STAT. ANN. § 921.137(1) (West 2006 & Supp. 2012); GA. CODE ANN. § 17-7-131(a)(3) (2008 & Supp. 2011); IDAHO CODE ANN. § 19-2515A(1)(a) (2004 & Supp. 2012); 725 ILL. COMP. STAT. ANN. 5/114-15(d) (2006); IND. CODE ANN. § 35-36-9-2 (LexisNexis 1998 & Supp. 2011); KAN. STAT. ANN. § 39-1803 (2000); KY. REV. STAT. ANN. § 532.130(2) (LexisNexis 2008); LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1) (2008); MD. CODE ANN., CRIM. LAW § 2-202(b)(i)-(ii) (LexisNexis 2002 & Supp. 2011); MISS. CODE ANN. § 1-3-24 (Supp. 2011); MO. REV. STAT. § 565.030(6) (West Supp. 2012); MONT. CODE ANN. § 53-20-102(8) (2011); N.H. REV. STAT. ANN. § 171-A:2 (LexisNexis 2010); NEV. REV. STAT. ANN. §174.098(7) (LexisNexis 2011); N.C. GEN. STAT. § 15A-2005(a)(1)(a) (2011); OHIO REV. CODE ANN. § 5123.01(N) (LexisNexis 2011); OKLA. STAT. ANN. tit. 10 § 1408 (West 2011); OR. REV. STAT. ANN. § 427.005(10)(a) (2011); S.C. CODE ANN. § 16-3-20(C)(b)(10); S.D. CODIFIED LAWS § 23A-27A-26.1 (2004); TENN. CODE ANN. 39-13-203(a)(1) (West 2010); TEX. HEALTH & SAFETY CODE ANN. § 591.003 (West 2010 & Supp. 2012); UTAH CODE ANN. § 77-15a-102 (LexisNexis 2008); VA. CODE ANN. § 19.2-264.3:1.1(A) (2008 & Supp. 2012); WASH. REV. CODE ANN. § 10.95.030(2)(e) (West 2012); WYO. STAT. ANN. § 8-1-102 (2011).

<sup>92</sup> See, e.g., *Lynch v. State*, 951 So.2d 549, 556 (Miss. 2007) (setting out guidelines for determining mental retardation during an *Atkins* claim) (citing *Chase v. State*, 873 So.2d 1013, 1029 (Miss. 2004)).

<sup>93</sup> See, e.g., *Tobolowsky*, *supra* note 28, at 99, and sources cited therein.

<sup>94</sup> See *State v. Strode*, 232 S.W.3d 1 (Tenn. 2007) (relying on defendant's juvenile IQ test scores to determine that he did not exhibit any signs of mental retardation prior to the age of 23.)

<sup>95</sup> *Bonnie*, *supra* note 30, at 855.

<sup>96</sup> See, e.g., *White*, *supra* note 28, at 708-709.

<sup>97</sup> *Id.* at 709; see also *Dupler*, *supra* note 28, at 16-17 (absence of documented evidence of age of onset "is particularly likely in the case of the typical capital offender, whose developmental years are too frequently filled with sporadic school attendance, frequent family relocations, poor or abusive parenting, and inadequate mental and psychological attention").

<sup>98</sup> See *Murphy v. State*, 54 P.3d 556 (Okla. Crim. App. 2001), *holding modified* by *State ex rel. Lane v. Bass*, 7 P.3d 639 (Okla. Crim. App. 2004) (Chapel, J., dissenting) (explaining how indigent, transient, or foreign defendants may have unfair difficulty in documenting their pre-18 onset).

application of law, since it suggested a requirement of pre-18 IQ tests which was not supported by applicable law.<sup>99</sup>

There are many reasons why educators, clinicians, and parents may not administer IQ tests during the subject's childhood. Indeed, most mentally retarded individuals have *not* taken IQ tests before the age of 18.<sup>100</sup> Often, schools refrain from such testing for financial reasons, or out of charitable concern about stigmatizing a child.<sup>101</sup> Other reasons may include fear of a discrimination claim, or fear of over-representation of MR students in school district report statistics; parental concern about teasing; or just plain misdiagnosis of a mentally retarded child as one suffering from a learning disability or attention deficit disorder.<sup>102</sup> The AAMR/AAIDD also recognizes the many reasons explaining the lack of a documented pre-18 manifestation—including cultural and linguistic barriers, and the defendant's lack of a "full school experience."<sup>103</sup>

In such cases, especially, adequate weight must be given to alternative methods such as school achievement evidence; testimony of parents and others who know the defendant from childhood; and the presence of known mental retardation risk factors such as medical problems at or shortly after birth, childhood diseases, poverty, etc.<sup>104</sup> For example, the record in *Van Tran* had un rebutted testimony of early developmental problems: Van Tran was not toilet-trained until age 5, did not speak until age 6, and had difficulty communicating in both Vietnamese and English as a child.<sup>105</sup> In an official "resource guide" to *Atkins* approved by the American Psychiatric Association and published by the American Bar Association, the APA advised that an assessment of the onset criterion must be based on multiple sources of information "generally accepted" in the mental health field, including, whenever available, "educational, social service, [and] medical records, prior disability assessments, and parental or caregiver reports."<sup>106</sup> The APA urges courts to recognize that "valid clinical assessments conducted during the person's childhood may not have conformed to current practice standards."<sup>107</sup>

The Ohio Supreme Court took this commendable alternative approach in *State v. White*, which factually was very similar to *Van Tran*. In *White*, the court reversed as an abuse of discretion a trial court's rejection of an *Atkins* claim, where the trial court had ruled that the defendant was not mentally retarded "despite the testimony of two experts...and the lack of any expert testimony to the contrary."<sup>108</sup> Although the defendant had never taken an IQ test or an

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<sup>99</sup> Nicholson v. Branker, 739 F.Supp. 2d 839, 857-858 (E.D.N.C. 2010).

<sup>100</sup> Blume, *supra* note 28, at 729-30.

<sup>101</sup> *Id.*

<sup>102</sup> Fabian, *supra* note 28, at 407-409.

<sup>103</sup> See USER'S GUIDE, *supra* note 59, at 18.

<sup>104</sup> White, *supra* note 28, at 709-710. See AAID, INTELLECTUAL DISABILITY, *supra* note 41, at 78 (table with comprehensive list of risk factors).

<sup>105</sup> *Id.* at \*5.

<sup>106</sup> Richard J. Bonnie, *The American Psychiatric Association's Resource Document On Mental Retardation And Capital Sentencing: Implementing Atkins v. Virginia*, 28 MENTAL & PHYSICAL DISABILITY L. REP. 11, 13 (2004).

<sup>107</sup> *Id.*

<sup>108</sup> 885 N.E.2d 905, 912-913 (Ohio 2008). The lack of any expert testimony from the State is remarkable. Most *Atkins* cases requiring extended adjudication involve conflicting expert testimony. See *Wiley v. Epps*, 625 F.3d 199, 215 (5th Cir. 2010) (describing most *Atkins* cases as a "battle of the experts"); *United States v. Bourgeois*,

adaptive skills test during childhood, the defendant's experts relied on school records showing poor academic performance, corroborated by testimony of family members.<sup>109</sup> The defense experts concluded that defendant would have scored poorly on the relevant tests had they been administered during childhood. The trial court rejected this testimony as "conjectural."<sup>110</sup>

The Ohio Supreme Court found such lower court findings an abuse of discretion. The Court considered the academic records and family testimony to be competent evidence, sufficient to meet defendant's *Atkins* burden even without pre-18 IQ or adaptive skills testing.<sup>111</sup> It noted that there was no evidence explicitly suggesting a post-18 onset of the defendant's impairments, such as a post-18 traumatic brain injury.<sup>112</sup> And the Court credited the experts' testimony that a person's mental retardation status does not change over his lifetime; thus, if an adult defendant has the requisite cognitive and adaptive impairments, and there is no reason to believe it to be caused by a post-18 trauma or disease, then it is reasonable to infer that the impairments have existed since childhood.<sup>113</sup> Some federal courts have taken a similar approach.<sup>114</sup>

This is a critical point. If the defendant suffers from the intellectual and adaptive problems associated with MR, the chances are pretty good that he experienced childhood onset. The overwhelming majority of patients with mental retardation-like symptoms developed them during childhood; it is the unusual case where they developed in adulthood.<sup>115</sup> As a general matter, then, if a defendant tenders IQ tests and adaptive behavior tests documenting mental retardation-level impairments, courts should presume childhood onset. The burden should shift to the prosecution to present specific evidence of adult onset.

Even where the prosecution can point to an alternative, post-18 source of the impairments, that should not automatically lead to an *Atkins* claim denial, if the totality of the evidence is equally consistent with childhood onset. But a lack of proper childhood testing may lead the court to blame intervening adult-era events such as head injuries for the defendant's mental capacity as an adult. A Pennsylvania Supreme Court case exhibits a clear contrast with the Ohio Supreme Court's analysis in *White*.<sup>116</sup> In each case, the defendant did not have access to proper evaluation methods growing up.<sup>117</sup> Each opinion relied heavily on evidence that the defendant was never able to progress past the 10th grade in school.<sup>118</sup> The only salient difference between the two was that Vandivner had sustained a head injury after turning 18, and

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2011 WL 1930684 (E.D. Tex. May 19, 2011) (most *Atkins* cases involve a choice between experts reaching different conclusions).

<sup>109</sup> *White*, 885 N.E.2d at 916-17.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*; see also *Hughes v. Epps*, 694 F.Supp.2d 533, 545 (E.D.N.C. 2010) (on *habeas*, finding similar state court rejection of *Atkins* claims on similar facts to be unreasonable application of law).

<sup>112</sup> *White*, 885 N.E.2d at 917; see also *Hughes*, 694 F.Supp.2d at 545.

<sup>113</sup> *Id.*

<sup>114</sup> See, e.g., *Nicholson v. Branker*, 739 F.Supp.2d 839, 857-858 (E.D.N.C. 2010).

<sup>115</sup> AAIDD, INTELLECTUAL DISABILITY, *supra* note 22, at 28.

<sup>116</sup> *Commonwealth v. Vandivner*, 962 A.2d 1170 (Pa. 2009); *State v. White*, 885 N.E.2d 905, 916 (Ohio 2008).

<sup>117</sup> *White*, 885 N.E.2d at 916; *Vandivner*, 962 A.2d at 1186.

<sup>118</sup> *White*, 885 N.E.2d at 916; *Vandivner*, 962 A.2d at 1183.



there was no proof that White ever had.<sup>119</sup> Because the court seized on the presence of a possible alternative origin of Vandivner's mental deficits, Vandivner was not successful in his claim,<sup>120</sup> while White was.<sup>121</sup> The Pennsylvania court did so despite evidence of academic problems during childhood, including the defendant's placement in special education classes, which reinforces the inference of MR.<sup>122</sup>

The two cases highlight how fortuitous circumstance, like an adult head injury, can determine the outcome on this life-and-death issue. More alarmingly, *Vandivner* ignores the possibility that the mentally retarded are more likely than the general population to suffer head trauma as a result of reduced motor skills or self-injurious behavior.<sup>123</sup>

### C. Relevance of Defendant's "Everyday" Skills

Additionally, courts often place significant weight on evidence that the defendant is able to hold a job, live independently in a house, participate in a crime cooperatively with others, etc. For example, in *Murphy v. Ohio*, the Sixth Circuit Court of Appeals relied in part on the fact that the defendant had moved out of his mother's house to live with a girlfriend, and had the ability to care for himself, in rejecting the defendant's *Atkins* claim.<sup>124</sup> Other courts have drawn similar conclusions, drawing negative inferences because the defendant had a job, bought a home, cooked for himself, had a girlfriend, graduated high school, could drive, or similar combinations of day-to-day skills and accomplishments.<sup>125</sup> At least one state definition of MR explicitly contemplates consideration of this sort of data regarding how the defendant functions generally and conducts himself.<sup>126</sup>

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<sup>119</sup> *White*, 885 N.E.2d at 917; *Vandivner*, 962 A.2d at 1187.

<sup>120</sup> *Vandivner*, 962 A.2d at 1187.

<sup>121</sup> *White*, 885 N.E.2d at 917.

<sup>122</sup> *Vandivner*, 962 A.2d at 1183.

<sup>123</sup> See DSM-IV-TR, *supra* note 50, at 44 (identifying reduced motor development and self-injurious behavior as being generally associated with mental retardation).

<sup>124</sup> *Murphy v. Ohio*, 551 F.3d 485, 510 (6th Cir. 2009).

<sup>125</sup> See, e.g., *Maldonado v. Thaler*, 625 F.3d 229, 243-244 (5th Cir. 2010) ; (rejecting claim of MR in part because defendant had had a job and apartment, could drive, corresponded with others, and used the prison grievance system); *United States v. Bouregouis*, 2001 WL 1930684, (E.D. Tex. May 19, 2011) (concluding defendant was not mentally retarded in part because defendant graduated high school, worked as a truck driver, bought a home, managed his own finances, and wrote lengthy letters); *State v. White*, 885 N.E.2d 905, 913-95 (Ohio 2008) (criticizing trial court for having rejected *Atkins* claim in part because defendant cooked for himself, lived with a girlfriend, signed a lease, taught the girlfriend card games, and hid from his landlord the fact that the girlfriend was living with him); *Hooks v. State*, 126 P.3d 636, 644 (Okla. Crim. App. 2005) (rejecting claim of MR in part because defendant had run a prostitution ring employing several women and enforced rules on them regarding behavior and personal hygiene).

<sup>126</sup> See *Ex Parte Briseno*, 135 S.W.3d 1, 9-10 (Tex. Crim. App. 2004) (explaining that trial courts should consider whether those who knew defendant during developmental period thought he was mentally retarded, whether he formulates plans or is impulsive, whether he shows leadership or is led by others, whether his conduct in response to stimuli is appropriate, whether he can lie effectively, and whether his crime required planning or complex execution).

Reasoning such as this misapprehends the nature of mental retardation. Many people are able to engage in those activities despite being mentally retarded.<sup>127</sup> A mentally retarded man can appear on the surface to be “an ordinary man, competent to live within the not too demanding constraints of his life circumstances.”<sup>128</sup> Many mentally retarded pass the sixth grade, and some graduate high school.<sup>129</sup> They can hold jobs, marry, and raise families.<sup>130</sup> The AAIDD acknowledges that the mentally retarded can be employed, though it notes that often, they are employed in part-time, entry-level service sector jobs.<sup>131</sup> Some can be gifted artists.<sup>132</sup> Empirical studies have led psychiatrists to conclude that mildly mentally retarded persons can have the capacity to consent to pharmacological experiments.<sup>133</sup>

This kind of reasoning results generally in undue rejection of *Atkins* claims. While it is not specifically related to the third prong of the MR definition (childhood onset), it illustrates the lack of understanding of the prongs generally by courts adjudicating such claims. A proper understanding of the origin, meaning, and purpose of each prong would avoid this error as well as a too-strict application of the onset prong.

Although some courts have failed to recognize the medical evidence that competence in certain life skills does not preclude a diagnosis of MR, others have taken a more enlightened approach. In *State v. White*, for example, the Ohio Supreme Court reversed as an abuse of discretion a trial court’s rejection of an *Atkins* claim based in part on the fact that the defendant cooked for himself, signed an apartment lease, hid from his landlord the fact that he lived with his girlfriend, and taught his girlfriend card games.<sup>134</sup> Relying on expert testimony, the Ohio Supreme Court stated that the mentally retarded are “not necessarily devoid of all adaptive skills. They can play sports, write, hold jobs, and drive.”<sup>135</sup> Some federal courts also have taken this enlightened approach.<sup>136</sup>

As the Ohio Supreme Court put it in *White*, courts must “focus on those adaptive skills that the person lacks, not those he possesses.”<sup>137</sup> This is another crucial point. The MR definition used by most courts follows the 1992 AAMR in requiring significant deficits in at

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<sup>127</sup> Frank J. Floyd et. al., *The Transition to Adulthood for Individuals with Intellectual Disability*, in 37 INTERNATIONAL REVIEW OF RESEARCH IN MENTAL RETARDATION 31 (2009). Over half (56.2%) of mildly or moderately MR individuals ages 18-33 had been employed at some point. Additionally, 16.8% had been engaged or married (all in the “mild” group). And 34% did not live with a parent or relative. *Id.* at 42-46.

<sup>128</sup> *Id.* See also *United States v. Hardy*, 762 F.Supp.2d 849, 902 (E.D. La. 2010) (the mentally retarded have “strengths as well as weaknesses,” and thus can often “pass” as normal population).

<sup>129</sup> Floyd, *supra* note 126, at 31.

<sup>130</sup> *Id.*

<sup>131</sup> AAIDD, INTELLECTUAL DISABILITY, *supra* note 22, at 157.

<sup>132</sup> Ellen Winner, *What Drawings by Atypical Populations Can Tell Us*, 22 VISUAL ARTS RESEARCH 90, 91 (1996) (“[A]rt of the (mentally retarded) can be more aesthetic, more creative” than art by non-MR individuals).

<sup>133</sup> Celia B. Fisher et al., *Capacity of Person with Mental Retardation to Consent to Participate in Randomized Clinical Trials*, 163 AM. J. PSYCHIATRY 1813 (2006).

<sup>134</sup> 885 N.E.2d 905, 913-915 (Ohio 2008).

<sup>135</sup> *Id.*

<sup>136</sup> See *Wiley v. Epps*, 625 F.3d 199, 220-222 (5th Cir. 2010); *Hughes v. Epps*, 694 F.Supp.2d 533, 538 (N.D. Miss. 2010).

<sup>137</sup> *White*, 885 N.E.2d at 914.

least 2 of 10 different categories of adaptive skills.<sup>138</sup> Those ten categories are communication, self-care, home living, social skills, community resources use, self-direction, health/safety, functional academics, work, and leisure.<sup>139</sup> If adaptive deficits are found in at least two categories, it is not fatal to the MR diagnosis that the patient has competence in other skill areas. Mildly mentally retarded persons will almost always have some skills, and some record of competence in certain areas. Courts should not seize on examples of such success to minimize the weight of adaptive deficit evidence and thus reject an *Atkins* claim.

At a minimum, if courts wish to place emphasis on lay testimony that the defendant has certain skills or abilities, they should focus only on those skills and abilities relevant to the categories under which it is alleged the defendant has adaptive deficits. If the defense argues for a deficit in oral and written communication, it does not matter that the defendant has the ability to drive. If the defense asserts that the defendant has serious deficiencies in the health/safety area, it is irrelevant that the defendant has the ability to manage basic finances.

Such reliance on competence in irrelevant adaptive skill categories is especially inappropriate where (as in Van Tran's case) the record has un rebutted expert testimony declaring that adaptive deficits exist. A pair of contemporaneous Fifth Circuit cases illustrates this point. In *Wiley v. Epps*,<sup>140</sup> the Fifth Circuit upheld the district court's granting of an *Atkins* finding. The Fifth Circuit decided it was not fatal to the defendant's MR claim that the defendant had supported himself with manual labor and drove a truck: the mentally retarded, the court noted, can "hold jobs, drive cars, and support families."<sup>141</sup> Later that year, the Fifth Circuit rejected a claim of mental retardation in *Maldonado v. Thaler*, in part because the defendant had had a job and apartment, could drive and correspond with others, and had used the prison grievance system.<sup>142</sup> The *Maldonado* panel distinguished *Wiley* by noting that in *Wiley*, there was formal testing by experts demonstrating the defendant's mental retardation, coupled with corroborating lay testimony; both factors were missing in *Maldonado*. Thus, even courts which reject *Atkins* claims in part because of this general "life autonomy" evidence might be reluctant to do so—and should be reluctant to do so---where defense experts opine on MR and no competing experts rebut the defense experts' opinion.

In a related manner, courts often place weight on the fact of the defendant's participation in past criminal activity.<sup>143</sup> The activity can include either the capital offense itself, or prior

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<sup>138</sup> See *Atkins v. Virginia*, 536 U.S. 304, 318 (2002). The "two out of ten categories" approach was later removed from the latest AAIDD definition. See AAIDD, INTELLECTUAL DISABILITY, *supra* note 22, at 8. But it has been retained in the APA's definition, see DSM-IV-TR, *supra* note 50, at 41, and was the approach adopted by the Supreme Court in *Atkins*.

<sup>139</sup> *Atkins*, 536 U.S. at 318. As noted, the AAMR/AAIDD has since refined this prong of the definition to include a more permissive "spectrum" approach to the range of adaptive behaviors. AAMR, *supra* note 50, at 81. However, since most of the court opinions to date have used the earlier approach, and the earlier approach is more bright line and well-defined, I will use it for the purposes of this discussion.

<sup>140</sup> 625 F.3d 199, 220-222 (5th Cir. 2010).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 243-44.

<sup>143</sup> See, e.g., *Maldonado v. Thaler*, 625 F.3d 229, 243-244 (5th Cir. 2010) (rejecting *Atkins* claim in part because defendant had engaged in robbery and murder); *Hernandez v. Thaler*, Civil No. SA-08-CA-805-XR, 2012 WL 394597, at \*24 (W.D. Texas 2012) (rejecting defendant's *Atkins* claim in part because he had previously abducted and sexually assaulted a fifteen year old girl); *Hooks v. State*, 126 P.3d 636, 644 (Okla. Crim. App. 2005)

criminal acts. This reasoning suffers from the same flaw as that regarding a defendant's ability to hold a job or care for himself. Mentally retarded individuals sometimes have the ability to cooperate with others in criminal plans. Almost always, they are followers and not leaders of these plans;<sup>144</sup> indeed, a common scenario is where hardened criminals manipulate or intimidate a mentally retarded individual into participating in a multi-defendant criminal scheme.<sup>145</sup> Moreover, it is relatively settled that the mentally retarded are especially susceptible to coercion of this type.<sup>146</sup> The AAIDD recommends against using past criminal behavior as a measure of adaptive behavior, or as relevant to mental retardation in any other way.<sup>147</sup>

On the subject of the defendant's life skills and criminal past, the words of the Ohio Supreme Court in *White* provide excellent guidance to courts, especially in cases where (as in Van Tran's case) there is defense expert testimony which is un rebutted. While a court is not obliged to uncritically accept expert testimony, "it may not disregard credible and uncontradicted expert testimony in favor of either the perceptions of lay witnesses or of the court's own expectations of how a mentally retarded person would behave."<sup>148</sup>

#### D. "Dual Diagnosis"

Finally, courts often rule that evidence of other psychological problems beyond MR weighs against an *Atkins* claim, because the other mental problems may provide an alternate explanation for any adaptive deficits.<sup>149</sup> This was the case in *Van Tran*, where the state court speculated that the defendant's diagnosed paranoid schizophrenia could serve as an independent cause of his cognitive deficits.<sup>150</sup> Federal courts also take this approach. In *Murphy v. Ohio*, for example, the Sixth Circuit rejected an *Atkins* claim in part because the defendant's diagnosed attention deficit disorder, alcohol abuse, and personality disorder provided alternate explanations

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(rejecting claim of MR in part because defendant had run a prostitution ring—a "continuing criminal enterprise"). *But see* Ex parte Briseno, 35 S.W.3d 1, 31 (Tex. Crim. App. 2004) (noting that petty crimes such as theft were not inconsistent with MR because they were simple, did not require planning, and showed impulsivity).

<sup>144</sup> See *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) ("in group settings they are followers rather than leaders").

<sup>145</sup> See, e.g., *U.S. v Hardy*, 762 F.Supp.2d 849, 904 (E.D. La. 2010) (describing mentally retarded defendant as being bullied by a non-retarded co-defendant); *U.S. v. Terance Johnson*, Cr. No. 01-20247, Order Granting In Part And Denying In Part Government's Motions In Limine ("*Terance Johnson* Evidentiary Order") (Dec. 31, 2003), at 12 (same); *Van Tran v. State*, No. 02-9803-CR-00078, 1999 WL 177560, at \*10 (Tenn. Crim. App. Apr. 1, 1999) (same).

<sup>146</sup> See Steven J. Mulroy, *The Duress Defense's Uncharted Terrain: Applying It to Murder, Felony Murder, and the Mentally Retarded Defendant*, 43 SAN DIEGO L. REV. 159, 198 (citing Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 511-12 (2002) (the retarded are "unusually susceptible to the perceived wishes of authority figures" and have "a generalized desire to please"); Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2044 (1998) (the "mentally handicapped" are "especially vulnerable" to the pressures of custodial interrogation)).

<sup>147</sup> AAIDD, *USER'S GUIDE*, *supra* note 59, at 18-22.

<sup>148</sup> *State v. White*, 885 N.E.2d 905, 914 (Ohio 2008).

<sup>149</sup> Although it is unconstitutional to execute persons who are insane at the time of execution, *Ford v. Wainwright*, 477 U.S. 399, 410 (1986), the Supreme Court has not held that persons who have mental illness but who are not legally insane are also immune from the death penalty. See *Baird v. Davis*, 388 F.3d 1110, 1114 (7th Cir. 2004), *cert. denied*, 544 U.S. 983 (2005) (making this observation); *Matheney v. Indiana*, 833 N.E.2d 454, 458 (Ind. 2005) (same).

<sup>150</sup> *Van Tran v. State*, No. 02-9803-CR-00078, 1999 WL 177560, at \*16 (Tenn. Crim. App. Apr. 1, 1999)

for his reported adaptive problems.<sup>151</sup>

This reasoning ignores the widely shared opinion of medical experts that MR and other psychological disorders are often interwoven, making it impossible to untangle one from another as the cause of observed cognitive and adaptive deficits.<sup>152</sup> Other state courts have ruled similarly.<sup>153</sup> Indeed, in recent decades the AAMR/AAIDD and the APA have given increasing attention to the co-occurrence of mental retardation and mental illness, discussing the issues of “dual diagnosis.”<sup>154</sup> In fact, the National Association for the Dually Diagnosed was created for this very purpose.<sup>155</sup>

Again, this error by courts illustrates the lack of understanding of the underlying medical facts concerning MR and mental illness. It also compounds the problem with the onset criterion. In many cases, as with schizophrenia, the co-presenting mental illness manifested in adulthood. If the court improperly identifies the mental illness as the sole cause of the observed cognitive and adaptive deficits, it can then purport to rule out childhood onset. This type of reasoning occurred in *Van Tran*.

The Tennessee Supreme Court has recognized the problem with such “dual diagnosis” denials of *Atkins* claims. In *Coleman v. State*, it overturned a lower court’s denial of an *Atkins* claim where the lower court found that the defendant’s adaptive deficits resulted from mental illness.<sup>156</sup> The trial court had disregarded, and the state supreme court relied on, expert testimony that where mental illness and mental retardation coexist, they are inextricably interwoven as causes of a defendant’s cognitive and adaptive impairments.<sup>157</sup> Thus, the Court explained, it is generally unreasonable to put aside competent evidence of MR simply because there is also evidence of a co-presenting mental illness. After the Tennessee Supreme Court’s decision in *Coleman*, the Sixth Circuit has clarified that this kind of reasoning would not be permissible in cases stemming from Tennessee.<sup>158</sup> However, this ruling does not prevent the

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<sup>151</sup> 551 F.3d 485, 509 (6th Cir. 2009). *See also* Hernandez v. Thaler, Civil No. SA-08-CA-805-XR, 2012 WL 394597, at \*19 (W.D. Texas 2012) (court rejected MR claim in part because it suspected adaptive functioning was hampered in large part by defendant’s longtime inhalant use).

<sup>152</sup> *See*, DSM-IV-TR, *supra* note 50, at 42; FRANK MANOLASCINO, CHALLENGES IN MENTAL RETARDATION: PROGRESSIVE IDEOLOGY AND SERVICES 126-27 (1977) (estimating that about thirty percent of individuals with mental retardation suffer from mental illness as well).

<sup>153</sup> *Ex parte Perkins*, 851 So.2d 453, 456 (Ala. 2002) (denying MR claim in part because defendant’s alcohol abuse likely played a role in his declining health); *Jones v. State*, 966 So.2d 319, 329 (Fla. 2007) (court denied defendant’s MR claim in part because it believed his deficits in intellectual functioning to be the result of “major trauma” to his brain suffered during the murder for which he was standing trial).

<sup>154</sup> Robert J. Fletcher, *Clinical Usefulness of the Diagnostic Manual-Intellectual Disability for Mental Disorders in Persons with Intellectual Disability: Results From a Brief Field Survey*, 70 J. CLINICAL PSYCHIATRY no. 7, 2009, at 1, 1-2 (explaining that the increased awareness of the co-occurrence of mental retardation and mental illness led the National Association for the Dually Diagnosed and the APA to develop an adaptation for the DSM-IV-TR called the Diagnostic Manual- Intellectual Disability); Jill L. VanderShie-Bezyak, *Service Problems and Solutions for Individuals With Mental Retardation and Mental Illness*, 69 J. REHABILITATION 1, 54 (2003) (citing W.E. MacLean, *Overview*, in J.L. Matson & R.P. Barrett, eds., PSYCHOPATHOLOGY IN THE MENTALLY RETARDED 1-16 (2d ed. 1993)).

<sup>155</sup> Fletcher, *supra* note 153 at 1-2.

<sup>156</sup> 341 S.W.3d 221, 249-251 (Tenn. 2011).

<sup>157</sup> *Id.* at 249.

<sup>158</sup> *See Black v. Bell*, 664 F.3d 81, 100 (6th Cir. 2011).

Sixth Circuit from engaging in reasoning similar to that employed in its ruling in *Murphy v. Ohio* for cases originating in other states.

Because “dual diagnosis” cases are fairly common, the approach taken in *Van Tran* and *Murphy v. Ohio* is especially pernicious. The logic employed is distressingly formalistic, both for narrow and broader reasons.

The narrow reason is that there seems to be no significant dissent in the medical community from the view that co-occurring mental illness and mental retardation are inextricably intertwined, and that it is impossible to tease out what strand is causally related to which cognitive or adaptive deficit. This is not merely to say that some deficits are caused solely by MR and some solely by mental illness, but doctors cannot say which is which. Rather, it is to say that where MR and mental illness are intertwined, *both* are causes of the cognitive and adaptive deficits. Thus, the presence of mental illness normally does not rule out MR as a causal factor.

The broader reason is that as a matter of logic, it should not matter whether a particular cognitive or adaptive deficit is caused by MR or MR mixed with mental illness. The reason *Atkins* blocked the execution of the mentally retarded is that their cognitive and adaptive deficits (1) reduce their culpability and deterrability, undermining the penological justifications for the death penalty; and (2) impair their ability to participate in the investigation and trial, and thus, enhances the risk of an unfair prosecution. The existence of MR-like cognitive and adaptive deficits will have those effects regardless of whether they are caused by mental retardation or mental illness. Thus, execution is equally unconstitutional, regardless of whether the deficits are caused by MR alone, or MR and mental illness combined.<sup>159</sup>

So, where mental illness and MR are both present, the question “Which one caused the cognitive and adaptive deficits?” should almost always yield the answer “Both—you can’t separate the two.”<sup>160</sup> Such a result is consistent with *Atkins* and progeny. More fundamentally (and by way of seeking new law), the answer really should be “Why does it matter?” It simply doesn’t make sense to ask the question in the first place.

#### E. The Proper Role of Expert and Lay Testimony

Not all courts evaluating *Atkins* claims handle the above issues improperly. Relying in some cases on arguments similar to those advanced above, courts in circumstances similar to *Van Tran*’s have ruled that mentally retarded defendants met not only their *Atkins* burden but

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<sup>159</sup> By the same logic, it should also not matter whether the cognitive and adaptive deficits were caused by mental illness alone. However, the Supreme Court has not yet held that the Constitution bars execution of defendants who suffered from mental illness at the time of the offense but who were deemed competent to stand trial (or plead) and were not found not guilty by reason of insanity. See Slobogin, *supra* note 31 (pointing out this gap in the law and arguing for a constitutional ban on such executions); see also *In re Neville*, 440 F.3d 220, 223 (5th Cir. 2006) (declining to extend *Atkins* to the mentally ill); *Commonwealth v. Baumhammers*, 960 A.2d 59, 96-97 (Pa. 2008) (same); *Lawrence v. State*, 969 So.2d 294, 300 n.9 (Fla. 2007) (same); *State v. Johnson*, 207 S.W.3d 24, 51 (Mo. 2006) (same); *Lewis v. State*, 620 S.E.2d 778, 764 (Ga. 2005) (same).

<sup>160</sup> See generally Slobogin, *supra* note 31 (arguing that there is no valid distinction between mental retardation and other mental illnesses).

also the more challenging AEDPA standards on *habeas* review. This is a remarkable result, given the extraordinary deference federal courts are required to give state court determinations under the AEDPA: the *habeas* court cannot grant relief unless the state court denial of the *Atkins* claim is “contrary to, or an unreasonable application of, clearly established law,” or based on “an unreasonable determination of the facts.”<sup>161</sup> These cases thus illustrate just how serious the problem is with state courts misapplying the MR definition. These and other cases also illustrate useful points about the varying roles of expert and lay testimony in evaluating *Atkins* claims.

In *Hughes v. Epps*,<sup>162</sup> the federal *habeas* court held that the state court’s rejection of defendant’s MR claim was an unreasonable determination of the facts, based on evidence remarkably similar to Van Tran’s. Given that multiple experts were unanimous that the defendant was mentally retarded, the court reasoned, it “need not engage in a detailed analysis”; it was enough to say that the defendant met the preponderance of the evidence standard.<sup>163</sup> The court relied on evidence of IQ tests at or below 70, and the fact that the experts concluded that there were adaptive behavior deficits in “functional academics” and “communication.”<sup>164</sup> Regarding adaptive deficits, it found it sufficient that an expert found an Independent Living Scale score which was two standard deviations below the mean.<sup>165</sup>

The *Hughes* court’s findings on the particular issue of age of onset also set a good example. Rejecting the contrary analysis of the state court, the federal court found that defendant had proven pre-18 onset, relying on evidence of: poor school grades; achievement test scores taken before the defendant was 18; and the defendant’s attendance at special education classes.<sup>166</sup> It did not find it problematic that the pre-18 tests were academic achievement tests rather than actual IQ tests. Nor did it find it problematic that the defendant had held down a job and had a family.<sup>167</sup>

This approach to the age of onset requirement is by no means unique. In *Wiley v. Epps*,<sup>168</sup> the Fifth Circuit upheld the district court’s grant of *habeas corpus* relief where school records; the testimony of family members regarding early difficulty with speaking and hygiene; and post-crime tests by expert witnesses, were all consistent with pre-18 retardation. Citing the DSM-IV-TR, the Court of Appeals emphasized that it was not fatal to the defendant’s MR claim that the defendant had supported himself with manual labor and drove a truck: the mentally retarded, the court noted, can “hold jobs, drive cars, and support families.”<sup>169</sup> The Court so concluded even despite the contrary testimony of the State’s expert.

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<sup>161</sup> 28 U.S.C. § 2254 (2006).

<sup>162</sup> 694 F. Supp.2d 533 (N.D. Miss. 2010).

<sup>163</sup> *Id.* at 543.

<sup>164</sup> *Id.* at 544-545.

<sup>165</sup> *Id.* at 545.

<sup>166</sup> *Id.* at 545.

<sup>167</sup> *See id.* at 538.

<sup>168</sup> 625 F.3d 199, 220-222 (5th Cir. 2010).

<sup>169</sup> *Id.* at 212, 217 (citing DSM-IV-TR, *supra* note 50, at 43 (MR patients often can advance to sixth grade level academically, learn enough vocational skills for self-support, and live in the community)); *see also Black v. Bell*, 664 F.3d 81, 99 (6th Cir. 2011); *Thomas v. Allen*, 607 F.3d 749, 759 (11th Cir. 2010); AAMR, *supra* note 50, at 8 (evidence of strengths in some adaptive areas is not inconsistent with an MR diagnosis).

Yet another court to grant *habeas* relief on the same “age of onset” issue amid similar facts is *Nicholson v. Branker*.<sup>170</sup> Once again, the court found that the state court’s denial of relief on the age of onset issue was unreasonable, and that the defendant had met his preponderance burden, based on pre-18 achievement test scores and lay testimony about adaptive skill problems in childhood.<sup>171</sup> More importantly, the court ruled that it was sufficient merely to present post-18 IQ scores, coupled with expert testimony that, absent intervening trauma, the IQ scores would have been consistent during childhood as well.<sup>172</sup> Again, the court so concluded despite contrary testimony from the State’s expert.<sup>173</sup>

These cases illustrate an appropriate way to handle the age of onset issue. If post-18 testing by qualified experts demonstrates cognitive and adaptive deficiencies consistent with mental retardation, the presumption should be that the defendant is mentally retarded, absent any specific evidence of post-18 onset. Thus, if a defendant is evaluated post-arrest and is seen to have an IQ below 70 and adaptive deficits in multiple adaptive skills categories, the burden should shift to the prosecution to rebut an inference of mental retardation by introducing evidence that post-18 trauma or disease caused the symptoms, or that the defendant is suffering from, say, adult-onset dementia. Absent such evidence, the court should accept an *Atkins* claim. This is especially the case where a qualified expert opines that the onset was likely in the defendant’s childhood. Under this approach, the courts in *Van Tran* would have accepted the expert testimony and corroborating evidence that Van Tran met all three prongs of the MR definition.

More generally, courts should overturn the un rebutted testimony of experts far less frequently than they do. If an otherwise qualified expert opines that the defendant is mentally retarded, and there are no expert witness contradicting that conclusion, it should be the rare case where the court denies the *Atkins* claim. Going even further, *Wiley* and *Branker* illustrate that, given such expert testimony, a classification as MR may still be appropriate even where there is contradictory expert testimony, and even under the stringent requirements of *habeas corpus* claims under the AEDPA.

#### IV. EIGHTH AMENDMENT

##### A. General

The Eighth Amendment prohibition on “cruel and unusual punishment” codifies a “basic precept of justice” that punishment for crime “should be graduated and proportioned.”<sup>174</sup> In deciding what is cruel and unusual, courts are to look beyond “historical conceptions” to the

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<sup>170</sup> 739 F.Supp.2d 839, 857-858 (E.D.N.C. 2010).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Miller v. Alabama*, 132 S.Ct. 2455, 2463 (2012).



“evolving standards of decency” of our “maturing society.”<sup>175</sup> The question is whether, in light of those standards of decency, the punishment is “grossly disproportionate.”<sup>176</sup>

This requirement of proportionality applies “with special force” to the “most severe punishment” of the death penalty.<sup>177</sup> Execution is limited to those “whose extreme culpability makes them the most deserving of execution”<sup>178</sup> ---that is, “the worst of the worst.”<sup>179</sup> Thus, since the culpability of the “average murderer” is not enough to warrant the death penalty, then any categorical group of offenders who are inherently less culpable than the average murderer must necessarily be ineligible for execution.<sup>180</sup>

This kind of “categorical” exclusion of a particular class of offenders from a specified punishment is distinct from the typical Eighth Amendment case, where the match between a particular sentence and a particular crime is compared to the sentence length given in the same jurisdiction for comparable crimes, and for comparable crimes in other jurisdictions.<sup>181</sup> For a claim of categorical exclusion under the Cruel and Unusual Punishment Clause, a court considers objective criteria of a national consensus against the practice, as evidenced by state laws, state enforcement practices, public opinion, and the like; and then applies its own judgment as to the “disproportionality” question.<sup>182</sup>

In a series of recent decisions, the Supreme Court of the United States imposed such a categorical exclusion for juveniles regarding the death penalty, and regarding life-without-parole (LWOP), the next most serious punishment,<sup>183</sup> where that LWOP sentence was either mandatory or imposed for a non-homicide crime. The decisions may provide clues to the Court’s current thinking in the area, especially since there are certain material similarities between juveniles and the mentally retarded. Indeed, the Court’s explanation for these Eighth Amendment holdings bolsters the argument against the constitutionality of a strict age-of-onset requirement in defining mental retardation under *Atkins*.

## B. Juvenile Cases

In *Roper v. Simmons*, the Court in 2002 invalidated the use of the death penalty on defendants who were juveniles at the time of the offense.<sup>184</sup> The Court emphasized three characteristics of juveniles which drove this conclusion. First, they have “a lack of maturity and an underdeveloped sense of responsibility” which result in “impetuous and ill-considered

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<sup>175</sup> *Graham v. Florida*, 130 S.Ct. 2011, 2021 (2010) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

<sup>176</sup> *Harmelin v. Michigan*, 501 U.S. 957, 997, 1000-1001 (Kennedy, J., concurring).

<sup>177</sup> *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

<sup>178</sup> *Id.*, (quoting *Atkins*, 536 U.S. at 319).

<sup>179</sup> *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (citing *Roper*, 543 U.S. 551, 568).

<sup>180</sup> *Roper*, 543 U.S. at 571 (quoting *Atkins*, 536 U.S. at 319).

<sup>181</sup> *Graham*, 130 S.Ct. at 2022 (“categorical” Eighth Amendment cases are distinct (citing *Harmelin*, 501 U.S. at 1000-1001 (Kennedy, J. concurring) (setting out the comparative factors to be used in the typical Eighth Amendment case))).

<sup>182</sup> *Graham*, 130 S.Ct. at 2022-2023.

<sup>183</sup> See *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring) (LWOP is “the second most severe penalty permitted by law”).

<sup>184</sup> 543 U.S. 551 (2005).

actions.”<sup>185</sup> Second, they are more susceptible to negative influences, including peer pressure and intimidation by others.<sup>186</sup> Third, the personality traits of juveniles are “more transitory, less fixed.”<sup>187</sup>

According to the Court, all these mental and emotional differences from adults undermined the case for juvenile executions. Juveniles’ immature and impetuous behavior tended to make their antisocial conduct “less morally reprehensible.”<sup>188</sup> Their greater susceptibility to influence makes them less capable of escaping negative influences in their environment.<sup>189</sup> And, the transitory nature of their character means that they may grow out of their current dangerous nature.<sup>190</sup> All these factors combined to undermine fatally any rationale for imposing the death penalty. The Court noted that it had previously established that there were only two penological justifications for the death penalty: retribution and deterrence.<sup>191</sup> Because the above-mentioned mental and emotional characteristics combined to diminish juveniles’ overall culpability, retributive goals did not justify death as punishment. They also undercut deterrence as a justification, since they made the likelihood that a minor would engage in the kind of “cost-benefit analysis that attaches any weight to the possibility of execution... so remote as to be virtually nonexistent.”<sup>192</sup>

The Court acknowledged that there might be rare cases where individual juveniles were sufficiently culpable to warrant the death penalty. But it reasoned that the risk that the brutality or cold-bloodedness of the criminal act would overpower the decision-makers into improper death sentences far outweighed the risk that a death-worthy juvenile would escape capital punishment.<sup>193</sup>

Eight years later, the Court in *Graham v. Florida* invalidated the use of a life-without-parole (LWOP) sentence for a non-homicide crime against a defendant who was a juvenile at the time of the offense.<sup>194</sup> The Court cited the same three culpability-lessening characteristics of juveniles identified in *Roper*: immaturity, susceptibility to outside influences, and under-formed character.<sup>195</sup> The lessened culpability fatally undermined the retribution-based case for sentencing juveniles to LWOP for non-homicides.<sup>196</sup> And the same impulsiveness found in *Roper* undermined the deterrence-based case for such sentences.<sup>197</sup>

Aside from reaffirming *Roper*’s reasoning and expanding its application, *Graham* contributed another set of reasons why juveniles deserved categorical Eighth Amendment protections: their cognitive and emotional shortfalls handicapped the effectiveness of their representation in criminal court. Juveniles have limited understanding of the criminal justice

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<sup>185</sup> *Id.* at 569.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 570-571.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 571; *Atkins v. Virginia*, 536 U.S. 304 at 319 (2002); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

<sup>192</sup> *Roper*, 543 U.S. at 571-572 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988)).

<sup>193</sup> *Id.* at 572-573.

<sup>194</sup> 130 S.Ct. 2011 (2010).

<sup>195</sup> *Id.* at 2026.

<sup>196</sup> *Id.* at 2028.

<sup>197</sup> *Id.*

system and the roles of the various actors within it.<sup>198</sup> They are less likely to work effectively with their attorneys to aid in their own defense.<sup>199</sup> They are more likely to make poor decisions regarding their own defense due to their impulsiveness and difficulty in weighing long-term consequences.<sup>200</sup> Of course, the Court in *Atkins* noted similar representational issues regarding mentally retarded defendants, based on similar cognitive and emotive shortfalls.<sup>201</sup>

The Court updated its jurisprudence in this area with the recent holding in *Miller v. Alabama*.<sup>202</sup> In *Miller*, the Supreme Court expanded the *Graham* holding by ruling that the Eighth Amendment barred *mandatory* LWOP sentences for juvenile offenders, *even if* the offense in question is a homicide. The Court again recited the three relevant characteristics (immaturity/impulsiveness, susceptibility to outside pressure, and under-formed character) of juveniles from *Roper*, and drew similar conclusions about the inability of the retribution or deterrence goals to justify the sentence in light of these cognitive/emotive characteristics.<sup>203</sup> Because the issue was unnecessary to a resolution of the case, the Court reserved the question of whether the Eighth Amendment barred all LWOP sentences for juveniles (or, alternatively, for all defendants 14 and under at the time of the crime).<sup>204</sup>

Of note in *Miller* is the majority's response to the argument that *Graham* was distinct because it dealt with non-homicide crimes. It was indeed the case that the opinion in *Graham* emphasized the unique nature of homicide, and carved out potential room for a different result (one that did not find an Eighth Amendment problem) for homicides committed by juveniles.<sup>205</sup> The State emphasized this fact. But the Court declined to be bound by this *dicta* from *Graham*. Instead, it looked past the superficial recitation of rulings to the underlying reasons for treating juveniles differently from other offenders. Taking a realistic approach, the Court noted that the characteristics of juveniles which made them improper subjects of LWOP for non-homicide offenses—their “distinctive . . . mental traits and environmental vulnerabilities” — was *not* crime-specific.<sup>206</sup> They applied just as much in homicide cases as non-homicide cases. The rationale for lower culpability applied just the same in the murder context, and thus, a similar result would obtain.

A comparable approach is appropriate in applying *Atkins* to persons who meet all but the age-of-onset criterion for MR status. As noted above, although *Atkins* recited age-of-onset as one prong in a three-prong test for MR, it did not officially adopt or require that three-prong test, expressly leaving it to the states to establish their own MR definitions. The Supreme Court and the states simply borrowed the test, and the onset criterion, from basic medical sources. Since that is the case, neither the Supreme Court nor lower courts should give this prong much weight in future cases. It should instead look to the underlying reasons why the MR are entitled to a

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<sup>198</sup> *Id.* at 2032.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> The *Graham* Court here also noted the risk that a juvenile may not trust defense counsel as part of a rebellious rejection of the adult world. *Id.* While this characteristic may not be present with the typical MR defendant, it is replaced by the opposite extreme, since MR patients tend to be overly trusting and gullible.

<sup>202</sup> 132 S.Ct. 2455, 2467 (2012).

<sup>203</sup> *Miller*, 132 S.Ct. at 2464-2465.

<sup>204</sup> *Id.* at 2469.

<sup>205</sup> *Graham*, 130 S.Ct. at 2027.

<sup>206</sup> *Miller*, 132 S.Ct. at 2465.

death penalty exemption. The lessened culpability, deterrability, and ability to assist in one’s own defense apply just as much to those who meet all MR criteria except age-of-onset. They suffer the same cognitive, emotive, and adaptive shortfalls. Thus, a similar result should obtain for them as the result obtained in *Atkins*.

Also of note in *Miller* was the Court’s willingness to impose a categorical ban despite the relative prevalence of similar sentences accepted in the various states. The Court acknowledged that 29 jurisdictions (28 States and the federal government) made LWOP mandatory for some juveniles convicted of murder.<sup>207</sup> Almost all these jurisdictions would apply this mandatory sentence to juveniles as young as 14 when they committed the offense.<sup>208</sup> Nonetheless, the Court rejected the argument that this bound its decision. It noted that in *Graham*, an even larger number of jurisdictions had had on the books the challenged sentence.<sup>209</sup> Of course, the Court in *Graham* had noted a trend in recent years away from the practice,<sup>210</sup> a trend not present in *Miller*. And, the Court in *Graham* emphasized that even though there were many laws on the books similar to the challenged sentence, such sentences were rarely actually imposed<sup>211</sup>—an argument not available in *Miller*, given that the challenged mandatory LWOP sentences removed any sentencing discretion to the judge.<sup>212</sup>

Nevertheless, the Court’s most recent pronouncement in this area shows that the relative prevalence of a challenged sentencing provision among the nation’s jurisdictions is not necessarily fatal to a “cruel and unusual” challenge. For this reason, it should not be dispositive that all but one<sup>213</sup> of the death penalty jurisdictions which define MR include in their definitions a requirement of onset before 18,<sup>214</sup> before 22,<sup>215</sup> or before the “developmental period.”<sup>216</sup> Indeed, given that the States simply adopted the *Atkins* criteria out of convenience and deference

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<sup>207</sup> *Id.* at 2470-2471.

<sup>208</sup> *Id.* at n. 9.

<sup>209</sup> *Id.* at 2471.

<sup>210</sup> *Graham*, 130 S.Ct. at 2025.

<sup>211</sup> *Id.* at 2024.

<sup>212</sup> *See Miller*, 132 S.Ct. at 2472 n.10 (acknowledging this point).

<sup>213</sup> *See NEB. REV. STAT.* §28-105.01 (2008).

<sup>214</sup> ARIZ. REV. STAT. ANN. §13-753(K)(3) (2010 & Supp. 2011); ARK. CODE ANN. § 5-4-618(a)(1) (2006 & Supp. 2011); CAL. PENAL CODE § 1376(a) (West 2011); DEL. CODE ANN. tit. 11, § 4209(d)(3)(d)(2)-(3) (2007); FLA. STAT. ANN. § 921.137(1) (West 2006 & Supp. 2012); IDAHO CODE ANN. § 19-2515A(1)(a) (2004 & Supp. 2012); 725 ILL. COMP. STAT. ANN. 5/114-15(d) (2006); KAN. STAT. ANN. § 39-1803 (2000); LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1) (2008); MISS. CODE ANN. § 1-3-24 (Supp. 2011); MO. REV. STAT. § 565.030(6) (West Supp. 2012); MONT. CODE ANN. § 53-20-102(8) (2011); N.C. GEN. STAT. § 15A-2005(a)(1)(a) (2011); OKLA. STAT. ANN. tit. 10 § 1408 (West 2011); OR. REV. STAT. ANN. § 427.005(10)(a) (2011); S.D. CODIFIED LAWS § 23A-27A-26.1 (2004); TENN. CODE ANN. 39-13-203(a)(1) (West 2010); VA. CODE ANN. § 19.2-264.3:1.1(A) (2008 & Supp. 2012); WASH. REV. CODE ANN. § 10.95.030(2)(e) (West 2012); U.S. v. Davis, 611 F.Supp. 472, 474-75 (D. Mary. 2009) (“Since *Atkins*, other federal courts have applied (the AAID and DSM-IV-TR) definitions, noting that the two are essentially identical.”); *Ex parte Perkins*, 851 So.2d 453, 456 (Ala. 2002); *Commonwealth v. Miller*, 888 A.2d 624, 630 n.7 (Pa. 2005).

<sup>215</sup> COLO. REV. STAT. ANN. § 16-8.5-101(9) (2011); IND. CODE ANN. § 35-36-9-2 (LexisNexis 1998 & Supp. 2011); MD. CODE ANN., CRIM. LAW § 2-202(b)(i)-(ii) (LexisNexis 2002 & Supp. 2011); N.H. REV. STAT. ANN. § 171-A:2 (LexisNexis 2010); UTAH CODE ANN. § 77-15a-102 (LexisNexis 2008).

<sup>216</sup> GA. CODE ANN. § 17-7-131(a)(3) (2008 & Supp. 2011); KY. REV. STAT. ANN. § 532.130(2) (LexisNexis 2008); NEV. REV. STAT. ANN. §174.098(7) (LexisNexis 2011); OHIO REV. CODE ANN. § 5123.01(N) (LexisNexis 2011); S.C. CODE ANN. § 16-3-20(C)(b)(10); TEX. HEALTH & SAFETY CODE ANN. § 591.003 (West 2010 & Supp. 2012); WYO. STAT. ANN. § 8-1-102 (2011).

to the Supreme Court, which in turn simply adopted it from the AAMR/AAIDD and the APA (at least one of which now disavows strict application of an onset requirement), its prevalence should not mean much in any event. It likely does not reflect the considered judgment of the Supreme Court, or of the jurisdictions in question, to endorse the kind of technical exclusion of a functionally mentally retarded person from *Atkins* on the sole ground of lack of pre-18 onset (or lack of proof thereof).<sup>217</sup>

A similar argument could address the widespread international application of an onset requirement.<sup>218</sup> The International Classification of Diseases and Diagnostic Statistical Manual of Mental Disorders are diagnostic instruments or classifications most often used to refer to intellectual disabilities.<sup>219</sup> The former requires manifestation during the developmental period, and the latter requires onset before the age of 18.<sup>220</sup> But they were designed as treatment and care guides, without reference to issues of criminal responsibility.

### C. Analogy To MR

In all these cases, the Court listed mental and emotional deficits common to juveniles which lessened their culpability. A similar dynamic is at work with MR. Almost every one of these mental and emotional characteristics of juveniles is also present with MR. Indeed, it is common when diagnosing MR to compare the patient's mental age to that of a child.<sup>221</sup> It is not far off to say that a person with MR is the mental and emotional equivalent of a child. And, these comparisons between the MR and children were based on evaluation of the first two prongs of the *Atkins* test. Doctors making these comparisons did so based on the intellectual ability of the patient, as well as on the adaptive behavior abilities.

So many of the characteristics identified by the Court with children apply to the person who is officially MR but for the age of onset. They still have difficulty controlling impulses.<sup>222</sup> They still have an IQ of a child. The MR are famously vulnerable to suggestion and undue influence by others. As noted above, the Court in both situations has acknowledged a greater risk of poor representation stemming from the client's reduced ability to understand the criminal justice process or assist her lawyer.<sup>223</sup>

Indeed, the Court in *Roper* explicitly drew the parallel between juvenile and mentally retarded defendants, noting that in both cases, prior cases had rejected Eighth Amendment

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<sup>217</sup> See *Miller*, 132 S.Ct. at 2459 (noting that in some cases, the law may produce outcomes that legislature did not anticipate or intend (citing *Graham v. Florida*, 130 S.Ct. 2011 (2010)); *Thompson v. Oklahoma*, 487 U.S. 815, 856-859 (1988) (O'Connor, J., concurring) (relying in part on notion that the legislature either did not realize that its actions would render 15-year-olds death-eligible, or else did not give the question serious consideration)).

<sup>218</sup> See WORLD HEALTH ORGANIZATION, ATLAS: GLOBAL RESOURCES FOR PERSONS WITH INTELLECTUAL DISABILITIES 19 (2007), [http://www.who.int/mental\\_health/evidence/atlas\\_id\\_2007.pdf](http://www.who.int/mental_health/evidence/atlas_id_2007.pdf). (discussing international application).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 100.

<sup>221</sup> See AAIDD, INTELLECTUAL DISABILITY, *supra* note 22, at 35; Brief of Amici Curiae for the American Medical Association et al., *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1633549 at \*3-5 (explaining that teens and mentally retarded individuals both exhibit "disabilities in areas of reasoning, judgment, and control of their impulses." (quoting *Atkins v. Virginia*, 536 U.S. 304, 306 (2002))).

<sup>222</sup> *Atkins v. Virginia*, 536 U.S. 304, 318 (2002).

<sup>223</sup> *Id.* at 320-21; *Graham*, 130 S.Ct. at 2032.

claims, and in both cases the “standards of decency,” as reflected in state legislative judgments, public opinion, and international law, had evolved to justify rejection of those precedents.<sup>224</sup> And, state courts acknowledge the interconnectedness of youth and impaired intellectual function in death penalty sentencing.<sup>225</sup>

Granted, there are some differences between juvenile status and MR status which undercut the analogy between the two. Chief among them is the Court’s observation that the immaturity of youth means their character is not fully formed, such that their negative characteristics—and thus their dangerousness—may be transient.<sup>226</sup> This reduces the need for incapacitation and increases the prospects for rehabilitation. In contrast, the adult mentally retarded offender’s character is well-formed, and their MR impairment is permanent. This is one argument for protecting juveniles from execution which does not transfer well to the mentally retarded. However, it is an argument entitled to relatively less weight than others, because it, in actuality, speaks more to the penological goals of incapacitation and rehabilitation. As the Supreme Court has acknowledged,<sup>227</sup> only the penological goals of deterrence and retribution can justify the use of the death penalty.

The two groups are also treated differently in other aspects of the law. Citing the impetuosity of youth, the Court in *Roper* noted that juveniles are barred from voting, serving on juries, or marrying without parental consent.<sup>228</sup> This is not universally the case with the mentally retarded. Generally, mentally retarded people can get married as long as they demonstrate the capacity to understand the responsibilities that will ensue.<sup>229</sup> In many states, they can also vote<sup>230</sup> and serve on juries, provided they are found competent to do so.<sup>231</sup> This is indeed a difference between the two groups, and it may provide an argument against analogizing juveniles to those who satisfy only the first 2 prongs of *Atkins*.

Further, is not the use of the age of majority as a cutoff in *Roper*, *Graham*, and *Miller* just as arbitrary? An offender who is 17 years and 364 days old at the time of a murder cannot be executed, but an offender who is 18 years and 1 day old at the time of the offense can be. Some individual minors may actually be more mature than some individual adults. Indeed, the Supreme Court has acknowledged this very problem even as it imposed a categorical “18 and

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<sup>224</sup> *Roper*, 543 U.S. at 564-567.

<sup>225</sup> See, e.g., *Lebron v. State*, 982 So.2d 649, 660 (Fla. 2008) (evidence that a defendant’s mental, emotional, or intellectual age was lower than his chronological age would be a mitigating factor in capital sentencing). Indeed, the parallel between juveniles and the mentally retarded is so strong that it may undergird an argument for extending *Graham*’s and *Miller*’s LWOP exclusions to the latter group. That assertion, while persuasive, is outside the scope of this article.

<sup>226</sup> *Id.*

<sup>227</sup> *Roper*, 543 U.S. at 570-571.

<sup>228</sup> *Graham*, 130 S.Ct. at 2025; *Roper*, 543 U.S. at 569.

<sup>229</sup> See e.g., N.Y. DOM. REL. LAW § 7:2 (McKinney 2010 & Supp. 2012) (“A marriage is void . . . if one of the parties to the marriage was incapable of consenting for want of understanding.”) See also Marissa DeBellis, *A Group Home Exclusively for Married Couples with Developmental Disabilities: A Natural Next-Step*, 28 *TOURO L. REV.* 451, 459 (2012).

<sup>230</sup> See *Doe v. Rowe*, 156 F.Supp.2d 35, 59 (D. Maine 2001) (concluding that Maine’s constitutional restriction on voting rights of the mentally ill violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

<sup>231</sup> See *Rogers v. McMullen*, 673 F.2d 1185, 1189 (11th Cir. 1982) (noting that the constitutional right to trial by jury requires that the jurors be impartial and competent).

under” capital punishment ban in *Roper*.<sup>232</sup> Arguably, there is no more of a rational basis for this distinction than the distinctions exemplified in Van Tran’s case. If such a stark “age of 18” cutoff is acceptable constitutionally in the context of juvenile crime, would it not then be acceptable to use a similar age-of-majority cutoff in applying *Atkins*?

I believe the answer is “no,” for one crucial reason. In *Roper*, *Graham*, and *Miller*, the Court excludes certain punishments (death, LWOP) because they are deemed excessive in situations where the defendant has lessened culpability. It is the lack of culpability—stemming from a lack of adult-level intellectual ability, emotional maturity, and self-control—that is determinative. The juvenile status of the offender is merely a proxy for those intellectual, emotional, and self-control deficits. The Court relies on centuries of legal tradition in using the age of majority as the proxy for the lessened culpability making the punishment in question excessive.

In *Atkins* and its progeny, the Court found that those determined to be mentally retarded have the same kind of intellectual, emotional, and self-control deficits to reduce their culpability below that which would justify execution. Mental retardation is not used as a *proxy* for the mental and emotional characteristics; mental retardation *is*, by definition, the requisite mental and emotional characteristics. A juvenile defendant is assumed by the law to be insufficiently culpable. By contrast, a defendant found by the court to be mentally retarded has already established, through competent proof, that his mental/emotional makeup is such that his culpability is reduced.

Underscoring this conclusion is the lack of any persuasive penological justification for executing defendants who satisfy all but the “age of onset” *Atkins* criteria. The Court has made clear that a sentence “lacking any legitimate penological justification is, by its nature, disproportionate to the offense.”<sup>233</sup> For the purposes of a “cruel and unusual punishment” analysis, the Court has recognized as potential penological justifications the traditional four goals of punishment from basic criminal law: incapacitation, rehabilitation, deterrence, and retribution.<sup>234</sup> As noted above, in the context of the death penalty, the Court has narrowed that list down to deterrence and retribution.<sup>235</sup>

Whatever problems in cognition, susceptibility to influence, impulse control, etc., which a traditional, mentally retarded defendant may have rendering capital punishment inappropriate, they stem from the defendant’s lower intellectual functioning and adaptive behavior deficits. No court, litigator, or commentator has asserted that the age at which these mental/emotional deficits first manifested—as distinct from the deficits themselves—has some independent, causal link to the problems in cognition, negative influence, and impulsiveness. Nor could they do so logically.

Thus, a defendant with the same intellectual functioning and behavior deficits would necessarily have the same lessened culpability, rendering retribution equally improper as a cause

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<sup>232</sup> *Roper*, 543 U.S. at 574.

<sup>233</sup> *Graham*, 130 S.Ct. at 2028.

<sup>234</sup> *Ewing v. California*, 538 U.S. 11, 25 (2003) (citing 1 W. LaFave & A. Scott, *SUBSTANTIVE CRIMINAL LAW* §1-5, pp. 30-36 (1986)).

<sup>235</sup> *Roper*, 543 U.S. at 571; *Atkins v. Virginia*, 536 U.S. 304, 319 (2002); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

for execution. And such a defendant would be just as difficult to deter through the threat of execution. Thus, by definition, a defendant who satisfies all the *Atkins* criteria save “age of onset” is no better a candidate for the death penalty based on considerations of deterrence and retribution. The distinction between “pre-18 onset retarded” and “post-18 onset retarded” is bereft of any legitimate penological justification. It is therefore a violation of the Eighth Amendment.

Even if one could point to individual instances where the later, post-18 onset of the cognitive and adaptive deficits somehow led to greater culpability or “deterability,” they would be rare indeed. And, such rare individual examples would not change the Eighth Amendment conclusion. Even where a punishment has “some connection to a valid penological goal,” it cannot be “grossly disproportionate” in light of that particular penological goal.<sup>236</sup>

Nor can the onset requirement be justified as a way of screening out non-genetic causes of the mental impairment. The exact cause—genetic, environmental, traumatic—of a patient’s mental retardation often cannot be determined.<sup>237</sup> But, as the definition is currently applied, it makes no difference whether the cause is genetic, environmental, or traumatic; all that matters is whether onset occurred prior to age 18.<sup>238</sup>

## V. EQUAL PROTECTION

By blindly importing the medical definition’s age-of-onset requirement into the legal definition of mental retardation, states have inadvertently produced an equal protection problem. Because the mental deficiencies present in mental retardation can be caused by a myriad of other conditions,<sup>239</sup> it is not unheard of for a person to develop them as an adult. Thus, if two defendants commit identical crimes, while in identical states of mind, depending on the age-of-onset of their mental handicap, one could be protected from the death penalty, while the other is not. In every important sense, this constitutes treating similarly situated persons dissimilarly. Many commentators agree.<sup>240</sup>

Any such equal protection challenge must first confront the threshold question of the standard of review to apply. For any such standard of review, a court would have to consider each of the various asserted state rationales for treating adult-onset retarded persons, or persons who cannot affirmatively prove childhood onset, from those meeting all three of the *Atkins* criteria.

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<sup>236</sup> *Graham*, 130 S.Ct. at 2028.

<sup>237</sup> See AAIDD, INTELLECTUAL DISABILITY, *supra* note 22, at 27 (“[D]isability does not have to be formally identified, but it must have originated during the developmental period.”).

<sup>238</sup> *Atkins*, 536 U.S. 304, 308 n.3 (citing DSM-IV-TR, *supra* note 50, at 41); *United States v. Hardy*, 762 F.Supp.2d 849, 903 (E.D. La. 2010); see also *State v. Williams*, 831 So.2d 835, 987 (La. 2002) (identical symptoms can develop through sudden injury at age 17 and then be considered mental retardation).

<sup>239</sup> See DSM-IV-TR, *supra* note 50, at 164 (traumatic brain injury); *id.* at 135 (dementia); *id.* at 70 (autism); AAIDD, INTELLECTUAL DISABILITY, *supra* note 22, at 60 (TBI, malnutrition, meningitis); Brief of Amici Curiae AAMR et al., *State v. Arellano*, No. CV-05-0397-SA (Sup. Ct. Ariz. Feb. 27, 2006), at 17 n.8 (dementia and TBI); see also Farahany, *supra* note 31, at 887 (mentioning all of the above).

<sup>240</sup> See *Ellis*, *supra* note 31, at 21 n. 33; Farahany, *supra* note 31, at 859; Larimer, *supra* note 24, at 944-45; Slobogin, *supra* note 31, at 299.



## A. Equal Protection Generally

The Fourteenth Amendment's Equal Protection Clause requires the government to treat similarly situated individuals alike.<sup>241</sup> The first task in an equal protection question is determining the proper standard of review. If the court uses a rational basis standard of review, the statute will be upheld so long as it is "rationally related" to a "legitimate state interest." This is the default standard of review, a deferential standard of review which applies absent a reason for a court to be more skeptical in evaluating the law.<sup>242</sup>

Under a "strict scrutiny" analysis, by contrast, a statute protecting MR individuals, but not others with comparable mental handicaps would be valid only if it were "narrowly tailored" to serve a "compelling government interest."<sup>243</sup> Strict scrutiny is used when a classification under law is based on a "suspect class" such as race, nationality, or alienage.<sup>244</sup> This standard asks more of the legislature when it comes to both ends and means. The asserted governmental interest need not only be legitimate, but among the most crucial of those pertaining to government.<sup>245</sup> And, the fit between that governmental end, and the means used in the classification to further that end, must be very close indeed, with very little tolerance for "under-inclusion" and "over-inclusion."<sup>246</sup>

Between rational basis and strict scrutiny is a level of intermediate scrutiny, usually applied to discriminatory classifications based on sex or illegitimacy.<sup>247</sup> This standard requires the statute at issue be "substantially related" to an "important government interest."<sup>248</sup> Again, both the weightiness of the governmental interest, and the requisite closeness of fit between means and ends, lies between those associated with rational basis and those associated with strict scrutiny.<sup>249</sup>

The standard of scrutiny used regarding this issue is pivotal. Some commentators have opined that the standard of review utilized on this issue may be determinative of the outcome.<sup>250</sup>

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<sup>241</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). *See also* U.S. CONST. amend XIV § 1.  
<sup>242</sup> *Exxon Corp. v. Eagerton*, 462 U.S. 176, 195-96 (1983) (explaining that provisions not adversely affecting a fundamental interest or classifying based on suspect criterion are evaluated under rationality standard).

<sup>243</sup> *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

<sup>244</sup> *Graham v. Richardson*, 403 U.S. 365 371-72 (1971).

<sup>245</sup> *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 929 (1992) (explaining that regulations only pass strict scrutiny "if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest." (citing *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965))).

<sup>246</sup> *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 578 (1993) ("A State may no more create an underinclusive statute, one that fails truly to promote its purported interest, than it may create an overinclusive statute, one that encompasses more protected conduct than necessary to achieve its goal.")

<sup>247</sup> *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *see Craig v. Boren*, 429 U.S. 190, 197 (1976) (sex); *Matthews v. Lucas*, 427 U.S. 495, 505-06 (1976) (illegitimacy).

<sup>248</sup> *Id.*

<sup>249</sup> *See Clark*, 486 U.S. at 461 ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny . . . To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.")

<sup>250</sup> *See, e.g., Slobogin, supra* note 31, at 299. ("In short, losing the suspect classification battle usually means losing the equal protection war."). *See generally Larimer, supra* note 24 (arguing for an equal protection violation by reasoning that strict scrutiny should apply).

## B. Rational Basis

Unless a suspect class or fundamental right is affected by a statute, the default form of scrutiny is rational basis review.<sup>251</sup> An Equal Protection claim under this standard is difficult to win, but not impossible.

No federal court has dealt with the precise issue of the Equal Protection standard of review in evaluating a definition of MR used to adjudicate *Atkins* claims. Any equal protection discussion regarding MR individuals must start with the Supreme Court's ruling in *City of Cleburne v. Cleburne Living Center*.<sup>252</sup> In that case, the city of Cleburne, Texas denied a permit for the operation of a group home for the mentally retarded, under an ordinance that required permits for group homes only if they served the mentally retarded.<sup>253</sup> The Cleburne Living Center subsequently filed suit alleging that the ordinance violated the equal protection rights of its potential residents.<sup>254</sup> Finding that MR individuals represented a quasi-suspect class, the Court of Appeals applied heightened scrutiny to strike down the ordinance.<sup>255</sup>

The Supreme Court held that MR individuals were not a quasi-suspect class, and thus, could only be afforded rational basis review.<sup>256</sup> Reviewing the characteristics of a group considered in deciding if a group is a "suspect class,"<sup>257</sup> the *Cleburne* Court acknowledged that MR was an immutable trait, and there had been some history of discrimination against the retarded, but countered that the characteristic had definite relevance to merit, and that the political branches had, in recent years, made efforts to assist the plight of the retarded, belying any inference of indifference or hostility toward them on the part of legislators.<sup>258</sup>

Normally, in applying rational basis review, legislatures are afforded a great deal of deference, their actions only being struck down if there is any conceivable justification for it.<sup>259</sup> However, the Court in *Cleburne* invalidated the city's action under that standard of review.<sup>260</sup> The Court noted that even if the land use restriction at issue in the case was subject only to rational basis review, for the differing treatment to pass constitutional muster, the affected retarded persons must still be shown to threaten some identifiable legitimate interests of the state, in a way that the non-retarded do not.<sup>261</sup>

The city gave several justifications for its decision: the negative attitudes of neighbors, the home's location on a flood plain and near a junior high school where kids might harass the occupants, and concerns that the home would be overcrowded.<sup>262</sup> The Court held the negative attitudes of neighbors to be an illegitimate purpose.<sup>263</sup> Next it found that the presence of other

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<sup>251</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 432.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 437.

<sup>257</sup> *Frontiero v. Richardson*, 411 U.S. 677, 685-86 (1973).

<sup>258</sup> *Cleburne*, 473 U.S. at 443.

<sup>259</sup> *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

<sup>260</sup> *Cleburne*, 473 U.S. at 448.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 448-50.

<sup>263</sup> *Id.* at 448.

group homes in the flood plain, and several MR students in attendance at the school, belied the proffered concerns over the facility's location.<sup>264</sup> Finally, the Court found that the city did not justify its concerns about overcrowding.<sup>265</sup>

Despite purporting to use rational basis in its decision, the *Cleburne* Court raised legitimate questions as to whether it was really using a more searching standard. As Justice Marshall pointed out in a separate opinion, under the traditional test, the Court would have allowed the city to single out the group home before other facilities in its concerns about the flood plain, because legislatures may take "one step at a time toward addressing a problem."<sup>266</sup> Moreover, because the traditional rational basis test treats all legislation as presumptively constitutional, the burden to prove overcrowding should not have been placed on the city.<sup>267</sup> In sum, the overall scrutiny of the city's justifications should not have been subject to such detailed review if rational basis were all that was being used.<sup>268</sup> Despite Justice Marshall's suggestion that the Court did not apply the traditional rational basis review it purported to use,<sup>269</sup> the case has been since accepted as subjecting classifications of MR individuals to that low standard of scrutiny.<sup>270</sup>

Some commentators have suggested that that *Cleburne* may govern here, such that the rational basis standard would apply to any Equal Protection challenge to the onset requirement.<sup>271</sup> This is not necessarily the case. *Cleburne* dealt with a classification between those clearly mentally retarded and those clearly not mentally retarded. Thus, the class at issue was undeniably the mentally retarded. By contrast, a post-*Atkins* challenge to the onset requirement arguably involves a classification within the universe of mentally retarded persons—i.e., between the "officially" mentally retarded (who experienced childhood onset), and the "unofficially" mentally retarded (who have identical symptoms but who experienced adult onset). In some cases, it may effect a difference in treatment between those childhood-onset, mentally retarded who have direct proof of childhood onset, and those childhood-onset, mentally retarded who do not have such proof. In either case, because the difference in treatment is not {MR versus non-MR}, *Cleburne* may not, in fact, control to compel the use of rational basis review. The door on heightened review for MR cases may be cracked open rather than shut.

*Board of Trustees of the University of Alabama v. Garrett*<sup>272</sup> arguably provides inferential support for this view. In *Garrett*, the Court struck down a portion of Congress' Americans with Disabilities Act (ADA) that allowed victims of disability discrimination to recover monetary damages from the state, holding that it violated states' Eleventh Amendment immunity from suit

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<sup>264</sup> *Id.* at 449.

<sup>265</sup> *Id.* at 449-50.

<sup>266</sup> *Id.* at 458 (Marshall, J., concurring in part, dissenting in part).

<sup>267</sup> *Id.* at 459 (Marshall, J., concurring in part, dissenting in part).

<sup>268</sup> *Id.* at 458 (Marshall, J., concurring in part, dissenting in part).

<sup>269</sup> *Id.* at 460 (Marshall, J., concurring in part, dissenting in part) (suggesting that the Court had actually employed intermediate scrutiny).

<sup>270</sup> *Bd. Of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001) ("such legislation incurs only the minimum 'rational-basis' review applicable to general social and economic legislation." (citing *Cleburne* 473 U.S. at 446)); *State v. Anderson*, 996 So.2d 973, 987 (La. 2008).

<sup>271</sup> Slobogin, *supra* note 31, at 293 ("One hurdle for this argument is likely to be the Supreme Court's consistent holding that laws that differentiate based on disability need only meet the 'rational basis' test."; *but see id.* at 300 (arguing later that *Cleburne* actually applied a "rational basis with bite" test).

<sup>272</sup> 531 U.S. 356 (2001).

in federal court.<sup>273</sup> To justify the Act’s abrogation of states’ Eleventh Amendment immunity, Congress tried to rely on its power under Section 5 of the Fourteenth Amendment to pass anti-discrimination statutes.<sup>274</sup> Examining Equal Protection case law, the Court rejected this justification, concluding that the discrimination against the disabled contemplated by the ADA was not a serious enough problem to warrant Congress’ proposed remedy.<sup>275</sup> Once again, the Court applied a rational basis test, this time relying heavily on *Cleburne* to do so.<sup>276</sup> Notably, however, Justices Kennedy and O’Connor wrote a separate concurrence, not mentioning *Cleburne*, in which they stressed the dangers of discrimination against mentally disabled individuals.<sup>277</sup> Expressing concern about animus suggests their support for the more skeptical use of rational basis review used by the Court in *Cleburne*. When considered alongside the similar concerns about discrimination found in Justice Breyer’s four-member dissent,<sup>278</sup> it appears that the Court may still have some doubts about the “suspect class” status of the mentally disabled, at least where discrimination is involved.

This may offer challengers to the onset requirement some hope, but it would be easy to overstate the matter. The somewhat more searching rational basis review in *Cleburne*, and the sympathetic language found in the *Barrett* concurrence and dissent, all stem from concern about bias against the disabled. There is no real reason to suspect that the onset requirement was created out of discriminatory animus against the mentally retarded. It had been used consistently by medical authorities for over a century before *Atkins*,<sup>279</sup> was adopted by *Atkins* based on that medical authority,<sup>280</sup> and had been adopted by states either in reliance on *Atkins* or on the pre-*Atkins* medical authority.<sup>281</sup>

Moreover, cases other than *Cleburne* and *Garrett* do suggest that a rational basis standard would apply to a challenge of the onset requirement. In a context outside of capital punishment, the Supreme Court has used rational basis to uphold state action that required different burdens of proof for involuntary commitment of MR individuals versus mentally ill individuals.<sup>282</sup> In *Heller v. Doe*, the Court accepted the state’s basic justification for the variance that mental retardation was easier to diagnose than mental illness.<sup>283</sup> Additionally, the Court noted that other proffered rationales, such as differences in recommended treatment and in predictability of future dangerousness, would be sufficient explanations standing on their own.<sup>284</sup> This reasoning has been cited in similar involuntary commitment cases around the country.<sup>285</sup>

A similar analysis may apply in capital cases as well. In *Walker v. True*, the Fourth Circuit Court of Appeals used a rational basis test to evaluate a law setting out different

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<sup>273</sup> *Id.* at 374.

<sup>274</sup> *Id.* at 362-63.

<sup>275</sup> *Id.* at 370.

<sup>276</sup> *Id.* at 366-67.

<sup>277</sup> *Id.* at 375 (Kennedy, J., concurring).

<sup>278</sup> *Id.* at 381-82 (Breyer, J., dissenting) (arguing that the ADA’s prohibition of discrimination based on mental disability implements the Court’s holding in *Cleburne*).

<sup>279</sup> See AAIDD, INTELLECTUAL DISABILITY, *supra* note 22, at 9.

<sup>280</sup> *Atkins*, 536 U.S. at 508 n.3.

<sup>281</sup> Larimer, *supra* note 24, at 931.

<sup>282</sup> *Heller v. Doe*, 509 U.S. 312, 312 (1993).

<sup>283</sup> *Id.* at 322.

<sup>284</sup> *Id.* at 328.

<sup>285</sup> See, e.g., *People v. Middleton*, 2009 WL 1816905, at \*8 (Cal. Ct. App. June 25, 2009).

procedures for capital defendants seeking post-conviction review. The Virginia statute at issue afforded a jury determination of mental retardation for defendants who had not yet sought state *habeas* relief at the time *Atkins* was announced, but denied that jury determination for those who had already exhausted their state *habeas* review at the time of *Atkins*.<sup>286</sup> The court cited *Cleburne* in holding that rational basis applied.<sup>287</sup> It noted that just as the federal *habeas* statute treats petitioners filing an initial *habeas* petition differently from those who are filing a successive petition, so too may the state *habeas* statute, because the classification was reasonably related to the state's "judicial resources" interest. It was enough, the court said, for the defendant to have the right (as he did) to pursue his claim via federal *habeas*.<sup>288</sup> Despite the implication of Walker's right to life, the court found that rational basis review was appropriate.<sup>289</sup>

Although no federal court has squarely addressed an Equal Protection challenge to the age-of-onset requirement, state courts have done so. The Supreme Court of Louisiana used a rational basis standard to evaluate an equal protection challenge to its age-of-onset provision in *State v. Anderson*.<sup>290</sup> It supported its use of this deferential standard based on *City of Cleburne*.<sup>291</sup> The *Anderson* court concluded that because the group of individuals who function on the same adaptive level as MR individuals (as a result of some other condition) is "far more diffuse and harder to define," a legislature may rationally treat them differently for purposes of determining eligibility for capital punishment.<sup>292</sup> The court was not swayed by hypotheticals such as the two identical defendants with identical states of mind, stating that, "Any rational system of classification may produce seemingly arbitrary anomalies."<sup>293</sup>

### C. Strict Scrutiny

Notwithstanding *Cleburne* and the several lower court cases relying on it to apply rational basis review to any case involving a mentally retarded defendant, there is some basis to argue that strict scrutiny should apply under an Equal Protection challenge to the onset requirement, because the requirement affects one's fundamental right to life. In *Foucha v. Louisiana*, the Supreme Court held that if a statute provides for "physical restraint" of any kind, it burdens a fundamental right, and any classifications involved therefore trigger strict scrutiny.<sup>294</sup> This includes, specifically, a classification based on the existence of psychological impairments. In *Foucha*, the Court invalidated a statute providing that persons acquitted by reason of insanity had to prove that they were not a danger to the community in order to be released from custody, even though persons acquitted on other grounds, or those about to be

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<sup>286</sup> 399 F.3d 315, 325 (4th Cir. 2005).

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 325-26.

<sup>290</sup> 996 So.2d 973, 987 (La. 2008).

<sup>291</sup> *Id.* (quoting *Cleburne*, 473 U.S. at 442).

<sup>292</sup> *Id.* at 987-88.

<sup>293</sup> *Id.* at 988. *Cf.* *Matheny v. State*, 833 N.E.2d 454, 458 (Ind. 2005) (without formally adopting a standard of review, rejecting defendant's Equal Protection claim that there was no "rational basis" for treating mentally retarded capital defendants from mentally ill capital defendants).

<sup>294</sup> *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992).

released for serving their time, did not. The Court invalidated this rule under Equal Protection, using strict scrutiny.<sup>295</sup>

A statute providing that someone be physically restrained on Death Row and then tied to a table and given lethal injections until he is dead (and thus, unable to move) would seem to meet *Foucha*'s "physical restraint" test for triggering strict scrutiny, and then some. And the difference in treatment struck down in *Foucha*—requiring proof of being no longer dangerous by people adjudicated to have been insane, but not by other criminal defendants—seems more plausible than the classification between mentally retarded defendants who developed symptoms as children versus as adults. Thus, if the difference in treatment in *Foucha* deserves strict scrutiny review, and invalidation, there is a strong argument that so too does the onset requirement.

Generally, the Supreme Court has stated that strict scrutiny is required "when state laws impinge on personal rights protected by the Constitution."<sup>296</sup> Any time that state law classifications are used for "circumventing a federally protected right," they will be subject to careful federal review under the Equal Protection clause.<sup>297</sup> The Court has demonstrated its commitment to protecting fundamental rights to vote,<sup>298</sup> marry,<sup>299</sup> and travel,<sup>300</sup> among others. Notably, the Court has not been swayed by the "difficulty" of protecting those rights, refusing to lessen its scrutiny.<sup>301</sup> Nor will it be swayed by costs the protection may incur.<sup>302</sup>

The right to life seems clearly one of those "personal rights protected by the Constitution, "as the plain text of the Fifth and Fourteenth Amendments makes clear."<sup>303</sup> Indeed, in *Walker v. True*, the capital punishment case discussed in the previous section,<sup>304</sup> Fourth Circuit Judge Gregory argued that "the execution of the mentally retarded is surely a fundamental, personal constitutional right," which requires review under strict scrutiny rather than rational basis review.<sup>305</sup> And the Supreme Court has strongly suggested that there is a fundamental right to life in a variety of contexts, including abortion and the withdrawal of life-sustaining treatment.<sup>306</sup>

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<sup>295</sup> *Id.*

<sup>296</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (strict scrutiny proper for classifications where a fundamental right is impaired, including for, in the instant case, forced sterilization laws).

<sup>297</sup> *Reynolds v. Sims*, 377 U.S. 533, 566 (1964) (quoting *Gomillion v. Lightfoot*, 364, U.S. 339, 347 (1960)).

<sup>298</sup> *Id.* at 554 (invalidating a redistricting plan under Equal Protection for violating the "one person, one vote" rule).

<sup>299</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>300</sup> *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (establishing a fundamental right to interstate travel in order to invoke the privileges and immunities of each state).

<sup>301</sup> *Shaw v. Reno*, 509 U.S. 630, 646 (1993) ("The difficulty of proof, of course, does not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race.").

<sup>302</sup> *Shapiro*, 394 U.S. at 633 ("The saving of welfare costs cannot justify an otherwise invidious classification.").

<sup>303</sup> See U.S. CONST. amend. V (providing that the federal government cannot deprive anyone of "life, liberty, or property, without due process of law"); U.S. CONST. amend. XIV (providing that no state or local government can "deprive any person of life, liberty, or property, without due process of law") (emphasis added).

<sup>304</sup> See *supra* discussion accompanying notes 285-292.

<sup>305</sup> *Walker v. True*, 399 F.3d 315, 328 (4th Cir. 2005) (Gregory, J., concurring in part and dissenting in part) (arguing that the majority's rational basis review of a Virginia law for determining mental retardation for execution

Perhaps more on point, the Court has also recognized a constitutionally protected interest in life for those charged with capital murder. In *Ohio Adult Parole Authority v. Woodard*, the Supreme Court considered a death row inmate’s interest in his life in a procedural due process challenge to clemency procedures.<sup>307</sup> A plurality of the Court recognized that persons charged with capital offenses had a recognized constitutional interest in life, although they considered this interest extinguished by a proper trial, conviction, and sentence.<sup>308</sup> The rest of the Court went further, recognizing a constitutional right to life even after a proper death sentence which would trigger at least some due process restrictions on the clemency process.<sup>309</sup> Although opinions varied on the effect of a proper conviction and sentence, and the extent to which due process protections reached clemency proceedings, all Justices acknowledged a constitutional right to life held by all those charged with a capital crime.

Given the long history of deference to the executive in granting clemency, pardons, and the like,<sup>310</sup> a deference rooted in fundamental considerations of separation of powers,<sup>311</sup> the Court’s unwillingness in *Woodard* to micromanage executive clemency is unsurprising. Its reluctance to intervene in executive clemency in *Woodard* thus may not doom an Equal Protection challenge to the procedures used by courts in adjudicating Death Row cases. Rather, *Woodard*’s recognition of the constitutional interest in life, coupled with *Foucha*’s use of strict scrutiny for criminal justice rules dealing with the mentally ill and the general case law mandating heightened constitutional review when the right to life or other constitutionally recognized rights are seriously burdened, all provide substantial support for the use of strict scrutiny in a challenge to the onset requirement.

#### D. Intermediate Scrutiny

There is also a possibility that the Supreme Court would settle between the extremes of the rational basis and strict scrutiny standards to evaluate Equal Protection challenges to age-of-onset provisions using intermediate scrutiny. Although the Court in *Cleburne* has previously

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was inappropriate because “when state laws impinge on the personal rights protected in the Constitution, strict scrutiny—not rational-basis review—is warranted.” (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)).

<sup>306</sup> *Id.* at 938 (citing *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 281 (1990) (withdrawal of life-sustaining treatment); *Roe v. Wade*, 410 U.S. 113, 156-57 (abortion); *see also* *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (One’s right to life . . . and other fundamental rights cannot be submitted to vote; they depend on the outcome of no election”).

<sup>307</sup> *Ohio Adult Parole Auth.*, 523 U.S. 272, 288, 292 (1998).

<sup>308</sup> *Id.* at 281 n.3 (citing *Ford v. Wainwright*, 477 U.S. 399, 425 (1986) (holding that the Eighth Amendment barred the execution of a person who has become insane since being convicted of a capital crime). The plurality also acknowledged that even properly convicted and sentenced persons retained a “residual life interest” in, for example, not being summarily executed by prison guards. *Id.* at 381.

<sup>309</sup> *Id.* at 288 (O’Connor J., concurring in part and concurring in judgment) (“a prisoner under a death sentence remains a living person and consequently has an interest in his life.”); *id.* at 292 (Stevens, J., concurring in part and dissenting in part) (“it is abundantly clear that the respondent possesses a life interest protected by the Due Process Clause”).

<sup>310</sup> *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 278 (1998) (“[P]ardon and commutation decisions have not traditionally been the business of courts . . . they are rarely, if ever, appropriate subjects for judicial review.”).

<sup>311</sup> *Id.*

refused to recognize MR individuals as being a quasi-suspect group,<sup>312</sup> there are arguments that favor the use of intermediate scrutiny to evaluate age-of-onset provisions.

Initially, regardless of the Court's statement that mentally retarded persons were not a quasi-suspect class, the Court may have actually used intermediate scrutiny. Many commentators, and even Justice Marshall in his concurrence, suggested that the Court had used intermediate scrutiny *sub silentio*.<sup>313</sup> This would explain the Court's surprising invalidation of the law under what purported to be a rational basis review.<sup>314</sup> The confusion that followed in the lower courts,<sup>315</sup> along with subsequent Supreme Court holdings, has left many to wonder if the equal protection status of MR individuals is as clear as it once seemed.

At any rate, under today's further evolved standards of decency, it is possible that the Court would consider MR individuals to be a quasi-suspect class.<sup>316</sup> Such a reversal has occurred before in the capital context, albeit under an Eighth Amendment analysis as opposed to Equal Protection. In *Roper v. Simmons*, the Court reversed its own ruling from only 16 years before, deciding that it was no longer constitutionally permissible to execute persons who were minors at the time of the capital offense.<sup>317</sup> And, in *Atkins* itself, the Court reversed its ruling from only 13 years before in *Penry v. Lynaugh*.<sup>318</sup>

In fact, many commentators have expressed the sentiment that at the time *Cleburne* was decided, the court erred in determining MR individuals were not a quasi-suspect class.<sup>319</sup> First, the Court in *Cleburne* justified its holding, in part, based on the fact that prejudice towards the mentally retarded no longer exists because of legislative actions to help them.<sup>320</sup> This justification seems undermined by the Court's ultimate ruling in the case that the Texas statute at issue was the result of "irrational prejudice" against the mentally retarded.<sup>321</sup> Additionally, despite the existence of legislation protecting other suspect groups, such as women and African-Americans, the Court has not suggested lowering the scrutiny of gender or racial classifications.<sup>322</sup> Moreover, the mentally retarded are indeed politically powerless in a way that women and racial minorities are not, for the mentally retarded must rely on the actions of others for their political power. Courts have even referred to them in the past as a "discrete and insular

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<sup>312</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985).

<sup>313</sup> *Cleburne*, 473 U.S. at 460 (Marshall, J., concurring in part, dissenting in part); see Gayle Lynn Pettinga, *Rational Basis With Bite: Immediate Scrutiny By Any Other Name*, 62 IND. L.J. 779, 793-99 (1987) (noting the *Cleburne* Court's placement of the burden on the city to explain the law and its detailed analysis of the city's reasons was inconsistent with traditional rational basis review).

<sup>314</sup> *Cleburne*, 473 U.S. at 453.

<sup>315</sup> See Richard B. Saphire, *Equal Protection, Rational Basis Review, And The Impact Of Cleburne Living Center, Inc.*, 88 KY. L.J. 591, 617-19 (2000) (quoting cases that interpreted *Cleburne* as requiring a more rigorous type of scrutiny than traditional rational-basis review).

<sup>316</sup> See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (explaining that the Court's views may change over time to reflect the evolving national consensus).

<sup>317</sup> *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (*abrogating* *Stanford v. Kentucky*, 492 U.S. 361 (1989)).

<sup>318</sup> *Atkins v. Virginia*, 536 U.S. 304, 307 (2002) (*abrogating* *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

<sup>319</sup> See, e.g., Laura C. Bornstein, *Contextualizing Cleburne*, 41 GOLDEN GATE U. L. REV. 91, 92 (2010); Mark V. Wunder, *Equal Protection and the Mentally Retarded: A Denial of Quasi-Suspect Status in City of Cleburne v. Cleburne Living Center*, 72 IOWA L. REV. 241-243 (1986).

<sup>320</sup> *Cleburne*, 473 U.S. at 443.

<sup>321</sup> *Id.* at 450

<sup>322</sup> See Wunder *supra* note 318, at 251.



minority.”<sup>323</sup> Since mentally retarded people are by definition the lowest 2 percent of intellectual capacity in the population,<sup>324</sup> the description “discrete and insular minority” does not seem out of place.

Interestingly, in *Heller*,<sup>325</sup> the Court had the chance to reaffirm its stance from *Cleburne*, but did not do so. Advocates for the mentally disabled criminal defendant argued for a heightened standard based on the disability of their client.<sup>326</sup> Rather than simply cite its precedent in *Cleburne* to justify rational basis review, the Court noted that heightened review could not be utilized because it had not been argued in lower court.<sup>327</sup> The absence of any reference to *Cleburne* in this discussion led to speculation that the Court may have been trying to distance itself from that decision.<sup>328</sup>

The equal protection cases involving mental disabilities appear to involve struggles to determine the proper standard of review. The Supreme Court cases so far purport to use rational basis. However, there are strong suggestions that the presence of animus may be leading the Court actually to apply a slightly heightened standard, or even intermediate scrutiny, as Justice Marshall suggested in *Cleburne*.<sup>329</sup> History has shown that such an erratic pattern on decisions may lead to the use of intermediate scrutiny.<sup>330</sup> An analogous instance would be the Court’s cases on gender. As in *Cleburne*, the Court struck down a gender-based classification in *Reed v. Reed* using what purported to be rational basis.<sup>331</sup> Just two years later, the Court held that heightened scrutiny was required to evaluate gender-based statutes,<sup>332</sup> before finally establishing intermediate scrutiny in *Craig v. Boren*.<sup>333</sup> Confusion over the proper standard applicable to classifications based on mental disability could follow a similar path to intermediate scrutiny.

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<sup>323</sup> See *Romero v. Youngberg*, 644 F.2d 147, 163 n.35 (3d Cir. 1980) (“[T]he mentally retarded may well be a paradigmatic example of a discrete and insular minority for whom the judiciary should exercise special solicitude.”), *vacated on other grounds*, 457 U.S. 307 (1982).

<sup>324</sup> Intellectual functioning and adaptive behavior definitions of MR require functioning two standard deviations below the mean. AAIDD, *INTELLECTUAL DISABILITY*, *supra* note 22, at 27. About 95% of the population falls within two standard deviations of the mean in data with a normal distribution, leaving roughly 2.5% above it, and 2.5% below it. Douglas G. Altman & J Martin Bland, *Standard Deviations and Standard Errors*, 331 *BRITISH MED. J.* 903, 903 (2005). Thus, the mentally retarded make up roughly the bottom 2 percent of the population in intelligence.

<sup>325</sup> *Heller v. Doe*, 509 U.S. 312 (1993).

<sup>326</sup> *Id.* at 318-19.

<sup>327</sup> *Id.* at 319.

<sup>328</sup> Slobogin, *supra* note 31, at 301.

<sup>329</sup> *Cleburne*, 473 U.S. at 460 (Marshall, J., concurring in part, dissenting in part).

<sup>330</sup> See 2 Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law- Substance and Procedure* § 14.7 (5th ed.). The Court initially used a rational basis review in sex discrimination cases in *Reed v. Reed*, 404 U.S. 71, 76 (1971). Later, it applied strict scrutiny in *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973). Finally, it settled on an intermediate standard of review in those cases in *Craig v. Boren*, 429 U.S. 190, 197 (1976).

<sup>331</sup> 404 U.S. 71 (1971).

<sup>332</sup> *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973).

<sup>333</sup> 429 U.S. 190, 197 (1976).

### E. “Rational Basis With Bite”

As noted above, under a traditional rational basis review, legislatures are given substantial deference with respect to what constitutes a legitimate governmental interest.<sup>334</sup> To invalidate a statute using rational basis review, the challenger carries the burden to negate “every conceivable basis which might support it.”<sup>335</sup> The basis does not have to be identified by the state itself; in fact, the state is not required to articulate any reason at all for its actions.<sup>336</sup> This obviously puts the burden of proof on the party challenging the statute. Alternatively, if the state shows that there is any conceivable rational basis for the legislation, it should prevail.<sup>337</sup>

It is certainly the case that an Equal Protection challenge to the onset requirement would be harder under rational basis review. But not all challenges using this standard fail. The Court has invalidated government action using rational basis scrutiny in cases involving women,<sup>338</sup> unmarried individuals,<sup>339</sup> “hippies,”<sup>340</sup> children of illegal aliens,<sup>341</sup> and lesbian, gay, and bisexual persons.<sup>342</sup> And in *Cleburne*, of course, the Court has struck down a law using rational basis in a case involving the mentally retarded.<sup>343</sup> During the 1985 term alone, the Court invalidated government action in four different cases using rational basis scrutiny.<sup>344</sup> Dissenting justices in many of those opinions contended that the Court had not really applied the traditional rational

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<sup>334</sup> *Armour v. City of Indianapolis*, 132 S.Ct. 2073, 2080 (2012) (“[R]ational basis review requires deference to reasonable underlying legislative judgments.”)

<sup>335</sup> *Heller v. Doe*, 509 U.S. 312, 320 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

<sup>336</sup> *Nordinger v. Hahn*, 505 U.S. 1, 28 (1992).

<sup>337</sup> *Id.* at 27 (“Unless a classification involves suspect classes or fundamental rights, judicial scrutiny under the Equal Protection Clause demands only a conceivable rational basis for the challenged state distinction.”).

<sup>338</sup> *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (striking down Idaho law that gave preference to males in selection of an estate administrators because it was an “arbitrary legislative choice . . . mandated solely on the basis of sex”).

<sup>339</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972) (invalidating Massachusetts law burdening the distribution of contraceptives to unmarried individuals because there was no rational explanation for the different treatment of married and unmarried individuals).

<sup>340</sup> *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 537-38 (1973) (holding that denying food stamps to unrelated individuals living together in an effort to keep “hippie communes” from abusing the program was not based on a rational objective).

<sup>341</sup> *Plyler v. Doe*, 457 U.S. 202, 229-30 (1982) (invalidating Texas law that prevented the children of illegal immigrants from entering public schools because there was no rational distinction between those children and legally resident alien children).

<sup>342</sup> *Romer v. Evans*, 517 U.S. 620, 632 (1996) (invalidating amendment to Colorado constitution that barred local governments from passing ordinances to protect gay, lesbian or bi-sexual individuals because laws inexplicable by anything but animus towards the affected class lack “rational relationship with legitimate state interests”).

<sup>343</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (invalidating a city council decision preventing a group home for the mentally retarded).

<sup>344</sup> *Id.* at 440 (invalidating a Texas city’s ordinance preventing a group home for the mentally retarded); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 612 (1985) (invalidating a New Mexico property tax exemption that applied only to Vietnam veterans who were residents of the state before a cutoff date); *Williams v. Vermont*, 472 U.S. 14, 14 (1985) (invalidating a state tax on automobiles purchased outside the state that burdened those who were non-residents at the time of the purchase); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 869 (1985) (invalidating a state tax burdening foreign insurance companies).

basis test.<sup>345</sup> Commentators have referred to these decisions as employing a slightly heightened rational basis standard known as “rational basis with bite.”<sup>346</sup>

The Court tends to apply this more searching rational basis analysis in cases where it detects animus against a particular group.<sup>347</sup> In one opinion, the Court observed that “bare congressional desire to harm a politically unpopular group” (in that case, hippies) could not justify government action, even under a rational basis standard.<sup>348</sup> Another example was *Romer v. Evans*, where the Court specifically noted that a Colorado law was inexplicable by anything other than animus towards gay, lesbian, and bisexual individuals.<sup>349</sup> As a result, the Court placed the burden on the state to provide an alternative rational justification for the law; it was unable to do so.<sup>350</sup>

Like *Cleburne*, *Moreno* and *Romer* are possible examples of how a court might invalidate a classification burdening persons with mental retardation symptoms using “rational basis with bite.” But getting to “rational basis with bite” might require some plausible suggestion that discriminatory bias was afoot. As noted above, it may be difficult to show that is true with respect to the age-of-onset criterion. However, *Cleburne* at least shows that despite the Court’s refusal to label MR individuals as a quasi-suspect class, it is sensitive to the possibility of animus against the mentally retarded, and the need for special protection for that group. Certainly, both of those concerns were at work in *Atkins*.<sup>351</sup> That sensitivity could possibly be grounds for heightened review in future cases.

#### F. Applying The Standard

The execution of MR individuals was prohibited because certain mental deficits present in mental retardation made it inconsistent with the deterrent and retributive goals of the death penalty.<sup>352</sup> The Court in *Atkins* identified some of these deficits as cognition, communication, judgment, adaptation, and mental health and behavior.<sup>353</sup> Additionally, the reduced culpability of MR individuals was a factor in the Court’s decision, as was the heightened risk that such individuals would not get a fair trial.<sup>354</sup> There are many other conditions that cause the same

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<sup>345</sup> *Cleburne*, 473 U.S. at 456 (Marshall, J., concurring in part, dissenting in part); *Hooper*, 472 U.S. at 625 (Stevens, J., dissenting); *Williams*, 472 U.S. at 33 (Blackmun, J., dissenting); *Metro. Life*, 470 U.S. at 882 (O’Connor, J., dissenting).

<sup>346</sup> See Pettinga, *supra* note 312, at 779; Jeremy B. Smith, Note, *The Flaws of Rational Basis With Bite: Why The Supreme Court Should Acknowledge Its Application To Classifications Based On Sexual Orientation*, 73 *FORDHAM L. REV.* 2769, 2774 (2005); Kenji Yoshino, *The New Equal Protection*, 124 *HARV. L. REV.* 747, 759 (2011) (“While the Court has not made this distinction, academic commentary has correctly observed that ‘rational basis review’ takes two forms: ordinary rational basis review and ‘rational basis with bite review.’”).

<sup>347</sup> See *Romer v. Evans*, 517 U.S. 620, 632 (1996) (noting that the challenged law was inexplicable by anything other than animus); *Cleburne*, 473 U.S. at 450 (“[T]his case appears to rest on an irrational prejudice against the mentally retarded”).

<sup>348</sup> *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

<sup>349</sup> *Romer*, 517 U.S. 620, 632.

<sup>350</sup> See *id.* at 635.

<sup>351</sup> See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (noting that MR needed protection from the tendency of jurors to assume “future dangerousness” on the part of the mentally retarded).

<sup>352</sup> *Id.* at 305.

<sup>353</sup> Farahany, *supra* note 31, at 886.

<sup>354</sup> *Atkins*, 536 U.S. at 306, 307.

deficits, such as certain infections, traumatic brain injury, dementia, and autism.<sup>355</sup> Moreover, MR deficits may also stem from such social factors as birth injury, malnutrition, child abuse, or extreme social deprivation.<sup>356</sup> Regardless of its initial cause, MR still compromises culpability and deterrability to the same extent, and presents similar risks of procedural problems during interrogation, trial, and sentencing.

In surveying the case law and scholarship in this area, several purported justifications are mentioned for the onset requirement. They include the arguments that the onset requirement (1) provides a bright line rule;<sup>357</sup> (2) affords ease of diagnosis;<sup>358</sup> (3) links MR to more permanent, unchanging impairment;<sup>359</sup> and (4) serves as a good check for malingering.<sup>360</sup> Each will be discussed in turn.

**Bright Line Rule.** The Louisiana Supreme Court in *Anderson* made a legitimate point in noting that the bright line nature of the age-of-onset requirement helps in making the class of persons exempt from the death penalty less “diffuse and difficult to define.”<sup>361</sup> This would seem to qualify as a “legitimate governmental interest.” But a bright line definition must nonetheless have at least a rational relationship (or, in the case of intermediate or strict scrutiny, be “substantially related” or “narrowly tailored”) to the purposes for which the class of persons is, in fact, exempt. Limiting the class to those who manifest symptoms before the age of 1, or before 60, or to those whose surnames begin with the letters A through M, would all serve just as well as a bright line. But, they would be of no help at all in determining whose mental deficits sufficiently interfered with retribution, deterrence, and prospects for a fair trial to make imposition of the death penalty cruel and unusual.<sup>362</sup> In order to evaluate the extent of a rational relationship of a criterion in the MR definition, one must examine the criterion’s help, if any, in identifying such interference.

In *Atkins*, the Supreme Court made clear precisely what characteristics of the mentally retarded created the constitutional problem. As already noted,<sup>363</sup> the Court listed their lessened

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<sup>355</sup> See AAIDD, INTELLECTUAL DISABILITY, *supra* note 22, at 27-28 (infection, traumatic brain injury); DSM-IV-TR, *supra* note 50, at 70 (autism), 164 (traumatic brain injury), 135 (dementia); Brief of *Amici Curiae* AAMR et al., *State v. Arellano*, No. CV-05-0397-SA (Sup. Ct. Ariz. Feb. 27, 2006), at 17 n.8 (dementia and TBI).

<sup>356</sup> AAIDD, INTELLECTUAL DISABILITY, *supra* note 22, at 59; DSM-IV-TR, *supra* note 50, at 45.

<sup>357</sup> *Heller v. Doe*, 509 U.S. 312, 321-22 (1993) (explaining that the age-of-onset requirement is helpful to distinguish between MR and mental illness and reduces the “risk of error”); *State v. Anderson*, 996 So.2d 973, 988-89 (La. 2008) (reasoning that the adult onset population with MR deficits are “far more diffuse and much harder to define”).

<sup>358</sup> *Id.* at 321 (upholding statute’s distinction between MR and mentally ill based in part on state’s assertion that MR is easier to diagnose than mental illness); *State v. Anderson*, 996 So.2d 973, 987-88 (La. 2008) (reasoning that the adult onset population with MR deficits are “far more diffuse and much harder to define”). *But see* DSM-IV-TR, *supra* note 50, at 39 (The age-of-onset provision “is for convenience only and is not meant to suggest there is any clear distinction between ‘childhood’ and ‘adult’ disorders.”).

<sup>359</sup> *Heller*, 509 U.S. at 323 (“Mental retardation is a permanent, relatively static condition. . . . This is not so with the mentally ill.”); *Ellis*, *supra* note 30, at 423 (“Mental retardation, by contrast (with mental illness), involves a mental impairment that is permanent.”).

<sup>360</sup> *State v. Anderson*, 996 So.2d 973, 991 (La. 2008) (rejecting *Atkins* claim in part because of defendant’s suspected malingering); *Larimer*, *supra* note 24, at 943-44.

<sup>361</sup> *Anderson*, 996 So.2d at 987-88.

<sup>362</sup> See *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982) (explaining that the State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational).

<sup>363</sup> See *supra* Section II.

ability to (i) understand and process information; (ii) communicate; (iii) learn from experience; (iv) reason logically; (v) control impulses; and (vi) understand the reactions of others.<sup>364</sup> These undermined the deterrence and retribution justifications for the death penalty.<sup>365</sup> Additionally, the Court identified specific risks of an unfair trial which are inevitably greater with mentally retarded defendants. Specifically, the Court noted that persons with MR are (a) more likely to give false confessions, (b) less capable of assisting their counsel, (c) more likely to be poor witnesses, (d) more likely to have a demeanor giving a false impression of a lack of remorse, (e) less capable of presenting persuasive mitigation at sentencing, and (f) more likely, by their very status as MR, to cause the sentencing jury to find the aggravating factor of “future dangerousness.”<sup>366</sup>

If a defendant exhibits the mental and behavioral deficits identified by the Court in items (i) through (vi) above, they are just as inappropriate as candidates for the death penalty, regardless of whether the symptoms manifested before age 18. A defendant with such adult-onset deficits is no closer to the “average murderer” in culpability, and no more worthy of execution under a “just deserts” theory. He is no more likely to be deterred. Similarly, regardless of whether symptoms presented during childhood or adulthood, defendants with the procedural disadvantages identified by the Court in items (a) through (f) above are just as much at risk for erroneous convictions and sentences. They are also just as prone to false confessions, damaging trial testimony and demeanor, and being tagged unfairly with the “future dangerousness” label. They are no better at assisting their counsel or making a persuasive mitigation case.

Thus, the “age of onset” criterion may indeed provide a bright line demarcation to assist in deciding between those who are and are not mentally retarded. But it has no relevance to the underlying reasons why the Court found execution of the mentally retarded impermissible.

If the above is true, then the bright line nature of the onset requirement would fail even the lenient rational basis test. Even if a court determined that there was some slight relevance between the onset requirement and the above listed criteria, it would likely still fail the test.

**Ease of Diagnosis.** Related to the “bright line definition” justification is one grounded in relative ease of diagnosis. In *Heller v. Doe*, the United States Supreme Court acknowledged that mental retardation is easier to diagnose than mental illness.<sup>367</sup> Although the Court mentioned these concerns to justify treating the mentally ill differently from the mentally retarded, a state might assert them as justification for the onset requirement. Theoretically, mental retardation stemming back through childhood might be easier to diagnose.

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<sup>364</sup> *Atkins*, 536 U.S. at 318.

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at 320-21.

<sup>367</sup> *Heller v. Doe*, 509 U.S. 312, 328 (1993); *id.* at 337 (Souter, J., dissenting) (“Obviously there are differences between mental retardation and mental illness. They are distinct conditions, they have different manifestations, they require different forms of care or treatment, and the course of each differs. It is without a doubt permissible for the State to treat those who are mentally retarded differently in some respects from those who are mentally ill.”). See also *Addington v. Texas*, 441 U.S. 418, 430 (1979) (explaining that it is “very difficult for the expert physician to offer definite conclusions about (mental illness in) any particular patient.”); DSM-IV-TR, *supra* note 50, at 39 (classifying some mental problems as developmental disorders “is for convenience only and is not meant to suggest there is any clear distinction between ‘childhood’ and ‘adult’ disorders.”).

But the “ease of diagnosis” rationale only applies where there are, in fact, records establishing onset before age 18. Where there are no such records, diagnosing MR based on the traditional three-prong definition is no easier than diagnosing adult-onset impairment otherwise identical to MR. And, in so many cases, like Van Tran’s, such evidence is lacking, giving the lie to the claim that diagnosis is easier with the onset requirement. Indeed, in many cases, like Van Tran’s, the onset requirement may be the most difficult to determine.<sup>368</sup> Thus, eliminating it, and relying strictly on IQ tests and tests for adaptive deficits, might very well make diagnosis easier.

If that is true—if the onset requirement actually complicates the essential diagnosis—then it can hardly be said to meet even the rational basis test, let alone intermediate or strict scrutiny. Again, though, a court might find it sufficient under the most lenient of the tests, but insufficient under heightened review.

**Permanency of the Impairment.** Some courts/commentators distinguishing mental illness from mental retardation note that the latter is essentially unchanging while the former is not.<sup>369</sup> A person who is mentally retarded may make slight improvements in intellectual and adaptive function over a lifetime, but will always be mentally retarded. In contrast, there are many types of mental illnesses which can be cured or chronically treated, or which resolve on their own.<sup>370</sup>

For example, a California appeals court distinguished mental illness and mental retardation in this manner in *People v. Middleton*.<sup>371</sup> The court stated that mental retardation that manifested in youth was unchanging, whereas other mental illnesses were brought about by some triggering event and could be remedied or corrected over time.<sup>372</sup>

One could make the same argument about the onset requirement. If a triggering event, like a traumatic brain injury, brought on MR, there is a greater chance that the impairment could be reversed or substantially ameliorated.<sup>373</sup>

However, the ability to remedy or correct the condition over time also seems somewhat dubious as a justification. For mental retardation, the course of the condition can be influenced to some extent by educational opportunities and environmental stimulation.<sup>374</sup> Individuals with mild MR early in life may, through appropriate training and opportunities, develop good adaptive skills and no longer have the level of impairment required for a diagnosis of mental retardation.<sup>375</sup> Similarly, individuals suffering from severe head trauma may have their physical

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<sup>368</sup> See USER’S GUIDE, *supra* note 59, at 18 (explaining the many reasons why it may be difficult to diagnose mental retardation during the developmental period).

<sup>369</sup> *Heller*, 509 U.S. at 323 (“Mental retardation is a permanent, relatively static condition. . . . This is not so with the mentally ill.”); Ellis, *supra* note 30, at 423 (“Mental retardation, by contrast (to mental illness), involves a mental impairment that is permanent.”).

<sup>370</sup> Deborah Zuckerman et. al., *Treatment, ADA & PEOPLE WITH MENTAL ILLNESS: A RESOURCE MANUAL FOR EMPLOYERS* 11 (1994).

<sup>371</sup> 2009 WL 1816905, at \*6 (Cal. Ct. App. June 25, 2009).

<sup>372</sup> *Id.*

<sup>373</sup> H. Gerry Taylor et. al., A Prospective Study of Short- and Long-Term Outcomes after Traumatic Brain Injury in Children: Behavior and Achievement, 16 *Neuropsychology* 15 (2002) (explaining that long-term rehabilitation from traumatic brain injury is often influenced by family environment).

<sup>374</sup> DSM-IV-TR, *supra* note 50, at 47.

<sup>375</sup> *Id.*

conditions stabilized through rehabilitation. However, many suffer from permanent changes in emotional control leading to increased anger, depression, anxiety, frustration, stress, denial, self-centeredness, irritability, and mood swings.<sup>376</sup> So, as a factual, medical matter, young-onset MR and adult-onset MR may not differ as to relative permanence as much as one might think.

More fundamentally, the relative permanence of the condition matters only as to treatment. It makes no difference regarding the reduced culpability and increased risk of unfair trial. For the former, the relevant time is the time of the offense; for the latter, it is the time of arrest and prosecution. The relative permanence of the condition is relevant only over the long-term, and is, thus, irrelevant to the reasons undergirding the *Atkins* holding. If a person has an IQ below 70 and significant deficits in two or more identified adaptive function areas at the time he commits an offense, the rationale of *Atkins* applies, regardless of whether the symptoms resolve 10 years later.

Again, this justification arguably fails even rational basis. If it passes rational basis, there is still a strong argument that it would fail a more searching inquiry such as intermediate or strict scrutiny.

**Malingering.** One of the most commonly stressed justifications for age-of-onset provisions is to prevent malingering.<sup>377</sup> The fear is defendants will be able to more easily feign the symptoms of mental deficiency without such a provision.

Indeed, the governmental interest relied upon by the *Anderson* Court—essentially, providing a convenient bright line in the definition because of the diffuse, harder-to-define nature of the population of non-MR who nonetheless exhibit identical mental deficits—seems related to the “malingering” concern. The argument is that requiring that the symptoms manifest in childhood serves as a guard against an otherwise mentally healthy defendant faking mental retardation after getting caught.

This seems to be the most powerful argument for retaining the onset requirement. Guarding against malingering is certainly a legitimate governmental interest. Moreover, it seems likely that a court may accept it as a “compelling” or “substantial” government interest. But as explained below, even this malingering concern arguably fails to justify the onset requirement under Equal Protection. It is doubtful that it is “narrowly tailored” or “substantially related” to the malingering concern, and far from clear that it is even rationally related.

In the Equal Protection context, courts often evaluate narrow tailoring by examining the extent to which a classification criterion tends to be overinclusive or underinclusive.<sup>378</sup> While the presence of underinclusivity or overinclusivity is not by itself fatal under rational basis, a pattern of such gaps can cumulate to a fatal disconnect between means and ends. As a proxy for

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<sup>376</sup> Stacey A. Tovino & William J. Winslade, *A Primer on the Law and Ethics of Treatment, Research, and Public Policy in the Context of Severe Traumatic Brain Injury*, 14 ANNALS HEALTH L. 1, 15-16 (2005).

<sup>377</sup> See Larimer, *supra* note 24, at 943-44 (citing *Commonwealth v. Vandiver*, 962 A.2d 1170, 1187-88 (Pa. 2009) (explaining that “the issue of malingering is also of concern” when discussing the rationales for an age-of-onset provision)).

<sup>378</sup> See *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 804 (2002) (stating that to survive strict scrutiny, a statute must be narrowly tailored to meet the government’s interest and if a less intrusive alternative exists, legislature must use it).

legitimate, non-malingering MR cases, the age-of-onset requirement seems both over-inclusive and under-inclusive, so much so that it might even fail under rational basis.

First, the malingering concern clearly does not apply to those cases where trauma, disease, or adult dementia are indisputably the cause of the cognitive and adaptive impairments. In those cases at least, there is no malingering issue, and the onset requirement is overinclusive.

Similarly, as a matter of basic logic, the relevant date for malingering purposes is the date of the offense, not the defendant's 18th birthday.<sup>379</sup> So, the malingering rationale clearly does not work for all those cases where onset is established after the defendant's 18th birthday, but before the date of the offense. If a wily young defendant commits murder at 16 and purposely fails IQ and adaptive functioning tests while in juvenile detention over the next 6 months, he may be able to satisfy the MR test. If an honest adult defendant has an intellectually normal childhood, then head trauma at age 19 causing demonstrated and incontrovertible low IQ scores and adaptive function deficits every year from age 19 through 25, and then kills someone at 26, he is categorically barred from satisfying that third prong. This result obtains despite the fact that the first defendant may be obviously malingering, while the second is clearly not. The onset criterion is under-inclusive as to the first defendant and over-inclusive as to the second. Moreover, it is difficult to see all this as anything other than arbitrary.

The malingering rationale makes even less sense in a case such as Van Tran's, where competent evidence exists indicating pre-18 onset. Where a defendant can present valid achievement test results taken at age 17, and testimony from relatives and friends that the defendant suffered from a high fever as an infant, could not speak until age 6, etc., it seems far more plausible that post-trial, below-70 IQ scores are evidence of consistent lifelong impairment, as opposed to recent fabrication. As noted earlier, therefore, where the first two prongs of the MR test are met, and there is no valid evidence of malingering, it should be presumed that there was pre-18 onset.<sup>380</sup>

In light of this, a defendant might be able to make a plausible "as applied" challenge to the onset requirement, showing how unrelated to furthering the malingering concern the requirement is under the circumstances of that particular case--e.g., where there is specific affirmative evidence of childhood impairment and no specific affirmative evidence of malingering. For that matter, such an "as applied theory" may be even more worth considering in other situations, such as particular cases where there is no dispute that onset occurred post-18 but prior to the offense itself.

Although there are inconsistencies in applying the malingering rationale, it is nonetheless possible that a court would consider it sufficiently related to the onset requirement as to pass the very deferential review of "rational relationship" contemplated by the rational basis test.<sup>381</sup> However, when analyzed under heightened scrutiny, the justification is much more likely to be found lacking. It is overinclusive and underinclusive in several distinct ways.

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<sup>379</sup> See ABA Report, *supra* note 73, at 668; Ellis, *supra* note 31, at 13.

<sup>380</sup> See Bonnie *supra* note 30, at 855.

<sup>381</sup> See *Heller v. Doe*, 509 U.S. 312, 321(1993) ([C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends.)



Nor does the malingering concern hold much sway among the professional community.<sup>382</sup> First, the consistent opinion of mental retardation experts is that MR patients tend to go out of their way to hide their condition.<sup>383</sup> If anything, the risk is of false negatives, not false positives. Second, experts uniformly state that testing and examination designed to root out malingering can lead to an effective screen.<sup>384</sup> Those screening techniques would likely expose anyone attempting to perpetrate a fraud on the court. Indeed, without any substantial proof that malingering represents a significant threat to justice, it is not even clear that proof of “age-of-onset” requirements serve a “compelling” government interest.

## V. Conclusion

*Atkins v. Virginia* was a significant step forward toward enlightened application of the death penalty, and enlightened treatment of the mentally retarded. Because the stakes are so high, and the affected class so vulnerable and incapable of protecting itself, it is especially important for courts applying *Atkins* to do so properly.

Sadly, many courts have used unrealistic and overly strict proof standards in evaluating a defendant’s *Atkins* claim, particularly with respect to the onset prong of the MR definition. Some of this may be due to underlying skepticism on the part of courts to giving a “free pass” to defendants convicted of a capital murder and sentenced to death. At any rate, courts should not require pre-18 IQ test scores, as long as other competent evidence of intellectual deficits exist. Because childhood onset of MR is the norm, and childhood-era IQ and adaptive skills testing the exception, competent expert testimony of mental retardation should shift the burden to the prosecution to disprove childhood onset. Courts should also find the “adaptive skills” prong of the MR definition met based on competent evidence of deficits in two or more adaptive skill categories, *regardless* of what evidence there may be of competence in other adaptive skill categories. Finally, they should not give weight to evidence that defendant cooperated with others in the underlying crime, or find a “dual diagnosis” of MR present with other mental disabilities fatal to an *Atkins* claim.

But the problem is more fundamental, rooted in the unfortunate, thoughtless adoption of the onset prong itself by the Court in *Atkins* and by the various death penalty states. While it may seem like a convenient way to provide a clear, objective criterion, the prong is irrelevant to any legitimate penological concern regarding the appropriateness of a death sentence, or to any procedural concern regarding the fairness of the investigation, trial, and sentence of mentally retarded persons for capital murder. It is particularly frustrating that a requirement with such dire and unfortunate consequences should have come about in such an accidental manner, with

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<sup>382</sup> See Ellis, *supra* note 31, at 13-14 (“[M]alingering has not proven to be a practical problem in the assessment of individuals who may have mental retardation”).

<sup>383</sup> AAIDD, INTELLECTUAL DISABILITY, *supra* note 22, at 153; AAMD, *supra* note 63, at 16; R. Stephens, *Criminal Justice in America: An Overview*, in THE RETARDED OFFENDER 7, 18 (M. Santamour & P. Watson eds. 1982); State v. White, 885 N.E.2d 905, 913 (Ohio 2008) (explaining that standard manual on testing for MR warned against overreliance on subject as informant for ‘adaptive behavior’ analysis because subjects tended to *overestimate* their abilities).

<sup>384</sup> See Richard Rogers & James L. Cavanaugh, Jr., “Nothing But the Truth” . . . *A Reexamination of Malingering*, 11 J. PSYCHIATRY & L. 443, 450-51 (1983). See also Steven I. Friedland, *Law, Science and Malingering*, 30 ARIZ. ST. L.J. 337, 366 (1998) (“[M]any psychologists and scientists swear by at least some of the methods described above (to detect malingering”).

States adopting it without careful consideration simply because it could be found in standard medical definitions and/or some *dicta* in the *Atkins* text.

The onset requirement is not only bad criminal law policy, it is likely unconstitutional in at least two ways. It warps the proper application of the Eighth Amendment theory underlying *Atkins*. It also creates a classification between the “officially” and “unofficially” mentally retarded, persons who are identical in every cognitive and adaptive way relevant to the death penalty, but who differ only as to the irrelevant criterion of their chronological age at the time of manifestation of their condition. Because this classification burdens the fundamental right to life, there are sound arguments for subjecting it to heightened scrutiny under the Equal Protection Clause. It would very likely not survive such heightened scrutiny. Even under ordinary rational basis scrutiny, the rationales for the onset requirement are constitutionally dubious.

It is a truism that societies are judged by how we treat the most vulnerable among us. The mentally retarded are the most vulnerable of the vulnerable. Having the power of the State to kill such persons depend on something as arbitrary as the ability to prove childhood onset seems inconsistent with any enlightened, rational system of justice.