

# NOTES

## Substantial Guidance Without Substantive Guides: Resolving the Requirements of *Moore v. Texas* and *Hall v. Florida*

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## INTRODUCTION

Exempting certain classes of people from the possibility of the death penalty is hardly new; Blackstone noted the common law prohibition on executing the insane, stating that “*furiosus furore solum punitur*”—madness is its own punishment.<sup>1</sup> Even then, however, “the reasons for the rule [were] less sure and less uniform than the rule itself.”<sup>2</sup> In the United States, Eighth Amendment jurisprudence does little to clarify the reasons behind a particular death penalty exemption because it relies, in part, on the practice of the states to decide what is outside the bounds of acceptable punishment.<sup>3</sup> Because exemptions are thus dependent on state actions, the reasoning behind any particular death penalty exemption is a step removed from the states’ underlying reasons for their own practices. These states’ conclusions, analyzed by the Court independently from their underlying reasons, then become the “objective indicia” the Court uses to determine whether a punishment is valid under the Eighth Amendment. Ironically, these conclusions are considered “the clearest and most reliable objective evidence of contemporary values,” even when the reasons behind the legislatures’ votes are not considered.<sup>4</sup>

Yet even when all factors point toward granting an exemption, clarity on the scope of the exemption does not necessarily follow. When the Court in *Atkins v. Virginia* exempted defendants with intellectual disabilities (formerly “mental retardation”) from execution, it left to the states the decision of how to define intellectual disability.<sup>5</sup> The Court did, however, leave the states with some guidance, noting that the statutory definitions of mental retardation in states that had already implemented an exemption for intellectual disability “generally conform[ed] to the clinical definitions” of the American Psychological Association (“APA”) and the American Association on Intellectual and Developmental Disabilities (“AAIDD”).<sup>6</sup> Those definitions specify that a defendant must have (a) intellectual deficits and (b) adaptive deficits that (c) manifested during the developmental period (i.e., before age eighteen).<sup>7</sup>

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1. 4 WILLIAM BLACKSTONE, COMMENTARIES \*24–25, \*395; see *Ford v. Wainwright*, 477 U.S. 399, 407–08 (1986) (applying the same philosophy in the United States).

2. *Ford*, 477 U.S. at 407.

3. See *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

4. *Id.* at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

5. *Id.* at 317.

6. *Id.* at 308 n.3, 317 & n.22.

7. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33, 37–38 (5th ed. 2013) [hereinafter DSM-5]; see AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND

Leaving the definition of intellectual disability to the states created two potential problems. First, some states required defendants to prove more than just the clinical definitions to make an *Atkins* case. Texas, for example, found the adaptive prong “exceedingly subjective” and supplemented it with seven additional factors not used in APA or AAIDD diagnostic criteria.<sup>8</sup> Separately, a group of at least three<sup>9</sup> other states imposed a strict IQ cutoff score of seventy, even though clinical definitions interpret IQ for intellectual disability as a range that can extend to seventy-five.<sup>10</sup>

Second, the clinical definitions are underinclusive because they are designed to aid clinicians in diagnosing intellectual disability, not to separate defendants into those who do or do not deserve the death penalty.<sup>11</sup> This highlights the poor fit between clinical definitions designed by and for medical practitioners and the penological aims of the death penalty. Even the act of questioning which defendants are categorically undeserving of the death penalty reveals a further oddity

STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed., text rev. 2000) [hereinafter DSM-IV-TR] (age-of-onset set at age eighteen). Because *Atkins* was decided while the DSM-IV-TR’s age-eighteen requirement was current, the states use age eighteen as the cutoff. See *Atkins*, 536 U.S. at 308 n.3 (describing definitions of two professional organizations, both of which include the age-of-onset at eighteen years).

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

9. The lack of uniformity even applies when determining which states had a cutoff. While Florida, Kentucky, and Virginia had the cutoff legislatively, Alabama had one by judicial decision, making its relevance to objective indicia murky. See *Hall v. Florida*, 134 S. Ct. 1986, 1996 (2014). Five other states had statutes allowing for such a cutoff, but had either conflicting statutes or no case law on whether to apply the standard error of measurement of the IQ test. *Id.*

10. *Id.* at 1995–96.

11. See DSM-5, *supra* note 7, at 25:

When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. . . . It is precisely because impairments, abilities, and disabilities vary widely within each diagnostic category that assignment of a particular diagnosis does not imply a specific level of impairment or disability.

The American Bar Association, American Psychiatric Association, and the APA, in a joint resolution, specifically condemned the practice of requiring defendants to show impairment before age eighteen, as per the age-of-onset prong, to be excluded from the death penalty. AM. BAR ASS’N, RECOMMENDATION 122A: MENTAL ILLNESS RESOLUTION (2006), [http://www.americanbar.org/groups/committees/death\\_penalty\\_representation/resources/dp-policy/mental-illness-2006.html](http://www.americanbar.org/groups/committees/death_penalty_representation/resources/dp-policy/mental-illness-2006.html) [https://perma.cc/KH3C-BPE9] [hereinafter RECOMMENDATION 122A]; AM. BAR ASS’N, REPORT ON RECOMMENDATION 122A: MENTAL ILLNESS RESOLUTION (2006), [http://www.americanbar.org/content/dam/aba/uncategorized/Death\\_Penalty\\_Representation/2006\\_am\\_122a.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/2006_am_122a.authcheckdam.pdf) [https://perma.cc/7ZJN-VYWP] [hereinafter REPORT ON RECOMMENDATION 122A]; AM. PSYCHOL. ASS’N, REPORT OF THE TASK FORCE ON MENTAL DISABILITY AND THE DEATH PENALTY 1 (2006), <http://www.apa.org/pubs/info/reports/mental-disability-and-death-penalty.pdf> [https://perma.cc/3B87-MPZ9] (APA version).

of Eighth Amendment jurisprudence: the objective indicia prong merely indicates how many states agree with a particular exemption. As such, any search for reasoning behind what classes of defendants are or are not culpable enough for the death penalty will ultimately find itself with a bare legislative pronouncement of that culpability. Thus, a deeper, culpability-based rationale is difficult to find either in clinical definitions or in legislative pronouncements.

This problem can be more clearly understood by comparing defendants who fall within clinical definitions to those who fall just outside of them. One example is the defendant who can show deficits in the intellectual and adaptive prongs, but cannot satisfy the age-of-onset prong—either because the condition manifested after age eighteen or because sufficient evidence does not exist.<sup>12</sup> Defendants in this situation are not treated as intellectually disabled for the purpose of the *Atkins* exception, even though they are no more culpable than those defendants with the condition. Clinical definitions might therefore be underinclusive.

In 2014, the Supreme Court addressed the first problem of states imposing additional requirements, while aggravating the second problem of the fit between clinical definitions and penological purposes. In *Hall v. Florida*, the Court rejected Florida's strict IQ cutoff because it strayed too far from clinical definitions that required incorporating the standard error of measurement ("SEM") into IQ tests.<sup>13</sup> The *Hall* Court noted that clinical definitions were a "fundamental premise" of *Atkins* and that *Atkins* provides "substantial guidance on the definition of intellectual disability."<sup>14</sup> And while the Court admitted that *Atkins* "did not provide definitive procedural or substantive guides for determining" the proper definitions, it held that "*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection."<sup>15</sup>

The pileup of *Hall*'s seemingly contradictory statements causes confusion about how closely states must adhere to clinical definitions.

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12. Steven J. Mulroy, *Execution by Accident: Evidentiary and Constitutional Problems with the "Childhood Onset" Requirement in Atkins Claims*, 37 VT. L. REV. 591, 645 (2013).

13. 134 S. Ct. at 2001.

14. *Id.* at 1999 ("[C]linical definitions . . . were a fundamental premise of *Atkins*."); *id.* ("This Court thus reads *Atkins* to provide substantial guidance on the definition of intellectual disability.")

15. *Id.* at 1998 ("It is true that *Atkins* 'did not provide definitive procedural or substantive guides for determining when a person who claims [intellectual disability]' falls within the protection of the Eighth Amendment." (quoting *Bobby v. Bies*, 556 U.S. 825, 831 (2009))); *id.* ("[T]he States play a critical role in . . . contribut[ing] to an understanding of how intellectual disability should be measured and assessed. But *Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection.")

Although *Atkins* appeared to leave the question of definitions to the states, *Hall* was clear that this discretion was not “unfettered”—yet it did nothing to define the bounds of those fetters. Worse still, *Hall* complicated the underinclusiveness problem by appearing to require stronger adherence to the very clinical definitions that exclude similarly situated defendants.

The Court did no better in explaining *Atkins*’s requirement to the states, or in addressing the underinclusiveness problem, in its next case on the subject. In *Moore v. Texas*, the Court invalidated additional adaptive prong requirements and other practices used by Texas that contradicted “medical standards.”<sup>16</sup> The Court held that Texas’s practices were unconstitutional because they created an “unacceptable risk” of execution of defendants covered by *Atkins*.<sup>17</sup> Like earlier cases, *Moore* again claimed that states retain some ability to craft definitions of intellectual disability, writing that “‘the views of medical experts’ do not ‘dictate’ a court’s intellectual-disability determination.”<sup>18</sup> And yet the Court did little to help the underinclusiveness problem when it held that the Texas practices at issue were invalid precisely because they “disregard[ed] current medical standards”<sup>19</sup> and “diminish[ed] the force of the medical community’s consensus.”<sup>20</sup>

As the dissent noted, *Moore*’s prohibition on “disregard[ing]” clinical practice did nothing to clarify how closely states must follow medical practice in establishing definitions of intellectual disability.<sup>21</sup> However, *Moore* did provide insight into both its own commands to the states, and those commands in *Hall*, when it relied so heavily on the “unacceptable risk that persons with intellectual disability will be executed.”<sup>22</sup> Relying on neither the “objective indicia” of the states nor on the Court’s own “independent judgment” of penological purposes, *Moore* elevated “unacceptable risk” to a core Eighth Amendment principle that could supply an independent reason for striking a state’s practice as unconstitutional.<sup>23</sup>

A focus on “unacceptable risk” also has implications for resolving problems of underinclusiveness. The root of the underinclusiveness problem is the objective part of Eighth Amendment analysis. If “evolving standards of decency,” as measured by the states’ laws and

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16. *Moore v. Texas*, No. 15-797, 2017 WL 1136278, at \*4, \*8 (U.S. Mar. 28, 2017).

17. *Id.* at \*9, \*12.

18. *Id.* at \*9 (quoting *Hall*, 134 S. Ct. at 2000).

19. *Id.*

20. *Id.* at \*4.

21. *See id.* at \*22 (Roberts, C.J., dissenting) (expressing confusion).

22. *See id.* at \*4 (quoting *Hall*, 134 S. Ct. at 1990).

23. *See infra* Part II.C.2 (describing *Moore*’s view of risk).

actions, do not grant a death penalty exemption, then no Eighth Amendment challenge is possible: the states have spoken. However, taking this too literally conflicts with one premise of *Atkins*: states must be free (within some boundaries) to choose their own definitions.<sup>24</sup> If states must define intellectual disability the way the majority of other states do, then this is no choice at all—a proposition that *Hall* and *Moore* both reject.<sup>25</sup> Determining the requirements of *Hall* and *Moore* in a way that resolves this problem, then, should not look directly to the Eighth Amendment; rather, the best way to determine the extent to which the Court requires clinical definitions is to interpret its cases through the lens of the Equal Protection Clause.<sup>26</sup>

Such an interpretation would look toward whether the defendant in question is sufficiently similar to one who qualifies for an exemption under clinical definitions. As such, objective indicia from the states would have no bearing on the question; the counting of legislative pronouncements only shows *who* is exempted, not *why*, and therefore cannot supply the reasoning behind an exception. It is this reasoning, which is absent when considering objective indicia, that must provide the criteria for what constitutes a similarly situated defendant. As such, the Court's independent judgment in *Hall* and its characterization of risk in *Moore* should be examined instead. After all, an equal protection challenge would not depend on the number of states that treat similar defendants differently—this would be the precise practice being challenged. Instead, determining which defendants are so similar as to require the same treatment should focus on the Court's independent judgment on culpability and the risk that similarly situated defendants would face execution.

This Note will proceed in three parts. Part I discusses how *Atkins* left definitions of intellectual disability to the states and the

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24. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (leaving to the states the task of defining intellectual disability).

25. *Moore*, 2017 WL 1136278, at \*9 (reading *Hall* to mean “that being informed by the medical community does not demand adherence to everything stated in the latest medical guide”); *Hall*, 134 S. Ct. at 1998 (“[T]he States play a critical role in advancing protections and providing the Court with information that contributes to an understanding of how intellectual disability should be measured and assessed.”).

26. For equal protection challenges to death penalty exemptions, see Nita A. Farahany, *Cruel and Unequal Punishments*, 86 WASH. U. L. REV. 859 (2009) (challenging lack of protection for defendants with serious mental illness under strict scrutiny for fundamental rights); Mulroy, *supra* note 12 (challenging age-of-onset prong); Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293 (2003) (challenging lack of protection for defendants with serious mental illness under heightened scrutiny).

resultant equal protection problems that arose when states chose underinclusive definitions.

Part II then describes *Hall* and *Moore*'s statements about how closely states must adhere to those clinical definitions. Far from clarifying the extent to which clinical definitions are controlling, *Hall* and *Moore* have given only a vague solution to the problem of additional requirements while exacerbating the underinclusiveness of clinical definitions of intellectual disability.

In Part III, this Note proposes a solution by which *Hall* and *Moore* require clinical definitions as a floor of protection for additional requirements while being interpreted through the lens of the Equal Protection Clause for underinclusiveness. Because equal protection has no objective indicia requirement, it is a better framework for solving the underinclusiveness problem. That framework can take advantage of the Eighth Amendment's independent judgment jurisprudence and *Moore*'s increased focus on risk to provide a mechanism to determine which persons are similarly situated and therefore warrant equal treatment.

## I. THE PROBLEM WITH *ATKINS*

In *Atkins v. Virginia*, the Supreme Court overruled its decision in *Penry v. Lynaugh*,<sup>27</sup> handed down just thirteen years earlier, to hold that the Eighth Amendment prohibits the execution of defendants with intellectual disabilities.<sup>28</sup> As with other death penalty exemption cases, the *Atkins* Court determined that the "evolving standards of decency" had shifted such that the execution of defendants with intellectual disabilities constituted cruel and unusual punishment.<sup>29</sup>

This Part will first detail the basics of the Court's Eighth Amendment jurisprudence, looking at the consistency of its reasoning in finding or rejecting death penalty exemptions. It will then examine how *Atkins* differs from previous cases in granting states the power to define the class of defendants constitutionally protected from the death penalty by the Eighth Amendment. It will conclude by explaining how the definitions chosen by the states are underinclusive, excluding from *Atkins*'s exception select defendants deserving of its protections.

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27. 492 U.S. 302 (1989).

28. The Court, beginning in 2014, began using the term "intellectual disability" over "mental retardation," following the lead of professional organizations. *Hall*, 134 S. Ct. at 1990 (citing DSM-5, *supra* note 7, at 33).

29. *Atkins*, 536 U.S. at 321.

*A. Objective Indicia and Independent Judgment*

When deciding an Eighth Amendment question, the Court first looks at “objective indicia” of the “evolving standards of decency” to determine whether a punishment constitutes cruel and unusual punishment. The Court primarily examines state legislation as the “clearest and most reliable objective evidence of contemporary values.”<sup>30</sup> That is, when a state bars a certain punishment for a certain class of defendants, the Court tallies that decision under “objective indicia” to determine what constitutes cruel and unusual punishment under the Eighth Amendment. If a sufficiently large number of states ban a certain punishment for a certain class, the Court will take that as evidence that the Eighth Amendment requires prohibition nationally.<sup>31</sup>

But the manner of actually counting states for this analysis is hotly contested, and the raw number of states barring a punishment rarely squares with how the Court counts those states for purpose of establishing the objective indicia. In fact, the Court has invalidated punishments still employed by up to thirty-seven states, far above the one-half that the Eighth Amendment would seemingly allow.<sup>32</sup> In some cases, the Court has done this by looking at actual state practices instead of legislative pronouncements.<sup>33</sup> In other cases, the Court has counted states that have abolished the death penalty entirely as speaking to specific exemptions—for example, when the Court abolished the death penalty for juveniles, it counted states that had abolished the death penalty for all defendants together with those that had abolished it only for juveniles in deciding that there was sufficient agreement to make the juvenile exemption national.<sup>34</sup> In still other cases, the Court has looked at the consistency and direction of change instead of raw numbers of states<sup>35</sup> and has also considered a particularly rapid speed of change as a factor in determining whether the objective indicia indicate a change in the evolving standards of decency.<sup>36</sup>

Dissents, however, have objected to a death penalty exemption when the punishment was employed by as few as six states—by counting “undecided” states whose positions were insufficiently

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30. *Id.* at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

31. *Id.*

32. *Graham v. Florida*, 560 U.S. 48, 62 (2010).

33. *E.g., id.*

34. *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

35. *Atkins*, 536 U.S. at 315.

36. *Miller v. Alabama*, 132 S. Ct. 2455, 2478 (2012).



certain,<sup>37</sup> not counting abolitionist states in death penalty exemptions,<sup>38</sup> looking to whether state legislatures were “discouraged” from writing new legislation by previous rulings,<sup>39</sup> finding too slow a speed of change,<sup>40</sup> and arguing that the independent judgment is dispositive irrespective of the objective indicia.<sup>41</sup> In effect, the counting of states is anything but objective—with so many methods of counting, both sides of virtually any death penalty issue can find support in the so-called objective indicia.

However, the Court does not end its Eighth Amendment analysis here. After examining objective indicia, the Court uses its own “independent judgment” to decide “whether there is reason to disagree with the judgment reached by the citizenry and its legislators.”<sup>42</sup> While the Court once looked to the degree of “moral depravity and . . . injury to the person and to the public,”<sup>43</sup> it has increasingly used its independent judgment to examine whether the punishment “measurably contributes” to the “two principal social purposes” of the death penalty: retribution and deterrence.<sup>44</sup> The Court therefore examines whether the class of defendants is culpable enough to deserve the death penalty and deterrable enough for the death penalty to be meaningful in preventing crime. The Court employed this framework when it created an exemption for defendants under age sixteen,<sup>45</sup> the intellectually disabled,<sup>46</sup> and juveniles.<sup>47</sup>

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37. Hall v. Florida, 134 S. Ct. 1986, 2004 & n.5 (2014) (Alito, J., dissenting).

38. *Id.* at 2004–05.

39. Kennedy v. Louisiana, 554 U.S. 407, 448 (2008) (Alito, J., dissenting).

40. Roper v. Simmons, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting).

41. *Id.* at 592 (O’Connor, J., dissenting); Coker v. Georgia, 433 U.S. 584, 603 n.2 (1977) (Powell, J., dissenting).

42. Atkins v. Virginia, 536 U.S. 304, 313 (2002) (quoting *Coker*, 433 U.S. at 597); see also *Roper*, 543 U.S. at 574 (holding that the Eighth Amendment requires consideration of the Court’s independent judgment, and that stopping the analysis at the objective indicia is “inconsistent with prior Eighth Amendment decisions”).

43. *Coker*, 433 U.S. at 598.

44. Enmund v. Florida, 458 U.S. 782, 798 (1982) (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)); see also Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149, 1150 (2006) (“[T]he Eighth Amendment embodies a broad delegation to the Court to exercise its own independent judgment about the moral and penological propriety of capital punishment in various circumstances.”); Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 101–02 (2010) (“[T]he Court most frequently examines the penological justifications for specific punishments in forming its independent judgment.”).

45. Thompson v. Oklahoma, 487 U.S. 815, 833–38 (1988).

46. *Atkins*, 536 U.S. at 317–21.

47. Roper v. Simmons, 543 U.S. 551, 568–74 (2005).

*B. Clinical Definitions in Atkins*

When the Court exempted the intellectually disabled from the death penalty in *Atkins*, it followed the familiar two-part framework in finding that both objective indicia and the Court's independent judgment supported the exemption. However, *Atkins* differs from other exemption cases in its definition of the class to which the prohibition applies. Some previous exemption cases defined the class using age limits,<sup>48</sup> whereas others held that commissions of particular crimes did not impart sufficient culpability to impose the death penalty.<sup>49</sup>

*Atkins*, however, barred the execution of defendants with intellectual disabilities, but left the definition of the class up to the states.<sup>50</sup> Unlike the age of the defendant or the crime charged, intellectual disability does not refer to a class with readily determinable members.<sup>51</sup> Because no obvious bright-line rule was apparent, the Court allowed the states to create their own definitions and gave tacit approval to the definitions used by states that had already exempted the intellectually disabled.<sup>52</sup>

Both the states that already exempted the intellectually disabled from the death penalty and those required to do so by *Atkins* largely adopted the clinical definitions of intellectual disability of the APA and AAIDD, both groups' definitions having been cited approvingly in *Atkins* itself.<sup>53</sup> These definitions have three prongs.

First, the intellectual prong requires a defendant to have "deficits in intellectual functions" that are "confirmed by both clinical assessment and individualized, standardized intelligence testing."<sup>54</sup> This prong is typically measured by an intelligence test that produces

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48. *Id.* at 571 (barring death penalty for juveniles); *Thompson*, 487 U.S. at 838 (barring death penalty for defendants under age sixteen).

49. *Kennedy v. Louisiana*, 554 U.S. 407, 420–21 (2008) (barring death penalty for child rape); *Enmund*, 458 U.S. at 798 (barring death penalty for accomplice without intent to kill in felony murder); *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (barring death penalty for adult rape).

50. *Atkins*, 536 U.S. at 317.

51. *Id.*:

To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. . . . Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.

52. *See id.* at 317 & n.22 ("The [states'] statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions . . ."); *see also* *Hall v. Florida*, 134 S. Ct. 1986, 1999 (2014) (noting that the Florida Supreme Court's newer reinterpretation of a Florida statute cited by *Atkins* "runs counter to the clinical definition cited throughout *Atkins*").

53. *See Atkins*, 536 U.S. at 308 n.3. *Atkins* cites the AAIDD's former name, the American Association of Mental Retardation ("AAMR"). *Id.*

54. DSM-5, *supra* note 7, at 33.

an IQ score.<sup>55</sup> An individual meets the intellectual prong by scoring “approximately two standard deviations or more below the population mean, including a margin for measurement error.”<sup>56</sup> Taking into account the SEM of a typical IQ test, this translates to a score below the range of sixty-five to seventy-five.<sup>57</sup>

Second, the adaptive prong requires a defendant to have “deficits in adaptive function that result in a failure to meet developmental and socio-cultural standards for personal independence and social responsibility.”<sup>58</sup> Adaptive deficits are grouped into three domains: conceptual, social, and practical. An impairment in any one domain is sufficient to meet the adaptive prong. Clinicians rely on “knowledgeable informants . . . [and] educational, developmental, medical, and mental health evaluations” to establish this prong.<sup>59</sup> Finally, the age-of-onset prong requires a defendant to have manifested both the intellectual and adaptive deficits “during the developmental period,” generally regarded as before age eighteen.<sup>60</sup>

In adopting these definitions, states defined the class clinically rather than legally. Unlike with legal terms of art like “premeditation,” “appreciation of wrongfulness,” or “inability to conform behavior,” states defined intellectual disability by directly importing definitions from professional organizations.<sup>61</sup> This quirk in state adherence to the requirements spelled out in *Atkins* meant that disagreements over the definition of the intellectually disabled would continue.

### C. Definitions Gone Awry

Adopting clinical definitions led to two problems. First, some states adopted additional requirements, either imposing more restrictive IQ requirements in the intellectual prong or providing interpretive guidance in the adaptive prong that went beyond what practitioners would consider. Second, the clinical definitions, developed for diagnoses, are a poor fit for determining whether a particular

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55. *Id.* at 37.

56. *Id.*

57. *Id.*

58. *Id.* at 33.

59. *Id.* at 33, 37–38; see DSM-IV-TR, *supra* note 7, at 41 (setting age-of-onset at age eighteen). Because *Atkins* was decided while the DSM-IV-TR’s age-eighteen requirement was current, the states use age eighteen as the cutoff. See *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002) (describing APA and AAMR definitions, both including age-of-onset at eighteen years). *But see* IND. CODE § 35-36-9-2 (2015) (setting Indiana’s age-of-onset at twenty-two instead of eighteen).

60. DSM-5, *supra* note 7, at 33, 37.

61. Christopher Slobogin, *Scientizing Culpability: The Implications of Hall v. Florida and the Possibility of a “Scientific Stare Decisis,”* 23 WM. & MARY BILL RTS. J. 415, 417 (2014).

defendant is culpable enough to be put to death for a crime, thus leading to underinclusive definitions of intellectual disability.

### 1. Additional Requirements

States have imposed additional requirements in two ways: quantitative and qualitative. One group of states imposed quantitative restrictions by disregarding the SEM and imposing a hard IQ cutoff at seventy, thereby ending the inquiry when a defendant tested above that number.<sup>62</sup> The APA and AAIDD both consider the SEM of IQ tests when diagnosing a patient with intellectual disability and consequently look for additional deficits in the adaptive prong when a patient presents an IQ score in the seventy to seventy-five range.<sup>63</sup> States adopting the hard IQ cutoff, however, disregard the SEM and, along with it, any need for considering the adaptive prong when the defendant cannot prove an IQ below seventy.<sup>64</sup>

Another quantitative restriction comes from how states consider the “Flynn Effect.” The Flynn Effect describes a phenomenon whereby “the administration of older psychological tests will generally result in higher test scores,” thereby causing inflated scores if a defendant is given an older test.<sup>65</sup> Although practitioners generally acknowledge the effect, its use in *Atkins* hearings is controversial; some courts find it clearly applicable if used by clinical professions, while others disregard it entirely.<sup>66</sup>

Other states have imposed qualitative restrictions on defendants asserting an *Atkins* defense. One such state, Texas, imposed various restrictions in *Ex parte Briseno* when the Texas Court of Criminal Appeals found the adaptive prong “exceedingly subjective” and too likely to result in experts of both parties providing confusingly contradictory evidence.<sup>67</sup> The *Briseno* court therefore supplemented the traditional three-prong clinical test with seven factors: (1) whether others thought the defendant was intellectually disabled, (2) whether the defendant formulated and carried through with plans, (3) whether the defendant’s conduct showed leadership, (4) whether the defendant’s

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62. See *Hall v. Florida*, 134 S. Ct. 1986, 1996 (2014) (listing states with hard cutoffs).

63. See *id.* at 1994–95 (noting views of APA and AAIDD).

64. See *id.* at 1996 (describing the effect of disregarding SEM).

65. See Nancy Haydt, *Intellectual Disability: A Digest of Complex Concepts in Atkins Proceedings*, CHAMPION, Jan./Feb. 2014, at 44, 44–45 (describing the Flynn Effect).

66. See, e.g., *Hooks v. Workman*, 689 F.3d 1138, 1170 (10th Cir. 2012) (rejecting the Flynn Effect as having no scientific consensus and not mandated by *Atkins*); *Walker v. True*, 399 F.3d 315, 322–23 (4th Cir. 2005) (remanding a case for consideration of the Flynn Effect).

67. See *Ex parte Briseno*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004) (describing the additional requirements).

conduct in response to external stimuli was rational, (5) whether the defendant could respond to questions coherently, (6) whether the defendant could hide facts and lie effectively, and (7) whether the crime required forethought or complex execution.<sup>68</sup>

Texas's additional requirements, like the hard IQ cutoff, also contradict clinical practice because they subject defendants to the death penalty who meet clinical definitions of intellectual disability. The adaptive prong is clinically met by showing adaptive deficits—not adaptive strengths.<sup>69</sup> The *Briseno* factors, however, worked to disqualify a defendant from *Atkins* when he shows particular strengths in an adaptive domain. Clinical definitions, by contrast, recognize the possibility that a patient can have certain adaptive strengths while still having an intellectual disability.<sup>70</sup> *Briseno* therefore subjected to the death penalty defendants who would have sufficient deficits to meet the clinical adaptive prong.<sup>71</sup>

## 2. The Underinclusiveness Problem

Even before *Atkins* made the intellectual disability exemption national, scholars noted that the clinical definitions excluded defendants of equal culpability.<sup>72</sup> One potential group affected by this underinclusiveness problem is defendants suffering from serious mental illness. Some scholars have advocated for applying the *Atkins* rule to this group, pointing out that factors distinguishing the two groups are often exaggerated.<sup>73</sup> For example, diagnoses of serious mental illnesses are just as objective as those of intellectual disability.<sup>74</sup>

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68. *Id.* at 8–9.

69. ROBERT L. SCHALOCK ET AL., AAIDD USER'S GUIDE WORK GROUP, USER'S GUIDE TO ACCOMPANY THE 11TH EDITION OF INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 26 (2012) (giving guidance on how to combat stereotypes of intellectual disability, such as the idea that adaptive strengths cannot also be present); *see also* DSM-5, *supra* note 7, at 33, 38.

70. DSM-5, *supra* note 7, at 33, 38.

71. Stephen Greenspan, *The Briseño Factors*, in THE DEATH PENALTY AND INTELLECTUAL DISABILITY 219, 219 (Edward A. Polloway ed., 2015).

72. Christopher Slobogin, *Mental Illness and the Death Penalty*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 667, 667–69 (2000).

73. *See* Farahany, *supra* note 26, at 886 (“A number of medical conditions give rise to the same cognitive, behavioral, and adaptive limitations the Court highlighted in *Atkins*.”); Slobogin, *supra* note 26, at 308–09 (identifying reasons for equating intellectual disability and mental illness).

74. *See* *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002) (citing DSM-IV-TR, *supra* note 7, at 41) (defining intellectual disability); DSM-IV-TR, *supra* note 7, at 285; Slobogin, *supra* note 26, at 308 & n.106. Even in *Atkins*, the prosecution's expert testified that Atkins had “average intelligence, at least,” while the defendant's expert diagnosed Atkins with an intellectual

The “adaptive functioning” component of intellectual disability involves ambiguity in the same way that “delusions” and “hallucinations” could in diagnosing serious mental illnesses.<sup>75</sup> Malingering, or “faking” a condition, is not an especially serious concern—employing clinical tests for malingering would be preferable to excluding the entire group from consideration.<sup>76</sup> Contrary to such concerns raised in the *Atkins* dissent, few defendants attempt to raise *Atkins* claims even when a meritorious claim could be presented.<sup>77</sup> Accordingly, there has always been little risk of a system flooded with false *Atkins* claims. Serious mental illness may also be as permanent a condition as intellectual disability, particularly because the chronic nature of some forms of mental illness and the rarity of complete remission suggest that serious mental illnesses and intellectual disabilities can be equally permanent.<sup>78</sup>

These concerns about underinclusiveness are bolstered by statements from professional organizations suggesting that clinical definitions should not be used to assess criminal liability. The APA has specifically cautioned against the use of its diagnostic categories in the legal context.<sup>79</sup> The APA wrote that its manual, the Diagnostic and Statistical Manual of Mental Disorders (“DSM”) was designed “for clinical and research purposes” and its definitions “do[ ] not imply that [a] condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder, or mental disability.”<sup>80</sup> The DSM further cautions that there are “significant risks that diagnostic information will be misused . . . because of the imperfect fit between the questions of ultimate concern to the law and the

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disability—showing how far diagnoses can differ in intellectual disability as well. See 536 U.S. at 308–09.

75. Slobgin, *supra* note 26, at 308 & n.106 (“‘[A]daptive functioning’ is at least as amorphous a term as ‘delusion,’ ‘hallucination,’ or ‘disorganized speech.’”).

76. See Farahany, *supra* note 26, at 884 n.141 (preferring tests of malingering for serious mental illness over categorical exclusion).

77. See *Atkins*, 536 U.S. at 353–54 (Scalia, J., dissenting) (raising malingering concerns); Denis W. Keyes & David Freedman, *Retrospective Diagnosis and Malingering*, in *THE DEATH PENALTY AND INTELLECTUAL DISABILITY* 263, 269 (Edward A. Polloway ed., 2015) (“Contrary to Scalia’s prophecy of a flood of new appeals, . . . only approximately 7% of those inmates previously sentenced to death ultimately raised claims in which they alleged that they had [intellectual disability] and, consequently, were ineligible for execution.”).

78. Slobgin, *supra* note 26, at 308–09 (“As the DSM states, ‘[s]chizophrenia tends to be chronic,’ and ‘[c]omplete remission (*i.e.*, a return to full premorbid functioning) is probably not common.’” (alterations in original) (internal quotation marks omitted) (quoting DSM-IV-TR, *supra* note 7, at 282)); see also *Heller v. Doe*, 509 U.S. 312, 329 (1993) (suggesting permanence justifies different treatment).

79. See DSM-IV-TR, *supra* note 7, at xxxii–xxxiii, xxxvii (highlighting the “imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis”); Farahany, *supra* note 26, at 886.

80. DSM-IV-TR, *supra* note 7, at xxxvii.

information contained in a clinical diagnosis.”<sup>81</sup> The APA supported this reasoning when it recommended extending *Atkins* to defendants suffering from certain serious mental illnesses at the time of the offense, even if their illnesses do not fall within the diagnostic category of intellectual disability.<sup>82</sup>

Scholars have argued that this underinclusiveness means that not extending *Atkins*’s protections to defendants with serious mental illness may violate the Equal Protection Clause.<sup>83</sup> Although the Supreme Court has never considered either persons with serious mental illnesses or those with intellectual disabilities to be a “suspect class” under the Equal Protection Clause, some precedent does indicate that a higher standard of review than rational basis would apply, making it more difficult for states to justify the use of potentially underinclusive clinical definitions.<sup>84</sup>

In *City of Cleburne v. Cleburne Living Center*, the Court purported to apply rational basis review, but still found unconstitutional a city’s ban on a group home for the intellectually disabled.<sup>85</sup> The Court justified finding the ban unconstitutional even under such lax review because the city’s actions were based on “an irrational prejudice against the mentally retarded” and “mere negative attitudes, or fear, unsubstantiated by factors which are properly considered in a zoning proceeding.”<sup>86</sup> However, such “negative attitudes” have long been considered acceptable under rational basis review, and rest on similar assumptions about the intellectually disabled that justified the *Atkins* decision itself.<sup>87</sup> This could suggest that a higher level of scrutiny was actually being applied because the ban targeted the intellectually disabled.<sup>88</sup>

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81. *Id.* at xxxii–xxxiii. These points are repeated by the dissents in *Hall* and *Moore*, arguing that the clinical definitions are *overinclusive* by noting the same “imperfect fit.” *Moore v. Texas*, No. 15-797, 2017 WL 1136278, at \*22 (U.S. Mar. 28, 2017) (Roberts, C.J., dissenting); *Hall v. Florida*, 134 S. Ct. 1986, 2006–07 (2014) (Alito, J., dissenting).

82. REPORT ON RECOMMENDATION 122A, *supra* note 11, at 6–7 (noting, in a joint resolution of the American Bar Association and the APA, reduced culpability of patients with “Axis I diagnoses” such as “schizophrenia and other psychotic disorders, mania, major depressive disorder, and dissociative disorders—with schizophrenia being by far the most common disorder seen in capital defendants”); AM. PSYCHOL. ASS’N, *supra* note 11, at 3–4.

83. See Slobogin, *supra* note 26, at 298–303 (arguing that differences between defendants with intellectual disabilities and those with serious mental illnesses are too small to overcome equal protection scrutiny).

84. *Id.*

85. 473 U.S. 432, 442–50 (1985).

86. *Id.* at 448, 450.

87. Slobogin, *supra* note 26, at 300.

88. *Id.*

Other cases provide similar support for heightened scrutiny. In *Heller v. Doe*, the Court purported to apply rational basis review in a case on the differences in standard of proof for commitment of individuals with serious mental illnesses and those with intellectual disabilities.<sup>89</sup> Yet, even though the argument for a higher standard was not presented in the lower courts, the Court proceeded to give reasons for the law that would have nevertheless survived a higher standard anyway.<sup>90</sup> And in *Board of Trustees of the University of Alabama v. Garrett*, only three members of the Court unequivocally stated that rational basis was the correct standard for cases involving the intellectually disabled.<sup>91</sup>

One last case suggests that the implication of Eighth Amendment rights against freedom from cruel and unusual punishment might also serve to elevate the standard of review. In *Skinner v. Oklahoma ex rel. Williamson*, the Court suggested that the right to procreate was fundamental and on that basis applied strict scrutiny and found unconstitutional an Oklahoma law that called for the sterilization of defendants convicted of larceny, but not for those convicted of embezzlement.<sup>92</sup> The Court noted that the only difference between larceny and embezzlement in Oklahoma was “‘with reference to the time when the fraudulent intent to convert the property’ . . . arises”<sup>93</sup> and that upholding the law on “such conspicuously artificial lines” would make the Equal Protection Clause a mere “formula of empty words.”<sup>94</sup> One scholar has suggested that the Supreme Court’s line of death penalty jurisprudence post-*Gregg* declaring that “death is different,”<sup>95</sup> along with *Skinner*’s application of strict scrutiny for an apparent fundamental right, could indicate that death penalty classifications are already being analyzed under a higher level of scrutiny than rational basis.<sup>96</sup>

Nonetheless, attempts to extend *Atkins* to defendants with a serious mental illness have been unanimously rejected by state courts. Some of these courts have held that serious mental illness is not well enough defined, or has too many forms, to be comparable to intellectual

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89. 509 U.S. 312, 317–19 (1993).

90. *Id.* at 319–22; Slobogin, *supra* note 26, at 301–02 (analyzing the court’s reasoning).

91. 531 U.S. 356, 367 (2001); *id.* at 375 (Kennedy, J., concurring); Slobogin, *supra* note 26, at 302–03 (noting the differences between the majority and concurring opinions).

92. 316 U.S. 535, 536–37, 541–42 (1942).

93. *Id.* at 541–42 (quoting *Riley v. State*, 78 P.2d 712, 715 (Okla. Crim. App. 1938)).

94. *Id.* at 542.

95. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976)

96. Farahany, *supra* note 26, at 904–05.



disability.<sup>97</sup> These states generally find that, although some defendants with a serious mental illness would be “utterly unable to control their behavior” and therefore “lack the extreme culpability associated with capital punishment,” no consensus exists on how to define the class that would fit within that exemption.<sup>98</sup> Another common rationale espoused by state courts is that serious mental illness does not impact culpability as severely as intellectual disability.<sup>99</sup> Courts holding this state that defendants with a serious mental illness do not categorically possess culpability equal to or less than that of defendants with intellectual disabilities.<sup>100</sup> Finally, some courts reject the extension of *Atkins* to serious mental illness as unsupported by case law.<sup>101</sup> These states find that, without a trend among the states reflecting objective indicia of the evolving standards of decency, *Atkins* cannot cover defendants with a serious mental illness.<sup>102</sup>

A second group affected by the underinclusiveness problem is defendants who suffer deficits in both the intellectual and adaptive prongs, but whose deficits manifested after age eighteen. Because clinical definitions require the onset of symptoms to occur before that age, this requirement leads to the exclusion of defendants with identical deficits at the time of the offense based solely on when in their lives those deficits began.

Several medical conditions can cause deficits that meet the first two *Atkins* prongs by affecting “cognition, communication, mental

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97. See *People v. Boyce*, 330 P.3d 812, 852–53 (Cal. 2014) (refusing, in a unanimous decision, to extend *Atkins* because of the supposed incoherence associated with mental illness); *Lawrence v. State*, 969 So.2d 294, 300 n.9 (Fla. 2007) (per curiam) (rejecting summarily an extension of *Atkins*); *State v. Anderson*, 996 So.2d 973, 987–88 (La. 2008) (claiming that the group of people with serious mental illness “is far more diffuse and much harder to define” than the class of people who are intellectually disabled); *State v. Hancock*, 840 N.E.2d 1032, 1059–60 (Ohio 2006) (declining to extend *Atkins* based on the many different forms of mental illness).

98. *Boyce*, 330 P.3d at 852 (quoting *People v. Hajek*, 324 P.3d 88, 174 (Cal. 2014)).

99. See *Lawrence*, 969 So.2d at 300 n.9 (rejecting defendant’s argument that mental illness reduces culpability in the same way as intellectual disability); *Hancock*, 840 N.E.2d at 1059 (claiming a lack of evidence that mental illness reduces culpability to the same extent as intellectual disability); *Mays v. State*, 318 S.W.3d 368, 379–80 (Tex. Crim. App. 2010) (unanimous decision) (“[A]ppellant has failed to show that, if he did suffer from some mental impairment at the time of these murders, that impairment was so severe that he is necessarily and categorically less morally culpable than those who are not mentally ill.”).

100. See *Hancock*, 840 N.E.2d at 1059 (questioning whether those with a serious mental illness are “comparable to a mentally retarded person with respect to reasoning, judgment, and impulse control”).

101. See *Dickerson v. State*, No. 2012-DP-01500-SCT, 2015 WL 3814618, at \*6–7 (Miss. June 18, 2015) (citing Fifth Circuit cases rejecting an extension of *Atkins*); *Mays*, 318 S.W.3d at 379 (citing numerous cases from other state and federal courts refusing to extend *Atkins*’s prohibition to mentally ill defendants).

102. See, e.g., *Mays*, 318 S.W.3d at 379–80 (pointing to the absence of a trend among the states as support for its decision not to extend *Atkins*).

health and behavior, judgment, and adaptive skills,” yet can arise after age eighteen.<sup>103</sup> These include traumatic brain injury, dementia, epilepsy, and bacterial meningitis.<sup>104</sup> The APA definition of major and mild neurocognitive disorders, like its definition of intellectual disability, includes an examination of cognitive and adaptive functioning.<sup>105</sup> However, unlike intellectual disability, neurocognitive disorders have no necessary restriction on age, meaning that a patient with a disorder such as traumatic brain injury might be diagnosed with a neurocognitive disorder rather than an intellectual disability simply because of the age-of-onset requirement.<sup>106</sup> Such a person would be eligible for the death penalty, while a similar defendant whose onset occurred before age eighteen would not.

Few justifications exist for excluding defendants purely because of age of onset. The same triggering events can cause intellectual and adaptive deficits regardless of the age of onset, so there is no necessary difference between the groups with respect to underlying conditions.<sup>107</sup> While setting the cutoff age at eighteen may provide a bright-line rule, the age at impairment does not impact whether a defendant can “(i) understand and process information; (ii) communicate; (iii) learn from experience; (iv) reason logically; (v) control impulses; and (vi) understand the reactions of others,” so the age-of-onset requirement gives “no help at all in determining whose mental deficits . . . interfere[] with retribution, deterrence, and prospects for a fair trial . . . .”<sup>108</sup> There is therefore no culpability-based rationale that appears to justify such a rule. Even apart from culpability concerns, the age-of-onset requirement complicates fact-finding when relevant medical records before age eighteen are either absent or incomplete, necessitating an often-contested retrospective diagnosis and can

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103. See Farahany, *supra* note 26, at 887 (comparing the deficits of intellectual disability with those of other medical conditions).

104. *Id.* Louisiana explicitly names and excludes defendants with “[t]raumatic brain damage occurring after age eighteen” from *Atkins* protection. LA. CODE CRIM. PROC. ANN. art. 905.5.1 (H)(2)(s) (2014).

105. See DSM-5, *supra* note 7, at 602–07 (describing the cognitive component of neurocognitive disorders as standard deviations from the mean and the functional component as reduced independence in everyday activities).

106. See *id.* (describing no age-of-onset requirement for neurocognitive disorders).

107. See Mulroy, *supra* note 12, at 647 (“[A]s a factual, medical matter, young-onset [intellectual disability] and adult-onset [intellectual disability] may not differ as to relative permanence as much as one might think.”).

108. *Id.* at 644 (citing *Atkins v. Virginia*, 536 U.S. 304, 318 (2002)).

potentially make the age-of-onset prong the *most* difficult of the three, even though it appears to be the most objective.<sup>109</sup>

Attempts in state courts to challenge the age-of-onset prong have had as little success as challenges to expand *Atkins* to serious mental illness. These cases allow courts to require an IQ test before age eighteen, holding that postdevelopmental IQ tests and circumstantial evidence are insufficient to meet the age-of-onset requirement.<sup>110</sup> Such circumstantial evidence has included placement in special education classes, reading at a second-grade level as an adult, scoring below seventy-five on a postdevelopmental IQ test, and reports from family and other witnesses of the defendant's condition prior to age eighteen—none of which, according to those courts, can be used as evidence of intellectual disability.<sup>111</sup>

One case is particularly noteworthy for demonstrating the evidentiary problems presented by the age-of-onset prong. In *Ybarra v. State*,<sup>112</sup> the defendant had been diagnosed with delusions, hallucinations, organic personality disorder, depression, and bipolar disorder, but not an intellectual disability; the closest the defendant got

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109. See *Van Tran v. State*, No. W2005-01334-CCA-R3-PD, 2006 WL 3327828, at \*26 (Tenn. Crim. App. Nov. 9, 2006) (rejecting intellectual disability diagnosis for lack of developmental period IQ test); *Mulroy*, *supra* note 12, at 645–46, 646 n.371 (“[I]n many cases . . . like *Van Tran*’s, the onset requirement may be the most difficult to determine.”); see also *Roper v. Simmons*, 543 U.S. 551, 573 (2005) (suggesting that difficulty of antisocial personality disorder diagnosis in patients under eighteen formed part of justification for juvenile exemption); *Ybarra v. State*, 247 P.3d 269, 277–80 (Nev. 2011) (discussing a complicated retrospective diagnosis at issue); AM. ASS’N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 95–96 (11th ed. 2010) [hereinafter AAIDD] (detailing guidelines and factors clinicians should follow when making retrospective diagnosis for legal and other nonmedical purposes).

110. See, e.g., *Stallings v. Bagley*, 561 F. Supp. 2d 821, 884 (N.D. Ohio 2008) (finding a “paucity of evidence” for the defendant to meet the onset requirement because of an absence of developmental intelligence testing); *Williams v. Cahill*, 303 P.3d 532, 538–40 (Ariz. Ct. App. 2013) (rejecting the use of interviews with past acquaintances to meet the onset requirement); *State v. Anderson*, 996 So.2d 973, 987–88 (La. 2008) (discussing the age-of-onset requirement under Louisiana law); *Ybarra*, 247 P.3d at 277–80 (stressing the significance of lack of intelligence testing during the developmental period); *Commonwealth v. VanDivner*, 962 A.2d 1170, 1185–86 (Pa. 2009) (upholding a finding that the onset requirement was not met because, among other reasons, a developmental IQ test had not been performed); *Van Tran*, 2006 WL 3327828, at \*26 (“The evidence of poverty, child abuse, lack of education, family dysfunction and poor social conditions are not enough to demonstrate that any deficits manifested during the developmental period.”).

111. See *Stallings*, 561 F. Supp. 2d at 882–84 (finding special education and low reading proficiency insufficient and postdevelopmental-period IQ test irrelevant); *Williams*, 303 P.3d at 537–39 (finding a postdevelopmental-period IQ test insufficient because deteriorating mental condition suggested a higher IQ at an earlier age, and family witnesses were too unreliable); *VanDivner*, 962 A.2d at 1184–85 (holding placement in special education classes and reading at a second grade level insufficient). *But see* AAIDD, *supra* note 109, at 95–96 (discussing possibility of retrospective diagnosis using witness recollections and school records other than formal IQ tests).

112. 247 P.3d 269 (Nev. 2011).

was a psychiatrist's diagnosis during his developmental period that he was "intellectually challenged."<sup>113</sup> The defendant had a significant head injury at age nine, scored a sixty on a postdevelopmental period IQ test, and was in and out of employment and the military.<sup>114</sup> However, the prosecution's expert concluded the defendant was malingering, another postdevelopmental period IQ test returned a score of eighty-six (although multiple issues made this score suspect), military records did not indicate the defendant was intellectually disabled, and the IQ test on which the defendant scored a sixty came with a disclaimer that, due to the stress that the testing caused, the score "may underestimate [the defendant's] actual intelligence functioning."<sup>115</sup> The Nevada Supreme Court held that the district court was not unreasonable in concluding that the defendant had failed to prove intellectual disability by a preponderance because his deficits were not shown to have occurred before age eighteen.<sup>116</sup> Relying on approaches taken by the APA, AAIDD, and other jurisdictions, the *Ybarra* court determined that the age cutoff of eighteen years best served the "twofold" purpose of the age-of-onset requirement because it (i) ensures that defendants with postdevelopment injuries or conditions are excluded and (ii) prevents those charged with a capital crime from malingering.<sup>117</sup>

States requiring clear evidence to meet the age-of-onset requirement give several reasons for rejecting pre-developmental-period evidence. One court speculated on alternative meanings to each piece of evidence suggesting intellectual disability, hypothesizing that placement in special education class could be for behavioral reasons and that poor academic performance could be the result of tardiness.<sup>118</sup> Another explained that postdevelopmental-period IQ tests were not sufficient evidence because of the defendant's deteriorating mental condition, which meant that the low IQ score later in life might not have accurately reflected the defendant's IQ at age eighteen.<sup>119</sup>

Many courts, however, simply point to clinical definitions. When confronted with a defendant who had no access to IQ testing while in school, the Pennsylvania Supreme Court simply referred to the APA and AAIDD definitions cited in *Atkins* that require onset before age eighteen, without considering the possibility of a retrospective

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113. *Id.* at 277.

114. *Id.*

115. *Id.* at 278–80.

116. *Id.* at 283–84.

117. *Id.* at 275–76.

118. See *Commonwealth v. VanDivner*, 962 A.2d 1170, 1184–85 (Pa. 2009) (upholding such speculation by the lower court).

119. *Williams v. Cahill ex rel. County of Pima*, 303 P.3d 532, 538 (Ariz. Ct. App. 2013).

diagnosis—even though those organizations allow for them.<sup>120</sup> Another court candidly admitted the absurdity of the age-of-onset prong, but applied it anyway, writing:

A normal 16-year-old who suffers traumatic brain damage in an automobile accident may receive a diagnosis of mental retardation while a normal 18-year-old who suffers the same damage in a similar manner may not, although the degree of impairment in intellectual functioning and adaptive skills may be identical in both instances.<sup>121</sup>

On the other hand, one court explicitly rejected clinical definitions when it looked to adaptive strengths to exclude a finding of intellectual disability, contradicting clinical definitions.<sup>122</sup> That court admitted that it departed from clinical definitions because state law “‘requires an overall assessment of the defendant’s ability to meet society’s expectations of him,’ not ‘proof of specific deficits.’”<sup>123</sup>

Ultimately, the decision in *Atkins* to leave definitions to the states, and the subsequent use of clinical definitions, led to two problematic ways in which states excluded defendants from the guarantee supposedly given in *Atkins*. Some states modified those definitions to set higher standards for defendants seeking to prove intellectual disability, while others stubbornly adhered to them to allow the death penalty for defendants technically falling outside of clinical definitions based on age of onset but who possessed equal culpability as defendants protected under *Atkins*.

## II. THE PROBLEMS WITH *HALL* AND *MOORE*

More than a decade after *Atkins*, the Supreme Court returned to the issue when it invalidated aspects of state definitions of intellectual disability in *Hall v. Florida* and *Moore v. Texas*.<sup>124</sup> Although each decision purported to clarify the bounds of state liberty to define intellectual disability with respect to *Atkins*, they provided only vague guidance on what additional requirements, if any, states were still allowed to impose.

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120. *VanDivner*, 962 A.2d at 1186–87 (citing *Atkins v. Virginia*, 536 U.S. 304, 309 n.3, 318 (2002)).

121. *State v. Anderson*, 996 So.2d 973, 988 (La. 2008).

122. *See Williams*, 303 P.3d at 541 (distinguishing Arizona’s statutory definition from clinical definitions).

123. *Id.* (quoting *State v. Grell*, 135 P.3d 696, 709 (Ariz. 2006)).

124. *Moore v. Texas*, No. 15-797, 2017 WL 1136278 at \*4 (U.S. Mar. 28, 2017); *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014).

*A. The Problems Hall Solved?*

In 2014, the Court in *Hall v. Florida* addressed the problem of additional requirements, invalidating Florida's hard IQ cutoff of seventy because clinical definitions incorporate the SEM into IQ tests, allowing for scores up to seventy-five to qualify for an intellectual disability diagnosis with additional adaptive deficits.<sup>125</sup>

On its face, *Hall* invalidated the strict IQ cutoffs used by Florida and other states in deciding which defendants meet the intellectual prong of intellectual disability. Although both the extent to which states must follow clinical definitions and the reasons why they must do so remain murky, it was at least clear from *Hall* that strict IQ cutoffs were inconsistent with *Atkins*.<sup>126</sup> However, the Court's emphasis on the importance of clinical definitions has uncertain application outside the precise facts of the case.

*Hall* stated that clinical definitions were a "fundamental premise of *Atkins*" and that the *Atkins* decision never gave "unfettered discretion to define the full scope of the constitutional protection."<sup>127</sup> However, *Hall* did concede that *Atkins* "did not provide definitive procedural or substantive guides for determining" the appropriate definitions—even though *Atkins* gave "substantive guidance on the definition of intellectual disability."<sup>128</sup>

In interpreting these seemingly contradictory statements, circuit courts unsurprisingly disagree on *Hall*'s meaning. The Seventh Circuit determined that "the Supreme Court again declined to set forth a legal definition of intellectual disability."<sup>129</sup> The Sixth Circuit took the exact opposite approach, stating, "In *Hall*, the Court reasoned that the Constitution *requires* the courts and legislatures to follow clinical practices in defining intellectual disability."<sup>130</sup> The Ninth Circuit partially agreed with the Sixth, but claimed that *Hall* merely took note of the national consensus on applying clinical definitions.<sup>131</sup> Meanwhile,

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125. 134 S. Ct. at 2000 ("[A]n individual with an IQ test score 'between 70 and 75 or lower,' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." (citations omitted) (quoting *Atkins*, 536 U.S. at 309 n.5)).

126. *Id.* at 1998 ("The *Atkins* Court twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70.").

127. *Id.* at 1998–99.

128. *Id.* (quoting *Bobby v. Bies*, 556 U.S. 825, 831 (2009)).

129. *Pruitt v. Neal*, 788 F.3d 248, 264 (7th Cir. 2015).

130. *Van Tran v. Colson*, 764 F.3d 594, 612 (6th Cir. 2014) (emphasis added).

131. *See Smith v. Ryan*, 813 F.3d 1175, 1204 (9th Cir. 2016) ("In *Hall v. Florida*, however, the Court held that, contrary to what the state courts and our own court had thought, *Atkins* set forth a substantive definition of intellectual disability encompassing those aspects of the clinical definition about which a national consensus exists." (citations omitted)).

the Fifth Circuit largely confines *Hall* to its facts, stating that it only bars IQ cutoffs without considering its application to other aspects of clinical definitions.<sup>132</sup>

### *B. The Problems with Potential Solutions to Hall*

Several attempts have been made to resolve the apparent contradiction in *Hall*'s statements in order to discover what “fettters” *Atkins* placed on the states without providing “definitive . . . guides,” while still upholding clinical definitions as a “fundamental premise.” These attempts fall into two categories: either *Hall* imposes an absolute requirement to use clinical definitions—as mostly clearly proposed by the *Hall* dissent and the Sixth Circuit—or *Hall* merely forbids a state from using IQ cutoffs to restrict the introduction of further evidence of intellectual disability, as proposed by the Fifth Circuit.

#### 1. *Hall* Dissent and Sixth Circuit

The *Hall* dissent and Sixth Circuit characterize *Hall* as an absolute requirement to use clinical definitions. Justice Alito wrote in his dissent that *Atkins* explicitly left definitions of intellectual disability up to the states because of the “‘serious disagreement’ among the States with respect to the best method for ‘determining which offenders are in fact [intellectually disabled].’”<sup>133</sup> The dissent further noted that shifting clinical definitions of professional organizations would cause practical issues in the majority’s approach.<sup>134</sup> These issues include which organizations to follow, how to handle updated or rescinded definitions, and whether any judicial scrutiny would apply to new changes.<sup>135</sup> In making these comments, the dissent construed the *Hall* holding as requiring adherence to clinical definitions in every respect, not just IQ scores.

Justice Alito’s view of *Hall* is shared by the Sixth Circuit, which stated that the Supreme Court “reasoned that the Constitution requires the courts and legislatures to follow clinical practices in defining intellectual disability.”<sup>136</sup> The Sixth Circuit in *Van Tran v. Colson* claimed that *Hall* instructs courts that “[s]ociety relies upon medical and professional expertise to define and explain how to diagnose the

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132. *Mays v. Stephens*, 757 F.3d 211, 217–18 (5th Cir. 2014) (“[*Hall*] exclusively addresses the constitutionality of mandatory, strict IQ test cutoffs.”).

133. *Hall*, 134 S. Ct. at 2003 (Alito, J., dissenting).

134. *Id.* at 2005–07.

135. *Id.*

136. *Van Tran v. Colson*, 764 F.3d 594, 612 (6th Cir. 2014).

mental condition at issue.”<sup>137</sup> The *Van Tran* court therefore concluded that additional factors, beyond those considered by clinicians in making a diagnosis, should not be considered by a trial court when determining whether a defendant has an intellectual disability.<sup>138</sup>

This view comprehensively solves the first *Atkins* problem identified above: the additional requirements states imposed on defendants. However, the approach does nothing to resolve the underinclusiveness problem, especially given that it would allow states to continue imposing the age-eighteen cutoff under the age-of-onset prong and thereby limit what evidence a defendant could present.

The Sixth Circuit attempted to resolve the evidentiary problems behind this view in *Williams v. Mitchell*.<sup>139</sup> There, the court decided, per clinical definitions, “that intellectual disability manifests itself before eighteen and remains consistent throughout a person’s life.”<sup>140</sup> *Williams* therefore determined that post-age-eighteen evidence of intellectual and adaptive deficits was acceptable evidence because the unchanging nature of intellectual disability meant that the condition post-eighteen would be identical to that pre-eighteen.

While this view would appear to solve the underinclusiveness problem, its focus on the unchanging nature of intellectual disability is misleading. In the example of intellectual disability caused by dementia or traumatic brain injury, it would not be true that post-eighteen clinical assessments would be evidence of pre-eighteen deficits. The Sixth Circuit approach therefore only helps those defendants who simply lacked pre-eighteen evidence, not those whose deficits actually began after age eighteen.

The Sixth Circuit view also has a more fundamental problem: it directly contradicts statements made in *Hall* about *Atkins*. While *Hall* may have required more adherence to clinical definitions, it reiterated that states “play a critical role in . . . providing the Court with information that contributes to an understanding of how intellectual disability should be measured and assessed.”<sup>141</sup> The Court did not go so far as to require strict adherence; it merely pushed states in that direction, stating that the “legal determination of intellectual disability is distinct from a medical diagnosis, but it is *informed* by the medical community’s diagnostic framework.”<sup>142</sup> Rather, in *Hall*’s own terms, it

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137. *Id.* (quoting *Hall*, 134 S. Ct. at 1993).

138. *Id.*

139. 792 F.3d 606, 609 (6th Cir. 2015).

140. *Id.* at 621.

141. *Hall*, 134 S. Ct. at 1998.

142. *Id.* at 2000 (emphasis added).



merely denied to the states the ability “to define the *full scope* of the constitutional protection.”<sup>143</sup> Accordingly, *Hall* did not purport to completely restrain the states and continued to “not provide definitive procedural or substantive guides.”<sup>144</sup>

## 2. Fifth Circuit

The Fifth Circuit takes a different approach to *Hall*, largely constraining it to its facts and allowing states to impose additional requirements. In *Mays v. Stephens*, the Fifth Circuit determined that *Hall* did not forbid Texas from using the *Briseno* factors, thus continuing to allow *Briseno*’s “guidance” to supplement the normal three-prong test for intellectual disability.<sup>145</sup>

The *Mays* court interpreted the ruling in *Hall* as limited to IQ cutoffs, inapplicable to the “non-diagnostic” factors like those created by *Briseno*.<sup>146</sup> It characterized the IQ cutoff as a “prohibition of sentencing courts’ considering even substantial, additional evidence of retardation” because the IQ cutoff in the intellectual prong served as a threshold matter for determining intellectual disability.<sup>147</sup> *Mays* found the cutoff issue “problematic largely because it restricted the evidence” and determined that the *Briseno* factors were unaffected by *Hall* because they “merely provide further guidance to sentencing courts as to *what kinds* of evidence the court might consider when determining adaptive functioning.”<sup>148</sup> The *Mays* court therefore found the “reasoning animating *Hall*” to be the evidence-restricting nature of the hard IQ cutoff as a threshold matter when that cutoff was contrary to established clinical practice.<sup>149</sup>

This approach has two problems. First, *Mays*’s interpretation of *Hall* as an evidentiary rule is merely an artifact of having a three-prong test; under a hard-cutoff system, a defendant that loses on the first prong would be barred from presenting evidence on the other prongs because that evidence would no longer be probative on the issue, not because any special evidentiary rule bars it.<sup>150</sup> Accordingly, most courts

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143. *Id.* at 1998 (emphasis added).

144. *Id.* (quoting *Bobby v. Bies*, 556 U.S. 825, 831 (2009)).

145. *Mays v. Stephens*, 757 F.3d 211, 218 (5th Cir. 2014).

146. *Id.* (citing *Hall*, 134 S. Ct. at 1994 (“That strict IQ test score cutoff of 70 is the issue in this case.”)).

147. *Id.*

148. *Id.*

149. *See id.* (“Because this cutoff did not take into account the well-known imprecision of IQ testing, the Court was wary of any blanket restriction on a defendant’s ability to present further evidence of his disability.”).

150. *See* FED. R. EVID. 401 (irrelevant evidence); FED. R. EVID. 403 (unnecessary evidence).

prior to *Hall* that found against a defendant on the intellectual prong did not continue the analysis into the adaptive prong.<sup>151</sup> Second, the reasoning behind *Hall* rejects a purely evidentiary view. It was clinical practice, not rules of evidence, that persuaded the Court that states must consider evidence of adaptive deficits even when the defendant scored above seventy on an IQ test.<sup>152</sup> The *Hall* Court's strong references to the importance of clinical practice conflicts with the Fifth Circuit's easy conclusion that *Hall* is inapplicable to the *Briseno* factors.

Neither of the approaches described above are satisfactory. Both deviate from clear statements made in *Hall*, and neither solve the underinclusiveness problem. Therefore, a new solution that adheres to all of *Hall*'s requirements, along with solving both the additional requirements and underinclusiveness problems, was needed. When the Court revisited the issue of clinical definitions in 2017, however, it provided little more clear guidance toward a solution than it did in *Hall*.

### C. One Moore Problem Solved?

In March 2017, the Supreme Court again ruled on the use of clinical definitions in *Moore v. Texas*.<sup>153</sup> *Moore* held that the *Briseno* factors and the other additional requirements imposed by Texas were violations of the Eighth Amendment by “disregard[ing] . . . current medical standards.”<sup>154</sup> *Moore* relied heavily on the importance of clinical practices, stating outright that “[t]he medical community’s current standards supply one constraint on States’ leeway in this area” because “current manuals offer ‘the best available description of how mental disorders are expressed and can be recognized by trained clinicians.’”<sup>155</sup> This reliance was harshly criticized by the dissent, which claimed the

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151. In one study of *Atkins* claim rejections, researchers found that “approximately 31% of all unsuccessful cases were considered a loss on Prong 1 [intellectual prong] only,” and that “[i]n most of these cases, the decision . . . contained little or no specific discussion of the evidence relevant to the other two prongs of the intellectual disability criterion,” noting that only three of fifty-five losses contained any discussion of the second prong. John H. Blume et al., *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years after the Supreme Court’s Creation of a Categorical Bar*, 23 WM. & MARY BILL RTS. J. 393, 400–01 (2014).

152. *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) (“It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment.”).

153. No. 15-797, 2017 WL 1136278 (U.S. Mar. 28, 2017).

154. *Id.* at \*4, \*9.

155. *Id.* at \*14 (citing DSM-5, *supra* note 7, at xli).

majority opinion “abandons the usual mode of analysis this Court has employed in Eighth Amendment cases.”<sup>156</sup>

*Moore* first held that Texas did not properly account for the standard error of measurement in finding that the defendant did not have intellectual deficits under the first prong of *Atkins*, the same error made by Florida in *Hall*.<sup>157</sup> The Court held that, because Moore scored a seventy-four, the state court was required to move on to the adaptive prong of *Atkins* even if other testimony suggested that Moore likely scored within the high end of the range of sixty-nine to seventy-nine (the five-score range of the SEM).<sup>158</sup>

Although the Texas Court of Criminal Appeals went on to consider the adaptive prong as an alternative holding, *Moore* reversed it there as well. *Moore* held that Texas “overemphasized” the defendant’s adaptive strengths and change in behavior while in prison because “the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*” and avoids making judgments based on behavior in a “controlled setting” such as prison.<sup>159</sup> It then noted two other factors Texas considered, the defendant’s traumatic experiences and coexisting conditions, that the state improperly interpreted as evidence *against* intellectual disability, when medical standards considered them “risk factors” (i.e., factors that should have *supported* a finding of intellectual disability).<sup>160</sup>

*Moore* then criticized and ultimately struck down Texas’s use of the *Briseno* factors for evaluating adaptive functioning. The Court held that those factors “[b]y design and in operation” created an “unacceptable risk” that defendants with milder forms of intellectual disability would be executed, even though *Atkins* protects the “entire category” of intellectually disabled defendants.<sup>161</sup> Because *Atkins* protects the entire group, Texas was not allowed to limit the group to the subcategory of the “Texas citizens’ consensus” on “who ‘should be exempted from the death penalty.’”<sup>162</sup>

The Court found that those factors were “an invention of [Texas] untied to any acknowledged source” and held that the *Briseno* factors “may not be used, as [Texas] used them, to restrict qualification of an

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156. *Id.* at \*16 (Roberts, C.J., dissenting).

157. *Id.* at \*10–11 (majority opinion).

158. *Id.*

159. *Id.* at \*11.

160. *Id.* at \*12.

161. *Id.*

162. *Id.* (quoting *Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004)).

individual as intellectually disabled.”<sup>163</sup> Finally, *Moore* found that the objective indicia supported striking down the *Briseno* factors—although it made no mention of objective indicia with respect to other Texas practices, like considering prison behavior or coexisting conditions.<sup>164</sup> Because the *Briseno* factors enjoyed the support of no state legislatures and only two other state courts, the objective indicia indicated that the *Briseno* factors were an “outlier.”<sup>165</sup>

### 1. What to Follow, What to Disregard

On its face, *Moore* purports to uphold the same balance as stated in *Hall* on how closely states must follow clinical definitions. It explained that “[e]ven if ‘the views of medical experts’ do not ‘dictate’ a court’s intellectual-disability determination . . . the determination must be ‘informed by the medical community’s diagnostic framework.’”<sup>166</sup> It then explained that “being informed” “does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards.”<sup>167</sup>

The *Moore* dissent noted the lack of guidance on how far to take prohibiting “disregard” of such standards.<sup>168</sup> The dissent noted that the majority could not mean “disregard” as in “dismiss as unworthy of attention,” as Texas took note of those standards while choosing to follow others.<sup>169</sup> The dissent found other guidance from the Court equally unhelpful in resolving how much freedom states retain in establishing working definitions of intellectual disability.<sup>170</sup> For instance, it noted that the Court’s instruction to read its precedents to not “diminish the force of the medical community’s consensus”<sup>171</sup> was just as vague as its requirements for states to “be[ ] informed” and not “disregard the views of medical professionals.”<sup>172</sup>

While the dissent’s only proposed conception of “disregard” was not consistent with the majority opinion, working through each possible meaning in light of the majority opinion and of *Hall* and *Atkins* provides

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163. *Id.* at \*4.

164. *Id.* at \*13.

165. *Id.* The dissent agreed that the *Briseno* factors were unconstitutional, but only because of the objective indicia. *Id.* at \*24 (Roberts, C.J., dissenting).

166. *Id.* at \*9 (majority opinion) (quoting *Hall v. Florida*, 134 S.Ct. 1986, 2000 (2014)).

167. *Id.*

168. *Id.* at \*22 (Roberts, C.J., dissenting).

169. *Id.*

170. *Id.*

171. *Id.* at \*4 (majority opinion).

172. *Id.* at \*9; *id.* at \*23 (Roberts, C.J., dissenting).

insight into what command *Moore* might offer to the states. First, *Moore* might have meant that states must consider all factors used by medical standards in creating a definition of intellectual disability. This hypothesis quickly fails: even if Texas had considered everything in the DSM-5, its *extra* consideration of the nonclinical *Briseno* factors were held invalid.<sup>173</sup>

Second, *Moore* might instead have intended that states may consider *only* factors used in clinical definitions, and nothing else. This appears too extreme in the other direction: it would contradict instructions in *Hall* and *Moore* that states still retain some role in defining intellectual disability.<sup>174</sup> *Moore* itself reiterated that “*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide.”<sup>175</sup>

One final hypothesis could be that states must interpret evidence consistently with medical standards. This theory would well explain the invalidation of how Texas regarded traumatic experiences and coexisting conditions; while Texas weighed those against a finding of intellectual disability, medical standards count them as risk factors.<sup>176</sup> However, this hypothesis does little to explain how the Court would rule on wholly nonclinical factors like those presented in *Briseno*.

It is therefore clear that the most straightforward interpretations of *Moore*’s prohibiting “disregard” of medical standards are insufficient to explain either the specific holding of *Moore* or the Court’s larger trajectory of cases on clinical definitions of intellectual disability. However, *Moore* did suggest another method of reasoning that may shed light on its meaning: risk analysis.

## 2. Risk as an Eighth Amendment Issue

When invalidating the *Briseno* factors, *Moore* held that because they were “[n]ot aligned with the medical community’s information” and “draw[ ] no strength from our precedent,” the *Briseno* factors “creat[e] an unacceptable risk that persons with intellectual disability will be executed.”<sup>177</sup>

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173. *See id.* at \*4 (majority opinion) (overruling *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004)).

174. *Id.* at \*9 (stating that it “does not demand adherence to everything stated in the latest medical guide”); *Hall v. Florida*, 134 S. Ct. 1986, 1999 (2014) (noting that *Atkins* “left” to the States the task of developing appropriate ways to enforce the constitutional restriction”) (quoting *Atkins v. Virginia*, 536 U.S. 304, 317 (2002)).

175. 2017 WL 1136278, at \*9.

176. *Id.* at \*12.

177. *Id.* at \*4 (quoting *Hall*, 134 S. Ct. at 1990).

Risk holds a particularly special place in *Moore's* analysis, and does so in a subtly different context than previous cases concerning risk and the death penalty. A brief examination of those cases reveals the evolution of death penalty risk, how *Hall* addressed it in a new way, and why risk is central to the holding in *Moore*.

Cases prior to *Hall* discussed the danger of risk in terms of executing an individual not sufficiently culpable to deserve that penalty. Beginning with *Gregg v. Georgia*, the Court was concerned with the risk of "arbitrary and capricious" decisions at sentencing.<sup>178</sup> Other cases pre-*Atkins* share this concern. In *Booth v. Maryland*, the Court held that victim impact statements were irrelevant to sentencing decisions in capital trials and therefore "create[ ] a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."<sup>179</sup> In *Caldwell v. Mississippi*, misleading statements to the jury on the nature of appellate review were held to "creat[e] an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously.'"<sup>180</sup> This early concern with risk was therefore focused on what evidence introduced at sentencing would increase the risk of arbitrary or capricious decisions by the jury.

When *Atkins* addressed risk, however, it instead used language from *Lockett v. Ohio*, which concerned "[t]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."<sup>181</sup> *Atkins* then listed several disadvantages that defendants with intellectual disabilities face, including "the lesser ability . . . to make a persuasive showing of mitigation," being "less able to give meaningful assistance to their counsel," being "poor witnesses," and having a "demeanor [that] may create an unwarranted impression of lack of remorse . . ." <sup>182</sup> In doing so, the Court did not characterize these reasons as being wholly "arbitrary," but nonetheless noted that intellectually disabled defendants "in the aggregate face a special risk of wrongful execution."<sup>183</sup>

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178. 428 U.S. 153, 188 (1976).

179. 482 U.S. 496, 502–03 (1987), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991).

180. 472 U.S. 320, 343 (1985) (quoting *California v. Ramos*, 463 U.S. 992, 999 (1983)). Other cases continued to address this concern, even when not ultimately granting relief. *See, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 323 (1987) (noting that the "emphasis on risk" highlighted the difficulty of determining any individual jury's reasoning for a death sentence).

181. *Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

182. *Id.* at 320–21.

183. *Id.* at 321.

But *Atkins* did not mean “wrongful” in the sense that intellectually disabled defendants might face death for crimes they did not commit. Rather, they might face execution when the factors, properly considered, weigh against it, even though the decision was not “arbitrary.”<sup>184</sup> Although this modified the previous conception of “risk,” it was still well within the Court’s decisions requiring only the most culpable offenders to be subject to the death penalty.<sup>185</sup>

The problem the Court faced in *Hall* involved a different type of risk, arising because of *Atkins*’s ill-defined class of defendants categorically exempt from the death penalty.<sup>186</sup> Because the category of persons protected by *Atkins* is so difficult to define, there arose a separate risk that intellectually disabled defendants would not be excluded by restrictive state definitions of intellectual disability.<sup>187</sup> *Hall* confronted that problem head-on when it determined that Florida’s strict IQ cutoff “create[d] an unacceptable risk that persons with intellectual disability will be executed, and thus [was] constitutional.”<sup>188</sup> Because *Atkins* had provided Eighth Amendment protections to all intellectually disabled defendants, the new risk *Hall* addressed was that of individuals being excluded because of state definitions.<sup>189</sup>

The Court’s death penalty cases have thus established three types of risk. The first, *Gregg* risk, addresses arbitrary and capricious death sentences. The second, *Atkins* risk, is the concern that juries will not properly weigh factors for and against sentencing a certain individual to death, possibly finding that factor weighs in favor of execution when the Court believes it should weigh against it. The final type, *Hall* risk, is the danger that a defendant within a categorically exempt group will nonetheless be executed. In all of these opinions, however, the usual Eighth Amendment analysis of objective indicia and independent judgment provided the backbone of the Court’s reasoning.<sup>190</sup>

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184. *See id.* at 320–21 (giving reasons why intellectual disability is a liability at trial).

185. *See, e.g.,* *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (requiring a more “depraved” mind than the average murderer to qualify for the death penalty).

186. *See Atkins*, 536 U.S. at 319 (“If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”).

187. *See supra* Part I.B (discussing difficulty in defining the class protected).

188. *Hall v. Florida*, 134 S. Ct. 1986, 1989 (2014).

189. *Id.*

190. *See id.* at 1996 (considering the objective indicia for use of the SEM); *Atkins*, 536 U.S. at 319 (discussing culpability of the intellectually disabled); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (discussing penological purposes of retribution and deterrence).

When *Moore* addressed risk, it did so independently of either prong of Eighth Amendment analysis and relied solely on risk for portions of the opinion. In describing *Atkins*, *Moore* explained that executing the intellectually disabled “serves no penological purpose; runs up against a national consensus against the practice; and creates a ‘risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.’”<sup>191</sup> In making such a list, *Moore* placed “risk” alongside the subjective and objective prongs of Eighth Amendment analysis, as if risk itself were another prong with a determinative power in death penalty cases all on its own.

*Moore* did not place risk alongside the other two prongs haphazardly. Other than a single paragraph on the *Briseno* factors, the opinion never applies the objective indicia, and nowhere does it mention how its independent judgment informed the analysis.<sup>192</sup> The opinion did not discuss either prong in its invalidation of adaptive strengths or coexisting conditions, and the dissent specifically noted that the majority “abandon[ed] the usual mode of analysis this Court has employed in Eighth Amendment cases.”<sup>193</sup>

Two other explanations may exist for the Court’s reasoning, but neither is adequate. First, the Court might have used its independent judgment in deciding that medical standards must be better respected by the states in defining intellectual disability. If true, however, the Court did not mention its independent judgment either in name or by reference to the culpability of the class of individuals affected by the case.<sup>194</sup> If the Court was trying to use its own judgment, it somehow did so without reference to culpability, deterrence, or any other penological purpose—unlike every previous decision discussing that prong of the Eighth Amendment.<sup>195</sup> Instead, the Court relied solely on clinical definitions and medical practice in identifying individuals fitting those definitions, writing that Texas “disregard[ed] . . . current medical standards,” “deviated from prevailing clinical standards,” and “departed from clinical practice.”<sup>196</sup> Far from employing its own judgment, the Court employed the judgment of the medical community

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191. *Moore v. Texas*, No. 15-797, 2017 WL 1136278, at \*9 (U.S. Mar. 28, 2017) (internal citations omitted) (quoting *Atkins*, 536 U.S. at 313–20).

192. *See id.* at \*13 (applying the objective indicia to *Briseno*).

193. *See id.* at \*16 (Roberts, C.J., dissenting).

194. *See id.* at \*9 (majority opinion) (reciting Eighth Amendment prongs by reference to *Atkins*).

195. *See supra* Part I.A (discussing objective indicia and independent judgment).

196. *Moore*, 2017 WL 1136278, at \*9, \*11–12.



in defining the proper procedures for determining whether a person is intellectually disabled.<sup>197</sup>

A second possible explanation could be that *Moore* is not an Eighth Amendment case at all. Under this view, *Atkins* does all of the Eighth Amendment analysis by exempting the intellectually disabled from the death penalty, while *Hall* and *Moore* simply define what class of individuals are covered.<sup>198</sup> This explanation, however, is also unpersuasive. First, *Hall* and *Moore* obviously define the class to which the Eighth Amendment protections of *Atkins* apply, and to the extent they rule that certain individuals may not be executed, they are straightforwardly constitutional cases.<sup>199</sup> Second, the decision in *Atkins* “[e]ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences,”<sup>200</sup> but *Hall* specifies that *Atkins* did not give states “unfettered discretion to define the full scope of the constitutional protection.”<sup>201</sup> To the extent that states go too far in excluding defendants under *Atkins*, the Court holds that to be a violation of the Eighth Amendment.

*Moore* is therefore an Eighth Amendment constitutional case that does not rely on the two traditional areas of Eighth Amendment analysis. It does not rely on objective indicia, as noted by the dissent.<sup>202</sup> Nor does it rely on its independent judgment, because it considered any questions on the defendant’s culpability sufficiently answered by *Atkins*.<sup>203</sup> Because of the original problems of defining the class in *Atkins*,<sup>204</sup> *Moore* therefore had to turn to the “unacceptable risk” of a deserving defendant being denied constitutional protections as an independent basis for an Eighth Amendment decision.

#### D. The Problems *Hall* and *Moore* Made Worse

Regardless of whether *Hall* and *Moore* solved anything regarding additional requirements, they appear to have made the underinclusiveness problem worse. If those cases require more

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197. *Id.*

198. *See id.* at \*12 (“States may not execute anyone in ‘the entire category of [intellectually disabled] offenders.’” (quoting *Roper v. Simmons*, 543 U.S. 551, 563–64 (2005))).

199. *See id.* at \*4, *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014).

200. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (alternations in original) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986)).

201. *Hall*, 134 S. Ct. at 1998; *see also Moore*, 2017 WL 1136278, at \*9 (“States’ discretion, we cautioned, is not ‘unfettered’”) (quoting *Hall*, 134 S. Ct. at 1998).

202. *Moore*, 2017 WL 1136278, at \*16 (Roberts, C.J., dissenting).

203. *See id.* at \*12 (majority opinion).

204. *See supra* Part I.C (discussing problems with *Atkins*).

adherence to clinical definitions in determining whether a defendant is excluded from the death penalty because of an intellectual disability, then they seemingly approve of the age-of-onset prong. They therefore do nothing to solve the problems faced by a defendant whose deficits began after age eighteen, or who has insufficient evidence to prove when the deficits started.

Recent changes to these clinical definitions could make these situations even worse. The APA's latest revision to its definition of intellectual disability removes the age cutoff, and replaces it with a requirement that the deficits begin "during the developmental period."<sup>205</sup> A state wishing to expand death penalty eligibility might change its age-of-onset requirement to match the DSM-5's, and thereby allow courts to disregard even evidence of intellectual disability before age eighteen if the court determined that the defendant's developmental period had already terminated.<sup>206</sup> Such an approach would inject even more confusion into the age-of-onset analysis.

Although professional organizations supported the use of clinical definitions in *Hall* to invalidate Florida's IQ cutoff and in *Moore* to overturn the *Briseno* factors, they disagree with the legal use of the age-of-onset prong.<sup>207</sup> The APA, in a joint statement with the American Bar Association and American Psychiatric Association, denounced the use of the age-of-onset requirement specifically because it would exclude conditions like dementia or traumatic brain injury.<sup>208</sup> The joint statement explained that if a person with either condition meets the intellectual and adaptive requirements, then "the reasoning in *Atkins* should apply and an exemption from the death penalty is warranted, because the only significant characteristic that differentiates these severe disabilities from mental retardation is the age of onset."<sup>209</sup>

### III. ALIGNING DEFINITIONS WITH CULPABILITY AND RISK

Even after *Hall* and *Moore*, the Court has articulated no clear test for whether a state's definition of intellectual disability violates

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205. Compare DSM-5, *supra* note 7, at 33, 37–38 (onset during developmental period), with DSM-IV-TR, *supra* note 7, at 41 (onset before age eighteen).

206. The problem of changing clinical definitions was noted by the dissent as a reason against considering them. *Hall*, 134 S. Ct. at 2005–07 (Alito, J., dissenting).

207. See *id.* at 1994 (majority opinion) (agreeing with the APA).

208. RECOMMENDATION 122A, *supra* note 11; REPORT ON RECOMMENDATION 122A, *supra* note 11; AM. PSYCHOL. ASS'N, *supra* note 11.

209. REPORT ON RECOMMENDATION 122A, *supra* note 11, at 5 (citing DSM-IV-TR, *supra* note 7, at 46, 135 (describing similar symptoms of dementia and intellectual disability)).

*Atkins*. However, those three cases provided enough guidance that a solution to their seemingly contradictory commands can be established.

An ideal solution would have three essential qualities. First, it would place some constraints on how states can define intellectual disability, and those constraints would be linked to clinical definitions; this requirement ensures that *Atkins* still “provides substantial guidance” on the question. Second, the solution would not completely constrain state choice; this is necessary so that medical practice would neither “dictate” the result nor impose “substantive or procedural guides.” Finally, the reason for selecting a particular solution would be grounded in the same reasoning that produced *Atkins*, *Hall*, and *Moore*; whatever middle ground is struck between strict adherence to clinical definitions and total state choice must find support in the Court’s previous Eighth Amendment cases.

The best solution would therefore first require that states exempt any defendant that meets clinical definitions, because the language of *Atkins*, *Hall*, and *Moore* makes it clear that these defendants are categorically not culpable enough to be executed.<sup>210</sup> Second, states could expand their definitions of intellectual disability to cover more (but not fewer) defendants.<sup>211</sup> Finally, any restriction on who may qualify, including restrictions found in clinical definitions, must not exclude defendants similarly situated to those who receive the exemption.

#### A. Substantial Guidance: The Minimum Protection

One element of this solution should be that any defendant meeting clinical definitions is exempt from the death penalty. *Hall* made this much clear when it claimed, “In the words of *Atkins*, those persons who meet the ‘clinical definitions’ of intellectual disability ‘by definition . . . have diminished capacities . . .’ Thus, they bear ‘diminish[ed] . . . personal culpability.’”<sup>212</sup> In connecting the clinical definitions to a lower bound on the protection *Atkins* gives, *Hall* declared that any defendant meeting at least those definitions is exempt from the death penalty.<sup>213</sup>

*Moore* supports the view that clinical definitions are a ceiling on what defendants may be required to prove. Like *Hall*, it takes an

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210. *Hall*, 134 S. Ct. at 1999.

211. *See id.* (requiring a minimum).

212. *Id.* (alterations in original) (internal citations omitted) (citing *Atkins v. Virginia*, 536 U.S. 304, 318 (2002)).

213. *See Slobogin, supra* note 61, at 424 (connecting clinical definitions to Eighth Amendment jurisprudence on culpability to establish a minimum).

absolute view of *Atkins*, writing that it “‘restrict[s] . . . the State’s power to take the life of *any* intellectually disabled individual.”<sup>214</sup> Reading clinical definitions as a ceiling also formulates a rule for “disregard” of medical practice consistent with the opinion.<sup>215</sup> When the Court invalidated how Texas considered Moore’s adaptive strengths, prison behavior, traumatic experiences, and coexisting conditions, it did so only on the grounds that they departed from medical practice in a way that restricted the scope of *Atkins*, leaving little other explanation for “disregard” available to any possible solution.<sup>216</sup>

The renewed focus on risk in *Moore* gives another reason to enforce clinical practice. Although *Moore* purported to address the kind of risk found in *Hall*, its invalidation of *how* Texas used evidence, in addition to *what* evidence it considered, invokes the type of risk the Court considered in *Atkins* as well.<sup>217</sup> In *Atkins*, the Court was concerned that juries would misconstrue evidence that should have factored against a death sentence as evidence favoring it.<sup>218</sup> In *Moore*, the Court made an analogous ruling with respect to state courts; it found that Texas had used a risk factor for intellectual disability as evidence against finding intellectual disability, and accordingly found the practice to create an “unacceptable risk.”<sup>219</sup>

*Moore* also supports this view because its holding abrogates the Fifth Circuit’s decision in *Mays*. In that case, the Fifth Circuit held that *Hall* did not bar the use of the *Briseno* factors, largely constraining *Hall* to the facts of the case.<sup>220</sup> To the extent that *Moore* undercuts the narrow view of *Hall*, the broader Sixth Circuit view of *Hall* described in *Van Tran*—that “medical and professional expertise . . . define and explain how to diagnose the medical condition at issue”—appears to prevail.<sup>221</sup>

In practice, this could mean that consideration of the Flynn Effect is next for the Court. Although its use is not without controversy, a defendant who shows that considering the effect is a medical practice in the same vein as the SEM could reverse a decision that did not also consider adaptive deficits.<sup>222</sup>

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214. *Moore v. Texas*, No. 15-797, 2017 WL 1136278, at \*9 (U.S. Mar. 28, 2017) (quoting *Atkins*, 536 U.S. at 321).

215. See *supra* Part II.C.1 (discussing possible interpretations of “disregard”).

216. See *supra* Part II.C (discussing *Moore*’s invalidation of Texas practices).

217. *Moore*, 2017 WL 1136278, at \*11–12; *Atkins v. Virginia*, 536 U.S. 304, 320 (2002).

218. *Atkins*, 536 U.S. at 320.

219. *Moore*, 2017 WL 1136278, at \*11–12.

220. See *supra* Part II.B.2 (discussing reasoning of *Mays*).

221. See *supra* Part II.B.1 (describing the Sixth Circuit’s broad view of *Hall*).

222. See *supra* notes 64–65 and accompanying text (discussing the Flynn effect).

However, making clinical definitions a ceiling should not be the *only* element of the solution. *Hall* and *Moore* still leave the states with some amount of choice, noting that no definitive guides exist. If *Hall* and *Moore* merely command that states exempt defendants who meet clinical definitions, then the “substantial guidance” becomes a “substantive guide.”<sup>223</sup>

### *B. No Substantive Guides: The States’ Ability to Define*

While clinical definitions set a limit on what requirements a state can impose on a defendant alleging intellectual disability, nothing would prevent a state from relaxing requirements beyond those set by clinical definitions—even, of course, from abolishing the death penalty for any offender.

*Moore* provides abundant support for this theory of state flexibility in defining intellectual disability. First, it solves the issue on how to interpret “disregard” by introducing a new rule: while states may *only* consider factors used in clinical definitions, they would not have to consider *every* factor found therein; states can remove requirements, but not add to them.<sup>224</sup> *Moore*’s focus on risk provides similar support. Because the *Briseno* factors “[b]y design and in operation . . . ‘create an unacceptable risk,’ ”<sup>225</sup> “they may not be used . . . to restrict qualification of an individual as intellectually disabled.”<sup>226</sup> These statements suggest that deviating from clinical definitions in a way that expands, rather than restricts, qualification for *Atkins* would be a permissible exercise of state authority in this area.

The Seventh Circuit encountered such an expansive definition in *Pruitt v. Neal*.<sup>227</sup> In *Pruitt*, the Seventh Circuit claimed that in *Hall*, “the Supreme Court again declined to set forth a legal definition of intellectual disability.”<sup>228</sup> Although such a statement seems at odds with *Hall*’s clear rejection of the IQ cutoff, it makes more sense given the Indiana statute before the court. Indiana’s definition of intellectual disability includes an age-of-onset prong with an age cutoff at twenty-

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223. See *Hall v. Florida*, 134 S. Ct. 1986, 1999, 2003 (2014) (requiring balance between substantial guidance and substantive guide).

224. See *supra* Part II.C.1 (discussing theories of “disregard” in *Moore*).

225. *Moore v. Texas*, No. 15-797, 2017 WL 1136278, at \*12 (U.S. Mar. 28, 2017) (quoting *Hall*, 134 S. Ct. at 1990).

226. *Id.* at \*4 (emphasis added).

227. 788 F.3d 248, 250 (7th Cir. 2015).

228. *Id.* at 264.

two rather than eighteen.<sup>229</sup> The Seventh Circuit correctly saw no reason to discuss the more lenient age requirement (even though it conflicted with clinical definitions), instead focusing primarily on Indiana's restrictive intellectual-prong requirements.<sup>230</sup>

Although that example may suggest that interpreting *Hall* to allow for relaxed definitions is straightforward, it is not. When the deviations from medical standards are quantitative, as seen in *Hall* and *Pruitt*, determining whether the deviation is restrictive or expansive is easy. However, unlike the IQ cutoff in *Hall* or the age cutoff in *Pruitt*, there is not necessarily a determinative way of knowing whether qualitative factors, like those in *Briseno*, are ones that will permissibly expand the definition of intellectual disability or impermissibly contract it. Because of this difficulty, a solution to *Hall* and *Moore*'s requirements requires one more piece.

### *C. Equal Protection: Protecting the Similarly Situated*

When *Moore* focused on risk, rather than traditional Eighth Amendment analysis, it tacitly acknowledged that evaluating the issue through the objective indicia and independent judgment was no longer an adequate framework for deciding what *Atkins* requires of the states.<sup>231</sup> Although it discussed the risk that “persons with intellectual disability will be executed,” it was implicitly concerned with a more general kind of risk: that someone undeserving of the death penalty would be subjected to it.<sup>232</sup>

The Court, however, believed that it had already resolved this matter in *Atkins*, where it held that all defendants of a certain level of culpability (by virtue of their intellectual disability) could not be executed.<sup>233</sup> The problem at this point was that some defendants faced execution while others did not, even though they shared the same level of culpability. Although the Court could see the risk of undeserving

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229. IND. CODE § 35-36-9-2 (2016); *Pruitt*, 788 F.3d at 264. Utah also sets the age-of-onset at twenty-two, as did Maryland before it abolished its death penalty entirely. See MD. CODE ANN., CRIM. LAW § 2-202(b)(1) (West 2002); UTAH CODE ANN. § 77-15a-102 (West 2017).

230. *Pruitt*, 788 F.3d at 265–69.

231. See *supra* Part II.C.2 (discussing *Moore*'s adoption of risk as an independent Eighth Amendment factor).

232. See *Moore v. Texas*, No. 15-797, 2017 WL 1136278, at \*2 (U.S. Mar. 28, 2017) (discussing the “unacceptable risk that persons with intellectual disability will be executed” (quoting *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014)); *Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (discussing the “risk ‘that the death penalty will be imposed in spite of factors which may call for a less severe penalty’” (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978))).

233. See *Moore*, 2017 WL 1136278, at \*9 (“[T]he Constitution ‘restrict[s] . . . the State’s power to take the life of any intellectually disabled individual.’”) (quoting *Atkins*, 536 U.S. at 321).

defendants being executed, it could not find a way to avoid that risk within the prongs of the Eighth Amendment, leading to vague statements on the “disregard” of medical practice.<sup>234</sup>

Because the Court’s true concern is with functionally similar defendants receiving different treatment, it cannot confine itself to the Eighth Amendment for a solution. It is this comparison between similarly situated defendants that makes the Equal Protection Clause a more suitable framework for answering these questions.

Because *Hall* and *Atkins* are Eighth Amendment cases, they have two meanings: that the states have indicated their positions (the objective indicia) and that the Court agrees (the independent judgment). So long as *Atkins* and *Hall* rest on the number of states that follow (or refrain from) a practice, their rulings will remain opaque to other courts attempting to discern their meanings.

This is because the Court does not necessarily evaluate the reasons why states have chosen to forego imposing the death penalty on a certain class of defendants. With so many Eighth Amendment decisions relying, at least in part, on the number of states that impose a requirement, using a traditional Eighth Amendment analysis would not be fruitful in determining what *Hall* says about what definitions of intellectual ability the states may use—it would tell us what the states say, without explaining why they say it. When asking how far *Hall* goes in requiring clinical definitions, then, looking to the Eighth Amendment is misleading. Rather, we should ask who is similar enough under the Equal Protection Clause.

Under an equal protection theory, the objective indicia of consensus from the states are irrelevant—whether a defendant challenging a death sentence is similarly situated to another defendant exempt from the death penalty does not depend on how many states agree. If a defendant challenges an arbitrary definition, the arbitrariness would not decrease if approved by thirty states instead of five.

This view allows us to eject the objective indicia when examining how far *Hall* goes, leaving the Court’s independent judgment as the basis for determining which defendants are similarly situated. And that part of Eighth Amendment analysis gives clear guidance on what to consider.

The Court’s independent judgment has consistently rested on whether the punishment promotes the penological purposes of

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234. See *id.* at \*9 (prohibiting “disregard” of medical practice).

retribution and deterrence.<sup>235</sup> In contrast to the chaotic objective indicia, the Court is remarkably uniform regarding what counts in independent judgment, where it considers whether penological purposes are served by the punishment in question. The Court has reiterated this commitment to ensuring a punishment enforces only valid penological goals in virtually every Eighth Amendment case brought before it.<sup>236</sup>

*Moore* provides further support for the need to compare similarly situated defendants. Its focus on the risk “that persons with intellectual disability will be executed”<sup>237</sup> harkens back to earlier statements of the risk “that the death penalty will be imposed in spite of factors which may call for a less severe penalty”<sup>238</sup> or that “the jury may impose the death penalty in an arbitrary and capricious manner.”<sup>239</sup> *Moore* is therefore a signal that the Court is searching for a workable standard for “unacceptable risk” in death penalty cases—one which the Equal Protection Clause provides. When added to the holdings of *Atkins* and *Hall*, *Moore*’s framing of risk means that the Court will invalidate a practice that puts a person similarly situated to an *Atkins*-protected defendant at an “unacceptable risk” of execution.

### 1. Solving Additional Requirements

In this solution, determining which deviations are impermissible additional requirements would involve finding whether those requirements produce an unacceptable risk of imposing the death penalty on defendants similarly situated, in terms of retribution and deterrence, to those who receive the *Atkins* exemption by meeting clinical definitions.

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235. See, e.g., *Hall*, 134 S. Ct. at 1992–93; *Miller v. Alabama*, 132 S. Ct. 2455, 2472 n.11 (2012); *Graham v. Florida*, 560 U.S. 48, 67–68 (2010); *Kennedy v. Louisiana*, 554 U.S. 407, 441–46 (2008); *Atkins*, 536 U.S. at 317–21; *Thompson v. Oklahoma*, 487 U.S. 815, 833–38 (1988); *Enmund v. Florida*, 458 U.S. 782, 798–801 (1982); *Coker v. Georgia*, 433 U.S. 584, 598 (1977).

236. See, e.g., *Graham*, 560 U.S. at 67 (“The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals.” (internal citations omitted)); *Thompson*, 487 U.S. at 833 (“[W]e . . . consider whether the application of the death penalty to this class of offenders ‘measurably contributes’ to the social purposes that are served by the death penalty.” (quoting *Enmund*, 458 U.S. at 798)); *Enmund*, 458 U.S. at 798 (“Unless the death penalty . . . measurably contributes to one or both of these goals, it ‘is nothing more than the purposeless and needless imposition of pain and suffering,’ and hence an unconstitutional punishment.” (quoting *Coker*, 433 U.S. at 592)).

237. *Moore*, 2017 WL 1136278, at \*4 (quoting *Hall*, 134 S. Ct. at 1990).

238. *Atkins*, 536 U.S. at 320.

239. *Booth v. Maryland*, 482 U.S. 496, 503 (1987), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991).



Under this framework, quantitative restrictions like Florida's IQ cutoff are easily solved: they either make intellectual disability easier to prove or make it more difficult. *Moore* made clear that extra factors "may not be used, as [Texas] used them, to restrict qualification of an individual as intellectually disabled."<sup>240</sup> Qualitative restrictions like *Briseno*, however, would involve a more searching analysis of the departure from clinical definitions to determine whether they would exempt similarly situated defendants from *Atkins*.

Taking the *Briseno* factors as an example is illustrative of how to approach the problem. The *Briseno* factors directed Texas courts to ask a series of questions to supplement the adaptive prong of *Atkins*.<sup>241</sup> These included examining the opinions of family and friends on the defendant's intellectual disability, whether the defendant could formulate and carry out plans, whether he showed leadership, how coherently he responded to questions, whether he could lie effectively, and whether the facts of the crime demonstrated forethought and planning.<sup>242</sup>

A comparison to clinical practice quickly establishes that these questions worked to exclude defendants from the *Atkins* protection, not to include more of them. Clinical definitions of adaptive ability require the defendant to prove deficits in one domain out of three: if a defendant can show a deficit in the conceptual, social, or practical domain, then the adaptive prong is met regardless of any other adaptive strengths that the defendant possesses in other areas.<sup>243</sup> By asking questions focusing on what a defendant *could* do (rather than could not, as clinical definitions ask), the *Briseno* factors prevented a defendant with adaptive strengths from making a successful *Atkins* claim, even though he was similarly situated to defendants who are exempt from the death penalty.

## 2. Solving Underinclusiveness

The application of penological purposes is more straightforward with respect to the underinclusiveness problem. This rule rejects any requirement imposed by clinical definitions that would exclude a defendant equally or less culpable than one with intellectual disability.

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240. *Moore*, 2017 WL 1136278, at \*4.

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

242. *Id.*

243. DSM-5, *supra* note 7, at 37; see also John H. Blume et al., *An Empirical Look at Atkins v. Virginia and Its Application in Capital Cases*, 76 TENN. L. REV. 625, 628 (2009) (noting that empirical data suggests *Briseno* factors result in higher rejection rate of *Atkins* claims).

Because the age-of-onset prong was imported directly from clinical definitions, its connection to deterrence and culpability is questionable.<sup>244</sup> Although equal protection challenges to the age-of-onset prong have failed, *Hall* changes the analysis by connecting clinical definitions to penological purposes.<sup>245</sup> Because the time at which a defendant begins manifesting symptoms is unconnected to society's interest in retribution or the extent to which the defendant could be deterred, there would be a substantial risk that a defendant no more culpable than one protected by *Atkins* could face execution.<sup>246</sup> The arbitrary nature of that age cutoff is analogous to the "conspicuously artificial lines" drawn in *Skinner*, and the previously discussed *Cleburne* and *Heller* cases suggest that, at a minimum, some higher level of scrutiny would apply even if *Skinner*'s Eighth Amendment fundamental rights paradigm is not adopted.<sup>247</sup>

That the age-of-onset prong is part of clinical definitions of intellectual disability would be unlikely to save it. *Moore* tellingly claims that "[t]he medical community's current standards supply one constraint on States' leeway in this area."<sup>248</sup> Yet the Court has never discussed any "constraint" other than clinical practice, suggesting that other restrictions could constrain even the use of medical standards. And while *Moore* asks states to not "disregard" medical standards, it also claims that it "does not demand adherence to everything stated in the latest medical guide."<sup>249</sup>

A harder question would be how this framework applies to defendants with serious mental illness. A court addressing this question would require a more reaching analysis of how defendants with intellectual disabilities and those with serious mental illnesses differ, both in terms of an interest in retribution against these

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244. See Farahany, *supra* note 26, at 859 (on problems with importing clinical definitions); Mulroy, *supra* note 12, at 596 (on the age-of-onset prong).

245. See *supra* Section I.C.2 (discussing the failure of equal protection challenges).

246. See Mulroy, *supra* note 12, at 597 (arguing for the equal protection challenge).

247. See *Heller v. Doe*, 509 U.S. 312 (1993) (suggesting higher standard than rational basis); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (finding discriminatory law arbitrary and therefore unconstitutional even under rational basis); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 542 (1942) (strict scrutiny applied for Eighth Amendment fundamental right); *supra* Section I.C.2 (discussing the standard of review for equal protection cases involving persons with intellectual disabilities).

248. *Moore v. Texas*, No. 15-797, 2017 WL 1136278, at \*14 (U.S. Mar. 28, 2017) (emphasis added).

249. *Id.* at \*9.

defendants and the extent to which they could be deterred from crime by the death penalty.<sup>250</sup>

### CONCLUSION

While there is broad consensus that the intellectually disabled should not be executed, there is considerably less agreement about which defendants are categorically not culpable enough for the penalty to be imposed.<sup>251</sup> When *Atkins* left definitions of intellectual disability to the states, states responded by largely adopting the clinical definitions of the APA and AAIDD, opening the possibility that those definitions would inappropriately treat defendants with a similar level of culpability differently.<sup>252</sup>

After emphasizing the importance of clinical definitions in *Atkins*, the Supreme Court specified in *Hall* and *Moore* that it is impermissible to deviate from those definitions by imposing on defendants a hard cutoff on IQ scores or considering evidence outside of that considered by medical practitioners.<sup>253</sup> Although *Hall* and *Moore* appear to require strict adherence to clinical definitions, seemingly conflicting statements within the opinions muddle how closely states must hew to those definitions.<sup>254</sup>

The best way to resolve these cases is instead to characterize their rulings as requiring any definition of intellectual disability to pose no unacceptable risk to defendants with a similar culpability. This solution provides a resolution to two unresolved *Atkins* problems. States would not be able to add additional requirements if they had the effect of narrowing the class eligible for *Atkins* protection, and defendants left out of clinical definitions but similarly situated to defendants falling within them would be protected.

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250. See Farahany, *supra* note 26, at 864 (arguing that these two groups are similarly situated); *supra* Section I.C.2 (recounting failure of the equal protection challenge prior to *Hall*).

251. See *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (“Not all people who claim to be [intellectually disabled] will be so impaired as to fall within the range of [intellectually disabled] offenders. . .”).

252. *Id.*

253. *Moore*, 2017 WL 1136278, at \*4; *Hall v. Florida*, 134 S. Ct. 1986, 2000 (2014).

254. See *Hall*, 134 S. Ct. at 1998–99 (explaining requirements for states to follow in definitions of intellectual disability).

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